

**IN THE MATTER OF the NWT Human Rights Act,
S.N.W.T., 2002, c. 18, as amended; AND IN
THE MATTER OF a complaint filed by Glen Villebrun
Against BHP Billiton Diamonds Inc., Gary Eyres and
Transwest Mining Systems, a Division of KLC West Holdings Inc.**

BETWEEN:

GLEN VILLEBRUN

(the “Complainant”)

-and-

BHP BILLITON DIAMONDS, INC. and GARY EYRES

(the “Respondents”)

DECISION

Date of Decision: March 13, 2008

Before: James R. Posynick
Chair, NWT Human Rights Adjudication Panel

Appearing:

Glen Villebrun, Complainant; Marie Jewell, advocate for Mr. Villebrun
Bruce R. Grist, Legal Counsel for BHP Billiton Diamonds Inc. (“BHPB”)

1. INTRODUCTION

The Complainant alleges that BHPB and Gary Eyres discriminated against in him on the basis of his race, ancestry, ethnic origin and disability in his employment, or any term or condition of employment, and by refusing to continue to employ him, contrary to Section 7 of the NWT *Human Rights Act*, S.N.W.T., c. 18, as amended (the “*Act*”).

Jeannie-Marie Jewell, Mr. Villebrun’s Aunt, conducted Mr. Villebrun by his Aunt,. Ms. Jewell is not a lawyer.

The Respondents say that there is no nexus between any of their conduct and Mr. Villebrun’s race, ancestry, ethnic origin or disability. Specifically BHPB says that Mr. Villebrun chose to “quit” his employment when he was being appropriately disciplined for unacceptable conduct and that he was therefore not terminated for any prohibited reason.

2. ISSUES

- (i) Was Mr. Villebrun discriminated against on the basis of his race, ancestry or ethnic origin?**
- (ii) Was Mr. Villebrun discriminated against on the basis of disability or perceived disability?**

3. FINDINGS OF FACT

Glen Villebrun

Glen Villebrun is a forty-year-old aboriginal person. He has a Grade XI education. His home community is in Fort Smith in the Northwest Territories (“NWT”).

In early 1998, he applied to enter BHP Billiton Diamonds (“BHPB”) trades apprenticeship program. During the ensuing six years, Mr. Villebrun successfully achieved the 3rd level of apprenticeship as a heavy-duty mechanic while working for BHPB. In August of 2004, however, his employment ended in circumstances that led to the filing of a human rights complaint and this hearing.

BHP Billiton

BHPB is an international corporation with diamond mining operations in the NWT. In 1996, BHPB entered into a “Socio-Economic Agreement” with the Government of the Northwest Territories by which it undertook to provide training for northern aboriginal people. The apprenticeship-training program was part of that commitment.

BHPB operates a diamond mine called “Ekati” located three hundred (300) kilometres north east of Yellowknife. According to its 2004 Annual Report on Northern and Aboriginal Employment, it had 314 northern aboriginal employees and almost as many northern non-aboriginal employees. During the same period, it also employed about 91 northern aboriginal contractors and a similar number of northern non-aboriginal contractors. Including “southern” employees and contractors, almost 1200 people worked at Ekati in 2004.

Ekati has no year-round road access. Employees travel to and from the site via aircraft originating in various N.W.T. and “southern” locations. Ekati is a “dry” operation. There is no alcohol allowed on site.

Mr. Villebrun’s Apprenticeship

One of the requirements for entry into BHPB’s apprenticeship program was completion of the Mine Trades Access Program at Aurora College in Fort Smith. The Complainant passed the Heavy Duty Mechanic Entrance Exam with a 75%, “A” grade. The Graduate Evaluation Form noted that his “attendance record and grades attest [that] he is a very good student”. However the author (his instructor) also says that Mr. Villebrun attended

class “on more than one occasion...suffering the effects of a hard bout of drinking” and that he “has a problem with alcohol”.

Mr. Villebrun subsequently underwent a medical examination, a criminal records check and a drug-screening test at BHPB’s request, all with acceptable results. On May 26th, 2004, he accepted an offer to work for BHPB as a heavy-duty mechanic apprentice. BHPB’s Offer of Employment (the “Offer”) contained a number of terms and conditions. Among them: he was to report to the “Maintenance Supervisor”, he would work at the Ekati Diamond Mine on a “2 weeks on, 2 weeks off rotation” and he would have a salary review on his “anniversary date”. The Offer also stated that Mr. Villebrun would have no “guarantee of continued employment” with BHPB after completing his apprenticeship.

The Complainant also entered into a “Contract for Apprenticeship” with BHPB. The contract was to take effect on May 28th, 1998. It contained the following provision:

5. The Employer agrees to train the Apprentice in all aspects of the designated trade so far as his facilities and the scope of his business will permit.

It so happened that Mr. Villebrun’s first rotation began on May 28th, 1998 with a two-week orientation program. The orientation program included information about BHPB’s employee benefits and employee obligations to obtain such benefits, e.g. sick leave reporting.

Bill Dean, Maintenance Supervisor

Mr. Villebrun’s immediate supervisor in Maintenance was Bill Dean. He reported to the Maintenance Superintendent, Gary Eyres. Mr. Dean started working at Ekati as the Maintenance Supervisor and “team leader” in 1998. He has a heavy-duty mechanic “ticket” obtained in 1976. In 2004 all of the eleven employees who reported to him were aboriginal. Some were labourers or “helpers” who worked in a “wash bay” washing equipment and vehicles, doing housecleaning and providing labour services to trades people who worked in Maintenance. Mr. Villebrun was the only heavy-duty mechanic apprentice of the lot (although Maintenance also had a welding apprentice working there at the time). Mr. Dean was responsible for employee discipline but he did not assign Mr. Villebrun’s daily tasks, that was up to the contractors who worked on heavy duty equipment at the site, namely: Finning Corporation (“Finning”) or (the named Respondent) Transwest Mining Systems (“Transwest”). Finning and Transwest employed their own heavy-duty mechanics but BHPB employed none who actually worked as mechanics.

Mr. Dean had “no complaints” about the Complainant’s work during the first few years of supervision then he had “a few complaints about performance” over the last few years of his supervision. He said the change was due to the Complainant missing more work. He occasionally discussed his concerns with Mr. Villebrun. Mr. Villebrun received Apprentice Assessment and Evaluations yearly. The contractor, who supervised his day-to-day work, completed them. Mr. Villebrun did not have any “unsatisfactory”

performance evaluations. The only disciplinary action taken by BHPB during Mr. Villebrun's six years of employment were "verbal warnings" given by his immediate supervisor, two during the first three months of 2003 and one in 2004 for falling asleep while on the job. The Complainant received regular pay increments. None were held back because of performance issues. Mr. Dean testified that Mr. Villebrun was scheduled to obtain his 4th year schooling in January 2005.

Mr. Villebrun's Work

Mr. Dean assigned the Complainant "preventative maintenance" ("PM") work with the Finning contractors during the first one and one-half years of his apprenticeship. During his first year, he did some fluid changes on trucks, dozers and graders and occasionally cleaned floors and equipment.

In order to advance in the apprenticeship program, Mr. Villebrun was required to attend classes at the Northern Institute of Technology in Edmonton and pass a yearly exam. He had a difficult time with his first year exam and failed at least twice. As a result he spoke with Mr. Dean about taking classes and writing his exams at Thebacha College in Fort Smith where he felt he would get more personal instruction in a smaller class setting. That was arranged for him. He also asked if he could work for Transwest instead of Finning. He felt that he would have a better opportunity to obtain "engine" work with Transwest. In 2000 he started working with a Transwest crew.

During his time at Transwest Mr. Villebrun became very efficient at doing equipment PM work. He looked at PM work as an exercise in "changing oil and spinning filters". However performing PM work on heavy-duty equipment at BHPB was part of a necessary, carefully planned program for the maintenance of heavy equipment that was used in mining operations on a daily basis. PM work involved inspecting various components of that equipment including engines, brakes, undercarriages, transmissions and accessories (e.g. cranes and hydraulics). It did not include, however, any significant engine repair work nor any rebuilding of engines. One of the reasons for that is that Finning and Transwest looked after specialized equipment to which they had proprietary rights. Their mechanics had specialized training and they performed work on those machines exclusively.

BHPB did not tell Mr. Villebrun that he would not get a lot of heavy-duty engine repair or rebuilding work when he entered the apprenticeship program. During his second year at BHPB, Mr. Villebrun became concerned that he was not getting what he felt was appropriate training to complete his apprenticeship. He felt that he was spending far too much time "changing oil and spinning filters" without getting "motor experience". Transwest did not deal with motors; only "undercarriage hydraulics – pumps and stuff".

Mr. Villebrun told Mr. Dean that he was worried that he would not be able to get another job when he graduated because of his lack of experience working on motors. He also told Mr. Dean that he felt disadvantaged when he attended apprenticeship school because of the lack of motor work that he was getting. He had to learn about motors from books

instead of having the experience of working on them. He felt that he had to work “twice as hard because he did not get the proper training”. During his second school session, he had to rebuild an engine and, without having worked on motors, he had to use a book to do the assigned tasks and it took him twice as long as the other students.

In short: Mr. Villebrun found that PM work was repetitive and did not further his knowledge of heavy-duty mechanics. He found that each year of schooling was more difficult for him and he felt that was because he was not getting the appropriate training.

Mr. Dean talked to Transwest in an effort to get Mr. Villebrun more motor experience and electrical experience (another area of Mr. Villebrun’s training that he felt he was missing). Mr. Dean also asked BHPB’s Adult Trades Educator to talk to Mr. Villebrun and he asked another contractor on site, Kingland Ford (“Kingland”), if they would accept Mr. Villebrun into their crew. Mr. Villebrun believed that Kingland did the kind of engine work that he wanted and needed to complete his apprenticeship and improve his opportunity for future employment. The transfer to Kingland did not happen. It is doubtful that the transfer would have made any real difference to Mr. Villebrun’s training since Kingland’s primary role was to maintain and repair passenger trucks rather than heavy-duty equipment.

Family Problems and Treatment for Stress and Depression

In January of 2003, Mr. Villebrun was having “family problems”. He and his wife had a newborn in the house and Mr. Villebrun was working away from the home two weeks at a time. When he was home, he began using alcohol excessively and that led to at least one incident of family violence. His wife left him to look after one of their children on one occasion and Mr. Villebrun informed his supervisor that he would not be able to return to work. He was “allowed” to take a week of vacation time before returning to work. When he did return to the mine site later in January, he arrived so hung-over that he went to the nursing station for help.

Between January and March of 2003, Mr. Villebrun missed two other days of work due to “family problems”. He told his supervisor, Mr. Dean, about those problems and he was referred to BHPB’s family assistance program. Mr. Villebrun obtained medical and family counselling but his family situation, struggle with alcohol abuse and dissatisfaction with his apprenticeship training made life very stressful for him.

Nonetheless, in June of 2003 Mr. Villebrun passed his 3rd year apprenticeship exam. He did well with his knowledge of hydraulics but he barely passed the motor requirements. Mr. Villebrun continued to worry about what would happen if he got his ticket and could not do the work of a heavy-duty mechanic. He continued to worry about how that would affect his family especially since his family situation had not improved.

In August of 2003 he was receiving medical treatment from a Dr. Sultan in Fort Smith. He was losing sleep, was “tired all the time” and felt “depressed”. Dr. Sultan told him to take time off from work. He was also referred for alcohol and family counselling, again.

Absenteeism

On August 26th, 2003 Mr. Villebrun arranged for a doctor's note to be faxed to Murray Wick who was filling-in for Bill Dean at the time. The note disclosed that Mr. Villebrun was being treated for "excessive stress and depression". Mr. Dean forwarded the note to BHPB Human Resources. Human Resources then sent a copy of the doctor's note to the Occupational Health Coordinator's office. On August 29th, 2003 Mr. Villebrun also signed and forwarded to BHPB a "Return to Work" form signed by Dr. Sultan. Included on the form was the Complainant's signed "Medical Information Release" authorizing Dr. Sultan to provide medical information to BHPB.

Over the next several months, Mr. Villebrun continued to be absent for medical reasons and to send completed Return to Work forms and doctor's notes to the Maintenance Supervisor at Ekati.

In the fall of 2003, the Complainant was charged with driving while impaired. He had been convicted of four other impaired driving charges, the most recent of which was in 1991.

On December 1st, 2003, Mr. Villebrun signed another "Return to Work" and "Medical Information Release" form and faxed it to BHPB. He returned to work at Ekati on the 3rd of December. When he arrived, he reported to an on-site nurse. He was hung-over and sick and was given the day off. The following day he returned to the nurse who found him improved but still "shaky". Mr. Villebrun told the nurse that he "has a lot of stress and family problems" and arrangements were made for him to have a month off with family counselling through a contractor in Yellowknife called "Northstar". On December 5th, Mr. Villebrun showed-up at the nursing station again. He was now vomiting and disclosed that he had "family and financial problems" and had "turned to booze. He said that he felt "suicidal" and requested immediate help. He filled out a signed "Authorization for Release of Patient Information" to BHPB specific to "stress related illness" and was flown to the Stanton Hospital in Yellowknife for evaluation. At Yellowknife he was told to take a month off "with the stipulation that he make positive steps toward the resolution of his family and ethanol issues..."

On January 7th, 2004, a Northstar counsellor faxed a note to BHPB indicating that Mr. Villebrun would be off work from January 7th, 2004 to February 6th, 2004 "or longer". On January 28th, 2004, Mr. Villebrun went into an alcohol abuse treatment program. He sent a fax to Bill Dean advising him of the same on January 29th, 2004. Mr. Villebrun completed the treatment on or about February 25th, 2004.

During the fall of 2003 and into February 2004, Mr. Villebrun remained in the care of a family physician in Fort Smith. On February 23rd, 2004, Mr. Villebrun sent another "Return to Work" and "Medical Information Release" form signed by himself and his family physician, to BHPB.

By the time Mr. Villebrun returned to Ekati on February 28th, 2004, he had been absent from work during a total calendar period of time of six months.

Return to Work February, 2004

The Complainant remained under the care of his family physician when he returned to work in February 2004. He fell asleep in a truck on the mine site in late March 2004. His supervisor, Mr. Dean, met with him to discuss what had happened. Mr. Villebrun fell asleep because he was very tired on the evening rotation. His flight to Ekati was weathered out and he had to return home to Fort Providence, via Hay River, then he drove back in the early morning hours to Hay River to fly to Ekati the following morning. Mr. Dean gave the Complainant a verbal warning and, as an “action plan”, told him that in the future he was to report such tiredness to his supervisor and return to his room to rest. Mr. Dean recorded the incident and Mr. Villebrun’s explanation on a Correction Action Plan form that was for his use only. The form says that Mr. Dean also planned to “follow up on performance as sleeping on the job is unacceptable” (underlining added).

Mr. Villebrun was convicted of his 5th impaired driving in May of 2004 and sentenced to serve a jail sentence intermittently in May and June 2004, with the cooperation of BHPB. In other words: he did not miss any rotations while he served the sentence.

On July 12th, 2004, a doctor’s note from the Hay River Community Health Board Medical Clinic was sent to Maintenance advising that the Complainant would be off work from July 14th thru July 21st “due to a health problem under investigation”. The “Return to Work” form that is routinely completed when a BHPB employee returns to work from medical leave was not entered into the evidence at the hearing.

Dee McCallum, BHPB Occupational Health Nurse

The Occupational Health Nurse at BHPB, Dee McCallum, has sixteen years of nursing experience in Northern Canada. She is a Métis person. Part of her role at Ekati was to “coordinate” and review all employee medical information including doctor’s notes and return to work forms. Another role she had was to be a contact person for employee supervisors who had employees that demonstrated any “problems” on the job. If a supervisor identified such an employee, Nurse McCallum or one of the other nurses on staff would assess the worker and, if necessary, send he or she to a physician in Yellowknife or in the employee’s home community. The same process would apply to employees who have “mental health” problems. Employees who were identified as having “personal problems” would be referred to BHPB’s employee assistance program to obtain counselling.

Another title Nurse McCallum held was that of “disability manager”, coordinating medical information between BHPB and employees and their physicians, while employees were on extended sick and disability leave. Although her office depends upon each employee’s treating physician to provide information about an employee’s illness and how it may affect their ability to carry out their employment tasks, she also

had the ability to contact those physicians with the consent of the employee should the need arise. Before returning to work after being off sick, they were required to complete a return to work form that included a “Medical Information Release” which authorized the employee’s physician to provide BHPB with the employee’s “medical information”. There were several signed releases on BHPB’s Villebrun medical file.

No evidence was presented at the hearing to the effect that Nurse McCallum or any of her staff followed-up with enquiries of Mr. Villebrun’s treating physicians as the several “Medical Information Release” forms allowed.

Doctor’s notes and Return to Work forms were received in Nurse McCallum’s office from various internal BHPB departments including Maintenance, Human Resources and Safety.

BHPB’s reaction to Mr. Villebrun’s Absenteeism

Nurse McCallum was aware that Mr. Villebrun was receiving medical care because she reviewed all incoming medical information, e.g. physician notes. She read the doctor’s note dated August 19th, 2003, indicating that Mr. Villebrun was treated for “excessive stress and depression”. She felt that the medical information about Mr. Villebrun’s illness was unacceptable without the doctor “providing more information”. Despite having Mr. Villebrun’s express written authorization to contact his physician for further information, Nurse McCallum did not do so.

By November of 2003, Nurse McCallum, grew concerned that Mr. Villebrun had been off for a significant period of time with “no formal documentation except from a family physician”. Nurse McCallum knew that there were “many things going on” in Mr. Villebrun’s life both from his medical file and from at least one personal conversation with Mr. Villebrun. She also heard “rumours” about Mr. Villebrun’s condition and that as doctor’s notes came in she “grew concerned that he had not been referred to a specialist if he had a medical problem”.

She testified that she grew concerned because she did not have sufficient information to “manage his case”. She sent an email to the Mine Maintenance Superintendent at the time (Brian Steane, Mr. Eyres’ predecessor), a Human Resources “advisor” (Mike Williams) and to Robert Beaulieu, BHPB’s Aboriginal Employment Coordinator, to complain that Mr. Villebrun’s physician “should be making a referral if things are that bad”.

A few days later, Nurse McCallum issued another Email, this time to Mr. Beaulieu and Mr. Williams stating:

...he...nor his physician have given any reasons for his absence. Three rotations for stress if that is the problem [underlined in the original] is totally unacceptable as he has not been referred to EFAP or a **psychiatrist** and therefore no treatment plan is in place for THREE MONTHS [capitalized in the original]. He and his

physician seem quite content **to hide behind sick notes** that have dates on them and nothing else. We have had at least three cases **of this kind of behavior** in the past six months. All of these persons have **chronic issues** with being off work for illness and/or spend a lot of their time down at the clinic. They are allowed to send in **sick notes that have no meaning**, they do not have to follow the medical flow charts, i.e. calling in to the nurse, **they do not follow up with their physicians** unless their pay is threatened and they have to respect for all the time that is being spent chasing them around. These guys who are using **flimsy excuses to be off work** for months at a time are not a medical management problem but a HR problem. No wonder our Short Term and Long Term Disability cases have increased. **We have had people off with serious fractures that have returned to work sooner than...Glen.** We have as much as we can assisted with the management of these cases but time is valuable with 700 other persons to look after for both work and non-work related issues, **we cannot baby-sit these guys anymore** than we already have. **I'm not interested in any reasons why they didn't do this or that, all I know is to date we have all these persons who have provided a poor example to their co-workers and their co-workers are telling me they are getting special treatment.** Thanks. [Highlighting added]

After receiving Nurse McCallum's email, Mr. Williams spoke with Mr. Villebrun who informed him that he was on "anti-depressants" and that his physician advised him not to return to work. Mr. Villebrun also told Mr. Williams that he was getting counselling in Fort Smith and from BHPB's contractors, Northstar. He said that he would call the nurses to explain his situation and he did so explaining that he was on "anti-depressants". The nurse he spoke to told him that the anti-depressants would not affect him at work. Mr. Villebrun thought that he had spoken to Nurse McCallum on the latter occasion however I accept Nurse McCallum's evidence that she did not have a telephone conversation with Mr. Villebrun about anti-depressant use and that he may have spoken to another nurse. However Nurse McCallum did come into that knowledge another way.

Mr. Williams advised Nurse McCallum of his conversation with Mr. Villebrun by return email. He said that Mr. Villebrun told him that his doctor had "put him on anti-depressants and advised him not to return to work". He confirmed that BHPB's employees were simply required to provide a "doctor's note".

Although I heard evidence from Nurse McCallum to the effect that their offices did not share diagnoses specific information to other BHPB staff, I find that was in fact not the case. For example diagnoses specific information ("stress" and "chronic issues") was shared with Human Resources via email. Even if Occupational Health and Safety was trying to keep worker medical information confidential, it is clear that doctor's notes and the information contained in them passed through various BHPB departments. Mr. Villebrun doctor's notes were sent directly to his supervisor in Maintenance (as per the BHPB policy described by Mr. Williams in his Email response to Nurse McCallum). Mr. Villebrun evidently had no hesitation in talking to Human Resources about his condition and Mike Williams had no hesitation in sharing what he learned with Nurse McCallum. Indeed another Human Resources employee, Robert Beaulieu, not only knew of Mr.

Villebrun's "stress" and family problems, he testified that he was aware that Mr. Villebrun was on anti-depressants a year before the events of August, 2004 and that the anti-depressants "would affect his ability to stay awake or affect his sleeping". I also accept Mr. Villebrun's evidence that personal medical information about employees was disclosed to him in cases where there were "performance issues" and that confidentiality was maintained by adhering to the principle that "the fewer people who know the better".

Whatever the "confidentiality" policies of BHPB were exactly (they were not produced in the evidence) and despite repeated use of "confidentiality" concerns by BHPB witnesses to suggest that they did not have knowledge of what was ailing Mr. Villebrun in 2003 and in 2004, it is evident to me from hearing from the witnesses that the "confidentiality" of diagnostic and treatment information was most often honoured in the breach in Mr. Villebrun's case.

Robert Beaulieu

Robert Beaulieu is one of two "Aboriginal Employment Coordinators" whose primary role is to provide assistance to BHPB management in all matters relating to the hiring and employment of aboriginal employees, including any disciplinary action that might be taken. In the latter role, Mr. Beaulieu testified that he would attend meetings between aboriginal workers and their supervisors to ensure that the aboriginal workers received "support" and to ensure that the disciplinary process was "fair". Although he had counselling training he did not function as a counsellor for aboriginal employees. As an employee of BHPB's Human Resources Department he was privy to records and information about employees that passed through it as well as records and information that was given to him while in the course of assisting BHPB management in any particular case.

Gary Eyres, Mine Maintenance Superintendent

In November of 2003, Gary Eyres became the Mine Maintenance Superintendent at BHPB, Ekati. He had obtained his Heavy Duty Mechanic ticket in Australia where he worked in the mining industry before coming to Canada. He worked in small aboriginal communities in Australia "all of his life". When he came to Ekati, he participated in a BHPB cross-cultural awareness program. Mr. Eyres was instrumental in developing BHPB's maintenance "philosophy" that included "planned and preventative maintenance" of all equipment on site.

In 2004, Mr. Eyres had under his direction some forty-three (43) BHPB employees, a large number of whom were members of First Nations. In addition three contractors, namely Finning, Transwest and Kingland, all of whom employed trades people, worked in Maintenance under his general supervision.

Mr. Eyres has a great deal of experience in administering employee discipline. His approach to discipline was to investigate complaints, listen to the employee and decide what needed to be done. In Mr. Villebrun's case, he gained knowledge of Mr.

Villebrun's "history" when he started in November 2003. He learned then that Mr. Villebrun was off work for a "medical condition for a period of time" and that he was receiving disability benefits. He testified that, for the latter reasons, he was "comfortable" making disciplinary decisions about Mr. Villebrun without talking to Mr. Villebrun's supervisor or taking advice or direction from BHPB Human Resources staff.

Mr. Villebrun Sleeps-in

Mr. Villebrun slept-in two mornings at the mine site – Thursday, August 12th and Friday, August 13th, 2004. He testified that, when telephoned in his room, he "raced down and went to work". That may be but I accept the evidence introduced by Mr. Eyres that on one occasion he was two hours late (his supervisor could not determine what Mr. Villebrun's room number was, to raise him up) and on the other, almost one hour late. However I do accept Mr. Villebrun's evidence that on each of those mornings he slept-in because he was having a hard time sleeping. I also accept his evidence that he was still receiving treatment for stress and depression and had been prescribed medication from his family physician at the time.

Mr. Villebrun testified that in the weeks prior to the events of August 13th thru 15th of 2004, he was to have a meeting with Mr. Eyres, Bill Dean and his chosen support person, Victor Marie to discuss his training concerns but that meeting did not take place. I accept his evidence that he was still experiencing stress arising from both his frustrations with the apprenticeship training and family matters and that his ability to sleep was compromised.

Mr. Eyres' Diary

Mr. Eyres kept a diary in which he made entries summarizing events that took place involving Glen Villebrun during the period of August 13th to 15th, 2004. He made notes in his diary about communications he received, his intentions in following-up on those communications and conversations with Mr. Villebrun. The notes were made shortly after each event took place. The diary does not represent a complete transcription of what happened during the days in question.

Mr. Eyres relied on both the diary and his recollection of what happened during the material times when giving testimony. I accept the contents of Mr. Eyres' diary as being a reasonably accurate summary of what transpired between he and Mr. Villebrun except that where what is contained in it and the testimony of Robert Beaulieu (who was present during most of the events and conversations set out in the diary) are different; I accept Mr. Beaulieu's evidence. Mr. Beaulieu's evidence was in my view much less guarded than Mr. Eyres'. Both in direct and in cross-examination, Mr. Beaulieu was given an opportunity to reflect before answering questions. His evidence was, on the whole, consistent with the preponderance of the evidence given by all of the witnesses during the hearing.

Friday August 13th, 2004

On August 13th, 2004, Mr. Eyres had a conversation with Duncan Olsen who was Mr. Villebrun's day-to-day supervisor at Transwest. Mr. Olsen told Mr. Eyres that Mr. Villebrun had fallen asleep while on the job and that he had been late for work two days in a row, i.e. the 12th and 13th of August. Mr. Eyres was also informed that Bill Dean had already spoken to Mr. Villebrun about the sleeping incident. Mr. Eyres was further told that other employees knew about Mr. Villebrun sleeping-in and were making jokes about it over their radio communications. According to Mr. Olsen, Transwest employees did not want to work with Mr. Villebrun any longer.

After Mr. Eyres' conversation with Ducan Olsen, he formed the intention of talking to the Complainant about three matters: (1) that he would no longer work with Transwest; (2) that he would be put to work in the wash bay until he demonstrated a "willingness to carry out duties and be on time for work"; and, (3) that he would be terminated if he was late for work again.

Mr. Eyres decided to talk to Mr. Villebrun personally despite the availability of Mr. Dean's alternate Maintenance Supervisor. Mr. Eyres decided to do so without reviewing any Corrective Action Plans (that would be available in the Maintenance Supervisor's office) or consulting with any other person at Ekati.

Mr. Villebrun went to Mr. Eyres office in the late afternoon of August 13th. Robert Beaulieu was there along with Mr. Eyres. Mr. Beaulieu had been summoned to the meeting by Mr. Eyres who told him he would be talking to Mr. Villebrun about "sleeping in the truck on more than one occasion" while at Ekati.

At the meeting, Mr. Eyres confronted Mr. Villebrun with the sleeping-in-the-truck incident. It was put to him that the incident had occurred on the previous rotation, which, in fact, it had not. Mr. Villebrun denied having done so and explained that the sleeping-in-the-truck matter was already dealt with by Mr. Dean months ago. The discussion then turned to Mr. Villebrun's recent lateness. Mr. Villebrun was told about how his lateness affected the Transwest crew, i.e. the joking, attitude concerns and reluctance to have him return to that crew. Mr. Villebrun did not offer the explanation to Mr. Eyres that he was taking prescription medications at the time. He simply told him that he was "tired".

Mr. Beaulieu did not disclose to Mr. Eyres that he was aware that the Complainant had been taking anti-depressants that affected his sleeping patterns.

Mr. Beaulieu's participation in the meeting was minimal however he did ask Mr. Villebrun if there was anything bothering him that was causing his (recent) behaviour. Mr. Villebrun said that he was "having a few problems but had been sober now for a long time..." Mr. Beaulieu reminded the Complainant about the support he had from BHPB in the past and that he had an obligation to "do his bit" in return.

Mr. Villebrun raised his training concerns, i.e. that he was not getting engine work and was restricted to doing PMs. Mr. Eyres explained the value of PMs to Mr. Villebrun.

Mr. Eyres told Mr. Villebrun that he had to think about what he will have to do to keep his job and he asked him to go to his room and prepare a "Letter of Commitment" to BHPB that will reflect his intention to become a "good employee". A discussion ensued about what the Letter of Commitment should contain.

Finally, Mr. Eyres told the Complainant that, until further notice, he would not be working with Transwest. He was told to retrieve his tools and report to work in the wash bay the following morning. Mr. Eyres sent him to work in the wash bay because he wanted to make sure that Mr. Villebrun would be on time for work (so he could observe his activities) and to ensure that if he had any "**problems**" he would have people close by and not be alone in the field.

Mr. Villebrun testified that, at the August 13th meeting, Mr. Eyres told him "he was tired of [Mr. Villebrun] milking the company". Mr. Villebrun's impression of the meeting was that his job security was seriously threatened. I am also certain that Mr. Villebrun was reminded emphatically of the support he had from BHPB, particularly in 2003, to deal with his past stress, alcohol and family problems. However I believe that if the "milking the company" comment was made, Mr. Beaulieu would have remembered it and confirmed Mr. Villebrun's testimony. He had no such recollection. Indeed his recollection was that "nothing unusual" occurred at the meeting and that Mr. Villebrun left with a positive attitude toward preparing a Letter of Commitment.

Saturday August 14th, 2004

Mr. Villebrun had trouble sleeping after his conversation with Mr. Eyres. Nonetheless he drafted a Letter of Commitment and met with Mr. Eyres and Mr. Beaulieu in Mr. Eyres' office to review it. Mr. Eyres had some concern about the wording of it. He told the Complainant to change the wording in a couple of sentences from "try" to "will". He did so because he did not want to "set up Mr. Villebrun to fail". The agreed upon letter reads as follows:

- I will be on time for work
- I will perform [sic] my duties that are assigned to me to the best of my ability
- I will work with my co-workers the best that I can.
- I will follow all safety rules and regulations that BHP has
- I will ["try" crossed out and initialled] to the best of my ability to get back on track of my duties that are required from me as an employee to both BHP & Transwest
- I will respect all of my co-workers that I work with
- I will follow all safety regulation that are required for my job
- **I will show up for my regular rotation unless there is a family problem or death** [highlighting added]
- I will not argue with the jobs that are given to me or ask questions about them unless I do not know

- Basically I will [~~“try to”~~ crossed out and initialled] be a good hard working employee to BHP and Transwest to the best of my knowledge that I know

[Signed Gary Eyres], Aug.14/04 [Signed Glen Villebrun], August 13.04

In the above commitment, Glen agrees that he will achieve his commitments. Glen has initialled any changes to the document.

[Signed] Gary Eyres, August 14, 2004.

Mr. Eyres thanked Mr. Villebrun for his commitments. He then told Mr. Villebrun that he “still had the matter of him being late to deal with” and he produced a handwritten letter to him entitled “Disciplinary Action Report – Glen Villebrun, Aug. 14, 2004”. He handed Mr. Villebrun a copy of the Report and read it aloud. The Report read as follows:

Over the past 7 months Glen has been spoken to on several occasions regarding his past performance and attendance. Glen has received several verbal warnings related to poor timekeeping and on at least one occasion, sleeping on the job. **A lenient approach has been taken in the past in order to assist Glen with his personal problems.** Time off for rehabilitation has been paid as has all rehabilitation costs. Glen has been supported during his recent detention period by allowing him to continue employment during that period.

Glen arrived on site Wednesday 11th Aug. for his normal rotation, he did not report work Thursday morning at the regular time. His team leader found his room number and had to wake him up to come to work. Glen was warned by his Team leader that he must be on time for his duties. Friday morning Glen again failed to report to work until he was once again woken by his Team leader.

I have now spoken to Glen and informed him that he is now on his final warning with BHP Billiton. **Any further occurrence of poor attendance**, time keeping or any breach of BHP Billiton values, rules or regulations will result in immediate termination of Glen’s employment.

Glen has agreed to the points and the stipulations of this memo and indicated such with his signature and date.

I agree to review and revise Glen’s disciplinary record at the end of 6 months being February 14th, 2005. This disciplinary action will remain in place until that date.

[Signed] Gary Eyres Aug. 14.2004

[Signed] Glen Villebrun Aug.14/2004. [Highlighting added]

After presenting and reading the Report to Mr. Villebrun, Mr. Eyres asked Mr. Villebrun to sign the letter assuring him that if he (Mr. Villebrun) would do his part to improve his “performance” he (Mr. Eyres) was “prepared to support Glen through some of the problems he was having”. Mr. Eyres said that Mr. Villebrun should consider his job and his family in deciding what he is going to do in the future. Mr. Eyres told Mr. Villebrun that if he missed another flight to Ekati he would be fired. Mr. Villebrun signed the Report because he felt that if he did not sign it, he would be fired.

After signing the Disciplinary Action Report, Mr. Villebrun went back to work in the wash bay. Mr. Eyres came by on more than one occasion to check up on him. The wash bay was close to where some of the Transwest crew was working and he had to endure some demeaning comments from them while he worked. That evening he telephoned his mother and told her about the Letter of Commitment and the Disciplinary Action Report. His mother felt that he was not being treated fairly. He slept poorly. He felt humiliated by having his job function changed from 3rd year apprentice mechanic to wash bay attendant; he felt humiliated by the jeers of Transwest staff and now he would be subject to both for the next six months.

Sunday, August 15th, 2004

Early in the morning, Mr. Villebrun approached Mr. Eyres and asked, “to be laid off or fired” because he was “stressed out”. Mr. Eyres asked him to sit in the non-smoking lounge and have a discussion with he and Mr. Beaulieu.

At the meeting, Mr. Villebrun said that after talking to his mother, he believed that he should not have signed the Disciplinary Action Report because he was “under duress”. He had changed his mind and just wanted to go home. Mr. Eyres encouraged him to think about what he was saying and the consequences for his job and family and reminded Mr. Villebrun that by making a commitment to BHPB he had already “come a long way”. But Mr. Villebrun reiterated that his mind was made up. In Mr. Beaulieu’s eyes the Complainant appeared “frustrated”. He raised his voice several times and said; “I quit”. When he left the room, Mr. Eyres tried to call him back and warned him that if he did not return further disciplinary action would follow. Mr. Villebrun was upset and angry and when he left his response was “I don’t care. Fuck you”. He went to his room to pack his belongings.

Mr. Eyres then called or met with a Human Resources person, Tim Butler, and asked Mr. Butler to “put together a letter accepting Glen’s resignation. They discussed how Mr. Villebrun might be flown out of Ekati. ”.

Around noon, the three met in a corridor and Mr. Eyres asked Mr. Villebrun if he had thought some more about leaving. Mr. Villebrun said that he was going home. Mr. Eyres asked him to meet with he and Mr. Beaulieu in the non-smoking lounge to have another discussion. This time Mr. Eyres again asked Mr. Villebrun to consider all of the effort he put into his apprenticeship, the time he spent on “rehab” and that he was almost finished his apprenticeship. Mr. Beaulieu talked to Mr. Villebrun about supporting his family. Mr. Villebrun indicated that he was determined to leave. Mr. Eyres then told Complainant that arrangements had been made for him to leave the site that day. He presented Mr. Villebrun with the following Letter of Termination and read it to him:

August 15, 2004
Mr. Glen Villebrun
c/o BHPBilliton Diamonds
Ekati Mines

Dear Glen:

Glen, as was pointed out to you in our meeting on August 14th **there have been many problems with your attendance and performance.** Most recently, you arrived on site on Wednesday, August 11, 2004. On Thursday, August 12, 2004 you did not report for work and your team leader had to wake you to come to work. On Friday, August 13, you again failed to report for work and again your team leader had to wake you to come to work. **These actions and previous infractions lead to the discussion with me on Saturday, August 14.**

Our meeting was a discussion about your commitment to be a productive employee and what you would need to do to achieve that goal. You were given time to think that through and you drafted and signed your own set of personal commitments. You were also advised in writing that this was your final warning.

On Sunday, August 15th, you met me on the shop floor and told me that you wanted to be laid off. I suggested that we meet and discuss in my office. In that meeting you again demanded to be laid off, became abusive, kicked furniture and swore at me.

You concluded that meeting by swearing at me, slamming the door and walking off the job.

Shortly thereafter, Robert Beaulieu and I attempted to contact you in your room but you were not there. We eventually located you and you were again requested to return to work. You said you would not be returning and wanted to leave site. In fact, you were on your way to clean out your locker when we located you. You have made a personal decision to pack up your room, clean our your locker and turn in your tools and keys.

Unfortunately your actions have made it clear that you do not intend to live up to the commitments you made in writing **to improve your attendance and performance.** In addition, your walking off the job, repeated refusals to come to work and subsequent actions, despite being given the opportunity to return and hostile actions leave us no choice.

Your actions and statements clearly indicate that you are refusing to report to work. You have requested to leave site immediately. Therefore we will process your termination effective tomorrow, August 16th, 2004 and fly you out of Ekati today.

Sincerely

Gary Eyres
Mobile Maintenance Superintendent" [highlighting added]

Mr. Villebrun understood the letter to say that he was "fired". Mr. Eyres and Mr. Beaulieu had the impression that Mr. Villebrun had voluntarily quit working for BHPB.

After the meeting, Mr. Villebrun was followed by a security guard. The guard was ordered by Mr. Eyres as a consequence of what he perceived to be Mr. Villebrun's "agitated" state of mind and to ensure that Mr. Villebrun would be escorted to the Charter

without incident (that Sunday was “family day” and a number of employee family members were visiting at the Mine Site). Mr. Villebrun was flown to Hay River that afternoon on a charter flight from Ekati.

At no time before or during the meetings between the Complainant and Mr. Eyres consult with Occupational Health and Safety; nor did Mr. Eyres ask Mr. Villebrun if he was still under the care of a physician; nor did Mr. Eyres personally or otherwise make a request to Mr. Villebrun’s physician for an update or further information about his condition.

Union Involvement

Both Mr. Eyres and Mr. Villebrun testified that “some time in 2003” an employee’s union was certified at Ekati. Mr. Villebrun said that at the meetings he had with Mr. Eyres and Mr. Beaulieu he was not given the opportunity to “have someone else attend with him”. Neither Mr. Eyres nor Mr. Beaulieu recalled any request made by Mr. Villebrun to have anyone else present and certainly no other person attended those meetings with Mr. Villebrun over the three days in which they took place.

Mr. Villebrun did consult with a union official named “Dave Matheson” after leaving Ekati. Mr. Matheson advised Mr. Villebrun that he would draft a letter for him to send to Mr. Eyres in an effort to get his job back. The letter explained, “To have left was in all likelihood an error in judgment on [his] part for which I now regret and apologize for having done so”. In two pages it reiterated Mr. Villebrun’s apprenticeship concerns, related the reasons for his sleeping-in to his family problems and “learning to cope with life without alcohol” and explained how he felt during the August meetings with Mr. Eyres. The letter included a “defence of [his] actions” which, however tactfully written, was nonetheless critical of BHPB’s actions.

The response from BHPB, contained in a letter dated September 29th, 2004, as follows:

September 29, 2004
Glen Villebrun
Box 274
Fort Resolution, NT X0E 0M0

Re: Your letter of September 13, 2004

I reply to your letter of September 13, 2004, which was addressed to Gary Eyres and copied to Dave Mathison and myself.

We take exception to any suggestion the BHP Billiton Diamonds Inc has not accommodated you or your situation. As you know we have taken an active role in assisting you with paid time off and other such assistance to deal with your personal issues.

Further, there is nothing in the company’s conduct form, which you could reasonably conclude we were “setting you up to be terminated”. **We were dealing with legitimate workplace performance issues regarding your continued attendance problems.** The

August 14 meeting with Gary was a positive step in managing your workplace performance. If you had asked to have an employee representative at the meeting you would have been given permission to have one present. This right is spelled out in the policies and procedures available to all employees.

[Highlighting added]

On August 15th, your behaviour cannot in any way be attributed to any person or medical issues you are dealing with. You clearly decided to end your employment with us. Notwithstanding this, members of senior management tried unsuccessfully on more than one occasion to convince you to change your mind and maintain your employment. You repeatedly rebuffed any efforts in this regard and insisted on leaving the site immediately.

Almost one month later you write and indicate that your decision may have been an error in judgment. You ask us to conclude that the employment relationship has not been irreparably damages [sic] and seek an opportunity to return to work. The lengthy delay in your contacting us persuades us that your quitting was to a momentary aberration but was in fact precisely what you intended to do.

Glen your behaviour last August was totally unacceptable. Although we tried at that time to convince you to reconsider, you adamantly and abusively communicated a total unwillingness to do so. In our view, the employment relationship has indeed been irreparably damaged. You clearly resigned from your employment despite the company's efforts to dissuade you from doing so.

We are not prepared to discuss with you or any other party the possibility of your becoming re-employed with BHP Billiton Diamonds.

Yours truly,

[Signed]

Tim Butler

Cc. PSAC attn Dave Mathison

Credibility

In making my findings of fact I have considered the credibility of all of the witnesses generally and compared the credibility of those whose evidence appeared to be in conflict, specifically taking into account the principles set out in *Faryna v. Chorny* [1952] 2 D.L.R. @354. I am keenly aware that the credibility of witnesses depends less on their appearance in the witness box than on whether their evidence accords with the “preponderance of probabilities” that emerged from all of the evidence.

4. THE APPLICABLE LAW

The Legislation

Section 5(1) of the N.W.T. *Human Rights Act* (the “Act”) states:

5. (1) For the purposes of this Act, the prohibited grounds of discrimination are race, colour, ancestry, nationality, ethnic origin, place of origin, creed, religion, age, disability,

sex, sexual orientation, gender identity, marital status, family status, family affiliation, political belief, political association, social condition and a conviction for which a pardon has been granted.

Section 7(1) of the *Act* says:

7. (1) No person shall, on the basis of a prohibited ground of discrimination,
 - (a) Refuse to employ or refuse to continue to employ an individual or a class of individuals; or
 - (b) Discriminate against any individual or class of individuals in regard to employment or any term or condition of employment.

Discrimination

The *Act* does not specifically define the word “discrimination”. In *Andrews v. Law Society of British Columbia* (1989) 56 D.L.R. (4th) the court said:

...discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society. Distinctions based on person characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual’s merits and capacities will rarely be so classed.

Burden of Proof

Mr. Villebrun has the evidentiary burden of proving that he was discriminated against on either of the prohibited grounds claimed, e.g. race, ancestry, ethnic origin or disability. He does not have to prove that the prohibited ground was the only or the main cause of the discriminatory conduct, he only has to demonstrate that the prohibited ground was a factor (a reason) that resulted in the discriminatory conduct: *Quereshi v. Toronto (City) Board of Education* (1989) 29 C.H.R.R. D/5.

The legal test that he has to meet is the establishment of a “*prima facie*” case. The Supreme Court of Canada in *O’Malley v. Simpsons-Sears Ltd.* (1985) 7 C.H.R.R. D/3102, defined a *prima facie* case this way:

A *prima facie* case [of discrimination]...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.

5. Was Mr. Villebrun discriminated against on the basis of race, ancestry or place of origin?

Mr. Villebrun's Position

To paraphrase Ms. Jewell's submissions on this ground, Mr. Villebrun says that he suffered adverse treatment as evidenced by inadequate apprenticeship training and by being disciplined in what he perceived to be an unfair, even harassing manner, resulting in the termination of his employment.

BHPB and Mr. Eyres' Position

BHPB and Mr. Eyres say that there is no "nexus" or link between the alleged discriminatory conduct and the grounds of race, color or ethnic origin.

Analysis

Mr. Villebrun must not only demonstrate that he is an aboriginal person who has been treated unfairly, he must demonstrate that the unfairness arises as a result of, or is in some way related to, the fact that he is an aboriginal person. That is the "link" that he must establish in the evidence. He need not establish an intention to discriminate on the basis of race, etc. and he need not show any direct evidence of racial discrimination (evidence of what was said or heard, e.g. racial slurs or comments). Evidence of discrimination is most often "inferred" from the findings of fact. The rule for inferring discrimination from the evidence may be stated as follows:

An inference of discrimination may be drawn where the evidence in support of it renders such an inference more probable than the other possible inferences or hypotheses.¹

A "nexus" may be inferred from circumstantial evidence on that basis: *Khiamal v. Greyhound Canada Transportation Corp.*(2007) C.H.R.D. No. 34.

The findings of fact that I have made in this case may very well suggest that Mr. Villebrun was treated, in a general sense, unfairly. For example, it seems to me that at the outset of the apprenticeship program Mr. Villebrun might have been told that his apprenticeship contract limited his employer's responsibility for his training to "all aspects of the designated trade so far as his facilities and the scope of his business will permit" and that engine work and rebuilding were not part of the scope of BHPB's business.

Mr. Villebrun might also have been given the opportunity to choose where he would like to take his schooling before having to endure going to NAIT and having to experience failure and some resulting damage to his self-esteem and feelings of insecurity.

¹ Vizkelely, B., *Proving Discrimination in Canada*, 1987 (Toronto) Carswell, p. 142

Perhaps BHPB might have used the many authorized “Medical Information Release” forms to learn about his condition and coordinate Mr. Villebrun’s return to work in 2004 with his treating physician(s).

Maybe Mr. Eyres could have talked to the Occupational Health Coordinator or to Human Resources or even waited for the return of Mr. Villebrun’s supervisor, Bill Dean, before initiating discipline proceedings and avoided the kind of confrontation that developed by the third day.

Although the latter examples may suggest that Mr. Villebrun was treated “unfairly” in a general sense, there is in my view no direct or any circumstantial evidence in this case from which I may reasonably infer that he was treated unfairly or adversely because of his race. Specifically, race was, in my view, not a factor in the way his apprenticeship-training program was delivered or in the disciplinary treatment he received. The apprenticeship program was simply not designed in a way that would meet Mr. Villebrun’s expectations and perceived needs. Nor am I able to infer from the evidence that the disciplinary treatment he received was based on or related to his race, ancestry or place of origin.

I therefore dismiss the complaint of discrimination based on race, ancestry and place of origin against BHP Billiton and Mr. Eyres.

6. Was Mr. Villebrun discriminated on the basis of disability or perceived disability?

(a) Did Mr. Villebrun have a disability?

Mr. Villebrun’s Position

Ms. Jewell argues that her nephew was treated as if he was an “alcoholic” from the moment he was hired in 1998. To paraphrase, she says that Mr. Villebrun was stigmatized by the comments about his drinking back in 1998 made by his pre-apprenticeship instructor and that, along with Mr. Eyres’ knowledge of Mr. Villebrun’s alcohol treatment leave, affected Mr. Eyres’ decision to discipline him and how he would be disciplined.

Secondly, Ms. Jewell says that Mr. Villebrun suffered from stress and depression commencing in 2003. She implied in her argument (and questions on cross-examination) that BHPB ought to have investigated Mr. Villebrun’s condition and provided him with ongoing support. In any event, Mr. Jewell says, BHPB knew that Mr. Villebrun was suffering from stress related illnesses and depression and that he was taking anti-depressants that affected his sleep. She says that Mr. Beaulieu was aware of it; others in Human Resources must have known of it also.

Finally, as I understand it, Mr. Villebrun’s position is that he suffered from a disability or disabilities that prevented him from working for an extended period of time between

August 2003 and December, 2004 and which continued to affect his performance, including his ability to be at work on time, through August 13th, 2004.

BHPB and Mr. Eyres Position

The Respondents say that there is no medical evidence "...that establishes that the Complainant has either conditions [addiction to alcohol or depression] such that either has become a "condition of mental impairment" as set out in the definitions in the *Act*. Consequently there is no medical evidence that "disability" had anything to do with him quitting. While admitting that Mr. Villebrun has and had in the past a "problem with alcohol", the Respondents say that Mr. Villebrun bears the evidentiary burden of producing medical evidence showing that his resignation was involuntary. However, from the Respondent's perspective, the evidence overwhelmingly suggests that Mr. Eyres and Mr. Villebrun tried to talk Mr. Villebrun out of quitting and out of leaving BHPB on August 15th, 2004. Further, the company "bent over backwards" to help Mr. Villebrun, to accommodate him throughout.

Analysis

Section 1 of the *Act* says:

"Disability" means any of the following conditions:

- (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness,
- (b) a condition of mental impairment or a developmental disability,
- (c) a learning disability, or a dysfunction in one or more of the processes involved in understand or using symbols or language,
- (d) a mental disorder

Section 2.1 of the *Act* says:

Whenever this Act protects an individual from discrimination on the basis of disability, the protection includes the protection of an individual from discrimination on the basis that he or she

- (a) has or has had a disability;
- (b) is believed to have or have had a disability; or
- (c) has or is believed to have a predisposition to developing a disability

The question that I have to decide at this stage of my analysis is whether Mr. Villebrun had a disability at the material times or was perceived as having a disability by his employer at the material times.

Evidence of Disability

In this case therapist notes, doctor's notes and BHPB nursing notes were introduced into the evidence.

A letter dated February 28th, 2003, from “Jette Finsborg, Family and Mental Health Therapist” to Dr. Rabih Kamel at the Fort Smith Health Centre, describes Mr. Villebrun as “emotionally distraught for ½ hour” after which “...he calmed down to a point where he thought he was able to return home to sleep”. The letter states that the Complainant and his wife had been “drinking and smoking marijuana” during the previous six days and that he was seeking alcohol treatment and anger counselling.

A second letter from Jette Finsborg was also entered into the evidence. It is dated September 2nd, 2003, and is addressed to Dr. Sultan in Fort Smith. In that letter, Ms. Finsborg describes the Complainant as “despondent...he worries a great deal and feels he has low self-esteem”. It points out that the Complainant was then facing his 5th impaired driving charge (for which he was later sentenced in the spring of 2004). It says that the Complainant also has to “consider addressing childhood trauma and anger management as it relates to current episodes of family violence”.

The Finsborg letters were disclosed to the Respondents as a result of a successful, pre-hearing application made by them to obtain Mr. Villebrun’s medical records.

Mr. Villebrun’s physician signed a note dated August, 2003 stating: “Glen has been treated for excessive stress and depression”. Successive notes from Mr. Villebrun’s doctor given to BHPB throughout the fall of 2003 do not give any other details. A letter from the Nats’ Ejee Keh Treatment Program says that between January 28th, 2004 and February 25th, 2004, Mr. Villebrun attended an alcohol treatment program. In July of 2004, BHPB received a doctor’s note from a Health Clinic in Hay River stating that “Mr. Villebrun needs an off work rest from July 14/04 till Jul.21/04 due to a health problem under investigation”.

Entries in BHPB nursing notes beginning in January 2003, demonstrate that Mr. Villebrun was abusing alcohol and having family problems. For example, on January 29th, 2003, he went to see a nurse on site smelling of alcohol and crying. He said that his wife and baby had left him. He was treated with prescription medication and referred to BHPB’s family assistance program. He subsequently underwent family counselling and drug and alcohol sessions.

On December 5th, 2003, he went to the nursing station complaining of family problems, that he was still abusing alcohol and that he felt suicidal. He was crying again and sought alcohol treatment and family counselling, both of which were provided to him. The nursing notes of the same date indicate that the treating nurse assessed him as “depressed” and “unfit to work”. He was subsequently sent to the Yellowknife Stanton Hospital to see a physician. The result of that visit was more family counselling and his enrolment in the Nats’ Ejee Keh alcohol treatment program.

Documentary evidence introduced by the Complainant, namely “Personnel Action Forms”, demonstrated that Mr. Villebrun was on “salary continuance” from November 12th, 2003 thru February 24th, 2004. Mr. Eyres gave evidence that he believed that

“salary continuance” status meant that 2/3rds of Mr. Villebrun’s wages were being paid by a disability insurer and the balance by BHPB.

Mr. Beaulieu was aware that Mr. Villebrun was being treated with anti-depressants. He knew that Mr. Beaulieu was having difficulty sleeping before the events of August 2004.

Nurse McCallum was aware that Mr. Villebrun had stress, alcohol and family problems. She was concerned that Mr. Villebrun should be getting the help he needed – possibly psychiatric help. In Email correspondence to BHPB Human Resources, she describes Mr. Villebrun’s condition as “chronic”, i.e. not transitory.

Mr. Dean was at least aware that Mr. Villebrun suffered from stress.

I have also considered Mr. Villebrun’s evidence about how he was dealing with alcohol problems, about stress created by both personal and workplace issues, depression and lack of sleep.

After-acquired Evidence

The only other medical information about Mr. Villebrun’s condition in 2003 – 2004 is a letter prepared by Dr. Sultan, MD, on December 9th, 2004, four months after Mr. Villebrun’s departure from Ekati. The Applicant offered the letter as evidence of Mr. Villebrun’s medical condition during the material times. The Respondents objected to it being received into the evidence at the hearing because, in their view, it was “after the fact” and not probative of any of the issues before me. There were no concerns raised by the Respondents as to the timeliness of disclosure of the letter or as to its authenticity.

The letter is fairly short and bears observation:

To Whom it May Concern

December 09, 2004

Glen Villebrun
D.O.B. 03 Jan. 1967

This is to certify that Mr. Villebrun has been treated since February 2003 for major depressive disorder, which encompassed disturbed sleeping pattern and many other function difficulties.

He had regular follow ups in Fort Smith Health Centre, been treated with anti depressants and counselling therapy.

He is still on medication and regular follow up for his illness.

This medical note was issued upon his request.

Sincerely,

[Signed]

Mahmud Sultan, MD
Fort Smith Clinic

I note that the letter is stamped “Received” by the NWT Human Rights Commission on June 14th, 2005 and that the copy of Mr. Villebrun’s complaint that is contained in the materials before me is dated July 12th, 2005.

I am satisfied that the letter is relevant and probative of the issue of whether Mr. Villebrun suffered from a disability during the material times. I base my conclusion on the following factors:

1. The fundamental question for the admissibility of evidence is whether it is relevant to an issue in question. Evidence will be relevant “...if it is logically probative of either a fact in issue or a fact which itself is probative of a fact in issue. Evidence which tends to make the existence of a fact in issue either more or less probable is logically probative of that fact...” *Anderson v. Maple Ridge (District)* 1992, 10 C.P.C. (3d) 258 at 266 (B.C.C.A.).
2. According to section 56 of the *Act* I am not bound by the rules of law respecting evidence in civil actions. The use of hearsay evidence by Administrative Tribunals has been expressed this way by J. Sopinka, the late judge of the Supreme Court of Canada, in “The Law of Evidence in Canada, 2d ed. (Toronto: Butterworths, 1998) at p. 308:

“In proceedings before most administrative tribunals... hearsay evidence is freely admissible and its weight is a matter for the tribunal ... to decide unless its receipt would amount to a clear denial of natural justice. So long as such hearsay evidence is relevant, it can serve as the basis of the decision, whether or not it is supported by other evidence which would be admissible in a court of law.”

The B.C. Human Rights Tribunal, in *Radek v. Henderson Development (Canada) Ltd. (No. 3)* (2005) 52 C.H.R.R. D/430, put it this way:

“In the end, the use to which hearsay evidence may be put depends on ensuring that all parties receive a fair hearing and that the Tribunal has reliable evidence before it on which it can make its findings of fact”.

3. On the fairness aspect I take into account the abundance of evidence in this case that BHPB had in its possession since at least August 2003, the consent of Mr. Villebrun to obtain medical information regarding his illness from the author of the letter. I am of the view that there is no prejudice to the Respondent in admitting the evidence or, in the alternative, if there is any prejudice, it is outweighed by its probative value.
4. Both the Complainant and Respondent entered into the evidence voluminous “hearsay” documents without objection for me to consider.

5. The letter contains information that is consistent with the other evidence of disability received from the witnesses and contained in the documentary exhibits and I would afford it similar weight.

Mr. Villebrun was Disabled

In *Granovsky v. Canada* [2000] 1 S.C.R. 703, the Supreme Court of Canada established that “disability” in the legal sense means a physical or mental impairment which results in a functional limitation or is associated with a perception of impairment. In *Desormeaux v. Ottawa* [2005] FCA 111, the court found that a chronic or debilitating condition that periodically causes an individual to become significantly incapacitated and interferes with his or her ability to work, is a disability.

After reviewing the totality of the evidence in this case, I find that Mr. Villebrun suffered from the disability of alcohol dependency and, further, that his employer in the corporate sense was intimately aware of that disability dating back to at least February of 2003. BHPB was continually aware through the Occupational Health staff and Human Resources staff that Mr. Villebrun was in and out of treatment for alcohol dependency in 2003 and through January 2004. BHPB was aware that in the fall of 2003 he was charged with impaired driving. He had even been flown from Ekati on one occasion in December 2003, to obtain treatment.

That corporate knowledge evidenced itself during discussions with Mr. Eyres and Mr. Beaulieu between August 13th and 15th, 2004 when there was some discussion of his sobriety and offers of continued help should he decide to stay on and meet his commitments. Mr. Eyres said that one of the reasons that Mr. Villebrun was sent to the wash bay was to ensure that if he had “problems”, there would be people close by. In my view that was an indication that he was aware that Mr. Villebrun’s health issues – particularly his alcohol dependency issues - were not yet resolved.

I also find that there is evidence of Mr. Villebrun being functionally disabled by depression in 2003 and 2004. Here I refer to the doctor’s notes, nursing notes and Dr. Sultan’s letter of December 9th, 2004 as well as the Complainant’s own evidence. While the precise effects of his condition on his ability to work are not known I accept Mr. Villebrun’s evidence and that of Dr. Sultan to the effect that his sleeping pattern was affected. In light of the evidence I find it more likely than not that the Complainant slept in on August 12th and 13th, 2004 as a consequence of depression.

Depression is not a transient condition and has been found to be a disability in a number of cases (e.g. *Oak Bay Marina Ltd. V. British Columbia (Human Rights Commission)* (2002) 217 D.L.R. 4th, 747; *Morris v. B.C. Railway* (2003) BCHRT 14). In this case the employer knew or ought to have known that Mr. Villebrun was diagnosed as suffering from “excessive stress and depression” (Bill Dean, Occupational Health and Human Resources), that he was taking anti-depressants (Email from Mike Williams to Nurse McCallum; telephone conversation between Mr. Villebrun and a nurse in Occupational

Health; and Mr. Beaulieu's knowledge) and that his sleep was affected by it (Mr. Beaulieu's knowledge gained from other BHPB staff in Human Resources).

Clearly Mr. Villebrun's disabilities created a "...loss or limitation of opportunities to take part in the life of the community on an equal level with others": *Quebec (Comm. Des droits de la personne et des droits de la jeunesse) et Mercier c. Montreal (Ville)* [2000] 1 S.C.R. 665.

In my view Mr. Villebrun was absent from work and his performance suffered during 2003 and 2004 because of the latter described disabilities.

(b) Did BHPB discriminate against Mr. Villebrun because he was disabled?

The Superintendent of Maintenance, Gary Eyres, decided to take disciplinary action against Mr. Villebrun (instead of delegating the matter to Mr. Villebrun's supervisor) in response to a complaint from Mr. Villebrun's team leader at Transwest who said that Mr. Villebrun had slept-in two days in a row and that, in the past, Mr. Villebrun had fallen asleep on the job. As I have found after considering all of the evidence, Mr. Eyres then formulated the intention of removing Mr. Villebrun from working as a field mechanic, installing him in the wash bay and giving him a "final warning" about lateness. He then contacted Robert Beaulieu to attend the disciplinary meeting with him.

The discussions that took place at the four meetings over the next three days were supposedly about Mr. Villebrun's "performance" but in fact the discussion focused on an incident that had already been dealt with by Mr. Dean (the sleeping-in-the-truck incident) and two consecutive "timekeeping" incidents, i.e. sleeping-in. There was no evidence led to show that the meetings were intended to address any other aspect of the Complainant's performance, e.g. that he was doing the work of a 3rd year apprentice in a substandard or unacceptable fashion. Indeed the evidence that I heard was that he had received regular pay increments and acceptable performance appraisals until August 2004. In short: Mr. Villebrun had a relatively good disciplinary record with BHPB for almost six years. Yet the disciplinary action that was taken against Mr. Eyres was extremely serious, so serious in fact that I infer from the evidence that, in addition to the "timekeeping" (sleeping matters), the Complainant was in fact disciplined for absences taken as a consequence of his disabilities. The documentary record supports that inference:

Letter of Commitment, August 13th:

"I will show up for my regular rotation unless there is a family problem or death".

Disciplinary Action Report, August 14th:

Over the past 7 months Glen has been spoken to on several occasions regarding his past performance and attendance...A lenient approach has been taken in the past in order to assist Glen with his personal problems...Any further occurrence

of poor attendance, time-keeping or any breach of BHP Billiton values, rules or regulations will result in immediate termination of Glen's employment.

Letter of Termination, August 15th:

...there have been many problems with your attendance and performance... These actions and previous infractions lead to the discussion with me on Saturday, August 14... Unfortunately your actions have made it clear that you do not intend to live up to the commitments you made in writing to improve your attendance and performance.

Letter of Response, September 29th, 2004:

“We were dealing with legitimate workplace performance issues regarding your continued attendance problems.”

Here I should also add that the attitude of frustration evidenced in the highlighted sections of the email of Nurse McCallum to Human Resources personnel Mike Williams and Robert Beaulieu above, suggests strongly to me that Mr. Villebrun's attendance had become a matter of general, corporate concern and frustration.

Innocent Absenteeism

In this case I have found that the employee's past record of innocent, i.e. without fault, disability based, absenteeism was taken into account – and was a factor - in the disciplinary action that took place between August 13th and August 15th, 2004. As a consequence, Mr. Villebrun received what he perceived as, and probably was, a demotion within the meaning of the law of constructive dismissal:

...it is not the direction of the change but the degree of change which is critical to assessing whether altered job duties amount to a fundamental breach of the employment contract... Courts may take into account whether there has been a reduction or broadening of duties, a change in the nature of the work to be performed by the employee, altered reporting relationships, a change in job title, or a loss of status, prestige or authority. Usually a change in job duties is assessed with reference to its impact upon the entire employment relationship... Reduced responsibilities need not be accompanied by a pay loss... Even where an employee's duties are reduced significantly as a result of the employer pursuing legitimate business objectives, this change may result in a demotion and accordingly in a fundamental breach... (*Quitting for Good Reason: The Law of Constructive Dismissal in Canada*, 2001, Canada Law Book)

Whether the Complainant was constructively dismissed or not when Mr. Villebrun's job functions as a 3rd year apprentice were reduced to performing those of a trades helper in the wash bay (for at least this six months immediately preceding his January, 2005, 4th year trade school classes) his employment and the terms and conditions thereof were adversely affected.

I therefore do not need to decide the question of whether Mr. Villebrun quit voluntarily or was fired. However I would add that if Mr. Villebrun can be said to have quit his job, based on the evidence, Mr. Villebrun's decision to quit was undoubtedly influenced by the demeaning adverse consequences of the change in his job functions.

Further, the Respondents had a duty to make inquiries of Mr. Villebrun about whether the medical conditions that he suffered from were affecting him on the days in question, i.e. when he slept-in and during the August meetings. In my view that duty was not discharged by the general enquiry about how he was doing (see *Martin v. Carter Chevrolet Oldsmobile*, 2001 BCHRT 37). Mr. Beaulieu, for one, testified that he had knowledge that Mr. Villebrun had been taking anti-depressants and how those anti-depressants affected his sleep. The meetings in August 2004 were supposed to be about that very issue: sleeping on the job and sleeping-in.

Further, BHPB had the professional resources on hand, e.g. Occupational Health nurses and human resources personnel who could have made appropriate enquiries of Mr. Villebrun and his treating physicians (as per his several written "authorizations") to determine whether his sleeping-in was disability related and, if so, to consider the extent to which it was able to accommodate him. Mr. Villebrun had been off work as recently as July 21st, 2004, for "a health problem under investigation". Surely that was a clue – coming on the heels of several months of medically approved absences - that should have prompted meaningfully inquiry if not investigation.

In short, BHPB and Mr. Eyres knew or ought to have known that Mr. Villebrun continued to suffer from the effects of alcohol dependency and depression.

For all of the above reasons, I find that Mr. Villebrun has met the burden of demonstrating a *prima facie* case that he was discriminated against by BHPB and Gary Eyres on the basis of disability.

(c) Is the conduct of the Respondents excusable because of a *Bona Fide Occupational Requirement*?

In accordance with *British Columbia (Public Service Employee Relations Comm.) v. B.C.G.E.U.* (1999) 35 C.H.R.R. D/257, (S.C.C.), (usually referred to as "Meiorin") the next step in this case is to hear argument from the employer justifying the discriminatory conduct on the basis of a *bona fide* occupational requirement ("BFOR" – see also s. 7 (3) of the *Act*).

BHPB may therefore have the opportunity to demonstrate that the "standard" employed in disciplining Mr. Villebrun was adopted for a purpose rationally connected to the performance of his job. Secondly, the employer may demonstrate that it adopted the standard in good faith and without any intention to discriminate against Mr. Villebrun. Finally, the employer may be able to demonstrate that it was impossible to accommodate Mr. Villebrun without experiencing undue hardship.

Under the circumstances I would ask the parties to provide their earliest possible availabilities to have a teleconference to allow BHPB to make its arguments and for Mr. Villebrun to respond. The parties are directed to contact the Adjudication Panel offices in Yellowknife at their very earliest convenience.

DATED this 13th day of March 2008.

James R. Posynick
Chair, Adjudication Panel