Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2020 CHRT 33
Date: October 19, 2020
File No.: T2097/1315

Between:

Michael Christoforou

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

John Grant Haulage Ltd.

Respondent

Decision

Member: Jennifer Khurana

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I. OVERVIEW

[1] Michael Christoforou, the complainant, was a commercial tractor trailer driver from 1977 until 2010 with John Grant Haulage Ltd., the respondent. The respondent is a regional and long haul trucking company that transports bulk cements and resins in Ontario, Quebec and parts of the United States.

[2] In 2006, the complainant gave the respondent a doctor's note recommending that he not work more than 45 hours a week due to ongoing stress and anxiety. For the next 4 years the complainant continued working for the respondent, often exceeding 45 hours a week if he felt up to it. In May 2010, the complainant tried to book off work for health reasons, but was suspended for failing to report for work. He provided the respondent with a letter from his doctor recommending that he work no more than 40 hours a week for health reasons. The complainant has not worked for the respondent since. The respondent would not allow Mr. Christoforou to come back to work without medical confirmation that he was fit to drive without any restrictions.

[3] This case turns on whether it was discriminatory for the respondent to deny the complainant's request to work reduced hours and ultimately to refuse to continue to employ him. The complainant argues that his employer did nothing to try to accommodate him. The respondent justifies its decision on the basis of safety. It could not risk putting the complainant back on the road unless he was fit to drive, and it could not accommodate the complainant short of undue hardship.

II. DECISION

[4] The complaint is allowed. Mr. Christoforou has shown that the respondent's denial of his request for accommodation and refusal to continue to employ him constitute a *prima facie* case of discrimination on the ground of disability. The respondent did not establish that it would have been impossible to accommodate Mr. Christoforou without suffering undue hardship.

[5] The complainant is entitled to remedies, but I will need to seek clarification from the parties before making an order. I am asking the parties to consider resolving this on their own or with the Tribunal's assistance in mediation. If not, the Tribunal will contact the parties to determine next steps.

[6] The complainant's discrimination allegations on the basis of age are dismissed.

III. BACKGROUND TO THIS DECISION AND WHY I AM WRITING IT

[7] I am writing the final decision in this case, but I did not hear it. This case was reassigned to me by the Chairperson in January 2020 with the consent of the parties. Given the circumstances that led to this reassignment, I am compelled to review some of the background that led to me taking carriage of this file.

[8] This file was initially assigned to the former Vice-Chairperson of this Tribunal. It was later reassigned to Member Dena Bryan who conducted the hearing of this complaint over 13 days in 2016 and 2017 (October 31 to November 4, 2016; November 14 to November 18, 2016 and January 23, 25 and 27, 2017).

[9] Ms. Bryan made two procedural rulings in this case. The first granted the complainant's motion to exclude the report and oral evidence of a proposed expert witness (2016 CHRT 14). The second denied a motion filed by the respondent shortly after the end of the hearing in January 2017, asking that Ms. Bryan recuse herself due to a reasonable apprehension of bias. Approximately 5 months later, Ms. Bryan denied the motion and wrote: "As I stated at the conclusion of the hearing, *I will review the evidence and submissions thoroughly and carefully, and make a decision supported by comprehensive reasons* (2017 CHRT 17 at paras 37-38) (emphasis added)."

[10] Unfortunately, this did not happen. Ms. Bryan did not render a final decision or issue any reasons. The parties inquired multiple times as to the status of the decision in 2018 and 2019. Ms. Bryan promised that a completed decision would be issued several times. Yet she did not issue reasons and the parties were kept waiting.

[11] In December 2018, the Tribunal's Chairperson gave the parties three options to allow the file to proceed given Ms. Bryan's failure to render a decision. He offered to: 1) reassign the file to another member of the Tribunal who would issue reasons relying on the record and the transcripts of the hearing; 2) return to mediation with the parties; or 3) start over with a new hearing and a new Tribunal member on an expedited basis. The parties rejected these options in favour of waiting for Ms. Bryan to issue a decision. They hoped that she would finally make good on her numerous promises to complete the decision.

[12] Ms. Bryan did not render the decision as promised. Over the course of the next year, the Tribunal Chairperson tried to follow up with Ms. Bryan. She responded on a few occasions, promising to issue the decision. At a certain point, she stopped taking his calls or responding to his emails.

[13] Finally, in December 2019, the parties revisited the three options discussed in 2018 with the Tribunal Chairperson. The parties agreed that if Ms. Bryan did not finish the decision by December 31, 2019, the Chairperson would reassign the complaint to another member who would issue reasons on the basis of the record. The file was then reassigned to me by the Chairperson with the consent of the parties.

[14] There are different approaches to handling a situation where an adjudicator who did not hear the case must render the decision. I will not review these here. The parties were offered other options, including recalling witnesses, or starting over with a new hearing. They agreed in this case that I would base my decision on the transcripts and on the official case record and the recordings.

[15] First I must start by apologising to the parties on behalf of the Tribunal. The parties have had to endure unacceptable delays and unfulfilled promises at every turn. The Tribunal has fallen well short of its duty to the public and to parties looking for a resolution of their human rights complaints in an effective, timely and accessible way. I empathise with both the complainant and the respondent who have expended considerable resources on a lengthy hearing. They have been faced with difficult choices and imperfect options in trying to get access to justice in this case.

[16] I cannot undo what has happened in this case but I am very sorry for what the parties have had to endure. Proceedings before the Tribunal are to be conducted informally and expeditiously (s.48.9(1) of the *Canadian Human Rights Act* (the "*Act*) and Rule 1(1) of the *Tribunal's Rules of Procedure* (the "*Rules*")). Yet most regrettably, the parties have waited until 2020 to get a decision, close to 4 years following the end of proceedings.

[17] We must do better by Canadians. The Tribunal has a duty to conduct an inquiry in human rights complaints that have been referred to it by the Canadian Human Rights Commission (the "Commission") and to do so in a fair and timely way. Canadians must have confidence in their public institutions and systems of justice and this type of failure erodes that confidence.

IV. THE HEARING AND THE SCOPE OF THE COMPLAINT

[18] This hearing was conducted over 13 days (October 31-November 4, 2016; November 14-18; January 23, 25, 27). The Commission did not participate at the hearing.

[19] It should be clear to everyone involved in a complaint– the parties, counsel, and the presiding member – what the issues are in dispute. In other words, everyone should understand what the Tribunal's task is and what the member has to decide. Unfortunately this was not made clear by the member either at the beginning of or during the hearing. This may have impacted the scope of evidence admitted by the Tribunal, the length of the hearing, including the many discussions between the member and the parties about evidence and issues that either predated the scope of the inquiry, or that were not referred to the Tribunal.

[20] A Tribunal member does not decide on their own what they should decide. Rather, the *Act* mandates the Tribunal start an inquiry into a complaint referred to it by the Commission (ss. 49, 50 of the *Act*). The summary of complaint form sent by the Commission lists the dates of alleged discrimination as May 7, 2010 to August 9, 2010. No harassment allegations were referred to the Tribunal on the basis of s.14 of the *Act*. While sometimes parties disagree about the scope of what was referred to the Tribunal, that did not happen

in this case. The parties did not file a motion either prior to or during the hearing requesting that the Tribunal determine the scope of the complainant.

[21] When I received a copy of the case file, I reviewed the entire case record, including the transcripts. During a case management conference call held with the parties, the parties confirmed that there were no outstanding procedural rulings for me to address.

[22] I also asked the parties to confirm my understanding of the issues in dispute, including the temporal scope of the complaint, because of what I had read in the transcripts. Specifically, I asked them to confirm that my task was to determine whether the respondent failed to accommodate the complainant's request for reduced working hours and whether it terminated his employment on the ground of disability or age. I indicated that the complaint does not include any issues that were not before the Tribunal and that the allegations cover the period from May to August 2010. I also asked the parties to validate the exhibit list and to address any discrepancies.

[23] I offered the parties the opportunity to review the transcripts and make additional submissions or direct me to what they believed were the most important parts of their evidence. They did not opt to do so, but they did offer to respond to any questions I may have in the event that the hearing record did not allow me to make a decision. I will take them up on that offer with respect to the remedies being sought by the complainant.

[24] Neither party modified the way I framed the issues, either during the call or in writing in response to the Tribunal's request for confirmation of the issues in dispute. The complainant provided minor corrections to the exhibit list.

[25] The respondent's counsel advised that due to the passage of time and difficulties accessing his records he could neither confirm nor suggest changes to the way I framed the issues. However I note that in closing submissions, the respondent's counsel stated as follows: "the issue that we've been in this hearing for, and that we're closing with today is with respect to the second accommodation request after the first one had already been accommodated". The "second accommodation request" refers to the same time period I mention above, and to the very issues I have determined in this decision.

[26] At the hearing, the complainant testified, as did his former colleagues who were drivers, some of whom also played a role in the union as stewards. Robert Gaumont, Mike Riley, Jeffrey Seaton, Marcello Leasey and Ray Guenette all testified on behalf of the complainant. The respondent called Ralph Shepley, the respondent's general manager, as well as John Valeri, the dispatcher, Gregory St. Croix, Wayne Gibson, and Ronald Trecoce. The respondent also questioned Dr. Bautista, the complainant's family physician. I have not listed the evidence chronologically or witness-by-witness. Rather, the evidence is integrated into my analysis and reasons below. I refer to it where it is relevant to my determination of the issues in dispute.

V. FACTUAL CONTEXT

[27] The allegations in this case start in 2010, but I will provide some background context that is relevant to the circumstances underlying the complaint.

The complainant's work at John Grant Haulage until 2010

[28] The complainant completed Grade 10 as well as specialised training in the operation of trailers. He worked for the respondent for 33 years from 1977 until 2010 as a tractor trailer driver, transporting cement. He was a member of the Teamster's Local Union No. 879 and the terms of his employment were covered by a collective agreement.

[29] The complainant's working relationship with his employer was generally positive and continued largely without incident until the end of 2003 when a new general manager, Ralph Shepley, was hired. The complainant did not like Mr. Shepley's managerial style.

[30] The complainant filed a number of grievances from 2005 onwards. He felt like Mr. Shepley and the respondent were trying to push him out, along with other senior drivers, in favour of using brokers or independent contractor drivers who cost less for the company. He felt like he was being picked on for small things.

[31] The complainant met with the respondent and the union after he filed a grievance related to incidents involving his working hours and his relationship with Mr. Shepley. After that meeting, the complainant went to see his family physician, Dr. Bautista. His doctor

issued a medical note dated November 24, 2006, stating that the complainant could not work more than 45 hours a week due to ongoing stress and anxiety. The respondent did not ask for more information or take further action after it received this note. That same year, in 2006, between April and November 2006, the complainant was absent 21 times.

[32] For the next 4 years, the complainant continued to work as advised by Dr. Bautista, but many weeks he worked more. On average he worked 49 hours a week in 2006; 60 hours a week in 2007; 59 hours a week in 2008; 46 hours a week in 2009 and 43 hours a week in 2010.

The trucking industry and the complainant's job at Grant Haulage

[33] The trucking industry, and cement truck driving in particular, is difficult work that requires a lot of skill. Drivers work long hours and the schedule is unpredictable because of traffic, site and delivery delays and mechanical issues. Drivers must be alert, sharp and focused. When a cement truck like the one driven by the complainant was fully loaded, it weighed approximately 63 tons or somewhere between 120,000-140,000 pounds.

[34] Public safety is paramount. The consequences of making a mistake, whether during pre-trip inspection, during loading or unloading cement, or while driving on some of North America's busiest roadways, can be catastrophic.

[35] Cement trucking companies are a largely unionised environment and the industry is heavily regulated for safety reasons. According to the terms of the collective agreement that governed the respondent's workplace, the hours of work of the general driving force consisted of 11 hours per day and 55 hours per week. The collective agreement also provided that no employee could be compelled to work more than 9 hours in any one day or 45 hours a week.

[36] For long trips, drivers are entitled to layover money. Drivers doing long-haul trips could make use of the layover provision, whereas drivers doing local routes, even if they exceeded 9 hours, would generally return to the terminal and go home.

[37] Drivers would typically call dispatch at around 7 p.m. to get information about the following day's work. Shifts were allocated based on seniority. According to the collective agreement, the most senior drivers were entitled to get the "best day's pay".

[38] At the start of a shift, drivers would go to the terminal and dispatch, punch in, and do full circle checks and safety inspections on their vehicles. Drivers also travelled with log books, as required by the Ministry of Transportation (MTO), and could be inspected at truck inspection stations on the highway.

[39] Start times vary as schedules would be tied to when a load would come in and when the client needed the delivery. Sometimes drivers could do multiple loads in a single day, requiring them to return and reload. Loading and unloading requires concentration to avoid an accident or even an explosion.

[40] At the end of a day when returning the truck to the terminal, drivers would fuel up, complete paperwork and ensure that their log book was up to date. They would also do a post-inspection check. These duties would take on average 15 to 30 minutes.

[41] In May 2010, the respondent employed 60 drivers out of a staff of 75 employees. At the time of the hearing, 15 of those 60 drivers were still employed by the respondent, in addition to approximately 25 independent contractors, also known as owner-operators, who are not employees and who drive their own trucks.

The allegations of discrimination start in May 2010

[42] The allegations of discrimination underlying this complaint start in May 2010 when the complainant was 59 years of age. On Thursday, May 6, 2010, the complainant called dispatch and spoke with John Valeri, one of the respondent's dispatchers. He told Mr. Valeri that he needed to book off the next day due to fatigue as he was not feeling well. Mr. Valeri told the complainant that he had been instructed by Mr. Shepley to tell him that he would be fired if he booked off that Friday. The complainant did not come to work on May 7, 2010. He was suspended until further notice on May 10, 2010, for "refusal to work Friday May 7th and for his previous attendance record.

[43] On May 13, 2010 the complainant met with the union and Mr. Shepley. At that meeting, it was agreed the complainant would see his doctor and get clarification of his health status.

[44] On May 14, 2010 the complainant went to see Dr. Bautista, and she provided a handwritten medical note stating that the complainant has been unable to attend work "more than 40 hrs per week as a result of stress and fatigue". The complainant did not provide this note to his employer after the visit to Dr. Bautista. That same day, the complainant called dispatch and attempted to book on to work the following Monday, May 17, 2010. He was told he could not return to work without a medical note clearing him to work regular hours.

[45] On May 23, 2010 the complainant started a planned vacation for two weeks. He was due to return to work on June 9, 2010.

[46] On May 26, 2010, Mr. Shepley sent the complainant a letter stating that he had been absent from work without permission. The complainant did not pick up the May 26 letter, sent by registered mail, until June 11. In the letter, the respondent requested the doctor's note discussed at the May 13 meeting confirming Mr. Christoforou's ability to return to regular duties "unencumbered by any physical or mental disabilities or in the alternative, your "prognosis for return to regular duties". The letter noted that the complainant had attempted to book on to work on May 17 and reminded the complainant of the documentation required before he could return. According to the letter, the complainant "did not report for duty during the week of May 17th", such that the respondent considered him absent from work without permission as he did not make contact with the company during that week. The letter concludes with the following paragraphs:

> Noting your previous attendance record, this week's absence in now under investigation.
>
> We also note that you had vacation booked for two weeks, starting May 23, 2010. As such, if we have not received written medical proof of your status, or contact from you immediately, it will be deemed you have abandoned your employment at John Grant Haulage, and will be sent your remaining pay, record of employment and deemed to have quit.

[47] On June 7, 2010 the complainant called Mr. Shepley to advise that he was at the doctor's on Friday June 4th. He indicated that his medical note would be ready to pick up on June 8th and wanted to book on for work on Wednesday. Mr. Shepley told the complainant to come to a 6:30 a.m. interview with him, and that depending on the content of the medical note, he may be able to return to work.

[48] On June 9, 2010, the complainant provided his employer with a letter from Dr. Bautista dated June 8, 2010 supporting his absence on May 7th, and recommending that he work no more than 40 hours due to his symptoms:

> This letter certifies that Mr. Christoforou has been under my care since February 16, 1995. Last May 14, 2010, Mr. Christoforou came to the office due to stress, headache and feeling fatigued. These symptoms started the previous week. He felt exhausted and was not feeling confident that he will be able to drive more that [*sic*] forty hours that week. He requested a sick leave on May 7, 2010 and was unable to go to work. Mr. Christoforou's work agreement with his employer is forty hours per week. He has the option of extending it when he is not yet exhausted and feels capable of driving further during that day. He does not get paid if he opts not to work.
>
> He had the same episode in November 2006 when he was required to drive beyond his regular weekly hours. He was also feeling stressed, exhausted and fatigued at that time. I have recommended to his employer to limit his working hours to forty hours per week which was in agreement with the required hours by his employer. However, he may drive and extend his hours when he has recovered with his symptoms. In this context, I still feel that he has to continue on these recommendations. His work entails a lot of skill, concentration and alertness and it might be hazardous when he is ordered to drive when he has the symptoms.
>
> Mr. Christoforou has requested this letter for legal purposes. If you need further information, please contact this office.

[49] On June 15, 2010, the complainant met with Mr. Shepley and union stewards in an attempt to resolve the grievance. At that meeting, the complainant was given an application for short-term disability benefits.

[50] On July 23, 2010, the complainant received a notice of termination of his health benefits as of a termination date of July 1, 2010.

[51] On August 9, 2010, Mr. Shepley wrote to the complainant issuing a Record of Employment indicating that he "voluntarily terminated" his employment with John Grant Haulage Ltd. The letter refers to the May 26th letter and notes that per the last meeting with the union, the complainant was supposed to report back to the company with information to support a claim for benefits. Mr. Shepley notes: "Not only have you failed to report as agreed with your Union, but have not had communication with the Company as to your status". At the time he received the letter, the complainant was paid $24.20 per hour.

[52] On August 12, 2010, the complainant completed an application for short-term disability after seeing Dr. Bautista.

[53] On August 20, 2010, the complainant filed a grievance because of the August 9, 2010 letter stating that he had voluntarily quit.

[54] In October and again in November 2011, Dr. Bautista wrote other letters about Mr. Christoforou in relation to his grievance. The letters advise that the complainant could safely work a maximum of 40-42 hours a week, and recall that he has always been willing to work these hours.

[55] In 2013 the complainant rejected an offer of reinstatement through the union representative that was conditional on him being able to prove that he was medically fit to work 45 plus hours a week.

VI. ISSUES

[56] I have to determine the following issues. I will address them in turn in my analysis below.

1. Has the complainant established a prima facie case of discrimination under section 7 or 10 of the Act, or both, because the respondent refused his request to work reduced hours and refused to employ him?

2. If yes, has the respondent established a valid justification for its otherwise discriminatory actions? In particular, has it established that the requirement to work without any medical restrictions was a bona fide occupational requirement (BFOR)?

3. If the respondent cannot establish a justification, what remedies should be awarded that flow from the discrimination?

VII. REASONS AND ANALYSIS

A. Age

[57] I dismiss Mr. Christoforou's allegations on the basis of age. No specific submissions were made on the basis of this protected ground, and minimal evidence was led by the complainant to support these allegations. The complainant testified that he believed Mr. Shepley and the respondent were trying to push him and other drivers out of the company because of their age and because they favoured using brokers. Robert Gaumont, who worked for the respondent for over 35 years and was also the chief union steward, testified that he believed Mr. Shepley wanted to get rid of more senior drivers because they cost more for the company.

[58] The respondent led evidence at the hearing regarding the seniority of the drivers. A number of drivers were in their 60s, and as of the time of hearing, 15 were still employed by the respondent. Mr. Shepley testified about the shortage of drivers in the industry and the fact that many are over the age of 55.

[59] The allegations about age are speculative, particularly in light of the respondent's evidence about the age of its drivers, which I accept. The complainant did not make any other submissions at the hearing about age or present evidence to explicitly link this protected ground with the alleged adverse treatment he suffered. Rather, the focus was on the respondent's alleged failure to accommodate his disability-related request for reduced work hours. I will therefore only address the allegations on the ground of disability in my reasons below.

B. Legal Framework

[60] Mr. Christoforou alleges discrimination in relation to employment on the basis of disability, contrary to sections 7 and 10 of the *Act*. There are two parts to proving discrimination in the employment context.

[61] First, the complainant has the onus of proving the existence of a *prima facie* case. A *prima facie* case of discrimination is one that covers the allegations made and 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 (*Ontario Human Rights Commission v. Simpsons-Sears Ltd.* [1985] 2 S.C.R. 536 at para. 28 ("*Simpsons-Sears*").

[62] The use of the expression "*prima facie* discrimination" must not be seen as a relaxation of the complainant's obligation to satisfy the tribunal in accordance with the standard of proof on a balance of probabilities, which he must still meet (*Québec (C.D.P.D.J) v. Bombardier Inc.,* 2015 SCC 39, at para. 65 ("*Bombardier*").

[63] To establish a *prima facie* case, the complainant has to prove that it is more likely than not that he meets all three parts of this test: 1) he had a characteristic protected from discrimination under the *CHRA; 2)* he experienced an adverse impact with respect to employment; 3) the protected characteristic was a factor in the adverse impact (*Moore v. B.C. (Education)* 2012 SCC 61*,* at para. 33).

[64] The protected characteristic need not be the only factor in the adverse treatment, and a causal connection is not required (See, for example, *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada* (*for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 ["*FNCFCSC*"] at para. 25).

[65] In determining whether discrimination has occurred, the Tribunal may consider the evidence of all parties. The respondent can present evidence to refute an allegation of *prima facie* discrimination, put forward a defence justifying the discrimination under s. 15 of the *Act*, or do both (see *Bombardier* at paras. 64, 67, 81; *Emmett v. Canada Revenue Agency,* 2018 CHRT 23 at paras. 61, 63-67).

[66] If the complainant establishes a *prima facie* case of discrimination, the burden shifts to the respondent to justify its decision or conduct based on the exemptions set out in the *Act* or developed by the Courts (*Bombardier*, *supra*, at para 37).

Issue 1: Has the complainant established a *prima facie* case of discrimination under section 7 or 10 of the *Act,* or both, because the respondent refused his request to work reduced hours and refused to employ him?

(a) Does the complainant qualify for protection from discrimination because he has a protected characteristic?

[67] Yes, I find that the complainant had a disability and therefore qualifies for protection from discrimination. The respondent did not argue at the hearing that the complainant did not have a disability or dispute that he has a characteristic protected by the *Act*.

[68] A "disability" under the *Act* means any previous or existing mental or physical disability..." (s. 25 of the *Act*). The *Act* does not contain list of "disabilities". A disability does not have to be permanent and it is not just the most serious or most severe mental disabilities that are entitled to the protection of the *Act* (*Mellon v. Canada (Human Resources Development)*, 2006 CHRT 3, at para. 88). The *Act* prohibits discrimination in the workplace on the basis of a perception or impression of a disability, and requires accommodation by the employer unless it constitutes undue hardship (*Dupuis v. Canada (Attorney General),* 2010 FC 511 at para. 25).

[69] There is no dispute that the respondent recognised the complainant had health issues related to a disability or perceived disability and that he was not permitted to continue working because of the respondent's concerns about how his health was impacting his ability to safely perform his job.

(b) Did the complainant suffer an adverse impact with respect to employment?

[70] Yes. The complainant's request to be accommodated was refused, he was suspended, and he was ultimately terminated.

[71] There is no dispute that the complainant's request to work fewer hours was denied. The complainant wanted to book off work on May 6, 2010 and indicated that this was due to health issues. He was suspended for not coming to work and because of his previous

attendance record, also related, at least in part, to his health. That suspension remained in place even after the complainant submitted the medical note from Dr. Bautista. Mr. Shepley acknowledged at the hearing that the complainant's suspension was never lifted and even if he had wanted to work, the complainant was told he could not do so unless his doctor could confirm that he could work without restrictions. The complainant called in on May 14th to try to work the following week and was told he could not book on without the medical confirmation he could work regular hours.

[72] I also find that the complainant suffered an adverse impact because the respondent refused to continue to employ him on the basis of a prohibited ground of discrimination within the meaning of s.7(a) of the *Act*. The complainant was sent a Record of Employment by the respondent by way of Mr. Shepley's August 9, 2010 letter.

[73] I do not find that the evidence supports the respondent's claim that the complainant abandoned his position. The August 9, 2010 letter suggests the claimant abandoned his job as he had not communicated with his employer about his medical status and the benefits form, as agreed at the last meeting with the union. The May 26, 2010 letter from Mr. Shepley had previously warned that if the complainant did not provide the requisite medical documentation, he would be considered to have abandoned his employment.

[74] While the complainant did not immediately complete the Short-Term Disability (STD) form that he was given during the June meeting, he testified that he did not think he should because he intended to return to work. While I accept that the complainant did not complete the STD form until mid-August, I am not persuaded that his delay in communication or this failure, constitute "abandonment" of his job of 33 years. He clearly indicated his intention and desire to return to work in calling in to book on. He was restricted from doing so, which is admitted by the respondent. I also accept the oral evidence of both Robert Gaumont and Mike Riley, who were the complainant's colleagues, and testified that they did not believe that Mr. Christoforou, a long-standing driver with seniority, would voluntarily leave his job. Further, while the complainant did not send any further information after the June 9th letter, he was technically still suspended from work on the understanding that he was being investigated.

(c) Was the complainant's disability a factor in the refusal to work reduced hours and in his termination?

[75] Yes. There was a connection between Mr. Christoforou's disability and the reason his request to be accommodated was refused. The complainant would have been able to continue working but for his health issues and disability-related restrictions.

[76] The respondent does not dispute that it did not allow the complainant to work any amount of hours because of his health issues, but argues that its actions were justified due to public safety reasons and undue hardship. Mr. Shepley and Mr. Gibson, a consultant employed by the respondent at the time, both testified that they did not consider accommodating the complainant because of safety reasons. The respondent also submits that given the complainant's attendance record in 2010 and what it saw as a pattern of absenteeism, it suspended the complainant pending investigation.

[77] I also find that the complainant's disability was a factor in his termination from his employment. For the same reasons that the complainant was not permitted to work reduced hours and was suspended, he was ultimately terminated. While the respondent claimed that the complainant abandoned his employment and failed to communicate about his status or complete the benefits form, these issues all ultimately related back to concerns about the complainant's health and absences which were, at least in part, due to a disability or perceived disability.

[78] The complainant has established a *prima facie* case of discrimination. This now requires a justification or explanation from the respondent.

Issue 2: If the complainant established a *prima facie* case, has the respondent provided a valid justification for its otherwise discriminatory actions? In particular, has it established that the requirement to work without any medical restrictions was a *bona fide* occupational requirement (BFOR)?

[79] The respondent must demonstrate that it is more likely than not that the standard or policy it established is a BFOR (s.15 of the *Act*; *Bombardier*, *supra*, at para. 37 and *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652

(SCC), [1999] 3 S.C.R. 3 ("*Meiorin"*) at paras, 54 and 71-72). If the respondent fails to justify the discriminatory conduct, this will result in a finding of discrimination.

[80] To establish that an occupational requirement is genuine or real, or *bona fide*, the respondent must prove, :

> [...](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.
>
> *(Meiorin, supra* at para. 54)

[81] The respondent must demonstrate that it took reasonable steps to accommodate the employee without suffering undue hardship. The onus is on the employer, as the employer is in possession of the necessary information to show undue hardship. The employee, will rarely, if ever, be in a position to show its absence (*Simpson-Sears*, *supra*, at para. 28).

[82] Where a respondent refutes the allegation of discrimination, this explanation must be reasonable, it cannot be a "pretext" - or an excuse - to conceal discrimination (*Moffat v. Davey Cartage Co (1973) Ltd*., 2015 CHRT 5 at para. 38).

[83] The balance of my reasons is focused on the third part of the *Meiorin* test. In my view, this case turns on whether the respondent has met its burden to show that it could not accommodate the complainant short of undue hardship.

(a) Did the employer adopt the standard for a purpose rationally connected to the performance of the job?

[84] Yes. The general purpose of the requirement to prove that drivers are fit to drive without restriction was to ensure that drivers could do their job safely and effectively. The

importance of safety and the need to ensure it in this industry are not disputed. In my view the standard had a valid general purpose, and there is a clear connection between the safety-oriented purpose of the requirement and the tasks of a cement truck driver.

(b) Did the respondent adopt the standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work related purpose?

[85] Yes. I am persuaded that the respondent adopted the requirement that drivers be fit to drive without restriction in good faith and that it believed that it was necessary for the purpose of ensuring the safe handling and operation of its trucks. The respondent has a duty to public safety and to ensure the safety of its drivers. It must also protect its business interests and its assets.

[86] I acknowledge that the complainant filed a number of grievances related to Mr. Shepley and his managerial style. The complainant testified about how the stress of having Mr. Shepley as his manager contributed to his health issues. However, in light of the fact that the complainant had been a driver for 33 years, and worked for Mr. Shepley from 2003 until 2010, I am not persuaded that the standard was adopted in bad faith because of Mr. Shepley's working relationship with the complainant or as a veiled attempt to remove the complainant from the workplace.

(c) Was the standard reasonably necessary to accomplish its purpose or goal because it was impossible to accommodate Mr. Christoforou without imposing undue hardship?

[87] The respondent argues that its standard requiring the complainant to be fit to drive without restrictions was justified. It submits that accommodation of the complainant's disability-related needs would have imposed undue hardship on the business, considering health, safety and cost (ss.15(1)(a) and (2) of the *Act*).

[88] The complainant disputes the respondent's claims about undue hardship. He submits that the respondent ignored his doctor's medical opinion and did nothing to try and accommodate him.

What did the respondent do to try to accommodate the complainant's request to work reduced hours?

[89] There is no separate procedural duty to accommodate under the *Act* that can give rise to remedies. The employer still has to prove, however, that it was more likely than not that accommodating the complainant's disability would have imposed undue hardship. (Canada (Attorney General) v. Cruden, 2013 FC 520 (CanLII) ("*Cruden*"), confirmed in *Canadian Human Rights Commission v Attorney General of Canada and Bronwyn Cruden*, 2014 FCA 131).

[90] This does not mean the procedure used by the employer when considering accommodation does not have any practical significance.

> Indeed, in practical terms, if an employer has not engaged in any accommodation analysis or attempts at accommodation at the time a request by an employee is made, it is likely to be very difficult to satisfy a tribunal on an evidentiary level that it could not have accommodated that employee short of undue hardship (*Cruden supra*, at para. 70, referring to *Koeppel v Canada (Department of National Defence)*, 97 CLLC 230-024, 32 CHRR D/107 at paras 212 – 228 (CHRT).

[91] Mr. Shepley was unequivocal in his evidence that he did not consider accommodating the complainant's health-related restrictions. He testified that he could not legally accommodate someone who is on the highway in a safety-sensitive function if he knew or ought to have known that this driver could be a risk. He had also discussed the situation with the owner of the company and with Wayne Gibson, a consultant with extensive experience in the trucking industry.

[92] Mr. Shepley contacted Mr. Gibson and told him that they had a problem with one of their drivers not being able to work the 45 hours all drivers are supposed to work. Mr. Gibson advised Mr. Shepley not to let the complainant drive as he felt that it was too much of a risk. Mr. Gibson did not think Dr. Bautista understood the industry or the risks associated with letting a driver with symptoms like the complainant's drive a 62 ton cement truck on busy highways.

[93] Mr. Christoforou alleges that other than requesting medical confirmation that would clear him to drive without restrictions, the respondent never acknowledged the nature of his

ongoing accommodation request or tried to formally meet his needs. The respondent essentially brushed aside Dr. Bautista's medical opinion but failed to follow up if it doubted her comments at face value. The complainant argues that the requested accommodation was minor, as Dr. Bautista advised that the complainant's health issues could be accommodated if his working hours could be reduced from 45 to 40 hours. This decision to ignore Dr. Bautista's advice was made by Mr. Shepley and others, who do not have medical training.

[94] There is no dispute that the respondent did not request additional information from Dr. Bautista about the nature of the complainant's disability-related restrictions to better understand what he may have been able to do in the workplace. Mr. Shepley questioned how Dr. Bautista would know that the complainant was fit to drive at 39 hours, but not at 40 or 42. Yet he testified that he was not going to "override" Mr. Christoforou's family doctor, and did not seek an independent medical examination though the terms of the collective agreement explicitly provided for this possibility. Similarly, Mr. Gibson acknowledged that he did not turn his mind to the idea of getting a second opinion. The respondent believed it was "clear enough" what Dr. Bautista's opinion was and it would have been a waste of money to go through another medical examination.

The complainant's role in the accommodation process

[95] The respondent argues that the complainant failed to facilitate the accommodation process and was unresponsive. Following the June 15, 2010 meeting with the union, the complainant did not apply for STD, as had been discussed. He only submitted his application in August, after he was terminated. Mr. Shepley testified that he told the complainant to attend a meeting on June 8th but the complainant failed to show up. He did not drop off the requested letter from Dr. Bautista in May, and waited until June 9th.

[96] Employees have an obligation to accept reasonable accommodation and cannot expect a perfect solution (*Central Okanagan School District No. 23 v. Renaud*, [1992], 2 S.C.R. 970 ("*Renaud*"), at p.995). This is not a case, however, where the employer proposed alternatives and tried to come up with a plan, or where the employee failed to hold up his or her end of the bargain. I do not find the complainant's responses, even if imperfect,

to be a refusal to cooperate or to engage reasonably in the accommodation process. Further, the respondent admits that it did not initiate any accommodation process or make a proposal to the complainant. On the contrary, I find the respondent took an all or nothing approach. Either Mr. Christoforou could drive without restrictions, or he could not work. In the words of Mr. Shepley at the hearing, “you can’t be half pregnant”.

The respondent’s justification for not trying to accommodate the complainant

[97] The respondent relies on the evidence of a number of witnesses who testified about the difficult and stressful job of a cement truck driver in support of its claim that it could not accommodate the complainant’s request without compromising safety. Robert Gaumont, Ray Guenette, Ralph Shepley and the complainant all testified that weather, traffic and unforeseen delays mean the hours of work can be unpredictable. The complainant also testified that when you are on the road, even if you were already at 9 hours of driving, you could not always just pull over on the highway and stop working, even if the terms of the collective agreement allowed it. A normal day could easily run 11 hours of work.

[98] When asked why his level of concern changed in 2010 compared to 2006 when the complainant provided a similar medical note, Mr. Shepley testified that it was only in looking at the whole picture that he became concerned. He considered the complainant’s absenteeism, the hours he had been working each week, together with the wording of Dr. Bautista’s medical notes. It appeared that the complainant’s symptoms had worsened as the number of hours she recommended he work had decreased from 45 to 40 or 42. In 2009, the complainant had booked off 14 times, and in 2010 he had already booked off 14 times before the May 7 request. Mr. Shepley was concerned that the complainant may already have been driving with symptoms.

[99] The respondent also relied on evidence about the complainant’s health and symptoms to explain its level of concern. Robert Gaumont and Mike Riley both testified that they knew about the complainant’s symptoms and that Mr. Christoforou was stressed out. Mr. Riley had seen the complainant look withdrawn and tired and seen his hands shaking.

[100] The respondent was concerned that the stakes were too high to risk letting the complainant work and that it was opening itself up to criminal or civil liability. The respondent

was also concerned with insurance implications in allowing the complainant to work. It referred to Bill C-45, otherwise known as the “Westray Bill”, that established new requirements for workplace health and safety, imposing serious criminal penalties for violations that result in injuries and death.

[101] The respondent did not have a written “fit to drive” policy, but submits that it did not need one. It argues that drivers in commercial settings are held to higher standards with their class of licence, and that under the *Highway Traffic Act Regulation*s (O. Reg 421/16) at s.14), drivers must not suffer from any mental, emotional, nervous or physical condition or disability liable to significantly interfere with their ability to safely drive a vehicle of their class.

[102] The respondent called two experienced safety and insurance professionals who were not involved in the complainant’s case at the relevant time, but who testified about concerns they would have had about putting the complainant on the road. Gregory St. Croix is an experienced transportation safety professional who worked at the MOT for over 20 years until 1995. From 1995 to 2010 he worked with a global insurance brokerage and risk management company. At the time Mr. St. Croix started a working relationship with the respondent, John Grant Haulage’s claims history was terrible from an insurance perspective. Over the years that he worked with the respondent, Mr. St. Croix noted a significant improvement in the respondent’s safety protocols, accident management programs, driver training and recruitment.

[103] Mr. St. Croix testified that the complainant’s health could have affected his ability to safely operate a motor vehicle, and should have prompted his physician to notify the MOT for a medical review. He explained that the whole idea of a medical review board is to let professionals and those so qualified make a determination, request further documentation, or recommend testing the individual driver.

[104] The respondent also called Ron Trecoce, who has extensive experience in the transportation brokerage and insurance industry. His company provided services to the respondent until approximately 2006 and again as of approximately 2011. He testified that Dr. Bautista’s opinion would have raised serious concerns for him about putting the

complainant on the road or insuring him, even with reduced hours. He would have recommended further medical investigation and evaluation of the driver.

The complainant's position

[105] Mr. Christoforou submits that in light of the fact that the employer never proposed any solution for his medically prescribed 40-hour limitation for driving, or any alternatives, the respondent has failed to prove that it could not accommodate him without undue hardship.

[106] The complainant relies on the Supreme Court of Canada's finding in *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 ("*Grismer*") in support of its argument that the respondent cannot expect perfection and that while standards can and should be adopted for public safety and other legitimate purposes, they must be set in a way that accommodates persons with disabilities where this can be done without incurring undue hardship.

[107] *Grismer* involved a mining truck driver who had lost his peripheral vision after a stroke. The B.C. Motor Vehicle Branch cancelled his licence because his vision no longer met the standards set by the Superintendent of Motor Vehicles. His licence was refused four times because there was no exception to the rule about vision and no individual assessment was permitted. The Court found that Mr. Grismer should have been given an opportunity to show that he could drive without undue risk in an individualised evaluation.

[108] Relying on *Grismer*, the complainant argues that risk can be considered as part of hardship, but not as an independent justification of discrimination (*Grismer*, supra, at para. 30). It submits that the respondent has not actually proven hardship on a balance of probabilities and has given the complainant an ultimatum: either be able to work at 100% or stay home.

Findings on undue hardship

[109] In my view, there is insufficient evidence to find that the respondent could not accommodate the complainant without undue hardship. The respondent acted in haste and without regard for the complainant's individual circumstances.

[110] I have no difficulty accepting that public safety is critical and that there are significant consequences for the respondent if it fails in its duty to its drivers and the public, particularly in a heavily regulated industry. However, on its own, the goal of safety is not enough to meet its burden under s.15 of the *Act*. An employer cannot refuse to even consider how to accommodate an individual with disability-related restrictions because ensuring safety is a legitimate purpose in the workplace.

[111] In order to prove that its standard of requiring the complainant to drive without restrictions is "reasonably necessary", the respondent must prove the standard incorporates every possible accommodation to the point of undue hardship (*Grismer*, *supra*, at para. 32). Some hardship is acceptable. It is only "undue" hardship that satisfies this test (*Meiorin*, *supra*, at para. 62, citing *Renaud, supra*, at p. 984).

[112] The respondent's arguments cannot succeed. If an employer could cite safety as a reason not to engage in any accommodation process, many other workers in jobs where safety is critical would be sent home indefinitely or terminated until they were back to 100% without any assessment of what they were actually able to do. Bus drivers, train and boat operators, air traffic controllers, pilots, paramedics - all may face health-related restrictions at some point in their lives, and should not be written off without some kind of individualised assessment, as was contemplated in *Grismer*.

[113] Anticipated hardships caused by proposed accommodations should not be based only on speculative or unsubstantiated concerns that certain adverse consequences "might" or "could" result if the claim is accommodated. (*Adga Group Consultants Inc. v. Lane, 2008 CanLII 39605 (ON SCDC), para 117 (Lane)*, citing *Grismer*, *supra* at para. 32 and *Meiorin*, *supra* at para. 79.

[114] I acknowledge that it was the "whole picture" that caused concern to the respondent, including Mr. Christoforou's record of absenteeism, the wording of Dr. Bautista's letters, and what they perceived as a worsening of the complainant's condition. Yet, the complainant passed his medical test in 2009 and did not have any collision accidents on record in 2008, 2009 or 2010. He was also described by the dispatcher, John Valeri, as a diligent and safe driver.

[115] The appropriate approach if the respondent had a concern about health or safety would have been to raise these issues with the complainant, a long-standing employee of 33 years, and to follow up and obtain more medical information, test him, or make a plan together to consider whether and how he could have been enabled to work in some capacity. However, the respondent admits that it did not investigate how to accommodate the complainant or even consider doing so, and therefore it has not provided evidence to show that to provide such accommodation would cause undue hardship.

[116] There are multiple examples of what employers do to try and bring employees back to work and keep them working. The respondent could have followed up with Dr. Bautista, attempted to get information about the complainant's functional abilities, or requested clarification on possible medical or related restrictions. It could have asked about a plan for his recovery, or whether she saw it as a temporary, transitional health issue. These requests would have been reasonable and Mr. Christoforou would have reasonably been expected to participate and cooperate in this process. Mr. Shepley also testified that the respondent's safety manager occasionally assessed drivers' safety levels, yet this option was not pursued with Mr. Christoforou.

[117] The respondent submits that the error Dr. Bautista made in her June 8, 2010 letter in referring to 2006 work arrangement as being for 40 hours, rather than 45 hours, is concerning. I do not find that these errors absolve the respondent of its responsibility to at least consider how to accommodate the complainant. If the respondent had doubts about what Dr. Bautista wrote, all the more reason to consult her or follow up.

[118] Dr. Bautista testified that in her opinion the complainant was "perfect to drive 40 hours". She expected him to self-regulate because he was a long-standing patient who was very compliant with her recommendations. Dr. Bautista did not feel the complainant's symptoms warranted reporting to the MOT. She felt his stress and anxiety were situational and she would not have labelled him as someone suffering from a major illness such as depression or generalised anxiety disorder. She confirmed that the company did not contact her at any time between 2006 and 2010 to request any follow-up or further information.

[119] The respondent relies on the evidence of Mr. St. Croix and Mr. Trecoce, who were not involved in the complainant's case but who have extensive experience in the industry. It is telling that both agreed they would have had concerns about allowing the complainant to drive and would *want more information.* Again, seeking more information is not what the respondent chose to do in this case.

[120] I also find that the standard applied to the complainant was one of perfection, one that does not even appear to have been consistently applied to others in the company. Mr. Shepley testified that there were drivers who lost their licences because of heart conditions. When they recovered and got their licenses back and were medically cleared, they came back to work full-time. The respondent therefore appears to have agreed to bear some measure of risk with respect to these drivers, and appears to have accepted the opinion of these drivers' doctors that they were able to return to work. The respondent accepted that they were "fit to drive" despite the fact that there is also a degree of risk inherent in putting someone with a cardiac condition behind the wheel of a massive cement truck, even if their doctor "cleared them". It therefore appears that in some cases the respondent accepted that there is no "risk free" driver, and that it applied a standard more akin to "reasonable safety" in other situations.

[121] As the Supreme Court of Canada found in *Meiorin*, while it may be ideal from the employer's perspective to choose a standard that is uncompromisingly stringent, if it is to be justified under human rights legislation, it must accommodate factors relating to the "unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship" (*Meiorin*, *supra* at para. 62).

[122] To be clear, I am not finding that the respondent had to lower its safety standards. But employers have to look past their assumptions about individuals with disability-related restrictions who are not able to perform their job at 100%, even if temporarily. An employer is required to consider what an individual *could* do, and not simply reject outright the notion of any accommodation without even engaging in a meaningful attempt to work with the employee.

[123] Additionally, “accommodating the complainant to the point of undue hardship” does not mean that the respondent was obligated to put Mr. Christoforou back on the road after receiving Dr. Bautista’s letter. The Supreme Court’s reasoning in *Grismer* is very helpful in dispelling the misplaced notion that a finding in favour of the complainant is tantamount to ordering the respondent to put a driver on the road at the expense of safety: “[t]his case is not about whether unsafe drivers must be allowed to drive. There is no suggestion that a visually impaired driver should be licensed unless he or she can compensate for the impairment and drive safely.” (*Grismer*, *supra*, at para. 2).

[124] Similarly, this case is not about whether an unsafe cement truck driver must be allowed to drive. Rather, as the Court reasoned in *Grismer*, it is about whether the driver should have been allowed to have a chance, on an individual basis, to prove that he could drive. In my view, in order to be meaningful, the right to reasonable accommodation at this stage of the analysis must allow for some measure of individual assessment rather than simply allowing for an employer to write off the ability of an individual to do anything at all without engaging in any type of process or analysis. Standards must be as inclusive as possible (*Grismer*, *supra*, at para. 22).

[125] The goal of accommodation is to ensure that an employee who is able to work can do so. The employer does not have a duty to change working conditions in a fundamental way, but it does have a duty, if it can do so without undue hardship, to arrange the employee’s workplace or duties to enable the employee to do his or her work (*Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d’Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, [2008] 2 S.C.R. 561, at paras. 14 and 16.

[126] The respondent relies on *Dennis v. Eskasoni Band Council,* 2008 CHRT 38 (“*Dennis*”) in support of its claim that the safety-sensitive nature of the position justified the standard, and that it could not take the risk of leaving “self-regulation” to the complainant given the dangers involved in putting him on the road. *Dennis* involved a challenge to the Band Council’s “fit to work” policy which included mandatory drug and alcohol testing as a requirement of employment at a commercial fishery.

[127] The Tribunal in *Dennis* found that the Band Council would have experienced hardship based on safety and cost were it required to have individuals who test positive in a drug-screening test work on its vessels. Accommodating these individuals through alternate employment on land or sea was not an option, as there were no such jobs available. It also found that it could not find alternative means to assess the risk and that drug testing was a reasonable standard.

[128] I am not persuaded, as the Tribunal was in *Dennis*, that there was no alternative available to the respondent. The respondent did not follow any procedure in an attempt to work with Mr. Christoforou, or consider alternatives. It did not rely on a written policy, such as the one in *Dennis*, that could have provided a framework for individualised accommodation. The respondent simply issued a blanket refusal and did not have a screening process to assess the presence of safety hazards within the workplace as in *Dennis*. The Band Council's "Fit to Work" policy itself provided for individual accommodation. Individuals who tested positive could take the test again, and were given information addressing what they would have to do to pass the next test, and enable them to get back to work. An employee who failed could re-test before definitively being turned down for employment (*Dennis*, *supra*, at para. 114).

[129] I also distinguish the complainant's circumstances from those underlying the case of Alberta *(Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Company*, 2007 ABCA 426 ("*KBR*") on which the respondent relies. In *KBR*, the Court held that the chambers judge erred in finding that the prospective employee had been the victim of discrimination based on the employer's perception that he suffered from drug addiction. Since the workers in *KBR* handled large industrial equipment, they were required to pass a mandatory drug test. The respondent relies on the following finding from *KBR*: "Extending human rights protections to situations resulting in placing the lives of others at risk flies in the face of logic" (*KBR*, *supra*, at para. 36). As in *Dennis*, *KBR* involved mandatory drug testing. A test is a way of assessing that the individual can complete the job in a safety way. In Mr. Christoforou's case, there was no individual assessment of his fitness to complete the job, or even some modified version thereof.

[130] Similarly, the respondent relies on *Simcoe (County) v. Ontario Public Service Union* 98 O.R. (3d) 523 ("*Simcoe*"). *Simcoe* involved a paramedic whose eyesight was impacted by a medical condition. He could not meet vision requirements for the class of licence required for paramedics. He was removed from his position and the arbitrator found that the failure of the regulation to provide for reasonable accommodation amounted to substantive discrimination. The arbitrator also found that the paramedic could have served as an "attend only" paramedic, riding in the ambulance without driving. The Divisional Court set aside the arbitrator's decision on the grounds that it was unreasonable to conclude that the workplace standard was not reasonably necessary for the health and safety of patients. An essential element of the job of a paramedic is to transport patients as quickly as possible, and if a paramedic is unable to drive, there could be delays. Unlike in Mr. Christoforou's case, in *Simcoe*, the arbitrator was presented with evidence specific to the job and to the essential duties of a paramedic, which included being able to drive the ambulance.

[131] The respondent in Mr. Christoforou's case did not present sufficient evidence to support its claim that the complainant could not do any work at all for the respondent, whether in the yard, loading, or unloading, or even driving one or two days a week. According to Mr. Shepley, all of this work is safety-sensitive, and hence, too risky for the complainant. He also testified that there was no other job that Mr. Christoforou could have done at the relevant time. He could not work with non-unionised workers. He was not trained to work dispatch and was not qualified to work as a mechanic. Nothing more about the nature of the work, and why these options were not reasonable alternatives, was provided in support of the respondent's claims.

[132] Beyond the fact that both *KBR* and *Simcoe* are distinguishable on the facts, I do not accept that they stand for the general proposition that there is no role for human rights in safety sensitive workplaces. There must be some evidence to link the "outright refusal of even the possibility of accommodation with an *undue* safety risk" (*Lane*, *supra*, at para. 118).

[133] While the respondent argued that the October and November 2011 letters sent by Dr. Bautista after the termination are evidence of the fact that the complainant's condition had not changed and that her diagnosis was still a cause for worry, this was not evidence the respondent had at the time it suspended or terminated the complainant. The employer

may not use after-acquired evidence to support its view that an employee could not be accommodated. After-acquired evidence is only relevant to remedy (*Lane, supra at* para. 107).

[134] In closing submissions, the respondent referred to the complainant's duty of fair representation complaint filed against his union that was denied by the Canadian Industrial Relations Board (CIRB). It notes that the CIRB found that the respondent's policy and concerns on health were reasonable and "laudable and proper". The CIRB's finding is not binding on me, nor is it evidence. Further, the Tribunal's role is to apply the *Act* and human rights case law and principles, as was explained by the member at the hearing.

[135] The complainant submits that the experienced drivers who testified did not believe there would be any impact on the respondent's business if a driver was allowed to work 3 or 4- day weeks. Jeffrey Seaton testified that a driver could work a shortened week because the company had enough drivers at the time, and that they were paid by the hour. Raymond Guenette also testified that at one point the company employed about 100 unionised drivers. He could not see why there would be any impact on the business if a driver worked a shorter week, particularly as other drivers could have picked up extra hours if asked. The complainant also argues that the terms of the collective agreement provide that a driver may cancel his or her shift on a two-hour notice with a reasonable explanation and that therefore, the respondent was already able to have drivers on stand-by to fill in for a driver if required.

[136] While the respondent did not accept that a shorter work week or fewer shifts were options when asked, in my view it also did not present sufficient evidence to support its proposition that these were not viable options. It again referred to the potential cost to the business if the complainant was involved in an accident or if it lost its insurance. It made no reference to specific attempts at accommodation that it tried or considered. In my view, its evidence on the impact on its business is minimal and speculative and falls short of what is required to prove undue hardship.

VIII. REMEDIES

Issue 3: If the respondent cannot establish a justification, what remedies should be awarded that flow from the discrimination?

[137] Much may have changed for both Mr. Christoforou and the respondent since this hearing started almost 4 years ago. At the time of the hearing, in late 2016 and early 2017, the complainant sought reinstatement as a remedy if there was a finding of discrimination. He is now 70 years of age. His circumstances and remedial requests may well have changed in that time. I need to hear from the parties on these issues and ask questions about their evidence at the hearing before making an order on remedies.

[138] The Tribunal will schedule a case management conference call with the parties if they cannot resolve this issue directly. The Tribunal will work with the parties to discuss how to address the remedial portion of the hearing, including next steps.

[139] I am also prepared to conduct a mediation/adjudication of this issue, with the parties' consent. The session could be held by telephone or via videoconference platform given restrictions on in-person meetings and travel due to COVID-19.

IX. ORDER

[140] The complaint is substantiated, and the complainant is entitled to remedies.

[141] Within 14 days of this decision, the parties are directed to notify the Tribunal whether they are prepared to mediate the remedial issues either on their own or with the assistance of the Tribunal. If not, the Tribunal will immediately schedule a case management conference call to address next steps as soon as possible to avoid further delay.

Signed by

Jennifer Khurana
Tribunal Member

Ottawa, Ontario
October 19, 2020

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2097/1315

Style of Cause: Michael Christoforou v. John Grant Haulage Ltd.

Decision of the Tribunal Dated: October 19, 2020

Date and Place of Hearing: October 31 to November 4, 2016;
November 14 to November 18, 2016;
January 23, 25 and 27, 2017

Toronto, Ontario

Appearances:

Nikolay Chsherbinin, for the Complainant

No one appearing, for the Canadian Human Rights Commission

Aaron Crangle, for the Respondent