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IN THE MATTER OF THE *HUMAN RIGHTS CODE,*
RSBC 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

BETWEEN:

Giovanni Ciliberto

COMPLAINANT

AND:

Tree Island Industries Ltd.

RESPONDENT

REASONS FOR DECISION
APPLICATION TO DISMISS A COMPLAINT
Section 27(1)(c)

Tribunal Member:	Jonathan Chapnick
On his own behalf:	Giovanni Ciliberto
Counsel for the Respondent:	Scott A. McCann and Jaime Hoopes

I INTRODUCTION

[1] Giovanni Ciliberto was employed as a wire draw operator at Tree Island Industries Ltd. for almost 30 years. In January 2015, he suffered a disabling injury to his neck and shoulder. Mr. Ciliberto went on medical leave, and never returned to work. On April 3, 2019, Tree Island terminated his employment for non-culpable absenteeism. Mr. Ciliberto's union grieved his termination, but an arbitrator dismissed the grievance following an arbitration hearing.

[2] On March 24, 2020, Mr. Ciliberto filed a discrimination complaint with the Human Rights Tribunal, alleging that Tree Island failed to accommodate him and instead terminated him due to his physical disability, in contravention of s. 13 of the *Human Rights Code*. His complaint describes some the impacts of his dismissal, on his family, finances, and mental health, following almost three decades of service.

[3] Tree Island denies discriminating and applies to dismiss his complaint without a hearing. It says the complaint should be dismissed under s. 27(1)(f) of the *Code* because it was appropriately dealt with in the grievance arbitration process. Alternatively, Tree Island says it reasonably accommodated Mr. Ciliberto, and so the complaint should be dismissed under s. 27(1)(c) because it has no reasonable prospect of success.

[4] I find I can most efficiently decide Tree Island's application under s. 27(1)(c) of the *Code*. For the reasons that follow, I am satisfied that Tree Island is reasonably certain to prove at a hearing that it met its duty to accommodate. As a result, Mr. Ciliberto's complaint has no reasonable prospect of success, and I dismiss it under s. 27(1)(c). To make this decision, I have considered all the information filed by the parties. In these reasons, I only refer to what is necessary to explain my decision. I make no findings of fact.

II BACKGROUND

[5] The parties agree on most of the relevant circumstances giving rise to Mr. Ciliberto's complaint. Along with its dismissal application, Tree Island submitted a sworn statement from its human resources director [**HR Director**] and supporting documents. With his response

submission, Mr. Ciliberto provided an unsworn statement and supporting documents. Both parties included a copy of the arbitration decision regarding Mr. Ciliberto's termination grievance [**Arbitration Decision**] in their evidence. I thank the parties for their thorough materials. Unless otherwise specified, the following background information is drawn from those materials and is not in dispute.

[6] Mr. Ciliberto began working for Tree Island in June 1990. During the time period relevant to the complaint, he was a member of Teamsters Local Union No. 213 [**Union**] and the terms and conditions of his employment were set out in a collective agreement. In January 2015, Mr. Ciliberto suffered a disabling injury to his neck and shoulder, and went on medical leave. He went on short-term disability benefits under the collective agreement in early-2015, and began receiving long-term disability [**LTD**] benefits from Tree Island's third-party LTD provider, Co-operators Insurance Company, in February 2016. Under the collective agreement, eligibility for short-term disability and LTD benefits was based on total disability from an employee's "own occupation" for the first 104 weeks (i.e., 52 weeks on short-term disability, plus 52 weeks on LTD), and then total disability from "any occupation" thereafter.

[7] On August 19, 2016, Tree Island wrote to Mr. Ciliberto to request medical information to support his long-term absence. In its letter, Tree Island stated, in part, as follows:

> To support your continued absence from work, and to ensure we are aware of your restrictions and whether an accommodation to suit your disability is possible, the Company requires ongoing medical documentation from your Physician regarding your current status and future prognosis for recovery.
>
> The information is to be provided … every six (6) months for the duration of your absence. This requirement is separate from the LTD information you provide to Co-operators … . Please take the attached Medical Information Form to your Physician … .
>
> I would like to remind you that as an employee of Tree Island, you have a duty to reliably make your services available to your employer. Failure to achieve this over a

prolonged period of time will impact your ability to continue in an employment relationship with Tree Island.

For your reference, I have attached an updated copy of the Plant Employee Guide for All Absences. Please review this information paying particular attention to our Return to Work requirements.

[8] Among other things, the medical form attached to the letter asked for information regarding: the nature of Mr. Ciliberto's health condition and its impact on his ability to work; whether his condition was permanent or temporary; the prognosis for Mr. Ciliberto's recovery and return to work; whether Mr. Ciliberto was capable of returning to work in any capacity in the foreseeable future; and, if a return to work was foreseeable, any restrictions or limitations that might affect Mr. Ciliberto's ability to perform his duties.

[9] In her sworn statement, the HR Director says there is no record of Mr. Ciliberto completing the form sent to him on August 19. Mr. Ciliberto does not dispute this. However, in the materials before me, there is medical note from Mr. Ciliberto's doctor, dated September 1, 2016, simply stating that he remained "injured and unable to work until further notice."

[10] As per its August 2016 letter, Tree Island periodically requested and received medical updates from Mr. Ciliberto during his absence, including as follows between February 2017 and November 2018.

a. By letter dated February 8, 2017, Tree Island asked Mr. Ciliberto to complete a medical form. The letter and form were similar to those sent in August 2016. In her sworn statement, the HR Director says Mr. Ciliberto did not submit a completed form. He does not dispute this.

b. Mr. Ciliberto submitted a medical note from his doctor, dated February 16, 2017, stating that he remained "injured and unable to work until further notice."

c. The HR Director says she called Mr. Ciliberto in March 2017 to inquire about the outstanding medical form, and he told her his physician would complete it. She

also says she called Mr. Ciliberto twice in April 2017 and left voice messages regarding the outstanding medical form, but he did not call her back. Mr. Ciliberto does not dispute this.

d. By letter dated April 27, 2017, Tree Island asked Mr. Ciliberto to complete another medical form. The letter and form were similar to those sent in August 2016 and February 2017, and were also forwarded to the Union. In her sworn statement, the HR Director describes phone calls and follow-up requests in April and May, but says Mr. Ciliberto did not submit a completed form during that time. He does not dispute this.

e. By letter dated May 25, 2017, Tree Island again asked Mr. Ciliberto to complete a medical form. The letter and form were similar to those sent in August 2016, February 2017, and April 2017. However, the letter included an additional concluding statement, warning Mr. Ciliberto that his "employment will be impacted with Tree Island – up to and including termination" if he did not submit a completed form as requested. In her sworn statement, the HR Director describes phone calls and follow-up in June and July, but says Mr. Ciliberto did not submit a completed form until July 28, 2017. He does not dispute this.

f. In Mr. Ciliberto's July 28, 2017 medical form, his doctor indicated that he would be capable of returning to work in some capacity in the foreseeable future, but also that his health condition was likely "permanent" and his prognosis for recovery and return to work was "poor … due to chronicity."

g. By letter dated October 1, 2018, Tree Island asked Mr. Ciliberto to complete another medical form. The letter and form were similar to those sent previously.

h. On November 6, 2018, Mr. Ciliberto submitted a completed medical form. In the form, his doctor indicated that his condition was "temporary," but he would not be capable of returning to work in any capacity in the foreseeable future and his prognosis for recovery and return to work was "unknown."

[11] In response to Mr. Ciliberto's November 6 medical form, Tree Island wrote to him on November 14, making a "final request" for medical information to support his long-term absence, and attaching another medical form, which was similar to the previous forms. In its letter, Tree Island stated, in part, as follows:

> The medical certificate from your physician dated November 6, 2018 indicates that it is unlikely that you will be able to return to work in the foreseeable future. Giovanni, we have accommodated your absence from the workplace for over three (3) years. The current medical information from your physician indicates that it is unlikely that you will be able to return to work.
>
> Based on the information which is currently available to us, Tree Island must consider from an operational perspective as to whether there is any reasonable prospect that you will be able to return to employment with Tree Island in the foreseeable future. If not, Tree Island will be considering the termination of your employment on the basis of non-culpable absenteeism and frustration of the employment contract. Prior to making any decision concerning your employment, you may provide an update from your physician with respect to your medical status, if there is any change, on or before December 15, 2018.
>
> If you are unable to meet this timeframe, please contact me as soon as possible to arrange a mutually agreeable alternate date for the updated medical information to be provided. If we do not receive any new information from you by December 15, 2018 (or another mutually agreeable alternate date), we will reach a decision concerning your employment status based on the information we currently have.

[12] On November 21, 2018, Mr. Ciliberto submitted one page of a completed medical form, in which his doctor stated as follows in answer to a question regarding whether Mr. Ciliberto was capable of returning to work in any capacity in the foreseeable future: "No, not currently, but with ongoing treatment in the future." In the HR Director's opinion, this additional medical

information was vague, confusing, and inconsistent with the information received on November 6.

[13] Further to the information it had received in November, Tree Island wrote to Mr. Ciliberto on December 18, making a "follow up request" for medical information to support his long-term absence, and attaching a new medical form. In its letter, Tree Island stated, in part, as follows:

> The medical certificate from your physician dated November 6, 2018 indicated that it is unlikely that you will be able to return to work in any capacity in the foreseeable future. … On November 21st, your physician provided a subsequent medical certificate which indicated that you are currently unable to return to work in any capacity but with ongoing treatment you may be able to return in the future.
>
> Due to the change in your prognosis, we now require more detailed information in order to determine whether there is any reasonable prospect that you will be able to return to employment with Tree Island in the foreseeable future.

[14] The new medical form requested "sufficient general information about Mr. Ciliberto's condition and prognosis to confirm his ability to safely return to work in the foreseeable future," and asked Mr. Ciliberto's doctor to "explain in detail the reasons for the change in [Mr. Ciliberto's] prognosis." On January 14, 2019, Mr. Ciliberto submitted a completed form, in which his doctor stated that there had been "no significant change" in Mr. Ciliberto's prognosis, that "the possibility of a return back to work remains after rehabilitation," and that the doctor was "currently … unable to give a time frame."

[15] In the HR Director's opinion, the information regarding Mr. Ciliberto's medical status remained vague and inconsistent. By letter dated February 13, 2019, Tree Island made another follow-up request for medical information, this time asking Mr. Ciliberto to consent to Tree Island's arrangement of an "Independent Medical Examination" [**IME**] by a third-party physician. In the letter, Tree Island stated that the medical information provided by Mr. Ciliberto's doctor in November 2018 and January 2019 was "somewhat convoluted" and did not

provide sufficient clarity regarding his prognosis. Tree Island indicated that the IME would provide a more thorough and complete assessment of Mr. Ciliberto's prognosis. Mr. Ciliberto initially agreed to the IME, which was scheduled for March 7, 2019.

[16] The IME did not end up going ahead. By letter to Mr. Ciliberto dated March 5, 2019, Co-operators asked him to attend a "functional capacity evaluation" by a medical practitioner chosen by Co-operators, scheduled for March 12. The letter indicated that the medical assessment was important for Co-operators' management of Mr. Ciliberto's LTD claim. The stated purpose of the assessment was to examine his "existing impairments, the medical evidence, and the effect they have on [his] ability to work."

[17] On March 6, the Union emailed Tree Island to say that Mr. Ciliberto had been advised not to participate in the IME.

[18] By letter dated March 11, 2019, Tree Island made another follow-up request for medical information, again asking Mr. Ciliberto to consent to an IME. The letter indicated that the IME was meant to give Tree Island a better understanding of Mr. Ciliberto's prognosis, so it could make a fully informed decision about whether it could continue to accommodate his absence. The letter suggested that if Mr. Ciliberto refused to attend an IME, his employment would be in jeopardy. It stated that, without an IME, Tree Island would "have no choice but to base [its] decision on the medical information on file and the length of [his] absence to date," which Tree Island said indicated Mr. Ciliberto would "remain unable to work in the foreseeable future."

[19] Mr. Ciliberto says he spoke to the HR Director on the phone in "mid-March 2019" [**Phone Call**] at which time he advised that he had attended a medical assessment for Co-operators. He says he gave the HR Director permission to ask Co-operators for a copy of the assessment report [**Co-operators Report**] and consented to Tree Island using the assessment results "in any way they needed." He says it was his understanding that "Tree Island could use the results of the Co-operators [assessment] for the purposes of their own determination." Tree Island disputes that Mr. Ciliberto told the HR Director about the Co-operators Report and denies that he gave her permission to access it.

[20] By letter dated March 19, 2019, Tree Island made a final follow-up request for medical information, again asking Mr. Ciliberto to consent to an IME, and again stating that if he refused to attend an IME, it would proceed based on the information it already had.

[21] According to the Arbitration Decision, the Co-operators Report was issued on March 26, 2019. Mr. Ciliberto says the report determined that he "was still disabled, and that [he] would continue to receive LTD." Neither party provided a copy of the Co-operators Report to the Tribunal. Mr. Ciliberto says that, because he had participated in the Co-operators' medical assessment, he did not want to attend Tree Island's IME. He says the Co-operators' medical assessment process was "physically and mentally exhausting and it left [him] in pain." He says he "did not want to needlessly go through that process again" and "was advised that [he] did not need to attend."

[22] The HR Director says the Union told her on April 1, 2019 that Mr. Ciliberto remained unwilling to attend an IME. She says Tree Island subsequently reviewed Mr. Ciliberto's file and concluded there was no indication he would be able to return to work in the foreseeable future. By letter dated April 3, 2019, Tree Island terminated Mr. Ciliberto's employment, stating, in part, as follows:

> Based on a review of your entire file … we have determined that it is unlikely that you will be able to return to work any time in the foreseeable future. We have also determined that your refusal to participate in the IME in these circumstances was unreasonable and interfered with the accommodation process. We are unable to accommodate your absence from work for a further, unknown duration. Accordingly, we have decided to terminate your employment on the basis of non-culpable absenteeism, effective today, April 3, 2019.
>
> The termination of your employment will not affect your access to long-term disability benefits under the Cooperators LTD Plan, although, remaining conditional on the insurers criteria and your eligibility.

[23] On April 8, 2019, the Union formally submitted a grievance regarding Mr. Ciliberto's dismissal. The grievance was heard by an arbitrator on November 18, 2019, and the Arbitration Decision was issued on November 27, 2019. Mr. Ciliberto filed his complaint to the Tribunal on March 24, 2020.

III DECISION

[24] While Tree Island applies to dismiss Mr. Ciliberto's complaint under both s. 27(1)(c) and 27(1)(f) of the *Code*, I find it most efficient to address its application under s. 27(1)(c) alone.

[25] Section 27(1)(c) of the *Code* gives the Tribunal discretion to dismiss complaints that have no reasonable prospect of success and therefore do not warrant the time and expense of a hearing: *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95 at paras. 22-26, leave to appeal ref'd [2006] S.C.C.A. No. 171; *Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49 at para. 27 [***Hill***]. The Tribunal does not make findings of fact under s. 27(1)(c). Instead, my task in applying this section of the *Code* is to look at the information filed by the parties to decide if there is no reasonable prospect that findings of fact supporting the complaint could be made on a balance of probabilities after a hearing of the evidence: *Berezoutskaia* at para. 22. The onus is on Tree Island to establish that Mr. Ciliberto's complaint should be dismissed under s. 27(1)(c): *Paulsen v. BC Hydro and another*, 2020 BCHRT 75 at para. 11. Tree Island must show me that either (1) Mr. Ciliberto has no reasonable prospect of making his case at a hearing, or (2) Tree Island is reasonably certain to establish a defence: *Lado v. Hardbite Chips and others*, 2019 BCHRT 134 at para. 25.

[26] To make his case at a hearing, Mr. Ciliberto would need to prove that (1) he had a personal characteristic protected by the *Code*, (2) he was adversely impacted in his employment, and (3) his protected characteristic was a factor in the adverse impact: *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33. In its initial response to Mr. Ciliberto's complaint, Tree Island conceded he would be able to prove the first two elements of his case (i.e., he had a protected characteristic – a disability – and he experienced an adverse impact in the form of the termination of his employment), but argued he had not properly alleged a

connection between the two. In its dismissal application, however, Tree Island did not pursue this line of argument, instead focusing its submissions on its chances of defending itself against Mr. Ciliberto's complaint. Tree Island argues that, at a hearing, it is reasonably certain to establish a defence under s. 13(4) of the *Code*; therefore, the complaint has no reasonable prospect of success.

[27] Section 13(4) of the *Code* provides a justification defence against a complaint of discrimination in cases where a workplace standard (i.e., a rule, requirement, policy, procedure, practice, norm, etc.) adversely impacts an employee in relation to a protected personal characteristic. At a hearing, if the employee is able to prove the elements of their case, the burden shifts to the respondent – typically the employer – to justify the adverse impact. If the employer succeeds in doing so, there is no discrimination: *Smith v. Sobeys Inc.*, 2023 BCHRT 138 at para. 30; see *Hydro-Québec v. Syndicat des employé-e-s de technique professionelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43 [***Hydro-Québec***] at para. 18. To justify the adverse impact of a workplace standard, an employer must prove three things:

a. **Valid purpose.** The employer must prove it adopted the standard for a purpose rationally connected to the performance of the employee's job or function.

b. **Good faith.** The employer must prove it adopted the standard in an honest and good faith belief that it was necessary to fulfil its valid purpose.

c. **Reasonable necessity and accommodation.** The employer must prove that the standard was reasonably necessary to accomplish its purpose and that it discharged its duty to accommodate: *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (Meiorin Grievance)*, [1999] 3 SCR 3 [***Meiorin***] at para. 54.

[28] In the present case, Tree Island describes the relevant workplace standard as a requirement that employees "must work for pay," and argues that this standard satisfies the first two elements of the justification defence. Mr. Ciliberto makes no submissions regarding

these elements of the analysis. While I agree with Tree Island that it is reasonably certain to establish the first two elements of its justification defence at a hearing, I would describe the relevant standard with more specificity. The evidence indicates it was an attendance standard that required Mr. Ciliberto to regularly attend work and do his job on a full-time basis.

[29] At a hearing of Mr. Ciliberto's complaint, the Tribunal's first task in its justification analysis would be to determine what this attendance standard was generally meant to achieve: *Meiorin* at para. 57. This determination is made on the basis of the available evidence: see *Gordy v. Painter's Lodge (No. 2)*, 2004 BCHRT 225 at paras. 104-107; see also *Meiorin* at paras. 24-27. In general, attendance standards are aimed at ensuring the fulfillment of the essence of employee's side of the contractual employment relationship – i.e., that the employee performs work for the employer according to the terms and conditions expressed or implied in the applicable collective agreement or individual employment contract. In my view, considering the Tribunal's case law and given the absence of any evidence or argument pointing toward a different purpose behind the attendance standard in this case, the Tribunal is reasonably certain to conclude it was generally aimed at ensuring Mr. Ciliberto perform work as required under his employment relationship with Tree Island: see *Kelly (by Kelly) v. Saputo Dairy Products Canada and another (No. 3)*, 2021 BCHRT 128 [***Kelly***] at para. 161; *Morris v. ACL Services Ltd.*, 2012 BCHRT 6 at para. 210; *Ford v. Peak Products Manufacturing and another (No. 3)*, 2010 BCHRT 155 at para. 97; *Senyk v. WFG Agency Network (No. 2)*, 2007 BCHRT 376 at para. 354. Further, the Tribunal's case law establishes that this general purpose is rationally connected to the performance of an employee's job or work function: see, e.g., *Kelly* at para. 161; *Senyk* at para. 354; *Chohan v. Costco Wholesale Canada*, 2017 BCHRT 233 at para. 30; see also *Hydro-Québec* at para. 15. I therefore find that Tree Island is reasonably certain to prove at a hearing that the attendance standard it applied to Mr. Ciliberto was adopted for a valid purpose.

[30] On the evidence before me, I also find that Tree Island is reasonably certain to prove it adopted this standard in good faith. In his response to Tree Island's dismissal application, Mr. Ciliberto argues that his dismissal did not result from the application of the attendance

standard, but rather from Tree Island's failure to accommodate him. However, he does not assert – and there is no evidence before me to suggest – that the "imposition of the standard was not thought to be reasonably necessary or was motivated by discriminatory *animus*": *Meiorin* at para. 60.

[31] The remaining question, then, is whether Tree Island is reasonably certain to establish the third element of its justification defence. At a hearing, the onus would be on Tree Island to prove that the attendance standard was reasonably necessary to accomplish its purpose, and that it discharged its duty to accommodate Mr. Ciliberto: *Meiorin* at para. 54. The parties disagree over Tree Island's chances of meeting this onus of proof. Neither party argues their position in express reference to the reasonable necessity of the standard in general. Instead, they focus their arguments on the issue of whether Tree Island discharged its duty to accommodate Mr. Ciliberto in particular. In his submissions to the Tribunal, Mr. Ciliberto does not dispute the legitimacy of having an attendance standard that requires him to work. However, he argues that Tree Island cannot establish that it met its duty to accommodate. Tree Island takes the opposite position. It argues that it met its duty to Mr. Ciliberto and so it is reasonably certain to establish a justification defence at a hearing.

[32] Based on my assessment of the whole of the evidence before me, I am satisfied that Tree Island is reasonably certain to prove at hearing that it met its duty to accommodate. My analysis and reasons for this conclusion follow.

A. Duty to accommodate: general principles

[33] In the employment context, the third element of the justification analysis involves assessing the legitimacy of the workplace standard itself, and determining whether the employer discharged its duty to accommodate the individual employee or group adversely impacted by the standard: see *Meiorin* at paras. 39-42, 62-68, and 72-82. In the present case, the issue between the parties centres on the latter.

[34] The purpose of an employer's duty to accommodate an individual employee is "to ensure that an employee who is able to work can do so" and that "persons who are otherwise

fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship": *Kelly* at para. 163, quoting *Hydro-Québec* at para. 14. The duty to accommodate is "an exercise in common sense and flexibility," comprised of both procedural and substantive components: *Kelly* at para. 164 and cases cited therein. In assessing whether an employer has met its obligations to an employee under the *Code*, the Tribunal considers the employer's process of accommodating – or trying to accommodate – the employee, and the substantive outcome of those efforts: see *Emergency Health Services Commission v. Cassidy*, 2011 BCSC 1003 at paras. 34-38.

[35] The duty to accommodate an individual employee is not open-ended; rather, it "is limited by the words 'reasonable' and 'short of undue hardship'." These are "not independent criteria but alternate ways of expressing the same concept": *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 [***Renaud***] at 984. Determining what constitutes reasonable accommodation, or accommodation to the point of undue hardship, has been described as "a question of fact," in the sense that the answer depends on the context and circumstances of the case: *Renaud* at 984. The point of undue hardship is reached "when reasonable means of accommodation are exhausted and only unreasonable or impractical options for accommodation remain": *Kelly* at para. 166, quoting *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15 at para. 122.

B. Duty to accommodate: Mr. Ciliberto

[36] Tree Island says Mr. Ciliberto's complaint will not succeed at a hearing because Tree Island is reasonably certain to prove it discharged its duty to accommodate. Mr. Ciliberto disagrees. He says Tree Island "has failed to demonstrate that it experienced undue hardship in its efforts to accommodate" and "has not demonstrated that [his] termination was not discriminatory." Mr. Ciliberto says the bar for establishing undue hardship is very high and Tree Island has not met it, citing a passage from *Martin Desrosiers v. Canada Post Corporation*, 2003 CHRT 26, which outlines general principles from the Supreme Court of Canada's decisions in *Meiorin* and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* 1999 CanLII 646 (SCC), [1999] 3 SCR 868. Contrary to Tree Island's assertions,

Mr. Ciliberto argues that his medical information was neither unclear nor inconsistent when Tree Island required him to attend an IME. He says his medical information showed he "was permanently injured and not fit for work at that time, but that with ongoing treatment [he] may be able to return in some capacity."

[37] Mr. Ciliberto says Tree Island knew it could access the Co-operators Report, but did not do so. He says the report would have given Tree Island an opportunity to resolve any issues regarding his medical information. He argues that Tree Island "neglected to utilize this opportunity and as such cannot say that it reached the point of undue hardship." He says he was not terminated because Tree Island determined he was unable to work in the foreseeable future; rather, Tree Island's "failure to accommodate [him] led, at least in part, to its decision to terminate [him] for non-culpable absenteeism." He argues that, had Tree Island "properly accommodated [him] by accessing [the Co-operators Report], it would have had a clearer picture of [his] medical condition and would not have been able to justify [his] termination."

[38] Mr. Ciliberto adds that the parties' disagreement regarding the Phone Call raises "a key question of credibility that must be fully weighed by a Tribunal Member at a hearing."

[39] For its part, Tree Island advances two arguments regarding the duty to accommodate. First, it argues that it accommodated Mr. Ciliberto to the point of undue hardship, relying on non-culpable absenteeism case law and the doctrine of frustration of contract to support its position. Second, it argues that the accommodation process broke down because Mr. Ciliberto failed to provide medical information. I find that I need not consider Tree Island's second argument, because I am persuaded to dismiss the complaint based on its first.

[40] In cases where an individual employee cannot work because of a disability, the employer's duty to accommodate to the point of undue hardship ends "where the employee is no longer able to fulfil the basic obligations associated with the employment relationship for the foreseeable future": *Kelly* at para. 167, quoting *Hydro-Québec* at para. 19. The determination of whether this end point has been reached must be based on an assessment of the employee's entire situation: *Hydro-Québec* at para. 21. Based on the information it had

when it terminated Mr. Ciliberto – information that is now evidence before me in this dismissal application – Tree Island argues that it is reasonably certain to establish at a hearing that Mr. Ciliberto was unable to return to work in any capacity for the foreseeable future, and so his complaint has no reasonable prospect of success. Tree Island relies on the Tribunal decision in *Chohan* to support its argument. I find *Chohan* helpful to my analysis of Mr. Ciliberto's case.

[41] In *Chohan*, an employer dismissed a 20-year employee three-and-a-half years into a disability-related medical leave after determining it was unlikely he would be able to return to work in any capacity in the foreseeable future. The employee filed a complaint with the Tribunal, alleging the employer discriminated against him on the basis of disability because it failed to accommodate him and terminated his employment. The employer applied to dismiss the complaint under s. 27(1)(c) of the *Code*, arguing that it was reasonably certain to establish a justification defence based on frustration of contract. Under the "doctrine of frustration," an employment relationship can come to an end when an employee's disability is of such a nature, or is likely to continue for such a period of time, that the performance of their job in the future would be impossible or at least something fundamentally different than was originally contemplated by the parties to the relationship: see *Senyk* at paras. 301-302 and cases cited therein; see also *Demuynck v. Agentis*, 2003 BCSC 96. The frustration of contract analysis is contextual and fact-specific. The Tribunal considers relevant contextual factors in assessing whether an employment contract has become frustrated, such as the terms and conditions of the employment relationship, the nature of the employee's position, their length of service, and their prospects for recovery and return to work: *Senyk* at para. 302; *Chohan* at paras. 33-34. Depending on the circumstances, a frustration of contract finding may support a conclusion that the duty to accommodate has been discharged: *Senyk* at para. 314.

[42] The evidence in *Chohan* was similar to the evidence before me in this dismissal application. The employer had received regular medical updates from the employee during his absence. The medical information indicated that the employee was experiencing varying degrees of functional impairment and was unable to return to regular or modified duties. The final medical information received prior to the employee's termination stated he was incapable

of working and it was not known when he would be able to return to work. In light of this information, the employer concluded that the employee was unlikely to return to work in the foreseeable future and the employment contract had become frustrated.

[43] Based on the evidence before it, the Tribunal in *Chohan* determined that the employer was reasonably certain to establish at a hearing "that there was no reasonable prospect that [the employee] would return to his employment with [the employer] in any capacity within a reasonably foreseeable timeframe, and that [the employer] reasonably accommodated [the employee] throughout the course of his medical leave." The Tribunal found that the employee had been unable to perform "the essential functions of his job for a period of time sufficient to say that, in a practical and business sense, the object of the employment had been frustrated." It therefore concluded that there was no reasonable prospect that the employee's "complaint of discrimination respecting the termination of his employment would succeed as [the employer] can establish that it fulfilled its duty to accommodate his disability to the point of undue hardship." I reach similar findings in this case. On the evidence before me, I find that several contextual factors favour a conclusion that the parties' employment relationship was frustrated, and even if the relationship was not frustrated, the evidence points toward a finding that Mr. Ciliberto was no longer able to fulfil the basic obligations associated with the employment relationship for the foreseeable future. Additionally, in my view, the Tribunal is reasonably certain to find at a hearing that, from a procedural perspective, Tree Island reasonably accommodated Mr. Ciliberto. My reasons for these findings follow.

1. Frustration of contract

[44] First, based on the evidence before me, in my view, at a hearing, the Tribunal is reasonably certain to find that several contextual factors favour a conclusion that the employment relationship between Tree Island and Mr. Ciliberto had become frustrated. For instance, the evidence in this case is that Mr. Ciliberto was a regular, full-time employee who had not worked at all during an over four-year period leading up to his termination. While the applicable collective agreement provided for long-term disability benefits, the evidence suggests those benefits contemplated, and were designed to survive, a non-culpable

termination of the LTD claimant's employment relationship with Tree Island. In any event, the "mere presence of an LTD plan, and the availability of benefits" under such a plan, does not mean that an employment contract cannot be frustrated: *Senyk* at para. 303.

[45] In addition, I find that the evidence regarding the anticipated duration of Mr. Ciliberto's disability and absence from work factors in favour of a frustration determination. Throughout Mr. Ciliberto's leave, the medical information from his doctor described his prognosis for recovery and return to work in uncertain and open-ended terms (e.g., "until further notice" in September 2016; "poor" in July 2017; "unknown" in November 2018), with no resolution in clear sight at the time of his dismissal.

2. Foreseeability of return to work

[46] Second, regardless of whether it can prove at a hearing that its contract of employment with Mr. Ciliberto was frustrated, I am persuaded that Tree Island is reasonably certain to establish that, at the time of Mr. Ciliberto's termination, he was no longer able to fulfil the basic obligations associated with the employment relationship for the foreseeable future. The ability to perform work is the "essence" of an employment contract: *Kelly* at para. 161, citing *Hydro-Québec* at para. 15. Unfortunately, the evidence before me is that, at the time of his dismissal, Mr. Ciliberto had been unable to perform work in any capacity for over four years and his doctor could not say that his status would change in the foreseeable future.

[47] While I agree with Mr. Ciliberto's submission that his medical information was not inconsistent when his employment was terminated, I find that this does not help his case. Both medical forms from November 2018 ask the question, "Is Mr. Ciliberto capable of returning to work in any capacity in the foreseeable future?" In each form, the answer to this question is the same: "No." The only difference between the forms is that, on November 21 (but not on November 6), Mr. Ciliberto's doctor suggests a **possible** return "with ongoing treatment in the future." Similarly, in the January 14, 2019 medical form, the doctor speculates regarding the "possibility" of a return at some unknown point in time following rehabilitation; the doctor is "unable to give a time frame." In my view, at a hearing, these speculative comments in the

evidence, regarding the **possibility** of a return to work, would be outweighed by the doctor's definitive, negative statements regarding the **foreseeability** of such a return. Given this evidence, and considering the substantial length of Mr. Ciliberto's absence, his doctor's "unknown" prognosis for his recovery, and Mr. Ciliberto's admission that his "medical information showed that [he] was permanently injured," I am satisfied that Tree Island is reasonably certain to establish at a hearing that, at the time of his dismissal, Mr. Ciliberto was unable to work for the foreseeable future, and so, under the law, Tree Island's duty to accommodate to the point of undue hardship had come to an end.

3. Accommodation process

[48] Finally, despite Mr. Ciliberto's concerns regarding Tree Island's accommodation process (specifically, his claim that Tree Island failed to access the Co-operators Report), I am satisfied that the Tribunal is reasonably certain to find at a hearing that, from a procedural perspective, Tree Island reasonably accommodated Mr. Ciliberto.

[49] The undisputed evidence in this case is that Tree Island accommodated Mr. Ciliberto's need for disability-related medical leave for several years, in the sense of not holding him to the attendance standard that required regular, full-time work. Tree Island could be viewed as having applied a modified attendance standard to Mr. Ciliberto during his extended absence, which only required him to be able to return to work in some capacity in the foreseeable future.

[50] In addition, the evidence is that, during Mr. Ciliberto's leave, Tree Island made inquiries regarding his prognosis for return to work and any limitations or restrictions he might have upon returning to the workplace, through what appears to be appropriate correspondence at reasonable intervals. In an individualized accommodation process, an employer's ability to inquire into an employee's medical information is not unfettered: *Thorburn v. Vancouver Coastal Health Authority*, 2013 BCHRT 260 at para. 24; *de Champlain v. BC Ministry of Health* at para. 56. However, in general, an employer is permitted, and in some circumstances required, to seek information necessary to evaluate whether it can accommodate an individual

employee: *Gordy* at para. 84; see generally *Michaud v. BC Government and Service Employees' Union and another*, 2021 BCHRT 115. In my view, based on the materials before me, Tree Island is reasonably certain to establish at a hearing that its requests for information from Mr. Ciliberto were not excessive, unreasonable, or discriminatory. Mr. Ciliberto has not alleged otherwise.

[51] Also, the evidence indicates that Tree Island did not move hastily to terminate Mr. Ciliberto without advance notice or at its earliest possible opportunity. For instance, the evidence is that, when its requests for a completed medical form in February, March, and April 2017 were unsuccessful, Tree Island tried again in May (and June and July), cautioning Mr. Ciliberto regarding the potential employment consequences of not providing the requested information. Similarly, even after receiving medical information on November 6, 2018 stating Mr. Ciliberto would not be capable of returning to work in the foreseeable future, the evidence indicates that Tree Island gave him additional opportunities to provide information in support of his continued employment, including providing a December 18, 2018 medical form, which was tailored to Mr. Ciliberto's situation, and seeking the specific, clarifying information it felt it needed under the circumstances.

[52] Further, the materials before me indicate that Tree Island proposed an IME by a third-party physician as a last resort, only after making several attempts to obtain clarifying information from Mr. Ciliberto's chosen physician regarding his prospects for returning to work. Tree Island's rationale for seeking an IME appears evident in its March 11, 2019 letter to Mr. Ciliberto. Tree Island told Mr. Ciliberto that the information it had on file indicated he would remain unable to work in the foreseeable future, which – as Tree Island had explained in previous correspondence – meant that Mr. Ciliberto's employment was in jeopardy. The IME appears to have been a chance to turn this around. The March 11 letter indicated that the IME was meant to give Tree Island a better understanding of Mr. Ciliberto's prognosis, which went to the question of its duty to continue to accommodate his absence. Under the circumstances, and considering the authorities cited above regarding requests for employee medical information in the accommodation process, I find that, at a hearing, the Tribunal is reasonably

certain to conclude that Tree Island's IME proposal was not overly intrusive, unreasonable, or discriminatory.

[53] I appreciate Mr. Ciliberto's evidence that the medical assessment for Co-operators resulted in pain and exhaustion, and he did not want to needlessly duplicate that process. However, in my view, even if the Tribunal accepts Mr. Ciliberto's claim that Tree Island knowingly failed to obtain the Co-operators Report, I find that this would not be fatal to Tree Island's justification defence at a hearing. Accommodation is a "two-way street," in the sense that both the employer and the employee have responsibilities in the accommodation process: *Braden v. Howe Sound Pulp and Paper and others*, 2023 BCHRT 225. In the present case, Mr. Ciliberto's responsibilities included bringing forward relevant accommodation-related information: *Renaud*; *Braden* at para. 30. In this regard, Mr. Ciliberto says he gave the HR Director permission to ask Co-operators for a copy of its report. But he does not say he was unable to obtain a copy of the report himself and bring it forward to Tree Island. Under s. 27(1)(c) of the *Code*, I can only consider the information before me; I cannot speculate about what might come out at a hearing: *University of British Columbia v. Chan*, 2013 BCSC 942 at para. 77. In my view, evidence of a single conversation about the Co-operators Report with the HR Director – in the absence of any indication Mr. Ciliberto tried to obtain the report himself – would not be enough for the Tribunal to conclude that either Mr. Ciliberto had met his responsibility to bring that medical information forward or Tree Island had breached its duty to accommodate. I also note that, on the evidence before me, it is not clear how Tree Island's review of the Co-operator's Report would have changed anything in this case. Mr. Ciliberto describes the report as determining that he "was still disabled" – meaning he was disabled from working "any occupation" according to the terms of the LTD plan set out in the collective agreement. The Arbitration Decision says the report stated Mr. Ciliberto had "minimum functional capacity." Based on these descriptions, I do not see how the Co-operators Report would have, in Mr. Ciliberto's words, given Tree Island a "clearer picture of [his] medical condition" such that it "would not have been able to justify [his] termination." For all of these reasons, I also do not accept Mr. Ciliberto's argument that the parties' disagreement regarding the Phone Call amounts to a key credibility issue that must be resolved at a hearing.

[54] In sum, then, on the whole of the evidence before me, I am satisfied that Tree Island is reasonably certain to prove at a hearing that it reasonably accommodated Mr. Ciliberto throughout his medical leave, and that, at the time of Mr. Ciliberto's dismissal, Tree Island's duty to accommodate to the point of undue hardship had ended because Mr. Ciliberto was not able to fulfil the basic obligations associated with the employment relationship for the foreseeable future. I am therefore persuaded that Mr. Ciliberto's complaint has no reasonable prospect of success and does not merit a hearing, and so I grant Tree Island's application to dismiss the complaint under s. 27(1)(c) of the *Code*.

IV CONCLUSION

[55] In his original complaint to the Tribunal, Mr. Ciliberto said he had not yet healed sufficiently to return to work and he remained under his doctor's supervision and care. He said the termination of his employment had caused him and his family significant financial difficulties and mental distress. My decision to dismiss Mr. Ciliberto's complaint is not meant to diminish his stated experience of his dismissal.

[56] The law regards an employer's duty to accommodate to the point of undue hardship as being discharged in cases like Mr. Ciliberto's. I acknowledge, however, that on a human level, the real hardship in these cases is typically felt by the individual employee whose employment has unfortunately come to a disability-related end.

[57] Tree Island's application to dismiss Mr. Ciliberto's complaint under s. 27(1)(c) of the *Code* is granted. The complaint is dismissed.

Jonathan Chapnick
Tribunal Member