

Board No.: 2007-03

**BEFORE THE HUMAN RIGHTS BOARD OF ADJUDICATION**  
**IN THE MATTER OF THE YUKON *HUMAN RIGHTS ACT***

**AND IN THE MATTER OF**  
**Farley Hayes and**  
**Yukon College**

**BOARD DECISION**

**Appearances**

Farley Hayes	Complainant
Zeb Brown	Counsel for the Complainant
Susan Roothman	Counsel for the Yukon Human Rights Commission
John Pereira	Respondent Representative Yukon College
David Goult	Counsel for the Respondent Yukon College

**Panel Members**

Barbara Evans, Chief Adjudicator  
Darcy Tkachuk, Adjudicator  
Michael Riseborough, Adjudicator

Heard: May 20, 21, September 8,  
October 17 and November 3, 2008  
Whitehorse, Yukon  
Decision Issued: December 11, 2008

## I. Introduction

Many of the facts presented to the Panel in this hearing were introduced through an agreed Statement of Facts, so few of the substantive facts were disputed by the parties. Where evidence was led to substantiate or prove other facts, few incidents of *factual* disagreement arose.

Farley Hayes was hired by Yukon College (or "the College") on November 13, 2001 as a full-time computer support technician. He completed his six-month probationary period on May 13, 2002. On April 15, 2002, he lost three days' work due to a medical condition diagnosed as an ulcer. He lost a further two days' work April 28, 29, 2002, for a blood transfusion. On May 7 he saw a specialist in Calgary who identified that he was suffering from Hepatitis C, which required three days' lost time.

Shortly after completing his probation period, Mr. Hayes' health problems escalated. On June 18, 2002, he suffered severe gastro-intestinal bleeding that necessitated medical evacuation to Alberta where he was diagnosed with end-stage liver failure arising from the Hepatitis C. He began receiving Employment Insurance benefits for 15 weeks of medical leave.

Mr. Hayes' circumstances became grave. He could not live unless he was able to obtain a successful liver transplant in the near future. Mr. Hayes informed the College of his circumstances on August 2, 2002, and was approved for medical leave on August 27, 2002, and approved for long-term disability.

Over the next 24 months, Mr. Hayes' condition deteriorated while he waited for a transplant. At one point in September 2003, he was again medevac'd to Alberta for a transplant that did not take place because the donor had the West Nile virus. Another possible liver transplant opportunity did not proceed because of the unsuitability of the donor liver.

Thanks to a live-liver donation from his brother, Mr. Hayes was scheduled for a transplant in May 2004. Due to circumstances at the hospital, that transplant was delayed until August 2004 when his transplant operation finally occurred. Following the transplant, Mr. Hayes' recovery was delayed by complications that necessitated three further operations over the next several days.

Yukon College sent a letter to Mr. Hayes dated October 5, 2004, indicating that his employment with the College was being terminated effective September 27, 2004 "due to operational requirements".

Mr. Hayes was discharged from the hospital in Edmonton on October 18, 2004, and remained in Edmonton for physiotherapy and post-surgical psychological care. He returned to Whitehorse on November 4, 2004, when he received the

### **III. Who are the Parties?**

The Complainant, Farley Hayes, was represented by counsel, Zeb Brown.

The Yukon Human Rights Commission was represented by its counsel, Susan Roothman.

The Respondent, Yukon College, was represented by John Pereira and counsel, David Goult.

### **IV. What are the circumstances giving rise to the Complaint?**

Mr. Hayes' employment was terminated by the College on the grounds that continuing to await Mr. Hayes' possible return to work would cause undue hardship that exceeded its requirements to accommodate Mr. Hayes. The Complainant believes his employment should not have been terminated and that by doing so before a more certain prognosis of his condition and the likelihood or duration of time before his return to work, he has suffered from discriminated under the *Act*.

### **V. What are the Parties' Positions?**

#### **The Complainant's Position**

The Complainant argues that his employer, Yukon College, dismissed him without undertaking any direct investigation or analysis to determine whether it could accommodate him by extending his leave beyond the two-year time period that it applied. Although Mr. Hayes had agreed in August to contact the College post-surgery, his medical and psychological condition after the transplant required him to remain focused on his health issues until his return to Whitehorse early in November 2004. As a result, he did not contact the College until that time. In the meantime, Yukon College did not contact Mr. Hayes following surgery to inquire about his condition, prognosis, abilities, functional capacity, or when or if he expected to be able to return to work. Mr. Hayes wants to return to his position at Yukon College and re-activate his health and welfare benefits.

The Complainant submitted that it was discriminatory of Yukon College to dismiss a permanent employee while they are unable to do their job due to physical disability. At the very least, the employer is required, prior to dismissal, to investigate the circumstances prior to dismissal, and where possible, make accommodations for that disability.

The College clearly relied upon its disability insurer in making the decision to terminate Mr. Hayes' employment. The insurer sets a two-year timeframe for review of disability files. Because of the inherent uncertainty involved with liver transplant operations, the insurer had transferred Mr. Hayes' file to its extended disability unit. This reduced the level and frequency of contact that the insurer had with Mr. Hayes and his medical practitioners, and allowed disability payments to be extended for an indeterminate period.

Holding Mr. Hayes' position open for a further period of time beyond the two-year deadline in the face of his uncertain condition, the College argued, would cause undue hardship to business continuity and the College's ability to maintain its operations effectively and provide services to the public. After Mr. Hayes' medical leave began, the College encountered difficulties staffing the position and maintaining operational continuity. Evidence was led that the support provided by Mr. Hayes or the person in his position was very important to the College's operations, and that inadequate or untrained support led to operational challenges and complaints from staff. At the time of the College's decision to terminate, it had experienced a period of success with the second of two temporary (term) employees who had been hired to fill in during Mr. Hayes' absence. This employee was receiving commendations from staff for his ability and was also indicating that he would seek alternative employment if he was not provided with more certain employment with the College. Therefore, the College felt compelled to terminate Mr. Hayes' employment so it could promote the temporary employee to permanent status and maintain operational continuity.

## **VI. What are the Issues to be determined?**

The principal issues to be decided in this hearing are:

1. Was Mr. Hayes discriminated against by reason of physical disability pursuant to section 7(h) of the *Yukon Human Rights Act*?
2. Did Yukon College meet its responsibility pursuant to section 8(1) of the *Yukon Human Rights Act* to make reasonable provisions for Mr. Hayes, and would it face undue hardship if required to accommodate Mr. Hayes beyond the two-year period that it applied?
3. Does an issue of *systemic discrimination* arise pursuant to section 12 of the *Yukon Human Rights Act*?
4. If Mr. Hayes was discriminated against by reason of physical disability, did not receive reasonable provisions, or was a victim of systemic discrimination, what remedy is appropriate in the circumstances?

it was agreed that a better prognosis could be provided about a month following the surgery, and the College agreed to wait to make any decisions regarding Mr. Hayes' employment until that time, anticipating a telephone call from Mr. Hayes or Ms. Thompson with further information about Mr. Hayes' ability to return to work.

Following Mr. Hayes' transplant operation on August 14, Mr. Hayes' recovery was delayed by some significant, though not unlikely, complications. Mr. Hayes required three further operations and remained in hospital in Edmonton until he was discharged on October 18. As a result of the operations and the medication he was taking, his ability to function and think clearly was impaired. For a number of weeks after the operation, Mr. Hayes' medication made him delusional, though this issue abated over time. In the weeks following his transplant, Mr. Hayes was forced to focus upon his recovery and was in no state or condition to consider his employment or contacting the College.

Compounding Mr. Hayes' medical problems, at or about this time, Mr. Hayes' relationship with Ms. Thompson also broke down and the two separated. Although Ms. Thompson had agreed earlier to be the College's primary contact for Mr. Hayes during his operation and recovery, she failed to maintain communications with the College or advise it that she would no longer accept that responsibility, presumably because of the relationship breakdown.

## **VIII. Finding on Discrimination**

### **1. Was Farley Hayes discriminated against by reason of physical disability pursuant to section 7(h) of the Yukon *Human Rights Act*?**

The majority of the Panel believes that Mr. Hayes almost certainly faced discrimination because of his disability, specifically his debilitating liver disease and treatment that he underwent that prevented him from fulfilling his employment duties for the College. The Respondent chose to terminate Mr. Hayes' employment because he was unable to work and because it faced the prospect of losing its temporary replacement worker that had been filling in for Mr. Hayes.

The reason Mr. Hayes was unable to work was directly and causally linked to his disability.

Arguments of the College that it did not discriminate against Mr. Hayes because it did not expect him to recover are not convincing. The College did not terminate Mr. Hayes after satisfying itself in any reasonable or responsible manner that he would be unable to return to work. It relied almost entirely upon one source of information regarding Mr. Hayes' likelihood to return to work: the minimalist reports provided by the disability insurer. The College had been provided with Mr. Hayes' consent to obtain medical information from its physicians, but did not

The Panel also considered the recent Supreme Court of Canada decision in *Hydro-Quebec v. Syndicat des employées de techniques professionnelles et de bureau d'Hydro-Quebec, section locale 2000*, [2008] S.C.C. 43, where it is established that if a person is unable to return to work or there is **no reasonable expectation** of their ability to return to work with an ability to perform the tasks necessary for the job, the employer has no further obligation to accommodate that employee by holding the position open in anticipation of their return to work. This case is distinguished from that precedent because evidence suggests that within months after his operation, Mr. Hayes could be, and in fact appeared to be, in a position to return to work with few if any work limitations.

Mr. Hayes' Union also recognized that there was a requirement to consider accommodation as evidenced by an offer it extended to the College, waiving its customary two-year limit on term positions in the collective agreement. The Union favoured further extending the temporary term position to enable the College to retain Mr. Hayes until he was able to return to work.

It appears to the majority of the Panel that the College was focused on filling Mr. Hayes' position permanently with its current term employee who was performing well and threatened to leave if he was unable to secure more permanent employment. The College chose not to accept the Union's extension offer, proceeded to terminate Mr. Hayes' employment and awarded a permanent position to the term employee. The College clearly indicated in its evidence that it feared losing the term employee and the possible consequences of additional hardships within its computing department, and chose to accept the risks associated with terminating Mr. Hayes' employment. While this may appear to have been a good corporate decision, in circumstances such as these where there was a good prospect that Mr. Hayes could return to work within months of its decision, the standards of accommodation in the Yukon *Human Rights Act* are not met.

The College argued that because it had held Mr. Hayes' position open for more than two years prior to his liver transplant, it had accommodated Mr. Hayes to the point of undue hardship and was justified in terminating him with cause. Mr. Hayes was unable to resume his position at the time when employer felt it needed to fill the position permanently.

The net effect remains — Mr. Hayes' absence from work was caused directly by his disability: his liver condition and his wait for a liver transplant. In the circumstances, his repeatedly postponed surgery, and a precise recovery timeline could not be quantified, and in the circumstances the College could not expect a clearer prognosis until his condition stabilized after the transplant. Up to the two-year point, it appears from the evidence that Mr. Hayes was 'entitled' to having his job held. It would be considered "accommodation" if the College had made any attempts beyond the two-year entitlement to facilitate Mr. Hayes' further extended absence.

The College submitted that it was obliged to apply the two-year period for two reasons:

1. It is the timeline used by the insurer to trigger a review of the status of an employee who was on disability. The communication between the insurer and the College indicated that because Mr. Hayes had not yet received a liver transplant, his file had been transferred to the insurer's extended (long-term) disability unit because there was no clear indication of when he would receive the transplant, or his recovery time following surgery.
2. The College's collective agreement indicated that where the College implemented a 'temporary position', that position must be made 'permanent' within two years. The intent of this requirement is to prevent employers from continuously filling positions with temporary employees, effectively preventing them from qualifying for full-time employee benefits.

Established practices and protocols are often applied in large organizations to ensure consistency and fairness. Unfortunately, the blanket application of these practices can lead to unintended consequences. The College's arbitrary adoption of the insurer's two-year review timeline, and reliance on the collective agreement's two-year 'temporary position' limitation in this case give rise to the question of systemic discrimination. The College's rigid attempts to adhere to these practices appear to have blinded it to the actual circumstances, including the realistic possibility that Mr. Hayes could be able to resume his employment within a reasonable timeframe following surgery. It is clear from the evidence that the College formally and informally applies policies and procedures that may be inconsistent, unfair, and in some circumstances may lead to discrimination:

- When an employee receiving disability benefits approaches the end of their initial 24-month period of disability payments and therefore approaches the transition to extended disability upon a determination of whether they are able to perform their own job, and are evaluated on the basis of whether they are able to perform any job, the College automatically undertakes a review of their employment status, regardless of the circumstances involved.
- There is a corporate goal of maintaining operational continuity and service for computer maintenance and user assistance, with insufficient consideration to employment and human rights standards.
- Employees' disability benefits, managed by the College's insurer, which are intended to reduce the impacts of long-term illness or disability for their employees are an entitlement awarded by their employment.
- The College's practice of minimizing its involvement with the co-management of the employee's return to work with the insurer. The employee's ability to return to work is monitored and managed by the insurer, and based largely on reports received by the insurer. The College

**4. If Farley Hayes was discriminated against by reason of physical disability, did not receive reasonable provisions, or was a victim of systemic discrimination, what remedy is appropriate in the circumstances?**

As a consequence of its findings of discrimination, a failure to provide reasonable provisions, and systemic discrimination the Panel orders the College make the following remediation for Mr. Hayes, and changes to its policies:

1. The Panel orders Yukon College to forthwith reinstate Mr. Hayes to permanent full-time employment status at full salary. To facilitate his return to work, the College will also develop an effective return-to-work accommodation plan within 30 days.
2. The Panel orders Yukon College to pay Costs of these proceedings to the Complainant and the Commission.
3. The Panel orders Yukon College to institute a policy that addresses the systemic risk related to employee termination and disability. Such policy shall be reviewed and approved by the Yukon Human Rights Commission.

The Panel makes no order with respect to the payment of lost wages. The evidence satisfies the Panel that during the time of his disability, Mr. Hayes received employment insurance benefits, the insurer's disability payments, Canada Pension disability payments, and coverage for Chronic Care (prescriptions). No tax assessments were provided in evidence to substantiate a loss of income, and in the absence of such assessments, the Panel finds that the payments and benefits that Mr. Hayes has received approximated his lost wages sufficiently that such an order is unnecessary.



- a. Safety;
- b. Disruption to the public;
- c. Effect on contractual obligations;
- d. Financial cost;
- e. Business efficiency.

Section 9 of provides:

No person shall discriminate

(b) in connection with any aspect of employment or application for employment.

The first question to be decided is whether or not the dismissal of Mr. Hayes was the result of unfavourable treatment predicated on his physical disability, or whether, given the uncertainty of a return to work date, the College (having accommodated Mr. Hayes, in my view, to the point of undue hardship) was justified in releasing him for his sustained inability to work.

The second question is whether the College made reasonable provisions in connection with Mr. Hayes' employment "...for the special needs of others if those special needs arise from physical disability..." to the point of undue hardship.

The third question involves determining "undue hardship" by balancing the advantages and disadvantages of provisions by considering such factors as:

- a. Safety;
- b. Disruption to the public;
- c. Effect on contractual obligations;
- d. Financial cost;
- e. Business efficiency.

And finally, the fourth question is whether the Respondent discriminated against Mr. Hayes in connection with an aspect of employment in this matter.

### **Evidence at Hearing**

The first question is whether or not the dismissal of Mr. Hayes was the result of unfavourable treatment predicated on his physical disability, or whether, given the uncertainty of a return to work date, the College (having accommodated Mr. Hayes, in my view, to the point of undue hardship) were justified in releasing him for his sustained inability to work.

Evidence was led at the hearing of this matter that suggests Mr. Hayes received favourable treatment from the College.

It should be noted that his tenure with the College was short, just five months, before his first health episode and prior to successfully completing his probation in May 2002.

This uncertainty was further complicated by circumstances:

- The first transplant, scheduled for September 2003 (a year after his medical leave was approved) was cancelled because the donor had West Nile virus.
- A second transplant, scheduled for January 2004 was also cancelled because the donor liver was "fatty."
- A third transplant, scheduled for May 2004, was postponed because another patient held higher surgical priority.

It was at this point the College received advice from its insurance carrier indicating that "there is no prospective return to work date." Furthermore, Mr. Hayes' file had been referred to the insurer's Extended Duration Unit, a unit that managed files of beneficiaries it did not expect "ever to return to work again" (E-mail from Cassandra Connell of 25 May, 2004).

Twenty-one months had passed since Mr. Hayes was off work, and the commencement of medical leave. Throughout this time, the College was back-filling his substantive position by hiring students and contractors.

Under the insurance plan that covered Mr. Hayes, he was entitled to benefits for a period of 24 months, as long as he could not do his own job. After 24 months, he was entitled to benefits for as long as he was unable to perform his job or any other job. Throughout this period, the College continued to pay the premiums to maintain this coverage.

The College's practice was that when a person on disability approached the end of the initial 24 months of disability payments, and was about to cross the threshold from being qualified for payments because they were unable to do their own job, to being unable to do any job, a review of the individual's employment status would be triggered.

On 28 July 2004, Mr. Hayes advised the College for the fourth time that he was about to undergo a liver transplant, and indicated that there would be a six-month to one-year recovery period.

The College advised Mr. Hayes on 31 July 2004, of his impending termination, effective 26 August 2004.

A subsequent meeting took place in which it was agreed that Mr. Hayes or his spouse, Ms. Thompson, would contact the College on or about September 17 or 27 (there is some disagreement as to the specific date). The purpose of this contact was to advise whether the surgery had been a success, and provide any further information with respect to prognosis.

3. Is there evidence from which it is reasonable to infer discrimination was a factor in the treatment?”

In my view, these three tests are conjunctive and *all must be true* in order to establish a prima facie case.

While there is no doubt that Mr. Hayes had a disability, it is not clear to me that he experienced unfavourable treatment, or that any unfavourable treatment was a direct result of that disability. In my view, the test fails to demonstrate a prima facie case of discrimination in this case, because I do not see the required conjunctivity.

Two further evidentiary points relevant to this test include the fact that at least one other person was previously released by the College after a two-year medical absence. Therefore, in my view the practice of releasing a person after such a long absence, given that their benefits continue cannot be viewed as unfavourable. Secondly, Mr. Hayes' release was predicated both by his inability to work, and the uncertainty or, more specifically the absence of a specific return to work date.

Ms. Roothman further argued that the employer has a duty to accommodate innocent absenteeism due to disability, requiring that the employer individually assess the employee.

In my view, the employer was guided by the advice of the insurance carrier at the time of its decision to terminate Mr. Hayes. That advice was that the carrier did not expect Mr. Hayes to return to work. Given that advice, what was the employer to further assess?

Ms. Roothman cited the *Hydro-Quebec v. Syndicat des employe-e-s de techniques professionnelles et de bureau d'Hydro-Quebec, section locale 2000*, [2008] S.C.C. 43. While referencing the *McGill* case, the Supreme Court indicated that the employer should assess the duty to accommodate globally, meaning that the assessment should take into consideration past absenteeism as well as whether the employee would be able to *return to work in the foreseeable future* (emphasis added).

In my view, two factors were absent that reduced, if not negated the College's obligation to conduct such an assessment. Firstly, I believe that a request for further accommodation had actually been arranged through the agreement that Mr. Hayes or Ms. Thompson would contact the College in September 2004. Secondly, it was improbable that Mr. Hayes would be able to return to work in the “foreseeable future” — a fact supported by his absence from work some four years after surgery. The “future” and any associated obligation on the employer surely must terminate upon receiving the advice (provided by the insurer who

The third question involves determining “undue hardship” by balancing the advantages and disadvantages of provisions by considering such factors as:

- a. Safety;
- b. Disruption to the public;
- c. Effect on contractual obligations;
- d. Financial cost; and
- e. Business efficiency.

In my view, the College did everything reasonable to the point of undue hardship in accommodating Mr. Hayes. Despite a relatively short tenure, his job was protected for more than a two-year period, and the College was forced to deliver computing services by hiring students and contractors. The dilemma of not being able to provide stable continuity in such a high paced department for an indefinite period must have been frustrating for the College.

Finally, the fourth question is whether the Respondent discriminated in connection with an aspect of employment in this matter.

It would be callous not to acknowledge the hardship experienced by Mr. Hayes throughout a most arduous ordeal resulting not only from major surgery but also his dismissal, but I contend that much of that hardship was occasioned by timing and circumstance rather than discrimination, and that neither any malicious intent nor a “decision of convenience” on the part of Yukon College were factors in the dismissal.

Weighing the balance of probabilities, I conclude that after a lengthy period of accommodating Mr. Hayes, the College in the interest of certainty and with regard to its fiduciary responsibilities to faculty and students, took the step of terminating Mr. Hayes in the absence of any reasonable assurance that he would be able to return to work in the foreseeable future.

Decided this 8<sup>th</sup> day of December 2008 at the city of Whitehorse, Yukon



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Barbara A. Evans, Chief Adjudicator