

CANADIAN HUMAN RIGHTS ACT
R.S.C., 1985, c. H-6 (as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

JOHN MURRAY EDWARDS

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

KLEYSSEN TRANSPORT LTD.

Respondent

TRIBUNAL DECISION

TRIBUNAL: JUDITH H. ALEXANDER, B.A.,LL.B., Chairperson

APPEARANCES: ODETTE LALUMIERE, Counsel for the Commission

DENIS W. HAYES, Counsel for the Respondent

MARCEL GREGOIRE, Counsel for the Complainant

DATES & LOCATION November 29-30, 1994

OF HEARING : Dauphin, Manitoba

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THE COMPLAINT

In a complaint filed on March 16, 1991 with the Canadian Human Rights Commission ("the Commission"), John Murray Edwards ("Edwards" or "the Complainant") alleged that Kleysen Transport Ltd. ("Kleysen" or "the Respondent") had discriminated against him on the ground of disability (diabetes) contrary to Section 7 of the Canadian Human Rights Act ("the CHRA"). The particulars of the complaint are as follows:

"Kleysen Transport Ltd. ("Kleysen") has discriminated against me by terminating my employment because of my disability, contrary

to section 7 of the Canadian Human Rights Act. In May, 1989 I began work as a truck driver for Kleysen, but was absent from work beginning in October 1989 because I developed diabetes. My condition was brought under control by diet modification, without the use of insulin. In May, 1990 my physician pronounced me fit to return to work, and I so informed my supervisor, Al Martin. He told me that, with my medical history, Kleysen did not need me, and refused my request that I be assessed by a company doctor."

(Exhibit HRC-1)

By letter dated September 1, 1994, I was appointed by the President of the Human Rights Tribunal Panel to conduct a hearing of this Complaint.

BACKGROUND FACTS

The Complainant, John Murray Edwards, is a resident of Dauphin, Manitoba who has worked in recent years as a truck driver for various employers, mostly on a seasonal basis.

He was employed as a driver by Kleysen, which is based in Winnipeg, Manitoba, from May 7th to November 4th of 1989. His job performance during this period was evidently satisfactory to the employer, Kleysen.

At the time of his application for employment with Kleysen in May of 1989, Edwards provided the company with a physical examination form which indicated that he had a mild form of diabetes. In November of 1989, Edwards consulted his physician, Dr. Gilbert Bretecher, and was advised that his blood sugar was elevated and that his diabetes was poorly controlled by the previous regimen of diet and exercise. The recommended treatment continued to be diet and exercise. In that same month, Edwards requested and was granted a medical leave of absence by his employer, Kleysen. For some period of time over the next

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months, Edwards received Great West Life disability benefits.

Edwards continued to consult Dr. Bretecher on a monthly basis. In January of 1990, Dr. Bretecher prescribed medication for Edwards' diabetic condition in addition to diet and exercise. At no time was insulin prescribed for Edwards' condition.

On April 30, 1990, Edwards was advised by Dr. Bretecher that his diabetes was becoming well-controlled and that he would probably be fit to return to work by June 1, 1990.

On May 15, 1990, Edwards drove from Dauphin to the premises of Kleysen Transport in Winnipeg, a distance of some 200 miles. At Kleysen's offices, Edwards had a meeting with Allan Martin, Safety Personnel Manager for Kleysen. The two men had been acquainted over the period when Edwards drove for Kleysen. A Personnel Notification indicating his resignation from employment was signed by Edwards during this meeting. The central issue in this case concerns what was said and what occurred at this meeting of May 15, 1990.

BURDEN OF PROOF AND STANDARD

It is established in case law that the initial burden of proof is on the Complainant to establish a prima facie case of discrimination.

A prima facie case is one which covers the allegations made and which, if believed, suffices to justify a finding in favour of the Complainant in the absence of an answer from the Respondent. Only if a prima facie case is found does the burden shift to the Respondent.

The standard of proof in discrimination cases is the civil standard of the balance of probabilities.

ISSUES OF FACT

It is uncontested in this case that, if discrimination did occur, it occurred in the course of the meeting between Edwards and Martin on May 15, 1990. There are, however, two widely divergent versions of what transpired at that meeting.

Complainant's Version

Edwards testified that he drove to Kleysen's on the day in question because he felt ready to work and that his intention was to return to work as a driver. He entered Martin's office where he observed Martin and another man. It is unclear from the evidence whether Edwards did or did not see the face of the other man.

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There was extensive testimony regarding Edwards' initial belief that this other person was one Herb Reid and a later belief that it really was Grant Gerdis. Both of these men were employees of Kleysen. The second identification (of Gerdis) was confirmed, according to Edwards, by recognition of his voice, which he recalled some weeks later.

Edwards stated that Martin said to him "Anybody with as extensive a medical history as you we don't need in the trucking industry." Martin did not ask for a medical certificate.

Edwards testified that he was shocked, that he insisted he was well enough to drive and offered to take the company's "own medical".

At this time the third man in the room is said to have interjected with the suggestion that Edwards should be given "a company medical".

Martin then handed a separation document (Personnel Notification) to Edwards who objected to the fact that none of the options, i.e. "laid off", "resigned", or "terminated", applied to him as he wanted to return to work. Edwards testified that after Martin checked off the word "resigned" he felt he had no other option and signed the document. Martin then entered on the form the words "Please issue holiday pay. Due to medical reasons cannot drive."

Edwards then left the office and, after twenty or thirty minutes, placed a telephone call to Martin asking that the separation document be cancelled. Martin refused, according to Edwards' testimony.

Evidence pertaining to Unemployment Insurance benefits received by Edwards and their bearing on his intentions on May 15, 1990 was too uncertain to be of assistance.
Respondent's Version

This version of the events of May 15, 1990 was presented to the hearing through the evidence of Allan Martin, Grant Gerdis and, indirectly, by Kenneth E. Bass.

According to Martin, he had telephoned Edwards in late April or early May of 1990 and invited him to come to Kleysen's in Winnipeg to discuss his employment status. Martin's testimony was that Edwards came into his office on a day towards the middle of May and said that he was not medically fit to go to work. Edwards also indicated that he was having financial difficulties, that his benefits had run out and that if he resigned he would be able to claim unemployment benefits.

The two men discussed the options for completing a Personnel Notification and agreed that Martin should check off

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"resignation". According to Martin, Edwards expressed no objection and showed no reluctance to signing the Personnel Notification. Martin denied that there was any other person in the office and denied receiving a telephone call from Edwards later that day.

Martin also denied that he had said to Edwards that the trucking industry did not need anyone with as extensive a medical history as Edwards had.

Grant Gerdis ("Gerdis") testified that he was a Personnel Supervisor with Kleysen at the time pertinent to the complaint. He stated that he occasionally discussed personnel matters with Martin, that he knew Edwards when the latter was employed by Kleysen but that he was never present at a meeting between Martin and Edwards.

The evidence of Kenneth E. Bass, the Human Rights Officer who investigated this complaint, was that no witness to the meeting between Martin and Edwards was mentioned in his initial conversations with Edwards or his lawyer. This evidence, however, was not conclusive and a witness was noted in later discussions with Mr. Bass.

CONCLUSION

The two versions of the events of May 15, 1990 are entirely contradictory with regard to Edwards' expressed intention in going to Kleysen's, whether he felt ready to work, who suggested his resignation, whether he signed the Personnel Notification form willingly, whether there was a third person present and whether Edwards made a subsequent telephone call to Martin. A final and crucial point of inconsistency between the two versions was whether Martin stated that the trucking industry did not need anyone with "as extensive a medical history" as Edwards.

Considering the testimony of the witnesses noted above together with the evidence that Kleysen was aware of Edwards' diabetic condition from the beginning of his employment and had no policy or practice of excluding disabled persons from employment as drivers, I accept the version of the Respondent as to what occurred on May 15, 1990. The credibility of Edwards' testimony was diminished by his evasiveness, selective memory, contradictions within his evidence, inconsistency between his statements and the documentation and lack of corroboration by other witnesses.

In accepting the Respondent's evidence, I find that Kleysen accepted Edwards' voluntary resignation and that the reason for doing so was to accommodate Edwards' wishes and not because of his disability.

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I find that the complaint is, on the balance of probabilities, unsubstantiated by the evidence and that the Complainant has failed to make out a prima facie case of discrimination.

Accordingly, the complaint is dismissed.

Dated at Oakville, Ontario thisday of January, 1995.

Judith H. Alexander
Chairperson