

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2020 CHRT 26

Date: August 13, 2020

File No.: T2610/3416

Between:

Jamison Todd

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

City of Ottawa

Respondent

Decision

Member: Kirsten Mercer

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I. Summary of Conclusions

[1] In large part, I am satisfied that OC Transpo met its obligations in respect of Mr. Todd's human rights during his employment as a bus driver. While there were some flaws in the agreed approach to accommodating Mr. Todd's disabilities, particularly apparent with the benefit of hindsight, I find that the approach to accommodation adopted by OC Transpo and Mr. Todd was to their mutual satisfaction at the time. I do not believe that OC Transpo discriminated against Mr. Todd in the way that it approached his accommodation or in adopting the Continuing Employment Agreement (as defined herein) upon his return to work in 2012.

[2] When OC Transpo terminated Mr. Todd in 2014, I find that it was within its rights to do so pursuant to the CEA. Neither the obligation on Mr. Todd to contact his supervisor, nor his failure to do so were in any way related to Mr. Todd's disability, and Mr. Todd understood what he was required to do and the consequences for not doing it.

[3] If Mr. Todd's breaches of the CEA were the only reason provided for his termination, then I do not believe that terminating him would have been discriminatory. However, when it terminated Mr. Todd, OC Transpo conflated the breach of the CEA with Mr. Todd's overall pattern of absenteeism and in doing so did not distinguish the disability-related absences from the non-disability-related absences. At that time, it did not consider any other options of accommodation and it failed to demonstrate that it had reached the point of undue hardship.

[4] By identifying Mr. Todd's overall absenteeism as one of the reasons for his termination, OC Transpo engaged the protections of the *Canadian Human Rights Act* against actions motivated in whole or in part by discrimination.

[5] While OC Transpo argued at the hearing that it was justified in its decision to terminate Mr. Todd because his absenteeism was excessive, the evidence before me at the hearing did not satisfy OC Transpo's burden to demonstrate that it took care to disaggregate Mr. Todd's disability-related absences from his other absences. Further, while there was no dispute that regular and reliable attendance at work is important, OC Transpo did not

discharge its burden to prove that it had reached the point of undue hardship in its efforts to accommodate Mr. Todd.

[6] Even though it was in a position to fire Mr. Todd for other reasons, when OC Transpo included Mr. Todd's overall history of absenteeism without accounting for his disability-related absences or demonstrating that it had reached the point of undue hardship, it breached the Canadian Human Rights Act.

II. Overview

[7] Jamison Todd (the Complainant) worked as a bus operator for the public transit service of the City of Ottawa, OC Transpo (the Respondent) from 2001 until he was fired in 2014. While Mr. Todd enjoyed his work as a bus operator, he missed a lot of work over the course of his career for various reasons, including a number of medical conditions.

[8] This complaint is about whether OC Transpo discriminated against Mr. Todd on the basis of one or more of his disabilities while he worked as a bus driver or when it decided to terminate his job as a bus driver in 2014.

[9] Although Mr. Todd was diagnosed with several conditions identified in his complaint, his ability to perform his duties as a bus driver was impacted particularly by two disabilities. First and foremost was Mr. Todd's Irritable Bowel Syndrome ("IBS"), which was diagnosed in 2004 and flared up intermittently over the course of his career. Mr. Todd also experienced musculoskeletal pain, which came and went over several years, but which was particularly bad in the period from 2008 to 2010.

[10] In other words, the medical restrictions provided by Mr. Todd's doctors (particularly in relation to his IBS) made it hard for him to drive a bus. OC Transpo and Mr. Todd agreed that he would miss work when his disabilities prevented him from working, and those disability-related absences would not be counted against him for the purpose of OC Transpo's attendance management system.

[11] This approach to accommodating Mr. Todd's disability (which the parties referred to as the Accommodation Plan) meant that Mr. Todd accumulated a large number of absences from work.

[12] Mr. Todd also missed work for other reasons. And in some cases, Mr. Todd said he was missing work because of a disability, but OC Transpo said that there was no medical documentation to support his claim.

[13] After Mr. Todd was away from work for an extended period of time, which was not supported by the medical evidence, OC Transpo decided to impose a new plan with rules designed to ensure that Mr. Todd improved his attendance at work. This was called the Continuing Employment Agreement (the "CEA"). Sometimes these plans are called Last Chance Agreements, because they are often used as a last chance for an employee who would otherwise be terminated.

[14] After a little more than a year of working under the CEA, Mr. Todd's attendance at work was improving, but he was not doing all of the things that he was required to do under the CEA. Most importantly, he was not calling his manager, Mr. Chaudhari, before he missed a shift. This meant that his manager could not offer him alternate duties. The CEA required Mr. Todd to contact his manager, and the consequence for failing to do what the CEA required was that Mr. Todd could be fired.

[15] After warning Mr. Todd both verbally and in writing about his failure to contact his manager before he was going to miss a shift, on January 29, 2014, Mr. Todd missed a shift because he had the flu, and he did not call his manager.

[16] OC Transpo decided to fire Mr. Todd.

[17] When OC Transpo was making the decision to fire him, however, it also considered Mr. Todd's whole history of missed work. OC Transpo didn't consider Mr. Todd's disability-related absences separately from his other absences, and it didn't consider whether there was anything else it could do to accommodate Mr. Todd's disability before considering his overall absences in its decision to fire him.

[18] The Canadian Human Rights Act protects Canadians from discrimination on the basis of a protected characteristic- in this case, disability. That means that an employer can't impose a negative treatment where the protected characteristic (disability) is a factor in its decision.

[19] When a complainant proves on the balance of probability that an employer acted in a way that negatively impacted them on the basis of a protected characteristic, the employer then has to prove that it did everything it could to accommodate the employee up to the point of undue hardship.

[20] In doing so the employer will be required to prove, on a balance of probabilities, that it accommodated the complainant to the point of undue hardship. If the employer fails to justify the discriminatory conduct, discrimination will be found to have occurred (*Beattie and Bangloy v. Indigenous and Northern Affairs Canada*, 2019 CHRT 45, at 91).

[21] In this case, OC Transpo was in a position to fire Mr. Todd for failing to contact his manager in advance of his shift. However, when it added Mr. Todd's "continued excessive absenteeism" as an additional reason for firing him, it had to show that it had tried to accommodate Mr. Todd but had reached the point of undue hardship in terms of health, safety or cost. OC Transpo didn't do so and thus did not meet its burden under the CHRA.

[22] As a result, I have decided that OC Transpo breached the Canadian Human Rights Act when it fired Mr. Todd (in part) for "continued excessive absenteeism".

III. The Complaint

[23] Mr. Todd filed a complaint with the Canadian Human Rights Commission in which he identified three main elements:

- i. OC Transpo's response to Mr. Todd's request for accommodation represented a breach of its procedural and substantive duties to accommodate his disabilities at work.
- ii. OC Transpo's imposition of a CEA when Mr. Todd returned to work in 2012 was discriminatory on the basis of his disability, especially when considering the reason for imposing the CEA; and the terms imposed.

- iii. OC Transpo discriminated against Mr. Todd when it terminated him in 2014, because his termination was, at least in part, based on his disability-related absences.

[24] OC Transpo argued that it did not breach its obligations to Mr. Todd. Rather, OC Transpo argued:

- i. Mr. Todd sought and received an accommodation for his IBS and that the accommodation was appropriate in the circumstances. OC Transpo argued that Mr. Todd was satisfied with the accommodation plans, despite the fact that the practical result of the plan was that Mr. Todd was frequently absent from work. OC Transpo argued that Mr. Todd only objected to the accommodation plans following his termination.
- ii. Mr. Todd was placed on the CEA upon his return to work because he had been absent without any medical justification for several months, and Mr. Todd's manager felt that he needed a more rigorous approach to his management of Mr. Todd's attendance. Furthermore, OC Transpo asserted that Mr. Todd's absence from work in 2012 was not related to any disability.
- iii. Mr. Todd was terminated in 2014 for repeatedly breaching the CEA by failing to contact his supervisor before the start of his shift. OC Transpo argued that this requirement existed so that Mr. Chaudhari could better manage Mr. Todd's attendance at work and so that Mr. Todd could be offered alternate duties (that satisfied his medical restrictions) if he was unable to perform his regular duties as a bus driver.

IV. Preliminary Issue

A. Counting the Days

[25] A great deal of time and effort has been expended by the parties and by the Tribunal in an attempt to capture a complete record of Mr. Todd's attendance at work from 2001 to 2014.

[26] In addition to the voluminous records that were filed with the Tribunal, at my request, the parties produced (on consent) an annotated calendar for the 11 years that are the subject of this complaint (2004-2014). This calendar has been immensely helpful to me to get an overall picture of Mr. Todd's attendance at work and the reasons for his absences when they occurred, despite the fact that the record contains a number of dates about which the parties were not able to agree.

[27] These instances are fairly limited and are immaterial over the span of 11 years that are the subject of a dispute.

[28] After an examination of all of the evidence in this case and detailed consideration of the complaint, and for the reasons detailed herein, I do not believe that this case turns on precisely how many days Mr. Todd worked, or how many days of work Mr. Todd missed, and for what reason. Even without perfect clarity on the precise number of days worked, or agreement on the nature of every absence, it is clear that Mr. Todd missed a lot of work.

[29] Sometimes these absences were related to Mr. Todd's disability. Sometimes they were not. And still other times, I am left with significant questions about the reasons for Mr. Todd's absence from work, unable to satisfy myself on a balance of probabilities of any valid reason for a significant number of Mr. Todd's absences.

[30] My findings with respect to this complaint, however, do not turn on a question of how many days were too many, or whether Mr. Todd's sick days were accurately represented in a log or spreadsheet.

[31] I have not attempted to parse the hundreds of pages of evidence accounting for every missed shift in Mr. Todd's career to make a precise determination of how many days Mr. Todd worked in a given year, or to make a finding about whether Mr. Todd's or OC Transpo's characterization of a given absence is the correct one. I don't believe that I have enough evidence to answer these questions with sufficient precision, nor do I believe that anything turns on the answer one way or the other.

[32] In recounting the evidence in this decision, therefore, I have been as precise as I believe the evidence permits and my decision requires, and where specific numbers are provided, they should be seen as my best determination based on the evidence before me. I acknowledge that there are some areas where perfect clarity has eluded me, but in the overall context of this complaint, I believe that this imperfection is not material.

V. Chronology of the Complaint

[33] The complaint alleges a discriminatory conduct that spans almost a decade. And while I have found that the complaint centres on two primary health concerns, the facts disclose four alleged distinct medical conditions experienced by the Complainant during his tenure at OC Transpo.

[34] I hope that an overview of the relevant chronology will help to clarify the legal analysis that follows.

[35] Mr. Todd was hired as a bus operator at OC Transpo in 2001 and began his career with considerable success. Mr. Todd was a member of the Amalgamated Transit Union (the “ATU”).

[36] By all accounts, Mr. Todd enjoyed his work as a bus driver, and early in his career received a number of commendations for excellent service.

(i) Musculoskeletal Pain

[37] In or around 2004, Mr. Todd began to suffer from increasing pain and impairment in his neck and shoulder. In the fall of 2004, Mr. Todd sought treatment from Dr. Maureen Grace, a sports medicine doctor. Dr. Grace recommended a series of treatments, including massage and physiotherapy, which Mr. Todd pursued.

[38] Dr. Grace’s medical file for Mr. Todd was introduced as evidence at the hearing. Based on those notes, Mr. Todd’s treatment for musculoskeletal pain was limited at this time to a few visits with Dr. Grace, and the follow up therapies as directed. There is no evidence to suggest that Mr. Todd experienced limitations on his ability to work as a result of musculoskeletal pain at this time.

(ii) IBS Diagnosis and Accommodation

[39] Also in 2004, Mr. Todd was diagnosed with IBS, a gastrointestinal condition that impacts the lower intestine and can cause cramping, abdominal pain, bloating, gas, and

diarrhea or constipation. While there is no known cure for IBS, the condition is intermittent (resulting in flare-ups of the symptoms), and they can often be managed by lifestyle choices such as diet, exercise, and limiting stress.

[40] Following his IBS diagnosis, Mr. Todd initiated the process of having his condition recognized as a disability by his employer, including restrictions and limitations to his ability to work as a bus driver.

[41] Mr. Todd's gastroenterologist, Dr. Tambay, completed a City of Ottawa Medical Assessment Form (an "MAF") outlining a series of restrictions relating from Mr. Todd's condition. Essentially, Dr. Tambay advised OC Transpo that Mr. Todd required access to washroom facilities when he was experiencing a flare-up of his IBS. Dr. Tambay also advised that the flare-ups would be intermittent and somewhat unpredictable in their frequency.

[42] In September 2005, OC Transpo granted Mr. Todd's request for accommodation of his IBS. Mr. Todd was advised that his diagnosis would be formally recognized as a disability by his employer.

The 2005 Accommodation Plan

[43] On September 22, 2005, OC Transpo, Mr. Todd and the ATU signed a formal agreement laying out the approach that they would take to accommodate Mr. Todd's IBS in the workplace. The agreement stated:

(...)

As a result of this disability, information from the attending physician and discussion between the Employer and the Employee, the following Accommodation Plan has been established:

1. The Employee will consult with their treating physician for each and every absence from the workplace related to the disability.
2. For each and every absence from the workplace, which is due to the Employee's documented disability, medical certificate signed by the treating physician must be provided to EHW, clearly outlining that the absence was due to the documented disability.

3. The employee will contact EHW prior to or upon return to duty after each and every absence from the workplace, which is due to the documented disability.
4. All absences satisfying No. 2 above will be recorded separately from the Employee's Leave and Attendance record.

This Accommodation Plan will be reviewed annually from the date of its signing and the medical information related to the documented disability will be reassessed at that time.

(the "2005 Accommodation Plan")

[44] The evidence before me at the hearing was that the 2005 Accommodation Plan was implemented successfully, without issue or complaint from either Mr. Todd or OC Transpo.

(iii) Gastroesophageal Reflux Disorder (GERD) Diagnosis and Treatment

[45] Around this time, Mr. Todd was also experiencing symptoms of a condition known as Gastroesophageal Reflux Disorder ("GERD"), resulting in sometimes debilitating acid reflux. Mr. Todd experienced considerable discomfort as a result of this condition and sought treatment.

[46] The treatment that Mr. Todd underwent included a surgical procedure which was, unfortunately, unsuccessful. Mr. Todd experienced complications associated with the procedure, including swelling of the area around the esophagus, which Mr. Todd testified was painful and sometimes incapacitating.

[47] In order to address these surgical complications, in 2006 and 2007, Mr. Todd underwent a series of procedures to stretch the esophagus in an effort to restore its normal functions. This procedure is known as esophageal dilatation.

[48] Mr. Todd testified that the esophageal dilatation was also very painful, and he was required to fast in advance of the scheduled procedure. In the days following the procedure, Mr. Todd was unable to work.

[49] Mr. Todd was off work for about a month in early 2005 for the initial GERD surgery. Mr. Todd missed approximately 22 scheduled workdays and took 5 vacation days during

this period. The OC Transpo records indicate that these absences were treated as non-culpable (or excused) absences for the purpose of the OC Transpo attendance management system.

[50] On at least three other occasions, Mr. Todd missed work in order to undergo the dilatation procedure. In each of these cases, Mr. Todd missed two or three days of work.

[51] Throughout 2007, Mr. Todd experienced intermittent bouts of IBS, missing approximately 42 workdays that year as a result. Mr. Todd also missed two days as a result of a workplace injury, three vacation days, six certified sick days as a result of a cervical strain, 5 days as a result of illness and 6 days attributed to a mental health condition known as dysthymia, for a total of 64 missed work days.

[52] In 2008, Mr. Todd testified that he was still experiencing musculoskeletal pain and some anxiety associated with the failed GERD procedure. In 2008, Mr. Todd was referred back to Dr. Grace for further assessment and treatment of pain in his neck and shoulder.

[53] Mr. Todd was diagnosed with rotator cuff tendonitis, and on February 4, 2008, Dr. Grace recommended that Mr. Todd take 12 weeks off work as a bus driver to give his neck and shoulder a chance to recover, which he did.

[54] Dr. Grace also identified a number of temporary medical restrictions related to Mr. Todd's musculoskeletal pain, but as Mr. Todd was not attending work, these temporary restrictions were never implemented.

[55] According to Mr. Todd's testimony and detailed notes that were entered in evidence at the hearing, Mr. Todd had been working only intermittently in the period leading up to Dr. Grace's diagnosis of rotator cuff tendonitis. Mr. Todd had been off on short term disability starting on January 2, 2008.

[56] On June 18, 2008, Mr. Todd returned to work in an accommodated position with modified duties, based on the restrictions provided by Dr. Grace. Mr. Todd worked cleaning buses until August 26, 2008. Mr. Todd testified although the accommodated position satisfied the restrictions and limitations identified by his doctor, he did not enjoy these modified duties and he found them difficult with his injuries.

[57] On August 26, 2008, Mr. Todd went off work due to his musculoskeletal injury and collected long term disability benefits until February 5, 2010.

The 2010 Accommodation Plan

[58] Soon after Mr. Todd returned to work in February 2010, OC Transpo initiated a process to review and update (if necessary) the 2005 Accommodation Plan. The 2005 Accommodation Plan contemplated an annual review process, but it does not appear from the evidence that such a review had taken place prior to 2010.

[59] Mr. Todd sought updated medical information from Dr. Tambay that confirmed his ongoing IBS diagnosis, and a somewhat revised accommodation plan was drafted.

[60] On June 28, 2010, the updated accommodation plan was signed. The provisions of the new plan largely mirrored those of the 2005 Accommodation Plan, with a few changes. In practice, however, little changed. The revised plan stated:

The Employer has received confirmation from Employee Health and Wellness (EHW) that the Employee has a disability according to established human rights guidelines, and requires a workplace accommodation. The Parties agree to the following:

1. Medical absences related to the Employee's disability will be recorded separately from his/her Leave and Attendance Record, **provided** that:
 - The Employee will be assessed by their treating physician (or alternate should treating physician not be available) for **every** absence from the workplace related to the disability.
 - The employee will provide a medical certificate (forms provided to employee), signed by their treating physician, which **clearly** indicates that the absence is due to the documented disability – within the first ten (10) days of the absence.
 - The Employee will **contact** EHW, and his/her supervisor, as soon as possible at the commencement of any disability-related absence.
2. Medical certificates for absences unrelated to the documented disability shall be provided in accordance with applicable collective agreement provisions.

This Accommodation Plan will be reviewed annually or as needed if requested by either party (employee or employer).

(the “2010 Accommodation Plan”)

[61] The 2010 Accommodation Plan required that Mr. Todd contact his supervisor “as soon as possible” at the commencement of any disability-related absence. The parties to this complaint agreed that while Mr. Todd routinely contacted the dispatcher when he was going to miss a shift (for any reason), he did not contact his supervisor as required by the 2010 Accommodation Plan.

The 2010 Ergonomics Assessment

[62] On his return to work in February 2010, Mr. Todd met with Susan Gibbons, an ergonomics consultant with the City of Ottawa, to ensure that he would be successful in his transition back to his role as a bus operator. Ms. Gibbons’ role was not to provide or confirm medical restrictions and limitations. Rather, the objective of this appointment was to determine how best to avoid re-aggravating the neck and shoulder condition that had put Mr. Todd off work for more than a year.

[63] At this time, Mr. Todd’s only musculoskeletal medical restriction was that he required time to stretch every 2-3 hours. The OC Transpo had determined that this medical restriction could be met within Mr. Todd’s existing role and did not require any adaptation of his position as a bus operator or a formal accommodation. In other words, Mr. Todd could self-accommodate.

[64] At his Feb 8, 2010 ergonomics appointment with Ms. Gibbons, Mr. Todd expressed concern about whether his return to work would permit him to continue with his stretching regime. Mr. Todd also noted that his tolerance for sitting was about one hour, though this was not identified by his physician as a medical restriction at this time.

[65] Also at the ergonomics appointment, Mr. Todd expressed a preference for buses with arm rests and noted that he preferred shifts with straighter bus routes, as they involved less manipulation of the large steering wheel.

[66] In her Feb 12, 2010 report, Ms. Gibbons made the following recommendations to support Mr. Todd's return to work:

1. To support success in his RTW, I would suggest Mr. Todd get assigned onto a route that has sufficient recovery time at the end of a run; his impression is that this would be more likely on an evening shift.
2. I would also recommend that he be assigned buses ***that have arm rests during his RTW process*** to provide additional support for his neck and shoulder region. These would include the later models of 4300 buses, 4400 and 5000 series buses.
3. I have asked Mr. Todd to contact me to arrange a follow up date after he has returned to work for 2 weeks.
4. Mr. Todd was encouraged to get up out of the chair and stretch at the end of every run, even if only for a short interval of time (1-2 minutes).

[67] In response to Ms. Gibbons recommendations, OC Transpo determined that while certain routes were more likely to have the style of bus that Mr. Todd favoured, it was operationally unable to guarantee that Mr. Todd would get a specific bus on any given day during his return to work.

[68] The way that route assignments are set out in the collective agreement also limited the extent to which the City could assign a specific route to Mr. Todd. However, it was agreed at the hearing that Mr. Todd had sufficient seniority at this point in his career at OC Transpo that he could exercise some control over the routes he was driving, through the bidding process.

[69] In other words, the City argued that Mr. Todd could increase the likelihood that he was assigned routes with his preferred model of busses by booking shifts that regularly use those vehicles, or that run straighter routes, in order to self-accommodate. He did not do so.

[70] It appears from the evidence that neither Mr. Todd nor OC Transpo took any steps to implement Ms. Gibbon's ergonomic recommendations during Mr. Todd's return to work in 2010 or that Mr. Todd ever pursued the recommended follow up appointment.

[71] Following his return to work, Mr. Todd continued to experience intermittent flare-ups of his IBS which resulted in his absence from work. He also experienced two bouts of myofascial pain. After only a few months back at work, Mr. Todd testified that his musculoskeletal condition began to deteriorate.

The April 2010 MAF

[72] Mr. Todd returned to Dr. Grace, who provided a new MAF diagnosing bilateral myofascial arthritic neck pain with shoulder tendonitis. Dr. Grace provided OC Transpo with a number of medical restrictions and advised that Mr. Todd would require a permanent workplace accommodation (the "April 2010 MAF").

[73] In the April 2010 MAF, Dr. Grace noted that Mr. Todd's musculoskeletal condition was likely to reoccur in the form of "intermittent flare-ups", but that his prognosis for regular and consistent attendance at work was good.

[74] Dr. Grace went on to direct that, during a flare-up, Mr. Todd was able to perform modified work, provided his duties met with certain medical limitations, including:

- Lifting restricted to 5 kg
- Pushing or pulling restricted to 5 kg
- Avoid repeated turning of the neck.

[75] Dr. Grace also reiterated Mr. Todd's earlier request for a bus with arm rests. She noted that the 4200 series buses should be avoided due to the steering column and that the 97 NOVA series buses should be avoided due to the forward seat placement. However, on cross-examination, Dr. Grace conceded that these recommendations were not medical limitations derived from her examination of her patient, but rather were requests that she was relaying on Mr. Todd's behalf.

[76] Upon receipt of the April 2010 MAF, OC Transpo sought clarification regarding the medical restriction that Dr. Grace had identified limiting Mr. Todd's neck movement, as this restriction raised questions about Mr. Todd's ability to safely drive a bus.

[77] In the meantime, OC Transpo decided to offer Mr. Todd modified duties until it was able to resolve the outstanding questions about Mr. Todd's restrictions and limitations, and how they might impact his ability to safely operate a vehicle.

[78] On July 12, 2010, OC Transpo wrote to Dr. Grace seeking this clarification and specifically inquiring if Mr. Todd was medically able to drive. Dr. Grace completed the form provided by the City on August 9, 2010 and confirmed that Mr. Todd could indeed drive safely. At this time, she also reversed her prior medical opinion about Mr. Todd's medical conditions stating that Mr. Todd now had no permanent medical restrictions whatsoever pertaining to his musculoskeletal condition.

The 2010 Functional Capacity Evaluation

[79] In the face of this sudden reversal of Dr. Grace's medical advice, and to satisfy itself of Mr. Todd's ability to safely operate a bus, the City requested that Mr. Todd undergo a Functional Capacity Evaluation (an "FCE").

[80] The FCE was conducted in September 2010, and the results indicated that Mr. Todd had no functional limitations and no barriers to work. Based on his musculoskeletal examination and functional testing, the prognosis for Mr. Todd's regular and reliable attendance at work was "excellent".

[81] The evidence before the Tribunal did not provide any rationale for the discrepancy between Dr. Grace's findings detailed in the April 2010 MAF (indicating a need for a permanent accommodation) and the results of the September 2010 FCE. However, the results of the FCE confirmed Dr. Grace's revised diagnosis provided in August, which found that he did not have any restrictions or limitations at that point.

[82] If Mr. Todd believed that his medical or operational limitations were not being adequately assessed or represented in the FCE report, it was incumbent upon him to make that known at the time that the report was prepared- either through further medical documentation from his physician, by communicating directly with the evaluator, by alerting his supervisor or Employee Health and Wellness that he had ongoing concerns or by contacting his union.

[83] Mr. Todd did none of these things.

[84] Mr. Todd returned to work with the 2010 Accommodation Plan still in place, and no other accommodations or restrictions. There is no evidence that Mr. Todd had any objection to returning to work under these conditions. Rather, based on the report of the FCE, and Mr. Todd's own evidence, I find that he was eager to return to work as a bus driver at this time, with as few restrictions possible.

(iv) Mr. Todd's 2012 Absence from Work

[85] In or around March 2012, Mr. Todd claimed to have experienced another physical injury that impacted his ability to do his job. The evidence before the Tribunal does not clearly demonstrate the precise nature of the condition, or its cause.

[86] Mr. Todd testified that he injured his quadriceps while moving a refrigerator in early March, causing him to miss work from March 2-8, 2012. He provided the City with a medical certificate to this effect.

[87] Mr. Todd also made an insurance claim in respect of a different musculoskeletal condition during this time period.

[88] The documentation pertaining to these absences in Mr. Todd's Employee Health and Wellness ("EHW") file, which was entered as evidence at the hearing, provides no information about the nature of this injury. Mr. Todd filed a series of medical certificates without providing reasons for the absence and it is not clear that OC Transpo had any information about why Mr. Todd had missed these shifts.

[89] By April 7, 2012, OC Transpo took the position that Mr. Todd had exhausted his available sick days, as he had used 17 cumulative weeks since the fall of 2011.

[90] At the time, Mr. Todd disputed that he had exhausted his bank of sick days and these conflicting views led to some confusion and a series of exchanges between Mr. Todd and EHW in early May 2012.

[91] Based on the evidence before me at the hearing, I am unable to conclude with any certainty what transpired with regard to Mr. Todd's purported sick leave in the first part of 2012, and I am unable to find on a balance of probabilities that this period of absence was disability-related. However, what is clear is that EHW encouraged Mr. Todd to apply for long-term disability (LTD) in early May 2012.

[92] Eventually, Mr. Todd did apply for benefits (which were denied), but the process was not completed until late August 2012. In the interim, Mr. Todd did not attend work and while Mr. Todd asserted that he was disabled, this claim was not supported by the evidence before me at the hearing.

[93] Dr. Grace, who was involved in Mr. Todd's application for benefits, testified that she completed paperwork in June 2012 wherein she identified Mr. Todd's diagnosis as myofascial neck pain, myofascial pain in the right hip, trochanteric bursitis in the right hip and calcific tendonitis in his left shoulder. She noted that Mr. Todd was unable to sit for 30 minutes without a break and was unable to do repetitive forward reaching with his right arm (the "June 2012 Medical").

[94] Dr. Grace further noted that Mr. Todd had had these conditions since 2004, and that his symptoms flared up occasionally and intermittently.

[95] On cross-examination, Dr. Grace admitted that she had not examined Mr. Todd in advance of completing the insurance paperwork in June 2012. She further testified that she had no idea that Mr. Todd had not been attending work during this period. Dr. Grace testified that she believed that the June 2012 Medical she prepared was in support of Mr. Todd's claim for massage and physiotherapy benefits and had no idea that the forms were being used to support a claim for total disability.

[96] On August 8, 2012, Manulife contacted Mr. Todd and advised him that they would require further information by August 29, 2012 in order to complete their assessment of his application for LTD benefits.

[97] On October 12, 2012, Manulife contacted Kendra Haggarty of EHW to advise that Mr. Todd's LTD claim was not medically supported and was therefore being denied. The same information was formally communicated to EHW by letter dated October 15, 2012.

[98] Based on the evidence before me at the hearing, and in particular the evidence of Dr. Grace, I am unable to conclude on a balance of probabilities that Mr. Todd was unable to attend work as a result of a disability in 2012 (excluding any IBS-related absences, at this time, which are not in dispute).

[99] After being advised that his claim for long term disability benefits had been denied, on October 19, 2012, Mr. Todd reached out to Mr. Chaudhari to inquire about modified duties and to seek clarification about his retroactive entitlement sick days in 2011 and 2012. Mr. Todd did not advise Mr. Chaudhari that his LTD claim had been found to be medically unsubstantiated.

[100] On October 22, 2012, Mr. Chaudhari directed Mr. Todd to EHW regarding his allotment of sick days and promised to inquire about a return to work with modified duties.

[101] On October 25, 2012, Mr. Chaudhari followed up with Mr. Todd to let him know that he had sent a request to EHW regarding accommodation and modified duties.

[102] By this time, some concern was being raised internally at OC Transpo about Mr. Todd's unexplained absence from work and his ability to return to work on a regular and reliable basis. Mr. Chaudhari set up a meeting with Labour Relations to discuss the situation and the next steps. That meeting occurred on October 24, 2012.

[103] On October 27, 2012, Mr. Todd followed up with EHW regarding his sick days and the possibility of returning to modified duties, and on October 29, 2012, EHW advised Mr. Todd that he would need an updated medical form outlining his current medical restrictions and limitation before he would be able return to work. Ms. Kendra Haggerty, an EHW employee, requested that Mr. Todd have his physician complete the form and return it to EHW by November 12, 2012.

[104] On Nov 1, 2012, Mr. Todd advised Ms. Haggerty that he would not be able to see his doctor until November 19, 2012 and was therefore unable to meet the November 12 deadline.

[105] On November 6, 2012, EHW contacted Yogi Sharma at the AMT to advise him of Mr. Todd's file, and to alert him to the complexity of the case.

[106] OC Transpo took the position that Mr. Todd had been off work for 263 days since August 2011, and that EHW was unable to provide Mr. Todd with any further top up payments for sick leave. In documents tendered in evidence before me at the hearing, Ms. Lefebvre of EHW noted that Mr. Todd had drawn 101 days of paid sick leave in 2010, 104 days of paid sick leave in 2011 and that by April 12, 2012, his sick leave bank had run out.

[107] Ms. Lefebvre advised that EHW was working to develop a return to work plan for Mr. Todd, but that the process required medical information from Mr. Todd's doctor.

[108] On November 13, 2012, Mr. Chaudhari issued a letter to Mr. Todd formally advising him that his current employment status was that he was considered to be on a leave of absence without pay, and that his health, dental and life insurance benefits would run out on November 30, 2012. Mr. Chaudhari advised Mr. Todd that OC Transpo was waiting for completed medicals and put him on notice that his employment status would be reviewed if the supporting medicals were not received by EHW on or before November 30, 2012.

[109] On November 19, 2012, Mr. Todd saw Dr. Grace, who testified at the hearing that she did not have time at that appointment to complete the required medical forms. Mr. Todd advised EHW of the situation and notified them that the forms would be completed on November 26, 2012 and promptly submitted to EHW. He also advised that he believed that he would be cleared to return to regular duties and inquired about updated training.

[110] EHW responded that they would review the completed medical information upon receipt and would then determine the appropriate steps to return Mr. Todd to work, if medically possible.

The November 2012 MAF

[111] On November 26, 2012, Mr. Todd provided a partially complete MAF to EHW. Dr. Grace had not completed the section of the form advising of a date for Mr. Todd's return to work (the "November 2012 MAF").

[112] In the November 2012 MAF, Dr. Grace noted that Mr. Todd's prognosis for regular and consistent attendance was "fair" and identified the following medical restrictions:

- Walking restricted to 45 minutes with a 5-minute recovery time
- Standing restricted to 45 minutes with a 5-minute recovery time
- Sitting restricted to 45 minutes with a 5-minute recovery time
- Lifting above the shoulder limited to 10 pounds
- No repetitive pushing/pulling with the left arm
- No repetitive reaching
- No repetitive overhead activities

[113] On cross-examination, Dr. Grace admitted that her assessment of Mr. Todd's prognosis for regular and reliable attendance at work in the November 2012 MAF was not based on her assessment of his physical condition at that time. Rather it was her view based on her recent discovery that Mr. Todd had not been attending work for some time without any medical reason.

[114] At this time, Mr. Todd was anxious to return to work and advised EHW that he would like to return to modified duties in the meantime. EHW advised that they would forward the necessary forms to the booking department, along with the medical limitations identified by Dr. Grace.

[115] By email dated November 26, 2012, Ms. Haggarty advised Mr. Todd that he was cleared for modified duties, subject to the limitations identified on the November 2012 MAF.

[116] On December 3, 2012, Dr. Grace provided an updated MAF in which she provided medical clearance for Mr. Todd to return to regular duties on December 4, 2012.

[117] On December 4, 2012, Kendra Haggarty advised that Mr. Todd was cleared to return to work as a bus operator.

[118] OC Transpo was still concerned about Dr. Grace's prognosis that Mr. Todd's ability to regularly and consistently attend work was only "fair", and on December 5, 2012, EHW advised Mr. Todd that they would require further medical information from his doctor. OC Transpo provided Mr. Todd with a letter to Dr. Grace, which EHW had also forwarded to her directly.

[119] Mr. Todd testified at the hearing that he did not open the attached letter and was unaware of its contents.

[120] In her response, Dr. Grace advised EHW that while Mr. Todd's restrictions were temporary, they may impact his ability to safely operate a bus and may last six months. She further notified EHW that it was her opinion that Mr. Todd should undergo another FCE.

[121] The notes of Dr. Grace's call with EHW were entered into evidence at the hearing. The note's author, Ms. Lefebvre, did not testify at the hearing, but Dr. Grace's evidence confirmed that the content of the notes was consistent with her memory of their conversation. Ms. Lefebvre's notes stated:

I received a call from Dr. Maureen Grace. She indicates that she has received my letter and that yes, she does support that we proceed with an FCE. I will make arrangements for this ASAP. Also, she indicates that based on Mr. Todd's work history, his prognosis for regular and consistent attendance is very poor. She indicates that even though he is not considered to be totally disabled, he appears to suffer from many reoccurrences. She questions whether he should continue to work as a bus operator and that perhaps a less physically demanding job would be more suitable for him. She recommended that perhaps the City try to find him a sedentary position and that if his attendance does not improve, then the employer would have done everything they could do to accommodate him.

I indicated that this might be possible, through our PP process.

Dr. Grace also does not support that he proceeds with an appeal for disability benefits because again, she indicated that he is not totally disabled and Mr. Todd can work.

She was very surprise (sic) by the number of sick days he has taken over the last 6 years and she agrees that this is beyond what an employer should have to deal with. She understands management's reluctance or hesitation to reintegrate him, especially in his bus driver position.

She will answer my questions to the best of her ability and will fax the document today.

(...)

[122] Mr. Todd was placed on paid investigative leave, effective December 4, 2012 through January 3, 2013, when he returned to work for retraining.

[123] In the meantime, Mr. Todd was sent for a further comprehensive FCE, which took place over two days on Dec 17-18, 2012 (the "December 2012 FCE")

[124] The report of the December 2012 FCE concluded that there were no barriers to Mr. Todd returning to regular duties as a bus operator. The report noted, in fact, that Mr. Todd was eager to return to work as soon as possible and was not restricted in any way from performing his duties as a bus driver.

[125] In the face of these results and of Mr. Todd's stated desire to return to his role as a bus operator, there was no further discussion of finding another role for Mr. Todd at OC Transpo, or of the City's Priority Placement program. Mr. Todd was deemed fit to return to work, and indeed wanted to do so. Accordingly, the parties proceeded to develop a plan to facilitate the resumption of his duties.

(v) The Continuing Employment Agreement

[126] Mr. Todd's supervisor, Mr. Chaudhari, testified at the hearing that, as Mr. Todd prepared to return to work, he remained concerned about Mr. Todd's ability to attend work on a regular and reliable basis, and about his own ability to manage Mr. Todd's attendance.

[127] Mr. Sharma, who was acting in his capacity as a steward of the ATU, was actively engaged in the ongoing negotiations about Mr. Todd's return to work as a bus driver. Mr. Sharma and Mr. Chaudhari both testified that Mr. Sharma was actively advocating for OC Transpo to find a way to allow Mr. Todd to return to work despite the concerns about his

prognosis for regular attendance. Mr. Sharma testified that he pleaded with Mr. Chaudhari to give Mr. Todd a chance as he believed that OC Transpo was considering termination of Mr. Todd at this time.

[128] Mr. Sharma was successful in convincing OC Transpo to adopt a last chance agreement for Mr. Todd, or what the parties to this complaint referred to as the Continuing Employment Agreement (or the CEA).

[129] Following a series of discussions between the union and OC Transpo and negotiation of various clauses, on December 28, 2012, Mr. Todd, the ATU and OC Transpo signed an agreement that would regulate Mr. Todd's return to work for a period of 18 months.

[130] The terms of the CEA were the following:

1. The employee, Jamison Todd agrees to meet with his Section Head on a monthly basis.
2. For each absence the employee, Jamison Todd must call his Section Head prior to the scheduled shift.
3. A medical certificate must be supplied in accordance with the Collective Agreement.
4. The employee, Jamison Todd shall not miss more than four days in each quarter (3 months).
5. This Continuing Employment Agreement will remain in place for a period of eighteen (18) months from the signing of this agreement.
6. If Mr. Todd fails to satisfy any of the conditions found in paragraph 1 through 5 his employment with the City of Ottawa will immediately be terminated.
7. The employee, Jamison Todd and the union agree that by signing this Continuing Employment Agreement they will not file a grievance on this or further action that may result in termination from any breach of this agreement.

[131] Following the execution of the CEA, Mr. Todd returned to work in January 2013.

[132] Mr. Todd was also asked to update the medical information in support of his 2010 Accommodation Plan.

[133] It took Mr. Todd several months to obtain the necessary information from Dr. Tambay, which delayed the development of an updated accommodation plan.

The 2013 Accommodation Plan

[134] The new IBS accommodation plan was signed in November 2013, and provided for a specific regime to facilitate alternate duties for Mr. Todd when he was off due to his IBS. The plan stated:

The Employer has received medical documentation that the Employee has a bona fide medical condition recognized by Human Rights that may require the following:

Workplace accommodation(s) required:

- Work close to a bathroom

The Parties agree to the following:

When medically required, The Employee will call their Section Head (with as much notice as possible) and request modified duties within the above limitation.

Should the Employee's medical condition change such that the medical accommodation is no longer required, the Employee is to notify their Employer (Manager), Union and Employee Health and Wellness (EHW).

This accommodation may be reviewed at the request of either party at a reasonable interval or upon receipt of new information. This review will be done in consultation with the Employee, Union and Employer (Manager) on a case by case basis.

(the "2013 Accommodation Plan")

[135] Despite some initial confusion with regard to disability-related absences under the CEA, Mr. Todd's IBS-related absences were in fact not counted against Mr. Todd for the purposes of OC Transpo's attendance management.

(vi) The call-in requirement

[136] OC Transpo submitted that the CEA and the 2013 Accommodation Plan were designed to function together to ensure that Mr. Todd could be provided with alternate duties that met the medical restrictions and limitations put in place by Dr. Tambay.

[137] Because of the unpredictable nature of Mr. Todd's IBS, EHW believed that the only way to ensure that Mr. Todd could be offered modified duties when his IBS flared up was to have him contact his supervisor, Mr. Chaudhari, as soon as he became aware that he would be missing his shift.

[138] This call-in requirement under the CEA provided a dual function: first, it would allow Mr. Chaudhari to know specifically when Mr. Todd was off work (rather than receiving this information many days later as part of an internal tracking report); and second, it would facilitate the provision of alternate duties, if Mr. Todd was medically able to attend work.

[139] This call-in requirement was necessary to make sure that his supervisor could arrange for modified work and was not an onerous requirement. Mr. Todd was already very diligent about contacting the OC Transpo dispatcher to advise that he would be missing an upcoming shift. The call-in requirement was nothing more than an additional phone call.

[140] There is no evidence before me to suggest that Mr. Todd's disability or his medical restrictions would have impaired his ability to contact his supervisor. To the contrary, the pattern of Mr. Todd's own conduct throughout his career of diligently contacting the OC Transpo dispatcher when he would be missing a shift (either due to an IBS flare-up or for another reason) demonstrates that he could indeed comply with the call-in requirement.

Attendance Management Meetings

[141] The CEA regime also contemplated a more active management of Mr. Todd's absences, including his disability-related absences. A feature of this plan was the monthly meeting between Mr. Todd and Mr. Chaudhari where they would review Mr. Todd's absences, discuss the reasons for the absences and identify any issues as they arose.

[142] With the exception of an extended vacation that Mr. Chaudhari took in the summer of 2013, these meetings occurred monthly, as planned. Both Mr. Todd and Mr. Chaudhari testified that they met, and reviewed Mr. Todd's absences and discussed the call-in requirement, among other things.

[143] During the meetings, Mr. Chaudhari prepared notes summarizing their discussions, which included a space for Mr. Todd to add his comments. Mr. Todd did not sign the note or add any comments noting any concerns or objections.

[144] These notes were entered into evidence at the hearing, along with documentation supporting Mr. Chaudhari's concern about Mr. Todd's failure to consistently call his supervisor in advance of a missed shift. I find that these documents and Mr. Chaudhari's testimony (which was in large part corroborated by Mr. Todd's own testimony) are a reliable reflection of the monitoring and management of Mr. Todd's attendance during the implementation of the CEA.

(vii) Improved Attendance under the CEA

[145] Following his return to work under the CEA in early 2013, Mr. Todd's attendance began to improve almost right away. Despite a number of IBS related absences, 2013 saw Mr. Todd return to a pattern of regular and reliable attendance.

[146] In January 2013, Mr. Todd missed two days which he claims were IBS-related (although the City records do not support this assertion), and a week of vacation at the end of the month.

[147] In February 2013, Mr. Todd did not miss any days of work, with the exception of three days of bereavement leave due to a death in the family.

[148] Mr. Todd became sick part way through his shift on March 1, 2013 and was off work the following day, but then returned to work the day after that. For the balance of the month of March, Mr. Todd experienced two bouts of IBS, missing a total of five days related to his disability.

[149] In April 2013, Mr. Todd was off for 5 days, three of which were IBS-related. In May and June 2013, he missed a total of 12 days, all of which were IBS-related.

[150] In July 2013, Mr. Todd missed only three days of work for an unspecified reason, and from August through the end of the year, Mr. Todd missed a total of 22 days, only a handful of which were not IBS-related.

[151] The City's records show that in 2013, Mr. Todd missed only 7 days that were not related to his IBS.

[152] Based on my review of the records tendered in evidence at the hearing, this pattern represented a marked improvement in Mr. Todd's workplace attendance.

[153] Both Mr. Chaudhari and Mr. Sharma testified that Mr. Todd's attendance was improving and felt that the CEA was working in this respect.

[154] Unfortunately, another issue had emerged.

(viii) Mr. Todd's repeated failure to contact his supervisor

[155] The CEA required Mr. Todd to contact both his supervisor and the dispatcher in advance of his shift if he was going to be absent from work. Although Mr. Todd regularly contacted the dispatcher (as he had reliably done throughout his OC Transpo career), the City alleges that he regularly failed to contact his supervisor.

[156] In fact, OC Transpo alleges that Mr. Todd failed to call his supervisor prior to the start of his shift as many as 9 times over the term of the CEA.

[157] At the hearing, Mr. Chaudhari testified about Mr. Todd's failure to reliably contact him when Mr. Todd was going to be off work. Mr. Chaudhari tracked and documented those incidents when Mr. Todd failed to contact him as required by the CEA in his notes, which were entered into evidence at the hearing.

[158] Mr. Chaudhari testified that he raised these breaches of the CEA with Mr. Todd verbally at their monthly meetings and provided documentation to support the concerns he

was raising. In October 2013, Mr. Chaudhari began to document the breaches of the CEA in compiling the notes of their monthly meetings.

[159] Mr. Todd disputed this assertion and testified that he did not fail to contact his supervisor, although admits to using email rather than the phone to make this contact.

[160] Mr. Todd testified that the first time he was advised of his failure to contact his supervisor was in October 2013, and not as early as March 2013 (as Mr. Chaudhari testified). Mr. Todd further testified that the reason for this error in October 2013 was related to an issue with the time display on his email, although he did not provide any documentary evidence to support this assertion, or to otherwise cogently explain this alleged email issue.

[161] Mr. Chaudhari's account of events was supported by his contemporaneous notes and by the evidence of Mr. Sharma, who testified that he was very concerned about Mr. Todd's seeming refusal to comply with this term of the CEA. Mr. Sharma testified that Mr. Todd did not appear to take this requirement seriously and that Mr. Todd told him that OC Transpo would never fire him for not calling his supervisor.

[162] At the hearing, Mr. Sharma was visibly distraught as he recounted these events. I found his evidence to be both credible and reliable, and I believe that he was indeed concerned that Mr. Todd was being reckless about his obligation under the CEA.

[163] I am left with two irreconcilable versions of the evidence.

[164] On balance, I find Mr. Chaudhari's evidence, as corroborated by his notes and by Mr. Sharma's testimony, to be more credible than Mr. Todd's unsupported assertion that his email was broken.

[165] I find that Mr. Todd failed to contact his supervisor (by phone or by email) as many as nine times prior to his termination in March 2014.

[166] These repeated breaches of a relatively simple requirement became a significant management problem. Mr. Todd's apparent resistance to the requirement that he contact his supervisor, despite his regular and consistent ability to call the OC Transpo dispatcher,

was confusing and reflected a lack of cooperation on his part with the 2013 Accommodation Plan.

(ix) Mr. Chaudhari issues a Formal Warning

[167] On October 21, 2013, at their monthly attendance management meeting, Mr. Chaudhari formally warned Mr. Todd in writing that this breach of the CEA was serious and that OC Transpo could take further actions.

[168] Mr. Sharma testified that he once again pleaded with Mr. Todd to contact his supervisor in accordance with the requirements of the CEA but testified that Mr. Todd laughed him off.

[169] On January 29, 2014, Mr. Todd was off work with what he described as a flu. He testified that he contacted dispatch when he realized that he would not be able to work, but that he was suddenly unable to contact Mr. Chaudhari because he became too ill.

[170] Mr. Todd could not provide any evidence beyond his own testimony to support his claim of sudden incapacitation.

[171] It is simply not credible that Mr. Todd was able to contact dispatch to advise them that he would not be able to work his shift, but was unable to contact his supervisor, particularly given the warnings that he had received from Mr. Sharma and Mr. Chaudhari about the consequences of failing to do so.

[172] It is more likely the case that Mr. Todd forgot or chose not to contact his supervisor.

[173] In either case, this choice represented another clear breach of the CEA and was unrelated to Mr. Todd's IBS, or any other disability.

(x) Termination of Employment

[174] Following Mr. Todd's failure to contact his supervisor on January 29, 2014, OC Transpo had determined that Mr. Todd's persistent pattern of breaches could no longer be

tolerated and began the process of terminating Mr. Todd's employment, even in the face of admitted improvements in his attendance.

[175] As part of the termination process, Mr. Chaudhari prepared a memo summarizing Mr. Todd's career at OC Transpo, including all of his disability and non-disability related absences. (the "Termination Memo")

[176] The Termination Memo states:

Current Issue:

One of the terms of the Continuing Employment Agreement (attached) signed by Mr. Todd required him to:

"For each absence the employee Jamison Todd must call his Section Head prior to the scheduled shift".

During the period of August 23rd to October 21st, 2013, Mr. Todd failed to call his Section Head on numerous occasions. In the meeting held on October 21st, 2013 Mr. Todd was provided the dates and occasions of the violation of the agreement. Mr. Todd understood his failure to abide by the terms of the agreement. Concern over his excessive absenteeism was also expressed.

During the period of October 22nd to November 25th, 2013 once again Mr. Todd failed to inform his Section Head of his absence from work. In a meeting on November 25th, 2013 he was again provided with details of his non-compliance to the agreement.

On January 29th 2014 Mr. Todd for the third time violated the agreement and by now has missed 59 days, since the signing of the agreement on December 28th, 2012.

Recommended Course of Action:

It is recommended that the employment of Operator Jamison Todd be terminated primarily because he violated the terms of the agreement on numerous occasions, despite being given opportunities to comply with the terms and also because of continued excessive absenteeism:

"For each absence the employee Jamison Todd must call his Section Head prior to the scheduled shift".

[177] The memo clearly identified the primary reason for Mr. Todd's termination to be his repeated breaches of his obligation to contact his supervisor in advance of a missed shift.

[178] As a factual matter, I find that OC Transpo was prepared to terminate Mr. Todd for failing to comply with the Terms of the CEA. I further find that Mr. Todd consistently failed to cooperate with the requirement that he contact his supervisor in advance of a missed shift, that he was warned repeatedly, and that, pursuant to the terms of the CEA, that OC Transpo was within its rights to terminate Mr. Todd's employment.

[179] I further find that the Termination Memo raised an additional cause for termination; Mr. Todd's "continued excessive absenteeism".

[180] On March 10, 2014, Mr. Todd was terminated from his employment as a bus operator and ceased to be an employee of OC Transpo.

VI. Issues

[181] The issues before me on this complaint are as follows:

- a) Are Mr. Todd's disabilities protected characteristics under the Act?
- b) Did OC Transpo treat Mr. Todd adversely:
 - a. By failing to properly accommodate him in the course of his employment as a bus operator?
 - b. By placing him on a CEA upon his return to work in 2012?
 - c. In terminating his employment in 2014?
- c) Was there a nexus between any adverse treatment and one or more of Mr. Todd's disabilities?
- d) If OC Transpo treated Mr. Todd adversely as a result of one or more of his disabilities, can its conduct nonetheless be justified?

VII. Analysis

The Legal Framework

(i) The CHRA

[182] Section 7 of the *CHRA* states that it is a discriminatory practice to refuse to employ or continue to employ any individual, or, in the course of employment, to differentiate adversely in relation to an employee on a prohibited ground of discrimination.

[183] Section 10 of the *CHRA* states that it is a discriminatory practice for an employer to enter into an agreement affecting [...] any matter relating to employment that deprives or tends to deprive an individual of employment opportunities on a prohibited ground of discrimination.

[184] Disability is a prohibited ground of discrimination under section 3 of the Act.

[185] Mr. Todd's initial complaint to the Canadian Human Rights Commission identified two sections of the Act that he alleged were breached by OC Transpo: Section 7 and Section 10. However, neither the complaint, nor Mr. Todd's Statement of Particulars clearly identify which conduct pertains to which section of the Act.

[186] Most, if not all, of the submissions made before me at the hearing and the content of the parties' closing submissions, appears to be focussed on section 7 of the *CHRA*. And even where the parties are addressing the CEA (which is an agreement that could be captured in the meaning of section 10(b) of the Act), the parties do not appear to be applying the statutory language of that section to their arguments.

[187] That being said, as a matter of law, the Tribunal's analysis of a complaint under s. 7 or s. 10 is the same: was there a protected characteristic, was there an adverse treatment or impact, and is there a connection between the impact and the characteristic.

[188] I do not believe that my analysis differs whether applying s. 7 or (in the case of the CEA) s. 10.

(ii) The threshold test

[189] In *Ont. Human Rights Comm. v. Simpson-Sears*, [1985] 2 SCR 536, at para. 28, the Supreme Court of Canada established the threshold test that a complainant must meet: “[A] *prima facie* case in this context is one which 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.”

[190] More precisely, to demonstrate discrimination in the context of the *CHRA*, complainants are first required to show: (1) that they have a characteristic or characteristics protected from discrimination under the *CHRA*; (2) that they experienced an adverse impact with respect to a situation covered by sections 5 to 14.1 of the *CHRA*; and, (3) that the protected characteristic or characteristics were a factor in the adverse impact (see *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33; *Siddoo v. I.L.W.U., Local 502*, 2015 CHRT 21, para. 28). The three elements of discrimination must be proven on a balance of probabilities (see *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center) (“Bombardier”)*, 2015 SCC 39 at paras. 55-69) (*Stanger v. Canada Post Corporation*, 2017 CHRT 8, at para 12).

[191] Despite the fact that it is still being used by many administrative tribunals and courts, the CHRT has begun to move away from characterizing the threshold test as the *prima facie* case. There are various reasons for this departure (see *Brunskill* para 57) but I wish to highlight the challenge facing all legal decision makers to make the language of our decisions more easily understood by Canadians who are not legally trained.

[192] At a time when every legal writer should be striving to make her decisions clear and accessible to all readers, Latin maxims do not serve us well. It is our job to articulate, in plain and straightforward language, what we are doing and why. Nowhere is this more important than in articulating the test that parties have to meet.

[193] This shift in language does not represent a change in the underlying analysis that the Tribunal is adopting, but rather a shift in its description in the interest of clarity and accessibility.

[194] In this complaint, the application of the threshold test requires that that Mr. Todd demonstrate, on a balance of probabilities, that: (1) he had a characteristic protected against discrimination at the relevant times (here, disability); (2) the Respondent adversely impacted him (in its approach to accommodation, in imposing the CEA or in terminating his employment); and (3) the protected characteristic (disability) was a factor in OC Transpo's adverse treatment (*Moore v. British Columbia [Education]*, 2012 SCC 61, para. 33 [Moore]; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. [Bombardier Aerospace Training Centre]*, 2015 SCC 39, paras. 56 and 64 [Bombardier]).

[195] As the Federal Court of Appeal noted in *Holden v. Canadian National Railway Company*, (1991) 14 CHRR D/12 (FCA), para. 7, for a complaint to be substantiated, discrimination does not need to be the only reason for the actions, decision or practice. It is enough for a prohibited ground of discrimination to have been a contributing factor in the employer's decision (see *Bombardier*, paras. 44-52).

[196] It is important to note that it is often challenging to show direct evidence of discrimination and this is why direct evidence is not needed to establish discrimination under the CHRA (see *Bombardier*, paras. 40-41). The Tribunal's task is therefore "...to consider all the circumstances and evidence to determine if there exists the 'subtle scent of discrimination'" (see *Basi v. Canadian National Railway Company*, 1988 CanLII 108 (CHRT); *Tabor v. Millbrook First Nation*, 2015 CHRT 9, para. 14).

(iii) Justification

[197] If, on consideration of all of the evidence, the Complainant meets his burden, the Respondent has the opportunity to demonstrate that its conduct or practice was nevertheless justified under s. 15 of the Act.

[198] Section 15 CHRA says the following:

15 (1) It is not a discriminatory practice if

(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement;

[...]

Accommodation of needs

(2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a bona fide occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a bona fide justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

[199] If the Complainant meets the threshold required to establish discriminatory conduct, and the Respondent cannot justify its actions, a finding of discrimination will be made.

(iv) Accommodation and Cooperation

[200] The duty to accommodate is central to the fundamental purpose of the CHRA. The law in Canada requires that an employer go to considerable lengths to find an accommodation for an employee who would otherwise experience discrimination in the course of their employment (*Simpson-Sears, supra*, at para 20).

[201] To paraphrase s.2 of the Act, the purpose of the CHRA is to ensure that all individuals are able to have an equal opportunity to make for themselves the lives that they are able and wish to have, without being prevented from doing so on the basis of a protected characteristic. All individuals are entitled to have their needs reasonably accommodated, consistent with our duties and obligations as member of society.

[202] The obligation to accommodate an employee is not a freestanding obligation owed to an employee with a disability (or any other protected characteristic) under the CHRA regime. The obligation to accommodate only arises once a complainant has established *the preliminary conditions* of discrimination. It is not the disability that triggers the obligation to accommodate to the point of undue hardship. It is the existence of a barrier created by that disability in the context of the workplace that requires an employer to take steps to

mitigate that barrier and ensure that the employee has every opportunity to participate fully at work.

[203] As explained by our Tribunal in *Moore v. Canada Post Corporation*, 2007 CHRT 31, at para 86, “I cannot emphasize enough that failure to accommodate is neither a prohibited ground of discrimination nor a discriminatory practise under the CHRA. There is no free-standing right to accommodation under the CHRA.”

[204] A successful accommodation is a two-way street requiring the cooperation of all parties involved, including (and sometimes especially) the individual seeking the accommodation. The SCC has outlined this need for cooperation in its decision in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 (*Renaud*) at 995:

To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.

This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in *O'Malley*. The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.

(v) No Procedural Duty to Accommodate under Federal Law

[205] The Complainant submitted that OC Transpo failed in its procedural duties to accommodate him. This issue was addressed in oral arguments, but it is important for the sake of clarity to restate here that the Federal Court of Appeal has directed that no such

procedural duty has been found to exist under federal law. (*Canadian Human Rights Commission v. Canada (AG) and Bronwyn Cruden*, 2014 FCA 131, at para 24). There is no procedural duty to accommodate under the CHRA.

The Discrimination Analysis

A. Narrowing the focus of this analysis

[206] In his complaint, Mr. Todd identified four categories of disability upon which he based his complaint. While the record contains some evidence pertaining to each of the four conditions, over the course of the hearing it became clear that only two of the four categories of disability were material to the analysis of his complaint: Mr. Todd's IBS and his musculoskeletal conditions.

[207] In order to simplify the analysis that follows, I will address the other two alleged disabilities (Mr. Todd's GERD and his mental health) in a more summary fashion here, so that the balance of the analysis can focus of the alleged disabilities that I believe to be the real issues before the Tribunal.

(i) Mr. Todd's GERD

[208] As described in some detail above, Mr. Todd was diagnosed with GERD and underwent treatment in 2006 and 2007.

(a) Mr. Todd's GERD is a protected characteristic

[209] Mr. Todd testified about his experience with GERD and the particular challenges he experienced with the side effects of the procedure he underwent in 2006. Mr. Todd's evidence was supported by the testimony of his family doctor, and by the medical records that were filed in evidence.

[210] While it was not a primary focus of the parties' submissions or the Tribunal's inquiry, there is sufficient evidence before me to ground a finding that Mr. Todd's GERD and the

subsequent difficulties that Mr. Todd experienced following his 2006 surgery constitute a disability that attracts the protection of the Act.

(b) Adverse Treatment

[211] Mr. Todd's complaint does not allege any specific adverse treatment arising from his GERD diagnosis and the complications arising from his subsequent treatment. Rather, Mr. Todd alleges that the cumulative impact of all of his workplace absences led to the following aggregated adverse treatments:

- insufficient or improper accommodation;
- implementation of a CEA; and
- termination.

OC Transpo did not fail to properly accommodate Mr. Todd's GERD

[212] There is no evidence or suggestion that Mr. Todd was improperly accommodated with regard to his GERD diagnosis and treatment, or that Mr. Todd sought any accommodation whatsoever beyond excused absences for flare-ups and treatment.

[213] During this time, Mr. Todd was absent from work due to his GERD symptoms and/or treatment, and those absences were treated as non-culpable absences by his employer.

[214] In support of his diagnosis, Mr. Todd submitted a Medical Assessment Form completed by Dr. Sundaresen and provided to EHW in May 2006. The MAF identified Mr. Todd's GERD diagnosis, and stated that Mr. Todd had no limitations to his ability to work as a result of his condition, his normal daily activities were not affected by GERD.

[215] As a result of this information, OC Transpo determined that GERD was not a disability requiring accommodation at that time, but his absences were treated as non-culpable medical absences.

[216] For the reasons provided in more detail below, I have determined that Mr. Todd was not improperly accommodated and therefore that he did not experience adverse treatment in the course of his employment at OC Transpo. I have also determined that the CEA was

not adverse treatment in this case. However, there was no dispute before me at the hearing that Mr. Todd's termination did constitute adverse treatment.

(c) No nexus between Adverse Treatment and Mr. Todd's GERD

[217] With respect to the implementation of the CEA, and I will articulate in more detail below, there is no evidence of a nexus between Mr. Todd's diagnosis and treatment for GERD in 2006 and 2007 and the requirement that Mr. Todd sign a CEA in 2014.

[218] While Mr. Todd's overall absences were referenced in the termination process, I find that any connection to Mr. Todd's GERD diagnosis and treatment is immaterial and too remote to meet the threshold required by law to establish a nexus. There is no evidence to support a finding that Mr. Todd's GERD diagnosis and treatment were a factor in his termination.

[219] Therefore, on a balance of probabilities, I find that OC Transpo did not discriminate against Mr. Todd on the basis of his GERD diagnosis, symptoms and/or treatment.

(ii) Mr. Todd's Mental Health

[220] Mr. Todd alleges that he experienced various mental health issues during his tenure as a bus driver at OC Transpo, and that he experienced discrimination as a result of his mental health conditions.

[221] There is no question that mental health issues can attract the protections of the Act against discrimination.

[222] Employers must take care to appreciate the prevalence and significance of mental health issues in our society and ensure that the stigma that can be associated with mental health issues does not (intentionally or unintentionally) prevent the proper identification of adverse impacts or the need for accommodation of employees with mental health issues.

[223] However, a diagnosis of a mental illness is not necessarily a declaration of a workplace disability. With treatment, many Canadians who live with a mental illness have

full and meaningful lives and careers unlimited in the workplace by their diagnoses. Nor does such a diagnosis, in and of itself, dictate that an employee will experience adverse or differential treatment at work, or will even require accommodation from their employer.

[224] When accommodations are required to support an employee with a mental health diagnosis, the Act requires that these accommodations be afforded to the point of undue hardship. To do anything less could be discriminatory. However, where no accommodations are sought or required, Canadians living with mental illness should not be treated differently from others in the workplace merely as a function of their mental health diagnosis.

(a) Mr. Todd's mental health conditions could have been a protected characteristic

[225] Notwithstanding my general statements regarding the protections afforded to those who are diagnosed with a mental health condition, Mr. Todd's mental health was not a significant focus of the evidence before me in this case.

[226] Both Mr. Todd and his family doctor referred to Mr. Todd's dysthymia diagnosis, though I note that Dr. Gill was not Mr. Todd's treating physician at the time of his diagnosis.

[227] The evidence before me supporting Mr. Todd's mental health diagnoses is not strong. This is not to say that it is in doubt, but rather that it was not a focus of the submissions before me at the hearing. If Mr. Todd's mental health was the only disability upon which his complaint was based, this lack of evidence might prove fatal to a meaningful analysis of his allegation of discrimination. However, this diagnosis was not challenged by OC Transpo. So while I did not have sufficient evidence before me to understand what, if any, limitations Mr. Todd experienced as a result of these diagnoses, or to meaningfully engage with his diagnosis, I will pass to the next step of my analysis.

(b) Adverse Treatment

[228] As I have noted above, Mr. Todd's mental health was not a significant focus of the evidence before me or the parties' submissions. Mr. Todd's complaint does not allege any specific adverse treatment arising from his mental health diagnosis. Rather, Mr. Todd

alleges that the cumulative impact of all of his workplace absences led to the following aggregated adverse treatments:

- insufficient or improper accommodation;
- implementation of a CEA; and
- termination.

OC Transpo did not fail to properly accommodate Mr. Todd's mental health conditions

[229] Based on the limited evidence before me, I cannot conclude that OC Transpo failed to properly accommodate Mr. Todd's mental health conditions, to the extent that they were aware of them, which is also not clearly established by the evidence.

[230] Part of Dr. Gardiner's medical file was entered in evidence before me at the hearing. The partially completed MAF found in Dr. Gardiner's medical file that appears to have been initiated as a result of Mr. Todd's dysthymia diagnosis indicated that Mr. Todd was "capable of attending work on a regular basis", and while Dr. Gardiner appears to indicate that Mr. Todd could be impacted by "periodic distress" with "occasional limitations", the form does not identify what limitations or restrictions Mr. Todd might have or whether and how he might require accommodation.

[231] Mr. Todd's EHW file, which was also submitted in evidence before me at the hearing, does not contain a copy of the MAF that Dr. Gardiner appears to have started to complete.

[232] Despite Mr. Todd's familiarity with the process of requesting workplace accommodations, there is no evidence (including his own testimony) that he ever completed the necessary process to submit the necessary documentation identifying any restrictions and limitations (if they existed) or request for accommodations from his employer.

[233] In fact, when Mr. Todd identified his dysthymia diagnosis on paperwork documenting an absence from work that he submitted to EHW, OC Transpo followed up to inquire about whether this diagnosis presented any limitations for him at work. Based on the evidence before me, I find that Mr. Todd did not provide a response to this inquiry from EHW.

[234] As mentioned earlier, and for the reasons provided in more detail below, I have determined that Mr. Todd was not improperly accommodated and therefore that he did not experience adverse treatment in the course of his employment at OC Transpo. I have also determined that the CEA was not adverse treatment in this case. However, there was no dispute before me at the hearing that Mr. Todd's termination did constitute adverse treatment.

(c) No nexus between Mr. Todd's mental health and the adverse treatment

[235] Based on the evidence at the hearing, I am not convinced of the relevance of Mr. Todd's mental health to this inquiry. While I am sure that the conditions that Mr. Todd experienced represented challenges for him in his life, which I do not wish to minimize in any way, I did not hear evidence to support a conclusion that these conditions had a material impact on Mr. Todd's ability to perform his duties as a bus operator, or on the way he was treated at work. In absence of more detailed medical evidence in this case, I am not prepared to assume that Mr. Todd's mental health has any bearing on the issues before me in this complaint.

[236] With respect to the implementation of the CEA, and as I will articulate in more detail below, there is no evidence to support a finding of a nexus between Mr. Todd's mental health and the requirement that Mr. Todd sign a CEA in 2014.

[237] While Mr. Todd's overall absences were referenced in the termination process, I find that any connection to Mr. Todd's mental health (and any absences arising as a result) is immaterial and too remote to meet the threshold required by law to establish a nexus. There is no evidence to support a finding that Mr. Todd's mental health was a factor in his termination.

[238] Therefore, on a balance of probabilities, I find that OC Transpo did not discriminate against Mr. Todd on the basis of a mental health disability.

B. Are Mr. Todd's IBS and/or Musculoskeletal Conditions Protected Characteristics under the Act?

[239] In his complaint, Mr. Todd alleged that OC Transpo breached the Act by discriminating against him on the basis of disability in the course of his employment and in the termination of his employment.

[240] Mr. Todd complained that his employer, OC Transpo, discriminated against him on the basis of four disabilities: IBS, GERD, mental health and musculoskeletal issues.

[241] As was discussed above, based on the evidence before me, I have found that OC Transpo did not discriminate against Mr. Todd on the basis of his GERD diagnosis and treatment or his mental health. Therefore, this analysis will focus on the two conditions that I believe were at the heart of Mr. Todd's discrimination complaint and the evidence and submissions before the Tribunal: his IBS and alleged musculoskeletal conditions.

[242] Essentially, Mr. Todd alleged that he was terminated, either directly or indirectly, as a result of disability-related absenteeism. He argued that a significant number of his absences from work were related to a disability, and further suggested that if OC Transpo had better managed his medical conditions, he would not have accrued so many absences. Therefore, he asserted that the requirement that he sign the CEA in 2012 to manage his absenteeism and his subsequent termination in 2014 were discriminatory.

[243] In order to consider Mr. Todd's argument in more detail, we must first determine whether the conditions that Mr. Todd experienced are disabilities under the Act.

[244] "Disability" is defined at section 25 of the Act as "any previous or existing mental or physical disability. . .". This is widely seen as a broad and permissive definition.

[245] The Tribunal has interpreted and expanded this definition in *Audet v. Canadian National Railway*, 2006 CHRT 25, at paragraph 39, which essentially reiterates the interpretation of disability provided in *Desormeaux v. Corporation of the City of Ottawa*, 2005 FCA 311 (CanLII), at paragraph 15, which defines disability as "a physical or mental impairment, which results in a functional limitation or is associated with a perception of impairment". See also *Temple* at para 39. See also *Brunskill*.

[246] The law is clear that the definition of disability based on functional limitations must be expanded to include the subjective perception of impairment, even where no functional limitations exist. In other words, even when an individual has no functional limitations resulting from a medical condition, we must still consider whether those around them may impose their own belief, based on misinformation, stigma or bias. (See *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 SCR 665, 2000 SCC 27)

[247] In this case, there are no issues pertaining to a perception of impairment so in considering whether Mr. Todd's medical conditions represented disabilities protected by the Act, I have considered if and how each condition impacted Mr. Todd's ability to do his job as a bus operator.

(i) Irritable Bowel Syndrome

[248] At the hearing, I heard evidence from a number of Mr. Todd's physicians, including his family physician Dr. Gill and his gastroenterologist, Dr. Tambay. I also reviewed Mr. Todd's medical file, various diagnostic records, and Mr. Todd's EHW records, including the accommodation plans signed by Mr. Todd and OC Transpo acknowledging and accommodating Mr. Todd's IBS.

[249] As a bus driver, the symptoms of IBS posed an obvious problem for Mr. Todd. When experiencing a flare-up, Mr. Todd often required urgent access to a washroom- something that is not possible on any OC Transpo buses and in the majority of cases along municipal bus routes.

[250] OC Transpo acknowledged that Mr. Todd's IBS is a medical condition that has a functional impact on his ability to perform his duties as a bus driver. At the hearing into Mr. Todd's complaint OC Transpo raised some questions about the extent of his condition, but ultimately did not dispute that Mr. Todd's IBS is disability under the Act.

[251] Based on the record before me at the hearing and the agreement of the parties I find that Mr. Todd's IBS is a disability in the meaning of the Act.

(ii) Musculoskeletal Issues

[252] In the Statement of Particulars filed with the Tribunal in support of his complaint, Mr. Todd identified two categories of musculoskeletal issues that he allegedly experienced during his time at OC Transpo:

- i. neck and shoulder pain, and
- ii. hip and leg pain.

[253] In his closing submissions, Mr. Todd grouped all of the various conditions and injuries that he experienced during his tenure with OC Transpo together into a category of “musculoskeletal pain”.

[254] While I am convinced that there was a point during his career at OC Transpo where one or more of these musculoskeletal injuries or conditions impacted his ability to perform his duties as a bus operator, I don’t believe that the analysis necessary in this case is aided by treating these conditions as a singular condition or disability.

[255] Instead, my review of the evidence before me indicates that there are two distinct musculoskeletal conditions that plagued Mr. Todd during his tenure as a bus operator. I will deal with each in turn below:

(a) Left Neck and Shoulder Injury (Tendonitis and Repetitive Strain Injury)

[256] Mr. Todd’s asserts that his complaints of neck and shoulder pain go back as far as 2004. At the hearing, I heard evidence from both Mr. Todd and Dr. Grace, who testified that she began treating Mr. Todd in October 2004 for an injury to his left arm and shoulder.

[257] After a series of initial visits in the fall of 2004, Mr. Todd did not return to Dr. Grace for further treatment until January 2008, when he claimed to have been involved in a workplace injury for which he sought coverage through the Workers Safety and Insurance Board.

[258] His WSIB claim was denied.

[259] In June 2008, Mr. Todd sought and obtained disability benefits from his insurer, Manulife, based on Dr. Grace's diagnosis of tendonitis and repetitive strain injury and the report of Dr. Gittens of Medisys, on behalf of the insurance provider Manulife (the "Gittens Report").

[260] I note that Dr. Grace also reviewed and agreed with the findings of the Gittens Report.

[261] This injury persisted for many months during which time Mr. Todd was not attending work. From June 16 to August 26, 2008, Mr. Todd worked in an accommodated position cleaning buses, but was unable to sustain these alternate duties due to his condition. From August 27, 2008 until February 5, 2010, Mr. Todd was on Long Term Disability for more than 17 months.

[262] For the purpose of this analysis, I find that at this time, Mr. Todd's neck and shoulder injury met the definition of a disability.

[263] Although some of his symptoms persisted, he was fully cleared to return to work in February 2010 without medical restrictions. For the purpose of this analysis, I do not find that Mr. Todd was experiencing a disability in his neck and shoulder after that point in time.

(b) Hip and Leg Pain (Trochanteric Bursitis, Lower Back Pain and Continued Upper Body Issues)

[264] Early in 2012, Mr. Todd claimed that he began to experience pain in his hips and lower back. The cause of this pain is unclear, and it appears to overlap with a quadriceps injury sustained in March 2012 while moving a refrigerator. At this time, Mr. Todd was also still experiencing intermittent pain associated with his earlier upper body injury.

[265] Mr. Todd testified that he was unable to work at this time due to his injuries but did not provide medical evidence to substantiate that claim.

[266] In the spring of 2012, Mr. Todd applied for long term disability benefits which were eventually denied. The insurer found that the Mr. Todd's claim was unsupported by the medical evidence provided.

[267] While an insurer's findings with respect to an application for long term disability coverage may be relevant, the insurer's conclusion on its own is not dispositive of the question of Mr. Todd's medical condition. However, beyond Mr. Todd's own testimony, there was very little evidence and virtually no medical evidence provided at the hearing into this complaint to support his assertion that he was unable to perform his duties as a bus operator due to musculoskeletal pain.

[268] I have serious reservation about the reliability of Mr. Todd's evidence on this point for the following reasons.

[269] First, despite two visits to Dr. Grace to complete insurance paperwork in June of 2012, it does not appear that Mr. Todd was seeking regular medical treatment at this time. Mr. Todd's two visits to Dr. Grace in this period are inconsistent with the pattern of treatment that he himself undertook beginning in 2008 when he was medically unable to attend work due to musculoskeletal issues.

[270] Second, while Dr. Grace testified that Mr. Todd was indeed still experiencing symptoms of musculoskeletal pain, on cross-examination she admitted that she was not aware that Mr. Todd was not attending work at this time. What's more, she testified that she felt that Mr. Todd was able to attend work and perform his duties as a bus operator and did not know at the time that he had not been doing so.

[271] Third, while insurance documents completed by Dr. Grace attesting to Mr. Todd's injuries were submitted as evidence in support of Mr. Todd's assertion that he was disabled from work in 2012, after hearing testimony from Dr. Grace at the hearing, I am left with considerable doubt as to the weight that can be placed on these documents. It does not appear that Mr. Todd was being forthcoming with his physician about his employment situation. And Dr. Grace testified that she believed she was completing this paperwork to support his claim for physio and massage benefits, not a claim of full disability entitling Mr. Todd to Long Term Disability Benefits.

[272] Fourth, Mr. Todd was not engaged with his employer in an attempt to find an accommodation or to develop a plan that would allow him to return to work at this time. OC Transpo had no information about his medical status and characterized him as being "in the

wind". Mr. Todd only resurfaced once OC Transpo advised that he was considered to be absent without leave and was at risk of losing his benefits.

[273] Finally, in December 2012, when Mr. Todd underwent a functional capacity evaluation provided by OC Transpo, he showed no signs whatsoever of any restrictions.

[274] All of these points, taken together, leave me with serious doubts about the reliability of Mr. Todd's evidence. On a balance of probabilities, I find that there is insufficient evidence to support Mr. Todd's claim that he was experiencing musculoskeletal issues that ought to be considered a disability in the meaning of the Act in 2012.

(iii) Summary of Mr. Todd's Disabilities

[275] For the purpose of the analysis of Mr. Todd's complaint, I find that Mr. Todd experienced IBS beginning in 2004, which lasted throughout his career at OC Transpo. Mr. Todd's IBS had a functional impact on his ability to work as a bus operator from the time of his diagnosis until the time of his termination.

[276] I further find that Mr. Todd had musculoskeletal issues at various points during his career as an OC Transpo bus operator, but the evidence before me limits the finding that Mr. Todd was functionally disabled by this condition to the period from his initial medical leave in 2008 to August 2, 2010, when Dr. Grace cleared Mr. Todd to return to work with no limitations or restrictions that would impact his ability to perform his job as a bus operator.

C. Did Mr. Todd Experience an Adverse Impact?

(i) Mr. Todd Was Not Treated Adversely in the Course of his Employment

Accommodation of Mr. Todd's IBS

[277] Mr. Todd's complaint alleges that he experienced adverse impacts throughout the course of his employment at OC Transpo. In particular, he alleges that by failing to consistently offer him alternate duties when he was off work for a disability-related reason,

OC Transpo caused Mr. Todd to accrue absences which he would not have accrued if he had been provided with modified work.

[278] OC Transpo argued that, for the most part, Mr. Todd did not avail himself of the opportunity to work modified duties while experiencing bouts of IBS, despite the fact that his MAF indicated that he would be able to work, provided that he had easy access to a washroom.

[279] OC Transpo also argued that it was not able to do more to offer alternate duties because of the intermittent and unpredictable nature of Mr. Todd's flare-ups, and given the fact that OC Transpo (and Mr. Todd's supervisors) were often not made aware of the absence or the reason for the absence until after he returned to work with a medical note.

[280] Ultimately, Mr. Todd's duties as a bus driver could not be performed in a way that met with the medical restrictions and limitations prescribed by Dr. Tambay: i.e., that he be provided with access to a washroom when he was experiencing a flare-up of his IBS. While it was possible to provide Mr. Todd with alternate work that could have met his restrictions, there was no way to modify the job of a bus driver to make it readily accessible to a restroom.

[281] By mutual agreement, the 2005 Accommodation Plan (and subsequent accommodation plans) resolved this problem by allowing Mr. Todd to miss his shift when he was experiencing a flare-up of his IBS and exempting him from the attendance management program for absences that were the result of Mr. Todd's IBS. Whether this was the best possible accommodation at the time, it is the approach that the parties selected.

[282] Accommodation doesn't have to be perfect in order to meet the requirements of the Act- particularly without the benefit of hindsight.

[283] And while an employer has a leadership role to play in the accommodation process, an accommodation plan must be the result of dialogue between the employer, the employee, and (where appropriate) the employee's union. It is incumbent on an employee to speak up if he or she feels that the accommodation is not meeting their needs.

[284] Based on the evidence before me, I cannot conclude that Mr. Todd raised any concerns about the proposed accommodation with his employer in the negotiation of the

2005 Accommodation Plan, nor did he raise a concern when the accommodation plan was updated in 2010. And in fact, it was the employer who (in 2013) initiated the alternate duties pilot and incorporated that initiative into the 2013 Accommodation Plan.

[285] Mr. Todd testified that following the 2010 Accommodation Plan, his medical notes indicated that he was able to perform modified duties. However, there is no evidence that Mr. Todd ever took any steps to discuss the need to develop a plan that would allow him access to modified or alternate work with his supervisor, with EHW or with his union. While it is not his exclusive responsibility to do so, if Mr. Todd had concerns about the accommodation plans in place, he had an obligation to voice those concerns so that they could be addressed.

[286] The evidence does not support a finding that he did so.

[287] Physically, it is not clear that Mr. Todd would indeed have been able to work when he was experiencing a flare-up of his IBS. Mr. Todd testified and argued in his closing submissions that in many cases, his condition prevented him from even attending at his doctor's office to obtain medical notes. While understandable, given the nature of the symptoms he described, I am not convinced that he would have been able to report for alternate work at OC Transpo in those circumstances.

[288] Further, I am not convinced that Mr. Todd objected to the accommodation plans in place from 2005 to 2013.

[289] I find that the approach taken by OC Transpo and Mr. Todd to the accommodation of his IBS was a reasonable one and did not constitute an adverse treatment under the Act.

[290] While Mr. Todd argued that his high absenteeism- including his IBS-related absences – was the reason he was placed on the CEA which led to his termination, I have found that the reason Mr. Todd was placed on the CEA was that he had been absent for more than six months in 2012 without any valid explanation, and his employer needed a tool to keep track of his attendance if they were to allow him to return to work.

[291] For the most part, Mr. Todd was either unable or unwilling to report to work when experiencing a flare-up of his IBS. And based on the testimony of Mr. Todd, and my review

of the evidence, I find that it is more likely than not that Mr. Todd was satisfied to “call in sick” as provided in the accommodation plans. I did not hear evidence to support a finding that the accommodation plans created an adverse impact.

Accommodation of Mr. Todd’s Musculoskeletal Conditions

[292] Mr. Todd also argued that OC Transpo failed to provide him with alternate work when he was unable to work due to musculoskeletal pain and that this constituted adverse differential treatment.

[293] While OC Transpo did not directly respond to these allegations, I do not think that the evidence supports Mr. Todd’s assertions.

[294] The evidence shows that Mr. Todd was offered alternate duties at several points in his employment when experiencing musculoskeletal pain.

[295] While there are times when it took a number of weeks for these duties to be offered, or where the duties offered were not suitable, I do not find that this constitutes adverse treatment of Mr. Todd. Finding the right accommodation often requires a process of trial and error, where cooperation and communication are paramount. Delays and “bumps” along the way are sometimes part of the dialogue inherent in the accommodation process.

[296] In Mr. Todd’s case, the delays in securing alternate duties related to inaccurate, incomplete medical information, and do not give rise to a finding that OC Transpo was treating Mr. Todd adversely.

[297] It is important that an employee not be unduly delayed in accessing alternate or modified work. However, having complete and accurate medical information is critical to ensure that employees are not asked to perform work that could aggravate their condition or put them in danger.

[298] Having to wait for current medical restrictions and limitations is not (in itself) a form of adverse differential treatment, provided the delay is not excessive or the result of prolonged inaction on the part of the employer.

Communication Breakdown in 2012

[299] Mr. Todd claimed that, in 2012, he was forced to miss work due to his musculoskeletal condition. As was detailed previously, Mr. Todd was absent from work for a large portion of 2012 and was in the process of applying for long term disability benefits, which were denied.

[300] Mr. Todd alleged that OC Transpo failed to keep in touch with him while he was in the process of applying for these benefits, and that the approach taken to his return to work constituted adverse treatment.

[301] While it is clear that there was a communication breakdown with regard to Mr. Todd's absence in 2012, I cannot conclude that this breakdown constituted adverse treatment on the part of OC Transpo.

[302] As I have detailed already above, Mr. Todd could not demonstrate to the insurer, his employer or to this Tribunal that there was any medical evidence to support his absence from work, and his doctor testified that she believed he was medically able to work. Nonetheless, Mr. Todd did not contact his employer, he did not seek alternate duties (until after he was denied benefits) and he was not even communicating transparently with his doctor about the fact that he was not working.

[303] I find that any communication breakdown that occurred in 2012 is more likely the result of Mr. Todd's conduct. I do not find any basis to conclude that this constituted adverse treatment on the part of his employer.

Requiring updated Medical upon his Return to Work in November 2012

[304] Mr. Todd argued that the OC Transpo should have allowed him to return to work in November 2012 on the basis of Dr. Grace's June 2012 Medical that stated that he could work with some restrictions.

[305] In light of the fact that Mr. Todd continued to be off work claiming to be disabled for several months following the June 2012 Medical, and the fact that Dr. Grace was operating under the misinformation that Mr. Todd was attending work at the time, I cannot agree that seeking a FCE before allowing Mr. Todd to return to work constituted adverse treatment.

[306] Furthermore, Dr. Grace testified that she agreed that OC Transpo should conduct a further FCE and she made this clear to EHW in late 2012.

[307] This is not a case of the employer preferring the recommendations of its own medical experts over those of an employee's treating physician. Dr. Grace supported the EHW's proposed approach. And there is no merit whatsoever in the assertion that OC Transpo's request for a FCE prior to Mr. Todd's return to work was adverse differential treatment or was, in any other way discriminatory.

[308] I find that there was considerable uncertainty about the medical causes of Mr. Todd's absence for much of 2012 (including on the part of Dr. Grace, who testified that she thought Mr. Todd was working at that time), and his ability to perform the duties of a bus operator, as well as his suboptimal prognosis for regular and reliable attendance.

[309] I cannot agree with Mr. Todd's submission that the December 2012 FCE was unnecessary, inappropriate or otherwise constituted an adverse treatment in the circumstances.

(ii) The CEA was not Adverse Treatment

A note about CEAs and Human Rights

[310] Continuing Employment Agreements, or last chance agreements as they are sometimes called, are widely employed in the labour relations context, and have been considered extensively by labour arbitrators.

[311] While these remedial tools are indeed widely used, they have not been given much attention by human rights adjudicators, likely because they are often used in the context of collective agreements and are therefore subject to the jurisdiction of labour arbitrators and not human rights tribunals.

[312] In general, CEAs are seen as a useful and important tool to provide employees facing termination with a final opportunity to remedy the conduct that would otherwise lead to the loss of their job.

[313] That being said, these last chance agreements present particular challenges when dealing with employees who require human rights accommodation.

[314] It is settled law that you cannot contract out of your human rights obligations. Re: *Etobicoke (Borough) v. Ontario (Human Rights Commission)*, [1982] 1 S.C.R. 202 at p. 213.

[315] However, employees who require accommodation should not be excluded from the benefit of a last chance, simply because they require an accommodation. So we are left with the question of how to integrate the labour relations tool with the human rights analysis?

[316] When considering a last chance agreement or CEA in a context that may intersect with human rights issues, employers ought to consider the following:

(i) if a nexus exists between the reason for the CEA and a protected characteristic, an employer should demonstrate that it is justified in imposing the CEA;

(ii) if a nexus exists between a protected characteristic and the conduct that the CEA seeks to modify,

i. The CEA must provide for an accommodation to the point of undue hardship;

ii. The CEA must provide for an individualized approach to the employee's restrictions and limitations;

(iii) The CEA must reflect a genuine attempt to rehabilitate an employee, and cannot be a mere pretext for termination;

(iv) an employee should, where represented by a union, be given the chance to seek advice about the CEA, and where not represented by a union, be provided with an opportunity to seek legal advice;

(v) where an employer purports to terminate an employee for a breach of the CEA, and a nexus exists between the breach and a protected characteristic, the employer must undertake a human rights analysis to ensure that it has accommodated to the point of undue hardship and/or that the termination is justifiable under the Act.

The Decision to Place Mr. Todd on the CEA was Not Adverse Treatment

[317] Mr. Todd alleged that he was placed on the CEA as a result of his disability-related absences in general, or (alternatively) as a result of his 2012 absence, which he claimed was disability-related.

[318] I have already determined that there is insufficient evidence to support a finding that Mr. Todd's 2012 absence was disability-related.

[319] I have also determined that Mr. Todd was placed on the CEA because he had been absent without leave or medical explanation for six months, and the CEA was proposed as a last chance alternative to termination, because Mr. Chaudhari did not want to lose track of Mr. Todd again.

[320] I therefore cannot agree with Mr. Todd's assertion that he was placed of the CEA as a result of his disability or for a discriminatory purpose.

[321] Furthermore, the evidence of Mr. Chaudhari and Mr. Sharma confirmed that (in November 2012) the likely alternative to the CEA for Mr. Todd was termination. In that light, I cannot conclude that the CEA was adverse treatment.

The Terms of the CEA were not Adverse to Mr. Todd

[322] Mr. Todd asserted that because the requirements of the CEA were different from those of the OC Transpo attendance management program, the CEA was necessarily adverse to Mr. Todd. The individualized approach provided for in the CEA cannot be directly compared with the attendance management regime that governed the attendance of other OC Transpo employees because it was specifically tailored to correct conduct that (but for the CEA) may have led to the employee's termination.

[323] Most aspects of the regime (calling the supervisor, monthly meetings, providing a medical certificate in accordance with the Collective Agreement, etc...) do not represent adverse treatments, even if the treatment is different than that which is afforded to other employees.

[324] The number of allowable absences, however, warrants a closer examination. While on its face, the four absences per quarter allowed under the CEA are fewer than the number of absences permitted under the more general attendance management program, the CEA also carved out any IBS-related absences from the count, and provided a one-on-one opportunity for coaching and management of any absence-related issues.

[325] And even if I were to find that the regime was more stringent, which I have not, that enhanced rigour did not cause Mr. Todd any adversity because he never reached the maximum allowable number of absences under either the CEA or the attendance management program during the period following his return to work in 2012.

[326] While the attendance regimes are different, I cannot conclude that the regime of the CEA is necessarily more adverse- particularly since Mr. Todd never came afoul of the requirement that Mr. Todd not miss more than four days in a quarter.

[327] There are two requirements that are clearly more strict than the general regime: (i) the strict enforcement regime whereby an employee can be terminated immediately for a breach of the CEA; and (ii) the requirement that the employee waive the right to grieve a termination as a result of a breach of the CEA.

[328] However, these features are at the heart of the *last chance agreement*.

[329] While it is clear in human rights analysis that differential regimes can often lead to discriminatory outcomes, given the importance of last chance agreements to both employees and employers as a management and labour relations tool, I am unwilling to dictate a scenario where different is necessarily adverse. To do so could bar employees with a disability (or other protected characteristic) from availing themselves of a performance management tool that other employees can access as a last chance to avoid termination.

[330] While the CEA provides for a right of immediate termination for a breach of the agreement and a waiver of the right to grieve that termination, the alternative for Mr. Todd in the circumstances was likely termination. The CEA provided Mr. Todd with an opportunity to return to his job and improve his attendance, which he did.

[331] For the forgoing reasons, I find that the use and application of the CEA in this case does not constitute adverse treatment against Mr. Todd.

(iii) Mr. Todd's Termination was Adverse Treatment

[332] There was no dispute before me that Mr. Todd's termination constitutes adverse treatment.

D. Was there a Nexus between the CEA and Mr. Todd's Disability?

[333] While I have found the use of a CEA in this case does not constitute adverse treatment against Mr. Todd, in the event that I have erred in that regard, I also find that the application of a CEA in Mr. Todd's case upon his return to work in 2012 was not related to his disability.

[334] Following Mr. Todd's extended absence in 2012, which could not be explained or supported by the available medical evidence, Mr. Todd wanted to return to work as a bus operator. There was no apparent medical reason to limit his ability to do so, subject to the ongoing restrictions pertaining to Mr. Todd's IBS, which were addressed in the 2010 and 2013 Accommodation Plans.

[335] Mr. Chaudhari, Mr. Todd's supervisor, testified that he felt he had dropped the ball with respect to Mr. Todd's lengthy and unexplained absence in 2012. Mr. Chaudhari testified that, as Mr. Todd's direct supervisor, he felt that he needed an additional management tool to ensure that he could effectively oversee Mr. Todd's attendance at work. This was particularly challenging in a workplace like OC Transpo, because the bus operators work all over the City, and their shifts may not always overlap with those of their supervisors.

[336] I found Mr. Chaudhari's evidence on this point to be credible and reliable, particularly as he readily admitted his own role and responsibility for losing track of Mr. Todd in 2012.

[337] Mr. Todd argued that OC Transpo sought to put in place a CEA before his return to work as a result of his overall level of absences. But he did not provide evidence to support this assertion.

[338] Neither Mr. Chaudhari's evidence, nor the documentary record supports this conclusion.

[339] In the spring of 2012, at the beginning of this extended absence from work and in full knowledge of his overall attendance record, OC Transpo explored the possibility of priority placement for Mr. Todd. In other words, they had begun to consider whether an alternate job would be more appropriate for Mr. Todd, as his level of absenteeism was quite high at this time. The need for a last chance agreement was not raised at this time.

[340] In addition, Mr. Chaudhari, who (as Mr. Todd's supervisor) was the driving mind behind the CEA at OC Transpo, testified that the reason for the CEA was because he was concerned that they would lose track of Mr. Todd again, as he had for several months previously.

[341] I find Mr. Chaudhari's evidence on this point to be persuasive, and consistent with his overall testimony and the documents. He was the principal decision maker advocating for an additional management tool to use with Mr. Todd, and I find no reason not to accept his evidence as to the reasons for doing so.

[342] I am convinced that, on balance, the reason that OC Transpo wanted a CEA was because it had concerns about its ability to manage Mr. Todd's attendance following his extended and unexplained absence in 2012, and not as a result of his disabilities or any disability-related absences.

[343] Therefore, I agree with OC Transpo that Mr. Todd's placement on the CEA was, as a factual matter, the result of his 2012 absence without leave, and not related to his disability, or his prior record of disability and non-disability related absences.

[344] Having said that, in the event that his disability had played some role (even as a minor factor) in OC Transpo's decision to require a CEA, I am not convinced that this agreement represented adverse differential treatment. If OC Transpo had refused to offer Mr. Todd the ability to enter into a CEA as a last chance measure, merely because of his history of disability-related absenteeism, that too would have been problematic, and possibly discriminatory.

[345] Lastly, even in the event that the CEA constituted adverse differential treatment that was connected to Mr. Todd's disability, I find that OC Transpo was justified in employing the CEA as a management tool under the circumstances of this complaint. OC Transpo was trying to manage an employee who had struggled with accountability in a diffuse workplace and had recently, willingly or otherwise, fallen through the administrative cracks.

[346] I find that Mr. Chaudhari and OC Transpo were justified in their need to take steps to ensure they could manage Mr. Todd's attendance at work on a regular and reliable basis.

[347] Therefore, to the extent that the CEA was in any way adverse to Mr. Todd, it is nonetheless not discriminatory in the meaning of the Act.

E. Was there a Nexus between Mr. Todd's Termination and his Disability?

[348] At the point of his termination, OC Transpo had determined that Mr. Todd's persistent pattern of breaches of the CEA could no longer be tolerated and began the process of ending Mr. Todd's employment, even in the face of admitted improvements in his attendance.

[349] As part of the termination process, Mr. Chaudhari prepared the Termination Memo, which provided two reasons for terminating Mr. Todd, and recommended his termination:

It is recommended that the employment of Operator Jamison Todd be terminated primarily because he violated the terms of the agreement on numerous occasions, despite being given opportunities to comply with the terms and also because of continued excessive absenteeism.

[350] I have already determined as a factual matter that OC Transpo was contractually within its rights to terminate Mr. Todd for breaching the CEA.

Termination for Breach of the CEA

[351] Following Mr. Todd's absence from work on January 29, 2014, when he once again failed to contact his supervisor prior to missing his shift, OC Transpo determined that it would proceed with terminating Mr. Todd for repeatedly breaching the CEA.

[352] Having already considered the CEA at some length and having found that the CEA did not discriminate against Mr. Todd, there is no basis for this Tribunal to interfere with the contractual operation of that agreement.

[353] Furthermore, there was no nexus between Mr. Todd's breach of the CEA and Mr. Todd's disability.

[354] Mr Chaudhari testified that he prepared the Termination Memo, seeking the authority to terminate Mr. Todd, because he had consistently refused to cooperate with the terms of the CEA.

[355] In this respect, I find that the decision to terminate Mr. Todd for breach of the CEA was not discriminatory under the CHRA as there was no nexus between that decision and Mr. Todd's disabilities. However, in executing the termination, Mr. Chaudhari, and OC Transpo introduced an additional rationale for terminating Mr. Todd: his "continued excessive absenteeism".

Termination for *Continued Excessive Absenteeism*

[356] In support of the Termination Memo, Mr. Chaudhari attached a summary printout of all of Mr. Todd's absences throughout his career at OC Transpo, without disaggregating or otherwise accounting for Mr. Todd's disability-related absences.

[357] Mr. Todd argued that the references to his absenteeism in the memo meant that the decision to terminate him was based in part on his disability, or that his disability was a factor in his termination.

[358] I agree with Mr. Todd. The inclusion of all of Mr. Todd's absences (including the disability-related absences) in the rationale for his termination (which is not in dispute) satisfies the threshold test for discrimination.

[359] The law is clear that where a protected characteristic is a factor in adverse treatment, even if it is not the only factor, or even the most important factor, that conduct meets the threshold test under the Act (see *Holden v. Canadian National Railway Co.* (1990), 14 CHRR D/12 (FCA)).

[360] Such is the case with OC Transpo's decision to terminate Mr. Todd (in part) for "continued excessive absenteeism".

F. Did OC Transpo Justify its Termination of Mr. Todd on the Basis (in part) of his Disability?

[361] Since I have determined that Mr. Todd met the burden of proof with respect to the termination of his employment, the burden shifts to the Respondent to demonstrate that its conduct could nevertheless be justified, within the meaning of paragraph 15(1)(a) and subsection 15(2) of the *CHRA*. For the following reasons, I find that OC Transpo failed to meet its burden to demonstrate that its decision to include Mr. Todd's overall history of absences (without regard to the reason for his absences) was justified.

[362] Subsection 15(2) of the *CHRA* stipulates that:

For any practice mentioned in paragraph (1)(a) to be considered to be based on a *bona fide* occupational requirement . . . it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

[Emphasis added]

[363] The Supreme Court in *British Columbia (P.S.E.R.C.) v. BCGSEU*, [1999] 3 SCR 3 [Meiorin], outlines the test to establish that a practice is a bona fide occupational requirement (BFOR). To prove a BFOR, it must be demonstrated on a balance of probabilities that (1) the standard was adopted for a purpose rationally connected to the purpose of the job, (2) the standard was adopted in the honest belief that it was necessary to accomplish this legitimate work-related purpose, and (3) the standard is reasonably necessary to accomplish this legitimate work-related purpose.

[364] In this case, the parties agreed that regular and reliable attendance at work was a reasonable and necessary requirement.

[365] The issue here is not whether the requirement to attend at work on a regular and reliable basis is a valid one. Rather, the issue is that when OC Transpo decided to consider

all of Mr. Todd's absences, including those that were related to a protected characteristic, in their decision to terminate him, they were required to demonstrate that they had accommodated Mr. Todd to the point of undue hardship, having regard to health, safety and cost.

[366] In other words, had OC Transpo demonstrated that it could not have done anything else reasonable or practical to avoid the negative impact on Mr. Todd, it might have been able to satisfy the justification requirements. (*Moore, supra* at para 49)

[367] It is clear that a disabled employee can be justifiably terminated for excessive absenteeism, provided that the employer can demonstrate that it had reached the point of undue hardship. *Ottawa v. Desormeaux* and *City of Ottawa v. Parisien*, [2004 FC 1778]. See also *Scheuneman v. Canada (Attorney General)*, (2000) 266 N.R. 154 (F.C.A.), where leave to appeal to S.C.C. was refused, [2001] C.C.C.A. No. 9

[368] A disabled employee can also be justifiably terminated pursuant to a breach of a properly-executed CEA.

[369] However, where an employer conflates these two reasons for termination, the existence of the second (the breach) does not absolve the employer of its human rights obligations arising in the face of the former (excessive absenteeism) to demonstrate that it had reached the point of undue hardship.

[370] During the hearing, OC Transpo failed to demonstrate that it had reached the point of undue hardship, having exhausted all reasonable and practical alternatives, when it terminated Mr. Todd.

[371] At the time of his termination, there was no evidence to suggest that OC Transpo considered alternatives to termination, including alternate approaches to accommodation or Mr. Todd's transfer to an alternate position (that met his restrictions and limitations) through priority placement.

[372] Looking back at the period leading up to the imposition of the CEA (2004-2012), Mr. Todd missed 28% of his shifts for non-LTD and non-IBS related absences. When all of Mr. Todd's sick days are considered (i.e., including disability related absences, sick leave, and

other undefined absences) relative to his working days including vacation, investigatory leave, bereavement leave and family emergency leave, Mr. Todd's level of absenteeism reaches 42%. And while Mr. Todd's attendance improved under the CEA (including 2012), his total level of absenteeism was still over 39% or just under 30% excluding IBS- and LTD-related absences.

[373] It was open to OC Transpo to demonstrate that, even excluding Mr. Todd's disability-related absences, that his overall absenteeism was a problem, and had reached the point of undue hardship. At nearly 30% absenteeism (even excluding Mr. Todd's IBS and LTD related absences) Mr. Todd's attendance might have met the burden for undue hardship, if OC Transpo had presented evidence to support such a conclusion. And while OC Transpo drew this distinction in argument at the hearing, there is no evidence before me that it did so at the time it made the decision to include this factor in its rationale for terminating Mr. Todd.

[374] While it was agreed at the hearing that regular and reliable attendance are important for any employer, and for OC Transpo specifically, OC Transpo did not provide evidence of the actual cost of Mr. Todd's absences to the organization, nor did it lead evidence that would permit me to situate those costs within the context of the organization's overall budget. Further, it did not account for how Mr. Todd's specific absences impacted the availability of spares (who are routinely scheduled and paid whether or not they are required to drive a route).

[375] It also neglected to present any evidence concerning major health and safety issues (see *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).

[376] Ultimately, the onus lies on OC Transpo, as the employer, to demonstrate that it could not have taken any other reasonable or practical measure to avoid terminating Mr. Todd (in part) for absences related to his disability (see for example *Moore, supra*, at para. 49 and *Simpsons-Sears, supra*, at para. 28). For the reasons set out above, I find that OC Transpo failed to meet its duty to accommodate Mr. Todd's disability to the point of undue hardship when it included his disability related absences in its rationale for his termination.

VIII. Conclusion

[377] For the forgoing reasons, I conclude that:

[378] OC Transpo did not discriminate against Mr. Todd on the basis of one or more of his disabilities during the course of his employment, and that the accommodation plans that were in place, while imperfect, were satisfactory.

[379] OC Transpo did not discriminate against Mr. Todd when it placed him on the CEA upon his return to work in 2012.

[380] Mr. Todd failed to cooperate with OC Transpo in complying with the requirements of the CEA and (pursuant to the terms of that agreement) it was not discriminatory for Mr. Todd to be terminated for breaching the CEA.

[381] However, by including Mr. Todd's overall history of absenteeism as one of the two grounds for his termination without disaggregating the disability related absences or justifying its conduct in a manner permitted by the Act, OC Transpo discriminated against Mr. Todd.

IX. Disposition

[382] I find that the complaint is dismissed in part and substantiated in part.

[383] At the joint request of the parties, the hearing into this complaint was bifurcated as between the merits and the remedies. As I have found that the complaint is substantiated in part, I am prepared to receive submissions from the parties with respect to remedies at the earliest possible opportunity.

[384] The Registry Office will contact the parties in due course with further directions and to schedule the hearing (if necessary).

Signed by

Kirsten Mercer
Tribunal Member

Ottawa, Ontario

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2610/3416

Style of Cause: Jamison Todd v. City of Ottawa

Ruling of the Tribunal Dated: August 13, 2020

Date and Place of Hearing: August 21-25, 2017, September 27-29, 2017, November 1-2, 2017, December 19-21, 2017, January 29 & 31, 2018, February 1 & 2, 2018 and March 8 & 9, 2018

Ottawa, Ontario

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