Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2021 CHRT 26
Date: August 16, 2021
File No.: T2262/1718

Between:

Goran Petrovic

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

TST Overland Express

Respondent

Decision

Member: Alex G. Pannu

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I. OVERVIEW

[1] Goran Petrovic, the complainant, was born in Bosnia and Herzegovina and immigrated to Canada nearly thirty years ago. He worked as a commercial tractor trailer driver from 2010 until 2014 with TST Overland, the respondent. The respondent is a federally regulated trucking company which provides cross-border transportation services throughout Canada and parts of the United States. Mr. Petrovic's job involved pick up and deliveries, driving a truck locally as well loading and unloading the truck of sometimes heavy loads. The job was unionized and Mr. Petrovic belonged to Unifor Local 114.

[2] This case turns on whether it was discriminatory for the respondent to deny the complainant's request to return to work with limitations following a workplace injury, and ultimately to refuse to continue to employ him. The complainant argues that his employer did not do enough to try to accommodate him. The respondent says it could not have accommodated the complainant short of undue hardship. It also alleges that the complaint amounts to an attempt to relitigate issues already raised and decided in the course of a grievance; and that to allow it would be an abuse of process.

[3] Both parties were represented by counsel at the hearing. The hearing was held in Vancouver, British Columbia and took place over multiple days. The Canadian Human Rights Commission ("Commission") which investigated and referred the matter to the Tribunal for adjudication did not participate at the hearing.

[4] At the hearing the complainant testified and called on Ranko Reskovic, a close friend who assisted him in many of his letters to the respondent to testify. The complainant also called Fiona Fleming, who wrote an opinion report on an earlier functional capacity evaluation on Mr. Petrovic. The respondent subpoenaed Robert Gander, who wrote the functional capacity evaluation and Gord McGrath, Unifor Local 114's president to testify. The respondent also called its head of human resources Kim Glenn to testify.

[5] Witness testimony and documentary evidence is integrated with my analysis of the issues and applicable legal authorities.

II. DECISION

[6] The complaint is not allowed. The complainant showed that the respondent's denial of his request for accommodation and refusal to continue to employ him constitute a prima facie case of discrimination on the ground of disability. However, the respondent established that it could not accommodate the complainant without suffering undue hardship.

[7] As I found that the respondent met its burden to prove that its otherwise-discriminatory actions were justified, it was not necessary to consider whether the complaint was duplicative of a separate grievance process and should be dismissed on that basis.

III. FACTUAL CONTEXT

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

Factual overview

[9] Goran Petrovic is originally from Bosnia. He emigrated from Bosnia to Serbia in 1992 because of the civil war. He immigrated to Canada in 1996, first to Quebec City and then Vancouver. English is not his first language. He studied English when he first arrived, completing level 3 (of 5) in Language Instruction for Newcomers to Canada. During the time of the events which form the basis of his complaint, he was not fluent in written or spoken English. Mr. Petrovic gave his oral testimony during the hearing through a translator.

[10] After working at several jobs in Vancouver, Mr. Petrovic obtained his Class 1 driver's license and worked as a truck driver between 2005-2010. He suffered a back injury in 2009 but did not report it to WorkSafe BC.

[11] Mr. Petrovic started work at TST Express in March 2010 as a short-haul truck driver. At first, he worked an afternoon to evening shift, driving a truck for deliveries to local Home Depots, the respondent's client. He did not have to do any lifting. About a year later, he assumed a new shift starting in the morning to pickup and deliver goods in three local cities. This job required him to load and unload goods on pallets using a manual pallet jack. The loads could be up to 2,000 pounds.

[12] In August 2010, while working for TST, Mr. Petrovic was injured lifting a bridge for a loading dock. He developed severe back pain in his lower lumbar area, which radiated down both his legs and into his right anterior thigh. He was unable to work for two days. He again did not make a claim with WorkSafe BC. In a subsequent incident in August 2011, Mr. Petrovic was injured at work while loading and unloading his truck, resulting in lower back pain with radiation to his legs. This time he reported the injury to TST and WorkSafe BC. Mr. Petrovic suffered another back injury in May 2012, again while loading and unloading his truck. He again reported the injury to TST and WorkSafe BC.

[13] Over the next few months, Petrovic's back pain worsened, and he suffered from intermittent exacerbation of back pain, which prompted a referral to a neurosurgeon. As a result of this referral, he chose a surgical option and had back surgery in July 2012.

[14] Between May 2012 and April 2013, Mr. Petrovic remained on medical leave from TST while receiving short-term disability benefits from the respondent's insurer.

[15] Between June and November 2012 Mr. Petrovic unsuccessfully sought benefits from WorkSafe BC. While finding Mr. Petrovic to be injured, WorkSafe BC ruled that he did not suffer the injury during the course of his employment with TST.

[16] In April 2013, the complainant went to see his manager at TST, Jim Stanworth, to discuss his return to work. Mr. Petrovic provided a note from his family physician which the respondent deemed inadequate. Mr. Petrovic's physician then completed the respondent's standard Work Capabilities Form (WCF) indicating that he could gradually return to work as a truck driver with the following restrictions: local driving, no heavy lifting, and no pushing, pulling or carrying.

[17] On May 6, 2013 Mr. Stanworth wrote to Mr. Petrovic saying upon review of the medical information provided by his doctor that Mr. Petrovic remained medically incapable of resuming his full-time driving position. The letter went on to say that TST was currently unable to offer safe and suitable accommodation with his current medical restrictions.

[18] Following the completion of the disability claim, Mr. Petrovic was on an unpaid leave of absence from TST. Mr. Petrovic then received Employment Insurance benefits for a few

months, then provincial income assistance payments. Income assistance was replaced with provincial disability benefits when Mr. Petrovic was designated as a person with disabilities.

[19] On May 9, 2014 at the respondent’s request, Mr. Petrovic provided another WCF to TST completed by his doctor. This WCF said Mr. Petrovic could return to work with restrictions such as driving limited to two hours per day and no lifting at all.

[20] On May 12, 2014, Unifor initiated a step two grievance on behalf of Mr. Petrovic. The union cited TST's violation of the applicable articles of the collective agreement for failing to provide an accommodation within his medical limitations as the basis for the grievance.

[21] On June 6, 2014, Danny Kowarchuk of TST sent a letter to Todd Romanow, Unifor National Representative, acknowledging receipt of the union's correspondence regarding the grievance and advising that TST was unable to find suitable accommodation for Petrovic, as the medical restrictions specified by Petrovic’s physician were too limiting and severe to be accommodated.

[22] In its letter of June 6, 2014, TST offered Petrovic severance in the amount of$3,500 "for the frustration of the employment relationship." Mr. Petrovic declined this offer.

[23] On June 14, 2014, Mr. Petrovic filed a Duty of Fair Representation complaint against Unifor with the Canada Industrial Relations Board (“CIRB”) for failing to represent him in good faith in obtaining an accommodation from the respondent. CIRB ultimately dismissed the complaint.

[24] On August 18, 2014, TST provided subsequent correspondence to the Union indicating that they were unable to provide accommodation for Petrovic's physical disability because of his medical restrictions and the information available to them.

[25] TST indicated a willingness to continue to review the situation and expressed an intent to consider additional opportunities, including a possible position in the Burnaby office upon receipt of Petrovic's resume.

[26] On August 29, 2014 Mr. Romanow wrote to Mr. Petrovic after he rejected the respondent’s offer of severance to advise him that Unifor would continue with his grievance

and to ask him for an updated resume, and update on his medical restrictions and a list of any jobs he believed he could perform at TST. The complainant did not provide any of the requested information by the deadline of September 11, 2014.

[27] On September 3, 2014, Mr. Petrovic wrote to TST accusing both the respondent and Unifor of breaching their fiduciary obligation to him and saying that "I am not capable of accepting work due to my injury; otherwise I would have been employed long ago".

[28] On September 11, 2014, Mr. Petrovic received correspondence from TST terminating the employment relationship because of the lack of medical progress in over 18 months and Mr. Petrovic's continued inability to perform any kind of work. The respondent paid severance to Mr. Petrovic in the amount of $3,500 less statutory deductions. TST claimed that it was unable to accommodate Petrovic because of his severe medical restrictions.

[29] On December 3, 2014, Mr. Petrovic filed a complaint against TST with the Canadian Human Rights Commission ("Commission").

IV. ISSUES

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

1. Has the complainant established a prima facie case of discrimination under section 7 of the *Act*, because the respondent refused his requests to return to work and refused to employ him?
2. If yes, has the respondent established a valid justification for its otherwise discriminatory actions?
3. If the respondent cannot establish a justification, what remedies should be awarded that flow from the discrimination?

V. REASONS AND ANALYSIS

A. Legal Framework

[31] Mr. Petrovic alleges discrimination by TST in relation to employment on the basis of disability, contrary to section 7 of the *Act*. Section 7 of the *Act* says it is a discriminatory practice to refuse to employ or continue to employ, or differentiate adversely in relation to an employee, on a prohibited ground of discrimination. The prohibited grounds of discrimination are set out in section 3(1) of the *Act*.

[32] There are two parts to proving discrimination in the employment context.

[33] First, a complainant must establish a case which covers the allegations made and which, if believed, is complete and sufficient to justify a decision for the complainant in the absence of a justification from the respondent (*Ontario Human Rights Commission v. Simpsons-Sears Ltd.* [1985] 2 S.C.R. 536 at para. 28 ("Simpsons-Sears").

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

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

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

[37] The Supreme Court of Canada elaborated on this definition in *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para. 56:

> … the proof required of the plaintiff is of a simple "connection" or "factor" rather than that of a "causal connection", he or she must nonetheless prove the three elements of discrimination on a balance of probabilities. This means that the "connection" or "factor" must be proven on a balance of probabilities

[38] The Supreme Court went on to say that in practical terms, this means that the respondent can either present evidence to refute the allegations of discrimination, put forward a defence justifying the discrimination or both. If no justification is established by the respondent, proof of these three elements on a balance of probabilities will be sufficient for the Tribunal to find that the *CHRA* has been violated. If, on the other hand, the respondent succeeds in justifying his decision, there will be no finding of discrimination, even if the complainant meets their case. *(Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para. 64.)

(i) Issue 1: Has the complainant established a prima facie case of discrimination under section 7 of the *Act*, because the respondent refused his request to return to work and refused to employ him?

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

[39] Yes, it is not disputed that Mr. Petrovic suffered from a physical disability, namely a serious back injury incurred during work.

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

employer unless it constitutes undue hardship (*Dupuis v. Canada (Attorney General)*, 2010 FC 511 at para. 25).

[41] There was no dispute that the respondent recognised the complainant had health issues related to a disability or perceived disability and that he was not permitted to return to work because of the respondent's concerns about how his disability would impact his ability to safely perform his job.

[42] Mr. Petrovic initially also alleged discrimination on the basis of race, and national or ethnic origin. During the hearing, only the claim of discrimination because of his disability was raised. Therefore, disability is the only ground I considered. I dismiss the others, due to a total lack of evidence and argument.

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

[43] Yes, the complainant suffered an adverse impact on his employment.

[44] Following Mr. Petrovic's medical leave, TST said it could not accommodate his return to work because of his medical restrictions. The complainant was subsequently terminated by the respondent.

[45] The complainant attempted a return to work and met with his manager Jim Stanworth in April 2013. He presented a note followed by a Work Capability Form completed by his doctor. The respondent, through Mr. Stanworth, took the position that based on the WCF, Mr. Petrovic was medically incapable of returning to his full-time truck driving job.

[46] The respondent did not change its position over the next year although Mr. Petrovic provided another WCF with similar medical restrictions and Unifor initiated a grievance on Mr. Petrovic's behalf. Unifor also engaged with the respondent on a settlement with Mr. Petrovic if they were not going to accommodate his return to work.

[47] In September 2014, after concluding that there was insufficient change in his medical condition and not receiving any information about Mr. Petrovic's other skills for consideration for a potential office job with TST, the respondent terminated the complainant's employment.

(c) Was the complainant's disability a factor in the refusal to allow him to return to work and/or in his termination?

[48] Yes. There was connection between Mr. Petrovic's disability and the reason his request to be accommodated was refused. Was it a factor in his termination?

[49] The respondent's head of human resources Kim Glenn testified that the complainant's medical limitations prevented him from returning to his job as a truck driver. The respondent did not have part-time truck driver positions. The complainant's limitations included use of machinery which ruled out TST purchasing an electric pallet jack for his use.

[50] TST also did not believe that Mr. Petrovic could perform a clerical job in the Burnaby office or any of TST's offices because of his limited English and lack of skills required in an office such as telephone reception or computer operations. The respondent said it considered a position in the guard shack at the Burnaby location but concluded that Mr. Petrovic would not be able to perform those duties.

[51] The complainant's disability was a factor in the respondent's decision not to offer an accommodation for his return to work.

[52] Ms. Glenn testified that based on the medical information, in her opinion Mr. Petrovic's medical condition had not improved after almost two years. In the respondent's view, Mr. Petrovic was not capable of returning to work as a truck driver nor was he capable of performing another job at TST. Given that the respondent could not offer an accommodation, they made the decision not to continue the employment relationship. The complainant's disability was a factor in the respondent's decision to terminate his employment.

[53] The complainant has established a prima facie case of discrimination. I will now turn to the Respondent's justification.

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

[54] The test for establishing a bona fide occupational requirement (BFOR) was set out by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC), [1999] 3 S.C.R. 3 ("*Meiorin*") at paras, 54 and 71-72). It says an employer relying on an undue hardship defence must prove the following on a balance of probabilities:

a. The Respondent adopted the impugned standard (in this case the employer's minimum physical capacity requirements) for a purpose or goal rationally connected to the function being performed;

b. The Respondent adopted the standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate purpose or goal; and

c. The standard is reasonably necessary to the accomplishment of that legitimate purpose or goal, in the sense that it is impossible to accommodate an individual sharing the characteristics of the Complainant without incurring undue hardship based on health, safety or cost.

[55] The respondent must demonstrate that it is more likely than not that the standard or policy it established is a BFOR if the respondent fails to justify the discriminatory conduct, this will result in a finding of discrimination.

[56] The respondent must demonstrate that it took reasonable steps to accommodate the employee short of incurring undue hardship. The onus is on the employer, as the employer is in possession of the necessary information to show undue hardship. The employee, will rarely, if ever, be in a position to show its absence (*Simpson-Sears*, supra, at para. 28).

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

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

[58] Yes. The general purpose of the requirement is to ensure that the respondent's drivers can perform their jobs as truck drivers safely and effectively, without restriction. The importance of safety in the trucking industry was not disputed. The standard had a valid general purpose, and it is rationally connected between the safety-oriented purpose of the requirement and the tasks of a truck driver.

[59] The evidence at the hearing showed that TST was part of a much larger group of some 80 multi-national trucking companies who operated under a similar set of policies including safety. The standard in question was a common one that these trucking companies were required to operate under.

(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?

[60] Yes. The respondent's witness Kim Glenn testified that in the trucking industry which is regulated under federal, provincial, US and local authorities, safety is a paramount concern. TST viewed the pick-up and delivery (P & D) truck driving position as being safety critical because truck drivers and the public could be exposed to danger.

[61] P & D drivers picked up and delivered freight locally. The drivers were required to perform pre and post trip truck inspections. Drivers commonly helped load and load their cargos. Driver's physical tasks required them to climb up into the truck cabs and into the trailer, crank dolly wheels, test the fifth wheel, tie down cargo on flatbeds, walk around the truck and check the undercarriages.

[62] I heard nothing to suggest that the respondent did not the adopt the standard in good faith. I believe that the standard was necessary for the fulfilment of a legitimate work purpose – a safe and effective truck driving operation.

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

[63] The respondent argues that there was no accommodation possible for Mr. Petrovic because his physical limitations were such that he could not perform his truck driving job or any physical jobs available at the company. Furthermore, they did not consider him capable of a supervisory position nor did could he handle a clerical job in the office because of his limited English language ability.

[64] The respondent argues that its standard requiring the complainant to be fit to drive was justified. It submits that accommodation of the complainant's disability-related needs would have imposed undue hardship on the business, considering health, safety and cost (ss.15(1)(a) and (2) of the *Act*).

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

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

[66] Mr. Petrovic testified that while he was still on medical leave, it was the respondent that inquired when he would return to work. He said that he brought a WCF dated April 29, 2013 completed by his doctor to a meeting with Mr. Stanworth, his manager at TST.

[67] This WCF noted that Mr. Petrovic had a lower back injury but was fit to return to work with limitations. There were no limitations on driving but sitting was limited. A number of limitations were confusingly listed as 1 without clarity as to whether that meant hours or minutes although hours would be the logical conclusion. His lifting was either not capable or restricted to the lightest loads. The form did not indicate that a follow-up visit was necessary.

[68] Mr. Stanworth replied on behalf of the respondent with a letter to Mr. Petrovic dated May 6, 2016. Based on the WCF, the respondent concluded in the letter that Mr. Petrovic was "medically incapable of resuming your full-time driving position". TST said that "We currently unable to offer safe and suitable accommodations within your current medical

precautions". The letter ended with "Please keep in communication with us as your condition improves.

[69] At this point in 2013, there is no dispute among the parties that Mr. Petrovic could resume his duties as a full-time truck driver for the respondent because of his medical condition.

[70] I also note that at this time the union does not seem to have be notified nor involved in the accommodation process. I mention this because the complainant sought to undermine the respondent's argument that they properly conducted their communication with Mr. Petrovic on accommodation through the union and not directly with him.

[71] However, at this initial stage, it is not clear and the complainant produced no evidence, that union involvement was required by the collective agreement. I have more to add on this topic later in my analysis.

[72] The complainant alleged that the respondent did not follow its own Return to Work program with regards to the complainant. For example, TST's Human Resources people did not provide Mr. Petrovic with a job description or a letter outlining the Duty to Accommodate process. However, in my view, these were procedural, not substantive errors.

[73] There was no progress in the accommodation process until May 2014. Mr. Petrovic said that a new manager at TST asked him to submit a new WCF which he did on May 9. This report limited Mr. Petrovic to two (2) hours of driving and two hours of work daily. He could not lift anything nor operate heavy machinery. These restrictions meant he could not drive a truck.

[74] Mr. Petrovic said that he was asked to meet by Danny Kowarchuk, a regional vice president at TST. Mr. Petrovic said that at this meeting sometime in May 2014, Mr. Kowarchuk offered him his previous position as a truck driver with a route in the city of his choice in Metro Vancouver. Mr. Petrovic said Mr. Kowarchuk required a medical note saying he was capable of performing the job.

[75] On May 12, Unifor filed a grievance on behalf of Mr. Petrovic to compel TST to search again for accommodation.

[76] Mr. Kowarchuk wrote back to Unifor on June 6, 2014, saying that “the company has done a complete review internally and is unable to find a suitable accommodation based on the medical restrictions made clear by Mr. Petrovic’s physician. Unfortunately, they are to(sic) limiting and to (sic) sever (sic) and we do not have anything available that meets his boundaries”. The respondent offered to pay severance of $3,500 for what they considered a “the employment relationship being frustrated”.

[77] When Unifor presented the respondent’s offer to Mr. Petrovic he rejected it. The union continued to press the respondent for an accommodation.

[78] The respondent wrote again to the union on August 24, 2014, saying that based on the medical restrictions provided by Mr. Petrovic’s physician, he is “unable to perform the core functions of his regular/posted job. The letter went on to say that the respondent would explore the limited number of jobs in the Burnaby office but that have not received an “updated resume detailing qualifications and education that may differ than his prior position and skill set”.

[79] On September 3, 2014, Mr. Petrovic wrote directly to TST saying that “I am not capable of accepting work due to my injury; otherwise I would have been employed long ago…”.

[80] The respondent terminated Mr. Petrovic’s employment on September 11, 2014, citing frustration of the employment relationship due to Mr. Petrovic’s physical limitations.

[81] The respondent’s human resources director Kim Glenn elaborated on what it did in the accommodation process during her testimony.

[82] Ms. Glenn explained that the respondent’s Return to Work program was intended as a short-term (4-6 weeks) process to modify work if appropriate, with the goal of returning the employee to their pre-injury position. She said that Mr. Petrovic’s situation did not trigger the program because his medical conditions were too severe to return him to his previous truck driving job.

[83] Ms. Glenn outlined the respondent’s Western Canadian operations. She said that at Mr. Petrovic’s location they had about 20 unionized truck drivers and loading dock workers,

three dock supervisors and three clerical staff in the office. Their Edmonton office had the same structure and similar numbers. The Calgary office had some more managers because it was the main office, and the Winnipeg location was smaller than the Burnaby one.

[84] Ms. Glenn said that they did not have part-time truck drivers or dock workers. She said that Mr. Petrovic was not qualified to be a dock supervisor because of his lack of experience and limited English. Based on his original resume, the respondent also did not believe he had the technical skills such as with computers or sufficient English language ability, to work in the office. The clerical staff required experience with Microsoft Office, basic accounting and customer service.

[85] Ms. Glenn said that the respondent asked Mr. Petrovic and the union to provide updates on his medical condition and an updated resume to see if he had unique skills, acquired any new skills or improved his language abilities.

[86] She also testified that she considered a position in the guard shack for Mr. Petrovic but after personally visiting it, concluded that it required too much climbing to access it, and too much constant standing which his medical restrictions limited. She explained that the guard shack was also run by a security company not TST and required English ability, training and a security clearance. She said she advised the union of her conclusions.

[87] Ms. Glenn also said she considered a position driving for Amazon but found that it could require Mr. Petrovic to lift packages as heavy as 75 pounds. She believed it was not suitable for Mr. Petrovic because he would have to become an owner-operator of his own delivery truck and give up his seniority because it was a different bargaining unit. She conveyed her conclusion about this option with the union.

[88] Even after Mr. Petrovic was terminated, Ms. Glenn said they continued to look for an accommodation. Mr. Petrovic submitted another WCF to the respondent on March 27, 2015. She noted that medical restrictions remained including a limit of four hours of work a day.

[89] On December 10, 2015, TST responded to Mr. Petrovic’s request to purchase an electric pallet jack. The respondent did not have any in its inventory and did not intend to purchase one. Ms. Glenn personally tried to operate an electric pallet jack and found it was

physically demanding and considered heavy machinery which was not allowed by Mr. Petrovic's medical restrictions. It was not offered as an accommodation to the complainant.

[90] The complainant alleges he put forward four specific accommodation suggestions: to provide him with an electric pallet jack, to allow him to work with a forklift, to drive empty trailers and to perform pin-to-pin work. The respondent says each of these suggestions was considered by it and/or Unifor and determined not to be suitable.

[91] The respondent submits that there are very few positions outside of the unionized driving or dock positions at TST, and those positions are clerical in nature and require English proficiency. Moreover, any accommodation in the positions would have required either the displacement of another employee or creation by the respondent of unproductive work for the complainant, which it is under no obligation to do.

The complainant's role in the accommodation process

[92] Mr. Petrovic's role in the accommodation process was affected by a marked lack of trust in the respondent and his union. This contributed to poor communication between the parties.

[93] Mr. Petrovic testified that he expected to make a gradual return to work because of his medical condition. It was not clear to me during his testimony that he communicated that desire during his meeting with Mr. Stanworth in April 2013.

[94] After he received the May 6, 2013, letter from Mr. Stanworth advising that the respondent could not return him to his previous job and that they could not find a suitable accommodation, he did not respond by asking for a gradual return to work or some other form of accommodation. Nor did he ask his union for assistance in obtaining an accommodation. Although the respondent asked him to advise if his medical condition improved, Mr. Petrovic did nothing until TST asked him to provide another WCF in May 2014. It may be that Mr. Petrovic's medical condition had not improved which is why he did not respond.

[95] When Mr. Petrovic met with Mr. Kowarchuk in May 2014 and was offered his previous position, he did not tell Mr. Kowarchuk that he could not work a full-time job but required an accommodation, according to his testimony.

[96] Although Unifor filed a grievance on his behalf in May 2014 seeking an accommodation from the respondent, Mr. Petrovic claimed to be unaware of it.

[97] Unifor was now engaged in the matter and discussed the possibilities of accommodation for Mr. Petrovic. The respondent maintained its position that it could not find an accommodation and proposed a settlement including a $3,500 severance payment which the union presented to Mr. Petrovic. He refused the settlement.

[98] Mr. Petrovic did not respond to a request to meet with the union and provide an updated resume, update on his medical condition and a list of positions he thought he could do for TST. This information was requested by the respondent. Mr. Petrovic testified that he did not provide the information because “nothing had changed” in his resume or medical condition.

[99] Mr. Petrovic wrote directly to the respondent on September 3, 2014, to tell them that he “was not capable of accepting work due to his injury…”. Mr. Petrovic testified that although he reviewed and signed the letter, his friend Ranko Reskovic, who drafted the letter on his behalf, made a mistake. The letter left out the word “full-time”. He meant he could not work his previous full-time job.

[100] After his termination by the respondent, Unifor continued its grievance on his behalf and asked him for meetings and follow-up on its previous request for information.

[101] Mr. Petrovic submitted a WCF in March 2015, but it was not until November 2015 that all the clarifications requested by the respondent on the form were provided. He did not provide an updated resume until May 2015. It did not show any updated office skills or language ability.

The respondent's explanation of its accommodation efforts

[102] The respondent's position is that the complainant's medical restrictions were too severe for allow Mr. Petrovic to return to his previous job as a full-time truck driver. TST's only other jobs were a small number of dock supervisors and clerical staff at the Burnaby and other Western Canadian operations. They did not consider Mr. Petrovic qualified for these jobs and could not offer him an accommodation.

[103] The respondent relied on the medical information provided by Mr. Petrovic's doctor, information from the union representing him and from Mr. Petrovic himself.

[104] Ms. Glenn noted that she at the time of the first WCF in May 2013, Mr. Petrovic had already been off work on long term disability for a year. In total, he was off work for two years and five months. Her interpretation of the WCF was that Mr. Petrovic's medical limitations were too severe to allow him to return to his pre-injury job. She said that the WCF did not have a time when he could return to work. She thought the fact that no follow-up visit to the doctor was scheduled meant it was a long-term injury.

[105] On the second WCF form dated May 9, 2014, Ms. Glenn noted that the complainant's limitations were even more restrictive. There was now a restriction to two hours a day of work. She said that without being able to drive, operate heavy machinery, push or pull or lift without restrictions, there were no positions in the bargaining unit available nor was the guard shack a possibility. Since there were no positions in the Burnaby office either, there was no accommodation available. She said the situation would be the same at their other Western Canadian operations and neither Mr. Petrovic nor the union suggested he was willing to relocate.

[106] Ms. Glenn testified that she worked with the union on the accommodation for Mr. Petrovic and contrary to Mr. Petrovic's allegation that TST and the union were "in cahoots", it was a difficult relationship. She expected that the union was keeping Mr. Petrovic informed on the progress of the search for accommodation.

[107] When Ms. Glenn read Mr. Petrovic's September 3, 2014, letter to TST saying that he was "unable to work" she viewed that as an unambiguous statement from Mr. Petrovic that

he was medically unable to return to his former job. Since there were no other positions possible, the respondent could not offer him an accommodation without incurring undue hardship.

The complainant's position

[108] The complainant's position is that the respondent failed to accommodate him in his return to work. Mr. Petrovic testified that he believed TST would provide a graduated return to work to accommodate his medical restrictions.

[109] Instead, he alleges the respondent said in 2013 that the only position available was his previous job. A year later, they again only offered him a full-time truck driving job.

[110] The complainant said the respondent did not look into other potential options such as driving a truck to Seattle without any loading, being provided with an electric pallet jack or retrieving empty trucks.

[111] Mr. Petrovic says they he was left out of the loop in accommodation discussions as the respondent only dealt with the union, whom he believes mishandled his case and filed a complaint against at the Canada Industrial Relations Board. The respondent failed to confirm many important issues directly with him especially whether he had ceased asking for an accommodation.

[112] Mr. Petrovic says that the respondent did not have updates on his medical restrictions nor job skills which could have led to an accommodation before they terminated him. Despite requests from Unifor and TST, he did not provide the updates.

[113] The complainant cites *Central Okanagan School District No. 23 v. Renaud* [1992] 2 SCR where the Supreme Court said that the word "undue" implied that some hardship is acceptable. The complainant alleges that the respondent failed to establish that they could not accommodate him without undue hardship.

Findings on undue hardship

[114] I find that there is sufficient evidence to support the respondent's position that it could not accommodate the complainant without suffering undue hardship.

[115] The fact that Mr. Petrovic was unable to return to his previous job as a pickup and delivery driver in May 2013 because of his medical condition is not disputed by the parties. Mr. Petrovic said he expected a gradual return. TST said that, based on the medical information provided by Mr. Petrovic's doctor on the WCF, they could not return the complainant to his previous job. There was no accommodation possible to his pre-injury job.

[116] An assessment by an independent professional confirmed that conclusion. In 2014, an agency retained by the government to help people go back to work hired Robert Gander, an occupational therapist. Mr. Gander examined Mr. Petrovic, assessed him through a number of tests and produced a report for the agency.

[117] The respondent had no knowledge of the Gander report during the accommodation process and the complainant's subsequent termination. The complainant was given a copy of the report but did not provide it to his union or the respondent. The respondent received a copy of the Gander Report during the disclosure process and introduced it into evidence as well as having Mr. Gander testify under a subpoena.

[118] Although the respondent cannot rely on the Gander Report to substantiate its medical assessment of Mr. Petrovic, I can use it to corroborate the basis for their assessment. Among the features of the Report are the following statements:

a. Mr. Petrovic presents a concerning functional profile. Overall, his ability to dependably and competitively meet full-time work demands is doubtful at this juncture. He possesses some capacity to perform part-time work, although in a limited capacity within the bounds of his abilities and limitations.

b. Mr. Petrovic is not able to meet the typical/expected demands of Truck Driver (short haul or long haul) work at this juncture. His sitting capacities (altered seat posture) are not "functional" for the purpose of effectively and safely operating a motor vehicle over prolonged time periods. His lifting/carrying capacities also do not meet the typical demands of this line of work, nor do his trunk positioning capacities.

c. Other considerable barriers to Mr. Petrovic regaining remunerative employment include his limited English language capacities (he possesses good conversational capability but is limited for conversing in very "technical" language) alongside his reported work history of universally performing "physically demanding" work.

[119] I give little weight to the testimony of Fiona Fleming, another occupational therapist called by the complainant to review the Gander Report. Ms. Fleming did not examine Mr.

Petrovic and her suggestions that Mr. Petrovic could have performed some clerical work did not in my view, take into account sufficiently his language and technical office skills nor the small number of available clerical positions available.

[120] The Gander Report merely confirms what all the parties knew in 2013 – the complainant could not be accommodated with his previous job as a truck driver. Even in 2015 when Mr. Petrovic was looking for other employment, he sought a driving position that was limited to about two hours a day.

[121] Despite his severe injuries in the period 2010 to 2014, Mr. Petrovic has been able to be employed full-time since 2015 as a long-haul truck driver. However, I am not admitting post-termination evidence because of the decision by the Supreme Court of Canada in *Cie minière Québec Cartier v. Quebec (Grievances arbitrator)*, [1995] 2 S.C.R. 1095. The court held that an arbitrator had to determine the matter of whether the company had just and sufficient cause for dismissing the employee on the basis of evidence available at the time the employee was dismissed – not with reference to subsequent-event evidence – in that case, of the employee's ability to rehabilitate himself from alcoholism.

[122] Further support for my decision of the inadmissibility of subsequent event evidence can be found in *Gordy v. Painter's Lodge (No. 2)*, 2004 BCHRT 225. The B.C. Human Rights Tribunal decision that found prohibited discrimination was sent back on appeal for a rehearing on the issue of a BFOR.

[123] In the rehearing decision, the member stated the employer has an obligation to act reasonably when deciding whether an employee is medically fit to return to work. The employer is entitled to rely on the attending physician's current assessment – "especially if that physician is familiar with the employee's job duties and work environment".

[124] The member also considered whether the employer could rely on any subsequent-event or after-acquired evidence to justify an inability to accommodate the complainant. She determined any such evidence demonstrating an inability to safely work could not be used to maintain the reasonableness of the employer's decision not to accommodate the complainant.

[125] Looking at the information available at the time of Mr. Petrovic's termination, I find that his medical limitations were too severe for the respondent to accommodate without undue hardship.

[126] Although *Meiorin* is the starting point in finding whether a prima facie discriminatory standard is a BFOR, there is some dispute whether the categories of hardship should be confined to those expressly enumerated in section 15(2) of the *CHRA* being factors of safety, health and costs.

[127] In view of the increasing complexities of the modern workplace, I believe it is time to move on from the Federal Court decision in *Vilven v. Air Canada*, 2009 FC 367 which stated that the Tribunal was restricted to only considering health, safety and cost. I therefore chose to follow the more recent decisions in *Adamson v. Air Canada*, 2014 FC 83 and *Brunskill v. CPC*, 2019 CHRT 22.

[128] In *Adamson* the Federal Court reviewed the *Meiorin* test and stated that the factors of health, safety and costs listed in section 15(2) are not exhaustive. Justice Annis pointed to the comments of the Supreme Court of Canada in *McGill University Health Centre v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, where they said factors in the undue hardship analysis should be applied with flexibility and common sense.

[129] In *Brunskill*, Member Gaudreault, relying on *McGill* and *Croteau v. Canadian National Railway Company*, 2014 CHRT 16 said that the duty to accommodate is neither absolute nor unlimited.

[130] In following *Adamson* and *Brunskill*, one must keep in mind the factors to be considered when determining whether an employer has met the test for reasonable accommodation short of undue hardship set out in in *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489. There the court laid out factors such as financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of workforce and facilities.

[131] Finally, by applying the Supreme Court of Canada's test for reasonable accommodation short of undue hardship set out in *Hydro-Quebec v. SCFP-FTQ*, 2008 SCC

43, the fact that Mr. Petrovic was not able to resume his job with the respondent due to his medical limitations and not qualified to hold any other available jobs, echoes the court's words "the employer's duty to accommodate ends where the employee is no longer able to fulfil the basic obligations associated with the employment relationship for the foreseeable future." The test is not whether it is impossible to accommodate the employee.

[132] It was an unfortunate situation without fault attributable to any party. Mr. Petrovic was unable to resume work in a job deemed safety critical by his employer and there was no evidence that he could return within a short period of time.

[133] Offering the complainant a truck driving position at another location would not have resulted in a different outcome. Mr. Petrovic was simply physically unable to perform as a truck driver at the time. That conclusion was based on the WCFs containing information provided by Mr. Petrovic's doctor.

[134] The other available positions considered by the respondent simply did not correspond with the complainant's qualifications. Although Mr. Petrovic's English language ability might be characterized as "functional", it was not sufficient for the clerical positions in the office where the require the workers to deal with shipping manifests, track down missing shipments, deal with damaged shipments, respond to customer claims regarding missing or damaged shipments (by telephone and e-mail), and deal with internal human resources issues such as payroll, time records, sick and vacation requests, WCB forms, and union-related paperwork such as pay and shift changes.

[135] In addition, Mr. Petrovic did not have even the most basic office skills for clerical positions where he would be expected to have a minimum typing speed of 35 to 40 words per minute, experience with Microsoft Office suite and basic accounting skills connected with administration of payroll.

[136] Given the limited number of clerical positions available, to accommodate Mr. Petrovic in one of these positions would have likely required them to either displace an existing employee or create a position for him for which he was not qualified. The respondent is not required to modify the worker by providing him with English language lessons or computer courses to upgrade his skills. (See *Brunskill v. CPC*, 2019 CHRT 22 para 68).

[137] Even in a clerical job, his own medical restrictions were limiting him to two hours a day of sitting. That also ruled out the guard shack position which Ms. Glenn explored for Mr. Petrovic.

[138] Of the other alternate accommodation suggestions heard at the hearing, an electric pallet jack, or driving a forklift, driving empty trailers and pin-to-pin work, all would have required him to operate heavy machinery. But his medical restrictions did not permit to operate heavy machinery and, at the very most, only able to operate such machinery for one hour per day. There was no productive position available which he could safely fill given his inability to push/pull, crouch, climb or lift any weight.

[139] The respondent did not follow some of its own Return to Work program procedures. However, there were not items that materially affected its attempts at accommodating the complainant. There were procedural, not substantive errors.

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

[141] This does not mean the procedure used by the employer when considering accommodation does not have any practical significance. Indeed, in practical terms, if an employer has not engaged in any accommodation analysis or attempts at accommodation at the time a request by an employee is made, it is likely to be very difficult to satisfy a tribunal on an evidentiary level that it could not have accommodated that employee short of undue hardship. That is not the case here.

[142] The complainant also alleged that in the accommodation process, the respondent dealt with the union and did not involve Mr. Petrovic leading to what they characterized as a monologue rather than a dialogue. The complainant claimed the respondent never asked him for updated medical information and did not know what skills he had because they did not talk to him. Mr. Petrovic also alleged that the union left him in the dark about the

accommodation discussions and generally bungled him case as well as an earlier WCB appeal.

[143] Gord McGrath was subpoenaed by the respondent. He testified about how he, the local union president and later Todd Romanow from Unifor's national office, tried to obtain an accommodation for Mr. Petrovic for over two years during discussions with the respondent.

[144] His testimony about filing a grievance on behalf of the complainant to obtain an accommodation directly contradicted Mr. Petrovic's claim that he knew nothing about the grievance.

[145] Mr. McGrath said that he raised the possibility of a monetary settlement of $5,000 for Mr. Petrovic when it became apparent to the union that an accommodation was not possible.

[146] Mr. McGrath expressed frustration in dealing with Mr. Petrovic. In a letter from Mr. Petrovic to the Unifor on October 23, 2015, he alleged …" the Union has demonstrated time and time again that they are working on the side of the Company and its interests rather than on behalf of me and my interests as they claim and suppose to."

[147] In Mr. Romanow's response from Unifor to Mr. Petrovic, he said "I'm not going to answer all your accusations but to be clear you have fought us all along, not communicated with us, not participated in the accommodation process as we have asked, you have held back information and have provided written confirmation at one point that said you permanently disabled and could not work again contrary to your latest claims."

[148] The principle of a trade union being the exclusive bargaining agent for employees bound by a collective agreement was well established in *McGavin Toastmaster Limited v. Ainscough* [1976] 1 S.C.R. 718. The respondent was entitled to rely on the union to represent the complainant and expect that they would communicate with the employee. The respondent was not required to confirm every aspect of their discussions on accommodation with Unifor directly with Mr. Petrovic.

[149] The Canadian Industrial Relations Board dismissed Mr. Petrovic's claims against Unifor. Although I am not bound by the decision of the CIRB, I am able to rely on it to confirm

that I do not see any evidence that the union's involvement adversely affected the complainant's ability to obtain an accommodation from the respondent.

[150] Some of the union's comments on dealing with Mr. Petrovic support the idea that the complainant's communication style and general distrust of the respondent and union affected the accommodation process.

[151] Although the complainant testified that the respondent never asked him for updated medical information, the first letter he received during the accommodation process, from Mr. Stanworth, asked him to provide medical updates. With the exception of the second and third WCFs (the third after his termination) he did not provide medical updates. Nor did he provide the union or the respondent with the Gander Report.

[152] According to the union and the respondent, Mr. Petrovic was slow to respond to requests for information. The evidence does not reveal a motivation, but it does show a pattern of unenthusiastic cooperation by Mr. Petrovic during the accommodation process. He made it clear in correspondence with the union that he considered the respondent and union to be working against his interests.

[153] His good friend Mr. Reskovic may have been very helpful in drafting his letters, but he too, in his testimony and draft letters appeared to contribute to Mr. Petrovic's feelings of mistrust towards the union and respondent.

[154] The cumulative effect of this seeming indifference, especially in his September 3, 2014 letter that he "was not capable of accepting work due to his injury" led to the respondent taking an unambiguous interpretation of Mr. Petrovic's words that he was incapable of working again.

[155] Both Petrovic and Reskovic testified that it was a mistake to leave out the qualifier that he could not work full-time. That is an easy claim to make in hindsight and though I do not doubt their sincerity, it is also reasonable to assume that at the time the letter was read by the respondent, they took him at his word. It would have been reasonable for the respondent to assume that due to the severity of his injury, Mr. Petrovic could no longer

work and not only was there no accommodation available, he was also not intending to return to TST.

VI. ORDER

[156] The complaint is not substantiated, and the complainant is not entitled to remedies.

Signed by

Alex G. Pannu
Tribunal Member

Ottawa, Ontario
August 16, 2021

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2262/1718

Style of Cause: Goran Petrovic v. TST Overland Express

Decision of the Tribunal Dated: August 16, 2021

Date and Place of Hearing: February 10,11, 12, 24, 25 and 28, 2020

Vancouver, British Columbia and by teleconference

Appearances:

Sherry Shir, for the Complainant

No one appearing, for the Canadian Human Rights Commission

James D. Kondopulos and Sylvia Nicholles, for the Respondent