

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2022 CHRT 18

Date: May 31, 2022

File No.: T2461/1820

Between:

Glenn Luckman

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Bell Canada

Respondent

Decision

Member: Alex G. Pannu

Table of Contents

I.	Overview	1
II.	Decision	1
III.	Factual Context	1
IV.	Issues.....	2
V.	Analysis/Reasons	3
	A.	
	Issue 1: Can Mr. Luckman prove, on a balance of probabilities and considering the respondent's evidence, a <i>prima facie</i> case of discrimination based on disability and/or family status, contrary to section 7 of the <i>Act</i> ?	3
	(i) Legal Framework	3
	(ii) Is Mr. Luckman someone with a protected characteristic or characteristics under s 3(1) of the <i>Act</i> ?	4
	(iii) Did Mr. Luckman experience an adverse impact in the course of employment?	5
	(iv) Was Mr. Luckman's cancer a factor in Bell's decision to terminate him?	5
	B.	
	Issue 2: If discrimination is established, what remedies flow from the discrimination?	16
	(i) Overview	16
	(i) Legal Framework	16
	(ii) What remedies is Mr. Luckman entitled to?.....	16
VI.	Order.....	22

I. Overview

[1] Glenn Luckman started his employment as a Business Development Manager (BDM) with Bell Canada on May 9, 2016. During his time at Bell, he cared for his ailing father until his passing in April 2017. Also in April 2017, Mr. Luckman was diagnosed with cancer. He started a medical leave in May 2017 and ultimately returned to work in November 2017. He was terminated less than a month later on December 6, 2017.

[2] The key issue in this case is the reason for Mr. Luckman's termination from his employment with Bell Canada. Mr. Luckman maintains that his cancer or caregiving responsibilities for his father were factors in his termination. Bell maintains that Mr. Luckman's termination was a result of a corporate restructuring and did not involve any consideration of his cancer or caregiving responsibilities.

[3] My assessment of the evidence, including the credibility issues the parties raise, and the law is integrated into my analysis. While I considered all the evidence and submissions, my analysis addresses what is necessary to decide the case.

II. Decision

[4] For the reasons that follow, the complaint is substantiated. The respondent discriminated against the complainant contrary to section 7 of the *Canadian Human Rights Act*, RSC 1985 c H-6 [the *Act* or the *CHRA*] and is entitled to compensation of \$91,052.40 for lost wages. The complainant is also entitled to \$15,000 in damages for pain and suffering and damages of \$15,000 for the respondent's wilful and reckless conduct.

III. Factual Context

[5] Mr. Luckman started working for Bell Canada as a Business Development Manager on May 9, 2016. Mr. Luckman was responsible for maintaining and developing accounts with Bell's customers. He received a base salary of \$80,000 and was eligible for a bonus of \$44,000, for total potential compensation of \$124,000.

[6] In mid-2016, Mr. Luckman started experiencing health challenges and he sought medical attention in December 2016 when he discovered a lump in his groin. He was formally diagnosed with cancer on April 8, 2017.

[7] In January 2017, Bell made some changes to their BDM structure and transferred Mr. Luckman to a new team where he reported to Andy Zankowicz, who in turn reported to Rosanna D'Ambrosio.

[8] Mr. Luckman's father was hospitalised in April 2017 and unfortunately passed away later that month. Mr. Luckman had been the caregiver for his father for the previous five years. Mr. Luckman took a five-day bereavement leave.

[9] On May 5, 2017, Mr. Luckman commenced a medical leave to have surgery. He attempted to return to work on October 2, 2017. There was a gradual return-to-work schedule put in place by Bell's insurer, although the parties dispute to what extent Mr. Luckman's return to work was in fact gradual. In any event, the return to work was unsuccessful and Mr. Luckman returned to medical leave.

[10] In November 2017, Mr. Luckman returned to work for a second time. The parties again dispute the exact nature of this return-to-work.

[11] Bell Canada terminated Mr. Luckman on December 6, 2017.

[12] Mr. Luckman secured a new job that started November 12, 2018.

IV. Issues

[13] The complaint raises the following issues:

- A) Can Mr. Luckman prove, on a balance of probabilities and considering the respondent's evidence, a prima facie case of discrimination based on disability and/or family status, contrary to section 7 of the Act?
- B) If discrimination is established, what remedies flow from the discrimination?

V. Analysis/Reasons

A. Issue 1: Can Mr. Luckman prove, on a balance of probabilities and considering the respondent's evidence, a *prima facie* case of discrimination based on disability and/or family status, contrary to section 7 of the *Act*?

(i) Legal Framework

[14] Mr. Luckman alleges discrimination in relation to employment on the basis of disability and family status 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 to 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*. They include disability and family status.

[15] The 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 SCR 536 at para. 28 [*Simpson-Sears*]).

[16] 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*)).

[17] 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; 3) the protected characteristic was a factor in the adverse impact (*Moore v. B.C. (Education)*, 2012 SCC 61 at para. 33).

[18] 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 at para. 25).

[19] The Supreme Court of Canada elaborated on this definition in *Bombardier* 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.

[20] 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 (*Bombardier* at para. 64).

[21] However, the *CHRA* does not impose a separate and freestanding procedural duty to accommodate (*Canada (Attorney General) v. Cruden*, 2014 FCA 131).

(ii) Is Mr. Luckman someone with a protected characteristic or characteristics under s 3(1) of the Act?

[22] Yes. Mr. Luckman was diagnosed with cancer on April 8, 2017. It was a return of the same cancer he had in 2012 which resulted in surgery. He took a medical leave from May 5, 2017 until October 1, 2017. He was either still in the process of returning to work or had just completed his return to work after his medical leave when he was terminated.

[23] Mr. Luckman was a caregiver for his father until his father’s passing in April 2017. He also took a bereavement leave. The *CHRA* protects Mr. Luckman’s ability to attend to his ailing father. Mr. Luckman’s conduct in caring for his father and mourning his father’s death is protected by family status.

(iii) Did Mr. Luckman experience an adverse impact in the course of employment?

[24] Yes. There is no dispute that Bell Canada terminated Mr. Luckman's employment on December 6, 2017. That was an adverse impact on him financially, emotionally and psychologically.

(iv) Was Mr. Luckman's cancer a factor in Bell's decision to terminate him?

[25] Yes. Mr. Luckman's cancer was a factor in Bell's decision to terminate him.

Mr. Luckman's medical condition

[26] Mr. Luckman testified that he suffered from cancer in 2012 which required surgery. At the time he commenced working for Bell in May 2016, he was not aware of any health issues related to his previous cancer.

[27] Mr. Luckman said he started experiencing flu-like symptoms in mid-2016. Later he experienced bleeding gums, conjunctivitis and allergy-like symptoms. When he found a lump in his groin in December, he went to see a doctor.

[28] Mr. Luckman went to many medical appointments and underwent various screening procedures between December 2016 and April 2017. He was diagnosed with a recurrence of the cancer on April 8, 2017. Mr. Luckman said that Bell was aware that he went to multiple medical appointments and did not object to him going.

[29] Mr. Luckman said that his cancer symptoms during this time affected his work for Bell. He testified that he suffered from low energy, irritability, stomach pains and stress which impacted his focus and ability to do his BDM job. He said his physical discomfort, anxiety and missing work because of medical appointments caused him stress.

[30] That stress was exacerbated by the fact that he was the sole caregiver for this father. At about the same time as his cancer diagnosis, his father was hospitalized.

[31] Mr. Luckman also claimed that there was additional stress at work as he had been transferred to Mr. Zankowicz's team in December 2016 and required a second "ramp up" to learn the processes of his new team although he remained a BDM. Since this issue also relates to Mr. Luckman's performance, I will discuss it in more detail when I address the respondent's explanation for Mr. Luckman's termination.

[32] Despite his challenges, the parties agreed that Mr. Luckman did not formally advise Bell of his medical condition and father's worsening condition until he sent an email to Mr. Zankowicz and Ms. D'Ambrosio on April 18, 2017.

[33] Mr. Luckman and Mr. Zankowicz disagreed in their testimony on whether he provided medical evidence that his work was impacted by his cancer during the January to April 2017 period.

[34] In the April 18 email, Mr. Luckman advised that he would not be in the office the next day. His father was being transferred to palliative care and Mr. Luckman was taking a bereavement leave to spend time with his father before he died. Mr. Luckman also said that his cancer was back. Mr. Luckman said he was staying on top of his work but the situation was taking a toll on him.

[35] In response, Ms. D'Ambrosio said he could take the next day off. There was no evidence submitted that the respondent offered or even considered helping Mr. Luckman perform his job while coping with his father's dying and his cancer.

[36] Mr. Luckman's father died on April 26, 2017. He took five days of bereavement leave approved by Bell. He then returned to work on May 1 and worked full-time preparing to transition his business accounts before he departed on a medical leave. During this period, Mr. Luckman said that Bell did not offer additional time off, flexible working hours, working remotely or being given additional support to do his work.

[37] I do not accept the complainant's claim of discrimination on the basis of his family status – namely his father's health. The time between Mr. Luckman's advising Bell of his father's condition and his death was a short period. Although Mr. Luckman was undoubtedly adversely affected by his father's condition and it added stress to his work performance,

there was insufficient evidence that it was a factor in his termination which occurred eight months later.

Mr. Luckman's first medical leave

[38] Mr. Luckman went on a medical leave on May 5, 2017 to receive treatment for his cancer. The medical leave transitioned into a short-term disability (STD) leave which was approved by the respondent's insurer Manulife.

[39] Mr. Luckman underwent successful surgery on May 17, 2017 to remove eight lymph nodes. It was a major procedure which required a lengthy recovery period. He stayed in hospital four days before being discharged. Afterwards, he had regular follow-ups with his surgeon, family doctor, physiotherapist, and nurse. His medical leave was extended by his doctor on August 16 and September 18.

Mr. Luckman's Return to Work

[40] Mr. Luckman started a gradual return to work on October 1, 2017 under a plan the respondent said was wholly designed by Manulife and their doctors. Diana Galvis, a Bell human resources manager confirmed that the respondent was "hands off" on the return to work plan. The plan called for Mr. Luckman to work two non-consecutive days in week one, then three non-consecutive days in week two, then four days in week three and 22.5 hours in week four. A return to a full working week was scheduled to commence on November 10, 2017.

[41] The respondent's witnesses testified that Mr. Luckman's accounts continued to be managed by Loreena Percy and Stephanie Burrows when he returned to work. Bell said they did not want to cause any disruption to customers by transferring the accounts to different BDMs. The only specific assignment that Mr. Luckman was given was to work with a team on a large Request for Information project from an Ontario school board.

[42] Mr. Luckman testified that soon after he returned, his customers learned that he was back and, in his words, "bombarded" him with telephone calls with various account inquiries.

He said that his return to work was not gradual. He said that he was overwhelmed by the demands of work and had to go back on a medical leave.

[43] Mr. Zankowicz said he was unaware that Mr. Luckman's customers were contacting him or that they could even do so. He does not appear to have monitored Mr. Luckman's return to work as he testified that Bell "would have" adhered to Manulife's gradual return to work plan.

[44] Mr. Luckman said he raised the issue of the volume and nature of the work he faced with Mr. Zankowicz in late October 2017. The respondent did not offer any accommodation for Mr. Luckman. Mr. Zankowicz suggested that he could return to a STD leave.

Mr. Luckman's termination

[45] There is some discrepancy as to when Mr. Luckman returned to work from his second STD leave. He said it was November 21, 2017. Diana Galvis said her records show Mr. Luckman returned on November 10.

[46] Mr. Luckman said that in his second return to work he experienced the same stresses as before. Bell did not offer any accommodation such as a flexible schedule, remote work or additional resources. Ms. Galvis said that Manulife cleared Mr. Luckman for work with no restrictions, so they expected him to work as he did prior to his medical leave in May.

[47] Mr. Luckman said that he felt management, including Mr. Zankowicz and Ms. D'Ambrosio were cold to him during this second return. He was concerned enough about his future that he met with Mr. Zankowicz and asked him directly if his employment was secure. According to Mr. Luckman, Mr. Zankowicz reassured him of his future at Bell. Mr. Zankowicz confirmed the meeting but denied giving any such assurances.

[48] On December 6, 2017, Bell terminated Mr. Luckman's employment. In the respondent's letter to Mr. Luckman following a meeting at work, Bell said that "...as a result of changes in the organization, your position is eliminated, and your services will no longer be required as of today."

[49] Ms. Galvis said that Bell goes through approximately two restructurings each year, driven by cost saving measures. She said that Bell underwent large-scale restructurings in 2017, 2018, 2019 and 2021 although Bell only submitted evidence describing the 2017 restructuring which impacted Mr. Luckman.

[50] Ms. Galvis said that the 2017 restructuring took place in two phases, December 2017 and early 2018. A total of 118 employees from Bell Business Markets (BBM) and eight from Network, were terminated in the first phase. Mr. Luckman was the only employee from his team that was terminated. The respondent did not provide any evidence as to what criteria were to be used by managers in selecting employees for termination because of a restructuring.

[51] The Tribunal does not question Bell Canada's business judgement and whether it should have undertaken a corporate restructuring. Its interest lies in determining how Mr. Luckman was selected for termination and whether discrimination, because of his disability or family status, played any factor in his selection.

Respondent's explanation

[52] Bell Canada denies that they discriminated in any way in the termination of Mr. Luckman. Ms. Galvis testified that Mr. Luckman was terminated without cause because Bell underwent a corporate restructuring in which certain numbers of employees were selected in order to meet the respondent's objectives of a reduced workforce. It is the criteria on which Mr. Luckman was selected that I will examine in more detail to determine whether there was discrimination by the respondent.

[53] As a practical matter, the key issue in this case is whether Bell has a non-discriminatory reason for Mr. Luckman's termination. Mr. Luckman was terminated shortly after returning from a medical leave. There were minimal efforts to reintegrate him into his job. When the restructuring occurred, he was the only employee on his team who was terminated. Without an explanation from Bell, the inference naturally arises that his disability was a factor in his termination. However, I am conscious that the obligation of proving discrimination remains with Mr. Luckman.

Mr. Luckman's Performance

[54] In the Respondent's Statement of Particulars (SOP), it stated that Mr. Luckman's performance did not meet expectations. The SOP made it clear that his performance was one of the criteria for his selection.

"The Complainant was a short-service mediocre employee who was likable, but also underperformed during times when he was fit-to-work and had no medical restrictions or accommodation needs. Accordingly, his role was selected to be eliminated, and this was reflected in his termination letter."

[55] Mr. Luckman received his only performance review at the end of December 2016 which assessed him for the seven months he worked at Bell that year.

[56] According to the SOP, the 2016 Performance Review was broken into three sections; the Overall Objective Status, which looked at objective metrics with respect to sales and targets; the Overall Leadership Status, which assessed the softer qualities related to attitude and initiative; and Overall Performance Status, which was a blend of the two previous categories.

[57] In his 2016 Performance Review, Mr. Luckman was assessed as follows:

- (i) Overall Objective Status: Below Meets
- (ii) Overall Leadership Status: Effective
- (iii) Overall Performance Status: Partially Meets

[58] Tim Harvey testified for the respondent as Mr. Luckman's manager. Although he did not do the rating of Mr. Luckman, he did his performance review. Despite Bell's characterization of Mr. Luckman's performance as substandard, Mr. Harvey said he had no issues with his performance. In Mr. Harvey's opinion, Mr. Luckman was performing at an appropriate level.

[59] As a long-term Bell employee, Mr. Harvey said most employees, including Mr. Luckman required a ramp up period of six months, even if they had telecommunications industry experience, to get used to Bell's processes. The period on which his work was assessed corresponded to the ramp-up period on which Mr. Harvey said Mr. Luckman required.

[60] The only other evidence of performance were extracts of Key Performance Indicator (KPI) reports which the BDM team used to track new business won and open opportunities of each BDM. Mr. Luckman was consistently near the top of the KPI reports submitted as evidence.

[61] The respondent attempted to explain Mr. Luckman's above average ranking by saying he benefitted from being assigned many of Mr. Zankowicz's accounts when he was transferred to his team. Mr. Luckman was not the only BDM to benefit from acquiring Mr. Zankowicz's accounts but no information was submitted to the Tribunal on the other BDMs' performance.

[62] The respondent also submitted into evidence various emails from customers or other Bell employees to suggest that Mr. Luckman was unable to fulfill some of his BDM responsibilities in attending to customer inquiries or resolving customer issues with Bell.

[63] However, on cross-examination of Mr. Zankowicz there was very little evidence to support the implication that Mr. Luckman was responsible for these customer issues or that they were not resolved to the customer's satisfaction.

[64] I note that again, these were emails selected by the respondent. There were no emails submitted about similar issues affecting other BDMs. In my view, this evidence was cherry-picked by Bell to reflect negatively on Mr. Luckman.

[65] I found a pattern of selective evidence and omissions submitted by the respondent to try to explain Mr. Luckman's above average sales ranking and purported substandard performance.

[66] That leads me to a serious evidentiary issue that surfaced during the hearing. In her testimony, Ms. Galvis made frequent reference to employee information which she relied upon in supporting the termination process. This information is contained within the respondent's SAP database, the existence of which was only disclosed at the hearing. The respondent said that the database contained employees' personal information and claimed client-solicitor privilege.

[67] I believe that this information should have been disclosed prior to the hearing. Information about the restructuring and subsequent terminations, as well as other employees' performance in comparison to Mr. Luckman, are arguably relevant. In *Brickner v. RCMP*, 2017 CHRT 28, paragraphs 4-10, the Tribunal said that parties must be given "a full and ample opportunity to present their case". That requires relevant information to be disclosed prior to the hearing.

[68] If the respondent chose to claim privilege, they should have done so prior to the hearing in accordance with the Tribunal's Rules of Procedure and the parties and the Tribunal could have dealt with the issue then.

[69] The lack of evidence from the respondent that Mr. Luckman's performance on the KPI reports was due to him benefitting from Mr. Zankowicz's accounts leads me to conclude that his performance was not sub-standard.

[70] At the hearing and in its closing submissions, the respondent downplayed Mr. Luckman's performance as a proximate cause for his termination. In its submission the respondent said "The complainant was a not a poor performer and was at no point subject to a performance improvement plan or discipline. He excelled on the client facing aspects of the BDM role but needed improvement on the administrative side."

[71] Mr. Harvey's testimony did not show he had any concerns about Mr. Luckman's performance. Mr. Zankowicz's evidence about Mr. Luckman's performance were selected emails showing some concern with his ability to handle customer inquiries. Mr. Zankowicz also testified that they met weekly and junior BDMs were assigned to assist Mr. Luckman in account management. Mr. Luckman was the only BDM to receive this support.

[72] Loreena Percy was one of the BDMs assigned to help Mr. Luckman. Although she held the same title, she did not have accounts of her own. She was a member of Bell's university graduate hire program, new employees being groomed for leadership roles and moved around the company to learn the business.

[73] Ms. Percy testified about helping Mr. Luckman with administrative tasks and attending his weekly meetings with Mr. Zankowicz. She said she spent more time helping

Mr. Luckman than the other BDMs. However, her evidence provided no additional insight as to why Mr. Luckman was selected for termination by the respondent.

Ms. D'Ambrosio's Evidence (Selection in Early 2017 Explanation)

[74] Ms. D'Ambrosio testified that she was the one who selected Mr. Luckman in November 2017 as the team member to be terminated. She explained that she was told by the respondent to reduce her team by one person. She said that after going through several restructurings at Bell already, she had Mr. Luckman in mind in January 2017 when he was assigned to her team as the most likely team member for termination at the next restructuring. She provided no evidence to corroborate this assertion.

[75] Ms. D'Ambrosio spent much of her testimony describing Bell's emphasis on servicing the customer and that she had built a high-performance team that had been in place for about 2.5 years. Mr. Luckman was a relatively new employee although not the most junior team member. Although she did not state it explicitly, Ms. D'Ambrosio clearly implied that she did not consider Mr. Luckman to be able to meet her expectations to be a team member. I did not find that she provided a specific, non-discriminatory and reasonable explanation for her decision to select Mr. Luckman for termination.

[76] Ms. D'Ambrosio said that she chose not to hire Mr. Luckman for her team when he first interviewed for the BDM job. She said she did not select Ms. Percy for termination, who was junior to Mr. Luckman, because new graduates are rarely included in a Bell restructuring since it spends much effort in recruitment of graduates for future leadership roles. She also did not select Ken Lou, another BDM for termination who was also junior to Mr. Luckman because she had actively recruited him to work for Bell.

[77] Ms. D'Ambrosio denied that Mr. Luckman's family status, disability and need for accommodation were factors in her selection of him for termination. She said Mr. Luckman's performance was not a pretext for his termination.

[78] I do not find the respondent's explanation that its decision to terminate Mr. Luckman was lawful and non-discriminatory to be persuasive.

[79] If the respondent had been able to establish that Mr. Luckman's poor performance was the reason he was selected for termination, it might have been able to persuade the Tribunal that performance was a valid non-discriminatory reason. However, the evidence it submitted was insufficient to support such an explanation. Indeed, in its closing argument, the respondent changed its defence from its SOP to state that Mr. Luckman's performance was not a factor at all in his termination.

[80] The respondent shifted its defence in its closing to claim that Mr. Luckman was predestined for selection for termination at the next Bell restructuring regardless of his performance or any disability. This claim is based solely on Ms. D'Ambrosio's testimony that she had built a strong sales team and Mr. Luckman was its weakest member and thus vulnerable to termination when the next restructuring came around. Mr. Luckman was selected over more junior employees because she did not want him for her team originally. He was transferred to her team, she did not pursue him like she did Mr. Lou.

[81] When Ms. D'Ambrosio told Ms. Galvis in late 2017 that she selected Mr. Luckman as the employee from her team to be terminated because of the restructuring, she had full knowledge of his father's death, his battle with cancer and his struggle to reintegrate back into her high-performance BDM team.

[82] I do not find it credible or reasonable to claim that Mr. Luckman's disability was not a factor at all in Ms. D'Ambrosio's decision to select him for termination. Ms. D'Ambrosio showed herself to be very focused on outcomes and performance for her team during her testimony. I find that Ms. D'Ambrosio believed Mr. Luckman would be unable to perform to her high standards because of his medical condition that resulted in a significant leave for cancer treatment and a second leave when his return to the workplace was unsuccessful. She was concerned that he may require future leaves or may lack energy at work, both of which would disrupt her team's service to its clients.

[83] Bell said that Mr. Luckman's accounts were not returned to him upon his return to work to avoid stress on him and because Bell did not want to disrupt service to its customers. It also supports an inference that Ms. D'Ambrosio thought she could avoid disruptions to her team's operations and customer service by terminating him.

[84] None of the respondent's other witnesses corroborated her explanation. Nor is there any documentary evidence to support her explanation. As an experienced Bell manager, I would have expected her to document her decisions in terms of team members potentially affected by the next restructuring. She did not mention her reasons for selecting Mr. Luckman to Mr. Zankowicz or Ms. Galvis during the termination process. Without any corroborating evidence, the explanation is entirely self-serving. I do not believe it is possible that Ms. D'Ambrosio did not consciously or unconsciously consider Mr. Luckman's physical and mental impairment at all in her decision to select Mr. Luckman for termination at the time she made her final decision and gave her choice to Bell. I did not find Ms. D'Ambrosio to be credible on this point.

[85] I believe that Mr. Luckman's medical condition was a consideration for Ms. D'Ambrosio when she assessed his continued usefulness as a team member. It was a factor in her decision to select him for termination. Therefore, since Mr. Luckman's disability was a factor, the respondent discriminated against him in terminating his employment contrary to section 7 of the *Act*.

[86] The respondent's explanation in this matter is subjective and without supporting evidence. The Tribunal cannot accept the respondent saying that its acts were not discriminatory but based on some other vague and unsupported basis. Their explanation seems contrived after not being able to support their original rationale of poor performance by Mr. Luckman as the reason for his termination.

[87] Based on these conclusions, I find that Mr. Luckman has established a *prima facie* case of discrimination by the respondent based on his disability. I do not accept the respondent's explanation for its actions. While the parties raised the issue of accommodation, it appears to me that was in relation to whether or not Bell's accommodation or lack thereof in his return to work demonstrated that his disability was a factor in his termination. The respondent did not argue that it terminated Mr. Luckman because to continue to employ him would have constituted an undue hardship and he could not meet a bona fide occupational requirement.

B. Issue 2: If discrimination is established, what remedies flow from the discrimination?

(i) Overview

[88] Having found that the respondent's conduct constitutes discrimination, I turn now to the question of the appropriate remedy.

(i) Legal Framework

[89] If the Tribunal finds that a complaint is substantiated, it can make an award against the party found to have engaged in a discriminatory practice. The purpose of the remedial provisions under the *CHRA* (s. 53) is to make a victim of discrimination whole and to put the complainant back in the position he or she would have been in had the discrimination not occurred (*Public Service Alliance of Canada v. Canada Post Corporation*, 2010 FCA 56 at para 299, *aff'd* 2011 SCC 57).

[90] There must be a causal link between the discrimination and the loss claimed (see (*Chopra v. Canada (Attorney General)*, 2007 FCA 268 [*Chopra*] at paras 32, 37). The onus is on the complainant to establish that it is more likely than not that this causal connection exists.

[91] The specific statutory framework for each remedy is integrated into the analysis of that claim.

(ii) What remedies is Mr. Luckman entitled to?

Lost Wages

[92] The Tribunal can compensate the victim of discrimination for some or all of the wages that the victim was deprived of as a result of the discriminatory practice (s.53(2)(c) of the *CHRA*). The purpose of the compensation, and therefore the corresponding analysis, is distinct from compensation for wrongful dismissal and the timelines for compensation for

wrongful dismissal should not be incorporated into a human rights analysis (*Laronde v. Warren Gibson Ltd.*, 2003 CHRT 38 at para. 179).

[93] In determining an end date, the Tribunal must consider when, after the end of a grace period, the discrimination suffered by the victim stopped having an effect on his or her income-earning capacity (see *Tahmourpour* at para 47). There must be a rational connection between a cut-off date and the factual record (see *Hughes* at paras 42, 72); *Canada (Attorney General) v. Morgan*, 1991 CanLII 8221 (FCA) [*Morgan*] at paras 4, 16). A reviewing judge must be able to discern from the Tribunal's decision why the Tribunal chose the cut-off date in question (see *Tahmourpour* at para 47).

[94] In this case, Mr. Luckman is entitled to be compensated for the wages he would have received but for his termination of \$91,052.40. The respondent did not dispute the amount claimed. Bell said in its closing submission that had the corporate restructuring not occurred, Mr. Luckman would still have been employed. Since I found that the complainant's termination was based, in part on discrimination because of his disability, he is entitled to lost wages until the time he found a new job.

[95] The Tribunal must exercise its discretion to award lost wages on a principled basis. The amount of the loss is determined by the circumstances of each case and the Tribunal can impose a limit to losses caused by the discriminatory practice suffered (see *Chopra* at paras 37, 40). One such principled basis, is the application of the principle of mitigation (see *Chopra* at para 40; *Walsh v. Mobil Oil Canada*, 2013 ABCA 238 [*Walsh*] at para 41).

[96] I do not accept the respondent's contention that Mr. Luckman failed to mitigate his losses. The facts in this case are distinguishable from the facts in the cases Bell cites to suggest that Mr. Luckman did not sufficiently mitigate his losses. Despite still recovering from his surgery, Mr. Luckman immediately updated his resume, reached out to his network of contacts, contacted recruiters and applied to several jobs. He secured a job in November 2017 comparable in seniority and salary to his former position at Bell. These facts distinguish this case from *Christoforou v. John Grant Haulage Ltd.*, 2021 CHRT 15, where the complainant initially limited his job search to making six calls. This case is more similar to *Hughes v. Transport Canada*, 2018 CHRT 15 the complainant obtained only temporary

positions in the 9 years after the discrimination. The failure to apply to one specific position did not negate the complainant's extensive efforts to mitigate his losses (para. 341).

[97] It was not unreasonable for Mr. Luckman to decline to pursue Bell's internal job opportunities that were made available to him at the time of his termination. This was a wholly different position involving a retail mobile phone outlet. They were not as attractive as the positions he was already pursuing. Neither were the Cogeco and Cogent positions that Bell cited which based more of the compensation on commissions. Mr. Luckman was not obligated to accept the first opportunity to come along when he had credible chances to obtain better compensated positions that more closely matched his skills and experience.

Pain and Suffering

[98] Mr. Luckman is entitled to \$15,000 in compensation for pain and suffering.

[99] The Tribunal can order up to \$20,000 for any pain and suffering that Mr. Luckman experienced because of the respondent's discriminatory practice (s.53(2)(e) of the *CHRA*). The Tribunal tends to reserve the maximum amount of \$20,000 for the very worst cases or the most egregious of circumstances (*Grant v. Manitoba Telecom Services Inc.*, 2012 CHRT 10 at para 115; *Alizadeh-Ebadi v. Manitoba Telecom Services Inc.*, 2017 CHRT 36 at para 213).

[100] There is no need for the complainant to provide medical evidence as to his pain and suffering (*McFee v. Canadian Pacific Railway Company*, 2019 CHRT 28 at para. 135). Mr. Luckman asked for damages separately based on his family status and his disability. I dismissed his claim for discrimination based on his family status above.

[101] Even if I had accepted the claim for family status, the wording of s. 53(2) of the *CHRA* provides that:

If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel **may**, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the **order** any of the following terms that the member or panel considers appropriate:

...

(e) that the person compensate the victim, by **an amount not exceeding twenty thousand dollars**, for any pain and suffering that the victim experienced as a result of the discriminatory practice.
(emphasis added)

[102] The wording of the section says that the amount the Tribunal can award for pain and suffering is \$20,000 for the entire complaint rather than for each protected ground. This is consistent with the Tribunal's past practice. Mr. Luckman has not provided any argument or authority that suggests a different interpretation.

[103] What is an appropriate amount for pain and suffering? In my view, Bell's conduct was a serious transgression of the *Act*. They terminated an employee who was still recovering from cancer surgery. They made no inquiries as to whether his disability continued to affect his ability to work. In addition to the physical suffering and stress from his cancer recovery, Mr. Luckman was forced to endure the humiliation of being fired and being forced to find a new job on top of all his problems.

[104] I would consider this matter to be on a similar level to the following cases and damages awarded by the Tribunal. In *Christoforou v. John Grant Haulage Ltd.*, 2021 CHRT 15 at paras. 98-105, the complainant's doctor's notes refer to physical symptoms like headaches, insomnia, stress and anxiety because of situation with employer. The employer submitted inaccurate employment record to Employment Insurance. The complainant was 60 and had worked for the employer for more than 30 years. There was no attempt to accommodate the employee. The Tribunal awarded \$18,000 for pain and suffering. However, in the current case, Bell terminated Mr. Luckman without cause and paid severance.

[105] In *McFee v. Canadian Pacific Railway Company*, 2019 CHRT 28 at paras. 132-137, the complainant's disability was a factor in his termination. No medical evidence of pain and suffering was required. The complainant testified to a lack of self-confidence, hurt feelings, low self-esteem, humiliation, stress, depression, anxiety. He had to borrow money from his aunt and retired mother who returned to part-time work to support him. He lost his extended health and dental. He was unable to pay child support or do fun activities with son. He was

on social assistance for first time in his life. He worked for the employer for 20 years. The Tribunal awarded him \$15,000 for pain and suffering.

Special Damages (Willful or Reckless Conduct)

[106] Mr. Luckman is entitled to \$15,000 in special damages.

[107] The Tribunal can order up to a maximum of \$20,000 in special damages if it finds that the respondent has engaged in the discriminatory practice willfully or recklessly (s. 53(3) of the *CHRA*).

[108] Special damages are punitive and intended to provide a deterrent and discourage those who deliberately discriminate. A finding of wilfulness requires an intention to discriminate and to infringe a person's rights under the *Act*. Recklessness usually denotes acts that disregard or show indifference to the consequences, such that the conduct is done wantonly or needlessly (*Canada (Attorney General) v. Johnstone*, 2013 FC 113 at para 155). A finding of recklessness does not require proof of intention to discriminate (see *Hughes* at para 89, citing *Collins v. Canada (Attorney General)*, 2013 FCA 105 at para 4, rev'g *Canada (Attorney General) v. Collins*, 2011 FC 1168 at para 33).

[109] I find the respondent's conduct was reckless rather than wilful in selecting him for termination while he was suffering from a disability.

[110] Ms. D'Ambrosio's single-minded pursuit of maintaining her team's sales and customer focus left no doubt in her mind that Mr. Luckman with his medical limitations was a liability to her goals.

[111] Despite Bell's sophisticated human resources processes and policies, it does not appear to me that anyone considered whether firing an employee recovering from cancer surgery might be discriminatory. Ms. Galvis testified that she simply checked her database to see that Mr. Luckman had returned without medical restrictions. Ms. D'Ambrosio was aware of Mr. Luckman medical limitations but never raised it to anyone at Bell during the termination process.

[112] I have considered a number of comparable cases in determining the award amount such as *Christoforou v. John Grant Haulage Ltd.*, 2021 CHRT 15, where the employer contended the firing was because of public safety considerations but was found not to have made a serious effort to accommodate. The respondent was a sophisticated employer aware of its obligations. The Tribunal awarded \$15,000 in damages for reckless and wilful conduct.

[113] In *McFee v. Canadian Pacific Railway Company*, 2019 CHRT 28, the employer failed to make basic inquiries before termination on performance grounds. The key decision-makers were aware of the complainant's Return to Work status and fought against him joining the team in the first place. The Tribunal awarded \$15,000 for wilful and reckless conduct also.

[114] In *Lafrenière v. Via Rail Canada Inc.*, 2019 CHRT 16, the employer showed wilful ignorance of the complainant's disability, failed to reasonably investigate disability when presented with a doctor's note and denied the disability existed. It was a sophisticated employer who should have known better. Again, the Tribunal awarded \$15,000 for wilful and reckless conduct.

Interest

[115] The Tribunal can make an award of interest on an order to pay compensation (s.53(4) of the *CHRA*). Any award of interest shall be simple interest calculated on a yearly basis, at a rate equivalent to the Bank of Canada rate (monthly series), set by the Bank of Canada. Interest accrues from the date on which the discriminatory practice occurred until the date of payment of the award of compensation (Rule 9(12) of the Tribunal's *Rules of Procedure under the CHRA* (03-05-04) [the "*Rules*"]. The accrual of interest on the award made should not result in a total award that surpasses the statutory maximums prescribed in the *CHRA*.

[116] Mr. Luckman is entitled to simple interest at the average annual bank rate established by the Bank of Canada. The interest shall run from the date on which the discriminatory practice occurred which is the date Mr. Luckman was terminated, December 6, 2017, until the respondent pays the ordered compensation.

Expenses

[117] The Tribunal can compensate a victim for any and all expenses incurred by a victim as a result of a discriminatory practice (s. 53(3)(d) of the *CHRA*). The focus on this section is costs incurred to seek alternative goods or services, perhaps out of pocket or at a higher cost, than those that the complainant would otherwise have received from the respondent. It can include medical expenses (e.g. *Christoforou v. John Grant Haulage Ltd.*, 2021 CHRT 15 at paras. 89-90). It does not, however, include legal costs (*Canada (Canada Human Rights Commissions) v. Canada (Attorney General)*, 2011 SCC 53 [Mowat]).

[118] Mr. Luckman's claim for \$30,000 in expenses to bring this claim is not allowed.

VI. Order

[119] Mr. Luckman's claim for lost wages is substantiated and I order the respondent to pay \$91,052.40 in lost wages. Further, Mr. Luckman is entitled to \$15,000 for pain and suffering and \$15,000 for the respondent's wilful or reckless conduct. Interest applies to all these amounts.

Signed by

Alex G. Pannu
Tribunal Member

Ottawa, Ontario
May 31, 2022

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2461/1820

Style of Cause: Glenn Luckman v. Bell Canada

Decision of the Tribunal Dated: May 31, 2022

Date and Place of Hearing: May 31 to June 4, 2021 and August 30, 2021

By Videoconference

Appearances:

Craig Colraine and Olivia Mann-Foster for the Complainant

No one appearing for the Canadian Human Rights Commission

David S. Alli for the Respondent