

**Canadian Human
Rights Tribunal**



**Tribunal canadien des
droits de la personne**

BETWEEN:

ALAIN PARI SIEN

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

OTTAWA-CARLETON REGIONAL TRANSIT COMMISSION

Respondent

REASONS FOR DECISION

MEMBER: Athanasios D. Hadjis

2003 CHRT 10
2003/03/06

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[1] The Complainant worked as a bus operator for the Respondent. Throughout the course of his employment, he was absent from work for a significant number of days, mainly on account of illness. Eighteen years after he was hired, the Respondent dismissed the Complainant due to his “chronic absenteeism”. As a result, the Complainant filed the present complaint in which he alleges that the Respondent discriminated against him by refusing to accommodate him and by refusing to continue to employ him because of his disability, contrary to s. 7 of the *Canadian Human Rights Act* (“Act”). The disability consists principally of post-traumatic stress disorder (also known as “PTSD”) and ailments related thereto.

[2] The Complainant’s employer at the time of his termination in 1996 was the “Ottawa-Carleton Regional Transit Commission”, which operated Ottawa’s public transit system (otherwise known as “OC Transpo”). His complaint was filed several months later and the same organization was named as the Respondent. In 2001, pursuant to s. 9 of the *City of Ottawa Act, 1999*, OC Transpo’s operations, including all its assets and liabilities, were transferred to the amalgamated City of Ottawa.¹ Ms. Lois Emburg, a manager with the City of Ottawa, stated during her testimony that the City of Ottawa is accepting any liability to be attributed to the Respondent in the present case. In light of her representations, the Ottawa-Carleton Regional Transit Commission shall continue to be treated as the Respondent in this case. It should be noted, though, that according to the abovementioned legislative provision, the Respondent was dissolved on January 1, 2001.

I. FACTS

[3] Most of the facts are not in dispute. All of the parties agree that during his employment with the Respondent (a total of about 18 years and 2 months), the Complainant was absent for about 1664 full days and 33 partial days. His absences were mostly related to illness. The Respondent does not call into question the genuineness of these illnesses.

¹ S.O. 1999, c. 14.

A. The Complainant's Employment History with the Respondent

[4] The Complainant was hired by the Respondent as a bus operator in November 1977. His employment was subject to an initial probationary period. The Respondent's records demonstrate that from the outset, the Respondent was concerned with the Complainant's level of absenteeism, so much so that the probationary period was extended by three months in January of 1979. In the month of September 1979, he was even suspended for several days because of his absenteeism, in accordance with the Respondent's policy in place at that time. No evidence was led as to the nature of the illnesses or other causes that resulted in the Complainant's absences during this early period. The Complainant acknowledges that he was made aware early on that excessive absenteeism within the OC Transpo workforce was an ongoing cause of concern for the employer.

[5] In his testimony, the Complainant brought up some of the events in his life that he feels may have contributed to the onset years later of post-traumatic stress disorder. In 1979, his relationship with a woman to whom he was engaged to be married suddenly ended. This break-up was "devastating" for him but it did not lead to his being absent from work. In October of 1980, the Complainant's mother died of cancer. He also describes this loss as devastating, noting that he had maintained a very close relationship with her. He took three days off work on bereavement leave, as permitted under the collective agreement.

[6] Only a couple of months later, in December 1980, the Complainant was the victim of a violent assault while he was driving his bus. A passenger wearing army fatigues and a balaclava over his head entered the bus and without any warning hit the Complainant on the side of his face, knocking him unconscious. The Complainant was treated at the hospital and released the same day. He did not return to his job until one week later.

[7] No evidence was led detailing the Complainant's attendance during the early 1980's other than an acknowledgement by him and the Commission that he worked "on and off". However, his attendance sheets for the years 1984 and following were produced. In 1984, the Complainant was

absent for the entire period from March to early September. The attendance sheet indicates that he was in receipt of worker's compensation benefits during this period but no explanation was provided at the hearing as to the nature or cause of his illness or disability. In 1985, the Complainant was absent due to illness for thirteen full days and four partial days. In 1986, he was absent for thirty full days and one partial day.

[8] In 1987, the Complainant's father suddenly died. The Complainant testified that this was also a significant and disturbing loss for him. He took the permitted bereavement leave of three days. During 1987, he was absent 42 full days and another 4 partial days, due to illness. The Complainant was on sick leave for 28 full days and seven partial days in 1988.

[9] On March 7, 1989, the Complainant was interviewed by management regarding his level of absenteeism. As luck would have it, only two weeks later, another unsettling incident occurred while he was at work. A male passenger entered his bus and began yelling at him. The passenger eventually got off the bus, but just two days later, he confronted the Complainant again. The Complainant was standing outside his bus, at the starting point of his bus route, when the individual approached him. The man had his hand in his pocket and began telling the Complainant that he was going to kill him. Two other bus operators happened to witness the incident and one called over a supervisor. The supervisor reacted by assisting the individual onto another bus, but he did not make a report nor call the police. The Complainant claims that he was genuinely scared of the passenger and that he felt "very unprotected and unsafe" as a result of the manner in which his employer had dealt with the threat.

[10] Although he did not miss any work at the time of these incidents, in the weeks and months that followed, the number of absences due to illness increased significantly. On July 18, 1989, the employer interviewed him regarding his absenteeism. The Complainant recalls that following the March incidents, he began getting "pains in [his] stomach" and was feeling "quite sick". He went off work from December 1989 until February 1990, his medical certificates indicating that he was suffering primarily from gastro-intestinal problems. He returned to his job in early March 1990 but

ceased working on March 21, 1990. This leave of absence ended up lasting for 199 working days. During this period, he was compensated by the Workers' Compensation Board, as his disability was deemed to be related to the trauma associated with the death threat made against him. The medical certificates issued by the Complainant's family physician during this period refer to his "anxiety state", "job tension" and "adjustment reaction".

[11] While the Complainant was on leave in 1990, OC Transpo's Occupational Health Unit ("**Health Unit**") communicated regularly with him to follow up on his status and his expected date of return to work. According to the evidence adduced by the Respondent, the Health Unit had a mandate that included gathering information regarding the condition of employees on sick leave and advising the divisions where they worked (their "**employing divisions**") when and if they were ready to return to work. The Health Unit would also assess whether a non-occupational disability claim was well founded, based on the medical information available. It was composed of several nurses who were employed full time as well as one medical doctor who was not an employee of the Respondent but who would be asked occasionally to provide an opinion. The Health Unit's activities were integral to the program that the Respondent had established to manage the attendance of its employees ("**Attendance Management Program**"). One of the main reasons for the existence of this separate unit was to protect the confidentiality of the employees' medical information. As such, the Health Unit never disclosed to management the details of an employee's condition. It would only provide to employing divisions general conclusions and opinions as to an employee's preparedness to return to work.

[12] On December 14, 1990, based on the medical information collected from the Complainant and his physician, the Health Unit determined that commencing January 2, 1991, he would be able to resume regular job duties, provided that he be initially assigned to work four hours per day instead of eight. This type of transitional activity was referred to as a process of "work hardening". The Complainant performed these modified duties until February 25, 1991, when he went on sick leave, suffering from back pain and abdominal pain, according to the medical certificates submitted to the Respondent at the time.

[13] By April 1991, the Complainant's family physician had come to the realization that the Complainant was "preoccupied with being assaulted" on his job, "to the point of almost paranoid feelings". The family physician apparently concluded that the Complainant was suffering from post-traumatic stress disorder. The physician therefore informed the Respondent that the Complainant could not yet return to work. He referred the Complainant to the Royal Ottawa Hospital for a psychiatric assessment. Dr. Hamilton Sequeira, M.D., a psychiatrist, examined the Complainant on May 17, 1991, and made a provisional diagnosis of "post-traumatic stress disorder of longstanding with anxiety, depressive, somatic manifestations". In presenting his diagnosis, Dr. Sequeira referred in his report to the 1980 assault and the 1989 threat as well as the sudden deaths of the Complainant's parents. The Complainant's family physician issued an updated medical certificate declaring that the Complainant would be unable to return to work for an indefinite period. The Complainant received workers' compensation benefits while on this extended medical leave.

[14] Dr. Sequeira recommended a therapeutic approach for the Complainant that included medications as well as cognitive behavioural therapy to "desensitize him from his trauma related negative constructs and feelings". For this latter purpose, Dr. Sequeira sought the assistance of Dr. David Erickson, PhD, R. Psych., who was at that time doing his internship to become a clinical psychologist, a recognition that he achieved in 1994. Dr. Erickson testified that cognitive behavioural therapy involves two components: the behavioural aspect encompasses the breaking down of a person's fear into small manageable steps. The cognitive aspect is conducted once some success has been achieved with respect to the behavioural element, and consists of the individual attempting to imagine in advance, doing the activities which are at the source of his anxiety.

[15] Dr. Erickson began treating the Complainant on November 4, 1991. He determined that the Complainant was a good candidate for cognitive behavioural therapy. Between November 1991 and August 1992, Dr. Erickson met the Complainant weekly. He kept the Health Unit abreast of the Complainant's progress. He states in the expert's report that accompanied his testimony in this case, that by July 1992, after eight months of cognitive behavioural therapy combined with medication, the Complainant's state was "dramatically improved" and "ready for a graduated return to work". As

part of this transition to full-time work it was agreed between the Health Unit and Drs. Sequeira and Erickson that the Complainant begin this process by driving what was known as the “DERC shuttle bus”. DERC is the acronym for the Disabled Employees Review Committee, made up of OC Transpo employee and management representatives. The DERC was established by the Respondent in order to assist in the reintegration of disabled employees into the workforce. The DERC shuttle bus was in fact a mini bus in which operators were driven to various locations to take over runs from other drivers. The only passengers on this bus were other OC Transpo employees.

[16] The Complainant drove this vehicle from mid-July to mid-September 1992, following which he was assigned to modified duties (four hours per day) driving regular OC Transpo passenger buses. According to Dr. Erickson, by mid-October 1992, the Complainant was “symptom-free and back to his normal level functioning”. The Health Unit accordingly recommended to the Complainant’s employing division that he could return to full time regular job duties beginning October 14, 1992.

[17] Between December 7, 1992 and January 14, 1993, the Complainant booked off sick for a total of thirteen full days and two partial days, suffering from blurred vision, dizziness, insomnia and gastroenteritis. Dr. Erickson noted, after speaking with the Complainant on December 14, 1992, that his anxiety problems had returned, in part as a result of driving on some of the routes that he most feared prior to his treatment. Medication was prescribed for him by Dr. Sequeira and regular visits were scheduled with Dr. Erickson.

[18] Unfortunately, on January 15, 1993, a bus that the Complainant was driving was hit from the rear by another vehicle, as a result of which he suffered a whiplash injury (cervical neck strain). According to his family physician, the injury was such that he could not return to work until May 1993. Dr. Erickson notes in his expert’s report that the Complainant experienced great frustration at being prevented from working as a result of the accident, and some gastro-intestinal problems and headaches that he suffered over this period were likely related to this distress. However, Dr. Erickson points to the absence at that time of any anxiety, mood problems or sleep disturbance that would indicate residual post-traumatic stress disorder.

[19] After being on leave due to the work-related whiplash injury for a total of 92 working days, the Complainant returned to his regular job duties at the beginning of June 1993. In August 1993, he went on sick leave for a total of six days and one partial day. According to the medical certificate that he submitted, he was suffering from “acute anxiety”. By October 1993, the Complainant had developed a major sleep disturbance and had to take another leave of absence that was to extend until June 1994.

[20] His sleep had been reduced to two to three hours per night. Dr. Sequeira transferred the Complainant to the care of another psychiatrist with a specialty in sleep disorders. His treatment included prescribing medication to help the Complainant sleep and to prevent the occurrence of periodic partial leg movements that were awakening him during his sleep. By May 1994, this psychiatrist deemed the sleep problems to be “now under control” and believed that the Complainant was ready to return to work.

[21] On May 27, 1994, the Health Unit sent a memo to the Complainant’s employing division stating that his prognosis was now for “regular attendance at work”. The memo referred to an unnamed treating physician of the Complainant who had declared that his medical problem had been resolved and that it “should not cause him any future problem”. In addition, the Complainant was examined by the external medical practitioner of the Health Unit and the memo notes his observation that the Complainant’s attitude was very positive, more so than in earlier assessments conducted by the same doctor in 1992 and 1993.

[22] The Complainant therefore returned to his regular job duties on June 2, 1994. Shortly after returning to work, he was confronted by several teenagers while driving his bus, in a manner that he perceived as threatening. He felt scared and vulnerable, as if someone was always out to get him. He found himself unable to sleep again so he took a higher dose of his sleep medication. This resulted in drowsiness that rendered him unable to perform his work properly. On June 5, 1994, the Superintendent of Operational Personnel, Mr. Ron Mooney, having observed the Complainant’s reduced faculties, instructed him to cease operating a bus. The superintendent sent a memo several

days later to the Health Unit asking that the Complainant be reassessed to determine if he was capable of returning to regular full time employment.

[23] By July, 1994, Dr. Sequeira had resumed all of the Complainant's psychiatric care. The Complainant also recommenced receiving treatment from Dr. Erickson. Within weeks, Dr. Sequeira observed that the Complainant had become so depressed, anxious and sleep-deprived that it became necessary to admit him into the Mood Disorders Unit of the Royal Ottawa Hospital. He was diagnosed with major depression, sleep disorder and generalized anxiety disorder. He was discharged from the hospital on September 20, 1994. The depression and sleep troubles were resolved by June 1995.

[24] As these problems diminished, though, the presence of post-traumatic stress disorder symptoms became apparent again. His "avoidance pattern" was consistent with a fear of being assaulted, combined with regular daytime flashbacks. Dr. Erickson implemented another program of cognitive behavioural therapy for the Complainant. According to Dr. Erickson, as part of the therapy, the Complainant exerted great effort as he relived the fear of being assaulted on a daily basis. In Dr. Erickson's opinion, the therapy proved effective and by February 1996, (the month in which the Complainant was dismissed) the post-traumatic stress disorder had been "vanquished".

B. Events in the Months Leading up to the Complainant's Dismissal

[25] On October 26, 1995, the Health Unit interviewed the Complainant, in accordance with a policy that required such meetings periodically with employees who were in receipt of long-term disability benefits. It determined, based on the Complainant's comments as well as information obtained from his physicians, that he hoped to return to his regular occupation as a bus operator. According to a memo prepared by the Health Unit after the meeting, the Complainant was advised that his job with the Respondent was only protected for a period of 24 months following the date when he began receiving long term disability benefits. This period was to come to an end on

February 2, 1996. If by that time he did not return to his own job or to some other job within OC Transpo, the Respondent would make a decision as to his “continuing status” and would “in all likelihood [...] medically terminate” him.

[26] On December 13, 1995, Dr. Sequeira filled out a form for the Ontario Ministry of Transport. The Complainant’s “C” Class driver’s licence, which permitted him to operate buses, had been downgraded because he was disabled on a long-term basis. The application for regaining the permit required that a physician report on the driver’s medical condition. Dr. Sequeira stated on the form that the Complainant was ready to regain his licence as he was “much improved of the symptomatology of fear-anxiety-avoidance-depression that was part of his post-traumatic stress disorder”.

[27] On January 31, 1996, Dr. Sequeira and Dr. Erickson signed a letter that they had jointly prepared, addressed to the Health Unit of OC Transpo, in which they stated the following:

Alain is now in the final stages. Within a few weeks, the [cognitive behavioural therapy] regarding the post-traumatic anxiety will be sufficiently advanced to allow a safe return to work. The feared stimuli, i.e. clothing worn by his assailant, will no longer prompt incapacitating anxiety. Rather, Alain will experience only mild tremulousness.

His sleep disturbance is similarly well controlled. While he continues to have anxiety-related nightmares, they are no longer severe enough to disrupt his sleep. He does continue to have difficulty waking in the morning, however: once he has had time to gradually adjust to a structured daily routine, this problem will return to normal limits.

Finally, Alain’s depressed mood is no longer an issue. In the past month, he has experienced mild dysphoria an average of 2-3 times per week, where each occasion lasts 1-2 hours. No period of severe or sustained depressed mood has occurred in the past month. Thus, Alain’s mood is clearly within normal limits.

Drs. Sequiera and Erickson then went on to describe the Complainant's medications, noting that they would not interfere with his ability to operate an OC Transpo bus. It was also pointed out that the Complainant would continue to see both specialists over the following several months, just to deal with any remaining anxieties and to monitor the medications. The following conclusions were made towards the end of their letter:

During this time, Alain's health will be best served by beginning with part-time duties, and gradually building up to full-time duties. In the initial period of readjustment, extreme hours are contraindicated because of their potential for sleep disturbance. We would greatly appreciate being consulted in preparing increases in Alain's scope of duties, as experience from his past has shown that it is possible to do too much too soon.

In sum, the prognosis is very good. Alain has worked hard to regain positive and constructive moods, such that he is now well within normal limits. The PTSD-related anxiety is much diminished, and will not interfere with his performance as an operator.

(My emphasis)

[28] The Complainant contacted the head nurse of the Health Unit to discuss his coming back to work, several days in advance of the February 2, 1996 deadline that the Respondent had set for his return. She advised him to simply show up at work on that designated day and speak to Mr. Mooney, the Superintendent of Operational Personnel. The Complainant did so, and when he met with Mr. Mooney, he explained that he was ready to work, requesting only that some adjustments be made to ease his transition back, in accordance with the recommendations of his psychiatrist and psychologist. Mr. Mooney informed the Complainant that no such work-hardening adjustments would be made available to him and, according to the Complainant, when he asked if he could be assigned to work at some other job at OC Transpo, he was told "there was nothing". Instead, Mr. Mooney said that the Complainant's file was under investigation and that the Complainant would be informed of the outcome two weeks later. The Complainant's testimony regarding these meetings was not contradicted and neither the head nurse nor Mr. Mooney testified in this case.

[29] On February 6, 1996, Mr. Mooney wrote to the Health Unit asking if the Complainant's present condition, for which he had just received treatment, was the same as the condition for which there had been a prognosis of regular attendance back in May 1994. He also asked if the Health Unit was convinced, based on the medical information, that the Complainant should return to work as a bus operator when his licence was reinstated. In the Health Unit's reply, dated February 9, 1996, specific reference was made to the recently obtained opinions of Drs. Sequiera and Erickson to the effect that the Complainant could begin with part-time duties and gradually build up to full time duties. The Health Unit, however, concluded as follows:

Taking into consideration the medical information on file at present, the fact that Mr. Parisien does not hold a class "C" licence at present, as well as his past record of attendance, the Health Unit is not fully convinced at this time that Mr. Parisien will be able to perform his duties as a bus operator on a regular basis.

If the Transportation Division [the Complainant's employing division] is able and prepared to offer Mr. Parisien alternate employment, we will contact his medical advisors to quantify his restrictions and to obtain a more complete prognosis. Please advise us as to your decision.

(My emphasis)

[30] Mr. Mooney met with the Complainant about a week later, on February 15, 1996, and advised him that his employment was terminated. In a follow-up letter addressed to the Complainant on February 19, 1996, Mr. Mooney stated:

This letter is to confirm our meeting held on February 15, 1996 to clarify your employment status with the Commission.

Based on the information presented at our meeting we find it necessary to terminate your employment with the Commission due to chronic innocent absenteeism effective February 15, 1996.

[31] The Complainant claims that he pleaded with Mr. Mooney to allow him to return to work for OC Transpo but he was told that the decision to terminate would stand. He contends that at the time

of his termination he was feeling “quite good” and wanted to get back right away to his ordinary duties as a bus operator. He acknowledges that he was not yet “one hundred per-cent” and that he could not have immediately returned to regular full-time bus driving duties. He would, however, have been able to perform modified job duties during a period of transition, as Drs. Sequiera and Erickson had recommended.

C. Events Subsequent to the Complainant’s Termination

[32] The Complainant filed a grievance against his dismissal several days later. The grievance passed through the required stages in the grievance process and was ultimately ruled upon through an expedited arbitration process on December 4, 1998. The labour arbitrator decided that there was just cause for the Complainant’s termination and dismissed the grievance. He found that the Respondent “reasonably concluded, on the evidence before it” that the Complainant “would not be able to perform his duties as a bus operator on a regular basis”.

[33] In a preliminary motion presented to the Tribunal prior to the hearing on the merits of the present case, the Respondent submitted that the subject matter of the Complainant’s human rights complaint fell within the exclusive jurisdiction of the labour arbitrator and that the doctrines of issue estoppel and cause of action estoppel deprived the Tribunal of jurisdiction to hear the matter. The motion was dismissed by Tribunal Chairperson Anne L. Mactavish on July 15, 2002.² In her ruling, the Chairperson found that the issue before the arbitrator was whether the Complainant’s termination was unjust and not whether he had been a victim of a discriminatory practice within the meaning of the *Act*.

² Parisien v. Ottawa Carleton Regional Transit Commission, [2002] C.H.R.D. No. 23 (C.H.R.T.)(QL).

D. The Evidence of the Experts

[34] The Commission called Dr. Erickson and Dr. Sequeira to testify as experts at the hearing. They were qualified as persons who have acquired special or peculiar knowledge through study, education and experience with the Complainant, such that they could assist the Tribunal with respect to their interactions with him and their respective fields generally (psychology for Dr. Erickson and psychiatry for Dr. Sequeira).

[35] In Dr. Erickson's opinion, between 1989 and 1996 inclusively, the Complainant experienced two distinct episodes of post-traumatic stress disorder, one at the beginning of this period (from the threat to his life in 1989 until his return to work in September, 1992) and another towards the end (from June 1994 until February 1996). Between these "bookends", the Complainant also passed through an episode of "severe sleep, mood and generalized anxiety", from about October 1993 until June 1995, overlapping onto the final PTSD bookend. Dr. Erickson believes that this episode was "likely related – in an indirect way" to the Complainant's initial bout with PTSD.

[36] Dr. Erickson finds that the Complainant exhibited all of the classic elements of post-traumatic stress disorder, including:

- experiencing a traumatic event,
- intrusive daytime reliving of that event, as well as recurring nightmares,
- avoiding certain behaviours that he used to enjoy in the past, and
- being in a state of persistent hyper-arousal.

[37] For his part, Dr. Sequeira agrees that the initial diagnosis of PTSD was "well-substantiated" and that the PTSD had fully developed by 1989. In his opinion, the second episode, in 1994-95, was a re-emergence of the PTSD and not so much a bookend. With respect to some of the other illnesses that caused the Complainant to be absent from work, Dr. Sequeira points out that it is not uncommon for persons suffering from PTSD to also experience generalized anxiety disorder, phobia, major

depression and sleep disorder. According to Dr. Sequeira, a connection may even exist between PTSD and some of the other ailments from which the Complainant suffered, including diarrhea and muscle spasms, although it is also possible that these symptoms were unrelated.

II. LEGAL FRAMEWORK AND ANALYSIS

A. The Law

[38] Section 7 of the *Act* declares that it is a discriminatory practice to refuse to continue to employ an individual, or to treat an employee in an adverse differential manner, on the basis of a prohibited ground of discrimination. Disability is included amongst the list of prohibited grounds of discrimination set out in s. 3 of the *Act*. According to s. 25, “disability”, for the purposes of the *Act*, means “any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug”.

[39] Section 15 (a), as it was designated prior to the 1998 amendments to the *Act*,³ provides that it is not a discriminatory practice if the differential treatment exercised by the employer is based on a *bona fide* occupational requirement (“**BFOR**”). In 1999, the Supreme Court of Canada, in what are generally referred to as the *Meiorin*⁴ and *Grismer*⁵ cases, had the occasion to restate the approach to be followed whenever such a defence is invoked. The Court reaffirmed that a complainant bears the initial burden of establishing that the standard or policy adopted by the employer-respondent is *prima facie* discriminatory.

³ This provision is now designated as S. 15 (1)(a). See An Act to amend the Canada Evidence Act and the Criminal Code in respect of persons with disabilities, to amend the Canadian Human Rights Act in respect of persons with disabilities and other matters and to make consequential amendments to other Acts, S.C. 1998, c.9, s. 10.

⁴ *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3 (“*Meiorin*”).

⁵ *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 (“*Grismer*”).

[40] Once a *prima facie* case of discrimination has been established, the employer-respondent may justify the impugned standard by establishing on the balance of probabilities:

1. that the employer adopted the standard for a purpose rationally connected to the performance of the job;
2. that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose;
3. that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.⁶

B. The *Prima Facie* Case

[41] The Commission submits that one need only look at the Respondent's Statement of Particulars, which was prepared prior to the hearing in accordance with the Tribunal's *Interim Rules of Procedure*, to conclude that a *prima facie* case has been established. Amongst the items detailed in the document are the material facts that the Respondent seeks to prove in support of its case (Interim Rule 6(1)(a)). The Respondent declares, as a material fact, that the Complainant's absences from work were the result of illnesses, some of which were diagnosed as being PTSD and chronic sleep disorder. After detailing the number of days that the Complainant was absent from work, the Respondent states that on February 15, 1996, the Complainant was dismissed due to chronic absenteeism, "as there was no prospect of regular or reliable attendance at work".

⁶ *Supra*, note 4 at 32-33.

[42] In a subsequent letter from Respondent counsel to the Commission, it was clarified that at the time of the dismissal, the Respondent considered the Complainant fit to return to full and regular duties as a bus operator. However, the Respondent did not accept that the medical report from Dr. Sequeira and Dr. Erickson dated January 31, 1996, provided any prognosis of regular attendance in respect of the performance of these duties, and the Complainant was consequently dismissed.

[43] Two former managers at OC Transpo, Mr. Ron Marcotte and Mr. Gerald Timlin, testified that amongst the factors considered by the Health Unit, when assessing whether an employee has any prognosis of regular attendance, is his or her previous attendance record. Unquestionably, the Complainant's attendance record was poor, but the Commission points out that this came as a result of the Complainant's illnesses, principally PTSD, a "mental" disability falling within the definition of "disability" as set out in s. 25 of the *Act*.

[44] Thus, it is argued, all of the elements of the *prima facie* case have been made out. The Complainant, who suffered from a disability, was dismissed from his employment by the Respondent, at least in part, because of his record of absenteeism. The primary cause of the absenteeism was his disability. Therefore, one of the factors in the Respondent's decision to dismiss the Complainant was his disability, which constitutes one of the proscribed grounds of discrimination under the *Act*. For a complaint to be substantiated, discrimination need only be one of the factors underlying a respondent's conduct.⁷ Accordingly, submits the Commission, the Respondent in the present case is *prima facie* in breach of the *Act*.

[45] The Respondent disagrees, arguing that in order for a *prima facie* case to be established, it must be demonstrated that the Complainant has actually been discriminated against. It is not sufficient to contend that merely because a disabled person has been dismissed, discrimination has taken place. It must be shown that the individual was dismissed *because* of the disability. The

⁷ *Singh v. Canada (Statistics Canada)* (1998), 34 C.H.R.R. D/203 (C.H.R.T.) at para. 174, aff'd *Canada (A.G.) v. Singh* (April 14, 2000) T-2116-98 (F.C.T.D.); *McAvinn v. Strait Crossing Bridge Ltd.*, [2001] C.H.R.D. No. 36 (C.H.R.T.)(QL) at para. 102; *Holden v. Canadian National Railway Company* (1991), 14 C.H.R.R. D/12 (F.C.A.) at para. 7; *Pitawanakwat v. Canada (Secretary of State)* (1992), 19 C.H.R.R. D/10 (C.H.R.T.) at para. 85.

Respondent points out that it did not disagree with the opinion of the medical experts to the effect that the Complainant was able to return to work as a bus operator. Counsel for the Respondent reiterated, in his final submissions, the position that he had adopted in his pre-hearing correspondence with the Commission: that is, when the Complainant was dismissed in February 1996, the Respondent considered him fit to return to full and regular duties as a bus operator. The Respondent argues that the decision to dismiss the Complainant, therefore, was not based on any assumption that he was disabled. In the absence of this element, the Commission cannot claim that the Complainant was subject to discriminatory treatment on the basis of a disability. The Complainant was simply let go because of the poor prognosis of his regular and reliable attendance, not his ability to perform the work whenever he would attend. The Respondent's treatment of the Complainant, pursuant to its policy on innocent absenteeism, was no different than that afforded any worker, whether disabled or not, who failed to have a good attendance record and whose predicted attendance in the future was equally unsatisfactory.

[46] I find that the facts do not support this argument. The Respondent's decision to dismiss the Complainant was clearly influenced by the Complainant's medical condition, as appears from the evidence of Mr. Timlin, who was then Director of Occupational Health, Safety and Benefits at OC Transpo. He participated in the management process that led to the decision to dismiss the Complainant. Mr. Timlin testified that in deciding to fire the Complainant, OC Transpo relied heavily on the opinion of its Health Unit. The memo that the Health Unit sent to management regarding the Complainant's prognosis could not have been any more clear, stating that its finding took into consideration "the medical information on file" and the Complainant's "past record of attendance". The Respondent cannot now suggest that the Complainant's medical condition was not at least one of the factors that lead to its conclusion to dismiss him. As I indicated earlier, it is not necessary for a proscribed ground to be the only factor underlying a respondent's conduct for there to be a finding of discrimination. I would also add that Mr. Timlin testified that OC Transpo's decision to terminate the Complainant was not influenced at all by the other consideration stated in the Health Unit's memo, that of his lacking a Class C driver's licence. Mr. Timlin explained that the

Respondent regularly assists employees, whose permits have been downgraded while on leave, to reacquire the required certification.

[47] As an indication that the decision to dismiss the Complainant was not influenced by his medical condition, the Respondent refers to the Complainant's poor overall attendance record, dating back to the 1970's, and well before his affliction with PTSD. It is therefore suggested that the Complainant was simply someone who could not maintain regular and reliable attendance. An employer that suffers the consequences of an employee's failure to fulfill his work obligations should be justified at some point to consider the employment contract as having come to an end. But this argument does not truly reflect the facts of this case either. As I have already stated, the Health Unit's memo, upon which the Respondent's decision to dismiss was based, unquestionably concerned the Complainant's medical condition. Furthermore, although some of the Complainant's absences were not related to PTSD, the largest portion of them was, and, moreover, I accept the evidence of the Commission's experts that some of his other illnesses may have been related to the PTSD. In any event, even if the absenteeism prior to the PTSD was the only factor in his dismissal, why was the Complainant not dismissed before the onset of the disability? It is noteworthy that in the period leading up to his dismissal, the Complainant's longest continuous absence from work occurred while he was recovering from PTSD and other illnesses that may be related to this disorder.

[48] I do not accept the Respondent's further submission that the treatment of the Complainant should only be compared to that of other OC Transpo employees with poor non-culpable absenteeism records. The Complainant's attendance record was inextricably linked to his disability. The Respondent concedes that as of the date of the Complainant's dismissal, he was considered fit to return to work. Yet the employer expected him to produce medical or other evidence to demonstrate that he would be able to maintain regular and reliable attendance in the long term, defined by Mr. Timlin to mean as many as twenty years into the future. Other OC Transpo employees who were healthier than the Complainant were able to maintain good attendance records in the past because they lacked his distinguishing characteristic, a disability. It was not suggested that those employees were expected to provide evidence demonstrating a 20-year prognosis of regular and reliable

attendance. In this sense, the Complainant, a person who had suffered from a disability, was treated differently than employees who were not disabled.

[49] I find that the Respondent's prediction that the Complainant's attendance in the future would be poor was based on the likelihood that he would suffer some form of relapse. When Mr. Mooney, the Superintendent of Operational Personnel, sought the Health Unit's opinion prior to dismissing the Complainant, he was interested in knowing whether the Complainant's condition, at that time, was any different from that for which there had been a prognosis of regular attendance, in 1994, after the Complainant's recovery from the sleep disorder. According to Mr. Timlin's testimony, the employer was in effect seeking some additional guarantee that the Complainant's attendance would improve.

[50] I am convinced that underlying the Respondent's decision to dismiss the Complainant was an assumption that he would likely suffer from some sort of recurrence of prior illnesses, which would in turn result in additional absences from work. Conduct that is based on an actual or perceived possibility that an individual may develop a disability in the future constitutes discrimination on the basis of disability, according to the Supreme Court of Canada, in *Quebec (C.D.P.D.J.) v. Montreal (City)* ("*Montreal*").⁸ Although that case dealt with the Quebec *Charter of Human Rights and Freedoms*,⁹ which prohibits discrimination based on a person's "handicap", as opposed to his "disability", the Court stressed that the objectives of human rights statutes throughout Canada do not vary because of such differences in terminology.¹⁰

[51] The Respondent argues that its motive at all times was to manage the attendance within its workforce. Labour relations law recognizes the right of an employer to dismiss an employee due to excessive innocent absenteeism, provided the employer satisfies the test of demonstrating that the

⁸ [2000] 1 S.C.R. 665 at 700.

⁹ R.S.Q., c. C-12.

¹⁰ *Supra*, note 8 at 689.

employee has a record of undue absenteeism in the past and that he or she is incapable of regular attendance in the future.¹¹ However, any discussion relating to the Respondent's motives is irrelevant to the issue before this Tribunal. It is trite law that an intention to discriminate is not a necessary element to proving discrimination under Canadian human rights legislation.¹² If the application of a labour relations policy has as an unintended effect, the adverse differential treatment of an individual based on a proscribed ground of discrimination, there may still be a finding of discrimination against the employer who is implementing the policy.

[52] The Respondent is concerned that if this approach is followed, the logical outcome will be that an employer will never be permitted to dismiss an employee whose level of disability-related absenteeism is unacceptably high. In effect, the employer will be compelled to keep an employee who is unable to fulfill his end of the employment bargain, that is, the performance of his work. Counsel for the Respondent directed me to the labour arbitration decision in *Re: Air B.C. Ltd. and Canadian Airline Dispatchers Assn.*,¹³ wherein the arbitrator rejected such a suggestion and noted that the existence of human rights legislation does not result in the eradication of the labour relations doctrine of non-culpable absenteeism.

[53] The conclusions of the labour arbitrator in that case, though, serve to demonstrate that the Respondent's concerns are, in fact, unwarranted. As is pointed out in the decision, there are two issues to be considered in such cases: first, did the employer meet the tests set out in labour relations jurisprudence to establish a case of non-culpable absenteeism, and then, second, whether the employer's conduct contravenes the applicable human rights legislation. This latter issue is resolved by conducting a BFOR analysis, the approach for which was most recently set out in *Meiorin*. It is the third step of the *Meiorin* test that maintains an employer's right to dismiss an employee in such cases, provided the employer demonstrates that it cannot accommodate the employee without

¹¹ See *Re: Air B.C. Ltd. and Canadian Airline Dispatchers Assn.* (1995), 50 L.A.C. (4th) 93.

¹² *Ontario (Human Rights Commission) v. Simpson-Sears Ltd.* [1985] 2 S.C.R. 536 at 547; *Robichaud v. Canada (Treasury Board)* [1987] 2 S.C.R. 84 at para. 10.

¹³ *Supra*, note 11.

imposing undue hardship on itself. Where an employer is able to establish these elements, its decision to dismiss an employee due to his or her non-culpable absenteeism will be justified.

[54] When measured against the labour relations test, there is no doubt that the Complainant's record of innocent absenteeism was very high. There is some issue as to what the prognosis for regular attendance was. The medical experts' letter of January 31, 1996 stated that his prognosis was "very good", yet in their respective testimonies, they were both forthright in their explanations that this prediction was limited to the short term. It would have been irresponsible of them to have attempted to foretell the state of the Complainant's health to any greater extent. Counsel for the Respondent suggests that I am in some way bound by the findings of fact of the labour arbitrator who, in his ruling regarding the Complainant's grievance, stated that the prognosis for his regular attendance was indeed poor. However, I do not see the necessity to follow this course, considering that the medical evidence of the Commission's experts does not contradict the position of the Respondent that at the time of the dismissal, the prognosis beyond the short term was at the very least uncertain.

[55] The point to be made here is that even if the Respondent was correct in its assessment of the Complainant's condition and its decision satisfied the non-culpable absenteeism test formulated in labour relations law jurisprudence, the matter before this human rights tribunal remains undecided. One must still proceed through the BFOR analysis articulated by the Supreme Court of Canada in *Meiorin*.

[56] To summarize on this point, I find that a *prima facie* case of discrimination has been established. The decision by the Respondent to dismiss the Complainant, in furtherance of its program to manage and improve attendance within its workforce, was based, at least in part, on the Complainant's disability. It is therefore now incumbent upon the Respondent to demonstrate that its decision was based on a *bona fide* occupational requirement.

C. *Meiorin* Test

(i) Steps 1 & 2

[57] The first element of the *Meiorin* test requires the employer to demonstrate that the standard in issue was adopted for a purpose rationally connected to the performance of the job. A document describing OC Transpo's Attendance Management Program was entered into evidence. Mr. Marcotte testified that the principles set out therein reflect the policy that was in place when the Complainant was dismissed in 1996, although the document itself may have been drafted some months thereafter. According to this text, the stated purpose of the Attendance Management Program was as follows:

[...] to reduce the high cost of absenteeism in a way that is consistent and fair to all employees. Employees have an obligation to maintain regular attendance; OC Transpo has a responsibility to; [*sic*] create working conditions conducive to good attendance, monitor attendance, and to work with employees who are experiencing extraordinary levels of absenteeism.

As the Canadian Human Rights Tribunal concluded in *Eyerley v. Seaspan International Ltd.*,¹⁴ there is an obvious rational connection between a rule designed to maintain reasonable levels of attendance on the job and the requirements of that job. In any event, the Commission did not argue that Step 1 was not satisfied in the present case.

[58] It is similarly not in dispute that the Respondent adopted the Attendance Management Program in an honest and good faith belief that it was necessary for the fulfilment of this stated purpose.

¹⁴ [2001] C.H.R.D. No. 45 (C.H.R.T.)(QL) at para. 139.

(ii) Step 3

[59] In order for the Respondent to show that its program regarding innocent absenteeism was reasonably necessary for the accomplishment of its stated purpose of maintaining reasonable levels of attendance, it must be demonstrated that it was impossible to accommodate the Complainant or other employees sharing his characteristics, without imposing undue hardship upon the Respondent.

[60] When the *Act* was amended in 1998, Section 15(2) was added to provide that health, safety and cost are the factors to be considered in determining whether accommodating a person's needs would impose undue hardship on an employer. However, the facts giving rise to the present complaint occurred prior to the passage of this amendment, and, as was pointed out in *Desormeaux v. Ottawa Carleton Regional Transit Commission*¹⁵, my consideration of the accommodation issue is therefore governed by the principles articulated by the Supreme Court in *Central Dairy Pool v. Alberta (Human Rights Commission)*¹⁶ and several subsequent cases. Some of these principles have been summarized in *Eyerley*:¹⁷

In *Central Okanagan School District No. 23 v. Renaud*,¹⁸ Sopinka, J. noted that undue implies that some hardship is acceptable; it is only undue hardship that satisfies this test. In *Central Dairy Pool v. Alberta (Human Rights Commission)*,¹⁹ other relevant factors considered by the Supreme Court include, financial cost, interchangeability of the workforce and facilities, the provisions of the collective agreement, substantial interference with the rights and morale of other employees, and employee safety. Excessive cost may justify a refusal to accommodate those with disabilities, but there

¹⁵ 2003 CHRT 2

¹⁶ [1990] 2 S.C.R. 489 at 520-21

¹⁷ *Supra*, note 14 at para. 141.

¹⁸ [1992] 2 S.C.R. 970 at 984.

¹⁹ [1990] 2 S.C.R. 489 at 520-21.

must not be too low a value put on accommodating disability. Otherwise it would be too easy to use increased cost as a reason for refusing to accord the disabled equal treatment.²⁰ The provisions of a collective agreement cannot absolve the employer of its duty to accommodate, although substantial departure from its terms is a factor to be considered for undue hardship.²¹

[61] The Respondent contends that in cases involving innocent absenteeism releases, the accommodation aspect of the analysis may not be necessary. When assessing an employee's prognosis for regular and reliable attendance, an employer implicitly takes into consideration whether that employee could be accommodated to the point of undue hardship. As Counsel for the Respondent noted, there is "nothing incompatible with innocent absenteeism releases and human rights considerations flowing through each other". In such cases, therefore, there no longer remains any need to proceed through the third step in the *Meiorin* analysis.

[62] I respectfully disagree. As the arbitral decision in *Air B.C.* illustrates, there are two stages involved in reviewing innocent absenteeism dismissals. The first is conducted in accordance with labour relations law and the second in accordance with human rights law. I fail to see how one can assume that once an employer properly concludes that an employee's prognosis for attendance is poor, the employer's duty to accommodate under human rights law is satisfied. A review of the labour arbitration ruling regarding the Complainant's grievance supports this point. OC Transpo's decision to dismiss the Complainant was held to be just, even though the arbitrator did not examine whether the employer had accommodated the employee to the point of undue hardship, in accordance with the human rights principles referred to above. The Arbitrator's comments on the issue were limited to a blanket statement that the Complainant had been "amply accommodated in the past to no avail" and that therefore, it was "not a case where the employer has failed to accommodate a disability". The notion of "undue hardship" was never even discussed.

²⁰ Grismer, *supra*, note 4 at para. 41; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at paras. 87-94.

²¹ *Renaud*, *supra*, note 18 at 587.

[63] The Respondent goes on, however, to provide a second reason for not proceeding through an accommodation analysis. Based on the medical opinion of Drs. Sequeira and Erickson, OC Transpo viewed the Complainant as being fit to work as a bus operator at the time of his dismissal. Consequently, there remained no disability for the employer to accommodate. Having come to the conclusion that the Complainant's prognosis for regular and reliable attendance in the long term was poor, the only possible form of accommodation would have been for OC Transpo to "tolerate" the Complainant's predicted high level of absenteeism. This, argues the Respondent, is not an acceptable form of accommodation.

[64] Counsel for the Respondent directed me to the 1992 case of the Ontario Board of Inquiry in *Bonner v. Ontario (Minister of Health)*,²² which related to a complainant who suffered from periodic bouts of depression. The Board mentioned in its ruling that "a person who by reason of handicap cannot work competently on a regular basis is incapable of satisfying the requirements of the position regardless of how he or she might perform when unaffected by that handicap".²³ The Board went on to reject the premise that someone with such a disability should be accommodated in the sense of being tolerated.

[65] I find this decision of limited relevance to the present case. First of all, these references constitute *obiter dicta*, as the principal finding of the Board was that the complainant in that case would not have performed satisfactorily, irrespective of his handicap. Furthermore, the Board did not consider differential treatment of someone who may possibly develop a disability in the future, as being a form of discrimination. This finding is incompatible with the subsequent judgment of the Supreme Court in the *Montreal* case. Overall, the Board took a narrow view regarding accommodation and undue hardship. The Board asserted that the principle of undue hardship does not require an employer to hire or retain employees who, because of a handicap, are always or occasionally incapable of doing the work, simply because the employer has the resources to tolerate

²² (1992), 16 (C.H.R.R.) D/485 (Ont.Bd.Inq.)

²³ *Ibid.* at para. 82.

“actually deficient work”.²⁴ The law has moved well beyond such an interpretation, as evidenced by the statement of the Supreme Court of Canada, in *Meiorin*, that the employer bears the burden, under the third step of the analysis, of demonstrating that it is *impossible* to accommodate individual employees sharing the characteristics of the complainant without imposing undue hardship on the employer.²⁵

[66] Besides, I fail to see how “tolerating” absenteeism cannot constitute an acceptable type of accommodation. Certainly, all employers must be prepared to accept some level of absenteeism from all employees as it is inevitable that they will be unable to attend their work, from time to time. The issue to be decided is whether this “tolerance” of a certain level of absenteeism would impose undue hardship on the employer, taking into consideration all the appropriate factors. In the recent Alberta Court of Queen’s Bench case of *UNA v. Calgary Health Authority*,²⁶ one of the issues to be decided was whether an employer is obliged to hire a qualified woman who is pregnant, for a term position, if it is known from the outset that she cannot complete the entire term due to the impending birth of her child. The Court found that it would be erroneous to assume that accommodating this sort of availability issue would inevitably result in undue hardship. The Court saw no distinction between the duty to accommodate such absenteeism from the duty in cases such as *Central Alberta Dairy Pool* and *Simpsons-Sears*,²⁷ where the employers were obliged to accommodate employees who would be absent on a regular basis, to the point of undue hardship. I do not, therefore, accept the Respondent’s suggestion that the third step in the *Meiorin* analysis has no application in this case.

[67] One of the reasons why the Respondent considered that the only form of accommodation available would be to tolerate absenteeism was because it assumed that the Complainant could only and would only work as a bus operator. Yet, the evidence shows otherwise. To begin with, the

²⁴ *Ibid.* at para. 83.

²⁵ *Supra*, note 4 at 40.

²⁶ 2002 ABQB 859.

²⁷ *Supra*, note 12.

Health Unit memo, which OC Transpo management relied upon in deciding to terminate the Complainant's employment, suggested in its second paragraph that the Health Unit was willing to contact his medical advisors regarding "alternate employment", if his employing division was "able and prepared to offer the Complainant" such employment. The Health Unit, therefore, had not rejected the possibility of his being able to perform satisfactorily in another job.

[68] In addition, the Complainant testified that when he was told that he would not be allowed to return to his job, he asked Mr. Mooney to let him take on some other duties within OC Transpo. Mr. Mooney refused and informed him that no form of "rehabilitation" would be provided. I found the Complainant's entire testimony forthright and credible and no evidence was led to contradict his recollection of this conversation. Even if the OC Transpo managers who decided to dismiss the Complainant (including Mr. Mooney and Mr. Timlin) thought that the only employment option available in his case was to keep him as a bus operator, the information before them clearly suggested that other options should have been examined.

[69] This raises another important failure on the part of the Respondent in dealing with the Complainant. In *Meiorin*, the Court alluded to the practical usefulness, in conducting the accommodation analysis, of considering separately:

- a) the appropriateness of the *procedure* that the employer adopted to assess the issue of accommodation, and
- b) the *substantive content* of the accommodating standard that was offered to the employee, if any.²⁸

The Commission submits that, with respect to the Complainant's disability, the Respondent failed to even observe the policies outlined in its own Attendance Management Program, and, as such,

²⁸ *Supra*, note 4 at 37.

neglected to accommodate him procedurally. For instance, the Attendance Management Program provided that all reasonable efforts must be taken to try to rehabilitate or accommodate an employee who is found to be innocently absent from work because of a disability, if this can be done without undue hardship. These accommodation mechanisms included the options offered by the DERC, such as the shuttle bus to which the Complainant had been assigned in 1992.

[70] The Attendance Management Program goes on to declare that an employee can only be “medically terminated” once “every reasonable effort has been made to accommodate the employee within the work place”. The Commission argues that the Complainant was terminated before any such effort was made. Indeed, I find that the Respondent, on whom rests the burden to demonstrate that the employee could not be accommodated, did not present evidence that any such attempts were made. To the contrary, it appears that the Respondent, having concluded that the Complainant was already fit, proceeded with the dismissal without considering any other options. Yet, as I have already explained, OC Transpo’s decision was tainted with an assumption that the Complainant would not be able to regularly attend work, on account of a possible occurrence of illness in the future.

[71] There was some suggestion in the medical experts’ letter of a process of work hardening that would assist in the Complainant’s “readjustment”. In addition, the Complainant’s past experience demonstrated that his recoveries were undermined when confronted with stressful situations, such as driving on routes on which he had been attacked in the past. Ensuring that the Complainant avoided such circumstances may have assisted in preventing any recurrence of his disabilities. The Respondent argues that the Complainant’s medical advisors never suggested that he needed to do another job, but that he was ready to return to his duties as a bus driver. I do not find this argument convincing. There is no evidence that any question about alternate employment was ever asked of the experts. Dr. Sequeira and Dr. Erickson certainly were prepared, as indicated in their January 31, 1996 letter, to be consulted by the employer regarding the assignment of duties, presumably as a bus driver. Considering the Respondent’s concern that the Complainant would be unable to maintain regular attendance as a bus operator, nothing prevented the Respondent, at this point, from

requesting that the Complainant's experts provide their opinion regarding alternate employment. There is no evidence that any such request was made.

[72] Do employers have the obligation to make such an enquiry? The Respondent suggests not, citing as authority for its position the recent judgment of the British Columbia Court of Appeal in *Oak Bay Marina Ltd. (c.o.b. Painter's Lodge) v. British Columbia (Human Rights Commission)* ("**Oak Bay**").²⁹ The Court found that the employer in that case was entitled to rely on its own experience with the complainant in assessing his ability to perform the job, and was not required to investigate any further into his mental disability by, for instance, obtaining additional expert opinions. However, the findings in this decision are clearly fact-specific. The job in question was that of a guide working on small fishing boats travelling over what were described as among the deadliest waters in British Columbia. The lives of the employer's clients rested in the hands of the guide and it is evident that the Court believed that in the interests of their safety, the employer was entitled to rely on its own empirical knowledge regarding the complainant's capacity to function under these circumstances. In the present case, the Respondent does not question the Complainant's ability to perform his duties well, when he is working. The issue for the Respondent is the Complainant's level of absenteeism.

[73] The Court also suggested that the scope of the duty to investigate could vary depending on the nature and size of the employer. The Court distinguished the small business of the employer in that case from, as an example, the operations of a government "with entire departments and volumes of information available to it".³⁰ OC Transpo certainly is more reflective of the latter example. Finally, regarding this question of the duty to investigate, I am guided yet again by the findings in *Meiorin*. The Court identifies some of the important questions to be asked in the course of the Step 3 analysis, including whether the employer investigated alternative approaches that do not have a discriminatory effect. Implicit in this finding is the duty upon an employer to conduct such an

²⁹ 2002 BCCA 495.

³⁰ *Ibid.* at para 26.

investigation. Without question, there also exists a duty upon the employee to cooperate with the employer in such a process but, as I discussed earlier, I am convinced that the Complainant and his medical advisors were willing and prepared to cooperate in finding a way to rehabilitate him and assure his full reintegration back into the OC Transpo workforce.

[74] Assuming the only available accommodation, as suggested by the Respondent, was to tolerate the Complainant's absenteeism in the future, what evidence was presented to demonstrate that this would impose undue hardship on the employer?

[75] The work schedule for bus operators was typically established on the basis of four or five booking periods per year. In advance of each period, drivers were permitted to select their routes and dates of work, based on their seniority. One of the options available to them was to work on the "spare board". The spare board consisted of a number of drivers (the evidence suggests between 30 and 50 persons) who were available to replace absent workers, as the need arose. These absences were typically unexpected in nature, such as when an operator overslept, was snowed in or fell sick. Spare board drivers received their full salary, whether they were assigned to replace another operator or not.

[76] In the event that the number of absentees exceeded the number of drivers on the spare board, OC Transpo was obliged to ask other drivers to fill in, who were then paid on an overtime basis. On occasion, enough overtime operators could not be found, in which case buses did not go out and service to the public was affected. Dissatisfied transit users were known to complain about service interruptions to their local politicians who in turn conveyed these concerns to the OC Transpo management.

[77] Mr. Marcotte has served as Manager of Staff Relations and Employee Relations at OC Transpo. He testified as to the complexity associated with attempting to predict how many individuals would be absent on a given day and accordingly, estimating the number of operators to put on the spare board.

[78] In the case of longer term absences, where it was known in advance of a booking period that an employee would be unavailable for the entire term, the operator was not permitted to book any shifts. It is my understanding, based on the somewhat sketchy evidence on this issue, that because such absentees had no scheduled shifts, they were not replaced with drivers on the spare board. On the other hand, if it was uncertain whether the duration of the absence would cover an entire booking period, the employee was permitted to book work dates. If he or she was ultimately unable to come in on those days, a spare board driver would have to fill in.

[79] To summarize, the hardship that the Complainant's potential future absenteeism may have imposed is the following:

- a spare driver, who would receive a salary whether the driver was assigned to a bus route or not, would have to replace him;
- between 30 and 50 drivers were assigned to the spare board on any given day. If an insufficient number of spare drivers were available, another operator would have to be paid overtime wages to fill in;
- if an overtime employee could not be found, the bus service on that run would be interrupted;
- affected transit users could complain to their local politicians who would pass on the complaints to OC Transpo management.

[80] I do not find that this evidence demonstrates that accommodating the Complainant's possible absenteeism would impose undue hardship on the Respondent.

[81] To begin with, this evidence, introduced through the testimonies of Mr. Timlin and Mr. Marcotte, was basically anecdotal in nature. Mr. Timlin prefaced some of his comments with a warning that his expertise related to the payment of employee benefits, not the work scheduling process. Neither he nor Mr. Marcotte provided any details whatsoever as to the actual financial cost of running the spare board or paying the overtime wages when the spare board was depleted,

particularly in comparison to OC Transpo's overall expenditures. No evidence was led as to how frequently the spare board was depleted nor how often transit service to the public was interrupted due to absenteeism.

[82] The Complainant had received disability benefits during many of his absences. No evidence was led by the Respondent to indicate the related costs, if any, and the level of hardship to the Respondent arising therefrom.

[83] Mr. Marcotte confirmed that a bus operator's absence did not put anyone's health at risk. He also acknowledged that it would be a "stretch" to contend that excess overtime imposed so much stress on the replacing employees that safety concerns were raised. In fact, the Respondent did not demonstrate what hardship would be imposed on the workforce at large. Most of the alleged hardship relates to the spare board process. Yet the evidence regarding the Complainant shows that during many of these absences, especially while he was being treated for PTSD, he was placed on long-term disability leave. Thus, over a period of nine months in 1992 and for the last eleven months leading up to his dismissal, the Complainant had not booked any shifts. Spare board employees should therefore not have been called upon to replace him in these periods. If the Complainant was likely to be innocently absent in the future, as the Respondent had predicted, it is certainly possible that these absences would have resembled the past incidents and resulted in his being disabled over a long term. The spare board would consequently have been unaffected.

[84] Respondent counsel referred me to the recent judgment of the Ontario Divisional Court in *Ontario (Human Rights Commission) v. Roosma*,³¹ which affirmed a decision of the Ontario Board of Inquiry. The case concerned two employees at the Ford automobile plant in Oakville who for religious reasons could not work from sunset on Friday until sunset on Saturday. They sought to be permanently excused from working Friday evenings. The Ontario Human Rights Commission led evidence that the cost to Ford of replacing the employees on those shifts was negligible. The Board

³¹ [2002] O.J. No. 3688 (Ont.S.C.J.-Div.Ct.)(QL), leave to appeal to F.C.A. refused.

of Inquiry disagreed with this assessment by extending the notion of cost to include the real cost of resulting declines in both quality and production, which while difficult to measure were nonetheless deemed real. The Board concluded that accommodating these employees, by arranging for the swapping of shifts or the hiring of part-time or student workers, would impose undue hardship on Ford.

[85] The circumstances regarding the *Roosma* case differ significantly from those of the present case. First of all, the Court did not necessarily adopt the reasons of the Board of Inquiry; it simply concluded that the board's findings met the "reasonableness" standard of judicial review. The Court noted that the Board was presented with extensive detailed and uncontradicted evidence from Ford, regarding the consequences of accommodating the complainants. Moreover, amongst the factors that influenced the Board's findings was not only the financial cost to Ford but also the interchangeability of its operations, the importance of having the regular operator on each job, the impact of the collective agreement, safety considerations and the substantial effect of accommodation on other workers.³²

[86] As I have already indicated, I have no evidence before me of the actual financial cost regarding the Respondent's measures for accommodating or "tolerating" absenteeism. Safety issues do not arise and evidence was not introduced regarding the impact of the collective agreement. Aside from the mention of the possible, though unlikely, additional stress on overtime employees, I was not provided with any insight as to how accommodating the Complainant's potential future absenteeism would affect other employees. In addition, contrary to the evidence raised in *Roosma* with respect to Ford's automobile assembly line workers, the evidence before me suggests that the functions of a bus operator are highly interchangeable. I thus find that *Roosma* can be distinguished from the present case.

³² *Ibid.* at para. 158.

[87] The Respondent has failed to establish that accommodating the potential innocent absenteeism of the Complainant after his return to work in February 1996 would have imposed undue hardship on OC Transpo.

[88] The complaint is therefore substantiated.

III. REMEDY

A. Reinstatement

[89] In human rights cases, where a complaint of discrimination is found to be substantiated, it is the duty of the Tribunal to attempt to restore a complainant to the position that he or she would have been in, but for the discrimination.³³ The Commission accordingly submits that the Complainant should be reinstated to the position of bus operator or such other suitable occupation as the Tribunal may determine.

[90] Respondent counsel argued that reinstatement is inappropriate in the present circumstances. In the seven years since his dismissal, the prognosis for the Complainant's attendance has remained unchanged. Once he is reinstated, and provided the employer's predictions hold true, the parties will again find themselves in the difficult situation of having to deal with the Complainant's excessive absenteeism. This argument appears to me to be predicated on an assumption that is itself related to the Complainant's disability. I have already held that such an assumption is discriminatory and it can therefore play no role in the fashioning of the remedy.

[91] I am satisfied that the appropriate remedy would be for the Complainant to be reinstated as a bus operator. I therefore order the Respondent to reinstate the Complainant to the position of bus

³³ *McAvinn*, *supra*, note 7 at para. 189; *Canada v. Morgan*, [1992] 2 F.C. 401 at 414-15 (C.A.).

operator, together with the commensurate seniority and benefits of a full-time permanent employee, the whole with retroactive effect to the date of his dismissal.

[92] According to the evidence, the Respondent ordinarily assists employees returning from extended leave in their reintegration into the workforce. This assistance includes the provision of training as well as aid in the reacquisition of any necessary driving permits from the appropriate authorities. The Respondent must provide this assistance to the Complainant.

B. Damages for Lost Income

[93] The Respondent is ordered to pay to the Complainant damages for his lost wages from February 2, 1996, until the date of his return to full time employment, taking into account other income, statutory deductions and gross-up for the purposes of the *Income Tax Act*. All of his benefits should also be adjusted accordingly.

[94] I do not accept the Respondent's suggestion that the damages for lost wages should only run from the date of the labour arbitrator's decision that the Complainant was justly terminated. The Respondent's liability flows from its decision to end the Complainant's employment, based in part on a discriminatory ground, irrespective of whether the labour arbitrator deemed the dismissal just.

[95] Instead of presenting evidence or submissions at the hearing with respect to the calculation of these damages, the parties agreed to work together to determine these amounts. As I explain below, I will retain jurisdiction in case these discussions do not prove fruitful.

C. Hurt Feelings

[96] The facts giving rise to the complaint precede the 1998 amendments to the *Act*. Section 53(3) stated, at that time, that the Tribunal could order a respondent to pay up to \$5,000 in compensation to a victim of discrimination who had suffered in respect of feelings or self-respect. I am in agreement with the findings of the Tribunal, in *Premakumar v. Air Canada*³⁴ and *Desormeaux*³⁵, that the \$5,000 maximum award must be reserved for the very worst cases that fall within the range of cases in which such awards are warranted.

[97] The Complainant testified as to the effect that the termination had on his life. He felt a loss of dignity and feared for his family's economic well-being. The financial impact was so great that it became difficult for him to purchase appropriate food for his family. The evidence does suggest, though, the dismissal did not lead to a recurrence of PTSD and that to the contrary, Dr. Erickson having noted that the Complainant was "taking it extremely well".

[98] Taking into account these and all of the other circumstances in this case, I order the Respondent to pay to the Complainant the sum of \$3,500 as special compensation.

D. Policy Review

[99] The Commission seeks an order that the Respondent's policy regarding the accommodation of employees with disabilities be reviewed and revised. Over seven years have passed since the Complainant was dismissed. The evidence is that since that time, the employer has changed (to the City of Ottawa) and the accommodation policies and attendance management programs have gone through several modifications and updates. The newest attendance management program that is now

³⁴ (2002), 42 CHRR D/63 at para. 107.

³⁵ *Supra* note 15 at para 128.

being implemented extends to all the employees of the City of Ottawa, not just those working within OC Transpo. Furthermore, the liability in the present case stems in part from the Respondent's failure to apply the program that was in place at the time of the Complainant's dismissal, and was not necessarily the result of a particular defect in the program itself. The Commission's request is consequently denied.

E. Interest

[100] Interest is payable regarding all of the monetary awards made pursuant to this decision. The interest shall be simple interest calculated on a yearly basis, at a rate equivalent to the Bank Rate (Monthly Series) set by the Bank of Canada. With respect to compensation for hurt feelings, the interest shall accrue from the date of dismissal until the final payment of the award. Interest on the lost wages shall also run from the date of dismissal until the final payment of the award, but shall be calculated as the wages would have become payable to the Complainant.

F. Retention of Jurisdiction

[101] In the event that any difficulties arise in the implementation of these remedies, including a failure by the parties to reach an agreement regarding the damages for lost wages, I retain jurisdiction to receive evidence, hear further submissions and make further orders.

Athanasios D. Hadjis

OTTAWA, Ontario
March 6, 2003

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NO.: T699/0402

STYLE OF CAUSE: Alain Parisien v. Ottawa-Carleton Regional Transit
Commission

PLACE OF HEARING: Ottawa, Ontario
(July 22-24, 2002; September 4-5, 2002;
November 15, 2002)

DECISION OF THE TRIBUNAL DATED: March 6, 2003

APPEARANCES:

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Patrick O'Rourke For the Canadian Human Rights Commission

Stephen Bird For the Respondent