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## Alberta Court of Queen's Bench Overturns Human Rights Tribunal's Finding of Disability Discrimination in Employment

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Case Commented On: *Syncrude Canada Ltd v Saunders*, [2015 ABQB 237](#)

*Syncrude Canada Ltd v Saunders*, [2015 ABQB 237](#), case highlights the role of the appeal court in reviewing Human Rights Tribunal decisions, and the effect of the claimant's credibility on proving discrimination on the basis of disability or perceived disability.

Jeff Saunders was hired by Syncrude as a process operator, effective March 17, 2003, in its oil sands operation in Fort McMurray. Although process operators work in a dangerous environment, he had no prior experience. Saunders was required to undergo a health assessment for new hires, where he did not disclose any health issues. He denied ever smoking marijuana, denied consuming alcohol regularly and indicated he was a body builder who worked out regularly at the gym. He passed the company's drug and alcohol tests. Usually, process operators commence employment with on-site training. After training, Saunders was assigned to a 128-day-cycle, with two days worked, two nights worked, two days off, two days worked, two nights worked and then six days off.

Saunders was entitled to use vacation days as long as he obtained the supervisor's approval in advance. During the first six months of employment, he was granted six vacation days. He was absent for two separate days for illness. Medical notes were not required for these absences under Syncrude's policy (at para 13).

A routine performance review on July 18, 2003 indicated that Saunders was getting more comfortable with his surroundings but that he was very new to the process and it would take some time to gain the required knowledge. The supervisor also expressed concern about Saunders' attendance, and an appointment was made with the Syncrude health and wellness advisor to discuss Saunders' absenteeism (at para 14).

On July 31, 2003, Saunders requested vacation leave for August 2-3, 2003 to attend the Big Country Jamboree in Camrose. The acting supervisor refused because they were short staffed that weekend (at para 16). On August 1, 2003, Saunders took the company bus to the worksite but did not report to his shift because he had a severe headache. He telephoned his supervisor from the site, left a message that he was sick and returned to Fort McMurray on the bus (at para 16). Saunders also called in sick the next two days. The acting supervisor was suspicious that Saunders had taken the days off to attend the Jamboree, and sent an email to Saunders'

supervisor, his manager and human resources, describing the events that had occurred (at para 17). Saunders was instructed not to report for his regular shifts on August 8 and 9, 2003, but to attend the previously scheduled meeting with the health and wellness advisor on August 11, 2003. Before the meeting, Saunders obtained medical notes confirming that he had seen his physician on August 1 and 6, 2003 (at para 18).

On August 11, 2003, Saunders met with the health and wellness advisor, his supervisor and a representative from human resources. The manager accepted Saunders' explanation that he had a migraine headache from August 1 to August 6, 2003. Saunders was reminded of the proper rules for reporting absences and told that he would be tracked medically for three months (at paras 19, 20).

Saunders had illness absences in September 2003, and he also requested some vacation leave in order to babysit his younger siblings due to an urgent family matter. On October 24, 2003, Saunders broke his hand in a bar fight while intoxicated, and he went on disability leave, and was ready to come back to work on February 17, 2004. His supervisor did not want him back because of his absenteeism and his belief that Saunders could not be made an operator (at para 23). The supervisor testified he was concerned about the number of vacation days that Saunders had taken on short notice in order to extend his days off. Also the absences due to illness were at the end or beginning of a period when Saunders was scheduled to have days off, causing the supervisor to suspect that Saunders was "manipulating the system" (at para 24). Then, on January 1, 2004, Saunders fell on some ice after a late night party and re-broke his hand, requiring surgery (at para 25). He was terminated "without cause" on February 17, 2004, based on poor performance and innocent absenteeism (at para 26).

On March 4, 2004, Saunders filed a human rights complaint against Syncrude, alleging discrimination on the basis of disability or perceived disability in employment practices. The Alberta Human Rights Tribunal concluded that Syncrude had discriminated against Saunders and awarded him \$33,901 for lost wages and \$10,000 general damages, plus interest and out of pocket costs (at para 4).

Syncrude appealed to the Alberta Court of Queen's Bench under section 37 of the (now) *Alberta Human Rights Act*, [RSA 2000, c A-25.5](#). This section states (in part):

37(1) A party to a proceeding before a human rights tribunal may appeal an order of the tribunal to the Court of Queen's Bench by application filed with the clerk of the Court at the judicial centre closest to the place where the proceeding was held.

...

(4) The Court may

- (a) confirm, reverse or vary the order of the human rights tribunal and make any order that the tribunal may make under section 32, or
- (b) remit the matter back to the tribunal with directions.

...

Justice Bryan Mahoney of the Alberta Court of Queen's Bench noted that when determining whether a complainant has established a *prima facie* case of discrimination, the standard of review is reasonableness. Normally, appellate courts will not disturb findings of fact made by a trier of fact if there was credible evidence upon which the trier of fact could reasonably base his or her conclusion (at paras 33, 34). Thus, the task of the Court in this case was to look at

whether the weighing of the evidence done by the Tribunal was reasonable, and whether all relevant evidence was considered (at para 37).

Syncrude argued that the Tribunal erred in finding that Saunders had established a *prima facie* case of discrimination, because he was the only witness at the hearing, and his evidence was untruthful and evasive, and thus not credible. In addition there was no reliable medical evidence (there were just a couple of notes submitted) to establish perceived disability or disability (at para 40). Saunders and the Director of the Human Rights Commission argued that the Tribunal should have identified whether the basis for its finding of a *prima facie* case was the headaches or the hand injury. Nevertheless, they argued that Saunders had provided satisfactory medical evidence to establish discrimination based on disability (at para 42).

Justice Mahoney noted that while Syncrude had expressly challenged Saunders' credibility, the Tribunal had failed to adequately address the impact of Saunders' credibility on his ability to establish a case of discrimination. Thus, this was a reviewable error. Justice Mahoney then reviewed the evidence and provided twelve indicators that demonstrated Saunders' lack of credibility. These may be summarized as follows (at para 50):

- While Saunders denied substance use in his new-hire health assessment, on cross-examination he admitted to smoking marijuana until at least the age of 20. His physician's medical notes indicated he was smoking one ounce of marijuana per week, but he denied their accuracy (the physician was not called to give oral evidence);
- In his new-hire health assessment, Saunders said he had never broken any bones or had any prior sprains, but his medical records indicated prior injuries not disclosed to Syncrude;
- He did not recall using cocaine, despite his medical records indicating he was using cocaine and financing this habit by selling his possessions;
- While he denied using alcohol in his pre-hire assessment, his medical chart indicates he consumed 30 ounces of alcohol per week. He also admitted he was intoxicated on both occasions when he broke his hand—the first by punching someone in the face in a bar and the second when he fell down on ice after leaving a New Year's Eve party;
- While Saunders had indicated he had sought medical attention for his headaches in June 2003, medical records did not include any record of attending the clinic for treatment at any time in June 2003;
- He also told his supervisor that he was seeing his doctor for the headaches in July 2003, but his medical records and his own admission on cross-examination indicated he did not seek medical attention until August 1, 2003;
- Saunders never provided any documentation of his assertion that he had attended a hospital for a headache in June 2003;
- While Saunders testified that his absence in early September 2003 was caused by having the flu, the medical records said nothing about him having the flu;
- He testified he had broken his hand playing floor hockey on October 24, 2003, but later admitted that he had punched someone in the face during a bar fight;
- Saunders originally told Syncrude that he had re-broken his hand by falling on ice at 8 a.m. January 1, 2004, but hospital records indicated he had injured his hand shortly after midnight, which he acknowledged in cross-examination;
- Saunders had testified that he could not pay child support due to his termination, but confirmed during cross-examination that his wages had been garnisheed by maintenance

enforcement before his termination. Further, the evidence indicated that his cocaine use and sale of possessions were the actual reasons for inability to pay child support; and

- While he testified he had tried to find alternate employment immediately after he was terminated, he was unable to provide any evidence of any actual mitigation efforts.

The Tribunal had therefore erred in not evaluating the credibility of a witness whose evidence was critical and needed to be proven as reliable in order to form a factual basis for a finding of *prima facie* discrimination (at para 52). The Tribunal had also committed a reviewable error when it did not draw an adverse inference against Saunders for not calling his physician to testify in support of his claim of disability or perceived disability (at paras 67, 69). Because of this error, Syncrude had not had the opportunity to cross-examine the author of the medical records. This breached the duty of fairness (at para 78).

The Tribunal also erred when it concluded that Saunders had established a *prima facie* case that he was terminated on the basis of perceived disability. There had been no evidence of any linkage between his termination and a perceived disability (at para 86).

Justice Mahoney also analyzed whether, assuming the complainant had established a *prima facie* case of discrimination, the respondent had demonstrated that the discrimination was justifiable. Had the employer accommodated Saunders' needs with respect to a disability or perceived disability to the point of undue hardship (at para 87)?

While the Tribunal had concluded that Saunders' absenteeism was excessive and his poor attendance had been discussed with him, it was not accurate in stating that Saunders had not been warned that his continued employment was in jeopardy (at paras 90-1). Justice Mahoney pointed out that Saunders was aware of Syncrude's concerns about his attendance and was aware of the disciplinary actions available under the employee guidelines (at para 92). Because Justice Mahoney had concluded that Saunders' poor attendance was not connected to any disability, it would be impossible for Syncrude to accommodate Saunders without undue hardship due to the patterns of his absenteeism (at para 93).

Justice Mahoney also concluded that had Saunders made out his discrimination complaint, the remedies provided by the Tribunal (two years lost wages with a 50% discount for failure to mitigate, and \$10,000 for pain and suffering) were reasonable.

Given the long history of the matter and the futility of remitting the matter back to the Tribunal to arrive at the "only reasonable result", Justice Mahoney allowed Syncrude's appeal and dismissed Saunders' claim (at para 106).

## **Commentary**

With respect, I have some difficulty with the conclusions reached in this case. First, some of the indicia of Saunders' lack of credibility were not relevant to the issue of discrimination on the basis of disability. For example, the Tribunal had correctly noted that evidence (medical notes) indicating alcohol and cocaine use by Saunders was actually about a period of time *after* he was dismissed and therefore not relevant to the issue of discrimination (or credibility) (at para 45).

Second, the Tribunal had concluded that the documentary evidence submitted (e.g., the doctor's notes) was sufficient to support a finding of discrimination. It is clear that, whatever the cause, Saunders was disabled by his hand injury for a period of time. Further, no one at the hearing disputed that Saunders had a broken hand that required surgery (at para 64). Counsel for the Human Rights Commission and Saunders submitted that it may have been better if the Tribunal had specifically identified the basis of Saunders' case as the headaches or hand injury. Nevertheless, the Tribunal had concluded that Saunders had provided satisfactory medical evidence to support a *prima facie* case (at para 42). The Tribunal was prepared to accept the tendered evidence for proof of disability. Syncrude argued it was denied the opportunity to cross-examine the physician on the medical records, but the Tribunal had indicated that Syncrude could have called the physician as a witness; it was not the Tribunal that denied Syncrude that opportunity.

Third, Justice Mahoney held that Saunders did not state to Syncrude that he had a disability or required accommodation (at para 56). Further, the physician could have testified about the needed accommodations for Saunders' disability (at para 72). Yet, Syncrude was aware of the headaches and the hand injury, and the Tribunal's decision indicates that Saunders had communicated with the health and wellness office about "light duties" after his hand injury (see 2013 AHRC 11 at paras 24 to 27).

Further, case law is clear that if disability is one of the reasons for discrimination (even if not the sole reason) that is sufficient to make out a *prima facie* case of discrimination (see *Holden v Canadian National Railway Co.*, [1990] FCJ No 419 [QL], 112 NR 395; *Bernard v. Waycobah Board of Education*, [1999] CHR D No 2 [QL], (1999), 36 CHRRD/51 (CHRT), cited by the Tribunal). The Tribunal relied on *Desmoreaux v Ottawa-Carleton Regional Transit Commission* [2003] CHRT No 1 at para 72 for the principle that taking into account disability-related absences in deciding to terminate an employee for excessive absenteeism is *prima facie* discriminatory (see 2013 AHRC 11 at para 78). Thus, since most of Saunders' absences were related to his hand injuries and surgery, terminating him for "excessive innocent absenteeism" was *prima facie* discriminatory. Of course, if excessive absences pose an undue hardship for the employer, at some point, the employer would be able to argue that disability could not be accommodated to the point of undue hardship. However, there was little discussion of this in Justice Mahoney's decision. He concluded that disability was not the cause of the excessive absenteeism (at para 93).

Perhaps it was Justice Mahoney's decision that was unreasonable?

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