

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

BETWEEN:

PERRY DENNIS

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ESKASONI BAND COUNCIL

Respondent

DECISION

MEMBER: Athanasios D. Hadjis

2008 CHRT 38
2008/09/12

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[1] The Complainant, Perry Dennis, alleges that the Respondent, the Eskasoni Band Council, did not hire him to work as a deckhand on a fishing boat because he failed to pass a pre-employment drug screening test. He claims that the Respondent's decision discriminated against him on the basis of his disability (drug dependency), under s. 7 of the *Canadian Human Rights Act*, and that the Respondent's drug screening policy is itself discriminatory, within the meaning of s. 10 of the *Act*.

I. THE PARTIES' PARTICIPATION AT THE HEARING INTO THE COMPLAINT

[2] The Commission had initially referred five other complaints, along with Mr. Dennis', to the Tribunal. Shortly before the hearing began, four of those complainants settled their complaints with the Respondent. The Commission then advised the Tribunal that it would no longer participate at the hearing. Two days into the hearing, the other remaining co-complainant also settled his case.

[3] Mr. Dennis was not represented by legal counsel at the hearing into his complaint. On the sixth day of the hearing, after Mr. Dennis had closed his case, he suddenly and without any notice to the Tribunal or the registry officer, collected his things and left the hearing room during a break in the proceedings, at around 11:45 AM, accompanied by his common law spouse, Mary Lou Gould. He never returned. I adjourned the proceedings for about two hours while the registry officer attempted to telephone Mr. Dennis at home. There was no response. I asked all persons present, including the Mi'kmaq interpreter assigned to this case, whether Mr. Dennis had mentioned why he had left and for how long. No one was able to provide any further details. Mr. Dennis was only observed picking up his papers and leaving without saying anything. The Respondent, at that time, was part way through its examination in chief of an expert witness. Given the circumstances, and particularly Mr. Dennis' sudden departure without any notice, excuse, or explanation, I decided to proceed in his absence. The Tribunal's digital voice recording system continued to record the proceedings and a copy of the audio recording was subsequently provided to both parties.

[4] Later that afternoon, the registry officer sent an e-mail message to Mr. Dennis informing him that the hearing would continue as scheduled the following day. He was invited to contact the registry officer by e-mail or telephone. Mr. Dennis replied by e-mail to the registry officer that evening. He explained how he felt “alone” and overwhelmed by the proceedings, placing some blame on the Commission for failing to participate at the hearing and “abandoning” him “to the wolves”. The following morning, Mr. Dennis sent an e-mail to the registry officer asking whether Ms. Gould could appear on his behalf. She had been in attendance at the hearing since its outset and had already testified. I granted Mr. Dennis’ request and she presented herself that afternoon. She is not a lawyer. She cross-examined the remaining witnesses who were called to testify by the Respondent and she made final submissions on Mr. Dennis’ behalf.

[5] The Respondent, for its part, was represented by legal counsel throughout the course of the hearing.

II. THE FACTS GIVING RISE TO THIS COMPLAINT

A. Mr. Dennis’ car accident

[6] Mr. Dennis is a registered member of the Mi’kmaq First Nation community of Eskasoni situated about 40 km south of Sydney, Nova Scotia. The Respondent is the community’s band council (the “Band”).

[7] Mr. Dennis grew up in Eskasoni and has spent most of his life there. He is 38 years old. In 1989, he was involved in a serious car accident. His injuries included fractures to his neck. He testified that the fractures have left him with several painful chronic health problems. From time to time, his neck will swell up, which restricts head rotation and causes him neck and shoulder pain as well as sharp headaches. His physicians initially prescribed him some “strong” medication to deal with the pain but it had the effect of making his face look “droopy and sad”, even though he felt fine. When he took weaker dosages, he claims to have become “addicted to the pills”, although he did not provide any further elaboration or explanation in his evidence.

[8] Around 1990, Mr. Dennis discovered that using marijuana would relax him and ease his pain in his shoulders and neck, without the above-mentioned side effects that his physician-prescribed medication had caused him. He did not use marijuana on a daily basis, but only on the occasions when his pain would “flare up”. On some pain-ridden days, however, he would not take any marijuana and simply “lived” with his condition and the pain.

[9] At one point in 2004, Mr. Dennis recalls asking a physician at Eskasoni’s health clinic to prescribe marijuana medicinally for him. Mr. Dennis claims that although the physician did not disapprove of his marijuana usage, he told Mr. Dennis that he was not authorized to give such prescriptions. Mr. Dennis did not apparently try to find another physician who possessed such authorization. Instead, Mr. Dennis continued to acquire his marijuana through other unspecified means. The physician was not called as a witness in this case.

B. The Eskasoni Fishery

[10] Prior to 2000, the Band’s fishery operation was quite modest. It was run by a department of the Band known as the Eskasoni Fish & Wildlife Commission (EFWC). Most of its activity was in fisheries research and conservation. There were only about five full-time employees and between 15 and 40 casual workers throughout the year.

[11] In two 1999 decisions (*R. v. Marshall*, [1999] 3 S.C.R. 456 and *R. v. Marshall*, [1999] 3 S.C.R. 533), the Supreme Court affirmed the treaty rights of Mi’kmaq persons to hunt and fish, and to trade in the product of these activities, in order to earn a moderate livelihood for themselves and their families. Following these decisions, the federal Department of Fisheries and Oceans (DFO) entered into agreements with First Nations to provide them with the tools that would enable them to develop their commercial fisheries. The Band signed such an agreement in 2000 (the “Marshall Agreement”), pursuant to which the DFO provided funding for the purchase of fishing licences, vessels and other equipment, the construction of buildings, and the training of fisheries workers.

[12] When the Marshall Agreement was implemented in 2000, there were very few Band members who had the skills required to fish commercially. Consequently, the Band put in place programs to train individuals as certified deckhands, first mates, and captains. Mr. Dennis had done some work from time to time as a deckhand for non-native fishers between 1992 and 2000, but he had never gained his certification. Mr. Dennis therefore registered for the Band-offered training and he successfully obtained his deckhand certificate in 2000.

[13] A deckhand's duties include cleaning, maintaining, mending and emptying nets. Deckhands also place catches such as shrimp into special bags, empty and bait traps, and clean the deck and bilge. A deckhand takes directions from the captain who, aside from guiding the boat, also operates the hauler or winch that is used to lift traps and nets into the boat.

[14] The fishing season for most of the species fished by the Band runs typically from March to November. In order to distribute jobs equally amongst the qualified deckhands in Eskasoni, the EFWC compiled a list annually on which band members would place their names and phone numbers. As a boat would get prepared to go out to sea, the EFWC would call up deckhands off the list on a rotational basis. The fishers were compensated based on the size of the catch and the price at which it was sold. This form of employment was considered seasonal work that entitled a fisher to obtain employment insurance benefits in the off-season, provided his or her earnings exceeded a basic threshold (about \$11,000). Mr. Dennis placed his name on the list and was called to work in 2001, 2002, and 2003. His 2003 earnings were just under \$30,000. Thus, Mr. Dennis and the other EFWC deckhands were neither full-time nor indeterminate employees of EFWC. Their employment was casual. In 2005, the EFWC handed off management of the commercial fishery to a corporation called Crane Cove Seafoods, which was wholly owned by the Band. For all intents and purposes, the Band remained in charge of its commercial fishery.

[15] According to the testimonies of the current Chief and several band councillors, reports began surfacing during the commercial fishery's first two years of operation in 2001-02, about fishers going out to sea while under the influence of drugs or alcohol. Therefore, on December 10, 2002, a motion was passed by the Band Council that commercial fishers submit to mandatory drug testing. In the ensuing months, the Band appointed Jim Maloney to take charge

of the development of a drug testing policy. Mr. Maloney was a member of another First Nation community in Nova Scotia. In the past, the Band had assigned him the task of developing other programs. By the summer of 2003, the proposed policy, entitled the “Eskasoni Fit to Work (Drug and Alcohol) Program Policy”, had been prepared.

[16] Mr. Maloney testified that he conducted a number of information sessions for Eskasoni’s commercial fishers in order to introduce them to the new policy. Posters were put up advertising the events and a one-page letter summarizing the policy was sent to the address of anyone involved in the EFWC fishery. The same letter was distributed to anyone who attended the information session. The letter was entitled “Open Letter to the Community of Eskasoni - Fit to Work (Drug and Alcohol) Program”. It stated that the people of Eskasoni had identified drug and alcohol abuse as a serious problem that was affecting everyone’s life within the community and that the Band’s Chief and Council were committed to resolving the problem. The letter went on to state that the policy was required in the Eskasoni commercial fishing operations, since commercial fishing is “recognized as one of the most dangerous professions, making safety in the workplace essential in protecting the lives of those involved”.

[17] The letter also noted that the policy provides a series of “progressive steps, linked to treatment, for those who test positive”, so that they may ultimately return to work.

C. The “Fit to Work” Policy

[18] On September 16, 2003, the proposed policy was formally adopted by the Band Council. Its implementation was to begin during the 2004 fishing season. The policy states that its general purpose is to ensure that EFWC employees “comply with and set an example in the community, by being drug and alcohol free in a safe, alcohol and drug-free workplace”. The policy also extends to “contractors” and “contract workers”. Some of the specific objectives mentioned include:

- preventing employees from being in a position where impaired performance becomes a risk to them and the safe operation of EFWC facilities and equipment,

- preventing accidents and injuries resulting from the use of drugs and alcohol, and
- encouraging and supporting those with drug, alcohol and substance addictions in achieving and maintaining a “drug and alcohol free quality of life”.

[19] The policy puts an onus on EFWC management and staff to read, understand and acknowledge the policy. Employees must meet a “fitness to work” standard, which is defined as being fit and capable of performing their work. This includes being free from the influence of alcohol, illegal drugs, medications or substances that will affect performance. Employees are expected to seek advice and follow appropriate treatment if they suspect they have or are developing a substance dependency.

[20] The policy provides that all EFWC employees are subject to drug and alcohol testing as a requirement of employment. Any job offer is conditional on passing the required test. Furthermore, random testing is to take place at the discretion of the employer throughout the year, without any advance notice. Testing may also take place after the occurrence of a “significant incident” that causes or has the potential to cause death, injury, or loss/destruction of equipment. In addition, if managers have reasonable cause to believe that an employee’s actions, appearance or conduct while on duty are indicative of drug or alcohol use, they may require that the employee be tested, but the decision must be made with the concurrence of a second person wherever possible.

[21] The substances for which testing is conducted are the following:

- under the category of drugs - cannabinoids (marijuana, hashish, hash oil), stimulants (cocaine, opiates, amphetamines) and veterinarian anaesthetics (phencyclidine (PCP)); and,
- under the category of alcohol – beverage alcohol, ethyl alcohol or other low molecular weight alcohols, including methyl or isopropyl alcohol.

The policy details how the screening test is carried out to see if any drugs and alcohol are present in amounts exceeding certain concentration levels (which are listed in a table). A positive result

(i.e., in excess of these “cut-off” levels) is submitted to a more advanced test for further confirmation. Positive confirmation tests are then reported to a medical review officer for further evaluation and “to ensure that an individual is not assigned a false positive laboratory result”.

[22] Where the medical review officer’s evaluation confirms the initial result and rules out the possibility of a “false positive”, a series of assessment and treatment options are made available under the policy. If it is the first time that the individual has tested positive, it will be “recommended” that the person seek drug and alcohol assessment and/or treatment, but this is strictly voluntary. The phone numbers for the Native Alcohol and Drug Abuse Counselling Association (NADACA) and the Mi’kmaq lodge, where addiction counselling is available, are listed in the policy. An individual who wants to try to be hired again or to return to work must complete a “return to work” drug screening test that produces a negative result before being considered for the job.

[23] If the individual tests positive a second time, then he or she will be required to see an addiction counsellor at NADACA for assessment but follow-up treatment will be voluntary, not mandatory. The individual remains ineligible to work. After a third failure, assessment and treatment become mandatory. The individual must complete the treatment before being re-hired, and the re-hiring is subject to the findings and recommendations provided by the addiction counsellor or treatment facility.

[24] After a fourth failure, the person will be dismissed and not eligible for re-hire until “proof of sobriety” for a period of one year. Thomas Johnston, the EFWC’s executive director, testified that the EFWC interpreted this period not to mean exactly twelve months but rather just until the next fishing season. Thus, even if some fishers did not pass the fourth test in October, they could nonetheless enter the testing process all over again the following spring, along with all the other fishers.

[25] The policy stipulates that the EFWC will cover the cost of an initial substance abuse assessment of an individual who tests positive, but the cost of any other assessments or treatments is not covered by the EFWC. All testing results are confidential and are not to be disclosed except

to the appropriate EFWC manager. Communication and correspondence of positive test results utilize a code rather than the individual's name and EFWC management is to maintain the list that matches the names with the codes in a secure location.

[26] An individual who commits a "policy violation" during an "on-call period" or while working on EFWC premises, vessels or equipment is, at EFWC's discretion, subject to immediate dismissal, suspension from work without pay, removal from EFWC vessels or premises, police notification where there is the presence of illegal drugs, or placement on "return to work" status. In this latter instance, the individual will be considered for a return to work after being re-tested, as discussed above.

D. The 2004 Testing

[27] Mr. Maloney testified that for the 2004 fishing season, the Band hired an outside firm, East Coast Mobile Medical Inc. (East Coast), to conduct the drug testing on site in Eskasoni over the course of one day. He added that he sent notices to all fishers advising them that they had to register under the "Fit to Work" Program by March 8, 2004, on a list set up at the EFWC's offices. These notices were also broadcast on the local community television station.

[28] Mr. Dennis claimed in his testimony that he never got this notice and that he only learned of the drug testing process mere days before it was conducted on May 14, 2004. The evidence calls into question this claim. He testified that he was "out to sea" in January and February, when the notices were distributed, although the evidence was that crews would usually leave port for no more than three days at a time. In addition, Mr. Dennis' denial of knowledge was contradicted by the drug testing registration sheet that was filed in evidence. His name appears on the list along with his telephone number, his Band number, and an annotation stating "after 5 pm". Mr. Maloney testified that he recalled Mr. Dennis phoning him to register and indicating that he would prefer doing the testing after 5 pm. Mr. Maloney added that he did not object to this request since the EFWC was trying to be as flexible as possible in order to ensure that each fisher would be tested.

[29] Furthermore, there is evidence that in March 2004, after the EFWC began registering persons for the testing, several fishers joined forces to form a union to oppose the imposition of the “Fit to Work” policy. Mr. Dennis helped organize the union and his name appears as a supporter in an open letter that was prepared prior to March 15, 2004. The letter invites all Eskasoni residents to attend a union meeting dealing with the “Fit to Work” policy. The meeting was held on March 22, 2004, and the minutes show that Mr. Dennis attended. It does not seem credible, therefore, for Mr. Dennis to claim that he did not know until mere days before, that the testing was forthcoming.

[30] Mr. Dennis disapproved of the policy. He felt that it was an attack by the Chief and the Band Council against certain Band members, to prevent them from earning a good income. After being tested on May 14, 2004 (urinalysis and breathalyser), he contacted Mr. Johnston, who at the time was director of operations at EFWC, and learned that he had failed the urinalysis by testing positive for the presence of cannabis. Mr. Dennis testified in chief that he was not told he could be re-tested that season. He claims that Mr. Johnston told him that he would be denied work that summer and that he could only re-test the following year at his own cost.

[31] Mr. Dennis’ evidence on these points is contradicted by the evidence of Mr. Maloney and East Coast’s business records. Mr. Maloney recalls having spoken to Mr. Dennis on the phone after he had failed the pre-employment drug testing. He remembers Mr. Dennis stating that he was eager to be re-tested and, hopefully be allowed to return to work that summer.

[32] So Mr. Maloney undertook to book a new appointment for testing, which would have to take place at East Coast’s facility in North Sydney, Nova Scotia. Mr. Maloney testified that he advised Mr. Dennis by telephone that an appointment was set for June 18, 2004. Mr. Dennis never showed up for this appointment. Mr. Maloney therefore booked a second appointment for Mr. Dennis, for August 6, 2004. Mr. Maloney recalls telling Mr. Dennis that it was important he attend because East Coast had billed the Band for the first appointment even though Mr. Dennis had not shown up. The East Coast records show that Mr. Dennis had been booked for both of these appointments, but that he had not shown up on either date.

[33] I find this evidence persuasive and I am not convinced by Mr. Dennis' claim that he was told to come back "next year" to be re-tested. I note that such a response does not accord with the policy, which states that a person is entitled to be re-tested as many as four times. If the individual fails the fourth test, he or she may still take the test again one year later. This is the only time limitation mentioned. There are no time conditions attached with respect to the first re-testing. Presumably, whenever an individual feels ready to retake the test, he may do so. The entire testing and re-testing process set out in the policy is intended to be completed by the end of the annual fishing season, in keeping with the re-hiring process that takes place at the start of each fishing season. Thus, every fisher must pass a test every year, even if he or she tested negative the previous season. Furthermore, the policy provides that even in the worst case, where an individual fails the test four times, he or she remains ineligible for re-hire only until the following year.

[34] Mr. Dennis emphasized in his testimony that East Coast only came to Eskasoni once a year to test all the fishers. This may have been the source of his misunderstanding regarding when he could take a re-test. There was some suggestion in the evidence that he may have been unwilling to go elsewhere to take the test. It was not unreasonable, however, for the Band to have required an individual who is seeking employment but failed the initial on-site test, to attend East Coast's offices in North Sydney (about an hour's drive from Eskasoni) to be re-tested, rather than paying for East Coast to bring its equipment down to Eskasoni again just to test one individual.

[35] Although Mr. Dennis did not go to East Coast's facility in North Sydney to be tested, he did visit the Eskasoni Community Health Centre on June 23, 2004, where he was examined by an attending physician. The physician handwrote Mr. Dennis a five line note addressed "to whom it may concern" in which he stated that, based on his examination, Mr. Dennis "appears to be fit to work". No further comment is provided and in particular, there is no mention made of any testing by the physician for drugs or alcohol.

[36] Since Mr. Dennis did not end up taking another drug screening test in 2004, he was not cleared to work as a fisher for the EFWC that year.

[37] After learning that he had failed the drug screening test, Mr. Dennis filed a “Letter of Grievance” with the Band, complaining of “unfair testing” by the EFWC. He alluded in the letter to a protest that the fishers involved in the union had conducted outside the EFWC offices for several days in May 2004. Allegedly, the Chief had met with them and agreed to allow fishers to work even if they tested positive. However, several days after the alleged agreement, the Band Council met and reaffirmed that the policy would be enforced. Mr. Dennis refers in his grievance to the Canadian Human Rights Commission policy on alcohol and drug testing which he had apparently consulted. He asserted that the Commission’s policy “clearly states” that his rights were being infringed.

[38] Interestingly, Mr. Dennis makes no mention in his letter of any requirement for him to use marijuana as a pain medication for his neck and shoulder. He refers to having experienced headaches, fatigue, depression, insomnia, and loss of appetite, but he attributes these problems to the “many stressors” brought upon him by the application of the policy that resulted in his “inability to work”. Mr. Dennis attached the above-mentioned physician’s note to his grievance letter.

[39] On July 7, 2004, Mr. Dennis filed the present human rights complaint, in which he stated that he was denied employment “because of the fact that I have a physical disability and I take the drug marijuana”. In his Statement of Particulars, however, which he later filed jointly with the Commission, he made no mention of a physical disability, but instead alleged that the Band discriminated against him on the basis of disability or perceived disability, which he specified as being “drug dependency”. He did not allege discrimination based on any disability relating to his back and neck injury. He led his case in keeping with the allegations set out in the Statement of Particulars. The Band, in turn, took the position that the disability in issue is drug dependency and presented its case accordingly. Although the actual complaint is somewhat ambiguous in its description of the alleged discrimination, it would in my view be unfair to the Band to treat this matter as anything other than a claim of discrimination based on drug dependency, given the way that the case has unfolded.

E. The 2005-2006 Testing

[40] Drug screening was conducted for all fishers again, in 2005, and Mr. Dennis was tested on April 22, 2005. He tested positive for “cannabinoids”. In cross-examination, Mr. Dennis was asked if he sought re-testing in 2005. He could not recall but said that he “must have been doing something”. There is no evidence in the record to indicate that he sought re-testing in 2005.

[41] As the 2006 fishing season was approaching, Mr. Dennis decided to take measures to ensure he could pass the drug screening. He stopped using marijuana altogether. However, the anguish he was feeling of not being able to earn a good living and look after the well-being of his family had led to his becoming very depressed. One evening, he began drinking alcohol even though he had been “sober” for seven years. His drinking became excessive, to the point that the RCMP had to intervene and take him to the detachment where he spent the night.

[42] Fortunately for Mr. Dennis, a community Elder learned of his troubles and stepped in to help Mr. Dennis by taking him to a sweat lodge. Traditional healing methods were administered to him for his pain, including the application of bear grease. Mr. Dennis testified that he became better able to cope with his pain as a result of these healing methods.

[43] On March 24, 2006, Mr. Dennis was tested again for the presence of drugs. This time the tests came back negative. His name was thus added to the list of available fishers and he worked that season.

[44] In 2007, Mr. Dennis did not register to take the EFWC’s drug testing. Mr. Dennis apparently formed the mistaken opinion that he did not need to formally register for testing in 2007 because he had passed the previous year. He thought he was entitled to merely show up on the day of the testing and provide his sample. This understanding was inaccurate. Mr. Dennis (and all fishers) had to formally register each year for testing. Since Mr. Dennis had not registered he was not entitled to submit himself for testing in 2007.

[45] Regarding the 2008 season, the hearing was completed as the fishing season was about to start. The EFWC's fishing manager testified that Mr. Dennis had not shown up for his scheduled drug testing appointment on March 28, 2008. The evidence before me with respect to this event and the 2008 season overall is, however, insufficient for me to make any findings.

III. THE LEGAL PRINCIPLES APPLICABLE TO THIS CASE

[46] Mr. Dennis' complaint is brought pursuant to sections 7 and 10 of the *Canadian Human Rights Act*. Section 7 makes it a discriminatory practice to refuse to employ, or to continue to employ, an individual, on a prohibited ground of discrimination. Section 10 makes it a discriminatory practice for an employer to establish or pursue a policy or practice that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

[47] Section 3 of the *Act* designates disability as a prohibited ground of discrimination. Section 25 of the *Act* specifies that the term "disability" includes "previous or existing dependence on alcohol or a drug".

[48] The initial onus is on a complainant to establish a *prima facie* case of discrimination (*Ont. Human Rights Comm. v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at para. 28 ("O'Malley")). A *prima facie* case is one which covers the allegations made, and which, if believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent.

[49] Once the *prima facie* case is established, it is incumbent upon the respondent to provide a reasonable explanation for the otherwise discriminatory practice (*Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204 at para. 18). An employer's conduct will not be considered discriminatory if it can establish that its refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is based on a *bona fide* occupational requirement (BFOR) (s. 15(1)(a) of the *Act*). For any practice to be considered a BFOR, it must be established that

accommodation of the needs of the individual or class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost (s. 15(2) of the *Act*).

IV. THE SECTION 7 COMPLAINT

A. Has a *prima facie* case been established under s. 7?

(i) Was Mr. Dennis disabled (i.e. drug dependent) within the meaning of the *Act*?

[50] I find that Mr. Dennis did not demonstrate that he was disabled within the meaning of the *Act*. The evidence unquestionably establishes that he was a user of marijuana but it was not sufficient to establish *prima facie* that he was drug dependent.

[51] Mr. Dennis testified that he suffers from chronic pain as a result of the traffic accident in which he was involved in 1988. Several documents dating from 1988-89 were filed detailing some of the treatments that he received following the accident. His common-law spouse attested in her evidence to the outward signs of pain that Mr. Dennis presents to this day. There is no basis, in my view, to question Mr. Dennis' claims about the physical pain that he experiences.

[52] More importantly, however, no evidence was put before me that he was dependent on marijuana when he failed the drug test in 2004 and filed this complaint. To establish a *prima facie* case, the evidence led must be sufficient to “cover the allegations made”. Mr. Dennis’ allegation is that he is “dependent” on the drug and is therefore disabled. But I find that his evidence only demonstrates that he used the drug, not that he was “dependent” on it. *The New Shorter Oxford English Dictionary*’s definition for the word “dependent”, in the context relevant to s. 25 of the *Act*, is the following:

Resting entirely on someone or something for maintenance, support, or other requirement; obliged to use something; *unable to do without someone or something, especially a drug*; maintained at another’s cost.

(emphasis added)

The French rendering of s. 25 utilizes the term “la dépendance ... envers l’alcool ou la drogue”. *Le Petit Robert de la langue française, 2006* defines “dépendance”, in this context, as:

État résultant de la consommation répétée d’une substance toxique, qui se caractérise par le besoin de continuer la prise et d’augmenter les doses.

Translated to English :

State resulting from the repeated use of a toxic substance, characterized by the need to continue its use and increase the amount taken.

[53] Both these definitions, in my view, capture the meaning of the term as it is used in s. 25. Applying these definitions to the present case, I find that there is insufficient evidence to establish *prima facie* that Mr. Dennis was dependent on marijuana (i.e., unable to do without it, or alternately, in a state where he needed to continue its use and increase the amount taken).

[54] He did not call any physician (including the Eskasoni Community Health Centre physician whom he visited on June 23, 2004) to testify that he was dependent on marijuana, nor did he file any expert report to the same effect. No other witness was called to confirm the extent

of his marijuana usage, even though Mr. Dennis initially stated in his testimony in chief that “everyone in the community” knew of his “condition” and of his “habit”. In cross-examination, however, he testified that the majority of the people in the community did not know he smoked marijuana. Mr. Dennis claimed that even his children had not known that he was using marijuana. He complained about the fact that in not hiring him, the Band had effectively made it known publicly that he had failed the drug and alcohol pre-screening test, which he viewed as a violation of his right to privacy. On balance, it appears to me that his marijuana use was, in fact, not very evident.

[55] Mr. Dennis testified that he was using marijuana as a pain medicine, which he would take in varying amounts that he would try to “stretch out” as much as possible. The fact that the policy was forcing him to change his way of life and begin using other means to cope with his neck and shoulder pain bothered him. He preferred to use marijuana over other pain medications that his physicians had prescribed to him in the past. He stated in his evidence that he wondered why the Band was requesting him to give up his marijuana use. I note again, however, that he made no mention of any drug dependence in the grievance letter that he sent to the Band prior to filing the present complaint.

[56] Mr. Dennis confirmed that by applying traditional healing methods, he was able to accept and cope with the pain relating to the injuries he had suffered in the 1988 car accident. He therefore ceased using marijuana to deal with the pain and thus passed the EFWC’s pre-employment drug screening in 2006. He testified that he did not experience any withdrawal symptoms after stopping his marijuana use. There was no indication in his testimony or elsewhere in the evidence that the traditional healing methods he received at the sweat lodge were in any way used to address a drug or alcohol dependency. This was not a drug or alcohol rehabilitation treatment that he received.

[57] In determining whether Mr. Dennis was disabled due to a drug dependency, I am mindful that the notion of disability is not to be interpreted narrowly. Disability may exist even without proof of physical limitations or the presence of an ailment (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. City of Montreal*, [2000] 1 S.C.R. 665 at para. 76).

Nevertheless, in the circumstances of this case, the evidence regarding Mr. Dennis' drug usage does not support his claim that he was dependent on a drug. (The matter of whether the Band *perceived* him as disabled is addressed in the next section of this decision).

[58] His assertion that he used marijuana regularly has not been contradicted, and the results of the pre-employment drug testing of 2004 and 2005 would not be at odds with such a finding. However, regular use of marijuana does not necessarily constitute frequent use. As I elaborate later in this decision, expert evidence was led to show that even a single use of marijuana will be detected by a drug test even ten days later. More frequent use can be detected even one to two months later.

[59] I am not persuaded that the mere presence of the drug in his system, nor for that matter the other evidence regarding his marijuana usage, establishes *prima facie* that he was dependent on the drug within the meaning of the *Act* (i.e. that he could not do without it or that he had a continuing need to use it, in increasing amounts).

(ii) Did the Band perceive Mr. Dennis as being drug dependent?

[60] As the jurisprudence in similar cases instructs us, however, the fact that a tribunal is not persuaded that a complainant is drug dependent and therefore suffers from a disability, is not fatal to that person's human rights complaint (see *Milazzo v. Autocar Connaisseur Inc.*, 2003 CHRT 37 at paras. 82-88, *Alberta (H.R.C.C.) v. Kellogg Brown and Root (Canada) Company*, 2007 ABCA 426 at paras. 29-30, leave to appeal to SCC denied May 29, 2008 (docket no. 32505)). The prohibition against discriminating on the basis of a disability has been extended to cases where an employer refuses to employ an individual based upon a *perception* that the individual is dependent on alcohol or drugs.

[61] There is no evidence before me to suggest that the Band actually perceived Mr. Dennis to be drug dependent. Mr. Dennis certainly did not call any witnesses or produce any document affirming the existence of such an opinion. Nothing before me indicates that any questions were asked or any investigation was carried out by the Band in order to determine whether Mr. Dennis

was drug dependent (see *Milazzo* at para. 90). In fact, Mr. Maloney testified that the Band never assumed that an individual who tested positive on the first test (like Mr. Dennis) was addicted, as demonstrated by the fact that drug or alcohol dependency assessments or treatments were not required of Mr. Dennis and others like him before they could take the test for a second time.

[62] None of the Band's employees who gave evidence at the hearings testified knowing that Mr. Dennis was using marijuana. Mr. Dennis asserted in his own testimony that he never went to work in previous years while under the influence of marijuana. Thus, presumably, no outward signals were available to the EFWC and the Band of his marijuana usage, let alone any indication that would result in their perceiving him as being drug dependent.

[63] As the *Milazzo* Tribunal held, at para. 92, in order to benefit from the protections afforded by the *Act*, a complainant must demonstrate the involvement of one or more of the prescribed grounds listed in s. 3 of the *Act*. Having failed to establish even on a *prima facie* basis that he was either disabled due to drug dependency or was perceived by the Band to be so disabled, Mr. Dennis has not established a *prima facie* case of discrimination, and accordingly, his s. 7 complaint is dismissed.

V. THE SECTION 10 COMPLAINT

[64] In contrast to complaints under s. 7, which relate to employer actions affecting specific, named individuals, s. 10 addresses the discriminatory effect that employer policies or practices may have or may tend to have on an individual or class of individuals (*Milazzo*, at para. 94). The focus is therefore not confined to Mr. Dennis' own situation.

A. Has a *prima facie* case been established under s. 10?

[65] Extensive evidence was led about the widespread problem of drug and alcohol use at Eskasoni. I note that one of the Band's declared objectives for adopting the policy was to encourage and support those with substance "addictions" in achieving and maintaining a "drug

and alcohol free quality of life”. The number of Eskasoni residents who sign up to be fishers has increased significantly over the years. As the proportion of the Eskasoni population that joins the ranks of the commercial fishers increases, it becomes more likely that persons struggling with substance abuse, and thus dependent on drugs or alcohol (i.e. disabled within the meaning of s. 25) will seek out this work, only to fail the drug and alcohol screening test. Those who fail will be - at least temporarily - deprived of the opportunity to work as fishers. Just as in *Milazzo*, in my view, the policy in the present case will therefore “inevitably” affect individuals who suffer from substance related disabilities.

[66] A drug testing policy that has the effect of depriving these individuals, who fall within the protected class of disabled persons, of employment opportunities, is thus *prima facie* discriminatory under s. 10 of the *Act*. I note in passing that the Band’s counsel acknowledged in his final submissions that “a great deal of jurisprudence” suggests that “drug testing cases” of this sort are *prima facie* discriminatory (see *Milazzo* at para. 97).

B. Has the Band discharged its burden of providing a reasonable explanation?

[67] As I mentioned earlier, once the *prima facie* case is established, the onus then shifts to the respondent to provide a reasonable explanation. In this particular case, the Band has sought to demonstrate that there was a *bona fide* occupational requirement (BFOR) for the adoption of the drug testing policy (s. 15(1)(a) of the *Act*). To do so, the Band must establish that accommodating these individuals, who are either drug dependent or perceived as such, would impose undue hardship on the Band, considering health, safety and cost (s. 15(2) of the *Act*).

[68] The Supreme Court has articulated a three-step approach to be followed in determining whether a BFOR has been established (see *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3 ("*Meiorin*"). A respondent may justify the impugned standard by proving, on the balance of probabilities, that:

- (1) The respondent adopted the standard for a purpose or goal that is rationally connected to the job or function being performed;

- (2) The respondent adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate purpose or goal;
- (3) The standard is reasonably necessary to the accomplishment of that purpose or goal. To show that the standard is reasonably necessary, the respondent must demonstrate that it cannot accommodate the complainant or persons with the complainant's characteristics without experiencing undue hardship.

(i) Did the Band adopt its policy for a purpose or goal rationally connected to the job or function being performed?

[69] The focus of this first step in the analysis is not on the validity of the standard or policy but rather on the validity of its more general purpose (*Meiorin*, at para. 59). I am satisfied, on the evidence, that the purpose of the Band's adoption of the "Fit to Work" policy was to prevent employees from being injured as well as from causing damage to the Band's property, due to drug or alcohol related impairment. These objectives are in my view rationally connected to the performance of fishers' jobs (deckhands, first mates, captains) in a safe environment, as well as helping to assure the long term viability of their jobs.

(ii) Did the Band adopt its standard in good faith?

[70] At this step in the analysis, a respondent must establish that it adopted the standard or policy with an honest and good faith belief that it was necessary to the accomplishment of its purpose, with no intention of discriminating against the claimant (*Meiorin*, at para. 60). If the imposition of the standard was not thought to be reasonably necessary or was motivated by discriminatory *animus*, then it cannot be a BFOR.

[71] As I indicated earlier, soon after Eskasoni's commercial fishery began operating in 2001, reports began surfacing of fishers being out at sea while under the influence of drugs or alcohol. The current Chief of the Eskasoni Band is Charles Joseph Dennis. He was director of the commercial fishery at that time. He testified that he was receiving many complaints from people working on the Band's vessels who were worried about their personal safety because other fishers

were impaired. Chief Dennis recalled one captain telling him that while out at sea one day, he thought all his crew had fallen overboard. Just as he was about to call the coast guard, he noticed puffs of smoke coming from inside the vessel's lifeboat. All three deckhands had crawled inside it to smoke drugs.

[72] Thomas Johnston, who was EFWC Director of Operations until 2004, testified that on one occasion a captain was so drunk while fishing that he passed out. One of the deckhands had to steer the vessel back into port and in the process bumped it against the wharf. Mr. Johnston also heard reports that some fishers were trafficking in drugs on the Band's fishing boats as well. As I already mentioned, there is widespread usage and abuse of alcohol and drugs within the Eskasoni community.

[73] The Band contends, therefore, that it adopted the "Fit to Work" policy in the honest and good faith belief that it would assist in preventing or reducing the incidence of alcohol and drug usage by its employees and thereby prevent them from being injured and causing damage to Band property. As a bonus, the Band hoped that the policy would help curb substance abuse within the community at large.

[74] Mr. Dennis appeared to suggest in his evidence that the policy was adopted with another intention entirely: to adversely affect particular individuals or families within the Eskasoni community. The evidence does not support this claim, however. The minutes from a number of Band council meetings were produced at the hearing. They document the councillors' broad support for the policy's adoption. Their declared reasons for supporting it all relate to workplace safety and the encouragement of substance-free living within the community. No other motive is indicated. Mr. Dennis suggested that some of the councillors were coerced into adopting these positions of support for the policy but he did not present any foundation for this belief. His assertion was not corroborated by other witnesses or evidence. Mr. Maloney, in his testimony, stated that "family issues" arise in any small community and that "family feuds" and factions might have played a "little bit of a role", but that the major issue for the Band was safety and maintaining the fishery's productivity and viability. He did not elaborate any further on how these feuds may have played themselves out. Mr. Johnston agreed that a dispute did arise

between some families over the policy, but that only occurred after its adoption, as groups within the community began taking sides over its implementation. Of note, none of the alleged “targets” of the “Fit to Work” policy were called as witnesses to comment on whether they perceived the situation in the manner alleged by Mr. Dennis.

[75] Perhaps most importantly, as the question relates to the second of the three steps in the *Meiorin* analysis, there has been no assertion made or evidence brought forward that the Band’s “animus”, as expressed by the Supreme Court in *Meiorin*, was to discriminate against drug dependent (i.e. disabled) persons, which is the group that Mr. Dennis alleges in his complaint had been discriminated against.

[76] I find the evidence regarding the Band’s alleged ulterior motives for the adoption of the policy to be unpersuasive. They constitute nothing more than mere conjecture on Mr. Dennis’ part. I am satisfied that the Band has established that the policy was adopted in the good faith belief that it was necessary for the fulfillment of the objectives stated in the first step of the *Meiorin* analysis.

(iii) Is the standard reasonably necessary to the accomplishment of the purpose or goal?

[77] In order to satisfy this step in the analysis, the Band must demonstrate that it cannot accommodate drug and alcohol dependent persons (i.e. disabled persons) who test positive for the presence of drugs or alcohol in their systems, without experiencing undue hardship considering health, safety and cost (s. 15(2) of the *Act*). The Band alleges that undue hardship would be experienced in this case based both on the factors of safety and cost.

a) Safety as a consideration – a safe workplace

[78] The Band contends that it is required to make every effort to prevent impaired employees from working on its vessels for the safety of those very employees. The Band must therefore test its workers for the presence of drug and alcohol. Any accommodation that would prevent the

Band from keeping workers who fail their test off its vessels would impose undue hardship on the Band.

[79] On the question of workplace safety, Mr. Dennis conceded in his Statement of Particulars, prepared jointly with the Commission, that the work of a captain of a commercial fishing vessel is “safety sensitive”. Mr. Dennis did not make any similar concession with respect to the other available jobs on the Band’s fishing vessels. The Band, for its part, contends that safety is a major concern with respect to all of its employees who fish on its vessels (captains, first mates, and deckhands).

[80] For the purpose of this analysis, I do not believe it is important to make distinctions between so-called safety sensitive work and non-safety sensitive work. What must really be determined is whether accommodating the class of individuals in questions (drug or alcohol dependent persons) would impose undue hardship to the Band considering safety, as the matter has been raised in the present case.

[81] Greg Johnstone, the consultant who helped draft the “Fit to Work” policy, was called by the Band to testify as an expert in risk management in the workplace, occupational health and safety, as well as in toxicology. His expertise in these areas was established at the hearing. Mr. Johnstone stated that as part of any employer’s duty to ensure the health and safety of all “workplace parties”, the guiding rule or principle is one of prevention. One of the key elements of a health and safety management system consists of identifying, evaluating and controlling hazards. The greater the exposure to hazards that could lead to accident or harm, the greater that safety becomes a matter of concern for the job, thereby justifying the need for effective recognition, evaluation, control and prevention of the harm associated with the hazard.

[82] In the case of a commercial fishing operation such as the one run by the Band, the very nature of the activities and the environmental exposure to the elements create large hazards, risks, and probabilities of occurrence of harm, which according to Mr. Johnstone render the work “highly safety-sensitive”. In this context, I take him to mean that safety thus becomes a matter of increased concern due to the prevailing working conditions. Mr. Johnstone pointed out that safety

becomes an issue even with respect to the most mundane of jobs on a vessel that is out on the water and away from shore because if an urgent situation arises (e.g. rough seas, fire on board, pulling in a person who has gone overboard, etc.), every worker would be expected to assist. Mr. Maloney testified that the vessels fish 100 to 200 km off-shore, where weather and ocean conditions change quickly. Some boats have had their windows blown out by the rough seas and crews have had occasion to simply cut their lines and rush back to port.

[83] Mr. Johnstone referred to a number of studies regarding fishing vessel safety confirming the dangerous nature of commercial fishing. He also cited the Nova Scotia Workers' Compensation Board Rate Book, which lists the premiums payable by employers. They vary depending on the levels of compensation that the Board has had to pay to workers in the past. According to Mr. Johnstone, the actual risk of harm associated with particular types of jobs is thus reflected in the magnitude of the premiums. The premiums for jobs involved in the commercial fishery (on the water) are near the top of the scale for the province. In Mr. Johnstone's opinion, as soon as a worker sets foot on a vessel and leaves port, the very nature of the work becomes dangerous with numerous specific hazards and circumstances under which those hazards can lead to harmful outcomes including loss of life.

[84] Mr. Dennis spoke about some of those hazards in his own evidence. His vessel broke down four times in one year and had to be towed back into port. He stated that while the Coast Guard Service will not let fishers go out on "windy" days, he has been at sea on occasion in rough waters. When he works on vessels harvesting snow crab, the equipment he uses includes a hauler comprised of a system of pulleys and hydraulics, which lifts traps out of the water. The captain controls the hauler while the deckhands grab the ropes, empty the traps, re-bait them and place them up over the edge of the boat to be dropped into the water. Shrimp boats operate with a winch that pulls up a net. Deckhands empty the net as it is hauled in and place the shrimp into bags. Mr. Dennis admitted that if the equipment involved in the commercial fishery is not properly maintained, the fishers could get hurt if, for instance, a cable is not in good shape or one of the pulleys comes loose.

[85] Mr. Dennis was the only deckhand on the vessels on which he worked who wore a life vest (which he had purchased for himself). Deckhands are not required to wear life vests at sea, which exposes them to further risk of harm if they fall overboard and which would hamper, one would think, the rest of the crew's efforts to save them even more. Mr. Dennis also recalled an incident where a fellow deckhand dove under the water to untangle a rope that was caught in the boat's propeller. The individual was badly injured in the process.

[86] In my view, the evidence is more than persuasive that workplace conditions put the safety of all employees working on the Band's fishing vessels very much at risk, including the job of deckhand.

b) Impairment is a safety hazard

[87] According to Mr. Johnstone, an individual whose functional capacity and fitness for dangerous work is impaired due to drugs or alcohol, is a major hazard to his or her safety and that of others within this type of workplace environment. Such a hazard must be approached with the same prudence and due diligence as one would exercise in the presence of, for instance, faulty or inadequate equipment, a lack of employee competency, or unsafe working conditions. In these circumstances, an employer must apply the same principles and measures of a sound safety management system to a person, who is in essence a hazard, as they must to non-human hazards. That is, the employer must proactively seek out, evaluate, monitor, and control the respective hazards in the interests of preventing the adverse outcomes that could reasonably be expected to occur if they were not controlled. Mr. Johnstone associates this approach with the concept in risk management known as the Precautionary Principle, which holds that protective action should be taken by stake holders when there is reasonable evidence that not to do so could lead to harm.

[88] The “Fit to Work” policy adopted by the Band provided that testing would be conducted for the presence of alcohol and five types of drugs (known as a Panel V test):

- Cannabis (marijuana, hashish, hash oil),
- Amphetamines (e.g. speed, “crystal meth”)
- Opioids or Opiates (e.g. morphine, oxycodone),
- Cocaine (including Crack)
- Phencyclidine (PCP) (a veterinary general anaesthetic).

Mr. Johnstone referred to a Panel V test as being “typical” and constituting the “industry standard”. All of these drugs can impair a person’s functions in the period immediately following consumption.

[89] According to Mr. Johnstone, the mere presence of a drug known to be capable of impairing the worker should be the basis of employing the Precautionary Principle, by removing the subject employee from the workplace where safety is a serious concern, until adequate evaluation and management of any associated risk is achieved, particularly where the amount of the drug detected exceeds acceptable cut-off levels.

[90] This evidence is persuasive. It is clear, in my view, that an impaired employee poses a major hazard to the safety of himself and others in workplaces such as the fishing vessels of the EFWC.

c) **Is the drug and alcohol screening process an effective means to detect the presence of a hazard in the workplace?**

[91] Mr. Dennis contends that drug and alcohol screening is ineffective as a means for detecting the presence in the workplace of a hazard related to the impairment of workers. He argued, for instance, that testing for cannabinoids does not measure present impairment but merely the presence of the drug in the individual’s system from past usage. Mr. Johnstone

explained in his testimony that cannabis is a drug that is absorbed by body fat. Although the blood level of the drug may drop, an amount continues to leak out from the body fat. A single usage of marijuana may be detected (i.e., will exceed the levels established in the “Fit to Work” policy) up to ten days later. Regular usage (weekly or daily) may be detected one or even two months later.

[92] Is there, therefore, any value in testing for drugs such as cannabinoids where the usage may have occurred weeks earlier and where the testing is not conducted while the subject is at work? Mr. Johnstone testified that there are lingering and residual effects associated with drug use, including cannabinoids. These effects include sustained disturbances in body functions (sleep and hormone disturbances), nutrition deficiencies, health or toxicity damage to organ systems, preoccupations with relationship difficulties, and even the financial or legal problems associated with drug use. Even if a person has suspended or ended his substance use, one or more of these symptoms can contribute to relapse or return to use, perhaps while the person works on a vessel. In the case of alcohol, Mr. Johnstone referred to hangovers, which persist even though the alcohol may no longer be present in an individual’s blood. The lingering effects such as headaches and tiredness will continue to impair the person’s functionality and thereby put him or her at risk.

[93] Mr. Johnstone testified that some drugs like PCP, cocaine, as well as marijuana when taken in high dosages, can result in the user experiencing flashbacks well after the drug was taken. These flashbacks result in sensory perceptions that cause the user to become preoccupied with fantasies, unpleasant memories or other distractions, resulting in impairment. Such flashbacks are particularly profound with drugs like PCP. Mr. Johnstone pointed out that nowadays, PCP has been known to be added to street drugs like marijuana to give it an increased effect, simulating a “good” quality product.

[94] In the broader sense, with regard to the value of finding persons testing positive even though they are no longer impaired, Mr. Johnstone points out that the detection of a drug that is known to impair worker safety can and should be treated in much the same way as the smell of alcohol on a driver’s breath alerts a police officer to the necessity of inquiring into the driver’s

blood alcohol level. As Mr. Johnstone notes, the big problem from a safety perspective is the high level of uncertainty associated with having a positive test while not knowing the extent of impairment, if any, present in the worker and how that may increase risk. In his opinion, drug testing is an effective and useful measure that provides some objective foundation from which to proceed with other measures that may ultimately effectively address problems. As the Tribunal in *Milazzo* similarly found, at para. 171, although a positive drug test does not indicate that a worker was actually impaired while on the job, it serves as a “red flag” that can assist in identifying workers who are at higher risk.

[95] Are there any alternative means for assessing the risk? Could the Band rely on the fishers themselves to refuse to board a vessel if they are under the influence of drugs or alcohol? Mr. Dennis testified that he never worked while under the influence of marijuana. Such assurances, however, do not preclude the possibility of the fishers continuing to be subject to the lingering post-usage effects that Mr. Johnstone highlighted in his evidence. More importantly, Mr. Johnstone pointed out that drug users are not inclined to notify their supervisors of their drug use or impairment, and are in fact much more likely to deny their use and the drug’s effects on them. Once drug users reach the advanced stages of abuse or “addiction” (stages which presumably would come within the meaning of drug dependency under s. 25 of the *Act*), many manifestations of that state contribute to denial and their inability to evaluate their own state of fitness.

[96] Can supervisors themselves be relied upon to identify drug impairment amongst their employees? The “Fit to Work” policy anticipated this possibility. In the list setting out management responsibilities under the policy, managers were directed to confront employees about any observed impairment and to suggest such employees obtain – or refer them to – appropriate assessment and treatment. Managers could submit employees whom they reasonably suspected to be using drugs or alcohol, to testing. In the period leading up to the policy’s implementation, the Band provided training on how to identify employee drug usage during the information sessions that were given exclusively to captains.

[97] Mr. Johnstone testified that while subjective observations may be of some use, they are not an effective means to assess risk. To begin with, there may be insufficient interaction between the supervisor and the employee to enable him to observe any impairment. The Band's fishing vessels obviously do not constitute large workplaces but nevertheless, evidence was led of at least one captain who was apparently so preoccupied with his own job tasks that he failed to observe his entire crew sneak away into a lifeboat and consume drugs. Of greater concern is the state of the supervisors themselves. As I indicated earlier, there were incidents reported of captains being impaired by drugs or alcohol. On the water, there is no one to supervise them. Finally, even the most well-trained supervisor may be effectively fooled by an employee who is in fact using drugs. Mr. Johnstone testified that despite his many years of training and experience in the areas of toxicology and impairment, he can be manipulated by an experienced person with a history of drug use. Drug and alcohol testing, therefore, provides an objective scientific tool that cannot be fooled like individuals who would draw their conclusions based solely on subjective observations of a person's eyes or demeanour, for example.

[98] Some may also question the effectiveness of testing given the possibility that individuals may refrain from using drugs or alcohol in advance of their test, pass the screening, but then use drugs or alcohol thereafter and possibly work while still under their effect. Mr. Johnstone addressed this concern by pointing out that pre-access testing is an opportunity to screen someone before placing that person and his co-workers in a hazardous situation. However, it is possible that a person will test negative and then use a substance thereafter and thus go to work impaired. Nevertheless, the process is worthwhile in at least helping to identify those who are so dependent that they have lost self-control and cannot regulate their consumption, if only long enough to pass the test.

[99] I am satisfied, therefore, that the Band's drug and alcohol screening process is an effective means to detect the presence of safety hazards within the workplace and ultimately, of attaining the goal of preventing fishers from working while impaired.

d) Cost as a factor – The impact on the Band’s commercial fishery

[100] Safety was not the only reason for the Band to be concerned about the hazards and risks created by the presence of impaired workers within the workplace. The Band relies heavily on the proceeds from the commercial fishery for the general well-being of the community and its members. The Band was worried about the financial losses it would suffer were the fishery’s operations to be disrupted.

[101] The Eskasoni Band’s finances have been in a critical state for years. By 1995, its accumulated deficit had reached \$14 million. The Department of Indian and Northern Affairs (INAC) intervened and imposed a system of “co-management” on the Band whereby an independent auditing firm was assigned to co-manage the Band’s operations. Since 2001, Alan Simpson, a chartered accountant, has served as the Band’s co-manager. He testified that a 15 year plan has been put in place to reduce the deficit by \$875,000 annually. This objective has to be met while at the same time, the Band must continue to provide services to the community that include social assistance (about \$10 million per year), education (another \$10 million annually), and housing (about \$1 million per year). The Band’s total operating budget is about \$50 million. According to Mr. Simpson, INAC and other government funding does not exceed \$30 million. The Band therefore relies on other sources of funding to balance its budget and meet its deficit reduction objectives. These additional sources include gaming, tobacco sales, and the commercial fishery. The latter accounts for about \$2 million in net annual contributions to the budget. Without the infusion of the commercial fishery revenues, the Band would be unable to meet its targets. It would otherwise be required to cut spending in sectors such as housing or social assistance. This reliance on commercial fishery revenues and other local sources of income is accentuated by the fact that the Band’s population, according to Band manager Gerard Francis, is increasing at a much greater rate than the rate at which government funding has been rising.

[102] The Band has faced some significant challenges in maintaining its revenues from the commercial fishery. Seafood prices have dropped significantly since 2001 when the EFWC’s post-Marshall Agreement commercial fishery first began operating. There has only been a very modest rise in prices in the last year, solely with regard to a few of the species harvested.

Furthermore, the increase in operating costs, namely fuel for the vessels, threatens to cut into profits, although this phenomenon was likely not as much a factor in 2004 when Mr. Dennis filed his complaint. The point is that the viability of the Band's commercial fishery is fragile; any number of factors may put it at risk. At the same time, the Band relies heavily on the revenues generated from it, not to mention the roughly one hundred fishers and their families who depend on the income they earn from the seasonal work and the employment insurance benefits to which they are then entitled in the off-season. Employment opportunities in Eskasoni are limited and unemployment rates are high. The availability of this gainful employment, in turn, eases the demand for social assistance from the Band.

[103] The Band argues that allowing the use of alcohol and drugs on the vessels to go unheeded will put this source of income at risk. Mr. Maloney mentioned in his evidence that by 2003, problems were developing regarding the availability of crews. Call-outs for deckhands came at all hours of the day, including overnight, due to changing weather patterns and tides. Eskasoni's vessels were deployed from harbours that were quite a distance away from the community (e.g., Louisbourg, Arichat), which meant that crews needed a bit of time to reach the vessels. The "window of opportunity" was therefore small. According to Mr. Maloney, many crew members did not respond to these calls for duty and their failure to do so was often due to drug or alcohol use. They just were not in a condition to go to work. In 2003, a lot of product was left in the water, including 300,000 lbs. of shrimp worth about \$600,000. Other bands had to be invited to collect the shrimp.

[104] Gerard Francis, the Band's manager, testified of his fear that the DFO may revoke the Band's licences and seize its vessels if it caught crews using drugs and alcohol while at sea. Another concern, of which the Band was aware when the policy was adopted according to the testimony of several witnesses, was the potential for criminal liability under amendments to the Criminal Code enacted following the tragic loss of life at the Westray mine in Nova Scotia. Bill C-45 created an explicit duty amongst those who have responsibility for directing the work of others to take reasonable steps to prevent bodily harm or fatal injuries among workers, failing which the employer organization and its senior officers could be charged with an offence, which

carries high maximum fines. The Band's legal counsel at the time had informed the Band Council of these new provisions.

[105] In sum, therefore, taking all of the circumstances into account, the Band has, in my view, established that it would experience hardship considering both safety and cost, if it failed to implement a policy in an effort to prevent crew members from working on its vessels while impaired by drugs and alcohol. But a further question remains to be answered; is that hardship "undue"?

e) Is the Band's hardship "undue"?

[106] In determining the answer to the question, courts and tribunals must be sensitive to the various ways in which individual capabilities may be accommodated, as well as be innovative yet practical when considering how this may best be done in particular circumstances (*Meiorin* at para 64).

[107] One approach to exploring the accommodation of individual capabilities suggested in *Meiorin* is to consider whether different ways of performing the job were available. The evidence in the present case precludes this possibility. All of the work to be performed by the fishers was to be at sea, whether as deckhands, first mates, or captains. The hazards and risks linked to fishing on the water cannot be dissociated from the job tasks of these positions. Mr. Johnstone testified that even people with other occupations on some commercial fishing vessels, such as cooks, are exposed to similar hazards and risks as other crew members. They are expected to contribute along with all crew members if an emergency arises while at sea. Moreover, they may be subject to particular hazards related to their specific job, such as fire or explosion from the fuels and ingredients used to cook. In any event, I have no evidence before me of any jobs other than deckhands, first mates, and captains, being available on the water, at the EFWC.

[108] Mr. Dennis contends that the EFWC should offer alternate employment in non-safety sensitive positions to those who test positive, at least for the period during which they may be receiving counselling and treatment for their substance dependency. He even went so far as to

suggest that if no other jobs are available, these fishers should continue to receive some “compensation” while in treatment.

[109] Mr. Johnston, the EFWC Executive Director, testified that aside from the fishing crews, the commercial fishery has a staff of about ten people working during the busy fishing season, most of whom are laid off at the end of the season. These positions include two “monitors” who perform security functions on the docks, two dispatchers or “call out” persons, one person who organizes the work schedule, and one person who moves the traps and lines around on the dock. There are also a number of employees with science backgrounds involved in the EFWC’s research section as well as three full-time bookkeepers/accountants. Mr. Leonard Denny, the commercial fishery manager, testified that even in the summer, the commercial fishery runs a “tight ship” in terms of staffing, consisting of the fishers and the few above-mentioned employees. No other jobs are available.

[110] I am satisfied by the Band’s evidence that it has no alternative employment to offer in the commercial fishery to persons who fail their drug screening test, and that it would be unreasonable to expect the Band to either create jobs or simply pay fishers a salary while they are in treatment for their dependencies (see *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d’Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2000 SCC 43 at paras. 15-18; *Canada (Human Rights Commission) v. Canada (Human Rights Tribunal)*, [1997] F.C.J. No. 1734 (Q.L.)(T.D.) (“*Dumont-Ferlatte*”) at para. 44). It is important to note that the fishers like Mr. Dennis are not indeterminate employees although they have the opportunity to be rehired each year. The compensation that the fishers receive is generated by the sale of the seafood that they catch. The commercial fishery does not have another source of income. More importantly, the evidence is clear that the commercial fishery was established with the mission of generating employment and revenues for the Band and its members; it was not meant to serve as a replacement for the Band’s social assistance program.

f) Does the policy place an undue burden on employees?

[111] Mr. Dennis argued that the Band's drug testing policy placed an undue burden on those to whom it applied, which according to *Meiorin* at para. 65, is one factor that can be considered in assessing whether a policy is reasonably necessary. He emphasized the unfairness to persons like him who may test positive in their test and were denied employment, but who in fact were never previously observed working while impaired.

[112] However, even if an employer's policy is viewed by some as "unfair", it does not necessarily result in a breach of the *Canadian Human Rights Act*. As the Tribunal in *Milazzo*, at para. 180, pointed out, the fact that an employee tests positive in an employer-sponsored drug test does not automatically mean that the employee is disabled and therefore entitled to the protection of the *Act*.

[113] The opportunity to re-test, obtain an assessment and receive treatment available under the "Fit to Work" policy stands in stark contrast to the component of the policy in *Milazzo* that was the basis on which the Tribunal found that the policy in that case did not satisfy the *Act's* requirements. In that case, prospective employees suffering from drug related disabilities saw their offers of employment simply withdrawn, without first addressing the issue of accommodation, a practice that the Tribunal held employers were not entitled to pursue. The Tribunal contrasted the treatment of prospective employees with the opportunity afforded to existing employees who came forward and informed the employer of their drug or alcohol problem. The employer allowed such workers to rehabilitate themselves and return to work. The Tribunal suggested that at a minimum, a similar form of accommodation should be extended to prospective employees.

[114] In the present case, I note that the "Fit to Work" policy is significantly more "accommodating" to prospective employees than the policy that was at issue in *Milazzo*. As such, the policy reflects the guidance given in *Meiorin*, at para 68, that the standard set by the employer should itself provide for individual accommodation, if reasonably possible. The policy states that individuals who tested positive could take the test again. Mr. Maloney testified that such persons

were given a document explaining the nature of the testing and what circumstances would yield positive results. This provided them with the information they needed to adjust their practices, pass the next drug-screening test, and enable them to get back to work. An employee who failed again could re-test two more times before being definitively turned down for employment, but the bar to employment would only last until the following year. The employee would in the process be encouraged or required, depending on the number of drug testing failures, to seek assessment and/or treatment of his or her problem. As a result, the employee hopefully would succeed in the treatment and not fail the test again in the future.

[115] I have already determined that the Band would have experienced hardship based on safety and cost were it required to have individuals who test positive in a drug-screening test work on its vessels. Accommodating these individuals through alternate employment on land or sea was not an option as there were no such jobs available. Furthermore, requiring the Band to remunerate a fisher who is not working (and therefore not generating any income for the fishery) would be unreasonable. Either of these forms of accommodation would have, in my view, unquestionably imposed undue hardship on the Band. On the other hand, the accommodation procedures that the Band incorporated into the policy were more than reasonable. Individuals were afforded ample opportunity to be re-tested during the fishing season, and whatever the outcome, they could always try again the following year.

[116] For these reasons, I find that the Band has demonstrated that it was reasonably necessary to adopt the “Fit to work” policy for the accomplishment of Band’s goals of protecting its employees from injury and its property from damage. Step 3 of the *Meiorin* analysis has been satisfied. The Band has therefore discharged its burden. Accordingly, Mr. Dennis’ s. 10 complaint is dismissed.

VI. SECTION 67 OF THE CANADIAN HUMAN RIGHTS ACT

[117] As part of its defence to the complaint, the Band argued that the “Fit to Work” policy was a “measure of self governance” exercised by the Band pursuant to the provisions of the *Indian Act*

and that as such, it was exempt from the provisions of the *Canadian Human Rights Act*, pursuant to s. 67. Given my findings dismissing the complaint on other grounds, it is unnecessary to address this argument.

“Signed by”

Athanasios D. Hadjis

OTTAWA, Ontario
September 12, 2008

CANADIAN HUMAN RIGHTS TRIBUNAL

PARTIES OF RECORD

TRIBUNAL FILE: T1134/1606

STYLE OF CAUSE: Perry Dennis v. Eskasoni Band Council

DATE AND PLACE OF HEARING: March 3, 4, 5, 6, 7, 2008
March 17, 18, 19, 2008
March 31, April 1, 2, 3, 4, 2008
Sydney, Nova Scotia

DECISION OF THE TRIBUNAL DATED: September 12, 2008

APPEARANCES:

Perry Dennis/
Mary Lou Gould For himself/
Representing the Complainant

No one appearing For the Canadian Human Rights Commission

Christopher Conohan For the Respondent