BEFORE THE HUMAN RIGHTS BOARD OF ADJUDICATION

IN THE MATTER OF

THE **YUKON HUMAN RIGHTS ACT**

AND

IN THE MATTER OF

Sharon McConnell

v.

Y.T.G. - Public Service Commission and Dept. of Justice

- DECISION -

And

Reasons for the Decision-

IN THE MATTER OF THE YUKON HUMAN RIGHTS BOARD OF ADJUDICATION
And in the matter of
Sharon McConnell v. Y.T.G. Public Service Commission & Dept. of Justice

-- DECISION --

The Yukon Human Rights Board of Adjudication finds that Sharon McConnell has established on a balance of probabilities a *prima facie* case that the Yukon Territorial Government had discriminated her human rights by terminating her employment on the basis of a mental disability in contravention of the Yukon Human Rights Act.

The Board also finds that the Yukon Territorial Government has not established, on a balance of probabilities, that they attempted to the point of undue hardship to reasonably accommodate Ms. McConnell's mental disability. The failure to reasonably accommodate Ms. McConnell's mental disability is discrimination in contravention of the Yukon Human Rights Act.

As a result of the discrimination, the Complainant was terminated from her employment with the Yukon Territorial Government. But for the discrimination, Ms. McConnell may have enjoyed six years of employment since July 23, 1992. Therefore, the Board makes the following orders for damages:

1. Ms. McConnell is entitled to an award equal to the amount she would have earned as a full-time Employee for two full years – until July 23, 1994;
2. Any award must deduct the actual income earned by the Complainant during each of the first two years after the discrimination;
3. Simple interest shall be calculated and added to the award for financial loss;
4. $1,500 attributable as damages for injury to dignity, feelings, and self-respect; and
5. The Yukon Territorial Government shall pay costs to the Complainant.

The Board also orders that the Yukon Territorial Government shall, within one month, offer to re-hire Sharon McConnell in a department other than Justice. Ms. McConnell shall either accept or reject the offer within two months. If Ms. McConnell accepts the offer, the Yukon Territorial Government shall apply the Reintegration of Disabled Employee's policy to assist the Complainant's reintegration back into the workforce.

Lee Francoeur, Chief Adjudicator

Timothy Vickery

Jan Kulicki

Michael Dougherty

Brenda Jackson

REASONS FOR THE DECISION

Summary Facts

A summary of the facts of this matter are as follows:

1. Sharon McConnell [the "Complainant"] started her employment with the Department of Justice, Government of Yukon [the "Respondent"] on October 11, 1985.
2. In 1990, as a result of stresses from within and outside the workplace, the Complainant was diagnosed with depression resulting in long term disability. The Complainant requested and was granted a two year extended leave pursuant to the Yukon Government's Prolonged Illness Policy.
3. An April 30, 1992 letter from the Yukon Territorial Government attempted unsuccessfully to communicate to Ms. McConnell that she would be terminated "on July 20th, 1992 in accordance with the Prolonged Illness Policy".
4. June 4th, 1992 was the effective date of Reintegration of Disabled Employees Policy. The purpose of this process was to provide alternate employment opportunities to disable employees.
5. In a letter from Terry Kinney to the Complainant, dated June 26th, 1992, it was stated "if you are unable to return to your position...you will be terminated effective July 18, 1992, in accordance with the attached Prolonged Illness Policy".
6. A letter from the Complainant to Public Service Commission, YTG, dated July 10th, 1992 stated that the Complainant intended to return to work by July 18th, 1992.
7. In a letter to the Public Service Commission from Christian Dutil, Clinical Psychologist to the Complainant, dated July 7th, 1992, it was recommended that it would be in the best interest of the Complainant to be placed in a position with the Employer, YTG, in a department other than the Department of Justice.
8. A meeting between the Complainant and the Public Service Commission was held on July 14th, 1992 during which the Complainant stated that it would be in her best interest to be placed in a position in a department other than Justice. Further, the Complainant suggested that the Employer should discuss the Complainant's needs with Christian Dutil. The Employer did not contact Christian Dutil. Further, the Employer stated that they could not fulfill this request and that there were no positions available.
9. The Complainant and the Respondent subsequently learned that there was an AR-8 position available in Tourism.
10. In a letter dated July 17th, 1992 from Terry Kinney to the Complainant, she stated that her employment would not be terminated on July 18th, 1992 and that if she applied for the position available with the department of Tourism, an interview would be granted. Subsequent to that interview, should she be certified, she would be appointed to the position. If, however, she did not certify, she would be terminated effective July 23rd, 1992.
11. The Complainant was not informed of the competition information, and at 11:30 a.m. on July 21st, 1992, the Complainant was informed that she had been scheduled for her interview at 2:00 p.m. that same day. The Complainant attended the interview.
12. On July 24th, 1992, the Complainant was notified that she had failed the competition and had been terminated effective July 23rd, 1992.

13. The Complainant was advised that she would be given preference for positions for which she chose to apply within YTG for the period of one year. However, the change in government resulted in a hiring freeze. In fact, the Complainant's former position in Justice was not filled until May, 1993.

14. The Complainant filed a Human Rights Complaint on or about December 17th, 1992.

Prima Facie Discrimination

The Supreme Court of Canada held that the test to prove *prima facie* discrimination is:

> The Complainant in proceedings before a human rights tribunal must show a *prima facie* case of discrimination. A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the Complainant's favour in the absence of an answer from the Respondent-Employer.[1]

In civil cases, the duty to establish a *prima facie* case is not as onerous as in criminal cases. The burden of persuasion in civil cases requires proof on the balance of probabilities, which means that the evidence in favour of the Complainant must be more probable than the evidence against.

In this case, to establish a *prima facie* case of discrimination in contravention of the Yukon Human Rights Act[2], the Complainant would have to establish that:

1. she was treated unfavourably on the basis of a physical or mental disability in contravention of section 6(h) of the Yukon Human Rights Act;
2. she was discriminated in connection with any aspect of employment or application for employment in contravention of section 8(b) of the Yukon Human Rights Act; and
3. she made an effort to notify the Employer of her disability.

Physical or Mental Disability (Section 6(h))

A prerequisite for a claim of discrimination is that the Complainant must establish on a balance of probabilities that she was suffering from a disability at the time of the alleged unfavourable treatment. To succeed, the Complainant has to establish that her condition is recognized as a disability and that the disability continued to afflict her when the Employer treated her in the discriminatory manner.

The Complainant suffered from a reactive depression resulting from her situation at work and at home. In 1990, the Respondent recognized her depression as an illness and granted the Complainant with a two year leave pursuant to the Prolonged Illness Policy.

Depression, along with anxiety, is one of the most frequent complaints heard by therapists and has been called "the common cold of mental illness."[3] Fortunately, like physical disabilities,

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[1]Ontario Human Rights Commission v. Simpsons-Sears [1985] 2 S.C.R. 536 at 558.

[2]SY 1986, c. 11

[3]Bruno, F.J. Ph.D., *The Family Mental Health Encyclopedia*, (Toronto: John Wiley & Sons, Inc, 1991): 93.

depression can be treated with drugs or psychotherapy, depending on the type of depression. Although the goal of treatment is full recovery, it is not certain. In many cases after treatment, depression can still exist and, like in Ms. McConnell's case, even though one or more of the symptoms of depression may not be present, the illness can still plague the sufferer to a lesser degree.

The Respondent does not dispute that depression is in fact a disability. Rather, upon the complainants desire to return to the workforce, the Respondent submits the untenable position that either:

1. the Complainant was completely recovered from her disability; or
2. the medical assessment states that the Complainant has not recovered from her disability and therefore she should not return to her former position.

Full Recovery

Counsel for the Respondent submits that the Complainant did not suffer from depression at the time of her termination. In support, the Respondent argues that since the Complainant acknowledges that she is well enough to return to the workforce, she can no longer claim to be disabled.

The Ontario Board of Inquiry held that a Complainant suffering deep vein thrombosis was not handicapped and she could therefore not claim discrimination.[4] In light of the temporary nature of the illness and the fact that the Complainant's physician considered her fully recovered, the Board found that the Ontario Human Rights Code did not apply and dismissed the complaint.

In this Board's opinion, the *Elkas* v. *Blush Stop Inc.* case is distinguishable from the present complaint as Ms. McConnell's depression can neither be characterized as a temporary illness nor can she be considered fully recovered.

As in the present case, we find that in cases of depression, the Complainant may not be fully recovered but recovered enough to consider reentering the workforce, with some accommodation. We see no distinction between physical and mental disabilities in terms of ability to reenter the workforce despite the fact that full recovery has not occurred. If full recovery was a prerequisite to reentry, the principle of accommodation would become moot.

Mr. Dutil put it succinctly in his letter of July 7, 1992 wherein he stated,

> "Because of the nature of the referring problem and because *Ms. McConnell has only recently improved enough to consider gainful employment*, it would be ill advised, in my opinion, to have her return to the same or a similar position to the one she had in the Department of Justice." [italics added]

In conclusion, we find that Ms. McConnell suffered from depression, which is a mental disability and that she was disabled at the time of her termination from her Employer.

Terminated for Cause

Although the point was not strenuously argued by counsel for the Respondent, there was some suggestion in the evidence that the Complainant had not recovered and was unable to perform her former duties. In a letter to Ms. McConnell dated August 31, 1992, J.N. Besier of the Public Service Commission writes:

[4]Elkas v. Blush Stop Inc.(1989) 25 C.H.R.R D/158

> "Perhaps there was a misunderstanding about your interest in returning to your former position. However, the medical report provided advises strongly against such a move. To act in contravention of the medical assessment could put our future insurance coverage with you in jeopardy."

This letter suggests to the Board that the Public Service Commission would not return the Complainant to her former position on the basis of the medical report that discouraged such a placement.

The Respondent submits that since the Complainant was unable to return to work after twenty-four months, she should have been terminated for cause in accordance with the Prolonged Illness Policy, which reads in part:

> b) if it is determined medically that the Employee is unable to return to work within the twenty-four month period, the Employee shall be terminated for health reasons.

Counsel for the Respondent argues that the use of the word "shall" leaves no discretion for the Employer but to terminate the Employee.

However, we find that this provision only applies in strict cases whereby "it is determined medically that the Employee is unable to return to work." On the other hand, the Prolonged Illness Policy also provides that:

> Where an Employee ... recovers and submits evidence satisfactory to the Commission that they are fit to return to work but cannot perform the duties of the position they occupy, the Commission *may* release the Employee for ill health. [italics added]

Even if the Public Service Commission concluded that Ms. McConnell was willing to return to work but unable to perform her former position, the Policy provides for discretion in the word "may" to not release the Employee. As between the two conflicting policies, we conclude the discretionary policy is more applicable.

In the present case, however, Ms. McConnell proved a high ability to perform her duties which was reflected in her evaluations. The Complainant provided evidence to the Commission that she was fit to return to work and that, with some skills upgrading and accommodation, able to perform her former duties.

We find therefore that Ms. McConnell was both fit to return to work and able to perform the duties of her former position. The fact that Ms. McConnell desired another position, and was advised the same by Mr. Dutil is different from concluding that she could not perform the duties. In this Board's opinion, subject to our findings below, we find that the Public Service Commission did not have the discretion to release Ms. McConnell until they fully considered accommodation possibilities.

In conclusion, we hold that Ms. McConnell was afflicted with depression which is a mental disability. Ms. McConnell was not fully recovered but well enough to reenter the workforce, with accommodation. The Complainant was fit to return to work and could perform her former duties, with accommodation. Termination of the Complainant's employment on this basis of the Prolonged Illness Policy is unfavourable treatment for the purpose of the Yukon Human Rights Act.

In Connection with Any Aspect of Employment or Application of Employment (Section 8(b))

In light of our above conclusions, we hold that the alleged discrimination was in connection with an aspect of employment. Ms. McConnell termination is obviously in relation to an aspect of her employment.

Effort to Notify and Cooperate with Employer

We accept the Respondent's submission that before a *prima facie* case of discrimination can be established, the Employee must give reasonable notice of the disability and be willing to explore accommodation options. It would be a perversion of the law to invite less scrupulous complainants to conceal their disabilities and expect the Employer to presume accommodation is required. If accommodation is required, the Complainant or their doctors must inform the Employer.[5] If the Employer is not informed of a special need, it is reasonable to expect that no accommodation is required, especially as in this case, after the Employer contacts the Employee requesting notification of special needs. It is the opinion of this Board that this issue could have been avoided if the parties had maintained effective communication during Ms. McConnell's sick leave.

In this case, we find that Ms. McConnell did give sufficient notice to the Employer by delivering by hand a letter dated July 10, 1992 stating in part:

> During the past several months the focal point of my recovery has been aimed at returning to work. This letter is to confirm my intention to do so, with the Yukon Territorial Government.
>
> After due consideration, I desire to be placed with a department other than Justice. In support of this request, please find enclosed a letter from Christian Dutil, Clinical Psychologist, Mental Health Services.

Her letter of July 10, 1992 and the attached supporting letter of Christian Dutil should have put the Employer on notice that some accommodation was required. The Complainant gave further notice of her requirement for accommodation following the meeting of July 14, 1992 wherein the Complainant requested a position in another department. Finally, the meeting on July 14, 1992 was specifically called to discuss Ms. McConnell's needs respecting her reentry into the workforce. We conclude that the Employer must have known that Ms. McConnell was trying to communicate that some form of accommodation was required.

We find further that Ms. McConnell expressed a willingness to explore accommodation options by requesting and participating in the meeting with the Public Service Commission on July 14, 1992.

In passing, we note that the Complainant need not show that the Employer intended to discriminate as supported by section 11 of the Yukon Human Rights Act which provides that "Any conduct that results in discrimination is discrimination."

Conclusions - Prima Facie Discrimination

We conclude that the Complainant has proven a *prima facie* case of discrimination since she has shown that:

1. she was treated unfavourably on the basis of a physical or mental disability in contravention of section 6(h) of the Yukon Human Rights Act;
2. she was discriminated in connection with any aspect of employment or application for

[5]Bonner v. Ontario (Ministry of Health) (1992), 16 C.H.R.R. D/485 (Ont. Bd.Inq.): 55

employment in contravention of section 8(b) of the Yukon Human Rights Act; and

3. she made an effort to notify the Employer of her disability and cooperate in exploring accommodation options.

Reasonable Accommodation

Having found a *prima facie* case of discrimination, the onus of proof now shifts from the Complainant to the Respondent Employer. For the Supreme Court of Canada, McIntyre J explains the need for the shifting onus:

> Where adverse effect discrimination ... is shown ... the Employer is not required to justify it but rather to show that he has taken such reasonable steps toward accommodation of the Employee's position as are open to him without undue hardship. It seems evident to me that in this kind of case the onus should again rest on the Employer, for it is the Employer who will be in the possession of the necessary information to show undue hardship, and the Employee will rarely, if ever, be in a position to show its absence.[6]

The duty to accommodate is reflected in section 7 of the Yukon Human Rights Act:

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

Is there a duty to accommodate for mental disabilities?

Counsel for the Respondent suggested that there may be no duty to accommodate in cases of mental disability as section 7 specifically states "physical disability." We reject counsels submission for two reasons:

1. We interpret section 7(1) as including mental disability. Section 6(h) of the act specifically considers physical or mental disability together. Further, human rights legislation should be read purposively.[7] One of the main objects of the Yukon Human Rights Act is to discourage and eliminate discrimination. It would be grossly ironic to discriminate between a physical and mental disability in applying the Act. Notwithstanding the vacuum in the wording of the Act, we find that Employee's with a mental disability requires reasonable steps towards an accommodation by the Employer.
2. Accommodation is a defence to a *prima facie* case of discrimination after the onus has shifted. Even if section 7 of the Act did not apply to mental disabilities, there would still be an onus on the Employer to show that it has taken reasonable steps. Once discrimination is shown and the onus has shifted, the Employer may remain silent but only at their peril.

If so, what is the duty to accommodate?

As reflected above in section 7 of the Yukon Human Rights Act, the Employer has a duty to make reasonable provisions for the special needs of employees, up to the point of undue

[6]Ontario Human Rights Commission v. Simpson-Sears, Supra at 558.

[7]Ontario Human Rights Commission v. Simpson-Sears, Supra at 554.

hardship.[8] There are many factors to consider in assessing what will constitute an undue hardship. Section 7(2) of the Yukon Human Rights Act sets out a list of some of the factors that may be relevant. In addition, the Supreme Court of Canada decided:

> I do not find it necessary to provide a comprehensive definition of what constitutes undue hardship but I believe it may be helpful to list some of the factors that may be relevant to such an appraisal. I begin by adopting those identified by the Board of Inquiry in the case at bar - financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the Employer's operation may influence the ease with which the work force and facilities can be adapted to the circumstances. ... This list is not intended to be exhaustive and the results, which will obtain from a balancing of these factors against the right of the Employee to be free from discrimination, will necessarily vary from case to case.[9]

In addition to the factors set out in section 7(2) of the Yukon Human Rights Act, we note that the size of the Employer's operations and the interchangeability of work force and facilities are relevant factors to consider.

In particular, we observe that the Yukon Territorial Government is the largest single Employer in the Yukon with more than 3,000 employees cumulating almost 25% of the total workforce.[10] We also note that Yukon Territorial Government uses a classification system to assess Employee's responsibilities based on similar skills and abilities that applies throughout the government. For each classification level, different departments within the Government will have secretaries with similar skills and abilities. In Ms. McConnell's case, she was classified as an AR-8 secretary.

In a 1992 decision respecting discrimination based on religion, the Supreme Court of Canada explained further the extent of the duty to accommodate,

> More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term "undue" infers that some hardship is acceptable; it is only "undue" hardship that satisfies this test. The extent to which the discriminator must go to accommodate is limited by the words "reasonable" and "short of undue hardship." These are not independent criteria but are alternate ways of expressing the same concept. What constitutes reasonable measures is a question of fact and will vary with the circumstances of the case.[11]

In balancing the hardship of interfering with the rights of other employees and the complainants right of accommodation, the court later concluded:

> However, more than minor inconvenience must be shown before the Complainant's right to accommodation can be defeated. The Employer must establish that actual interference with the rights of other employees, which is not trivial but substantial, will result from the adoption of the accommodating measures. Minor interference or inconvenience is the price to be paid for religious freedom in a multicultural society.

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[8]Central Alberta Dairy Pool v. Alberta (Human Rights Commission) (1990), 12 C.H.R.R. D/417: 62.

[9]Supra: 63

[10]Yukon Statistics, Government of Yukon homepage.

[11]Central Okanagan School District No. 23 v. Renaud (1992) 16 C.H.R.R. D/425: 19

An Employer may claim a defence that the Employee unreasonably failed to assist in the accommodating efforts of the Employer. This places some onus on the Complainant to assist in accommodation. Reasonable accommodation to the point of undue hardship must also consider some flexibility on the Complainant to compromise. For example, the Supreme Court of Canada in a decision respecting discrimination on the basis of religion stated:

> The Employer must take reasonable steps towards that end which may or may not result in full accommodation. Where such reasonable steps, however, do not fully reach the desired end, the Complainant, in the absence of some accommodating steps on his own part such as an acceptance in this case of part-time work, must either sacrifice his religious principles or his employment.[12]

Did the Respondent satisfy the duty to accommodate?

In the present case, the Respondent presented the following options to the Complainant:

1. Ms. McConnell could reenter the workforce in her substantive position before her termination effective July 18, 1992;
2. Ms. McConnell's termination was extended until July 23, 1992 to allow time to apply and interview for a secretarial position in Tourism;
3. If Ms. McConnell did not certify for the secretarial position, she would be terminated but given preference for re-hire for 12 months pursuant to the Prolonged Illness Policy.

However, the Respondent did not offer to extend the Complainant's termination beyond July 23, 1992 or transfer the Complainant to a department other than Justice.

[12] IBID

Substantive Position

In accordance with the Prolonged Illness Policy, the Respondent held Ms. McConnell's position during her leave by back-filling her position with term employees. In a letter from Terry Kinney to Ms. McConnell dated June 26, 1992, the Public Service Commission wrote in part:

> This is to advise you that effective July 18, 1992, you will have been on leave without pay for two years. If you are still unable to return to your position as secretary with the Justice Department your employment will be terminated effective July 18, 1992 in accordance with the attached Prolong Illness Policy.
>
> If you are now able to return to your position with some modification, please advise us so that we may meet with you prior to July 18, 1992 to discuss your needs.

In effect, the only option that was presented to Ms. McConnell was the return to her substantive position or the return to her position with some modification.

Ms. McConnell's response to this letter stated that did not want to return to her former position. Rather, based in part on the advice of her Clinical Psychologist, Ms. McConnell wanted a meeting to discuss the possibility of a position in another department.

The Canadian Human Rights Tribunal also considered whereby an Employee did not want to return to his substantive position on the basis of stress. The Tribunal ruled:

> Based on the evidence as a whole, and, more particularly, the foregoing medical evidence, the Tribunal has concluded that the Respondent, in having failed or neglected to give due and proper consideration to Complainant's request for transfer, discriminated against the Complainant and this because of his disability.[13]

In another case, the Ontario Board of Inquiry heard a case of an Employer who forced an Employee to take a position that he did not want.[14] In this case, the Employee wanted his former position. The Board held that the Employer was required to fairly and accurately assess the Employee's ability to perform the duties of the position by requiring the Employee to provide a medical certificate or undergo a medical examination to indicate whether he was capable of performing the required duties. The failure to properly assess the Employee resulted in a violation of the Ontario Human Rights Code.

The failure of the Employer to consider or put their minds to the possibility of a transfer is a failure to accommodate. The Employer need not in all cases grant a transfer, but when an Employee proposes a possible accommodation option, the Employer has a duty to fairly and accurately assess the option before dismissing it. The Employer has a duty to assess the option and determine if accepting the proposal would result in an undue hardship to the Employer. In some cases, a fair and accurate assessment may require the Employer to require a medical certificate or a medical examination from the Employee.

In considering what will constitute an undue hardship, the Employer will consider the factors set out in the Human Rights Code and the case law.

In this case, Ms. McConnell requested, for medical reasons, a position in a department other than Justice. Her request was supported by her Clinical Psychologist, Christian Dutil. The Employer's response was that it was impossible within the short time frame to find a suitable position and terminated her. We also accept the evidence that in the meeting of July 14, 1992,

[13]Boucher v. Canada (Correctional Services) (1988), 9 C.H.R.R. D/4915: 37883

[14]Chamberlin v. 599273 Ontario Ltd. (1990) 11 C.H.R.R. D/117: 43

the Employer said they believed the Employee did not have a right to another position and that it would be an inconvenience to the Employer, and therefore they did not consider another position.

After considering all the factors from the Yukon Human Rights Act and the case law, it is hard to see how a transfer would constitute an undue hardship for the Respondent. The Respondent is the largest Employer in the Yukon with over 3,000 employees. The classification system would accommodate the transfer of workers with similar skills and abilities from one department to another.

In addition, the Yukon Territorial Government should have considered the Reintegration of Disabled Employees policy that was specifically designed "to provide alternate employment opportunities to employees who become either temporarily or permanently disabled resulting in their inability to perform the functions of their own job." The policy came into effect on June 4, 1992 and was therefore in effect in July 1992 when Ms. McConnell was seeking accommodation. The Respondent submits that the policy should not apply since:

1. it would allow Ms. McConnell two years of benefits in addition to the benefits she received under the Prolonged Illness Policy; and
2. because the policy can not apply retroactively.

Additional two years' of benefit

The Employer failed to apply the policy since they believed that by allowing Ms. McConnell to benefit from the Reintegration policy after she had nearly completed two years under the Prolonged Illness Policy would entitle her to an additional two years of benefits that no other disabled Employee would be entitled to. However paragraph 6.0 of the Reintegration policy provides in part:

> 6.0 TERMINATIONS
>
> Where terminations occur, the underlying support mechanism is provided by the Prolonged Illness Policy. Releases at the end of this period are made pursuant to the Public Service Act (part 6).
>
> 6.1 Employees may be terminated where they are unable, by virtue of their medical condition, to continue in the re-integration activity. In these cases, the Employee will retain his/her Employee status until the expiry of the prolonged illness period.

We find that at the expiry of the prolonged illness period under the Prolonged Illness Policy, the Employer would have had the right to terminate Ms. McConnell even under the Reintegration of Disabled Employees policy. Therefore, Ms. McConnell would not have been entitled to an additional two years of benefits.

Retroactive application

In our opinion, applying this policy to Ms. McConnell would not mean applying the policy retroactively. The policy clearly states that it applies to Ms. McConnell as a permanent employee who has completed twelve months of service and the policy clearly states that Ms. McConnell is eligible. We do not accept the proposition that the policy only applies to newly disabled employees. This policy only comes into effect after the disabled employee and employer identifies the need for re-integration, which will be near the end of their leave under the Prolonged Illness Policy. Paragraph 3.0 of the policy, the eligibility section, specifically states that to participate in activities under the policy the employee must:

> ...have been medically and/or psychologically assessed as a) requiring re-integration assistance as outlined in the following options, and b) able to meet the demands of the position.

In this case, once Ms. McConnell identified the need for re-integration in her letter of July 10, 1992, We find that the Employer failed to properly consider the Reintegration of Disabled Employees Policy. We find the failure to properly consider the policy is a failure to fairly and accurately assess the need for accommodation.

In our opinion, the failure to consider another position in this case was a failure to accommodate the mental disability of the Complainant. Reasonable accommodation in this case required the Employer to fairly and accurately assess the request for a position in a department other than Justice. The failure to consider a transfer in this case is of special concern as one of the Employer's concerns was how inconvenient a transfer would be to them.

In this case, there was even some medical evidence in support of the request for a transfer. If the Employer wanted to dispute the evidence, they have a duty to make additional inquiries. As the basis for the request was for medical reasons, we find that it was reasonable in these circumstances for Ms. McConnell to refer the Employer to her psychologist. While Ms. McConnell may have had the sense that returning to her former position was "not in her best interest", she is not a medical expert and should not be expected to understand what specific accommodation she requires and why. Ms. McConnell invited the Employer to discuss her request with Mr. Dutil but no one did. The Respondent dismissed her invitation. In cases involving human rights, employers must take additional steps. Simply saying: "it's not my job"; or, "I expected another department to contact him"; or, "we had no legal obligation to contact him", is not sufficient.

Position in the Dept. of Tourism

In the meeting of July 14, 1992, Ms. McConnell requested a transfer to an AR-8 position, possibly in the Department of Tourism. The Employer did not consider the transfer and responded that there was no similar position in Tourism available. After the meeting, the Complainant discovered that there was in fact an AR-8 position in Tourism available. The Employer extended the termination deadline until July 23, 1992 to allow time for the Complainant to apply and interview for the Tourism position.

As we stated above, the Employer would have satisfied the duty to accommodate if they had fairly and accurately considered a transfer. However, can it be said that the Employer fulfilled their duty by extending the termination deadline from July 18, 1992 to July 23, 1992 to allow the Complainant an opportunity to apply on and interview for the Tourism position?

In this Board's opinion, in light of all the options for accommodation as reflected in the Reintegration of Disabled Employees policy, we find that the allowing an extension for the Complainant to apply and interview for the Tourism position was minimal accommodation and therefore inadequate.

In this case, Ms. McConnell in an effort to co-operate, agreed to apply and interview for the Tourism position. However, the evidence is unclear whether the Complainant even knew she would be participating in a competition. Ms. McConnell was informed at 11:30 a.m. that her interview was at 2:00 p.m. that afternoon. Ms. McConnell was not offered or given any assistance in preparing for the interview, despite the fact that she was out of the workforce for nearly two years.

When the Complainant failed to certify for the position she was terminated. The termination was improper as the Employer should have done an fair and proper assessment to consider whether Ms. McConnell would reconsider and be able to return to her former position. Ms.

McConnell was informed on July 24, 1992 that she was terminated effective July 23, 1992. She was never even given an opportunity to reconsider returning to her former position.

The Employer did not specifically ask Ms. McConnell if she would return to her former position after she failed to certify for the Tourism position. We note that a letter from J.N. Besier to Ms. McConnell dated August 31, 1992 indicates that a medical report advises strongly against such a move. However, given that the Employer did not contact Mr. Dutil, the person with the most knowledge about the Complainant's mental condition, we can not consider their evaluation as a fair and accurate assessment.

We find the extension to allow time to apply for the Tourism position and the subsequent termination as inadequate and minimal accommodation. The Employer could have done much more to accommodate before the point of undue hardship.

Preferential Re-hire

The Complainant was informed that after the she was terminated, preference would be given to her application for a twelve month period over other applicants for vacant positions for which she was qualified. However, as a result of a change in government following an election, there was a hiring freeze in the Yukon Government. In fact, Ms. McConnell's former position was not filled until May of 1993.

In our opinion, placing Ms. McConnell on a preferential re-hire list can not be considered reasonable accommodation. This action is minimal accommodation, especially since this effort takes place after the Complainant is terminated. In some cases, when the Employer has made other reasonable attempts to accommodate, placing an Employee on a preferential re-hire list may be appropriate. However in this case, as we mentioned above, the Employer could have done much more to accommodate and can not, therefore, rely on the preferential re-hire to justify the termination.

As we find that the preferential re-hire option was not reasonable accommodation, we also find that the Complainant did not have a duty to assist in this accommodation. Her failure to attend the office of the Employer for the purpose of finding another job opportunity does not make the employers accommodation reasonable. However, as we will discuss below, the failure to attend the office may be considered in respect of her duty to mitigate her losses.

Conclusions - Reasonable Accommodation

We hold that the Employer's attempts at accommodation were not reasonable, and certainly not to the point of undue hardship. By failing to consider options other than the Complainant's return to her substantive position, including the application of the Reintegration of Disabled Employees policy, the Respondent did not fairly and accurately assess Ms. McConnell's accommodation requirements. The slight extension of her termination to allow Ms. McConnell an opportunity to apply and interview for the Tourism position was only minimal accommodation. Ms. McConnell assisted in this accommodation option and when she failed to certify, it was then up to the Employer to consider other options. At minimum, the Employer had a duty to fairly and accurately assess if the Complainant would reconsider and be capable of returning to her former position. Likewise, giving the Complainant preference for twelve months is not reasonable accommodation.

Having found that the Yukon Territorial Government did not reasonably accommodate the Complainant's mental disability prior to her termination on July 23, 1992, the Board holds that that the Yukon Territorial Government did discriminate the human rights of Ms. McConnell in contravention of section 8(b) of the Yukon Human Rights Act.

Remedy

Having proved discrimination of human rights, the Complainant is entitled to damages in accordance with section 23 of the Yukon Human Rights Act which provides:

> 23. (1) If the complaint is proven on the balance of probabilities the Board may order the party who discriminated to
> (a) stop the discrimination,
> (b) rectify any condition that causes the discrimination,
> (c) pay damages for financial loss suffered as a result of the discrimination,
> (d) pay damages for injury to dignity, feelings, or self-respect,
> (e) pay exemplary damages if the contravention was done maliciously,
> (f) pay costs.
>
> (2) No order made under this section shall contain a term
> (a) requiring an individual to be removed from employment if the individual accepted the position in good faith, or
> (b) requiring an occupant of a dwelling to leave if the occupant obtained possession of the dwelling in good faith.

This Board therefore makes the following Orders pursuant to section 23(1) of the Yukon Human Rights Act:

Rectify any condition that causes the discrimination

As a result of the discrimination, the Complainant was terminated from her employment with the Yukon Territorial Government. But for the discrimination, Ms. McConnell may have enjoyed six years of employment since July 23, 1992. To stop the discrimination and ensure that Ms. McConnell does not continue to suffer from the wrongful termination, the Yukon Territorial Government should rehire Sharon McConnell. In our view, this will go far in putting the Complainant back to the position she would have been in had the discrimination not occurred.

Therefore, this Board orders that the Yukon Territorial Government shall, within one month, offer to re-hire Sharon McConnell in a department other than Justice. Ms. McConnell shall either accept or reject the offer within two months. If Ms. McConnell accepts the offer, the Yukon Territorial Government shall apply the Reintegration of Disabled Employee's policy to assist the Complainant's reintegration back into the workforce. The Complainant and the Respondent shall consider a reintegration plan to consider specific items such as:

1. Which department is appropriate to both parties;
2. On the job training and upgrading needs;
3. Formal training options;
4. Phased return to the workplace options;
5. Job modification; and
6. Any other accommodation requirements.

In the event that there is no suitable AR-8 or equivalent position immediately available, the Board orders that Sharon McConnell shall be hired on a temporary or casual basis until an appropriate position is available.

In the event that any party appeals this decision, the Board orders that Sharon McConnell shall nonetheless be re-hired according to this decision, pending the outcome of the appeal.

Pay damages for financial loss suffered as a result of the discrimination

In this case there were clearly some financial losses as a result of the discrimination. One of the main losses was loss of income for the past six years. However, the Board must also take into account the following other factors in determining the appropriate damages:

1. The actual income earned by the Complainant during the period for which compensation is awarded;
2. The duty of the Complainant to reasonably mitigate their loss;
3. The limit of reasonable foreseeability; and
4. Interest.

Actual income earned

In this case, the actual income earned by Ms. McConnell was negligible. Nonetheless, this Board orders that any award must deduct the actual income earned by the Complainant for each year that damages are awarded.

Duty to Mitigate

This Board finds that the Complainant failed to reasonably mitigate her losses. Even though it is neither party's fault that this complaint has taken so long to conclude, the Complainant should have taken much more action to mitigate her damages. While it may have been reasonable and appropriate for the Complainant to expect the issue to be resolved in her favour for the first few years, failing to acquire or even reasonably seek another position after such a lengthy period of time becomes unreasonable.

Counsel for the Complainant submitted that Ms. McConnell's action were reasonable as her small business initiatives indicate that she did all she could to get by. We do not agree with this submission as Ms. McConnell had a duty to mitigate her losses reasonably. We find that after no more than two years, the Complainant should have recognized that her small business initiatives were not returning a reasonable income and chosen another avenue. It is unreasonable to continue down the same course after it becomes obvious that the path is leading nowhere.

Even though Ms. McConnell did not have a duty to accept the Employer's offer to give her preference for future job opportunities, Ms. McConnell's failure to consider using the program to possibly mitigate her losses suggest that Ms. McConnell could have done much more to minimize her damages. However, the Board also recognizes that even if Ms. McConnell had fairly considered the offer for preferential re-hire, that the change in government following the 1992 election resulted in a hiring freeze for the Yukon Territorial Government.

Rather than applying for government or private sector jobs as a secretary, Ms. McConnell attempted several small business initiatives. Can it be said that her action was reasonable at the time? In this case, she was terminated in 1992 from the largest employer in the Yukon consisting of approximately 75% of the government workforce and 24% of the total workforce. It may be fairly said that the decision to start a small business is reasonable, especially as the Complainant was expecting a speedy resolution to her human rights complaint and expected to return to full time employment with the Yukon Government. It is reasonable that even after one

year, Ms. McConnell was still waiting for a resolution to her human rights matter and continued investing in her small business initiatives.

However, after two years, this Board finds that it is unreasonable that Ms. McConnell could expect to resolve her human rights issue quickly and that her business initiatives would suddenly provide a reasonable income level. At this point, she had the duty to at least consider reentering the workforce and applying for other jobs. Her failure to do so after two years is a failure to mitigate.

This Board orders that damages should be limited to two years of lost income as a result of the complainants unreasonable failure to mitigate her losses.

Reasonable Foreseeability

Although the Yukon Territorial Government would not foresee that this issue would take six years to resolve and that Ms. McConnell would fail to reasonably mitigate her losses, it is reasonably foreseeable that Ms. McConnell would not obtain full and meaningful employment for two years. Especially in light of the hiring freeze within the Yukon Government. It is reasonably foreseeable that after being terminated from the largest Employer in the Yukon that an Employee would consider a small business initiative which may not earn the entrepreneur any money for several years. Further, Ms. McConnell did not sit on her rights and started her human rights complaint almost immediately.

In the result, this Board orders that it is reasonably foreseeable that Ms. McConnell would not obtain full and meaningful employment for at least two years.

Interest

This Board orders simple interest to be calculated on the award for financial loss.

Pay damages for injury to dignity, feelings, or self-respect

This Board orders damages in the amount of $1,500 attributable as damages for injury to dignity, feelings, and self-respect.

Pay costs

This Board orders the Respondent Yukon Territorial Government to pay costs to the Complainant.

Conclusion

The Yukon Human Rights Board of Adjudication finds that Sharon McConnell has established on a balance of probabilities a *prima facie* case that the Yukon Territorial Government had discriminated her human rights by terminating her employment on the basis of a mental disability in contravention of the Yukon Human Rights Act.

The Board also finds that the Yukon Territorial Government has not established, on a balance of probabilities, that they attempted to the point of undue hardship to reasonably accommodate Ms. McConnell's mental disability. The failure to reasonably accommodate Ms. McConnell's mental disability is discrimination in contravention of the Yukon Human Rights Act.

As a result of the discrimination, the Complainant was terminated from her employment with the Yukon Territorial Government. But for the discrimination, Ms. McConnell may have enjoyed six years of employment since July 23, 1992. Therefore, the Board makes the following orders for damages:

1. Ms. McConnell is entitled to an award equal to the amount she would have earned as a full-time Employee for two full years – until July 23, 1994;
2. Any award must deduct the actual income earned by the Complainant during each of the first two years after the discrimination;
3. Simple interest shall be calculated and added to the award for financial loss;
4. $1,500 attributable as damages for injury to dignity, feelings, and self-respect; and
5. The Yukon Territorial Government shall pay costs to the Complainant.

The Board also orders that the Yukon Territorial Government shall, within one month, offer to re-hire Sharon McConnell in a department other than Justice. Ms. McConnell shall either accept or reject the offer within two months. If Ms. McConnell accepts the offer, the Yukon Territorial Government shall apply the Reintegration of Disabled Employee's policy to assist the Complainant's reintegration back into the workforce.

Lee Francoeur, Chief Adjudicator

Timothy Vickery

Jan Kulicki

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