

Case Law - Disability

Jeppesen v. Corporation of the Town of Ancaster, Fire and Emergency Services et al.

Board of Inquiry Decision: January 2, 2001

OHRC Counsel: Jennifer Scott

Key Words: handicap, constructive discrimination, bona fide occupational requirement, accommodation

The Facts

The complainant, Mark Jeppesen commenced employment with the Ancaster Fire and Emergency Services as a part-time firefighter in January, 1988. In 1995, Jeppesen was diagnosed with Histoplasmosis, an airborne fungal disease which resulted in the loss of central vision in his left eye. In June, 1997, the Ancaster Fire Department advertised for 2 full-time firefighter positions. One of the job requirements of the full-time position was the ability to drive an ambulance. A Class F license is required to drive an ambulance. Jeppesen was unable to obtain the Class F license because of his vision impairment. He was, however, able to retain his Class A license, the license required to operate all fire equipment, through the Monocular Vision Pilot Project. The Ancaster Fire Department advised Jeppesen that he would not be able to obtain the full-time position without a Class F license.

In November, 1997, the Ancaster Fire Department hired 2 more full-time firefighters. Jeppesen was advised that he could have the position if he was able to obtain a Class F license. Jeppesen advised the Ancaster Fire Department that he could not obtain the Class F license and asked to be accommodated through the provision of straight firefighting duties. The Ancaster Fire Department refused Jeppesen's request for accommodation and he was once again denied the position because of his inability to obtain a Class F license. The Ancaster Fire Department hired three more full-time firefighters in July, 1998. Jeppesen was advised by the Ancaster Fire Department that its position on accommodation remained the same. As a result, Jeppesen did not apply for a full-time firefighter position.

The hearing proceeded in two stages: the first stage dealt with liability and the second stage addressed the question of remedy. This case summary is on the Board's decision on liability.

The Board's Decision

The Board held that Jeppesen had a handicap under the *Code*. The Board held further that the requirement that all full-time firefighters be legally qualified to drive an ambulance [by obtaining a Class F license] constituted prima facie discrimination because it excluded persons with visual disabilities from becoming full-time firefighters. The Board held further that Jeppesen could have been accommodated, short of undue hardship, by permitting him to perform firefighting and related duties only. The Board relied on the following evidence in determining that the Ancaster Fire Department failed to prove that it could not have accommodated Jeppesen without incurring undue hardship:

In 1997 and 1998, the Ancaster Fire Department was hiring firefighters, not ambulance operators;

1. It was not necessary for the Ancaster Fire Department to designate all new employees to the ambulance. By the fall of 1998, there were 8 floaters in addition to the 8 firefighters assigned to the ambulance;

2. There was no persuasive evidence that all the full-time firefighters hired in 1998 were required to substitute for employees dedicated to the ambulance. From January 5, 1998 to December 31, 1998, there were 2 or more floaters in the station not scheduled to substitute for ambulance personnel on 96.5% of the day shifts. One of these floaters could have been dedicated to firefighting or related duties;

3. In October 1998, the Ancaster Fire Department enhanced its firefighting service by moving to 12 hour, 7 day a week fire coverage. The Ancaster Fire Department looked forward to having a crew of full-time firefighters on duty 24 hours per day;

4. At the highest, 12 full-time firefighters were needed to adequately staff the ambulance service. The greater number of firefighters by the fall of 1998 meant that at least one firefighter could be accommodated without undue hardship by assignment to firefighting duties only; and,

5. There was no concrete evidence that anyone, at the material time, considered whether the existing or a modified schedule could accommodate one firefighter assigned to firefighting duties only.

Metsala v. Falconbridge Ltd, Kidd Creek Division

Board of Inquiry Decision - February 15, 2001

OHRC Counsel - Jennifer Scott

Keywords: handicap, depression, chronic fatigue, accommodation

Facts

Dawn Metsala began working as a clerk with Falconbridge Ltd. in 1972. In 1988, she was promoted to payroll clerk, a position which involved significant overtime work and increased pressure. In early December 1989, Metsala asked for a transfer because of the workplace stress and was told she would have to wait for a position to become vacant. On December 11, 1989, Metsala commenced sick leave and was subsequently diagnosed with reactive depression and chronic fatigue. Metsala received her full salary for six months while on short term disability. Subsequently, Metsala went on long-term disability and received benefits equivalent to 66% of her salary for two years. Metsala's long-term disability benefits were cut off on June 30, 1992.

On June 26, 1992, Metsala's doctor completed a certificate of fitness indicating that Metsala was not fit for her regular job but was capable of completing a half day of non-intense office work. Metsala provided this information to Rodda, Falconbridge's supervisor of occupational health and rehabilitational services, and informed him that the restrictions were temporary and would last only 2 weeks to a month. At no point did anyone at Falconbridge contact Metsala or her doctor to discuss a return to work or to clarify the nature of her restrictions.

Customarily upon receipt of an employee's restrictions, Rodda would first seek a job in the employee's department that would meet the restrictions. If none was available, Rodda would look to other departments. Rodda had no authority or budget to create positions or modify existing positions. Employees on short-term disability leave were frequently given light duties.

From June 1992 to the end of December 1993, only one clerical position was posted and the complainant competed for and received this position despite not being the preferred candidate. However, during this time five clerical positions were filled on a contract basis. Rodda claimed that he did not believe these positions were appropriate for Metsala, although he did not contact her or her doctor in making these determinations.

From June 1992 to the end of December 1993, Metsala received no income replacement benefits nor did she earn income from other sources. Metsala did not seek other employment because she did not want to terminate her employment with Falconbridge and give up her significant service recognition credits.

Analysis: Metsala and Falconbridge were in an employment relationship at all material times. The Board found that reactive depression and chronic fatigue syndrome, from which Metsala suffered, constituted handicaps under the *Code* .

The Board found that Metsala was treated unequally vis-à-vis other employees when she was not provided with contract work or general clerical duties from June 1992 to the end of December 1993, and when she was required to compete for the position which she ultimately received. This unequal treatment resulted from the assumptions that were made about her particular handicap, a mental disorder, and from a lack of appropriate inquiries to gather accurate information. Rodda's actions on the basis of stereotypes constituted a prima facie case of direct discrimination on the basis of handicap.

The Board held that s.17 was the only available defence to Falconbridge for its actions of direct discrimination. In order to meet that defence, Falconbridge had to demonstrate that Metsala could not have performed the essential duties or requirements of the contract positions or general clerical positions, and that to have returned her to work in either capacity would have constituted undue hardship.

As Falconbridge took no steps to ascertain the true nature of Metsala's medical condition and did not offer her the contract positions based on assumptions and stereotypes, it failed to establish that it had an objective basis for concluding that she was incapable of fulfilling the work duties. Accordingly, the Board held that Falconbridge could not rely on the s.17(1) defence. Additionally, there was no evidence led on which the Board could rely to find that accommodating Metsala would have constituted undue hardship. The Board held that to require Metsala to wait for a vacant position for which she was qualified was not accommodation under the *Code*. Accommodation required more than merely investigating whether an employee could perform an existing job.

The Board found that Falconbridge contravened sections 5(1) and 9 of the *Code* by discriminating against the Complainant on the basis of handicap.