Federal Court  Cour fédérale

Date: 20220421

Docket: T-1099-20

Citation: 2022 FC 579

Ottawa, Ontario, April 21, 2022

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

CITY OF OTTAWA

Applicant

and

JAMISON TODD AND
CANADIAN HUMAN RIGHTS COMMISSION

Respondents

JUDGMENT AND REASONS

I. Overview

[1] The applicant, the City of Ottawa, seeks judicial review of an August 13, 2020 decision of the Canadian Human Rights Tribunal (CHRT) finding the City discriminated against the respondent, Jamison Todd, when it terminated his employment with OC Transpo (the Decision) contrary to the *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA*].

[2] The Decision is reported at: *Todd v City of Ottawa*, 2020 CHRT 26.

[3] Although named as a party to this proceeding, the Canadian Human Rights Commission did not participate in the application.

[4] The City seeks to: (1) have the CHRT finding that Mr. Todd's disability-related absences were a factor in the termination of his employment set aside, and (2) have an Order issued to dismiss the complaint in its entirety.

[5] The City also seeks a declaration that it did not discriminate against Mr. Todd contrary to sections 7 and 10 of the *CHRA.*

[6] In the alternative, the City seeks an Order setting aside the CHRT finding that the City did not accommodate Mr. Todd to the point of undue hardship and to have the complaint dismissed in its entirety.

[7] As a further alternative, the City seeks an Order remitting the matter to the CHRT with the direction that it be reconsidered in a manner consistent with the reasons of this Court.

[8] Mr. Todd seeks an order dismissing the application, with costs.

[9] For the reasons that follow, the application is dismissed.

II. **Legislation**

[10] For ease of reference, any parts of the *CHRA* discussed in these reasons are set out in the attached Appendix.

III. **Relevant facts**

[11] The issue before the CHRT was to determine whether OC Transpo discriminated against Mr. Todd on the basis of one or more of his disabilities while he worked as a bus operator or when it decided in 2014 to terminate his job as a bus operator.

[12] Mr. Todd worked as a bus operator for the City of Ottawa, OC Transpo, from 2001 until he was fired in 2014. He missed a lot of work over the course of his career for various reasons, including a number of medical conditions.

[13] Mr. Todd's ability to perform his duties as a bus operator was impacted particularly by two disabilities. The major disability was Irritable Bowel Syndrome ("IBS"), which was diagnosed in 2004. It flared up intermittently over the course of his career. Mr. Todd also experienced musculoskeletal pain, which came and went over several years, but which was particularly bad in the period from 2008 to 2010.

[14] The medical restrictions provided by Mr. Todd's doctors, particularly in relation to his IBS, made it hard for him to drive a bus. OC Transpo and Mr. Todd agreed that he would miss work when his disabilities prevented him from working. The disability-related absences would

not be counted against him for the purpose of OC Transpo's attendance management system. This was referred to as the Accommodation Plan.

[15] This approach to accommodating Mr. Todd's disability resulted in Mr. Todd accumulating a large number of absences from work.

[16] Mr. Todd also missed work for other reasons. In some cases, Mr. Todd said he was missing work because of a disability, but OC Transpo said that there was no medical documentation to support his claim.

IV. **The Continuing Employment Agreement**

[17] After Mr. Todd was away from work for an extended period of time, for which there was no supportive medical evidence, OC Transpo decided to impose a new plan with rules designed to ensure that Mr. Todd improved his attendance at work. This was called the Continuing Employment Agreement (the "CEA"). These plans are often also called Last Chance Agreements, because they are used as a last chance for an employee who would otherwise be terminated.

[18] The CEA was signed December 28, 2012. It required Mr. Todd to contact his manager if he was going to miss a shift. The consequence for failing to do so was that Mr. Todd could be fired.

[19] Mr. Todd was warned both verbally and in writing about his failure to contact his manager before he was going to miss a shift.

[20] After a little more than a year of working under the CEA, Mr. Todd's attendance at work was improving, but he was not calling his manager, Mr. Chaudhari, before he missed a shift. This meant that his manager could not offer him alternate duties.

[21] On January 29, 2014, Mr. Todd missed a shift because he had the flu. He did not call his manager to report that he would miss that shift. That day, Mr. Todd's manager, Zahid Chaudhari, recommended in a memo to senior managers that Mr. Todd's employment be terminated as, contrary to the CEA, Mr. Todd missed his January 29, 2014 shift without first calling his manager. The memo, which will be discussed in some detail later in these reasons, included mention of all of Mr. Todd's non-disability and disability related absences.

[22] On March 10, 2014, OC Transpo fired Mr. Todd.

[23] On November 16, 2014, Mr. Todd filed a complaint against the City alleging discrimination under sections7 and 10 of the *CHRA*.

[24] The CHRT found that when OC Transpo was making the decision to fire Mr. Todd it also considered Mr. Todd's whole history of missed work. OC Transpo did not consider Mr. Todd's disability-related absences separately from his other absences, and it did not consider whether

there was anything else it could do to accommodate Mr. Todd's disability before considering his overall absences in deciding to fire him.

V. **The Decision**

[25] The CHRT hearing took place over 19 days, between August 21, 2017 and March 9, 2018.

[26] In a 64 page, 384 paragraph decision, the CHRT found that OC Transpo breached the *CHRA* by identifying Mr. Todd's overall absenteeism as one of the reasons for his termination and not demonstrating that it took care to disaggregate Mr. Todd's disability-related absences from his other absences.

[27] The CHRT commented that if Mr. Todd's breaches of the CEA were the only reason provided for his termination, it did not believe that terminating him would have been discriminatory.

[28] The CHRT ended the Decision with these conclusions:

> [378] OC Transpo did not discriminate against Mr. Todd on the basis of one or more of his disabilities during the course of his employment, and that (*sic*) the accommodation plans that were in place, while imperfect, were satisfactory.
>
> [379] OC Transpo did not discriminate against Mr. Todd when it placed him on the CEA upon his return to work in 2012.
>
> [380] Mr. Todd failed to cooperate with OC Transpo in complying with the requirements of the CEA and (pursuant to the terms of that agreement) it was not discriminatory for Mr. Todd to be terminated for breaching the CEA.

> [381] However, by including Mr. Todd's overall history of absenteeism as one of the two grounds for his termination without disaggregating the disability related absences or justifying its conduct in a manner permitted by the Act, OC Transpo discriminated against Mr. Todd.

[29] As to disposition of the complaint, the CHRT dismissed the complaint in part and found it substantiated in part.

[30] The parties had bifurcated the hearing therefore the question of remedies was not considered. It was left to be determined at a later date.

VI. **Issues**

[31] The overall issue to be determined is whether the CHRT erred in finding Mr. Todd's discrimination claim was made out. If it did err, the Decision is unreasonable.

[32] To that end the City alleges the following errors in the Decision make it unreasonable:

(1) The CHRT drew unreasonable conclusions in finding that a *prima facie* case of discrimination had been established.

(2) The CHRT misapplied the law with respect to the test of undue hardship in cases of excessive absenteeism.

VII. **Standard of Review**

[33] Subject to certain exceptions, none of which apply here, the standard of review presumptively is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], at paras 10, 16, 23 and 69.

[34] The onus is on the City to demonstrate that the decision is unreasonable: *Vavilov*, at para 75.

[35] The parties agree that both issues contain questions of mixed fact and law the result of which is that this Court's role on judicial review is limited to a deferential review of the CHRT's conclusions provided that the Decision meets the standards of a reasonable decision.

[36] Reasonableness review begins with the principle of judicial restraint and a respect for the distinct role of administrative decision-makers: *Vavilov* at para 13.

[37] A decision is considered reasonable where it is justified in relation to the facts and law constraining the decision-maker and is based on an internally coherent and rational chain of analysis. Where this is the case the reasonableness standard requires a reviewing court to defer to such a decision: *Vavilov* at para 85.

[38] The reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived": *Vavilov* at para 102. A decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis: *Vavilov* at para 103.

[39] It is trite law that the decision maker may assess and evaluate the evidence before it and, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from reweighing and reassessing the evidence considered by the decision maker: *Vavilov* at para 125.

VIII. **Did the CHRT unreasonably conclude that Mr. Todd proved his claim of *prima facie* discrimination?**

A. *The termination documents*

[40] There was a lot of evidence - documentary and *viva voce* - before the CHRT.

[41] In addition to the CEA, two documents were critical: (1) the Termination Memo of Mr. Chaudhari recommending Mr. Todd's employment be terminated and (2) the Termination Letter, also signed by Mr. Chaudhari, which was given to Mr. Todd during the termination meeting on March 10, 2014.

B. *Termination memo*

[42] The opening paragraph of the Termination Memo indicates that "The following is a summary of performance issues, concerns and actions taken with regards to the employment history for Operator Jamison Todd. It is recommended that Mr. Todd's employment with the City of Ottawa be terminated for breach of "Continuing Employment Agreement" signed by Mr. Todd, the Union Local 279 and the Section Head on December 28, 2012."

[43] The Termination Memo next stated in a brief paragraph that Mr. Todd's "attendance at work started to deteriorate in 2005 and by 2012 it became unsustainable, hence a Continuing Employment Agreement was signed with him based on the prognosis that Mr. Todd was in good health to attend work on regular (*sic*) and reliable basis."

[44] What followed was a summary of Mr. Todd's attendance . It listed the number of days per year, for each year between 2005 and 2014, that Mr. Todd was absent from work. The list shows that Mr. Todd was absent during that time period a total of 1241 days.

[45] Notation was then made of certain information in Mr. Todd's employee file. In 2011 it was recommended that Mr. Todd be placed at step 1 of the Attendance Management Program (AMP) but, as a result of his manager's discretion, he was given the opportunity to improve his attendance. Subsequently, in December 2012 he was placed at step 1 of AMP. At that time Mr. Todd's prognosis suggested that he was able to attend work on a regular basis. On December 28, 2012, the Continuing Employment Agreement was signed.

[46] The Termination Memo identifies the "Current Issue" as being the non-compliance by Mr. Todd, on three occasions, with the CEA requirement that if he was to be absent he was to call his Section Head prior to a scheduled shift. Three separate time periods when Mr. Todd failed to call his Section Head prior to a scheduled shift were set out: August 23 to October 21, 2013, October 22 to November 25, 2013 and January 29, 2014.

[47] The Termination Memo was written on January 29, 2014. It indicated that since Mr. Todd signed the CEA on December 28, 2012, he had missed 56 days in 2013 and 3 days in 2014.

[48] The Termination Memo also set out that during the period May 10, 2008 to March 31, 2010, Mr. Todd missed 131 days in 2008 and 261 days in 2009 due to Long Term Disability (LTD).

[49] The Termination memo concludes with a Recommended Course of Action. The wording of that recommendation is at the heart of the dispute in this application:

> It is recommended that the employment of Operator Jamison Todd be terminated primarily because he violated the terms of the agreement on numerous occasions, despite being given opportunities to comply with the terms and also because of continued excessive absenteeism:
>
> "For each absence the employee, Jamison Todd must call his Section Head prior to the scheduled shift".
>
> (My emphasis)

[50] On the following page, the Termination Memo ended with the statement that "The union has in writing admitted to a clear violation of the Last Chance Agreement."

[51] The CEA and Monthly performance meetings were listed as attachments to the Termination memo.

[52] A critical finding was made by the CHRT that attached to the Termination Memo was "a summary printout of all of Mr. Todd's absences throughout his career at OC Transpo, without disaggregating or otherwise accounting for Mr. Todd's disability-related absences."

C. *Termination letter*

[53] The Termination letter is dated March 10, 2014. The opening sentence states "[t]his letter is further to the Continuing Employment Agreement that was signed on December 28th, 2012."

[54] The Termination Letter then set out sections 2 and 6 of the CEA. Section 2 required Mr. Todd to call his Section Head prior to a scheduled shift if he was going to be absent. Section 6 states that if Mr. Todd failed to satisfy any of the conditions in paragraph 1 through 5 then his employment would be immediately terminated.

[55] The Termination Letter reviewed that on October 21, 2013 it was brought to Mr. Todd's attention that he had violated section 2 of the CEA on numerous occasions, the details and dates of the violations having been presented to Mr. Todd at that time, he agreed that he did violate the agreement.

[56] The Termination Letter then mentioned that Mr. Todd was advised in a meeting on November 25, 2013 that he had violated the CEA on November 19, 2013.

[57] The Termination Letter next set out that Mr. Todd "continued to disregard the terms of the agreement and violated it for the third time on January 29, 2014."

[58] The culmination of those incidents was the conclusion by OC Transpo that:

> You have failed to honour the terms of the Continuing Employment Agreement that was signed on December 28, 2012. As a result, you are in breach of the Continuing Employment Agreement and your employment with the City of Ottawa shall be terminated immediately.

[59] The final two paragraphs of the Termination Letter provided Mr. Todd with human resource information confirming he would receive a record of employment, who he should contact if he had questions about his pay or credits and who to contact for arrangements concerning his pension and other benefits. He was also provided with the contact information for the Employee Assistance Program which he could contact for up to two weeks from the date of termination if he wanted confidential counselling.

D. *The termination meeting*

[60] The minutes of the termination meeting indicate it lasted 5 minutes. The Termination letter was read to Mr. Todd by his manager, Mr. Chaudhari, in the presence of both Mr. Todd and Mr. Sharma, the union steward. Another person, who presumably recorded the Minutes of the Meeting, was also present.

[61] At the conclusion of the meeting, Mr. Todd was asked to surrender his I.D. and keys. He was advised that he would be paid to that date, March 10, 2014.

E. *Submissions of the Parties*

[62] The City submits that the CHRT erred when, despite finding it was not discriminatory to terminate Mr. Todd for breaching the CEA, it found that the City had relied on Mr. Todd's disability related absences when terminating his employment, thereby breaching the *CHRA*.

[63] In support of this submission, the City states that the conclusion was not justified in light of the facts and record. Specifically, two witnesses - Mr. Chaudhari and Mr. Sharma - testified before the CHRT that the only reason for Mr. Todd's dismissal was his breach of the CEA.

[64] The City adds that the CHRT failed to explain why it ignored the evidence of Mr. Chaudhari and Mr. Sharma in this regard as it had repeatedly found them to be credible and Mr. Todd to be not credible.

[65] The City points out that when Mr. Todd's Union representative, Mr. Sharma, testified he said that the Union decided not to proceed with a grievance on Mr. Todd's behalf following the termination noting that had the termination been for "disability or something" the Union would have filed a grievance and that Mr. Todd could easily have filed a grievance "if he was terminated for excessive disability days or something".

[66] Mr. Todd relies on *Canada (Attorney General) v Bodnar*, 2017 FCA 171, which cites *Stewart v Elk Valley Coal Corp*, 2017 SCC 30 to submit that a reviewing court must defer to an

expert tribunal's conclusions regarding a *prima facie* case of discrimination if the finding falls within a range of possible, acceptable outcomes.

[67] In support of the CHRT finding, Mr. Todd adds that the CHRT noted Mr. Chaudhari's memo relied not only on the breach of the CEA, but also on Mr. Todd's disability related absences and "continued excessive absenteeism" which Mr. Todd says contradicts the testimony of Mr. Chaudhari and Mr. Sharma that the only reason for termination was the breach of the CEA.

[68] Mr. Todd adds that the City did not call Mr. Chaudhari's superiors to testify about the reasons for dismissal. Having failed to lead direct evidence of the decision to terminate, Mr. Todd says the City cannot now attempt to distance itself from the additional reasons for termination set out in the Termination Memo.

F. *Analysis*

[69] The CHRT correctly identified the threshold test as being that set out in *Ontario Human Rights Commission v Simpson-Sears*, [1985] 2 SCR 536, at paragraph 28:

> A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer. [. . .] but once the *prima facie* proof of a discriminatory effect is made it will remain for the employer to show undue hardship.

[70] The CHRT then correctly identified that under the *CHRA*, a complainant alleging discrimination is required to show that:

1. They have a characteristic or characteristics protected from discrimination under the *CHRA*;

2. They have experienced an adverse impact with respect to a situation covered by sections 5 to 14.1 of the *CHRA*; and,

3. The protected characteristic or characteristics were a factor in the adverse impact.

[71] There was no dispute before the CHRT that Mr. Todd's termination did constitute adverse treatment. The only issue was whether Mr. Todd's disability was a factor in the adverse impact.

[72] The Decision begins with a "Summary of Conclusions". Relevant to this issue are the following paragraphs:

> [3] If Mr. Todd's breaches of the CEA were the only reason provided for his termination, then I do not believe that terminating him would have been discriminatory. However, when it terminated Mr. Todd, OC Transpo conflated the breach of the CEA with Mr. Todd's overall pattern of absenteeism and in doing so did not distinguish the disability-related absences from the non-disability-related absences. At that time, it did not consider any other options of accommodation and it failed to demonstrate that it had reached the point of undue hardship.
>
> [4] By identifying Mr. Todd's overall absenteeism as one of the reasons for his termination, OC Transpo engaged the protections of the *Canadian Human Rights Act* against actions motivated in whole or in part by discrimination.
>
> [5] While OC Transpo argued at the hearing that it was justified in its decision to terminate Mr. Todd because his absenteeism was excessive, the evidence before me at the hearing did not satisfy OC Transpo's burden to demonstrate that it took care to disaggregate Mr. Todd's disability-related absences from his other absences. Further, while there was no dispute that regular and reliable attendance at work is important, OC Transpo did not discharge its burden to prove that it had reached the point of undue hardship in its efforts to accommodate Mr. Todd.

[73] The City takes issue with the CHRT's lack of explanation as to why it "ignored" Mr. Chaudhari and Mr. Sharma's evidence that Mr. Todd's breach of the CEA was the only reason for his dismissal, particularly as it had repeatedly found them to be credible and Mr. Todd to be not credible. This does not render the Decision unreasonable: "Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16.

[74] Regarding that evidence, it appears that neither of the witnesses had direct knowledge of the reason or reasons of the superiors for firing Mr. Todd. The CHRT accordingly could reasonably assign little weight, if any, to the testimony of Mr. Chaudhari and Mr. Sharma on this issue. It is open to the trier of fact to accept some of the evidence of a witness, while rejecting other evidence of the same witness: *R v REM*, 2008 SCC 51, at para 65.

[75] It has been held that mere reliance on the evidence of some witnesses over others cannot, on its own, form the basis of a reasoned belief that the [CHRT] must have forgotten, ignored or misconceived the evidence in a way that affected their conclusion: *Housen v Nikolaisen*, 2002 SCC 33 at para 46.

[76] The City has also submitted that the finding that Mr. Todd's disability related absences were a factor when terminating him was not supported on the facts and record. The argument in the Applicant's factum is put this way:

> Despite having found that it was not discriminatory for Mr. Todd to have been terminated for breaching the CEA's requirements and in the face of evidence to the contrary, the Tribunal nonetheless concluded that the City had relied on Mr. Todd's disability-related absences when it terminated his employment, thereby breaching the *Act*.

[77] The CHRT readily acknowledged and found that it would not be discriminatory for the City to have fired Mr. Todd based on breach of the CEA. That was a distinct and separate finding by the CHRT. It was made independently of the finding that the City did not disaggregate the disability-related absences from the non-disability absences. These factual findings are owed deference and the Court is to adopt a "posture of restraint" when considering them: *O'Grady v Bell Canada*, 2020 FC 535, at para 31; *Vavilov* at para 24.

[78] The City has not shown the challenged finding by the CHRT was in error. To the contrary, on cross-examination Mr. Chaudhari acknowledged that the number of hours he calculated and listed in the Termination Memo for absenteeism was done without distinguishing the disability-related absences from the non-disability absences. In other words, Mr. Chaudhari admitted that he did not disaggregate Mr. Todd's disability-related absences from his non-disability absences.

[79] After considering the Termination Memo, the Termination Letter, the above-noted CEA evidence and jurisprudence as well as other testimony, the CHRT found that Mr. Todd "forgot or chose not to contact his supervisor". The CHRT said that was a clear breach of the CEA and it was unrelated to Mr. Todd's IBS or any other disability.

[80] The City further submits that it was unreasonable for the CHRT to fail to address the Termination Letter's explicit statement that Mr. Todd's employment was terminated for his breach of the CEA, without making any reference to Mr. Todd's absenteeism, whether related to disability or not.

[81] The CHRT did note that Mr. Chaudhari's memo relied, not only on the breach, but also on Mr. Todd's disability related absences and "continued excessive absenteeism". The record shows that Mr. Chaudhari was not the decision-maker. Rather, he testified that he attended a meeting with his superiors to discuss the Termination Memo which he referred to as "just a summary".

[82] The transcript shows that Mr. Chaudhari explained his role in the meeting with senior management to discuss the memo this way:

> Q. [. . .] And this recommendation at the bottom; this comes from you?
>
> A. Yes.
>
> Q. And you make the recommendation that Mr. Todd be terminated, in part because of continued excessive absenteeism?
>
> A. This is a whole picture that I'm giving to them.
>
> Q. That's right.
>
> A. But ultimately, Mr. Todd wasn't terminated because of his absenteeism, it was the violation of the agreement; that was that he wasn't calling me -- yes.
>
> Q. Well, here, you say it's both.
>
> A. It's -- that's the way it says that, but really, at the end of the day, that wasn't the reason; but yes, it says -- because I'm giving him the entire picture.

[83] The evidence on record was that neither Mr. Chaudhari nor Mr. Sharma had direct knowledge of what role the phrase “excessive absenteeism” played in the decision of Mr. Chaudhari’s superiors to decide to terminate Mr. Todd’s employment.

[84] Mr. Todd points to the evidentiary problem before the CHRT that the people who made the decision, being Mr. Chaudhari’s superiors, did not testify. As a result, there was no direct evidence before the CHRT to counter the direct evidence in the Termination Memo that a secondary reason for termination was “continued excessive absenteeism”.

[85] To demonstrate *prima facie* discrimination, Mr. Todd was required to show that his disability was a factor in his termination. He was not required to show that his disability was the only or even the primary reason for his termination: *Moore v British Columbia (Education),* 2012 SCC 61 at para 33; *Holden v Canadian National Railway* [1990] FCJ No 419 (FCA) at para 8.

[86] The CHRT noted that it is often challenging to show direct evidence of discrimination and, for that reason, direct evidence is not needed to establish discrimination under the *CHRA*. It then identified the task of the Tribunal to be “. . to consider all the circumstances and evidence to determine if there exists the ‘subtle scent of discrimination’” (see *Basi v Canadian National Railway Company*, 1988 CanLII 108 (CHRT); *Tabor v Millbrook First Nation*, 2015 CHRT 9, para. 14): Decision at para 196.

[87] After hearing all the evidence and considering the submissions of the parties, the CHRT found that "[w]hen OC Transpo was making the decision to fire him, however, it also considered Mr. Todd's whole history of missed work. OC Transpo didn't consider Mr. Todd's disability-related absences separately from his other absences, and it didn't consider whether there was anything else it could do to accommodate Mr. Todd's disability before considering his overall absences in its decision to fire him."

[88] The CHRT received extensive evidence over the 19 days of hearing. It was entitled to, and did, weigh the evidence. Absent exceptional circumstances, none of which appear to be present here, a reviewing court will not interfere with such factual findings. Indeed, that is the main function of a first-instance decision maker. It is not however the role of this Court to reweigh that evidence: *Vavilov* at para 125.

[89] For the reasons set out above and in the Decision, I conclude that the CHRT's determination that a *prima facie* case of discrimination by OC Transpo was made out is reasonable. It accords with the jurisprudence and falls within the range of possible, acceptable outcomes taking into account the legal and factual constraints in the underlying record. The CHRT clearly laid out the reasons for arriving at the findings it made in this respect and the jurisprudence it relied upon to arrive there. The reasoning is detailed and thorough. It shows "how" and "why" the CHRT arrived at the conclusions it did using an internally coherent and rational chain of analysis.

[90] As set out at paragraph 85 of *Vavilov*, I am required to defer to such a finding.

IX. **Did the CHRT misapply the law regarding the test of undue hardship in cases of excessive absenteeism?**

[91] Once an applicant has made out a *prima facie* case of discrimination, the burden shifts to the respondent to demonstrate its actions constitute a bona fide occupational requirement (BFOR): *British Columbia (Public Service Employee Relations Commission) v BCGSEU,* 1999 CanLII 652 (SCC), [1999] 3 SCR 3, [*Meiorin*] at para 70.

[92] The City submits the CHRT's findings on undue hardship are unreasonable because it misapplied caselaw relating to the duty to accommodate and undue hardship and failed to justify its departure from the jurisprudence. The City states that it met both its procedural and substantive duty to accommodate Mr. Todd.

[93] With respect to the City's duty to accommodate, Mr**.** Todd submitted to the CHRT that the accommodation plans implemented by the City were that he could miss work and not have it count against him for attendance management purposes but, he wasn't offered work as a formal accommodation. For example, although he was cleared by his doctors to return to modified work on July 18, 2010 he was not offered any such work until August 30, 2010. Mr. Todd also submitted to the CHRT that those absences were considered in concluding that he should be dismissed for excessive absenteeism.

[94] The Decision recognized that it was open to OC Transpo to demonstrate that, even excluding Mr. Todd's disability-related absences, his overall absenteeism reached the point of undue hardship. The CHRT found though that "OC Transpo failed to meet its duty to

accommodate Mr. Todd's disability to the point of undue hardship when it included his disability related absences in its rationale for his termination".

[95] The CHRT made the factual finding at paragraph 370 of the Decision, that during the hearing OC Transpo failed to demonstrate that it had reached the point of undue hardship, having exhausted all reasonable and practical alternatives, when it terminated Mr. Todd.

[96] The CHRT also made the factual finding at paragraph 371 of the Decision, that at the time of Mr. Todd's termination, there was no evidence to suggest that OC Transpo considered alternatives to termination, including alternate approaches to accommodation or Mr. Todd's transfer to an alternate position (that met his restrictions and limitations) through priority placement**.**

[97] The CHRT reviewed Mr. Todd's non-LTD and non-IBS related absences and found that in the period leading up to the CEA, being from 2004 to 2012, Mr. Todd missed 28% of his shifts. When all of his sick days, disability related absences, sick leave and other undefined absences were considered relative to Mr. Todd's working days including vacation, investigatory leave, bereavement leave and family emergency leave, Mr. Todd's level of absenteeism reached 42%.

[98] The CHRT found that under the CEA Mr. Todd's total level of absenteeism was over 39% or just under 30% excluding IBS and LTD- related absences.

[99] The City submits that the CHRT disregarded the extensive line of cases it put forth (*Hydro-Québec v Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43 (*Hydro-Québec*) at para 17) to support the proposition that excessive innocent absenteeism and an employee's failure to achieve a reasonable level of attendance because of illness may nullify the employment relationship in that the employee is unable to fulfil their fundamental contractual obligation to provide work. Indeed, there comes a point where the employer can legitimately say that the bargain struck with the employee is not completely capable of performance.

[100] The CHRT noted at paragraph 373 that "it was open to OC Transpo to demonstrate that, even excluding Mr. Todd's disability-related absences, that (*sic*) his overall absenteeism was a problem, and had reached the point of undue hardship. At nearly 30% absenteeism - even excluding Mr. Todd's IBS and LTD related absences - Mr. Todd's attendance might have met the burden for undue hardship, if OC Transpo had presented evidence to support such a conclusion." The CHRT finished that thought by saying "And while OC Transpo drew this distinction in argument at the hearing, <u>there is no evidence before me that it did so at the time it made the decision to include this factor in its rationale for terminating Mr. Todd</u>." (my emphasis)

[101] The City also criticized comments made by the CHRT that they had neglected to present any evidence concerning major health and safety issues. Contrary to the City's submission, the CHRT was not applying irrelevant factors to the consideration of undue hardship, it was commenting on the fact that it could not consider factors it was statutorily required to consider in

evaluating undue hardship pursuant to subsection 15(2) of the *CHRA* because no evidence to that effect had been presented. The CHRT's comments in relation to these factors were reasonable.

[102] The CHRT remark that OC Transpo did not provide evidence of the actual cost of Mr. Todd's absences was characterized by the City to mean that excessive innocent absenteeism and an employee's failure to achieve a reasonable level of attendance because of illness may nullify the employment relationship required the cost of absenteeism to be high enough to reach undue hardship.

[103] I do not agree.

[104] It appears these comments were merely made in reference to the fact that the CHRT could not consider the impact of cost since there was no evidence placed before it regarding cost, nor was there evidence that cost was a factor in the rationale for terminating Mr. Todd's employment.

[105] But, as the CHRT found, it is the reason relied upon at the time the decision to terminate the employment that counts and the CHRT reasonably found that by identifying Mr. Todd's overall absenteeism as one of the reasons for his termination, OC Transpo engaged the protections of the *CHRA* against actions motivated in whole or in part by discrimination.

[106] Given the finding that the City failed to submit evidence to support their position, I am satisfied that it was reasonable for the CHRT to conclude that including Mr. Todd's overall

history of absenteeism without disaggregating the disability related absences amounted to discrimination.

X. **Conclusion**

[107] The decision under review "should be approached as an organic whole, without a line-by-line treasure hunt for error": *Vavilov* at para 102, citing *Irving Pulp & Paper Ltd v CEP, Local 30*, 2013 SCC 34 at para 54, citing *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 14.

[108] The CHRT's finding that there was a *prima facie* case of discrimination due to the City's reference to Mr. Todd's "excessive absenteeism" as a reason for termination without distinguishing disability-related absences from non-disability absences was reasonable. It was justified in the Decision and supported by the underlying record.

[109] The CHRT's conclusion that this conflation of disability and non-disability absences amounted to discrimination was also reasonable given the lack of evidence put forward by OC Transpo to show it had reached the point of undue hardship in trying to accommodate Mr. Todd.

[110] Throughout the period starting in 2004, Mr. Todd suffered from a number of medical problems. For each medical issue, the CHRT reviewed the health issue involved, any missed days of work and any accommodation provided by OC Transpo.

[111] The Decision contains a rational chain of analysis discussing the law of discrimination, the appropriate sections of the *CHRA* and the evidence presented. The CHRT drew rational, coherent conclusions after considering the evidence and arguments of the parties. The conclusions are justified, transparent and intelligible based on the factual and legal constraints. The outcome falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[112] For all the foregoing reasons, the application is dismissed.

[113] As the successful party, Mr. Todd is entitled to his costs. The parties agreed prior to the hearing of the application that such costs would be $5,000, all inclusive.

JUDGMENT in T-1099-20

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. Costs are awarded to Mr. Todd in the amount of $5,000.00.

"E. Susan Elliott"
Judge

APPENDIX

Canadian Human Rights Act, RSC 1985, c H-6

Employment	**Emploi**
7 It is a discriminatory practice, directly or indirectly,	7 Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :
(a) to refuse to employ or continue to employ any individual, or	a) de refuser d'employer ou de continuer d'employer un individu;
(b) in the course of employment, to differentiate adversely in relation to an employee,	b) de le défavoriser en cours d'emploi.
on a prohibited ground of discrimination.	
Discriminatory policy or practice	**Lignes de conduite discriminatoires**
10 It is a discriminatory practice for an employer, employee organization or employer organization	10 Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite et s'il est susceptible d'annihiler les chances d'emploi ou d'avancement d'un individu ou d'une catégorie d'individus, le fait, pour l'employeur, l'association patronale ou l'organisation syndicale :
(a) to establish or pursue a policy or practice, or	a) de fixer ou d'appliquer des lignes de conduite;
(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or	b) de conclure des ententes touchant le recrutement, les mises en rapport, l'engagement, les promotions, la formation,

any other matter relating to employment or prospective employment,

l'apprentissage, les mutations ou tout autre aspect d'un emploi présent ou éventuel.

that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination

Exceptions

15 (1) It is not a discriminatory practice if

(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement;

Exceptions

15 (1) Ne constituent pas des actes discriminatoires :

a) les refus, exclusions, expulsions, suspensions, restrictions, conditions ou préférences de l'employeur qui démontre qu'ils découlent d'exigences professionnelles justifiées;

[. . .]

[. . .]

Accommodation of needs

(2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a bona fide occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a bona fide justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the

Besoins des individus

(2) Les faits prévus à l'alinéa (1)a) sont des exigences professionnelles justifiées ou un motif justifiable, au sens de l'alinéa (1)g), s'il est démontré que les mesures destinées à répondre aux besoins d'une personne ou d'une catégorie de personnes visées constituent, pour la personne qui doit les prendre, une contrainte excessive en matière de coûts, de santé et de sécurité.

person who would have to accommodate those needs, considering health, safety and cost.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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