Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2021 CHRT 15
Date: April 16, 2021
File No.: T2097/1315

Between:

Michael Christoforou

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

John Grant Haulage Ltd.

Respondent

Decision

Member: Jennifer Khurana

Table of Contents

I. OVERVIEW

[1] This decision determines the remedies that flow from my findings of discrimination in 2020 CHRT 33 ("the Liability Decision"). In the Liability Decision I found that the respondent, John Grant Haulage Ltd., discriminated against the complainant, Michael Christoforou, by denying his request to work reduced hours and ultimately by terminating him. The respondent did not establish that it would have been impossible to accommodate Mr. Christoforou without suffering undue hardship.

[2] This complaint was heard by another member of the Tribunal, Dena Bryan, who failed to issue a decision (see the Liability decision at paras 7-12). The file was reassigned to me by the Tribunal Chairperson after the parties agreed that a new member would render a decision based on the record, including the transcripts and recordings of the hearing.

[3] I did not make an order on remedies because I needed to ask the parties questions about the factual record at the hearing. I also needed to get their submissions on legal principles I am bound to apply to a determination on remedies, and to a claim of lost wages in particular. The parties had not previously addressed how these principles apply to the factual record nor did they refer to relevant case law. The original member also failed to put these questions or the relevant authorities to the parties at the hearing.

[4] Mr. Christoforou makes several claims of financial compensation for losses arising out of the discrimination, including close to 11 years of lost wages. He also asks to be reinstated to his previous position and claims damages for pain and suffering as well as special damages. He also wants the respondent to review and revise its anti-discrimination policy as a public interest remedy.

[5] I have set out my detailed findings with respect to each of these categories of remedies below.

II. BACKGROUND

[6] Before turning to my reasons on the remedies, I am compelled to set out the details of counsel's conduct since the release of the Liability Decision, and in particular, their

responses to my attempts to seek clarification on the remedial issues so that I could issue this decision.

[7] When I was first assigned this file, I offered the parties the opportunity to review the transcripts and make additional submissions or to direct me to what they believed were the most important parts of their evidence. They did not opt to do so, but they did offer to respond to my questions in the event I could not make a decision relying solely on the hearing record.

[8] I did not need to go back to the parties before issuing my reasons on liability. But as I explained in the Liability Decision, I did need to seek clarification before making an order on remedies (Liability Decision at paras 137-139). I asked the parties to consider resolving the issue of remedies on their own or with the Tribunal's assistance in mediation. They did not agree to do so. I therefore scheduled a case management conference call to determine next steps.

The parties' initial positions on supplementing the evidentiary record or making additional submissions

[9] Given that almost 4 years had passed since the hearing, I asked the parties if they wanted to supplement the evidentiary record, update their positions on the remedial requests, or make additional submissions. Neither party wanted to do so.

[10] Mr. Christoforou confirmed that he was maintaining his request to be reinstated and that he would provide written submissions on what an appropriate cut-off date should be for his lost wages claim in light of the delay caused by Ms. Bryan's failure to render a decision.

[11] I advised the parties that I would prepare a list of questions and issues for them to respond to with respect to the evidentiary record. In my view, I needed to hear from the parties on these questions to be able to render this decision on remedies and to discharge my duty to issue intelligible reasons that are justified in regard to the evidence and law.

The respondent's request to examine the complainant and the complainant's suggestion to set motion dates

[12] Before I sent my questions to the parties, the respondent asked to examine Mr. Christoforou under oath to obtain full details regarding the status of his commercial licence. It advised that it obtained "new evidence" that Mr. Christoforou no longer had an AZ licence, which it says is required for Mr. Christoforou to drive a commercial tractor/trailer. According to the respondent, Mr. Christoforou lost his AZ licence sometime between November 2, 2016 and October 30, 2020. It argued that this new evidence is highly relevant to issues of mitigation, credibility, and damages, and that it would be highly prejudicial to the respondent if this new evidence was not introduced.

[13] Mr. Christoforou objected to the request, arguing that the respondent was trying to reopen the case. He enclosed a copy of his Class G driver's licence and confirmed that his full AZ licence was valid as of November 5, 2020 and that he was medically fit to drive. Counsel for the complainant also suggested that if the respondent wished to reopen the case, it had to do so by way of formal motion.

[14] The respondent maintained its request to ask Mr. Christoforou questions about the period during which his AZ licence was invalid. It questioned how the Tribunal could render a decision on damages when it did not have the complainant's updated evidence with respect to his mitigation efforts and his licence. Finally, it argued that the copies of the complainant's licence were "in the nature of new evidence" that had not been properly submitted to the Tribunal and that it had not had the opportunity to ask Mr. Christoforou questions about these documents.

[15] I set deadlines for the filing of a motion because the parties did not agree about reconvening the hearing for the purpose of recalling witnesses or introducing any new evidence. I noted that if the parties consented to reconvene to deal with the remedial portion of this complaint, the Tribunal could schedule a brief hearing immediately.

The complainant's response to my questions and the setting of motion dates

[16] The complainant's counsel, who initially argued that the respondent must file a motion if it wished to "reopen the case" and examine Mr. Christoforou, alleged that allowing the respondent to file a motion was "troubling and procedurally unsound". He also stated that my intention to ask questions about the evidentiary record is not "what Chairperson Thomas' direction directs you to do". According to counsel for the complainant, allowing the respondent to file a motion and potentially seek answers from the complainant, would visit "further psychological and financial injuries upon Mr. Christoforou". He referred to the Tribunal's duty to conduct human rights inquiries in a fair and timely way (Liability Decision at para 17).

[17] The complainant proposed that the Tribunal convene another Case Management Call Conference (CMCC) to discuss the remedial issues and a proposed cut-off date for the lost wages claim, as well as the respondent's motion. The respondent suggested that the Tribunal render an interim decision on the issue of how long potential damages and interest should run following the conclusion of the hearing in January 2017, which could obviate the need to bring a motion to re-examine the complainant. The respondent stated that if the mitigation period were limited to 6 months following the conclusion of the hearing, it would not have to bring a motion. In the alternative, it asked for more time to file its motion.

The parties' request that the Tribunal send questions in writing

[18] In light of the parties' communications, I scheduled a case management conference call to explain to them what I required to render a decision on the remedial portion of this complaint, particularly the claim for lost wages. Although the parties suggested an end date for a wage loss claim that was not linked to the factual record, I explained that the relevant case law does not authorize me to pick an arbitrary cut-off date, such as the date the hearing ended, or some date that reflects what a reasonable amount of time would have been for the original member to issue her decision. Rather, in considering an end date for wage loss compensation, the Tribunal has an obligation to turn its mind to the question of when, after

the end of a recovery period, the discrimination suffered by the complainant ceased to have an effect on his income-earning capacity.

[19] I provided the parties with a non-exhaustive list of relevant authorities to help them understand the law in this area and my task in making a remedial order (*Chopra v. Canada* (Attorney General), 2007 FCA 268 [*Chopra*] at para 37, *Tahmourpour v Canada* 2010 FCA 192 [*Tahmourpour*] at para 47 and *Hughes v. Canada* 2019 FC 1026 [*Hughes*] at paras 41-42, 47,72,80, released after the hearing). As mentioned above, neither party relied on these authorities at the hearing and the original member did not bring these cases or the well-established principles they contain to the attention of the parties. I directed them to review the authorities before our call to allow them to participate in the discussion in an informed way.

[20] During the CMCC, the respondent's counsel acknowledged that he did not review the authorities in detail but looked at some paragraphs during the call. Mr. Christoforou confirmed his position that there should be no cut-off date as lost wages should run to the date of reinstatement. He also suggested that there was little in the evidentiary record to assist the Tribunal in determining a cut-off date and an amount for lost wages.

[21] I noted that the parties could agree on a cut-off date for the wage loss and the Tribunal would then rule on the remaining remedies sought. I also advised that the Tribunal could schedule a brief hearing as soon as possible and that I would ask the parties my specific questions about the record and the law.

[22] Instead, the parties asked that I send my questions in writing.

[23] I sent my questions with detailed instructions, noting that the parties were required to review the record and to make specific references to the evidence to support their positions in their responses. Among other things, I asked the parties for their submissions on the causal link between the respondent's discriminatory practices and the losses claimed by Mr. Christoforou, and for their positions on whether there should be a limit to any losses ordered, and if so, as of what date. I noted that my questions would need to be addressed at a minimum, but that it was up to the parties to make any other arguments they deemed relevant in support of their respective positions about Mr. Christoforou's remedial claims.

The respondent's preliminary objections and allegations of bias

[24] Together with its response, the respondent objected to the fact that the parties were asked to answer these questions and to make submissions 4 years after the conclusion of the hearing conducted by Dena Bryan.

[25] The respondent stated that it is "procedurally unfair" and "a breach of natural justice" to allow the complainant to make submissions if it has the effect of filing in gaps to the evidentiary record. If the Tribunal cannot reach a decision on damages due to deficiencies in the record, the respondent argued that the Tribunal should not award any damages to the complainant. Finally, it alleged that "[a]llowing the Complainant to make supplementary submissions now, 4 years later, ***once again*** **raises the issue of a reasonable apprehension of bias**" [emphasis added]**.**

[26] The respondent has not raised the issue of bias since I have been assigned to this file. The respondent previously claimed that the original member had a reasonable apprehension of bias against it. Ms. Bryan issued a ruling on the question of bias and declined to recuse herself from the matter (2017 CHRT 17).

[27] The Tribunal directed the respondent to bring a motion for recusal without delay if it had a concern about bias, explaining that allegations of bias are taken seriously and must be addressed promptly. The Tribunal further advised that if the respondent did not provide notice of its intention to file a motion for recusal, it would be deemed to have waived its right to object on this ground and I would continue to deal with the outstanding issues in the case.

[28] The respondent confirmed that it did "not intend to bring a motion for recusal at this time, but reserve[d] all rights that [his] client has". The respondent wrote that among other things, it raised "legitimate issues about fairness with respect to a hearing that ended over 4 years ago."

[29] In the absence of a formal request that I recuse myself, I have determined the remaining issues in dispute.

The Tribunal's questions on remedies

[30] My questions did not direct the parties to provide additional evidence. Rather, in answering my questions, I asked them to refer to the transcripts and the evidentiary record.

[31] I understand the parties' frustrations at having to review the record given the resources they had already invested in this case. But I am still required to issue a decision that is justified, transparent, and intelligible. It must be based on an internally coherent and rational chain of analysis that is justified in relation to the relevant facts and law (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 85, 99). The delays caused by Ms. Bryan and the Tribunal are regrettable and inexcusable. However, that does not mean I can arrive at an arbitrary remedial determination without justifying my analysis in relation to the relevant facts and law.

The respondent's concerns about the transcripts

[32] Together with its response to my questions, the respondent also raised concerns about the quality of the hearing transcripts. It referred to transcription errors and gaps in the transcripts marked as inaudible. The respondent questioned how I could have relied on these incomplete and inaccurate transcripts in making the Liability Decision.

[33] Counsel for the respondent acknowledges that he did not review the transcripts until he had to prepare his responses to my questions. He did not review them when he agreed that the Chairperson reassign the file to a new member who would rely on the transcripts and the record in issuing a decision. He says he had no reason to believe they were flawed.

[34] The Tribunal sent the parties a copy of the transcripts on December 20, 2019, and again on October 30, 2020, together with a copy of the exhibit lists, because counsel for the respondent indicated that he no longer had access to his copy of the case file. The transcripts were resent on December 20, 2020 and again to counsel for the respondent on February 8, 2021, at his request, before the respondent's submissions were due.

[35] As acknowledged by counsel for the respondent, I relied on the record, transcripts and recordings in making the Liability Decision. If I did not think I could fairly render a

decision on that basis, I would have advised the parties accordingly. Further, as set out above, the reason I asked the parties questions on the remedial issues had nothing to do with the quality of the transcripts and the recordings (Liability Decision at para 23). Yet, when I sought clarification to discharge my duty to fairly and intelligibly determine the remedial issues in this case, the long history set out above is how the parties chose to respond.

III. ISSUES

[36] What remedies should I order to put the complainant back in the position that he would have been in had the discrimination not occurred?

IV. REMEDIES

[37] If the Tribunal finds that a complaint is substantiated, it can make an award against the party found to have engaged in a discriminatory practice. The purpose of the remedial provisions under the *Canadian Human Rights Act*, R.S.C 1985, c. H-6 [the *Act*])(s.53) is to make a victim of discrimination whole and to put the complainant back in the position he or she would have been in had the discrimination not occurred (*Public Service Alliance of Canada v. Canada Post Corporation*, 2010 FCA 56 at para 299, aff'd 2011 SCC 57).

[38] In an employment context, this can include reinstating the victim and compensating for losses that flow from the discriminatory conduct, including lost wages (see *Hughes* at para 36). There must be a causal link between the discrimination and the loss claimed (see *Chopra* at paras 32,37). The onus is on the complainant to establish that it is more likely than not that this causal connection exists.

[39] The Tribunal can also order that the respondent make available the rights, opportunities or privileges that were denied the victim as a result of the discriminatory practice (s.53(2)(b) of the *Act*), including reinstatement.

A. Lost Wages and Benefits

[40] The Tribunal can compensate the victim of discrimination for some or all of the wages that the victim was deprived of as a result of the discriminatory practice (s.53(2)(c) of the *Act*).

[41] Mr. Christoforou claims an award of $539,573 in lost wages from the date he was first suspended in May 2010 until February 15, 2021 when he filed his submissions in response to my questions. He argues that there should be no cut-off date and that compensation for his wage loss should continue until he is reinstated, which he is also asking the Tribunal to order. Mr. Christoforou submits that he has incurred close to 11 years of wage loss due to the respondent's discriminatory actions. As a unionized employee with enhanced job security and 33 years of experience, he says that he could have continued working with the respondent for many years to come.

[42] The respondent submits the complainant should not be entitled to any wage loss as he did not reasonably mitigate his damages. In the alternative, it argues there were other events that broke the causal link between the discrimination and Mr. Christoforou's losses, including when he started another job and when Mr. Christoforou said he retired.

[43] For the reasons set out below, I find that Mr. Christoforou is entitled to lost wages from May 10, 2010, when he was suspended, until March 31, 2011. This award includes two periods: the first before his termination on August 9, 2010, and the second for a period after his termination to allow for recovery time and a reasonable amount of time for the limited job search he pursued.

[44] Beyond March 31, 2011, the respondent is not responsible for Mr. Christoforou's losses. Mr. Christoforou did not adequately mitigate his damages and I do not find that the discrimination continued to have an effect on Mr. Christoforou's capacity to earn an income. I have broken down each of the periods and set out my analysis below.

Lost wages as of the date of suspension

[45] I find that there is a causal link between the respondent's refusal to consider Mr. Christoforou's request for accommodation and his loss of income as of May 10, 2010, when he was suspended. Mr. Christoforou is therefore entitled to lost wages as of that date.

[46] In the Liability Decision I found that there was a connection between Mr. Christoforou's disability and the reason his request for accommodation was refused. I also found that Mr. Christoforou would have been able to continue working but for his health issues and disability-related restrictions (Liability Decision at para 75).

Lost wages during a reasonable recovery period

[47] The respondent terminated Mr. Christoforou on August 9, 2010. I accept that Mr. Christoforou is entitled to a reasonable recovery or grace period following his termination during which time he was not expected to mitigate his losses.

[48] The parties do not dispute that Mr. Christoforou did not seek new employment until January 2011. The respondent submits that a 2-month or 3-month period is reasonable before a job search must begin, relying on the finding in *Fermin v. Intact Financial*, 2016 ONSC 5631 (CanLII) at para 27, in which the court found that a terminated employee has the right to some recovery time.

[49] I find that a longer recovery period is warranted considering the circumstances of Mr. Christoforou's termination. He was a long-standing employee whose request to be accommodated was refused outright, despite having been accommodated in the past. When he could not perform his job without restrictions, he was terminated. I accept his evidence and that of his family physician, Dr. Bautista, about his health condition and how the termination impacted him. Mr. Christoforou was already suffering from stress, fatigue and headaches prior to his suspension and termination. I accept that the discrimination impacted his ability to start mitigating his losses, and find that waiting until the end of 2010 to return to the job market was reasonable in light of his health vulnerabilities.

[50] Having found that the complainant is entitled to lost wages from the time of his suspension and during a reasonable recovery period, I must now determine whether and when there should be a limit to this compensation.

Cut-off date for compensation for lost wages

[51] The Tribunal must consider when, after the end of a grace period, the discrimination suffered by the victim stopped having an effect on his or her income-earning capacity (see *Tahmourpour* at para 47)**.** There must be a rational connection between a cut-off date and the factual record (see *Hughes* at paras 42,72*)*; *Canada (Attorney General) v. Morgan*, 1991 CanLII 8221 (FCA) [*Morgan*] at paras 4,16)*.* A reviewing judge must be able to discern from the Tribunal's decision why the Tribunal chose the cut-off date in question (see *Tahmourpour* at para 47). That date will not necessarily coincide with the date of instatement or reinstatement, if ordered (see *Hughes* at para 43).

[52] The Tribunal must exercise its discretion to award lost wages on a principled basis. The amount of the loss is determined by the circumstances of each case and the Tribunal can impose a limit to losses caused by the discriminatory practice suffered (see *Chopra* at paras 37,40).

[53] One such principled basis, is the application of the principle of mitigation (see *Chopra* at para 40; *Walsh v. Mobil Oil Canada*, 2013 ABCA 238 (CanLII) [Walsh] at para 41).

When did the discrimination stop having an effect on Mr. Christoforou's income earning capacity?

(a) Mitigation

[54] Society has an interest in promoting economic efficiency by requiring those who have suffered a loss to take steps to minimize that loss. It is not in the public interest to allow some members of society to maximize their loss at the expense of others, even if those others are the authors of the loss (see *Chopra* at para 40).

[55] I find that Mr. Christoforou failed to mitigate his losses. His efforts were scant, and his job search was unreasonably narrow.

[56] Mr. Christoforou argues that the onus is on the respondent to prove that the complainant did not reasonably mitigate its losses. He submits that he was diligent in his attempts to mitigate his losses by looking for comparable employment, which produced limited results.

[57] The respondent has met that onus. It should not be required to pay for losses that could have been avoided had Mr. Christoforou made genuine efforts to obtain comparable employment.

[58] Mr. Christoforou testified that he called “a few companies, cement companies”. The parties do not dispute that he restricted his job search to making phone calls to six cement delivery companies. In some cases, he waited three or more months between phone calls. He called some of the companies back but did not expand his search until much later when he eventually secured another job, as discussed below.

[59] I accept that Mr. Christoforou wanted to focus his initial job search on cement delivery as he had worked in this area for most of his career. On that basis, I am satisfied that an additional three months of lost wages is warranted. I find this a reasonable time for having focused his job search in a field that the complainant knew and liked. Beyond March 2011, however, I am not satisfied that Mr. Christoforou’s approach was comprehensive or serious enough to support a link with the losses he claims. He knew that finding a job in the specialized area of cement delivery was going to be very difficult and relies on that very fact in support of his claim for lost wages. Yet he did not expand his search until sometime in 2012 or 2013, which does not reflect a genuine intention to find other employment.

[60] Even Mr. Christoforou’s minimal efforts that solely focused on cement delivery companies were few and far between. The complainant did not explain why he stopped at six employers, or present evidence to support a claim that this was even an exhaustive list of cement transport companies. On the contrary, in support of his claim that it was hard to find a job with his health restrictions, he submitted collective agreements from different cement delivery businesses that were not all among the six he called.

[61] Mr. Christoforou did not provide a reasonable explanation for why he did not broaden his job search. His efforts to find a job in cement delivery were ineffective and yet he did not change his strategy. Even if the complainant is not computer-literate, as he testified at the hearing, mitigation requires more than calling six companies over a two-year period or more. Other types of trucking jobs that may have been available could have involved fewer hours which would have been easier to manage with his health concerns. Mr. Christoforou did not make any personal contacts with prospective employers despite his considerable experience in the industry. He did not complete any applications, give his name to a personnel agency, consult any other resources or databases, or put up a listing.

[62] I accept the respondent's submissions that the essence of the complainant's job was driving a commercial truck. Mr. Christoforou was a trained and highly experienced driver who could have driven another type of truck or vehicle and made potentially comparable earnings. At the hearing, Mr. Shepley, the respondent's general manager with extensive industry knowledge, testified about the transferability of the skills of a cement truck driver. He explained that if a driver can drive a cement truck, which is challenging and highly specialized, he or she can also drive a dump truck, haul livestock, transport fuel, operate a delivery or postal truck, or even drive a bus. Yet, Mr. Christoforou did not attempt to apply his considerable experience and skills to working in comparable commercial or other transportation positions.

[63] In support of his claim for 11 years of lost wages, Mr. Christoforou relies on authorities where tribunals ordered respondents to pay extensive back pay. They are distinguishable because unlike Mr. Christoforou, the complainants in those cases all exercised reasonable diligence in searching for other employment.

[64] In *McAvinn v. Strait Crossing Bridge Ltd*., 2001 CanLII 7954 (CHRT) [*McAvinn*], the Tribunal found that the respondent discriminated against the complainant in the interview process because she was a woman. The Tribunal ordered 10 years of lost wages and found that Ms. McAvinn had reasonably mitigated her damages. The complainant sent out hundreds of applications in search of a job, including 67 job applications in 1997, 112 in 1998, 108 in 1999 and 92 in year 2000. While the applicant only found two jobs despite all of her efforts over 4 years, the Tribunal found that jobs in Price Edward Island were hard to

come by. These extensive efforts are not remotely comparable to Mr. Christoforou making phone calls to 6 companies.

[65] In *Fair v. Hamilton-Wentworth District School Board,* 2013 HRTO 440(CanLII) [*Fair*] *affd Hamilton-Wentworth District School Board v. Fair,* 2016 ONCA 421, the Human Rights Tribunal of Ontario (HRTO) ordered the respondent to pay 13 years of lost wages to the date of reinstatement, less any income and non-repayable benefits she received. Mr. Christoforou argues that *Fair* is "virtually identical" to his case because the respondent similarly discriminated against the applicant by failing to accommodate her disability-related needs and then terminating her.

[66] The HRTO found that the applicant took reasonable steps to mitigate her losses. Ms. Fair "submitted detailed evidence of her assiduous attempts to find employment. She continued to look for full-time employment after accepting part-time employment"(see *Fair* at para 34). Contrary to the applicant in *Fair*, Mr. Christoforou did not take reasonable steps to mitigate his losses after a reasonable recovery period. His evidence on his efforts to secure employment was neither detailed nor assiduous.

[67] In *McKee v. Hayes-Dana Inc*., 1993 CanLII 14231 (ON HRT), the Board of Inquiry ordered the respondent to pay lost wages and benefits for 8 years after finding that the respondent discriminated against the complainant on the grounds of age. The complainant had worked as a production operator and foreman in a forge shop for more than 30 years. The Board found that Mr. McKee made reasonable efforts to mitigate his damages. It considered the specialized kind of work performed by Mr. McKee over many years, his age, and the state of the depressed job market for a person with his special skills.

[68] Unlike the circumstances in *McKee*, I do not find that it was unlikely that Mr. Christoforou could have secured similar or comparable employment had he made diligent efforts because of a depressed job market, his age or the nature of the work he performed. On the contrary, there was evidence about the transferability of his skills, and the fact that drivers often work well past the age of 65.

[69] The respondent also produced several job postings and listings at the hearing in support of his claim that comparable employment was available in abundance, albeit not

with a cement delivery company. While the complainant suggests that this is only evidence of truck driving jobs that were available at the time of the hearing in 2016 and 2017 and not at the time of his termination in 2010 or thereafter, Mr. Shepley gave evidence based on his extensive experience in the industry about the long-standing shortage of drivers more broadly.

[70] Had Mr. Christoforou tried to secure a new position and presented evidence of his attempts to find a new job, his efforts may well have been found to be reasonable and appropriate even if it had not led to him securing a job, due to either the market or the unavailability of jobs with his skill set. However, he was not reasonably diligent in trying to mitigate his losses. On the contrary, he only called a few employers he claims were not likely to hire him in any case, based on what he knew about the type of work and hours required in cement delivery. He did no more.

Mr. Christoforou's new job

[71] At some point, Mr. Christoforou started looking for alternate employment. It is not clear from the evidence when that was. This is not determinative, however, since I have found that he did not mitigate his losses and that he is not entitled to lost wages past March 2011.

[72] Mr. Christoforou eventually started working 30-35 hours a week with S&J Transport, a commercial van company, making $20 an hour, comparable to the $22.15 an hour he earned with the respondent in 2010. While there is some confusion in the record about whether he started with S&J in November 2012 or 2013, the complainant's latest submissions and other parts of the record confirm that he started in November 2013.

[73] In any case, this date is eclipsed by the complainant's failure to mitigate. The position with S&J was comparable employment and would have broken the causal link between the discrimination and Mr. Christoforou's wage loss. However, as set out above, Mr. Christoforou's job searches were unreasonably narrow well before he started looking for work for S&J transport, such that any losses incurred in that period following March 2011 are not linked to the respondent's discriminatory practice. Irrespective of when the

complainant started with S&J Transport or broadened his search for work, he is not entitled to wage loss except for the periods I have set out above.

Calculation of the lost wage award

[74] The respondent did not challenge the specifics of Mr. Christoforou's calculations, except for the two-week period he was away on holiday in May 2010 and the vacation pay being added to his lost wages. At the hearing, the respondent submitted that if the Tribunal were to award lost wages, it should not add 12% vacation pay. It argues that Mr. Christoforou would have taken his vacation anyhow and that he should not earn lost wages during this period.

[75] In my view, Mr. Christoforou should be compensated for the vacation pay amounts to which he was contractually entitled, at a rate of 12%. Had he not been suspended and eventually terminated, Mr. Christoforou would have taken his vacation from May 23rd until June 9th and returned to employment.

[76] I do not, however, accept Mr. Christoforou's claim that the respondent should compensate him for lost wages on the basis of 42 hours of work per week. This is not supported by his doctor's evidence, nor his oral evidence at the hearing. Dr. Bautista's May 14, 2010 and June 8, 2010 letters advised Mr. Christoforou to limit his hours to 40 hours per week. Dr. Bautista may have changed this advice slightly to a maximum of 42 hours, but this was not until October and November 2011.

[77] Mr. Christoforou is therefore entitled to $886 in wages per week for 2010, calculated at 40 hours per week, at a rate of $22.15 per hour. As the complainant submits, there are 34 weeks between May 10, 2010 and December 31, 2010. Had Mr. Christoforou not been terminated, he would have been expected to earn $30,124 (34 weeks at $886 per week in wages) from May 10, 2010 to December 31, 2010. I have added $3,614.88 in vacation pay (12% of $30,124) for that period of 2010, which totals $33,738.88.

[78] In 2011, the complainant would have earned $22.45 per hour, per the terms of his collective agreement, or $898 per week (40 hrs per week at $22.45 per hour). Between

January 1 and March 31, 2011, there were 13 weeks. He therefore would have earned $11,674. With the vacation pay of $1,400.88 for that period, this totals $13,074.88.

[79] The respondent is ordered to pay Mr. Christoforou $46,813.76 in lost wages and vacation pay from May 10, 2010 until March 31, 2011.

B. RRSP entitlement and adjustment for early withdrawal

[80] Mr. Christoforou claims RRSP contributions that he would have been entitled to under the terms of his collective agreement from May 2010 to February 2021. In my view, the complainant is entitled to those contributions for the same period as the discrimination was linked to his losses, namely from May 10, 2010 until March 31, 2011. Mr. Christoforou is entitled to 34 weeks at 40 hours per week at the rate of $2.05 for 2010 or $2,788. In 2011, that amount would have increased to $2.15 per the terms of the collective agreement, so he is entitled to 13 weeks at 40 hours at $2.15 per hour or $1,118. The respondent is ordered to pay the total amount of $3,906 in RRSP contributions.

[81] Mr. Christoforou also requests $36,567 for the loss he submits he suffered as he was forced to redeem his RRSPs early due to the discrimination he suffered. That calculation is based on $65,000 redeemed at the published rate of return by his financial institution from July 2010 to July 2015.

[82] I agree that Mr. Christoforou's losses until the end of March 2011 were linked to the discrimination. The complainant is therefore directed to calculate and provide to the respondent the amount of losses related to the early redemption of his RRSP that he incurred between May 10, 2010 and March 31, 2011, if any, and to provide proof of these amounts. The respondent is ordered to reimburse only that amount.

C. Tax Gross-up

[83] Mr. Christoforou submits that he would suffer loss by receiving payments following this decision in a lump sum. He asks that the respondent be ordered to calculate those tax consequences and compensate the complainant accordingly (see *Fair* at para 40).

[84] I agree that to put the complainant back in the position he would have been in but for the discrimination, he should suffer a tax penalty by the receipt of a large lump sum (see *McAvinn* at para 210). The Tribunal orders the respondent to pay Mr. Christoforou an amount sufficient to cover the additional income tax liability that he will incur as a consequence of receiving the lump sum award for lost wages ordered below.

[85] The parties are directed to work together to calculate this amount. Mr. Christoforou is directed to provide any information required by the respondent to confirm this amount and to facilitate its compliance with this order.

D. Pension Adjustment

[86] Mr. Christoforou submits that the respondent should remit retroactive payments to the Canada Pension Plan (CPP), or if that is not permissible, should compensate him for any losses arising from the loss of CPP pension contribution.

[87] I agree. If Mr. Christoforou had not been terminated, he would have continued working and contributing to the CPP. The respondent is responsible for confirming the total amount with the complainant, for the period covering May 10, 2010 to March 31, 2011.

E. Employment Insurance (EI)

[88] I will not deduct any amounts received from EI from the award. I leave it to the parties to determine who will remit the required amounts as required by law. If Mr. Christoforou owes monies because of his receipt of this award, it is his responsibility to check how this aligns with his receipt of EI, and whether, and in what amount, he must pay any amounts back.

F. Expenses

[89] Mr. Christoforou seeks reimbursement of $2,582.85 of out-of-pocket medical and dental expenses. He claims amounts he paid to his family physician, Dr. Bautista on May 14, 2010 ($15) and August 12, 2010 ($117.85), for which he provided receipts. He also

claims amounts he paid to physicians in August and October 2011, and to Dr. Bautista in September 2015.

[90] The complainant is entitled to $132.85 for medical expenses he incurred from the time of his suspension in May 2010 until the end of March 2011.

G. Reinstatement

[91] The discretion to order reinstatement must be "exercised on a principled basis, considering the link between the discriminatory practice and the loss claimed" (*Grant v. Manitoba Telecom Services Inc*., 2012 CHRT 20 at para 6).

[92] Mr. Christoforou argues that to be made whole, he must be reinstated in the position he would have been in, but for the discrimination. He relies on Mr. Shepley's testimony at in stating that the respondent would accept to reinstate the complainant, subject to his fitness to work. He also relies on the fact that the respondent made a verbal offer of reinstatement in 2013.

[93] In support of his claim, Mr. Christoforou relies on three cases in which complainants were reinstated after lengthy periods of time (see *Fair; Uzoaba v. Canada (Correctional Services),* 1994 CanLII 1636 (CHRT), and *Cremona v. Wardair Canada*,1993 CanLII 8243 (CHRT)).

[94] I agree with the complainant that the passage of years is not, by itself, determinative of whether reinstatement is an appropriate remedy. Rather, the decision is context-dependent (see *Fair* at para 95). In my view, what is determinative, is Mr. Christoforou's own testimony at the hearing that he would have retired at the end of 2015. He testified that the person he worked for at S&J Transport advised that he could only work there until the end of 2015, which suited the complainant as he wanted to retire anyhow at the end of 2015.

[95] In my view, reinstatement is not an appropriate remedy because of the lack of evidence of any intention to continue working past 2015. Making the complainant whole in this case does not include reinstating him when he testified that he was going to retire at the age of 65.

[96] In arguing why his wage loss compensation should not end, Mr. Christoforou submits that he was “forced” into retirement in 2015 because he did not have a job. However, it is difficult to have a job if you do not look for one.

[97] At the time of the hearing, which started on October 31, 2016, Mr. Christoforou was 65 years old. On cross-examination, he testified that he was retired, but that he wanted to work again because he was bored. Yet Mr. Christoforou did not present evidence of having made any effort to look for another job when his employment ended with S&J or in support of his claim that he intended to continue working past the age of 65. It is not credible to continue to claim that he would still be working today when he presented no evidence at the hearing to support his assertion that he intended to continue working after his stated retirement date.

H. Damages for Pain and Suffering

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

[99] In my view, an award $18,000 for pain is appropriate under the circumstances.

[100] Damage awards should not be so trivial or insignificant so as to be meaningless. Damage awards that do not provide for appropriate compensation can minimize the serious nature of discrimination, undermine the principles at the heart of human rights legislation and further marginalize a complainant. They can also have the unintended but very real effect of perpetuating discriminatory conduct (see *Walsh* at para 32).

[101] Mr. Christoforou seeks $20,000 in general damages. He testified about the impact the termination had on him, including stress and anxiety. His family doctor’s clinical notes refer to physical symptoms such as headaches, insomnia, stress and anxiety because of the situation with his employer. Mr. Christoforou argues that the respondent caused

additional hardship by submitting an inaccurate Record of Employment, indicating that he had resigned, which delayed his receipt of EI.

[102] The respondent submits that Mr. Christoforou has not made out a case for damages, but that in the event damages are awarded, they should be minimal. It relies on *Chopra*, in which the Tribunal awarded $3,500 for pain and suffering (see *Chopra* at para 49).

[103] The respondent's reference to the damage award in *Chopra* is the wrong comparator. The limit on general damages at the time *Chopra* was decided was $5,000, not $20,000. This means that the $3,500 awarded in *Chopra* was at the upper end of the maximum the Tribunal could award and was not an award at the bottom of the scale, as the respondent seems to claim. While Mr. Chopra argued that the amended version of the *Act* which increased the maximum damage amount to $20,000, should be retrospectively applied to his case, the Tribunal did not agree and determined that $5,000 was the maximum amount.

[104] The Human Rights Tribunal of Ontario primarily applies two criteria in evaluating appropriate compensation for injury to dignity, feelings and self-respect: the objective seriousness of the conduct and the effect on the particular applicant who experienced discrimination (See *Arunachalam v. Best Buy Canada*, 2010 HRTO 1880 (CanLII) at para 52; *Sanford v. Koop*, 2005 HRTO 53 (CanLII) at para 35).

[105] I find this a useful framework to apply to these circumstances and find that an award near the higher end of the scale is warranted and appropriate. Working at John Grant Haulage was Mr. Christoforou's livelihood for more than three decades. When he was suspended and eventually terminated, he was 60 years old. Mr. Christoforou and his physician both testified with respect to the impact of his inability to work on his health and his stress and anxiety levels. Mr. Christoforou was a person with a disability whose long-standing employer did not even attempt to accommodate him and terminated him after claiming he had voluntarily resigned.

I. Special compensation

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

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

[108] In determining the appropriate award under this section, the Tribunal must focus on the respondent's conduct, and not on the effect that the conduct has had on the complainants (*Beattie and Bangloy v. Indigenous and Northern Affairs Canada*, 2019 CHRT 45 at 210, citing *Warman v. Winnicki*, 2006 CHRT 20 at paras 178, 180*).*

[109] Mr. Christoforou asks that the Tribunal award the maximum allowable amount of $20,000. The respondent cancelled his health benefits, later requiring him to submit short-term benefit forms. He also relies on the fact that Mr. Shepley sent him a letter indicating that he had "voluntary resigned".

[110] While the respondent relies on my finding that it acted in good faith in its concerns about public safety (Liability Decision at para 85), I also found that discharging its legal and professional responsibilities to public safety did not free the respondent from its duty to consider how to meet the needs of an employee with a disability. Mr. Shepley testified that the company had accommodated other employees in the past. It is a large, sophisticated employer within a unionized environment, aware of its obligations. In my view, choosing to ignore and refusing to even attempt to accommodate or work with the complainant is indicative of reckless and wanton disregard for the consequences of its actions on the complainant.

[111] I find that an award of $15,000 is warranted considering the respondent's conduct. A trifling amount is not sufficient given the purposes of this provision and the respondent's conduct.

J. Interest

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

[113] Mr. Christoforou requests prejudgement interest on all amounts from May 10, 2010 to the date of this decision. He also asks for post-judgment interest on all amounts from the date of this decision until the decision is fully complied with.

[114] The respondent submits that it would be improper to award interest for the period that was caused by the Tribunal's delay.

[115] I agree. The respondent should not be ordered to bear the costs of delay over which it had no control and in which it played no part. Neither party is responsible for the delay that was caused by Member Bryan's failure to issue reasons, or for any other Tribunal delay that cannot be imputed to the parties.

[116] The hearing ended on January 27, 2017. Members are typically expected to render merits decisions within 6 months of a hearing. An award of compensation would therefore reasonably have been expected by the end of July 2017.

[117] I will therefore exercise my discretion to vary the application of the *Rules* in this instance. Interest will accrue from May 10, 2010, when the discriminatory practice occurred and the complainant was suspended, until July 31, 2017.

[118] As the *Rules* provide that interest is payable until the date of payment of the award of compensation, Mr. Christoforou is also entitled to interest on the compensation ordered, from today's date until the date of payment of the award.

K. Public Interest Remedy

[119] In addition to compensating victims of discrimination, the Tribunal's remedial authority serves another important societal goal: preventing discrimination and acting as a deterrent and an educational tool (see *Walsh* at para 31, citing *Canada (Treasury Board) v. Robichaud*, 1987 CanLII 73 (SCC), [1987] 2 SCR 84).

[120] Mr. Christoforou asks that the Tribunal order the respondent to adopt or revise an anti-discrimination policy, with special consideration to its obligations under the *Act*. He wants the respondent to incorporate the Commission's recommendations after it reviews the policy. Mr. Christoforou also submits that the policy should include a complaint mechanism and a procedure for investigation, be communicated widely to all staff and be published on the respondent's website.

[121] The respondent attached a copy of its anti-discrimination policy to its submissions. It welcomes any suggestions for improvement.

[122] In my view, public interest remedies will help to ensure future compliance with the *Act*, with the goal of preventing future acts of discrimination. They will also help the respondent meet its human rights obligations and ensure that its employees charged with facilitating accommodation understand the content of their duties to accommodate persons with disabilities.

[123] I therefore order the respondent to work with the Commission to review and revise its anti-discrimination policy and to develop a workplace accommodation policy, if it does not already have one. I leave it to the Commission, with its expertise in this area, to determine whether there are gaps in the respondent's existing policies and to make recommendations for change.

[124] The respondent shall confirm to the complainant that it has consulted with the Commission to review and revise its anti-discrimination policy and a workplace accommodation policy. It will provide Mr. Christoforou with a copy. It must also confirm that a copy of the policy or policies has been communicated to all its employees and that it has trained all employees on their content. Additionally, it must confirm that those employees who have a managerial function or higher and any human resources employees, have been trained with respect to the revised policy or policies, including how to respond to requests for accommodation.

[125] The Commission shall also provide its guide to health issues in the workplace entitled "Accommodation Works" or an updated or equivalent resource of its choice to support the respondent's understanding of the content of an employer's obligations in addressing requests for accommodation, including the procedures that should be followed when dealing with such requests.

[126] The respondent shall confirm to the complainant in writing that it has consulted with the Commission's resources and that all staff holding the position of manager or higher and any human resources employees, have reviewed these materials on accommodation in the workplace.

V. ORDER

[127] Within 90 days of this decision, the respondent is ordered to pay the following to Mr. Christoforou:

a. $46,813.76 in compensation for lost wages and vacation pay, subject to any withholdings for statutory deductions;

b. $3,906 in RRSP entitlements;

c. RSSP adjustment for early withdrawal to be calculated and confirmed by the parties as set out above;

d. Tax Gross-up to be calculated and confirmed by the parties as set out above;

e. Pension adjustment to be calculated and confirmed by the parties as set out above;

f. $132.85 in reimbursement for medical expenses;

g. $18,000 for pain and suffering experienced as a result of the discriminatory practice;

h. $15,000 in special compensation.

[128] The respondent shall pay pre-judgment interest as of May 10, 2010 until July 31, 2017, as set out in para [117]. The respondent shall pay the complainant post-judgment interest from the date of this decision, calculated as set out in para [118].

[129] The complainant is responsible for making his own payments to EI, as required by law.

[130] Within 120 days of this decision, the respondent shall confirm to Mr. Christoforou and the Commission in writing that it has:

a. consulted with the Commission to review and revise its existing anti-discrimination policy and develop an accommodation policy, if it does not already have one;

b. distributed a copy of the policies set out in (a) to all of its employees and provided a training to them on the content of these policies; and

c. trained all employees who have a managerial function or higher, and any human resources employees, with respect to the employer's obligations and how to respond to requests for accommodation.

[131] Within 30 days of this decision, the Commission shall provide the respondent with a copy of its guide to health issues in the workplace entitled 'Accommodation Works" or other updated educational resources of its choosing to support the respondent's understanding of the content of an employer's obligations in addressing requests for accommodation with a view to preventing future acts of discrimination.

[132] Within 120 days of this decision, the respondent shall confirm to Mr. Christoforou and to the Commission in writing that all employees who hold the position of manager or higher, as well as any human resources employees, have reviewed the Commission's recommended resources on accommodation in the workplace.

[133] In the event of any disputes among the parties regarding the amounts or implementation of any of the remedies awarded in this decision, they will work together to resolve them or pursue other avenues. I do not retain jurisdiction of this complaint.

Signed by

Jennifer Khurana
Tribunal Member

Ottawa, Ontario
April 16, 2021

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2097/1315

Style of Cause: Michael Christoforou v. John Grant Haulage Ltd.

Decision of the Tribunal Dated: April 16, 2021

Date and Place of Hearing: October 31 to November 4, 2016;
November 14 to November 18, 2016;
January 23, 25 and 27, 2017

Toronto, Ontario

Appearances:

Nikolay Chsherbinin, for the Complainant

No one appearing, for the Canadian Human Rights Commission

Aaron Crangle, for the Respondent