Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2018 CHRT 11
Date: May 15, 2018
File No.: T1897/12712

Between:

Mr. X

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian Pacific Railway

Respondent

Decision

Member: Olga Luftig

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I. Complaint

[1] On March 25, 2011, Mr. X (Complainant) brought a complaint (Complaint) at the Canadian Human Rights Commission (Commission) alleging that his employer, Canadian Pacific Railway (Respondent or CP), discriminated against him on the grounds of disability and family status, contrary to section 7 of the *Canadian Human Rights Act*, R.S.C. 1985, cH-6 (*Act* or *Human Rights Act*). The Complainant also alleges the Respondent retaliated against him for filing previous human rights complaints, contrary to section 14.1 of the *Act.* The Complaint alleges the discrimination was wilful and reckless.

[2] On January 3, 2013, by its referral letter pursuant to section 44(3)(a) of the *Act*, the Commission asked the Acting Chairperson of the Canadian Human Rights Tribunal (Tribunal) to institute an inquiry into the Complaint. The Commission participated throughout the inquiry, including at the hearing.

[3] For the reasons that follow, the Complaint is partially substantiated.

II. Confidentiality

A. Background

[4] The Complainant sought and received an oral confidentiality order with respect to any medical evidence about himself and his immediate family submitted during the inquiry. The Respondent did not object. The terms of the confidentiality order were not then specified, and are particularized in this decision (Decision).

[5] The parties also agreed that during the hearing, when there was testimony regarding medical or other sensitive evidence about the Complainant's children, the hearing recording would be confidential, and described as such by the Registry Officer. This was done.

[6] At the end of the hearing, the Complainant again raised the issue of confidentiality with respect to one of his children, and applied for a confidentiality order to govern this Decision. Respondent counsel suggested anonymizing the Decision. Anonymizing the

Decision would mean it would not contain the Complainant's or his family members' names, while at the same time protecting the precedential value of the Decision. The Complainant and Commission agreed. I agreed to anonymize the Decision by not naming the Complainant or his family members.

[7] After the hearing, the Complainant made written submissions that the Decision be further anonymized by not naming the two cities involved, nor many of the witnesses, to protect the Decision's confidentiality. He submitted that by naming the cities and most of the witnesses, it would be easy for any co-workers and others in the industry to identify the Complainant and his family. He further requested that the Tribunal omit from the Decision the disability and self-harming behaviour of one of his children.

B. The Respondent's position on further anonymization

[8] The Respondent objected to further anonymizing the Complaint, on the grounds that not referring to the disability and self-harming of the child in question had the potential to create procedural unfairness, and to undermine the Tribunal's statutory mandate. The Respondent submitted that the Tribunal's mandate was to apply the *Act* fairly, and through its public decisions, provide guidelines for Canadian society on what constitutes a discriminatory practice. Further, if the Tribunal did not adequately identify the facts of the Complaint, the Decision would have little or no precedential value. Also, if a party wished to apply for judicial review of the Decision, the Decision would be hard or impossible to review without adequate facts, thus prejudicing the appealing party.

[9] The Respondent acknowledged that some of the facts in the Complaint are sensitive, and had suggested and consented to anonymization at the hearing. The Respondent argues that this provides reasonable protection of the Complainant's privacy, considering that the Complainant decided to take his Complaint to the Tribunal, which is a public forum.

C. The Commission's position

[10] The Commission submitted that section 52 of the *Act* authorizes the Tribunal to issue a confidentiality order "…if the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public." This provision acknowledges that this need can arise if there is a "real and substantial risk that the disclosure of personal or other matters will cause undue hardship to the persons involved".

[11] The Commission submitted that the facts about the Complainant's child's self-harming and psychology are in themselves of a sensitive nature, and justify an order of anonymization pursuant to section 52 of the *Act.*

[12] The Commission also stated that after the Tribunal "fully assesses" the evidence, the Tribunal can determine the appropriate balance between the public's right to know and the Complainant's privacy concerns.

D. Analysis

[13] Pursuant to section 52(1) of the *Act*, the Tribunal is a venue of public record, and hearings are generally public. Tribunal cases are meant not only to provide a place for an individual to have his allegations of discrimination heard and decided, but also to educate the Canadian public and serve as precedents to potential parties on issues of human rights at the federal level and sometimes the provincial level as well.

[14] The question before me is whether the circumstances are sufficient to justify a departure from the general rule that an inquiry is to be held in public.

[15] In making this determination, I must consider section 52(1) of the *Act*, which states:

> "…the member or panel conducting the inquiry may, on application, take any measures and make any order that the member or panel considers necessary to ensure the confidentiality of the inquiry if the member or panel is satisfied, during the inquiry or as a result of the inquiry being conducted in public, that

> (c) there is a real and substantial risk that the disclosure of personal or other matters will cause undue hardship to the persons involved, such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public; or
>
> (d) there is a serious possibility that the life, liberty or security of a person will be endangered."

[16] My main concern with respect to confidentiality was and is that this Decision not negatively impact the Complainant's child, whose situation was material and relevant to this inquiry. That child (and the sibling) was neither a party to the Complaint nor a witness at the hearing. The child did not ask to be involved in this proceeding, but nevertheless, in a substantive law and practical sense, the child is in fact a person "involved" in the inquiry.

[17] Although the child is an adult in age, there was credible evidence at the hearing that the child is very sensitive, vulnerable and private about the child's own disability and its impact. Further, the child has suffered bullying and behaviour harmful to the child's psychological state, on account of the child's disability. Of significance is that there was also credible evidence that the child had exhibited self-harming, possibly suicidal behaviour.

[18] I have assessed the evidence with respect to the child's sensitivity, psychological state and self-harming, specifically:

- the testimony of the child's family doctor (GP) and those of his reports which refer to the child;
- the Complainant's and his wife's testimony; and
- a January 12, 2011 psychiatrist's report which, while it assessed the Complainant, referred to the child's self-harming behaviour.

[19] I did not give the January 12, 2011 report as much weight as I did the aforementioned evidence because that psychiatrist did not testify and because that psychiatrist relied on the Complainant's self-reporting of the child's self-harming. However, the report contained additional undisputed information that the child had exhibited what the Complainant had characterized as an attempt at suicide.

[20] Further, during the hearing the Complainant testified that the child refused to consent to the Respondent's request that the child's psychologist release information to the Respondent regarding the child's situation for the purposes of family status accommodation. The Complainant and his wife both testified that the child's refusal was because the child did not want information about the child's psychological counselling sessions released. Although this was hearsay evidence, I found it credible because the Complainant's wife confirmed the Complainant's testimony on this point, and no party submitted the child's consent to release the information from the psychologist.

[21] The totality of the aforementioned evidence establishes that it is necessary to take confidentiality measures with regards to this Complaint and the written Decision, to the point of anonymity, because I am satisfied that as a result of the inquiry being conducted in public, there is a real and substantial risk that the disclosure of the names of many of the witnesses and individuals named in the documentary evidence, and the naming of the cities involved in this Complaint, would reasonably lead to the identification of the Complainant and his family. This in turn would cause undue hardship to the Complainant's child and the child's sibling, each as a "person involved", such that the need to prevent disclosure of their names outweighs the societal interest that the inquiry be held in public, pursuant to subsection 52(1)(c) of the *Act*.

[22] In addition, and in accordance with subsection 52(1)(d) of the *Act*, I am satisfied there was credible evidence at the hearing that the Complainant's child had exhibited self-harming, possibly suicidal behaviour. I therefore conclude that publication of the Complainant's name and that of his family, the names of the aforementioned witnesses or the names of individuals who did not testify but whose documents were in evidence, would reasonably lead to the identification of the Complainant and his family. Identification would negatively impact the Complainant's child to a degree that there is a serious risk of self-harm, including a risk to the child's life. Therefore, I conclude that it is necessary to take confidentiality measures, including anonymizing of parts of the Decision.

[23] However, the Decision's anonymization shall not extend to the Complainant's child's disability and reasonably necessary descriptions of its impact, including physical, cognitive and psychological. I find that doing so would exclude material facts from the

Decision. Excluding this information would not only gut the rationale of, at the very least, a significant portion of this Decision, but would also negate whatever precedential and educational value the Decision may have. Further, any party wishing to apply for judicial review of this Decision is entitled to have a complete record of what the Tribunal considered in coming to its Decision.

[24] I acknowledge that the Tribunal's approach to anonymity does not fully satisfy the Complainant's requests. I have done my best to balance the potential undue hardship and safety of the Complainant's child with the Tribunal's general mandate to hold hearings in public. It must also be kept in mind that, as is his right, the Complainant has chosen to bring his Complaint to a public forum.

[25] Therefore, in addition to making the Decision anonymous, the Decision does the following:

- refers to the two cities involved as the "Larger Hub" and the "Smaller Hub";
- calls the Complainant's younger child the "Adult Child" because during the relevant period, the child was at least the age of majority, and "Child" because the Adult Child lives with their parents; no disrespect whatsoever is intended by this designation;
- omits any pronoun identifying the Adult Child's gender;
- sometimes, in order to avoid identifying the Adult Child's gender, the Decision uses the pronoun "their", notwithstanding that "their" is plural;
- calls the Complainant's other child "the Older Sibling" and omits any pronouns identifying the Older Sibling's gender;
- refers by their initial to various witnesses and others named in the evidence, whether oral or documentary, because I find there is a reasonable likelihood that naming these individuals would lead to the identification of the Complainant and his family;
- only names one of the Respondent's managers who was a witness, because she works out of the Respondent's Canadian head office in Calgary and not in the Larger or Smaller Hub and deals with employee matters from all across Canada;

- refers by an initial (“Dr. C”) to the Respondent’s expert witness, and to the Complainant’s two expert witnesses as “the GP” and “the Psychologist”;
- refers by name to CP’s Dr. Cutbill, then Chief Medical Officer of CP’s Occupational Health Services (OHS), who did not testify; he dealt with employees’ health issues from all across Canada; and
- refers by their initial, and in one case, to “Dr. OK”, to those doctors who did not testify but whose reports were in evidence, because I find there is a reasonable likelihood that naming them would lead to the identification of the Complainant and his family.

[26] As previously noted, the Tribunal’s mandate is to have open proceedings. This extends to the Tribunal’s records. However, if a member of the public could request the Tribunal’s record, even if medical documents are kept confidential, the Complainant’s name will likely be on other documents, thus negating the purpose of the other orders. As such, given the circumstances of this particular case and the serious prejudice which could result if anonymity of the Complainant’s Adult Child is not maintained, I order that the Tribunal’s record of this Complaint be kept confidential. The only documents available to the public, with anonymization, shall be the Complaint and the Statements of Particulars of the parties. Please note that the Statement of Particulars will not include a witness list or a document list.

[27] In this way, I have tried to both fulfill the Tribunal’s mandate of open proceedings in section 52(1) of the *Act*, which includes the accessibility of Decisions to the public which can provide guidance and precedents on human rights law by naming and describing what I find are the relevant and material facts and issues in the Complaint, while at the same time doing as much as reasonably possible within the confines of the *Act* and natural justice to avoid undue hardship and risk of harm to the Adult Child.

III. DECISION ON THE MERITS

A. POSITIONS OF THE PARTIES

(i) Complainant & Commission's position

[28] The Complainant alleges that he has a disability: anxiety disorder not otherwise specified (referred to in this Decision as "anxiety" or "anxiety disorder"). He and the Commission allege that the Respondent discriminated against him on the ground of this disability when on April 30, 2010, the Respondent removed the Complainant's medical restrictions, which provided he work only during the day, and in a yard ("Work Restrictions"). Until then, the Respondent had been accommodating the Complainant.

[29] The evidence established that the Complainant also has other health issues, including a diagnosed back problem, which the Respondent accommodated. None of the foregoing health issues are the disability on which the allegation of discrimination is based. Unless it is relevant, this Decision will not describe or make findings on evidence about conditions other than the anxiety disorder.

[30] The Complainant and the Commission allege that the lifting of the Work Restrictions constituted adverse differential treatment because of the Complainant's anxiety disorder.

[31] The Commission argues that the Respondent discriminated against the Complainant on the basis of his disability and/or family status by forcing him to work an irregular schedule on the Spareboard, which is one of the ways the Respondent assigns positions, and is described later. The Commission specifically argues that intersectionality, pursuant to section 3.1 of the *Act,* is at issue in this Complaint.

[32] The Commission submits that the Complainant suffered from anxiety which had a functional limitation and medical diagnoses that were specific and substantive. As such, it argues, the Complainant established a disability within the meaning of the *Act*.

[33] The Commission further submits that "Family Status" in the *Act* would include parental obligations towards an Adult Child with disabilities, and that the Complainant meets the current legal test for discrimination based on family status.

[34] The Complainant argues that the Respondent committed several acts of retaliation, contrary to the *Act*. The Commission took no position on retaliation except to provide cases on the correct legal test to apply.

(ii) Respondent's position

[35] The Respondent takes the position that the Complainant has not proven a *prima facie* case of discrimination with respect to either disability or family status grounds. The Respondent also suggests that the nature of this case suggests an intersection of two grounds, disability and family status. The Respondent argues that the family status test ought to apply to the intersecting grounds because, in the Respondent' opinion, the Complainant's family situation is impacting his disability.

[36] Further, the Respondent submits that the Complainant has failed to participate in the accommodation process in respect of his request for family status accommodation.

[37] Lastly, the Respondent submits that the complaints of retaliation are unfounded.

IV. CREDIBILITY OF WITNESSES

[38] Overall, I found all of the witnesses to be credible and reliable. At times, I have found the evidence of some witnesses preferable over that of others and will explain why in the Decision.

A. Credibility of Complainant

[39] When examined in chief, the Complainant seemed to be a straight-forward and reasonably forthcoming witness. However, he had significant difficulty independently recollecting many events, even during direct examination, and often had to consult notes either he or his wife had made. He often read *verbatim* from documents which he or the

Commission put into evidence. Part of this I attribute to a bit of nervousness, but certainly not all. He had no problem describing railway operations, which he seemed to know well.

[40] The Complainant also had no trouble remembering that the Respondent had denied him a request for time off to take his father on a canoe trip when his father had terminal cancer. However, the Complainant had a lot of trouble remembering that the Respondent had provided him a family status accommodation in 2004 or 2005, for at least 2 months, in order to spend more time with his sick father. In other words, sometimes his memory seemed selective. Many times, he was reluctant to testify about something specific, such as a date, unless he could look at a confirming document.

[41] During cross-examination, the Complainant was at times evasive, indirect, would exaggerate (for example, regarding timelines) and lacked answers until pressed several times, once by me. Also, he was sometimes overly concerned with trying to think two steps ahead of Respondent counsel. He said at one point, “I’m wondering what the next question is going to be”. I think this was partly a reflection of his significant and general mistrust of most, but definitely not all, of the Respondent’s managers, and by extension, the Respondent’s counsel.

[42] Generally, my review of his testimony, particularly his cross-examination, altered my impression of the reliability of his testimony. In spite of this, I did not assess the Complainant’s testimony as being deliberately untruthful. Rather, his testimony was provided to a material degree through the lens of his own views and feelings that the Respondent’s management has treated him badly in the last few years and asked for too much private information.

V. ISSUES

[43] This Decision addresses the following issues:

a. Did the Respondent discriminate against the Complainant based on a disability?
    (i) If so, did the Complainant fail to participate in the accommodation process?
b. Did the Respondent discriminate against the Complainant based on family status?

(i) if so, did the Complainant fail to participate in the accommodation process?

(ii) Should the Respondent have notified the Complainant he could apply for family status accommodation?

c. Does intersectionality apply in this Complaint, pursuant to s. 3.1 of the *Act?*

d. Did the Respondent retaliate against the Complainant, contrary to the *Act*?

e. What remedies should the Tribunal award, if any?

VI. DISCRIMINATION BASED ON A DISABILITY

[44] All parties presented arguments pertaining to discrimination based on a disability, separately from their arguments regarding discrimination based on family status. As such, the Tribunal will proceed with to examine each alleged ground of discrimination separately, and will subsequently examine the issue of intersectionality.

A. FACTS

(i) Complainant's employment history

[45] The Complainant lives in the Smaller Hub, and has worked for the Respondent since 1981. The Complainant belongs to a union. For the first three years, he worked shift work, but with predictable hours. He then occupied various positions, including safety critical positions, while working for the Respondent.

[46] The Complainant testified that from 1985 to 2005, including after his children were born, he worked mainly on the Spareboard. The Complainant and the Respondent's Mr. P testified that the Spareboard is a revolving roster of employees who are to be available 24 hours a day, 7 days a week, only subject to mandatory rest periods. They are "on call". At any time of the day or night, on any day, on a minimum of two hours' notice, a CP crew clerk can call a Spareboard employee to come to work. The days and hours of work on the Spareboard are irregular and unpredictable. The Spareboard's purpose is to have a pool of conductors, engineers and trainmen available around the clock, every day, to fill in for employees who are absent, on vacation, ill, or to fill any voids.

[47] The Respondent's Mr. P described the "Road" as the actual movement of the trains on their routes in various directions, and are the rail lines outside a Yard. The Complainant testified that an employee on the Spareboard who comes in from finishing a job (a trip on the Road) can book up to 24 hours' rest. As soon as the 24 hours' rest is finished, the employee is subject to a 2-hour lead time to be called for work.

[48] The Complainant described working on the Spareboard as a "hectic lifestyle", not knowing "when you're coming and going or if you're coming and going". But during the period up until 2005 when he was on the Spareboard, he testified that managers were more understanding and flexible. If the trip didn't work for the Complainant, he could trade for a trip of a more suitable length with another Spareboard employee. He could also ask the crew clerk to book him off work. If the crew clerk couldn't do so because of a shortage of employees, he would permit the Complainant to miss a call. To the Complainant, the complicated part of being on the Spareboard was that he didn't know when the call to work would come, which meant he didn't know if the trip would work for his schedule until he got the call.

[49] In 2005, the Respondent disciplined the Complainant with demerit points for absenteeism between November 1, 2004 and March 24, 2005**.** The Complainant testified his back and sometimes family issues caused the absenteeism**.**

[50] The Complainant testified that to his recollection, starting around 2005, management became sterner and required employees to attain their maximum mileage on the Spareboard. The Complainant characterized the change as "rule changes", but acknowledged there were no written changes, and also conceded that there were no written rules before 2005 either. The Respondent was emphasizing better attendance by employees working the Spareboard.

[51] He continued on the Spareboard until October, 2005. He testified that at the time he wanted to continue on the Spareboard because he made more money than in the Yard. The "Yard" is where individual rail cars are lifted on and off the train; trains are moved in the Yard by locomotive engineers, but only in the Yard area; switches are also operated in the Yard. Both the Smaller and Larger Hubs have Yards attached. However, because of

the 2005 discipline for absenteeism, his Union advised him to bid the Yard to avoid further problems with management. In October, 2005, pursuant to a successful bid, he went to the Larger Hub's Yard on the day shift as a Locomotive Engineer. The Complainant testified that Yard work, although also shift work, is predictable. He was on a regular shift, with 2 consecutive days off each week.

[52] The Complainant held his position in the Larger Hub's day Yard shift for 3 years, until the last week of November, 2008, when another employee "bumped" him from the position. Being bumped meant the Complainant had to go on the Spareboard. The Complainant testified that he became so anxious that he could not return to the Spareboard. He therefore did not go to work and called in sick.

[53] The Complainant's family doctor (GP) completed CP's medical forms and diagnosed the Complainant as having anxiety, and recommended that he work days and in a Yard. Dr. A of CP's Occupational Health Services (OHS) then issued work restrictions that the Complainant work day shift, in a Yard. Dr. A characterized these as temporary restrictions pending further medical information. On November 28, 2008, the Complainant went to work in a day Yard position pursuant to this accommodation by the Respondent.

[54] The Complainant continued in a day Yard position for most of the period from November 28, 2008 to April 30, 2010, with some sick leave for foot issues.

[55] On April 30, 2010, OHS removed the Work Restrictions, which meant the Complainant had to take Spareboard duties. He testified that his anxiety made him unable to work the Spareboard. He did not work from May 1, 2010 to November 6, 2011. He returned to work on November 7, 2011 in a day Yard, without accommodation from CP.

(ii) OHS and Return to Work Rules ("RTW" rules)

[56] The Complainant testified that when he booked himself off sick for 72 hours or more, CP's standard process was that he could not return to work in a Safety Critical position unless OHS cleared him as fit to work (72 Hour Illness Policy). He felt he needed a manager to help him have the OHS clearance timed correctly – so that it was not received mid-week. Mid-week OHS clearance meant being placed temporarily on the

Spareboard, until he could hold be placed in a Yard position in his own seniority the following week pursuant to the Sunday night weekly crew change. The Spareboard placement caused him to book off sick because of his anxiety, and the process would repeat itself after 72 hours off sick.

[57] The Respondent's Ms. Giddings of Employee Relations (ER) testified that the Return to Work (RTW) process is outlined in the March 2009 document entitled "Role of Occupational Health Services". OHS has protocols on the protection of employee health information and OHS personnel are very conscious to ensure they are meeting the confidentiality requirements. When returning an employee to work who has been off sick or injured, OHS' role is to provide the workplace or manager with the returning employee's clearance and any medical restrictions which the manager needs to know for the employee. OHS focuses on employees who hold safety critical and safety sensitive positions, and deals only with medical issues.

[58] Ms. Giddings explained that while OHS deals with medical issues, ER deals with all other accommodation requests, including family status. Ms. Giddings also detailed the relevant policies and privacy measures in place with regards to family status accommodation requests dealt with by ER.

[59] The Respondent argued that the Complainant, in November 2008, could have asked for more leniency on the Spareboard as an accommodation. That is, he could have asked the Respondent to accommodate him by permitting him to use the same methods he had used to make the Spareboard assignments work for him in the past – for example, by missing a call, or trading places with another employee, or booking off, and so on. The Complainant felt that this was not the tone he perceived from what was then happening in the workplace, and further, his anxiety about going on the Spareboard was being handled as a medical issue. Given the Complainant's and the Respondent's Mr. P's testimony, it is doubtful the Complainant would have received such an accommodation given the Authorized Leave of Absence Policy (ALOA Policy) and the Respondent's focus on improving the attendance problem.

[60] In any event, this Tribunal does not need to assess whether the above suggested accommodation was realistic, because the Respondent denied accommodation based on a disability. The Complainant provided the medical information related to his disability whenever it was requested and saw a psychiatrist at the Respondent's request. Given the Respondent denied the Complainant's request for accommodation and lifted the temporary work restrictions in April 2010, the parties did not proceed to determine appropriate accommodation and the Tribunal will not assess whether the Complainant ought to have or could have requested leniency.

(iii) Overview of Medical witnesses

[61] The evidence throughout the hearing referred to several medical practitioners and correspondence, reports, notes and in some cases, testimony. For confidentiality, the Decision identifies them as follows:

- Complainant's family doctor: "GP";
- the Respondent's OHS doctor who first dealt with the Complainant in 2008: "Dr. A" or "OHS Dr. A";
- the Respondent's then Chief Medical Officer, Dr. Cutbill;
- the psychiatrist who on September 1, 2009 conducted an independent medical evaluation of the Complainant: "the IME Psychiatrist";
- a psychiatrist who the Complainant saw once in 2010 : "the 2nd Psychiatrist";
- the psychiatrist who conducted a psychiatric evaluation of the Complainant in January, 2011: "Psychiatrist Dr. OK" or "Dr. OK";
- the Respondent's former occupational health specialist who testified: "OHS Dr. C" (not the same person as Dr. Cutbill above);
- the Complainant's treating psychologist, who testified at the hearing: "the Psychologist".

General Practitioner (GP)

[62] The Commission tendered the GP as an expert in family medicine. The Respondent had no objection. The Tribunal qualified the GP as an expert in family medicine and he testified at the hearing.

[63] The GP has been the family physician for the Complainant and the Adult Child, as well as the Older Sibling, since 2001. Briefly, the GP's position is that the Complainant suffered from generalized anxiety disorder and the Respondent should have accommodated the Complainant with a day Yard position.

OHS Dr. A

[64] Dr. A did not testify at the hearing. Several of his emails and notes were in the Respondent's OHS file. Dr. A was the first OHS physician assigned to the Complainant's file and had granted temporary accommodation by way of the Work Restrictions.

[65] The Complainant's testimony, which notes in the OHS file confirmed, was that there had been several phone calls between the Complainant and Dr. A regarding the Complainant's anxiety. There were also some notations that the Complainant was having family issues because of an Adult Child with a disability.

[66] Dr. A granted a temporary accommodation to the Complainant in 2008 and later indicated that the Complainant would need to see a psychiatrist for an independent medical evaluation, in order for the Respondent to obtain additional information regarding the Complainant's anxiety.

[67] The temporary accommodation remained in effect for the duration that Dr. A was assigned to the Complainant's file.

IME Psychiatrist - 2009

[68] In September, 2009, the Respondent sent the Complainant for an independent medical examination (IME) with a psychiatrist (IME Psychiatrist), who rendered his report

to the Respondent (Psychiatric IME Report). The IME Psychiatrist did not testify at the hearing.

[69] The Psychiatric IME Report diagnosed the Complainant with anxiety disorder, not otherwise specified, pursuant to the Diagnostic and Statistical Manual of Psychiatric Disorders, Fourth Edition (DSM-IV). In it, the IME Psychiatrist opined that if the Complainant "has to take the spareboard responsibility, it is my opinion that he may develop more anxiety symptoms and anxiety attacks".

[70] This IME Psychiatrist was retained by the Respondent, for its purposes of gaining additional information. At no time did an employee from OHS follow up with the IME Psychiatrist to clarify the Psychiatric IME Report or obtain additional information.

Treating Psychologist

[71] The Respondent did not object when the Commission tendered the treating Psychologist as an expert in treating people with anxiety. Having heard his testimony on his education, background, practice and work, and having reviewed the "Background" section in his Expert Report, I qualified him as such.

[72] The Psychologist saw the Complainant on multiple occasions and prepared a report dated November 13, 2009 which was provided to the Respondent. The Psychologist testified that he agreed with the IME Psychiatrist's diagnosis of anxiety, and that this occurred when the Complainant was assigned to the Spareboard, and related to his concern about being away and not knowing when he would work, for how long, or where.

[73] At the hearing the Psychologist maintained his position that the Complainant had anxiety symptoms which prevented him from working the Spareboard.

Respondent Occupational Health Specialist Dr. C

[74] Dr. C is a physician, specializing in occupational medicine. He worked for CP on contract on a regular part-time basis to provide fitness to work assessments from 2001 to

2011. He provided assessments to OHS on the Complainant's case. Dr. C never spoke with or met with the Complainant.

[75] He described the field of occupational medicine as dealing with the effects of the workplace on health, and conversely, how a person's state of health might limit or impact his work. Fitness and return to work (RTW) is one aspect of the field.

[76] The Respondent tendered Dr. C as an expert witness in the field of occupational medicine. Neither the Complainant nor the Commission objected. After reviewing Dr. C's extensive *Curriculum Vitae* and hearing his testimony about his qualifications, the Tribunal qualified Dr. C as an expert witness in the field of occupational medicine.

[77] Dr. C accepted that the Complainant was diagnosed with anxiety. However, Dr. C's position, which was maintained throughout his time dealing with the Complainant's file and at the hearing, was that the Complainant's anxiety did not prevent the Complainant from working the Spareboard. Rather, Dr. C's opinion was that if the Complainant could manage his scheduling conflict arising from his work obligations and care obligations for the Adult Child, he would be living "a largely anxiety-free life".

Psychiatrist Dr. OK

[78] Psychiatrist Dr. OK did not testify at the hearing. However, all parties referred to Dr. OK's Initial Assessment dated January 12, 2011, and no one contested its validity.

[79] The GP had referred the Complainant to Psychiatrist Dr. OK, who confirmed the diagnosis of anxiety disorder, and also diagnosed the Complainant with adjustment disorder with depressed mood, both pursuant to the DSM-IV.

Respondent's Chief Medical Officer Dr. Cutbill

[80] Dr. Cutbill did not testify at the hearing. He never met with or spoke to the Complainant. His involvement was limited to a paper review of the Complainant's file. He thought the issue in the Complainant's case was whether he had a mental disorder that could reasonably impair his ability to perform his duties, and suggested that OHS might wish to obtain a psychiatric assessment.

OHS Case Notes

[81] The Respondent's Ms. Kari Giddings testified that the contributors to OHS Individual Case Notes (OHS Case Notes) are only OHS staff: the Chief Medical Officer, the Director, the nurses and doctors. Other employees are not entitled to access the OHS Notes, unless the employee signs a release.

[82] The Respondent objected to witnesses other than the authors testifying as to the truth of the contents of the OHS Case Notes. Respondent counsel submitted that the OHS Case Notes were akin to business records, and should have been introduced by their authors, including Dr. A and OHS Nurses C and E, none of whom testified.

[83] The Complainant, the GP, and Dr. C. testified about Dr. A's various emails, letters, and OHS Case Notes. Unless a recipient of a letter or participant in a documented phone call testified about them, the Tribunal did not admit these documents into evidence as in and of themselves being proof of the truth of their contents; they are hearsay. However, all parties referred to these documents and their contents, and as such, I have given them their appropriate weight.

[84] It should also be noted that I do not refer to all of the documentary evidence and testimony, but only that which I find is necessary to make my decision.

(iv) Overview of Complainant's Medical History re: Anxiety

[85] On January 22, 2008, while conducting a complete assessment of the Complainant which the Respondent required because he occupied a Safety Critical position, the GP noted on the mandated Return to Work Form (RTW Form) that the Complainant was suffering from Generalized Anxiety. This was while the Complainant was still working days in a Yard position, prior to being bumped to the Spareboard.

[86] On November 3, 2008 the GP completed the Respondent's RTW Form, where he recommended the Complainant continue with day Yard duties and noted that he did not tolerate the stress and anxiety of Road duty and irregular hours very well. During the hearing, the GP added that this work stress was coupled with the Complainant's worries

about not being available to the Adult Child when his wife, who works at night, was not there, although he did not think this was the Complainant's main worry or cause of his anxiety.

[87] On November 4, 2008, Dr. A responded to the GP's November 3, 2008 RTW Form, confirming that the Complainant would continue with day Yard duties at this time. However, Dr. A sought further information: specific diagnosis, prognosis, treatment plan, rational for the restrictions and anticipated duration of the restrictions.

[88] On November 24, 2008, the GP saw the Complainant to complete the Respondent's Treating Physician's Medical Report form. He again diagnosed anxiety and advised that the Complainant was seeing a psychologist. On November 26, 2008 the GP sent a detailed letter to OHS Dr. A, responding to the questions in Dr. A's November 4, 2008 letter. The GP explained that the Complainant suffered from anxiety, related to being an engineer on the Road. He stated that the Complainant was seeing a psychologist for other related issues, including a special needs child who "requires constant supervision". The GP added that the Complainant's wife was an evening emergency room nurse, and if the Complainant worked days, it would allow "him to help out at home". The GP did not fully provide a rationale for or proposed duration for his recommendation, other than indicating that the Complainant was not unwilling to do Yard duties and that "he should continue to do the job he was doing before".

[89] On November 28, 2008, Dr. A sent an email to OHS Nurse E, copied to Nurse C, noting he spoke with the Complainant on November 27 regarding the GP's November 26 correspondence. The Complainant told him he needed to work days because of family issues, and that failing to be accommodated in this regard would increase his anxiety. Dr. A restricted the Complainant to working day shifts in the Yard temporarily, pending receipt of more information from the Complainant's psychologist.

[90] The GP completed another Respondent Medical Report Form on May 4, 2009. The GP noted anxiety, that the Complainant reported anxiety if he was to work on the Road, and that the GP recommended the Complainant continue seeing the psychologist.

[91] On May 6, 2009, OHS Chief Medical Officer Dr. Cutbill became involved in the case. He wrote a Case Note questioning whether the Complainant truly had a mental disorder that could reasonably impair his ability to safely perform his duties on the main line (as opposed to working in the Yard only). He noted the Complainant's desire to be home due to child issues and his wife working nights. Dr. Cutbill expressed his opinion that in the interest of safety, a mental disorder should be confirmed with a psychiatric assessment, given that the Complainant worked on the main line and could be deemed unfit. Overall, Dr. Cutbill thought a psychiatric assessment might help OHS determine the Complainant's fitness to work.

[92] Dr. A explained to the Complainant that the Respondent required an independent psychiatric evaluation to assess his anxiety disorder, seeking a diagnosis, prognosis and an assessment of his fitness for duty and any restrictions required. The Complainant would continue to be temporarily accommodated in a day Yard position until OHS re-assessed after it received the psychiatric evaluation.

[93] Dr. A was replaced by Dr. C who became involved in the Complainant's file on September 4, 2009. At this time Dr. C opined that the GP's reporting of anxiety on the RTW and other medical Forms was related to the Complainant's change in work assignment, which compromised his family care giving role and was not a medical issue. Dr. C noted that at some point the GP's diagnosis became "anxiety disorder", a specific psychiatric diagnosis, without supporting explanation, prescription of medication or further assessment.

[94] The IME Psychiatrist completed the assessment and on September 17, 2009, issued an independent medical evaluation report to the Respondent (Psychiatric IME Report). Although the IME Psychiatrist did not testify, and the Respondent's counsel did not object to the Psychiatric IME Report being admitted into evidence, she did object to its admission by way of the Complainant's testimony. I permitted the admission of the Psychiatric IME in that manner, and permitted the Complainant (and others) to testify about it, pursuant to subsection 50)(3)(c) of the *Act,* which gives the Tribunal wide latitude in admitting any information at a hearing, so long as it is not privileged, and on the basis that I would later decide the weight to give it.

[95] The IME Psychiatrist diagnosed the Complainant as suffering from anxiety disorder, not otherwise specified, pursuant to the DSM-IV, and work-related stress, and scoring 70-75 in the Global Assessment of Functioning (GAF) test.

[96] The GP testified that GAF refers to a scale used by psychiatrists to determine how the patient is functioning in his workplace and overall. A 100 score is perfect; 70 to 75 means there are certain issues but the patient is able to function fairly well; 0 is where the patient is in danger of harming himself or others and needs more care, and perhaps hospitalization. The GP testified that given the Complainant's GAF score, his anxiety was considered to be a mild case and that most approaches start with treating it with cognitive therapy and psychotherapy. If not stopped, mild anxiety can lead to depression. If those therapies don't work, medication can be added.

[97] The Psychiatric IME Report noted that the Complainant was very much motivated to get better, and that he realized he had anxiety symptoms. The short term prognosis was that the Complainant was then clinically stable and motivated to practice cognitive behavioural techniques to address his anxiety symptoms. In the IME Psychiatrist's opinion, the short term prognosis was "good". The long term prognosis depended on the Complainant's work situation, since he considered his work as somewhat stressful. The IME Psychiatrist Report found the Complainant currently fit to return to work in a safety critical work environment. He noted that the Complainant felt "comfortable with his current role" as Yardman. However, the IME Psychiatrist opined that if the Complainant had to take Spareboard responsibility, "he may develop more anxiety symptoms and anxiety attacks".

[98] The IME Psychiatrist noted that the Complainant's main worry was the possibility of being forced to work on the Spareboard. The Complainant discussed his work-related stress about being unsure when and where his next shift would be. The IME Report also indicated that the Complainant mentioned anxiety symptoms that were physical and psychological in nature.

[99] In the IME Psychiatrist's opinion, the Complainant did not then need psychotropic medication, but would benefit from a psychological approach to his anxiety symptoms, and

from regularly seeing a psychologist for training in various techniques to address his anxiety symptoms.

[100] On September 21, 2009, as set out in his Case Note, Dr. A had a conference call with OHS Nurse C. He had reviewed the GP's September 3, 2009 Form Report and the Psychiatric IME Report. Dr. A noted the Psychiatric IME's diagnosis, and noted that the IME Psychiatrist recommended that the Complainant work as a "Yardman in his current role and should avoid spareboard responsibilities". As such, Dr. A issued Work Restrictions for the Complainant limiting him to day shift, Yard duties. Dr. A noted the restrictions were temporary and the Complainant was required to see a psychologist pursuant to the Psychiatric IME's treatment plan.

[101] In accordance with the Psychiatric IME Report and Dr. A's instructions, on October 6, 2009, the Complainant began counselling sessions with the Treating Psychologist (or Psychologist). The Complainant testified that he followed the Psychologist's recommendations and techniques, including swimming and exercising more, and that helped his general anxiety. The Complainant saw an improvement in his anxiety generally, but not towards working on the Spareboard.

[102] The Psychologist's testimony confirmed the Complainant's description of the treatment approach and confirmed that, based on what the Complainant told him, there was improvement in the anxiety generally, but not regarding going back to the Spareboard. In response to the Respondent's request, the Psychologist wrote a report dated November 13, 2009 (November 13, 2009 report), explaining the treatment with the Complainant to date. The Psychologist testified that this request for a report was his only contact with the Respondent. The Respondent never contacted him to discuss the Complainant's anxiety disorder or lifting the Work Restrictions.

[103] OHS asked Dr. C to review the Psychiatric IME Report and the Psychologist's November 13, 2009 report. Dr. C responded on November 25, 2009 and noted that aside from mentioning "work-related stress" and stating that the Complainant's symptoms were not typical of Generalized Anxiety Disorder or panic disorder, the Psychiatric IME Report was sparse regarding anxiety symptoms or providing a rational for the restrictions. In Dr.

C's opinion, the anxiety was described as "not otherwise specified", meaning the anxiety is not better classified more precisely.

[104] Dr. C noted that the Complainant's GAF score was between 70 and 75. He testified he was not a psychiatrist, but explained that symptoms in the 70-75 range were typically mild, transient and any impact they had on a person's functioning tended to be temporary. In cross-examination, Dr. C conceded that he would never base his opinion of someone's requirement for accommodation solely on the GAF score – it was one indicator of the severity of the medical condition.

[105] Dr. C testified regarding the IME Psychiatrist's opinion that if the Complainant were to work the Spareboard, his anxiety symptoms could increase. Dr. C did not interpret that opinion as a "recommendation" that the Complainant not work on the Spareboard or at night; he interpreted as in fact not placing any restrictions on the Complainant. Dr. C acknowledged that OHS Dr. A had interpreted the IME Psychiatrist's opinion as a recommendation.

[106] To Dr. C, the fundamental issue as it became clear to him and to OHS was that this was not a medical issue. The cause of the Complainant's anxiety was that one of the Complainant's children had special needs and required someone to be with the child virtually all day, and with the Complainant and his wife working nights, they were having a great deal of difficulty covering off the care for the special needs child. Dr. C accepted that this would cause some anxiety, because the Complainant was not only working nights, but also had unpredictable shifts on the Spareboard.

[107] It was Dr. C's opinion on November 25, 2009 that the information contained in the file supported a finding that the Complainant was fit for his position and there was "insufficient information" supporting a restriction from the Spareboard. In his November 25, 2009 email to OHS Nurse C, Dr. C wrote that had he been involved when OHS received the Psychiatric IME Report, he would have called the IME Psychiatrist and asked for clarification.

[108] Despite now being involved in the file, Dr. C did not contact the IME Psychiatrist who had been retained by the Respondent. In cross-examination, Dr. C acknowledged

that technically, there would have been nothing stopping him from calling the IME Psychiatrist. No other information was led by the Respondent that someone from OHS had contacted the IME Psychiatrist for further information or clarification of the Psychiatric IME Report.

[109] In February, 2010, OHS requested medical updates from the Complainant. The GP was away for some time and on April 26, 2010, the GP completed the Respondent's medical form for a treating physician (April 26, 2010 Report), in which he stated that the Complainant was seeing a psychologist for anxiety issues and that any information regarding anxiety should be obtained from the psychologist.

[110] The GP testified although he explained the above anxiety issues, he did not specifically write a "diagnosis" of anxiety disorder in his April 26, 2010 Report because he assumed OHS was aware of the anxiety as an ongoing issue and had referred the Complainant to a psychologist; therefore, the GP thought the day Yard restriction was still in effect and would continue to be in effect.

[111] The Complainant recalled having a discussion with an OHS Nurse on April 26, 2010. The OHS Case Notes confirm that OHS Nurse E and the Complainant had a phone discussion about the GP's April 26, 2010 Report. The Note records the Complainant telling the Nurse he suffered from anxiety, and his diagnosis "is not new; it is due to the way the company is treating him". The Note describes the Complainant saying he was tired of the stress of being on call, which he felt was more stress than it should be, and that he had a complex family situation, and his wife worked nights.

[112] On April 28, 2010, OHS Nurse C wrote a Case Note that she spoke with the GP who confirmed he thought it more appropriate that the Psychologist comment on the Work Restrictions. She also noted that the Complainant told her he had an appointment with the Psychologist on May 11, 2010.

Lifting of the Complainant's Work Restrictions

[113] Dr. C testified that on April 30, 2010, he met with the OHS Nurse to review the file and all the reports about the Complainant to that date, including the GP's April 26, 2010

report. In his Expert Report, Dr. C described the GP's April 26, 2010 Report as deferring to the Complainant's Psychologist for updates on his anxiety. Dr. C testified that he did not interpret the GP's April 26, 2010 statement that the Complainant was seeing the Psychologist for anxiety issues and information should be obtained from the Psychologist as "instructions or a request" that Dr. C must again call or contact the Psychologist. Dr. C testified that he already had prior reports from the Psychologist, so did not need to follow up again with the Psychologist.

[114] Dr. C testified that he thought the Complainant was fit to go back to safety critical work, subject to restrictions for his back. He acknowledged the Complainant's family issues and work scheduling challenges, but his opinion was that those issues did not warrant or support medical restrictions. He thought the Complainant had to discuss his scheduling concerns with his managers.

[115] As far as Dr. C knew, on April 30, 2010 and thereafter, OHS recommended that administrative measures be taken to help resolve the Complainant's family scheduling conflict.

Aftermath – Work Restrictions removed and Return to Work November 2011

[116] The Complainant was ultimately off work from May 1, 2010 to November 6, 2011.

[117] OHS Nurse C's April 30, 2010 Case Note describes her phone discussion with the Complainant. There were subsequent discussions that occurred throughout June which were all noted in the Case Notes. These discussions were the subject of much dispute regarding the information, or clarity of same, which OHS provided to the Complainant.

[118] The Complainant testified that during the April 30, 2010 call from Nurse C, he was in a busy station, felt he did not have privacy and could not concentrate that well on Nurse C's questions. He described being very surprised and confused by the lifting of the Work Restrictions, because the last he knew, the GP had told OHS to obtain information about anxiety from the Psychologist, and OHS had not done that. The Complainant testified that although he knew that the Work Restrictions were temporary, he was still "in shock", because as far as he could see, there was no change in his medical condition. The

Complainant told OHS Nurse C on April 30, 2010 that he would have to book off sick because of his anxiety.

[119] In cross-examination, he conceded it was possible that OHS Nurse C told him on April 30, 2010 that the reasons he gave on April 26, 2010 about why he could not work on the Spareboard or at night were not medical reasons. However, if she did tell him that, he did not understand and was still asking months later why OHS removed his Work Restrictions.

[120] While the Complainant was off work he continued to see the Psychologist. On May 26, 2010, at the Complainant's request, the Psychologist wrote to OHS Nurse C, stating he met with the Complainant 6 times between October 6, 2009 and January 5, 2010, to work on techniques to reduce and manage symptoms of anxiety. He also noted that at the May 11, 2010 session, after the Respondent notified the Complainant he was assigned to the Spareboard, the Complainant reported the anxiety he experienced was significant and caused him a high level of distress.

[121] In his May 26, 2010 letter to OHS, the Psychologist described the Complainant's anxiety as follows:

> "It appears that the focus of the anxiety is the unpredictability when the call will come and not knowing where he is going and for how long. It does not appear to be the work itself."

[122] On June 28, 2010, the GP sent a form medical report to OHS, diagnosing anxiety, stating that the Complainant could return to Yard duties "as before", and advising that he was awaiting a psychiatric appointment with the 2nd Psychiatrist.

[123] Although the GP noted a diagnosis of anxiety disorder in the June 28, 2010 Form to the Respondent, Dr. C's opinion in his July 16, 2010 fax to the GP was that OHS still did not have evidence that the Complainant had a *medical or mental health disorder* that required restriction of his work schedule. The GP testified he received Dr. C's July 16, 2010 fax but did not recall having any discussion with Dr. C after July 16, 2010.

[124] The GP had referred the Complainant to the 2nd Psychiatrist. The Complainant testified that when he saw the 2nd Psychiatrist and told him he needed a diagnosis, the 2nd Psychiatrist said that the Complainant already had a diagnosis from the IME Psychiatrist. The 2nd Psychiatrist reported to the GP in his August 29, 2010 letter that nothing had changed in the Complainant's condition since the Psychiatric IME, no new diagnosis was required, and the Complainant should continue seeing the Psychologist.

[125] Dr. C testified that he viewed the 2nd Psychiatrist's Report as not containing any diagnosis, and not changing his opinion.

[126] The GP also referred the Complainant to Psychiatrist Dr. OK, who provided an Initial Assessment to the GP on January 12, 2011. Dr. OK provided a history noting that the Complainant's wife works shift work and that he has to cover his wife's shift to care for the Adult Child with cerebral palsy and the Complainant's worries about that. Dr. OK noted that the Complainant reported he had been anxious for the last 20 years since his kids were growing up. The Complainant reported physical abdominal symptoms, sleep difficulties, noting it was because he was worried about the unpredictability of his schedule. Dr. OK also noted that the Complainant "…has panic attacks about once or twice a week while on the spare board".

[127] Dr. OK noted that the Complainant stated he finds some of this worry irrational as well as his anxiety about going back to the Spareboard. Dr. OK reported the Complainant had decreased interest, appetite, concentration and energy and that although this had been ongoing for the last 9 months, it had been worse in the last couple of weeks.

[128] Dr. OK diagnosed "Adjustment Disorder with depressed mood" and "Anxiety Disorder Not Otherwise Specified" pursuant to the DSM-IV. Overall, Dr. OK wrote that the Complainant presented with significant anxiety which was mostly related to his work and the Adult Child. The Complainant also reported being depressed as a result of the work situation. Dr. Ok reported that his anxiety about work always led back to his being available to care for the Adult Child. Dr. OK suggested the Complainant consider other options for work that would have more flexible scheduling.

[129] After the GP received Dr. OK's Report, he wrote to OHS on February 24, 2011, and conveyed Dr. OK's diagnosis. He also advised:

> "[T]here are many stress factors that are added to his condition, these factors have no way of changing. [The Adult Child] who is physically disabled, requires care on a constant basis."

[130] The GP stated that CP should try to accommodate the Complainant's schedule with his need to sometimes be the Adult Child's caregiver, which would benefit both CP and the Complainant. He also advised that not working added to the Complainant's stress, chronic disability and negativity, whereas a return to work program would help overcome some of those problems. He also advised the Complainant would continue regularly seeing the Psychologist.

[131] In Dr. C's opinion, the Summary in Dr. OK's report stressed that the Complainant's anxiety symptoms were very situational in nature, and it was significant that the Complainant himself denied anxiety in any other context, and his anxiety arises because of his family scheduling issues regarding the Adult Child. Dr. C agreed in cross-examination that simply because a medical condition was situational did not mean that it was not disabling.

[132] However, Dr. C felt Dr. OK's report confirmed Dr. C's own working approach, which was that the Complainant was medically fine to do his safety critical job, but had a home situation that had to be addressed. The only solution was by administratively addressing the conflict between the Complainant's work schedule and his home situation. Dr. C did not view Dr. OK's remarks as a psychiatrist stating the Complainant was medically restricted from working nights or the Spareboard.

[133] Ultimately, the Respondent never reinstated the Complainant's day Yard restriction due to anxiety. The Complainant obtained a day Yard position with his own seniority on November 7, 2011.

[134] It should be noted that the Complainant was seeking accommodation based on a disability until March 2011, when he made it clear to the Respondent that he was also

formally seeking accommodation based on his family status. Despite this request, given the Respondent's corporate structure, the Respondent was asking that the two requests be dealt separately - the medical disability by OHS and the family status by ER. The Complainant wanted OHS to handle both, given the sensitive information regarding the Adult Child. When Ms. Giddings told him that OHS could not handle the family status request, the Complainant agreed for some time to focus on the disability request rather than family status. The family status request is dealt with later in this Decision.

B. Law

[135] A discrimination complaint based on a disability in employment is brought pursuant to section 7 of the *Act* which states:

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

[136] To prove a *prima facie* case of discrimination, the Complainant is required to show:

i. that he had a characteristic protected from discrimination under the *Act,*
ii. that he experienced an adverse impact with respect to employment,
iii. and that the protected characteristic was a factor in the adverse impact (*Moore v. B.C. (Education)*, 2012 SCC 61, para. 33).

This must be established on a balance of probabilities (*Quebec (Commission des droits de la personne et des droits de la jeunesse*) v. *Bombardier Inc.*, 2015 SCC 39, at paras. 59, 65).

[137] The Respondent has three options in responding to an allegation of *prima facie* discrimination. The Respondent may call evidence to show its actions were not discriminatory; it may establish a statutory defence that justifies the discrimination; or it may do both (see *Bombardier*, supra, para. 64).

[138] None of the parties cited *Moore, supra.* Also, *Bombardier, supra*, was released after submissions closed. However, these decisions have simply confirmed or clarified the law first expressed in *Ontario Human Rights Commission and O'Malley v. Simpson-Sears,* [1985] 2 SCR 536. The Tribunal finds the *Moore* decision particularly helpful as it confirms the analytical framework for applying section 7 of the *Act*, which was also outlined at paragraph 19 of the Commission's final submissions.

C. Analysis

(i) Does the Complainant have a disability within the meaning of the *Act*?

[139] Section 25 of the *Act* states:

> "In this *Act*, "disability" means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug."

[140] In *Desormeaux v. Ottawa (City)*, 2005 FCA311 (*Desormeaux)*, the Federal Court of Appeal (FCA) followed the Supreme Court of Canada's decisions in *Granovsky v. Canada* [2000] 1 S.C.R. 703 and *Quebec* (*Commission des droits de la personne et des droits de la jeunesse*) *v. City of Montreal*, [2000] 1 S.C.R. 665 in finding that "…disability in a legal sense consists of a physical or mental impairment, which results in a functional limitation or is associated with a perception of impairment" *(Desormeaux*, at para. 15). The FCA held that whether an individual had a disability was a mixed question of law and fact. In *Desormeaux,* the FCA upheld the Tribunal's finding that the complainant's headaches were "…chronic, significantly incapacitating and periodically interfered with her ability to do her job", and therefore constituted a disability (*ibid*, at para 2).

[141] The Complainant alleges that he suffers from anxiety disorder, which interferes with his ability to work the Spareboard.

[142] The Respondent submits that the Complainant does not have a disability within the meaning of the *Act* because he has not provided evidence based on pathological

symptoms that his anxiety disorder restricts his ability to perform his normal workplace roles as a locomotive engineer. The Respondent argues that the source of the Complainant's anxiety was extrinsic to his role as a locomotive engineer and was based on his family obligations.

[143] The Complainant submitted his own post-hearing written submissions, but also relied on the Commission's Closing Submissions. The Commission argues that with respect to the Complainant's anxiety, there was both a functional limitation and medical diagnoses with specificity and substance, which establish that the Complainant has a disability within the meaning of the *Act*. The Commission relies, among other things, on the facts that in 2008, the Complainant received an initial diagnosis of anxiety disorder from the GP and that this was followed in September, 2009 by a specialist's diagnosis by the IME Psychiatrist selected by the Respondent, who opined that if the Complainant was placed on the Spareboard, he might suffer more anxiety symptoms and anxiety attacks. The Commission further submits that even after the Respondent lifted the Work Restrictions, the GP, the Treating Psychologist and Psychiatrist Dr. OK all confirmed the diagnosis of anxiety disorder and recommended some type of flexible work schedule and/or work restrictions.

Complainant's feelings of anxiety

[144] The Complainant testified that although he knew that "nothing is forever in the railroad", he was shocked at being bumped from his day Yard job in November, 2008 and assigned to the Spareboard. He was not mentally ready for it. As soon as he found out he was placed on the Spareboard, he described wanting to vomit, being "hot and shaky", and feeling so anxious that he had to book off work as sick.

[145] The Complainant felt that his anxiety was about being on call, and was caused by the "new restrictions" and the "new rules" around booking off the Spareboard, rather than completing the tasks of the job itself. He felt that with the Respondent's stricter attitude represented by the requirement for a manager's permission to book off rather than the crew clerk's, there was "no way out" if he absolutely couldn't work a trip. He could no longer trade assignments with another employee if a run did not work for his schedule. He

stated that missing a call now triggered a disciplinary investigation. He felt so much anxiety under these restrictions, it was to the point that he felt physical reactions and could not work. He testified that he wished he could work the Spareboard because he would have made more money.

[146] Although the Complainant stated in cross-examination that he did not have anxiety outside of work, which concurred with Dr. OK's notes, he also testified that at times the anxiety from work would overflow into other areas of his life. He felt that being on call and the new restrictions imposed by the Respondent were his stressors.

[147] Generally, I find that the Complainant feels heightened anxiety about working on the Spareboard, which is consistent with the findings in the Psychiatric IME Report, as well as supported by Dr. OK, the Psychologist and the GP.

[148] The Complainant testified that between May 1, 2010 and November 7, 2011, he never tried to work a Spareboard shift because his anxiety was too great. He testified that his anxiety was so high with regards to the thought of waiting for a call for the Spareboard, he had to book off before even being assigned a trip.

Weighing of the medical and psychological evidence

[149] The Respondent's Dr. C did not meet personally with the Complainant nor did he ever speak to the Complainant**.** He formed his opinions throughout, including from September 4, 2009 to April 30, 2010, and thereafter, on a review of medical reports, including the GP's and Psychologist's Expert Reports, the Psychiatric IME Report, the Psychologist's November 13, 2009 report, the Psychologist's May 26, 2010 letter, information from OHS nurses about discussions they had with the Complainant, and OHS Dr. Cutbill's email that the Complainant's family issues constituted an "overlap" with an administrative issue.

[150] Although Dr. Cutbill did not testify at the hearing, I find that because Dr. C relied on Dr. Cutbill's May 6, 2009 Case Note in his Expert Report, and noted Dr. Cutbill's opinion in his testimony, the Tribunal is entitled to rely on Dr. Cutbill's May 6, 2009 Case Note as

establishing that Dr. Cutbill and Dr. C both viewed family issues as not being medical, but rather administrative in nature.

[151] The lack of personal discussions, examinations or telephone discussions with the Complainant gives less weight to Dr. C's opinions than the opinions of the physicians and the Psychologist who met personally with the Complainant or spoke with him. The Psychologist met with the Complainant six times before April 30, 2010 and ten times thereafter. The GP, as his family physician, saw him numerous times and has been his family physician since 2001. The evidence established that OHS Dr. A spoke with him twice. Both the Psychologist and the GP testified at the hearing. Balanced against that is the fact that none of the IME Psychiatrist, the 2nd Psychiatrist and Psychiatrist Dr. OK testified. Therefore, subject to my comments below, I give somewhat more weight to the evidence of the GP, Dr. C and the Psychologist, because they testified.

[152] The Psychologist testified in a professional, straightforward manner. He was never defensive when answering questions from any of the parties. He explained the difference between anxiety pursuant to a DSM-IV diagnosis, and someone who is simply nervous. I also give added weight to his testimony given his experience in dealing with individuals with anxiety.

[153] I take into account that the IME Psychiatrist is a specialist physician in psychiatry. However, as noted, he did not testify and the Tribunal did not qualify him as an expert. Nevertheless, I accept many parts of the Psychiatric IME Report as having probative value. The GP and the Psychologist accept and agree with the findings in the Psychiatric IME Report, including the diagnosis and treatment plan. I also find it significant that the Respondent's expert, Dr. C. did not dispute, and in fact accepted, many parts of the Psychiatric IME Report, including the diagnosis. Dr. OK, also a psychiatrist, agreed with the diagnosis in the Psychiatric IME Report.

[154] When asked what the symptoms of the Complainant's anxiety disorder were reported to be up to April 30, 2010, Dr. C looked to the Psychiatric IME Report because in his opinion, it provided the best psychiatric information, whereas the GP's reports provided family medicine information. Dr. C also testified that family doctors were less precise than

psychiatrists in naming psychiatric disorders. However, when Dr. C lifted the Work Restriction on April 30, 2010, one of his reasons was that the GP's April 26, 2010 report contained no reference to anxiety. This is despite the fact that both a psychologist and the Respondent's IME Psychiatrist had previously noted anxiety. I find that at different times, Dr. C was inconsistent in the weight he gave to the GP's opinions about the Complainant's anxiety disorder.

[155] I also take into account that twice during his testimony, Dr. C expressed surprise that in light of it seeming so central in the case, the Psychiatric IME Report did not explore the Complainant's family situation. I find that this was all the more reason why Dr. C should have at least spoken to the IME Psychiatrist about whether the IME Psychiatrist had canvassed the issue with the Complainant during the IME.

[156] Dr C never contacted the IME Psychiatrist for further information. Nor did Dr. C ever send the Complainant for another psychiatric independent medical evaluation, notwithstanding his November 25, 2009 opinion that this was an option if the Complainant still stated he could not work on the Spareboard.

[157] I give more weight to the evidence of the GP, Dr. C and the Psychologist because they testified. Of the three, I find that the GP and the Psychologist had a better understanding of the Complainant and his anxiety disorder, particularly considering the additional level of contact they had with the Complainant. As such, I give more weight to the opinions and testimony of the Psychologist and the GP, and the documentary evidence in the Psychiatric IME Report, over the testimony, opinion and Expert Report of Dr. C.

Did the Complainant have a disability within the meaning of the Act?

[158] The Respondent did not dispute that the Complainant had a diagnosis from a psychiatrist of anxiety disorder, not otherwise specified. The Respondent's position was that the diagnosis did not constitute a disability within the meaning of the *Act*, because to do so, there had to be a functional limitation arising from it. The Respondent's medical expert, Dr. C, was of the opinion that the diagnosis of anxiety disorder did not result in a

functional limitation because it did not affect the Complainant's ability to do his safety critical job.

[159] Dr C's opinion on April 30, 2010, and from May 1, 2010 until he left CP in 2011, and in his Expert Report of June 3, 2014, was that the Complainant's anxiety did not disable his ability or fitness to work in his Safety Critical job. Dr. C's opinion was that if the conflict between the scheduling of the Complainant's family responsibilities and work demands was solved, then the Complainant would be "living a largely anxiety-free life". He characterized the issue as an administrative scheduling conflict, which should not have "medical clothes" put on it.

[160] The issue for the Tribunal to decide is whether there is enough evidence to substantiate the Complainant's allegation that his anxiety is a disability within the meaning of the *Act*.

[161] First, what does the Complainant's job entail? The evidence obtained from both the Complainant and the Respondent's witnesses was that a Spareboard employee's work consists not only of being able to do the tasks of Locomotive Engineer, or Conductor or Trainman, but also of the ability to be flexible, to be able to go to work on two hours' notice, day or night, and to be able to tolerate and function on an unpredictable work schedule. That is all part of being and functioning on the Spareboard.

[162] As previously noted, the Complainant described physical reactions when he thought of going on the Spareboard, to the degree that he had to book of sick. I note that the Complainant had a lot to lose by refusing to work the Spareboard: he could not work for another employer because he was off sick from the Respondent and risked losing his job if he did so, he was therefore losing wages and benefits. He was also losing pensionable service and pension contributions. In addition to his anxiety, he became depressed; not working also affected his family life. He knew his manager Mr. P considered him "AWOL". Refusing to work the Spareboard was costing the Complainant financially, emotionally, and in his work reputation. I find that but for his anxiety disorder, he would not have refused to work the Spareboard.

[163] The evidence established that several physicians diagnosed the Complainant with anxiety, including:

- the GP
- the IME Psychiatrist
- the 2nd Psychiatrist; who although he did not diagnose him, stated that nothing had changed since the Psychiatric IME's diagnosis;
- Psychiatrist Dr. OK

The Psychologist testified that he agreed with the IME Psychiatrist's diagnosis.

[164] Dr. C agreed that in certain work situations, specifically the Spareboard and night shifts, the Complainant's anxiety symptoms worsened. When discussing the Psychologist's May 26, 2010 letter, Dr. C accepted that the Complainant was experiencing "significant symptoms" of anxiety at the thought of the Spareboard.

[165] However, Dr. C's opinion was that the fundamental issue was not medical, but rather a scheduling conflict, and if that could be sorted out the Complainant would be "leading a largely anxiety-free life". Dr. C wrote in his Expert Report and also testified that everyone has symptoms - a little nervousness, their stomach may hurt and everyone has medical diagnoses. However, he opined that just because a medical diagnosis is present does not mean that work limitations or restrictions are required. It very much depends on how that medical condition interacts with the nature of the job.

[166] Every other medical physician and expert disagreed with Dr. C, with the exception of Dr. Cutbill, who as previously noted, also never met the Complainant.

[167] First, we have the GP who diagnosed the Complainant with anxiety in January 2008 and later recommended that he not work the Spareboard. The GP believed that the stress of the Complainant thinking of going back on the Spareboard would increase his anxiety, and could perhaps lead to further problems, like depression. The GP testified that some anxiety is normal, but the feelings or sensations connected to it should not be having a negative impact. The GP thought the Complainant had a number of anxiety symptoms, both physical and psychological, presenting themselves in the Complainant's behaviour.

He testified he was “shocked” when the Complainant told him that the Work Restrictions had been removed. The GP believed that the Complainant was doing well on the day Yard job and contributing to the workforce.

[168] Dr. C testified that he called the GP on November 27, 2009, to “introduce” him to the distinction between a medical restriction which was necessary because of a medical condition, as opposed to the family situation; which in Dr. C’s opinion, had to be addressed administratively. Dr. C felt the GP was “advocating” for the Complainant not to work nights or on the spareboard. In his December 4, 2009, follow-up letter to the GP, Dr. C attached the Respondent’s “Role of Occupational Health Services – Return to Work” statement, which outlined the idea that employees often bring to their treating physician non-medical “…issues such as harassment, job dissatisfaction, or dislike of a supervisor”.

[169] The GP recalled Dr. C calling him and explaining the Respondent’s guidelines. However, the GP did not agree that the situations Dr. C described in his November 27, 2009 phone call and December 4, 2009 letter applied to the Complainant. In the GP’s opinion, a diagnosed anxiety disorder was definitely a medical condition and in the Complainant’s particularly situation, required accommodation.

[170] Second, we have the Psychologist’s testimony that he agreed with the IME Psychiatrist that the Complainant suffered anxiety. The Psychologist also testified that the anxiety regarding working on the Spareboard was never alleviated. In his words, “the anxiety was there” as a diagnosed condition. He and the Complainant worked on managing the symptoms of the anxiety and on self-care processes, but that did not alleviate the anxiety condition itself. The Psychologist testified that for a diagnosis of anxiety to be made at a clinical level, the anxiety was a different kind of anxiety than “simple butterflies or nervousness”. The anxiety with which the Complainant was diagnosed was a much more debilitating kind of condition and did affect his ability to work the Spareboard.

[171] At the hearing, the Psychologist explained what he meant in his May 26, 2010 letter to OHS by “it does not appear to be the work itself” which was the focus of the Complainant’s anxiety. The anxiety seemed to occur when CP called the Complainant to

work “in an unpredictable fashion”. In particular, not knowing where he was going and how long he’d be gone, and specifically as it related to his concern about being away at night when his wife was working, without anyone to help his children when they needed it. The Psychologist maintained that regardless of the cause of the anxiety, the anxiety about the Spareboard was present, and affected the Complainant’s ability to work the Spareboard.

[172] Third, we have the 2009 Psychiatric IME Report. The Respondent’s Dr. C interpreted it as not finding that the Complainant could not work the Spareboard. This interpretation conflicts with those of OHS Dr. A., the GP, and the Psychologist.

[173] On September 22, 2009, after receiving the Psychiatric IME Report, OHS Dr. A read it as recommending that the Complainant “should work as a Yardman in his current role and should avoid spareboard responsibilities”. Dr. A set up temporary Work Restrictions accordingly.

[174] The GP testified that he interpreted the Psychiatric IME’s statement that “if the Complainant has to work the Spareboard, he may develop more anxiety symptoms and anxiety attacks” as a recommendation that the Complainant not work the Spareboard. The GP fully agreed with the Psychiatric IME that the Complainant should continue to work in the day Yard, did not require medication for his anxiety, but should see a psychologist.

[175] The Psychologist, the 2nd Psychiatrist and Psychiatrist Dr. OK all agreed with the Psychiatric IME Report. The Psychologist testified he was surprised and a bit disappointed that the Respondent had lifted the Complainant’s Work Restrictions, because he did not know what the Respondent had based its decision on in terms of the Complainant’s anxiety issues. In fact, in his May 26, 2010 letter to OHS, he noted that the Psychiatric IME Report had “…indicated the anxiety could recur with a return to spareboard responsibilities, and this appears to be the case”.

[176] Although the 2nd Psychiatrist simply reported that the Complainant’s condition had not changed since the Psychiatric IME Report and that no new diagnosis was required, I find this adds some weight to the original diagnosis and the testimony of the GP and the Psychologist.

[177] Psychiatrist Dr. OK's January 12, 2011 Report is also consistent with the Psychiatric IME Report. Dr. OK diagnosed anxiety, and added adjustment disorder with depressed mood. In this report Dr. OK also detailed physical and psychological symptoms and suggested flexible scheduling for the Complainant.

[178] Despite the above, Dr. C maintained that the Psychiatric IME Report did not state that the Complainant should not work the Spareboard. It found he was fit to work his safety critical position. Dr. C noted that the Psychiatric IME Report stated that: the Complainant had been feeling anxious for about 6 months, talked about work-related stress and wasn't sure where and when his next trip will be. Dr. C testified that this was the nature of the Spareboard. The IME Psychiatrist described the physical and psychological symptoms as not very typical of generalized anxiety disorder or panic disorder. Dr. C thought the IME Psychiatrist did not precisely define the anxiety symptoms.

[179] As evidenced in his November 25, 2009 email, Dr. C thought that Dr. A's questions to the IME Psychiatrist did not distinguish the Complainant's "work preferences from medical contraindications/restrictions". With respect, I find that the Psychiatric IME Report did not indicate that not working the Spareboard was the Complainant's preference. Rather, the IME's Psychiatrist's response to Dr. A's question whether the Complainant should be "observing any specific occupational restrictions and/or limitations to reduce harm" was his opinion that if the Complainant was placed on Spareboard, he might develop more anxiety symptoms and anxiety attacks. There is nothing there about a preference. If Dr. C wanted further clarification, he could have contacted the IME Psychiatrist, who had been retained by the Respondent.

[180] In order to support his position, Dr C. testified that it was clear to him that Psychiatrist Dr. OK also felt that the scheduling conflict was quite significant. Dr. C felt this was in line with his own thinking that the scheduling conflict could not be "dressed up" as a medical restriction.

[181] Dr. C felt that Dr. OK's report confirmed his working approach, which was that the Complainant was medically fine to do his safety critical job, but had a home situation that had to be addressed. The only solution was by administratively addressing the conflict

between the Complainant's work schedule and his home situation. Dr. C did not view Dr. OK's remarks that the Complainant should consider options for work that would have more flexible scheduling as a psychiatrist stating that the Complainant was medically restricted from working night shift or the Spareboard.

[182] I find that Dr. C equated being "a little nervous" and having a stomach ache on account of nerves with having a diagnosed anxiety disorder. This is not consistent with the facts that in the Complainant's case, there were continuing diagnoses of anxiety starting in January, 2008 by the GP, and starting in September, 2009, by psychiatrists: first by the Respondent's chosen independent psychiatrist, and then in January, 2011, by another psychiatrist, for a total period of almost one and one-half years. The psychiatrists each diagnosed a DSM-IV-classified anxiety disorder. I prefer the Psychologist's evidence: that the condition of a DSM-IV-classified anxiety disorder is a much more debilitating condition, and not a fleeting situation, like butterflies in the stomach due to nervousness about a certain event.

[183] I conclude that there is a material flaw in Dr. C's opinion that the Complainant's anxiety disorder did not constitute a disability, but resulted from a scheduling conflict involving his family/work obligations which could and should have been solved administratively, by management.

[184] That flaw is that the Psychiatric IME Report did not mention the Adult Child's disability or any requirement for the Complainant to be a caregiver for the Adult Child. The Complainant testified that he did not remember the details, but he must have told the IME Psychiatrist about his family situation, although they did not delve into it in detail. Nevertheless, the Psychiatric IME Report made no mention of the Complainant's family situation being a stressor, and did not mention any scheduling conflicts between work and home. It contained nothing in its Treatment Plan or elsewhere about the need to resolve any family issues as a way to deal with the Complainant's anxiety disorder. There was no opinion that any family or scheduling issues specifically caused the Complainant's anxiety.

[185] When asked by OHS Dr. A if the Complainant should be observing any occupational restrictions to reduce harm, the IME Psychiatrist's opinion was that if the

Complainant were put on the Spareboard, his anxiety and panic attacks might worsen. He answered the question without any reference to a family situation or scheduling conflict.

[186] The fact is that the Respondent arranged the Psychiatric IME and chose the IME Psychiatrist. The IME Psychiatrist made it clear he would not see the Complainant again unless the Respondent requested it and that he was the Respondent's doctor, not the Complainant's. Therefore, if Dr. C. was of the opinion that the IME Psychiatrist left out an important and material aspect of the Complainant's case, as his November 25, 2009 email to OHS Nurse C reveals, Dr. C. could have sought clarification from the IME Psychiatrist. This was not done.

[187] Further, Dr. C's reliance on the GP's April 26, 2010 Report which did not specifically diagnose anxiety as part of his reasons for lifting the restrictions is flawed. Dr. C testified family doctors were less precise in naming psychiatric disorders than psychiatrists. I find that the GP specifically stated in this report that the Psychologist was dealing with the Complainant's anxiety issues, and information about anxiety should be obtained from the Psychologist. Dr. C explained that given he already had reports on file from the Psychologist, he did not need to obtain further information. This is despite the more recent medical form filled out by the GP on April 26, 2010. I find that the sole Psychologist Report the Respondent had on April 30, 2010 was dated November 13, 2009. More than five months had passed since that report. I find that Dr. C's interpretation of the GP's April 26, 2010 Report regarding anxiety and the resulting failure to contact the Psychologist before lifting the Work Restrictions were both not reasonable.

[188] Given the above, I conclude that there is ample evidence to find that the Complainant had a disability within the meaning of the *Act.* The evidence established that the Complainant had a mental impairment, that of anxiety disorder, which resulted in functional limitations to the extent that he could no longer work on the Spareboard.

(ii) Did the Complainant suffer an adverse impact and was the protected characteristic a factor in the adverse treatment?

[189] As a result of the Respondent's failure to consider and accommodate the Complainant's disability, he suffered an adverse impact. He was unable to work from May 1, 2010 to November 6, 2011, had to book off sick and suffered wage losses.

[190] The Respondent's decisions and the impact it had on the Complainant were directly related to the Complainant's disability, a protected characteristic.

[191] As such, the Complainant has satisfied the 2nd and 3rd steps of the *Moore* test.

D. Conclusion on liability – discrimination based on disability

[192] I conclude that the Complainant does have a disability within the meaning of the *Act* and the Complaint of discrimination based on a disability is substantiated.

Did the Complainant fail to participate in the accommodation process?

[193] The Respondent argued in its written submissions that the Complainant failed to participate in the accommodation process. However, the arguments all pertained to the Complainant's failure to provide required information regarding family status. At no time did the Complainant fail to provide requested information or submit to the Respondent's request for an independent medical evaluation. As previously found, the Respondent simply did not interpret the diagnosis and information as affecting the Complainant's ability to work the Spareboard.

VII. DISCRIMINATION BASED ON FAMILY STATUS

Overview of parties' positions

[194] The Complainant and the Commission submitted that the Complainant satisfied the requirements for family status accommodation and that the Respondent failed in its duty. They also take the position that the Respondent was aware of the family status issues and

ought to have accommodated the Complainant on both grounds of disability and of family status.

[195] The Complainant testified that he thought the Respondent, through OHS Dr. A, had accommodated him for reasons of both his disability and family status. He explained that this was because he felt he spent a lot of time talking with Dr. A about the issues regarding the Adult Child, as well as his anxiety.

[196] The Respondent submitted that the Complainant failed to meet the legal test for discrimination based on family status. The Respondent further submitted that the Complainant failed to provide the necessary information and as such, failed to participate in the process with the employer to determine accommodation, if required.

[197] It should be noted that although the Complainant thought he was being accommodated for both disability and family status by Dr. A, this is not relevant for the purposes of this Decision. Dr. A's accommodation was a temporary one, to see how the Complainant fared and so the Respondent could gather additional medical information. This was in the OHS Notes and was confirmed during testimony at the hearing. As such, no formal, final position regarding accommodation needs had been taken by the Respondent during Dr. A's handling of the Complainant's file.

A. FACTS

(i) Overview of accommodation request

[198] The Respondent terminated the Complainant's temporary accommodation on April 30, 2010. Following this, there were some delays due to communication problems between OHS and ER, as well as managers changing jobs. The Complainant testified that although an OHS nurse may have explained the reasons for the termination to him, he continued to believe that he needed to submit additional medical documents regarding his anxiety. He did not understand that OHS was characterizing his issues as a family scheduling conflict.

[199] Ms. Giddings testified that she became aware that there may be a family status issue in the summer of 2010. She did not contact the Complainant because he was off sick, and it was not the Respondent's practice to contact sick employees for information. However, the Complainant continued to be off sick, and stated it was because OHS was not providing the proper medical restrictions. OHS told Ms. Giddings that there were no medical restrictions. In December, 2010 Ms. Giddings met with Dr. C where he explained his opinion that the Complainant had an administrative, scheduling issue on account of his family, and not a medical issue. She then contacted manager Mr. P and suggested scheduling a RTW meeting with the Complainant to gather information. Mr. P was in the process of changing jobs at this time and was replaced by Mr. M in January 2011. As such, Ms. Giddings then suggested the same thing to Mr. M, causing further delays.

[200] On March 10, 2011 the Complainant emailed his manager, Mr. M, formally requesting accommodation based on family status due to the Adult Child's needs. In this email, the Complainant asks his manager if OHS can handle the request due to the sensitive nature of the Adult Child's medical information and due to previous inappropriate comments made by Return to Work committee members.

[201] Mr. M forwarded this email to Ms. Giddings, of ER, who handles family status requests. Ms. Giddings then spoke with OHS to obtain information; OHS could not provide this confidential information without the Complainant's consent. On both March 14 and March 15, 2011 the Complainant emailed Ms. Giddings, explaining that he wanted OHS, and not ER, to handle his request for family status accommodation for confidentiality reasons.

[202] In her testimony, Ms. Giddings explained that in conducting a process of family status accommodation, she would speak directly with the employee and asks them to give her the information. She would then advise management and the Union, if involved; either that ER had corroborating information or whether ER required additional information. ER shares only the restrictions with managers, not the actual information, similar to the OHS process. ER promises confidentiality unless the Respondent is legally required to disclose the information.

[203] Despite the above measures which appear sufficient, it is unclear to what extent these measures were explained to the Complainant given his concerns for confidentiality.

[204] Ms. Giddings responded to the Complainant in an email dated March 18, 2011 explaining that she required substantiating information for the family status request and that the Complainant should provide it to Mr. M. She also recommended a confidential meeting be arranged between the Complainant, his manager Mr. M and an appropriate union representative to address the accommodation requirements.

[205] A meeting occurred on April 21, 2011 between the Complainant, Mr. M, and two other union representatives. Mr. M summarized this meeting in an email correspondence to Ms. Giddings dated April 29, 2011. It explained that the Complainant felt that the restrictions noted on his file due to his disability were incorrect. This is consistent with Mr. M's testimony that at the April 2011 RTW Meeting, because the Complainant did not agree with the restrictions in the July 2010 RTW Form, and refused the offer of a position as Locomotive Engineer because of his anxiety disability, Mr. M's approach to returning the Complainant to work focussed on first dealing with the Complainant's disability, and not on the family status request. Mr. M saw them as two separate issues and felt that the disability issue needed to be dealt with first. The Complainant agreed to first proceed with the disability request.

[206] Following this RTW meeting, no changes were made to the Complainant's medical restrictions between the date of the meeting and a letter the Respondent sent to the Complainant on July 14, 2011. This letter contained specific questions to obtain additional information about the family status request and the Adult Child's medical and therapeutic requirements. The Respondent stated that if the Complainant failed to provide the requested information, he was required to return to work by July 25, 2011.

[207] The Complainant answered the July 14, 2011 letter on July 16, 2011. He attached the GP's February 24, 2011 letter to OHS which stated the Adult Child required care on a constant basis.

[208] Ms. Giddings testified that it seemed to ER that the Complainant was advocating for the day Yard shift and one of the purposes of Mr. M's next letter, on July 25, 2011, was to

determine whether this was the best accommodation. This letter contained questions using the *Johnstone* family status test, discussed later in this Decision. Ms. Giddings drafted the letter; Mr. M reviewed it before sending it.

[209] On August 17, 2011 the Complainant responded that he did not answer specific family status questions in his July 16, 2011 letter because he had wanted to discuss the answers with the GP. On August 23, 2011, the Respondent sent another letter to the Complainant, once again trying to clarify the information the Respondent had received. Ms. Giddings, who basically also drafted this letter, testified that the Respondent gave the Complainant a deadline because they wanted to impress upon him that they wanted to get the process done. The August 23, 2011 letter repeated the family status questions in the July 25, 2011 letter. The Complainant responded on August 26, 2011. Ms. Giddings testified that although this response gave more information, it also raised questions.

[210] Therefore, she sought further clarification from the GP. The GP responded on October 20, 2011, explaining that the Adult Child was seeing a psychologist regularly who might help the Adult Child's chronic condition, but that in the meantime, the Adult Child was "more comfortable with" their parents due to the nature of the Adult Child's "condition, fear and depression". On October 27, 2011, Ms. Giddings asked for the Complainant's consent to release the Adult Child's psychologist's information to the Respondent. On November 1, 2011, the Complainant refused, and also refused Ms. Giddings' November 2, 2011 repeated request, in which she explained the specific information the Respondent required from the psychologist.

[211] The Complainant returned to work on November 7, 2011 in a day Yard shift which he obtained by a bid, and through his own seniority, without accommodation.

[212] On November 15, 2011, in a 3-page letter, the Complainant's wife responded to Ms. Giddings' November 2 request again seeking additional information. The letter did not contain any consent for the Adult Child's psychologist to release information to the Respondent. Although this letter was from the Complainant's wife, I find the Complainant adopted the letter's contents – for example, in his post-hearing written submissions he noted that his wife's letter provided the information about why he or his wife had to be the

Adult Child's caregivers. The November 15, 2011 letter was the last time the Complainant communicated with the Respondent on the family status issue. He did not respond to an email sent by Ms. Giddings' on November 22, 2011, requesting additional information.

(ii) Summary of Information re: Adult Child

[213] Where the Complainant's testimony differs from that of his wife's on the same points about the Adult Child, I prefer the Complainant's wife's testimony, because of the Complainant's difficulties in independent recollection and because the Complainant's wife was more accurate about the Adult Child's routine. I do wish to note that the Complainant's testimony reflected both knowledge of and involvement with the Adult Child, and that the Complainant is a loving, caring father.

[214] The Adult Child was born prematurely and has cerebral palsy. The Adult Child also has a significant risk of retinal detachment which can lead to blindness. If the Adult Child reports changes to vision within a certain guideline, the Adult Child must immediately go to emergency in the Larger Hub, and see a retinal specialist. In the last five years, they have had to rush the Adult Child to the Larger Hub two or three times because of vision problems.

[215] The Adult Child was described by the Complainant's wife as a very social and happy person, but who does not have a lot of friends. She testified that the Adult Child has special needs, but is not in a wheelchair where people can better conceptualize a disability. She opined it is more difficult for people to accept the Adult Child because they see the Adult Child with a milder version of a condition and expect the Adult Child to be like everyone else, so this has been a challenge regarding friends.

[216] Since graduating high school, the Adult Child is enrolled in a course at a post-secondary poly-technical educational institution (institute). The course usually takes one year. The Adult Child takes one class per year. The Complainant feels that being at the institute allows the Adult Child to spend time with others in a social setting and assists in building the Adult Child's social skills. Neither the Complainant nor his wife are with the Adult Child at the institute. The Adult Child has not failed any course at the institute, which

the Complainant thinks is excellent for the Adult Child's self-esteem, because failure would be a crushing blow to the Adult Child.

[217] The Complainant, his wife and the GP were all definite in their opinions that the Adult Child could not yet live independently. The Adult Child requires assistance with meal preparation, managing money, transportation and emotional support if the Adult Child has had a bad day or is feeling overwhelmed.

[218] Despite the above, the Adult Child has held part time jobs for short periods of time. One was working in a grocery store under supervision, but not by the Complainant or his wife. It is difficult for the Adult Child to obtain employment.

[219] In the opinions of both the Complainant and his wife, the Adult Child hides their feelings. It is difficult for those who do not know the Adult Child well to see when the Adult Child is upset or down about something.

[220] The Complainant testified that there were times when the Adult Child was bullied, including at the part time jobs. Further, in the course of growing and getting older, the Adult Child became more aware of their disabilities and of being different from their peers**.** The GP confirmed that as the Adult Child grew older and became aware of the differences, it caused the Adult Child to have self-esteem issues. The Complainant testified that although these situations are a normal part of growth, he opined that they are overwhelming for the Adult Child, and an incident can cause a flare-up of very negative feelings and put the Adult Child at risk of self-harm.

[221] The Complainant testified that the Adult Child has bad thoughts when alone, and is afraid of being alone. The Complainant and his wife try very hard to ensure that the Adult Child is not left alone, and they try to keep the Adult Child occupied.

[222] The Complainant's wife testified that the Adult Child has been diagnosed with an anxiety disorder and that the GP and a counsellor have non-medical, non-prescription behaviour modification ways of dealing with the Adult Child's anxiety. She confirmed that the Adult Child has never been hospitalized on a suicide watch.

[223] The Complainant testified that the Adult Child has never been diagnosed with major depressive disorder. However, he explained that when life gives the Adult Child challenges, the Adult Child becomes overwhelmed, has anxiety, and then talks of suicide. The Complainant's wife confirmed this explaining that at times the Adult Child can become frustrated, stressed and has spoken about being better off dead.

[224] Both the Complainant and his wife testified about an incident of self-harm. Although their recollection of the incident involved different dates, I find that the incident did occur, likely in October 2008, as recalled by the Complainant's wife. She testified that in October 2008 the police brought the Adult Child home, and told her that the Adult Child had been walking in the park alone, was very anxious and thought the Adult Child would self-harm, so the Adult Child called 911. After that incident, the Adult Child was taken for counseling, and continued to see the GP.

[225] In 2010, after undergoing bloodwork with the GP, results showed that the Adult Child had elevated liver enzymes. After questioning, the Adult Child finally told the Complainant's wife about taking a large amount of Tylenol pills. She testified that this was a concern because one can die from an overdose of Tylenol pills. All pills have been locked up since that incident, and only the Complainant and his wife have access to them.

[226] The Complainant acknowledged that he had never informed Respondent management that the Adult Child was diagnosed by a medical professional as being at risk of suicide.

I find that there is no written report from a physician or the Psychologist that the Adult Child was or is at risk of suicide. Despite this, I accept and find that there is sufficient evidence to establish that the Adult Child has tried to self-harm.

B. Law

[227] The leading case on family status within the meaning of section 7 of the *Act* is *Johnstone v. Canada (Border Services Agency),* 2014 FCA 110 *(Johnstone).*

[228] The Federal Court of Appeal in *Johnstone, supra*, at para. 93*,* decided that for a complainant to make out a *prima facie* case of discrimination in employment on the ground of family status resulting from childcare obligations, the complainant must satisfy four criteria. As previously noted, the standard of proof to establish a *prima facie* case of discrimination is the civil standard of the balance of probabilities (see *Bombardier, supra,* at paras 59, 65).

[229] The test established in *Johnstone* is as follows:

i. A child is under the claimant's care and supervision;
ii. the childcare obligation at issue engages the claimant's legal responsibility for that child, as opposed to a personal choice;
iii. the claimant has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible; and
iv. the impugned workplace condition or rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation. *Johnstone FCA*, at para 93

C. Analysis

(i) Care and Supervision

[230] The Adult Child was older than the age of majority when the Complainant made his March 10, 2011 written request for family status accommodation. The Adult Child lives full-time with their parents.

[231] As previously noted, the Adult Child has cerebral palsy. The Adult Child attends the institute in the hopes of completing a course. The Adult Child has very little of their own income because of sporadic employment in part-time jobs, which are difficult for the Adult Child to obtain. As such, the Adult Child does not have the income to be self-supporting.

[232] Further, the Adult Child is claimed as a dependant of the Complainant or his wife for income tax purposes. The Adult Child also relies on the parents for meals, transportation to and from school and to doctor's appointments.

[233] The Respondent did not dispute that pursuant to the *Act,* "family status" should be given a broad interpretation, and can include care for an adult, disabled child in some circumstances. The Respondent further admits that the Adult Child is under the Complainant's care and supervision.

[234] I conclude that in the particular circumstances of the Adult Child, the Complainant has established on the balance of probabilities that the Adult Child is under the Complainant's care and supervision.

(ii) Legal responsibility to the Adult child ("care on a constant basis")

[235] The second *Johnstone* factor is whether the childcare obligation at issue engages an individual's legal responsibility, in this case for the Adult Child, as opposed to a personal choice (*Johnstone, supra,* at para 95). To paraphrase *Johnstone*, this means that the Complainant must establish that the "child has not reached an age where he or she can reasonably be expected to care for themselves during the parent's work hours" (*Johnstone*, supra, at para 95).

[236] In this Complaint, I find that because of the cerebral palsy's effects on the Adult Child's functioning, "age" is not the relevant criteria as to whether the Adult Child can reasonably be expected to care for themselves. Rather, the word "stage" can be substituted for the word "age". The concept remains the same: can the Adult Child reasonably be expected to care for themselves during the parent's work hours?

[237] The Complainant argues that he must work day shifts since the Adult Child requires care on a constant basis, and in order to do this, he needs to be available to provide care for the Adult Child during the evenings and nights because that is when his wife works.

[238] The Respondent submits that the Complainant has not provided evidence to demonstrate that the Adult Child requires care on a constant basis. As such, they argue,

the Complainant has not satisfied the second part of the *Johnstone* test where the Complainant has a legal responsibility towards the Adult Child, as opposed to a personal choice.

[239] Much of the testimony of the Complainant and his wife dealt with the Adult Child's cerebral palsy and the consequences of that chronic condition. The evidence provided by their testimony demonstrated that the childcare obligations were not principally to care for the physical consequences of cerebral palsy, but rather general activities of daily living such as meal preparation, transportation and the Adult Child's emotional health. They set out their emotional support for the Adult Child's fears and negative thoughts, and their understanding of the Adult Child's mental health issues.

[240] The Complainant explained that the childcare obligation at issue was to not leave the Adult Child at home alone when the Complainant's wife was working her night shift. In this way, the Complainant could monitor and address the Adult Child's emotions, negative thoughts, or any anxiety the Adult Child was experiencing. In the Complainant's opinion, these symptoms could potentially lead to the Adult Child self-harming, or even attempting suicide. The Complainant testified this was what he meant by "constant care".

[241] Further, the Complainant and his wife opined that only they had the expertise to be the Adult Child's caregivers. They believed they could assess the Adult Child's true emotions when it would not be evident to someone who did not know the Adult Child. The Complainant argued that only he and his wife could be the caregivers.

[242] The GP provided a letter to the Complainant dated February 24, 2011 which stated that the Adult Child required care "on a constant basis". In his testimony it was evident the GP meant that such care was needed when the Adult Child was at home, to prevent the Adult Child being there alone.

[243] The Respondent attempted to find out whether the Complainant's position that the caregivers had to be himself (and his wife) was a personal choice, or a medical or therapeutic need for the Adult Child.

[244] As noted above, the Adult Child attends the institute without supervision and has held brief part-time jobs at different times. During these times the Adult Child is not with the Complainant or his wife. This appears to conflict with the statements that the Adult Child requires “care on a constant basis”.

[245] I find that “constant care” or “care on a constant basis” were misnomers – the incorrect use of phrases – perhaps a dramatization or exaggeration of the way the Complainant interpreted the term “constant care”. I find that the Complainant could not or would not appreciate or admit that there was a conflict between the professed need for “constant care” of the Adult Child by the Complainant or his wife versus the facts that the Adult Child had worked part-time and attended the institute without parental supervision.

[246] Given this language, coupled with the information that the Adult Child was physically disabled, Ms. Giddings testified that management thought the Adult Child required round-the-clock, 7-day-a-week care and supervision. I find it was reasonable for Respondent management to be confused and require more information, especially given that the information in the GP’s October 20, 2011 letter indicated that the Adult Child had a part-time job. On its face, this is inconsistent with an individual needing “care on a constant basis”.

[247] Between February, 2011 and October, 2011, the Respondent had received conflicting information from the GP and the Complainant regarding the needs of the Adult Child. I find that the information the Respondent had by October 20, 2011 was contradictory and confusing. There was insufficient information about: why the care had to be by the parents; whether this was a preference or a requirement; and how the parents could be providing constant care when at the same time, the Adult Child had a part-time job. Ms. Giddings knew by October 20, 2011 that self-harm was an issue, but needed to know if, in the circumstances, the care required had to always be provided by the parents.

[248] The Respondent continued to seek medical information from the Complainant as to whether there was a therapeutic or medical need for “care on a constant basis” or “constant supervision”. I find that despite requesting this information, what was provided at various times by the Complainant, and also by the GP in his October 20, 2011 letter to Ms.

Giddings, had not answered that question or whether supervision could be provided by someone other than the parents.

[249] In his August 26, 2011 letter response to CP, the Complainant stated that the caregivers needed to be himself or his wife "[D]ue to the specific nature of the circumstances", without providing additional information of or a note from a medical professional about what those circumstances were.

[250] In her November 15, 2011 letter to Ms. Giddings, the Complainant's wife reiterated the position that only she and the Complainant could care for the Adult Child, who required their care because they knew the Adult Child, could monitor the Adult Child's moods and forestall another attempt at self-harm.

[251] The Complainant received Ms. Giddings' November 22, 2011 email, which stated among other things that in order to further the Complainant's request for family status accommodation, the Respondent still required information from the Psychologist on whether it was a therapeutic or medical need for the Complainant and his wife to be the caregivers for the Adult Child, or whether that was the Adult Child's preference. The email stated that the information the Respondent requested previously and in this email was relevant, reasonable, and complied with legislation. The email also stated that the employee's responsibility in accommodation cases was to provide such information and also look into community or family resources for reasonable alternative accommodation. It is reasonable that ER would turn for answers to the Adult Child's treating psychologist.

[252] The Complainant acknowledged in cross-examination that he understood Ms. Giddings' email and the information sought. However, he chose not to answer the email because he was already back at work in a day Yard position in his own seniority. The Complainant testified that he would have preferred family status accommodation, but felt he and his wife could not provide more information because the Adult Child refused to let the Respondent talk to the Psychologist, who was also the Adult Child's treating psychologist.

[253] At the hearing the Respondent again attempted to clarify the information from the Complainant and the GP regarding "care on a constant basis". The GP testified that the

Complainant and his wife were the best caregivers for the Adult Child as they knew the Adult Child best and could recognize the warnings signs of problems in the Adult Child's behaviour.

[254] However, that is not the issue before the Tribunal. The issue is whether only the Complainant and his wife could be the caregivers. In this case, rather than looking at a legal age of the Adult Child, the Tribunal is looking at whether there was a medical or therapeutic need that required the Complainant or his wife to be the caregivers during work hours. Although the GP opined they were the best caregivers for the Adult Child, the GP did not indicate that it was medically necessary for the Complainant or his wife to be the only caregivers.

[255] In correspondence dated October 17, 2011, the Respondent asked the GP whether there was a medical requirement that the Adult Child be supervised by the parents. The GP responded that the Adult Child was more comfortable with the parents because of the Adult Child's fear and depression. There was no mention of a medical requirement that it be the parents.

[256] The GP's opinion is that the Adult Child is definitely dependent on the family, and I accept that opinion. Also, the Adult Child will be dependent on some kind of help, including physical and emotional support on a long term basis. The GP's opinion was that it was and is better for the Adult Child that the parents be the caregivers. The GP also agreed in cross-examination that it would be medically acceptable for someone other than the parents to supervise the Adult Child for up to 12 hours, provided the Adult Child was sleeping for 6 of those hours, and provided the person understood the Adult Child, and so long as the Adult Child knew and felt comfortable with that person.

[257] The GP consistently stressed in his testimony that although in 2011 and presently it would be medically acceptable for the Adult Child to be supervised for a short period by an adult other than the parents, it would have to be someone the Adult Child knew and with whom the Adult Child was comfortable. In his opinion, the Adult Child was more comfortable with the parents. He agreed with Respondent counsel that the Adult Child does not have a social condition which would stop the Adult Child from interacting with

other people, or having a companion or someone from a facility that provides companions for short periods. The GP thought finding a companion who the Adult Child got to know, to supervise occasionally would be a good idea, because the GP knows from the past that the Adult Child is very lonely and does not have a lot of friends.

[258] The Complainant's Psychologist, who also counselled the Adult Child, was not in a position to answer questions about the Adult Child. Neither the Complainant nor the Adult Child gave their consent that he do so. The Complainant's position was that like any other adult, the Adult Child could decide about the Adult Child's personal care and whether to release personal information from the Psychologist to the Respondent. The Complainant's Wife's testimony was that the Adult Child was very private and defensive about the disabilities. She herself was also concerned about the Adult Child's privacy. Further, she and the Complainant were not convinced that the only information the Respondent would ask from the Psychologist was confirmation that it was a medical or therapeutic need for the Complainant and his wife to be the sole caregivers for the Adult Child.

[259] The Adult Child did not testify and did not provide consent for the release of information by the Psychologist. The Complainant however did provide a consent form, consenting that the GP provide information to the Respondent about the Adult Child. The Complainant and his wife confirmed that neither is the Adult Child's attorney for property or personal care, nor does either have a guardianship order for the Adult Child.

[260] Despite this conflicting information as to who may or may not provide consent on behalf of the Adult Child, there was no information from the Psychologist regarding the Adult Child's therapeutic or medical needs.

[261] In my review of all of the testimony and the documentary evidence, at no time did the Complainant or any medical professional provide a satisfactory answer that the Complainant or his wife needed to be the sole caregivers for the Adult Child for medical or therapeutic reasons.

[262] While I am sympathetic to the Complainant's desire to keep the Adult Child's medical information private, it is the Complainant who bears the onus of making out a *prima facie* case. Procedurally, the Respondent could have provided the Complainant with

additional assurances regarding confidentiality. Despite this, I conclude that the totality of the above evidence failed to establish that the Complainant has a legal responsibility to provide personal care for the Adult Child during work hours, as opposed to this being a personal choice.

(iii) Reasonable efforts for alternative solution

[263] Although I have concluded that the Complainant fails under the second *Johnstone* factor, if I am incorrect and the Adult Child requires care on a constant basis by the Complainant and his wife, I will proceed and consider the third *Johnstone* factor.

[264] The third *Johnstone* factor is whether the Complainant can demonstrate that he has made reasonable efforts to meet the obligations through "reasonable alternative solutions, and that no such alternative solution is reasonably accessible" (*Johnstone, supra*, at para 95).

[265] The Complainant's position is that not only were he and his wife the best caregivers for the Adult Child, they were the only caregivers who could do so. He argues this was because they had the insight to tell whether the Adult Child was in reality feeling so "down" or anxious that there was a risk of self-harm, which could lead to suicide. This position was evident in the testimony of both the Complainant and his wife. They both testified that the Adult Child hid feelings, so someone who did not know the Adult Child well would not know when the Adult Child was feeling anxious or down, which in turn could lead to a danger of self-harm. The Complainant maintained this position in his post-hearing written submissions.

[266] The Complainant explained that he had self-accommodated his childcare needs in the years 1990 and 2005 when he was working mainly on the Spareboard. He explained that extended family was available, including for overnight stays with the children when he and his wife were working at the same time. Further, the Complainant explained that the Respondent was more lenient in that period in permitting missed calls and traded runs, which he would do when their schedules conflicted.

[267] When the Respondent first broached the concept of alternate caregivers with the GP, it was clear from his initial answers that he assumed the Respondent meant in a residential facility. His opinion was that although dependant on the parents, the Adult Child did not need to be in a residential facility, and the Adult Child had expressed not wanting to be put in a residential facility.

[268] The Complainant and his wife testified that there were no longer members of the extended family to care for the Adult Child due to aging. The Complainant and his wife were of the opinion that lack of family, coupled with the emotional needs of the Adult Child, meant that there were no caregivers other than themselves who could provide the kind of care the Adult Child required.

[269] The GP confirmed the testimony of the Complaint and his wife that to the GP's knowledge, there were no longer any relatives in the Smaller Hub who could assist with caregiving. He also opined that the parents were the best caregivers for the Adult Child, and in particular, the Complainant's wife, who is a nurse. However, in cross-examination, in response to a question whether the Adult Child could be with another caregiver, the GP responded that the Adult Child could, so long as the Adult Child knew the other person and was comfortable with that person. The GP's recommendation was that the caregiver's time with the Adult Child be no more than 12 hours, provided the Adult Child was sleeping for 6 of those 12 hours, and was firm in his opinion that the caregiver would have to be someone the Adult Child knew and with whom the Adult Child was comfortable.

[270] The Complainant's opinion, shared by his wife, was that because the Adult Child tended to hide emotions, only he and his wife could read the Adult Child's emotions accurately enough to know when the Adult Child was anxious or upset, and forestall any potential issues of self-harm.

[271] The Complainant's wife testified that appropriate alternate caregivers in the Smaller Hub "may be out there", but she did not personally know of any. The people she had encountered as an emergency nurse, who worked for example in institutional facilities, did not, in her opinion, have the expertise to care for the Adult Child because they could not

provide for the Adult Child's need for emotional support and were not trained in mental health issues.

[272] Besides the Complainant's wife's testimony that the Adult Child had a mentor at the Y who the Adult Child felt comfortable speaking with, and vague testimony from the Complainant that they had been thinking of a companion from an organization specializing in companions for young people, the Complainant submitted no other evidence that he or his wife had made reasonable efforts to canvass the Smaller Hub and surrounding area to see if there was anyone who could be suitable to get to know the Adult Child and stay with the Adult Child at home when required. As such, there was also no evidence as to the cost and if that cost was unreasonable. I find that they had simply not taken any measures whatsoever, because they were of the firm opinion that not only were they the best caregivers, but they were the only suitable caregivers. This opinion was also stated in the Complainant's post-hearing final submissions.

[273] In addition to the above, the Complainant did not provide evidence about efforts he or his wife made to arrange her schedule to assist in care for the Adult Child on the occasional days where the Complainant could be called to work a shift which conflicted with her schedule.

[274] The GP's November 26, 2008 letter to OHS contained the information that the Complainant's wife was an evening nurse, and that granting the Complainant the accommodation to day Yard would assist when the Complainant had to attend to caregiving duties for the Adult Child when his wife was at work.

[275] The documentary evidence and testimony submitted at the hearing established that from November 2008 to November 22, 2011, the information provided to the Respondent's OHS and to Respondent's management, was that the Complainant wife's work schedule consisted not only of 12 hour night shifts, but that these shifts were likely more frequent than 2 or 3 times per week, on alternating weeks.

[276] The information provided would not have lead someone to think, as the Commission's October 22, 2013 SOP stated, and the Complainant's wife's testimony established, that her schedule was presently an alternating average of 2 and 3 days per

week, with no shifts at all in some weeks. For example, the Complainant's wife's November 15, 2011 letter to Ms. Giddings – page 1, paragraph 5 [my italics]:

> *"…I as a specialized registered nurse have worked the night shift for the last approximately 19 years. Nursing shifts in general are 12 hours in length … (permanent days are not an option). I work permanent night shift as this has provided our family with some consistency with at least me working steady, predictable hours. The need for overlap is clear. Having my husband working evening/night shift is not workable in our unique family situation."*

[277] The particulars of a spouse's working hours are relevant to an employer's understanding of what kind of family status accommodation an employee seeks (*Johnstone*, FCA, supra, at para 96), and whether the employee's spouse is available as an alternate caregiver.

[278] The Complainant was specific in the accommodation he sought: day shifts to accommodate family status and Yard to accommodate his anxiety, but I conclude that during the Respondent's information-seeking process between March, 2011 and November, 2011, he was not forthcoming about the actual number of nights his wife worked on a bi-weekly and monthly basis. As such, if it was established that constant care was required, the Respondent never had the opportunity to explore whether the Respondent could accommodate the Complainant around his wife's particular schedule.

[279] I conclude that the totality of the evidence established that the Complainant and his wife did not reasonably consider or make reasonable efforts to look for alternate third party caregivers to see if there was anyone appropriate and reasonably available to be a caregiver for the Adult Child for up to twelve hours per day during the times during the week when the Complainant and his wife would be working at the same time. Further, the Complainant and his wife also did not provide sufficient details regarding her night shifts as a nurse, or demonstrate any steps taken to adjust her scheduling for caregiving.

Therefore, the Complainant has not satisfied the third *Johnstone* factor.

(iv) Workplace Rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation

[280] Given my findings on the second and third *Johnstone* factors, it is not necessary for me to address the fourth *Johnstone* factor.

[281] I conclude that because the Complainant has not established the second and third factors in *Johnstone,* he has not made out a *prima facie* case that the Respondent discriminated against him on the ground of family status. As such, the Tribunal dismisses the allegation.

VIII. Did the Complainant fail to participate in the accommodation process?

[282] The Respondent argued that the Complainant failed to participate in the accommodation process. More specifically, the Respondent explained that the Complainant did not provide the information sought by the Respondent in order to determine what type of accommodation, if any, was required with regards to family status.

[283] Given my decision that the Complainant failed to establish a *prima facie* complaint on the ground of family status, it is not necessary for me to consider these arguments.

IX. Employer's obligation to advise employee to apply for family status accommodation

[284] The Commission has argued that the Respondent, as a sophisticated employer, had a positive obligation to advise the Complainant to apply for family status accommodation and to facilitate this process. The Commission submits that the Respondent cannot be willfully blind to a need for family status, which the Commission argues was evident in this case.

[285] The Respondent submits that it acted appropriately at all times in responding to the Complainant's needs, but that if they did violate some procedural norms, there is no distinct remedy for breach of a procedural duty to accommodate (see *Canada (Human*

Rights Commission) v. Canada (Attorney General), 2014 FCA 131, also called *Cruden v. CIDA (Cruden)*, at para 21).

[286] While ordinarily it is incumbent upon the employee to commence the accommodation process by informing the employer of his or her need for accommodation, in circumstances where the employer has constructive knowledge of this need, the employer is obliged to commence the process. In *Moffat v. Davey Cartage (1973) Ltd*., 2015 CHRT 5, the Tribunal explained that there is no further duty for an employer to inform itself when the employer does not in good faith have any knowledge of the disability.

[287] In this case, I find that it was not a situation where the Complainant was not aware of the possibility of family status accommodation: the evidence established that he had requested it twice in the past and received such accommodation once. It was also noted in the Respondent's policies that it was the employee's responsibility to request accommodation. Nor was it a case where the Respondent was unaware of the Complainant's potential need for family status accommodation. Rather, miscommunication between the parties and the structure of the Respondent's process to handle accommodation requests for both disability and family status resulted in delays. Added to this is the fact that the Complainant was extremely reluctant, particularly at the beginning of the formal process, and remained reluctant to provide information about the Adult Child to the Respondent's management team, and at times chose to proceed only with accommodation based on a disability. Ultimately, the Complainant did seek family status accommodation in March 2011, demonstrating again that he was aware that such accommodation could be available to him.

[288] As such, I conclude that although there are situations where a respondent would have a duty to advise the employee of his or her right to request accommodation, this Respondent was not willfully blind to the issues. Further in this Decision I provide comments regarding some suggested practices for the Respondent.

X. INTERSECTIONALITY

A. The Complaint and the parties' positions

[289] The Complaint specifically outlines two grounds of discrimination – disability and family status. Both grounds are pleaded under the same discriminatory practice of adverse differential treatment in employment pursuant to section 7 of the *Act*. This is evident in both the written Complaint and the Summary of Complaint which the Commission prepared and sent to the Tribunal when the Complaint was referred.

[290] The Commission and the Respondent prepared detailed written final arguments which were filed with the Tribunal. The parties first presented arguments considering the two grounds separately, and applying the respective legal tests. After going through each respective test for disability and family status separately, the Commission and the Respondent submitted arguments about intersectionality.

[291] The Commission submits that in this Complaint, the grounds of disability and family status intersect and the Respondent's actions "…resulted in an intersectional form of discrimination", within the meaning of section 3.1 of the *Act.* The Commission argues that the test for *prima facie* discrimination ought to be flexible and contextual.

[292] The Respondent submits that in this case, the legal test for family status accommodation ought to apply to the intersecting grounds of disability and family status, given that the family situation is impacting the disability. There was no case law available on this point.

B. Intersectionality & *prima facie* discrimination

[293] Section 3.1 of the *Act* states:

> "For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds."

[294] Section 3.1 is not often argued before the Tribunal and there are not a significant number of precedents. In *Turner v. Canada (Attorney General)*, 2012 FCA 159, the Federal Court of Appeal explained that when multiple grounds of discrimination are present, analyzing them separately may minimize what is in fact, compound discrimination. As such, when applying section 3.1 the alleged grounds must be considered together.

[295] As submitted by the Commission at para 17 of their written submissions, the Federal Court of Appeal has stressed that the test for *prima facie* discrimination is "necessarily flexible and contextual", since it is to be applied in many factual situations, involving various grounds of discrimination. Quoting from one of its earlier decisions, the Court of Appeal noted that a "flexible test of a *prima facie* case is better able than more precise tests to advance the broad purpose underlying the CHRA, namely, the elimination in the federal legislative sphere of discrimination from employment […]" (*Johnstone*, 2014 FCA 110, at para. 83, quoting form *Morris v. Canada*, FCA 154 at para. 28).

[296] With that in mind, when interpreting and applying Section 3.1 of the *Act,* the Tribunal considers the broad purpose of the *Act,* and would adopt a flexible approach. Section 3.1 is worded to allow "one or more prohibited grounds" or the effect of a combination of grounds to be considered in establishing a *prima facie* case. It may be used by complainants in situations when they may be unable to satisfy the test for *prima facie* discrimination on one ground alone, thus adopting a more flexible approach and specifically requesting the Tribunal to consider a more fulsome picture, assisting in assessing subtle forms of discrimination.

[297] This interpretation and a flexible approach is consistent with the Federal Court decision in *First Nations Child and Family Caring Society v. Canada (Attorney General)*, 2012 FC 445 (FNCFCS):

> In upholding the Tribunal's decision, the Federal Court of Appeal specifically rejected the appropriateness of a fixed formula or test for the establishment of a *prima facie* case, noting that a flexible legal test is better suited to advancing the broad purpose underlying the Act. The Federal Court of

> Appeal noted that "[d]iscrimination takes new and subtle forms" and that it was "now recognized that comparative evidence of discrimination comes in many more forms than the particular one identified in *Shakes*": *Morris*, above, at para. 28 (*FNCFCS,* at para 302).

Although Justice McTavish was specifically referring to whether or not a comparator is required, the fundamental principles of a flexible approach apply generally.

[298] Despite outlining a test for establishing a finding of *prima facie* discrimination based on child care obligations, the FCA also reiterated the need for flexibility in determining *prima facie* discrimination, on a case by case basis (see *Johnstone FCA, supra,* at paras 84, and 96-99).

[299] In *Johnstone*, the FCA recognized that "…a prima facie case must be determined in a flexible and contextual way, and the specific types of evidence and information that may be pertinent or useful to establish a prima facie case of discrimination will largely depend on the prohibited ground of discrimination at issue" (*Johnstone*, at para. 84).

[300] Given the above, the Tribunal would caution parties in attempting to rigidly apply a specific test for prima facie discrimination, such as the test for family status or the guiding steps of *Shakes/Israeli* for discriminatory hiring practices, in situations where there are intersecting grounds.

C. How to apply intersectionality, if at all, in this Complaint

[301] In this Complaint, the Tribunal has decided against the Respondent in favour of the Complainant with regards to discrimination based on a disability.

[302] As explained above, section 3.1 permits a Complainant to establish a *prima facie* case based on the effect of a combination of prohibited grounds, in circumstances where discrimination based exclusively on one sole ground may not be reflected in the evidence. That being said, depending on the circumstances, if the Complainant succeeds in establishing a *prima facie* case on one ground, it may serve no practical purpose to look at intersectionality.

[303] Given the facts of this case and my conclusion that a discriminatory practice occurred based on the sole ground of disability, I do not find it necessary to consider intersectionality in this case. In the *Act,* remedies are awarded per discriminatory practice, not per ground (subsection 53(2)). Section 3.1 states that a discriminatory practice includes a practice based on one or more prohibited grounds. Section 3.1 does not create a separate discriminatory practice in and of itself. The Complainant could not be awarded additional compensation under the *Act* in the event of a finding under section 3.1 when a discriminatory practice has already been substantiated. As such there is no practical purpose to complete this analysis.

XI. Processes to consider when dealing with accommodation requests on potentially intersecting grounds

[304] While there is no substantive discrimination on the ground of family status in this Complaint, there are some aspects of the Respondent's process that, while not imposing liability on the Respondent, could have been conducted more effectively, and upon which I wish to remark.

The Division between OHS and Management

[305] First, it is important to review the Respondent's structure regarding accommodation requests. It has a separate division, OHS, to deal with all accommodation requests for medical reasons. A team of health professionals deals with such requests and ensures that all medical information is private and kept confidential, and cannot be obtained by Respondent management or other employees. Management only receives the restrictions [accommodations] from OHS for the particular employee, and no personal medical information. To obtain personal medical information in light of this "wall of privacy", an employee must provide prior written consent for OHS to release medical information.

[306] Employee Relations (ER), deals with other accommodation requests including family status. Although ER is made up of Respondent employees at its head office, it also operates in a similar manner as OHS, in that ER only provides managers with the required accommodation for the employee, not the details of the reasons for the accommodation.

Complainant's Privacy Concerns & Communication problems

[307] I formed the impression that the Complainant was overwhelmingly concerned with not only the privacy of his own medical information, but also that of the Adult Child. I find the Complainant was well aware of the wall of privacy between OHS and management. In fact, the Complainant relied on that wall and had confidence in it. He knew its purpose was to protect the privacy and confidentiality of employees' medical information.

[308] The Complainant understood that Ms. Giddings wanted information about the Adult Child's need for care in order to look into his request for family status accommodation, because management wanted to be the ones to deal with the request. However, the Complainant wanted OHS to handle his family status accommodation because of the confidential nature of the Adult Child's medical situation. This was also due to his concern about alleged prior confidentiality breaches by members of the Smaller Hub's RTW committee, and because he felt that OHS' Dr. A had handled it in the past.

[309] Ms. Giddings testified about ER's process of dealing with accommodation requests, and the privacy standards ER followed. In fact, the Respondent has written policies which discuss some of these measures, and they are included in the Employee Manual. Despite this, it is unclear to what extent the Complainant was familiar with those privacy standards, and whether ER specifically told the Complainant about them to reassure him about the process, particularly when the Complainant expressed his concerns.

[310] Nevertheless, specific communication and explanations, perhaps in writing, may have assisted in communicating OHS' position to the Complainant, especially in light of his pre-eminent and strong privacy concerns.

[311] A significant amount of testimony was heard surrounding whether or not the Complainant understood in April, 2010, that OHS denied his request for accommodation on the ground of disability because OHS viewed his situation as family related and therefore administrative, and not medical. With better communication, in some cases in writing, he may have had clarity sooner.

[312] The Complainant testified that sometime on or after his April 30, 2010 discussion with OHS Nurse C, he was led to believe that he required another medical diagnosis before the Respondent would accommodate him for anxiety. He also testified that he didn't request accommodation for family status earlier than March 10, 2011 because when on April 30, 2010, he asked the OHS Nurse what he would need to get his Work Restrictions put back on, she said they would not go back on unless another medical diagnosis was received.

[313] In his letter to Mr. M dated August 26, 2011, the Complainant denied, as he also did in his testimony, that OHS Nurse C told him in the spring of 2010 that OHS removed his restriction because in OHS' opinion, his condition was not medical. The Complainant wrote that had he been advised of this, he would have requested accommodation for his family situation then. He was never advised in writing about the specific reasons for the denial until Mr. M's July 25, 2011 letter.

[314] The Complainant testified that he was particularly confused because OHS Dr. A felt his anxiety had warranted a medical restriction for approximately a year and a half. I find it is understandable that the Complainant did not grasp that OHS thought his was an administrative, not a medical, problem. OHS' new position on his anxiety was a reversal of almost one and one-half years' medical accommodation. Further, in his mind, as he testified, he had a diagnosed anxiety disorder from his GP and from the IME Psychiatrist, a specialist who the Respondent itself had chosen, and OHS had not received any new or different diagnosis.

[315] I find that what also led to the Complainant's confusion was the manner in which OHS told the Complainant it was lifting his day Yard restriction. That manner left much to be desired in terms of effective communication. OHS could have informed him on the phone, then followed up in writing, by email or by letter. OHS emailed him on other occasions. I think in the circumstances of this case, with a reversal of position after accommodation of almost one and one-half years, writing to the Complainant would have been appropriate and clear. Further, writing could have clearly and simply communicated to him that OHS' opinion was that he did not require medical accommodation, but administrative accommodation through management, on account of his family. The

Complainant could then have decided, presumably earlier than March 10, 2011, if he wanted to ask for accommodation because of his family situation.

[316] Notwithstanding the foregoing, I wish to confirm that even if OHS had written to the Complainant so he would have had clarity sooner about why OHS lifted the Work Restrictions, the evidence established that it would not have made any difference in the outcome of his family status accommodation request. The Complainant did not make out a *prima facie* case on family status, and the Complainant and the Adult Child would still not have consented to the Psychologist communicating with the Respondent about the Adult Child, and the Respondent would still not have had the information it required.

Intersectionality & lack of communication between OHS & ER/Management

[317] The Complainant testified to multiple discussions with OHS nurses about his situation, which included some information about the Adult Child. Further, there was information in the medical notes and reports reviewed by OHS Dr. C which discussed this issue. In the OHS Case Notes themselves, Dr. C stated that this was an administrative issue for the management team. However, it appears there was a lack of communication between the OHS team and the management team, including ER, for a time in 2010, which caused some delay.

[318] Even prior to Dr. C noting the issues in the file, OHS Dr. A had also discussed at length with the Complainant the family issues regarding the Adult Child. OHS cannot say they were unaware of some issues regarding the Adult Child. Although OHS does not have the mandate to assess requests for accommodation based on family status, nor am I suggesting OHS should, OHS is employed by the Respondent and receives pertinent information from the employee. I am mindful of the tension between communication from OHS to management and ER, and OHS' privacy and confidentiality mandate, but Ms. Giddings' testimony established that she met with OHS Dr. C about the Complainant's case. Therefore, measures can be found to deal with the inherent tension between information sharing and confidentiality mandates.

[319] Although it is understandable why ER did not have all of the relevant information in this case, given the privacy structure between OHS and ER, it would be beneficial to the Respondent to have better communication between OHS and ER, particularly when dealing with intersecting grounds.

[320] As noted in *Turner*, *supra,* intersecting grounds of discrimination should not be dealt with in silos. In future cases with other employees, the Respondent may wish to improve their communication between OHS and ER (See *Turner v. Canada (Attorney General)*, 2012 FCA 159 at paras 48-49).

XII. RETALIATION

[321] The Complaint alleged that the Respondent retaliated against the Complainant for filing previous human rights complaints and that this retaliation had been ongoing since his first human rights complaint.

A. Statute and case law

[322] Section 14.1 of the *Act* states:

> "It is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim."

In this Decision, "retaliation", "retaliated" or "retaliate", each mean retaliate within the meaning of section 14.1 of the *Act.*

[323] It should be noted that after the filing of the parties' submissions on the law of retaliation, the Federal Court released its decision in *Millbrook First Nation v. Tabor*, 2016 FC 894 (*Tabor FC*), which confirmed the test to be applied to retaliation complaints under the *Act*. Prior to this, there was confusion surrounding whether or not intention was a requirement to establish a *prima facie* case of retaliation. The Respondent's submissions

acknowledged the unsettled law, and, anticipating both options, presented a defence addressing same. As such, I will simply follow the test confirmed by the Federal Court.

[324] The Complainant bears the onus of establishing a *prima facie* case of retaliation. The standard of proof for establishing a *prima facie* case of retaliation, as with other allegations of discrimination, is the balance of probabilities (*Bombardier, supra*, paras. 59, 65). A complainant is required to show that he: (1) previously filed a human rights complaint under the *Act;* (2) experienced an adverse impact following the filing of the complaint; and (3) that the human rights complaint was a factor in the adverse impact (see *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2015 CHRT 14 at paras. 3-30 (*Caring Society 2015*); and *Tabor FC, supra,* at paras. 54-64.

[325] Proof of intent is not required to make out a retaliation complaint. A complainant may demonstrate that the human rights complaint was a factor in the alleged adverse treatment received following the filing, based on the Complainant's reasonable perception of the incidents or otherwise (See *Caring Society 2015* at paras. 3-30; and, *Tabor FC* at paras. 54-64).

[326] As previously noted in the disability section, a respondent may defend against an allegation of *prima facie* discrimination by calling evidence to show its actions were not discriminatory, by establishing a statutory defence that justifies the discrimination, or by doing both (see *Bombardier*, supra, at para. 64).

B. What human rights complaints did the Complainant file and when?

[327] There were no copies of complaints in the documentary evidence other than the one at issue. However, in his testimony, the Complainant recalled filing two other human rights complaints against the Respondent: one which was ultimately settled in 2008 (the Settled complaint) and another in November 2009 when he was dissatisfied with the accommodation in place. The Complainant testified that the 2009 complaint was dismissed. The Complainant also made reference to this dismissed 2009 complaint in his Complaint filed March 25, 2011, which is the subject of this inquiry and hearing.

[328] Ms. Giddings testified that she worked on revising CP's policies as a result of a settlement, likely arising from the Settled complaint. There is also evidence in the OHS Case Notes where Ms. Giddings noted in a June 17, 2011 email addressed to some of the Respondent's managers and OHS personnel, informing them that the Commission had dismissed the Complainant's complaint, which she dated December 2, 2009. Although the date does not correspond with the Complainant's recollection of November 2009, it is in the same time frame. Also, Ms. Giddings notes that there is still an outstanding complaint filed in "February 2011". It is reasonable to find that she meant the within Complaint, which was filed March 25, 2011.

[329] Putting the above evidence together, I conclude that the Complainant filed a total of 3 human rights complaints with the Commission:

- a complaint filed some time before the summer of 2008, which the parties settled (the Settled complaint);
- the 2009 complaint which the Commission dismissed;
- this Complaint, filed March 25, 2011.

C. The Complainant's Specific Allegations of Retaliation

[330] The Complainant submitted that acts or omissions by the Respondent's employees listed below constituted retaliation against him by the Respondent. There was no dispute that the individual employees acted on behalf of the Respondent.

(i) Mr. D

[331] The Complainant alleged that the following acts or omissions by Mr. D constituted retaliation against the Complainant for having filed human rights complaints:

- Mr. D's failure to answer the Complainant's November 20, 2009 email request for an authorized leave of absence (ALOA) for a family vacation from December 14 to December 18, 2009 (Vacation Request); and

- during the period from May 1, 2010 to December 6, 2011 (Off Work Period), Mr. D's failure to answer "in a timely manner", or at all, many of the Complainant's phone messages telling Mr. D that the Complainant could hold specific positions without accommodation (other than the Spareboard) in certain weeks during the Off Work Period, causing the Complainant to be placed on the Spareboard, which he could not work because of his anxiety, thereby lengthening the Off Work Period and contributing to the Complainant's financial loss from not working.

[332] From approximately May, 2006 until March, 2011, Mr. D worked for the Respondent in the Smaller Hub in the management position of Crew Management Application Co-ordinator (CMA Co-ordinator). Mr. D acted as a liaison between the Union and management regarding regular crew changes, processing Authorized Leave of Absence (ALOA), annual vacations and dealing with absenteeism. He also facilitated the return to work of employees who had been off sick. During 2009 and 2010, Mr. D reported to Mr. P.

The Vacation Request

[333] The Complainant emailed the vacation request to Mr. D on Friday, November 20, 2009. The Complainant testified that Mr. D never responded to it and that the Complainant left two phone messages for Mr. D about this request. Other than the Complainant's testimony, there was no independent evidence that he left Mr. D the two phone messages.

[334] Mr. D testified that during the time he worked as CMA Co-ordinator, he was familiar with the Authorized Leave Of Absence Policy dated February 16, 2009 (ALOA Policy). Mr. D acknowledged that he would have had enough time between November 20, 2009 and the Complainant's requested date for time off to answer the Vacation Request. However, he could not recall if he received or answered the Vacation Request. Mr. D testified that if he had not responded to the Vacation Request, it was likely an oversight and not because the Complainant lacked service hours or did not meet eligibility under the ALOA Policy.

[335] In response to the Complainant's question whether any manager had ever told Mr. D not to answer the Complainant's messages or email requests, Mr. D testified that no

manager had ever directed him to that effect. Further, Mr. D testified that by the time he left the CMA Co-ordinator's position and the Smaller Hub in March 2011, he did not know that the Complainant had filed a human rights complaint.

Has the Complainant established a prima facie case that Mr. D retaliated against him by not responding to the Vacation Request?

[336] I recognize that there could be an issue as to whether the 2009 complaint was a factor in this allegation. The time span between November 20, 2009 when the Complainant sent the Vacation Request, and the December 14 date when his vacation was to start overlaps the time period in which I have found that the Complainant filed the 2009 complaint. In any event, the Complainant had also already filed the Settled complaint.

[337] There was no documentary evidence regarding whether Mr. D answered the Vacation Request and Mr. D. could not recall answering it. Given the facts, it is reasonable to find that the Complainant did not take the family vacation that week and that a missed vacation constituted an adverse impact on the Complainant. As such, it is reasonable that the Complainant perceived that because Mr. D. did not answer the Vacation Request, Mr. D retaliated against him. Therefore, the Complainant has established a *prima facie* case that Mr. D retaliated against him by not answering the Vacation Request.

Did Mr. D have a reasonable, credible explanation for not answering the Vacation Request?

[338] Mr. D testified that if he did not answer the Vacation Request, it was more probable that it was due to an oversight by him, and not because the Complainant lacked service hours or because a manager had told him not to answer the Complainant's emails or phone calls. I also take into account that this admission of an oversight by Mr. D bolsters the credibility of his answer because he admitted that he may have made a mistake.

[339] Mr. D's explanation is both reasonable and credible, is not a pretext, and leaves no reasonable perception that the human rights complaint was a factor in his treatment towards the Complainant. I conclude that Mr. D did not retaliate against the Complainant within the meaning of section 14.1 by not answering the Vacation Request. This allegation is dismissed.

The Complainant's telephone calls to Mr. D during the Off-Work Period

[340] The Complainant alleged that Mr. D's failure to answer the Complainant's phone calls quickly or at all caused the Complainant to have to book off sick rather than work the Spareboard, which Mr. D at times had booked him on. The Complainant's position was that had Mr. D answered those phone calls quickly, or at all, the Complainant could have worked the non-Spareboard positions which required no accommodation, and gone back to work earlier than he did.

[341] The Complainant testified that he called Mr. D several times between May 4 2010 and June 2010. In most of the messages he left when he made those calls, he would either ask Mr. D to place him in a Yard position which he could hold in his own seniority, or would tell Mr. D there was a Yard position the Complainant could hold in his own seniority, either that week or the next week. In one of the messages, the Complainant asked Mr. D why he had not been placed.

[342] The Complainant testified that he had made handwritten notes either during, or after the calls. These notes also contained a typewritten page which was used in a Commission investigation. As such, Respondent counsel objected to this evidence because it was created by the Complainant for the Commission investigation. The typewritten page was not admitted, but the rest of the exhibit containing the handwritten notes was admitted into the record.

[343] The Complainant asserts that Mr. D did not return these calls, or did not return them quickly enough for the Complainant to be placed in a position he could hold, and that by not returning them, Mr. D was retaliating against the Complainant for filing human rights complaints.

[344] At the hearing, Mr. D testified that he searched for, but did not have any documents noting whether he received or returned any of these phone calls. He testified that all the documents would have been in the Complainant's personnel file. There was nothing there about the phone calls. Mr. D also testified that although he could not say with certainty that he had answered the Complainant's specifically-noted calls, his process was that if he

received a phone call, he responded. Mr. D did recall speaking by phone to the Complainant many times, but did not recall the specific dates of the conversations.

[345] The Complainant had a note stating that on June 17, 2010 he spoke to Mr. D, who had “okayed him” for work but put him on the Spareboard. The Complainant then told Mr. D that he couldn’t work the Spareboard and would have to book off sick if placed there. The Complainant could not recall Mr. D’s reaction at the time.

[346] Mr. D testified that he did recall that when he told the Complainant he was placed on the Spareboard, the Complainant responded that he was unable to take the Spareboard. The Complainant was placed on the Spareboard because the information OHS gave to Mr. D at that time was that the Complainant was fit, with no restrictions from Spareboard.

[347] Mr. D explained that no matter the timing of the phone call, nothing was certain regarding placement without proper OHS clearance, stating the Complainant was fit for work. That process was out of Mr. D’s hands.

Has the Complainant established a prima facie case that Mr. D retaliated against him by not returning the Complainant’s phone calls or not returning them promptly?

[348] These events had all occurred after the first two complaints were filed.

[349] I find, on the balance of probabilities, that the Complainant made the phone calls to Mr. D as he recorded them. Further, I find given Mr. D’s testimony that he answered at least some of the phone calls based on his own recollection, that he did return some of them. Mr. D was scrupulous in not stating that something was a fact without being completely certain that it was; when asked if he returned the Complainant’s specific phone calls, he answered that he couldn’t be 100% certain about specific phone calls and messages, but he recalled speaking to the Complainant many times and that it was also his practice to return calls.

[350] I also find that in accordance with the Complainant’s own testimony acknowledging the 72 Hour Illness Policy, it was not reasonable for the Complainant to perceive that his placement in jobs that he could work without accommodation hinged on whether Mr. D

returned his phone calls – OHS clearance was first and foremost in the RTW process. Mr. D also testified that without OHS clearance, no placement could be made, and further**,** the usual procedure was that if OHS clearance was received mid-week, the Respondent placed the employee on the Spareboard until the next Sunday night weekly crew change.

[351] I conclude that the evidence has failed to establish that Mr. D retaliated against the Complainant. The Tribunal dismisses all the allegations of retaliation against Mr. D.

(ii) Manager Mr. P

[352] The Complainant alleged that Mr. P retaliated against him as follows:

- in the week of December 20, 2009, by failing to assign the Complainant to a locomotive engineer's position in the Smaller Hub's Yard, which he could have held in his own seniority, and instead assigning the Complainant to a Trackman Helper job in the Larger Hub; and
- for that same week, failing to pay him both mileage for the commute between the Smaller and Larger Hubs, and the difference in wages between the two positions.

December 20, 2009 placement & owed mileage/wages

[353] The Complainant testified that he had the seniority to have held two locomotive engineer positions in the Smaller Hub's Yard on day shift in the week of December 20, 2009. He pointed out the two positions as shown in the Smaller Hub's Engineers Weekly Changes Bulletin for that week. He asserted the two positions were assigned to employees who had less seniority than he did.

[354] On December 21, 2009, the Complainant sent an email to Mr. P, stating that the Complainant could hold the Smaller Hub Locomotive Engineer day Yard position in his own seniority [without accommodation] but had been placed in the Larger Hub's Yard as Helper. He requested immediate placement in the Smaller Hub position. Mr. P confirmed that the Complainant stayed working as a Helper in the Larger Hub that week.

[355] The Complainant testified that at the meeting with Mr. P in December, 2009 about this job placement, Mr. P told him it was too late to change the incorrect work assignment. The Complainant thought this was “a lame excuse” because Mr. P received the Sunday night weekly crew changes much earlier for his position, than other types of jobs such as the “running trades” for example. The Complainant also testified that he had problems in the past being left in the Larger Hub as a Trainman when he could be placed in the Smaller Hub as an engineer, but had caught some of those errors earlier. The Complainant felt that Mr. P was responsible for placing him as an engineer when he could hold the position without accommodation, and that Mr. P had not done so for the week of December 20.

[356] Mr. P testified that between 2008 and 2010, he was responsible locally for arranging the Complainant’s accommodation. Mr. P agreed that the Complainant was incorrectly placed that week. He also testified about his meeting with the Complainant and stated that he agreed to pay the Complainant’s mileage for the week given the error. Although Mr. P could not recall if he agreed to pay the difference in wages between a Locomotive Engineer and a Helper for that week, he testified it would have made sense that he did. He also testified that for the Complainant to receive the difference in wages, the Complainant had to submit a request to the local manager as a “stand-alone claim”, and the Respondent would then assess and audit the claim.

Has Complainant established a prima facie case that Mr. P retaliated against him?

[357] I find that because of the incorrect placement, and the fact that the Complainant remained working there despite his December 21 email to Mr. P requesting a change, it was reasonable for the Complainant to perceive that Mr. P retaliated against him. However, that perception was only reasonable until their meeting, when Mr. P explained his mistake.

[358] I accept Mr. P’s testimony and find that the December 20, 2009 placement was a mistake. Mr. P admitted the error and offered to pay the Complainant’s mileage costs and the difference in wages for that week. I further find that it was up to the Complainant to request these payments from the local manager as a “stand-alone claim”.

[359] Given the circumstances and the credible and reasonable explanation from Mr. P, it was not reasonable for the Complainant to continue to perceive this incident as retaliation once Mr. P admitted the error and offered to approve payment of the mileage costs and difference in wages.

[360] I therefore conclude that Mr. P did not retaliate against the Complainant by placing him as he did for the week of December 20, 2009. The Tribunal dismisses this allegation.

(iii) OHS Nurses C or E regarding the referral to Respondent's Mr. Tom W

[361] The Complainant's testimony was that many times, he could not tell the difference between the voices of OHS Nurse C and OHS Nurse E. One of them referred him to the Respondent's Mr. Tom W when the Complainant asked who he should verify with to see if Manulife covered him for sick leave benefits. The Complainant's position is that the referral to Mr. Tom W constituted retaliation by the referring Nurse, because Mr. Tom W did not return the Complainant's calls until the limitation period for his benefits application to Manulife had elapsed.

[362] Neither Nurse C nor Nurse E testified at the hearing. The OHS Case Notes submitted into evidence do not mention the Complainant's question or the referral. The evidence about this retaliation allegation consists of the Complainant's testimony and some of his handwritten notes.

[363] The Complainant made handwritten notes about various dates he left messages or spoke to individuals at Manulife and at the Respondent. The first note is dated February 26, 2010 wherein the Complainant testified Sheryl at Manulife responded to his February 23 phone message and told him she thought Manulife took over from "unemployment" on February 15 but wasn't sure and would check.

[364] The second note states that on March 24, 2010 the Complainant had left 2 previous messages for Mr. Tom W and no messages were returned. On March 24, the Complainant left a message for Mr. Tom W that he needed to know whether Manulife was "covering" him. Mr. Tom W's voicemail said he would return to the office March 29.

[365] The Complainant testified he left Mr. Tom W another message on March 30 regarding coverage and that message was not returned. The Complainant testified he left a message for Sheryl at Manulife on April 18, 2010, also asking if he was covered.

Has the Complainant established a prima facie case that the OHS nurse(s) retaliated against him?

[366] These incidents occurred in 2010, after the Complainant had filed two human rights complaints.

[367] In alleging that the referral to Mr. Tom W was retaliation by one of the OHS Nurses, the Complainant is inherently alleging that the referral itself had an adverse impact on him because he had filed human rights complaints.

[368] In Paragraph 15 of his Complaint, the Complainant identified Mr. Tom W as the Respondent's liaison with Manulife. This was not disputed.

[369] There was no evidence submitted that either of the above OHS nurses were responsible for or directed Mr. Tom W's work, or that he reported to either of them. In other words, there was no evidence submitted that either nurse had control over Mr. Tom W's actions or alleged inaction.

[370] I find that what the Complainant alleges as adverse treatment or an adverse impact by an OHS Nurse was in actuality a referral to the correct person: the Respondent's liaison with Manulife. That was the information he asked for, and that was the information he received. Therefore, the referral did not constitute adverse treatment of, or have an adverse impact on the Complainant because he had filed human rights complaints.

[371] I also conclude that it was not reasonable for the Complainant to perceive that because an OHS nurse referred him to Mr. Tom W, who the Complainant alleged failed to respond to him in time, the referral itself constituted retaliation.

[372] The Complainant has therefore not made out a *prima facie* case of retaliation against either Nurse E or Nurse C for referring him to Mr. Tom W. The Tribunal dismisses the allegation.

(iv) Mr. Tom W

[373] The Complainant alleged that Mr. Tom W retaliated against him as follows:

i. by not returning the Complainant's phone messages asking whether Manulife covered him for weekly indemnity benefits (WIB) until June 10, 2010, he caused the Complainant to late-file his WIB claim, which in turn caused Manulife to deny his claim;
ii. by directing Manulife to deny the Complainant's WIB claim and his August 2, 2010 appeal of that denial, the Complainant did not receive WIB benefits.

[374] The Complainant testified that he had left two messages for Mr. Tom W prior to March 24, 2010. On this date, he states he left a message indicating that he needed to know if Manulife covered him. As previously noted, the Complainant had taken notes during the calls or around the same time as the calls. On March 30, he noted he left a further message regarding coverage and that the message was not returned. On April 18, 2010, he left a message with Sheryl at Manulife, once again asking if he was covered. The Complainant testified that Sheryl did not answer this message.

[375] The Complainant believed that some time in June, he left another message for Sheryl. She called him back and told him she would get Mr. Tom W to contact him. Tom W did, in June, and told the Complainant to submit a claim and they would then find out if Manulife covered him. The Complainant's testimony was that he submitted his claim the same day he spoke to Tom W.

[376] The Complainant had a note dated June 10, 2010, stating that he called Sheryl F "yesterday" requesting a denial letter so he could claim unemployment. On June 10, 2010, the Complainant sent the Respondent his WIB Manulife claim, with a cover letter explaining why his claim was late. The letter also outlined the telephone messages he had left for Sheryl, and for Mr. Tom W at CP.

[377] The Complainant testified that all of Manulife's notes on his WIB claim (the Manulife Notes) were filed with the Tribunal. The Manulife Notes contain a July 21, 2010 email from Ms. CF to the Respondent's Benefits Team saying that the claim was late-filed, and asking

how to proceed. Mr. Tom W responded the same day, advising Ms. CF to decline the claim.

[378] There is no dispute that Manulife declined the Complainant's June 10, 2010 application for WIB or that the Complainant has never received benefits from Manulife for the period May 1, 2010 to November 6, 2011.

[379] Manulife's July 22, 2010 letter to the Complainant denied his application because the Complainant failed to file it within 30 days of the May 1, 2010 start date of his disability from sickness or disease (WIB Denial). The WIB Denial also stated that failure to meet the 30 day deadline would not invalidate the claim if the Complainant showed it was "not reasonably possible to furnish proof" within the time limit and he furnished proof as soon as reasonably possible.

[380] On August 2, 2010, the Complainant appealed the WIB Denial. His appeal letter set out the reasons the claim was late. On September 18, 2010, Manulife declined the appeal on the basis that the claim was late filed (WIB Appeal Denial). Nothing in this letter states that the Respondent asked Manulife to deny the appeal.

[381] The Complainant did not testify about the September 18, 2010 note on page 9 of the Manulife Notes, headed "1st Appeal Review for WIB claim" (the September 18, 2010 Manulife Note). It contains a paragraph stating that the claim involved an ASO account, so if a claim was declined due to late filing, Manulife had to confirm with the ER if ER wished Manulife to proceed with the review or decline the appeal as late. There was no evidence about what an ASO account is. The Manulife Notes show "Tom" instructing Angela to decline the appeal because it was late-filed. The Complainant testified that "Cindy" at Manulife told him that the Respondent instructed Manulife to decline the appeal. After receiving the Manulife Notes, the Complainant thought it was "Tom" who was responsible for denying his WIB claim.

[382] After the Complainant testified on the allegation of retaliation by Mr. Tom W, Respondent counsel objected to the admission of the Manulife Notes on the grounds that they were notes by Manulife, and they were a form of business record, which is normally hearsay, but can be admitted into evidence as an exception to the hearsay rule if identified

as accurate by a witness who can testify to their creation and accuracy. There being no such witness, the Respondent did not consent to the Manulife Notes being entered at all, including for the truth of their contents. Commission counsel submitted that the Manulife Notes contained relevant information and helped corroborate some of the Complainant's testimony. He submitted that the Tribunal should admit the Manulife Notes, and that it was the Tribunal's decision on how much weight to give them.

[383] I ruled at the hearing that the Manulife Notes are hearsay. I did however admit them into evidence given that the Manulife Notes are relevant information. Pursuant to subsection 50(3)(c) of the *Act,* the Member has great discretion in admitting any relevant evidence or information the Member sees fit.

[384] These Manulife Notes confirm the Complainant's testimony that Manulife denied his WIB application and appeal because it was late-filed. There is also information that someone named "Tom" told Manulife to deny the claim, but no reasons are given.

Has the Complainant established a prima facie case of retaliation by Mr. Tom W?

[385] I find that the human rights complaints relevant to this allegation are the Settled complaint and the 2009 complaint**.**

[386] Mr. Tom W was not a witness, nor was anyone from Manulife. The evidence consists of the Complainant's testimony, his application and appeal letters, Manulife's WIB Denial and WIB Appeal Denial, and the Manulife Notes.

[387] The Complainant's June 10, 2010 note that he again called Sheryl yesterday and requested a denial letter so he could claim unemployment insurance establishes that he knew by June 9 or 10, 2010 that Manulife would deny his claim. I find there was no evidence as to how he found out.

[388] The Complainant's testimony was that when Sheryl called him back on June 10, she said she would get Mr. Tom W to call him, and Tom W did so the same day. It was Tom W who told the Complainant to submit his claim to Manulife and that once submitted, they would be able to tell him if he was entitled. The Complainant's handwritten notes confirmed this. I also find that almost his entire June 10, 2010 cover letter consists of the

reasons the claim was late. For all of these reasons, I conclude that the Complainant knew his claim was late.

[389] I also find that as set out above, there are gaps in the evidence regarding this allegation. Those gaps leave certain unanswered questions which I find are relevant to whether the Complainant reasonably perceived Mr. Tom W's actions to be retaliation. The Complainant knew that starting May 1, 2010, he was booking off sick. Previously, in February, 2010, he had asked whether Manulife covered him when he was off sick, the same issue which arose on May 1, 2010. There was no evidence of what an "ASO" account was, and if that impacted the rights and obligations among Manulife, the Respondent, and the Complainant as WIB claimant, and no evidence of what was in the specific Manulife group policy.

[390] I find there is insufficient evidence to establish whether it was reasonable for the Complainant to perceive that Mr. Tom W retaliated against him by instructing Manulife to decline his claim for WIB benefits and decline the appeal of that decision. Therefore, the Complainant has not made out a *prima facie* case, and the Tribunal dismisses the two allegations of retaliation against Mr. Tom W.

(v) Ms. Kari Giddings

[391] The Complainant alleged that Ms. Giddings retaliated against him by:

i. not processing his request for family status accommodation through OHS;
ii. stopping the request for family status accommodation; and
iii. not granting his request for family status accommodation.

[392] Sometime in 2004 or 2005, the Complainant requested family status accommodation on account of his ill father, and did so through management. I find that he knew that OHS did not usually handle family status requests. Ms. Giddings testified that usually, Employee Relations (ER) handled these requests. Further, OHS had told her that there was no medical basis for the Complainant's 2011 family status request. Ms. Giddings confirmed with the Complainant in March, 2011 that the process was meant to go through Employee Relations.

[393] Given the above, I find that it was not reasonable for the Complainant to perceive that Ms. Giddings retaliated against him by requiring him to give information to ER and management on his March 10, 2011 request for family status accommodation rather than to OHS. The Complainant has not made out a *prima facie* case on this allegation, and the Tribunal dismisses it.

[394] The Complainant took the position and testified that it was Ms. Giddings who stopped the family status accommodation process. He believed there was a "document somewhere" in which she said that because the Complainant was back at work on November 7, 2011 in a position which accommodated his needs, the accommodation process stopped. I find that no such document was submitted into evidence.

[395] I find the evidence established that on November 22, 2011, when Ms. Giddings again wrote to the Complainant, requesting information, the Respondent's questions and position remained the same: the Respondent was seeking the same information from the Psychologist that it had requested on November 2, 2011, in order to assess the family status accommodation.

[396] I therefore find that the evidence established that after November 7, 2011, Ms. Giddings continued to seek the information she and the director of ER thought was required for the Respondent to make its family status accommodation decision.

[397] I find that the Complainant did not answer Ms. Giddings' November 2 and November 22, 2011 requests for further information.

[398] The Complainant testified that although he would have liked to have had the family status accommodation notwithstanding the November 7, 2011 job placement, he felt the process could not go further because the Adult Child refused to consent to the Psychologist releasing information about the Adult Child and the Complainant felt he could not consent on the Adult Child's behalf.

[399] The Complainant knew when he received Ms. Giddings' November 22, 2011 email that the Respondent's position was that the Respondent still required the Psychologist's answer to whether it was a therapeutic or medical need for the Adult Child that the

Complainant and his wife be the supervisors or caregivers at all times. The Complainant testified that the Adult Child would not consent to the Psychologist providing any information about the Adult Child, and the Complainant would not force that consent. The Complainant knew, in other words, that he had not answered all of the Respondent's questions.

[400] The foregoing evidence established that it was the Complainant, not the Respondent's Ms. Giddings, who stopped the process of searching for possible accommodation on account of family status by not providing further information after November 22, 2011. Further, I find that the Respondent did not make a decision about whether to accommodate the Complainant for family status. Ms. Giddings held the accommodation request in abeyance, waiting for the information she sought.

[401] Therefore, I conclude that it was not reasonable for the Complainant to perceive that Ms. Giddings had stopped the request or made a decision about his request for family status accommodation. The Complainant has not made out a *prima facie* case of retaliation on these allegations.

[402] The part of the Decision which concludes that the evidence failed to establish a *prima facie* case that the Complainant was entitled to family status accommodation means that the allegation in (iii) above is moot.

[403] The above findings and conclusions establish that the evidence has failed to substantiate any of the Complainant's allegations of retaliation against Ms. Giddings.

(vi) OHS Nurse C

[404] The Complainant alleged that OHS Nurse C retaliated against him by relaying inaccurate information to his managers that the Complainant had no medical reason to be off work. I will not repeat all the foregoing evidence which I have found establishes that during the period April 30, 2010 to November 6, 2011, the opinion of OHS, including Dr. C, was that the Complainant was fit for safety critical work without restrictions except for his back, because OHS did not think his anxiety constituted a medical disability.

Has the Complainant established a prima facie case that Nurse C retaliated against him?

[405] The information that the Complainant was fit for his work is the information which OHS Nurse C had, and that was the information she conveyed to the Respondent's managers. The Complainant did not agree that this information was correct or complete but knew this was the information the Nurses had. In the April 2011 RTW Meeting, Mr. M specified to the Complainant that the medical restriction Mr. M had was in the July 16, 2010 OHS Fitness To Work Report, and did not include anxiety. Mr. M repeated this information in his letters to the Complainant.

[406] Further, the Complainant knew that OHS had its own doctors who ultimately decided on restrictions, and that OHS Nurses, including Nurse C, did not take instructions from employees' doctors, but rather from the OHS doctors. In the Complainant's case, OHS Nurse C took instructions from Dr. C.

[407] I find for the foregoing reasons that it was not reasonable for the Complainant to perceive that OHS Nurse C sent inaccurate medical information about him to the workplace. The Complainant has therefore not made out a *prima facie* case on this allegation of retaliation. I conclude that the evidence has not substantiated that OHS Nurse C retaliated against him. The Tribunal dismisses this allegation.

[408] Lastly, I wish to comment that an individual who feels they have been discriminated against and files a human rights complaint may perceive all subsequent actions that impact him negatively as being retaliation for having filed a complaint. But it is not necessarily the case that every adverse effect following the filing of a complaint is retaliation. It was evident throughout the hearing that the Complainant mistrusted his employer and perceived many actions to be retaliation for his having filed human rights complaints. However, this is not enough to establish a finding of retaliation. As indicated by the Federal Court in *Tabor,* the complainant's perception that retaliation has occurred must be reasonable (*Tabor FC, supra,* at para. 64). In this Complaint, there was no retaliation.

XIII. CONCLUSION ON LIABILITY

[409] The Complainant has substantiated his complaint for discrimination based on a disability. The Complainant does have a disability within the meaning of the *Act* and the Respondent failed to recognize this and accommodate the Complainant.

[410] However, the Complainant did not provide the information necessary to substantiate his complaint of discrimination based on family status. The Tribunal dismisses that part of the Complaint.

[411] Lastly, the Complainant advanced numerous retaliation complaints, none of which were substantiated. The Tribunal dismissed those complaints.

XIV. REMEDIES

[412] Remedies under the *Act* are awarded pursuant to subsection 53(2). I will now determine which remedies the Complainant is entitled to, if any, based on the conclusion that the Complaint of discrimination with respect to disability was substantiated

A. Compensation for any or all lost wages (subsection 53(2)(c))

[413] The Complainant and the Commission submit that the Respondent was the cause of the Complainant's wage losses from May 1, 2010 to November 6, 2011.

[414] I find that in accordance with subsection 53(2)c) of the *Act,* the Complainant is entitled to compensation for the wages he was deprived of during the time he was off work as a result of the Respondent's discriminatory practice. Based on the evidence presented, I find the Complainant was off work from May 1, 2010, right after the Respondent's OHS lifted the Work Restrictions, to November 6, 2011, when he obtained a position by way of his own seniority (with assistance from the Respondent's Mr. M), commencing November 7, 2011. This is a period of eighteen (18) months.

[415] The Complainant could not mitigate his damages by working for another company. Both the Complainant's and Ms. Giddings' testimony confirmed that if the Respondent

discovered an employee working for another employer while off sick, that employee would be investigated and would run the real risk of being fired. It would not be reasonable to expect the Complainant to take that risk. I therefore conclude that mitigation is not an issue in calculating wage loss.

[416] The Complainant testified he worked full time in 2009, although he was off work for two months because of foot issues. There was no evidence about whether he was paid or whether he received benefits for those two months. The Complainant only worked parts of the years 2010 and 2011 and as such, the T4s do not properly reflect an annual income. I find that notwithstanding that in 2014, the Complainant worked all year, it is not reasonable to use that year's employment income for the calculation, because 2014 is too distant from the period May 1, 2010 to November 6, 2011 which applies to this Complaint.

[417] I find that the most reliable information available to calculate the Complainant's wage loss is his 2009 T4. That T4 states that his income from employment was $49,553.12. The Complainant was off work for 18 months, so he is entitled to another six months of wages. One-half of $49,553.12 is $24,776.56. When one adds the two amounts, the wage loss is $74,329.68. I recognize that the Order for wage loss may not cover the entire wage loss, but this is the best approximation, given the evidence before the Tribunal. I note that the Complainant collected Employment insurance benefits in 2010. The order for compensation for wage loss leaves it to the parties to decide the method of dealing with sections 45 and 46 of the *Employment Insurance Act*.

[418] The total amount of compensation for lost wages is $74,329.68, subject to the *Employment Insurance Act*. The Complainant is also entitled, if applicable, to a gross-up for any negative tax consequences arising out of the Respondent's payment of lost wages compensation (*Desormeaux v. Ottawa-Carleton Regional Transit,* 2003 CHRT 2, at para.126). The Complainant is also entitled to the vacation pay he would have received for the period May 1, 2010 to November 6, 2011, based on the foregoing compensation, which calculation shall be left to the parties. The Complainant is further entitled to all employee benefits he would have received for the period May 1, 2010 to November 6, 2011, based on the foregoing compensation, which calculations shall also be left to the parties, except for his CP pension, addressed below.

B. Pension (ss. 53(2)(b))

[419] The Complainant also asks that the Respondent credit him with pensionable service and pension contributions for the period May 1, 2010 to November 6, 2011. I find that pursuant to subsection 53(2)(b) of the *Act,* the loss of pensionable service and pension contributions is a right, opportunity or privilege which was denied to the Complainant as a result of the Respondent's discriminatory practice.

[420] The Complainant's evidence on CP's employee pension was sparse. Mr. W testified briefly and generally on how CP calculates an employee's pension entitlement, but there was no evidence on how to calculate the Complainant's pension loss, or conversely, what was required to restore his pension. Mr. W testified that the following factors form part of the calculation: the greater of (i) the employee's highest earnings for 5 years, or (ii) his earnings for the last 60 months of employment; (ii) years of service; (iii) age. I find that the Complainant's evidence did not establish how his pension loss was calculated, or what his own and the Respondent's contributions would be during the Off-Work Period.

[421] Given the lack of information before me, I will leave it to the parties to do the calculations and arrive at the amounts. However, if they cannot agree on the amounts, the Tribunal retains jurisdiction, but the Tribunal orders the parties to raise any implementation issues within four (4) months from the date of this Decision if the parties wish to have the Tribunal's assistance.

C. Pain and Suffering (s. 53(2)(e))

[422] A victim of a discriminatory practice may be compensated up to $20,000 for any pain and suffering that he experienced as a result of a respondent's actions.

[423] The Complainant testified that he didn't see the April 30, 2010 lifting of the Work Restriction coming and felt blindsided. The Complainant believed that if the Respondent required more information to substantiate his medical disability, the information ought to

have been obtained from his treating Psychologist. He knew that OHS had not done this at the time his restrictions were lifted.

[424] The Complainant testified that the lifting of the restriction and his not working created a huge stress not only on his own mental and physical health, but on his wife and family. When he was testifying to this, he was emotional and his voice was cracking.

[425] The Complainant testified that he had lost interest in activities such as swimming and volunteering since the Respondent had lifted the restrictions. He explained he had some very dark nights and days, but tried to keep it to himself as much as possible. He felt he did not tell his doctors the extent of how he felt.

[426] I find that although the Complainant's testimony was that he did not tell his doctors the full extent of how he felt, many of the reports of the GP, the Psychologist, and Dr. OK's January 12, 2011 report spoke to the effects of being off work on the Complainant's anxiety and mood.

[427] The GP also testified to the Complainant's stress after being off work for a long time. The GP felt that it was affecting the family structure and the Complainant's self-esteem. The GP's opinion was that if the Complainant could continue working, he would be contributing to the workforce and his self-esteem would improve.

[428] The Complainant's wife also testified to the change in the Complainant's behaviour following the lifting of the Work Restrictions. She explained that the Complainant was not sleeping properly and his behaviour was different, much less easy-going.

[429] I conclude that the fact that the Complainant did not work for a period of one and one-half years, the exacerbation of his anxiety, the anger and helplessness he felt, and the negative effect on his self-esteem and dignity during that time were direct and serious consequences of the Respondent's discrimination. However, I conclude that the evidence did not establish pain and suffering to a degree which calls for an award in a high range of such awards. I conclude that the Complainant is entitled to $12,000.00 compensation from the Respondent for pain and suffering.

D. Special Compensation (subsection 53(3))

[430] In some circumstances the Tribunal may order a respondent to pay compensation to the victim if the respondent is found to have engaged in the discriminatory practice wilfully or recklessly.

[431] *Johnstone FC, supra,* decided that there must be an element of intent to find that discrimination was wilful (at para.155). In my view, despite the fact that the Respondent dealt with the accommodation requests in silos and could have had better communication between OHS and ER, it did not do so wilfully or recklessly. In fact, the Complainant himself had at one time asked to pursue the disability request only, and by his own submissions, had he been successful on that ground, he would not have pursued the family status request out of privacy concerns. In addition, I formed the impression that Dr C, whose testimony I had the opportunity to assess, was genuinely of the medical opinion that the Complainant's anxiety was not a disability within the meaning of the *Act.* The fact that this Tribunal comes to a different conclusion on the evidence is not the issue. This was Dr. C's professional opinion and I assessed it as genuinely and honestly taken.

[432] *Johnston, FC, supra* decided that recklessness "usually denotes acts that disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly" (at para 155). The Commission submitted Dr. C's failure to speak with or meet the Complainant in person constituted wilful or reckless discrimination. I find that Dr. C's method of dealing with the Complainant's case reflected his usual practice in dealing with employee files – it was not a singling out of the Complainant nor was it heedless or wanton disregard or indifference. I find Dr. C's lack of contact with the Complainant, although taken into account in assessing the weight given to his opinion, did not constitute either wilful or reckless discrimination.

[433] The evidence has failed to establish that the Respondent wilfully or recklessly discriminated against the Complainant on the ground of disability. The Tribunal dismisses this allegation.

E. Interest

[434] Pursuant to subsection 53(4) of the *Act* and Rule 9(12) of the Tribunal's Rules of procedure, the Complainant is entitled to interest on the compensation ordered, from May 1, 2010 to the date of this Decision. This interest shall be simple interest calculated on a yearly basis, at a rate equivalent to the Bank of Canada rate (monthly series), set by the Bank of Canada.

F. Commission's requested remedies

[435] The Commission sought orders pursuant to subsection 53(2)(a) of the *Act* requiring the Respondent to cease its discriminatory practice and take measures, in consultation with the Commission in order to redress any discriminatory practices, or to prevent the same or similar practices from occurring in the future. The Commission also sought orders that CP review and revise its workplace accommodation policies and procedures to allow more flexible scheduling, in accordance with the Commission's recommendations, within one year of the Tribunal's decision; that CP develop a training program for all of its managers regarding workplace accommodation, focusing on mental health disabilities and family obligations, for the Commission's approval, within 2 years of the Tribunal's decision; and that the Tribunal retain its jurisdiction until the parties confirm the foregoing remedies are implemented, in case of disagreement between the parties on the interpretation or implementation of the foregoing relief.

[436] I have reviewed the Respondent's policies which were tendered into evidence. I find that CP already has policies and procedures in place for both mental health and family status requests for accommodation. I also find that the issues in this Complaint did not arise as a result of a lack of policies and procedures for employees to seek accommodation on account of human rights grounds, or problems with those policies, nor on account of scheduling policies. Rather, at the heart of this Complaint was a medical opinion from a doctor at the Respondent's Occupational Health Services. I formed the impression from the CP managers who testified that they were aware of their employees' rights to accommodation with respect to disability and family status, and I would add,

aware of privacy concerns. As previously discussed, CP may consider improving communications between management and OHS, but those observations do not impact on liability. Regarding scheduling flexibility, the crux of that issue still led back to the requirement for prior OHS fitness to work clearance, and, in any event, there was simply not enough evidence regarding the impact or feasibility of ordering a new scheduling system. The Tribunal dismisses the Commission's requested remedies.

XV. ORDER

A. Confidentiality

[437] Pursuant to section 52(1)(c) of the *Act,* the Tribunal's record shall be kept confidential, with the exceptions noted at paragraph 26 of this Decision.

B. Remedies

[438] The Respondent shall:

i. pay the Complainant the amount of $74,329.68, representing compensation for wages, plus a gross-up for any negative tax consequences arising out of the payment . The parties shall be responsible for complying with sections 45 and 46 of the Employment Insurance Act, S.C. 1996, c.23;
ii. pay the Complainant the amount of $12,000.00 as compensation for pain and suffering*;*
iii. pay the Complainant interest on the total amount of all compensation as instructed in the reasons for this Decision*;*
iv. credit the Complainant with the same amount of pensionable service and pension contributions between May 1, 2010 and November 6, 2011 as it would have done had the Complainant been working*.* The Respondent shall also contribute the amount if any, the Respondent would have contributed to the Respondent's pension plan on behalf of the Complainant during that period had the Complainant been working.

[439] The Tribunal shall remain seized to deal with any implementation issues. However, the Tribunal orders that the parties raise any implementation issues within four (4) months from the date of this order.

Signed by

Olga Luftig
Tribunal Member(s)

Ottawa, Ontario
May 15, 2018

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1897/12712

Style of Cause: Mr. X v. Canadian Pacific Railway

Decision of the Tribunal Dated: May 15, 2018

Date and Place of Hearing: June 8 to 17, 2015

Appearances:

Mr. X, for himself

John Unrau, for the Canadian Human Rights Commission

Meghan McCreary, for the Respondent