Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

**Citation:** 2022 CHRT 9
**Date:** March 25, 2022
**File No.:** T1941/2113

**Between:**

**Cheryl Lynn Bezoine**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**City of Ottawa**

**Respondent**

# Decision

**Member:** Lisa Gallivan

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## I. Summary of Conclusions

[1] I do not believe that any delay in this case has caused sufficient prejudice to any of the parties to warrant a stay of proceedings.

[2] I find that when the Respondent terminated the Complainant's employment on June 22, 2010 due to her failure to provide regular and reliable attendance at work, it was within its right as an employer to do so and was not discriminatory.

[3] I find that while the Complainant was clearly having medical issues during the course of her employment, there is insufficient evidence in this case to establish that she was disabled as required by the CHRA at the time of termination of her employment and no evidence to suggest that any medical condition prevented her from notifying her employer of her inability to attend work.

[4] The decision to terminate the employment relationship was based on the Complainant's failure to provide regular and reliable attendance at work. She had eight (8) culpable absences during her probationary period. She also failed to meet her obligation to follow the established process to advise the Respondent of her inability to attend work; an obligation of which her behaviour demonstrates that she was well aware. The Complainant understood what she was required to do if she was unable to attend work and the consequences of failing to do so.

[5] Regular and reliable attendance at work is an essential part of the work relationship and especially so when working in a position where service to the public could be compromised and bus routes canceled as a result of a failure by an employee to provide notification of the inability to attend a scheduled shift.

[6] Furthermore, the evidence is clear that the Complainant did not provide indication of a need for or request accommodation from the Respondent for her culpable and unexplained absences. The Respondent cannot therefore be faulted for a failure to provide accommodation. I do not believe in these circumstances where there was no evidence of a need for accommodation that accommodation was required or that the resulting termination

for culpable absences and failing to follow proper procedure when she would be absent from work was discriminatory.

## II. Overview

[7] Cheryl Bezoine is the Complainant in this case. She alleges that the Respondent, the City of Ottawa, discriminated against her on the basis of a disability contrary to section 7 of the *Canadian Human Rights Act,* RSC 1985, c H-6 (CHRA) by terminating her employment due to disability-related absences.

[8] The Complainant alleges that at the time her employment was terminated she was suffering from a disability and that this was a factor in her termination.

[9] The Respondent says that the Complainant was terminated due to her failure to provide regular and reliable attendance. The Respondent further says that the Complainant has failed to establish that a protected characteristic was a factor in her termination. In addition, the Respondent submits that the Complainant failed to establish a connection between a disability and the termination of her employment, which it maintains was based solely on unexcused absences from work, and therefore the Complainant has failed to establish that the termination was discriminatory.

[10] The Complainant represented herself at the hearing. The Respondent was represented by counsel. The hearing started in Ottawa, Ontario in November 2015 and was concluded virtually on September 21, 2021. There were two motions during this time. The motions, issues with document production, unavailability of counsel due to illness and the COVID-19 pandemic all contributed to the delay from start to finish of this hearing. The Canadian Human Rights Commission ("Commission") participated at the hearing. Both the Complainant and Respondent provided evidence and called witnesses to testify.

[11] This hearing was bifurcated between the merits and the remedies. This decision determines the merits of the complaint.

## III. Background

[12] The Complainant was hired by the Respondent as a Bus Operator Trainee in August 2009. After successfully completing a six (6) week paid training program she was hired as a probationary Bus Operator on September 23, 2009. On that same date she became a member of the Amalgamated Transit Union, Local 279 (the "Union").

[13] The Collective Agreement between the Respondent and the Union requires that employees have nine (9) continuous months of employment before permanent employment can be established. This period may be extended for up to three (3) months for reasonable cause, with notice to the Union.

[14] The Collective Agreement also provides that the employer will perform a final examination to determine whether an employee satisfactorily completes probation and only if this examination is successful will the employee be granted seniority. Seniority is then retroactive to the date of hire.

[15] Bus Operators are assessed regularly during their probationary period by their Sections Heads. A Section Head is a management employee who supervises approximately 400-500 Bus Operators. The Complainant's Section Head was Wayne McKinnon. McKinnon testified at this hearing.

[16] The Complainant missed approximately fifty-two (52) days of work during her probationary period. Approximately thirty-five (35) of these days related to an injury to her hand that she sustained at a previous workplace. She underwent several surgeries for this injury including one during her employment with the Respondent. This injury resulted in a WSIB claim with the former employer. The absences related to this injury occurred primarily between October 14 and November 29, 2009. The Complainant had surgery for this injury on October 14, 2009. Following surgery, and based on the recommendations of her surgeon and physiotherapist, the Complainant requested modified duties. The Respondent had no such work available for her so she was granted unpaid time off.

[17] In addition to the thirty-five (35) days missed as a result of the WSIB injury, the Complainant also missed nine (9) days during her probationary period that were deemed

non culpable, and for which the Complainant was paid sick time, and eight (8) days that were unexcused and deemed culpable.

[18] The Complainant's performance in her job was not an issue outside of her inability to provide regular and reliable attendance.

[19] In October 2009 the Complainant developed gynecological issues. She testified that she experienced vaginal bleeding, swelling and pain which was exacerbated by sitting for long periods of time driving a bus and by wearing the form fitting pants of her bus driver uniform.

[20] On October 9, 2009, the Complainant was absent from work and failed to notify the Respondent that she would be absent or provide any documentation to justify her absence as required by the Collective Agreement.

[21] She was also absent from work on December 17, 2009; December 24, 2009; February 25, 2010; April 24, 2010, May 11, 2010, May 13 and May 22. These absences were deemed culpable and the Complainant was not paid for these days.

[22] In November 2009 the Complainant's symptoms worsened to the point that she sought urgent medical attention. She was treated on two occasions at the Montfort Hospital Emergency Department for these issues. She testified that she also sought medical attention for her gynecological issues on December 30, 2009 at the Orleans Urgent Care Clinic. At this time, she was diagnosed with polyps and advised that she would need surgery. The Complainant was absent from work from December 30 – January 1, 2010 as a result of these medical issues. She provided documentation to justify the absence and was paid for this time.

[23] On December 22, 2009, the Complainant had her three month probationary performance appraisal. This was her first appraisal. This appraisal noted that she had excellent overall attendance, having missed only one half day due to sick leave and that she had lost "other time due to an old WSIB. The Complainant had in fact missed an additional day on December 17, 2009 that was not referenced in this meeting because this absence

had not yet been entered into the Respondent's data system and therefore did not show up on the record provided to her Section Head.

[24] The Complainant was absent from work and paid for missed time on January 19, 2010, February 10 -12, 2010, March 10- 12, 2010 and May 18, 2010. On each of these occasions she provided medical documentation to justify the absence. The Respondent accepted the documentation provided and paid sick time to the Complainant for these days.

[25] On April 19, 2010 the Complainant had her 6 month probationary performance review. At this time, it was noted that she had missed an additional 7 days of work but had otherwise maintained reasonable attendance. Her performance was noted as "very good".

[26] On April 20, 2010, the Complainant was notified that her probation period would be extended for three months as a result of her extended WSIB leave so that the Respondent would have time to properly assess her skills as a Bus Operator. She was also advised that the extension to her probationary period would not impact her pay progression.

[27] This extension was not grieved nor was it raised as an issue before this Tribunal until it was referenced in closing arguments.

[28] In May 2010, the Complainant sought medical attention for a condition unrelated to her gynecological issues. Following this appointment it was recommended that she wear a mask. The Complainant testified that she provided a medical note to her supervisor, McKinnon, to confirm the requirement to wear a mask and was instructed by McKinnon to attend at the Health and Wellness department. She was granted a day of sick leave after she provided the medical documentation.

[29] On June 21, 2010, the Complainant met with McKinnon, at his request, to discuss her attendance during her probationary period. Union representative, Michel Fecteau was also present at this meeting. Mr. Fecteau was not called to testify at the hearing. McKinnon kept notes of this meeting. McKinnon testified that he became aware of the excessive number of culpable absences the Complainant had accumulated during her probationary period in June 2010. He testified that the focus of this meeting was to allow the Complainant

to explain the eight (8) culpable days she had been absent. The Complainant also testified that this was the focus of the meeting.

[30] McKinnon's notes describe the purpose of the June 21, 2010 meeting as follows:

> This meeting was held to review Operator Bezoine's attendance from October 5, 2009 to the present. In total follow-up Operator Bezoine has lost a total of seventeen (17) days from work as follows:
>
> 1. Non-culpable absenteeism=nine(9) days
>
> 2. Culpable absenteeism=eight (8) days.
>
> In addition Operator Bezoine lost a total of thirty-five (35) due to a Workplace Safety and Insurance Board (WSIB) claim with a former employer.

[31] Non-Culpable and Culpable absences are described as follows:

> Non-Culpable Absenteeism-Paid Sick Leave Usage absences for which an application and medical certificate were provided.
>
> Culpable absenteeism-Unpaid absences from work for which no application or medical certificates were provided.

[32] Minutes of this meeting also note that WSIB time was not factored in overall absences for the Complainant.

[33] The Complainant was asked at this meeting to explain her culpable absences. She could not do so and asked that the meeting be adjourned until June 22, 2010 so that she could review her calendar.

[34] The Complainant testified that she was shocked to learn that her attendance was a concern to the Respondent and that this meeting was the first time that the issue was raised with her. She testified that she was not advised during this meeting that her continued employment was in jeopardy.

[35] On June 22, 2010 the meeting was reconvened. McKinnon testified that the Complainant did not provide any medical justification for the absences and provided only vague responses to his questions as to the reasons for her absences. The Complainant testified that she provided documentation for her absences at this time including a note from

the Mer Bleue Dental Clinic and a record from the Montfort Hospital. She also stated that she advised McKinnon that she was awaiting surgery. McKinnon testified that he did not receive any documentation and that if the Complainant had provided medical documentation she would have been instructed to provide such documentation to the Health and Wellness Department. This is consistent with evidence that the Complainant was instructed to provide information to Health and Wellness by McKinnon on the occasion where she required a mask due to a respiratory issue. There is no indication in McKinnon's notes that medical, or any, documentation was provided to him at this meeting. McKinnon's notes indicate that the Complainant said she was absent for a variety of reasons on the eight (8) days in question including:

a. In two cases she simply thought she had worked;

b. In two cases she said she went to the dentist;

c. In one case she said she was on WSIB;

d. In one case she said she was sick but never claimed the date;

e. She was too upset to drive on one occasion (Christmas Eve) and;

f. The October 9th absence is not mentioned.

[36] The Complainant testified that she advised McKinnon during this meeting, but after the time had been taken, that she would be submitting sick leave for some of the culpable absences and advised McKinnon that she had surgery booked for a medical condition. Notes of Marg White taken during the arbitration hearing also note that the Complainant testified that she advised McKinnon that she would need future time off for surgery for a medical condition during this meeting. McKinnon testified that he did not receive any documentation to support the claim.

[37] At the end of this meeting and prior to the successful completion of the extended probationary period, the Complainant was advised that her employment was terminated.

[38] Two days later, on June 24, 2010, the Complainant was provided with a letter confirming the termination of her employment. The reasons for termination were stated as "failure to provide regular and reliable attendance". The letter outlines all of the

Complainant's absences including non-culpable paid sick time, culpable and unpaid time and 35 WSIB days:

> During your probationary period your non-culpable absenteeism, for which you were paid sick was as follows:
>
> 1. December 30, 2009-January 1, 2010-three(3) days paid and certified
>
> 2. January 19, 2010-2.85 hours paid and certified
>
> 3. February 10 to 12, 2010-2.5 days paid and certified
>
> 4. March 10 to 12, 2010-2.5 days paid and certified
>
> 5. May 18, 2010-8 hours paid certified.
>
> Additionally, your culpable absenteeism, for which you were not paid, was as follows:
>
> 1. October 9, 2009 – 5.5 hours unpaid
>
> 2. December 17, 2009- unpaid this was related to a WSIB injury suffered with a previous employer and you stated that this lost time was paid by WSIB
>
> 3. December 24, 2009-9.48 unpaid
>
> 4. February 25, 2010-4.88 hours unpaid-you stated that this, also, was related to your WSIB injury suffered with a previous employer and the lost time was paid by WSIB
>
> 5. April 24, 2010-10.40 hours unpaid
>
> 6. May 11, 2010-7.5 hours unpaid- you stated that this was related to a Dental claim for which you are now submitting an application for Sick Leave.
>
> 7. May 13, 2010-4.84 unpaid – you stated that this was related to a Dental claim for which you are now submitting an application for Sick Leave
>
> 8. May 22, 2010 -10.40 hours unpaid.

[39] The letter goes on to state:

> As a result of the above you have been deemed unsuccessful in completing your probation and therefore I must inform you that your employment, as a bus operator with the City of Ottawa, is being terminated effective immediately for failure to provide regular and reliable attendance.

[40] On June 29, 2010 the Union filed a grievance of the termination of her employment.

[41] The grievance was referred to arbitration. A hearing was held April 6, May 24, and June 8, 2011 before Arbitrator Christine Schmidt. The Complainant provided sworn testimony in this hearing. There is no transcript of the evidence in this arbitration. However, Marg White, an employee of the Respondent who was present at the arbitration, kept detailed notes during the proceeding. These notes were entered into evidence at the hearing.

[42] In June 2011, the Respondent and Union settled the Complainant's grievance by an agreement that the termination be replaced with a resignation for the limited purposes of employment references and that a neutral reference be given to any employer inquiries. The Complainant initially agreed to the settlement on or about June 8, 2011, the last date of the hearing, and subsequently withdrew her agreement sometime before the Minutes of Settlement were executed on June 15, 2011.

[43] Minutes of Settlement were executed on June 15, 2011 on the following terms:

> (...)
>
> AND WHEREAS this grievance asserted that the termination as both wrongful and discriminatory within the meaning of the *Canadian Human Rights Act*
>
> (...)
>
> AND WHEREAS the parties, including the grievor, following the closing of the Union's case and a discussion with Arbitrator Schmidt agreed to a settlement of her grievance and a settlement of her outstanding human rights complaint currently before the Canadian Human Rights Commission;
>
> AND WHEREAS the grievor has subsequently advised the Union that she no longer wished to settle either her grievance of her human rights complaint;
>
> AND WHEREAS the Union, in the interest of good and harmonious labour relations, is not prepared to continue to litigate a grievance that had been resolved;
>
> NOW THEREFORE the parties agree as follows:

> 1. The termination of the grievor, Cheryl Bezoine, for the limited purposes of her employment record and for any references to future employers is hereby withdrawn and replaced with a resignation effective the same date.
>
> 2. The grievor should be given a neutral reference by the City of Ottawa in regards to any future employers. Specifically, any employers who enquire in regards to the grievor shall be advised only of the dates of her employment, the nature of her duties and that she resigned her employment with the City as of June 24, 2010.
>
> 3. The parties agree that the evidence put before Arbitrator Schmidt canvassed the issue of disability and whether or not the grievor had been discriminated against by the City contrary to the provisions of the Canadian Human Rights Code.
>
> 4. The parties agree that nothing in these Minutes of Settlement precludes or restricts the City from offering any defence to the complaint filed by the grievor with the Canadian Human Rights Commission.
>
> 5. In consideration of paragraph 1 and 2 above, the Union agrees to withdraw the grievance #T-65-10 dated June 29, 2010.

[44] The Minutes of Settlement also note that the grievor "has subsequently advised the Union that she no longer wished to settle either her grievance or her human rights complaint".

[45] Because the matter was settled at arbitration, the arbitrator did not issue a final decision on the issue of whether or not the Respondent discriminated against the Complainant on the basis of her disability or any other matter. There is no evidence that a decision was reached on this issue.

[46] On August 20, 2010 the Complainant filed a human rights complaint.

[47] On September 8, 2011, the Respondent requested that the complaint be dismissed pursuant to section 41(1)(d) of the *Canadian Human Rights Act* (the "*Act*") on the basis that the issues raised in the complaint had been dealt with in the grievance process.

[48] On December 8, 2011, the Commission issued a section 40/41 report recommending that the Commission deal with the complaint pursuant to section 41(1) of the CHRA because it was not satisfied that the other process had addressed the allegations of discrimination.

[49] On February 17, 2012, the Commission adopted the section 40/41 report and advised the parties that they had 30 days to judicially review the decision. Neither party filed for judicial review of this decision.

[50] On June 23, 2014, the Respondent filed a Statement of Particulars claiming that the complaint was an abuse of process as a result of the settlement of the grievance. The Respondent objected to the hearing of this matter alleging it was an abuse of process.

[51] The Tribunal determined that argument on this issue should follow the hearing of evidence and that the motion could not be dealt with on a preliminary basis.

[52] A hearing was held in November 2015.

[53] On November 5, 2015, after the Complainant's testimony, but before any other witnesses were called, the Respondent requested that the claim be dismissed based on settlement of the grievance and abuse of process.

[54] On December 4, 2015, the Respondent filed a motion to dismiss the Complaint as an abuse of process.

[55] On January 25, 2017, the Tribunal issued a decision dismissing the motion to dismiss the Complaint on the basis of abuse of process.

## IV. Issues

[56] The issue for the Tribunal to determine is whether the Respondent discriminated against the Complainant contrary to Section 7 of the CHRA when it terminated her employment due to her absences from the workplace.

[57] In order to make this determination the Tribunal is required to consider whether:

a. Ms. Bezoine had a disability as defined by the CHRA; if so whether
b. She experienced an adverse effect as a result of this disability; and
c. Whether the disability was a factor in the decision to terminate her employment.

[58] Due to the conflicting evidence presented at the hearing, findings of credibility will also need to be made.

## V. Analysis

### A. Findings of Credibility

[59] Given that there were several discrepancies in the hearing between the witness testimony and documentary evidence and between witnesses, credibility forms an important component of this case.

[60] When assessing credibility it is important to recognize that the demeanour of a witness is only one aspect of credibility. It is also important, and perhaps more so, to consider the context and content of the witness testimony and what was said, and done, and in this case written, during the events that led to the complaint in relation to the totality of the evidence presented to assess credibility. It is also important to recognize that the credibility of a witness does not mean that everything the witness says or writes is accepted or rejected.

[61] In *Faryna v. Chorny* 1951 CanLII 252 (BCCA), the British Columbia Court of Appeal outlined the approach that should be taken to assess credibility as follows at p 356-357 of its decision:

> …Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors combine to produce what is called credibility.
>
> The credibility of interested witnesses, particularly in cases of conflict of evidence cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of the witness in such a case must be in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions (…) Again a witness may testify to what he sincerely believes to be true, but he may honestly be mistaken.

[62] Credibility becomes an issue in this case because the sworn testimony provided by the Complainant at the hearing differs in some instances with that of her prior sworn evidence in an arbitration proceeding, documentary evidence provided at the hearing, including the Complainant's prior written statements and the sworn testimony of other witnesses at the hearing.

[63] Some examples affecting the credibility of the Complainant in this case include:

a. Her testimony at this hearing that she provided her supervisor, Wayne McKinnon, with Dr. Moreau's medical note during a meeting in June 2010. This conflicts with the testimony of Dr. Moreau and the documentary evidence that shows the note was not written at the time of this meeting. Dr. Moreau testified that he did not write the note in question until July 2, 2010 which is after the Complainant's employment was terminated and means that she could not have provided this note to McKinnon in June 2010.

b. Her testimony in 2011 at an arbitration was that she could not recall giving McKinnon Dr. Moreau's note when told that McKinnon would testify that he did not receive the note. This conflicts with her testimony in this hearing that the note was provided to McKinnon in June 2010.

c. Her testimony in this hearing that she was sent home by McKinnon on December 24, 2009 which conflicts with McKinnon's testimony that he was not at work on that day. Testimony of Zahid Chaudhari also confirms that McKinnon was not at work on that day and that he met with the Complainant and sent her home on December 24, 2009.

d. There were also discrepancies in the Complainant's testimony as to the reasons that she missed time from work and on what dates.

[64] As a result of these, and other discrepancies in her evidence, I find that in many instances the Complainant was not credible and her evidence was not reliable. The Complainant's testimony at the hearing was often in conflict with the evidence of other witnesses and with evidence she had provided in previous sworn testimony and documentary evidence provided at the hearing. While I do not believe that she was intentionally attempting to mislead, I do find that the Complainant was not credible.

[65] Other witnesses who testified at the hearing included Dr. Moreau, Wayne McKinnon, Marg White, Zahid Chaudhari and Andrea Alegio. I find that all of these witnesses were credible and that their evidence was generally reliable. While each stated on occasion

that they could not recall when asked a question, each of these individuals answered the vast majority of questions put to them succinctly and their testimony was generally consistent with the documentary evidence before me. Three of these witnesses – Dr. Moreau, Marg White and Wayne McKinnon had taken notes on the issues to which they testified at the time that the alleged events occurred. These notes were entered into evidence and these witnesses referred to their notes during their testimony before me.

[66] For these reasons I find that where there are discrepancies in the evidence presented before me, the Complainant's evidence is unreliable and have resolved these factual discrepancies by relying on the testimony of other witnesses and documentary evidence before me.

## B. Delay

[67] Before addressing the issue of discrimination, I must first address the issue of delay. The Respondent has submitted that this matter should be dismissed for delay based in part on the fact that it was over ten years from the time the complaint was filed until it was in a position to provide evidence to defend the claim. It has suggested that the time between the filing of the complaint and its ability to provide an answer to the claim has resulted in prejudice to its ability to answer the allegations. The Respondent claims that such prejudice is demonstrated by the inability of witnesses to recollect certain events and inability to locate certain documentary evidence.

[68] When considering the issue of delay it is important to note that delay without more will not warrant a stay of proceedings. This was confirmed by the Supreme Court of Canada on October 5, 2000, in *Blencoe v. British Columbia (Human Rights Commission)* [2000] 2 S.C.R. 307 (S.C.C.). At page 64 of this decision the court stated:

> In my view, there are appropriate remedies available in the administrative law context to deal with state-caused delay in human rights proceedings. However, delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period [emphasis added].

[69] The Respondent also relied on the cases of *Nulla Holdings v. BC* 2000 CarswellBC 1887, and *Grover v. National Research Council of Canada* 2009 CHRT 1 where the British Columbia Supreme Court and this Tribunal each dealt with the issue of delay.

[70] In *Grover* the Tribunal confirmed that before a matter is dismissed for delay there must be a finding of prejudice of "sufficient magnitude to impact the fairness of the hearing":

> The Supreme Court pointed out in *Blenco* at para. 101, that "delay, without more will not warrant a stay of proceedings." The delay must be such that it would necessarily result in a hearing that lacks the essential elements of fairness. Evidence must be brought to bear demonstrating prejudice of "sufficient magnitude to impact on the fairness of the hearing" (*Blenco* at para. 104. *Ford Motor Co. of Canada v. Ontario (Human Rights Commission)* [1995 CarswellOnt. (Ont. Div. Ct.)], 1995 Can LII at para 16).

[71] There is no question that there were delays in the processing of this file from the filing of the complaints and their referral to the Tribunal and the processing to this decision. I believe, however, as the Supreme Court states in the *Blencoe* case, that these delays alone do not warrant a stay of proceedings. For the reasons noted below I do not believe that there was evidence before me that any delay caused prejudice of "sufficient magnitude to impact the fairness of the hearing".

[72] The Complainant testified at this hearing. She also testified at the earlier arbitration. Notes of the arbitration taken by Marg White were entered into evidence. Notes that the Complainant had taken at the time of the events in question were also referenced. The Complainant's testimony is at times generally consistent with these notes. At other times her testimony conflicts with these notes and other witness testimony. I find that this is more likely a matter of credibility than a lack of recollection.

[73] The Complainant called Dr. Moreau to testify. He relied on his medical file to provide accurate evidence on the questions he was asked. His evidence was reliable and credible. He was the only medical professional called to testify.

[74] The Respondent called four other witnesses at the hearing: Andrea Alegio, Marg White, Wayne McKinnon and Zahid Chadourie. The Respondent claims that, due to delay, these witnesses no longer have a clear recollection of the events and evidentiary issues in this case. In hearing from these witnesses I find that, while they did not have perfect recall

of the events in question, they appeared to have good knowledge and recollection of the key events giving rise to this complaint. They were able to give evidence independently and some had made notes contemporaneously with the events in question to which they referred during their testimony. Evidence was also provided of testimony given and notes taken in the grievance case that was heard shortly after the Complainant's termination. As a result, I do not accept that any delay in these proceedings has resulted in the significant prejudice to the Respondent required for dismissal of the claim on the basis of delay. Nor do I believe that any delay has resulted in a situation where it would be impossible to provide a fair hearing of the claim.

[75] I will therefore address the merits of the claim.

## C. Discrimination

**Did the Respondent discriminate against the Complainant contrary to Section 7 of the CHRA when it terminated her employment on June 22, 2010 due to her absences from the workplace.**

[76] The Complainant alleges that the Respondent discriminated against her on the basis of disability contrary to section 7 of the CHRA by terminating her employment for disability-related absences on June 22, 2010. The Complainant's termination letter states that she was terminated due to her failure to provide regular and reliable attendance. The evidence shows that the Complainant was absent for approximately fifty-two (52) days during her probationary period; thirty-three (33) days relating to a WSIB injury; nine (9) non culpable days and eight (8) culpable days.

[77] The Respondent submits that the termination was not discriminatory and that there is insufficient evidence to establish that the Complainant had a disability at the time of termination of her employment. The Respondent further submits that it was not aware of a claim of disability prior to termination of employment. As discussed in more detail below, on these points I agree with the Respondent.

[78] Section 7 of the CHRA defines a discriminatory practice as an "adverse differentiation and refusal to continue to employ an individual" on a prohibited ground of

discrimination. The prohibited grounds of discrimination are set out in section 3(1) of the CHRA and include disability.

[79] The Supreme Court of Canada considered the issue of discrimination in *Andrews v. Law Society of British Columbia,* [1989] 1 SCR 143 and found that:

> ...discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

[80] The test to determine whether a case of discrimination has been established was set out by the Supreme Court of Canada in *Ontario Human Rights Commission v Simpsons-Sears Ltd.* 1985 CanLII 18 (SCC), [1985] 2 SCR 536 at 546-547 [O'Malley] wherein the Court found that a successful case is:

> One which covers the allegations made and which, if [the allegations] are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the City-employer.

[81] In *Stewart v Elk Valley Coal Corp*., 2017 SCC 30 (CanLII), the Supreme Court set out the following framework to determine the requirements to establish a case of discrimination:

> To make a case of *prima facie* discrimination, "complainants are required to show that they have a characteristic protected from discrimination under the Code; that they experienced adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact": Moore, at para. 33. Discrimination can take many forms including "indirect discrimination", where otherwise neutral policies may have an adverse effect on certain groups: […] Discriminatory intent on behalf of an employer is not required to demonstrate prima facie discrimination" […]

[82] It is the Complainant who bears the burden of proving allegations of discrimination. This was confirmed by the Federal Court of Appeal in *Canada (Social Development) v. Canada (Human Rights Commission)*, 2011 FCA 202 at para 16:

> It is settled law that the burden of proof in the human rights context is the same as in the civil context: he or she who alleges bears the burden of proving on a balance of probabilities….

[83] Thus, to establish her case, the Complainant must show that:

a. she had a characteristic protected from discrimination under the CHRA*;*

b. she experienced an adverse impact; and

c. the protected characteristic was a factor in the adverse impact.

[84] 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 Supreme Court found it is not necessary to establish a 'causal connection' but a simple 'connection' or 'factor' is sufficient:

> [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…"

[85] The Supreme Court went on to say that where a complainant establishes these three elements a respondent must either present evidence to refute the allegations of discrimination, put forward a defence justifying the discrimination or both. If a respondent is unable to provide justification, proof of these three elements on a balance of probabilities will be sufficient to find that a violation of the CHRA has occurred. If a respondent is successful in justifying its decision, there is no violation of the CHRA.

[86] The Tribunal will first consider whether the Complainant has established that she had a disability at the time of her termination.

**Did the Complainant have a disability as defined by the CHRA?**

[87] Section 25 of the CHRA defines "disability" as "any previous or existing mental or physical disability. . .".

[88] In *Desormeaux v Corporation of the City of Ottawa*, 2005 FCA 311 (CanLII), at paragraph 15, the Court defined disability as "a physical or mental impairment, which results in a functional limitation or is associated with a perception of impairment".

[89] The law is clear that not all medical conditions are disabilities.

[90] In this case the Complainant did not report to work and, on at least one occasion, October 9, 2009, did not notify her employer that she was unable to do so. In other instances she did not provide reasons or justification for her absence until confronted in a disciplinary meeting.

[91] I will first consider whether the Complainant suffered a disability that prevented her from reporting her absences as required by the Respondent.

[92] In *Riche v TB* 2013 PSLRB 35 at para 130 the Board found that in order to establish a disability in cases where reporting is in issue and disability alleged, there must be evidence that the condition was so bad that it limited the ability of the employee to comply with the reporting condition:

> The fact that one experiences such conditions does not establish a *prima facie* case of disablement or all the more so, a *prima facie* case of discrimination based on a disability. Needed in this case was evidence that the conditions were so bad that they disabled or at least limited the grievor's ability to comply with the reporting conditions. But the grievor offered no such evidence other than the conditions themselves.

[93] There is no such evidence of a condition that disabled the Complainant to the point of making her unable to comply with reporting conditions in this case. The condition for which she provided a physican to testify was a gynecological condition that she testified made it difficult for her to sit for long periods of time and wear a tight fitting uniform. She provided no evidence that this prevented her from reporting her absences to her employer. Nor did she provide evidence that any other condition prevented her from so doing. I cannot therefore conclude that a medical condition was the reason that she failed to report her absence to the Respondent on October 9, 2009.

[94] I will now consider whether there was evidence before me of a disability for any or all of the eight (8) culpable absences of the Complainant.

[95] In *Bodnar v. TB* 2016 PSLREB 71 at para 106 (reversed on other grounds) the Board found that mere assertion or production of a brief medical note does not provide sufficient evidence of a disability:

> A disability is not established during the hearing by virtue of the employee's mere assertion that one exists or the production of a brief medical note without the benefit of the doctor's testimony.

[96] Although there was medical testimony from Dr. Moreau in this case, I find that he did not provide sufficient evidence to establish a disability. Dr. Moreau verified the condition from which the Complainant was suffering. He also verified an absence of approximately 2.5 days and a need for future surgery. He did not establish that the eight (8) unexplained culpable absences of the Complainant resulted from this condition nor did he establish that the Complainant's failure to notify the Respondent of an inability to attend work resulted from a disability.

[97] The law is clear that it requires more than reference to pain and/or symptoms to establish a disability (*Canada v. Gatien* 2016 FCA 3 at para 48 citing *Crowley v. Liquor Control Board of Ontario* 2011 HRTO 1429 at paras. 57-65).

[98] The evidence in this case confirms that the Complainant was suffering pain from a medical condition during her employment and that she required surgery to correct this medical condition. She had surgery for this condition approximately 3 weeks after her employment was terminated. This alone however does not establish that she had a disability at the time of termination of her employment particularly in light of the fact that the evidence shows that the culpable absences were, based on her own testimony, unrelated to the condition in issue. The Complainant testified that the absences in question were due to a variety of reasons ranging from her WSIB injury, dental appointments, upset due to discrepancies in her pay and some were unexplained. None of these explanations relate to her gynecological condition, or, with the potential exception of her WSIB injury, any other condition that would establish a disability, and none of these explanations were provided until long after the absences occurred and only when the Complainant was called to a disciplinary meeting.

[99] The Complainant testified that her gynecological condition started in October 2009 when she developed hymenal tags which caused her significant pain that was exacerbated by sitting for long periods of time as a bus driver. She also testified that she sought medical attention in November and December 2009 for this condition. On these occasions she reported her inability to report to work to the Respondent, provided medical documentation to substantiate the absence and was granted paid sick time. These days were not counted in culpable absences.

[100] Her treating physician and surgeon's, testimony supports the symptoms and conditions claimed by the Complainant and accounts for her absence from the workplace on February 10 – 12, 2010 for approximately 2.5 days. It does not however establish a disability. Dr. Moreau did not provide evidence that the Complainant had any limitation from performing her employment duties or required any other accommodation from her employer to attend work outside of this time frame. His evidence accounts for her absence on those 2.5 days only and not at any other time in her employment with the Respondent. This does not establish a disability for the culpable absences. Furthermore, it does not explain the other culpable absences of the Complainant which even she testified resulted from other causes.

[101] I am not denying that it would have been difficult, as a bus driver, to deal with the symptoms described by the Complainant. Both the inability to sit for extended periods of time and wear a tight fitting uniform would conceivably pose difficulty for the Complainant when she was experiencing a flare up of symptoms of her gynecological condition. The issue however is not whether this would pose problematic for the Complainant, but whether this condition was disabling to the point of establishing a disability and, whether at the time of the absences, this, or any disability, was actually the reason that she was unable to attend at the workplace. I find based on the evidence before me that it was not.

[102] After analyzing the record before me at the hearing and applicable case law, I have concluded that there is insufficient evidence to establish that the Claimant was suffering from a disability within the meaning of the CHRA at the time of termination of her employment in June 2010 that caused her to miss work on the eight (8) culpable days in

question for which documentation was not, at the time of her termination, provided to the Respondent.

**Did the Complainant experience an adverse impact?**

[103] Given my conclusion that the Complainant was not suffering from a disability at the time of termination of her employment, it is not necessary for me to determine whether there was an adverse impact. However, I do find that even in the event the Complainant was suffering a disability, there was no adverse impact suffered.

[104] The law is clear that the Claimant must demonstrate actual adversity to meet the second element of the test.

[105] The Federal Court of Appeal in *Bodnar*, found that employers have a right to monitor absences and that counting absences, even if such counting includes absences relating to disabilities, is not, in and of itself, adverse treatment of an employee. (*Canada (Attorney General) v. Bodnar 2017 FCA 171* at para 26-33). I find that the Respondent was within its right as an employer to monitor the Complainant's absences and that it did so.

[106] The evidence before me was clear that at no time did the Complainant advise the Respondent of a disability prior to the termination of her employment; she, herself, confirmed this in her testimony.

[107] The courts have been clear that disability cannot be a factor in adverse treatment in cases where the employer is not aware of a disability. In *Central Okanagan School District No. 23 v. Renaud* 1992 CanLII 81 (SCC) the Supreme Court dismissed the claim because the employee had neither requested accommodation nor advised the employer of a disability. The same can be said in this case.

[108] Although not raised in her complaint, the Complainant has submitted that the extension of her probationary period supports a finding that she experienced an adverse impact. I disagree. The extension of the probation period was a decision made as a result of and to accommodate the Complainant's absences during her probationary period and allow the Respondent sufficient time to assess her abilities as a bus driver. The extension

did not impact the Complainant's pay progression or any other benefits of her employment. I do not find this or any other evidence before me sufficient to establish an adverse impact.

**Was there a nexus between the Complainant's termination and disability?**

[109] Because I have concluded that there was no disability, there cannot be a nexus established in this case. I note however that the mere fact that an individual has a disability does not prevent an employer from disciplining or terminating employment if the decision to do so is unrelated to the disability. This was confirmed in *Stewart v. Elk Valley Coal Corp.* 2017 SCC 30 where the Supreme Court upheld an employee's termination finding that there was no evidence the disability in question, addiction, prevented the employee from advising the employer of the drug use as required by safety policy.

[110] The evidence presented at the hearing showed that the Complainant was absent from the workplace for approximately fifty-two (52) days during the first nine months of her employment. Approximately thirty-three (33) of these days were related to an injury sustained during prior employment and covered by a WSIB claim; witness testimony shows that none of these absences were considered in the termination of the Complainant's employment. Witness testimony also confirms that the disciplinary meeting leading to termination of the Complainant's employment was focused on culpable absences from the workplace.

[111] The Complainant testified that she missed time during her employment due to a WSIB injury with a prior employer. She also testified that she was experiencing painful gynecological issues which made sitting for long periods of time as a bus driver very difficult for her. She provided *viva voce* and medical evidence to this effect. She testified that she saw a medical specialist, Dr. Moreau, about her condition. She called Dr. Moreau to testify. Dr. Moreau testified that he diagnosed the Complainant with swollen hymenal tags that would be painful in sitting positions and that wearing the close fitting uniform required in her position would also exacerbate her condition. He recommended surgery for this condition. He also recommended time off work. The Complainant requested and was granted paid sick time when she notified her employer and provided documentation to justify her request for time off as a result of this recommendation. It was only when she failed to do so that

disciplinary action and ultimately termination ensued. Furthermore, it appears that these absences, as noted above, were unrelated to this condition.

[112] There was evidence before me that the Complainant requested time off work on approximately nine (9) occasions as a result of medical issues and for her WSIB injury. She was granted paid sick time for the non culpable absences.

[113] The Complainant did not provide explanation for the eight (8) days of culpable absences she accrued during her employment until confronted with this in a disciplinary meeting in June 2010. It is clear from the many other instances in which she followed policy and notified the employer of her inability to attend work that she was aware of the need to do so. Both the Complainant and her supervisor Wayne McKinnon testified that the focus of the investigatory meetings in June 2010 that ultimately led to the termination of her employment was on culpable absences. McKinnon testified that the termination was based on culpable absences. The Complainant corroborated this testimony. The Complainant failed at any time during her testimony to provide any explanation for why these absences were accumulated without proper notification or medical documentation or how her medical condition contributed to her inability to follow proper procedure to notify her employer of an inability to attend work. It was her failure to do so that resulted in the termination of her employment. I therefore conclude that there was no nexus between the termination and any disability the Complainant may have had.

[114] I note that I have also considered the recent case of *Todd v. City of Ottawa* 2020 CHRT 26 which was relied upon by the Commission in its submissions. In this case the Tribunal found that disability related absences were included in the rationale for Mr. Todd's termination and there was no dispute on this point. I find that the present case is distinctly different given McKinnon's testimony that the matter in issue at the disciplinary meeting in June 2010 was the culpable absences of the Complainant not the WSIB absences or non-culpable absences. The Complainant's culpable absences was the Respondent's concern at the time of termination of employment. The Complainant herself corroborated this testimony. I therefore find that there is insufficient evidence before me to conclude that the non-culpable absences, although recited in the termination letter along with the WSIB absences, formed part of the rationale for termination.

## VI. Conclusion

[115] For all of the above noted reasons I conclude that it was not discriminatory for the Respondent to dismiss the Complaint as a result of her inability to provide regular and reliable attendance.

## VII. Disposition

[116] I find that the complaint is dismissed.

[117] At the commencement of the hearing it was agreed that the hearing into this complaint would be bifurcated as between the merits and the remedies. Given that I have found that the complaint has not been substantiated, I do not require further submissions on remedy in this case.

*Signed by*

Lisa Gallivan
Tribunal Member

Ottawa, Ontario
March 25, 2022

## Canadian Human Rights Tribunal

## Parties of Record

**Tribunal File:** T1941/2113

**Style of Cause:** Cheryl Lynn Bezoine v. City of Ottawa

**Decision of the Tribunal Dated:** March 25, 2022

**Date and Place of Hearing:** November 2 to 5, 2015; September 13, 2017; January 11, 12, 13, 2021 and September 21, 2021

Ottawa, Ontario and by videoconference

**Appearances:**

Cheryl Lynn Bezoine, for herself

Ikram Warsame, for the Canadian Human Rights Commission

David Patacairk, for the Respondent