

IN THE MATTER OF
THE YUKON HUMAN RIGHTS ACT
and
IN THE MATTER OF
DONNA SHOPLAND
versus
WATSON LAKE BUSLINES (o/a TAKHINI TRANSPORT)

DECISION

Yukon Human Rights Board of Adjudication

- DECISION SUMMARY -

- REASONS FOR THE DECISION -

October 7, 2004
Whitehorse, Yukon Territory

IN THE MATTER OF THE YUKON HUMAN RIGHTS ACT

**The Yukon Human Rights Commission and
Donna Shopland (the Complainant)**

v.

**Watson Lake Bus Lines (o/a Takhini Transport)
(the Respondent)**

DECISION SUMMARY

The Yukon Human Rights Board of Adjudication finds that there was neither discrimination on the basis of a physical disability, nor a perception of a physical disability when the employment of Donna Shopland was terminated by Watson Lake Bus Lines (Takhini Transport).

Ms. Shopland drove school bus for 27 years. In the fall of 2001, a new contractor, Watson Lake Bus Lines (Takhini Transport), hired her to perform essentially the same job that she had done with Diversified Transport, the previous contractor.

In December, 2001, work issues and conflicts led the Office Manager, Pat Jamieson, to direct the Operations Manager, Norma Lee Craig, to terminate the employment of Donna Shopland after the Christmas holiday period of 2001-02.

Ms. Craig did not terminate the Complainant's employment prior to January 29, 2002.

A follow-up examination in January, 2002, to a routine medical examination, revealed that Ms. Shopland had a potential cardiac problem that required a referral to a cardiologist. The attending emergency room physician recommended that she not drive school bus at least until she had seen the cardiologist due to potential side effects of the medication prescribed. Ms. Shopland surrendered her driver's license and took leave from her work.

After being medically cleared to return to work and having her driver's license reinstated, Ms. Shopland began work again on April 15, 2002. Renewed work-related issues led Ms. Craig to terminate Ms. Shopland's employment on April 26, 2002.

It is the finding of the Board of Adjudication that a *prima facie* case of discrimination on the basis of physical disability or perceived physical disability was not made in the case of Shopland v. Watson Lake Bus Lines (Takhini Transport).

IN ATTENDANCE

Yukon Human Rights Board of Adjudication

Barbara Evans, Chief Adjudicator
Michael Dougherty, Adjudicator
Renzo Ordonez, Adjudicator
Vicki Wilson, Adjudicator
Donna Mercier, Adjudicator

Deana Lemke, Registrar

Appearing for the Complainant

Donna Shopland (Complainant)

Appearing for the Yukon Human Rights Commission

Joie Quarton, Legal Counsel

Appearing for the Respondent

Pat Jamieson (Respondent)

Witnesses Called

Norma Lee Craig
Marjorie Jensen
Vern Parkin

Debra Chambers (Testimony via Affidavit)

THE COMPLAINANT'S ALLEGATIONS

The Complainant alleges that, in April 2002, the Respondent terminated her employment as a school bus driver because of her disability.

ISSUES

1. Was the Complainant discriminated against in connection with her employment on the basis of "disability" as defined in the *Yukon Human Rights Act*?
2. Was a "perceived disability" a factor in the termination of the Complainant's employment?

SUMMARY OF EVIDENCE

1. Many of the elements surrounding the events which form the factual background of Ms. Shopland's complaint and work history were contested or are inconclusive.
2. Watson Lake Bus Lines is a Corporation established in Watson Lake, Yukon, whose principal officers are Ernie Jamieson and Said Secerbegovic.
3. Prior to 2001, Watson Lake Buslines operated in Watson Lake, Yukon and provided school bus services in Watson Lake under contract to the Department of Education.
4. Watson Lake Bus Lines (operating as Takhini Transport) was awarded the School Bussing contract for service throughout the Yukon, including Whitehorse, in the spring of 2001 and established operations in Whitehorse during the summer of 2001.
5. Watson Lake Bus Lines employed approximately thirty-five (35) permanent part-time drivers, six (6) spare on-call drivers and two (2) mechanics.
6. Pat Jamieson is identified as the Office Manager and Bookkeeper and also the person who participated in the initial hiring process for the Company. Norma Lee Craig is identified as the Operations Manager whose duties include hiring/firing and disciplinary matters and Marjorie Jensen is identified as the Driver and Safety Supervisor/Driver Trainer.
7. Most of the applicants to Takhini Transport were laid-off employees of the previous contractor, Diversified Transportation, and were hired during the summer of 2001. Ms. Shopland, employed as a school bus driver for 27 years by Diversified Transportation, was hired as a driver on or about September 1, 2001.
8. As a condition of employment, employees must possess a valid Class 2 Drivers' License, which is subject to specific medical standards.
9. The general job description for drivers is that upon reporting to work, the driver conducts a safety pre-trip inspection of the bus, performs pick-ups and drop-offs as scheduled or directed by the Driver Supervisor or Operations Manager — including additional pick-ups/drop-offs known as "tack-ons" within the two-hour reporting time — returns to the bus yard, performs post-trip checks and completes daily reports.

10. The Complainant was assigned Department of Education Bus Route No. 8, kindergarten “runs” and other driving assignments which were virtually synonymous with the route she had previously with Diversified Transportation.
11. Regular hours of work for the Complainant were approximately 7:30 a.m. to 9:30 a.m., Kindergarten (11:00 a.m. to 1:00 p.m.) and 2:30 p.m. to 4:30 p.m. (minimum two-hour reporting pay for a six-hour shift) on regular school days.
12. In the late fall, the Complainant attended her physician for a medical examination as required for the renewal of her Class 2 Driver’s License. Part of the recommendation by the physician was that she undergo an electrocardiogram due to an irregular heartbeat.
13. The Operations Manager testified that she had been instructed in December 2001 by the Office Manager to terminate the employment of the Complainant in January 2002, after the Christmas Break, because of her disruptive personality and argumentative nature. As this was Ms. Craig’s first encounter with disciplinary action and termination in a managerial role, she felt intimidated by the process and did not immediately terminate the Complainant’s employment in January.
14. On January 22, 2002, at approximately 1:00 p.m., the Complainant reported for the electrocardiogram and was detained until late afternoon at Whitehorse General Hospital as a result of the outcome of the test.
15. The Complainant notified her employer that she would not be able to drive that afternoon, but reported for work as usual the following day.
16. Sometime within a week later Norma Lee Craig requested a doctor’s note to confirm that there was no medical disability which would impair her ability to continue driving.
17. On January 29, 2002, the Complainant obtained the note from her doctor. There was no initial concern about her license, until consultation with the emergency room doctor when it was recommended she not drive school bus until after her consultation with a cardiologist because of the possible side effects of the prescribed medication.
18. The Complainant attended Yukon Motor Vehicles and the Registrar accepted the physician’s report and offered her a regular Class 5 Driver’s License for the interim until the cardiologist report was received. The Complainant chose to surrender her driver’s license and did not accept the Class 5 license.

19. The Complainant advised her employer that she would be off work for two or three months in order for her to schedule and attend an appointment with a cardiologist in Edmonton, Alberta. The Office Manager testified that she indicated to the Complainant that the Complainant needed to look after her medical concerns and not to be concerned about her job. The Office Manager further testified that she made this comment because the medical issue arising superseded the issue of employment, and she wished to avoid causing further stress on the Complainant. She chose to leave the disciplinary issues until the Complainant's return to work.
20. The Complainant did not receive wages while absent from work. There is no evidence presented regarding any financial compensation or hardship for her time away from work.
21. The only reported contact with her employer was to pick up the pay cheque due to her.
22. The Complainant traveled by car to Edmonton to meet with the cardiologist in March 2002, and reported that she was told she was fit to work and there had been no medical reason for her to have surrendered her license or stop driving.
23. In Whitehorse, on or about April 8, 2002, the Complainant obtained a note from her attending physician indicating she was fit to return to work and arranged to have the note faxed to her employer.
24. On Monday, April 8, 2002, the Complainant attended the Motor Vehicles Branch and her Class 2 License was reinstated based on a medical report received from her physician.
25. On Monday, April 8, 2002, the Complainant contacted the Employer and spoke to the Operations Manager advising that she had her Class 2 license reinstated and was ready to return to work.
26. The Operations Manager, Norma Lee Craig told the Complainant that all she needed in order to return to work was a letter from her doctor and the return date was established for Monday, April 15, 2002.
27. On April 10, 2002, Pat Jamieson telephoned the Complainant's physician and spoke to the nurse/receptionist requesting confirmation that Ms. Shopland was medically fit to return to work. The doctor's note was received by fax on April 10, 2002 by the Employer.
28. On April 15, 2002, at approximately 7:00 a.m., as she was getting ready to return to work, the Complainant received a phone call from Pat Jamieson who told her that she would not be allowed to drive until she produced her

Class 2 Driver's license, and that a substitute driver had already been called-in for the morning shift. The Complainant was to bring her license to the Employer's place of business and have a meeting with the Operations Manager.

29. The meeting between the Complainant and the Operations Manager, included a discussion regarding:
 - a) The obligation to drive "tack-ons" as assigned for completion within the two-hour reporting period guarantee for which drivers are paid;
 - b) The obligation to schedule medical appointments so that they don't interfere with runs, with the exception of specialist appointments, or medical procedures;
 - c) The agreement that, because of her absence, her probationary period would be extended by two months from the date of her return to work.
30. While the Complainant says that she was told that meetings were being conducted with all drivers to review procedural and policy matters, the Operations Manager said the meeting was specific to Ms. Shopland and was clearly identified as a disciplinary meeting to clarify standards and expectations prior to Ms. Shopland's return to work. These included concerns about Ms. Shopland rushing through her run, parent complaints, management not receiving reports regarding route changes, and her switching of tack-ons.
31. During the meeting, a "log" which had been written by Ms. Craig regarding the concerns was reviewed. Ms. Craig indicated the Complainant initialled the three items of concern to indicate agreement. The Complainant testified that during the conversation, she contested that she had refused tack-ons, or given tack-ons to other drivers and had, in fact, requested that Ms. Craig provide her with specifics, which were never provided.
32. Marjorie Jensen, Driver Supervisor gave evidence that the Complainant never refused tack-ons, although she did, on occasion, ask for changes (ie. to do afternoon tack-ons rather than morning ones).
33. There is further uncontested testimony that the Complainant did switch a tack-on and that it was brought to the attention of management because there had been a complaint that the driver who took the tack-on went to the wrong pickup location.
34. The Complainant returned to work later in that day, April 15, 2002, and continued to drive her regular runs with the exception of April 19, 2002, when she had a medical procedure scheduled, which the Employer accommodated with spare drivers.

35. The employer did not have any further meetings with the Complainant about her performance or the job. The evidence is that the driving abilities of the Complainant were never an issue and that the Complainant was a good driver.
36. The “log” was submitted into evidence as prepared by Ms. Craig, noting it was part of the Complainant’s personnel file. In addition to the three items discussed at the April 15 meeting, a record of a number of events which occurred after the Complainant had returned to work had been recorded. The “log” included a notation that the Complainant had suggested to the spare drivers who were going to drive her route on April 19, 2002, that she might be back to drive her afternoon runs. The drivers were upset enough to consult the Operations Manager about their scheduled work time and resentment for any loss of hours. The Complainant stated that she knew she would need the whole day away from work because the medical procedure, a cardioversion, would require general anaesthesia which would render her unfit to drive for the day. She supported this claim by stating her husband had arranged the day off from his work to attend with her.
37. Approximately 12 to 14 days after the Complainant returned to work, an issue arose regarding a route change/work time and the driver involved was upset. Management heard from drivers that the Complainant was instructing him that Takhini Transport couldn’t take his run from him and suggested they go to the union.
38. On April 26, 2002, at the end of her shift, the Complainant was called into Ms. Craig’s office and told that her employment had been terminated. Ms. Craig indicated that she chose not to provide reasons, which was her right under the *Yukon Labour Standards Act*.
39. The Complainant was paid one-week’s pay in addition to her earned hourly wages upon termination. Her Record of Employment states that she was dismissed.
40. Ms. Shopland testified that in the absence of a stated reason for her termination, she believed her medical condition was perceived by management as an ongoing disability resulting in her termination.
41. The Complainant and Respondent Employer witnesses all stated that they did not believe a disability existed at the time of Ms. Shopland’s return to work or at termination.

PRIMA FACIE DISCRIMINATION

1. The Supreme Court of Canada held in Ontario Human Rights Commission v. Simpsons-Sears Ltd. 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.” (1985, 2 S.C.R. 536 at 558)
2. In civil cases the burden of persuasion 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.
3. In this case to establish a *prima facie* case of discrimination in contravention of the Yukon *Human Rights Act*, the Complainant would have to establish that;
 - a) She was treated unfavourably on the basis of a physical disability in contravention of s. 7(h) of the *Yukon Human Rights Act*; and
 - b) She was discriminated against in connection with any aspect of employment in contravention of s. 9(b) of the *Yukon Human Rights Act*.
 - c) "There is evidence from which it is reasonable to infer that [her] disability or perceived disability... was a factor in the adverse treatment."
Comeau v. Cote (2003) 46 C.H.R.R. D/469, para. 79.
4. Given the evidence presented to this Board of Adjudication, a *prima facie* discrimination case on the balance of probabilities was not made. The evidence is not sufficient to justify a finding of discrimination nor was a disability proven.

PHYSICAL DISABILITY [Section 7(h)]

1. As noted in *McConnell v. Yukon*: “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 disability continued to afflict her when the employer treated her in the discriminatory manner.”
2. The Complainant and Respondent Employer witnesses all stated that they did not believe a disability existed at the time of Ms. Shopland's return to work or termination.

PERCEPTION OF DISABILITY

1. "A 'handicap' or disability may exist even without proof of physical limitations or the presence of other ailments. The emphasis is on the effects of the distinction, exclusion or preference, rather than the precise nature of the handicap, the cause and origin of the handicap."

Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Broisbriand (City), [2000] 1 S.C.R. 665, pages 2 and 3 of 28.

2. The Board of Adjudication accepts that a disability at the root of a discriminatory act may be real or perceived. The Board concludes that Ms. Shopland's disability was real, if only on the basis of the perception of a disability by both the Complainant and the Respondent. The Complainant was off work for medical reasons, which, whether erroneous or not, resulted in the suspension of her Class 2 Driver's License. This state of "disability" existed, though, only until the Complainant's return to active duty. At the very outside, upon presentation of her Class 2 Driver's License to the Operations Manager on April 15, 2002, the perception of disability ended in the minds of both the Complainant and the Employer.

To have allowed the Complainant to return to work without evidence that no impacting disability existed (i.e. Driver's License) the Employer would be facing legal liability for any incident. By the time the decision to terminate the Complainant was made by the Operations Manager, there is sufficient testimony that there were other causal factors for Ms. Shopland's termination, and that the perceived disability could no longer be considered a factor.

CIRCUMSTANTIAL EVIDENCE

1. "It is often difficult to find direct evidence of discrimination."
It is the task of the tribunal to view all of the circumstances to determine if there exists a "subtle scent of discrimination". Bernard v. Waycobah Board of Education (1999), 36 C.H.R.R. D/51 (CAn.Trib.) supra, para. 37,
2. Circumstantial evidence, which may be likened to a jigsaw puzzle, usually depends on a series of facts, each of which would by itself be insufficient to permit an inference of discrimination, but when combined may justify it. Vizkelety, Beatrice, Proving Discrimination in Canada, The Carswell Co. Ltd. 1987 (Toronto) page 141.

3. Discrimination is not a practice which one would expect to see displayed overtly. In fact, rarely are there cases where one can show by direct evidence that discrimination is purposely practiced. Basi v. Canadian National Railway Company (1988) 9 C.H.R.R. D/784, para. 38481.
4. It is sufficient to establish discrimination if a person's disability played any role in the decision; the fact that other factors may have been taken into account does not negate a finding of discrimination. Morris v. British Columbia Railway Co., 2003 BCHRTD 14, para. 227.
5. The Board of Adjudication accepts the following evidence as providing an argument for the termination of Ms. Shopland's employment with Watson Lake Bus Lines (Takhini Transport): upon the Complainant's return to work, her habits remained unchanged and unacceptable and she was terminated for job performance issues, to which they had attempted clarification and remedy, to no avail. Ms. Craig noted that the Complainant was let go because of a culmination of events, and the interference with the driver was the last straw.
6. Ms. Craig indicated that the Yukon Labour Board had advised that a reason for termination did not have to be provided.
7. The Complainant testified that although the employer alleged that they had cause for dismissing her, she was not made aware of their concerns regarding her job performance prior to being dismissed or told that her job was in jeopardy if the concerns weren't addressed. She also indicated that in the absence of reasons, she believes her employment was terminated because of her physical disability, specifically, her heart condition.
8. Pat Jamieson stated that the Complainant was argumentative, created "a commotion of an upsetting nature" in the office and didn't do her job in the manner her employer wanted it done, specifically including performing unauthorized route changes.
9. All evidence provided showed that Takhini Transport had never denied a driver time off for medical reasons or failed to provide necessary accommodation for medical reasons. Evidence suggested that they indeed accommodated the medical needs of their driving staff as long as they were in possession of a legal driving license.
10. The Board accepts that a note was made in the "log" indicating the Complainant had needed a day off for medical reasons. It further believes this served as reference to the issue of work time assignments to other drivers, and the commotion arising as a result of it.

11. Ms. Craig admitted that Pat Jamieson did not believe the Complainant was a good employee. Ms. Craig was unprepared to terminate Ms. Shopland until she realized that the Complainant was not going to change her behaviour.
12. In her evidence, Ms. Jamieson stated at least four times, that she did not trust the Complainant and that she was dishonest. While these statements were not proven, it indicates a personality clash between the employee and the employer.
13. Regardless of the fact that this Board of Adjudication found no *prima facie* case for discrimination, the circumstantial evidence points to the conclusion, on the balance of probabilities, that no discriminatory act on the basis of a disability or a perception of a disability occurred. Further there is no reasonable evidence to conclude that a disability or perception of a disability was even a factor in the dismissal of Ms. Shopland.

The Board accepts and further notes:

No accommodation was requested or necessary pursuant to Section 7(1) of the *Yukon Human Rights Act* which states:

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

DECISION OF THE BOARD

It is the decision of this Board that a *prima facie* case of discrimination on the basis of disability or perceived disability was not made in the case of Shopland vs. Watson Lake Bus Lines (Takhini Transport).

Dated this 7th day of October, 2004 at the City of Whitehorse in the Yukon Territory

Barbara A. Evans, Chief Adjudicator
On Behalf of the Yukon Human Rights Board of Adjudication