

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2025 CHRT 29

Date: April 15, 2025

File No.: T2160/3416

Between:

Jamison Todd

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

City of Ottawa

Respondent

Ruling

Member: Kirsten Mercer

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I. OVERVIEW

[1] During the hearing into the complaint filed by Jamison Todd, the Complainant, the parties agreed that the process would be bifurcated. Because the parties agreed that there would be significant resource implications and expert costs associated with some of the remedies sought by Mr. Todd (including in relation to Mr. Todd's claim for restitution of pension entitlements) in the event that his complaint was upheld, I agreed that it would be most efficient and expeditious for the parties to reserve evidence in relation to the calculation of damages flowing from lost wages and/or reinstatement until a finding of liability was made.

[2] The first phase of the Tribunal hearing would focus on evidence relevant to determining liability, and a second hearing would be convened, if needed, at which time the parties would be permitted to lead evidence relevant to remedies arising from the Tribunal's decision on liability (the "Liability Decision") (*Todd v. City of Ottawa*, 2020 CHRT 26).

[3] The Tribunal issued the Liability Decision on August 13, 2020.

[4] The Liability Decision was judicially reviewed by the Federal Court. In a decision rendered on April 21, 2022, the Federal Court upheld the Liability Decision, which means that the Tribunal must now consider the appropriate remedies to award in respect of Mr. Todd's complaint. Beyond the fact that the Liability Decision was upheld by the Federal Court, I have not considered the fact of the judicial review or the positions taken by the parties in that proceeding in rendering my decision on this motion.

II. THE MOTION

[5] In the Liability Decision, the Tribunal made a series of factual findings about Mr. Todd's termination by the City of Ottawa, which operates OC Transpo.¹

[6] The Respondent brought a motion seeking to clarify the scope of remedies available to Mr. Todd in the second phase of the hearing, arguing that the Tribunal's findings at the

¹ During the hearing and over the course of these proceedings, the parties have referred to Mr. Todd's employer as OC Transpo – a practice that I have adopted in these reasons.

liability stage preclude it from ordering either lost wages or reinstatement of Mr. Todd to his job at OC Transpo. It argues that the causal link between the conduct that the Tribunal held to be discriminatory and Mr. Todd's lost employment was broken by Mr. Todd's own conduct. OC Transpo also submits that putting Mr. Todd in the position he would have been in but for OC Transpo's discriminatory conduct would still mean that Mr. Todd lost his job.

[7] Mr. Todd disagrees, arguing that the Tribunal's finding that OC Transpo engaged in discriminatory conduct in relation to his termination entitles him to be put back in the position he would have been if he had not been terminated, including that he be reinstated to his role at OC Transpo and made whole with respect to lost wages, salary and benefits (including pension entitlements) during the period since his termination.

[8] Following the exchange of written submissions, OC Transpo requested that the Tribunal grant an oral hearing on the motion. In granting OC Transpo's request, I made various procedural rulings about how that hearing would unfold, but, in essence, I asked the parties to provide me with their submissions about the findings in the Liability Decision indicating the presence or absence of a causal link between the proven discriminatory practice and the claims for lost wages and reinstatement.

[9] The oral hearing was held on January 18, 2024, and I am grateful to counsel for both parties for their detailed submissions, thorough arguments and careful responses to my questions.

III. DECISION

[10] The motion is granted.

[11] Following my review of the parties written and oral submission, the relevant case law and the Tribunal's Liability Decision, and for the reasons laid out in these reasons, the Tribunal is precluded from granting Mr. Todd's request for reinstatement, lost wages or other consequential damages flowing from his termination by OC Transpo.

IV. ISSUE

[12] The only issue to be determined on this motion is whether the findings made in the Liability Decision preclude Mr. Todd from being awarded reinstatement, lost wages and/or consequential damages arising from his termination.

V. ANALYSIS

Issue 1. Does the Liability Decision limit the scope of remedies available to Mr. Todd by precluding an order for lost wages or reinstatement?

[13] The factual findings made in the Liability Decision preclude Mr. Todd from establishing a causal relationship between the termination of his employment and OC Transpo's discriminatory conduct.

Relevant factual findings

[14] In the Liability Decision, I made the following findings that constrain any subsequent remedial award:

- a. OC Transpo did not discriminate against Mr. Todd when it placed him on the continuing employment agreement (at paras 352 and 379);
- b. Mr. Todd's placement on the continuing employment agreement was not related to his disability (at para 343);
- c. Mr. Todd failed to cooperate with OC Transpo in complying with the requirements of the continuing employment agreement and, pursuant to the terms of that agreement, it was not discriminatory for Mr. Todd to be terminated for breaching the continuing employment agreement (at para 380);
- d. The decision to terminate Mr. Todd for breaching the continuing employment agreement was not discriminatory under the Canadian Human Rights Act, R.S.C., 1985, c H-6 (the "Act") as there was no nexus between that decision and Mr. Todd's disabilities (at para 355);

- e. An employee with a disability can be justifiably terminated pursuant to a breach of a properly executed continuing employment agreement (at para 368);
- f. The Tribunal had no basis to interfere with the contractual operation of the continuing employment agreement (at para 352);
- g. In terminating Mr. Todd, OC Transpo introduced Mr. Todd's "continued excessive absenteeism" as an additional rationale for the termination (at para 355); and
- h. By including Mr. Todd's overall history of absenteeism as one of the two grounds for termination without disaggregating the disability-related absences or justifying its conduct in a manner permitted by the Act, the OC Transpo discriminated against Mr. Todd (at para 381).

The law of causation

[15] Having found the complaint to be substantiated in part, it is the Tribunal's job under section 53(2) of the Act to make an order that provides complainants with a remedy for the discrimination and (under section 53(2)(a)) to prevent such discrimination from occurring again in the future. In other words, to put the complainant back in the position that they would have been in had the discrimination not occurred and to prevent future discrimination. The Tribunal's job is to order a remedy for any damage that was caused as a result of the discrimination.

[16] If a complainant establishes liability for discrimination, they can ask the Tribunal to make an order to repair the damage that they experienced because of that discrimination, provided that they can prove, on a balance of probabilities, the causal link between the discrimination and the remedy. This is known as establishing causation, and it is quite distinct from the exercise that the Tribunal undertakes at the liability stage, when it examines the nexus between the harmful conduct and the protected characteristic of the complainant.

[17] The law of causation is very well-established. The Supreme Court of Canada has described the test for proving causation in its decision in *Clements v. Clements*, 2012 SCC

32, [2012] 2 S.C.R. 181 [*Clements*], and other authorities. In *Clements*, McLachlin C.J. stated, at para 8:

The test for showing causation is the “but for” test. The plaintiff must show on a balance of probabilities that “but for” the defendant's negligent act, the injury would not have occurred. Inherent in the phrase “but for” is the requirement that the defendant's negligence was necessary to bring about the injury -- in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails. [Italicized emphasis in original; underlined emphasis added]

[18] While human rights tribunals must take care in applying common law concepts to the adjudication of discrimination complaints, the requirement of a causal link between the loss claimed and the discriminatory conduct is embedded in the language of the Act and is well-established in Tribunal jurisprudence.

[19] The analysis of the causal link is also directly connected to the Tribunal's fundamental remedial objective: to restore the complainant to the position they would have been in if the discrimination had not occurred.

[20] This is sometimes referred to in the case law as making a party whole (*Grant v. Manitoba Telecom Services*, 2012 CHRT 20 [*Grant*] at para 6). To accomplish this goal, the Tribunal's remedial discretion must be exercised on a principled basis, considering the link between the discriminatory practice and the loss claimed (see *Chopra v. Canada (Attorney General)*, 2007 FCA 268 [*Chopra*] at para 37). In other words, the Tribunal's remedial discretion must be exercised reasonably, in consideration of the particular circumstances of the case and the evidence presented (*Hughes v. Elections Canada*, 2010 CHRT 4 at para 50; *Tahmourpour v. Canada*, 2010 FCA 192 at para 47; *Public Service Alliance of Canada v. Canada Post Corporation*, 2010 FCA 56 at para 299, aff'd 2011 SCC 57).

[21] In an employment context, making a complainant whole can include reinstating them to their prior employment and compensating the complainant for losses that flow from the discriminatory conduct, including lost wages (see *Hughes* at para 36). In all cases, there

must be a causal link between the discrimination and the loss claimed (see *Chopra* at paras 32, 37).

[22] In considering a remedy being sought by the complainant, the onus is on the complainant to establish that it is more likely than not that this causal connection exists between the discriminatory conduct and the loss for which the remedy is claimed (*Christoforou v. John Grant Haulage Ltd.*, 2021 CHRT 15 [*Christoforou*] at para 38).

[23] Put simply, in order for the Tribunal to order a remedy, the complainant must show that there is a causal link between the discrimination and the remedy they seek.

[24] As the Supreme Court directed in *Clements*, the “but for” test for causation entails a factual inquiry, and in exercising its discretion to determine the appropriate remedy in the context of a human rights complaint where liability has been established, the complainant must convince the Tribunal that (based on the facts it has established) it is more likely than not that the loss they experienced is the result of the discrimination.

The Position of the parties

(a) OC Transpo’s position

[25] OC Transpo argued that Mr. Todd was going to be terminated with or without consideration of his excessive absenteeism and that it is not possible for Mr. Todd to establish a causal link between the discrimination and his termination because “but for” the discrimination, he would still have been terminated by OC Transpo. It submits that the findings made by the Tribunal in the Liability Decision preclude the Tribunal from making an order of damages arising from Mr. Todd’s termination and/or ordering that he be reinstated in his position at OC Transpo.

[26] OC Transpo asserts that the purpose of the Tribunal’s authority under the Act is remedial in nature and that it cannot be used to place the Complainant in a better position than he would otherwise have been in. OC Transpo submits that allowing Mr. Todd to seek damages arising from his termination, including possible reinstatement, would shield him

from responsibility for his breach of the continuing employment agreement and leave him in a better position than he would have been had the discriminatory conduct not occurred.

[27] The Respondent also argued that the Tribunal should not order reinstatement because the relationship between the Complainant and the employer “has been destroyed”.

(b) The Complainant’s position

[28] The Complainant’s position is that the scope of the remedies phase ought not to be limited in the manner sought by OC Transpo. Mr. Todd argued that a causal connection exists between the discriminatory conduct and his termination and that there was no guarantee that he would have been terminated but for the discriminatory conduct. In any event, Mr. Todd submits that the discriminatory conduct is too closely tied to the decision to terminate his employment and that the two factors cannot be disaggregated at this point in time.

[29] The Complainant pointed to two decisions in which the Tribunal had granted lost wages to employees who were terminated in the face of both discriminatory and non-discriminatory factors. In both *Parisien v. Ottawa Carleton Regional Transit Commission*, 2003 CHRT 10 and *Luckman v. Bell Canada*, 2002 CHRT 18, the Tribunal made an order of lost wages despite finding in each case that the discriminatory rationale was only part of the reason for the termination.

[30] The Complainant asserted that OC Transpo was attempting to use the motion in an effort to appeal the decision of the Federal Court rendered on an application for judicial review of the Liability Decision. The Complainant further suggested that OC Transpo was inviting the Tribunal to speculate, in the absence of evidence, about the reasoning of Mr. Todd’s superiors who were not called to testify as to the rationale for his termination.

[31] The Complainant responded to OC Transpo’s submission with respect to whether a reinstatement order is appropriate in light of the state of the relationship between the parties, arguing that the decision did not make findings about whether or not the relationship was fractured for the purpose of reinstatement.

Decision

Remedial scope

[32] The parties agree that where the causal link between the discrimination and the harm for which a remedy is sought cannot be established, it is appropriate for the Tribunal to preclude or deny that remedy.

[33] As stated in the Liability Decision, it is not necessarily discriminatory for an employee with a disability to be terminated for breaching a continuing employment agreement (at para 368). And in this case, it was not discriminatory for OC Transpo to terminate Mr. Todd for repeatedly breaching the continuing employment agreement (at para 355). It is clear from the findings made in the Liability Decision that Mr. Todd broke that last straw when, despite multiple chances and warnings, he failed to contact his supervisor upon missing a shift for the ninth time in March 2014.

[34] The Tribunal determined (at para 178) that, at that point, OC Transpo decided that it was prepared to terminate Mr. Todd.

[35] The Complainant asserted that it was not possible to determine with certainty the precise rationale for Mr. Todd's termination because the employer did not call the decision makers to testify at the liability hearing. He further asserts that the Tribunal cannot be sure whether Mr. Todd would have been terminated "but for" the discriminatory conduct, stating in his submissions that "there was no guarantee that he would have been terminated but for the discriminatory conduct".

[36] While the Complainant may be correct in the assertion that we cannot be certain, the Tribunal's task is not to guarantee what would have happened in the absence of the discriminatory conduct. Rather, it is the Complainant's burden to establish, on a balance of probabilities, that it is more likely than not that there is a causal link between the discrimination and the remedy sought. It is Mr. Todd's task to show that it is more likely than not that, in the absence of his employer considering his excessive absenteeism, he would not have been terminated, therefore entitling him to the damages that flow from that termination.

[37] In this case, the Tribunal has already determined that OC Transpo had reached the breaking point with Mr. Todd in respect of his refusal to cooperate with the requirements of his continuing employment agreement and had decided to terminate him (at para 178). The fact that an additional rationale was added after that point (which the Tribunal has found to breach the Act), does not change the fact that Mr. Todd's conduct had already crossed the line.

[38] The discriminatory conduct that was established at the liability phase of the hearing was OC Transpo's inclusion of Mr. Todd's overall history of absenteeism as one of the two factors in its decision to terminate him. The Tribunal noted in the Liability Decision that OC Transpo's decision to terminate Mr. Todd for breaching the continuing employment agreement was not discriminatory and that his employer had valid grounds to terminate him even without considering his excessive absenteeism.

[39] In order for the Tribunal to grant the remedy that Mr. Todd is asking for, the Complainant would have to be able to establish, on a balance of probabilities, that he would not have been terminated if OC Transpo had not discriminated against him. That is to say, if OC Transpo had excluded Mr. Todd's disability-related absences from its decision to terminate him or had otherwise appropriately discharged its duty to accommodate Mr. Todd to the point of undue hardship, he would, more likely than not, have retained his job.

[40] However, in this case, the Tribunal has already concluded, as a factual matter, that OC Transpo both had sufficient cause to validly terminate Mr. Todd on the non-discriminatory basis of the failure to comply with the continuing employment agreement and intended to do so. The fact that OC Transpo engaged in an act of discrimination following that decision (for which Mr. Todd is entitled to a remedy) does not give the Tribunal the authority to override an otherwise valid and non-discriminatory decision to terminate Mr. Todd.

[41] In light of these findings, which have already been tested on judicial review, it is not possible for Mr. Todd to establish that, "but for" his employer's discriminatory conduct, it is more likely than not that he would have retained his job as a bus driver.

Reinstatement and the relationship between the parties

[42] While I have reviewed the parties' submissions on whether the nature of the relationship between the parties precludes reinstatement in this case, I am not addressing reinstatement from this angle for two reasons:

- a. **Beyond the scope of this motion:** I agree with the Complainant that the parties did not specifically lead evidence or make submissions at the liability phase hearing about whether the relationship between Mr. Todd and his employer was fractured to the point that it would preclude reinstatement, nor were specific findings made about this issue in the Liability Decision.
- b. **Unnecessary in light of my ruling on this motion:** the jurisprudence governing the availability of a reinstatement order requires that a link be established between the discriminatory practice and the loss claimed (*Grant* at para 6; *Christoforou* at para 91). The Tribunal's authority to reinstate an employee who has been terminated because of the employer's discrimination is a powerful remedial tool. In light of my other findings in this motion, no causal link can be established between the discrimination and loss of employment. As such, there can be no causal link between the discrimination in this case and an order for reinstatement. Therefore, any consideration of reinstatement is outside the scope of the final remedies decision.

Conclusion

[43] Therefore, for the foregoing reasons, I grant OC Transpo's motion to exclude reinstatement and lost wages from the remedial scope available to the Complainant at the remedies phase of this complaint.

VI. ORDER

[44] OC Transpo's motion to limit the scope of the remedies available in this case is granted. More specifically:

- i. Remedies relating to reinstatement, lost wages or damages specifically arising from the end of Mr. Todd's employment at OC Transpo are excluded from the scope of the remedies phase of this complaint;
- ii. The remedies phase of the hearing will exclude evidence and/or submissions regarding pecuniary loss arising from the termination of Mr. Todd's employment; and
- iii. A case management conference will be scheduled with the parties at their earliest convenience to determine whether a remedies hearing will be required and, if so, to set a timetable for that hearing as soon as possible.

[45] I would encourage the parties to make best efforts to come to an agreement about the appropriate quantum of damages arising from OC Transpo's discriminatory conduct. In the event that the Tribunal can be of assistance to the parties in this regard, they are encouraged to contact the Registry to convene a mediation with a Tribunal mediator. Or, if the parties agree, I would be prepared to conduct a mediation-adjudication session with the parties.

Signed by

Kirsten Mercer
Tribunal Member

Toronto, Ontario
April 15, 2025

Canadian Human Rights Tribunal

Parties of Record

File No.: T2160/3416

Style of Cause: Jamison Todd v. City of Ottawa

Ruling of the Tribunal Dated: April 15, 2025

Date and Place of Hearing: January 18, 2024
By videoconference

Appearances:

Travis Ujjainwalla and K. Scott McLean, for the Complainant

No one appearing, for the Canadian Human Rights Commission

Raquel Chisholm and Kassandra Tannouri, for the Respondent