Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2021 CHRT 9
Date: February 19, 2021
File No.: T2344/0319

Between:

Robert Philps

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Ritchie-Smith Feeds Inc.

Respondent

Decision

Member: David L. Thomas

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I. Background

[1] This is the decision in the matter of a complaint brought by Mr. Robert Philps (the Complainant) against his former employer, Ritchie-Smith Feeds, Inc. (the Respondent or Ritchie-Smith). The complaint was filed with the Canadian Human Rights Commission (the Commission) on December 13, 2016, and forwarded to the Tribunal on January 14, 2019. A preliminary motion was filed by the Respondent in 2019 and the Tribunal issued a ruling on October 28, 2019 (2019 CHRT 43) to guide the parties through the hearing process. The original hearing dates were postponed due to the Covid-19 pandemic. The hearing was eventually conducted on the Zoom videoconference platform over three days, from September 21-23, 2020.

[2] The Complainant gave evidence on his own behalf. His wife, Deb Philps, also testified to matters within her knowledge. The Respondent called Mr. Leon Wamsteeker, an employee of the Respondent, as their only witness. Although some memories may have faded with the passage of time, I was satisfied with the credibility of all of the witnesses. Their testimony was largely supported by the documentary evidence that was submitted as exhibits.

[3] Most of the facts in this matter are not contested. Mr. Philps is 63 years old. He gave evidence that he worked most of his career as a truck driver, and at the time of his termination in 2016, he had been employed by the Respondent for 22 years. The Respondent is a provider of livestock feed, supplying mainly dairy and poultry farms in the Fraser Valley region of British Columbia. Mr. Philps worked primarily as a truck driver for the Respondent, hauling specialized trailers with several bins containing different types of feed for customers. In addition to driving the truck, his duties involved various physical tasks associated with unloading the feed into the customers' storage facilities. Mr. Philps also testified that sometimes when he worked on a Saturday, he worked as a dispatcher for the Respondent. Mr. Philps usually worked 40 hours per week, beginning his workday at 5:00 am, and occasionally he was required to work overtime.

[4] In May of 2011, Mr. Philps was in a car accident on his way to work. Less than five kilometres from the Ritchie-Smith yard, his personal vehicle was struck and Mr. Philps was

injured. He testified that he did not go into work that day, but he did continue to work as much as he could, even though he had sustained some injuries. As a result of the accident, Mr. Philps had soft tissue damage in his neck which required surgery in January of 2015. Unfortunately, after the surgery, Mr. Philps developed chronic pain and was unable to return to work. As of May 13, 2015, the Respondent's insurance provider moved Mr. Philps to long term disability (LTD) benefits. Mr. Philps never returned to work with the Respondent after the neck surgery in January of 2015.

[5] On August 17, 2015, Mr. Wamsteeker, the Operations Manager at Ritchie-Smith, wrote a letter to Mr. Philps. The letter confirmed that Mr. Philps had been absent from work since January 6, 2015, that he had recently been granted LTD benefits and that to the best of the Respondent's knowledge, Mr. Philps would not be returning to work in the near future. The letter invited Mr. Philps to submit medical evidence containing a prognosis regarding his ability to return to work. The letter concluded by stating that if they did not hear from Mr. Philps within two weeks, they would make decisions on his continued employment based upon their understanding set out in the letter and without the benefit of any further information from him.

[6] Over the course of the next eight months, in response to this letter and several subsequent letters from the Respondent, Mr. Philps provided medical evidence from his treatment providers. The exchange of correspondence culminated in a letter from Ritchie-Smith dated April 6, 2016, terminating Mr. Philps' employment, stating, "…it appears that you will not be able to return to your previous work as a truck driver in the foreseeable future."

[7] Mr. Philps alleges that he was fired because of his disability, in violation of section 7 of the *Canadian Human Rights Act* (*CHRA* or the *Act*).

II. Issues

[8] There are three issues to be determined:

1. Has the Complainant established a prima facie case of discrimination, within the meaning of section 7(a) of the CHRA?

2. If so, has the Respondent established a valid justification under section 15 of the CHRA for its otherwise discriminatory actions?

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

III. Legal Framework

[9] The Complaint cites section 7 of the *CHRA* as the discriminatory practice in which the Respondent engaged, on the basis of Mr. Philps' disability. This section reads as follows:

> **7.** It is a discriminatory practice, directly or indirectly,
> (*a*) to refuse to employ or continue to employ any individual, or
> (*b*) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

[10] According to section 3 of the *CHRA*, disability is a prohibited ground of discrimination.

[11] A *prima facie* case 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." (*Ontario Human Rights Commission and O'Malley v. Simpsons-Sears,* [1985] 2 S.C.R. 536, at p. 558). Once a complainant establishes a *prima facie* case of discrimination, he is entitled to relief in the absence of justification by the employer (*Ontario Human Rights Commission v. Etobicoke*, [1982] 1 S.C.R. 202, at p. 208; *Lincoln v. Bay Ferries Ltd.,* 2004 FCA 204, at para. 18).

[12] To prove a *prima facie* case of discrimination, the Complainant is required to show:

A. that he had a characteristic protected from discrimination under the Act;

B. that he experienced an adverse impact with respect to employment; and

C. and that the protected characteristic was a factor in the adverse impact (Moore v. B.C. (Education), 2012 SCC 61 (Moore), para. 33.)

[13] A respondent can either present evidence to refute the allegation of *prima facie* discrimination, put forward a defence justifying the discrimination, or do both (see *Québec (C.D.P.D.J.) v. Bombardier Inc., (Bombardier Aerospace Training Center),* 2015 SCC 39, at para. 64). Where the respondent refutes the allegation, its explanation must be reasonable.

It cannot be a pretext to conceal discrimination (*Khiamal v. Canada,* 2009 FC 495, at para. 58).

[14] The *CHRA* provides very limited circumstances under which a prima facie case of discrimination may be justified. A respondent may rely on section 15(1)(a) of the *CHRA* which reads as follows:

> **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;

[15] Section 15(1)(a) of the *CHRA* is interpreted in light of the three-step test set out by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. BCSGEU,* 1999 CanLII 652 (SCC), (1999) 3 S.C.R. 3 ("*Meiorin*") at paragraph 54, which lists the requirements to establish that an occupational requirement is *bona fide*:

> [...]
>
> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job.
>
> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work related purpose, and;
>
> (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

[16] The *CHRA* provides further clarification for an employer relying on undue hardship to justify an act of discrimination. Specifically, section 15(2) of the *CHRA* reads as follows:

> 15(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.

[17] In the decision of *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 at para. 16, [2008] 2 SCR 561 (*Hydro-Québec*), the Supreme Court of Canada clarified that the accommodation standard in the *Meiorin* test is not one of impossibility:

> The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.

[18] In the present case, it is also important to note the distinction between a procedural right to accommodation versus a substantive right to accommodation. In Canada *(Human Rights Commissions) v. Canada (Attorney General and Bronwyn Cruden)*, 2014 FCA 131, (*Cruden*), the Federal Court of Appeal (FCA) clarified that there is no separate procedural right to accommodate under the *CHRA*. In the Tribunal's decision, Ms. Cruden was awarded damages and systemic remedies were ordered for the failure of the respondent to accommodate her procedurally, although in the end, the Tribunal found that the respondent was justified in their actions. The Federal Court and the FCA both rejected the Tribunal's conclusion that a separate failure of a procedural duty to accommodate could give rise to remedies by itself.

[19] The Tribunal considered the impact of *Cruden* recently in a similar case, *Christoforou v. John Grant Haulage Ltd.* 2020 CHRT 33 ("*Christoforou*"):

> [90] This does not mean that the procedure used by the employer when considering accommodation does not have any practical significance.
>
> > Indeed, in practical terms, if an employer has not engaged in any accommodation analysis or attempts at accommodation at the time a request by an employee is made, it is likely very difficult to satisfy a tribunal on an evidentiary level that it could not have accommodated that employee short of undue hardship. (*Cruden supra*, at para. 70, referring to *Koeppel v Canada (Department of National Defence)*, 97 CLLC 230-024, 32 CHRR D/107 at paras 212 – 228 (CHRT).

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> [121] As the Supreme Court of Canada found in *Meiorin*, while it may be ideal from the employer's perspective to choose a standard that is uncompromisingly stringent, if it is to be justified under human rights legislation, it must accommodate factors relating to the "unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship" (*Meiorin*, *supra* at para. 62).
>
> [122] To be clear, I am not finding that the respondent had to lower its safety standards. But employers have to look past their assumptions about individuals with disability-related restrictions who are not able to perform their job at 100%, even if temporarily. An employer is required to consider what an individual *could* do, and not simply reject outright the notion of any accommodation without even engaging in a meaningful attempt to work with the employee.
>
> [131] The respondent in Mr. Christoforou's case did not present sufficient evidence to support its claim that the complainant could not do any work at all for the respondent, whether in the yard, loading, or unloading, or even driving one or two days a week. According to Mr. Shepley, all of this work is safety-sensitive, and hence, too risky for the complainant. He also testified that there was no other job that Mr. Christoforou could have done at the relevant time. He could not work with non-unionised workers. He was not trained to work dispatch and was not qualified to work as a mechanic. Nothing more about the nature of the work, and why these options were not reasonable alternatives, was provided in support of the respondent's claims.
>
> [136] While the respondent did not accept that a shorter work week or fewer shifts were options when asked, in my view it also did not present sufficient evidence to support its proposition that these were not viable options. It again referred to the potential cost to the business if the complainant was involved in an accident or if it lost its insurance. It made no reference to specific attempts at accommodation that it tried or considered. In my view, its evidence on the impact on its business is minimal and speculative and falls short of what is required to prove undue hardship.

IV. Analysis of Issue #1 - Has the Complainant established a prima facie case of discrimination, within the meaning of s. 7(a) of the CHRA?

[20] Although the original Complaint to the Commission indicated discrimination under section 7 of the *CHRA*, Mr. Philps did not lead evidence suggesting, nor did he present arguments alleging, discrimination under section 7(b) (adverse differentiation in the course

of employment). Therefore, this decision is only examining allegations under section 7(a) of the *CHRA*.

[21] I have found Mr. Philps' evidence supports the finding, on a balance of probabilities, that a *prima facie* case of discrimination did occur, and in fact the Respondent conceded this point. Mr. Philps clearly had a disability, he was terminated from his job, and the disability was a factor in his termination. I have found that Mr. Philps' firing was prima facie discriminatory.

[22] Once a *prima facie* finding of discrimination is made, the onus shifts to the Respondent to prove that there was a legal justification for its actions. Therefore, the main question in this case is whether the Respondent can prove its conduct was justified.

V. Analysis of Issue #2 - Has the Respondent justified its actions under s. 15(1)(a) of the *CHRA* by establishing that the standards for Mr. Philps' position was a *bona fide* occupational requirement (BFOR)?

[23] The Respondent relied on the testimony of Mr. Wamsteeker for its BFOR defense. Mr. Wamsteeker oversees three main sections of the company: Transportation, Feed Production, and, Maintenance. At the time of his testimony, the Transportation group included 26 truck drivers like Mr. Philps. The specialized trucks of the Respondent contain 10 or 11 separate bins to carry different types of feed. Each bin may contain up to 3 tons of feed. Mr. Wamsteeker's evidence was that, in addition to driving truckloads of feed to customer farms, the truck drivers were required to perform a number of physically demanding tasks related to the loading and unloading of the feed bins.

A. Did the Employer adopt the standard for a purpose rationally connected to the performance of the job?

[24] Mr. Philps testified that on most days, his truck was already loaded with the feed that he would deliver to customer farms. If the truck was not loaded, it had to be driven into the loading area and the driver would be required to climb up to a platform about 13 feet high. The lids of the bins would have to be removed and after the feed was loaded, samples would be taken and the bin lids re-secured, which requires bending down and some physical lifting.

[25] At the delivery point on customer farms, a driver would be required to climb farm ladders to open storage bins and take stock of the customer's inventory using various physical methods. The unloading of the feed involved a sucker hose from the truck, using an auger system, which included opening the doors at the bottom of the bins, which would require some force due to the weight of the feed above. After unloading the feed, the driver would climb the truck ladder and use an air hose to blow out the bin and sometimes the flushing process necessitated the driver carrying a 50 pound bag of grit.

[26] There was also testimony from Mr. Philps and Mr. Wamsteeker that some customer farms did not give the trucks a wide berth for maneuvering. As such, it could be tricky for the driver to turn the truck in a tight area, while avoiding people and structures on the farm.

[27] A Physical Demands Analysis document was entered as an exhibit at the hearing. The document set out the various manual handling tasks and other critical job demands for the position of truck driver at Ritchie-Smith. The tasks included frequent low-level lifting of 20 pound loads, waist level lifting of the sucker hose (30 pounds), frequent above-shoulder lifting of 25 pound loads and handling 50 pound bags of grit.

[28] Based on the evidence at the hearing, I am satisfied that the physical demands, beyond driving the truck, appeared to be consistent with the nature of the Respondent's business, and therefore rationally connected to the position. Mr. Philps' testimony about the job requirements was largely consistent with the Physical Demands Analysis, although he did say that he was very seldom required to carry the 50 pound bags of grit. Nevertheless, the physical demands listed were part of Mr. Philps' position and there was nothing in the evidence that led me to believe these standards were not rationally connected to the job of truck driving for the Respondent.

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

[29] There was nothing in the evidence to suggest that the standards were created in bad faith. I am persuaded that the job requirements were necessary for the purpose of furthering the goal of carrying out its business and ensure drivers were fit to safely carry out the job.

[30] As such, the first two prongs of the *Meiorin* test are satisfied.

[31] The third prong of the *Meiorin* test asks whether the employer's work-related objectives could be met through the accommodation of the affected employee. This invokes section 15(2) of the *CHRA* and is the main point in contention in this complaint. The crux of this decision is whether the Respondent had discharged its duty to accommodate Mr. Philps to the point of undue hardship when he was terminated.

C. Was the standard reasonably necessary to accomplish its purpose or goal because it was impossible to accommodate Mr. Philps without imposing undue hardship?

[32] In analyzing this aspect of the *Meiorin* test, I will first review the medical evidence regarding Mr. Philps' condition.

[33] From August 2015 to April 2016, Mr. Philps provided ten separate letters and reports from his medical treatment providers regarding his medical condition and fitness to return to work. Not all of it was consistent. The first letter from his General Practitioner Physician, Dr. B.J. Turchen, was sent to Mr. Wamsteeker on August 25, 2015. The letter confirmed that Mr. Philps still had chronic pain in his neck which was exacerbated by repetitive heavy loads or activities. Dr. Turchen suggested it would be reasonable for Mr. Philps to start a gradual return to work, as soon as the following week, with 3 half-days per week to allow him to continue physiotherapy. Dr. Turchen concluded, "Due to the heavy activity nature that he (Mr. Philps) has described to me that his previous job entails I am unsure if he will be able to return full time to that position, but if that fails to be possible, other less strenuous activities within your company that he is capable of could be a consideration."

[34] Dr. Turchen's letter was partly based on a report from Mr. Philps' physiotherapist, Karolyn Chiasson, dated August 20, 2015, which was also forwarded to the Respondent. Ms. Chiasson confirmed that Mr. Philps continued to be restricted in his neck movements and that he would likely always be so. Regarding his work, Ms. Chiasson was concerned about Mr. Philps turning his head, sitting for prolonged periods, and holding his arm up. She concluded that Mr. Philps might need to try a graduated return to work with a gradual increase in hours to be successful.

[35] Ritchie-Smith took no further steps until Mr. Wamsteeker wrote a second letter to Mr. Philps dated November 18, 2015 acknowledging receipt of the letters from Dr. Turchen and Ms. Chiasson. Mr. Wamsteeker expressed concern that returning Mr. Philps to work on any basis would expose him to further injury. He also noted that the Respondent had not been able to identify any other position at Ritchie-Smith where this would not be the case. Mr. Philps was again invited to provide updated medical prognosis regarding his ability to return to work.

[36] In response, Mr. Philps provided a letter from a neurosurgeon, Dr. Navraj Heran, whom he consulted upon the recommendation of Ms. Chiasson. Dr. Heran noted the numbness in Mr. Philps' right hand and suggested that certain procedures could be undertaken. This led to a consultation with Dr. Owen Williamson of the Jim Pattison Pain Clinic on December 2, 2015.

[37] Mr. Philps also provided Mr. Wamsteeker with a new letter from Ms. Chiasson dated December 7, 2015. Based on the reports from the other doctors, Ms. Chiasson stated she felt that Mr. Philps' current physical status was not permanent. However, she noted he was still not ready to return to his full pre-injury employment. She suggested if lighter duties and decreased hours were possible, he might be able to return to work on some modified basis. Ms. Chiasson concluded by saying she was "reluctant to say his physical function has plateaued at this time."

[38] Dr. Turchen wrote to Mr. Wamsteeker in a letter dated December 14, 2015 and reported the following:

> Mr. Philps was seen recently by his neurosurgeon, Dr. Heran, and a pain specialist, Dr. Williamson. There are indications that he may need to have further surgery to stabilize his neck and decrease his pain so there is some hope that he will be able to recover from the pain. He is extremely anxious to return to his job but as I understand it, there are no other jobs besides that one available to him at Ritchie Smith for him to be able to return on an earlier basis as he cannot do the heavy opening of bins that are required in his delivery. Perhaps if there was an airlock that could be utilized instead of a cranking system, he would be able to return earlier. In any event, he needs to have further investigations and possible treatment before he could return to work with the heavy manual labour and the time frame of this is uncertain.

[39] Ritchie-Smith next wrote to Mr. Philps on February 16, 2016. This letter confirmed that the evidence from Mr. Philps' treatment providers led the Respondent to conclude his ability to return to work in the near future remained unchanged and any future changes remain unclear. In the same letter, Mr. Wamsteeker advised Mr. Philps that his employment was being terminated. Nevertheless, the he invited Mr. Philps to submit any documentation supporting a contrary conclusion by no later than February 29, 2016.

[40] In response to this letter, Mr. Philps sent Mr. Wamsteeker an undated, handwritten fax note advising that he was still receiving physiotherapy and that he was hopeful he would be returning to work. Mr. Philps also wrote:

> 'It seems premature that my job is being terminated at this time because I am still undergoing treatment. Also we have not discussed any accommodation that can be made to assist in my return to work.
>
> I appreciate your patience in this matter and look forward to communicating with you."

[41] After the February 16, 2016 letter terminating Mr. Philps' employment, Mr. Wamsteeker testified that the union intervened on Mr. Philps' behalf and his employment was temporarily re-instated.

[42] In the meantime, Mr. Philps asked his treatment providers to send another set of letters to Ritchie-Smith. Ms. Chiasson provided a letter dated February 23, 2016 noting "objective measured improvements to his resisted strength of his left rotator cuff, which is promising." Ms. Chiasson went on to write:

> "He continues to not be able to return to his pre-injury job but if there were the ability by the employer to make accommodations, he would be able to return to lighter duties and a (sic) decreased hours. The medical information is not currently stating that he will never be able to return to his pre-injury job, but rather is noting that further intervention is still ongoing."

[43] Ritchie-Smith responded to the above submission by writing a further letter to Mr. Philps dated March 21, 2016. In this letter, Mr. Wamsteeker stated that Ms. Chiasson's letter did not satisfy their request. Specifically, the employer was seeking a letter from Mr. Philp's physician setting out his prognosis for returning to work. The letter continued:

> "We are providing you one last opportunity to forward us written medical evidence by your Physician or Specialist by March 31, 2016 that outlines your current medical situation, and in particular, an assessment of your ability to return to work in the very near future.
>
> If medical evidence is not received we will proceed with non-culpable termination as outlined in the February 16, 2016 Absence from Work letter."

[44] In response to Mr. Wamsteeker's letter, a final set of submissions were provided to the Respondent by Mr. Philps' treatment providers. These were a letter from Dr. Turchen dated March 30, 2016, a letter from Ms. Chiasson dated March 30, 2016, and two reports from Dr. Williamson, the specialist at the Jim Pattison Pain Clinic, dated December 3, 2015 and March 30, 2016.

[45] Dr. Turchen's letter confirmed the physiotherapist's conclusion that Mr. Philps was still unable to do his job as described, including rotating levers against 3 tons of pressure and other manual activities. Dr. Turchen made a suggestion that the installation of "air gates" might be helpful in allowing Mr. Philps to return to work at a lower level of physical demand. However, Dr. Turchen concluded his letter with the observation that, "I do not think he is fit to return to his previous job at this point and it is problematic whether or not he will be able to in the future."

[46] The March 30, 2016 report of Dr. Williamson included the following conclusion:

> "At this stage, I think it is unlikely that Mr. Philps will be able to return to his previous occupation as a truck driver in the foreseeable future, and will recommend that Mr. Philps undergo functional capacity and vocational assessment with a view to possible retraining for future employment."

[47] The next correspondence from the Respondent was Mr. Wamsteeker's letter dated April 6, 2016 terminating Mr. Philps' employment. The letter acknowledged receipt of the recent reports from the treatment providers and stated:

> "Regrettably, based upon our review of the most recent information, it appears that you will not be able to return to your previous occupation as a truck driver in the foreseeable future. In light of that, we have concluded, as outlined in our letter of March 21, 2016, that it is necessary to terminate your employment effective April 6, 2016."

[48] The question about the Respondent's conduct, based on the information on hand at the relevant time, relates to the third part of the test in *Meiorin* and whether it can be demonstrated that it would be have been impossible to accommodate Mr. Philps without imposing undue hardship.

[49] In the pre-hearing motion, the Respondent questioned whether the Tribunal would accept as truth the content of letters from the complainant's treating health professionals, where it was proposed they would be introduced into evidence without any direct testimony by those professionals. The letters were introduced as exhibits and none of the authors were called as witnesses at the hearing. Of particular concern to the Respondent were certain recommendations made by the professionals about Mr. Philps' possible return to work, which included some assumptions about the workplace conditions. This included the recommendation of Dr. Turchen that Ritchie-Smith consider the installation of air gates on its trucks to alleviate some of the physical effort required of Mr. Philps.

[50] The Respondent submitted the Physical Demands Analysis for the position of truck driver and Mr. Wamsteeker gave direct evidence of the physical demands of the position. He testified that even with an air lock, Mr. Philps would still have been required to sit for long periods, execute regular shoulder checks, climb a ladder, and perform other physically challenging tasks. I prefer the testimony of the Respondent on this point as being more informed and comprehensive. I am not satisfied that the installation of air gates alone would have overcome the physical limitations which had prevented Mr. Philps from returning to his position.

[51] Mr. Philps testified that during the whole period of time he was off work after his surgery, no one from Ritchie-Smith ever called him or spoke to him directly. He was never asked to undergo an independent medical evaluation or to complete any employer forms confirming his physical limitations. He only received the written letters from Mr. Wamsteeker.

[52] In *Cruden*, the Federal Court of Appeal reminded the Tribunal that employees are not entitled to a standalone procedural right to accommodation under the *CHRA*. It would have been a more compassionate approach to reach out to Mr. Philps by telephone, or to

have him come into the office in person, especially when his termination was under contemplation. It would have made sense for the Respondent to request Mr. Philps undergo an independent medical examination to measure his capabilities against the Physical Demands Analysis document and to complete the assessment form attached thereto. By not engaging in a more rigorous accommodation analysis, Ritchie-Smith ran the risk of leaving a very thin evidentiary trail to support the conclusion it could not accommodate Mr. Philps short of undue hardship. (see *Cruden* at para. 70.)

[53] I am persuaded that Mr. Philps was not able to return to work as a truck driver Ritchie-Smith at the time he was terminated. The physical demands of the position, described by both Mr. Philps and Mr. Wamsteeker, confirmed that there were several aspects of the job that required physical demands that were beyond Mr. Philps' capacity. The specific limitations described by Ms. Chiasson suggested that Mr. Philps did not even have the capacity to do certain tasks limited to driving the truck, such as turning his head to do shoulder checks, or sitting for prolonged periods of time.

[54] Although Dr. Turchen initially suggested that Mr. Philps would be ready for a graduated return to work, the totality of the evidence confirms this was an unrealistic proposition. The position required the driver to perform a number of demanding physical tasks. The medical reports from his treatment providers suggested a certain degree of fragility and it was reasonable to conclude that Mr. Philps would risk re-injuring himself, even if working only half-days. Furthermore, given physical limitations that would impede the safe driving of a very large tractor trailer, it was also reasonable for the Respondent to conclude that Mr. Philps could have been a risk to others at that time. Although Mr. Philps did testify in re-examination that he was able to perform shoulder checks when driving, the letter from Ms. Chiasson dated August 20, 2015 noted that Mr. Philps neck movements were restricted and were likely always to be. Based on this evidence at the time, it was not unreasonable for the Respondent to conclude the Mr. Philps' operation of a tractor trailer could be precluded by the injury.

[55] The question remaining is whether or not Ritchie-Smith could have accommodated Mr. Philps in another position within his physical capabilities. This is more difficult to

determine because the Respondent did not provide much in the way of evidence to show that they had made actual efforts to try to accommodate Mr. Philps.

[56] Although a functional capacity and vocational assessment of Mr. Philps was recommended by Dr. Williamson, there is no evidence this was ever done. Therefore, I am left to rely solely on the evidence of Mr. Wamsteeker that he knew there was no other position in which Mr. Philps could be trained or accommodated. Having spent 15 years as the Operations Manager at Ritchie-Smith, I was satisfied that Mr. Wamsteeker had an in-depth understanding of most of the positions and their requirements. However, his experience does not speak to a complete knowledge of the capacity and vocational potential of Mr. Philps and it would seem somewhat reckless for a manager to dismiss a 22-year employee without having conducted a personalized assessment first.

[57] In his cross-examination, Mr. Philps stated he wanted to come back to work and that he would work in another position, like sales. At some point he submitted to his employer a list of possible jobs he could do, but he couldn't recall them at the hearing.

[58] Later in cross-examination, Mr. Philps was asked to identify what other jobs, in the plant, or in the office, that he could have performed given his experience and physical limitations. Mr. Philps suggested the position of afternoon or night supervisor. However, Mr. Philps was forced to admit that the afternoon and night supervisor positions did not exist at the time of his termination.

[59] Mr. Philps gave evidence that when he worked on Saturdays, he worked as a dispatcher, which was different from being a truck driver, and was within his post-operation physical limitations. The Respondent gave evidence that the regular dispatcher position, held by another employee for the Monday to Friday shift, required knowledge of a computer inventory program, for which Mr. Philps had no training or experience. However, Mr. Philps countered that the dispatcher work he performed on Saturdays did not require him to use the computer.

[60] The problem with this line of questioning was that it implied the onus was on Mr. Philps to come up with ideas and suggestions for his possible accommodation. However, I note that the Respondent must demonstrate that it took reasonable steps to

accommodate the employee without suffering undue hardship. The onus is on the employer, as the employer is in possession of the necessary information to show undue hardship. The employee, will rarely, if ever, be in a position to show its absence (*Simpsons-Sears*, *supra*, at para. 28). Employees have an obligation to accept reasonable accommodation and cannot expect a perfect solution (*Central Okanagan School District No. 23 v. Renaud*, [1992], 2 S.C.R. 970 ("*Renaud*"), at p.995).

[61] The Respondent relied solely on the evidence of Mr. Wamsteeker that Mr. Philps could not be accommodated in any other positions at Ritchie-Smith. Mr. Wamsteeker also confirmed that he did not have any discussions with Mr. Philps about any other positions at Ritchie-Smith where he might be accommodated or for which he could be trained.

[62] As noted above, there is a distinction between a procedural and substantive duty to accommodate. While *Cruden* establishes there is not a separate right for procedural accommodation at the federal level, Ritchie-Smith has failed to convince me that they were unable to accommodate Mr. Philps in some fashion without incurring undue hardship.

[63] Mr. Philps' physical limitations were never measured against the criteria in the Physical Demands Analysis document. His doctors were not requested to complete the questionnaire in that document. Mr. Philps was never requested to go for an independent medical assessment by the employer. Mr. Wamsteeker, nor anyone else at Ricthie-Smith, ever called Mr. Philps to have a discussion about what other opportunities might exist for him. In short, the procedures one would expect a sophisticated employer to follow were not followed in this case. The Respondent's conclusion, that they were unable to accommodate Mr. Philps to the point of undue hardship, was speculation on their part in the absence of any documented efforts to determine that. (See *Christoforou, supra*, at para. 136.)

[64] In my view, Ritchie-Smith has not provided sufficient evidence to convince me, on a balance of probabilities, that accommodating Mr. Philps in some way would have caused them undue hardship. It was not the burden of Mr. Philps to design his accommodation plan. He gave evidence that he was at least capable of performing the dispatcher's job on Saturdays. In response, Ritchie-Smith gave no evidence that offering this position would push the employer to a point where it would be an undue hardship.

[65] Though it is not germane to my findings, I must add in obiter that I was confused as to why Ritchie-Smith acted in such haste to make a final determination about Mr. Philps' condition and his continued employment. During the hearing, I asked Mr. Wamsteeker why he was seeking to make a final decision about Mr. Philps' continued employment as early as August 2015, only about 7 months after Mr. Philps became disabled. Mr. Philps had been an employee of the company for 22 years. He was then receiving LTD payments from the Respondent's insurer and they were likely to continue until at least May of 2017. My question to Mr. Wamsteeker was essentially, what was the hurry to make a final determination about Mr. Philps at that particular point in time?

[66] Mr. Wamsteeker's response was that he wrote his letter in August 2015 because he had not heard from Mr. Philps and he relied on employees to keep him updated. There was no particular trigger, he testified. He was just checking in to see how Mr. Philps was feeling.

[67] However, Mr. Wamsteeker's letter did suggest that the employer was already contemplating termination, just after 7 months of disability. The letter warned that if Mr. Philps' did not respond with medical information within two weeks, they would make further decisions about his "continued employment" based on their understanding he would not be returning to work in the near future, and without the benefit of any further information from him.

[68] I also asked Mr. Wamsteeker if there was any pressure to formally terminate Mr. Philps in February of 2016? Why terminate him after 13 months as opposed to, say 23 months? Mr. Wamsteeker said he could not think of a particular reason. To him, the medical information at that point looked like there was not likely to be a "positive outcome" for Mr. Philps.

[69] Ritchie-Smith has not satisfied me that they took Mr. Philps' accommodation request seriously. They presented no evidence of specific attempts at accommodation that they tried or seriously considered. There is a dearth of evidence about their efforts to accommodate at all, let alone to the point of undue hardship. In my view, Mr. Wamsteeker's blanket conclusions were speculative and fall short of what is required to prove undue hardship. Accordingly, I must find liability in this regard.

VI. What remedies should be awarded flowing from the discrimination?

[70] Remedies under the *Act* are awarded pursuant to subsection 53(2). I will now determine which remedies the Complainant is entitled to, if any, based on the conclusion that the Complaint of discrimination with respect to disability was substantiated.

A. Lost Wages and expenses (s. 53(2)(c))

[71] In Mr. Philps' Statement of Particulars (SOP), he seeks lost wages and benefits from April 6, 2016 to the date of the hearing. The difficulty with his claim for lost wages is that there is little evidence before the Tribunal about what Mr. Philps' would have done for the Respondent, had he been accommodated and allowed a return to work. Mr. Philps testified that he had tried to work part time as a driver for Bradner Farms in 2017. That employment was not wholly successful, in that Mr. Philps could not drive two consecutive days because of his disability and he ceased working there after a short time.

[72] This knowledge of Mr. Philps' continued limitations was acquired after his termination. While it does not assist the Respondent in explaining their conduct at the time of termination, it does inform my decision on remedy. (See *Adga Group Consultants Inc. v. Lane, 2008 CanLII 39605 (ON SCDC)).* Mr. Philps was clearly not able to return to work as a full-time truck driver. Therefore, it would not be appropriate for the Tribunal to award Mr. Philps lost wages for that position.

[73] The following passage in Professor Waddams' text, The Law of Damages (at 13-30), which was cited with approval by Evans JA, in Public Service Alliance of Canada v. Canada Post Corporation, 2010 FCA 56, affirmed by the Supreme Court of Canada in 2011 SCC 57 is particularly apt in this context:

> If the amount [of a loss] is difficult to estimate, the tribunal must simply do its best on the material available, though of course if the plaintiff has not adduced evidence that might have been expected to be adduced if the claim were sound, the omission will tell against the plaintiff.

[74] Unfortunately, there was little evidence before the Tribunal about how Mr. Philps might otherwise have been accommodated. It does appear, though, Ritchie-Smith could

have at least accommodated Mr. Philps in a permanent part-time position as the dispatcher on Saturdays.

[75] In the absence of any other evidence, I make an award for lost wages equivalent to Mr. Philps working one day per week in the Saturday dispatcher position. The last day of hearing was September 23 2020. I am satisfied of a causal link between the discriminatory practice and the wage loss up until this date. However, Mr. Philps did not specify a future loss claim for the post-hearing period, nor did he provide any evidence to potentially substantiate such a claim. The Tribunal is therefore unable to make any compensation Order for a period beyond the hearing, and in accordance with the principles outlined in *Chopra* 2007 FCA 268 (*Chopra)* this is the end date of the compensation period.

[76] The lost wages are calculated on the basis that Mr. Philps normally worked 40 hours per week over the course of 4 days on an alternating schedule. Therefore, my calculation is based on one 10-hour day being worked per week from the date of termination until the date of the hearing. The hourly wage increased on July 1st in most years, from $31.52 on the date of termination, to $32.15 as of July 1, 2016, to $32.79 as of July 1, 2017, and to $33.45 as of July 1, 2018 to the date of hearing.

[77] From date of termination to June 30, 2016, I conclude the lost wages to be 14 days at $315.20 per day, or $4,412.80. For the next period to June 30, 2017, I calculate the wages to be 52 days at $321.50 per day, or $16,718. For the next period to June 30, 2018, I calculate the wages to be 52 days at $327.90 per day, or $17,050.80. For the remaining period, from July 1, 2018 to the date of the hearing, I calculate the wages to be 116 days at $334.50 per day, or $38,802. For the entire period, the total gross lost wages is $76,983.60.

[78] When calculating lost wages, it is appropriate for the Tribunal to deduct sources of income actually received by a complainant, such as LTD payments and other employment income earned in an effort to mitigate damages. In this case, there are two amounts to be deducted from the gross lost wages amount. Mr. Philps received LTD payments of $2,500 per month from April 6, 2016 to May 6, 2017. This total amount is $32,500. Secondly, Mr. Philps earned employment income of $8,296 in 2017. I believe both these amounts should be deducted from the gross lost wages calculation. While I appreciate the potential

for an argument that LTD payments and income should be deducted only in 2016 and 2017, the net difference in the calculation is not significant and I prefer to keep the calculations simple. Therefore, the adjusted lost wages award is $36,187.60. I am prepared to increase this amount by 6% for vacation benefits. The amount including vacation is $38,358.86.

[79] In his SOP, Mr. Philps also requested a "grossing up" of taxable amounts to off-set negative tax consequences. As the lost wages amount will attract statutory deductions and taxes, the taxes will be higher if the lost wages are paid in all in one year (2021), as opposed to over time. Accordingly, the Respondent shall pay to Mr. Philps an additional amount sufficient to cover any income tax liability he may incur as a consequence of receiving payment in this fashion.

[80] Mr. Philps also seeks compensation for out-of-pocket expenses that would have been covered by his benefits plan, such as dental care, medical prescriptions, Medical Services Plan payments, doctors' reports and physiotherapy treatments. I am prepared to make an order for those amounts that are properly claimed, from June 2016 to the date of the hearing. Counsel for both parties agreed at the hearing that if I made such an order, they would attempt to determine the correct amount between themselves, but that I would retain jurisdiction for six months from the date of this decision to resolve the matter, if need be.

B. Compensation for Pain and Suffering (s. 53(2)(e))

[81] Mr. Philps claims he suffered anger and upset because his termination, after 22 years of employment, came "out of the blue." Ms. Philps also gave evidence that her husband was shocked and disappointed by the unexpected dismissal. He was sad and disappointed as he felt he had been a loyal employee to the company for all those years. Mr. Philps asks the Tribunal to award him the maximum amount permitted for pain and suffering under section 53(2)(e) of the *CHRA*, which is $20,000.

[82] I am convinced that Mr. Philps should receive some compensation under section 53(2)(e) for the effects of the discriminatory behaviour. Mr. Philps was a long-term employee of the Respondent and on LTD benefits when the company made the decision,

with no clear explanation of the timing, to terminate him. It was foreseeable that Mr. Philps would be surprised, shocked and saddened by his employer's decision. I find it was a particularly cold way to treat a 22-year employee, without so much as a meeting or a telephone conversation. However, I do not find this to be a case where an award in the higher range would be appropriate. Accordingly, the Tribunal orders Ritchie-Smith to pay Mr. Philps the sum of $8,000 for pain and suffering under section 53(2)(e) of the *CHRA*.

C. Compensation for Willful and Reckless Discrimination (s. 53(3))

[83] Mr. Philps argues that he should also be awarded the maximum $20,000 permitted under section 53(3) of the *CHRA* for the willful and reckless conduct of the Respondent. Mr. Philps points out that no one at Ritchie-Smith ever called him to discuss accommodation, there was no discussion about alternate positions he might have returned to, and there was never any attempt at a return-to-work on a gradual basis.

[84] It was surprising that an employer like Ritchie-Smith did not conduct itself with more diligence when it came to the termination of a 22-year employee. They did not conduct an independent medical assessment. They did not have the Complainant's physician complete the assessment form attached to the Physical Demands Analysis. They never conducted a functional capacity and vocational assessment as recommended by Dr. Williamson. As noted above, the dearth of evidence to support efforts for accommodation to the point of undue hardship is what has led to a finding of discrimination in this case.

[85] I find that Ritchie-Smith handled Mr. Philps' termination in a reckless manner, without due regard to what is expected under the *CHRA*. It is difficult to say if the conduct was deliberate. However, the termination in the absence of direct communication and effort to accommodate certainly suggests a degree of recklessness. Accordingly, the Tribunal makes an award of $3,000 under section 53(3) of the *CHRA.*

D. Interest (s. 53(4))

[86] Section 53(4) of the CHRA permits an award for interest. I am guided by Rule 9(12) of the Tribunal's *Rules of Procedure* in ordering that Mr. Philps is entitled to interest on the

compensation ordered, from April 6, 2016 to the date of payment. This interest shall be simple interest calculated on a yearly basis, at a rate equivalent to the Bank of Canada rate (monthly series) set by the Bank of Canada for the relevant period. In no case shall the accrual of interest on the award made under subsection 53(2)(e) result in a total award that surpasses the statutory maximums prescribed therein.

E. Systemic Remedy

[87] Mr. Philps also requested an order for the Respondent to establish a policy on how to discharge its duty to accommodate employees who have a temporary or permanent physical disability. I do not think such an order is necessary. The adverse finding in this decision will serve as a reminder of those obligations. Ritchie-Smith is represented by very able counsel who will undoubtedly assist them with properly discharging their duties in the future.

VII. Conclusion

[88] To summarize this decision, I find that the Respondent has not presented sufficient evidence to convince me, on a balance of probabilities, that they could not accommodate Mr. Philps' physical disabilities to the point of undue hardship.

[89] I award Mr. Philps the following remedies:

A. $38,358.86 for lost wages, subject to tax and statutory deductions under section 53(2)(c), along with a gross-up amount sufficient to cover any additional income tax liability arising from the payment of these monies in a lump sum

B. the sum of $8,000 for pain and suffering under section 53(2)(e) of the CHRA;

C. the sum of $3,000 for reckless conduct under section 53(3) of the *CHRA;*

D. an award of interest under section 53(4) of the CHRA;

E. out-of-pocket medical expenses, claimed from June 1, 2016 to September 21, 2020. Counsel for both parties will attempt to determine the correct amount between themselves.

VIII. Retention of Jurisdiction

[90] It is the Tribunal's expectation that the parties will attempt to negotiate the resolution of any dispute that may arise in connection with the remedies ordered. That said, if the parties fail to resolve any such dispute, the Tribunal hereby retains jurisdiction to decide any dispute that may arise with respect to the quantification or implementation of any of these remedies. A party seeking the Tribunal's assistance must serve and file a notice to this effect no later than six months following the date of the present Decision. If the Tribunal does not receive notice within this time limit, the retention of jurisdiction order will be spent and this Decision will be final in all respects.

Signed by

David L. Thomas
Tribunal Member

Ottawa, Ontario
February 19, 2021

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2344/0319

Style of Cause: Robert Philps v. Ritchie-Smith Feeds Inc.

Decision of the Tribunal Dated: February 19, 2021

Date and Place of Hearing: September 21 to 23, 2020

By videoconference

Appearances:

Fiona H. McFarlane, for the Complainant

No one appearing, for the Canadian Human Rights Commission

Donald J. Jordan and Jessica S. Fairbairn, for the Respondent