

MANITOBA HUMAN RIGHTS BOARD OF ADJUDICATION

BETWEEN:

DANIEL LEONHARDT

complainant,

-and-

GOVERNMENT OF MANITOBA: DEPARTMENT OF FINANCE

respondent,

Appearances:

Daniel Leonhardt, in person

Scott Hoepfner, counsel for the respondent

Isha Khan, counsel for the Manitoba Human Rights Commission

DAN MANNING, adjudicator:

1. Daniel Leonhardt, (the “complainant”) alleges that his employer, the Government of Manitoba (“GOM”) contravened section 14 of the *Manitoba Human Rights Code*, (“Code”) when they rejected him on probation.
2. The facts are straight forward but lengthy. I have carefully reviewed the agreed book of documents, the filed exhibits, and the evidence heard at trial. I have distilled the evidence to the following relevant facts.

FACTS

3. The complainant is a trained Informational Technology (“I.T.”) Specialist who worked for the GOM between 1999-2006 until he relocated to Ottawa. In 2009, he returned to Winnipeg to look after his ill father. In 2010 he reported experiencing mental health and substance abuse concerns and attended the Klinik Community Health Centre for counseling. In December 2010 he went to the St. James Medical Clinic and met with Dr. Hobbs for help with anxiety. He requested a referral to a psychiatrist, but Dr. Hobbs could not facilitate his request. In May 2011 he commenced a 10-week non-residential treatment program through the Addictions Foundation of Manitoba (AFM). A letter from AFM dated November 17, 2011 confirmed the dates of the attendance but not the times.

4. In May 2011 he was re-hired by the GOM to start employment in June 2011. He was placed on a period of six months probation, which is typical for all employees following an appointment to a new position.
5. The complainant's immediate supervisor was John Mitchell. Mr. Mitchell and the complainant had known each other since 2003 due to the complainant's previous work history with the GOM. They were friendly.
6. Soon after commencing employment in June 2011, the complainant testified that he obtained permission from Mr. Mitchell to be absent from work to attend AFM counseling. The complainant testified that he sent an email request and spoke with Mr. Mitchell in person. For reasons I will discuss later, I find that the complainant, in fact, did not make such a request.
7. In July 2011, about a month in to his employment, the complainant started experiencing physical discomfort when he drank from the communal office coffee pot. He suspected that two colleagues were poisoning or "tampering" with his coffee. He reported his concerns to Mr. Mitchell.
8. Mr. Mitchell thought that the complainant's allegations were bizarre because no one else drinking the communal coffee had reported similar effects. He did not believe the allegation and expressed his doubts to the complainant. Mr. Mitchell knew that the complainant's father had been ill and was concerned for the complainant's wellbeing. He asked him if everything was okay with his personal

life and if he could offer any assistance. The complainant firmly declined assistance and responded emphatically that the problem was with the coffee and not related to his personal circumstances. Mr. Mitchell left the office on holidays around July 20, 2011 with the issue unresolved and unreported to senior management or human resources.

9. On July 21, 2011, the complainant brought the matter to the attention of a GOM Human Resources Manager, Ms. Carla De Ruyck. He told Ms. De Ruyck that on July 4, 2011 he had seen two colleagues, “Kevin” and “Neeraj” appear to tamper with the coffee equipment. He told her that he believed that someone was also tampering with his food that he left in the communal fridge. Within fifteen minutes of drinking the coffee he would experience nausea, headaches, dry heaving, tiredness, confusion, and excessive salivation. The symptoms would last 15 minutes to two hours. He had experienced this about twenty times.
10. He told Ms. De Ruyck about an encounter with an unknown male two weeks prior who had approached him outside of the building in the back lane. The male asked him how his coffee was. The complainant replied that the coffee was “fine”, and the man responded to him, “are you sure?” and walked away.
11. He told Ms. De Ruyck that Neeraj had “made fun” of the coffee, lifting it sarcastically and saying “ooo, the coffee” while walking towards his cubicle. He confronted both “Kevin” and “Neeraj” and told them not to make any more coffee

12. Ms. De Ruyck advised him to see his doctor and informed him of the Employee Assistance Program (“EAP”). The EAP is a confidential program that allows employees to seek and obtain counseling through the program during paid working hours. The complainant responded that he did not require EAP nor did he need to see a doctor. She asked him to stop drinking the coffee until the matter was investigated and resolved. The complainant insisted that he would continue to drink the coffee. Ms. De Ruyck found this meeting “uneasy” as the complainant had asked several questions relating to her personal life that she felt was “out of place” and inappropriate.

13. The next day, on July 22, 2011 at 11:50 am, Ms. De Ruyck sent an email to the complainant requesting a written statement describing his experience. She wrote: “I am encouraging you to see your physician especially if you continue to suffer from similar symptoms. If your physician has any recommendations, we would appreciate that in writing. You also have the Employee Assistance Program (EAP) as a resource.”

14. Later that day, on July 22, 2011 at 3:30pm, the complainant attended to Ms. De Ruyck’s office, but this time in an agitated state. He presented a jar of jam and told her “it’s happening right now,” referring to the physical symptoms that he believed were being caused by the poisoning of his food and the office coffee.

He repeated his allegation of being poisoned by two individuals and said that they were doing this to him because “they were not happy they didn’t get the job”.

15. Ms. De Ruyck was concerned for his immediate safety and wellbeing and urged him to attend the emergency and seek immediate medical attention. He declined saying he knew what was happening to him and did not need a doctor to tell him. Ms. De Ruyck asked him if there were any personal stressors in his life or if he was suffering from any mental or physical issues. He was “adamant” that he was not. He told her that he used to have an issue with alcohol and a failed relationship, but he was “over it”. She asked him if he was an alcoholic and he said it was a problem for him a couple of years ago but not now. Ms. De Ruyck testified that she was distressed from this encounter due to the complainant’s agitation. Ms. De Ruyck once again told him about EAP which he again declined.

16. On July 24, 2011 the complainant sent an email to Ms. De Ruyck documenting his allegation. He wrote that he appreciated her concerns and told her that in his view “EAP is a good resource however with the seriousness and nature of this matter, there is no assistance required from them that they would deal with in terms of the EAP function or mandate. (*sic*)” He wrote:

“Many times, after have (*sic*) consumed the coffee or eaten my own food at work I develop a wide range of symptoms, sometimes so ill-fully strong that I have had to vacate my work temporarily and seek fresh air. I feel and have

reason to believe that they are putting something in those foods that I and any human being would negatively react to. What I'm not clear on is the exact nature of the substance but even giving something as simple and harmless as salt or sugar to somebody without their consent is violating to the individual and could also have serious health repercussions...to give it to them without knowledge, things go from being tragic to criminal.

Specifically, the symptoms range from as subtle as headaches and excessive watering of the mouth to quick onset of tiredness and lethargy. More extreme symptoms have included a sense of loss of motor abilities, like I'd mentioned to you in person, a similar feeling as to being drunk. Often times all these feelings come with sharp pain in my stomach as though my body is telling me it's not agreeing with what I've just consumed" ...

"From our follow-up meeting Friday last there were a couple things loosely discussed that perhaps were misunderstood from two days prior... When I had mentioned to you that I used to drink but no longer; that was to give credence to my understanding of the symptoms but just as importantly, to underscore the fact that I present myself at work well rested and with a clear mind. You also had followed up with me possibly having a recent break-up, presumably to get a sense of outside factors: again, I understand this is your job. To respond, it has been nearly one and a half years since I split with my partner, ample time to deal with things. ...Am I under stress or feeling pressured at work? On the contrary, I am producing more and of quality than ever before."

17. On July 26, 2011 a follow up meeting was scheduled with the complainant by the Human Resources Department. Mr. Darren McGewan Watt, who was the HR manager responsible for the complainant's department attended along with Ms. De Ruyck. In preparation for the meeting, Mr. Watt made inquiries of the complainant's work history including examining the complainant's corporate emails, to see if there were any concerns about his work performance. He did not find any issues regarding attendance, productivity, or performance.

18. During the meeting the complainant reiterated much of what he already disclosed to Ms. De Ruyck earlier. He described his physical experience after consuming coffee, implicated two staff as responsible, and spoke of the encounter outside of the office with a man who had asked him about his coffee. The complainant denied suffering from any physical or non-physical illness, declined to see a physician, and declined the assistance of EAP at the suggestion Mr. Watt. Mr. Watt advised the complainant that his allegations would be investigated.

19. In early August 2011 the investigation into the food tampering was concluded and it was determined that the complainant's allegation was "unsubstantiated." No one other than the complainant reported any discomfort after drinking the coffee. The two employees implicated by the complainant were independently questioned and it was determined that they had not tampered with the coffee or the complainant's food.

20. On August 5, 2011 Ms. De Ruyck and Mr. Watt communicated the results of the investigation to the complainant who disagreed with their conclusion. Mr. Watt told him that they did not dispute he was feeling his symptoms but that the food poisoning allegations were unfounded. During the meeting, the complainant revealed to Mr. Watt that two years prior he had struggles with "substances". He told them that he lived a lifestyle he should not have while in Winnipeg for his

father's chemotherapy. He felt that people in the office were aware of this and did not respect him as a result.

21. Mr. Watt asked him if he required support to help him deal with his issues. The complainant indicated that he did not require assistance as he had supports in place. He advised that he was "clear headed" and was not relapsing from his past issues. Mr. Watt emphasized that he was in a supportive workplace and that if he was encountering struggles that he should engage EAP and see a physician because there could be some underlying medical condition causing the symptoms he was describing. The complainant declined.

22. During this meeting, the complainant testified that he told Ms. De Ruyck and Mr. Watt about trying to meet a doctor the day before. Mr. Watt and Ms. De Ruyck testified no such disclosure took place. On August 4, 2011 the complainant attended to Four Rivers Medical Clinic but was not able to see a doctor. He put his name on the waiting list but left before seeing a doctor. At the hearing a letter from the clinic was produced confirming that he had attended. I accept that the complainant went to the doctor's office on August 4, 2011 but I do not accept that he disclosed this to Ms. De Ruyck or Mr. Watt on August 5, 2011. Had he done so, I would have expected to see that comment reflected in either Ms. De Ruyck or Mr. Watt's notes. I also would have expected that such a disclosure would have resulted in a discussion surrounding the doctor's visit, his reason for

attending, and his reasons for leaving. None of that was in either Ms. De Ruyck's or Mr. Watt's notes.

23. On September 21, 2011 a meeting between GOM management and human resources staff was convened and they decided that the complainant would be rejected on probation. On October 3, 2011 the complainant was notified, and he was dismissed and escorted out of the workplace. He received two weeks pay in lieu of notice and his personal items were delivered to him.

24. Mr. Watt testified that the complainant was rejected because he had made very serious, disruptive accusations against people in the workplace that were unsubstantiated. Management had concerns that this behaviour could reoccur because the complainant was not willing to seek medical help or to engage EAP.

25. On October 13, 2011 the complainant filed a grievance seeking to be reinstated to his position and reimbursed for lost wages.

26. On November 16, 2011 the complainant wrote a letter to the then Deputy Minister of Innovation, Energy and Mines dated November 16, 2011. A part of that letter stated:

“Over the past few months I have been presented with some of life's greatest challenges, under fatigue and stress exhibited some instances where my behaviour was not only out of character but was improper. A significant error on my part was not being totally forthcoming with Management and HR as to the specifics of my trials and tribulations. Issues and their respective emotions are personal matters, we all like to keep them as such but I understand that

decisions are made based on the information at hand and I can not (*sic*) expect accurate assessment without all the facts.”

27. On January 25, 2012 the union representing the complainant requested an assessment from Dr. Globerman on the basis that the complainant had attended to the AFM program and that he had “personal issues” that may have affected his behaviour.

28. On March 14, 2012 a report from Dr. Globerman (“the Globerman report”) was prepared. A significantly redacted copy of the Globerman report was provided to the GOM on March 28, 2012. During preparation of the report, Dr. Globerman met with the complainant and interviewed him for a total of two hours and ten minutes on two occasions. The opinions of Dr. Globerman were based primarily upon the historical information obtained from the complainant. Dr. Globerman’s ultimate opinion was:

“It appears that the complainant’s behaviour in the workplace was related to him having experienced delusional ideation which, on the balance of probabilities, was likely secondary to the presence of a Major Depressive Episode which appears to have been associated with mood incongruent psychotic features”

29. On May 10, 2012 the GOM wrote to the union advising that they were not prepared to reverse their decision regarding the grievance. The matter was

referred to arbitration and hearing dates were scheduled for April 18 and 19, 2013.

30. On July 24, 2012 the GOM requested more information about the Globerman report. Up until this time, the GOM only had a redacted copy of the report. They requested the full report, the clinical notes, and provided questions for Dr. Globerman.

31. On August 14, 2012 the union provided the full report to the GOM and invited a list of questions that could be provided to Dr. Globerman.

32. On September 27, 2012 the complainant filed his Complaint with the Manitoba Human Rights Commission.

33. On December 31, 2012 the GOM provided a list of questions for Dr. Globerman and for the complainant's family doctor, Dr. Merek. I do not have any evidence of any response to the questions.

34. On April 10, 2013 the union withdrew the grievance. No explanation was provided and I draw no inferences from this fact.

ANALYSIS

35. Section 14(1) of the *Code* reads:

14(1) No person shall discriminate with respect to any aspect of an employment or occupation, unless the discrimination is based upon bona fide

and reasonable requirements or qualifications for the employment or occupation.

36. Section 9 of the *Code* prohibits discrimination of people with a mental disability whether the person responsible for the act or omission intended to discriminate.

It is not contested that addiction is a form of mental disability.

37. For the complainant to make out a case he is required to prove that (i) he has the protected characteristic of mental disability contemplated by section 9 of the *Code*; (ii) that he experienced an adverse impact regarding employment; and (iii) that his protected characteristic was a factor in the adverse impact. (*Moore v. British Columbia*, 2012 SCC 61 (“*Moore*” at para. 33)

38. The Supreme Court refers to this as a *prima facie* case. For the reasons expressed in *Vik v. Finamore (No. 2)*, 2018 BCHRT 9 at paras. 47-50 and adopted in other decisions from British Columbia, I refer to this as the “complainant’s case.” (*Complaint v. College of Physicians and Surgeons of BC (No. 2)*, 2018 BCHRT 189 at para. 64, *Maurice v. B.C. Ministry of Public Safety and Solicitor General*, 2018 BCHRT 123 at para. 15).

39. If the complainant establishes his case, then the burden shifts to the respondent to justify on a balance of probabilities that there was a *bona fide* and reasonable cause or justification for the action or that reasonable accommodation was made or was not possible in the circumstances. If it cannot be justified, discrimination

will be found to occur. (See *Ont. Human Rights Comm. V. Simpson-Sears*, [1985] 2 S.C.R. 536 (*O'Malley*) at paragraph 28, subsequently reaffirmed in *Moore, supra* by Abella J. at paragraph 33; *C.R., v. Canadian Mental Health Association, Westman Region Inc.*, 2013 CanLII 125 (MBHRC) (“*CR v. CMHAWR*” at page 38)

CREDIBILITY

40. All witnesses, including the complainant, appeared sincere and honest in giving evidence about events that occurred approximately seven years earlier. However given the lengthy passage of time between the incident and the hearing I have concerns about the reliability of some of the evidence. I am mindful of the guidelines articulated in *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.) at 356-357:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed

person would readily recognize as reasonable in that place and in those conditions. (emphasis added)

41. I have already discussed my finding that the complainant did not disclose, during the August 5 meeting with Ms. De Ruyck and Mr. Watt that he had attended to the Four Rivers Medical Clinic the day prior. I have made that finding of fact with the *Faryna v. Chorny, supra* instruction in mind.

42. The only other significant conflict of evidence that I am required to resolve relates to the complainant's claim that he obtained permission from his immediate supervisor, John Mitchell, to miss three hours of work every Wednesday while he was attending his AFM counseling sessions. The complainant's position is that he disclosed to his supervisor by email and in person that he was in treatment and that there was an accommodation made to his schedule. Mr. Mitchell denied this occurred.

43. I accept the complainant was attending AFM during the relevant dates because a document was provided at the hearing confirming his attendance. I have difficulty accepting the complainant's evidence that his attendance was during work hours and that he secured an accommodation from Mr. Mitchell. Mr. Mitchell's evidence was that his normal practice at the time was to allow his staff to flex their shifts up to an hour per day without altering the schedule. Anything outside the one-hour window would have to be documented in the scheduling

system. At the hearing the complainant's attendance record and payroll numbers were filed as exhibits (exhibit #10 and #11) and revealed no evidence of a three-hour alterations to his schedule.

44. Both Mr. Mitchell and the complainant described their relationship as friendly.

At times, they socialized together and generally got along. Mr. Mitchell's was emphatic when he testified that had he known that the complainant had been attending AFM counseling, "the whole situation would have been handled differently". Given their friendly relationship with each other I believe that Mr. Mitchell would have disclosed this information to management and the human resource staff had the complainant disclosed it to him.

45. In my view, the complainant was a hardworking and high performing employee.

He valued his privacy and did not want his employer to know of his personal issues. He was concerned that disclosure of unresolved addictions issues or mental health issues would negatively impact his career. In his July 24, 2011 email to Ms. De Ruyck he wrote: "I used to drink but no longer,"; "I present myself at work well rested and with a clear mind,"; "it has been nearly one and a half years since I split with my partner, ample time to deal with things." As the complainant put it in his letter to the deputy Minister of the department dated November 16, 2011:

“A significant error on my part was not being totally forthcoming with Management and HR as to the specifics of my trials and tribulations. Issues and their respective emotions are personal matters, we all like to keep them as such but I understand that decisions are made based on the information at hand and I can not (*sic*) expect accurate assessment without all the facts.”

(underlining added)

THE COMPLAINANT’S CASE

I. Does the complainant have the protected characteristic of mental disability?

46. The onus is on the complainant to establish that he had an actual disability or a perceived disability to make out the first part of the analysis.

Actual Disability

47. The Commission and the complainant rely on the AFM and Globerman report to establish actual disability on the part of the complainant. The respondent argues that there is insufficient proof that the complainant had an addictions issue or mental disability at the relevant time. The respondent submits that Dr. Globerman’s conclusions expressed in his report were derived almost exclusively from information provided to him by the complainant. Dr. Globerman was not produced as a witness to be available for cross examination which undermines the reliability of the report. The respondent pointed to several inconsistencies between the complainant’s evidence at the hearing and the information he

provided to Dr. Globerman. The AFM report does not assist because it lacks details other than attendance to a non-residential treatment program for ten group sessions and two one-on-one sessions. Further, the respondent argues that the report disclosed no nexus between the mental disability of the complainant and his conduct that led to him being rejected on probation.

48. To establish an addiction or illness, “clear and cogent medical evidence” is required. (see *C.R., v. CMHAWR*, at page 40) I find that the Globerman report falls short of establishing clear and cogent medical evidence of an addiction or illness for the following reasons.

49. In the report, Dr. Globerman states:

“The opinions and conclusions stated in this report are based primarily upon the historical information obtained from the complainant. I reserve the right to alter the conclusions or opinions stated in this report should additional information be made available to me.”

50. The opinions in the Globerman report were based on the information that the complainant provided during the grievance litigation process. No clinical notes were provided to the respondent nor was Dr. Globerman produced for cross examination. This, in my mind, raises reliability issues with respect to the information that Dr. Globerman relied upon in coming to his opinion. For example, Dr. Globerman wrote:

“The complainant did not seek treatment for his anxiety, with it being unclear, upon review, whether there was a temporal relationship with regard to his experience of panic and his use of substances”

51. However, the complainant testified that he did seek treatment for his anxiety. He attended to Dr. Hobbs’ office and requested a referral to a psychiatrist. He also attended counseling at Klinik for anxiety. It is not clear, and I do not speculate, what, if any effect this one inconsistency may have had on Dr. Globerman’s opinion but it causes me larger concerns with respect to the reliability of the conclusions of Dr. Globerman.

52. I also note that during opening submissions before any evidence was called, counsel for the respondent raised this issue and urged the complainant and the Commission to have Dr. Globerman made available so he could cross examine him on the report. Dr. Globerman was not produced for cross examination and his opinions remain untested.

53. I cannot rely on the report to establish that the complainant in fact had a mental disability at the relevant time. Even when I consider the Globerman report in conjunction with the AFM counseling records, I do not have clear and cogent medical evidence before me that satisfies me, on balance, that the complainant in fact suffered from a mental illness. However, the complainant’s case can still be made out on a perceived disability.

Perceived Disability

54. The onus is on the complainant to prove that the GOM “perceived” him as having a disability. In *Horrocks v. Northern Regional Health Authority*, [2015] M.H.R.B.A.D. No. 103 (“*Horrocks*”), Chief Adjudicator Walsh wrote at para. 135: “It is well established that discrimination on disability may be based as much on perceptions and stereotypes as on the existence of an actual functional limitation.” See also *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City)*; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City) Boisbriand*, 2007 SCC 27 at pp. 79 & 80)

55. There is sufficient circumstantial on a balance of probabilities that the GOM perceived the complainant as having a disability related need. (see *Basi v. Canadian National Railway Co.* (1988), 9 CHRR D/4029 (CHRT) page 10) I take the following into account:

(a) The nature of the unsubstantiated allegations is extraordinary.

(b) Ms. De Ruyck testified that at the time of the complainant’s allegation a GOM manager, Ms. Guinn, spoke with her and expressed concerns about his mental health as it related to his allegation.

(c) On July 22, 2011 Dean Tokariwski, another GOM manager, sent the following email to Ms. De Ruyck:

“I literally just finished talking to John. He confirmed that (*the complainant*) approached him about the contractors and tried to calm him down. There has been a couple occasions where he has had rambling conversations with John. (*The complainant’s*) dad is diagnosed with lymphoma and I’d (*sic*) going through chemo. At this point, I am not sure what to do. EAP is the only thing that I can think of. It is difficult to deal with this one if (*the complainant*) himself thinks all of this is true. I am hoping HR, or the HR community, has some experience in dealing with this.”
 (underlining added)

Ms. De Ruyck’s responded to Mr. Tokariwski’s email the same day and noted that “HR needs to take the accusation seriously and investigate. We can’t make assumptions about (*the complainant*) and ignore what he is claiming is going on in the office.”

- (d) Ms. De Ruyck testified that Dean Tokariwski had approached her and described the complainant’s behaviour as “eerily” close to a person known to him who had been diagnosed with mental illness.
- (e) Ms. De Ruyck testified that she suspected that the complainant had ill health and possibly suffered from a mental illness at the time.
- (f) Mr. Watt and Ms. De Ruyck’s repeated requests to the complainant to seek assistance are evidence that the GOM perceived the complainant to have disability-related needs. If there were no concerns, why bother asking the questions?

56. I conclude that the GOM perceived the complainant as having a mental disability.

II. Did the complainant experience an adverse impact regarding employment?

57. The Supreme Court of Canada has held that probationary employees are protected under human rights legislation. (*Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324 (O.P.S.E.U.)*, 2003 SCC 42 (CanLII) at paras. 34-36. There is no dispute that the complainant experienced an adverse impact regarding employment when he was rejected on probation.

III. Was the complainant's disability a factor in his rejection on probation?

58. The complainant bears the onus to prove on balance, that there was a connection between his disability and the decision of the employer to reject him on probation.

59. The complainant's food tampering allegation and the perception that he was mentally ill are inseparable. There is no dispute that the complainant was rejected on probation in large part because of his allegation of food tampering. The complainant does not need to prove that his disability was the only reason for his rejection. (*Defina v. Lithocolor Services Ltd.*, [2012] O.H.R.T.D. No. 1725 at para. 51 and *Stewart v. Elk Valley Coal Corp.*, [2017] S.C.J. No. 30 at para. 91)

I find that the complainant's perceived disability was a factor in his rejection on probation.

60. I conclude that complainant has established his case. The onus now shifts to the respondent to prove on a balance of probabilities that there was a *bona fide* and reasonable cause or justification for rejecting the complainant on probation or that reasonable accommodation was made or was not possible in the circumstances.

THE DUTY TO ACCOMMODATE

61. The law with respect to accommodation is set out in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union*, [1999] 3 S.C.R. 3 ("*Meiorin*"). Once a standard has been found to be *prima facie* discriminatory then the respondent can justify the discrimination based on a three-step analysis established by the Supreme Court. This is the *bona fide* occupational requirement. The instant case does not involve an impugned policy so my analysis focuses on whether the respondent discharged its duty to accommodate the complainant to the point of undue hardship. (see also *CR v. CMHAWR supra*, at page 46)

62. The respondent argues that the complainant discharged their duty to accommodate because GOM staff inquired numerous times in numerous ways for information that could substantiate their concerns but received no information

from the complainant. The Commission and the complainant argue that the respondent failed to accommodate the complainant because they could have made better, more direct efforts to inquire; they could have required the complainant to consult a physician as a condition for continued employment; or they could have simply done nothing, i.e.: not rejected him on probation.

63. I rely on *Meiorin, supra*, at paras. 62-68 for the following guidance to determine if the duty to accommodate has been discharged. First, an adjudicator must consider the *procedure* which was adopted by the employer to assess the issue of accommodation. Second, an adjudicator must consider the *substantive content* of the accommodation that was offered.

PROCEDURAL COMPONENT

64. The procedural obligation set out in *Meiorin* requires an employer to “take steps to understand the employee’s disability-related needs and undertake an individualized investigation of potential accommodation measures to address those needs.” (see *Titze v. O.I. International Inc.*, [2018] O.H.R.T.D. No. 83 at para. 43 “*Titze*”)

65. The respondent made the following efforts to understand the complainant’s disability-related needs:

- (a) Ms. De Ruyck initiated an investigation into the complainant’s allegation.

- (b) At the July 21, 2011 meeting, Ms De Ruyck advised the complainant to seek medical attention and speak with EAP. After the meeting, Ms. De Ruyck emailed the complainant and re-iterated her suggestion that he seek help from a doctor and EAP.
- (c) At the July 22, 2011 meeting, Ms. De Ruyck urged him to seek immediate medical attention. She asked him if he was suffering any physical or mental issues. She reminded him again about EAP.
- (d) In July 2011 Mr. Watt reviewed the complainant's work email and work history looking for any concerns related to his performance and found no issues.
- (e) At the July 26, 2011 meeting, Mr. Watt asked the complainant directly if he was suffering from any physical or non-physical disability and was advised to see a doctor and referred to EAP
- (f) At the August 5, 2011 meeting, the employer concluded that the complainant's allegation was false. Mr. Watt told the complainant that the GOM was a supportive workplace and that EAP and a physician could assist in discovering an underlying physical or non-physical medical condition.

In response to the above, the complainant did not disclose any mental health issues. He also declined to see a physician and declined to avail himself of EAP.

I acknowledge that there may be situations where a person who is suffering mental illness may not have insight into their condition due to the very nature of their disability however I have no evidence before me to support this proposition. Even if the complainant lacked insight into a mental illness, he did have information to share with the GOM regarding his attendance to AFM, Klinik, and Dr. Hobbs' office. This information was not provided. The GOM had a perception that the complainant had a disability however they were not able to get information to form an objective basis for the complainant's disability related needs.

66. I do not agree with the complainant and Commission's submission that the GOM ought to have been more direct or made more efforts of inquiry regarding the complainant's disability-related needs. The complainant was adamant that his symptoms were real and that he presented himself "at work well rested and with a clear mind". The GOM's inquiries were commensurate with their perception, at the time, of the complainant's disability.

67. I conclude that the GOM did take reasonable steps to understand the complainant's disability-related needs in the first part of the analysis.

SUBSTANTIVE COMPONENT

68. The substantive component of the analysis “considers the reasonableness of the accommodation offered or the employer’s reasons for not providing accommodation.” (*Titze, supra*)

69. The search for accommodation is a multi-party process. (*Central Okanagan School District No. 23 v. Renaud*, [1992] 2 SCR 970, 1992 CanLII 81 (SCC)). In the instant case the complainant failed to provide any information that may have led to reasonable accommodation at the relevant time. The complainant only provided information to the respondent long after he was terminated as part of the labour arbitration process by way of the Dr. Globerman report. He also refused to seek assistance through EAP or seek medical attention at the request of the GOM.

70. The Commission argued that the GOM could have accommodated the complainant in two ways: They could have required him to undergo a mandatory medical assessment prior to returning to work or they could have simply done nothing, i.e.: not rejected him on probation. However, I am not convinced either of these suggestions would have been reasonable for the reasons that follow.

Mandatory medical assessment

71. The GOM did not have an objective basis upon which to determine reasonable accommodation because I have found that the respondent’s perception of the complainant’s disability was based on anecdote and personal experiences. It

would not have been appropriate to impose a mandatory medical assessment on the complainant in these circumstances without an objective basis of the complainant's disability-related needs. In *Horrocks, supra*, at para. 165 it was held that it "constitutes discrimination for an employer to rely on personal experiences and common place assumptions or stereotypes rather than on objective assessments when determining an accommodation plan for an employee who has a disability." In my view, forcing an accommodation on the complainant in these circumstances would not have been reasonable because the GOM lacked an objective basis to impose such an accommodation.

Rejection on Probation

72. Not rejecting him on probation, or, put another way, simply overlooking the complainant's allegation was also not reasonable. Accommodation is a multi-party process. The complainant did not provide information to permit the GOM to accommodate any disability-related needs. Therefore, the GOM was left with the following unresolved employment issues:

- (a) The complainant's food tampering allegations were disruptive and required an investigation;
- (b) Throughout the investigation the complainant was not cooperating with the investigation by continuing to drink the coffee;

- (c) The complainant did not seek medical assistance or advice despite being repeatedly asked to do so;
- (d) The investigation revealed that his allegation was without merit and the allegation was frivolous and possibly vindictive;
- (e) The complainant showed no remorse once the investigation concluded that his allegations were baseless despite the seriousness of the allegation directed at two co-workers;
- (f) That there were concerns that this type of behaviour could recur in the future.

73. Having regard to all the circumstances, the actions of the respondent in accommodating the complainant was reasonable therefore I find the respondent complied with substantive component of the analysis.

74. The respondent has discharged their duty to accommodate and the complaint is dismissed.

DATED: 30th day of September 2018

Dan Manning
Adjudicator