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IN THE MATTER OF THE *HUMAN RIGHTS CODE*
R.S.B.C. 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

B E T W E E N:

Stuart Craigan

COMPLAINANT

A N D:

West Coast Mining Contractors Ltd. and Chad Joe

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:	Barbara Humphreys
Counsel for the Complainant:	Devyn Cousineau
Counsel for the Respondents:	Chris Martin
Dates of Hearing:	September 14, 15, and 16, 2009

1. Introduction

[1] Stuart Craigan and Chad Joe are both members of the Sechelt Indian Band (the "Band"). Mr. Joe is the owner/operator of West Coast Mining Contractors Ltd. (the "Company"), whose office is located on Band land. The Company provides haul truck services for Construction Aggregates Ltd. ("CAL") (now Lehigh Mines), which exports aggregates.

[2] Mr. Craigan alleges that the Company and Mr. Joe (the "Respondents") refused to hire him as a haul truck driver because of a physical disability, contrary to s. 13 of the *Human Rights Code*. Mr. Craigan also alleges that, later, the Respondents refused to hire him because he had filed his complaint, contrary to s. 43.

[3] The Respondents deny the allegations. They say that they did hire Mr. Craigan as a spare truck driver, the only position available at the time, but they had to lay him (and others) off due to a decline in business. Subsequently, Mr. Craigan did not apply for employment.

[4] In addition to Mr. Craigan's evidence, his common law wife, Bonnie Nahanee, and his employer, Daniel Mayers, testified on his behalf. Mr. Joe testified on behalf of the Respondents. Mr. Craigan, Mr. Joe, and Mr. Mayers are all related.

2. Background Information

[5] In 1988, the Band, as lessor, and CAL, as lessee, entered into an agreement giving CAL the right to extract aggregates from Band land. In 2001, CAL and the Band entered into further agreements regarding the development of a deep sea loading facility on a portion of foreshore within a water lot controlled by the Band. In Schedule A to the agreement, CAL, the Union of Operating Engineers, Local 115 (the "Union"), and the Band agreed that CAL would hire its employees on a rotating basis between Union picks and CAL picks, with the Band having first right of refusal regarding CAL picks (the "Hiring Agreement"). Schedule A set out further details about the rotating hiring process. In certain circumstances, the Company can "name request" a particular Union member.

[6] Between 2001 and Spring 2003, Mr. Craigan was employed as a part-time haul truck driver for Salish Land Developments Ltd. ("Salish"), a sub-contractor to CAL. Dexter Craigan was the president of Salish. Mr. Craigan testified that, in April 2003, he sustained a soft tissue neck injury (the "Neck Injury") at work, and began to receive WCB benefits. At one point, his WCB benefits were cut off. They were reinstated after an appeal, and later terminated after an investigation by WCB.

[7] In about March 2007, Mr. Craigan learned that Bonnie Nahanee was pregnant. He began to look for employment.

[8] In March or April 2007, he spoke to Mr. Joe about employment with the Company. They disagree about the contents of that conversation.

[9] On April 25, 2007, Mr. Craigan began to work as a spare haul truck driver for DBD Ventures LTD. ("DBD"), of which Mr. Mayers is president. DBD operates on the same mine site as, and shares a lunchroom with, the Company. While Mr. Craigan was not a full-time DBD employee, he did, at times, work full-time hours. At the time of the hearing, he continued in his position as a spare driver for DBD.

[10] Mr. Craigan worked several shifts at the Company as a spare haul truck driver in November 2007. During this period, Mr. Craigan also earned income from DBD.

3. Credibility

[11] In assessing the credibility of the witnesses and deciding what weight to give to their evidence, I am mindful not only of such factors as a witness' demeanour, powers of observation, opportunity for knowledge, relationship to the parties, judgment, memory, and ability to describe clearly what was seen and heard, but also whether the evidence of the witness is in "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": *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at p. 357.

[12] Mr. Craigan was often vague in his answers to questions and, at times, evasive. His frequent answers to many questions were "I don't know" or "I can't remember". In stark contrast, however, he testified that he specifically recalled two telephone conversations he had with Mr. Joe.

[13] Mr. Craigan's evidence was that, on December 13, 2007, Mr. Joe telephoned him and asked about the human rights complaint Mr. Craigan had filed. Mr. Craigan testified that the conversation became heated, and that it lasted for about five minutes, with both individuals yelling at each other. Mr. Craigan stated that he was certain of the date of the phone call because he had noted it on his calendar immediately after the call ended.

[14] Mr. Craigan testified that, on December 20, 2007, Mr. Joe telephoned him again. The conversation was very short: Mr. Joe simply informed him that his services were no longer required.

[15] In cross-examination, Mr. Craigan was asked about an amendment he filed on November 4, 2008, in which he wrote that Mr. Joe told him, on December 13, that his services were no longer required and that, one to two weeks later, Mr. Joe left a telephone message in which he swore at him. Mr. Craigan reiterated that the telephone calls were the other way around: the long, heated call was on December 13, and the short call was on December 20.

[16] When shown that Mr. Joe's telephone records did not list a December 13 phone call from him to Mr. Craigan, but did indicate a call from Mr. Joe to Mr. Craigan on December 14, Mr. Craigan allowed that he might have made an error in his calendar entry. Further, when it was brought to Mr. Craigan's attention that the December 14 call was only for two minutes, but that, on December 20, Mr. Joe had telephoned him and the conversation had lasted for six minutes, Mr. Craigan acknowledged that his earlier evidence was incorrect. He stated that he had mixed up the two telephone conversations.

[17] Another brief example of Mr. Craigan's poor memory was his response when asked when he began working for DBD. He answered that it was June (2007), when in fact it was April 25.

[18] Given his poor recollection, vagueness, evasiveness, and changes in his evidence, I am reluctant to rely on Mr. Craigan's evidence.

4. Summary

[19] I have found that both the s. 13 and the s. 43 allegations of discrimination are not justified. In reaching this conclusion, I have considered all the evidence, although I may

not refer to every piece of evidence that was before me: *Clifford v. Ontario Municipal Employees Retirement System*, 2009 ONCA 670, paras. 29 and 40.

[20] I will deal with each allegation separately.

5. Allegation of discrimination contrary to s. 13

[21] Section 13(1) of the *Human Rights Code*, which reads, in part:

> A person must not
>
> (a) refuse to employ or refuse to continue to employ a person, or
>
> (b) discriminate against a person regarding employment or any term or condition of employment
>
> because of the ... physical disability ... of that person....

[22] Mr. Craigan alleges that, in the Spring of 2007, the Respondents refused to hire him because of his Neck Injury and his WCB claim. The basis for this allegation is, as Mr. Craigan testified, that Mr. Mayers told him that Mr. Joe would not hire him because Dexter Craigan had told Mr. Joe about the Neck Injury and WCB claim.

A. Decision

[23] For the following reasons, I conclude that the Respondents did not discriminate against Mr. Craigan contrary to s. 13.

B. Reasons

[24] Mr. Craigan's evidence was that, in March or April 2007, he saw an advertisement in the Band newsletter that the Company was looking for a full-time truck driver. He did not produce a copy of the newsletter. He further testified that he spoke to Mr. Joe about the position, and told him about his experience with Salish. Mr. Craigan's evidence was that, while Mr. Joe did not explicitly say he would hire him, Mr. Joe stated he would get Mr. Craigan "trained up". Mr. Craigan's understanding was that Mr. Joe had agreed to employ him. Mr. Craigan testified that Mr. Joe told him he would get in touch with him in a few days. However, Mr. Joe did not contact Mr. Craigan, who testified that, every time that he telephoned him, Mr. Joe put him off.

[25] Mr. Craigan said that he believed he was discriminated against based on what he says he was told by Mr. Mayers, that is, that Mr. Joe would not hire him because of his Neck Injury.

[26] Mr. Mayers testified that he had a conversation with Mr. Joe in April 2007. Mr. Mayers testified that Mr. Joe did not say to him that he would not hire Mr. Craigan, or that Mr. Mayers should not hire him. While Mr. Mayers' and Mr. Joe's evidence differs as to who raised the subject, it is clear that Mr. Craigan's WCB claim was discussed. Mr. Mayers' evidence was that he was aware that, after an investigation, Mr. Craigan's WCB benefits were terminated. However, Mr. Mayers believed that Mr. Craigan deserved a second chance.

[27] I find that Mr. Mayers did not tell Mr. Craigan that Mr. Joe would not hire him because of his Neck Injury.

[28] I prefer Mr. Joe's evidence that, when Mr. Craigan approached him, he told Mr. Craigan there was no work for a truck driver at that time, but that the Company did need an excavator. Mr. Craigan was not trained as an excavator.

[29] Mr. Craigan testified that, while he was working for DBD, he could see that the Company hired new drivers, and that it is reasonable to infer that his Neck Injury was a factor in Mr. Joe not hiring him. Mr. Craigan did not know the background of the individuals hired by the Company, whom I will refer to by their initials.

[30] On April 13, 2007, the Company hired BJ. He was a Band pick. Mr. Joe testified that BJ was an employee of a company he took over.

[31] BJ left the Company on June 5. In response to a document showing that the Union attempted to contact him for employment with the Company on that day, Mr. Craigan responded that he must have missed the call. (I note his June 2007 calendar page indicates that he worked 7.5 hours at DBD on June 5.) As his call to the Union did not produce results, Mr. Joe moved JG, who was working for the Company as an excavator, to the truck driver position. JG already knew the mine site, the safety issues and the rules of the road.

[32] At the beginning of July 2007, the Company contacted the Union regarding an available position. When no candidate was provided by the Union, Mr. Joe, on his own, employed CP.

[33] Later in July, the Company required an excavator. It approached the Band for a name, but none was provided. The Company then contacted the Union. DF was hired on July 12.

[34] Mr. Craigan referred to another individual, BP, whom he identified as another new employee of the Company. Mr. Joe testified that BP, who was retired, and had previous haul truck experience, was referred by the Union because no current Union members were available. BP worked for the Company as a spare driver for five days in June and July, 2007.

[35] At the beginning of August, the Company again contacted the Band; no name was provided. On October 7, the Company hired NW, who had previous experience in Ft. St. John.

[36] On August 16, 20, and September 22, two truck drivers and an excavator left their positions with the Company, and were not replaced.

[37] On October 22, the Company again contacted the Band regarding an excavator/welder position. The Band did not provide any names.

[38] The employee who left the Company on August 20 had been hired by the Company as a Band pick. According to the minutes of a Band council meeting he attended on September 11, 2007, Mr. Craigan expected that he should be the replacement for this Band member.

[39] Mr. Craigan testified that he spoke with Mr. Joe on August 16. Mr. Joe testified that Mr. Craigan had heard that a Company employee, a Band member, was leaving, and Mr. Craigan wanted to take his place. Mr. Joe explained that the Company was not required to employ 50% Band members, but Mr. Craigan did not agree. In any event, Mr. Joe told Mr. Craigan that, before he could be hired, he would have to provide a doctor's note and undergo an alcohol and drug test, which Mr. Craigan provided the next day. Mr.

Joe testified that, after receiving the medical note, he had no concerns about Mr. Craigan's ability to do the job.

[40] When he was not hired, Mr. Craigan contacted the Band to raise concerns that the Company was not adhering to the Hiring Agreement, which he understood meant that 50% of the Company's employees had to be Band members. Mr. Joe understood that the Hiring Agreement required only that he approach the Union and the Band alternately regarding opportunities for employment. For example, if it was the Band's pick, and no name was provided, the Company could contact the Union. If neither put forward a candidate, the Company could go elsewhere to look for employees.

[41] On the morning of September 11, Mr. Craigan met with Band council members to discuss his concerns. Mr. Craigan also voiced his concern regarding the Band's process, saying that he had left his name at the Band office months ago.

[42] Mr. Joe met with the Band council members in the afternoon of September 11. He clarified that the employee who left on August 20 was on a leave of absence and would not be replaced. He also expressed his frustration, saying that he often left a message at the Band office regarding an employment opportunity, but did not hear back from the Band. The Band inquired if there was anything Mr. Joe could do for Mr. Craigan. Mr. Joe responded that the only opportunity for Mr. Craigan was to be a spare driver. Mr. Joe testified that there was no downside to the Company having an extra spare driver.

[43] As a result of the meeting, the Company and the Band agreed on a new process for communicating about employment opportunities. Mr. Craigan testified that, after his complaint, the Band began to keep a list of members interested in working with the Company. Mr. Craigan understood that there was an agreement between the Band and the Company that he would be the next Band pick.

[44] Mr. Craigan also contacted the Union, alleging that Mr. Joe refused to hire him. By letter dated October 17, 2007, the Union responded that it could find no information to support the allegation.

[45] Mr. Craigan did not allege that the Company's failure to hire him had anything to do with his Neck Injury in his complaints to the Band or the Union.

[46] Mr. Joe testified that, between May and June 2007, there were three accidents involving truck drivers at the mine site. After speaking with the mine inspector, Mr. Joe decided that he would have to develop better training for his drivers. Mr. Craigan agreed that, because of his long hours with DBD during the summer of 2007, he was not available to be trained by the Company in July or August.

[47] Mr. Joe contacted Caterpilllar to try to arrange for the training services of an expert. As the expert was very sought after, he was not available until the end of October.

[48] Mr. Craigan agreed that Mr. Joe told him in August 2007 that he was putting together a training program because of accidents at the work site. Mr. Craigan was trained between October 29 and November 8, 2007, and he worked several shifts for the Company between November 8 and November 20.

[49] Mr. Joe testified that work routinely slows down in winter. Mr. Mayers gave similar evidence. Mr. Craigan, and three other employees, were laid off. Two were full-time truck drivers; the other was a full-time excavator. Mr. Joe said that he has never kept a spare driver employed while laying off a full-time driver.

[50] Mr. Craigan's Record of Employment indicates that he was laid off due to a shortage of work.

[51] After considering all the evidence regarding the Company's hiring of employees, I conclude that there were valid reasons for the Company's hiring decisions, and that Mr. Craigan's Neck Injury was not a factor. The Union did telephone him to dispatch him to the Company on June 5, 2007, but there was no answer. Mr. Joe also contacted the Band a number of times, but, even though Mr. Craigan says that he had left his name at the Band office, the Band did not contact him. The failure of the Band to contact Mr. Craigan has nothing to do with Mr. Joe.

[52] Mr. Joe requested a medical note from Mr. Craigan, but that does not lead to a conclusion that Mr. Joe discriminated against him. Mr. Mayers testified that he also requests medical notes.

[53] After Mr. Craigan's complaint to the Band, Mr. Joe agreed to hire him as a spare driver, and did so. Mr. Craigan's lay-off in November was due to a decrease in work at that time of year, which also affected DBD.

[54] In summary, I find that Mr. Craigan's Neck Injury and WCB claim were not factors in the Respondents' hiring decisions.

6. Allegation of discrimination contrary to s. 43

[55] Mr. Craigan amended his complaint to allege that the Respondents retaliated against him because he had filed a complaint, contrary to s. 43, which reads:

> A person must not evict, discharge, suspend, expel, intimidate, coerce, impose any pecuniary or other penalty on, deny a right or benefit to or otherwise discriminate against a person because that person complains or is named in a complaint, gives evidence or otherwise assists in a complaint or other proceeding under this Code.

[56] Mr. Craigan alleges that the Respondents discriminated against him by refusing to hire him because he had filed a complaint against them.

A. Decision

[57] For the following reasons, I conclude that the Respondents did not retaliate against Mr. Craigan contrary to s. 43.

B. Reasons

[58] Mr. Craigan filed his complaint on October 22, 2007. On November 28, 2007, he filed the amendment.

[59] On December 4, the Tribunal sent the complaint to the Respondents. Mr. Joe testified that he has to go into Sechelt to pick up his mail. He received the Tribunal's letter on December 20. He testified that he did not understand why Mr. Craigan had filed

the complaint as Mr. Joe had trained him and hired him for several shifts. Mr. Joe telephoned Mr. Craigan that same day. Both agree that it was a heated conversation.

[60] Clearly, Mr. Craigan's complaint was not related to his lay-off in November, which occurred before Mr. Joe knew about the complaint.

[61] To demonstrate that the Company continued to need drivers, Mr. Craigan pointed to notices in the June 26 and July 3, 2008 Band newsletters that the Company was looking for a full-time truck driver. Those interested were asked to contact Mr. Joe.

[62] Mr. Craigan testified that he did not contact Mr. Joe regarding employment in 2008 (or any other time after November 2007) because he thought it would be pointless. He believed that he would just get the "run-around" again.

[63] Mr. Joe had trained and hired Mr. Craigan, and only laid him off (along with other employees) when business slowed down. In these circumstances, it was not, in my view, reasonable for Mr. Craigan to conclude that it would have been pointless for him to speak to Mr. Joe about employment.

[64] It was Mr. Craigan's choice not to contact Mr. Joe. I do not think that there was any obligation on Mr. Joe to contact Mr. Craigan directly, especially after he and the Band had agreed on a new process.

[65] In these circumstances, I find that the Respondents did not retaliate against Mr. Craigan because he had filed a complaint.

7. Conclusion

[66] I find that Mr. Craigan's complaints are not justified and dismiss them under s. 37(1) of the *Code*.

Barbara Humphreys, Tribunal Member