

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

IN THE MATTER OF THE **YUKON HUMAN RIGHTS ACT**
AND IN THE MATTER OF
FARLEY HAYES AND YUKON COLLEGE

Contents

I.	Introduction.....	1
II.	What is this Complaint About?	2
III.	Who are the Parties?	3
IV.	What are the circumstances giving rise to the Complaint?	3
V.	What are the Parties' Positions?.....	3
	The Complainant's Position	3
	The Commission's Position.....	4
	The Respondent's Position	4
VI.	What are the Issues to be determined?.....	5
VII.	Facts.....	6
VIII.	Finding on Discrimination.....	7
	1. Was Farley Hayes discriminated against by reason of physical disability pursuant to section 7(h) of the Yukon <i>Human Rights Act</i> ?	7
	2. Did Yukon College meet its responsibility pursuant to section 8(1) of the Yukon <i>Human Rights Act</i> to make reasonable provisions for Farley Hayes, and would it face undue hardship if required to accommodate Mr. Hayes beyond the two-year period?	8
	3. Does an issue of <i>systemic discrimination</i> arise pursuant to section 12 of the Yukon <i>Human Rights Act</i> ?.....	10
	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?	13
IX.	Dissent of Adjudicator Riseborough.....	14
	Introduction	14
	Issue	14
	Evidence at Hearing	15
	Conclusion	18

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

College's termination letter. At the time of the hearing, Mr. Hayes was continuing to receive disability payments from the College's insurer.

II. What is this Complaint About?

This complaint was brought by Farley Hayes against the Respondent Yukon College pursuant to allegations that he was discriminated against on the grounds of physical disability, and that the Respondent did not accommodate him with respect to his employment. Mr. Hayes' complaint alleges that sections 7(h), 8, and 9(b) of the Yukon *Human Rights Act* ("Act") were contravened by the Respondent's conduct.

The relevant sections of the Yukon *Human Rights Act* provide:

7. *It is discrimination to treat any individual or group unfavourably on the following grounds*

(h) *physical or mental disability;*

8. (1) *Every person has a responsibility to make reasonable provisions in connection with employment, accommodations and services for the special needs of others if those special needs arise from physical disability, but this duty does not exist if making the provisions would result in undue hardship.*

(2) *For the purpose of subsection (1) "undue hardship" shall be determined by balancing the advantages and disadvantages of the provisions by reference to factors such as*

- (a) *safety;*
- (b) *disruption to the public;*
- (c) *effect on contractual obligations;*
- (d) *financial cost;*
- (e) *business efficiency;*

(3) *This Act does not apply to structures which at the commencement of this Act were existing and complied with the applicable requirements of the Building Standards Act and regulations under that Act.*

9 *No person shall discriminate*

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

Systemic discrimination

12 *Any conduct that results in discrimination is discrimination.*

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 Commission's Position

In addition to agreeing with the Position of the Complainant, the Commission submitted that the College's application of an arbitrary two-year limit for holding a position open is discriminatory on its face, particularly in circumstances where minimal efforts were made to assess the employee's situation or to fully consider its own options for adapting to its operational challenges in this situation.

The Respondent's Position

The College followed the established practices and protocol determined through an earlier precedent and applied a two-year review period that was used by its disability insurer when it decided to terminate Mr. Hayes' employment. From the perspective of business continuity, the uncertainty of Mr. Hayes' condition, the uncertainty of timelines for a potential return to work, and the absence of assurances that he could return to work negated obligations for further accommodation.

The College argued that it is very difficult to find someone to fill a computer technician's job, and because it had found another employee who was able to perform the job, and threatened to leave the position unless a more permanent employment position was in place, the College felt compelled to follow the two-year limit for holding open temporary positions within its collective agreement.

From the College's perspective, it provided more than sufficient accommodation over the two-year (plus 90 days) waiting period during which they maintained premiums that enabled Mr. Hayes to continue receiving disability benefits. As the end of the two-year period approached, the College contacted Mr. Hayes and arranged a meeting to discuss the likelihood of his returning to work. Having been told that his surgery would be in August, the College required, and Hayes agreed to contact the College before September 27, 2004, to advise of his prognosis and projected return-to-work date.

Unfortunately, Mr. Hayes did not contact the College, nor return a phone message left at the contact number provided to the College. The College contacted the Union and was advised by one representative that they also had no contact with Mr. Hayes and had no further concern, indicating the College had "done what it could" and because Hayes had not contacted the College as he had committed, the College had fulfilled its responsibilities.

Mr. Goult also referred to the recent Supreme Court of Canada's ruling in *Hydro-Quebec v. Syndicat des employées de techniques professionnelles et de bureau d'Hydro-Quebec, section locale 2000*, [2008] S.C.C. 43. that an employer need not hold a job open for an employee where there is little or no expectation of the employee returning to work without full recovery.

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?

VII. Facts

Mr. Hayes graduated from a computer-networking program at SAIT, after which he worked for Northwestel Inc. He was re-trained in computers after he became unable to perform his job with Northwestel due to a disability (tennis elbow). Hayes started his own contracting business in computer maintenance, which he maintained on a part-time basis after being hired by Yukon College in 2001.

Mr. Hayes was employed by the College as a help desk computer network technologist on a permanent full time basis. His probation period of 6 months ended May 14, 2002. Mr. Hayes received a salary of \$42,000 annually and as a PSAC Union member, was entitled to all employee benefits including disability insurance.

Mr. Hayes held an entry-level position with low physical demands, largely limited to walking and lifting computers and printers. The Yukon College computer department was staffed in Whitehorse with about a half dozen people and the evidence indicates that Hayes was responsible for a variety of tasks including the maintenance of computers, software problem solving, installation of new equipment and software, answering help desk questions, and other miscellaneous tasks. He provided service to up to 300 Yukon College personnel.

The College gave evidence that it was having a very difficult time with its computer department during much of Mr. Hayes' absence. One manager was not proficient in managing, many staff were absent from work, often due to stress. The first temporary employee hired to backfill Mr. Hayes' position was a student, and a private contractor was also retained at times, with largely unsatisfactory results. The second temporary employee was hired by the College on a one-year term. As the 'two-year' term approached he became insistent that if he was not awarded a full-time, permanent position, he was leaving the employ of the College.

As this two-year review approached, the College's Human Resources Director, Bonnie Tripp, instructed its Human Resources Advisor, Sandra Richardson, to contact Mr. Hayes. Ms. Richardson called Mr. Hayes on or about July 28, 2004, and was advised that he would be receiving his liver transplant on August 14. Later that day, Mr. Hayes' common-law spouse, Ms. Thompson, contacted Ms. Richardson and further indicated that Mr. Hayes' recovery time, barring serious complications, would be six months to one year.

As part of its two-year review of Mr. Hayes' circumstances, a meeting took place on August 3, 2004, between Ms. Tripp, Mr. Hayes, his common-law spouse, Ms. Thompson, Denise Norman (a PSAC Union representative), and the College President of the day, Ms. Sally Webber. Mr. Hayes confirmed that his expected recovery time would be six months to one year. At the conclusion of the meeting

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

contact them to obtain a prognosis before deciding to terminate. It left a message on Mr. Hayes' home phone. There is no evidence that it contacted anyone other than the insurer or made any other efforts to ascertain Mr. Hayes' condition, or *even considered* waiting just a few weeks longer for better post-operation information before deciding to terminate — even though it knew that Mr. Hayes had been through a difficult operation and a clearer prognosis than had been available for the prior two years was likely to arise in the near future.

It is clear from the evidence that the College's principal motivation was the immediate operational challenges that would arise if its temporary replacement employee was not provided with Mr. Hayes' position on a permanent basis. Ironically, the College decided to terminate Mr. Hayes with incomplete knowledge about his prospects for recovery at the very point in time when it would, and could reasonably expect to receive actual, more comprehensive information about whether Mr. Hayes would recover and be able to return to work. In fact, the limited information that the College had at the time suggested there was at least a fair to good prospect that Mr. Hayes would be able to return to work within six to 12 months of the operation.

The Respondent's decision to terminate on its stated basis of Mr. Hayes' inability to work, which was caused directly by his medical disability, gives rise to discrimination in these circumstances, particularly in light of its failure to make adequate inquiries about the likelihood of Mr. Hayes' return to work.

2. Did Yukon College meet its responsibility pursuant to section 8(1) of the Yukon *Human Rights Act* to make reasonable provisions for Farley Hayes, and would it face undue hardship if required to accommodate Mr. Hayes beyond the two-year period?

Evidence at the hearing of this matter revealed that Ms. Tripp, the Yukon College Director of Human Resources, met with the College President who approved the termination of Mr. Hayes' employment. Evidence suggests that the decision was based on operational needs, combined with the belief that the College had no obligation to retain Mr. Hayes, based on his status reports that the College received from its disability insurer. Mr. Hayes' status as "extended disability" on the insurer's reports was interpreted as meaning that he would be unable to return to work, or at least it would be a very long time before he could return to work.

As early as the telephone call between Ms. Richardson and Mr. Hayes, the evidence suggests that the College intended to terminate Mr. Hayes and offer his position on a permanent basis to its term employee, but invited Mr. Hayes to contact the College when he was ready to return to work to see if a position was available.

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.

Unfortunately, the final decision to terminate was made shortly after the transplant, and prior to any stabilization that might provide better information regarding the prospects of Mr. Hayes' return to work. After waiting more than two years for the transplant, there was finally a real expectation that a clearer prognosis for Mr. Hayes' return to work would be available. Yet, almost no efforts were made by the College to confirm that Mr. Hayes would be unable to return to work following his transplant. The only actions the College made were a number of phone calls in attempts to reach Ms. Thompson or Mr. Hayes, and, although unsubstantiated, there is evidence of a call to the Union representative. No contact was made with the insurer or Mr. Hayes' physician in Whitehorse in spite of the consent to release information that had been provided to the Respondent by Mr. Hayes.

Further, no evidence was provided by the Respondent as to why it had to terminate Mr. Hayes in order to award a permanent position to another employee. In light of the stress and workload pressures of the department and the high level of turnover, it was at least conceivable that there could be value in having Mr. Hayes return to work after six to 12 months, even on a part-time basis as he recovered, while the new employee continued to work full-time. Given the high turnover, it was likely that an employee in the department would have left a position at some point, which would create hardship for the operations of the College. At worst, it appears that the College may have been responsible for duplicitous salaries for some period of time. In the absence of any significant evidence regarding investigation into such possible alternatives, the majority of the Panel fails to understand what hardship the College would have suffered if it had not terminated Mr. Hayes' employment.

3. Does an issue of *systemic discrimination* arise pursuant to section 12 of the Yukon *Human Rights Act*?

The Panel notes section 12 of the Yukon *Human Rights Act* and finds that it is relevant in these proceedings:

Systemic discrimination
12 Any conduct that results in discrimination is discrimination.

The majority of the Panel believes that this section addresses circumstances where formal or informal administrative policies or procedures result in discrimination, causing such policies or procedures to be impugned.

The Panel finds that the College's arbitrary application of the two-year review period, as adopted from its disability insurer, offends this section and gives rise to systemic discrimination.

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

appears to avoid investigating or preparing itself for an employee's return to work, and abrogates its responsibility to investigate the status of employees by contact with the employee, their health care providers, and any other available sources when information becomes difficult to obtain.

The College indicated that its retroactive termination date of September 27 was "based on the wording of the disability policy which referred to two years after Mr. Hayes first began receiving disability payments". The College appears to have unknowingly extended that timeline by one month, from August 27 to September 27, ignoring its own arbitrary timeline, without consequence. Also interesting to the Panel is that the insurance policy in effect at the time was never produced at the hearing.

One of the key factors in making a determination in this matter is related to the expectation of Mr. Hayes' ability to return to his former position at Yukon College. The reports submitted to the insurer from Mr. Hayes' attending physician were predominantly based upon subjective reporting by Mr. Hayes. It is likely that Mr. Hayes' physician prepared his reports to the insurer to better enable Mr. Hayes to continue receiving benefits, not knowing that the College would also use the very same information to determine whether he could return to work and to terminate his employment.

The physician was not aware that his patient had no job to return to, only that he had recently had surgery and a marital break up, which were the likely causes of Mr. Hayes' depression.

The insurer was unaware of the College's termination of employment relationship between its client and Mr. Hayes. This further adds credibility to the argument that the College did not actively engage with the insurer for the provision of up-to-date information prior to termination.

The majority of the Panel believes that Mr. Hayes' very natural fear that he could lose disability insurance payments, his major source of income, particularly after becoming aware that he was no longer employed with Yukon College, could have led him to tailor his communications with both his physician and the insurer. Even now, it remains unclear to the Panel when in reality Mr. Hayes would have or could have returned to work, had he a position to return to.

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.

IX. Dissent of Adjudicator Riseborough

Introduction

It is with the utmost respect for my fellow panelists, Chief Adjudicator Barbara Evans and Adjudicator Darcy Tkachuk, that I disagree that the Respondent, Yukon College, contravened the Yukon *Human Rights Act* by either discriminating against the Complainant, Mr. Hayes, or by applying a systemic discriminatory practice, when it dismissed Mr. Hayes from his position as a computer support technician on the help desk with Yukon College.

I accept the Respondent's position that the complaint must be dismissed for the following reasons:

- (i) As a matter of law, the contract of employment between Mr. Hayes and the College was frustrated because Mr. Hayes, through no fault of his own, was unable to fulfill a fundamental term of that contract, namely to work.
- (ii) If the doctrine of frustration of employment of contract does not apply in the circumstances of this case, then the duty to accommodate Mr. Hayes ended when it was clear that he would be unable to work for the reasonably foreseeable future.
- (iii) If the duty to accommodate did not end at that point, the College otherwise met its duty to accommodate to the point of undue hardship.

Issue

The key issue in this proceeding is whether the Respondent contravened the Act by discriminating against Mr. Hayes on the grounds of physical disability, and whether it failed to accommodate his disability sufficiently, in the area of employment.

The Complainant alleges that the Respondent contravened Sections 7(h), 8 and 9(b) of the Act. Section 7 states:

It is discrimination to treat any individual or group unfavourably on any of the following grounds

- (h) physical or mental disability;

Section 8 states:

- (1) Every person has a responsibility to make reasonable provisions in connection with employment, accommodations, and services for the special needs of others if those special needs arise from physical disability, but this duty does not exist if making those provisions would result in undue hardship.
- (2) For the purpose of subsection (1) "undue hardship" shall be determined by balancing the advantages and disadvantages of the provisions by reference to such factors as:

- 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.

His third absence from work on 18 June 2002 coincided with exhaustion of any sick leave provisions and employment income. The College paid out Mr. Hayes' vacation entitlement.

In June 2002, Mr. Hayes was advised that he would require a liver transplant. In August he advised the College of this requirement, and the fact that he may have to "go out soon."

Part of the discussion is reported in an e-mail sent by Ms. Richardson to Wayne Coghill and others on 8 August 2002:

"I informed him we need a doctor's note indicating that he is okay to come back before he returns and more information than part-time. He also told me that he will be getting a liver transplant and may need to go out soon. I informed him we need to replace the position and we need a fairly good idea of what time duration we are looking at. We also need to meet with Gerry Lecocq and Wayne to discuss if this is even an option."

It should be noted that on August 22, the College approved medical leave for Mr. Hayes, which approval constitutes accommodation. Significantly, in my view, this appears to be the only request by Mr. Hayes for any form of accommodation from the College.

In a backgrounder attached to the same e-mail, the writer comments with respect to Mr. Hayes that, *"I reminded him that he owes us money for premiums and he told me he cannot afford to pay until he receives money from Sunlife."* Evidence was later led indicating that the College had forgiven certain obligations owed by Mr. Hayes. In my view, such favourable treatment constitutes further accommodation.

There is much evidence to suggest that the uncertainty of a return-to-work date may well have been a principle factor in the College's decision to terminate Mr. Hayes.

From the outset, the College made clear its need to hire a replacement employee for the position.

As early as July 2003, Dr. Todd had provided a medial assessment to the insurance carrier indicating that Mr. Hayes was still unable to work and unsuitable for trial employment in his own or any other occupation. That assessment stated that it was possible that with a liver transplant, Mr. Hayes could recover without a large loss of function or impairment. Dr. Todd's use of the words "possible" and "could" clearly would not provide any sense of certainty to the College.

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.

Mr. Hayes suffered a variety of complications resulting in further surgery, and neither he nor his spouse contacted the College until November 2004.

On October 5 the College wrote Hayes advising of his termination, effective 26 September 2004.

The evidence as to whether or not Mr. Hayes could return to his regular job varies.

- In March of 2006, in a discussion with Dr. Todd, Mr. Hayes acknowledged that he could not work full-time, he could not work with computers again and he had difficulty concentrating.
- In August 2006, Mr. Hayes advised Canada Pension Plan and RBC Insurance that he “was ready to return to work.”
- In that same month, Dr. Gutfreund advised Dr. Todd that Mr. Hayes “feels he’s lost too many of his skills.”
- As late as November 2006, Astra Albertini testified, “Farley stated he is feeling pressure from the insurance company to go back to work, but he does not know if he is ready and not sure of what he wants to do. Farley stated he is able to take a step back and take his time to figure out what he is wanting to do and what he is capable of doing.”

Conclusion

Ms. Roothman, counsel for the Commission, argued what in my view is the most relevant case law she cited, noting that the British Columbia Court of Appeal in *Kemess Mines Limited v. International Union of Operating Engineers, Local 115*, [2006] B.C.J. No. 263, (paragraphs 29-34) for the starting point for the prima facie analysis to be the Human Rights code and the definition of “discrimination.” The Court of Appeal held that there is no need to do a comprehensive analysis, but cited the tests to be applied in establishing a prima facie case of discrimination:

... the starting point of a human rights analysis is to determine whether the disputed dismissal is prima facie discriminatory. The dismissal must be found to be prima facie discriminatory if the grievor had a physical or mental disability; if the company treated the grievor adversely; and if it is reasonable on the evidence to infer that the disability was a factor (not necessarily the overriding factor) in the adverse treatment: Martin (2001) 41 C.H.H.R. D/88.

“An analysis of whether a prima facie case of discrimination arises under the Act in this complaint involves the following three questions:

1. Does the complainant have a disability?
2. Did the complainant experience unfavourable treatment?

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

was in regular contact with Mr. Hayes' physician) that it was unlikely that Mr. Hayes would ever return to work.

Of further note, respecting contact with the College following the surgery, Ms. Norman testified that on or about September 28, 2004, Ms. Thompson and Ms. Norman specifically discussed whether the College should be contacted by the Union in order to pursue Mr. Hayes' continued employment, and Ms. Thompson directed Ms. Norman not to do so. As a result of this conversation, the Union did not pursue the issue further.

I disagree with the Commission's analysis which suggests that by applying the analysis from the *Kemess* case, the Complainant met the burden of proof. Specifically, although I agree that the Complainant had a disability at the relevant time, I do not accept that he was treated unfavourably by the Respondent on the basis of this disability, nor that it is reasonable on the evidence to infer that the disability was a factor in any adverse treatment.

I further contend that it is reasonable for an employer to await advice from the insurer that an employee is ready to return to work prior to attempting to assess any accommodation needs. To date, Mr. Hayes has not reached that point.

Mr. Brown, counsel for the Complainant, argues in a similar vein to the foregoing. It is helpful to reference his comments with respect to the *Hydro-Quebec* case wherein he notes that an employer's duty to accommodate comes to an end only if there is no prospect that the employee will return to work in the foreseeable future. "The employer's duty to accommodate ends when the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future."

In my view, Mr. Hayes was "no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future."

I am compelled to agree with the arguments put forward by Mr. Goult, counsel for the Respondent.

In conclusion, with respect to the first question, I cannot concur that Mr. Hayes' dismissal was the result of unfavourable treatment predicated on his physical disability, but on the balance of probabilities, find that it was more reasonably predicated on the uncertainty of a return to work date.

The second question is whether the College made reasonable provisions in connection with employment "... for the special needs of others if those special needs arise from physical disability ..." to the point of undue hardship. In my view, the College did everything it could reasonably be expected to, based on requests for accommodation.

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 8th day of December 2008 at the city of Whitehorse, Yukon



Barbara A. Evans, Chief Adjudicator