Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

BETWEEN:

BARBARA TANZOS

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

AZ BUS TOURS INC.

Respondent

REASONS FOR DECISION

MEMBER: Michel Doucet

2007 CHRT 33
2007/08/08

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I. INTRODUCTION

[1] On December 8, 2001, Barbara Tanzos (the "complainant") filed a complaint under section 7 of *the Canadian Human Rights Act* (the "*Act*") against AZ Bus Tours Inc. (the "respondent"). The complainant alleges that the respondent engaged in a discriminatory practice on the grounds of sex and disability, in a matter related to employment.

[2] No preliminary motion or objections were raised at the hearing.

A. THE FACTS

[3] The respondent is a charter bus company. It started its operation in 1998. It is in the business of providing highway passenger bus transportation between destinations primarily within the province of Ontario. The majority of its business, at the time relevant to this matter, was day runs to the Casino Rama, in Orillia, Ontario. It also chartered buses to other destinations outside of Ontario.

[4] The complainant began her employment with the respondent on May 21, 2000, as a bus driver. From October 2000 until March 2001, she was on sick leave. She returned to work on March 7, 2001, under certain medical restrictions. On October 18, 2001, her employment with the respondent ended.

[5] The complainant's principal employment duty was to drive a passenger bus between Toronto and Orillia, Ontario. In particular, she was required to drive passengers between various pick-up locations in Toronto and the Casino Rama, in Orillia. She was occasionally required to drive a bus between other locations, on charter trips. On Casino Rama runs, passengers would disembark upon arrival at the casino and spend several hours there. It took approximately one hour and thirty minutes for her to drive from Toronto to the Casino Rama. It took her approximately two hours to drive from Casino Rama to various passenger drop-off locations and then to the respondent's garage on Weston Road, in Toronto.

[6] The respondent keeps track of the hours worked by its bus drivers on a "bi-weekly time sheet". These "time sheets" include a column marked "Total Working Hours". This column refers to the period of time beginning when an employee arrives at the respondent's business premises prior to his or her first trip of the day, and ends after the employee returns the bus to the garage after his or her last trip of the day.

[7] The evidence shows that the drivers are paid on a per trip basis by the respondent. A compensation tariff sets out the pay. As of March 5, 2001, the compensation tariff showed that a single trip of less than twelve hours and thirty minutes was paid $100.00; trips of more than twelve hours and thirty minutes were paid $110.00. The compensation tariff also has provisions for double or triple trips. The respondent also paid a bonus of ten dollar a day to full-time drivers after one year of full service.

[8] According to the evidence of Terry Barnett, the General Manager of the respondent at all time relevant to this matter, work was allocated to the drivers on a seniority basis. The dispatcher was responsible for assigning the work to the drivers. The work would first be allocated to various crews of drivers for a period of six weeks. After the work was assigned to the crews, what was left was allocated on a daily basis by the dispatcher to the employees to whom work had not yet been assigned.

[9] On October 7, 2000, the complainant, on her doctor's recommendation, applied for sick leave due to "stress, chest pains, chronic headaches, etc." Her sick leave was approved by the respondent on October 9, 2000. On March 7, 2001, her doctor gave her clearance to return to work "part-time three days a week" and also recommended that she not work night shifts.

[10] Following her return, the complainant testified that she only got called to work for the first time on March 18. This situation worried her because she had been informed that the respondent was in the process of hiring new drivers and she was not getting any work. Her understanding was that, on her return from sick leave, she was still a full-time employee but, because of her medical limitations, she could only, on her doctor's order, work three days a week, and not at night.

[11] Seeing that her work situation was not improving, she decided, on March 24, 2001, to call Ron Roffey, the respondent's Operations Manager at the time, and asked him why she was not getting any work. She taped this call with Mr. Roffey. At the hearing, the respondent objected to the introduction in evidence of this taped conversation and of its transcript. It also objected to the introduction of another taped conversion, this time with Terry Barnett. We will come to this conversation with Mr. Barnett later. I made an oral ruling accepting the tapes and the transcription into evidence. A written ruling concerning this objection is issued with this decision.

[12] Here are excerpts of the transcription of the complainant conversation with Ron Roffey, on March 24, 2001:

> […]

Barbara	Why am I not getting any work?
Ron	Well I have no idea.
Barbara	I am put to the bottom of the list and all the work goes to the full timers, well how am I suppose to work my way back to full time.
Ron	Well when there is work available you will get if.
Barbara	But that's not how it works.
Ron	How should it work Barb.
Barbara	You mean to tell me when someone goes on sick leave and they come back, they don't have a job.
Ron	I didn't say you didn't have a job.
Barbara	But I am suppose to have three days work.
Ron	Who says that.
Barbara	The doctor said, instead of being full, so if I came back full time you wouldn't have any work for me.
Ron	If there is work available you will get if. There is no work available.
Barbara	Then lay me off. If you can't hold me on, if there is no work available, you have to lay me off.
Ron	We do have work, but as I say when there is work available you will get it.
Barbara	But you can't hold me on like this, I am suppose to have three days a week. That is being unfair to me. You know exactly how it works.
Ron	I don't understand what your problem is, other than the fact that Eddie [the Respondent's dispatcher] didn't detail you this week.
Barbara	I only had one day work in three weeks, since the day I called you.
Ron	You only had one days work?
Barbara	In three weeks, since the day I called you.
Ron	I can't very well lay you off when I am hiring people can I?

Barbara	Well that's up to you, like what are going to do with me. You can not give me one days work in a month, how am I suppose to live.
Ron	Well what do you want to do Barb?
Barbara	What are you going to do for me.
Ron	<u>I'll talk to Eddy and tell him to detail you at least three days a week.</u>
Barbara	That's right.
Ron	<u>If it's available.</u>
Barbara	Its but, ok, no it's if I get three days a week or you lay me off, that's what I want one, I want or the other.
Ron	I can't lay you off when I am hiring people.
Barbara	Well you gonna have to do something, because this is not right. You can't be hiring people and not having me work that doesn't make sense.
Ron	Well as I say not everybody is working right now. But its going to get busier and then you will be working.

[…]

Barbara	You know for three weeks work one days work. You can't…you know.
Ron	I don't understand why Eddie's had only had one days work I have to look into it, he's not here right now, but I will look into it and I'll…
Barbara	I least have to have three days a week as a full time person being put back to work by doctors ok, at least I should be available to step back into the job that I left.
Ron	But you are stepping back other than that you'll…
Barbara	Only one day work in three weeks that's a joke.
Ron	Well if, the other thing you got to look at too, is the other people here, like…
Barbara	I know the other people.
Ron	I understand what you are saying but not everyone is working right now.
Barbara	I just came down Hwy 11 and I counted 10 buses going to the casino.
Ron	Yeah they are normal runs.
Barbara	That's right, so every body is working, we have part timers and we have full timers.
Ron	Not everybody is working right now.

[…]

Barbara	I am not stupid I know how the system works if you want to get rid of me than lay me off, if not get me to work.
Ron	I don't want to get rid of you.
Barbara	Well that's what it feels like, wouldn't you think that.
Ron	As I say I don't know what the problem is let me look into it and I'll see that you get more.
Barbara	Please do.

[…]

[*sic* throughout]

[The underlining is mine.]

[13] After her conversation with Mr. Roffey, the complainant testified that she was called to work for four consecutive days from March 26 to March 29, 2001. Her bi-weekly time sheets indicate that some weeks she would get three days of work and even more, while on other weeks she would not get any work. From March 7, 2001 to the end of her employment on October 21, 2001, she worked approximately 99.5 days, an average of 3.1 days per week. More precisely, her bi-weekly time sheets show that she worked:

- From March 7 to March 24 one day
- From March 25 to April 22 four days
- From April 23 to May 6 five days
- From May 7 to May 20 five days
- From May 21 to June 3 five days
- From June 4 to June17 six days
- From June 18 to July 1 seven days
- From July 1 to July 15 eight days
- From July 16 to July 29 nine days
- From July 30 to August 12 seven days
- From August 13 to August 26 six days
- From August 27 to September 9 ten days
- From September 10 to September 23 nine days
- From September 24 to October 7 seven and half days
- From October 8 to October 21 seven days.

[14] On September 6, 2001, the complainant met with Terry Barnett to discuss her situation. The following are excerpts of this meeting. Ron Roffey was also present during this meeting:

Terry	When you were off sick, whatever it was. […] I remember that there was a discussion that you wanted to work only four days a week or three days a week.
Barbara	I, no the doctor, I have the doctor’s note in my car, the doctor sent me back to work that I am to work three days a week.
Terry	OK that legated the fact that you are a full time employee that put you in the part time.

Barbara	I am full time. No, see section 239 in the labour law when someone as full time driver or someone full time period goes on sick leave and comes back to work with a doctor's note and doctor says…
Terry	Long after your sick note Barbara I was under the impression from dispatch and I have to check it out that you switch from full time to part time that you had no interest in working 5 days a week.
Barbara	No, I wasn't capable of working 5 days a week.
Terry	Even after your sickness pass by you will not be capable of working
Barbara	No that's not true, that's not true because I had a conversation with Ron, I said how do I get back to work full time.
Terry	Is Barb full time now?
Ron	That's what we are debating its under investigation.
Barbara	Yeah
Terry	Okay
Barbara	I had a conversation with Ron that as a full time driver returning to work part time from doctor's order.
Terry	Uhuh
Barbara	Right, I was wanting work that he had to give me work or lay me off.
Terry	HmHm
Barbara	He wouldn't lay me off because he was hiring drivers
Terry	HmHm
Barbara	And right, also he's telling me there's no work available but he is hiring drivers and leaving me at home like not to work.
Terry	Okay, I was, let me make it very clear to you I was under the impression (a) that you were part time.
Barbara	No
Terry	I will debate that issue with you, but I will never debate anything until I investigate, I only got involve in this last night.
Barbara	Right.
Terry	Second thing is if you have statutory time as require by sick leave that legates (?) your full time period. So I am going to move on to when I consider you back on full time. So like a collective agreement if you go off sick six months when you come back you lost six month of seniority because you were off for sick time.
Barbara	But.
Terry	So if we're going to deem you to be full time. I don't know how long you were off but I'll have to check it out.
Barbara	Just under 5 months
Terry	Okay well that 5 months will be added to your period we would make you eligible for a full time employee. For example under entitlement of your benefits or your clothing allowance if you are off for 5 months that 5 months will be added to when you come back before you are eligible for the clothing allowance.
Barbara	But another issue is I did come back as a full time driver put to work part time because my ….

Terry Okay, that is a debatable issue cause when I check with dispatch I know they are going to tell me that you wanted to work part time not full time.

Barbara I'll tell you right now I have him recorded alright.

Terry I am not worried what he said I worry what the other members of dispatch tell me…

Barbara No, no the issue is I am full time.

Terry Cause its Eddie who is the…

Barbara No then that's the case I have a problem with. I have a discrimination against him. I have a discrimination I have lost a lot of potential income with this company right, I was suppose to be put back to work as a full time employee, he was suppose to accommodate me three days a week and recognize me as full time employee and he didn't I had a conversation with Ron I have proof.

Terry Hold on, then, then you know the whole issue with me, the way I work I simply go by a set of guidelines of rules and regulations.

[…]

Terry You can, you can feel whatever frustration you feel.

[…]

Terry You can pursue any avenue that you so choose to pursue because that's your choice as an employee and me as an employer will fight base on the information I have in my hands.

[…]

Terry No, no, let me finish, let me finish, cause I sense you are getting frustrated and I don't want you to be frustrated.

Barbara Well no because I lost a lot of money in this company for not being recognize as…

Terry You make a hold bunch of statements, you first of all say my people discriminate against you and I have never heard of this before I have a concern about that as a general manager of this company.

[…]

Terry If you want to pursue that, pursue it, that's your choice I will pursue it too, I have lawyers and I have all kinds or resources cause I go by the book.

Barbara And so am I.

Terry And that's fine, but don't try to force your way on.

[…]

Terry Listen to me first of all, don't'force me down a panel without me doing some investigation I don't work that way.

Barbara That's fine

Terry I will commence my investigation and report to you my findings.

Barbara Yes and we will have a meeting because there are two other drivers and I wish to have a meeting with you. With a whole bunch of situations going on here. We will set up a date, now is not the time to really have the meeting.

Terry We won't set up a date you will ask me when I would like to have a meeting and you will tell me what it's about prior to even having that meeting.

[…]

Terry And if you have a problem you got resources, you got the government, Labour Canada, go see them and explain to them and I will deal with them I am not going to deal with renegade drivers who have complaints about my dispatcher I will not.

Barbara No, of course not because I had, I had, I went to Ron three times ok, he said he would look into it and he would say I'll see that you get work if it's available.

Terry Well I see very clearly I think Ron is considering you as I am considering you which I will continue to argue that you are classified as part time.

[…]

Barbara Now another issue is, I'll make it clear to you I didn't come back to work and say I am only part time. I came back to work with a doctor's note saying I can work part time and he recommends that I don't' work nights.

Terry This is not a pick and chose type of operation. […] I will not provide that type of work.

[…]

Barbara I worked days last year, so I come back to work I said I am not able to work nights […]

Terry You don't have that choice Barbara, in the grand scheme of how a bus company works in relationship of Labour Canada we have a duty to provide work we don't have a duty to accommodate by the hours which you believe you can work.

[…]

Terry As far as I am concern at this point of time you are a part time employee.

[…]

Terry That's my interpretation right now.

[…]

Terry That's my instruction for Ron yesterday and that's only going off the top of my head without doing an investigation.

[…]

Terry We have rules and guidelines which determine a full time employee.

[…]

Terry You may have been one at one time.

[…]

Terry I am not arguing that.

Barbara And I have a doctor's note, have you seen the doctor's note?

Terry No I haven't seen anything.

Barbara Ok then you'll have to.

Terry A doctor's note doesn't legate (?) the difference between full time part time classifications it only simply says work restrictions that are put on.

[*sic* throughout]

[The underlining is mine.]

[15] At the hearing, Mr. Barnett testified that he personally never saw or asked to see the complainant's medical notes. He added that these notes had "most likely" been handed off to the Operations Manager who, at the time, was Ron Roffey. Mr. Roffey was not called as a witness at the hearing and no reasonable or acceptable explanation for his absence was given, other than the statement by counsel that he could not be located. Mr. Barnett also testified that when the complainant went off on her extended sick leave, her status was changed from full-time to part-time. He added that a new full-time employee was hired to occupy what he described as the "vacant position."

[16] The complainant testified that she never intended to change her status to that of a part-time employee. She added that what she was looking for was to be accommodated as per her doctor's instructions and eventually work herself back to working full-time, by which she meant returning to a five-day work week. The respondent's position was that the doctor's note had the effect of relegating her to a part-time status. Mr. Barnett testified that a full-time employee is an employee who is available five days a week. When he or she is not capable of working five days a week, then he or she is considered a part-time employee and work will be allocated to that employee on an availability basis.

[17] On September 21, 2001, Terry Barnett wrote to the complainant. In this letter, he referred to the meeting of September 6th and specified: "As I indicated to you at that time, I was aware that earlier in the year your status had changed from full-time, as mentioned to me by dispatch. Unaware that it was for medical reasons I assumed that this change in status was by your own choice." Regarding the complainant's request for a $10.00 per day bonus offered to full-time drivers after one year of employment, he stated that this bonus was for full-time drivers only. He further stated "Since your medical restriction limits your ability to work in a full time capacity, you cannot be eligible for this bonus."

[18] Regarding her status, the letter reads: "Your doctor's letter of March 7th states that you may return to work in a part-time capacity […] In any case, you can return to full time duties when your doctor gives you a clean bill of health and you can resume a five (5) day work week

without restrictions. Although I have not yet confirmed the number of days you have worked since March 7th, I am aware that dispatch has provided you work. By your calculation, from May 28th to Aug 31st 2001 you have worked 55 days. Given your restrictions, this indicates that the company has tried hard to accommodate your needs. As we approach the low season and the company will be required to adjust the daily use of equipment and manpower it may become even more difficult to meet your doctor's restrictions."

[19] Mr. Barnett testified that the respondent would assign work to the complainant on a regular basis as much as it could, considering her needs for accommodation. He added that the approach he favoured was one of "common sense" and that is why her status would remain that of a part-time driver until such time where there would be no restrictions to prohibit her from doing her job full-time.

[20] Finally, in the concluding paragraph of his letter of September 21, 2001, Mr. Barnett added: "[d]ue to your overall concerns about the amount of work you have been receiving and given the fact that we are heading into our slow season combined with the reduction of outside work as result of the American tragedy, I am open to considering a mutually agreed lay-off to give you the needed time to rehabilitate yourself."

[21] After having received this letter, the complainant submitted to the respondent a new note from her doctor. This note, dated September 28, 2001, indicated that the complainant could return to work five days a week but maintained the restriction concerning night work "as this causes worsening of her medical condition."

[22] The complainant wrote a letter to Mr. Barnett on October 1, 2001, in which she explained that she would not consent to "a mutually agreed lay off", as he had suggested in his September 21, 2001, letter. Mr. Barnett answered on October 16, 2001, "until you sign up and are available for 5 days work per week without any restrictions you will as all part time drivers be detailed by dispatch subject to work availability."

[23] The complainant's employment with the respondent ended on October 17, 2001. According to the respondent, the complainant voluntarily resigned her position, although in her opening statement, counsel for the respondent did suggest that the complainant was laid-off for economic reasons but no evidence was tendered to support this assertion. The complainant, for her part, asserts that her termination was a direct result of Mr. Barnett's letter of October 16, 2001.

[24] In a letter to the Human Rights Commission, dated July 4, 2002, in response to the question whether the respondent had a policy accommodating employees with medical restrictions, Mr. Barnett offered the following answer: "A comprehensive "Policy & Procedures Manual" was created by Management and was subsequently approved by an Employee Committee with some minor changes. Specifically, the policy has no language that deals directly with employees with medical restrictions but a common sense approach has been used recognizing the legal requirement to do so. With over 30 years in the coach and public transit business, I'm well aware of a duty to accommodate as best as possible." [The underlining is mine.]

[25] During his cross-examination, Mr. Barnett testified to what he understood was the duty to accommodate an employee with a disability considering the respondent had, what he described, as a "seniority-based system." He stated: "I can't give you [the complainant] a piece of work that somebody else who is ahead of you in seniority [has] simply because of accommodation restrictions." He felt that the respondent's duty to accommodate required that it give the complainant "as many hours as [it could.]"

B. LEGAL ANALYSIS

[26] In order to benefit from the protection afforded by the *Act*, the complainant must demonstrate the involvement of one or more of the proscribed grounds listed in section 3 of the *Act*.

(i) The section 7 complaint

[27] Ms Tanzos' complaint is brought pursuant to section 7. Section 7 makes it a discriminatory practice to refuse to employ, or to continue to employ, an individual, on a prohibited ground of discrimination. Section 3 of the *Act* declares that a "disability" is a prohibited ground of discrimination.

[28] The complainant alleges that the respondent has engaged in a discriminatory practice on the grounds of sex and disability, in a matter related to employment. No evidence was tendered to establish a discriminatory practice on the ground of sex, this decision will therefore deal solely with the issue of discrimination on the ground of disability.

(ii) Was a *prima facie* case made out?

[29] As a result of the Supreme Court of Canada's decisions in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU,* [1999] 3 S.C.R.3 (*"Meiorin"*) and *British Columbia (Superintendent of Motor Vehicles v. British Columbia (Council of Human Rights),* [1999] 3 S.C.R. 868 (*"Grismer"*), the historic distinction between direct and indirect discrimination has been replaced by a unified approach to the adjudication of human rights complaints. Under this approach, the initial onus is on the complainant to establish a *prima facie* case of discrimination. A *prima facie* case is one which covers the allegations made, and which, if believed, is complete and sufficient to justify a verdict in the complainant's favour in absence of an answer by the respondent. (See *Ontario Human Rights Commission* and *O'Malley v. Simpson Sears Limited*, [1985] 2 S.C.R 536, at p. 558.)

[30] In a complaint under the *Act*, the burden of proof is on the complainant to establish a *prima facie* case of discrimination. The standard of proof in discrimination cases is the ordinary civil standard of the balance of probabilities. In cases of circumstantial evidence, the test may be formulated as follows:

> An inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses

(B. Vizkelety, *Proving Discrimination in Canada* (Toronto), Carswell, 1987, at p. 142; *Uzoaba v. Canada (Correctional Services)*, [1994] C.H.R.D. No. 7, at p. 40.)

[31] What is the appropriate test to be applied when determining a *prima facie* case? In *Canadian Human Right Commission v. Attorney General of Canada*, 2005 FCA 154, the Federal Court of Appeal stated that the legal definition of a *prima facie* case does not require the complainant to adduce any particular type of evidence to prove that she was a victim of a discriminatory practice. A flexible test is more appropriate.

[32] According to *Québec (Commission des Droits de la personne et des Droits de la jeunesse) v. City of Montréal*, [2000] 1 S.C.R. 665, at p. 701 [also referred to as "*Mercier*"], in order to establish a *prima facie* case, a complainant has to (a) prove the existence of a distinction, exclusion or preference in the decision not to employ or continue to employ; (b) that the distinction is based on a real or perceived disability; and (c) that the distinction, exclusion or preference had the effect of nullifying or impairing the complainant's right to the full and equal exercise of human rights and freedoms.

[33] A key issue in this case is whether or not the complainant has a disability or was perceived by the respondent as having a disability.

[34] The evidence regarding the complainant's alleged disability consists of a request for sick leave on October 7, 2000. The application for sick leave indicated that it was requested by the complainant's doctor due "to stress, chest pains, chronic headaches." The request was granted by the respondent. A letter, dated March 2, 2001, from the *Markham Headache and Pain Treatment*

Centre addressed to Dr. Adrian R. Woodrow, the complainant's treating physician, indicates that the complainant is suffering from post traumatic cervicogenic headaches and cervical myofascial pain. An MRI scan of her cervical spine also revealed some early degenerative changes in the cervical spine and two cervical herniated discs. There is no evidence that this letter was provided to the respondent. On March 7, 2001, the complainant's doctor provided the complainant with a note to confirm that she could return to work but with a restriction, that she work "part-time – three days per week." The note also added the limitation that she should not work nights "as it will be detrimental to her present medical condition." There is no evidence that the respondent challenged the necessity of these restrictions. Finally, on September 28, 2001, the complainant provided the respondent with another medical note, this time from Dr. Mayer Yacowar, which indicates that she could return to work full-time but maintained the limitation that she should not work nights, adding "after midnight."

[35] Although, the complainant did not call as a witness her treating physicians or any other medical expert to testify as to her medical condition, I nevertheless conclude that she did establish a *prima facie* case of discrimination.

[36] When she returned to work on March 7, 2001, the complainant was suffering from a medical disability, as evidenced by her doctor's note. This medical evidence remained unchallenged and during her cross-examination, counsel for the respondent never questioned the complainant about her medical condition. The evidence even confirms that the respondent accepted that the complainant had medical limitations or restrictions. Mr. Barnett in his letter of September 21, 2001, for example, states: "In any case, you can return to full time duties when your doctor gives you a clean bill of health and you can resume a five (5) day work week without restrictions." [The underlining is mine.] Again, in his letter of October 16, 2001, he states "until you sign up and are available for 5 days work per week without any restrictions you will as all part time drivers be detailed by dispatch subject to work availability". [The underlining is mine.] If the respondent felt that the complainant did not suffer from a medical disability it could have asked for a second medical opinion. It chose not do so.

[37] The existence of a discrimination having been established *prima facie*, the respondent can now justify the impugned standard by establishing the following, on a balance of probabilities:

- The respondent adopted the standard for a purpose rationally connected to the performance of the job at issue;
- The respondent adopted that particular standard with the sincere belief that it was necessary in order to fulfill that legitimate work-related purpose;
- The standard is reasonably necessary in order to fulfill that legitimate work-related purpose. In order to establish that the standard is reasonably necessary, the respondent must show that it is impossible to accommodate the complainant without the respondent suffering undue hardship. The respondent must establish that it considered and reasonably rejected all viable forms of accommodation.

(See: *Grismer*, at paragraph 20).

(a) The two first steps of *Grismer*?

[38] Counsel for the respondent argued that it was essential for the respondent to have a business operation that operates safely and securely seven days a week, twenty-four hours a day. She stated that, to do this, the respondent needed full-time employees who could work five days a week and who were available for night shifts. Counsel added that the only choice left in a case such as the present was to consider the complainant as a part-time employee and allocate work to her on an availability basis.

[39] In their evidence and final arguments, the parties did not see fit to address the first two requirements of *Grismer.* We can infer from this that they acknowledged that the standard adopted by the respondent had a purpose rationally connected to the performance of the job at issue.

[40] We can also infer that the respondent adopted this standard in good faith, believing that it was necessary to ensure the operation of its business.

(b) Did the respondent establish that it would be impossible to accommodate Ms Tanzos without causing the respondent undue hardship?

[41] According to the respondent, the doctor's notes submitted by the complainant did not clearly state what her actual condition was. It further argues that her real condition was never known or made known to the respondent. The respondent adds that it nevertheless accommodated the complainant and complied with the doctor's recommendations without compromising its obligations to distribute work to the rest of the workforce.

[42] As the evidence indicates, the complainant's request was, at first, that she be allowed to return to her full-time job working three days a week, only daytime hours. In October 2001, the doctor's note indicated that she was now available to work five days a week but again only daytime hours. Other than Mr Barnett's assertion that this is "not typically" done since the respondent's business operates 24 hours a day, seven days a week, no evidence was lead to establish how the complainant's request constituted undue hardship. Mr. Barnett, the respondent's only witness, testified that this was the norm in the business, but he gave no evidence to support this conclusion.

[43] To establish that a standard is reasonably necessary an employer must demonstrate that it is impossible to accommodate the complainant without imposing an undue hardship. Therefore the onus is on the respondent to show that it made efforts to accommodate the complainant's disability up to the point of undue hardship. (See *Alberta Dairy Pool v. Alberta (Human Rights Commission*, (1990), 72 D.L.R.(4th) 417, at p. 439).

[44] The Supreme Court in *Meiorin*, at paragraph 64, advises courts of law and administrative tribunals to consider various ways in which individual capabilities may be accommodated. The employer should determine whether there are different ways to perform the work while still accomplishing the employer's legitimate work-related purpose. The skills, capabilities and potential contributions of the individual complainant and others like him or her must be respected as much as possible.

[45] In this case, the standard emphasizes the need to have employees available to work five days a week and, if necessary, for night shifts. The fact that this standard excludes certain classes of persons is not discrimination if the respondent can establish that it is reasonably necessary to meet the appropriate objective and if the accommodation was incorporated in the standard. Exclusion is only justifiable where the employer has made every possible accommodation short of undue hardship. (See *Grismer*, at paragraph 21).

[46] The search for accommodation is a multi-party inquiry. There is obviously a duty on the complainant to assist the respondent in securing an appropriate accommodation. (See *O'Malley*, supra, at p. 555.) This does not mean that, in addition to bringing to the attention of the respondent the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of its business. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfill the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. The complainant cannot expect a perfect solution (See *Central Okanagan School Distric No. 23 v. Renaud*, [1992] 2 S.C.R. 970).

[47] The respondent, as I have already indicated, has the obligation to demonstrate that it has made every possible accommodation short of undue hardship. To determine what constitutes undue hardship it has to establish that it considered and reasonably rejected all viable forms of accommodation. It has to demonstrate that it was impossible to incorporate individual aspects of accommodation without causing it undue hardship.

[48] The use of the adjective “undue” indicates that some degree of “hardship” is acceptable; it is only the hardship that is “undue” that can excuse the employer from its duty. The respondent did not persuade me that respecting the complainant's medical limitations would require a substantial reorganization of all of the duties to the point where it would cause “undue” hardship. The respondent alleges, without persuasive evidence to support its argument, that the

accommodation requested by the complainant would negatively affect its operations. No persuasive evidence supports this conclusion.

[49] On at least two occasions, the complainant met with representatives of management to express her concern about her working hours and to see how a solution could be found. What she was seeking was the opportunity to show that she could, with accommodation, perform the tasks of bus driver. She had requested, on her doctor's recommendation, to work three days a week. In response, the respondent put her in a part-time position with work being assigned to her on an availability basis. In September 2001, she indicated that her doctor had authorized her to return to work five days a week but had kept the restriction on her availability for night work. The respondent still refused to return her to her full-time status, indicating that it would not do so as long as the limitations on her working hours were not lifted. Again no evidence was given to indicate what "undue hardship" was caused to the respondent if it accepted to accommodate the needs of the complainant.

[50] Although it never contested the medical conditions of the complainant and the restrictions imposed by her doctor, the respondent acted as if this did not concern it and that its duty to accommodate the complainant was a very limited and narrow obligation. If the respondent felt it had insufficient information to decide what accommodation was needed, it could have enquired with the complainant's doctor if the restrictions imposed were temporary or permanent; whether they required accommodation; what type of duties the complainant could do and those she should avoid; how long should this accommodation be in effect; what date was she going to be medically re-assessed; what, if anything, should the employer do to assist the complainant's successful return to work.

[51] It follows from the evidence that the respondent has failed to discharge the onus imposed on it to demonstrate that it was unable to accommodate the complainant's disability without undue hardship. An uncompromisingly stringent standard, as the one put forward by the respondent, may be ideal from an employer's perspective. Yet, if it is to be justified under human rights legislation, the standard must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship.

[52] The respondent was aware of the complainant's disability. It was on notice that accommodation was required. It led no evidence with respect to its efforts to try to accommodate the complainant other than to treat her as a part-time employee. This was not sufficient to meet its burden.

(iii) Conclusion on the section 7 complaint

[53] Considering the factual situation of this case, I find that the complainant was discriminated against on the basis of a disability, contrary to section 7 of the *Act*.

C. DAMAGES

[54] In her Statement of Particulars, the complainant is seeking the following relief :

(i) Compensation for lost wages;

(ii) Compensation for pain and suffering; and

(iii) The reimbursement of certain expenses.

[55] Section 53(2) of the *Act* provides that if the complaint is substantiated, the Tribunal may make an order, against the respondent who is found to be engaging or to have been engaging in a discriminatory practice, including, amongst other relief, any of the following terms:

53(2) […]	**53**(2) […]
(c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;	*c)* d'indemniser la victime de la totalité, ou de la fraction des pertes de salaire et des dépenses entraînées par l'acte;
(d) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and	*d)* d'indemniser la victime de la totalité, ou de la fraction des frais supplémentaires occasionnés par le recours à d'autres biens, services, installations ou moyens d'hébergement, et des dépenses entraînées par l'acte;

(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.	*e)* d'indemniser jusqu'à concurrence de 20 000 $ la victime qui a souffert un préjudice moral.
53(4) Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.	**53**(4) Sous réserve des règles visées à l'article 48.9, le membre instructeur peut accorder des intérêts sur l'indemnité au taux et pour la période qu'il estime justifiés.

(i) Compensation for loss of wages

[56] The complainant is claiming lost wages for the respondent's failure to accommodate her medical condition. She also claims lost wages for the respondent's failure to put her back to work five days a week as of September 28, 2001. The evidence of her lost wages is not the clearest and the respondent, for its part, never challenged this evidence, nor cross-examined the complainant about her claims to lost wages. I will therefore, as best as I can, determine what I consider to be a reasonable amount for lost wages.

[57] The evidence indicates that from March 7, 2001, to September 28, 2001, the complainant worked eighty five (85) days, an average of 3.1 days per week, therefore for this period there appears to be no lost wages. If the respondent had accommodated the complainant on the basis of three days a week, she would not have been paid more than what she received for that period.

[58] For the period after September 28, 2001, where she was able to work five days a week, the evidence indicates that she worked 11.5 days up to October 21, 2001, her last day of work with the respondent. During that period she should have worked 15 days. Her loss of salary for that period is therefore equivalent to 3.5 days of work. Taking into consideration that for a day's work of twelve hours or less, she would have been paid, according to the evidence, one hundred dollars a day, her loss of salary for that period is $350.00.

[59] According to her Record of Employment, the complainant was "dismissed" on October 21, 2001. This was not a mutually agreed to lay-off as the respondent alleged. The evidence is clear that the complainant did not want to be laid-off but since, the respondent was unwilling to accommodate her, she felt that she had no choice. The complainant therefore has the right to claim loss wages following her dismissal.

[60] For the year 2000, her last full year of employment with the respondent her total earnings, according to her Individual Income Tax Return, was $24,594.00. Her total earnings for the year 2001, was $19,729.00, which included $5,740.00, in employment insurance benefits. Part of these benefits was paid while she was on sick leave but no evidence of what amount this represented was submitted at the hearing. If the complainant had worked five days a week, at $100.00 per day, for the remainder of that year, she would have worked an extra 40 days, which would mean a total of $4,000.00 in salary. Taking into consideration the fact that she received employment insurance benefits and also other eventualities that might have affected her earning capabilities, it would be reasonable to assess her loss of income for this period at $3,000.00.

[61] For the year 2002, her total income was $19,485.00, a difference of $5,109.00 with her income in 2001. I fix the amount of her lost wages for the year 2002 at $5,109.00.

[62] For the year 2003, her total income was $21,368.00, a difference of $3,226.00 with her income in 2001. Her total loss of income for the year 2003 is set at $3,226.00.

[63] In conclusion, the complainant is entitled to $350.00 lost wages for the period preceding her dismissal in 2001. She is also entitled to $3,000.00 for lost wages for the remainder of the year 2001. For the year 2002 and 2003, I fix her loss of income at $5,109.00 and $3,226.00, respectively.

[64] The complainant also claims for lost wages during Good Friday and Easter Sunday, which she said should have been paid. She also claims that she has a right to a ten dollar a day bonus paid to full-time drivers after one year of service.

[65] I order that the complainant be paid $200.00 for Good Friday and Easter Sunday. In regard to the $10.00 a day bonus, the evidence shows that the complainant began working for the respondent on May 21, 2000. If she had worked continuously, she would have started receiving the bonus on May 21, 2001. But from October 2000 until March 2001, she was on sick leave. For that period, she was not accumulating seniority and this period cannot be counted to establish the date from which she would have had a right to the bonus. She returned to work on March 7, 2001 and worked until October 18, 2001, when she was dismissed. As of October 7, 2001, she would have held her position as a full-time employee for one year and should have been entitled from then on to the ten dollar a day bonus. From October 7, 2001 to the end of the year, she should have worked approximately fifty days. I therefore order that she be paid the bonus for this period, which amounts to $500.00. For 2002 and 2003, since no evidence was produced to establish that the bonus was still in existence, I will make no order.

[66] Regarding the complainant's claim for a Christmas bonus, no evidence was presented supporting this claim and therefore I will make no order for its payment.

[67] Under paragraph 53(2)*(c)* of the *Act*, the complainant is therefore entitled to $12,035.00, for loss of salary following the respondent's discriminatory act. This amount seems reasonable given the quality of the evidence submitted and the complainant's duty to mitigate her loss.

(ii) Compensation for pain and suffering

[68] The complainant is also claiming compensation for pain and suffering under paragraph 53(2)*(e)*. Again, I must say that the evidence submitted in support of this claim is somewhat weak and is certainly not enough to justify an amount in the higher scale provided under the *Act*. While subsection 53(2) of the *Act* gives discretion to the Tribunal with regard to granting various remedies when a complaint proves to be founded, such discretion must be exercised judiciously in light of the evidence before the Tribunal. In this case, the complaint is allowed and nothing in the complainant's testimony indicates any reason to refuse awarding her compensation for pain and suffering. (See *Dumont v. Transport Jeannot Gagnon*, 2002 FCT 1280).

[69] I agree that the respondent's decision did cause the complainant pain and suffering, if only in terms of anxiety. I therefore award $3,000.00 as compensation for pain and suffering.

(iii) The reimbursement of certain expenses

[70] The claimant also made various claims for the reimbursement of certain expenses but no evidence having been presented to support these, it is impossible for this Tribunal to make any order regarding their reimbursement.

(iv) Interest

[71] Interest is payable with regard to all indemnities awarded in this decision (subsection 53(4) of the *Act*). Interest shall be calculated in accordance with subsection 9(12) of the *Canadian Human Rights Tribunal Rules of Procedure (03-01-04)*, simple interest calculated on a yearly basis based on the official rate set by the Bank of Canada. Interest shall accrue from the date of the complaint until the date the indemnity is paid.

II. CONCLUSION

[72] I find that the complainant was discriminated against on the basis of a disability contrary to section 7 of the *Act* and I order the respondent to pay to the complainant $15,035.00 in lost wages and pain and suffering, plus interest from the date of the complaint until the date the indemnity is paid, at the rate set out above.

"Signed by"

Michel Doucet

OTTAWA, Ontario
August 8, 2007

CANADIAN HUMAN RIGHTS TRIBUNAL

PARTIES OF RECORD

TRIBUNAL FILE:	T832/8203
STYLE OF CAUSE:	Barbara Tanzos v. AZ Bus Tours Inc.
DATE AND PLACE OF HEARING:	February 5 to 7, 2007 Barrie, Ontario
DECISION OF THE TRIBUNAL DATED:	August __, 2007
APPEARANCES:	
Barbara Tanzos	For herself
No one appearing	For the Canadian Human Rights Commission
Natalia Chang	For the Respondent