

T.D. 1/94

Decision rendered on January 20, 1994

CANADIAN HUMAN RIGHTS ACT

R.S.C., 1985, c. H-6 (as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

BRIAN TWEEDIE

Complainant

-and-

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and-

HENDRIE AND COMPANY LIMITED

Respondent

TRIBUNAL DECISION

TRIBUNAL: Keith C. Norton, Q.C. Chairman

Jane Armstrong, B.A., LL.B. Member

Jane Ellis, B.A., LL.B. Member

APPEARANCES: Mr. Prakash Diar For the Commission

Ms. Caroline Rowan For the Respondent

DATES AND PLACES

OF HEARING: November 1, 2, 3 & 4, 1993

Toronto, Ontario

November 5, 1993

St. Catharines, Ontario

November 8, 10 & 11, 1993

Toronto, Ontario

>-

2

RULING OF TRIBUNAL

INTRODUCTION:

This matter was heard at Toronto in November 1993. A hearing was held to determine whether the Respondent, Hendrie and Company Limited had engaged in a discriminatory practice in contravention of Section 7 of the Canadian Human Rights Act relating to the employment of the Complainant, Brian Tweedie.

BACKGROUND:

The Complainant, Brian Tweedie, is fifty-eight years of age and he is married with two children. He has resided in St. Catharines for thirty-four years and had worked for the Respondent, Hendrie and Company Limited, from 1964 until 1985.

The Respondent, Hendrie and Company Limited, is a trucking company and at the material time carried on business in Niagara Falls, Hamilton and Toronto where it maintained terminals. The Complainant, Brian Tweedie, was employed out of the Niagara Falls terminal. His immediate supervisor during the course of his employment was Mr. Guy Joubert and the terminal manager was Mr. Ernie Cripps. The Comptroller of the company during the material times of 1985 to 1986 was Mr. Steven Nash and Mr. George C. Hendrie was Director of Operations. At all material times the union stewards at the Niagara Falls terminal were Mr. Tom Singer and Mr. Cecil Cooper and the Union Chairman was Mr. Don Appleyard. The dispatching of the truck drivers was conducted by three dispatchers under the supervision of Mr. Guy Joubert, one of whom was Jack Boyer.

>-

3

FACTS:

The tribunal finds as fact the following in chronological order:

1. October 4, 1964: Brian Tweedie commenced employment with Hendrie and Company Limited as a truck driver. His duties included loading machinery, tarping and chaining down loads.
2. December 1, 1978: While spreading a tarpaulin over a load Brian Tweedie

fell and suffered injuries to his neck and the left side of his chest sustaining broken ribs and a bruised left shoulder. The accident took place at the CN Intermodal Yard in Hamilton, Ontario.

3. December 5, 1978 to April 1979: During this period Brian Tweedie consulted with Dr. Roger Rose, his family doctor, and with specialists including Dr. Eric Blackman, an orthopaedic surgeon, regarding his injuries and eventually returned to work in April of 1979 performing the same heavy work including moving of machinery, tarping and chaining down loads.

4. April 1982: During the course of his employment Brian Tweedie fell from a ladder striking his left shoulder against a tank and reinjuring his left shoulder. He did not lose any time off work but commenced chiropractic treatments.

5. September 1982: Mr. Tweedie consulted with Dr. Blackman with respect to an aggravation of the neck and left arm symptoms which he had been suffering. A myelogram was conducted showing significant degenerative changes in Mr. Tweedie's spine. He remained off work until 1983, when he consulted with

>-.4

Dr. Tasker, a neurosurgeon at Toronto General Hospital and subsequently resumed work until May of 1984.

6. May 29, 1984: Mr. Tweedie consulted with his family physician regarding a recurrence of symptoms and was placed off work until he consulted with Dr. Tasker in July of 1984 and did not resume work until February 5, 1985.

7. February 2, 1985: Mr. Tweedie felt able to return to work and consulted his family physician, Dr. Rose, from whom he obtained a note.

8. February 5, 1985: Mr. Tweedie met with his immediate supervisor, Guy Joubert, and provided him with the letter from Dr. Rose, shown as Tab C, page 3, Exhibit HR-4 dated February 2, 1985. The note stated "Cervical disc degeneration. May perform "Toronto" run with limited time of 8-10

hours only." They discussed the Toronto run and Joubert stated he was unable to guarantee eight to ten hours. Mr. Tweedie returned to work on February 5, 1985, and on February 8, 1985, he suffered a heart attack causing him to be off work until the end of April, 1985.

9. April 1985 to October 1985: Mr. Tweedie consistently worked in excess of eight to ten hours as disclosed by the time cards entered into evidence by the Commission. However, he did not complain to his employer about the number of hours he was required to work for the Toronto run.

10. May 13, 1985: Mr. Tweedie is assessed a permanent disability of 15% by the Workers' Compensation Board.

>-

5

11. October 25, 1985: The complainant did not feel well and had a conversation with the dispatcher, Jack Boyer, advising him that he would not be coming in to work on October 25th. Mr. Boyer advised Mr. Tweedie that he had already organized the dispatch for October 25th and would be short a driver if he was unable to work. An agreement was reached whereby Mr. Tweedie would perform one run to Toronto and return with a load of scrap paper. Boyer did not advise his Supervisor, Guy Joubert, of this arrangement.

Upon the completion of the agreed upon tasks in Toronto, Mr. Tweedie called to the Niagara terminal to advise of the number of the trailer which he would be hauling to Niagara Falls. When he called the terminal he asked for Mr. Boyer but was told that Mr. Boyer was not available. He then advised the other dispatcher, "John", of his intention to return to Niagara Falls and was put through to Mr. Joubert. Mr. Joubert was advised by John that Mr. Tweedie was intending to return to Niagara Falls without completing his assignment. Mr. Joubert and Mr. Tweedie had words.

Mr. Tweedie returned to the Niagara Falls terminal and attended at Mr.

Joubert's office with a Union representative, Mr. Linton. At this time Mr. Tweedie was handed a memo by Mr. Joubert and was requested to sign it. When Mr. Tweedie requested an opportunity to read the memo prior to signing it, the memo was taken from him. The memo contained a notice of suspension with intention to dismiss. Mr. Tweedie subsequently left the terminal premises.

12. October 28, 1985: Mr. Tweedie wrote to the Workers' Compensation Board seeking benefits.

>-

6

13. October 29, 1985: Mr. Tweedie saw his family physician, Dr. Rose who forwarded a report to the Workers' Compensation Board dated November 1, 1985, indicating that Mr. Tweedie could perform modified work.

14. October 31, 1985: The suspension with intention to dismiss was reduced to a five day suspension. Mr. Tweedie was notified of the five day suspension by registered letter dated November 4, 1985, and received on November 6th, 1985.

15. November 7, 1985: Mr. Tweedie filed a grievance respecting the suspension.

16. November 8, 1985: A meeting was held between the Union and Hendrie executives. Present at this meeting were Steven Nash, George C. Hendrie, David Tilley, Tom Singer, Don Appleyard. Don Appleyard indicated to George C. Hendrie that a step two grievance should be anticipated with respect to Mr. Tweedie's suspension.

17. November 1985: A letter was forwarded from the terminal management to Mr. Tweedie asking him to explain his absence from employment. Mr. Tweedie acknowledged receiving such correspondence although a copy of the letter is not entered into evidence.

18. December 2, 1985: Mr. Tweedie attended at the Workers' Compensation Board office in St. Catharines and spoke to Don Rode. He advised Don Rode that he had been terminated by his employer and that he was seeking

alternate work.

19. January 1986: A letter was forwarded to Brian Tweedie

>-

7

from Tom O'Sullivan of the Hendrie and Company head office asking for evidence that the Workers' Compensation Board was seeking any further information from the company and also asking that Mr. Tweedie advise O'Sullivan of his status.

20. January 10, 1986: A grievance meeting was held between the Union and Hendrie management. Present were Tom Singer, Don Appleyard, Steven Nash and George C. Hendrie. At this meeting the matter of Brian Tweedie's grievance was discussed. Neither the union nor management were aware of Mr. Tweedie's then current status. Time limits were suspended pending obtaining further information.

21. January 13, 1986: George C. Hendrie, Director of Operations forwarded correspondence to Mr. Donald Appleyard, Union Chairman, confirming the discussion at the January 10th meeting surrounding Mr. Tweedie's absence from work. The letter further confirmed that all time limits would be suspended pending a determination of the facts and until further information regarding Mr. Tweedie's situation could be determined.

22. February 13, 1986: In a letter written to the Workers' Compensation Board, Mr. Tweedie indicated that he had yet to receive any Workers' Compensation benefits for the time he had been off work and that he had been waiting approximately fifteen weeks. As no benefits had as yet been paid to Mr. Tweedie his Workers' Compensation claim would not appear in the Respondent company's records. Accordingly, the Respondent company would not be aware of a Workers' Compensation claim by Mr. Tweedie.

>-

8

23. February 1986: Mr. Tweedie attended at the Niagara Falls terminal and

indicated that he was desirous of returning to work. His return to work was denied as the company took the position that he was in contravention of the collective agreement in that no satisfactory explanation for his absence from work from October 25th, 1985, to February 24, 1986, had been provided to the company. The company was therefore seeking to suspend Mr. Tweedie's seniority rights thereby terminating his employment.

24. February 24, 1986: A grievance was filed by Mr. Tweedie grieving the denial of his return to work by the Respondent. Mr. Tweedie set out that he was of the view that he had provided a reasonable explanation for being absent from October 25, 1985, to February 24th, 1986, and was seeking the opportunity to resume his former position. The company's response, dated February 27, 1986, relied on the provisions of the collective agreement and stated that Mr. Tweedie's seniority rights were being suspended until such time as the company had received proof and was satisfied that Mr. Tweedie had complied with the requirements set out in the collective agreement, that is, had provided a satisfactory explanation for his absence from work.

25. March 14, 1986: A grievance meeting was held between the Union and Hendrie and Company Limited executives. Present at this meeting were George C. Hendrie, Steven Nash, David Tilley, Tom Singer and Don Appleyard. The Respondent company had received no evidence that Mr. Tweedie was on compensation. The Union stated that it could provide such evidence to the Respondent company. The Respondent company took the position that upon receipt of evidence of the reason for his absence

>-

9

they would meet with Mr. Tweedie, the compensation rehabilitation officer and the Union representative to determine if suitable employment was available for Mr. Tweedie. The Union advised that it would provide evidence that Mr. Tweedie had been off on compensation.

26. March 20, 1986: A letter was sent by George C. Hendrie, Director of Operations to Mr. Don Appleyard, Union Chairman regarding the Tweedie grievance of February 24, 1986. Mr. Hendrie confirmed the position of the Respondent company that as Mr. Tweedie had produced no evidence to support his claim of being absent due to medical disability, his grievance was denied by the company. The letter further confirmed that the Union gave assurances that it would provide evidence as to Mr. Tweedie's medical disability.

27. March 27, 1986: A grievance meeting was held between the Union and the Respondent company. Present at the meeting were Dave Tilley, Don Appleyard, Tom Singer, Steven Nash and George C. Hendrie. As no evidence that Mr. Tweedie was entitled to compensation had been forthcoming and no explanation as to Mr. Tweedie's absence had been received from the Union Mr. Hendrie agreed to arrange for a meeting with the Compensation Board, the Union, Mr. Tweedie and representatives of the Respondent company.

28. April 16, 1986: A meeting was held at the Niagara Falls terminal. Present were Brian Tweedie, George C. Hendrie, Don Rode, Ernie Cripps, Guy Joubert, Tom Singer and Cecil Cooper. No justifiable explanation was provided by Mr. Tweedie or the Union as to Mr. Tweedie's absence during the period of October 1985 to February 1986. Should such explanation have been

>-

10

forthcoming and accepted by the Respondent company a rehabilitation assessment was to be arranged by Don Rode with the Workers' Compensation Board to determine Mr. Tweedie's then current medical restrictions so that an appropriate job could be found for him at the Respondent company. A Workers' Compensation Board assessment was never arranged.

29. July 1986: Mr. Tweedie again attended at the Niagara Falls terminal with a letter from his physician, Dr. Rose, which indicated that Mr.

Tweedie could return to his previous job. As the explanation for his prior absence had not been provided to the Respondent company Mr. Tweedie was not returned to work.

30. July and August 1986: Mr. Tweedie subsequently consulted with Debbie Kehler of the Niagara North Community Legal Clinic. Ms. Kehler requested a report from Dr. Rose and in her correspondence requesting such report indicated that it was her understanding that Mr. Tweedie's job entailed working ten hours per day with the occasional twelve to thirteen hour day. This was consistent with Mr. Hendrie's position that the reference to twelve to thirteen hours per day, if made by him during the course of his discussion with Ms. Kehler, would have been a reference to regular work and not the work that Mr. Tweedie would be required to do in the event that he were to return to work at Hendrie.

31. October 20th, 1986: Mr. Tweedie obtained employment with Woodbridge Foam as a truck driver.

ARGUMENTS AND AUTHORITY:

The Complainant alleged that Hendrie and Company Limited

>-

11

discriminated against him by refusing to continue to employ him because of his disability contrary to section 7 of the Canadian Human-Rights Act (the Act):.s. 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.

Under section 3(1) of the Act, "disability" is a prohibited ground of discrimination.

It was not disputed that Mr. Tweedie's neck injury and shoulder injury left him with a physical disability within the meaning of the Act.

The Commission submitted that the discriminatory practice engaged in by the Respondent company took place during the period from February, 1985 to

October, 1985 when the Respondent company failed to abide by the limitation of hours set out in Dr. Rose's note and that Mr. Tweedie's work day ought to have been limited to nine hours.

Although Dr. Rose's note recommends that Mr. Tweedie work eight to ten hours per day, it also specifically suggests, upon the Complainant's request that he could perform the Toronto run. It is reasonable to conclude that the Complainant, a twenty-two year employee of the company, would have been well aware of the demands and requirements of the Toronto run.

The Complainant acknowledged that during his initial discussion with Mr. Joubert regarding the position, Mr. Joubert indicated he could not guarantee the hours on the Toronto run. He further acknowledged that from February 1985 to October 1985

>-

12

he did not complain to the Respondent about the hours even though he was consistently working in excess of ten hours per day.

This Tribunal finds that it is unreasonable to expect the Respondent company to conclude that Mr. Tweedie was unable to perform the assigned work or that it was aggravating his prior injuries when he had specifically requested the assignment and during the eight months that he performed it he did not indicate he was having any difficulties. In fact, had the Respondent limited Mr. Tweedie's hours or transferred him to another, less demanding run, because of his prior injuries and without a request from him after he had specifically requested the Toronto run, that in and of itself might have been a discriminatory practice.

Mr. Tweedie was an employee with twenty-two years seniority. This seniority granted him a considerable flexibility in the assignment he could choose. Local runs were available to Mr. Tweedie with shorter work days of eight hours. Mr. Tweedie, with his numerous years of experience with the company, would have been well aware of the demands of the Toronto run and the comparative demands of the local runs and notwithstanding this he presented

to his employer a note from his doctor specifically requesting the Toronto run.

In the view of this Tribunal the Respondent's obligation to accommodate the employee stops there. The Respondent provided to the employee the assignment he requested. Unless the employee had subsequently complained and advised the employer of his inability to perform his duties the Respondent had no further obligation in this regard. Mr. Tweedie did not subsequently complain and accordingly it would be unreasonable to expect the employer to take any further steps without an indication from Mr. Tweedie that such steps would be necessary.

>-

13

With respect to the Commission's argument, this Tribunal is of the view that consideration must mainly be given to the period of time after October 25, 1985, and in this regard, finds that there was no discriminatory practice by the Respondent in its failure to continue the employment of the Complainant. The Complainant had failed to comply with the provisions of the collective agreement requiring that a satisfactory explanation of his absence from work in excess of three days be provided to the Respondent. This was the reason the company did not return the Complainant to work.

The Union, Mr. Tweedie's representative, was well aware of the requirements of the Respondent through several meetings with the Respondent company with respect to Mr. Tweedie's grievance and absence from work. The Respondent was unaware of Mr. Tweedie's status and it would appear that despite many requests Mr. Tweedie and the Union failed to provide justifiable cause for his absence from employment.

This is an unfortunate situation indeed for an employee of twenty-two years to lose his employment in this fashion. There may have been a breakdown in the relationship between the Union and Mr. Tweedie who admits that he advised the Union that he no longer wished them to act for him.

After this time no further steps were taken by the Union to prosecute Mr. Tweedie's grievances. It appears that the Workers' Compensation Board failed to arrange for the reassessment agreed upon at the April 16th meeting and it would further appear that Mr. Tweedie did not follow up with his Workers' Compensation Board Officer or with the Union with respect to securing his return to employment.

We find that the request for an explanation for Mr. Tweedie's absence as a condition for his return to work in February 1986 is not inconsistent with the procedure followed in February 1985 by Mr. Joubert. In February of 1985, Mr. Joubert

>-

14

received from Mr. Tweedie a letter setting out the type of work to which he could return without any other explanation for his absence from work. At that time, however, the company had already been aware of Mr. Tweedie's absence on Workers, Compensation Board leave.

We were referred to a number of cases establishing that there is no need to prove an intention to discriminate and that a prohibited ground of discrimination need not be the sole determining factor in the decision complained against.

The Tribunal in *Richards v. The National Harbours Board* (1981.) 2 C.H.R.R. D/407 stated at page D/411, paragraph 3674:

"However, it cannot possibly be held that mere knowledge of a handicap or characteristic such as the heart attack in this case, or colour or sex in other cases, constitutes discrimination. One must prove that the Complainant suffered an adverse consequence as a result of the handicap.or characteristic, one which he or she would not have suffered if the handicap or characteristic had not been present."

In that case, the Complainant suffered a heart attack while employed at the Board. During the period that the Complainant was off sick he wrote a letter to his employer. The Tribunal found that the letter was limited to

sick benefits and was not a letter of resignation. The employer, however, had thought at the time that the letter was a resignation and replaced the Complainant. The Board's General Manager, when the Complainant was well enough to come back to work, agreed that Mr. Richards would be permitted to do so but then later wrote to him informing him that there was no suitable position available.

The Tribunal in the Richards case was urged by the Complainant to find that the employer had unreasonably misunderstood the Complainant to have resigned but the Tribunal stated at page D/414, paragraph 3696:

>-

15

"The Complainant's onus in this case is not to prove that (the complainant) was unjustly dismissed, or unfairly treated by the Board, or that as a result of a misunderstanding, his status as an employee was adversely affected. He must prove that there was discrimination on the basis of physical handicap."

In the present case, the onus is on Mr. Tweedie to establish that his disability was a reason for the Respondent's failure to return him to work. We are satisfied that disability was not a reason and accept the Respondent's explanation for not returning Mr. Tweedie to work.

We were reminded by the Commission of the tests set out in *Basi v. Canadian National Railway Co.* (1988) 9 C.H.R.R. D/5029 in arriving at a finding of discrimination. *Basi* may be distinguished from the instant case on its facts. In *Basi* the Complainant was denied an employment opportunity whereas in the instant case the Complainant was refused a return to work. In *Basi* at page D/5039, paragraph 38486, it was held that the Tribunal may consider the conduct of the Respondent both before and after the alleged act of discrimination in addition to circumstantial evidence in determining whether discrimination is present. The Tribunal adopted the test formulated by B. Vizkelety in her book, *Proving Discrimination in Canada* (Toronto: Carswell, 1987), page 142:

"an 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 or hypotheses."

In this case the Tribunal does not find that the Commission and Mr. Tweedie have met the evidentiary burden. The Complainant's task is to establish a prima facie case of discrimination according to the civil standard of proof, being a preponderance of evidence on a balance of probabilities. There was a lack of evidence from which such an inference of discrimination could be drawn.

>-

16. We were referred to and reviewed numerous other authorities argued by each counsel. We need not refer to them in our analysis given our findings above.

A case of prima facie discrimination has not been made out and the complaint is therefore dismissed. We are grateful to counsel for their able assistance in this matter.

Signed on the 16th day of December, 1993.

Keith C. Norton, Q.C.

Chairman

Jane Armstrong, B.A., LL.B

Member

Janet Ellis, B.A., LL.B.

Member