

Before the Yukon Human Rights Board of Adjudication

In the matter of the Yukon *Human Rights Act*

and the matter of

Robbie Walsh (Complainant)

&

The Yukon Human Rights Commission (Commission)

&

16142 Yukon Inc (o/a Northern Environment Services) (Respondent)

BOARD DECISION

Before: Chief Adjudicator Judith Hartling

Appearances

Emma Dickson for

Commission

Robbie Walsh

Complainant

Heard: Whitehorse, Yukon, October 1 and 2, 2025

Written Reasons by:

Chief Adjudicator Judith Hartling

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Summary

1. The Complainant, Robbie Walsh, filed a complaint alleging the Respondent, 16142 Yukon Inc., operating as Northern Environment Services (NES), discriminated against him by dismissing him from employment due to a physical disability to be fully vaccinated for COVID-19.
2. A hearing was conducted.
3. The Respondent did not attend or provide evidence at the hearing.
4. The Complainant established a *prima facie* case of discrimination on a balance of probabilities.
5. The Respondent did not raise a legal justification for the *prima facie* discrimination.
6. I found that the Complainant was discriminated against because of a physical disability pursuant to s.7 (h) of the Human Rights Act, RSA 2002, c.16.
7. The Complainant is awarded general damages of \$7,500.00, and specific damages of \$10,000.00.

History

8. This matter was referred to the Yukon Human Rights Panel the 8th of January 2025.
9. A hearing was conducted the 1st and 2nd of October 2025.

Complaint

10. The Complainant alleged that 16142 Yukon Inc. (NES) contravened subsection 7(h) of the Yukon *Human Rights Act* RSY 2002, c.116 (the Act) by discriminating against him on the prohibited ground of physical disability in relation to any aspect of employment or application for employment.

11. Specifically, the Complainant alleged that after he was hired by the Respondent, the Respondent then discriminated against him by refusing to continue its employment relationship with him. He was unable to receive a second dose of the COVID-19 vaccine because of a previous adverse medical reaction to his first dose of the vaccine.

Failure of the Respondent to Attend or Participate in the Hearing

12. The Respondent failed to attend the hearing or provide evidence.

13. The Commission submitted an affidavit stating in part that:

- The Respondent is a registered corporation in the Yukon; and
- The Respondent was personally served on the 29th of April 2025 with the Text of the Complainant, the Commission's Form 2, and the Complainant's Form 2, through the Sheriff's office.

14. On September 22, 2025, the Respondent called the Sheriff's office and advised that documents could be mailed to him and he provided an address.

15. Documents, including the Notice of Hearing, were mailed to the address the Respondent provided but were not picked up.

16. The Panel was satisfied that, pursuant to s. 23.1 of the Rules:

If satisfied that a party was served with a notice of the hearing under rule 14, the Board may proceed with the hearing in the absence of that party;

and S. 14.1:

The Registrar shall consult with and serve on the parties notice of the hearing date(s), sitting times and location of the hearing in Form 4.

17. In light of the following facts, the Respondent was aware of the complaint, the Respondent was aware there were documents at the Sheriff's office to be served on him and that he provided an address to which they could be mailed. Documents were mailed but not picked up.

18. Although actual service of the *Notice of the Hearing* was not served, I am satisfied the Respondent was aware of the complaint. The Respondent was avoiding service.

19. The Panel proceeded with the conduct of the hearing.

Procedure

20. The hearing was conducted in person save for the Complainant who attended via Zoom. The Commission presented its case by calling one witness, the Complainant, and entering Exhibit 1, an Affidavit signed by the Commission in reference to service of documents, and Exhibit 2 being a booklet containing Tabs A to R.

21. The Complainant elected to not call further witnesses or provide further evidence relying on the Commission's presentation.

The Law

22. The legal framework applicable to claims of discrimination involves a well-established two-step inquiry. First, a complainant must establish a *prima facie* case of discrimination. Where a *prima facie* case of discrimination is made out, the burden then shifts to the respondent to raise a legal justification for the *prima facie* discriminatory conduct or practice.¹

23. To establish a *prima facie* case of discrimination, a complainant must show, on a balance of probabilities, that:

- i. They have a characteristic which is protected from discrimination under the Act.
- ii. They experienced an adverse impact with respect to an area protected from discrimination under the Act.
- iii. The protected characteristic was a factor in the adverse impact.²

24. It is important to note that, in the human rights context, the term “*prima facie* discrimination”, in its various iterations, must not be confused with the relatively low *prima facie* standard of proof. A complainant must establish a *prima facie* case of discrimination on the civil balance of probabilities standard of proof.

25. The expression *prima facie* discrimination in the human rights context merely denotes the first step in the two-step analytical framework used to determine whether claims of discrimination are made out.

¹ Quebec v. Bombardier Inc, 2015 SCC 39, para. 64

² Stewart v. Elk Valley Coal Corp [2017] 1 R.C.S. paras. 23, 24

26. When considering whether a protected characteristic was a factor in the adverse impact, it is not necessary to show that the protected characteristic played a significant or major role in the adverse impact, much less that it was the sole reason or factor for the adverse treatment. It is also preferable to avoid expressions or terms connected to the lexical field of “causality”, as they detract from the effect-centered nature of the inquiry that must be undertaken.³

27. To establish *prima facie* discrimination, it is sufficient for a complainant to show that a protected characteristic was one of many factors in the adverse treatment — that it contributed to the adverse treatment.⁴

28. Moreover, because human rights legislation is aimed at correcting and eradicating discrimination as a systemic phenomenon, the complainant need not prove that the respondent had an intention to discriminate. Again, it is sufficient to show that the effect of a measure, decision, or conduct is discriminatory.⁵

29. A complainant, however, may certainly try to prove that a respondent’s actions or practices were intentionally discriminatory.⁶

30. Once a discrimination is established based on a physical disability, the Respondent has a responsibility to make reasonable provisions in connection with employment to

³ Stewart v. Elk para 46

⁴ Bombardier, para. 56

⁵ Bombardier, para. 41

⁶ Bombardier, para. 59

accommodate for the special needs arising from the physical disability unless it would result in undue hardship.⁷

31. However, there is an exception. If the Respondent can establish that the standard it applied was a Bona Fide Occupational Requirement, and it could not reasonably accommodate the Complainant without suffering undue hardship, the Respondent is exempt from providing accommodation for the disability.

Inferences

32. It will often be difficult for a complainant to show direct evidence of discrimination. Some forms of discrimination rarely manifest themselves overtly; rather they occur subtly or even unconsciously.

33. It is open to this panel to infer that a course of conduct is discriminatory if the evidence presented makes such an inference more probable than other possible inferences.

34. Even in the process of drawing inferences, however, the standard of proof must remain that of proof on a balance of probabilities. It is important never to lose sight of the standard of proof on a balance of probabilities, even when a complainant relies on both direct and circumstantial evidence in support of their claim.

Facts

35. The Complainant gave evidence that he was a heavy equipment operator (hydrovac).

⁷ S. 8 (1) the Act.

36. He resided in Newfoundland.

37. While conducting a job search, he read that the Respondent company was hiring. He submitted a resume in early February 2022. In a week or two after submitting his application, he received a call from Daman who he believed was the site supervisor. It was a job offer. No employment contract was signed. The Complainant was unsure of his hours and pay. It was a camp job at a mine he believed to be Victoria Gold near Watson Lake, Yukon.

38. At the time he accepted the position with the Respondent, he had a COVID-19 vaccine exemption. After his first vaccine shot in January 2022, he developed pericarditis — a serious breathing, chest pain condition. This precluded his having a second vaccine shot. This was his exemption on his QR card Newfoundland VaxPass showing his vaccine status. (Tab R)

39. He resigned from his present job.

40. On February 23, 2022, he received an email from the Respondent company providing him with an employment package to complete, and asking for copies of his driver's licence, driver's abstract, safety tickets, and banking information. Further, they required his date of birth, when he could travel, and his nearest airport. (Tab A)

41. On February 24, 2022, a further email was sent by the Respondent company requesting a copy of his QR Code for proof of vaccination against COVID-19. (Tab B)

42. The Complainant sent all requested documents, including the QR Code, to the Respondent company during the last days of February or the first week in March.

43. On March 2, 2022, the Respondent advised via email they were arranging for drug and alcohol testing in Whitehorse for the Complainant. (Tab C)

44. On March 2, 2022, the Respondent sent a further email concerning an online orientation. (Tab D)

45. On March 3, 2022, the Complainant sent an email to the Respondent advising he had sent the forms and inquiring if there was anything else he needed to do. (Tab E)

46. Tab F is an undated Filled Site Access COVID-19 Health Clearance Form which was part of the forms the Respondent sent to the Complainant. He completed and signed it, including agreeing that he was able to provide proof that he was fully vaccinated. The Complainant explained, in his evidence, that he understood he was fully vaccinated as he was medically certified as unable to receive further COVID-19 vaccinations.

47. At no time was the Complainant advised what was meant by the Respondent to be “fully vaccinated”.

48. At no time was the Complainant advised that he was to attend any particular location at a set time, or that the job starting date was time sensitive, although the Respondent did proceed to hire the Complainant almost immediately and then agreed to fly him to the location soon after.

49. On March 7, 2022, the Complainant attempted to board an Air Canada flight, a flight arranged by the Respondent, to fly to Watson Lake. Air Canada refused his boarding stating it is their policy that he must have a doctor’s certificate certifying the COVID-19 exemption. Within a few days, the Complainant obtained the required document, marked

as Tab M and Tab N. He then needed the date of the next flight reservation the Respondent made for him before Air Canada would accept the medical information.

50. On March 10, 2022, the Complainant emailed the Respondent asking for flight information.

51. He was advised by the Respondent:

I just heard back from the mine and its looking like they won't accept your QR code vaccination exemption.

That coupled with the issues with the airline, it looks like this isn't going to work out which is unfortunate.

If you have any questions, please feel free to phone Daman. 250 321 1497.

52. The Complainant texted Daman asking about his dismissal. Daman advised, "You were given a job based on being able to fly on s a specified date. You missed your flight. I've since hired someone else. Thanks for your interest."

Credibility

53. Because of the lack of participation, that is, the Respondent's absence from the hearing in any manner, and therefore no cross-examination of the witnesses, the Panel paid particular attention to the credibility of the witness.

If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what

he has seen and heard, as well as other factors, combine to produce what is called credibility, and cf. *Raymond v. Bosanquet* (1919), 50 D.L.R. 560 at p. 566, 59 S.C.R. 452 at p. 460, 17 O.W.N. 295. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial judge and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth....

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

Faryna v. Chorny, 1951 CanLII 252 (BCCA) (1952) 2 DLR 354

54. From this case we can synthesize that the demeanor of the witness, while giving evidence, is considered but additional factors are to be considered, such as:

Knowledge of the matter — Here the Complainant had intimate knowledge of the events as they occurred directly to him.

Powers of observation — Here it was obvious in the giving of evidence the Complainant could see, hear, and read so had full access and understanding of the emails and texts.

Memory — He appeared to have a good recall of the events. The printout of the emails and texts could assist in his memory.

Ability to describe — He had a command of English in which to give his evidence, he was coherent and logical.

55. In addition, and importantly, the Complainant was able to produce corroborating evidence. This was the printout of the emails and texts sent by the Respondent. As such, his evidence was consistent with the probabilities that surrounded the current conditions.

56. The Panel found the Complainant to be credible giving consistent and reasonable evidence.

Did the Complainant show the following, on a balance of probabilities:

1. that he had a characteristic which is protected from discrimination under the Act?

Yukon Human Rights Act, S.7:

It is discrimination to treat any individual or group unfavourably on any of the following grounds

(h) physical or mental disability

57. I find that the Complainant suffered from pericarditis, a condition developed from receiving a vaccine shot for COVID-19 on January 20, 2022. This affected his heart, chest, and breathing. Dr. Squires MD certified the Complainant had a medical contraindication to full vaccination against COVID-19 due to pericarditis. (Tab L, Tab M)

58. I find that this is a physical disability, a characteristic protected from discrimination under the Act.

2. that he experienced an adverse impact with respect to an area protected from discrimination under the Act.

The Area protected under the Act, S. 9:

No person shall discriminate

(b) in connection with any aspect of employment or application for employment

59. The Complainant gave evidence he received a call from Daman shortly after he submitted his resume with a job offer. He understood Daman to be a supervisor of the

Respondent company. Daman also advised that the Complainant would be dealing with Chelle who would be sending him the necessary forms.

60. There is a “Daman” listed in Tab G, being the Respondent company terms of employment as supervisor.

61. The Respondent company dealt with the Complainant as if he were employed by emailing him a company employment package, seeking documents such as driver’s licence, and advising they would be arranging travel for him. (Tab A)

62. These emails were signed by Chelle Smith, Office Assistant, Northern Enviro Services.

63. A similar email was sent the following day asking for, among other things, a copy of his “QR Code for proof vaccination against covid 19.”

64. Two further emails of similar nature were sent March 2, 2022. The Complainant responded to them by fulfilling the requests.

65. The Complainant spoke with Daman on March 11, 2022, seeking information on his dismissal and was advised, “You were given a job....”

66. I find that the Complainant was employed by the Respondent, despite the fact there was no contract of employment.

3. that he experienced an adverse impact with respect to an area protected from discrimination under the Act

67. The Respondent dismissed the Complainant from employment. He received an email on March 10, 2022 (Tab K):

Hi Robbie,

I just heard back from the mine and it's looking like they won't except your QR code vaccination exemption.

That coupled with the issues with the airline, it looks like this isn't going to work out. Which is very unfortunate.

*If you have any questions, please feel free to call Daman.
250-321-1497*

68. I accept that the words used by the office assistant "... this isn't going to work out," was a dismissal from employment.

69. It is noted there are no evidence of why the QR wasn't accepted by the mine. Since the QR card only referred to COVID vaccinations, it is inferred the mine did not consider the Complainant fully vaccinated.

70. The Complainant gave evidence that the Respondent was a contractor contracted to Victoria Gold. Further at Tab G, a document containing the Respondent's terms of employment shows that the Respondent was an employment contractor for the mine. Tab F, a medical form with the header "Victoria Gold Corp", and Tab H, a certificate showing the Complainant completed a course of Victoria Gold's, are evidence that the mine was Victoria Gold.

71. The dismissal email refers to the mine not accepting the Respondent's QR card.

72. The question, then, is: Is the mine or the Respondent the party who discriminated?

73. In *Matthew v Maharajh v Atlantic Offshore Medical Services Limited*, (AOMSL) the respondent was an employment subcontractor of BSS and Huskey, the parent company. It was the parent company that denied the Complainant access to the site. AOMSL did

not deny the Complainant access, however, because it had not followed policy AOMSL, was found to have discriminated.

74. I find that the Respondent acted on the mine's decision to not accept the QR card. This was a factor in in dismissing the Complainant.

75. After receiving this information, the Complainant texted Daman seeking further explanation:

I've missed the flight due to unforeseen circumstances that wasn't present with the papers I was sent and even after this issue arose, I actually asked Chelle if I had my opportunity lost for the job because of it, and her response was "no..we will wait for your doctor to get back the papers forms and then send them off to air canada medical...Then once on I finally get everything straightened up" I get the response of the mine will not accept your qr medical exemption and that this won't work out...Thanks for the opportunity... BUT THAT'S OK. THERE IS A COMPLAINT BEING FILED WITH THE YUKON HUMAN RIGHTS COMMISSION. I HAVE THE APPLICATION BEING MAILED RIGHT NOW.as I just explained my case and have grounds for a discrimination complaint. Take care and a good day Daman.

Daman's reply

Sounds good

76. The Complainant had resigned from his present work at Guy Bailey Limited knowing he was hired by the Respondent. When he was dismissed, he was without work for five weeks. He then had to borrow money from his father in order to meet expenses during that time.

The protected characteristic was a factor in the adverse impact.

77. The Complainant was advised by Daman that, since he missed his flight, Daman had hired someone else. This could indicate that the position was time sensitive.

78. However, there is no evidence that the Complainant was advised that the position was time sensitive or that he had to arrive by a certain date.

What was the reason for the dismissal?

79. There was no formal or written dismissal.

80. Daman, (supervisor of the Respondent as seen in Tab G) advised the Complainant that it was due to not attending work in a timely manner. He made no mention of the QR Code.

81. However, Chelle Smith, Office Assistance with the Respondent (this is a probable inference given the type of dealings she was engaged in with the Complainant and that she signed emails as Northern Enviro Services) advised that the mine wouldn't accept the exemption in the QR code, and that, along with the airline issues, it isn't working out.

82. The protected ground or characteristic need only be a factor in the decision. If a protected ground contributed to the adverse treatment, then it is material.⁸

83. I find that the one of factors for the Complainant's dismissal was the information on the QR Code stating the Complainant had an exemption.

84. This is a physical disability, a prohibited ground in the area of employment.

⁸ Stewart v Elk Valley Coal Corp. 2017 SCC 30

85. The Complainant has established, on a balance of probabilities, a *prima facie* case of discrimination.

86. The burden now shifts to the respondent to raise a legal justification for the discriminatory conduct.⁹

Respondent

87. The Respondent company was not in attendance at the hearing. The Respondent did not provide evidence in any manner.

88. Judicial notice is taken that this period was the COVID-19 pandemic, COVID-19 being a contagious disease with serious consequences including death.

89. The facts of the case show that there may have been a bona fide occupational requirement for dismissing the Complainant from employment based on his inability to be fully vaccinated. The Complainant gave evidence that it was a camp position and that he might be working with others such as a helper. However, there was no evidence of what constituted the camp or if in fact the Complainant would be working with others. There was no evidence showing it was necessary that employees be fully vaccinated.

Has the Respondent established that the standard it applied was a Bona Fide Occupational Requirement/Qualification (BFOR/Q), and that it could not reasonably accommodate the Complainant?

90. According to *Matthew Maharajh v Atlantic Offshore Medical Services Limited* 2020 CarswellNfdl 366,

⁹ Bombardier, para 64.

76. Discrimination in the employment context is subject to an exception which recognizes the practical necessity that employers be permitted to impose and expect compliance with standards which represent a “good faith occupational qualification”. In other Canadian jurisdictions, the language “bona fide occupational requirement” is used, and these terms are functionally equivalent and often abbreviated as “BFOR/Q”. The “Meiorin test” outlined by the Supreme Court of Canada in 1999 remains the test to determine if a *prima facie* discriminatory standard is justified as a BFOR/Q.

54 Having considered the various alternatives, I propose the following three-step test for determining whether a *prima facie* discriminatory standard is a BFOR. An employer may justify the impugned standard by establishing on the balance of probabilities:

(1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;

(2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and

(3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

55 This approach is premised on the need to develop standards that accommodate the potential contributions of all employees in so far as this can be done without undue hardship to the employer. Standards may adversely affect members of a particular group, to be sure. But as Wilson J. noted in *Central Alberta Dairy Pool, supra*, at p. 518, “[i]f a reasonable alternative exists to burdening members of a group with a given rule, that rule will not be [a BFOR]”. It follows that a rule or standard must accommodate individual differences to the point of undue hardship if it is to be found reasonably necessary. Unless no further accommodation is possible without imposing undue hardship, the standard is not a BFOR in its existing form and the *prima facie* case of discrimination stands.

Reference: British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [\[1999\] 3 SCR 3](#), 1999 Canlii 642 (SCC) (“Meiorin”).

77. Once the Complainant has established a “*prima facie*” case of discrimination meaning the burden shifts to the Respondent to show that its actions were justified as a BFOR/Q and that it could not accommodate the Complainant without suffering undue hardship:

A prima facie case in this context is one which covers the allegations made in which, if they are believed, is complete and sufficient to justify a verdict in the complainant’s favour in the absence of an answer from the respondent/employer.

...once the prima facie proof of discriminatory effect is made it will remain for the employer to show undue hardship. ...

Reference: O’Malley v. Simpson-Sears Ltd.,[\[1985\] 2 SCR 536](#), 1985 Canlii 18.

91. There being no BFOR in evidence, there is no need to decide further the issue of accommodation.

92. Interestingly, though, there is an accommodation written in the COVID-19 Health Clearance document, at Tab 5, of self-isolation on site if the person has been outside the Yukon in the past 14 days and is unable to provide proof of vaccination.

93. Had the Respondent provided evidence, the panel may have heard evidence of a BFOR and accommodation.

Conclusion

94. The Complainant has established a *prima facie* case of discrimination on a balance of probabilities.

95. The Respondent has not provided a legal justification (BFOR) for the *prima facie* conduct or an accommodation.

Remedy

General Damages

96. From *Arunachalam v Best Buy Canada*, 2010 HRTO 1880, 2010 CarswellOnt 20069,

53 The first criterion recognizes that injury to dignity, feelings, and self respect is generally more serious depending, objectively, upon what occurred. For example, dismissal from employment for discriminatory reasons usually affects dignity more than a comment made on one occasion. Losing long-term employment because of discrimination is typically more harmful than losing a new job. The more prolonged, hurtful, and serious harassing comments are, the greater the injury to dignity, feelings and self-respect.

54 The second criterion recognizes the applicant's particular experience in response to the discrimination. Damages will be generally at the high end of the relevant range when the applicant has experienced particular emotional difficulties as a result of the event, and when his or her particular circumstances make the effects particularly serious. Some of the relevant consideration in relation to this factor are discussed in *Sanford v. Koop*, 2005 HRTO 53 (CanLII) at paras. 34-3

97. The Complainant was dismissed from a new job. He hadn't even arrived at the camp. Therefore, there was no loss of dignity amongst his peers. It appears that only his father was aware of loss.

98. In determining an appropriate award, the Board must bear in mind that the purpose of remedies under the human rights laws are to compensate complainants for the harm of discrimination, not to punish the Respondent.¹⁰

¹⁰ *Hureau v Yukon Human Rights Board of Adjudication*, 2014 YKSC 21

99. The Complainant suffered an emotional impact describing it as “kinda of stressful” and in a “panic mode” as he was living paycheque to pay paycheque. I find that he did not experience particular emotional difficulties as a result of the event or that his particular circumstances make the effects particularly serious.

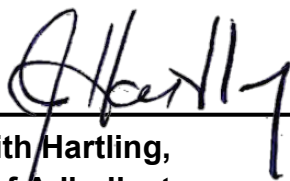
100. For general damages for injury to dignity, feelings, and self-respect the Complainant is awarded \$7,500.00.

Specific Damages

101. Specific damages being financial loss for loss of work for a period of five weeks, the Complainant is awarded an amount approximately equal to a wage of \$35 per hour for eight hours of work per day, plus expected overtime, for a total of \$10,000.00.

102. Post judgement interest in accordance with the *Judicature Act* RSY. 2002, c.128 s. 36 is ordered.

Signed: At Whitehorse, Yukon on October 30, 2025

A handwritten signature in black ink, appearing to read 'Judith Hartling', is written over a horizontal line.

**Judith Hartling,
Chief Adjudicator
Yukon Human Rights Board of Adjudication**