CHRR *Online*

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CRIMINAL RECORD — employment terminated for caretaker — protection afforded by human rights legislation — REASONABLE ACCOMMODATION — Meiorin test for reasonable accommodation — DISCRIMINATION — work performance as reasonable cause for discrimination — protection based on non-enumerated grounds of discrimination — HUMAN RIGHTS — criminal record as an analogous ground of discrimination

Summary: The Manitoba Board of Adjudication ruled that Fort Garry Services Inc. did not discriminate against Rodney Penner because of his criminal record.

Mr. Penner is a 51-year-old man who grew up on a farm near Carman, worked on the family farm and held various jobs in automobile dealerships and construction. In 2000 he had a difficult period. He was divorced and was twice convicted for driving while impaired.

He applied to Fort Garry Services in the fall of 2006 when it advertised for a live-in caretaker for a seniors' residence called Rotary Villa. Mr. Penner disclosed his two convictions for impaired driving. The respondent considered these convictions not relevant to the position as caretaker, as Mr. Penner would not be driving for his employer.

But he was asked to get a criminal record check and to provide the documentation to Fort Garry Services by December 31, 2006. Mr. Penner's job would require him to enter suites to do repairs. All the tenants were elderly and vulnerable to theft and fraud. Until the record check was provided, the respondent considered Mr. Penner to be in training and he could not perform the full duties of the position. The Tribunal accepted that a criminal record check was a reasonable requirement.

However, when he began the process, Mr. Penner discovered that obtaining a record check would take five weeks and he would not be able to provide the formal record by December 31, 2006. Before December 31, 2006, Mr. Penner's employment was terminated.

Mr. Penner alleged that because of his criminal record he was discriminated against in two ways: (1) by being required to provide documentation of a record check in an impossible time frame; and (2) by being fired before the deadline expired.

The Board of Adjudication held, however, that Mr. Penner's employment was not terminated because of his criminal record or because he could not produce documentation by December 31. His employment was terminated because he demonstrated little interest in doing his job, walked away from tasks before they were completed, and was argumentative and defensive.

The Board dismissed the complaint.

Manitoba Board of Adjudication

Date: 20091201

BETWEEN:

Rodney Penner

Complainant

AND:

Fort Garry Services Inc.

Respondent

Adjudicator: Peter A. Sim

For the Manitoba Human Rights Commmission: Sarah Lugtig

For the Respondent: James R. Smith

DECISION

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1. This is a complaint of discrimination under Section 9(1)(a) of *The Human Rights Code*, S.M. 1987-88, c. 45, C.C.S.M. c. H175 (the *"Code"*) by Rodney Penner against Fort Garry Services Inc. The complainant alleges that the respondent discriminated against him in respect to his employment on the basis of his prior criminal record in two ways. First, he was required to produce a transcript of his criminal record within a deadline that was impossible to meet as a condition of continuing his employment. Second, the respondent dismissed him before this time limit had expired. The respondent replies that it dismissed the complainant on the basis of his inadequate job performance and, if his performance had been satisfactory, it would have been prepared to allow him a reasonable time to obtain the transcript.

2. This case raises the issue of whether discrimination on the basis of a criminal record is covered by the *Code*. A criminal record is not one of the enumerated grounds of discrimination listed in subsection (2) of the *Code,* but the Commission relies on paragraph 9(1)(a) of the *Code* which reads:

> 9 In this Code, "discrimination" means
>
> (1)

> (a) differential treatment of an individual on the basis of the individual's actual or presumed membership in or association with some class or group of persons, rather than on the basis of personal merit...

3. Ms. Lugtig, for the Commission, argued that persons with a criminal records constitute a "class or group of persons" within the meaning of paragraph 9(1)(a). She referred to a line of cases which have held that section 9(1)(a) of the *Code* is to be interpreted on the same principles as Section 15 of the *Charter of Rights and Freedoms*. She argued that a class or group of persons exists for purposes of paragraph 9(1)(a) where the class analogous to the enumerated classes in subsection 9(2). She also called expert evidence on the public perception of persons with a criminal record. Mr. Smith, on behalf of the respondent, said that the respondent accepted that a criminal record fell within paragraph 9(1)(a) of the *Code*.

4. Because I did not have the benefit of full argument on both sides, I will not make any further comment on this issue but proceed, for purposes of this decision, on the basis that the law is as stated by the parties.

5. The complainant is 51 years old. He grew up on a farm near Carman and worked on the family farm and and various jobs in automobile dealerships and construction. In 2000 he testified that he ran into a difficult period. He was divorced and he was twice convicted of driving while impaired. In the fall of 2006, the complainant was living in Carman and working at various part time jobs in construction when he learned that the respondent had an opening for a live in caretaker.

6. The respondent is a not for profit corporation which operates a senior citizen's residence under the name of Rotary Villa.

7. The complainant applied for the job and was interviewed by the manager of Rotary Villa, Anne Cherewyk. He disclosed his two convictions for driving while impaired and was told that they were not a concern. He was not required to have a driver's license for the job and he assured the respondent that he no longer had a drinking problem. He was given the job, subject to a six month probation, but was required to sign an employment agreement which provided, in part:

> It is understood by both parties to this agreement that the whole of the agreement and the employment referred to in this agreement is subject to the employee providing to Fort Garry Services Inc. a satisfactory letter of clearance of any Criminal activities given by the proper authorities.

8. Mrs. Cherewyk explained that the criminal record check was required because the complainant would be given a pass key so that he could enter suites and do maintenance work. Until the complainant provided a satisfactory criminal record check, suite maintenance work would be handled by another employee. This interim period would be considered a training period and the complainant would be paid on a full time basis even though he was only doing part of the job.

9. After a few days on the job the complainant went to the Winnipeg police station and requested a criminal record report.

10. The Commission called Professor Debra L. Parkes of the Faculty of Law, who gave expert evidence on, among other things, the process for obtaining a criminal record search in Winnipeg. She explained that two steps are involved. The first is to submit an application for a record search

at the Public Safety Building. The initial search takes one or two weeks and the report will indicate one of five things:

1. that no record exists;
2. that a record of conviction exists at the Winnipeg police service;
3. that a record of conviction exists at the national repository;
4. that a record may exist but that it cannot be verified without a fingerprint check; or
5. that charges are before the courts.

11. This initial report simply states that whether or not a record exists. It does not give any particulars of the charges. In order to obtain a full transcript of the record it is necessary to pay an additional fee and submit fingerprints to the Winnipeg police, the national repository maintained by the R.C.M.P., or both. According to Professor Parkes, the time required for a response was three to four weeks from the Winnipeg police and three to five months from the national repository.

12. Shortly after he started work, the complainant requested a record search from the Winnipeg police. He received a report showing that he had a record at both the Winnipeg police and the national repository. The complainant informed Mrs. Cherewyk of the results of the initial search and she asked him the reason for the record at the national repository. He said that he did not know. According to Professor Parkes, the reason for the record at the national level was likely that one of the complainants impaired driving charges arose in Dauphin. However, the complainant never actually received a transcript of his record, so this could not be confirmed.

13. The complainant made further inquiries and learned that it would take about 150 days to get a transcript of his record. He asked Mrs. Cherewyk for time to order the transcript. On December 7, 2006 Mrs. Cherewyk gave the complainant the following letter:

> Dear Mr. Penner:
>
> This is further to our discussions yesterday and today regarding the Criminal Record Search Certificate which is a prerequisite for employees of Fort Garry Rotary Villa.
>
> I did advise that we would pay the $15.00 that was involved in obtaining this certificate upon receipt of the bill. You stated that it cost $16.00 and I said I could not reimburse you until I had a copy of the receipt you would have received at the time of payment.
>
> As it indicates a record of conviction exists on the Winnipeg Police System and Canadian National System we require a transcript of the WPS convictions. You advised me today that it was going to cost you $50.00 to be fingerprinted and another $20.00 + to receive the transcript.
>
> My response was that we would not be paying the additional costs and that would be your responsibility and we required this no later than December 31, 2006 in order for you to maintain the position you have at Fort Garry Rotary Villa. You advised you would not be able to get this information to us by December 31, 2006 and I advised I would check with our lawyer regarding extending the date until January 15, 2007. Our lawyer has advised that the date will not be extended and that the record and transcript all be acceptable by the Board of Directors of the Rotary Villa.

> You then asked if I was going to let you go if you did spend the money obtaining the transcript. My response to you was that you do not seem to be putting enough effort into cleaning or doing things that need doing on a daily walk through of the building. Maintenance work is not being done by you because we do not have the Certificate required and we are paying someone else to do the maintenance which is indeed part of your work and which you are also being paid for.
>
> You also asked how long you could live in your suite if things did not work out. I advised you would have until January 31, 2007. This is of course, if your rent is paid on or before January 1, 2007. If you do move out on or before December 31, 2006 there will be no charge for January.
>
> In order for you to continue in this position you must provide us with the required documents on or before December 31, 2006 and they must prove to be satisfactory. You must also be prepared to put a lot more time and effort into the position of Caretaker/maintenance here at the Rotary Villa and we remind you that you are on a six months probationary period.
>
> Yours truly,
> Anne H. Cherewyk
> Property Manager
>
> Xc Board of Directors

14. The complainant asked for further time to obtain his criminal record transcript and Mrs. Cherewyk told him that she would take the matter up with the board. On December 14, Mrs. Cherewyk told the complainant that his criminal record was no longer an issue and that he was dismissed because of his poor performance on the job.

15. The commission argues that the respondent discriminated against the complainant in two instances. First, the letter of December 7 which required him to produce a transcript of his criminal record without giving him a reasonable time to do so amounted to a constructive dismissal of the complainant. Second, by actually terminating the employment of the complainant before the deadline in the December 7 letter had expired.

16. The second allegation is easily disposed of. The evidence is clear that the complainant was dismissed because of his substandard performance during the first month of the job.

17. In addition to Mrs. Cherewyk, the respondent called two witnesses, Allan Pottinger and Cheryl Clark, who were responsible for working with the complainant and teaching him his duties. All three testified to numerous incidents where the complainant showed an unwillingness or inability to meet the minimum standards that any employer is entitled to expect.

18. Some incidents were trivial but telling in what they revealed about the complainant's attitude to his work. Many of the residents in the complex are elderly and some of them drop tissues on the floor of the common areas and are unable to pick them up. Other employees make an effort to pick up any tissues they happen to see on the floor. The complainant never bothered.

19. On one of the complainant's first days on the job, Mr. Pottinger noticed some light bulbs were out in the common area. He showed the complainant where to find the spare bulbs and the telescopic arm for changing bulbs. When Mr. Pottinger checked the next day, he saw that the bulbs and the telescopic arm had not been touched. On November 27, Mr. Pottinger changed sixteen bulbs himself. Normally, he would have to change three or four in a week.

20. One day, the complainant left a bucket of dirty water outside the women's washroom. This might have been minor in itself, but it happened just before a board meeting and the complainant had already been warned about this in past.

21. Mr. Pottinger had been doing in suite maintenance work for the respondent and he was assigned to teach the complainant this aspect of the job. One day, he was showing the complainant how to re-grout a shower stall. He demonstrated how to remove the old grout and apply fresh grout. Then he told the complainant to let the grout set for five minutes, wipe the excess of the surface of the tile, wait five minutes more and wipe again until the tile was clean. Mr. Pottinger then left the complainant to finish the job. When Mr. Pottinger returned to the suite, he saw that the complainant was gone and that he not wiped the tiles thoroughly. He had also left the can of grout open and the tools lying around the suite. Mr. Pottinger said that trying to find the complainant was "a nightmare" so he decided to finish the job and clean up the tools himself.

22. This was not the only time that the complainant had walked away from an unfinished job. When Mr. Pottinger was showing the complainant how to set out the garbage bins, the job was nearly complete but there were still a few things to take care of like putting away the tractor. The complainant asked Mr. Pottinger where he could buy a pack of cigarettes. Mr. Pottinger told him the nearest place was a Shell station. The complainant had walked away without even saying goodbye.

23. There was a similar incident when the complainant and Mr. Pottinger were shovelling snow together. The complainant had arranged for a ride to go grocery shopping. When his ride came, he simply dropped his shovel and left. It should be noted that Mr. Pottinger is an older man who has had health problems. The expectation of the respondent was that the complainant would be taking over the heavy jobs like snow clearing immediately leaving Mr. Pottinger to do the lighter maintenance work.

24. The complainant was slow to learn the duties of his new job and was argumentative when corrected. On the first, garbage day Mrs. Cherewyk was told by a resident that the complainant had not set up the bins properly and residents were have problems opening them. She said that this in itself was not a concern. It was the complainant's first time doing the job and he might have misunderstood what was required. What shocked her was the complainant's attitude. Rather than simply admitting he had made a mistake and correcting it, the complainant argued with her the whole time they were walking down the corridor until she showed him the bins and he admitted he was wrong.

25. Mr. Pottinger testified to a similar incident. He was clearing snow with the complainant in the driveway area and explaining to him that it was important to clean right down to the concrete. The complainant disappeared and came back with a piece of paper that said that snow did not have to be cleared down to the concrete. Mr. Pottinger had to explain that this policy applied to the rest of the property but not to the driveway area where residents got in and out of vehicles and were liable to slip.

26. All three witnesses said that the complainant was difficult to find, even during working hours. He had a cellphone but he often did not answer it and he frequently did not answer the door in his suite.

27. Ms. Clark was responsible for training the complainant in the aspects of his job relating to cleaning. She said that the complainant did not clean the glass doors, mop or vacuum on a regular basis. When he did mop the floors, he often neglected to put up the wet floor signs.

28. Ms. Clark said that she had a "horrendous" time teaching the complainant how to strip and wax the floors. He did not make any effort to read the instructions for waxing and completely ignored the instructions she gave him.

29. She also testified to the complainant's poor attitude and work ethic. One day and there was an area that urgently needed cleaning. Ms. Clark found the complainant but he said that he was working on another job. The work needed to be done immediately so she decided to do it herself. While she was still working the complainant came along and asked in a jocular manner whether she was trying to take his job away from him. Rather than offering to take over, he walked away and left her to continue.

30. Mrs. Cherewyk also testified to an incident where she saw the complainant standing and watching Ms. Clark doing a cleaning job that was really his responsibility.

31. Snow clearing was a constant problem with the complainant. Mrs. Cherewyk said that when he was hired it was explained that when it snowed, he was expected get the driveway and entrance cleared early in the morning before home care workers started to arrive and residents started to leave. The complainant was reluctant to deal with the snow early enough on weekdays or to deal with it at all on weekends. Mr. Pottinger said that there were two Saturdays in December when it snowed. Each time, he waited until 8:00 am to see if the complainant would clear the snow and then went out and did it himself.

32. One of these occasions led to the most serious allegation against the complainant. Mrs. Cherewyk said that the complainant submitted a claim for 2 hours of overtime for clearing snow on December 8. She checked the tapes from the security cameras and found that they showed that the complainant had only done about eighteen minutes of work.

33. The complainant did not directly deny any of these allegations. He admitted that there were various problems with his work which he put down to taking some time to learn the job. When he was confronted with some of the specific incidents, he said that he did not remember.

34. Counsel for the commission asked Mrs. Cherewyk why the complainant was not given written warnings about these incidents. She explained that during the first month of employment, an employee can be dismissed without notice and her practice during this initial period was simply to talk to the employee. She said that she frequently talked to the complainant but he showed no willingness to improve.

35. On the basis of this evidence, I am satisfied that the fact that the complainant had a criminal record played no role whatsoever in the decision to dismiss him. The two impaired driving charges did not affect his job duties and were not a factor in his dismissal. He would have been dismissed on the basis of his work performance whether he had a criminal record or not.

36. As to the first issue, it is arguable that the letter of December 7 did constitute discrimination against the complainant on the basis of his criminal record. On the face of the letter, he was told that he would have to produce a transcript of his record by December 31 or he would lose his job. The position of the respondent set out in this letter would have prevented anyone with a criminal record at the national level from continuing their employment. On this issue, the onus therefore shifts to the respondent to justify the discriminatory treatment. I am satisfied that the respondent has done so.

37. The issue here is whether the requirement of a satisfactory criminal record check is a *bona fide* occupational requirement and, if so whether the employer has made an adequate effort to accommodate the special needs of the employee.

38. The Commission referred to the case of *British Columbia (Public Relations Commission) v. British Columbia Government and Service Employee's Union (B.C.G.S.E.U.) (Meiorin Grievance)*, [1999] S.C.J. No. 46 (QL), [1999] 3 S.C.R. 3 [35 C.H.R.R. D/257] as the leading case on what constitutes a *bona fide* occupational requirement. McLachlin J. stated (at par. 54):

> An employer may justify the impugned standard by establishing on the balance of probabilities:
>
> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
>
> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
>
> (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

39. The requirement to produce a transcript of a criminal record meets the first, second and most of the third parts of the *Meiorin* test. The residents of Rotary Villa are elderly, with an average age of about 78, and many of them have memory problems and are very vulnerable to theft and fraud. While the impaired driving charges which the respondent disclosed were not a concern, the actual transcript might, for all the respondent knew, have contained other charges which were a cause for concern. The respondent had a right and a duty to insist on reviewing the transcript before it gave the complainant a master key so that he could start to perform his full duties.

40. The Commission did not argue that the criminal record check was discriminatory in itself. The Commission's policy on criminal records recognizes that there are circumstances where a criminal record is a relevant consideration for an employer. The only issue here is the extent to which the respondent was required to accommodate the complainant by allowing him time to obtain the record transcript.

41. There is some question as to whether the respondent was under a duty to accommodate the complainant in this case. The duty to accommodate is found in paragraph 9(1)(d) of the *Code* which refers to:

> (d) failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any characteristic referred to in subsection (2).

42. Section 12 of the *Code* provides:

> For the purpose of interpreting and applying sections 13 to 18, the right to discriminate where bona fide and reasonable cause exists for the discrimination, or where the discrimination is based upon bona fide and reasonable requirements or

> qualifications, does not extend to the failure to make reasonable accommodation within the meaning of clause 9(1)(d).

43. However, in this case having a criminal record is not a characteristic referred to in subsection 9(2) of the *Code* and therefore the statutory duty to accommodate does not apply. At the very least, more weight should be given to the potential hardship to the employer when applying the third part of the *Meiorin* test.

44. The root of the problem here is that the time required to obtain a record imposed an unreasonable burden on both employers and prospective employees. According to Professor Parkes, a new system of searching criminal records in the national repository was introduced in 2008 and under this system the turn around time is one to six weeks.

45. In this case the respondent set the December 31 time deadline on the basis of what it considered to be a reasonable training period. The complainant had been paid on a full time basis even though he was not performing the suite maintenance work so that he would have time to learn his other duties. Once this training period was over, the complainant would be expected to start his full duties. Since this would require a pass key, he could not do this without producing his criminal record transcript. It is not reasonable to expect that the respondent to continue paying the complainant a full time salary for part time work for four to five months.

46. Mrs. Cherewyk testified that if the complainant had showed any signs of improvement in his position, she would have recommended to the board that the respondent keep the complainant on after December 31 but reduce his salary and hours of work until he could produce a record transcript. She said that the request for an extension of time was not considered by the board because the complainant's poor work record made the criminal record check a non-issue.

47. One of the fundamental objectives of the *Code* is to protect "the right of all individuals to be treated in all matters solely on the basis of their personal merits." While the position taken by the respondent in the letter of December 7 might be unreasonable if applied as a general policy to all persons with a criminal record, the letter was not a statement of general policy. It was a specific response to the individual situation of the complainant. The respondent did treat the complainant on the basis of his personal merits as evidenced by his actual performance on the job.

48. Since I have not found any contravention of the *Code* by the respondent, it is not necessary for me to consider the question of remedies.

49. During the course of his argument, Mr. Smith described the complaint as "frivolous and vexatious" and a "money grab" on the part of the complainant. I directed his attention to subsection 45(2) of the *Code* and asked if he wished to make a request for costs.

50. Subsection 45(2) reads as follows:

> 45 (2) Where the adjudicator regards a complaint or reply as frivolous or vexatious, or is satisfied that the investigation or adjudication has been frivolously or vexatiously prolonged by the conduct of any party, the adjudicator may order the party responsible for the complaint or reply or for the conduct to pay some or all of the costs of any other party affected thereby.

51. After considering the submissions of both parties, I have decided that this is not an appropriate case for costs.

52. There is no evidence of any undue delay in the conduct of the investigation or adjudication.

53. A complaint is frivolous if it is obvious on its face that it has no merit or if it is brought for some trivial cause. A vexatious claim is one brought for the purpose of harassing or annoying the respondent. In this case, the complainant did suffer a real loss and the complaint did raise serious issues of law and fact. While I found that the evidence overwhelmingly favoured the respondent, I was able to make that finding only after seeing and hearing the witnesses.

54. I therefore dismiss the complaint of Rodney Penner against Fort Garry Services Inc.