Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2019 CHRT 28
Date: June 28, 2019
File No.: T2140/1416

Between:

Doug McFee

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian Pacific Railway Company

Respondent

Decision

Member: George E. Ulyatt

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I. Overview

[1] Doug McFee (the "Complainant") filed a complaint on May 5, 2014 against his former employer, the Canadian Pacific Railway Company (the "Respondent") pursuant to s. 7 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the "*Act*").

[2] Section 7 of the *Act* states:

> Employment
> It is a discriminatory practice, directly or indirectly,
> (a) to refuse to employ or continue to employ any individual, or
> (b) in the course of employment, to differentiate adversely in relation to an employee,
> on a prohibited ground of discrimination.

[3] The Complainant's Statement of Particulars refers to s. 7(a); however, his original complaint, as referred to the Tribunal, referred more generally to s. 7. Thus, the following review is of the complaint with both s. 7(a) and s. 7(b) in mind.

[4] The Complainant, a long term employee of the Respondent, alleges that he was discriminated against under s. 7 of the *Act.* The Complainant alleges that he was discriminated against for a disability going back to 2009, and that his disability was a factor in his ultimate termination.

[5] The Complainant in his Statement of Particulars alleges discrimination in relation to three specific instances:

> 1) By refusing to place me in one of the many full time positions that I applied for in 2010 and 2011;
>
> 2) Canadian Pacific Railway failed to give me adequate support to integrate me with my disability in the Customer Services Representative position in 2011 in which they removed me from that position after one month;
>
> 3) After my last performance management improvement meeting in September 2013, Canadian Pacific Railway failed to support me with my disability and finally fired me in January 2014.
>
> All of these discriminatory acts plus many more I experienced from the time of my diagnosis with a mental disability, to the time of my termination, prevented me from having an equal opportunity as others to have my needs

> accommodated consistent with the duties and obligations as a member of society.

[6] The Complainant alleges that his disability became known to the Respondent on May 14, 2008 when he was placed on short term disability following a diagnosis of hydrocephaly. The Complainant alleges that the Respondent failed to accommodate his disability and that his disability continued until he was ultimately terminated.

[7] It is worth noting that the Complainant was a self-represented individual who was assisted by a friend who helped the Complainant and the Tribunal greatly. At the outset of the hearing, the Complainant believed he could make his case based solely on the documentary record and cross-examination of the Respondent's witnesses. His representative explained that the Complainant was hesitant to testify due to his issues with memory and other impacts of his disability. The Tribunal at that juncture took a brief recess so that the Complainant could reconsider his position and ultimately he did testify.

II. Facts

[8] The Complainant was an employee of the Respondent from May 8, 1995 to January 29, 2014 in a number of positions. In December of 2007, the Complainant was promoted to the position of Process Coordinator, which, according to the Agreed Statement of Facts, is a "safety-sensitive position involving locomotive and car repair and servicing and working near a live track". This position required the Complainant to manage union staff, including mechanics, and to coordinate groups within the unit.

A. The Complainant's Diagnosis

[9] On May 14, 2008, the Complainant was placed on short-term disability following a diagnosis of hydrocephalus, which is defined as an increase of cerebrospinal fluid within the brain causing increased pressure inside the skull. The Complainant's condition manifested itself in a number of ways, including problems with balance, trouble walking, falling down, headaches and memory issues. As a result of his diagnosis, surgeons

implanted a ventriculoperitoneal shunt in the Complainant's brain to drain the buildup of these fluids. The procedure was performed on September 16, 2008.

[10] Dr. Mark Hamilton, the Complainant's treating neurosurgeon, cleared the Complainant for work on November 3, 2008. The Complainant returned to work on November 13, 2008 in his prior position of Process Coordinator; however, the Complainant was unable to meet the demands of this work and was placed on a medical leave of absence on July 4, 2009.

[11] The Complainant was again cleared by his physician to return to work in November 2009. That said, the Complainant was not cleared to return to a safety sensitive or safety critical position. The Complainant was therefore unable to return to his previous position as Process Coordinator and thus remained on leave, subject to some temporary work assignments, which will be described below.

[12] The Complainant began receiving short-term disability in July 2009. He later transitioned to long-term disability on January 4, 2010, which he continued to receive until October 12, 2010. I note again that there were limited instances during this period of time when the Complainant did work, as described below.

[13] While the Complainant was on long-term disability, the Respondent's Occupational Health Services wrote to Dr. Hamilton on January 10, 2010 with a series of questions relating to the Complainant's limitations. Dr. Hamilton responded to the inquiry by way of a letter dated March 31, 2010 stating, in part:

> Question 1 dealt with further information regarding his cognitive impairment. The neuropsychology testing last done on February 9, 2009 demonstrated difficulties with recall with both auditory and visual memory. He was noted to be 'managing his daily activities adequately'. Mr. McFee's hydrocephalus is long-standing and the effects have been accumulative over his life span. The memory issues are less significant when he is in a situation that is not stressful or 'overloaded'. This is quite typical for patients with chronic brain injury issues related to hydrocephalus. I would expect this to be static. I would not expect significant improvement. Most people with his degree of hydrocephalus respond to shunting / treatment with a ventriculoperitoneal shunt by stopping their clinical deterioration rather than a significant improvement with regards to memory function.

Question 2 dealt with do you anticipate that his cognitive deficit will less, worse, or remain stable with time. As above, I would expect these to remain stable from now on. I would not expect significant decline unless the ventriculoperitoneal shunt malfunctions. I would not expect significant improvement after this length of time. As noted, he can cope reasonably well in a non-stressful situation, however, decompensates in overload situations.

Question 3 dealt with which tasks of work, in your opinion, are most likely to be affected by his current cognitive deficits. He has difficulty with the sudden demands placed upon him by his job (as per the job description provided). In particular, it is noted the job description indicates 'high memory ability' auditory and visual is required. This, as noted by the neuropsychology testing, is affected. The other thing of note is the description of 'high level of distracting stimuli, must work effectively despite phone calls, delays and schedule changes'. This is the kind of environment that will definitely have an adverse affect on his ability to cope.

Question 4 dealt with do his difficulties with balance and coordination warrant his restriction from climbing and working at heights. The answer to that is yes. Although his balance and coordination (related to his hydrocephalus) has stabilized, he is still not within normal limits for this and I would not advise him to be doing climbing and working at heights.

Question 5 asked 'do you anticipate that his motor symptoms will lessen, worsen or remain stable with time'. I would expect them to remain stable in the short terms, however, long term it is impossible to predict. I would not expect them to improve significantly. He has already had his shunt in place for a year and a half. Maximal clinical improvement has already occurred.

Question 6 asked 'does his hydrocephalus pose a risk for seizure and sudden incapacitation'. Mr. McFee was having out of body experience spells prior to his shunt. He was seen by Dr. Paolo Federico from the Epilepsy Clinic and investigations were done. His electroencephalogram was normal. The symptoms resolved after his VP shunt was inserted. I would not expect him to experience these again unless his ventriculoperitoneal shunt malfunctioned."

[14] On April 9, 2010, the Respondent's Occupational Health Services completed a "Fitness to Work Assessment Form" which made the following recommendations:

Abilities/Limitations:

- Able to do work that has low time pressure: occasional pressure to meet deadlines or work within time constraints, with a moderate volume and pace of work. Not able to do the work that routinely requires high time pressure to meet the deadlines/time constraints.

- Able to take some responsibility for multiple tasks, but with clear guidelines or cues about when to perform each task.

- No more than a minor degree of distracting stimuli should be present during a work shift.

- Able to handle occasional exposure to emotionally stressful circumstances or emotionally distressed individuals. Should not do the job that requires routine exposure to emotionally stressful circumstances or emotionally distressed individuals.

- Able to handle occasional exposure to confrontational situations where assistance is not immediately available. Should not do the job that requires routine exposure to confrontational situations.

- Able to do a job in which moderate memory is required for written information or instructions. Able to do a job in which moderate memory is required for verbal information or instructions.

- Duration of limitations: likely permanent.

Return to modified work date: as soon as it can be arranged when accommodation is found.

Please proceed with your review of accommodation options and return to work plan in conjunction with the employee.

B. The Return to Work Process

[15] The Complainant was referred to the Respondent's Return to Work Program and Rod Varney, a return to work specialist, worked with the Complainant and placed him in a number of temporary positions to gain exposure to different types of work within the organization. The Complainant was required to participate in the Job Search program, which Mr. Varney assisted with as well.

[16] The Respondent's position was that it was necessary to fully understand the Complainant's disability and to find a role that the Complainant could handle. Mr. Varney testified that he communicated with supervisors as to the Complainant's limitations. He indicated that the limitations were such that it was difficult to find a position for the Complainant.

[17] The Respondent placed the Complainant in four work trials that Mr. Varney thought would be beneficial to the Complainant. Over this same time period, the Complainant testified that he also arranged a number of "job shadowing" opportunities on his own initiative, and took courses through the Respondent's online training program.

[18] The purpose of work trials as offered by the Respondent were to flesh out the capabilities and abilities of those seeking accommodation. The evidence disclosed that the Respondent attempted to understand the skills and limitations. Work trials were fashioned to a) clarify restrictions; b) better understand how restrictions affect the Complainant's ability to work; c) locate a permanent full-time position that the Complainant could perform in.

[19] The four work trials are as follows:

i) Worker's Compensation Board Filing, August 2010: This was an entry-level position, with minimal stress and pressure, preparing files for offsite storage. The Complainant successfully completed the two week work trial but stated he wanted more of a challenge.

ii) Risk Management Analyst, October 12, 2010 to February 21, 2011: This was a temporary position modified to suit the Complainant. The Complainant was required to do data collection and data input. There were no complaints; however, the position had a sunset and thus the Complainant left the position when it concluded.

iii) Customer Service Coordinator, March 28, 2011 to April 29, 2011: Mr. Varney thought this position, in a call centre environment, would be appropriate for the Complainant, who had been actively seeking positions in the Customer Service Centre. The position afforded a structured training program and the Complainant could also receive on the job training. An email from that department to Mr. Varney on April 27 2011 relayed serious concerns with his performance in the role. He was described as being unable to replace another employee without near-constant assistance. A colleague noted that it seemed "that each day was like starting from scratch" and he appeared to be "struggling with the basics of training". He was also described as expressing unwillingness to take on new and different tasks. He was

rated as functioning at a 4/10 in both performance and attitude and was not kept on after the expiry of his 30-day probationary period.

iv) Employment Coordinator, May 2011 to January 2012: The Complainant was placed in a position as an Employment Coordinator in Human Resources, which required setting up interviews, filing, paperwork and dealing with different individuals. The Complainant stayed in this position from May 2011 until he accepted the position as Representative, Human Resources Service Centre in January 2012, which will be discussed later more fully.

[20] Notwithstanding the Complainant's failure in the Customer Service Coordinator placement and his treating neurosurgeon's view that his limitations were likely permanent in duration, Mr. Varney testified that he felt the complainant was capable of performing at a higher level than his medical restrictions based on Dr. Hamilton's report allowed. The Complainant was also very keen to return to a position that was suitable for his abilities. Mr. Varney encouraged the complainant to participate in an Independent Medical Assessment.

[21] A neuropsychological report was obtained from Dr. Gregor Jason, PhD, on August 16, 2011. Dr Jason interviewed the Complainant, performed numerous tests and reviewed the Complainant's previous medical records. The Summary and Comment portion of his report reads, in part:

> This neuropsychological evaluation demonstrated impairments on a paced test of verbal working memory and certain aspects of memory for verbal material. The verbal memory impairment is similar to that observed in pervious testing conducted by Dr. King in 2007 and 2009. Memory for visual material has improved somewhat, from the impaired to the borderline range. Most aspects of Mr. McFee's neuropsychological test performance are broadly similar to what was observed in the previous testing conducted in 2007 and 2009.
>
> Impairments seen on current testing are most reasonably attributable to Mr. McFee's hydrocephalus. The overall pattern and level of impairment is similar to that seen on previous testing, although there has been some apparent improvement of visual memory. It is possible that this is due to some long-term benefit of the VP shunt which was inserted in September, 2008. It should also be noted that this is now the third time which he has

> been asked to copy and recall this figure, and so practice effects could well have played a significant role in the improvement seen. Overall, Mr. McFee's brain function is very likely quite similar now to what it has been for a number of years.

[22] Dr. Jason's report contained a list of functional limitations and restrictions which were somewhat less extensive than those which were previously laid out. For example, there was no mention of limiting exposure to confrontational situations, emotionally stressful circumstances, or emotionally distressed individuals. It also did not recommend limiting distracting stimuli or time pressure. Mr. Varney was of the opinion that the second report modified the original return to work restrictions. In testimony, he said that the Complainant's restrictions went from severe to moderate, in his view.

[23] Throughout this time, the Complainant applied for a voluminous number of positions with the Respondent that he did not obtain. The Complainant filed two internal complaints with the Respondent. The second complaint, filed in November of 2011, alleged that he had not been hired for any of the 49 jobs he had applied for at that time, including the position of Human Resources Service Centre coordinator.

[24] A number of e-mail exchanges were tendered as evidence by the Respondent at the hearing deal with the Complainant's third application for a role of Coordinator at the Respondent's Human Resources Service Centre.

[25] On October 19 2011, Ron Varney sent the standard covering e-mail he sent to hiring managers when the Complainant was participating in an application process. The e-mail states that he is a Return To Work Candidate and reiterates the Respondent's policy, which is to give RTW Candidates preference for positions for which they are qualified, over more senior or qualified candidates provided they "would be able to perform that job safely, efficiently and reliably following a reasonable probationary or qualifying period…"

[26] In response to Mr. Varney's e-mail, Donna Buchanan, then the Director of Employee Services at the Human Resources Service Centre, responds that "The best candidates will be selected." She explains that he has minimal payroll administration work on his resume and that the organization is in a period of change and therefore they require team players who possess a number of skills and abilities, including the ability to think

quickly and analytically and to take pressure and multi-task. She also cites various other requirements.

[27] Mr. Varney writes back, reiterating that the Accommodation policy must be followed, and raises several concerns with her list of required qualifications. Specifically, he writes "Your list of qualifications may be setting up some systemic barriers to accommodating employees. Right now, I see nothing that would preclude Doug from being considered for this position. If I am wrong, please let me know exactly what qualifications he is lacking…" The general manager of HR planning and development, Paul Wajda, is copied on this message.

[28] Mr. Wajda replies, copying among others Rod Varney, Donna Buchanan, Len Haraburda and Carol Graham:

> Doug has been working for the recruitment centre for the past 6 months or so doing a variety of tasks for the C. He has stepped up every time we had people leave and has been very resourceful. I have no idea why he would not get an interview for the position. He is a RTW candidate and wants a full time position and has the drive and desire.
>
> He deserves an interview in my view as it is an entry level position.

[29] In response to Rod Varney's e-mail reiterating the Workplace Accommodation policy, Donna Buchanan wrote: "Just to clarify it is in the company's best interest we hire the right person for the role. As stated I have advised my leads to follow the process and interview…"

[30] Several days later, Mr. Varney followed up to see what the results of the process were. On October 27, 2011, Donna Buchanan indicates that the Complainant will not be offered the job, writing

> … Even though Doug may have answered questions demonstrating that some evidence of skill is present he did not rank in our top 10. His previous work references also raises a concern.
>
> Based on all of the above we need to select the best candidates possible and Doug does not fit in our top 10 based on the interviews that were conducted.

[31] In response, Paul Wajda indicates that a discussion is necessary. In response to the request for a meeting, Len Haraburda wrote on October 28, 2011: “No need for all to meet. Paul we have completed this process correctly and he is not the selected candidate. You have seen the rationale.”

[32] On November 24 2011, The Complainant requested an investigation into why he was not awarded any of the positions he had applied to between May and November 2011. His letter cites the Respondent’s RTW policy, claiming that he believes several sections of it are not being followed. He wrote “I am going to be launching a Human Rights discrimination investigation as well and would like to set up a meeting with Peter Edwards to discuss why his own HR Department is not following their own policy.”

[33] The Complainant testified that he had a meeting with Peter Edwards, Vice President of Human Resources, and that shortly following this meeting he was offered the full-time permanent role at the HRSC. He accepted it on December 12, 2011 and began working on January 30, 2012.

[34] I note that on November 29, 2011, the Complainant was also offered a full-time, permanent position of Coordinator, Facility Lodging. The Complainant ultimately declined this offer on December 12, 2011, which was the same day he accepted the HRSC role.

C. HR Service Centre Representative Position

[35] As noted above, the Complainant was offered the full-time position of Representative, HR Services, as a permanent accommodation, commencing January 30, 2012. The position in the Human Resource Service Centre (“HRSC”) required the Complainant to assist union and non-union employees respecting pay, benefits and related matters. The Complainant’s manager, Gary Mitchell, testified that he was given no information about any limitations due to disability upon his hiring. He knew that the Complainant was a Return To Work employee but that was all, save for a short conversation he had with the Complainant’s former supervisor, who advised him to make efforts to write down instructions for the Complainant, rather than give solely verbal direction.

[36] Specifically, Mr. Mitchell confirmed that he was given no advice about limiting distractions, stress, or anything about the Complainant's memory issue or the fact that he may make some errors. He described the work environment as an open and fairly confined area with roughly 22 employees, and indicated that staff would have to take calls from irate, upset callers and that there were pressure situations where tasks were given late in the day and had to be completed immediately: "There were time crushes, payroll deadlines. We were always up against the gun, so we would always have strict deadlines that we had to get work done by, therefore that could cause some stress."

[37] Mr. Mitchell recalled the Complainant displaying memory issues and requiring instructions be repeated, as well as sometimes displaying frustration when under pressure. He testified that he did not take the Complainant's disability into account in rating his performance as he was unaware.

[38] The Complainant testified that the position was initially not that stressful for him. Each employee was required to work two hours per day on the telephone. In the HRSC Representative position, the Complainant was tasked with a number of position changes, new hires and scheduling.

[39] As time went on, the Complainant testified that the quantity of the work increased, and there were fewer staff which resulted in more stress being placed upon him. The Complainant alleges there was no accommodation made for his disability as the workload and stress increased. In performance management assessments completed by the Respondent, the Complainant received a "partially achieved" rating in 2012. The "Primary Reason" column reads "Has had difficulty following direction which has led to numerous repeated errors. Can come across with a confrontational attitude when working with colleagues. While eager to step up, tends to take on more than he can handle and is not focused on quality, which is a priority of our team".

[40] I note that regarding the "confrontational attitude", on cross-examination during the hearing Mr. Mitchell testified that he had not witnessed this first-hand but his director, Donna Buchanan, claimed that it was the case, and the directors had a role in the performance rating process, as well as direct managers.

[41] In February of 2013, due to his performance review results, the Respondent required the Complainant to participate in a Performance Improvement Management (PIM) Program. This required the Complainant to meet with his manager, Mr. Mitchell, every two weeks to analyze his performance in order to lower the number of mistakes being made. The record of the first meeting includes extensive reference to errors, attention to detail, and that quality is priority over quantity. One of the proposed outputs is "Effective immediately a zero tolerance is set" and "Aim for perfection." The "Manager's Comments" section of the first meeting minutes notes that "The seriousness of this is significant. If improvement is not immediate and sustained, escalation leading to dismissal is likely."

[42] The meetings continued and the Complainant testified that he found this program positive. The records appear to show an overall improvement, with most records containing references to positive improvement and progress although the warning about likely dismissal also remains present in each of the seven subsequent meeting records.

[43] Mr. Mitchell testified that during the course of their meetings the Complainant disclosed his "condition, the circumstances around it, the effects it has had on him and has on him." Mr. Mitchell reported that he was sympathetic and understanding and that the disclosure changed his view of the Complainant. I note the following exchange from his testimony:

> Q: During the time you managed Mr. McFee as an employee did you ever witness Mr. McFee having an attitude problem?
>
> A. No, I did not.
>
> Q. What was your impression of Mr. McFee's attitude at work?
>
> A. Doug was an individual who showed initiative. He would be the first one to take on work, to take on projects, to take on new things, to such an extent that if -- he took on too much. And you had to pull the reigns back on Doug. That was the issue with Doug. He got himself too busy and showed more initiative than he probably should have.
>
> Q. So on average he was a very positive employee at work?
>
> A. Yes. I had a good experience with Doug. I had no issues or concerns.

[44] The last Performance Improvement meeting recorded was September 23, 2013. Donna Buchanan, the then-Director, completed this final form as Mr. Mitchell was no longer in the manager role. The Complainant notes in the employee comments section that he is emphasizing accuracy and slowing down his production. Ms. Buchanan's notations indicate that the meetings will continue. There was never another meeting.

The Incidents Leading to the Complainant's Termination

[45] As noted, in the fall of 2013, there was a change in management and the Complainant had a new manager, Mr. Sonny Francoeur.

[46] In December of 2013, there was an incident in which an IT employee complained to Mr. Francoeur about the Complainant's attitude. The employee claimed that in response to a question about an internal website, the Complainant said "I don't know what that means and you're IT, this is your responsibility" after which the call disconnected. The Complainant claimed that he mistakenly ended the call and had not intended to hang up on the caller. Mr. Francoeur concluded that the Complainant's behaviour was unacceptable, and that he should have brought the issue to his manager's attention as well as following up regarding the employee's inquiry. The Complainant received a reprimand.

[47] The second incident involved a time in January 2014 where the Complainant refused to accept reallocation of priority work from other co-workers and his manager. The Respondent called evidence that the Complainant exacerbated this incident by sending a series of instant messages to a co-worker in which he indicated that he had refused to accept work and that she should do the same. The thrust of the conversation was that the Complainant was urging his co-worker not to take the work, and the co-worker indicated she could not say no to her supervisors. The co-worker complained to her supervisor about this incident and said she felt uncomfortable. An excerpt of their instant message conversation is as follows:

> **Doug McFee:**
> I just told Suzanne to fly a kite and suggest you do the same

Colleague:
she already gave me some contractors to do
it has to be done so if she brings me something Ill do it

Doug McFee:
that is reatarded
we can't do everything

Colleague:
I know
but if we say no then we are gonna catch shit

Doug McFee:
I will take the brunt but I don't fing care

Colleague:
I am done arguing with people on this team. Pile up the work and I will do one thing at a time as that is all I can do

Doug McFee:
I have stats to back it up. There are more then 2 people that can do stuff.

Colleague:
so you say no and sonny gives it to me
awesome
lol

Doug McFee:
say no
this is bs

Colleague:
can't say no to the manager
work needs to be done

Doug McFee:
you can. I just did
I would say it to sonny or to donna

Colleague:
that is why they gave it to me because you said no
lucky you I guess… I do it.
I will do it

Doug McFee:
Say no

Colleague:
I am already doing it
Has to be done by 12:00

Doug McFee:
Well there is no point in sticking together if you are just going to do it

Colleague:
The work has to be done Doug
There is no team work left ANYHWHERE in this department
I am tired of it

Doug McFee:
The idea is to use resources that are not being used right now. If you just do it then those resources will never be used

Colleague:
When a manager asks me to do something work related… I will do it

[48] The third incident occurred at approximately 2:30 p.m. on January 29 2014 when a supervisor, Donna-Marie Lloyd, assigned the Complainant two position changes. Ms Lloyd testified that there was a large volume of additional work that day and she had been dividing the extra tasks up equally among the employees. She acknowledged there was pressure, testifying that this was "because we had to get them done that day or nobody was leaving". When she reached the Complainant, he indicated that he had not yet taken his lunch and could not complete all the work. She felt he did so in a highly inappropriately rude tone.

[49] On cross-examination Ms. Lloyd confirmed that she had not been made aware of the Complainant's limitation and had not received any information from the Respondent on how to supervise employees with mental disabilities.

[50] On January 29, 2014, the Complainant was terminated. The termination letter cites poor performance as well as referencing the above-noted incidents.

[51] In the present inquiry, the Respondent claims that the Complainant's termination was not based upon poor performance, but rather was based solely upon the Complainant's insubordination and his attempt to incite insubordination.

III. Law

[52] Under the *Act*, the Complainant bears the onus of establishing a *prima facie* case of discrimination. A *prima facie* case is "...one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer." (*Ontario Human Rights Commission and O'Malley v. Simpsons-Sears, [1985] 2 SCR 536 ("O'Malley") at p. 558). As explained in Stanger v. Canada Post Corporation, 2017 CHRT 8 ("Stanger") at para. 12, this is a three-prong test. Stanger* explains that the courts have addressed the issue of a *prima facie* case and have stated:

> *[12] To demonstrate prima facie discrimination in the context of the CHRA, complainants are required to show: (1) that they have a characteristic or characteristics protected from discrimination under the CHRA; (2) that they experienced an adverse impact with respect to a situation covered by sections 5 to 14.1 of the CHRA; and, (3) that the protected characteristic or characteristics were a factor in the adverse impact (see Moore v. British Columbia (Education), 2012 SCC 61 at para. 33; Siddoo v. I.L.W.U., Local 502, 2015 CHRT 21, para. 28).* The three elements of discrimination must be proven on a balance of probabilities (see *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center) ("Bombardier")*, 2015 SCC 39 at paras. 55-69).

[53] The discriminatory considerations need not be the sole reason for the decision or conduct at issue in order for the Complainant to prove a *prima facie* case for discrimination. It is sufficient for the Complainant to prove the existence of a connection between a prohibited ground of discrimination and the adverse impact experienced, even if other factors were at play (*see Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 ("*Bombardier*") at paras. 44-52; see also *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada*), 2016 CHRT 2 at para. 25, and *Holden v. Canadian National Railway Co.*, (1991) 14 C.H.R.R. D/12 (F.C.A.) at para. 7).

[54] The protection afforded those with mental disabilities was canvassed in *Mellon v. Human Resources Developments Canada* 2006 CHRT 3, where the Member said that at paragraph 88:

> [88] The Act does not contain a list of acceptable and unacceptable mental disabilities. It is not just the most serious or most severe mental disabilities that are entitled to the protection of the Act. Additionally, it is not solely those that constitute a permanent impairment that must be considered. Where appropriate, even mental disabilities described as minor with no permanent manifestation could be entitled to protection under the Act. However, sufficient evidence still needs to be presented to support the existence of the disability.

[55] Many human rights cases depend upon circumstantial evidence. It has been observed that discrimination is not a practice one would expect to see displayed openly, and that rarely are there cases where one can show by direct evidence that discrimination is purposely practised. The Tribunal is therefore required to carefully analyse the evidence in order to determine if there exists what has been described as a "subtle scent of discrimination". This quote is often used before the courts and tribunals and the Tribunal is mindful of this. The said evidence of discrimination, even circumstantial, must nonetheless be tangible and related to the impugned decision or conduct.

[56] It is clear that the law is such that the Complainant need not prove the Respondent intended to discriminate in order to establish a *prima facie* case (*O'Malley* at para 14).

[57] In the case of *Moffat v. Davey Cartage Co. (1973) Ltd.,* 2015 CHRT 5 (at para. 38), the Tribunal stated:

> [38] A respondent can either present evidence to refute the allegation of prima facie discrimination, put forward a defence justifying the discrimination or do both (Bombardier, supra, para. 64). Where the respondent refutes the allegation, its explanation must be reasonable. It cannot be a pretext to conceal discrimination (Khiamal v. Canada, 2009 FC 495 at para. 58).

[58] Thus, in determining a *prima facie* case, the Respondent can challenge the credibility of the Complainant's evidence, it can argue the Complainant has not adduced enough evidence, or it can provide a non-discriminatory explanation of the impugned conduct. The Complainant still bears the burden of proof on the balance of probabilities. Again, it is trite law that the answer or explanation must be believed and not based upon pretext.

[59] If the Complainant meets his onus, the Respondent bears the burden of establishing, on a balance of probabilities, a defence under s. 15 of the *Act*, such as a defence based on a *bona fide* occupational requirement (*Bombardier*, paras. 37 and 64).

[60] Subsection 15(2) of the *Act* says that in order to establish a *bona fide* occupational requirement or a *bona fide* justification, "it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost." That said, a Complainant must do his or her part as well to facilitate the search for an accommodation. In particular, a Complainant must sufficiently explain the nature and extent of the problem to allow the Respondent to address and attempt to solve the issue of accommodation (*Central Okanagan School District No. 23 v. Renaud,* [1992] 2 S.C.R. 970).

IV. The Complainant's *Prima Facie* Case

[61] Before beginning my analysis, I note that the Respondent raised in its Statement of Particulars and in its pleadings the proposition that these claims of discrimination should be barred, due to the content of the allegations and the passage of time. In *Pequeneza v. Canada Post Corporation*, 2016 CHRT 21 at paras 36 and 26, the Tribunal said the following about these types of time based objections:

> At the end of the day, the basis upon which the Commission decides to "deal with" a complaint under s. 41 does not shape the way in which the Tribunal exercises its own jurisdiction; the germane consideration from the Tribunal's perspective is that the Commission has made a request under s. 49 that a Tribunal inquiry be instituted. Section 41 decisions, as well s. 49 decisions, can definitely be challenged, but the venue for such challenges is the Federal Court, in an application for judicial review.
>
> This clear division of responsibilities between Court, Commission and Tribunal—as enacted in the CHRA and the Federal Courts Act, R.S.C. 1985, c. F-7—is fully reflected in the Oster judgment, which is why it constitutes the preferable approach. The Tribunal simply has no jurisdiction to apply s. 41.

[62] Further, the passage of time between the incidents and the hearing did not prejudice the Respondent in its ability to make its case. I am satisfied that there is no reason for me to decline to hear and decide on these matters.

[63] Section 7 of the *Act* states:

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

[64] In keeping with the three-prong test from *Stanger* and *Moore* that I mention above, the Complainant must prove each of the prima facie elements on a balance of probabilities. I will proceed through each allegation separately below.

A. Allegation #1: Failures to Hire

[65] In his Statement of Particulars, the Complainant stated that he applied for "over 57" jobs, out of which he received 11 interviews. During the hearing and closing submissions, that number was changed to 69.

[66] Evidence was not tendered for all, or even most, of the roles the Complainant applied for. Specifically, the Parties, either in their pleadings or through testimony at the hearing, explored at least eleven other applications, including multiple applications for the HRSC Representative job, Business Analyst, Procurement Analyst, Coordinator, Shipment Planning, Supervisor Facility, Analyst, Systems and Information, and Locomotive Distributor.

[67] In October 2011, the Complainant filed an internal complaint with the Respondent's Employee Relations Group over having not been selected for a Business Analyst role. In November 2011, the Complainant filed an internal complaint with the Respondent's Employee Relations Group, and went on to escalate his issue to a Vice-President of the company.

[68] The Claimant argues that The Respondent, in failing to award him any of these jobs, was discriminating against him on the basis of disability.

[69] The Respondent argued that the Complainant applied to positions indiscriminately and that there were clear, cogent and non-discriminatory reasons for his lack of success in each one. They introduced evidence of communications between Mr. Varney and various hiring managers, where deficiencies in technical skills, required education, or experience are cited as reasons for not hiring him. In some cases, it is stated that the jobs require rapid multi-tasking or high memory load and as such he would not be a good candidate. In one case, the hiring manager indicated that he would have passed the Complainant's resume over at the interview stage had he not been a Return to Work candidate.

[70] While I do find it troubling that it appeared that hiring managers at times appeared to be adhering to the letter, rather than the spirit of the company's accommodations policy, that is not the test under the *Act*.

[71] As with the termination complaint, neither Party is disputing that the Complainant has a protected characteristic. I am also satisfied that the failure to secure employment, in these circumstances, constituted an adverse impact.

[72] The Respondents argued that the Complainant is required to satisfy a specific test in order to establish his prima facie case in this context. I disagree: see the following discussion from the Federal Court of Appeal in *Lincoln v. Bay Ferries Ltd*., 2014 FCA 204 at para 18:

> The decisions in Etobicoke, supra, and O'Malley, supra, provide the basic guidance for what is required of a complainant to establish a prima facie case of discrimination under the Canadian Human Rights Act. As McIntyre J. put it in Etobicoke, at page 208, "Once a complainant has established before a board of inquiry a prima facie case of discrimination ..., he is entitled to relief in the absence of justification by the employer". McIntyre J. reiterated the test for establishing a prima facie case of discrimination in O'Malley, supra, at page 558:
>
> > The complainant in proceedings before human rights tribunals must show a prima facie case of discrimination. A prima facie case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to

> justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer.

The tribunals' decisions in Shakes, supra, and Israeli, supra, are but illustrations of the application of that guidance. Each postulates that the complainant was qualified for the position, that he or she was not hired, and that the complainant belonged to one of the groups against whom discrimination is prohibited under the Act. The difference between the two decisions was pinpointed by Muldoon J. in Chander, supra, at paragraph 35: "Shakes applies to situations where someone other than the complainant is hired. Israeli applies when the employer does not hire the complainant and then continues to look for employees". As was recently pointed out by the tribunal in Premakumar v. Air Canada, [2002] C.H.R.D. No. 3, at paragraph 77:

> While both the Shakes and the Israeli tests serve as useful guides, neither test should be automatically applied in a rigid or arbitrary fashion in every hiring case: rather the circumstances of each case should be considered to determine if the application of either of the tests, in whole or in part, is appropriate. Ultimately, the question will be whether Mr. Premakumar has satisfied the O'Malley test, that is: if believed, is the evidence before me complete and sufficient to justify a verdict in Mr. Premakumar's favour, in the absence of an answer from the respondent?

[73] Nevertheless, in considering all the circumstances and evidence at the third step of the test for prima facie discrimination, I am not satisfied on a balance of probabilities that the Complainant’s disability was a factor in the adverse impact.

[74] Therefore, I am of the view that the Complainant has not made out a prima facie case for discrimination under s. 7 of the *Act*, on these bases. Because I have not found a case of prima facie discrimination, it is not necessary to undertake an analysis of whether the Respondent has provided a justification under s. 15.

B. Allegation #2: Removal from Customer Service Position

[75] The Claimant alleges that the Respondent failure to appropriately modify his role at the Customer Service Centre to accommodate his limitations, and that their failures led to his dismissal from the role.

[76] The Respondent characterized this role as a “work trial” through which the Return to Work program was able to gather “valuable information concerning the Complainant’s functional abilities”.

[77] It is clear based on my review of the evidence above that the role was not a match for the Complainant, and that this probably should have been obvious at the outset. However, I note that the period of time between when it ended and when he was placed in another role at the Employment Service Centre was less than a full week.

[78] As with the termination complaint, neither Party is disputing that the Complainant has a protected characteristic. In determining whether the lack of support in the Customer Service Position constituted an adverse impact, I consider the following from *Royal Canadian Mounted Police v. Tahmourpour*, 2009 FC 1009:

> What is the meaning of “adverse differentiation”? “Differentiation” is a noun that in its ordinary meaning means a distinction between things. “Adverse” is an adjective that in its ordinary meaning means harmful, hurtful or hostile. In my view, “adverse differentiation” means a distinction between persons or groups of persons that is harmful or hurtful to a person or a group of persons. It can also, in my view, mean a distinction that is made or indicated in a hostile manner, where it is the manner of its making that harms or hurts. If it is to be an adverse differentiation that is prohibited by human rights legislation, the distinction must be based on or made because of one of the prohibited grounds set out in the legislation.

[79] The Complainant did not lose his employment or any income as a result of the situation with the Customer Service role. I am unable to conclude on a balance of probabilities that this constituted an adverse impact within the meaning of the test.

[80] Therefore, I am of the view that the Complainant has not made out a prima facie case for discrimination under s. 7 of the *Act*, on these bases. As with the allegation above, because I have not found a case of prima facie discrimination, it is not necessary to undertake an analysis of whether the Respondent has provided a justification under s. 15.

C. Allegation #3: Termination

[81] The Respondent acknowledges that the protected characteristic and adverse impact elements are not in dispute. However, the Respondent argues that the condition of hydrocephalus was not a factor in the Complainant's termination

[82] The core issue of this case, to my mind, is whether the Complainant was fired solely for insubordination, or whether his job performance was a factor in his termination. The connection—if any— between his job performance and his termination is significant because, as I will explain later, I find that his job performance was linked to his disability, a prohibited ground of discrimination under s. 3 of the *Act*.

[83] The evidence is that the Complainant was a long term employee and in 2008 developed a condition known as hydrocephalus, which prevented him from working in safety-sensitive situations. The Respondent obtained a further medical report from Dr. Mark Hamilton, dated March 31, 2010, that stated, *inter alia:*

> The memory issues are less significant when he is in a situation that is not stressful or overloaded. This is quite typical for patients with chronic brain injury issues related to hydrocephalus. I would expect this to be static. I would not expect significant improvement.
>
> At paragraph 3:
>
> The Complainant can 'cope reasonably well in a non-stressful situation, however, decompensates in overload situations.
>
> At paragraph 4:
>
> … high level of distracting stimuli, must work effectively despite phone calls, delays and schedule changes'. This is the kind of environment that will definitely have an adverse effect on his ability to cope.

[84] The evidence is that the Return to Work program placed the Complainant in various trial positions. The Respondent's back to work monitor testified that the restrictions placed on the Complainant made it difficult to find a placement for him.

[85] The Complainant was referred to Dr. Gregor Jason, Ph.D. for a neuropsychological evaluation and an extensive medical report was prepared on August 16, 2011. Dr. Jason

stated that the test results are quite comparable to previous reports June 2007 and January 2009. Dr. Jason acknowledged that there was one minor improvement, but those could be attributed to the fact that this was the third time the Complainant had taken the tests. As a result of his assessment, the Complainant's functional limitations were modified in a less restrictive way, but Occupational Health Services stated that he had the following restrictions: "Mr. McFee should be restricted from tasks which are highly safety sensitive and which require moderately good accuracy of memory and working memory processes, including rapid multi-tasking. He would not be restricted from tasks with similar moderate demands if the occasional error can be corrected."

[86] The Complainant was working temporarily in another unit of the Respondent and as a result of an internal complaint was found to be a suitable candidate for the position as a representative in HR Services, a position he had applied for unsuccessfully twice before, and commenced in that position on January 30, 2012. The Complainant completed his six month probationary period and was working there until he was terminated on January 29, 2014.

[87] The evidence of the parties was that the workload within the department increased from the commencement of the Complainant's employment in that position and that the role required the Complainant to work under pressure, multi-task and deal with customers.

[88] The evidence discloses that the Complainant's work was not to the Respondent's standards and as a result, he was placed in the Performance Improvement Management program (PIM) between February 28, 2013 and September 23, 2013. The Complainant had ten official meetings with the managers or directors with respect to improvement.

[89] The evidence disclosed that after the Complainant finished his probationary period the efforts of the return to work program ceased and there was no follow up by that department. Also, the evidence disclosed that the Complainant's functional limitations as set forth in the medical reports were not shared with his managers, and supervisors. The only information that was shared beyond the initial interview process was that which was disclosed by the Complainant to Mr. Mitchell during the PIM meetings, when the Complainant explained his issues, how it impacted him and sought help. It is noteworthy

that Mr. Mitchell was the Complainant's supervisor and was implementing the PIM Program based on the Complainant's poor performance. The PIM program ceased shortly after Mr. Mitchell ceased to be his manager.

[90] The Respondent has not taken issue with the fact that the Complainant has a disability. However, the Respondent disagrees that the protected characteristic, the Complainant's disability, was a factor in the termination.

[91] The Respondent argues that the Complainant was terminated solely because of insubordination, inciting insubordination and problems in the past with co-workers, customers and managers, and that the termination was not based upon poor performance. It is noteworthy that Mr. Mitchell never disclosed the information that the Complainant shared with him in regards to his disability with his fellow supervisors, colleagues or more senior administrators within the Respondent organization. The Complainant's superiors, Len Haraburda and Donna Buchanan, testified they were never aware of the Complainant's disabilities.

[92] With respect to the Respondent's claim that the Complainant's termination was solely as a result of insubordination and the incitement of insubordination, there needs to be an examination of the termination letter issued by the Respondent to the Complainant. The letter dated January 29, 2014 states:

> This letter is written in reference to our ongoing discussions about your performance in your position as a services representative at our head office in Calgary.
>
> Over the past twelve months, we have worked with you on a performance management plan. Through that process, we have noted that you have failed to improve your overall work performance to a level that would be appropriate for an employee of your level at Canadian Pacific Railway.
>
> We also note that your employee performance ratings in the past seven years have predominately rated partial achieves/unsatisfactory and again partially achieved in your 2013 objectives as an employee at CP. As you will be aware, in order for an employee to continue to remain employed with a company such as CP, it is critical that the employee achieve his or her objectives. CP takes very seriously the performance of its employees and as such makes every effort to set expectations and correct performance

> issues but again your performance has fallen short of expectations resulting in a rating of 'partial achieves' your third such rating in 3 consecutive years.
>
> Most recently, CP has come across information where you have breached CP's Business Code of Ethics. In these cases, you have treated our internal customers with minimal respect and have suggested to fellow employees to disregard management's directions.
>
> Therefore, I have no choice but to now terminate your employment for cause as an HR Service Representative at CP's Headquarters Building in Calgary.
>
> CP reminds you of the provision of CP's Code of Business Ethics, and the general law, requiring you to keep confidential all information in your possession that might impair CP's competitiveness or which might violate the private rights of individuals or other entities.
>
> […]

[93] The letter, the Respondent argues, demonstrates that the Complainant was terminated for cause, namely, being insubordinate and inciting insubordination. Yet, the letter for the most part deals with performance issues. The only reference to anything that could be considered insubordination is contained in the paragraph stating that the Complainant "suggested to fellow employees to disregard management's directions". No mention was made of a refusal to accept work assigned by management on January 29, 2014. I note that the Respondent did not actually use the word "insubordination" in this letter.

[94] It is evident that the Respondent was not happy with the Complainant's performance prior to January 29, 2014. Hence, the PIM program. Further, supervisors advised the Complainant that if his performance did not improve then termination was likely. The Complainant was repeatedly advised to slow down and focus on quality over quantity. In the incident which the Respondent claims led to the termination, the expressed (perhaps rudely) that he was unable to take on more work and sent a series of instant messages to a co-worker suggesting she do the same. The co-worker reported this to the employer and the Respondent's witnesses testified this was one of the factors: inciting insubordination and insubordination.

[95] There was no follow up by the return to work department and his superiors were not aware of his restrictions and limitations. In particular, his supervisors did not make any

inquiries with the Return to Work program prior to the Complainant's termination in order to ascertain whether there were any issues the Complainant might have. This was even though one of the supervisors, Mr. Mitchell, was advised by the Complainant himself that he had issues, that might be understood to require accommodation. This information does not appear to have been passed on to those who would ultimately make the termination decision.

[96] Upon scrutiny of the Respondent's claim that the Complainant was dismissed for insubordination alone as opposed to dismissal for his job performance, this claim does not stand up. As I have noted above, the termination letter of January 29, 2014 primarily speaks of job performance over twelve months, failure to improve and performance that had not met expectations.

[97] The Complainant has a medical condition that interferes with memory and multitasking ability. Based on the evidence, I conclude that at least part of the problem with poor performance was caused by his disability. The report of Dr. Jason did not find that there was any significant change since the Complainant was first diagnosed with hydrocephalus.

[98] In the present circumstances, I cannot agree with the Respondent's position that insubordination alone was the reason for the dismissal. The evidence is quite clear that the Complainant, because of his disability, struggled with distracting stimuli, multi-tasking and being exposed to stressful situations, which were all present at the time of his termination. I find that the Complainant's poor performance was a factor in his termination, and that his poor performance was directly linked to his disability. He has thereby shown a connection between his protected characteristic and the adverse impact he experienced. I am of the opinion that the Complainant has proved a *prima facie* case of discrimination on a balance of probabilities, and the Respondent has not successfully refuted his case.

[99] On this allegation, the Respondent focused its argument solely on refuting the prima facie case, in arguing that the Complainant was dismissed for misconduct and not for any reason related to his disability. Consequently there are no justificatory defences to consider.

V. Conclusion

[100] The Complainant filed his complaint as previously stated based on three allegations:

> 1) By refusing to place me in one of the many full time positions that I applied for in 2010 and 2011;
>
> 2) Canadian Pacific Railway failed to give me adequate support to integrate me with my disability in the Customer Services Representative position in 2011 in which they removed me from that position after one month;
>
> 3) After my last performance management improvement meeting in September 2013, Canadian Pacific Railway failed to support me with my disability and finally fired me in January 2014.

[101] With respect to the allegations numbered one and two, the Tribunal is not satisfied that the Complainant has proven a *prima facie* case on either of these allegations as the Respondent has successfully refuted those allegations. Therefore, they must fail.

[102] With respect to the third allegation, I find that the reason for the Complainant's termination was due in part to his disability, and that the Complainant has satisfied his burden of proof in that regard. The Respondent has not successfully refuted the allegation that the disability was a factor in the termination. I further find that the Respondent did not accommodate the Complainant to the point of undue hardship. The Complainant, who had a mental disability for some time, was not treated appropriately once he was placed in the HSRC position. Mr. Varney did not follow up nor were his supervisors advised of the Complainant's restrictions and limitations. This harkens back to olden days when someone with a mental health condition would be "hidden away" and offered no support. The Complainant was set up for failure as the medical evidence shows that his condition would last forever and, in fact, if there was ever any improvement it would be minimal.

[103] In conclusion, the termination of the Complainant was due in part to his disability and the Respondent has not successfully refuted the allegation that the disability was a factor in his termination. It is accepted law that the Complainant alleging the discriminatory practice has the onus to establish same pursuant to the civil standard on the balance of probabilities. The Complainant has met this onus. Further, the Respondent has not

established on a balance of probabilities that it has accommodated the Complainant to the point of undue hardship. I therefore conclude that the allegation of a discriminatory practice in respect of the Complainant's termination is substantiated.

VI. Remedies

A. Section 53(2)(a)

[104] The Complainant seeks a wide variety of remedial orders under 53(2)(a) of the *Act*, which reads:

> **(2)** If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:
> **(a)** that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including
> **(i)** the adoption of a special program, plan or arrangement referred to in subsection 16(1), or
> **(ii)** making an application for approval and implementing a plan under section 17;

[105] Specifically, he asks the Tribunal to order the Respondent to do the following: Change hiring practices for people with mental disability; Develop non-discriminatory policies and procedures for people with mental disability; Develop internal human rights complaint procedures; Implement pro-active measures (such as a recruitment policy aimed at eliminating barriers for people with mental disability); Implement education and training programs (such as having all staff receive training on a human rights policy); Publish an extract of the decision in the corporate newsletter; Post the mental disability awareness poster in their workplace; Make a donation to mental disability charity; Ensure the CEO delivers mental disability training at the annual meeting; and Run a National ad campaign to bring awareness to mental disability in the workplace.

[106] The Respondent already has an extensive set of programs, policies and disability programs. However, there appears to be a breakdown with respect to individuals who are

able to complete a probationary period. Once an individual with a disability completes a probationary period there does not appear to be follow up with that individual by the Return to Work program, Human Resources or the individual's superiors. Also, the Complainant's supervisors, and not just the initial hiring managers, should have been made aware of his functional limitations in order to assure that he would be accommodated properly on an ongoing basis.

[107] I order that the Respondent work with the Canadian Human Rights Commission to supplement this gap in their Return to Work Policy, to ensure there is proper communication and follow-up with those individuals who have completed a back to work program to ensure that these individuals are not lost in the system.

B. Section 53(2)(b)

[108] The Complainant seeks reinstatement under s. 53(2)(b) of the Act, which permits the Tribunal, upon substantiating a complaint, to make an order "that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice."

[109] Specifically, he requests that he be put back into a modified return to work program with the Respondent and placed in a suitable position with accommodations for his disability, not limited to work environment, work load, and/or modified work responsibilities.

[110] The Respondent argued that reinstatement was not appropriate. Their position is that the Complainant would have been removed from employment regardless of his disability, citing the Federal Court of Appeal's dictum that the discretion to order reinstatement must be "exercised on a principled basis, considering the link between the discriminatory practice and the loss claimed" (*Grant v Manitoba Telecom Services Inc*., 2012 CHRT 20).

[111] In as much as I have found that the Complainant was terminated as a result of his insubordination and poor performance, and that his disability played a part in it, the Respondent did not factor his functional limitations into the evaluation of his performance.

[112] The Tribunal in *Grant v Canadian Human Rights Commission and Manitoba Telecom Services Inc*., (2012) CHRT 20, stated at paragraph 6:

> Having found the complaint to be substantiated, the objective in making an order under section 53(2) of the Act is to, as much as possible, make the Complainant whole. To accomplish this, the Tribunal's remedial discretion must be exercised on a principled basis, considering the link between the discriminatory practice and the loss claimed (see Chopra v. Canada (Attorney General), 2007 FCA 268 at para. 37 [Chopra]). In other words, the Tribunal's remedial discretion must be exercised reasonably, in consideration of the particular circumstances of the case and the evidence presented (Hughes v. Elections Canada, 2010 CHRT 4 at para. 50).

[113] I adopt the foregoing principles set forth in the above case. However, on a principled basis, one must consider the Complainant's disability in the whole circumstances. I find that he was put in a situation in which he could not cope. Prior to his diagnosis, there was no evidence of any disciplinary action over his long tenure. The alleged insubordination amounted to saying he was too busy to complete all his tasks on two occasions, and sending messages to a co-worker venting his frustrations when he was overwhelmed by work. Given his disability, such a reaction was foreseeable. These incidents in my view were not sufficient to fracture the employment relationship.

[114] *Krieger v. Toronto Police Services Board*, 2010 HRTO 1361 (CanLII) involved an application by a terminated employee for reinstatement following substantiated discrimination. In examining the issue of reinstatement, the Tribunal noted, at para. 182:

> While reinstatement orders are rarely requested or ordered in human rights cases, they are "normally" ordered in arbitral cases where a violation of a grievor's rights has been found, unless there are "concerns that the employment relationship is no longer viable" A.U.P.E. v. Lethbridge Community College, [2004] 1 S.C.R. 727, 2004 SCC 28 (S.C.C.) (CanLII), at para. 56. The goal of human rights legislation, which is remedial in nature, is to put the applicant in the position that he or she would have been in had the discrimination not taken place. See Impact Interiors Inc. v. Ontario (Human Rights Commission) (1998), 35 C.H.R.R. D/477 (Ont. C.A.). Where viable, reinstatement is sometimes the only remedy that can give effect to this principle

[115] Furthermore, in *Pitawanakwat v. Canada (Attorney General),* [1994] 3 FC 298, 1994 CanLII 3485 (FC) the Federal Court held that the CHRT erred in law when it declined

to order the reinstatement of the Complainant to the specific office from which she had been removed, despite the fact that her return could have been, in the Tribunal's words, "a recipe for disaster". "It would seem the Court held that challenges stemming from the reinstatement process are a burden properly imposed on a respondent who has engaged in a discriminatory practice.

[116] The goal of human rights law is remedial. In *Hamilton-Wentworth District School Board v. Fair*, 2016 ONCA 421 (CanLII), the Ontario Court of Appeal reviewed the decision of the Divisional Court in judicially reviewing the Ontario Human Rights Tribunal's decision to reinstate an employee over eight years after she was terminated. At paras 93-95 the Court said the following, which I find to be relevant to the case at hand:

> First, while rarely used in the human rights context, the remedy of reinstatement clearly falls within the Tribunal's discretion to order under s. 45.2(1) of the Code, as follows:
>
> > 45.2 (1) on an application under section 34, the Tribunal may make one or more of the following orders if the Tribunal determines that a party to the application has infringed a right under Part I of another party to the application:
> >
> > ...
> >
> > 3. An order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act.
>
> As the Divisional Court correctly noted, "The Code provides the Tribunal with broad remedial authority to do what is necessary to ensure compliance with the Code."
>
> The determination of remedy falls within the specialized expertise of the Tribunal, and as such is accorded a high degree of deference: *Phipps v. Toronto Police Services Board*, 2010 ONSC 3884, 325 D.L.R. (4th) 701 (Div. Ct.), at para. 42, aff'd 2012 ONCA 155, 347 D.L.R. (4th) 616.
>
> Further, *Ford Motor Co. of Canada Ltd. v. Ontario (Human Rights Commission)* (2001), 209 D.L.R. (4th) 465, where this court set aside the reinstatement of an employee, is distinguishable from the present case. Although in Ford Motor, this court pointed to the time that had passed since the employee's dismissal, it also relied on the internal inconsistencies within the Board's decision and the lack of consideration of an arbitrator's prior decision upholding the discharge: see paras. 68-73.

> The passage of years is not, by itself, determinative of whether reinstatement is an appropriate remedy. Rather, the decision as to whether to order reinstatement is context-dependent. In the present case, the Tribunal found none of the barriers to reinstatement that foreclosed reinstatement in the Ford Motor case. Specifically, Ms. Fair's employment relationship with the School Board was not fractured and the passage of time had not materially affected her capabilities.

[117] The Complainant called as witnesses two colleagues who had worked with him in the past and warmly reflected on working with him. Similarly, his former manager testified on his behalf and had largely positive things to say about him as an employee, even allowing for the fact that he had required performance management support. I do not accept that there is evidence of a toxic environment, or that the relationship is so fractured he could not return. Further, there was no evidence introduced to suggest that the passage of time has materially affected the Complainant's capabilities. Both medical reports in evidence suggest that his difficulties were longstanding, and unlikely to change significantly, and that he had developed many compensatory strategies.

[118] I find the Complainant to be an honest individual who wanted to achieve, took courses whilst employed and applied for many positions to try to continue his employment. The Complainant is not a malingerer. It is my finding that on a balance of probabilities, the Complainant would have continued to remain employed with the Respondent, had his employment not been terminated contrary to the *Canadian Human Rights Act*. Having accepted that the Complainant's disability was a factor in his termination and having carefully weighed the evidence and undertaken a principled analysis of the law, I order the Respondent, at its first reasonable occasion, to reinstate the Complainant to the position he occupied upon his termination with appropriate accommodations for his functional limitations per his treating doctors. This order is subject to the limitation prescribed in s. 54(a) of the *Act*.

C. Section 53(2)(c)

[119] The Complainant sought to be compensated for all lost wages until reinstatement, under s. 53(2)(c) of the *Act,* which grants the Tribunal the power to award any or all wages the victim was deprived of. He argued that his first manual labour job should not limit the

Respondent's liability as it was a menial job taken to pay for necessities, and neither should the healthcare job, as he failed to disclose to them his disability due to fear of mistreatment. He further sought to be compensated for the difference between his compensation rate on long-term disability, and his salary, for the time that he was on long-term disability.

[120] The Respondent argued that he was not owed any lost income during his term of employment, as he received disability payments or salary at all times, and his salary was maintained at his pre-disability rate. With respect to salary loss following termination, the Respondent argued that if he was entitled to any lost wages, the claim should be limited to his initial period of unemployment, which ended on February 10, 2014 when he took the manual labour job, or at the latest on September 28, 2015 when he began working for the healthcare organization.

[121] In *Tahmourpour v Canada (Royal Canadian Mounted Police),* 2010 FCA 192, the Federal Court of Appeal confirmed that, in awarding compensation for lost wages, the Tribunal must find a causal link between the discriminatory practice and the loss claimed.

[122] The Complainant seeks compensation for lost wages (including a 2% annual increase), the difference between his LTD payments and his salary, bonus, and pension following his dismissal. There is no evidence that at the time of termination there was any form of a severance package. In the circumstances of the case, I believe there was an onus is on the Complainant to attempt to mitigate these damages, as per *Chopra* 2007 FCA 268, para. 36 and *Canada (C.H.R.C.) v. Canada (A.G.)*, 2011 SCC 53 ("*Mowat*"), at paras 39-50, and I find that he attempted to do so by continuing to seek work. The first position he obtained was one for two weeks with a flooring company in 2014. The second was with a healthcare organization in 2015.

[123] The Complainant ultimately was terminated by the healthcare organization prior to the completion of his six-month probationary period, due to failing to meet the job's requirements. The Complainant testified that he failed to disclose his disability. There is no wonder that the Complainant withheld this information based upon his experience with the Respondent. The Complainant was faced with the issue of being terminated from a long

time employer and having a mental disability; both of which would be considered negative factors in the labour force.

[124] The Complainant did attempt to mitigate, which efforts were not very successful. The evidence disclosed that the Complainant was forced to go on Social Assistance and also to seek assistance from his mother. The Complainant was terminated after a nearly 20 years of work with one employer. This coupled with a mental disability would present an obstacle to many employment opportunities. Nevertheless, wage loss periods cannot extend indefinitely to some arbitrary future point in time.

(i) Lost Wages – Base salary

[125] The Complainant shall receive full salary from the date of termination to date he began his contract with the healthcare organization (on September 28, 2015), less any other income received in that period. I find that, at this point, the causal link between the discriminatory termination and the Complainant's wage deprivation was sufficiently severed. I was not presented with sufficient evidence to order the 2% annual increase; and I decline to make an award with respect to the LTD/salary differential as I am only upholding the claim of discrimination contrary to the *Act* as it relates to his termination, whereas these amounts predate that.

[126] This lump sum payment may result in negative income tax consequences for the Complainant. It would be unfair and inconsistent with the remedial goal of s. 53 should he suffer a larger income tax burden than he would have had he remained employed in 2014 and continued to earn his salary as it became due and payable (see *Public Service Alliance of Canada v Canada (Revenue Agency)*, 2010 CHRT 9, para. 104). Accordingly, the Respondent shall also pay the Complainant an additional amount sufficient to cover any additional income tax liability that he incurs as a consequence of receiving payment in this manner.

(ii) Lost wages - Bonus

[127] The Complainant seeks, in addition to lost salary, bonus in the amount of 10% of annual salary per year for the years since he was terminated. The respondent, by contrast, argued that a bonus award, if any, should be limited to $1,265, being the average of bonus amounts received in the years since his return to work.

[128] It is difficult to determine the appropriate amount of the bonus in the present circumstances. In looking at his bonus $3,537.00 in 2009 and $3,794.00 in 2012 the Respondent shall determine the average percentage amount awarded as a performance bonus to all others employed in that position in 2014 and 2015, and pay to the Complainant this amount, based on his salary, for those years.

(iii) Pension

[129] The complainant seeks to have the Respondent make contributions to his pension plan that would have been made had he remained employed from 2014 to the present.

[130] The Respondent is of the view that no compensation is warranted in this respect. Their argument is that the Complainant did not actually suffer any pension loss: they called evidence during the hearing from the company's Director of Pension Services. His evidence was that the value of the Complainant's pension as at the termination date was greater than the value of his pension had he remained employed with the Respondent until September 2015 when he became employed by the healthcare organization. The witness' evidence suggested that this situation was not entirely anomalous for mid-career employees who switch from union to non-union roles; and that the changes are to some extent market-driven.

[131] However, I am ordering reinstatement and therefore the Respondent's assumptions about loss and value at termination are not applicable. Consequently, I order the Respondent to make the contributions to the complainant's pension plan that it would have made in the normal course up to September 29, 2015.

D. Section 53(2)(e): Pain and Suffering

[132] The Complainant sought an award of $20,000 - the maximum permissible under the Act – for the pain and suffering he says he experienced as a result of being terminated by the Respondent.

[133] The Respondent argues that the Complainant did not introduce a “compensable level of distress” that would warrant an award for pain and suffering. They cite a lack of corroborative evidence such as diagnoses or treatment. Their submission is that, if the Tribunal disagrees and chooses to make an award under s. 53(2)(e) it should be for $5,000.

[134] The Complainant testified that as a result of the ongoing issues with the Respondent, he suffered from a lack of confidence, hurt feelings, low self-esteem, humiliation, stress, depression and anxiety. He described his self -worth as being at an all time low as a result of his termination. All of these issues were exacerbated by having to borrow money from his mother and aunt: he testified that he felt shame over the fact that his retired mother had returned to a part-time food service job to help him. He had no extended health or dental benefits for stretches of time. Additionally, he was unable to pay child support or partake in fun activities with his son and had to go on social assistance for the first time in his life, having begun working for the Respondent at age 18. He submitted that, prior to signing up with a temp agency for people with disabilities, which has resulted in some short, lower-paying contracts, he had been too frightened to disclose his disability in his job search process since being terminated due to fear of discrimination.

[135] I found the Complainant credible and accept his submission that he did suffer the foregoing pain and suffering and emotional harm, both directly stemming from the termination itself, and indirectly, as a result of the financial and social consequences of the termination. The Tribunal has regularly ordered awards for pain and suffering in the absence of either corroborating evidence and proof that the harms resulted in a need for medical assistance. See for example *Milano v. Triple K Transport Ltd*., 2003 CHRT 30; *Hicks v. Human Resources and Skills Development Canada*, 2013 CHRT 20 respectively.

[136] In *Douglas v. SLH Transport Inc*., 2010 CHRT 1 (CanLII) the Complainant was terminated after nine years of employment as a truck driver, while on long-term disability awaiting knee surgery. The Complainant described being devastated and humiliated by the termination, and became anxious and depressed. The Tribunal awarded him $15,000 for pain and suffering. In *Stevenson v. Canada (Canadian Security Intelligence Service)*, 2001 CanLII 8497 (CHRT), the Complainant was dismissed, and the Tribunal held that the dismissal was tied to his mental disability. The Complainant had been a long-serving employee and the firing caused injury to his self-respect. He was awarded $5,000, which was the maximum amount available under the applicable iteration of the Act at the time; but the Tribunal commented that the sum was "totally inadequate".

[137] It is clear that the Complainant did suffer and as such there will be an award of $15,000.00.

E. Section 53(3): Special compensation and reckless conduct

[138] The Complainant seeks the maximum award of $20,000 in special compensation under s. 53(3) of the *Act*, which provides:

> In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

[139] The Respondent denies that its conduct in this situation was either willful or reckless, reiterating that their decision to terminate him was not tied in any way to his disability.

[140] In *Canada (Attorney General) v. Johnstone*, 2013 FC 113 at para 154, the Federal Court stated the following with regard to subsection 53(3):

> This is a punitive provision intended to provide a deterrent and discourage those who deliberately discriminate. A finding of wilfulness requires the discriminatory act and the infringement of the person's rights under the Act is intentional. Recklessness usually denotes acts that disregard or show

> indifference for the consequences such that the conduct is done wantonly or heedlessly.

[141] In the case at hand it appears that the respondent was so determined to terminate the Complainant that it failed to make basic inquiries to Human Resources or the Return to Work program before terminating him. Furthermore, the key decision-makers were aware of his status as a Return to Work employee, and had fought against his joining their team at the outset. Even if they were not privy to his exact condition or specific limitations, they should have taken the minimal effort to enquire whether his performance and attitude issues were related to his disability, and they did not.

[142] I find that the Respondent behaved recklessly in terminating the Complainant, and consequently I order an award in the sum of $15,000.

F. Section 53(4): Interest

[143] Interest is payable on awards under the *Act.* I order simple interest should be paid on the monies awarded pursuant to this decision, in accordance with Rule 9(12) of *the Canadian Human Rights Tribunal Rules of Procedure (see O'Bomsawin v. Abenakis of Odanak Council*, 2018 CHRT 25) *.* Interest should run from January 29, 2014.

G. Jurisdiction

[144] I retain jurisdiction in the event that any dispute arises regarding the quantification or implementation of any of the remedies awarded in this decision. Should the Parties require my assistance, they are to serve and file notice to this effect within six months of the date of this decision.

Signed by

George E. Ulyatt
Tribunal Member

Ottawa, Ontario
June 28, 2019

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2140/1416

Style of Cause: Doug McFee v. Canadian Pacific Railway Company

Decision of the Tribunal Dated: June 28, 2019

Date and Place of Hearing: May 29 to June 2, 2017

Calgary, Alberta

Appearances:

Doug McFee, for himself

No one appearing, for the Canadian Human Rights Commission

Christine Plante and Paige Ainslie, for the Respondent