

THE NORTHWEST TERRITORIES HUMAN RIGHTS ADJUDICATION PANEL

IN THE MATTER OF the Northwest Territories
Human Rights Act, S.N.W.T., 2002, c.18, as amended

BETWEEN:

Harry Atkins

Complainant

-and –

North American Tungsten Corp.

Respondent

Reasons for Decision

Before: Kerry L. Penney, Adjudicator, Human Rights Adjudication Panel

Place of Hearing: Yellowknife, NT (By Telephone)

Date of Hearing: January 12, 2016

Harry Atkins, for himself

No one appearing for the Respondent

No one appearing for the NWT Human Rights Commission

Authorities Considered:

Human Rights Act, S.N.W.T. 2002, c. 18, as amended: Sections 1, 5 and 7

Rules of Practice and Procedure of the Human Rights Adjudication Panel, Rules 26 and 28

INTRODUCTION

[1] This decision involves a claim of discrimination against North American Tungsten Corp. (“North American”) on the basis of disability in regard to employment or any term or condition of employment, which is contrary to Sections 5 and 7 of the Northwest Territories *Human Rights Act* (the “Act”).

[2] The Complainant was an employee of North American. The Complainant alleges that North American refused to continue his employment because of his heart related medical condition referred to as paroxysmal atrial fibrillation. North American did not make any submissions.

[3] The hearing took place by telephone on January 12, 2016. The record provided by the Director of Human Rights to the Panel on April 21, 2015, consisting of the Complainant Information Form and complainant details, was the only document provided prior to the hearing. The Complainant gave oral evidence at the hearing but did not call any witnesses or submit any additional documents. North American did not attend the hearing.

DECISION

[4] The Complainant has established on a balance of probabilities that he was discriminated against on the basis of disability in regard to employment or any term or condition of employment, contrary to Section 5 and 7 of the Act.

PROCEDURE

Mode of Hearing

[5] Mr. Atkins resides in Nova Scotia. North American did not have a representative located in the Northwest Territories and North American did not attend the pre-hearing conference on November 27, 2016 or the hearing. Mr. Atkins told me that he did not intend to call any witnesses and preferred to conduct the hearing by telephone.

[6] Under section 52(2) of the *Human Rights Act* I have the authority to determine the practice and procedure for the hearing that I consider appropriate. Rule 26 of the Panel’s Rules of Practice and Procedure also establishes that I have the authority to determine the practice and procedure for the conduct of the hearing. Rule 28 provides that hearings may proceed by way of teleconference. Rule 31 says that the Adjudicator will decide the mode of hearing after hearing from the parties.

[7] In this case, I determined that it was impractical to hold an in-person hearing. Mr. Atkins preferred to give his evidence by telephone due to his location. I provided time for each party to produce documents to ensure each party knew the position of the other party. Neither party called any witnesses nor produced any documents prior to the hearing.

Hearing

[8] North American did not appear at the hearing. Pursuant to Section 57 of the *Human Rights Act* I have the authority, upon proof of service of a notice of the hearing, to proceed with the hearing in the absence of North American. I confirmed that North American had been served a notice of the hearing by the Panel's Office Administrator and as such I proceeded with the hearing as scheduled.

ISSUES

[9] The issues addressed in these written reasons for decision are as follows:

- (i) Did the complainant have a disability within section 7 of the Act?
- (ii) Was the complainant's disability a factor in the refusal to continue his employment, contrary to section 5 and 7 of the Act?
- (iii) If yes, did the respondent accommodate to the point of undue hardship?

SUMMARY OF EVIDENCE

[10] The Complainant provided evidence with respect to his employment with North American. The relevant facts are summarized as follows:

- (i) The Complainant was employed as a heavy duty mechanic by North American from September 2010 to February 2011 at the Cantung Mine;
- (ii) Mr. Atkins has suffered from episodes of atrial fibrillation in the past;
- (iii) On February 26, 2011 Mr. Atkins didn't feel great and went to the medic located at the mine site and requested to have his heart checked;
- (iv) The medic hooked Mr. Atkins up to a machine to get a reading for his heart beat;
- (v) Upon getting the results from the machine, the medic sent Mr. Atkins to the nearest hospital located in Whitehorse, YK;
- (vi) At the hospital another reading was obtained from a heart machine;

- (vii) The readout was reviewed by the medical professionals at the hospital and Mr. Atkins was deemed to be okay and was released within a few hours;
- (viii) Mr. Atkins called North American to advise he was okay and expressed his desire to return to work;
- (ix) Mr. Atkins stated that North American refused his request to return to work;
- (x) Mr. Atkins was assessed by Dr. Bouchier on October 5, 2011 and Dr. Bouchier determined that Mr. Atkins condition (paroxysmal atrial fibrillation) was adequately controlled by medication and deemed Mr. Atkins able to return to work based on his assessment;
- (xi) Mr. Atkins was issued a Record of Employment by North American dated March 25, 2013.

Complainant's Position:

[11] Mr. Atkins alleges that North American refused his numerous requests to return to work at the mine site based on his disability. Mr. Atkins says that he was a good employee and never had any problems until the episode on February 26, 2011. Mr. Atkins feels that North American's refusal to allow him to return to work is based on a perception that he is not physically able to perform the duties of his job. Mr. Atkins says that he is medically okay to return to work and North American has not responded in any way to his requests. He says that North American has not discussed his ability to return to work, provided any reasons for the refusal, or made any attempts to accommodate his return to work.

Respondent's Position

[12] The only documents filed by North American were filed by its court appointed representative in relation to proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36 indicating the poor financial situation of North American.

ANALYSIS

[13] In this case, in order to establish discrimination in employment within the meaning of Section 7 of the Act, Mr. Atkins must prove on a balance of probabilities that (a) he suffers from a disability; (b) that North American refused to continue his employment on the basis of his disability; and (c) that accommodation of Mr. Atkins would impose undue hardship on North American.

[14] This means that Mr. Atkins must show that it is more likely than not that the alleged conduct occurred and that the conduct amounts to discrimination within the meaning of the

law. The meaning of “discrimination” was described this way by McIntyre, J. in *Andrews vs. Law Society of British Columbia* [1989] 1 S.C.R. 143:

...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.

[15] If Mr. Atkins is able to meet these criteria, the burden then shifts to the Respondent to show that it had a *bona fide* (honest, sincere) and reasonable justification for its refusal to continue his employment. The Respondent must show that it could not have accommodated the needs of Mr. Atkins, i.e. by allowing him to return to work, without incurring undue hardship.

(i) Did the complainant have a disability within section 7 of the Act?

[16] I am satisfied, based on the evidence, that Mr. Atkins does have a heart condition and it does fall within the definition of “disability” under Section 1 of the Act. The definition of “disability” is broad and quite encompassing of a variety of diseases and conditions and is not dependent on the severity of the disease or condition.

(ii) Was the refusal to continue employment related to his disability?

[17] Mr. Atkins gave evidence that he was a good employee and up until the date of the incident he had not experienced any problems at work. The Record of Employment (ROE) provided to Mr. Atkins by the Respondent clearly indicates that the reason for issuance was illness or injury. Furthermore, the ROE says that the expected date of recall is unknown. Mr. Atkins says that he has called North American numerous times to request his return to work at the mine site and that North American has not responded. Mr. Atkins stated that he was not advised that he was terminated or that North American would consider his request to return to work. The information on the ROE supports the evidence given by Mr. Atkins that he was not working as a result of North American’s perception of him being unable to do his job as a result of his disability. Mr. Atkins memory was clear and consistent with the documents. I find his evidence credible and reliable.

[18] For these reasons, I conclude that on the balance of probabilities the reason that Mr. Atkins’ employment was not continued is because he is a person with a disability.

(iii) Was there a *bona fide* and Reasonable Justification for the refusal?

[19] The Respondent did not provide any evidence regarding a bona fide occupational requirement that would prevent Mr. Atkins from continuing his employment as a heavy duty mechanic. Mr. Atkins provided a letter from his medical doctor that stated he believed Mr. Atkins could return to work. The doctor also said that he wasn't aware of any job specific criteria related Mr. Atkins condition but if these criteria existed he would assess them if provided by North American.

[20] Mr. Atkins said that North American provided no response to his requests to return to work. As such, I conclude that Mr. Atkins has proven on a balance of probabilities that there was not a bona fide occupational requirement as there is no evidence that North American made any attempts to accommodate Mr. Atkins return to work.

REMEDY:

[21] I now turn to the remedies available under subsections 62(3) and (4) of the Act.

[22] Having found that Mr. Atkins has been discriminated against, I order that the Respondent, North American:

- (i) Cease the contravention complained of, namely refusal to continue his employment on the basis of his medical condition;
- (ii) To reinstate Mr. Atkin's employment ; and
- (iii) Compensate Mr. Atkins for all wages or income lost as a result of this contravention of the Act. As the amount to be paid for lost wages was not addressed by either party, I am going to direct that both parties provide the Adjudication Panel office with written submissions or documents addressing the appropriate amount to be paid to Mr. Atkins as compensation for lost wages within sixty (60) days of the date of this decision. If a party fails to respond or indicates that it does not wish to respond, I will decide the amount to be paid as compensation for lost wages without further notice to that party.

[23] I remain seized of this complaint to address any issues arising from this decision.

DATED at Yellowknife, Northwest Territories, this 26th day of October, 2016.

Kerry L. Penney
Adjudicator
Human Rights Adjudication Panel