Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2019 CHRT 16
Date: April 18, 2019
File No.: T2162/3616

[ENGLISH TRANSLATION]

Between:

Serge Lafrenière

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Via Rail Canada Inc.

Respondent

Decision

Member: Anie Perrault

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I. INTRODUCTION / COMPLAINT / BACKGROUND

[1] On November 30, 2012, Serge Lafrenière (the Complainant) filed a complaint under the *Canadian Human Rights Act* (*CHRA*) against Via Rail Canada Inc. (the Respondent).

[2] On August 22, 2016, after investigation, the Canadian Human Rights Commission (the Commission) referred the complaint to the Canadian Human Rights Tribunal (the Tribunal) for inquiry under section 7 of the *CHRA*.

[3] In essence, the Complainant says he was treated differently and had unfairly incurred penalty points in his disciplinary file, all of which led to his dismissal on October 5, 2012. The ground of discrimination alleged in this case, and upheld by the Tribunal, is disability (mental health impairment).

[4] Several preliminary motions were filed during case management, including a motion to strike, a motion to amend, two motions to disclose, and a motion for a medical assessment. I issued a written ruling for each motion (and written guidelines on one occasion). To understand the background of the case, it is important to read each of these rulings.[1]

[5] Lastly, following the rulings on these preliminary motions, I established that the Tribunal would review three incidents that led to penalty points in the Complainant's disciplinary file and his ultimate dismissal.

[6] The hearing in this case lasted 13 days, spread out over a four-month period from May 28 to October 1, 2018. It was suspended a few times to rule on new motions (motion to file a medical assessment, motion to dismiss the medical expert's report, etc.). I also had to address several objections. Lastly, we rescheduled twice because a witness was too ill to attend. The last witness in this case was finally heard on October 1, 2018.

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[1] Lafrenière v. Via Rail Canada Inc., 2017 CHRT 9
Lafrenière v. Via Rail Canada Inc., 2017 CHRT 12
Lafrenière v. Via Rail Canada Inc., 2017 CHRT 29
Lafrenière v. Via Rail Canada Inc., 2017 CHRT 38
Lafrenière v. Via Rail Canada Inc., 2018 CHRT 19

[7] The Commission was a full participant in the hearing.

[8] After consulting the Tribunal, it was decided that the parties would make their final submissions in writing, which they did in fall 2018. On December 21, 2018, the Commission made its final arguments in response to a new point raised in the Respondent's written submission, and the Respondent's final comments were received on January 18, 2019.

[9] I went into deliberation on January 21, 2019.

[10] Of the three incidents that led to penalty points in the Complainant's disciplinary file and his ultimate dismissal, I find that there was no discrimination in the first two incidents but that there was in the third.

II. PRELIMINARY ISSUES RAISED AT THE HEARING

[11] Two main objections were raised at the start of the hearing: one by the Respondent (to the filing of medical notes by the Complainant); the other by the Complainant and the Commission (to having an expert in the hearing room, and to the Respondent's request to file an expert report after the Complainant had testified).

[12] I ruled on each objection, and it is important here to recap my rulings from the hearing's first day.

[13] First, I dismissed the Respondent's objection to the filing of medical notes. Such notes may be filed with the Tribunal as evidence even if the doctor who signed them does not testify. While I agree that it is best not to rely solely on such sources, the *CHRA* allows such notes to be admitted as evidence. However, my task will be to weigh this evidence at the proper time—i.e. when determining whether a *prima facie* case of disability has been made, which I will do later in this decision.

[14] I upheld the Complainant's and the Commission's objections to having the Respondent's expert present during the Complainant's testimony, and to the Respondent's last-minute request that an expert report be provided once the Complainant's full testimony had been heard.

[15] I suspended the hearing for two days so the Respondent could file its expert report prior to the Complainant's testimony and ensure the rules of procedural fairness and natural justice were followed, at least in spirit. They had clearly not been followed to the letter, as such a report should have been issued before the hearing (at the case management stage) so the Complainant and the Commission could file a counter-opinion if necessary (Rule 6, CHRT *Rules of Procedure*). However, to ensure the Respondent had a chance to rebut the Complainant's evidence, I gave it two days to file an expert report, which it did.

[16] The Complainant's testimony began when the hearing resumed two days later. In the hours that followed, the Complainant and the Commission each filed a motion to dismiss the expert report (i.e. make it inadmissible). After setting a timeframe for all parties to make written submissions, and without disrupting the Complainant's testimony, I issued a written decision on the motions a few days later. The decision is available here. In brief, I granted the motion of the Complainant and the Commission and dismissed the Respondent's expert report, for the following reasons:

> After reading the expert report served on the parties and the Tribunal by the Respondent, and after reading the emails and documents exchanged between counsel for the Respondent and the expert in question, I conclude that the expert report submitted by the Respondent does not meet the criteria defined by the Supreme Court in *Mohan* and *White Burgess* such that it is not admissible within the meaning of paragraph 50(3)(c) of the *CHRA*. More specifically, the Tribunal considers the report submitted by the Respondent is not relevant, necessary, impartial or independent. Moreover, the Tribunal concludes, based on a cost-benefit analysis, that the probative value of this evidence is overborne by its prejudicial effect.
>
> The expert's report is not based on all the documents submitted and disclosed in this case, but only on some of them, those submitted by the Respondent. The text of the document is clearly unbalanced. It is not independent and does not seem to be free from the Respondent's influence. Moreover, without dwelling on it, it seems to me that it is not objective or unbiased, in the sense that it seems to clearly favour one party over the other. To conclude, this report does not aim to assist the Tribunal; instead, it serves the Respondent.
>
> For these reasons, the Tribunal allows the two motions, that of the Commission and that of the Complainant, to dismiss the expert report.

[17] At this point, we were able to continue the hearing without further motions or major objections.

III. THE FACTS

[18] The Complainant started working for the Respondent on May 29, 2000, and was dismissed on October 5, 2012.

[19] The Complainant worked in various capacities for the Respondent, including telephone sales agent, ticket agent, station attendant, baggage handler, porter, and, lastly, red cap captain. All positions were unionized.

[20] From the start of his employment to September 2011, the Complainant accumulated no penalty points in his disciplinary file. He was what might be called a model employee, with a spotless, problem-free record. The Respondent confirmed at the hearing that it had had no problem with the Complainant over this long period of 11-plus years. The Complainant's testimony included letters of commendation from clients, superiors, and even the Respondent's president and CEO.

[21] And then three incidents occurred in just over a year (September 2011, October 2011, and September 2012), resulting in 125 penalty points in the Complainant's disciplinary file and the end of his employment with the Respondent.

[22] The Respondent's rules of employment (collective agreement) state that more than 60 penalty points in a disciplinary file mean automatic dismissal, which happened to the Complainant on October 5, 2012.

[23] The Tribunal reviewed the three incidents at the hearing to see if discrimination had occurred or the *CHRA* had been violated.

[24] At the time of each incident, did the Respondent show discrimination? Did the Complainant have a disability? If so, was it a factor?

[25] Before answering these questions, I will describe and analyze each incident.

A. First incident — September 24, 2011

[26] The first incident, which occurred on September 24, 2011 at the Complainant's place of employment, was a physical altercation between the Complainant and another employee (in this case his former spouse, who, as a station manager, was the Complainant's superior).

[27] After an internal investigation by the Respondent, both employees received 25 penalty points.

B. Second incident — October 26, 2011

[28] On October 26, 2011, while off duty, the Complainant went to one of the Respondent's workplaces (phone sales office) to give a key to a colleague. He had his dog with him. As employees were not allowed to bring dogs to work, a security guard and the team leader asked him not to enter. The Complainant did not heed the instructions and consequently received 10 penalty points.

[29] In November 2011, the Complainant had accumulated 35 penalty points on his file. He was not involved in other incidents and incurred no further penalty points until September 2012, some 10 months later.

[30] Between 2010 and 2012, other workplace incidents occurred that did not result in penalty points but involved the Complainant in one way or another. Though I did not view these incidents as sources of discrimination (ruling on motion to strike, March 30, 2017), I let the Complainant describe them in his testimony to help provide some background. There was no need for evidence or rebuttal. I point this out so the parties understand that I will not explore these incidents in detail.

[31] However, I should point out that the Complainant's doctor advised him to take more than three months off work (March to June 2012) for what seems, based on the March 2012 medical note used in evidence, to have been adjustment disorders, anxiety, depression, and emotional dependency.

C. Third and final incident — September 14, 2012

[32] On September 14, 2012, the Complainant had an incident with a customer that led to two investigations, 90 penalty points and his dismissal. Here is a detailed account:

[33] On Friday September 14, 2012, the Complainant worked at Montreal Central Station from 2:00 p.m. to 10:00 p.m. It was his last shift before testifying on Monday, September 17, 2012, in a criminal case about events at the Respondent's premises that had included death threats. He also had to testify the day after (September 18) in a case that involved his former spouse but did not directly involve the Respondent.

[34] In the late afternoon of Friday September 14, the Complainant met with his supervisor to discuss concerns about the testimony he was to give on Monday.

[35] The Complainant testified at the hearing that he had met with his supervisor, Maryse Giguère, in three stages.

[36] First, while meeting alone with Ms. Giguère, he raised concerns about testifying on the following Monday in a case involving death threats against him. As he noted in his testimony:

> [Translation] I told her that since the person who threatened me knew where I worked, I was afraid he would come after me at the station to keep me from testifying. Since I was off work for the weekend of September 15 and 16 and in court on September 17, I knew he could only get to me on September 14. I told Maryse that recent incidents with fraudsters had left me stressed and anxious and that I hadn't slept well lately. . . .

[37] Two other people joined the phone conversation at Ms. Giguère's suggestion—Fern Breau and Marc Tessier, Via Rail security and safety advisors. The Complainant says this was meant to reassure him that there were effective procedures for his testimony in the criminal file and that he was safe at work.

[38] The Complainant says the meetings did not reassure him. However, in a handwritten note dated September 28, 2012 and filed at the hearing, Ms. Giguère said that they had.

[39] Unfortunately, Ms. Giguère could not testify at the hearing as she was on sick leave. The hearing was suspended twice in the hope that she could, since her testimony was crucial. We thus have only the Complainant's version of events as we could not ask Ms. Giguère direct questions about the meetings or the handwritten note.

[40] However, Ms. Giguère's supervisor, Christian Bergeron, attested to what he knew of the September 14 meeting between the Complainant and Ms. Giguère. Mr. Bergeron said the Complainant had shown no sign of fear, stress, or anxiety about his September 17 testimony but seemed only to want to know that he would be docked no pay for his absence. He testified that the Complainant had said he was reassured by the meetings and was fully capable of working his shift.

[41] The Complainant returned to work after his meetings with Ms. Giguère. Despite the mental state he claimed to be in, he did not ask his supervisor for time off.

[42] In the evening when a train had arrived from New York, the Complainant carried a customer's luggage out to a taxi stand. He then allegedly asked for a tip, in clear breach of Via Rail's code of conduct. When the customer replied that he had no cash, the Complainant is said to have picked the luggage back up and headed inside the station. An altercation ensued as the customer tried to take back his luggage. Videotapes of this were entered as evidence at the hearing.

[43] There is no doubt that an altercation occurred, though the two parties give widely divergent accounts of it.

[44] Though the customer did not file a complaint, two security officers (not employed by Via Rail) witnessed and reported the incident.

[45] After an investigation, the Complainant incurred 90 penalty points for the incident (tip solicitation/physical altercation with a customer). Based on total accumulated penalty points, his employment was terminated on October 5, 2012.

[46] The Complainant's union filed grievances against the decision to add 90 penalty points to his file. Arbitrator Michel G. Picher ruled on the matter on May 20, 2014,

upholding both the penalty points and the Complainant's dismissal. Neither the union nor the Complainant appealed.

IV. LEGAL ISSUES RAISED

[47] In reviewing this case, I addressed the following legal issues:

A. Does the CHRT have jurisdiction to rule on this matter given that the Arbitrator made a final decision on May 20, 2014?

If so,

B. For each incident that resulted in penalty points in the Complainant's file, was there discrimination as defined in the *CHRA*?

    i. Did the Complainant show that he had a characteristic protected from discrimination under the *CHRA* (in this case, a disability) at the time of each incident?
    ii. Did the Complainant suffer adverse effects (penalty points, dismissal, etc.)?
    iii. Was the protected characteristic (disability) a factor in decisions that led to these effects?

C. If a *prima facie* case of discrimination is established by the complainant for any of the incidents, has the Respondent established a defence under the *CHRA* justifying its discriminatory practice?

V. ANALYSIS

A. Jurisdiction of the Tribunal

[48] In its written submission, for the first time in these proceedings, the Respondent questions the Tribunal's jurisdiction in this matter and uses the argument of estoppel.

[49] This is an important legal issue that should have been raised at the start of proceedings. The Respondent could have filed a preliminary motion to address it, or raised it at the hearing, but did not. Its timing—raising it in its final submission— is surprising, if not doubtful.

[50] That said, I feel the Tribunal has jurisdiction to rule on issues raised in this case without undermining the arbitrator's decision of May 20, 2014.

[51] This case does not involve re-examining grievances or reviewing legal issues raised in a labour law case, but rather determining whether there was discrimination as defined in the *CHRA*. I feel I have jurisdiction in this matter for the reasons below.

[52] First, the Tribunal is not a forum to appeal or review the Commission's ruling to refer the complaint to it (s. 49, *CHRA*). The Respondent could have appealed by applying to the Federal Court for judicial review at the time of the Commission's ruling (August 2016) but chose not to.

[53] The Commission's grounds for having the Tribunal hear the complaint in August 2016 were as follows:

> [Translation]
>
> . . . There is another question: Did the Respondent know, or should the Respondent have known, whether the Complainant, who had no disciplinary record for years but accumulated multiple penalty points within a short time, had a mental illness requiring accommodation?
>
> The Respondent's submissions note that the arbitrator had the Complainant's medical record before making his ruling. However, the Complainant says the arbitrator refused to read it and that the ruling makes no mention of his disability or medical record. In short, if the arbitrator's ruling does not cite the Complainant's disability, we cannot assume the arbitrator applied human rights principles. The Canadian Human Rights Tribunal can address this important issue.
>
> As to whether the respondent knew of the Complainant's disability, witness credibility is also an issue. The Complainant says Ms. Giguère was aware but the respondent says she was not. As this is a credibility matter that the Commission cannot resolve, the Canadian Human Rights Tribunal (CHRT) can hear the evidence under oath and make its own findings.

[54] While the arbitration process likely adhered to the collective agreement, it seems clear from the ruling that the arbitrator gave no thought to the issue of human rights or compliance with the *CHRA*.

[55] No witnesses were heard at the arbitrator's hearing and the Complainant said he refused to read his medical record, though he may have while preparing his ruling. That said, I have heard no evidence to dispute the Complainant's statements on the matter. I would note that the Respondent chose to raise this point only in its final submission, giving the Tribunal no opportunity to hear or question the Complainant or other witnesses on the issue.

[56] Having reviewed the ruling of May 20, 2014, by Arbitrator Michel Picher, I agree with the Commission that he did not bother to determine whether there was discrimination or whether the *CHRA* was violated.

[57] The Commission was right to let the Tribunal address this important human rights issue, and I feel I have the jurisdiction and mandate under *CHRA* to review the incidents that occurred in 2011 and 2012.

[58] In my view, the doctrine of estoppel raised by the Respondent does not apply in this case. I see no indication that the arbitrator considered the issues of discrimination raised by the Complainant and the Commission. To invoke the doctrine here would be unfair and deny justice to the Complainant.

[59] The Supreme Court noted this in *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 SCR 125):

> [39] Broadly speaking, the factors identified in the jurisprudence illustrate that unfairness may arise in two main ways which overlap and are not mutually exclusive. First, the unfairness of applying issue estoppel may arise from the unfairness of the prior proceedings. Second, even where the prior proceedings were conducted fairly and properly having regard to their purposes, it may nonetheless be unfair to use the results of that process to preclude the subsequent claim. (Emphasis added.)
>
> . . .
>
> [42] The second way in which the operation of issue estoppel may be unfair is not so much concerned with the fairness of the prior proceedings but with the fairness of using their results to preclude the subsequent proceedings. Fairness, in this second sense, is a much more nuanced enquiry. (Emphasis added.)

[60] For issue estoppel to apply, the issue must already have been decided. However, let us continue:

> [45] Thus, where the purposes of the two proceedings diverge significantly, applying issue estoppel may be unfair even though the prior proceeding was conducted with scrupulous fairness, having regard to the purposes of the legislative scheme that governs the prior proceeding. For example, where little is at stake for a litigant in the prior proceeding, there may be little incentive to participate in it with full vigour . . . (Emphasis added.)

[61] In this case, it is my view that the arbitrator failed to consider the issue of human rights under the *CHRA*. It was not a key part of discussions about the grievances in question.

[62] Even if it had been, as the Respondent claims (and nothing has indicated or shown this), I feel the use of estoppel would be unfair to the Complainant.

[63] The arbitrator did not consider the issue of discrimination or think it important. The Respondent did not seem to find it important either, though it is a key part of the Tribunal's mandate. The Commission referred this case to me and I am duty bound to review it.

B. Discrimination under section 7 of the *CHRA*

(i) Legal framework

[64] Section 7 of the *CHRA* states that it is a discriminatory practice to refuse to employ or continue to employ any individual, or, in the course of employment, to differentiate adversely in relation to an employee on a prohibited ground of discrimination. Disability (mental health impairment) is a prohibited ground of discrimination under section 3 of the same act.

[65] Many tribunals, this one in particular, have ruled that complainants must establish a *prima facie* case of discrimination. In *Ont. Human Rights Comm. v. Simpson-Sears*, 1985 CanLII 18 (SCC), para. 28, the Supreme Court of Canada said "[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."

[66] For this complaint, the Complainant must show, on the balance of probabilities, that: (1) he had a characteristic protected against discrimination at the time of each incident; (2) the Respondent adversely affected him (penalty points) or ceased to continue employing him; and (3) the protected characteristic (mental health impairment) was a factor in his penalty points and ultimate dismissal (*Moore v. British Columbia [Education]*, 2012 SCC 61, para. 33 [*Moore*]; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. [Bombardier Aerospace Training Centre]*, 2015 SCC 39, paras. 56 and 64 [*Bombardier*]).

[67] The Supreme Court justices expressed themselves as follows in *Bombardier* (above):

> [63] Finally, in *Moore*, a more recent case, Abella J. wrote the following for the Court:
>
> > . . . to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a prima facie case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur. [Emphasis added; para. 33.]

[68] In response to a complaint, a respondent may submit evidence showing that its actions were not discriminatory or avail itself of a defence under the *CHRA* to justify the discrimination (s. 15, *CHRA*).

[69] Where the respondent refutes the allegation, its explanation must be reasonable. It cannot be a pretext to conceal discrimination. (*Dixon v. Sandy Lake First Nation*, 2018 CHRT 18, para. 28).

[70] In this case, the Respondent tried to show it could not have discriminated against the Complainant because the Complainant was not disabled at the time of the incident and had failed to show he had a disability; or, if there was a disability, the Respondent had been unaware of it.

[71] The Respondent cited two other defences in its written submission: (1) the Complainant had failed to meet his duty to disclose; and (2) the measures taken were justified. We will consider these defences below.

[72] We should add that since it is rarely possible to show direct evidence of discrimination or intent to discriminate, direct evidence is not needed to establish discrimination under the *CHRA* (see *Bombardier*, paras. 40-41). The Tribunal's task is thus ". . . to consider all the circumstances and evidence to determine if there exists the "subtle scent of discrimination" (see *Basi v. Canadian National Railway Company*, 1988 CanLII 108 (CHRT); *Tabor v. Millbrook First Nation*, 2015 CHRT 9, para. 14).

[73] Also, as noted by the Federal Court of Appeal in *Holden v. Canadian National Railway Company*, (1991) 14 CHRR D/12 (FCA), para. 7, for a complaint to be substantiated, discrimination does not need to be the sole ground for the actions at issue. It is enough for a prohibited ground of discrimination to have been a contributing factor in the employer's decision (see *Bombardier*, paras. 44-52).

C. Has the Complainant established a *prima facie* case?

(i) First two incidents

[74] The Complainant says he showed that he had a mental health disability at the time the incidents occurred and the penalty points were acquired, but that the Respondent discriminated against him by not considering it.

[75] The Tribunal is of the view that the Complainant failed to provide *prima facie* evidence that he had a disability as defined in the *CHRA* at the time of the first two incidents (September 24, 2011 and October 26, 2011).

[76] When questioned by Commission counsel during his testimony, the Complainant admitted he had no disability and that the first two incidents were not disability-related:

> [Translation]
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> Mr. Poulin: Okay, had you ever told Mr. Cyr that you had a disability?
>
> Mr. Lafrenière: Well, just at the end, just at the last investigation. Before that, it didn't concern him, and then, honestly, I never claimed that my disability was related. My disability had nothing to do with the fact that Stéphane Hamelin and Guylaine Piché had undermined my work, the first incident. When Stéphane Hamelin physically attacked me for the second time in September 2011, it wasn't related to my disability either. When I went to the phone sales office with my little dog, it had nothing to do with my disability either. I didn't bring the dog because of my disability. I wasn't going to work; I was taking a key to an old roommate. So that's everything. So no, I didn't talk about it.
>
> But in the other incident, the last one with the customer, my disability was clearly involved . . . (pp. 203-204, first transcript book).

[77] In view of the facts detailed by the Complainant, the Tribunal concedes that the work environment was challenging and seemed to have serious labour relations issues. However, these alone do not prove that the Complainant was disabled at the time of the first two incidents. Though the work environment may have played a part in the Complainant's mental health problems, I was shown no evidence of this. At any rate, it is neither my job nor the Tribunal's role to assess the cause of the Complainant's mental health problems. That is a labour law issue an arbitrator could have addressed.

[78] My mandate and duty is to determine whether the Complainant had a disability at the time of the incidents in question.

[79] Was there an unhealthy environment in some work teams, especially the Complainant's team? Was there harassment? Did the Respondent fulfill its duty as employer to provide a healthy, harassment-free workplace? Did the arbitrator understand the incidents that led the Respondent to take disciplinary action? Did he take the work environment into account? While these are legitimate questions, they do not fall within my mandate and I will not rule on them.

[80] The Complainant and his union did not appeal Arbitrator Picher's ruling on these otherwise legitimate issues.

[81] My mandate is to determine whether the Respondent discriminated in imposing disciplinary measures for these events, not to determine whether it violated labour laws.

[82] Based on the testimony and evidence, I feel the Complainant did not make a *prima facie* case that he had a disability at the time of the first two events.

[83] I thus find that the Respondent did not discriminate in imposing penalty points for the first two incidents, after which the Complainant had 35 points in his disciplinary file.

[84] This was not the case for the third incident.

(ii) Third incident

[85] We will now take a closer look at the third incident (September 14, 2012), which led to the Complainant's dismissal.

[86] Did the Complainant show that he had a characteristic protected under the *CHRA* (in this case, a disability related to his mental health) at the time of the incident?

[87] I agree that he did so.

(a) Protected characteristic

[88] While there is no direct evidence of a mental health disability, the facts and circumstances lead me to believe the Complainant had a protected characteristic under the *CHRA* at the time of the incident.

[89] First, the Complainant's testimony made it clear that on the afternoon of September 14, 2012, a few hours before the incident, he was very stressed and anxious.

[90] The Complainant met with his immediate supervisor, Maryse Giguère, regarding the testimony he was to give on Monday, September 17, in a work-related criminal case. The prospect had made him very anxious. In addressing the Tribunal, the Complainant

gave a clear and credible account of the fear and stress he had felt. He said he had been concerned for his safety and wanted his employer's support.

[91] Stress and anxiety alone are not proof of disability, and such feelings are normal in these circumstances.

[92] However, the Complainant also showed medical notes to the Tribunal, including one for his time off in the months before incident number three. The note, dated March 2012, said he had adjustment disorders and depression. Based on this note, the Complainant stayed away from work until early June 2012, a few months before the September 14, 2012 incident. The Respondent did not challenge the Complainant's absence or the March 2012 medical note, either at the hearing or during said absence.

[93] Mental health disabilities, though not always major, permanent, or ongoing, are also entitled to protection from discrimination.

[94] Despite the Respondent's claims, the Complainant's return to work in June 2012 did not prove his disability had disappeared.

[95] The Complainant filed another medical note dated September 21, 2012 (one week after the September 14 incident).

[96] Since the doctor who signed the notes could not come to testify and answer questions, the notes are considered hearsay evidence, but they still constitute evidence that I must assess.

[97] I found the March 2012 note (which the Respondent did not challenge) quite helpful in that it supported the Complainant's testimony and put his last months of work with the Respondent into context.

[98] Despite what the Complainant says, the medical note from September 21, 2012, does not in itself prove that he had a disability.

[99] However, the Respondent cannot now complain that it could not question the doctor who signed the note, since it seemed to have no intention of seeking a second opinion at the time of the events in 2012.

[100] The Respondent twice tried to enter a medical expert's report as evidence, and on both occasions I refused to admit the report.

[101] I do not feel current medical expertise at the hearing would have shed light on the matters at issue, which date back to 2012 and before.

[102] That said, it makes no sense to argue that the Tribunal should ignore the medical notes because the doctor who signed them did not testify and could thus not be questioned.

[103] The Respondent should have asked to contact the doctor when the Complainant submitted the medical note on September 21, 2012. It could then have discussed the note's content at the time of the incidents and considered it when reviewing events from the evening of September 14, 2012. Specifically, it could have factored it in when determining the Complainant's penalty points.

[104] The Respondent cannot now complain about its own negligence.

[105] Based on the Complainant's testimony, on events preceding the incident of September 14, 2012, on the Complainant's meeting with his supervisor the afternoon of the incident, and on his time off work in the months before the incident (justified by an undisputed medical note citing depression), it is my view that at the time of the incidents of September 14, 2012, the Complainant had a protected characteristic under the *CHRA*.

(b) Adverse effect

[106] The Complainant was adversely affected and received 90 penalty points after the incident of September 14, 2012, which led to his dismissal. This is not disputed by the parties.

(c) Link between protected characteristic and adverse effect

[107] Lastly, was the protected characteristic a factor in the events of September 14, 2012?

[108] On the balance of probabilities, I believe the Complainant's mental health impairment was a factor in the incident of September 14, 2012, and the resulting penalty points that led to his dismissal.

[109] First, in more than 11 years of employment, the Complainant was a good worker with no problems, grievances, or penalty points. The Respondent does not dispute that. This fact alone should have raised questions about the sudden behavioural change.

[110] Second, when the incident of September 14, 2012, was under investigation, Ms. Giguère's e-mail to her supervisor, Mr. Bergeron, dated September 28, 2012, suggests she knew or at least suspected that the Complainant had mental health problems:

> [Translation]
>
> Hello Christian,
>
> The last line in the policy notes that Via Rail's Employee Assistance Program will help employees exposed to workplace violence. When I suggested this to Serge, he said he was aware of the program, had already tried it, had its contact information, and knew the procedure for using the service. He said more than once that he had concerns, though the conference calls seem to have reassured him.
>
> I'm his manager, not a doctor who can assess his state of mind. However, he's said more than once that he's worried about testifying in court. So I've validated the legal procedure, promoted Via's role in safety and security, and recommended the program to help employees deal with emotional issues. . . . (Emphasis added.)

[111] In the memo to her supervisor, Mr. Bergeron, Ms. Giguère says she referred the Complainant to the Employee Assistance Program. She says he may have had mental health problems at the time of their meeting but that she is not qualified to assess that. We should again note that the meeting took place before the incident of September 14, 2012, that caused the Complainant to receive multiple penalty points.

[112] Ms. Giguère not only suspected that the Complainant had mental health problems but informed her supervisor, Mr. Bergeron, whom the Respondent says made the final decision about the Complainant's penalty points. Mr. Bergeron was thus aware of the

Complainant's situation yet rejected the medical note a few days after the incident without question or regard and while ignoring all mental health indicators.

[113] I thus find that there is a link between the Complainant's disability, the events of September 14, 2012, and the adverse effects he experienced (i.e. incurring multiple penalty points in his file).

(d) Finding on *prima facie* evidence

[114] I do not need to assess whether the Complainant's entire hearing testimony is true or his description of the work environment is wholly accurate. However, I do need to determine if he had a disability or perceived disability at the time of the incident, if the incident led to his disciplinary action and dismissal, and if the disability was a factor.

[115] Whether the Complainant had a condition or disability at the time of the incident is a question of fact for me to determine. Based on the hearing testimony and evidence, I find that the Complainant had a mental health disability at the time of the incident of September 14, 2012, that the Respondent should have known the Complainant had a disability as defined in section 25 of the *CHRA*, and that the disability was a factor in the September 14 events that led to his disciplinary action, penalty points and dismissal.

[116] However, it is my view that discrimination was just a small factor in the Complainant's job loss. He already had 35 penalty points before the third incident (September 14, 2012), which means he was 25 points short of dismissal. While 90 points for the third incident may have been excessive, even 25 would have cost him his job.

D. Has the Respondent established a defence under the *CHRA* justifying its discriminatory practice?

[117] The Respondent's written submission makes the following arguments:

(A) The employee did not have a disability, and that even if he did, the Respondent was not aware of it.

(B) The employee failed in his duty to facilitate accommodation (e.g., request accommodation, inform employer of his needs, etc.).

(C) The incident of September 14, 2012, was so serious that 90 penalty points were warranted.

(i) Respondent not aware of Complainant's disability

[118] In its testimony, to defend and justify its conduct, the Respondent (represented by Christian Bergeron) told the Tribunal it had been unaware of the Complainant's situation and state of mental health. Based on all the evidence and testimony, the Tribunal does not accept this defence.

[119] First, Mr. Bergeron said the only concern the Complainant raised when meeting with his supervisor, Ms. Giguère, was about his pay.

[120] Since the Respondent could not bring in Ms. Giguère to tell her version of the meeting with the Complainant, her supervisor, Mr. Christian Bergeron, testified that the meeting between the Complainant and Ms. Giguère had concerned only a pay issue and at no time discussed the Complainant's safety.

[121] The Tribunal does not believe the Respondent on this issue. If the meeting had only concerned a pay issue, why would Ms. Giguère hold two phone meetings between the Complainant and Via Rail security and safety advisors? I find this implausible.

[122] No note, e-mail, or memo about Ms. Giguère's meetings with the Complainant was entered in evidence to support the Respondent's case or confirm Mr. Bergeron's testimony, which, though admissible hearsay, seems doubtful given the Complainant's clear, consistent account of his meetings with Ms. Giguère.

[123] The only memo about the meeting, a note from Ms. Giguère to Mr. Bergeron dated September 28, 2012 (when the Respondent was investigating the September 14 incident), makes no mention of pay issues. It only cites the Employee Assistance Program and notes that Ms. Giguère is just a manager and not qualified to assess the Complainant's mental state.

[124] The Respondent's representative, Mr. Bergeron, a man with extensive Human Resources experience, should have known that the Complainant's time off work in the months before the September 14 incident—supported by a medical note citing adjustment disorders and depression that was undisputed at the time by the Respondent—indicated a problem.

[125] The suspected mental health issues cited in Ms. Giguère's note dated September 28, 2012, combined with the medical notes from March 2012 and September 21, 2012, and the workplace incidents in previous months that incurred the Complainant's first penalty points in 11 years, should have led the Respondent to inquire more about the Complainant's situation, ask questions or talk to his doctor, but it did nothing of the kind.

[126] The Respondent's defence did not address the March 2012 medical note but said several times that it knew that the Complainant had submitted a medical note on September 21, 2012. As it felt the Complainant had used the note only to justify his actions after the fact, it dismissed it as baseless when assigning demerit points.

[127] The Respondent argued that even if disability is broadly defined under the *CHRA*, it must include more than stress or anxiety and there must be evidence of a medical condition (*Breen v. Deputy Minister of Citizenship and Immigration*, 2014 PSST 17).

[128] The facts in the Public Service Staffing Tribunal decision were quite different from those before us. In that case, the Complainant said the stress she felt after her husband's death amounted to a disability. Her medical note was based on her husband's condition, not hers. While accepting that the Complainant was under considerable stress, the Tribunal ruled that stress alone was not a disability.

[129] While I agree that stress alone is not a disability, the facts in our case are broader and more complex than those of the *Breen* case. First, our Complainant's medical notes are based on his own condition rather than that of a third party (i.e. the deceased husband in *Breen*). Our Complainant has not claimed that another person's condition caused him stress, and his doctor's notes refer only to his own health.

[130] As noted above, since hard proof of discrimination is rare, I must weigh all facts and evidence when deciding if the Complainant had a disability at the time in question.

[131] The circumstances and evidence are based not only on the medical note of September 21, 2012, as the Respondent suggests, but on all facts, evidence, and testimony — including the March 2012 medical note and the Complainant's three-month absence for adjustment disorders and depression.

[132] Disability can take many forms and be viewed by an employer in many ways. In *Dupuis v. Canada (Attorney General)*, 2010 FC 511, the Federal Court clearly conveyed the state of law in this matter:

> [25] It has already been stated that mental illness is a "disability" within the meaning of section 25 of the Act. Mental illness may take many forms, including mood disorders such as depression and bipolar disorder; schizophrenia; anxiety disorders such as obsessive-compulsive disorder and post-traumatic stress disorder; eating disorders; and addictions. The Act prohibits discrimination in the workplace on the basis of a perception or impression of a disability, and requires accommodation by the employer unless it constitutes undue hardship.
>
> [26] An employee might well be unaware that he or she is suffering from a mental illness, so it is quite possible that he or she never consults a physician or notifies the employer. The absence of a medical diagnosis of depression or another mental illness does not mean that an employee will do better at home or will perform his or her job satisfactorily. In view of the scope and diversity of psychiatric disorders, an employee can experience cognitive, emotional and social problems, both at home and at work. These behavioural difficulties can manifest as mood swings, among other things.
>
> [27] If a manager can detect a change of behaviour that could be attributable to a mental disorder, it is his or her responsibility to determine whether accommodation is necessary. See the Canadian Human Rights Commission's *Policy and Procedures on the Accommodation of Mental Illness* (October 2008). It is also plausible to consider that erratic requests by an employee, and personality conflicts, can conceal a mental disorder. It is of course understood that the diagnosis of mental illness is not one for a manager or employee to make. Rather, it is the responsibility of a physician. However, a manager can raise the question with the employee in private and suggest that he or she consult a physician. In the meantime, by way of accommodation, the manager can grant the employee leave, which would be particularly urgent if the employee appears to be fatigued, on the verge of

> a burnout, or acting irrationally. Each case is unique and deserves to be assessed individually. (Emphasis added.)

[133] In our case, the employer could have perceived there was a disability when the Complainant met with his manager the afternoon of September 14, 2012, to share his fear and anxiety about important testimony he was to give in coming days.

[134] Ms. Giguère's aforementioned memo to her supervisor, Mr. Bergeron, does in fact cast doubt on the Complainant's mental health.

[135] The disability may also have been noticed if the manager had thought to ask why an employee with no behavioural problems for 11 years had incurred multiple penalty points in the space of 12 months.

[136] Lastly, the disability might also have been noticed if the employer had taken into account the fact that the employee took sick leave for mental health reasons in the months before the incident (March to June 2012, medical note submitted in evidence).

[137] It seems clear, from circumstances around the September 14 incident and the Complainant's situation in the months beforehand, that the Respondent should have detected the disability — and would have done so had it viewed the overall picture rather than the facts in isolation.

[138] The Respondent has therefore not convinced me that it had no knowledge of the Complainant's disability.

(ii) Complainant failed in duty to facilitate accommodation

[139] The Respondent argues that the Complainant has a duty to facilitate accommodation. I feel it important here to cite the Supreme Court's landmark ruling in *Central Okanagan School District No. 23 v. Renaud*, 1992 2 SCR 970, which clearly explains this duty:

> To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation.

> Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.
>
> This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in *O'Malley*. The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged. (Print version, p. 11.) (Emphasis added.)

[140] The Respondent says the Complainant never applied for disability-related accommodation even though the Respondent has an accommodation policy with special forms for this purpose. It also cites the Collective Agreement, most notably Article 15.

[141] This argument does not hold up as it is not easy for someone with a mental health issue to make such requests, for any number of reasons. Some may even deny the problem outright. If an employee shows clear signs of a problem, it is up to the employer to offer accommodation.

[142] In this case, there were many reasons the employer should have perceived that the Complainant had a problem: he had prior mental health issues and even took medical leave (with a doctor's note) a few months earlier; he incurred multiple penalty points in the space of 12 months after being a model employee for more than 11 years; he met with his immediate supervisor to share his concerns, and the supervisor's memo noted that he may have mental health problems ([Translation] "*I'm his manager, not a doctor who can assess his state of mind*.")

[143] It is my view that the Respondent did not take all of those events into account. The director who assigned the penalty points, Mr. Bergeron, testified at length and was clear in this regard. Without calling the Complainant's doctor or seeking a second opinion, he

dismissed outright his medical note for the incident of September 21, 2012, claiming he had used it to justify his actions after the fact.

[144] Mr. Bergeron did not consider other events such as the Complainant's meeting with his manager, Maryse Giguère, since he believes the meeting did not unroll as the Complainant says. Unfortunately, Ms. Giguère could not testify about the meeting, though her afterward memo says the Complainant was anxious and sought reassurance. That memo makes no mention of pay issues, as the Respondent claims to be the sole issue of the meeting.

[145] While the memo says the Complainant seemed reassured by the meeting, that does not mean he was unaffected by his upcoming testimony or that the circumstances and events surrounding the case did not create at least the appearance of a mental health disability. Was it enough to give the employer a sense that the Complainant had a disability as defined in the aforementioned *Dupuis* decision? In my view, it was.

[146] Furthermore, the French version of the Collective Agreement raised by the Respondent to require that the Complainant should have asked for accommodation through a form, refers only to physical disability and makes no mention of mental impairment. It is inconceivable and unacceptable that a major federal employer cannot give Francophone staff a proper translation of something as important as a collective agreement. In her testimony, Barbara Ann Blair, the Respondent’s HR manager, said employees must read the English version to know what their rights are. The Respondent must address this problem if it has not already done so.

[147] In short, the Respondent did not convince me that the Complainant had failed in his duty to inform the employer of his need for accommodation. Rather, it was for the Respondent, in light of circumstances around the events of September 14, 2012, to ask the Complainant what accommodation measures he needed. It did not do so.

(iii) The September 14 incident constituted misconduct and the resulting penalty points and dismissal were warranted

[148] The Respondent says the September 14 incident was serious enough to constitute misconduct, which, even allowing for the Complainant's alleged disability, warrants the resulting penalty points and dismissal.

[149] The Respondent says the Complainant incurred the penalty points because [Translation] "the incidents were serious and the complainant had lied and shown no remorse."

[150] The Respondent says the Complainant's disciplinary action and dismissal were wholly warranted, arguing that the incident of September 14, 2012, involved two major breaches of Via Rail's rules of conduct: (1) customers must never be asked for tips, and (2) physical aggression toward customers will not be tolerated.

[151] I agree that workplace violence is a serious offence that may warrant dismissal, especially if the person shows no remorse.

[152] I am not unmoved by the Respondent's argument that the Complainant's actions were serious, that he incurred penalty points because physical aggression toward a customer is unacceptable, and that he lied and showed no remorse.

[153] But in making a labour law case for misconduct, he is overlooking the undue hardship defence provided in section 15 of the *CHRA*.

[154] The Respondent could have argued that the rules of conduct the Complainant breached were a *bona fide* occupational requirement under section 15 of the *CHRA*, and that accommodating the disability and resulting aberrant conduct would have caused the Respondent undue hardship.

[155] If the Respondent had made this defence, I could have analyzed it based on the many existing precedents and on counter-arguments by the Complainant and the Commission.

[156] Though there is extensive case law on *bona fide* occupational requirements (*Meiorin*, etc.), the Respondent has cited no rulings or cases. It is not for me to do so on its

behalf or to rule on such a defence when the Respondent has not offered it and neither the Complainant nor the Commission could address it at the hearing or in their submissions.

[157] So, while the Respondent did not cite section 15 of the *CHRA*, even though it could have made a case for *bona fide* occupational requirement (BFOR) based on the facts, it is not for me to do so on its behalf.

[158] I thus find that the Respondent failed under the *CHRA* to justify its discriminatory practice.

VI. COMPLAINT SUBSTANTIATED

[159] On the balance of probabilities, I find that the Respondent engaged in a discriminatory practice under section 7 of the *CHRA* by failing to consider the Complainant's mental health disability for the third incident that occurred on September 14, 2012.

VII. REMEDY AND ORDER

[160] When the Tribunal finds that a complaint is substantiated, it has the power to make orders under section 53 of the *CHRA*. In this case, the Complainant asked that the Tribunal order the Respondent to cease all discrimination against employees with a disability or disabilities; reinstate him; and compensate him with interest for lost wages, pain and suffering, or wilful or reckless discrimination. Sections 53(2) (a), (b) (c), 53(2) (e), 53(3) and 53(4) apply, and we will review each one based on the evidence before us.

A. Cease to discriminate (s. 53(2) (a))

[161] I order the Respondent, in collaboration with the Commission, to take the following steps to avoid future workplace discrimination and ensure disciplinary measures take employee's disabilities (physical or mental) into account:

(A) Develop a clear labour relations policy stating that all disciplinary action must consider an employee's physical or mental health condition, and have it reviewed and approved by the CHRC.

(B) Ensure that all of the Respondent's documents concerning physical or mental disability (collective agreement, other policies, etc.) are written the same in English and French and are available to employees in their language of choice.

B. Reinstatement (s. 53(2) (b))

[162] The Complainant requests full reinstatement but says the decision to return (or not return) to work for the Respondent should be entirely his.

[163] This suggests he is unsure about returning to work for the Respondent. His desire to retain this option seems to imply a lack of conviction. I also agree with the Respondent that several times in the hearing, the Complainant showed contempt for certain colleagues. He also made unwarranted personal attacks and showed no remorse for the incident of September 14, 2012.

[164] I agree that trust between the Complainant and the Respondent has been broken.

[165] For all these reasons, I do not order the Complainant's reinstatement.

C. Lost wages (s. 53(2) (c))

[166] The Complainant asks that the Tribunal order compensation for all lost wages and pension contributions since the date of his dismissal.

[167] He also asks to be paid for the overtime hours he should have worked.

[168] Lastly, he asks to be compensated for any over-taxation.

[169] Section 53(2) (c) of the *CHRA* states that the Tribunal may order the Respondent, who was found to have discriminated against the Complainant, to "compensate the victim

for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice."

[170] Certain rules must be followed when applying this section. First, in *Chopra v. Canada (Attorney General)*, 2007 FCA 268 ("*Chopra*"), para. 37, the Federal Court of Appeal said there must be a causal link between the Respondent's discriminatory practice and the loss claimed.

> [37] The fact that foreseeability is not an appropriate device for limiting the losses for which a complainant may be compensated does not mean that there should be no limit on the liability for compensation. The first limit is that recognized by all members of the Court in *Morgan*, that is, there must be a causal link between the discriminatory practice and the loss claimed. The second limit is recognized in the Act itself, namely, the discretion given to the Tribunal to make an order for compensation for *any* or *all* of wages lost as a result of the discriminatory practice. This discretion must be exercised on a principled basis. (Emphasis added.)

[171] In *Cassidy v. Canada Post Corporation & Raj Thambirajah*, 2012 CHRT 29 (para. 192), the Tribunal also said "[t]he goal of the *CHRA* and other anti-discrimination human rights statutes is to 'make a complainant whole,' to put that person in a position s/he would have been in 'but for the discrimination' the complainant suffered."

[172] Therefore, if I think job loss would have occurred even without discrimination, I have discretion to order little or no compensation for lost wages.

[173] As I noted earlier when determining if there was *prima facie* evidence of disability, I believe discrimination was just a small factor in the Complainant's job loss. Given the circumstances of the case and the serious events of September 14, 2012, I feel that discrimination was not the sole cause of his dismissal.

[174] For the September 14, 2012 incident, I reviewed video footage, the reports of security officers Painchaud and Lapierre, and the hearing testimony of security officer Painchaud who gave a compelling and detailed account of the incident.

[175] The September 14 incident was not inconsequential or trivial, as it breached two of the Respondent's key rules of conduct: (1) customers must never be asked for tips, and (2) physical aggression toward customers will not be tolerated.

[176] Security officer Painchaud's report makes clear that the customer was asked for a tip, which the Complainant did not deny when recounting the incident.

[177] The video and images filed in evidence also clearly show a physical altercation between the Complainant and the customer.

[178] Security officer Painchaud said that in his eight years at Montreal Central Station he had never seen an altercation between an employee and a customer. It was clear from his testimony that the incident was serious and should have been reported.

[179] I would add that for the Respondent, a corporation whose core mandate is customer service, such an incident could not be ignored.

[180] Despite all this, the Complainant has never acknowledged the incident's importance or shown any remorse.

[181] The evidence and testimony make clear that the incident of September 14, 2012, was serious enough for the Respondent to take disciplinary action against the Complainant.

[182] At the time of the incident of September 14, 2012, the Complainant already had 35 penalty points in his disciplinary file. At 60 points, an employee is dismissed. Even taking his disability into account, I feel the serious nature of the incident could have given him enough points for dismissal.

[183] The Complainant's case for lost wages and other job-related costs was also far from complete before this Tribunal.

[184] The Complainant filed no evidence of lost wages. He did not file any T-4 slips. Nor did he file evidence in support of his requests relating to lost pension funds, his overtime hours or the excess taxes he claims he will have to pay.

[185] I cannot assume that such evidence exists or issue orders in its absence:

> . . . [O]rders of a remedial nature must be linked or have a nexus to the *lis* or subject-matter of the complaint substantiated by the tribunal: the "four corners of the complaint" or "the real subject matter". The remedy must be commensurate with the breach. The orders also must be reasonable and the remedial discretion exercised in light of the evidence presented. (Emphasis added.)
>
> (*Hughes v. Elections Canada*, 2010 CHRT 4, para. 50)

[186] While it may be rare that discriminatory practices are recognized in a case of dismissal without awarding compensation for lost wages, I cannot grant the Complainant such damages given the case's unique circumstances, the serious nature of the incident of September 14, 2012, and the aforementioned evidentiary issues.

D. Pain and suffering (s. 53(2) (e))

[187] Under section 53(2) (e) of the *CHRA*, the Complainant claims $20,000 for alleged emotional harm and its after-effects, which he says have persisted to this day.

[188] Under section 53(2) (e), I can award up to $20,000 if the Complainant has experienced pain and suffering.

[189] Emotional harm is based not on the Respondent's breach or omission but on the Complainant's pain and suffering.

[190] The Complainant discussed the impact of events that have occurred since he was fired. He said he has been under great stress since the events of September 14, 2012, and his resulting dismissal and that he suffers to this day. He claimed his life has been on hold for more than six years and that he has suffered financial harm, causing him even more stress, which he said he manages with medication.

[191] However, he gave scant detail about the pain and suffering he says is ongoing, and no evidence of his current medical condition and its link to the events in 2012 (e.g., no current medical notes regarding medications, reasons for taking them, etc.).

[192] This does not mean I disbelieve the Complainant or that the situation has not caused him stress, especially in the way the Respondent has handled things since September 14, 2012. I believe him when he says he still lives with the consequences.

[193] However, $20,000 is the maximum that may be awarded under the legislation and it is usually awarded by the Tribunal in more serious cases, i.e. when the scope and duration of the Complainant's suffering from the discriminatory practice justify the full amount.

[194] Based on the evidence, and because I find that the Complainant suffered harm from discrimination, I've ordered the Respondent to pay $10,000 for pain and suffering.

E. Special compensation (s. 53(3))

[195] The Complainant asks that the Respondent pay $20,000 in special compensation under section 53(3) of the *CHRA*. This section of the *CHRA* provides that the Tribunal may order the person to pay such compensation not exceeding $20,000 to the victim if the Tribunal finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

[196] According to *Canada (Attorney General) v. Johnstone*, 2013 FC 113, para. 155 (varied on other grounds, 2014 FCA 110), section 53(3) is a punitive provision intended to provide a deterrent and discourage those who deliberately discriminate. A finding of wilfulness requires the discriminatory practice and the infringement of the person's rights to be intentional. Recklessness usually denotes acts that disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly.

[197] As with section 53(2) (e), the maximum is awarded only in the most serious cases.

[198] The facts and evidence suggest the Respondent, despite all signs and indications, remained wilfully ignorant of its employee's condition. Though there was every reason to suspect a disability, it turned a blind eye and to this day will not admit the Complainant had a mental health problem on September 14, 2012.

[199] The Respondent dismissed the medical note submitted after the incident, saying the Complainant had used it to justify his actions after the fact. It did not take time to contact the Complainant's doctor, ask further questions, or request that the Complainant be cross-examined. It was only during Tribunal proceedings that it requested a medical assessment of the Complainant and asked that it submit its own expert report.

[200] The mere fact that the Respondent considered the medical note does not mean it did all it could to see if it was valid. Without having bothered to verify or look into it, it cannot hide behind the argument that the Complainant used the note to justify his actions after the fact.

[201] The Respondent felt the Complainant's actions were serious enough to warrant dismissal. I think it considered the medical note and circumstances around the incident mere barriers to its plan to dismiss the Complainant.

[202] A major employer like the Respondent should have known the law and considered all circumstances around the incident and events that followed. Though required to do so and to comply with the *CHRA*, it seems to have been reckless in this regard.

[203] I therefore order that the Respondent pay the Complainant $15,000 in compensation for engaging in a reckless discriminatory practice.

F. Interest (s. 53(4))

[204] Pursuant to section 53(4) of the *CHRA* and Rule 9(12) of the Tribunal's *Rules of Procedure* (03-05-04), I order that interest be provided on all amounts to be paid to the Complainant. Interest shall be simple interest calculated on a yearly basis at the Bank Rate (monthly series) established by the Bank of Canada, from the date of the Complainant's dismissal (October 5, 2012) to the date the compensation is paid.

VIII. ORDER

[205] As Serge Lafrenière's complaint is substantiated for the third incident only (September 14, 2012), it is ordered that Via Rail:

1. develop a clear labour relations policy stating that all disciplinary action must consider an employee's physical or mental health condition, and have it reviewed and approved by the CHRC;

2. ensure that all relevant documents concerning physical or mental disability (collective agreement, other policies, etc.) are written the same in English and French and are available to employees in their language of choice;

3. pay the Complainant $10,000 in compensation for pain and suffering;

4. pay the Complainant $15,000 in compensation for engaging in a reckless discriminatory practice; and

5. pay interest on the foregoing compensation amounts under the terms set out in paragraph 204 of this decision.

Signed by

Anie Perrault
Tribunal Member

Ottawa, Ontario
April 18, 2019

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2162/3616

Style of Cause: Serge Lafrenière v. Via Rail Canada Inc.

Decision of the Tribunal Dated: April 18, 2019

Date and Place of Hearing: May 28 and 31, June 11–13 and 26–29, July 12, and October 1, 2018

Montreal, Quebec

Appearances:

Serge Lafrenière, for himself

Daniel Poulin, for the Canadian Human Rights Commission

Jacques Rousse, for the Respondent