Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2019 CHRT 22
Date: May 17, 2019
File Number : T2224/4617

Between:

Glenn Brunskill

Complainant

– and –

Canadian Human Rights Commission

Commission

– and –

Canada Post Corporation

Respondent

Decision

Member: Gabriel Gaudreault

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I. Background

[1] Glen Brunskill is the Complainant in this case. He worked for Canada Post Corporation ("CPC") between 1992 and January 2015, and held several positions within CPC during that time. He ultimately held the position of letter carrier. During his employment, Mr. Brunskill suffered a serious back injury. In March 2013, when he returned to work at CPC, further to a memorandum of settlement, he informed CPC of his medical situation, which would prevent him from resuming his duties as a letter carrier. He therefore made a request for accommodation. He is claiming, in part, that CPC failed to meet its duty to accommodate and that its actions forced him to take early retirement, which he in fact did in January 2015.

[2] On October 27, 2015, he filed a complaint with the Canadian Human Rights Commission (the "Commission") under paragraph 7(b) of the *Canadian Human Rights Act* ("*CHRA*"), claiming that CPC directly or indirectly adversely differentiated him in the course of employment, because of his disability. This complaint was referred to the Tribunal on August 10, 2018, in accordance with paragraph 44(3)(a) of the *CHRA*.

[3] Following hearings held in Brampton, Ontario, from September 11 to 14, 2018, and based on all the evidence filed in this case, I find that Mr. Brunskill's complaint is partially substantiated, for the following reasons.

II. Motion for Non-Suit Filed by the Respondent at the Hearing

[4] During the second day of the hearing, CPC announced its intention to file a motion for non-suit. Before filing the motion, it asked the Tribunal's leave to be exempted from the requirement to make an election. In other words, CPC asked the Tribunal to hear its motion for non-suit, but still allow it to present its evidence in the event that the non-suit motion was dismissed. The Tribunal therefore needed to decide whether CPC would be required to make an election.

[5] After considering the parties' submissions, the Tribunal was able to render its decision orally at the hearing. Nevertheless, I believe it is appropriate to summarize the

positions of the parties in this written decision and to summarize the reasons for the decision I rendered on September 13, 2018.

[6] First, CPC argued that the clear trend in the Tribunal's case law is that when a party files a motion for non-suit, that party is not required to elect to either bring the motion or present its evidence.

[7] At the time the motion for non-suit was brought, CPC's position was that Mr. Brunskill had failed to prove the essential elements of his case or to present reliable evidence that would enable him to meet the burden of proof of his case. Consequently, the Respondent alleged that it should not be required to present a response.

[8] CPC filed some case law in support of its request, most notably *Filgueria v. Garfield Container Transport Inc.*, 2005 CHRT 30, *Filgueria v Garfield Container Transport Inc.*, 2006 FC 785, and *Fahmy v. Greater Toronto Airports Authority,* 2008 CHRT 12 [*Fahmy*]. These decisions have provided certain considerations that tribunals and courts of law have used as guidelines when dealing with matters concerning the issue of making an election. Three considerations have emerged from these decisions: costs; a response to the concern that the party which brings such a motion is able to "take the temperature", in other words, to test the waters with the Tribunal; and lastly, the merits of the motion itself.

[9] With respect to costs, CPC argued that the context in civil matters differs from the human rights context. Under the *CHRA*, costs cannot be recovered at the end of the proceedings because the Tribunal does not have the power to order costs.

[10] The Respondent also argued that as far as it was concerned, the costs were real: it would need to call a witness who lives in the Ottawa region to testify, as well as two other witnesses who live in Toronto. The Respondent added that the quasi-judicial process would not only require it to incur costs, but would also require the Complainant and the public to incur costs as well, since the Tribunal would need to take time to hear the complaint in its entirety. According to CPC, all these expenses could be avoided if the Tribunal granted the motion for non-suit.

[11] The Respondent then addressed the argument that the party bringing the motion for non-suit would be able to “take the temperature”, that is, to benefit from bringing such a motion since the decision-maker could potentially reveal his or her thinking on the case, thus putting that party at an advantage. According to CPC, the Tribunal’s role is to decide whether there is any evidence to support the Complainant’s allegations. It adds that the Tribunal member is not dealing with a situation where he or she is required to weigh the evidence or to provide any additional comments if the motion for non-suit is dismissed; the Tribunal remains in a state of suspended judgment, its neutrality intact.

[12] With respect to the merits of the motion, CPC’s view was that the motion was brought in good faith, was not frivolous and was not intended to obstruct justice. According to CPC, the motion was brought in the public interest in order to try to avoid proceedings that may not be necessary. Consequently, this could potentially avoid wasting the resources of the parties involved.

[13] After CPC made its submissions, the Tribunal gave Mr. Brunskill an opportunity to make submissions concerning this motion. He informed the Tribunal that he didn’t have any to make.

[14] For the following reasons, I dismissed CPC’s request that it be exempted from the requirement to make an election. Consequently, CPC decided not to bring its motion for non-suit and instead presented its evidence at the hearing as planned.

[15] I recognize that CPC was entirely within its rights to bring a motion for non-suit. Moreover, the Tribunal clearly has jurisdiction to hear this type of motion. However, I disagree with the Respondent’s claim that the current trend in the Tribunal’s case law is clear with respect to the issue of exempting the applicant from making an election. After consulting the Tribunal’s case law on this subject, I find that there are thorough and persuasive decisions for each option. This was also reiterated by Member Garfield in *Fahmy*, *supra*, at para. 13, as well as in *Croteau v. Canadian National Railway Company*, 2014 CHRT 16, at para. 14. In fact, there are indeed Tribunal decisions which require the applicant to make an election (see for example *Chopra v. Canada (Department of National*

Health and Welfare), October 7, 1999, T492/0998, Decision No.2 [*Chopra*], and *Khalifa v. Indian Oil and Gas Canada*, 2009 CHRT 27 [*Khalifa*]).

[16] As pointed out by both the Federal Court and the Tribunal, a decision requiring an election to be made is a matter of procedure, and the presiding member has great latitude in requiring or not requiring an election to be made by the applicant. This will depend on the circumstances of each case.

[17] With respect to the costs to the public as well as to the Tribunal, the Tribunal had already been present for the purpose of hearing the complaint. The travel as well as the related costs had already been planned several months earlier. Moreover, the estimated time scheduled for the hearing was very reasonable. I was therefore prepared to continue the hearing and was confident that the case could be closed within the four-day time period scheduled. Given that this matter arose on the third day of the hearing, a debate concerning the motion for non-suit, if necessary, would very likely have spilled over into the fourth and final day of the hearing. Mr. Brunskill would also have needed some time to prepare his response to such a motion, since the consequences could be fatal for the case, that is, it could lead to the dismissal of his complaint. In fact, the result was exactly the same, that is, the full hearing of the case would take place over a period of four days.

[18] With respect to the consideration of costs to the parties, it is important to remember that the hearing was very short. The Complainant did not call any witnesses to testify and therefore did not incur any costs related to subpoenas. Moreover, the Complainant only intended to file very few (if any) documents. The Complainant was not represented and therefore did not incur any costs related to legal representation. For the purposes of the hearing, he only needed to invest his time and travel-related costs. Therefore, the costs incurred by the Complainant did not constitute a compelling argument.

[19] For its part, the Respondent called only three witnesses to testify: two from Toronto and one from Ottawa. Costs are clearly a factor that the Tribunal needs to take into consideration. CPC did not demonstrate that the related costs were expected to be so exorbitant that they would give rise to special circumstances, and consequently constitute a determinative factor in the analysis of the election issue.

[20] With respect to the argument concerning “taking the temperature”, I agree with the Respondent’s submissions regarding the Tribunal’s functions in dealing with a motion for non-suit. I am aware that when a presiding member makes a decision concerning a motion for non-suit, he or she is only required to weigh the evidence filed in order to determine whether it includes any elements supporting the complainant’s allegations. By applying this approach, the member remains in a state of suspended judgment, his or her neutrality intact. Even though this is one element to be taken into consideration, according to the case law filed by CPC concerning motions for non-suit, my role is to weigh all the factors that need to be taken into consideration. I therefore found that this factor was not determinative in this case.

[21] Lastly, with respect to the argument concerning the merits of the motion, there was no indication that CPC’s motion was frivolous, vexatious or made in bad faith. As mentioned earlier, I recognize that a respondent is entirely within its rights to file a motion for non-suit, which is intended to offer protection against proceedings that are frivolous, abusive, vexatious, or made in bad faith against the respondent. Nevertheless, I find that in the decision in *Khalifa*, Member Hadjis made some interesting comments on this subject, at paragraph 8, pointing out that it is the Commission which is best positioned to assess whether complaints are frivolous, abusive, vexatious or made in bad faith when it decides whether to refer them to the Tribunal or not:

> . . . Section 41(1)(*d*) of the *Canadian Human Rights Act* provides that the Commission shall deal with a complaint unless it appears to the Commission that the complaint is trivial, frivolous, vexatious or made in bad faith. Respondents are able to make submissions to the Commission to have the complaints made against them dismissed on these grounds, and in the event that the Commission decides nonetheless to deal with a complaint and ultimately refer it to the Tribunal, respondents still have the option of seeking judicial review of the Commission’s decision. Thus, it is not in my view entirely correct to say that a respondent faced with a frivolous or vexatious complaint will have little recourse but to endure a full Tribunal hearing. Given these safeguards under the *Act*, it seems very unlikely that genuinely frivolous or vexatious complaints would ever make it to the Tribunal.
>
> [Emphasis added]

[22] That said, are there any other circumstances that would justify me exempting the Respondent from making an election? I have found that the timelines involved could be another consideration, but once again, the hearing was scheduled to take place over a short period of time for a case that was being referred to the Tribunal. The hearing ran smoothly, and I was optimistic that the case could be closed within the specified timeframe. Consequently, timelines did not constitute a determinative factor in my decision.

[23] Ultimately, CPC did not persuade me that it should be exempted from making an election. It was therefore free to bring its motion for non-suit, if it so desired, but was required to elect not to call evidence should its motion be dismissed. The Respondent decided to withdraw its motion for non-suit, and the case therefore proceeded as scheduled.

III. Facts

[24] Mr. Brunskill was employed by CPC from 1992 until his retirement in January 2015. During these years of service, he held various positions within CPC notably as a postal clerk and ultimately as a letter carrier.

[25] On March 1, 2012, the Complainant was dismissed for reasons unrelated to this complaint, and he subsequently filed a grievance. A memorandum of settlement was signed on March 19, 2013, between CPC, the Complainant and his union representative, whereby he was reinstated in his former position as a letter carrier at the facility in Brampton North. He was scheduled to be reinstated in this position on March 20, 2013. When Mr. Brunskill returned to work on March 20, 2013, he informed CPC that he would not be able to perform the duties of a letter carrier, owing to a back injury he had suffered in the past.

[26] The Complainant had suffered a workplace injury in the past, while he was working as a letter carrier. He explained that he had been carrying a heavy double bag for the purpose of transporting and delivering the mail. He fell down with the bag and suffered a significant shock to his spine which prevented him from continuing his work. After this fall,

he had to see a doctor, and his duties needed to be modified. At the Complainant's request, CPC therefore found him a temporary position with modified duties, that of a Decentralized Redirection System clerk ("DRS Clerk"), at the facility in Malton. This was one of the most sedentary positions that could be offered within CPC.

[27] CPC is not responsible for confirming and establishing an employee's medical limitations: this responsibility is assumed by an external company, Great-West/Morneau Sheppell ("GW/MS"). Without claiming to understand all the subtleties of claims processing at GW/MS, it is the Tribunal's understanding that an employee's claim is forwarded to GW/MS, where a disability case manager assumes responsibility for the file. A medical team then reviews the employee's medical situation. Finally the company informs CPC of any medical restrictions that apply to the employee and, where applicable, whether these restrictions are temporary or permanent. The company may also submit recommendations for accommodation measures to CPC.

[28] When CPC modified the Complainant's duties in March 2013, it did so without first obtaining information on the Complainant's medical restrictions. This was a temporary accommodation measure that was implemented while the Complainant's medical restrictions were being confirmed and established by GW/MS. At the time, CPC had also determined that the duties related to this position could be performed safely by the Complainant.

[29] It was in this context that Mr. Brunskill held the position of DRS Clerk at the facility in Malton, on a full-time basis, from March 20, 2013, to September 13, 2013. The evidence shows that even though the Respondent did not receive information concerning Mr. Brunskill's medical restrictions until much later, during the summer, the modified duties of this position constituted an accommodation measure which worked well under the circumstances. Both CPC and the Complainant were satisfied with this arrangement.

[30] On August 21, 2013, CPC received a letter from GW/MS, which confirmed and listed the Complainant's medical restrictions. Without getting into the details, these restrictions included limitations on how long the Complainant could walk, the maximum

weight that he could carry, the maximum amount of time he should remain standing or sitting, and limitations related to pulling and pushing objects.

[31] Following CPC's receipt of the medical restrictions on August 21, 2013, the Complainant continued to work as a DRS Clerk at the facility in Malton. The evidence shows that the accommodation measures that had been put in place on March 20, 2013, were compatible with the Complainant's medical restrictions.

[32] On September 13, 2013, the Malton facility was closed due to a restructuring of CPC's services, and the position that had been held by Mr. Brunskill was eliminated. For several months, the Respondent had been fully aware that this facility was going to be affected by restructuring activities, but as far as it was concerned, the DRS Clerk position at that facility was clearly a temporary accommodation.

[33] After this position was eliminated, CPC was unable to find another position for the Complainant where his duties would be compatible with his limitations. Consequently, the Complainant was invited to claim short-term disability benefits ("STD benefits"), which he did. It is the Tribunal's understanding that this is the usual practice at CPC; that is, when an employee cannot be accommodated because of his or her medical situation, the employee is invited to file a claim for STD benefits.

[34] Since, at that point, the Complainant was not assigned to any given position, CPC conducted a job search in order to identify another appropriate accommodation. On September 25, 2013, CPC informed Mr. Brunskill that it had identified another position with modified duties that were compatible with his medical restrictions. It involved working as a Video Encoding System Clerk ("VES Clerk"). However, the Complainant was required to successfully complete training before being assigned to this position. The training started on September 30, 2013. It is the Tribunal's understanding that the Complainant was paid while he participated in this training.

[35] As requested, Mr. Brunskill participated in the first part of the training in order to improve his keyboarding skills. However, he was not able to achieve the necessary objectives required to successfully complete this part of the training and move on to the next steps in the training process. CPC therefore offered the Complainant additional

training so that he could further improve his keyboarding skills. Despite this, the Respondent determined that the Complainant's chances of successfully completing this training were poor, a fact which is not contested by the Complainant. Mr. Brunskill's training therefore ended on October 10, 2013, and he had to wait for the Respondent to find him another position that would offer appropriate accommodation. CPC therefore started looking for a position with modified duties that would be compatible with the Complainant's medical restrictions.

[36] On October 30, 2013, GW/MS approved the Complainant's short-term disability due to his medical situation, retroactive to September 16, 2013. Mr. Brunskill therefore received STD benefits during his absence from work in September 2013 as well as after his training ended in October 2013. Short-term disability was approved until December 31, 2013. On December 31, 2013, GW/MS confirmed that Mr. Brunskill was still approved for short-term disability for the period between January 1 and February 23, 2014. Subsequently, GW/MS again approved short-term disability for the period from February 24, 2014, to April 13, 2014. This period represented Mr. Brunskill's final eligibility period for STD benefits from GW/MS. Consequently, Mr. Brunskill stopped receiving STD benefits as of April 13, 2014.

[37] Other than the potential VES Clerk position for which the Complainant was unable to successfully complete training, CPC was not able to identify any accommodation measure that would be compatible with the Complainant's medical restrictions for a period of 30 weeks, stretching from September 16, 2013 to April 13, 2014. During this time, Mr. Brunskill received STD benefits. In fact, his benefits amounted to the equivalent of 100% of his salary. Without going into all the details, employees of CPC could receive STD benefits amounting to 70% of their salary. However, it was also possible to make up for the remaining 30% by using top-up credits, which are notably obtained by converting accumulated sick leave credits into said top-up credits. Given Mr. Brunskill's seniority and the credits accumulated during his numerous years of service, the amounts that he received totalled 100% of his salary.

[38] Around the 22nd week of the short-term disability period, CPC's usual practice is to invite employees who are still disabled and absent from work to complete a package for

the purpose of claiming long-term disability benefits ("LTD benefits"). One other notable fact is that responsibility for LTD benefits is not assumed by GW/MS, but by SunLife Financial. On February 12, 2014, CPC sent this package to Mr. Brunskill, who unfortunately never received it. On April 13, 2013, the Complainant's STD benefits ended, and as a result, the Complainant was left without income as of April 14, 2013.

[39] On April 29, 2014, CPC learned that Mr. Brunskill had never received the package. It therefore sent a second package that the Complainant must have completed, since SunLife Financial denied his claim for LTD benefits on May 26, 2014. During this time period, the Complainant was still not receiving any income and was waiting for CPC to identify a position that was compatible with his medical restrictions.

[40] After SunLife Financial denied his claim for LTD benefits, the Complainant was once again referred to a disability case manager at GW/MS so that his medical situation could be updated. He was required to provide updated information on his medical condition by June 20, 2014, at the latest, but the company did not receive the requested information. On June 25, 2014, the company contacted the Complainant in order to clarify the situation. Dr. Matthew, Mr. Brunskill's attending physician, was away from his office and was not scheduled to return until mid-August 2014. Mr. Brunskill was therefore granted an extension requiring him to provide the requested information by July 3, 2014. As of July 9, 2014, GW/MS was still waiting to receive the necessary information. According to the disability case manager's notes, the Complainant's attending physician was apparently refusing to complete the documents required by the company. Mr. Brunskill also testified that his doctor was exasperated by all the requests he was receiving from GW/MS and CPC asking him to complete documents for the purpose of updating Mr. Brunskill's file.

[41] Dr. Matthew was not called to testify as a witness at the hearing. The only information available to the Tribunal concerning these specific circumstances was obtained from the notes of Andrew Rivers, the disability case manager, and Mr. Brunskill's testimony. Mr. Rivers was also not called to testify at the hearing. For the Tribunal, the circumstances surrounding the doctor's refusal to complete the requested paperwork is somewhat vague. It is the Tribunal's understanding that Dr. Matthew was away from his

office until mid-August 2014. That said, even if Dr. Matthew had refused to provide the requested information, this would not have changed the fact that as of July 9, 2014, GW/MS was still waiting to receive the relevant information required to update Mr. Brunskill's file.

[42] The Complainant informed the case manager that he would take the necessary measures to provide the requested information, and he did in fact do so. On July 14, 2014, he provided a medical note from Dr. Simarjot Grewal, Dr. Matthew's colleague. I believe that it is appropriate to reproduce Dr. Grewal's letter in its entirety:

> To Whom it May Concern,
>
> Dr. Matthew is on temporary leave until mid-August 2014. He will be able to provide an updated medical assessment for Mr. Glenn Brunskill upon is [*sic*] return.
>
> Until this time, Mr. Brunskill may return to work at his former position of DRS Clerk or MSC Driver.

[43] This letter is important because, as Mr. Brunskill explained to the Tribunal, he believed that he had fulfilled the request made by GW/MS and CPC. According to him, this letter provided an update of his medical situation and confirmed that he could work as a DRS Clerk or as a Mail Service Courier Driver ("MSC Driver"). As far as CPC was concerned, this letter did not provide an update of the Complainant's medical situation. According to CPC, the Doctor's letter explicitly stated that an update of the Complainant's medical situation would be forwarded by Dr. Matthew, his attending physician, upon his return from a leave of absence.

[44] That said, and even though the Complainant and the Respondent do not agree on the nature and scope of the letter, the evidence shows that CPC still endeavoured to evaluate the options listed therein. There was no available position for a DRS Clerk. With respect to the position of an MSC Driver, the Respondent determined that the Complainant would not be able to perform this type of work, based on his known medical restrictions. An evaluation of each of the positions available at CPC had been conducted by an outside firm. Part of this evaluation covered the physical requirements for a given

position. CPC refers to these evaluations when it is required to determine whether an employee is able to perform the tasks related to a particular position, considering his or her medical restrictions.

[45] CPC decided that, owing to Mr. Brunskill's known medical restrictions, it was not appropriate to assign him to work as an MSC Driver. A number of union representatives, including some who had either worked or were currently working as MSC Drivers, also believed that this position was not compatible with the Complainant's medical limitations.

[46] On August 26, 2014, Dr. Matthew provided an update of the Complainant's medical restrictions as requested. GW/MS sent a letter to the Respondent to inform CPC that Mr. Brunskill's medical restrictions remained unchanged. In that letter, Michael Sarazin, Disability Case Manager, confirmed that he had had a discussion with the Complainant's attending physician and again listed the Complainant's medical restrictions.

[47] Even though the Disability Case Manager informed CPC that the restrictions had not changed, a reading of these same restrictions reveals that certain differences did in fact exist. Indeed, the medical restrictions dated August 26, 2014, were more restrictive than those dated August 21, 2013. For example, and without restating all the restrictions in detail, while the restrictions dated August 21, 2013, authorized the Complainant to lift objects weighing a maximum of 20 pounds between the waist and the shoulders, that latitude was no longer authorized in the new restrictions dated August 26, 2014. Moreover, the Complainant had previously been authorized to frequently lift objects weighing a maximum of 5 pounds from the floor to waist level and from waist level to shoulder level, but in the new restrictions, for the same movements, he could still lift a maximum of 5 pounds but could only do so rarely or infrequently. Lastly, the maximum length of time he could consecutively spend walking was reduced from 15 minutes to 5 minutes.

[48] When the Respondent received the Complainant's updated medical restrictions, dated August 26, 2014, it once again conducted a job search in order to find him modified duties in a position that would be compatible with his new limitations. A vacant position was identified; specifically, a position working as a Postal Clerk for the return to sender service in Port Credit, starting on September 10, 2014. This position was very similar to

the position of DRS Clerk that the Complainant had held from March to September 2013, in Malton. However, it was a part-time position, requiring him to work 4 hours a day. The Complainant also had the help of an assistant who could move heavier packages when necessary. With the help of this person, Mr. Brunskill was able to perform most of the duties related to this position while still respecting his medical limitations.

[49] The evidence shows that the Complainant was not particularly well informed about the conditions of his employment. He did not receive any documentation or official letter of assignment. He only received a telephone call from an unknown woman, asking him to report to work on September 10, 2014, which he did. It was only after he started working in that position that Mr. Brunskill realized that the position in question was a part-time position. This angered the Complainant, who believed that the Respondent was trying to demote him in violation of his collective agreement. He explained that he subsequently continued to perform the duties offered for a certain period of time in order to ensure that he had a "foothold within CPC". That way, he could consult the various positions available within CPC, particularly those posted on the jobs board. For the Complainant, this particular accommodation measure was the last straw. It was what prompted him to take measures that he felt appropriate. The Complainant filed certain emails demonstrating that in September and October 2014, he had in fact contacted certain individuals, most notably within the union, in order to try to change things. For the Tribunal, the Complainant's messages clearly convey the fact that he did not understand his situation. They also clearly convey his distress about it.

[50] Mr. Brunskill was not amenable to working part-time in Port Credit. He maintained that CPC was required to find him modified duties in a full-time position. He informed the Tribunal that the income paid for work performed on a part-time basis was insufficient and that despite working a number of hours in that position in September and October 2014, he had later received paycheques from CPC in the amount of $0.

[51] On that point, the evidence filed during the hearing, more specifically the payment notifications sent to Mr. Brunskill and filed by the Respondent, instead demonstrate that Mr. Brunskill received a salary of $1,513.09 for work performed between September 14 and 27, 2014. Between September 28 and October 11, 2014, he received a

salary of $1,026.16. However, between October 12 and 25, 2014, the evidence shows that Mr. Brunskill owed the employer the amount of $124.59. After carefully reviewing this payment notification, the Tribunal notes that there was a recovery of an overpayment. The amount concerned was a significant amount and resulted in the Complainant's pay actually falling into a negative amount. Lastly, for the pay period from October 26 to November 8, 2014, Mr. Brunskill's pay was relatively minimal, $177.54. Once again, an overpayment had been recovered.

[52] Mr. Brunskill stopped working at Port Credit on October 24, 2014, and therefore did not receive any salary after that date. On November 12, 2014, CPC sent a letter to Mr. Brunskill explaining that he would be paid an additional amount of $1,000 as a salary advance for the period from October 26 to November 8, 2014. This letter also explained the terms and conditions for recovering the amount paid in advance.

[53] Finally, Mr. Brunskill alleged that the Respondent gave him no alternative but to liquidate all leave available to him, including personal days, pre-retirement leave, annual leave and top-up credits, and ultimately to retire. He therefore claims that he was subjected to constructive dismissal. That said, the evidence reveals that Mr. Brunskill did in fact liquidate all his leave as of October 24, 2014 (Exhibit C-6). According to him, if he had taken all his leave in the proper order, he could have retired on January 31, 2015. The evidence reveals that he in fact submitted his notice of retirement on January 26, 2015.

[54] For its part, CPC denied that it intended to demote Mr. Brunskill. It maintained that when it received the updated medical restrictions from GW/MS on August 26, 2014, it conducted a job search in order to identify positions that would be compatible with these restrictions. The evidence reveals that the search was successful and that an available position was identified for Mr. Brunskill. This position, in Port Credit, was adapted to ensure that it was compatible with the Complainant's restrictions, for example, by providing him with an assistant to move heavy packages. This work was part-time work, starting on September 10, 2014. The evidence also reveals that even though Mr. Brunskill held a part-time position, he was nevertheless considered to be a full-time employee in CPC.

[55] CPC added that if the Complainant decided to use all his leave and then retire, it was on his own initiative, and that this is not a constructive dismissal. Indeed, the evidence reveals that CPC did not ask Mr. Brunskill to take retirement. In fact, Mr. Brunskill presented CPC with a *fait accompli*. This issue, whether the Complainant was forced to take retirement, will be addressed further on.

IV. Legal Framework

[56] Mr. Brunskill is required to meet **the burden of proof for his case**. This is traditionally referred to as establishing a *prima facie* case of discrimination.

[57] Before continuing the analysis, I wish to adopt the comments made by my colleague, Susheel Gupta, in *Emmett v. Canada Revenue Agency*, 2018 CHRT 23 [*Emmett*], which most notably reiterates the analysis of Member Cousineau in the decision rendered in *Vik v. Finamore (No. 2),* 2018 BCHRT 9. Without restating all of their comments, the use of the phrase "a *prima facie* case of discrimination", when considering the burden that rests on the complainant's shoulders in order to prove his or her case, is not helpful. It is a source of confusion and may lead to an erroneous interpretation of the analysis applicable in the human rights context. It may also give complainants the impression that it is the same as a finding of discrimination, when the *CHRA* provides, for example, that an employer can provide justification for the discrimination; if the discrimination is justified, there is simply no discrimination (see section 15 *CHRA*) Conversely, from the point of view of respondents, this phrase may give the impression of having discriminated even before they have had an opportunity to justify their actions or conduct.

[58] Similarly, I believe that Latin maxims put distance between the Tribunal and the public that it serves, which often includes people who have never had any legal training. They do nothing to promote an understanding of the Tribunal's process and the applicable analysis. However, this does not mean that the analysis must change. The point here is that plain language should be favoured.

[59] As noted in *Ontario Human Rights Commission v. Simpson-Sears*, [1985] 2 SCR 536, at para. 28 [*Simpson-Sears*], in order for a complainant to meet **the burden of proof for his or her case**, the complainant must "show a *prima facie* case of discrimination. A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer".

[60] Under paragraph 7(b) of the *CHRA*, Mr. Brunskill must therefore demonstrate the following three aspects:

(1) that he has a characteristic protected by a prohibited ground of discrimination under the *CHRA* (in this case, disability);

(2) that he was subjected to adverse differential treatment in the course of employment (under subsection 7(b) *CHRA*);

(3) that the prohibited ground of discrimination (disability) was a factor in the adverse differential treatment suffered in the course of employment;

(see for example *Moore v. British Columbia (Education)*, [2012] SCR 61, at para. 33 [*Moore*])

[61] As stated in *Commission des droits de la personne et de la jeunesse v. Bombardier Inc. (Bombardier Aerospace Training Centre)*, 2015 SCC 39 and 44 to 52 [*Bombardier*], the applicable standard is that of proof on a balance of probabilities, and it is not necessary to demonstrate that the prohibited ground of discrimination under the *CHRA* was the sole factor in the manifestation of the adverse impacts suffered by the complainant.

[62] Discrimination is not usually direct or intentional. As indicated in *Basi v. Canadian National Railway Company*, 1988 CanLII 108 (CHRT) [*Basi*], direct proof of discrimination is not necessary, nor is it necessary to demonstrate an intention to discriminate (see also *Bombardier*, *supra*, at paras. 40 and 41). It is the Tribunal's role to analyze the circumstances of the complaint to determine whether there is any subtle scent of discrimination.

[63] When the Tribunal analyzes circumstantial evidence, discrimination may be inferred when the evidence presented in support of the allegations of discrimination make such an inference more probable than other possible inferences or hypotheses (see *Basi*, *supra*; *Chopra v. Canada (Department of National Health and Welfare*), 2001 CanLII 8492 (CHRT)). Evidence of discrimination, even if circumstantial, must nevertheless be tangibly linked to the respondent's impugned decision or conduct (see *Bombardier*, at para. 88).

[64] When the Tribunal must decide whether a complainant has met the **burden of proof for his or her case**, it must consider the evidence in its entirety. This also includes the evidence filed by the Respondent. In other words, evidence presented before the Tribunal by the Complainant and the Respondent should not be analyzed in silos. Consequently, the Tribunal may decide that Mr. Brunskill failed to meet the burden of proof for his case if (1) in the absence of a response from the Respondent, he fails to present sufficient evidence that meets the burden of proof for his case; or (2) the Respondent was able to present evidence that refutes the Complainant's allegations and, consequently, prevents the latter from meeting the burden of proof for his case.

[65] Lastly, if the Complainant is able to meet the burden of proof for his case, in spite of any evidence that may have been presented by the Respondent to refute the allegations (which, in fact, constitutes the first part of the analysis), the Respondent subsequently has an opportunity to justify the discriminatory practice (or practices) by availing itself of a defence provided under the *CHRA*, more specifically, in section 15. If there is a justification, there is simply no discrimination.

[66] Paragraph 15(1)(a) of the *CHRA* provides that it is not a discriminatory practice if "any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement". The facts provided in paragraph 15(1)(a) of the *CHRA* are *bona fide* occupational requirements if CPC can demonstrate that measures intended to respond to Mr. Brunskill's needs would impose undue hardship, considering health, safety and cost (see subsection 15(2) *CHRA*).

[67] At paragraph 28 of *Simpson-Sears*, the Supreme Court recalled the burden which an employer must meet in terms of accommodation and undue hardship. It mentions that the employer is required to demonstrate that it took reasonable steps to accommodate the employee without suffering undue hardship. This burden rests on the employer since it is the employer who will be in possession of the necessary information to show undue hardship. I completely agree with the point of view that complainants would rarely, if ever, have access to the employer's information in this regard.

[68] Accommodation short of undue hardship, or in other words reasonable accommodation, was the subject of a detailed analysis by Member Matthew D. Garfield, in his decision in *Croteau v. Canadian National Railway Company*, 2014 CHRT 16. I believe it is appropriate here to reproduce paragraph 44 of his decision in full:

> (1) The duty to accommodate is a multi-party obligation and exercise involving: the employer; the employee; and if applicable, the bargaining agent. I have written in this and other Decisions that the process should resemble a dialogue, not a monologue: *Jeffrey v. Dofasco Inc.*, 2004 HRTO 5, aff'd (2007), 230 OAC 96 (Div. Ct.). The employee may make suggestions as to his/her **preferences**, but must accept a reasonable solution (short of perfection) proposed by the employer addressing his/her **needs**. The outer limits are that of undue hardship, considering health, safety and cost,[10] or synonymously referred to as "reasonable accommodation": *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970. The duty to accommodate is neither absolute nor unlimited: *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, at para. 38;
>
> (2) *Renaud* also states that complainants have a duty to facilitate the accommodation process. In *Hutchinson v. Canada (Minister of the Environment)*, 2003 FCA 133, the Federal Court of Appeal held that where the employer proposes a reasonable accommodation, the complainant cannot insist on his or her preferred alternative accommodation, **even if the alternative would not create undue hardship**;
>
> (3) The goal is to address or accommodate the employee's needs in order that s/he is able to do the essential duties of his/her job. To that end, employers should be "innovative yet practical" and creative when considering how best this may be accomplished in each case: *British Columbia (Public Service Employee Relations Comm.) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin")*, at para. 64;
>
> (4) An employer does not have a "make-work" obligation of unproductive work of no value and doesn't have to change the working conditions in a fundamental way. However, it "does have a duty, if it can do so without undue hardship, to arrange

> the employee's workplace or duties to enable the employee to do his or her work.": *Hydro-Quebec v. Syndicat des employe-e-s de Techniques Professionnelles et al.,* 2008 SCC 43, at paras 16-18;
>
> (5) "Fairness in the accommodation process is not...limited to a fair assessment of the complainant's fitness for duty. Rather, the notion of fairness extends to all facets of the accommodation process . . . to the point of undue hardship." See *Day v. Canada Post Corporation*, 2007 CHRT 43, at para. 68; *Meiorin*, *supra*.
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> [Emphasis in original]

[69] It is in light of these precepts that I will analyze the established facts in this case.

V. Analysis

A. The Complainant and the Burden of Proof of His Case

(i) Does the Complainant have a prohibited ground of discrimination under the *Act*?

[70] As the Tribunal mentioned earlier, the Complainant cited disability as the prohibited ground of discrimination. As the Respondent confirmed in its final arguments, the alleged ground is not contested.

[71] The term "disability" is defined in section 25 of the *CHRA,* which states the following:

> ***disability*** means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug;

[72] As the decision in *Temple v. Horizon International Distributors*, 2017 CHRT 30, reminds us at paragraphs 38 to 40, the ground of "disability" has been subject to interpretation, most notably in *Audet v. Canadian National Railway*, 2005 CHRT 25, at para. 39 [*Audet*]. *Audet* reiterates the Federal Court of Appeal's interpretation of "disability" in *Desormeaux v. Corporation of the City of Ottawa*, 2005 FCA 31, at paragraph 15, and defines this term as "any physical or mental impairment that results in a functional limitation, or that is associated with a perception of impairment".

[73] In the specific case relating to Mr. Brunskill, his injury certainly fits this interpretation of disability.

(ii) Was the Complainant directly or indirectly differentiated adversely in the course of employment?

[74] For the following reasons, I believe that the Complainant was adversely differentiated in the course of employment.

[75] During the hearing, the Respondent tried to demonstrate that the Complainant was not adversely differentiated in the course of employment and therefore did not suffer any prejudicial impacts. In its final arguments, the Respondent maintained its position that the Complainant was not able to prove that he was adversely differentiated in the course of employment and that he had therefore failed to fulfill the second essential aspect of the analysis.

[76] CPC also cited *Simpson-Sears* and *Moore*, two key decisions concerning human rights, which most notably establish the applicable precepts for such matters and, more specifically, the applicable analysis for matters concerning discrimination. It explained that the first step is to determine whether the Complainant met his *prima facie* burden. As I mentioned earlier, I prefer to consider whether the Complainant met the burden of proof for his case rather than to refer to this idea of a *prima facie* burden.

[77] However, the Respondent briefly mentioned that when the Tribunal is required to decide whether the Complainant met the burden of proof of his case, it is limited to analyzing the evidence that the Complainant filed at the hearing (i.e. his testimony and his documents) and must set aside or disregard the evidence filed by the Respondent. In other words, the Tribunal should isolate the Complainant's evidence and, in light of this evidence alone, determine whether the Complainant met the burden of proof of his case. This is also consistent with CPC's position as set out in its statement of particulars (see for example paragraph 30).

[78] As I pointed out earlier, when the Tribunal is required to analyze the evidence filed during the hearing, it must analyze this evidence in its entirety, as a whole. *Simpson-Sears*

states that in order for a complainant to meet the burden of proof of his or her case, the complainant must:

> . . . show a *prima facie* case of discrimination. A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer.

[79] When I read this passage from *Simpson-Sears*, my understanding is that even if a respondent fails to provide an answer, the complainant is still required to provide the Tribunal with sufficient evidence in order to justify a verdict in the complainant's favour. I believe that this is just common sense. The evidence that a complainant must file at the hearing must be tangible and sufficient in order to allow the Tribunal to render a verdict in his or her favour. I would add that this is consistent with the balance of probabilities threshold, as recalled in *Bombardier*.

[80] This also means that if a respondent does not present any evidence and the complainant fails to present sufficient evidence during the hearing, the Tribunal could very well dismiss the complaint, because the burden of proof required for the case was not met on the balance of probabilities.

[81] That said, when the Tribunal considers the situation in this case in its entirety, it appears that between October 2013 and September 2014, Mr. Brunskill was adversely differentiated by CPC. The Tribunal will not endeavour to dissect each incident alleged by the Complainant or CPC in order to determine whether adverse differential treatment did in fact occur. On the whole, Mr. Brunskill was adversely differentiated in the course of employment.

[82] When Mr. Brunskill returned to work in accordance with the memorandum of settlement in March 2013, he was supposed to resume working as a letter carrier. However, due to the workplace injury that he had suffered, he could not resume his duties as a letter carrier. He informed CPC accordingly. CPC agreed to accommodate Mr. Brunskill and found him a position involving modified duties, working as a DRS Clerk at the facility in Malton. He started working in this position on March 20, 2013.

[83] Following a restructuring of CPC and the elimination of the DRS Clerk position held by the Complainant, the Complainant was left without a position as of September 13, 2013. He was therefore excluded from the workplace for a period of time while the Respondent tried to identify a position that would not only accommodate him but would also be compatible with his medical restrictions. During this period, he benefited from STD benefits.

[84] The Respondent quickly found him another position with modified duties, working as a VES Clerk. In order to remain in this position, Mr. Brunskill was required to complete some training and achieve specific objectives. As requested, the Complainant reported for training on September 30, 2013. Unfortunately, the Complainant was not able to achieve the necessary objectives in order to continue this training. By October 10, 2013, he once again found himself excluded from the workplace because CPC could not accommodate him.

[85] This situation remained unchanged until April 2014. On April 13, 2014, The Complainant's entitlement to short-term disability benefits expired. Mr. Brunskill remained excluded from the workplace because CPC had determined that it was not in a position to accommodate him.

[86] The Complainant applied for LTD benefits, but his application was denied by SunLife Financial on May 26, 2014. The Respondent had still not assigned him to any position, and he remained excluded from the workplace until September 2014. On September 10, 2014, CPC found him a position with modified duties that accommodated his medical restrictions. It is important to note that between April 14, 2014 and September 10, 2014 the Complainant was not assigned to any position, did not receive any salary paid by CPC and did not receive either STD or LTD benefits.

[87] On September 10, 2014, he started working in the position of Postal Services Clerk for the return to sender service in Port Credit. The Complainant left this position on October 24 2014. Indeed, an email which Mr. Brunskill filed in evidence (Exhibit C-6) shows that by October 24, 2014, he had essentially taken all leave available to him, including his annual leave, pre-retirement leave, personal leave and top-up credits.

Mr. Brunskill was therefore absent from the workplace between October 24, 2014, and January 26, 2015, the date he submitted his retirement notice.

[88] That said, CPC alleged in its closing arguments that the Complainant was not adversely differentiated in the course of employment. CPC tried to explain three of the specific situations referenced by the Complainant, namely, non-payment of salary while he was working in Port Credit in September and October 2014, his demotion to a part-time position, and the fact that the Complainant was allegedly forced to retire due to CPC's actions (constructive dismissal). I took the Respondent's submissions into consideration. However, I do not believe that it is necessary to dissect the evidence any further to conclude that the Complainant was adversely differentiated in the course of employment. Adverse differential treatment must be analyzed on a different basis.

[89] In this regard, it is important to remember that paragraph 7(b) of the *CHRA* stipulates that:

> **7** It is a discriminatory practice, directly or indirectly,
>
> . . .
>
> (b) in the course of employment, to differentiate adversely in relation to an employee,
>
> on a prohibited ground of discrimination.

[90] That said, an employer may present a defence under paragraph 15(1)(a) of the *CHRA*, which provides that "[i]t is not a discriminatory practice" if the "refusal, exclusion, expulsion, suspension, limitation, specification or preference" is based on a *bona fide* occupational requirement. In other words, the Tribunal can simplify the defence provided in paragraph 15(1)(a) of the *CHRA* as follows: An employer which refuses, excludes, suspends or limits or which imposes conditions or restrictions on an employee may be justified in doing so if it is able to demonstrate that there is an occupational requirement.

[91] If we read the defence provided in paragraph 15(1)(a) of the *CHRA* in conjunction with paragraph 7(b) of the *CHRA*, it seems evident to me that refusals, exclusions, suspensions, limitations, specifications or preferences are in fact situations which may

cause a complainant to suffer adverse differential treatment in the course of employment and which may nevertheless be justified if the employer is able to demonstrate the existence of occupational requirements.

[92] Based on the evidence filed during the hearing, it is the Tribunal's view that excluding Mr. Brunskill from his workplace in October 2013 constituted adverse differential treatment in the course of employment. It is important to remember that Mr. Brunskill was supposed to return to his position as a letter carrier in March 2013. However, due to his injury, he was unable to actually return to work in this position. When Mr. Brunskill informed CPC of this situation, it essentially agreed to accommodate him.

[93] In *Tahmourpour v. Canada (Attorney General of Canada)*, 2010 FCA 192, para 12 [*Tahmourpour*], the Federal Court of Appeal stated that, in order for adverse differential treatment to be considered discriminatory, it must be harmful, hurtful or hostile. During the hearing, Mr. Brunskill clearly indicated, without a doubt, how he welcomed the modified duties offered to him in Malton between the months of March and September 2013. It would be difficult for the Tribunal to consider this as an adverse treatment. It should be equally noted that CPC immediately accommodated him in March 2013 until September 2013.

[94] Unfortunately, the position was abolished and it was at that point that CPC located an alternate position that respected the medical limitations; that is, the VES position. It must be acknowledged that CPC still acted expeditiously in the circumstances. Once again, it is unfortunate that this was unsuccessful due to difficulties Mr. Brunskill encountered in completing the training.

[95] The Tribunal notes that, the situation began deteriorating and adverse differential treatment became apparent, following the complainant's failure to successfully complete the training and his subsequent exclusion from the workplace as of October 10, 2013 until the month of September 2014. Within this period of time, Mr. Brunskill was irrevocably excluded from the workplace as no other position was offered to him at CPC. It is, therefore, necessary for him to be eligible for STD benefits in order to meet his essential needs, while the respondent finds a position that respects his medical limitations.

[96] It is important to remember that the purpose of the *CHRA* is set out in section 2 of the *Act*:

> 2 The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on . . . disability . . . .
>
> 2 La présente loi a pour objet de compléter la législation canadienne en donnant effet, dans le champ de compétence du Parlement du Canada, au principe suivant : le droit de tous les individus, dans la mesure compatible avec leurs devoirs et obligations au sein de la société, à l'égalité des chances d'épanouissement et à la prise de mesures visant à la satisfaction de leurs besoins, indépendamment des considérations fondées sur […] la déficience […].
>
> [Emphasis added]

[97] In my opinion, a common meaning emerges from these two versions (English and French) of section 2 of the *CHRA,* that of allowing individuals to make for themselves the lives that they are able and wish to have.

[98] From October 10, 2013, while Mr. Brunskill was excluded from his workplace and his position as a letter carrier, he was not able to benefit from equal opportunities available to others to make a life that he was able and wished to have. Mr. Brunskill testified repeatedly that he wanted to return to work. On July 2014, he even proposed alternatives which, according to CPC, were not compatible with his medical restrictions. Moreover, when the employer offered him alternatives, Mr. Brunskill did not refuse them and went to work at various locations on the dates and times prescribed by the employer, such as when he was assigned to work in the position of a VES Clerk in September 2013, or in the position of a Postal Clerk for the return to sender service in Port Credit, in September 2014.

[99] In this regard, the Complainant made repeated references during the hearing to how much he suffered during all these months, beginning on October 10, 2013, waiting for

the Respondent to offer him a suitable position. In the Complainant's own words, his experience of the situation between himself and his employer was akin to a divorce, and again, to use his own words, he could not help but wonder how CPC could treat him so cruelly. Mr. Brunskill was able to demonstrate that he was prepared to return to work at any time. It is the Tribunal's understanding that working for CPC was an important part of Mr. Brunskill's life. I therefore believe that, CPC's treatment of Mr. Brunskill had harmful and hostile effects on him within the meaning of the Federal Court of Appeal decision in *Tahmourpour*.

[100] The adverse differential treatment becomes even more injurious as of April 14, 2014, when Mr. Brunskill was no longer receiving STD benefits or any other source of income. The Tribunal cannot ignore the harmful and hostile effects of the Complainant's situation following his exclusion from the workplace. In this regard, the Complainant testified about his financial difficulties, about the difficulties he experienced with housing and being able to feed himself and about his growing frustrations with his employer. He also sent a number of letters, for example, to union representatives, to inform them that he could not even afford to buy gas for his car to be able to drive to work, or to buy food to eat (see, for example, Exhibit C-5).

[101] In light of what has proceeded, how can the Tribunal say that Mr. Brunskill was not adversely differentiated by CPC between the 10th of October 2013 and September 2014? I am satisfied that the Complainant was able to demonstrate that he was adversely differentiated by CPC in the course of employment, by being excluding from the workplace, and that he suffered certain harmful and hostile effects as a result of this exclusion.

(iii) Was the prohibited ground of discrimination a factor in the adverse differential treatment he suffered in the course of employment?

[102] Since I have determined that Mr. Brunskill was adversely differentiated in the course of employment because CPC did indeed exclude him from the workplace, the Tribunal must now determine whether this adverse differential treatment was linked to a

prohibited ground of discrimination under the *CHRA*, in this case, disability. For the following reasons I believe that such a link does in fact exist.

[103] It is not necessary for the Tribunal to once again engage in a detailed analysis concerning the link between the adverse differential treatment in the course of employment and the prohibited ground of discrimination.

[104] It is my opinion that, given the circumstances, the link could not be any clearer. Mr. Brunskill was excluded from his workplace because he had suffered a back injury which prevented him from returning to his position as a letter carrier. In other words, the Complainant was no longer able to perform the duties related to the position of letter carrier, owing to his injury. For several months, the employer was in a position to accommodate the Complainant by assigning him to work in a position that was compatible with his medical restrictions (between March and October 2013), but ultimately, the Complainant found himself without a position as of October 10, 2013, and without a salary as of April 14, 2014. He was excluded from CPC's workplace for a single reason: his disability. Since the Respondent stated that it could not accommodate the Complainant, based on his medical limitations, the Complainant was required to stay at home, apply for STD benefits and wait for his employer to find him modified duties in a position that was compatible with his medical limitations. All of this would never have happened if he had not suffered the back injury that predated his return to work in March 2013.

[105] In conclusion, it is my opinion that Mr. Brunskill was able to meet the burden of proof of his case and that it is now necessary to analyze the Respondent's defence under paragraph 15(1)(a) and subsection 15(2) of the *CHRA*.

B. If the Complainant was able to meet the burden of proof of his case, was the Respondent able to meet its burden of proof concerning *bona fide* occupational requirements?

[106] Since the Tribunal has found that Mr. Brunskill met the burden of proof of his case, the onus now shifts to the Respondent to demonstrate that the Complainant's exclusion from the workplace was based on *bona fide* occupational requirements (BFOR), within the meaning of paragraph 15(1)(a) and subsection 15(2) of the *CHRA*. For the following

reasons, I find that CPC only partially met its burden concerning *bona fide* occupational requirements.

[107] Subsection 15(2) of the *CHRA* stipulates that:

> For any practice mentioned in paragraph (1)(a) to be considered to be based on a *bona fide* occupational requirement . . . it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.
>
> [Emphasis added]

[108] It is important to mention that in subsection 15(2), the *CHRA* explicitly explains how a respondent can demonstrate the existence of a BFOR. In this case, subsection 15(2) of the *CHRA* may be adapted to the circumstances as follows: Was CPC able to demonstrate that Mr. Brunskill's exclusion from the workplace was based on a *bona fide* occupational requirement, that is, was the Respondent able to demonstrate that the measures required to accommodate Mr. Brunskill's needs would impose undue hardship on CPC considering health, safety and cost?

[109] During the hearing, neither of the parties filed or discussed the decision rendered by the Supreme Court in *British Columbia (P.S.E.R.C.) v. BCGSEU*, [1999] 3 SCR 3 [*Meiorin*], which is nevertheless the leading authority on this subject. In their final arguments, they also failed to discuss the various steps of the analysis concerning the existence of a BFOR, as set out in that decision.

[110] However, I am well aware of the three-step analysis developed by the Supreme Court in *Meiorin,* because this decision is part of the Tribunal's Book of Authorities. To prove a BFOR, it must be demonstrated on a balance of probabilities that (1) the standard was adopted for a purpose rationally connected to the purpose of the job, (2) the standard was adopted in the honest belief that it was necessary to accomplish this legitimate work-related purpose, and (3) the standard is reasonably necessary to accomplish this legitimate work-related purpose. At this stage, it must be demonstrated that it was impossible to accommodate employees sharing the same characteristics as Mr. Brunskill without imposing undue hardship on the Respondent.

[111] Despite the existence of this analysis in *Meiorin*, I believe that subsection 15(2) of the *CHRA* is clear and specific. I may very well need to determine, after considering all of the evidence (see *Bombardier*, *supra*, particularly at para. 67), whether CPC demonstrated that the measures required to address Mr. Brunskill's needs would impose undue hardship on CPC considering health, safety and cost. It is important to remember that *Meiorin* incorporated provisions of the *British Columbia Human Rights Code* and that the language in that Code differs from the language in the *CHRA* regarding the concept of a BFOR. Like subsection 11(2) of the *Ontario Human Rights Code,* for example, the *CHRA* clearly sets out what needs to be demonstrated to substantiate a BFOR.

[112] That said, the Complainant and the Respondent focused more on the last aspect of the test in *Meiorin* and neglected to address the first two steps. As explained by the Supreme Court in *Moore*, *supra*, at paragraph 49, this last step requires an analysis of whether CPC demonstrated "that it could not have done anything else reasonable or practical to avoid the negative impact on the individual". In this context, a large part of the evidence heard by the Tribunal concerned this question of establishing whether CPC took all reasonable or practical measures that could be taken in order to avoid negative impacts for Mr. Brunskill.

[113] It goes without saying that *Meiorin* could be useful in different circumstances and apply in different cases, even before our Tribunal. For example, in a recent decision rendered in *Karimi v. Zayo Canada Inc. (formerly MTS Allstream Inc.)*, 2017 CHRT 37, Member Susheel Gupta used the three-step *Meiorin* analysis. In that same decision, the Member also relied on the Supreme Court's interpretation of undue hardship, the duty to accommodate and the unified approach for matters related to direct or indirect discrimination. Lastly, I also agree with this element of "good faith" which is explicitly included in the English version of "*bona fide* occupational requirements" and adopted in the analysis in *Meiorin,* particularly in step two of the analysis. My comments are not intended to suddenly exclude this analysis. *Meiorin* provides the basic test for a BFOR. That said, it is my opinion that this test must be adapted to the facts of the case.

[114] For example, in *Hutchinson v. Canada (Minister of the Environment)*, 2003 FCA 133 [*Hutchinson*], the Federal Court of Appeal (FCA) found, at paragraph 74, that the facts

could be distinguished from those in *Meiorin*, which is also true in the present case. Indeed, as in *Hutchinson*, the relationship between CPC and Mr. Brunskill was not dictated by a pre-existing policy or by an explicit pre-existing standard. As explained by the FCA, the relationship between the parties was instead based on:

> . . . a course of dealings in which the parties operate from an understanding of their respective rights and obligations. That understanding may have been rooted in rights guaranteed or obligations imposed by the collective agreement, the legislative scheme governing employment in the public service, human rights legislation, health and occupational safety legislation or departmental policies. It would be very difficult to extricate from this matrix a discrete coherent policy which one could subject to an orderly analysis as in *Meiorin*. This is not to say that the *Meiorin* analysis is not relevant to a course of conduct. But it does suggest that the analysis may have a different starting point.
>
> [Emphasis added]

[115] In the case at hand, neither Mr. Brunskill nor CPC filed a policy or pre-existing standard which, at first glance, would appear to be neutral, but would in fact result in a discriminatory situation. These facts can therefore be distinguished from the explicit minimum standard that was at issue in *Meiorin*. The circumstances are more in line with this idea of a course of dealings between the parties articulated in *Hutchinson*: this idea better reflects the situation involving Mr. Brunskill and CPC.

[116] When Mr. Brunskill returned to work on March 20, 2013, after signing the memorandum of settlement, he informed the Respondent that he could not perform the duties related to the position of letter carrier because of his injury but did not provide any medical documentation. Further to the information provided by Mr. Brunskill, CPC, accepted to transfer him in a position that would offer modified duties that were compatible with his needs.

[117] The modified duties associated with the position identified, namely, the position of DRS Clerk at the facility in Malton, were compatible with Mr. Brunskill's needs. Both the Complainant and CPC informed the Tribunal that this position was ideal. During this time, CPC referred the Complainant to GW/MS in order to identify his medical restrictions and

determine whether his need for accommodation was permanent or whether Mr. Brunskill could eventually return to his former position, that of a letter carrier.

[118] In August 2013, the Respondent received confirmation of the Complainant's medical restrictions. Luckily, the modified duties in the Complainant's assigned position at that time were in fact compatible with his limitations; the medical restrictions also confirmed that he could no longer return to his position as a letter carrier. Even though the Complainant's position was eliminated in September 2013, following a restructuring of the Respondent's services, which the latter had been aware would happen for quite some time, there is no evidence that the accommodation measures offered by CPC were provided in bad faith. I therefore find that for the period from March 2013 to September 2013, the Respondent was able to satisfy its duty to accommodate the Complainant.

[119] After the DRS Clerk position at the facility in Malton was eliminated, CPC quickly identified another position with modified duties for the Complainant, the position of VES Clerk. This position was compatible with his medical restrictions. Mr. Brunskill was required to participate in training, most notably in order to improve his keyboarding skills. He engaged in the accommodation and participated in the training as required. Unfortunately, he failed to achieve the objectives required to continue the training.

[120] The evidence shows that the Respondent also provided the Complainant with additional training to further develop his skills, but that these efforts proved to be in vain. The Complainant did not provide any evidence to refute these facts, nor does the evidence show that his disability was an issue in achieving these objectives. CPC sincerely believed that the modified position would meet the Complainant's needs and provided him with additional training to achieve the objectives for keyboarding skills. Unfortunately, the Complainant was not able to complete the training successfully. Therefore, he was once again excluded from the workplace while CPC worked on putting an appropriate accommodation measure in place. I therefore find that CPC did in fact satisfy its duty to accommodate at that time.

[121] Considering all the evidence, I find that it was after the Complainant failed to successfully complete the training associated with the VES Clerk position that the situation

became problematic, specifically, as of October 10, 2013. The evidence reveals that the Complainant filed a claim with GW/MS in order to obtain STD benefits. I understand that the Respondent asks its employee to obtain these benefits to minimize the impacts of an absence from work due to injury. It is true that the Complainant received his full salary while he was on STD benefits. That said, the Complainant's receipt of STD benefits does not relieve the employer of its duty to accommodate. In this regard, I find CPC's evidence to be particularly lacking. According to subsection 15(2) of the *CHRA*, the onus is on CPC to demonstrate that it could not have taken any other reasonable or practical measure to avoid adverse consequences for Mr. Brunskill. The Tribunal therefore finds that the Respondent did not meet its duty to accommodate, based on a balance of probabilities.

[122] In presenting its accommodation process, the Respondent relied almost entirely on the testimony of Ms. Petronis. Ms. Petronis has extensive experience within CPC, and the Tribunal must mention that her testimony was particularly credible and reliable. She was also personally involved in the Complainant's file and therefore had specific knowledge of the case.

[123] With respect to the accommodation process, Ms. Petronis mentioned in particular the existence of a committee (called the section 54 committee), which meets once a month to discuss all employees requiring accommodation. The objective of this committee is to establish permanent accommodation for employees with special needs, insofar as possible. This committee consists of members of CPC's management team, as well as local and regional union representatives who have received training on accommodation. Even though the committee meets only once a month, members of the committee can contact each other to discuss any situations that arise between meetings. This facilitates efforts to accommodate an individual as quickly as possible, and the situation can subsequently be discussed in greater detail during the next committee meeting.

[124] Ms. Petronis testified that the committee is nevertheless very effective in terms of being able to agree on the best solution to adopt for an employee with special needs. There were only a few situations where the committee was unable to reach a consensus. Ultimately, it is CPC which makes decisions concerning accommodation measures for an

employee. If the union representatives disagree with CPC, they can then file a grievance against the decision.

[125] It is important to remember that the Complainant was clearly excluded from the workplace from October 10, 2013, until September 10, 2014, a period totaling 11 months; CPC had required 11 months to identify a position with modified duties that could accommodate the Complainant's medical restrictions. The evidence reveals that between October 10, 2013, and April 13, 2014, and for a few days in September 2013, the Complainant received STD benefits. This disability period was promptly approved by GW/MS. However, Mr. Brunskill continued to be excluded from the workplace, and CPC did not offer him any accommodation measures. The situation became rather critical when the Complainant's STD benefits expired and then became urgent on May 26, 2014, when SunLife Financial denied his application for LTD benefits.

[126] The Tribunal agrees with the Respondent's position that in May 2014, after SunLife Financial denied his application for LTD benefits, it was reasonable to ask for an update of the Complainant's medical restrictions. It is the Tribunal's understanding that the Complainant's medical situation was deemed to be temporary and that an update was necessary. CPC was required to wait until July 14, 2014, before it was able to obtain additional information concerning Mr. Brunskill's medical situation, which did not in fact constitute an official update of his medical restrictions. Dr. Grewal instead mentioned that Dr. Matthew was away from the office and would be able to provide the requested information when he returned in August 2014. Mention was also made of two possible positions within CPC with duties the Complainant could perform. The Complainant's medical restrictions were only provided on August 26, 2014, and these restrictions turned out to be even more restrictive than those provided in August 2013.

[127] CPC tried to show that it was Mr. Brunskill who was responsible for delaying the accommodation process by failing to provide an update of his medical restrictions in a timely manner. CPC therefore determined that Mr. Brunskill did not cooperate with the accommodation process and that it should not be held responsible for the delay. The Tribunal is sceptical about this argument.

[128] The Tribunal is well aware of the fact that there was a period of time between April 14, 2014, when the Complainant's STD benefits expired, and May 26, 2014, when SunLife Financial refused to approve LTD benefits for the Complainant. There was also an interval of time between Dr. Grewal's letter, dated July 14, 2014, which not only suggested possible positions the Complainant could assume but also informed the Respondent that Dr. Matthew was away from the office until August 2014, and the receipt of the updated medical restrictions on August 26, 2014.

[129] Can all these delays be attributed to the Complainant, such that the Tribunal should conclude that he did not facilitate the accommodation process? (see *Croteau*, *supra*, at para. 44, which refers to *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970). I do not think so.

[130] The evidence reveals that when asked, Mr. Brunskill took the necessary steps to obtain an update of his medical restrictions. He was given a deadline of June 20, 2014, to provide an update of his medical restrictions. In all honesty, the deadline provided was too short (between late May 2014 and June 20, 2014), assuming that the person requiring accommodation needs to schedule an appointment with his or her physician, undergo a medical examination and wait for the physician to complete the requisite documentation, all in just a few days or weeks. GW/MS was also required to evaluate the situation, as it had always done. It takes time to accomplish these tasks.

[131] That said, on June 25, 2014, the Complainant informed his GW/MS disability case manager that his doctor was away and that he was going to try to make alternate arrangements. He was given an extension until July 3, 2014, an extension of 8 days. It was during this period that Mr. Brunskill allegedly had difficulty obtaining the requested information from his doctor, since the latter had refused to complete the necessary documentation. Even if the Tribunal was prepared to accept this vague evidence, does this situation automatically lead to the conclusion that the Complainant failed to facilitate the accommodation process, which would relieve the Respondent of any and all responsibility? Once again, I do not share this opinion.

[132] Altogether, the Complainant complied with CPC's requests. Ultimately, he was able to provide a letter from a doctor on July 14, 2014. Even though GW/MS and the Respondent were not satisfied with the contents of the letter because it did not provide an update of his medical restrictions, the Complainant did in fact take steps to comply with their requests. The Tribunal cannot consider this to constitute a lack of cooperation on the Complainant's part, especially since another doctor confirmed that his family doctor was away. Inevitably, additional delays would be incurred. The Tribunal cannot disregard these facts that were beyond the control of the Complainant, GW/MS and the Respondent. Given the circumstances, the Complainant was granted an extension until August 25, 2014, in the month that his family doctor was expected to return to his office. Finally, on August 26, 2014, the update of Mr. Brunskill's medical restrictions was received.

[133] It is my opinion that the delays in late May, June, July and ultimately August 2014 do not constitute a breach by the Complainant of his duty to facilitate the accommodation process.

[134] It is necessary to add that in its arguments, CPC also stressed the fact that it had been expecting Mr. Brunskill to provide an update of his medical restrictions and that this had therefore resulted in additional delays in the accommodation process. However, CPC was still in possession of the Complainant's medical restrictions provided by GW/MS and dated August 21, 2013. It is also important to remember that GW/MS also approved the Complainant's disability for a period of 30 weeks. It therefore determined that Mr. Brunskill's medical situation had remained the same, on an ongoing basis and without interruption, between October 2013 and April 2014, which therefore justified his absence from the workplace. GW/MS regularly approved the Complainant's disability during this period.

[135] It is therefore clear that between August 2013 and April 2014, Mr. Brunskill's medical restrictions remained unchanged and were confirmed by GW/MS on several occasions. Even though CPC requested an update of the Complainant's medical restrictions, it could still have relied on the medical restrictions dated August 2013 and confirmed until April 13, 2014, while it was waiting for the updated information to be

provided. The duty to accommodate is not time specific. It is an ongoing obligation. CPC should have continued to conduct job searches based on the information in its possession.

[136] In fact, Ms. Petronis testified that the search for an appropriate accommodation measure continued, despite the lack of an update, based on the existing medical restrictions that were already known. The Respondent also confirmed this fact in its final arguments. Therefore, CPC continued to conduct job searches based on the Complainant's existing medical restrictions. It is therefore the Tribunal's understanding that the existing medical restrictions remained useful and relevant to CPC in its efforts to continue searching for an appropriate accommodation measure for the Complainant after May 2014.

[137] I would add that Ms. Petronis also testified that CPC evaluated the two options suggested by Dr. Grewal in his letter dated July 14, 2014 (these options concerned the positions of DRS Clerk and MSC Driver), both of which were still based on the known medical restrictions on record, the same ones applicable between August 2013 and April 2014.

[138] The Tribunal finds it difficult to understand how CPC can, on the one hand, emphasize the delays caused by having to wait for an update of the Complainant's restrictions and then, on the other hand, present evidence showing that it ultimately continued to conduct job searches based on the Complainant's known medical restrictions, that is, the medical restrictions dated August 2013. The Respondent's arguments in this regard are very inconsistent.

[139] The evidence filed by CPC did not demonstrate that it tried to contact the Complainant before his STD benefits expired, in anticipation of the end of his benefits period, to ask him to provide an update of his medical restrictions. The evidence instead shows that CPC decided to send him the documents required to obtain LTD benefits. No one considered the possibility that Mr. Brunskill's application for LTD benefits could be denied. What did CPC plan to do in that case? There is no information on record that would allow me to conclude that CPC was proactive or that it anticipated the possibility that the Complainant's application for LTD benefits could be denied. The evidence shows

that an update of the medical restrictions was requested after SunLife Financial rejected the Complainant's application, sometime around late May 2014. The Tribunal was not left with the impression that the Respondent had anticipated this outcome. The various steps involved in the management of Mr. Brunskill's file and the accommodation process appear to have been followed mechanically, in a vacuum, without any overlap or anticipation in CPC's actions. The parties therefore found themselves in an information vacuum while waiting for the update to be sent.

[140] That said, it is also surprising that the Respondent did not submit more detailed evidence concerning undue hardship. CPC's evidence essentially indicated that there were only 20 positions for DRS Clerks in the Greater Toronto Area; these positions would have accommodated Mr. Brunskill's medical restrictions. Ms. Petronis' testimony in this regard was that there had not been any DRS Clerk positions available in the region at the time, and that's it. CPC did not file any other information on other types of positions available within CPC, sedentary or not, that had been evaluated. CPC did not provide any evidence that, during the 11-month period that the Complainant was excluded from the workplace, none of its employees took retirement or sick leave, left the company or were dismissed, particularly in respect of positions that are relatively sedentary and which could have accommodated the Complainant's needs.

[141] During the hearing, CPC also failed to present other alternatives that could have been contemplated by the committee and its members, most notably administrative tasks or positions available outside the Greater Toronto Area. Furthermore, CPC did not file evidence concerning the costs that it would have had to incur to consider some of these alternatives. It also neglected to present any evidence concerning major health and safety issues. When compared, for example, to the information on steps taken and the evidence filed by Hydro-Québec in *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, CPC's evidence concerning undue hardship is lacking if not virtually non-existent.

[142] The Tribunal was also particularly struck by the testimony of Ms. Petronis, who mentioned during her testimony that, in a way, CPC assumes that employees who require accommodation want to remain in the vicinity of their residence. If that is in fact the case, it

says a lot about CPC's approach to its duty to accommodate. Even though CPC was aware that the Complainant had been excluded from the workplace since October 10th, 2013, CPC did not feel it necessary to evaluate the possibility of offering him a position outside Toronto. How can such an assumption be made without actually asking the employee concerned? The Tribunal finds that CPC's approach to its duty to accommodate was rigid and closeminded.

[143] Furthermore, the Tribunal cannot ignore the fact that Mr. Brunskill was, to put it bluntly, completely excluded from CPC's accommodation process. The evidence shows that the Complainant was never involved in CPC's accommodation process in any way whatsoever. Ms. Petronis did not say that the Complainant participated in discussions with the employer. Mr. Brunskill also testified that he was left in the dark about the process and about developments in his file. He had difficulty obtaining updates and information from the employer. He demonstrated on several occasions that once he was excluded from the workplace, he was never sure who he was to report to. According to the evidence on record, he remained in contact with union representatives. This was even more apparent when Mr. Brunskill testified that he had agreed to go to Port Credit in order to have a foothold within CPC so that he could personally identify appropriate positions that were compatible with his needs, particularly by consulting the jobs board. This only confirms that CPC keeps employees who have been excluded from the workplace and are waiting for accommodation measures in the dark.

[144] CPC's approach increases the vulnerability of employees who need accommodation, at a time when these individuals already find themselves in a vulnerable situation, because of their specific needs. It is important to remember that the case law clearly indicates that the accommodation process involves multiple stakeholders, including the employer, the employee and the bargaining agent, if applicable. The process should be more akin to a dialogue than a monologue (*Croteau, supra*, at para. 44). Even though CPC engaged in discussions with union representatives, particularly in the section 54 committee, the employee was clearly excluded from these discussions. The employee is central to the accommodation, and yet he was not involved in any dialogue with the other parties involved. The Tribunal finds this inconceivable. CPC testified that it assumes that

employees with special needs want to remain close to home. If the employee had been involved in discussions, such an option could actually have been considered, rather than having CPC rely on speculation or assumptions based on generalizations.

[145] The Tribunal is aware that the employer is best positioned to identify an accommodation measure. The case law is also clear that the employee may propose options but cannot insist on an alternative accommodation (see for example *Hutchinson*, *supra*). Moreover, the employer is not required to fundamentally change working conditions. As stated by the Supreme Court in *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, at paras. 16 and 17:

> [16] The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.
>
> [17] Because of the individualized nature of the duty to accommodate and the variety of circumstances that may arise, rigid rules must be avoided. If a business can, without undue hardship, offer the employee a variable work schedule or lighten his or her duties — or even authorize staff transfers — to ensure that the employee can do his or her work, it must do so to accommodate the employee. Thus, in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, [2007] 1 S.C.R. 161, 2007 SCC 4, the employer had authorized absences that were not provided for in the collective agreement. Likewise, in the case at bar, Hydro-Québec tried for a number of years to adjust the complainant's working conditions: modification of her workstation, part-time work, assignment to a new position, etc. However, in a case involving chronic absenteeism, if the employer shows that, despite measures taken to accommodate the employee, the employee will be unable to resume his or her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship.

[146] Ultimately, the onus lies on CPC, as the employer, to demonstrate that it could not have taken any other reasonable or practical measure to avoid negative consequences for Mr. Brunskill (see for example *Moore*, *supra*, at para. 49 and *Simpson-Sears*, *supra*, at para. 28). For the reasons set out above, I find that CPC failed to meet its duty to

accommodate between October 10th, 2013 and September 9th, 2014. However, when CPC offered Mr. Brunskill the position of Postal Clerk in Port Credit, starting on September 10, 2014, I find that it satisfied its duty to accommodate.

[147] As stated earlier, the employee may propose options but cannot insist on an alternative accommodation. CPC was well aware that the position that was being offered to the Complainant was a part-time one. It explained to the Tribunal that it had intended to continue looking for a full-time position that would accommodate the Complainant's needs. The evidence even reveals that CPC and GW/MS took steps to determine whether Mr. Brunskill's medical restrictions were permanent. I therefore find that the Respondent proposed this option in good faith.

[148] That said, the accommodation only lasted for approximately a month and a half, because in mid-October 2014, Mr. Brunskill decided to take all his personal leave, vacation time, preretirement leave, etc., and no longer report for work. As explained earlier, the modified duties in this position were the last straw. The Complainant was angry and sincerely believed that CPC was trying to demote him or force him to take retirement.

[149] It is important to note that the Complainant was already angry before his decision to take retirement. Throughout Mr. Brunskill's testimony, this perceived injustice and breach of trust by CPC was readily apparent. I am sensitive to the fact that the Complainant had been waiting for accommodation since October 2013. I understand that he had difficulty contacting CPC and felt excluded and betrayed, and it is impossible for the Tribunal to ignore the financial difficulties that he faced.

[150] It appears that the relationship between Mr. Brunskill and CPC was already strained when he returned to work in March 2013. Even though it was not within the scope of the complaint, I heard Mr. Brunskill's testimony concerning events that occurred before March 2013, including his dismissal. A grievance was filed, and the parties reached an agreement, hence the signing of a memorandum of settlement. Even though I cannot take a position on what happened before that date, it is clear to me that this had already affected the employment relationship between Mr. Brunskill and CPC. Nevertheless, I must analyze the evidence that was filed during the hearing and the conduct of the parties

between March 2013 and January 2015. I find that the accommodation offered by CPC on September 10, 2014, was reasonable, even though the modified duties were linked to a part-time position. The evidence does not support the Complainant's theory that the Respondent was trying to demote him in violation of the collective agreement in effect. The option was not perfect, but it was reasonable (see for example *Moore*, *supra*).

[151] Mr. Brunskill also tried to provide evidence that CPC, though its actions, forced him to take retirement. I do not share that opinion. I believe that it was unfortunate that the Respondent was not able to find appropriate accommodation for the Complainant before September 2014. In this regard, I found that CPC failed to meet its burden to provide reasonable accommodation between October 10th, 2013 and September 9th, 2014. However, this does not mean that CPC was unable to subsequently correct the situation. Although belatedly, it was finally able to find modified duties for the Complainant in a position that was compatible with his medical restrictions. The Tribunal cannot overlook that fact.

[152] Mr. Brunskill's decision to take all his leave and leave CPC was somewhat hasty. I agree with the Respondent that it was somewhat unreasonable. Even though the solution was not perfect, Mr. Brunskill was back in the workplace, in a position which was compatible with his medical restrictions. At the very least, he was able to engage in meaningful work in exchange for a salary, even though this salary was not based on a full-time position.

[153] The evidence also reveals that Mr. Brunskill's payslip dated October 23, 2014, indicated that his net pay was negative. The Tribunal has already explained why the net pay for this period was negative. This scenario played out again when the payslip dated November 6, 2014, indicated that his net pay was $177.54. That said, I can understand why Mr. Brunskill was concerned and why he panicked when he saw these payslips. Who would not be? That said, CPC tried to minimize the impacts of this situation by giving him an advance of $1,000 (Exhibit R-1, table 17). However, Mr. Brunskill had already left his position and had taken steps to liquidate all his available leave, so that he could retire in January 2015.

[154] I agree with the Respondent that it was Mr. Brunskill's personal decision to leave CPC. The evidence does not support the theory that CPC tried to demote him or force him to take retirement. Even though I cannot disregard the fact that Mr. Brunskill was experiencing a range of emotions, I believe that it would have been beneficial for him to show perseverance. By taking all his leave and retiring, the Complainant excluded himself from the accommodation process. In mid-October 2014, Mr. Brunskill withdrew from the workplace, so CPC was no longer able to continue efforts to accommodate him. I must reiterate that the proposed option in Port Credit was not perfect, but it was, all in all, reasonable under the circumstances. I also cannot disregard the fact that CPC provided the Complainant with a monetary advance to minimize the effects of setting off the overpayments. This could have appeased the Complainant, but it was already too late: he was already in the process of liquidating his leave.

VI. Remedies

[155] Since I have determined that CPC was not able to demonstrate that Mr. Brunskill's exclusion from the workplace was based on a *bona fide* occupational requirement within the meaning of paragraph 15(1)(a) and subsection 15(2) of the *CHRA*, more specifically between October 10th, 2013 and September 9th, 2014, it is now necessary for the Tribunal to determine the appropriate remedies under subsections 53(2), (3) and (4) of the *CHRA.*

[156] First, the evidence shows that between October 10, 2013, and April 13, 2014, the Complainant received STD benefits. The evidence reveals that the STD benefits amounted to 70% of his salary and that he was able to increase his benefits to 100% of his salary by applying top-up credits. In other words, for the aforementioned periods, Mr. Brunskill received the full amount of his salary.

[157] I agree with the Respondent's position that in this particular case, Mr. Brunskill did not suffer any lost wages. Compensating the Complainant for these periods would therefore constitute double recovery. I would add that if the Tribunal had found that the Complainant should be compensated for lost wages, the Tribunal would have had to determine the date on which CPC was found to have failed to meet its burden with regard

to *bona fide* occupational requirements. In this case, since I have found that the Complainant was not deprived of his wages within the meaning of paragraph 53(2)(c) of the *CHRA* during these periods, it is not necessary for the Tribunal to determine this exact date.

[158] However, from April 14, 2014, I find that the Complainant must be compensated for the wages of which he was deprived. CPC asked the Tribunal not to find it liable for the Complainant's lost wages, particularly for this period in 2014, since the Complainant did not cooperate with the accommodation process. I reject this argument for the reasons given above.

[159] That said, Yannick Daoust, who is employed in CPC's pension centre, filed a table at the hearing that presented highly relevant information, including the wages which Mr. Brunskill would have received in 2014 (Exhibit R-2). His wages in 2014 would have amounted to $55,077.00. Since the Tribunal has found that CPC did not fulfill its duty to accommodate between April 14, 2014, and September 10, 2014 inclusively, the Complainant is entitled to wage compensation equivalent to 107 days of work, which amounts to $16,145.86, in accordance with paragraph 53(2)(c) of the *CHRA*.

[160] With respect to other benefits of which Mr. Brunskill may have been deprived during that same period, for example, amounts linked to his retirement pension, the Tribunal's understanding of the evidence, and as CPC itself stated repeatedly at the hearing, is that Mr. Brunskill was considered to be a full-time employee, even though he had been excluded from the workplace. Consequently, he should not have lost any benefits as a result of this exclusion. The Tribunal has little information in this regard, and even though it was prepared to compensate the Complainant for benefits of which he may have been deprived, including his retirement pension, Mr. Brunskill bore the burden of proving these damages. I find that the evidence provided in this regard was insufficient and does not allow me to order this type of compensation.

[161] The Complainant also failed to file sufficient evidence concerning the potential bonus that he could have received if he had been assigned to a position, particularly as a letter carrier. Consequently, I cannot order this type of compensation.

[162] Since CPC was able to fulfill its duty to provide reasonable accommodation as of September 10, 2014, I will not order any compensation after that date. Since I also concluded that Mr. Brunskill was not forced into taking retirement, it is not necessary for me to conduct an analysis concerning potential and future lost wages or the issue of mitigation of damages.

[163] Mr. Brunskill also requested $20,000 for pain and suffering as well as $20,000 for the Respondent's wilful and reckless conduct (under paragraph 53(2)(e) and subsection 53(3) of the *CHRA*). I therefore award the Complainant $12,000 for pain and suffering and $10,000 in special compensation for the Respondent's reckless conduct.

[164] With respect to pain and suffering, I have mentioned a number of times the various emotions which Mr. Brunskill experienced and which he also described in his testimony: frustration, anger, confusion, etc. His experience of the breakdown in his employment relationship with CPC was akin to a divorce. The word "divorce" is significant in the circumstances. Mr. Brunskill had been employed by the company since 1992. CPC was the Complainant's employer for a major part of his life. This feeling of abandonment by the employer had an impact on the Complainant and caused him to suffer harm. Throughout his testimony, I was able to see that the Complainant felt rejected and abandoned by his employer. During the hearings, he had difficulty containing his anger, and the Tribunal had to intervene several times to calm him down.

[165] That said, this is not one of the most determinative elements in the decision to compensate Mr. Brunskill for pain and suffering. It is important to mention that as of April 14, 2014, the Complainant was left without income. He testified that he did not even have enough money for transportation, to pay for housing-related costs, to put gas in his car, to feed his pets and, most importantly, to buy food for himself. The evidence in this regard was not contradicted by CPC. Mr. Brunskill "starved to death" during the weeks that he did not have any income. He was isolated and lost a lot of his property; he even had to get rid of certain documents that supported his claims in this complaint. How could the Tribunal fail to consider all these elements as being harmful? The Respondent was unable to refute these allegations. Considering the Complainant's suffering, the Tribunal awards

him compensation for pain and suffering in the amount of $12,000 under paragraph 53(2)(e) of the *CHRA*.

[166] With respect to special compensation, it is evident to the Tribunal that the situation became particularly urgent on April 14, 2014, when the Complainant stopped receiving his salary. The Respondent was aware of the situation, as was the union. The Respondent demonstrated a lack of sensitivity in this case, most notably by not being proactive and innovative in its attempts to find appropriate accommodation. CPC is a large institution which manages many employees. It does not need a Tribunal to remind it of its duty to accommodate. CPC should have known that by excluding Mr. Brunskill from the workplace, failing to involve him in discussions that concerned him and keeping him in the dark, CPC was acting unjustly and unfairly.

[167] I would add that CPC should also have been fully aware that the duty to accommodate requires a creative approach and further requires all the parties concerned to be involved in the process (the employer, the employee and the union, if applicable). The process should not be based on assumptions or speculation by either its employees or management. It was astonishing to hear Ms. Petronis say that CPC assumes that employees who need accommodation want to work close to their place of residence. Would it not make more sense for CPC to simply ask the employees requiring accommodation whether this is in fact the case? I consider this to be reckless conduct by the Respondent. For these reasons, the Tribunal awards the Complainant $10,000 in damages for CPC's reckless conduct, under subsection 53(3) of the *CHRA*.

[168] The Tribunal has the necessary discretion to award interest on damages. For the lost wages, I award simple interest calculated on a yearly basis at the Bank Rate (monthly series) established by the Bank of Canada, in accordance with subsection 53(4) of the *CHRA* and Rule 9(12) of the *Canadian Human Rights Tribunal Rules of Procedure* (03-05-04). This interest shall be calculated from April 14, 2014.

[169] With respect to the compensation for pain and suffering and special compensation, I award simple interest calculated on a yearly basis at the Bank Rate (monthly series) established by the Bank of Canada, in accordance with subsection 53(4) of the *CHRA* and

Rule 9(12) of the *Canadian Human Rights Tribunal Rules of Procedure* (03-05-04). This interest shall be calculated from October 10, 2013.

VII. Decision

[170] For these reasons, the Tribunal finds that Mr. Brunskill's complaint is partially substantiated.

[171] The Tribunal therefore orders CPC to pay Mr. Brunskill the amount of $16,145.86 for lost wages, under subsection 53(2)(c) of the *CHRA*;

[172] The Tribunal further orders CPC to pay Mr. Brunskill the amount of $12,000 for pain and suffering and the amount of $10,000 as special compensation for reckless conduct, under paragraph 53(2)(e) and subsection 53(3) of the *CHRA;*

[173] The interest awarded shall be simple interest calculated on a yearly basis at the Bank Rate (monthly series) established by the Bank of Canada, in accordance with subsection 53(4) of the *CHRA* and Rule 9(12) of the *Canadian Human Rights Tribunal Rules of Procedure* (03-05-04). Interest shall be calculated from October 10, 2013, for pain and suffering and special compensation. For lost wages, interest shall be calculated from April 14, 2014.

Signed by

Gabriel Gaudreault
Tribunal Member

Ottawa, Ontario
May 17, 2019

English version of the Member's decision

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2224/4617

Style of Cause: Glenn Brunskill v. Canada Post Corporation

Decision of the Tribunal Dated: May 17, 2019

Date and Place of Hearing: September 11 – 14, 2019

Brampton, ON

Appearances:

Glenn Brunskill, for himself

No one appearing for the Canadian Human Rights Commission

Stephanie Sangster, for the Respondent