Board No.: 2007-01 and 02

BEFORE THE YUKON HUMAN RIGHTS BOARD OF ADJUDICATION

Between:

Susan Malcolm and Sarah Baker

Complainants

Yukon Human Rights Commission

And:

Yukon College, Margot Neely (Harvey) and Ray Marnoch

Respondents

DECISION

Zeb Brown	Counsel for the Complainants
Susan Roothman	Counsel for the Yukon Human Rights Commission
Larry Page	Counsel for the Respondents

Yukon Human Rights Board of Adjudication: Barbara Evans

Hearing Dates:	2009	February 2, 3, 4, 5, 6
		April 6, 7, 8
		October 14, 15, 16
		November 16, 17, 18, 19, 20
	2010	February 8, 9, 10, 11
		May 3, 4, 5

INTRODUCTION

This case spans a time frame of two school years, from 2004 to 2006, when the Complainants were registered in the Community Support Worker program at Yukon College ("the College").

The Complainants, Sarah Baker and Susan Malcolm, are 57-year-old twins who allege that the primary instructors in the program, Ray Marnoch and Margot Neely (collectively, "the Instructors") discriminated against them on the basis of their age, family status, and mental/physical disability. They also allege that the Respondents harassed them while attending the Community Support Worker ("CSW") program.

On the one hand, there is evidence that when the Complainants were attending Yukon College, they suffered from health issues that impacted both their mobility and their ability to attend all of their classes. There is evidence that they told several staff members at the College that they may have a learning disability, which they described as "number dyslexia".

On the other hand, the Complainants' argument is that the Respondents harassed them by offering accommodations to address their alleged disabilities, when such offers were not welcome. The Complainants' position is that they clearly indicated that they did not want to be treated differently from other students and wished "to be left alone", even if they had disabilities.

What further confused the matter is that while the Complainants say they wished to be left alone, they also allege that the Respondents failed to provide the accommodations they requested for their health issues, including a request that they be allowed to do their final workplace practicum part time.

The Respondents contested the Complaints' allegations. They denied that the Complainants were discriminated against on the basis of age as the age of the Complainants was known at the time of being accepted into the program and most of the participants in the program are mature students. In the area of physical or mental disability, the Respondents denied that Complainants had physical or mental disabilities or that there was any evidence that they believed Ms. Malcolm and Ms. Baker had any physical or mental disabilities. In regard to the allegations of discrimination on the basis of family status, the Respondents argued that there was no evidence of discrimination on this basis. The Respondents' position was that their actions were all focused on trying to provide the Complainants with assistance so that they could be successful in completing the CSW program.

RELEVANT LEGISLATION: Yukon *Human Rights Act* and Regulations

Discrimination

S. 7: It is discrimination to treat any individual or group unfavourably on any of the following grounds:

e) age;
h) physical or mental disability;
k) marital or family status

Accommodation

S. 8(1): Every person has a responsibility to make reasonable provisions in connection with employment, accommodations, and services for the special needs of others if those special needs arise from physical disability, but this duty does not exist if making the provisions would result in undue hardship.

(2) For the purposes of subsection (1) “undue hardship” shall be determined by balancing the advantages of the provisions by reference to factors such as

a) safety;
b) disruption to the public;
c) effect on contractual obligations;
d) financial cost;
e) business efficiency.

S. 9: No person shall discriminate
a) when offering or providing services, goods, or facilities to the public

Harassment

S. 14(1): No person shall
(a) harass any individual or group by reference to a prohibited ground of discrimination;
(b) retaliate or threaten to retaliate against an individual who objects to the harassment.
(2) In subsection (1), “harass” means to engage in a course of vexatious conduct or to make a demand or a sexual solicitation or advance that one knows or ought reasonably to know is unwelcome. R.S., Supp., c.11, s.13

Acts of employees

S. 35: Employers are responsible for the discriminatory conduct of their employees unless it is established that the employer did not consent to the conduct and took care to prevent the conduct or, after learning of the conduct, tried to rectify the situation. R.S., Supp., c.11, s.32.

Disposition of complaints by commission

S. 21: After investigation, the commission shall
(a) dismiss the complaint; or
(b) try to settle the complaint on terms agreed to by the parties; or
(c) ask a board of adjudication to decide the complaint. R.S., Supp., c.11, s.20

Remedies

24(1) If the complaint is proven on the balance of probabilities the board of adjudication may order the party who discriminated to

(a) stop the discrimination;
(b) rectify any condition that causes the discrimination;
(c) pay damages for any financial loss suffered as a result of the discrimination;
(d) pay damages for injury to dignity, feelings, or self-respect;

(e) pay exemplary damages if the contravention was done maliciously;
(f) pay costs.

PROCEEDINGS

This matter was referred to the Yukon Human Rights Board of Adjudication (the "Board") by the Yukon Human Rights Commission (the “Commission”) on February 8, 2007, pursuant to section 21(c) of the Yukon *Human Rights Act* (“Act”). It is based on two complaints filed by twin sisters, Ms. Malcolm and Ms. Baker, on December 29, 2004. On July 6, 2007 the pre-hearing conference was attended by the Complainants along with Tony Malcolm, Susan Malcolm’s son, and Ann Nourse, the Complainants’ sister. The Commission was represented by Susan Roothman. The Respondents (Yukon College, Margot Neely and Ray Marnoch) were represented by Joie Quarton and Larry Page. At that time, submissions were requested in regard to joining the two complaints, the scope of issues and remedies, proposed witness lists, and lists of documents to be supplied by the end of August, 2007. On August 1, 2007 the Board was advised that the Complainants had retained Zeb Brown as counsel. An extension of timelines for submission of requested disclosure was granted and on November 1, 2007 the Board received submissions on the scope of the Complaint and the remedies sought by the Complainants.

In response, the Commission advised in correspondence of November 27, 2007 that the Board only had "jurisdiction to hear the complaints of the Complainants with respect to allegation 4, i.e. that, the Respondent discriminated against the Complainants by preventing them from registering for the second semester on the grounds set out in the Texts of the Complaints". A second pre-hearing conference was scheduled for November 27, 2007. At that time, jurisdiction was to be determined by submission. In addition, dates were scheduled for hearing commencing April 21, 2008.

On December 12, 2007 the Board received submissions from the Complainants regarding Board jurisdiction. On January 4, 2008 submissions were received from the Respondents and a reply from the Complainants was received on January 10, 2008. In a decision dated January 24, 2008, the Chief Adjudicator clarified that the issue was whether or not the Board should entertain amendments to a Complaint, regardless of who brings the motion to amend, effectively quashing the argument regarding jurisdiction.

The Original complaint text forwarded to the Board was:

> *The Complainant alleges that the Respondent contravened the Act by discriminating against her on the grounds of age, physical or mental disability, family status and association, harassed her and did not accommodate her in the area of services to the public*.

The Complete decision is attached as Appendix A, but in summary, the Board decision stated:

> *The question of whether the Commission has the right to determine which parts of a Complaint are breaches of the Act prior to referring a matter to the Board of Adjudication is not for the Board of Adjudication to decide. However, because of Regulation 8(2) it is my view that the legislators contemplated there may arise a situation where the Board (or Chief Adjudicator) should entertain amendments to a Complaint to be decided, regardless of who brings the motion to amend.*
>
> *It is my further view that the Complainants should be heard on the Motion, and the Commission and Respondent provided an opportunity to respond. Therefore, I am requiring the parties to bring submissions in order that a decision regarding an amended text of the complaint may be made in an informed manner.*

The hearing was scheduled to commence on April 21, 2008. The Respondents requested an adjournment which was ultimately granted, by agreement of the Parties. However, a third pre-hearing conference was scheduled for April 21, 2008 to confirm the status of the complaint text, hearing dates, duration and order of presentation, witness lists, and final disclosure of documents.

The Complainants filed an amended Form 1. The Commission requested and was granted an extension for their submissions until May 15, 2008.

On May 15, the Commission filed a Motion for permission to change the text of complaints, pursuant to section 8(2) of the Yukon Human Rights Regulations. The Chief Adjudicator asked the parties to file written submissions on this issue by July 15, 2008. The amended text of the complaints proposed by the Commission stated:

> *The Complainant alleges that the Respondent contravened the Act by discriminating against her on the ground of age, physical or mental disability, family status and association, harassed her and did not accommodate her in the area of service to the public by preventing her from registering for the second semester classes, unlike the other students in the CSW program resulting in her not being in a position to finalize the CSW program.*

In a decision rendered July 11, 2008, the Board decided not to allow the amendment. This decision is attached as Appendix B.

On July 28, 2008 the Commission contacted the Board and noted that the July 11, 2008 decision was rendered prior to the July 15, 2008 deadline submissions. The Board requested that all submissions be provided by August 19, 2008. In those submissions, the Commission submitted a further amended Text of the Complaints which read as follows:

> *The Complainants allege that the Respondents contravened the Act by discriminating against them on the grounds of age, physical or mental disability, family status and association, harassed them and did not accommodate them in the area of service to the public by preventing them from finalizing their studies at the Yukon College.*

The Board issued its initial decision September 16, 2008 with amendments on September 25, 2008. The final decision is appended as Appendix C.

The text of the Complaint that was before the Board is as follows:

> *The Complainants allege that the Respondents contravened the Act by discriminating against them on the grounds of age, physical or mental disability, family status and association, harassed them and did not accommodate them in the area of service to the public by preventing them from finalizing their studies at Yukon College.*

Chronology

Ms. Malcolm and Ms. Baker are mirror twins, who were investigating a new career as Community Support Workers by taking this program at Yukon College. When they began their studies, they were mature students, in their late 50s.

In 2002, Ms. Malcolm and Ms. Baker applied to Yukon College for the one-year (two-semester) Community Support Worker (CSW) program after closing their restaurant business in Dawson City. In 2003 and 2004 they completed the necessary college preparation courses successfully. These courses included math, English, computer keyboarding and psychology. Ms. Malcolm and Ms. Baker started the CSW program in September 2004 with the expectation that they would complete the one-year program and graduate in June 2005.

The requirements, during the first semester, were that students in the CSW program attend classes from 8:30 a.m. to 12:00 noon three days per week, as well as one evening per week. In addition, there was a requirement that students participate in practicums in the field, as arranged by Ms. Neely.

Early in the program, the Complainants faced what they considered to be challenges in regard to their assignments. First, the Instructors told them that their work was too similar, and encouraged them to work separately — the presumption being that they were helping each other with their assignments. Next, Mr. Marnoch asked the Complainants to ensure that their work did not smell of smoke as he had a strong allergy to smoke. A number of the Complainants' assignments were handed in late, had the incorrect cover page, or were placed in the wrong in-box. These matters were brought to their attention by the Instructors. In mid-October, Ms. Neely advised the Complainants that a meeting would be conducted with each of them separately, on October 20, 2004. The Complainants both interpreted this to mean that they were going to be ejected from the program. Ms. Malcolm was subsequently admitted to Whitehorse General Hospital with heart problems due to stress, and the meetings were rescheduled for November 3, 2004.

In late October 2004, the Complainants went to the Commission to ask for information and to discuss filing a complaint for discrimination and harassment. The Commission advised Yukon College of the Complainants' concerns and the Executive Director spoke to both Mr. Marnoch and Ms. Neely about the need to provide accommodations. Subsequently, on November 17, 2004, the College had a meeting with Ms. Baker and Ms. Malcolm to discuss their concerns and to attempt to resolve their concerns.

The evidence is contradictory in relation to what was discussed during the November 17 meeting except that both Parties agree that the Complainants agreed to try the

College's human rights resolution process and meet again with Ms. Neely and Mr. Marnoch. The Instructors testified that they were deeply affected by the realization that two of their students had filed a human rights complaint against them.

There were numerous other meetings between November 3, 2004 and December 15, 2004 involving the Complainants and the Instructors. Catalina Colaci, from the Learning Assistance Centre, and Gloria Baldwin-Schultz, a counsellor at the College, attended some of these meetings. The meetings were focused on the development of an education plan that would reduce the stress on the Complainants by extending the time for them to complete the CSW program into a third or fourth semester, while retaining full-time funding from Social Services.

During this time period, there were miscommunications between the Complainants and the Respondents. The Complainants say they were feeling increasingly harassed and stressed, with the result that, in a number of instances, they say they acquiesced to the Respondents' suggestions regarding their proposed education path. In fact, however, they say they remained intent on completing the program in one year. The Respondents, on the other hand, believed that the Complainants were agreeable to completing the CSW program part time, as outlined in the education plan, and they continued to focus on ensuring that the Complainants accepted the education plan to extend their learning timeframe, believing it would lead to the Complainants successfully completing the CSW program.

The Complainants returned to the Commission and filed a complaint dated December 29, 2004. In their complaint, they alleged they were being treated unfavourably because of their family status, that the stress was having a negative impact on their health, and that the Instructors were trying to disqualify them from the program because they perceived that they were mentally disabled. The remedy the Complainants sought was to be allowed to register for a full-time course load in the second semester and to find a way to minimize their contact with Mr. Marnoch and Ms. Neely. They also noted in their complaints that they were concerned about retaliation for filing the complaints.

The culmination of all of the meetings was on January 4, 2005, when the Complainants attempted to register for a full course load. One of the reasons they were unable to register for a full course load was that Ms. Neely hadn’t provided them with the authorization form that was necessary to register in the courses, believing that they were going part time and that before registering, they needed to meet to discuss which courses they would be taking.

Another reason the Complainants were unable to register for a part-time course load was that their reserved seats in a course on Fetal Alcohol Spectrum Disorder (FASD) were given to other students not in the CSW program. When this problem was identified, the Registrar offered to have the other students' registration withdrawn, but the Complainants say they were too intimidated to accept this offer and believed it was not right to bump other students from the course. They attempted to enrol in an on-line course delivery for the FASD program, but discovered that was not possible.

Recognizing they would not be able to graduate in June 2005 as planned, the Complainants say they acquiesced and began attending the program part time.

However, the Complainants returned to the Commission and added the complaint that Ms. Neely had interfered in their attempt to register for the term beginning January 10, 2005 without a doctor's note. The Commission accepted the Complaints for further investigation.

During the second semester (January to April 2005), based on concerns about the human rights complaint, Mr. Marnoch was provided with a co-facilitator in the classes he taught to the Complainants. The Complainants were assigned to the other facilitator. The Complainants allege that this was further proof that Mr. Marnoch was discriminating against them, even though this was one of the conditions they requested as part of the remedy they were seeking to their complaint.

Between January and April 2005, with the reduced course load, Ms. Malcolm completed the term and made the Dean’s list, and Ms. Baker was two points from making the Dean’s List, with a grade point average of 3.48. From the perspective of the Respondents, the plan of a reduced course load worked. In September 2005, Ms. Baker and Ms. Malcolm signed up for two Early Childhood Development courses and Introduction to Psychology. Both passed the Early Childhood Development courses. Ms. Baker failed psychology, and neither of them showed up for First Aid or Food Safe, which were two non-credit courses required for completion of the CSW program. They both failed Prevention and Management of Assaultive Behaviour.

In January 2005, both Complainants returned to the College and completed all of the academic requirements for the CSW program, including Communication in Relationships (ECD215) and the FASD course. Both signed up for Practicum III and Integration Seminar III and both withdrew before completing these courses. At that point, the remaining requirement for graduation from the CSW program was the final practicum. Working with John Berryman as their coordinator, the Complainants were assigned to work for two weeks at full-time hours. They requested that they be accommodated by not having to work full-time hours, and to extend the practicum so that they would only work four to six hours per day instead of eight. This request was refused. They did not complete the work practicum and have not graduated. Although they were invited to return the following year (2007-08) to complete the program, they did not.

The Complainants and the Respondents both gave evidence that Community Support Workers were in high demand. In fact, they both said that the demand is so high that many of the current workers are not CSW graduates. Testimony by both the Complainants and Respondents indicated that a number of students do not complete the program, but choose to leave to take full-time jobs in their field. Ms. Baker and Ms. Malcolm did not graduate and there was no evidence that they had sought or acquired work in this field, or in any other field.

ISSUES

The issues in this case are:

1. **Whether or not the Respondents discriminated against the Complainants on the basis of their age, family status, or disabilities, as prohibited by section 7 of the Act;**
2. **Whether or not the Respondents harassed the Complainants on the basis of a prohibited ground of discrimination, as defined by section 7 of the Act; and**
3. **Whether or not the Respondents failed to provide the Complainants with the accommodations they requested.**

Having heard all of the oral testimony and having reviewed the documentary evidence, I will consider the complaint in two parts:

1. The allegations up to the point where the Complainants were unable to continue in the second semester as full-time students (September 2004 to January 2005); and
2. The impact that going part time had on the Complaints' ability to complete the CSW program.

The Law

The onus is on the Complainants to prove on a balance of probabilities that they were discriminated against on the basis of their age, family status, or disabilities, as prohibited by section 7 of the Act.

Although not specifically defined in the Act, physical and mental disability are prohibited grounds of discrimination in the Yukon. Section 8(1) of the Act specifically provides that:

> Every person has a responsibility to make reasonable provisions in connection with employment, accommodations, and services for the special needs of others if those special needs arise from physical disability, but this duty does not exist if making the provisions would result in undue hardship.

While adjudicators have always interpreted the definition of disability broadly, in keeping with the mandate to apply a large and liberal interpretation to human rights legislation, it is clear that the concept of disability will not be interpreted so broadly that the purpose behind the legislation would be trivialized. Where an illness or condition is *not enumerated* in the applicable legislation, the board will have to determine whether the condition complained of is, in fact, a handicap or disability within the meaning of the particular legislation. Essentially, only disabilities that affect or are perceived to affect a person's ability to carry out life's important functions, including specific aspects of a job position, will be found to be a disability.

The perception of a disability will also amount to discrimination on the basis of disability if it forms the basis for discriminatory conduct. Ontario, the Northwest Territories, Nunavut and Nova Scotia expressly include protection against discrimination on the basis of perceived disability in their definitions of disability. However, even in provinces

in which disability is not defined and there is no mention of a perception of disability, tribunals have determined that discrimination on the basis of disability would require the employee to establish that he or she is, or was perceived to be, disabled and that such perception of a disability was a factor in the treatment accorded to him or her."

The Supreme Court of Canada in *Montreal (Ville) v Quebec (Commission des droits de la personne et des droits de la jeunesse)* further emphasized that the definition of "handicap" under human rights legislation is to be multi-dimensional with an emphasis on human dignity, respect and the right to equality rather than on the biomedical condition itself. The effects of the distinction, exclusion or preference and not the precise *cause* or *origin* of the handicap is what, according to the court, is important for definitional purposes. In *Davison v St. Paul Lutheran Home of Melville Saskatchewan* the respondent was found to have unlawfully discriminated against the complainant on a basis of a perceive disability from obesity.

In *Ontario (Human Rights Commission) v. Vogue Shoes*, it was held that obesity is not a physical disability unless it is an ongoing condition, effectively beyond the individual's control, which limits or is perceived to limit his or her abilities. In *Herron v Niagara (Regional Municipality*), the Ontario Board of Inquiry found that the complainant had been discriminated against because of a handicap (the complainant was obese and suffered from hypertension). The Board refused to decide whether obesity was a handicap within the meaning of the *Ontario Human Rights Code* but did find that hypertension was a disability.

In *Hamlyn v Cominco Ltd.* the Complainant alleged he was discriminated against because of obesity. The Council examined evidence on obesity and the doctors' reports which stated the Complainant's condition was caused by lack of willpower to achieve weight loss. Despite this evidence, it was found that the complainant was discriminated against because of his large size was 'perceived' as a physical disability, which would prevent him from fitting into vessels safely and was refused employment on that basis.

September 2004 to January 2005:

DISCRIMINATION ON THE BASIS OF AGE

Yukon College was aware when the Complainants registered in the CSW program that they were in their late 50s. Ms. Malcolm testified that age was not an issue. Her evidence at the hearing was, "I guess we were the oldest in the class, but I don't believe there was an age barrier to take the course". Ms. Neely's evidence was that most students in the CSW program are in their 30s and 40s, and listed 11 students in the class who were over 50 years of age. Mr. Marnoch stated that the College actually targeted students for the CSW program who would be considered "mature students", explaining, "We are looking for maturity and life experience in our students."

To establish that they were discriminated against on the basis of their age, the Complainants must show that they were treated unfavourably because of their age. For example, exclusion from a program because a person is "too old" or "too young" would be clear discrimination based on age.

In this case, there was no evidence that the Complainants were treated differently or unfavourably on the basis of their age. As a result, I do not find that the Complainants have met the onus of proving discrimination on the basis of age in this matter.

DISCRIMINATION ON THE BASIS OF FAMILY STATUS

Allegations

The Complainants are twins. They describe themselves as “mirror twins” and allege that they were discriminated against in two particular areas on the basis of their family status:

1. Group activities in class; and
2. Homework assignments.

1. Group Activities in Class

The Complainants allege that because they are twins, they were told to sit with other students during group activities, to work in groups with other students, and to be separated from each other during class participation activities.

Both Ms. Neely and Mr. Marnoch denied that they singled out the Complainants because they were twins. They said that it is their usual practice to mix members of the class when participating in group activities, that they are aware of family relationships (siblings, spouses, etc.), and that it is a factor when they watch how students interact together.

Ms. Neely recalled one occasion when she purposely asked the Complainants to be in different groups. She said that usually students were “encouraged” to work with different students. She stated that she thought she was being helpful because Ms. Baker and Ms. Malcolm had said that, as mirror twins, they feel the same, experience situations in similar ways, and need to share tasks. As such, Ms. Neely thought the exposure to different students would be beneficial to them.

2. Homework Assignments

On a number of occasions, the Complainants were challenged that they were not doing their assignments independently as their assignments appeared to be very similar. The Complainants stated that, as mirror twins, they think very much alike, so the similarities in their assignments were not surprising. They said they did, however, agree that they would try to ensure they did not collaborate when doing future assignments.

FINDINGS

To establish that family status was a ground of discrimination, the Complainants would need to show that they were treated differently from other students because of their family status — in this case, because they are twin sisters.

While it is understandable why the Complainants might have believed they were being singled out when they were asked to move into different groups, I accept the evidence of the Instructors that the teaching methods for the CSW program include encouraging diversity in group activities, and that this is a sound method, often used and generally accepted. Further, I accept the evidence that although there were no other students in

the program who shared family status, whenever the Instructors identified that students were not exposing themselves to different groups, they encouraged them to do so, and that this was done for all students.

Although the Complainants' testimony was that they were singled out repeatedly, they were only able to give details of one particular incident in class. I do not accept that this meets the test for harassment as defined in the Act as "to engage in a course of vexatious conduct or to make a demand or a sexual solicitation or advance that one knows or ought reasonably to know is unwelcome."

With regard to the similarities in the assignments handed in by the Complainants, I do not believe that the Instructors discriminated against the Complainants in this regard because of their family status. Having reviewed the documents, it is not difficult to see the similarities in the assignments the Complainants handed in, and to be concerned that two people living together and participating in the same educational program might collaborate while doing their assignments.

The Instructors brought their concerns to the Complainants' attention. The Complainants testified that they acknowledged the concerns, but that they didn't realize they were not allowed to discuss assignments with each other, which effectively was an admission that they had collaborated on assignments. Once it was brought to their attention that they needed to complete their work independently, they agreed to address the Instructors' concerns in future assignments.

Regardless of the similarity of the assignments, the Complainants' assignments were graded independently. Consequently, I find there was no evidence that the Complainants were treated differently from other students, or unfavourably because of they were twins. As a result, I find that the Complainants have not met the onus for proving discrimination based on family status.

DISCRIMINATION ON THE BASIS OF DISABILITY

1. Learning Disability, Cognitive Disabilities (possible dyslexia)

Allegations

Dyslexia

At one point in the pre-course preparation, Ms. Baker told the learning assistant that she thought she had a problem with scrambling numbers, and that it might be "number dyslexia". At that point, the learning assistant provided her with a calculator, which she used for a short period of time. The evidence did not disclose any issues with performance related to dyslexia during the CSW program.

During the hearing, both Ms. Baker and Ms. Malcolm denied having dyslexia. However, they did not deny that they had suggested they had problems with math and that it might have been because of dyslexia relating to numbers. However, at the hearing, Ms. Malcolm made it very clear that she didn't have any problems with numbers. This is confirmed in a number of documents, and by the evidence of Catalina Colaci, who runs the Learning Assistance Centre at Yukon College. Ms. Colaci testified that during her intake interview with the Complainants in March 2003, the Complainants told her that

they thought they had learning disabilities but wanted to return to school. According to Ms. Colaci, they said that was the reason they didn't finish school in the first place. The evidence provided by Ms. Malcolm's son, Tony Malcolm, was that he told Ms. Colaci that the Complainants have problems learning.

Ms. Neely's evidence was that Ms. Malcolm told her that she and Ms. Baker had "figure dyslexia", and that the College recommended they be tested. She noted that if the Complainants were tested, they would be provided with assistance if the testing indicated that they needed accommodations.

Mr. Marnoch testified that during the November 22, 2004 meeting, Ms. Baker and Ms. Malcolm again raised the concern that they "both have dyslexia and didn't tell anyone because they thought they could handle it on their own."

There was no evidence at the hearing that either of the Complainants had ever been diagnosed as having dyslexia. The testimony of Dr. Densmore was that neither Complainant has a mental or cognitive disability that had to be accommodated. On this issue, I find it to be entirely credible that the Complainants did report some sort of dyslexia to a number of Yukon College employees. However, it is also just as credible that Ms. Baker's claim that she has number dyslexia was merely her self-diagnosis based on the fact that she found math challenging throughout her school years, and during the pre-course upgrading at the College.

The concern, in this case, is not whether dyslexia existed, but how the possibility that it existed impacted the way the Respondents treated the Complainants. The evidence was that the College was attempting to help the Complainants acquire full-time funding while attending the College with only a part-time course load. Ms. Baker testified that the College wanted a letter from her doctor stating that she had a disability, but said she was refusing to comply because she didn't think she had a disability. However, she did raise the question with her doctor, as she said she had begun to have doubts, as a result of the College saying she was having problems. According to the documentary evidence and the testimony of both Complainants, Dr. Densmore conducted cognitive testing on both Complainants, and did not find anything to be concerned about.

FINDINGS

There is no doubt that the Complainants told a number of people at the College that at least one of them had a learning disability that they labelled "number dyslexia." It was a recurring theme during the various meetings with the Instructors that Ms. Baker and Ms. Malcolm used the excuse that they might have a learning disability whenever they were challenged and feeling they might be expelled from the program. The Instructors accepted their claims at face value, without verification, and determined that the best course of action for the Complainants would be to reduce their course load in the second semester.

Whether or not the Complainants actually have a learning disability, there is no evidence before the Board that the Respondents discriminated against the Complainants on the basis of a perception of dyslexia, given that the Complainants themselves told the Instructors that they might have dyslexia and that it might be a reason for their performance difficulties in the CSW program. If, in fact, either or both of

the Complainants have a learning disability, there is no evidence that they were treated unfavourably because of it. The College did, however, accommodate Ms. Baker's concern with her mathematical challenges with a talking calculator, at one point, and later urged the Complainants to seek further testing and diagnosis to support their claims and to assist with determining the appropriate accommodations.

2. Physical Disabilities – related to chronic health problems

Allegations

The Complainants' evidence was that they suffer from diabetes, chronic heart failure, and obesity. Dr. Densmore confirmed that they suffer from Type 2 diabetes, hypertension, hyperlipidemia, hyperthyroid, minor congestive heart failure, morbid obesity, sleep apnea, intermittent depression and lupus. In spite of these conditions, she testified that their primary problem is their excess weight, which contributes to their other conditions.

Dr. Densmore also testified that, in her professional opinion, none of these conditions constitutes a disability that would limit the Complainants' abilities to participate in the CSW program. In fact, Dr. Densmore confirmed that the Complainants were able to participate in the CSW program, and made no mention of any of their physical disabilities requiring accommodation prior to them being accepted into the program.

Doctor Densmore's evidence was that congestive heart failure is a chronic condition brought on by stress, but that it shouldn't interfere with the Complainants' studies and would not have disabled the Complainants in their ability to participate in the CSW program.

Ms. Malcolm testified that neither she nor Ms. Baker had physical disabilities and said that when it was suggested that they had learning disabilities, "It angered me because of accusations of disabilities. My marks were good to fair. I am not disabled. I am not mentally or physically disabled. I am no different than any other student."

Despite Ms. Malcolm's evidence that she is not disabled, a number of the Complainants' health concerns were brought to the attention of and addressed by the College. The Complainants had breathing problems, so they were provided with handicap parking privileges to reduce the stress of long walks from the parking lot into the College. They had difficulty attending all of their classes as a result of issues arising from their health. For these absences, they were penalized 10% in each of their courses, which was the standard for all students. Although they were able to hold grade point averages which were "passing" grades, Ms. Baker was put on probation when her grade point average reached the level of pass/fail.

The Respondents actively encouraged the Complainants to move from full-time to part-time participation in the program, based on their belief that the Complainants' physical disabilities necessitated accommodation. Such accommodation was focussed on reducing the Complainants' stress by reducing the demands of the normal course load. Ms. Neely's evidence was that she scheduled student meetings as a mid-semester check with each of her students. She told Ms. Baker and Ms. Malcolm about their meetings one day when she ran into them in the hallway. Their meetings were

scheduled for October 20, 2004. The Complainants testified that they did not know that everyone was scheduled for mid-semester meetings, and thought they were being singled out and were going to be kicked out of the program because Mr. Marnoch and Ms. Neely didn't like them. When they asked Ms. Neely if they were going to be kicked out, her response was not a denial, but only that they needed to come to their meetings. Ms. Neely testified that, at the time, she didn't realize that they had concerns about being removed from the program, and that the hallway meeting, when she told them about the mid-semester meetings, happened when she was in a hurry, and they just happened to cross paths. When Ms. Neely realized that the Complainants were concerned about the meetings, she called them the next day at home and told them that the meetings were routine and nothing to worry about. That weekend, Ms. Malcolm was admitted to the hospital and diagnosed with congestive heart failure which was stress-related. Ms. Baker told Ms. Neely she had to be with her sister while she was ill, and Ms. Neely called to say there was no problem moving their meetings. The meetings were rescheduled for November 3, 2004.

On November 3, 2004 the Complainants each met separately with Ms. Neely and Mr. Marnoch. Ms. Baker testified that they asked her questions about her Lupus, and said she told Mr. Marnoch it had been in remission for 10 years. Ms. Baker described the meeting as being "hostile" and "threatening". She said that Mr. Marnoch kept saying that she was exhausting herself and that at one point Mr. Marnoch asked "Who is going to hire you?" Ms. Baker's recollection was that Ms. Neely didn't participate very much in the meeting and that at one point Mr. Marnoch left the meeting to get Catalina Colaci from the Learning Assistance Centre. The evidence of the Instructors was that these meetings were intended to help students find ways to succeed. In Ms. Baker's case, because she indicated that it took her a long time to do assignments, and because she was feeling challenged by having to redo assignments, and by having to organize all the courses and assignments, the best option, from the perspective of the Instructors, was for her to continue in the program on a part-time basis.

Ms. Malcolm's meeting was similar to Ms. Baker's in that she also expressed concerns about the stressful demands of doing all the courses, but also said she felt she was doing just fine and was comfortable with her grades. Ms. Malcolm said she did mention that the comments on her assignments about them smelling of smoke were, to her, insulting. Ms. Malcolm said she also indicated in the meeting that it was her intent to finish the course and only seek part-time employment. Mr. Marnoch testified that he did recall some comments about chasing people down the street, arising from descriptions of what the practicum work might entail, but didn't recall whether it was during the meeting with Ms. Baker or Ms. Malcolm.

It was shortly after these meetings that the Complainants attended the Commission with concerns about discrimination and harassment. The documentary evidence, supported by the testimony of Stu Mackay, Dean for the CSW program, indicates that the Executive Director of the Commission contacted him and reported the Complainant's concerns. According to Mr. Mackay, he advised her that he would consider the matter and deal with the Complainants' concerns through the College's internal human rights process.

As a result, on November 17, 2004, Mr. Mackay, Mr. Marnoch, Ms. Neely, Ms. Baker and Ms. Malcolm met. The purpose of the meeting, according to the Complainants, was to “mend the fences.” They allege that, during this meeting, Ms. Neely told them they had ruined her reputation, and that Ms. Baker said all she wanted was for it to stop, to be left alone, to be treated normally, and to stop all the meetings. Her evidence was that she wanted the Instructors to “just grade my papers and give me the points I deserve." Mr. Mackay asked the Complainants to withdraw their human rights complaint and to move to the internal Yukon College process. According to Mr. Marnoch and Ms. Neely’s testimony, the Complainants agreed to try the College’s process. The notes of that meeting produced by Mr. Marnoch indicate that the process was for the Complainants to meet with the Instructors and to work out a plan for what they needed in order to be successful in the program.

At that point, Mr. Mackay withdrew from the process and it appears that no mediator/facilitator was identified to lead the process. Interestingly, the day following that meeting Ms. Neely presented each of the Complainants with an agreement that they would not miss any further classes and that they would accept withdrawal from the classes if they did.

As directed by Mr. Mackay, a follow-up meeting was scheduled for November 22, 2004, which was attended by Ms. Baldwin-Schultz, Ms. Neely, Mr. Marnoch, Ms. Baker and Ms. Malcolm.

According to Ms. Malcolm, Ms. Neely and Mr. Marnoch told them they looked tired, that their grades were not good, and that it wasn’t likely they would pull through the year. Ms. Malcolm’s evidence was that the Instructors demanded that they “‘fess up” to their disabilities, and reduce their course load and carry over into next year. When funding concerns were raised, during discussions about the Complainants attending part time, the Instructors explained that with a doctor's recommendation the Complainants' full-time funding could continue while they extended their participation in the CSW program into another semester.

According to the Complainants and the Instructors, it was the Instructors’ position that Ms. Baker and Ms. Malcolm needed to go part time if they were to succeed in the CSW program. The Instructors expressed serious concerns about the Complainants' ability to manage the full course load without over stressing their health.

According to the minutes from the meeting on November 22, the Complainants agreed to continue in the next semester as part-time students and to use the services of the Learning Assistance Centre in the afternoons. These meeting notes were presented to the Complainants as confirmation of what was discussed, but they refused to sign them. Ms. Malcolm denied being late four times for the Wellness class. She said she only missed that class once. In further response to the meeting notes, the Complainants both denied that they had “confused thinking” or dyslexia, and also denied missing medications or lunch (diabetes), or refusing to go to their doctor.

The Complainants’ testimony was that they did not want any more meetings, they did not want to go part time, and they did not want any more assistance from the Instructors. They said they wanted to be left alone but didn’t feel they were being heard.

Based on the evidence of the Complainants, I do not find it difficult to believe that, under the circumstances, the Complainants may have agreed to a number of things contained in the notes, with no intention of following through. To me, it is clear that they were not particularly forthcoming in participating in these meetings, but were fearful that if they did not do the things they were being asked to do, they would be expelled from the program. As a result, the College proceeded with the plan for the Complainants to attend part time, unaware that the Complainants were sending them mixed messages about attending part time. A further complication was the interference by Tony Malcolm, Ms. Malcolm's son, who was corresponding with Mr. Mackay during this time period, asking for information about how the stress on his mother and aunt could be reduced, and requesting a list of the second semester courses, rated by difficulty.

When Ms. Neely set up a further meeting for December 8, 2004 she e-mailed Ms. Baldwin-Schultz to ask for her assistance. Her e-mail read: "we would like to discuss how best to approach them [Ms. Baker and Ms. Malcolm] and how to set up the support that is needed for them to succeed."

At the meeting on December 8, 2004, Catalina Colaci made various suggestions about accommodations that could be offered to Ms. Baker and Ms. Malcolm, including arranging for them to receive full-time funding while attending as part time students, considering a modified course for a different certification, and finding ways to help them deal with their chronic health problems. These ideas all led to the development of a draft education plan.

On or about December 13, 2004, meeting notes were delivered to the Complainants, with an invitation for them to review the notes to be sure that the notes reflected their understanding of the discussions at the meetings held November 5 and 22, 2004. The Complainants testified that they were very upset by these notes as they felt the notes captured the discussions in a very negative manner.

Quoting from the education plan drafted by the Respondents, and provided to the Complainants, the following commitments from the Complainants were being sought:

1. Work with Yukon College team to identify and address our learning and physical needs
2. Be willing to provide detailed medical information relevant to the learning environment to clarify the impact of our medical, physical and mental health needs
3. Seek further assessment to identify the extend of our learning disabilities
4. Seek understanding from local organizations about the impact of these disabilities on our learning comprehension organization and ability to cope with the demands of daily life and being a student
5. Seek weekly assistance from Learning Assistance Centre to discuss assignments and receive help with organizational skills and comprehension in order to successfully meet the course requirements
6. Reduce the course load on two courses during the winter term to allow time to seek the necessary assistance to help us succeed in our studies
7. Meet with the support team by March 1, 2005 to evaluate our progress and the effectiveness of this education plan

The College asked the Complainants to meet on December 16, 2004, noting in their written “invitation” to the meeting that this would be "an important step" in determining the type of accommodations that would be required for them to successfully complete the CSW program. The Complainants did not attend this meeting.

Registration for the second semester started on December 1, 2004 and students were required to register by the first week of January. The Admissions Office would not accept student registrations without signed Authorizations to Register document. In the Complainants’ case, this document would need to be signed by Ms. Neely as their program advisor.

On the last day of classes in December, everyone in the CSW program except Ms. Baker and Ms. Malcolm received their signed Authorization to Register forms. According to the Complainants, when they asked where their forms were, Ms. Neely said the marks were not yet completed, and that since they would only be registering for a part-time course load, they would need to discuss which courses they would be taking. Ms. Baker testified that she said she wanted to take them all and that Ms. Neely refused, saying that she and Mr. Marnoch didn’t feel the Complainants could handle a full load.

The evidence of Ms. Neely was that when asked where their registration forms were, she replied that they would fill them out together the following day, December 16, as they had scheduled a meeting for then, based on the memo the Complainants were provided on December 13 with an invitation to a meeting and a draft education plan. The Complainants did not attend the December 16 meeting but contacted Ms. Neely on December 17, requesting a meeting to get their Registration Authorization forms.

The Complainants were scheduled to meet with Ms. Neely for January 3, 2005, but this meeting was changed to January 4 because it turned out the College was not open on January 3.

The Complainants testified that they attended the College on January 4, 2005 and asked Ms. Colaci to sign their authorization forms to register for all courses. She refused because she was not their program advisor and was not authorized to sign for them. When the Complainants subsequently tried to register, without the authorization forms, they were told that they would have to meet with Ms. Neely, who had their registration forms.

Later that day, the Complainants met with Ms. Neely and Ms. Baldwin-Schultz. The Complainants advised that they wanted to attend full time, and said that their doctor wouldn't give them a letter to get full-time funding if they only went part time. Ms. Malcolm testified that Ms. Baldwin-Schultz told her that to let them take a full-time course load would be “like giving an infant a huge rock to push uphill”. Following this meeting, the Complainants gave the College permission to contact their physician. The Complainants were not allowed to register for the full course load that day.

According to Ms. Neely, just before the scheduled meeting time, she saw the Complainants in the line up for registration and asked them to wait in student services. Ms. Neely testified that the meeting started with her explaining the courses that were

available, so Ms. Baker and Ms. Malcolm could choose which ones they wanted to take. According to Ms. Neely, they insisted they needed to complete the full-time program. In response, Ms. Neely urged them to assess themselves and to consider whether or not this was a reasonable option. Ms. Neely said that Ms. Baker asked why they couldn't be like everyone else, to which Ms. Neely responded that Ms. Baker needed to look out for herself and not compare herself to anyone else. At that meeting, in efforts to ensure full-time funding for part-time participation in the program, it was agreed that Ms. Colaci would draft a letter to the Complainants' physician. This is supported by the e-mail that indicates that Ms. Colaci was "drafting a letter to the doctor giving reasons why the twins would do better taking less course load".

There is some confusion in the evidence about the events, dates of meetings, and decisions made during this time period. According to the Complainants, when Ms. Baker and Ms. Malcolm spoke to Doug Graham, the Registrar, he reviewed their marks and said he thought they could go ahead and register for the courses that had no prerequisites, even though they had failed or not completed several courses. The Respondents' evidence was that the Complainants would not be able to register for those courses requiring a minimum 65% (C) in the prerequisite. According to the Respondents, Mr. Graham did not prevent the Complainants from attending full time but by that time the issue was moot because they were not going to be able to graduate because they hadn't passed all of the first-term courses. In fact, the one "F" assigned to Ms. Baker was appealed and changed to a "D" and a one-credit assignment, bringing her grade point average about 2.0.

According to the Complainants, when they met with Mr. Graham on January 7, 2005, he said he didn't understand why they were not being allowed to register for all the courses in their program, and accompanied them to find out why. Ms. Neely testified that she was surprised when she was called to Mr. Graham's office on January 7 to sign off on the Complainants' courses. It was at that point that he discovered that the required FASD course had been filled and that the Complainants' seats had been allocated to other students who were not in the CSW program.

According to the Complainants' testimony, Mr. Graham advised them that if they wanted him to tell those people they couldn't take the course, he would. The Complainants' further evidence was that they felt intimidated and didn't think they should prevent someone else from taking the course. It wasn't until later that they discovered that the course was only offered in the spring semester, so that if they didn't take it, they would not be able to complete the program in the next fall semester, which is what they said they had been told by the Instructors when the Instructors were trying to convince them to attend part time. From the Complainants' perspective, this effectively doubled the time it would take them to complete the CSW program from one year to two years.

FINDINGS

There are several questions to be answered in determining whether or not the Respondents discriminated against the Complainants on the basis of a physical disability by preventing them from finalizing their studies.

The first question to be answered is: **Did the College prevent the Complainants from completing the CSW program (as a one year program)?** In my view, this question

must be answered in the affirmative. The CSW program is established as a one-year program. While there is no way to predict whether the Complainants would have successfully completed the program, but for the actions of the College they would have had the opportunity to try.

In an e-mail sent by Ms. Neely to Colleen Wirth and Ms. Colaci, she says that she met with Ms. Baker and Ms. Malcolm on January 4, 2005, at which time they:

> "… informed us that they wanted to attend full time as they could not get a letter from their doctor after which Ms. Baldwin-Schultz explained that the stress and side effects from their ailments will interfere with them succeeding in this term and the result would be the same as last term only this time we would not be able to make accommodations, so they would get graded like everyone else and dismissed from courses if they missed too many days. So, in the end, Ms. Baldwin-Schultz had them sign a consent to release information and she is drafting a letter to the doctor giving reasons why the twins would do better taking less of a course load. Ms. Baker and Ms. Malcolm agreed to talk to Ms. Colaci tomorrow to see about getting funding arranged and Ms. Baldwin-Schultz will have a draft letter for us to look at tomorrow afternoon ..."

The second question is: **Did the College prevent the Complainants from completing the CSW program on the basis of their physical disabilities?** A finding that a prohibited ground was even a partial factor may be sufficient to find discrimination. In addition, the perception of disability can be cause for a finding of discrimination.

The third question is: **Did the College prevent the Complainants from completing the CSW program?** This involves looking at whether the Respondents prevented the Complainants from completing the program in the longer term — that is, after the first year of the program.

Following the November 17 meeting about the Complainants' human rights complaint, the Instructors believed that their job was to accommodate the Complainants in a manner that would reduce their stress and assure success in the CSW program. Using all of their experience and resources, they developed an education plan they believed would meet that goal.

The draft education plan is, in my view, evidence that the College believed the Complainants suffered from undiagnosed learning disabilities and physical and/or mental disabilities requiring accommodation, as the letter from the College to the Complainant's doctor asked for "detailed medical information relevant to the learning environment to clarify the impact of our medical, physical and mental health needs".

There are numerous other references in the evidence to the Respondents' belief that Ms. Baker and Ms. Malcolm were struggling, overwhelmed, suffering from a learning disability, and having health challenges. Along with these many references, in the various notes and e-mails made and sent by the College, is the consistent description by the College employees of how the Complainants blamed the heavy workload, in addition to their various health conditions, for their stress and fatigue.

The College did not take disciplinary action in regard to the poor attendance record of the Complainants beyond the fact that the Complainants' marks reflected low or no

marks for attendance. However, the College relied on missed classes as evidence that they were not capable of attending full time. Ms. Neely testified that students who do not attend class need to come to the instructor to advise why. She stated that "if students don't come to us, it seems they don't care about catching up or finding out what they missed." She testified that it was not usual for Ms. Baker or Ms. Malcolm to come to her after missing classes. Despite this concern by the College, the reports from the Complainants' initial practicums do not indicate that they were unable to meet the demands of their assigned placements in the first semester or pass their courses.

There was testimony provided by the Complainants that Ms. Neely suggested she could place them in practicums where substantial physical stamina would be required, to the point they would not be successful. Alleged by the Complainants, Ms. Neely said something to the effect that "you have to do a practicum with FASD and I could make sure it's a Youth Centre where you'll have to play volleyball all day — you're setting yourself up to fail". This conversation was not confirmed by testimony provided by Ms. Neely. However, I believe that some such conversation is likely to have happened because the tone of the meetings between Ms. Baker and Ms. Malcolm and the Instructors was contentious.

After the November 17 meeting, Mr. Marnoch asked to get together for another meeting. "Ms. Malcolm mentioned she didn't have any outstanding concerns and didn't think they needed another meeting. I mentioned I felt that it would be helpful for me and hopefully for them to make sure that we all had the same understanding of what had been said regarding the issues … Just to let you know, Ms. Malcolm and Ms. Baker may choose another forum to find solutions to their concerns and may not want to meet."

After the subsequent meetings in November, the Instructors met on December 8, 2004 and developed an education plan for the Complainants. By memo dated December 13, 2004 from Mr. Marnoch and Ms. Neely to Ms. Baker and Ms. Malcolm, summary notes of the meetings were delivered for their review and an education plan was to be implemented in the winter term. The Complainants were invited to take time to review the recommendations and to meet again on Thursday, December 16 to clarify the meaning of the stated conditions and to allow them an opportunity to contribute to the education plan. While the first two paragraphs of this invitation are carefully crafted, and the section related to the performance issues reported by Mr. Marnoch and Ms. Neely are objectively stated, the sections on Ms. Baker and Ms. Malcolm appear to have been captured in very specific detail, all of them supporting the College perspective that the Complainants had health issues and fears that made it necessary for them to go to a part-time status in the winter semester.

At the meeting on January 4, 2005, Ms. Neely's evidence was that she believed that Ms. Baker and Ms. Malcolm had accepted the need to take a part-time course load and that the purpose of the meeting was to discuss which three courses they would attend. At the meeting the Complainants stated they wanted to register for full- time courses, and that they had 30 days to drop a course if they found they couldn't handle it. Ms. Neely testified that she told them they needed to assess themselves and consider if it was reasonable for them to even try. She further advised, according to her testimony, that if the Complainants registered for courses in the spring semester, they would be expected to attend all classes, and if they couldn't meet the standards, they would fail.

When asked to clarify if the College was refusing any other accommodations if Ms. Baker and Ms. Malcolm didn't go part time, Ms. Neely indicated that if they had a need for accommodation for health issues, they had to tell the College and stop sending mixed messages.

It is clear from the cumulative evidence the College did not believe that Ms. Baker and Ms. Malcolm were capable of performing the duties of a CSW worker, or performing to the necessary level to successfully complete a full course load and that a formal action plan for them would have to be implemented. The Complainants' health problems constituted, in their minds, an inability — or disability — to do so. For example, the letter of January 5, 2005 from Ms. Baldwin-Schultz to the Complainants' physician, Dr. Densmore, while carefully drafted to suggest that the College was exploring "the possibility of a feasible accommodation", asked the physician to provide "input from you on the possible limitations that should be considered (e.g. walking, running for longer than 30 minutes, physical stamina, etc.)." The letter states that, "Often Susan and Sarah would be overwhelmed by the workload making it difficult to decide if health issues were a result or a cause of their problems … while every effort was made to accommodate their needs, by the end of the semester it was clear to all their instructors that we would have to implement a formal action plan that takes into consideration Susan and Sarah's unique needs."

Both Mr. Marnoch and Ms. Neely demonstrated, in their testimony before the Board, their commitment and dedication to the CSW program and their desire to see their students be successful in the program. It is clear from their testimony that they were following College protocol and the direction of the Dean in pursuing meetings with Ms. Baker and Ms. Malcolm. They were faced with two students who were, by their own admission, struggling with the workload. They offered alternatives to the full-time coursework, and urged the Complainants to accept. I believe that Mr. Marnoch and Ms. Neely completely believed that the part-time option was the best and only option for the Complainants, and that their ongoing encouragement to choose part-time registration arose from that belief. This is further demonstrated by Ms. Neely's testimony that she was completely blindsided when the Complainants became adamant about full-time registration on January 4, 2005. However, I must find that the Respondents' actions, unintentionally, had a negative impact on the Complainants' ability to complete the program in the one year as scheduled. Because of the Instructors' perceptions that the Complainants had disabilities, they urged them to move from full- to part-time study in the second semester and, as a result of their concerns, the Complainants were unable to register for courses in the same manner as all of the other students in the program. This was a decision made by the Instructors. The Instructors did not allow the Complainants to make their own decisions in regard to their education plan. Whether it was a good decision or not, it was not a decision to be made by the Instructors.

The Instructors' actions were not the only factor that impacted the Complainants' ability to complete the program as scheduled. They did not accept the offer to be registered in the FASD program, for example, and there were courses that they did not complete in the first semester, such as Prevention and Management of Assaultive Behaviour. These courses were required and would have to be completed in the second semester, further adding to their workload. However, for discrimination to be found, it is necessary only to

find that the actions of the Respondents were a factor, and not necessarily the only factor in a negative outcome.

The perception of a disability amounts to discrimination on the basis of disability if it forms the basis for discriminatory conduct. As noted earlier, Ontario, the Northwest Territories, Nunavut and Nova Scotia expressly include protection against discrimination on the basis of perceived disability in their definitions of disability. While Yukon's Act does not mention "perception of disability", tribunals have determined that discrimination on the basis of disability would require the employee to establish that he or she is, or was perceived to be, disabled and that such perception of a disability was a factor in the treatment accorded to him or her.

In the Supreme Court of Canada in *Montreal (Ville) v Quebec (Commission des droits de la personne et des droits de la jeunesse)* it was emphasized that under human rights legislation an emphasis on human dignity, respect and the right to equality was just as important a consideration as any real disability itself. It would appear, then, that the Supreme Court of Canada has accepted that a perception of disability has the same potential to have a negative effect as any real disability. Also previously noted was that in *Davison v St. Paul Lutheran Home of Melville Saskatchewan*, the respondent was found to have unlawfully discriminated against the complainant on a basis of a perceived disability from obesity.

In considering the testimony and documents before the Board, there are admittedly conflicting statements about whether or not the Complainants suffered from disabilities. At times, the Complainants claimed they had disability/medical challenges that impacted their ability to complete the coursework. There were also times when they requested that the College not provide them any accommodation or interfere in their goal of completing the coursework in the scheduled two terms/one school year. As the College became fixed on the belief that the Complainants needed to move to a part-time schedule, the Complainants became less communicative about their intention to finish the program in one year. As a result, the College did not anticipate the human rights allegations brought against them as they believed the Complainants were in agreement with the education plan and that their actions were a way of providing the Complainants with accommodation in accordance with the Act.

This finding does not address whether or not the Complainants would have been successful in completing the CSW program in the second semester. Rather, it is a finding that students, if they have met the College's criteria to continue in a program, must not be prevented from doing so based on another person's belief that the student suffers from a disability that might impact the student's ability to succeed.

The College, prior to accepting the Complainants into the CSW program, did due diligence in having student assessments done that should have ensured that the College was aware of anything that might impact their prospects for success in the program. This included the upgrading courses they were required to take, a pre-admission interview with Mr. Marnoch and medical forms from the Complainants' physician. The Complainants did not request any accommodations, and actually tried, by making a human rights complaint, to impress upon the Respondents that they did not want any further interference in their programming.

It is difficult to evaluate the Complainants' claims for the timeframe of October through December, when the Complaint was filed. The Instructors did consider that the physical condition of the Complainants was an impediment to their likely success in completing the program on a full-time basis, considering the Complainants' poor attendance record, the hospitalization for heart issues and disclosure of health conditions including Lupus.

Taking into account all of the evidence, I find that as a result of the Respondents' actions, the Complainants were prevented from registering for a full course load in January 2005, based on the Respondents' perspective that the Complainants were not physically capable of successfully completing the program on a full-time basis.

When the Complainants registered for the program and the College accepted them as students in the program, they were entitled to register for all courses offered and required for the program. By the actions of the College, the beliefs and perceptions of the Instructors overrode the right of the Complainants to register in the courses. Whether or not they would be successful is not the issue. The Instructors offered their expertise and experience to Ms. Baker and Ms. Malcolm, which led them to strongly endorse a move to part-time registration, along with the extraordinary support and assistance offered to diminish any hardship from being under-funded by the transition to part-time registration. Up to the point where the Complainants stated they wanted to register for full time, such efforts are commendable. However, the College did not have the right to make the decision that Ms. Baker and Ms. Malcolm could not register on registration day for the full allotment of courses they needed to graduate from the CSW program. Further, any problems flowing from that original day of registration should have been addressed by the College. (e.g. that the course seats were given away and the complainants chose not to evict the people who had been given the seats versus the College immediately assuming the responsibility for making the course seats available to the full-time CSW students.)

DUTY TO ACCOMMODATE

Allegations

The Complainants and the Commission submitted that "If chronic illness or obesity made it more difficult for Ms. Baker and Ms. Malcolm to complete any aspect of their studies, Yukon College and instructors were required to make a reasonable effort to adapt the program and eliminate the barrier. Inflexible rules are never acceptable." In principle, the Board agrees that with the duty to accommodate comes the need for flexibility.

The Complainants submitted that the Instructors knew that when Ms. Baker's and Ms. Malcolm's grades suffered, it was often due to the rigid lateness and absence policies and that they did not indicate they had any difficulty with the materials. Yukon College instructors testified that any absence from class must result in automatic loss of grade and eventual dismissal from the course and the CSW program, even if the absences are known to be due to a medical condition. No exceptions can be made because the program is experiential and the students must be in attendance to participate fully.

Accommodation does not require that post-secondary institutions lower academic standards to accommodate students, nor does it relieve the student of the responsibility to develop the essential skills and competencies expected of all students. It may, however, require making adjustments to institutional policies such as attendance or graduation requirements, where requested.

The College attendance policy is implemented inconsistently. Whether or not an instructor decides to expel a student for non-attendance is discretionary, even though the Students Handbook clearly stresses the importance of attendance.

The attendance policy allowed, at the discretion of the instructor, expulsion from a course if a student misses more than three (of 15) classes. In this case, the Instructors did not take that action, but rather limited it to warning the Complainants that they had met or exceeded the absentee limits and that further absenteeism would result in expulsion. The evidence provided by the Respondents was that attendance in classes was critically important because of the experiential nature of the learning process in the CSW program.

The Complainants lost 10% of their mark due to attendance, which was the same grading system for all students. They were allowed to continue in the program in spite of their attendance since Ms. Malcolm met the minimum grade point average, and Ms. Baker was close to the limit, but was placed on probation.

If there was a need for accommodation, it would predominantly have involved attendance issues due to hospitalization at the end of October 2004. Neither Ms. Baker nor Ms. Malcolm challenged the attendance records, or their loss of marks due to attendance, or requested any accommodation in regard to attendance due to health reasons.

Accommodating students with disabilities requires that the student identify the need for accommodation. Accommodation is a means of preventing and removing barriers that impede students from participating fully in the educational environment involving three principles: respect for dignity, individualized accommodation when request for accommodation is made, and inclusion and full participation by adapting services in a way that promotes student inclusion and elimination of barriers. During the first semester of the CSW program, the Complainants did not identify a need for accommodation and, for the most part, they denied any disability, even when giving their evidence at the hearing. The students accepted the parking pass, but did not identify any other requirement for accommodation. They accepted the attendance policy and did not challenge the marks they lost due to attendance in classes.

Findings

The Board finds that the Complainants have not proven that the Respondents did not accommodate them. As a result, this complaint is dismissed. The Complainants expressed a number of times, in a number of ways, that they did not want any accommodations. They cannot, later on, accuse the Respondents of failing to accommodate them.

HARASSMENT

Allegations

The Complainants alleged that they felt harassed to the degree that they went to the Human Rights Commission. Their evidence of this belief includes:

- On a field trip, while at the Gold Rush Inn, Mr. Marnoch asked a question and Ms. Malcolm answered it. She said that Mr. Marnoch responded by saying to her, "why don't you give someone else a chance to talk?" According to Ms. Malcolm, from this comment, she concluded that Mr. Marnoch did not like her.
- The Complainants felt that when they tried to participate in class Mr. Marnoch ignored them.
- After their first assignment, Mr. Marnoch returned the assignments to all of the students, except for three students. Two of the papers belonged to the Complainants. According to the Complainants, Mr. Marnoch insisted on meeting with them and during this meeting, told them that their papers were “too similar” and accused Ms. Malcolm of plagiarizing a poem.
- According to both Ms. Baker and Ms. Malcolm, the Instructors told the Complainants, at the November 3 meeting that they needed to reduce their course load if they wanted to be successful. Ms. Malcolm testified that Mr. Marnoch told her nobody would hire her, and that she was "not fit to run after a kid who could get away from me".
- Ms. Malcolm testified that when Ms. Neely was providing information about her first practicum, Ms. Neely said, “and I didn't tell them you were disabled.”
- The Complainants submitted that it is a common stereotype that obese people smell bad. This was raised because one of the incidents that deeply upset the Complainants was the allegation by another student, brought to Ms. Neely’s attention, and pursued by her, was that the Complainants “smelled bad”. When it was raised as an issue in a meeting, the Complainants expressed that this was “deeply hurtful and couldn't be true”.
- The Complainants were told repeatedly that they wouldn’t be successful if they continued on a full-time basis into the second semester and were directed to attend additional learning assistance. Even though the Complainants told the instructors that they were satisfied with passing the program, the Instructors continued to impress upon them the benefits of a part-time course load. I accept that the Complainants probably told the Instructors that they would change to part time, but I also accept that this was their way of relieving the stress of ongoing pressure to reduce their course load.

The initial visit the Complainants made to the Commission was prompted by a series of events that the Complainants perceived as harassment, and which they described as "for breach of confidentiality, for age, size and disability, blatant discrimination, for penalizing and discriminating against us because we are twins, for continuous harassment, badgering and singling us out in from of classmates". In the documents that were part of the hearing, there is a detailed description of how Ms. Malcolm perceived the treatment she and Ms. Baker were receiving at Yukon College. That document is strongly worded, demonstrating their anger and exasperation.

Findings regarding Harassment by the Instructors

For a finding of harassment, the Board must find that the Respondents engaged in a course of vexatious conduct or made a demand that they knew, or ought reasonably to have known, was unwelcome. Vexatious is not defined under the Act but its dictionary meaning is to annoy a person without any good reason. As this is not the case here, a finding that the Respondents harassed the Complainants would require that the Respondents made a demand of the Complainants that they knew, or ought reasonably to have known, was unwelcome.

I do not find that the requirements the Instructors set for the Complainants, in relation to participating in group activities, and doing their assignments independently, constituted harassment on the basis of their family status.

The philosophical quandary for teachers is how far to involve themselves in influencing their students and their right to choose their own path. It is not fair to set someone up to fail, but by the same token, once a person has been accepted into a program, the responsibility for performing to the scholastic standards rests with the student.

I find that in this case, for the Respondents to insist on an education path that veered from the standard path, when they knew, or reasonably ought to have known, that the advice they were giving the Complainants or the requests they made of the Complainants were unwelcome, may have constituted harassment. I accept that the Respondents had the best of intentions, but they did not listen to what the Complainants said they wanted. As early as November 18, 2004, Ms. Malcolm advised Mr. Marnoch that they did not wish to have further meetings, and that they felt there were no outstanding issues to be dealt with, arising from the November 17 meeting in regard to their human rights issues.

As earlier noted, the testimony clearly indicates that the Complainants vacillated in their presentation to the Instructors. At times they were clear that they wanted to continue without interference on a full-time path. At other times they indicated they would consider a part-time course load. They were not consistent in their position, and such mixed messages may have been confusing to the Respondents.

In my mind, it is reasonable to accept that a student would feel they should consider the opinion of a professional when being provided advice and therefore they may be somewhat reticent in communicating their true wishes. Such professional advice, however, does not bind the person or prevent them from changing their mind.

The strongest evidence, in my opinion, that the Respondents prevented the Complainants from completing the program in the anticipated one school year was on January 4, 2005. Even after clearly expressing that they wanted full-time registration at the January 4, 2005 meeting, Ms. Baldwin-Schultz and Ms. Neely continued to insist that they reconsider and pursue full-time funding for part-time registration. It appears that the College could not accept that the Complainants had made a decision that was not in keeping with what the College believed was in their best interest.

The ongoing meetings, letters and refusal to provide permission to register were all elements of a course of action intended by the Respondents to get the Complainants to choose a path that would, in the Respondents' opinion, have facilitated their success. The Instructors believed that the plan was an accommodation for the Complainants, pursuant to the Act, and the expressed concerns by the Complainants to the Commission. I cannot find harassment under the Act because I believe the actions of the Instructors arose out of the direction of the College administration and the impact of the Complainants' voicing their discrimination concerns to the Commission.

Findings of Harassment by the Respondent, Yukon College

In the course of events that led to this human rights complaint, there were a number of incidents that contributed to the progress of the complaint initially made in November 2004 to where the unresolved matter came before the Board of Adjudication.

Some of the inquiries about the need for possible accommodation arose because Ms. Baker and Ms. Malcolm went to the Commission with concerns.
Heather MacFadgen, the Executive Director for the Commission, told Mr. Marnoch it was his responsibility to ask Ms. Baker and Ms. Malcolm what accommodations they needed. He was told to have a meeting, recorded by two note-takers, and then to confirm in writing the decisions and outcomes of the meeting with the Complainants. According to Ms. Neely, Ms. MacFadgen said it was important not to make assumptions about what Ms. Baker and Ms. Malcolm could or could not do, but to meet with them to get information about their needs and to find out whether they needed to be accommodated in any way.

In an e-mail from Mr. Marnoch to Mr. Mackay, Mr. Marnoch suggested that it might be better if he and Ms. Neely did not attend the November 17 meeting. In his e-mail, he stated, "In fact, I understand our presence may trigger further anxiety that could interfere with the clear understanding of the proposed process ... I would suggest once an agreement has been made on a safe and acceptable forum for dealing with the concerns of our students that Ms. Neely and I would then become involved."
Mr. Mackay replied that he would check this out, but his thought was that with everyone attending, "everyone hears the same things at the same time". In my view, Mr. Marnoch's suggestion that his and Ms. Neely's presence at the meeting might not be helpful showed tremendous empathy and insight into the Complainants' concerns.

According to both Ms. Baker and Ms. Malcolm, it felt to them, at the meeting on November 17, that Mr. Mackay's primary concern was to have the Complainants withdraw their human rights complaint and use the internal Yukon College process, which they said they would try. In Mr. Mackay's memo of November 19, 2004, he

indicated that his understanding of the process going forward was that "Ms. Malcolm, Ms. Baker, Ms. Neely and Mr. Marnoch agreed to meet to try to improve the communication/understanding of the issues with the program. They will work on developing mechanisms that would assist in clarifying and resolving any conflicts. If any of the parties feel that they need assistance because they are uncomfortable or unable to reach a resolution, they would ask Catalina for help."

When the College was made aware that Ms. Baker and Ms. Malcolm had filed a complaint with the Commission, Mr. Mackay brought everyone together. In my view, the expectation that the Complainants would easily open up and communicate their feelings of harassment and demoralization in a group of five Yukon College employees was unreasonable. The Dean further put both the Complainants and the Instructors at risk of harm to their personal esteem and integrity by not participating in the resolution process himself, and by not delegating a person with facilitation skills to assist in the resolution process.

On November 18, 2004, Mr. Mackay stated: "with this memorandum I would like to state my understanding of the process that was agreed to in order to move forward. Susan, Sarah, Margot and Ray agreed to meet to try to improve the communication/ understanding of the issues with the program. They will work on developing mechanisms that would assist in clarifying and resolving any conflicts. If any of the parties feel that they need assistance because they are uncomfortable or unable to reach a resolution, they would ask Catalina for help."

Yet, in an e-mail from Mr. Marnoch to Ms. Neely dated December 20, 2004, Mr. Marnoch reiterated that "[Stu] says we should talk to them and recommends we simply clarify the focus, workload and requirements of each course and let them decide (without offering suggestions or providing any additional information that isn't requested). Stu did advise us not meet with either Sarah or Susan at any time without a witness".

I find that these e-mails clearly demonstrate two things. The first is that the College administration did not have a bona fide process for managing a human rights complaint that would properly address what Mr. Mackay had recognized as a situation that required conflict resolution between students and instructors.

The second is that the College, once it became aware of the human rights complaint, moved into defence mode as opposed to moving into an interest-based resolution process. No evidence was brought by the Respondents that an established process to deal with human rights complaints exists at Yukon College. In this sense, the College failed the Complainants and its instructors. There was no guidance offered beyond telling Mr. Marnoch to talk to them and make recommendations, without offering suggestions or providing information that was not requested.

In considering the information the Commission provided to the Instructors, one could easily see how defensive and fearful the Instructors might be going forward without additional guidance. To the best of their ability, the Instructors pursued the Complainants and tried to find a resolution in the only ways they knew how — by trying to ensure their scholastic success. At no time did anyone at the College deal with the actual allegations of harassment made by the Complainants.

As a learning institution, there is a reasonable expectation that matters relating to human rights would be well-understood, especially in regard to accommodation. One would also expect there would be a formal complaint-resolution process in place. At the very least, once the College became aware that a complaint had been made, it should have sought expertise on how to proceed before it offered a process that did not exist, or before taking the action it did.

The Act states as follows:

> Acts of employees
>
> S. 35: Employers are responsible for the discriminatory conduct of their employees unless it is established that the employer did not consent to the conduct and took care to prevent the conduct or, after learning of the conduct, tried to rectify the situation. (R.S., Supp., c.11, s.32.)

As Mr. Marnoch's and Ms. Neely's employer, the Board holds the employer responsible for any actions taken, pursuant to the Act. The College failed to address the harassment issues, and as a result, the harassment continued.

Findings on Failure to Accommodate

The Complainants' last practicum was scheduled for a four-week period, at eight hours per day, five days per week. John Berryman was assigned as their coordinator and, after discussions with them, found two placements that were residential facilities requiring minimal physical stamina. After the first week of placement, Mr. Berryman confirmed with Ms. Malcolm that her placement was going well, and that she had attended all shifts; Ms. Baker confirmed that her placement was going well, and that she had missed one shift. Mr. Berryman contacted the placements in week three and was told that both of the Complainants had missed most of their shifts since the end of the first week. The student report of May 16, 2006 showed that Ms. Malcolm missed seven shifts and one day of the Integration Seminar.

The Complainants testified that when Mr. Berryman was asked to change the requirements so that they could only work for a four- to six-hour day because of their health conditions, he refused, without explanation. Mr. Berryman denies any such request was made. He said that they met and discussed the student reports, and that he suggested that they withdraw from the practicum at that point so it would not negatively impact their transcript and then re-apply for the practicum at a later date. He adamantly denied that either Complainant requested an accommodation to part-time hours. Testimony from Mr. Berryman and the Complainants confirmed that the Complainants were waiting for gastric bypass surgery to assist them in losing weight, which would help them with their health and stamina.

I accept the testimony of Mr. Berryman. Although the Complainants were aware of the requirement to report any absences from a scheduled shift during their practicums, neither Complainant reported that they had missed shifts or that they were having difficulty attending regularly. If the Complainants were intent on completing their practicums, as they said they were, by working the required 160 hours over a longer period of time, they would have contacted Mr. Berryman to request this accommodation

to part-time hours. As it was, they waited for Mr. Berryman to contact them before admitting that they were not fulfilling the requirements of their practicums.

Taking into account the Complainants' failure to communicate and cooperate during the final phase of their coursework, I cannot find that the Respondents failed to accommodate them. In fact, at Mr. Berryman's suggestion and intervention on their behalf, they were allowed to withdraw from the program despite seeking withdrawal after the 30-day time limit. As a result, the Complainants' transcripts show that they withdrew from their practicums, which means that they could have re-registered at any time for their final placement.

CONCLUSION

> *"The Complainants allege that the Respondents contravened the Act by discriminating against them on the grounds of age, physical or mental disability, family status and association, harassed them and did not accommodate them in the area of service to the public by preventing them from finalizing their studies at Yukon College."*

The Board finds that the Respondents did not discriminate against the Complainants on the basis of age or family status. The Board finds that the Respondents did discriminate against the Complainants on the basis of mental or physical disability by treating them unfavourably based on a perceived disability, specifically a perception that the Complainants suffered from health issues and cognitive disabilities. This perception prompted the Respondents to insist that the Complainants adopt an alternative education plan, which involved taking a longer period of time to complete the CSW program.

In regard to whether or not the Respondents **prevented** the Complainants from completing the CSW program, I am convinced that, without intending to, the Respondents' actions, which extended the coursework over more than the anticipated one year duration of the CSW program, resulted in the Complainants becoming demoralized to the point that they gave up, as was suggested by Ms. Baker and Ms. Malcolm in their testimony before the Board. I find that, but for the actions of the Respondents the Complainants might have successfully completed the program and graduated, if allowed to proceed as they wished through the program. That is something that will never be known.

Therefore, I have determined that the actions of the Respondents had a discriminatory effect on the Complainants which, in essence, prevented the Complainants from completing the CSW program.

REMEDY SOUGHT BY COMPLAINANTS

1. A finding that Yukon College breached their rights;
2. An Order to provide training to staff;
3. Damages for injury to dignity feelings and self-respect for gruelling process lasting > 5yrs: $ 40,000 each;
4. Exemplary Damages for Yukon College's reckless indifference, malice, taunts and intimidation by instructors: $25,000 each;
5. Financial Loss for lost wages: $100,000 each; and
6. Costs: maximum tariff rate – Scale C for failure to cooperate and provide proper disclosure on an ongoing basis.

Decision and Order

The Board finds:

1. The Respondents did not discriminate against the Complainants on the basis of age or family status;
2. The Respondents discriminated against the Complainants on the basis of physical and cognitive disability, or perception thereof; and
3. The Respondents harassed the Complainants on the basis of the perception of mental and/or physical disability.

In determining the value of damages, the Board has taken into account that the Complainants vacillated on an ongoing basis in communicating their needs to the Respondents. They were not consistent, clear, or adamant in expressing their wishes to complete the program without the interference of the Instructors, which I find weakens their claim. While the Board accepts that by the end of the process, they were demoralized, the Board notes that they were savvy enough to seek assistance from the Commission early in their first semester. This, then, is a mitigating factor in considering their request for damages.

In considering the claim for lost-wage potential, there is no evidence that either Complainant attempted to find employment in the CSW field. The Board does not accept their suggestion that there was no point in trying to do so, as Mr. Marnoch and Ms. Neely “black-balled” them in the community. As the Complainants failed to mitigate their losses, and as there was no evidence before the Board of what losses the Complainants incurred, no award for wage loss is found.

The Board Orders:

1. Yukon College will pay to each Complainant the sum of $10,000 for damages to dignity, feelings and self-respect;
2. Yukon College will pay $30,000 to the Complainants for legal costs. This recognizes that while discrimination was ultimately found on the basis of perceived mental or physical disability, the Respondent had to defend itself against discrimination charges on the basis of age and family status, which

were not proven. Therefore, the Board anticipates that costs will ultimately be borne by both Parties in this matter; and

3. Yukon College will establish an appropriate process for managing human rights concerns and will provide appropriate training, support, and information to its employees. The appropriateness of the College's program shall be determined by the Commission.

Signed this 11th day of May 2011 at Whitehorse, Yukon

_____

Barbara A. Evans, Chief Adjudicator
Yukon Human Rights Board of Adjudication

IN THE MATTER OF THE YUKON HUMAN RIGHTS ACT

The Yukon Human Rights Commission

the Commission

and

Susan Malcolm and Sarah Baker

the Complainants

and

Yukon College

the Respondents

Decision on a Motion

by the Chief Adjudicator, Yukon Human Rights Board of Adjudication

Susan Malcolm and Sarah Baker are sisters who each separately filed a complaint with the Yukon Human Rights Commission. Subsequent to the investigation, the Commission referred both matters to the Board of Adjudication. With the consent of the parties, the matters have been joined as the Complaint Text for each is the same.

Counsel for the Complainants requests the Board of Adjudication allow the expansion of the scope matter from the Complaint Text as referred to the Board by the Yukon Human Rights Commission to the Complainants' Complaint as filed with the Commission. It is submitted that the Commission has limited the scope of the Complaint to "Allegation #4 only".

A Matter referred to the Board of Adjudication is 'de novo' limited to the Text of the Complaint received from the Human Rights Commission. In this matter, the Text of the Complaint states:

> *"The Complainant alleges that the Respondent contravened the Act by discriminating against her on the grounds of age, physical or mental disability , family status and association, harassed her and did not accommodate her in the area of services to the public".*

Position of the Yukon Human Rights Commission:

The Commission states that it is bound before the Board by the scope of the Complaint referred for hearing and cannot broaden the scope of their presentation of the Complaint. They clarify that the Summary contained in Form 1 & 2 (Board of Adjudication Interim Procedures) clearly defines the scope of the Complaint before the Board of Adjudication.

The Commission confirms that "only part of the Complaint was referred..." and that it is the opinion of the Commission that "the Tribunal has no jurisdiction to hear Complaints that have not been referred to it."

Position of the Complainants:

The Complainants each filed one Complaint with the Yukon Human Rights Commission alleging harassment, defined in the Act as a course of vexatious conduct. The Complaint filed by complainants noted allegation of 'ongoing' discrimination without reference to specific incidents. In support of the Complaint there were fourteen (14) allegations/incidents of breaches under the Yukon Human Rights Act. According to the Complainants, the Commission's Investigator treated the 14 incidents cited as separate complaints.

It is the position of the Complainants that a pattern of vexatious conduct and discriminatory attitudes may be discernable only when multiple incidents are examined together. Allegation 4 & 13, offered as evidence of the course of conduct, were the two incidents accepted for referral to adjudication. The Complainants say that the Commission, in not referring the whole of the Compliant (ie. The additional 12 incidents) is fettering the ability of the Complainants to establish a pattern of conduct.

They further submit that the Commission erred in severing the Complaint for referral for Adjudication as the Act states the Commission may dismiss the complaint, try to settle the complaint or refer the complaint for adjudication. Their interpretation of 'complaint' appears to be the Commission's record, in full, of the complaint made by the Complainant at the time of submission to the Commission.

Position of the Respondents:

The Respondents submit that the Commission has a statutory mandate to investigate and decide what matters should be referred to the Board of Adjudication for a hearing, and confirms that they believe the Commission may dismiss parts of a Complaint and refer others. Further, they stipulate that the jurisdiction of the Board of Adjudication is limited to only that which is referred to it by the Commission.

Analysis:

The Motion brought by the Complainants is to request the Board of Adjudication consider all of the incidents sited in the original complaint (the expansion of the Complaint) and not be limited to Allegation 4 only.

Submissions by the Commission and Respondent focused on the Motion and the jurisdiction of the board to consider any matter that has not been referred by the Commission.

Counsel for the Complainants argued that the Commission in preparing the "Text of the Complaint", cannot cherry pick what parts of the Complaint they may refer for adjudication.

The Complainants allege that the Commission erred by exceeding their jurisdiction in not delivering the Complaint as filed with the Commission to the Board of Adjudication for determination. They allege the Commission is adjudicating the Complaint, and making findings as to what is a breach of the Act, and what is not from within a Complaint; Subsequent to their findings, only the portions of the Complaint which they consider to be Act breaches are referred to the Board of Adjudication.

The disposition of a Complaint by the Commission is established in the Yukon Human Rights Act as being limited to *"21 After investigation, the Commission shall (a) dismiss the complaint; or (b) try to settle the complaint on terms agreed to by the parties; or (c) ask a board of adjudication to decide the complaint."*

The Yukon Human Rights Regulations require:
3. The Commission shall (b) record and deal with complaints in a written form that shows what contravention of the Act is alleged and what remedy is claimed for the contravention.

7.(2) (b) If the Commission decides to ask a board of adjudication to decide the complaint the Commission shall forthwith (a) formulate the text of the complaint to be referred for adjudication and deliver a copy to the complainant, the respondent and the Chief Adjudicator; and (b) ask the Chief Adjudicator to establish a board of adjudication to decide the complaint.

8 (2) The text of the Complaint to be decided may be changed at any stage of the proceeding, but only with the permission of the Chief Adjudicator or, if after the hearing begins, the board of adjudication, and only in circumstances or upon condition which give reasonable assurance that no party will be prejudiced by the change.

It has been cited previously to the Board by the Commission that Complaints often have a number of breaches cited in the Complaint, and attached thereto are incidents offered as evidence of the alleged breaches of the Yukon Human Rights Act (discrimination, harassment, failure to accommodate, etc.)

It was submitted that it is usual for the Commission to review each 'breach' of the Act and determine whether to refer it for adjudication or to dismiss. In essence, it is their position that dismissal on one part of a Complaint is not fatal to the whole of the Complaint.

In most cases, it is the Commission who requests a change in the Text of the Complaint. In this case it is the Complainants, who are party of equal standing to the proceeding. Therefore, consideration must be carefully given to this motion as the Human Rights Act is remedial legislation and should not be interpreted in a manner which is too narrow or technical.

Decision:

As this matter has arisen prior to the commencement of the hearing, the decision is the responsibility of the Chief Adjudicator. As such the decision is as follows:

The question of whether the Commission has the right to determine which parts of a Complaint are breaches of the Act prior to referring a matter to the Board of Adjudication is not for the Board of Adjudication to decide. However, because of Regulation 8(2) it is my view that the legislators contemplated there may arise a situation where the Board (or Chief Adjudicator) should entertain amendments to a Complaint to be decided, regardless of who brings the motion to amend.

It is my further view that the Complainants should be heard on the Motion, and the Commission and Respondent provided an opportunity to respond. Therefore, I am requiring the parties to bring submissions in order that a decision regarding an amended text of the complaint may be made in an informed manner.

- The Complainants are required to provide their requested amendments by noon on February 4th, 2008
- The Commission is required to reply on the issue of prejudice by noon February 18th, 2008.
- The Respondent is required to reply on the issue of prejudice by noon February 25th, 2008.

Dated this 24th day of January 2008 at the city of Whitehorse in the Yukon Territory.

Barbara A. Evans, Chief Adjudicator
Yukon Human Rights Board of Adjudication

Appendix B

Board File No: 2007-01

BEFORE THE HUMAN RIGHTS BOARD OF ADJUDICATION

IN THE MATTER OF THE ***YUKON HUMAN RIGHTS ACT***

AND

IN THE MATTER OF

Susan Malcolm and Sarah Baker

COMPLAINANT

AND:

Yukon College

RESPONDENT

AND:

Yukon Human Rights Commission

Appearances:

Zeb Brown	**For the Complainants**
Susan Roothman	**For the Yukon Human Rights Commission**
Joie Quarton and Larry Page	**For Yukon College**

Before the Chief Adjudicator:

Barbara Evans

Decision

on an application by from the Yukon Human Rights Commission to the Chief Adjudicator to amend original Complaint Text

The Human Rights Commission applied to the Chief Adjudicator for an amendment to the complaint text for the Malcolm & Baker v Yukon College matter.

The original text states: **"The Complainant alleges that the Respondent contravened the Act by discriminating against her on the ground of age, physical or mental disability, family status and association, harassed her and did not accommodate her in the area of services to the public."** The Commission wishes to add **"by preventing her from registering for the second semester classes, unlike the other students in the CSW program resulting in her not being in a position to finalize the CSW program."**

The Yukon *Human Rights Act* [Act] states that a complaint may be referred to the Board of Adjudication by the Yukon Human Rights Commission. The complaint text that is provided to the Board of Adjudication is formulated by the Commission pursuant to the Regulations, 7 (2)(b).

Section 8 (2) of the Regulations establishes that the complaint text may be amended with the permission of the Chief Adjudicator where the hearing has not yet commenced, if the amendment does not prejudice any party.

The question before the Chief Adjudicator is whether or not to permit an amendment to the text of the complaint.

The role of the Board of Adjudication is to decide complaints.

The Act empowers the Board to determine issues of discrimination based on a prohibited ground, systemic discrimination (by policy/practice) harassment, reasonable accommodation, remedy and costs.

Fundamentally, the complaint text drafted by the Commission should respect the substance of the original complaint as filed with the Commission. In determining the question of whether to permit an amendment to the complaint text, the requested changes need to be assessed as to whether:

(a) the party is seeking to add or delete a ground of discrimination referred by the Commission;

(b) the party is seeking to add additional allegations regarding the existing ground(s) established in the existing text;

(c) the requested amendment changes the scope of the referred complaint or impacts the jurisdiction of the Board as empowered by the Act; and

(d) prejudice to any party is created because of the amendment.

The parties' submissions in this application can be summarized as follows:

1. The Commission submits that the amendment better reflects the decision of the Commissioners when they decided to refer the complaint to the Board of Adjudication and as such, should be accepted as the original complaint text, clarified. The Respondent concurs.

2. The Complainants allege that the amendment would prejudice them insofar as it limits the scope of evidence that could be called at hearing and prevent them from fully and properly bringing evidence of discrimination on the prohibited grounds before the Board of Adjudication.

DECISION:

The **amendment is not allowed** for the following reasons:

1. The role of the Board of Adjudication is to decide whether there has been a breach of the Act based on the complaint of the Complainant.

2. The Yukon Human Rights Commission is responsible for drafting the "text of the complaint" to be referred to the Board which properly addresses the complaint accepted by the Commission.

3. It is recognized that a complaint, when brought to the Commission may have a number of allegations which relate to a number of prohibited grounds.

4. The only decision-making role the Commission has under the Act is to accept or dismiss a complaint. It is the experience of the Board that the Commission may 'separate' parts of a complaint into specific allegations, which relate to different

prohibited grounds. They have no jurisdiction to limit the scope of evidence before the Board once they have accepted the complaint on a prohibited ground. For example, if the complainant brought a complaint of fourteen allegations, those allegations would be categorized by prohibited ground, and then the Commission could accept or deny parts of the complaint within the confines of prohibited ground. They do not, however, have the power to decide which evidentiary 'allegations' can be presented at adjudication.

5. The amendment proposed by the Commission limits the scope of evidence that would be allowed in determining discrimination against the complainant, while asking the Board to find discrimination on a number of prohibited grounds.

6. While the proposed amendment may reflect the decision of the Commissioners in regard to their finding, to accept the amendment would unfairly fetter the discretion of the Board in meeting its legislated mandate. The requested amendment changes the scope of the referred complaint, impacts the jurisdiction of the Board as empowered by the Act and would prejudice the Complainant.

Signed at the City of Whitehorse, Yukon this 11th of July 2008.

Barbara A. Evans
Chief Adjudicator
Yukon Human Rights Board of Adjudication

Appendix C

File Nos.: 2007-01 & 02
September 16, 2008
Amended September 25, 2008

BEFORE YUKON HUMAN RIGHTS BOARD OF ADJUDICATION

BETWEEN:

Susan Malcolm and Sarah Baker

COMPLAINANTS

AND:

Yukon College, Ray Marnoch and Margot Harvey

RESPONDENTS

AND:

Yukon Human Rights Commission

DECISION
on
A MOTION BY THE COMMISSION TO FURTHER AMEND THE TEXT OF THE COMPLAINT

INTRODUCTION

The Chief Adjudicator, by letter dated August 12, 2008, allowed the Commission to submit a reply as the Chief Adjudicator, in error, made a determination on the Commission's Motion to Amend the Complaint Text on July 11, 2008, in advance of the Commission's reply date of July 15, 2008. The error was pointed out to the Chief Adjudicator on July 28, 2008, so, to be fair, the Chief Adjudicator determined to revisit the decision after receiving the Commission's reply to the submissions filed by the respondents and the Complainants.

Contained on the last page of the Commission's reply was a further proposed Amendment of the Complaint Text. The first proposed Complaint Text Amendment from the Commission read: "The Complainants allege that the Respondents contravened the Act by discriminating against them on the grounds of age, physical or mental disability, family status and association, harassed them and did not accommodate them in the area of service to the public by preventing her from registering for the second semester classes, unlike the other students in the CSW program resulting in her not being in the position to finalize the CSW program.

The Commission's second proposed Amendment to the Complaint Text reads: "The Complainants allege that the Respondents contravened the Act by discriminating against them on the grounds of age, physical or mental disability, family status and association, harassed them and did not accommodate them in the area of service to the public by preventing them from finalizing their studies at the Yukon College."

MATTER TO BE DETERMINED

Rather than making a reply, the Commission made a further Motion to Amend the Complaint Text. Therefore, the Chief Adjudicator has determined that the original decision of July 11, 2008, will stand in regard to the first Motion to Amend the Complaint Text.

This decision will deal with the current change to the Complaint Text requested by the Commission.

Upon receipt of the proposed further Amendment to the Complaint Text, the Complainants and Respondents were provided time to respond. The Respondents submitted a reply on September 5, 2008, referring to its June 30, 2008, submission. Both the Respondents and Complainants opposed the Commission's August 19 amendment without additions to their original positions or case law. Additionally, the Complainants contend that the Commission's presentation of a further amendment internal to their Reply was 'out of order'.

While the Chief Adjudicator does not disagree with the Complainants, the Board of Adjudication is allowed to set its own processes, and in this instance, to provide for the efficiency and necessity to move forward, the Board will determine what is really a Motion for a further Amendment.

COMMISSION'S POSITION

The Commission argues that pursuant to section 16(1)(e) of the *Human Rights Act*, R.S.Y., 2002, c. 116 (the "Act") it has the duty to "cause complaints which are not settled by agreement to be adjudicated, and at the adjudication adopt the position which in the opinion of the commission best promotes the objects of the Act."

The Commission argued that, to fulfill this duty, it has the obligation to be fair to all parties involved in a complaint and does not refer matters to the Board that will prolong proceedings before the Board at the cost of the Complainant or the Respondent. The Commission pointed out that it is not bound to refer the original complaint text to the Board, and believes that it has jurisdiction to screen a complaint and refer to the Board only what in the Commission's opinion has a reasonable basis in the evidence to proceed to the hearing level.

They also argued that the Board is bound to hear only complaints referred to it by the Commission and that the Board derives its jurisdiction to adjudicate a complaint from the Commission's referral.

The Commission argued that the complaints of the Complainants were filed as complaints based on a number of the prohibited grounds and related 14 separate incidents which the Complainants alleged contravened the Act. The Commission submitted that some allegations were against all the Respondents and some against individual Respondents. The Commission investigated the separate alleged contraventions as 14 separate complaints. The effect of the Commission's investigation and disposition of the complaints was summarized by the Commission as follows:

- The Complainants' complaints consisting of 14 alleged contraventions of the Act were screened by the Commission pursuant to sections 20 and 21 of the Act and were in effect reduced to one contravention of the Act or to one complaint.
- Alleged separate contraventions of the Act by Respondent Harvey and Respondent Marnoch were not referred to the Board by the Commission.
- Only one contravention of the Act by the Respondents jointly was referred to the Board on the basis that there is a reasonable basis in the evidence with respect to that contravention to refer it to a hearing.

The Commission reiterated that the fact that the Commission referred to the Board only allegation 4, consisting of one specific alleged contravention of the Act, does not curtail the Complainants to present, nor curtail the Board to receive, any relevant evidence during the hearing. The Commission stated it did not dismiss evidence during its disposition of the complaints, but dismissed 13 separate alleged contraventions of the Act.

The Commission said it captured the multiple grounds that make up the Complainants' identity in the complaints filed with the Board because, they advised, all the grounds may be relevant to the specific contravention of the Act referred to the Board.

The Commission further indicated that their approach to presenting their case will include an analysis that shows the interrelatedness among the different grounds that in the Commission's opinion best promotes the objects of the Act. The Commission further submitted that amending the Texts of the Complaints would ensure a clear demarcation of what the complaints are all about and solve the confusion about what the Commission actually referred and dismissed when disposing of the complaints. The Commission stated that at no time did it dismiss evidentiary allegations.

ANALYSIS

The Board does not accept the Commission's argument that the complaint filed by a Complainant may be dissected, with some parts being accepted and others dismissed. The Board believes that in doing so, the Commission is in fact 'judging' the complaint based on an investigation and perhaps some submissions made by the Parties. In the Board's opinion, there is no role in the Act for the Commission to decide the complaint, or to accept parts of the complaint and dismiss others.

The Board finds clear support for its finding in the Act at Section 21: "After investigation, the Commission shall dismiss **the** Complaint; or try to settle **the** Complaint on terms agreed to by the parties; or ask a board of adjudication to decide **the** Complaint". Further, Section 3 of the Human Rights Regulations states: "The Commission shall maintain records that distinguish inquires about human rights matters from complaints about alleged contraventions of the Act; record and deal with Complaints in a written form that shows what contravention of the Act is alleged and what remedy is claims for the contravention." And Section 7 (3) states: "If the Commission decides to ask a board of adjudication to decide **the** Complaint, the Commission shall forthwith formulate the text of **the** Complaint to be referred for adjudication…" (emphasis added)

However, the matter at hand is whether or not the latest amendment to the Complaint Text should be accepted. The Commission stated that this latest amendment would accommodate both Parties' concerns by deleting any reference to specific evidence. The Commission recognized the Complainants' fear that the original amendment would limit the evidence allowed, and that the Respondents were not prepared to present their case on matters which were not referred for adjudication.

It appears that the proposed amendment captures the Complaint as filed by the Complainants because it specifically refers to the alleged contraventions of the Act, namely the discriminatory grounds of age, physical or mental disability, family status and association, harassment and failure to accommodate.

Evidence does not need to be spelled out in the complaint, but can be led during the hearing as long as it meets the usual test for relevancy and reliability. The Board, therefore, will be responsible for weighing relevance and reliability as the evidence is presented.

The Chief Adjudicator allows the Complaint Text amendment so that the Complaint Text shall read:

The Complainants allege that the Respondents contravened the Act by discriminating against them on the grounds of age, physical or mental disability, family status and association, harassed them and did not accommodate them in the area of service to the public by preventing them from finalizing their studies at the Yukon College.

Barbara Evans, Chief Adjudicator
Yukon Human Rights Board of Adjudication