Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2020 CHRT 23
Date: July 29, 2020
File No.: T1853/8312

Between:

Dmitri Izrailov

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Greyhound Canada Transportation Corp.

Respondent

Decision

Member: Olga Luftig

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I. Reasons for Ruling on admission of documents into evidence

[1] A Ruling with reasons on whether certain documents should be admitted into evidence is annexed to this Decision.

II. Pronouns

[2] During the period covered by this Complaint, the Respondent employed both men and women as drivers. Therefore, rather than repeating the phrase “he or she” throughout this Decision, a driver is referred to in the singular as “he”, which is meant to include “she” and “he” should be read with that understanding, unless the context otherwise indicates.

III. General Overview of the Complaint

[3] There were originally five individual complainants who each filed separate complaints pursuant to section 7 of the *Canadian Human Rights Act, R.S.C.1985, c. H-6* (*Act*) against their former employer Greyhound Canada Transportation Corp. (Greyhound or Respondent). The Tribunal decided to consolidate the hearing of these five complaints, but each complaint retained its status as a separate complaint.

[4] Three of the complaints alleged that Greyhound discriminated against them on the prohibited ground of national or ethnic origin both in how Greyhound assigned work to them and when it terminated their employment. One of the other complainants added the ground of discrimination on the basis of colour, and the other complainant specified that he was a visible minority.

[5] The Commission participated in the hearing for the first few days and then ended its participation, as set out below. The hearing continued for a total of 20 days.

[6] The Complainant and the other four complainants were self-represented by one of the complainants (not the Complainant). This representing complainant had largely handled the case management process prior to the hearing, and, on behalf of all five complainants, made the opening statement at the hearing and questioned witnesses. The five complainants also had some assistance from Commission counsel.

A. Four of the five complainants settle

[7] On the sixth day of the hearing, the Commission advised the Tribunal that four of the five complainants (Settling complainants) had entered into conditional agreements with the Respondent to settle their complaints. The Commission told the Tribunal that one of those conditions was that each of the Settling complainants had a five-day "cooling off" period during which any of them could rescind his agreement to settle and continue with the hearing. On the day the parties advised the Tribunal of the conditional settlements, the Commission announced it would end its participation in the hearing and it did so at the end of that hearing day.

[8] None of the Settling complainants rescinded their agreements to settle. This meant that the Complainant was the sole complainant who continued with the hearing and the inquiry.

B. Anonymity

[9] At the hearing, the Commission's counsel informed the Tribunal that all parties including the Complainant, had consented to the anonymization of the name of the Settling complainant who had only testified in part. Pursuant to the parties' consent, I stated that insofar as the Decision might mention this Settling complainant, it would refer to him by a non-identifying initial. However, the Decision does not refer to him separately, but only as one of the Settling complainants.

[10] The other Settling complainants also requested that the Tribunal refer to them in the final Decision only by non-identifying initials. The Complainant consented to this. Therefore, where it has been necessary to refer individually to the other Settling complainants, the Decision uses non-identifying initials.

[11] At the time of the above discussions and requests for anonymity by the Settling complainants, the Complainant did not request that the Tribunal use non-identifying initials in the Decision when it referred to him.

[12] Just before final submissions began, I reviewed the above requests and consents with the parties and confirmed with them that the Decision would use non-identifying initials when referring to any individual Settling complainant. I also told the parties that the Tribunal would place the Decision on the Tribunal's website, which is accessible to the public.

[13] At the beginning of the second day of final submissions, there was a discussion about the consent order the parties had asked me to sign in 2013, specifically with respect to the confidentiality of names in the Driver Audit Spreadsheet (Exhibits R1-29 and HR1-31). This order is discussed in more detail later in the Decision. I repeated to the parties my understanding that when the Settling complainants advised the Tribunal that they were withdrawing their complaints, they requested that the Decision refer to them by non-identifying initials; the Respondent and the Complainant agreed to this request, and I decided that insofar as the Decision referred to any of the Settling complainants individually, it would do so by non-identifying initials. The Respondent and Complainant again agreed. I told the Complainant that this meant that the Settling complainants' names would therefore not be on the Tribunal's website when the Tribunal posted it there. The Complainant again agreed. He stated that it was fine that people saw his own name.

C. The issue of the Settling complainants as witnesses

[14] When the four Settling complaints informed the Tribunal that they were all withdrawing their complaints, only one of them had completed his testimony – that is, only one of them had testified in both direct examination and cross-examination. Two of the Settling complainants had not testified at all, and one had not completed his direct examination and had not been cross-examined before he settled. Commission and Respondent counsel informed the Tribunal and the Complainant that the two Settling complainants who had not yet testified were requesting that the Complainant undertake not to call them as witnesses, because this was part of their settlement agreement with the Respondent. The Complainant agreed not to call the two Settling complainants who had not testified as witnesses.

[15] The Complainant asked the Tribunal whether it would take into account the testimony of both of the Settling complainants who had already testified. The Tribunal's verbal ruling on this issue was that the Tribunal would not take into account the testimony of the Settling complainant who had not finished his direct examination or been cross-examined because his testimony had not been tested by cross-examination, but his testimony would still remain part of the record. With respect to the Settling complainant who had been cross-examined (Mr. X or X), the Tribunal ruled that it would take his testimony into account because he was cross-examined before he settled. In summary, of the four Settling complainants, I take only Mr. X's testimony into account in this Decision.

D. The Complainant Represented Himself

[16] I note that the Complainant represented himself for the rest of the hearing and case management procedures which took place between hearing dates. Before the start of the hearing, at the request of one of the Settling complainants, the Tribunal had arranged translation from English to Russian (and Russian to English) for the entirety of the hearing. The Complainant had stated before the hearing that he would also use these translation services, and this was continued for the Complainant throughout the hearing until its end.

E. Overview of the Complainant's employment with the Respondent and the Spare driver's work

[17] The Complainant testified that Greyhound hired him as a paid trainee driver in September 2007. He took Greyhound's approximately eight-week coach operator (bus driver) training course which Greyhound required its trainees to pass before they could operate buses transporting paying passengers and delivering packages. He found the course stressful, but passed it, including the written tests. He began driving buses full time in November 2007.

[18] The testimony of the Commission's witness Mr. Mouwad Al-Khafajy, who had been President of the Amalgamated Transit Union Local 1415 (Union) since 2014 and a Union Executive Board member before that, established that at the time the Complainant and the Settling complainants began to work for Greyhound, they were required to provide

documentary proof that they could legally cross the Canada-United States border. The Complainant had provided his passport. Mr. Al-Khafajy agreed with the Complainant and the evidence established that Greyhound therefore knew the national origin of its drivers at that time.

[19] There was no dispute that the employment of Greyhound bus drivers is mainly governed by a collective agreement (Collective Agreement) between the Union and Greyhound. The Complainant became a Union member when he began working for Greyhound. Canadian federal and provincial legislation and American legislation apply to Greyhound buses when they operate in those respective jurisdictions, irrespective of where their trip starts. The legislation also sets out and governs the number of daily, weekly, and monthly hours drivers can work in those jurisdictions. The legislation also sets out, among other things, mandatory rest periods. The entire scheme of permitted work, driving and rest periods are collectively called Hours of Service. The Hours of Service for Canada and the United States are different, and drivers must know each because no matter where a bus route may originate, if its route is in two different jurisdictions, the legislation which governs is the legislation in the jurisdiction which the bus is in during any particular point of the trip.

[20] The evidence established that Greyhound's bus drivers are divided into 2 groups: regular drivers and "Spare" (Spare) drivers. Regular drivers are more senior drivers who are permitted to bid on set routes and who therefore have set hours of work. More junior drivers are placed as Spare drivers. They do not have regular routes and set work hours – rather, during the Complainant's employment at Greyhound, Spare drivers handled any overflow of passengers who bought tickets for bus transportation where there was no more available seating on the regular driver's bus.

[21] The Complainant and the four Settling complainants were Spare drivers. Greyhound places the names of the available Spare drivers for a given period on a chart called a "Spare Board" (Spare Board). There are separate Spare Boards for separate terminals or groups of terminals. For example, the Toronto Spare Board, the Ottawa Spare Board and the London Spare board were separate. Toronto was the Complainant's and Settling complainants home terminal.

[22] Mr. David Butler was the Respondent's Regional Manager for Eastern Canada during the time period covered by the Complaint until the fall of 2012, when he was promoted to Director, Eastern Canada, his position at the time of the hearing. He testified that Greyhound's business was a 24-hour-a day, 365-day-a year operation. Weekends and holidays such as Thanksgiving, Christmas and Spring Break were Greyhound's busiest times. Spare drivers were "on call", meaning that they had to be available for work, unless they were officially booked off or on vacation or ill. When "on call", Spare drivers could be called in to work when given the required notice.

[23] The Respondent's witness Robert Davidson was a former Greyhound employee who was Manager of Operations for the Toronto terminal between April 2008 and June 2012, which included the period during which the Complainant and the Settling complainants worked for Greyhound. He had also been a driver and had acted as a Dispatcher. He testified that the Toronto operation included other terminals, called "satellite terminals", within about a 125-mile radius of Toronto. Mr. Davidson described the Spare drivers as the "bricks and mortar" of Greyhound's bus operations because they filled in when demand for passenger bus service required more buses than that offered through the regular drivers.

[24] The Respondent described the work of the Spare drivers as akin to "piece work" – pieces of work – that is, an assignment to operate a Greyhound bus on a bus route, whether one-way or round-trip – as and when they are required, subject to the Respondent's obligation in the Collective Agreement to pay each Spare driver a minimum amount, called the Guarantee. The evidence established that Greyhound paid its drivers basically by using what it called a "mile equivalency", and the evidence also established that in the period at issue in this Complaint, the mile equivalency a driver needed in order to make the Guarantee was 240 miles for each 24-hour work period.

[25] The individuals who assign the work to the Spare drivers are called dispatchers (Dispatchers). Dispatchers are not Union members. There is a set of procedures which govern how the Dispatchers are to assign work to the Spare drivers. These procedures are called the "Plugging and Assigning Procedures", which some of the witnesses called the "Working Procedures".

[26] The testimony of the Commission's witness Mr. Al-Khafajy and the Respondent's witnesses David Butler; Raymond Palmer who was Manager of the Respondent's consolidated Dispatch in Burlington, Ontario when he testified; and Frank Marsh, a Greyhound driver who had been the Union representative for the Complainant and the Settling complainants, established that the basic principle regarding assigning work to Spare drivers is "first in, first out" (FIFO). Mr. Butler testified that what FIFO meant was that whichever Spare driver had been the first to return to a terminal from a run the day before would be the first to be assigned from that terminal to another run the next working day. The list of Spare drivers available for the day was shown on the Spare Board for the particular terminal. There were other rules in the Plugging and Assigning Procedures which modified the strict application of FIFO, for example, a Spare driver's home terminal and other criteria, but the basic principle was first in, first out.

[27] The Respondent's witness Robert Davidson testified that in early 2010, Mr. Butler, to whom Mr. Davidson reported, asked him to look into how Greyhound was utilizing its Spare drivers. More precisely, Mr. Butler wanted to know if Greyhound was using its Spare drivers efficiently in terms of whether it was paying overtime to some Spare drivers while at the same time paying other Spare drivers their Guarantee because they were not working or not working enough hours. The Decision deals in more detail later with how Mr. Davidson conducted this review.

[28] The Complainant and the Settling complainants were under Mr. Davidson's jurisdiction, and in the course of his review, his subsequent investigation and the audits done on the Complainant's and Settling complainants self-recorded logbooks in April, 2010 (discussed in more detail later), they were found to be in violation of the Hours of Service. Greyhound's investigation and the meetings it held with the Complainant and the Settling complainants convinced Greyhound that the Complainant and two of the Settling complainants had altered the carbon copies of their Logbooks to appear legal in case they were inspected on the road and that the other two Settling complainants had also manipulated their Hours of Service in other ways to appear legal. They were also found to have made mistakes in or failed to record certain required information in their logs. These mistakes and omissions are classified as "Form and Manner" errors and are called Log

Infractions in the documentary evidence and in this Decision. The Hours of Service violations meant that they were driving in excess of the driving hours permitted by the governing legislation or not taking the required rest or time off.

[29] The Respondent decided to terminate the Complainant's employment in May 2010 as a result of its audits of his logbooks and its investigation, but agreed that he could resign, and he did so in writing on May 14, 2010. Greyhound agreed that the other two Russian Settling complainants could also resign, and they did so. The other two Settling complainants chose not to resign, and Greyhound terminated their employment.

[30] In its opening statement and Statement of Particulars (SOP), the Commission's position included the submission that the Tribunal ought to draw the inference of discrimination on account of national or ethnic origin from the fact of the Respondent's lack of progressive discipline of the Complainant and the settling Complainants, compared with its less severe treatment of those of its non-immigrant drivers who had had the same or similar Hours of Service violations. The Complainant adopted that position.

[31] The Complainant also submitted that Greyhound used the audits of their Logbooks as a pretext to fire him and the four Settling complainants because they were either new immigrants, specifically in his case and that of two of the Settling complainants, of Russian national or ethnic origin, or, as in the case of the other two Settling complainants, because they were visible minorities and that Greyhound also did so because it wanted to make space for white Canadian drivers.

[32] The Complainant and the Commission further submitted that the Respondent's reduction of services in various parts of Canada, including Ontario, led to the Respondent employing too many drivers in Toronto and needing to make room for drivers from the Barrie, Ontario terminal, so it used the pretext of the Hours of Service violations to differentiate adversely against the Complainant by terminating his employment (and that of the Settling complainants) because they were immigrants of a different national or ethnic origins than Canadian.

IV. Issues

[33] The Tribunal must determine the following in this Decision.

[34] First, has the Complainant made out a *prima facie* case of discrimination contrary to section 7 of the *Act*?

[35] If so, has the Respondent established a *bona fide* justification for the termination of the Complainant's employment and his treatment while employed? Furthermore, if applicable, has the Respondent been able to refute the presumption of s. 65 of the *Act?*

[36] And, finally, depending on whether the complaint has been established, what remedies should the Tribunal order?

V. Decision

[37] Briefly, the Tribunal concludes that the evidence failed to establish a *prima facie* case that the Respondent Greyhound engaged in a discriminatory practice against the Complainant. On that basis, the Tribunal dismisses the Complaint. Therefore, the Tribunal is not required to address the Respondent's burden of proof, nor the remedies the Complainant sought.

VI. Reasons

A. The Law

[38] The Complainant believes he has been discriminated against by the Respondent in the course of his employment. He submits that the Respondent's discriminatory practice was twofold: a) its Dispatchers treated him adversely while he was employed and b) the Respondent treated him adversely when it terminated his employment. He submits that both forms of the Respondent's discriminatory practice occurred because he was a new immigrant in Canada, in other words, because of his national or ethnic origin.

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

> 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.

[40] Subsection 3(1) of the *Act* states, in part:

> For all purposes of this *Act*, the prohibited grounds of discrimination are race, **national or ethnic origin, colour**, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

[41] To establish a *prima facie* case of discrimination, the Complainant needs to establish:

a. that he had a characteristic protected from discrimination under the *Act,* in this case, his national or ethnic origin;

b. that he experienced an adverse impact or multiple adverse impacts with respect to employment, and

c. that the protected characteristic was a factor in the adverse impact (*Moore v. B.C. (Education*), 2012 SCC 61 (*Moore*), at para. 33).

[42] The Complainant must establish a *prima facie* case on the civil standard of the balance of probabilities (*Québec (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. 59, 65). The balance of probabilities is when the evidence has established that it is more likely than not that events occurred in the way the complainant claims they did.

[43] If the Complainant meets his burden, 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 (*Bombardier, supra*, at para. 64).

B. Did Greyhound Discriminate Against the Complainant?

(i) Does the Complainant have a characteristic protected by the *Act*?

[44] The *Moore* test (*supra*) requires that the decision maker first decide whether a complainant has a characteristic protected by the applicable human rights legislation.

[45] There was no dispute that the national origin of the Complainant and two of the Settling complainants was Russian, including Mr. X. There was also no dispute with Mr. X's testimony that he was born in Ukraine, then part of the former Union of Soviet Socialist Republics (U.S.S.R.) and that he considered himself Russian. There was also no dispute that the Complainant had a non-Canadian accent, as did Mr. X, and that English was not their first language.

[46] The Commission also described the Complainant and the Settling complainants as "new immigrants". The Complainant and Settling complainant Mr. X both also identified themselves as "new immigrants" or "new Canadians". When asked what "new Canadian" meant to him, Mr. X testified that it was someone who had been in Canada for less than 20 years and was still learning Canadian "ways". I find that Complainant's self-description as a "new Canadian" and "new immigrant", and his self-description of "Russian" nationality and ethnicity are covered by the *Act's* prohibited grounds of discrimination on the basis of national or ethnic origin in subsection 3(1) of the *Act.* I therefore conclude that the Complainant has a characteristic protected by the *Act* – specifically, his Russian national or ethnic origin.

(ii) Did the Complainant experience any adverse impacts and was there a nexus or connection between the protected characteristic and the adverse impact(s)?

[47] In *Tahmourpour v. Canada (Attorney General)*, 2010 FCA 192 (*Tahmourpour, FCA*), the Federal Court of Canada stated that adverse treatment usually involved "something harmful, hurtful, hostile" (Tahmourpour, FCA, supra, at para. 12). I must therefore decide if the Complainant experienced treatment from the Dispatchers or any of them which was

harmful, hurtful or hostile. I must also decide if the Respondent's termination of his employment constitutes adverse treatment.

(iii) Allegation of Adverse treatment by Greyhound Dispatchers

C. Did the Complainant suffer adverse treatment in relation to the way the Respondent's Dispatchers treated him?

[48] The Complainant alleges that he was adversely treated by the Dispatchers, specifically that they pressured him to accept assignments even if those assignments would cause him to violate his Hours of Service. Furthermore, because he feared their reactions if he did not do as they instructed – including not giving him work, or only giving him low-paying routes or even, as he mistakenly thought, suspending him – he accepted work that put him in violation of his Hours of Service. The Complainant testified that early in his employment at Greyhound, a Dispatcher, Cory Gillis, told him to "be creative" with his Logbook. He further testified that after that, "no one could say" that he was not "creative".

[49] After the Complainant's direct testimony, cross-examination and re-examination, I asked him what the Dispatcher's words "be creative" meant to him - what was he supposed to do? The Complainant responded that he thought it meant that he had to find his own solution to the situation. When I asked how he was supposed to find a solution, he responded that he did not know, but that the Dispatcher told him to "be creative".

[50] In order to support this allegation, the Complainant called Anastasia Meicholas as a witness. She testified by speakerphone from Alberta. She had worked for Greyhound from about September 2007 when she started the bus driver training course, which she described as lasting "quite a while", until she resigned about two years later, in 2009. When asked by the Complainant in direct examination whether she had any issues with the "hours", she responded that there were always issues with hours and always issues with Dispatch. In response to the Complainant's question "When we were out of hours, what [did] we had [sic] to do?", Ms. Meicholas responded that if a driver was out of hours, he or she was supposed to mark themselves as "on duty, not driving". She testified that the driver did not really have a choice if he wanted to get paid. She testified that in order to get paid for the time, "they"

would tell us, “you have to get creative or change the times”. I found the part of Ms. Meicholas’ testimony about the details in how to get paid as a driver incoherent but I accept her testimony about the phrase “get creative”. I generally found Ms. Meicholas to be an honest, truthful and forthright witness. In her testimony, it was obvious that she did not feel Greyhound was a caring employer when she was injured on the job, but I found that her feelings about that did not taint the reliability of most of her testimony, with the exception of what I found to be her incoherent testimony when she described how to get paid.

[51] When asked in direct examination if she remembered the Dispatcher named Cory, Ms. Meicholas responded that she did, and described him as “number one” and that “He was quick to curse you out.” She again repeated that “they would always tell you to be creative when you’re doing your Logbook so you can make things happen.” When asked what kind of issues she would have with Dispatchers if she told them she did not have enough Hours of Service to accept an assignment, she responded that they would threaten the driver and that “Cory would tell you straight off. Dispatchers did spiteful things”. She gave as an example having to stay overnight in an out-of-town location longer than she wanted to. Ms. Meicholas also testified that Mr. Gillis was fired and that a Dispatcher named “Chris” took his place.

[52] I accept the Respondent’s David Butler’s testimony that Greyhound fired Dispatcher Mr. Gillis in February of 2008. I therefore find that the Complainant remained employed by the Respondent for more than two years after Mr. Gillis’ firing and thus worked with other Dispatchers after Mr. Gillis no longer worked for Greyhound.

[53] The Complainant also testified that he was afraid of the Dispatchers because he felt that they had the power and discretion to both give out and withhold work and to suspend drivers. Both he and Mr. X testified that they had been told by Walter Kiskunas, a Greyhound instructor, that the Dispatchers were the Spare drivers’ immediate supervisors and that the Spare drivers should have good relationships with the Dispatchers if they wanted good and steady work. The Complainant testified that Mr. Kiskunas suggested that he should do small favours for the Dispatchers, such as bringing them coffee, to foster that good relationship. Settling complainant Mr. X testified that he had seen then Dispatcher Raymond Palmer

suspend Spare driver Dan Gregoriev, who was of Russian national origin, right in front of him for refusing to drive on account of being tired.

[54] The Complainant's witness Brian Cadieux, a former Greyhound Spare driver who identified as French-Canadian, testified that the Dispatchers sometimes withheld work from Spare drivers. He testified that the Dispatchers could "forget" about a Spare driver who was at home if they wished to, and not give that Spare driver work. He recalled this happening to him at least once. He also testified that Dispatchers would tell drivers to "work your books". Mr. Cadieux interpreted this as a hint to record the Hours of Service in his logbook in such a way as to be within the legal Hours of Service while at the same time accommodating a Dispatcher's request that he take a route that would result in Mr. Cadieux driving longer than the Hours of Service permitted.

[55] Greyhound's witnesses David Butler; Raymond Palmer; and former Toronto Operations Manager Robert Davidson testified that Dispatchers did not have the discretion to change the system in the Plugging and Assigning Procedures (or Working Procedures) when they assigned work to the Spare drivers. Mr. Davidson described those Procedures as "basically the Bible" of assigning work to the Spare drivers. Mr. Butler referred to his own experience as both a driver and a Dispatcher in London, Ontario, and testified that when he was a driver and told a Dispatcher he could not do the run the Dispatcher wanted him to do because he was out of Hours of Service, the Dispatcher would move on to the next available Spare driver. He said it was the same when he was a Dispatcher and the situation was reversed.

[56] Mr. Palmer, who was a Dispatcher during the period covered by the Complaint and, since May 2013, is Greyhound's Operations Manager for Consolidated Dispatch in Burlington, Ontario, also testified that FIFO was the basic principle of assigning work to Spare drivers and that it had to be done in accordance with the Working Procedures "to ensure that everything is fair". When asked in direct examination if there was any room for discretion in how a Dispatcher assigns work to the Spare drivers, he responded that there was not. He further testified that in his current role as Dispatch Operations Manager, if he became aware that a Dispatcher was demanding that Spare drivers go beyond their Hours of Service in order to take runs, that Dispatcher would be fired.

[57] Mr. Butler and Mr. Davidson also testified that if they ever found out that a Dispatcher was hinting or pressuring drivers to violate their Hours of Service, that Dispatcher would have been fired.

[58] Mr. Butler and other of the Respondent's witnesses further testified that if a Dispatcher did not assign a driver to a route in compliance with the Working Procedures, the driver to whom the Dispatcher should have assigned the route according to the Working Procedures could claim what was called a "Run-around". If the Run-around claim was successful, Greyhound would have to pay the skipped-over driver what he would have earned for that route, in addition to paying the driver who actually drove the route. Mr. Butler also testified that if a Dispatcher had what Greyhound considered to be too many Run-around claims, Greyhound would investigate him and discipline him if warranted, because Run-around claims were unnecessary costs for the Respondent. I find that Run-around claims were therefore a disincentive for Dispatchers to fail to comply with the Working Procedures in assigning runs. The evidence established that one of the Settling complainants had filed a Run-around claim.

[59] Mr. Butler and Mr. Palmer asserted in their testimony that Dispatchers did not have the authority to discipline drivers – they could not suspend drivers or execute any form of discipline, nor take them out of service on their own authority during the time the five complaints arose. Mr. Palmer testified that a Dispatcher could not take a driver out of service with pay, although he also testified that he had "yanked" a driver (see below). Mr. Davidson modified Mr. Palmer's testimony when Mr. Davidson testified that if the situation involved a serious violation of the Hours of Service, and a Dispatcher could not reach a manager, the Dispatcher could take a driver out of service. According to all these Respondent witnesses, what the Dispatchers had the authority to do was document situations and write reports to the next level of management, who would then decide on discipline if there was an incident where they thought that a driver had not followed either Greyhound or governmental rules.

[60] The evidence, specifically the Collective Agreement, and the Complainant's and Mr. Butler's testimony on the point, which I accept, established that when the Respondent takes

a driver “out of service”, it means that he is removed from his working duties but still receives a flat basic rate of pay until the final resolution of the issue[1].

[61] I also accept Mr. Butler’s testimony that a “suspension” of a driver (suspension or suspending) was a disciplinary decision that could only be made by management, and in accordance with the Collective Agreement, only after the driver had been given the opportunity for both Union representation and to explain his side of the alleged issue. A suspension was almost always without pay. A suspension could vary from one to five days’, with five days usually being the longest number of days.

[62] I find that the evidence established that in most cases, the Respondent’s decision to take a driver out of service is made by the next level of management above the Dispatchers. The decision to actually discipline a driver – and examples of such discipline are to suspend the driver without pay, order re-training, or terminate his employment - can only be made after conducting an investigation and having an investigative hearing (Investigative Meeting) with Greyhound management during which the driver gives the driver’s side of the situation and during which the driver is entitled to Union representation.

[63] I accept the testimony of these Respondent’s witnesses that when they were Dispatchers, they followed the Assigning and Plugging Procedures and the governing legislation.

[64] I also accept the testimony of some of the Complainant’s witnesses that sometimes, what went on between the Dispatchers and the Spare drivers was not the rules-based, co-operative, pleasant relationship that was meant to exist between them. I take into account and accept on this point the testimony of the Complainant’s witnesses Brian Cadieux, Ms. Meicholas, Mr. X and the Complainant himself that the Dispatchers, in particular but not limited to former Dispatcher Mr. Gillis, could be rude and “curse” at the drivers, could pressure a Spare driver, and could make the Spare driver’s working day more difficult. In

[1] The Respondent’s witness Alex Bugeya of Ontario’s Ministry of Transport (MTO) testified that the MTO has the authority to take a driver “out of service” as a result of an MTO on-road inspection which finds Hours of Service violations. However, when the MTO takes a driver out of service there are different consequences for the driver and the driver’s employer than when the Respondent as a carrier takes its own driver “out of service”.

fact, Mr. Palmer himself testified about an incident when he was a Dispatcher and “yanked” Dan Gregoriev from service, a driver who he identified as being of Russian national origin, for what Mr. Palmer felt was a breach of the rules. Mr. Palmer did not specify nor was he asked what he meant by “yanked” – that is, did he mean taking the driver out of service with pay or actually suspending the driver. Taking into account all the previous testimony and my finding about the lack of authority Dispatchers had to actually discipline a driver, I find Mr. Palmer took Mr. Gregoriev out of service and a manager suspended him. Mr. X may have misunderstood what he saw when he testified about being present when a Dispatcher suspended Mr. Gregoriev right in front of him, but the upshot was that the driver ended up being suspended.

[65] I find that it is not a coincidence that both the Complainant and Ms. Meicholas described Dispatchers as saying to them “be creative”. At the start of the hearing, I made an oral order excluding all witnesses from the hearing room before they testified except the Respondent’s instructing witnesses and the five complainants. Ms. Meicholas testified by phone from Alberta, where she lived, so she was not even near the hearing room before she testified. There was also no evidence that the Complainant and she had spoken before her testimony - in fact the Complainant had previously advised the Tribunal that he had had trouble reaching her. Ms. Meicholas’ testimony confirmed that Dispatcher Gillis told her to “be creative” at least once. She acknowledged in her testimony that no Dispatcher told her outright to go beyond her Hours of Service, and she was never found to have done so, but she also took the phrase as a hint to adjust her logbook in order to be able to do what the Dispatchers requested.

[66] In assessing the evidence on this point as a whole, I find that during the time period addressed in the Complaint and by the witnesses’ testimony, the Dispatchers sometimes did treat the Spare drivers, including the Complainant, adversely because they were sometimes rude to, swore at and attempted to pressure drivers and could make a Spare driver’s day more difficult, and in some situations, skip over the next driver in line on the Spare Board and put the onus on the skipped-over driver to claim a Run-around. I find that this behaviour constituted adverse treatment.

(i) Was the Complainant's national or ethnic origin a factor in the way the Dispatchers treated him?

[67] Having found that sometimes the Dispatchers did treat the drivers, including the Complainant, adversely, did they treat him adversely and differently than they treated other Spare drivers and was the fact that he was of Russian national or ethnic origin - a self-described "new immigrant" of Russian national or ethnic origin - a factor in that treatment?

[68] During his testimony, Settling complainant Mr. X, who was of Russian ethnic origin, explained that some Dispatchers and drivers referred to "us" as "the Russian mafia". He did not specify who "us" was, but it is reasonable to find from the context of the question and the answer, that by "us", Mr. X either meant himself and the other Russian Settling complainant or himself, the other Russian Settling complainant and any other drivers of Russian national or ethnic origin. Mr. X stipulated that he was not saying that all the Dispatchers used the term, but that it was a common term. He testified that he did not pay too much attention to it at the time. When asked if he was a member of any mafia, Russian or otherwise, he answered that he was not. I accept Mr. X's testimony on this.

[69] Mr. X also testified in direct examination that he had a good relationship with the Dispatchers. He felt it was only common sense to have that good relationship because he felt that the Dispatchers could control the amount of money a Spare driver made by assigning more lucrative routes to drivers who cooperated with them. Neither Mr. X nor the other Russian Settling complainant referred to the phrase being used by any Dispatchers or other drivers in their Complaints or in their Statement of Particulars.

[70] The Complainant did not refer to the term "Russian mafia" in his Complaint, or in his testimony, nor did he refer to it in his closing arguments and submissions.

[71] Mr. X could have testified that he felt offended or degraded or hurt or harmed by this phrase – he knew he was in a human rights venue where he was alleging that the Respondent discriminated against him on account of his national or ethnic origin, and specifically, because he was of Russian national or ethnic origin. It would have been in his interest to do so. Yet he did not and answered that he didn't pay much attention to it. This contrasts with his testimony about the word "Yellow" which a Respondent executive used in

an email, discussed later. Therefore, I believe him about the use of the phrase “Russian mafia” and its lack of effect on him.

[72] The use of this epithet nevertheless troubles the Tribunal. In popular parlance, the word “mafia” is used to denote a criminal organization, or a conspiratorial, secretive organization engaged in pursuits to the detriment of other people. It has also recently been used in connection with various ethnicities and has sometimes even been used to describe a gender-based grouping. I have stated the foregoing from my knowledge as a member of the reading public, aware of everyday language, and not in any way purporting to be an expert in or having any special knowledge of linguistics. I find that the word “mafia” is not meant as a compliment.

[73] Intent is not a necessary element for a finding of a discriminatory practice (*Robichaud v. Canada (Treasury Board*), 1987 CanLII 73 (SCC), at para 10) (*Robichaud*). If a discriminatory practice is found to exist or to have existed, then it is in the compensation stage that subsection 53(3) of the *Act* provides that if the evidence has established that the perpetrator of the discriminatory practice acted wilfully or recklessly, then the victim may receive special compensation for that aspect of the discrimination.

[74] Having noted all of the above, I also take into account the testimony of the Complainant’s witnesses, who all confirmed that the Dispatchers sometimes treated them poorly. It is true that the Tribunal does not have to compare different groups of people to establish discrimination, but in the current case, it is helpful to take a holistic view of the issue. Indeed, I find that the big picture shows that the Dispatchers who were mistreating the Spare drivers did not do so on the basis of any protected characteristic. Instead, it seemed to be their way of working, no matter how unsatisfactory that was.

[75] For instance, the Complainant’s witness Ms. Meicholas, who I found to be a truthful and reliable witness on this point, testified that Dispatcher Mr. Gillis was miserable to all the drivers and quick to “curse out” the drivers. She also testified that Dispatchers could be nasty. At no time did she testify that Mr. Gillis or any other Dispatcher acted this way towards her because she was a female, or because of another prohibited ground of discrimination, nor that they did so to any other Spare driver because of their national or ethnic origin or

other discriminatory ground. Her testimony was that Mr. Gillis acted in the way he did because that was his manner of behaving. Mr. Cadieux' testimony about staying at home waiting to be called for work because Dispatchers purposely "forgot" about him did not include that they did so on any discriminatory ground. I also take into account that the Respondent terminated Mr. Gillis' employment in February of 2008.

[76] The Tribunal in *Baptiste v. Canada (Correctional Service)*, 2001 CanLII 5801 (CHRT) (*Baptiste*) dealt with a complaint alleging multiple incidents of racial discrimination. One of the incidents related to the fact that one of the complainant's supervisors gave her a poor review, which the complainant alleged was because of racial bias. To support her allegations, the complainant submitted that she had heard that her supervisor used a racially derogatory epithet about herself twice. At the Tribunal hearing, the supervisor acknowledged doing so once but denied that she gave the complainant the poor review because of her race. The Tribunal found that other of the complainant's co-workers had also used racially derogatory epithets about the complainant. The complainant had not heard all of the epithets.

[77] Nevertheless, in *Baptiste,* the Tribunal concluded that although it could not rule out the "…*possibility* that some of the actions of individuals within the respondent workplace "…were tainted by racism, on all of the evidence and for the reasons set out in this decision", the Member did not think it was "…*probable* that racism was a factor in the treatment" that Ms. Baptiste encountered "…in relation to the matters that are the subject matter of her complaint." (*Baptiste*, *supra,* at para 227).

[78] In assessing the testimony of Mr. X on this point, which included his assertion that he had a good relationship with the Dispatchers; the testimony of Ms. Meicholas that the Dispatchers were at times nasty and miserable to all the drivers; Mr. Cadieux' testimony that Dispatchers withheld work from him, and the fact that the Complainant's testimony did not include any Dispatcher or driver referring to him as part of the "Russian mafia", I find that Dispatchers could be nasty and miserable to all the drivers, regardless of their national or ethnic origin. Therefore, I conclude that during the time period covered by the Complaint, the evidence did not establish that the use of the phrase constituted a discriminatory practice within the meaning of the *Act.*

[79] I nevertheless wish to stress the fact that this Tribunal finds that the use of the phrase was rude, crude, ignorant, and disgraceful for anyone to use as a label for individuals of Russian national or ethnic background, let alone Dispatchers who were in a supervisory position. This also applies to drivers who used the term.

[80] I therefore conclude that the evidence failed to establish that there was a connection or link between the adverse treatment the Dispatchers sometimes meted out to the Complainant and his national or ethnic origin.

(ii) Termination of Employment

(a) Was the termination of the Complainant's employment an adverse impact?

[81] There was no dispute that Greyhound terminated the Complainant's employment on May 14, 2010. Greyhound agreed with the Union that he had the option to resign. The Complainant testified, and I accept, that he did so because he did not wish to have a termination on his employment record. He also testified that he did not want to lose his job and indeed, one of the remedies he sought before me was reinstatement to his position at Greyhound as a Spare driver. I find that Greyhound's termination of the Complainant's employment constituted an adverse impact on him.

(b) Was the Complainant's national or ethnic origin a factor in his termination?

[82] As a preliminary remark, I wish to comment on the fact that the Complainant was self-represented and did not obtain the assistance of the Commission at the hearing after the Settling complainants withdrew their complaints. As a result, the Complainant did not cite any case law in his oral closing arguments and submissions. He also did not submit written closing arguments and submissions. I wish to assure the Complainant that I did not take either of these facts into account in making the within Decision. I also wish to note that as had been done throughout the hearing, when the Complainant made his oral closing arguments and submissions in Russian, they were translated into English for me and the

Respondent. They were also translated into English in a written transcript, so I was able to review the English transcript plus the witness' testimony and documentary evidence and my notes in arriving at this Decision.

[83] It is important to note that the *Canadian Human Rights Act* outlines the jurisdiction of this Tribunal and its role. The Tribunal is a federal tribunal and has jurisdiction over federally regulated entities such as Greyhound regarding human rights. The Tribunal's role is to inquire into allegations of discriminatory practices by federally regulated entities and make decisions on whether discriminatory practices as defined in that *Act* have occurred, and if the Tribunal finds that such discriminatory practices have occurred, to order all or some of the remedies in the *Act.*

[84] The Tribunal is not tasked with nor does it have jurisdiction to decide if a corporation or other federal entity has complied with employment and labour relations law such as the *Canada Labour Code*, other federal labour legislation or with collective agreements. The complaint inquiry process at the Tribunal is not a labour arbitration process and the Tribunal is not the Canada Industrial Labour Relations Board (CIRB). The Tribunal is also not a court with inherent jurisdiction. The Tribunal is a quasi-judicial, administrative body governed by the *Act*. It is therefore not my role in this inquiry to decide if Greyhound's termination of the Complainant's employment was correct under labour law, employment law or labour relations law. My role is to decide if Greyhound's termination of his employment was a discriminatory practice based on the prohibited ground of national or ethnic origin, contrary to the *Act.* Even if there is evidence that could be interpreted in another venue such as an arbitration process or at the CIRB to find that the termination of the Complainant's employment was a disproportionate sanction, that does not mean that it amounted to a discriminatory practice within the meaning of the *Human Rights Act.* The issue I have to decide is whether the termination of his employment was a discriminatory practice pursuant to the *Act.*

[85] With respect to whether the protected characteristic was a factor in the adverse impact, the case law does not require that the protected characteristic be the *only* factor in the adverse impact – it is sufficient if it is *one* of the factors in the adverse impact, as set out

in *Stanger v. Canada Post Corporation,* 2017 CHRT 8 (*Stanger*), at para. 14, which quoted a case from the Federal Court of Appeal:

> "It is not necessary that discriminatory considerations be the sole reason for the actions in issue for a complaint to succeed. It is sufficient that the discrimination be a factor in the employer's actions or decisions (*Holden v. Canadian National Railway Co.* (1990), 14 C.H.R.R. D/12 (FCA)."

[86] Further, paragraph 14 in *Stanger (supra)* goes on to rely on *Bombardier, supra,* at para. 52, by stipulating that the "complainant has the burden of showing that there is a *connection* between a prohibited ground of discrimination and the adverse treatment".

[87] In this context, the Complainant must demonstrate that his national or ethnic origin was a factor in Greyhound's decision to terminate him.

[88] For the following reasons, I conclude that the Complainant did not meet the burden of proof and did not demonstrate that either of the adverse impacts he experienced while working for Greyhound were linked to his national or ethnic origin, or, as he also describes himself, to the fact that he was a "new" immigrant. The evidence established that Greyhound's termination of the Complainant's employment was rooted in objective reasons, was not a pretext for discrimination, and that as an employer, Greyhound did not take any other factor into consideration when it made its decision to terminate his employment.

(iii) The ratings systems for federal carriers, including Greyhound

[89] When he testified, David Hickie was the Respondent's Director of Safety, Canada. During the time period covered by the Complaint, he was also in management positions, including in 2009, Interim Director of Safety, Canada, which position became permanent in about March 2010. He had also been a Dispatcher for five years. His testimony included describing the ratings systems for federal carriers, including Greyhound.

[90] Mr. Hickie testified about what is called the "Carrier Profile". Greyhound's head office is in the province of Alberta; and its buses are plated in that province. The Carrier Profile for Greyhound is generated by the province of Alberta and was described by Mr. Hickie as akin to a "report card", which rates the safety of a carrier like Greyhound. The testimonies of Mr.

Hickie and Alexandre Bugeya of the Ontario Ministry of Transport (MTO), together with the documentary evidence, established that the Carrier Profile's safety rating for a transportation company such as the Respondent has a direct impact on how many buses the carrier can licence and operate. Mr. Bugeya's testimony included that a less than "Satisfactory" safety rating has a negative impact on their business.

[91] The Carrier Profile is published yearly, and each Carrier Profile reports on one calendar year, and includes for that year the carrier's convictions, inspections, collisions and Safety rating. It includes other items, but the foregoing are the relevant ones for this Decision.

[92] The Respondent's witnesses Mr. Butler, Mr. Hickie and Mr. Bugeya testified that a roadside inspection by an MTO inspector, a police officer or Department of Transport inspector or American inspector can happen at any time. If the roadside inspection found Hours of Service violations, the violation was recorded in the bus carrier's Carrier Profile. This could have a negative impact on the Carrier Profile.

[93] The Respondent's Mr. Hickie testified that Log Infractions are classified as "form and manner" (Form and Manner) infractions and are not considered as serious as Hours of Service violations. Examples of Log infractions Mr. Hickie gave were drivers not recording licence plates or odometer readings.

[94] The evidence established that Greyhound had a very good Carrier Profile – it was rated as "Satisfactory". It was clear that Greyhound management wished to retain this rating denoting it as a safe carrier.

[95] It is necessary to describe briefly how Spare drivers were required to keep track of their working hours in order to understand the context of this Complaint. The federal legislation governing the working hours and record-keeping requirements for carriers like Greyhound who operate cross-country and who cross the Canada/United States border is the *Commercial Vehicle Drivers Hours of Service Regulations,* SOR/2005-313 (Hours of Service).

[96] Almost all the witnesses testified about the legislative requirement that Spare drivers had to record their Hours of Service in a bound, pre-printed book of forms which Greyhound supplied to each driver. The book's printed title is "Greyhound Canada Transportation ULC Operator's Payroll Report Book; National Safety Code Log"; the witnesses called it the Logbook or Log, and this Decision also calls it the Logbook or Log. The version of the Logbook in evidence is dated July 2011 (Exhibit R7). Mr. Butler testified that in July 2011, Greyhound revised the Logbook by moving the Supervisor's signature to a different location. The version in evidence is basically in the same form and requires the same information from the driver as the Logbook in effect when the Complainant and the Settling complainants worked for Greyhound.

[97] The legislation mandates that drivers record their hours in their Logbook for each working 24-hour period – that is, each working day. The Logbook contains one page for each such 24-hour period, with a carbon underneath each page. There was no dispute that during the period Greyhound employed the Complainant, each page was divided in two, as set out below. Each Logbook was meant to cover one month of driving. The purpose of the Logbook was as set out below.

[98] First, the Logbook is meant to record the driver's Hours of Service and is used as a record to ascertain whether he complied with Hours of Service legislation. To record his Hours of Service, the driver would include the following information into the Logbook: the times of day or night he was assigned or "plugged" into a bus route; the times he was on "Protect" (when a driver has been assigned on a route, but is waiting to start it); the times at which he started driving the route; took breaks on the way, if any; arrived at his destination; unloaded the passengers and any package to be delivered and returned or started another trip.

[99] Second, because each blue page for each 24-hour period had a white carbon underneath it, at the end of each such 24-hour period, the driver was meant to remove the blue page, which some witnesses called "the Waybill" or "the Payslip", and give it to a Dispatcher who was to initial it as received and mark or stamp the date received. The Commission's witness Mr. Al-Khafajy testified that there would sometimes be a box or receptacle for drivers to put their Waybills into. Dispatch then forwarded the Waybills to

Greyhound's Payroll department (Payroll). The drivers were required to retain the carbons in their Logbooks. The evidence established that Greyhound's drivers were paid every two weeks – that is, bi-weekly; the Decision calls the bi-weekly period a Pay Period.

[100] Third, the drivers were required to carry their current and previous month's Logbook with them at all times when they were working, and keep the current Logbook continuously up-to-date, so that if they were stopped for inspection by officials from the Ministries of Transport, the Department of Transport, or American authorities, or by law enforcement, their Logbooks could be inspected, including the carbon copies, to see if the driver was in compliance with the relevant Hours of Service and to see if the driver was keeping his Logbook up-to-date.

[101] The evidence established that during its training, Greyhound teaches its trainee drivers that it is contrary to the Hours of Service governing legislation to carry two Logbooks or to keep two Logbooks covering the same period of time – that is, the same day, the same week or the same month. Greyhound's training also taught the drivers that they were prohibited from altering, in any way defacing or destroying any part of their Logbooks. The evidence established that the Complainant and Settling complainant Mr. X both acknowledged in writing after their training, and approximately one year later, that they understood that there were not to keep two Logbooks.

(iv) The Recap

[102] In addition to the legislative requirement that each Spare driver carry an up-to-date Logbook, the Respondent required that Spare drivers keep what was called a "recap" (Recap) of their daily, weekly and monthly hours worked and keep it up to date. The Recap is a one-page running tally of the weekly and monthly hours a Spare driver works and starts with the tally of hours worked in the last six or seven days of the previous month. The Recap is meant to enable the driver to keep track of both his daily, weekly and monthly hours, so that he can see how many Hours of Service he has available for the next day.

(v) The Daily Dispatch Log

[103] Mr. Butler testified that since about 2004, Greyhound Dispatchers across Canada used the form of log in Exhibit R8 as their own log to keep track of where the drivers on the Spare Board of each terminal were (Daily Dispatch Log or Dispatch Log). The Dispatchers fill in the Dispatch Log in real time and they are to do so only in pen. Each Daily Dispatch Log is meant to record each 24-hour working period, from 12:01 a.m. to 12:00 midnight. Exhibit R1-22A is a group of Daily Dispatch Logs for the dates shown therein. The times in the Dispatch Log are recorded based on a 24-hour clock.

[104] Each Daily Dispatch Log includes, among other things, the following: the names of the Spare drivers as they are called by the Dispatchers to report for work; the time of day the Dispatcher called the driver to tell him there was a route for him to drive; the time of day the Dispatcher assigned that piece of work to the driver; the time of day the driver departed; if the driver returned to the terminal from which he had departed, the time of day he returned.

[105] Greyhound's witnesses David Butler, Rob Davidson, Raymond Palmer, Manager of the consolidated Dispatch in Burlington when he testified, David Hickie, Greyhound's Director of Safety who had been a Greyhound Dispatcher for five years, and the Commission's witness Mr. Al-Khafajy, all testified that one could not always tell by looking only at the Daily Dispatch Log if a driver had violated the Hours of Service on any given day. One would also have to review the driver's Logbook to see, for example, if the driver worked for the whole period shown on the Dispatch Log, or if he was off-duty or on Protect or had returned to the terminal as a passenger (called Dead Head on Cushion) during the day.

[106] As Mr. Hickie testified, the Dispatcher might see from the Daily Dispatch Log when the driver arrived at the Dispatcher's terminal, but there were other variables that the Dispatcher would only be able to see if he had the driver's Logbooks in front of him. Dispatchers did not have driver's Logbooks in front of them – there was only one copy of a driver's Logbook, and the driver had it. Therefore, it was up to the driver to tell the Dispatcher if he had Hours of Service available to take the assignment that the Dispatcher offered. The driver's changes of work status throughout the day affect whether he has complied with the Hours of Service for that day. Changes of work status are such events as going from driving

to going off duty, or going from off-duty to Dead Head On Cushion, and so on. Furthermore, one would also have to review the driver's Recap and Logbook for a week if one wanted to see if the driver violated weekly Hours of Service, and the same was true with respect to monthly Hours of Service.

[107] David Butler testified that Greyhound previously had a system in place where each month, each Dispatcher randomly audited the Recaps of five Spare drivers on that Dispatcher's Spare Board to see if the drivers were complying with the Hours of Service. When Mr. Butler was a Dispatcher in London from 2004 to 2007, he actually did monthly audits of all his drivers in London and Windsor. He testified that he never found a violation.

[108] Mr. Butler further testified that it came to Greyhound's attention in May of 2009 that the Dispatchers had stopped doing the random monthly audits in the spring of 2007, around the time where some changes were made to the Hours of Service Regulations. The documentary evidence confirmed Mr. Butler's testimony in that there are emails therein from Stuart Kendrick, then Senior Vice-President for Canada, the most senior Greyhound executive in Canada, to various individuals, including Mr. Butler, asking why the Dispatchers were no longer doing the monthly random audits. The evidence established that in 2009, Mr. Davidson sent an email ordering all 12 of his Dispatchers to immediately begin submitting monthly checks of five drivers each. I find that there was no evidence submitted as to whether the Dispatchers resumed doing the random monthly audits. In 2010, the audit system changed, as described in more detail below

(vi) Burlington Initial Response Centre (BIRC) random audit program

[109] When Mr. Butler was asked in direct examination to discuss to what extent managers were asked to look at labour costs, he first provided background about a change to Greyhound's Payroll department. In about the summer of 2009, the Payroll department relocated from Calgary to Burlington, Ontario and started using a new payroll system which allowed it to capture more details about the categories of pay which made up the Spare drivers' bi-weekly earnings. For example, the new system could break down how much of a driver's pay was regular earnings, how much was overtime and how much was the

Guarantee. Managers had not had this information available before. Mr. Butler started receiving a bi-weekly earnings report for the Eastern Division every two weeks. He testified that when managers started reviewing the drivers' earnings, they decided to look for four "red flags". If a driver's earnings showed one of these four red flags, then Greyhound would investigate further. When the Complainant asked Mr. Butler in cross-examination what the "guiding principle" was for Greyhound to select a driver for further investigation, Mr. Butler responded that Greyhound's red flags or criteria were:

i. regular bi-weekly earnings of more than $3,000

ii. high numbers of overtime hours when compared with the majority of employees;

iii. insurable hours approaching or over 140 as shown in the Comments section of Exhibit R1-30;

iv. the Guarantee payment.

[110] Mr. Butler testified that on February 24, 2010, Greyhound's Stuart Kendrick emailed the Regional Managers, including Mr. Butler, that Greyhound's Burlington Initial Response Centre (BIRC) would be doing random audits of drivers' Hours of Service and Log Infractions. BIRC would use the Hours of Service Audit and Recap templates attached to the email. Mr. Butler confirmed Mr. Kendrick's instructions that any drivers found not to be compliant with the Hours of Service or who had multiple Log Infractions were to be taken out of service and disciplinary hearings immediately held.

[111] Greyhound's witness Robert Davidson was employed by Greyhound for 14 years. He started as a Spare driver, and later alternated for three years between some days being a driver and some days being a Dispatcher. He testified that he spent approximately 90 percent of his last year in Ottawa as a Dispatcher. He moved into management and in the period from April 2008 to June 2012, he was Manager of Operations for Greyhound's Toronto terminal, which included the surrounding area and satellite terminals in Barrie and Peterborough, among others. He resigned from Greyhound to move to Metrolinx management. When he was Manager of Greyhound's Toronto Operations, he managed a team of Dispatchers and approximately 120 drivers, including Spare drivers. David Butler was his boss.

[112] Mr. Davidson testified that senior management, specifically David Butler, Randy Padley to whom Mr. Butler reported and who was then Greyhound's Director for Eastern Canada, and Stuart Kendrick, gave him the project of reviewing the earnings of the Spare drivers he managed. The purpose of the review was to assess if Greyhound was using its Spare drivers in the most cost-effective way. He was specifically asked to look for whether Greyhound was paying the Guarantee to some drivers while at the same time allowing other drivers to work overtime. If that was happening, senior management wanted a justification as to why Greyhound would have a driver at home who Greyhound had to pay the top-up Guarantee while at the same time paying another driver overtime.

[113] To ascertain the drivers' earnings, Mr. Davidson reviewed what he called Bi-weekly Driver Earnings Spreadsheets, which was Exhibit R1-30 and was copied in Exhibit HR1-34, where it is titled by hand as "Driver Earnings Report". Although Mr. Davidson called Exhibit R1-30 the Bi-Weekly Driver Earnings Spreadsheets, he also called it by other names. Therefore, for the purposes of clarity and consistency, this Decision will refer only to Exhibit R1-30 and it will call it the "Driver Earnings Report".

[114] What concerned Mr. Davidson in the Driver Earnings Report was the bi-weekly overtime pay and the number of hours worked during each Pay Period. He testified that as the Toronto Operations Manager, he filled in the Comments section of the Driver Earnings Report, and administrative assistants populated the other sections.

[115] With respect to the Complainant and the four Settling complainants, the Driver Earnings Report showed high earnings of over $3,000 bi-weekly, which prompted further investigation. That further investigation consisted of:

a) asking the Payroll department for what Mr. Davidson called "Bi-weekly Pay Summaries" (Bi-weekly Pay Summaries) for the individual high earners, and reviewing them to see if the drivers had high insurable hours or high overtime hours; these Bi-weekly Pay Summaries were in the same format and provided the same information for each such driver as Exhibits C6 through C10 which were Bi-weekly Pay Summaries for the Complainant and the four Settling complainants for April, 2010;

b) inputting the information from the Bi-weekly Pay Summaries into the Comments section of the Driver Earnings Report (Exhibits R1-30 and HR-34);

c) considering all that information together to see if there was a reasonable explanation for the high earnings or high insurable hours;

d) and, finally, if the above information failed to provide a reasonable explanation for the driver's earnings, sending a request that BIRC do an Hours of Service Audit for the Pay Period in question on any such driver.

[116] In cross-examination, Mr. Butler explained that the Complainant had been taken out of service because of the Hours of Service violations found in his BIRC Audit. He testified that taking the Complainant and the Settling complainants out of service had nothing to do with the drivers' ethnicity, skin colour or gender. The guiding principle for that action was if the BIRC Audits showed Hours of Service violations, then in accordance with Senior Vice-President Stuart Kendrick's February 24, 2010 instructions, that driver was taken out of service. Mr. Butler asserted that no one was removed from service based solely on their high earnings of over $3,000 bi-weekly. The high earnings would prompt a further investigation, which, in the case of the Complainant, led to the discovery that he had multiple Hours of Service violations. Those Hours of Service violations were why Greyhound removed him from service.

[117] Mr. Davidson also testified that the results of his reviews of the BIRC Audits were the actual reasons the employees were taken out of service – that is, he used the BIRC Audits to make the decision about who would be taken out of service.

[118] Mr. Butler testified in cross-examination that to see which employees had earnings higher than the criteria Greyhound management had decided on, Greyhound reviewed the Driver Earnings Report. I find that the Driver Earnings Report at Exhibit R1-30 contains five pages, which contain the bi-weekly earnings of the Greyhound Spare drivers named in it for five Pay Periods of two weeks each. The first Pay Period ends January 2, 2010 and the fifth Pay Period ends February 27, 2010. Therefore, the Driver Earnings Report covers a span of approximately 10 weeks. I find that for each Pay Period in the Driver Earnings Report, there were at least 18 and as many as 38 drivers. Some of the drivers were the same people in some or all of the Pay Periods.

[119] Mr. Butler also testified in cross-examination that not every driver listed in the Driver Earnings Report was audited, although many were. For example, the Pay Period ending

January 2, 2010 contained two statutory holidays – Christmas Day and New Year's Day - therefore overtime earnings were expected because of the statutory holidays; that was why Greyhound was not overly alarmed by the high earnings of many of the employees shown in that Pay Period. Nevertheless, Mr. Butler was concerned by the amount of overtime shown for the Complainant, the two Russian Settling complainants and one of the visible minority Settling complainants in that Pay Period.

[120] Mr. Butler also testified that the investigations started a couple of months after receiving the Driver Earnings Report.

[121] Mr. Butler testified in cross-examination that Mr. Davidson ordered the Hours of Service Audits and ordered quite a few, not just on the original five complainants. Mr. Davidson later confirmed in his testimony that he had ordered BIRC Audits of other drivers in addition to the five original complainants. An April 21, 2010 email from BIRC Auditor, E. Chiappetta, to Mr. Butler, among others, in response to a question from the Respondent's Eve Harris on behalf of Stuart Kendrick, stated that BIRC audited 133 drivers and found 22 of them in violation. I find that Mr. Butler's and Mr. Davidson's testimony together with the documentary evidence established that the Respondent audited other drivers besides the original five complainants during the same time period.

[122] When the Complainant asked Mr. Butler in cross-examination why some people who earned more than $3,000 were not audited, Mr. Butler responded that it was not necessarily the highest earners who were investigated first – it was that anyone making over $3,000 regular earnings bi-weekly warranted further investigation. Mr. Davidson was the one who usually did this further investigation. If Mr. Davidson did not find a reasonable explanation for the higher earnings, it was then that he would request a BIRC Audit on that driver. Mr. Davidson confirmed this in his testimony. Mr. Butler also testified that the Respondent did not look at the five pages in the Driver Earnings Report (Exhibit R1-30) in any particular order and Mr. Davidson also said this in his testimony.

[123] Mr. Butler explained that the Driver Earnings Report was created by Payroll and was a record of earnings and a record of insurable hours credited to the employee. These records would then be sent by the Respondent to the relevant government department for

verification. The Driver Earnings Report and its individual pages were not Hours of Service Audits, which were completely separate and different documents. Information in the Driver Earnings Report could still act as a red flag which warranted further investigation. However, a red flag in the Driver Earnings Report did not necessarily indicate an Hours of Service violation. For example, with respect to the information in the Comments section about the number of hours worked, Mr. Butler further explained that a driver could have over 140 insurable hours but not necessarily be in violation of the Hours of Service; conversely, a driver could have less than 140 insurable hours, and nevertheless be in violation of the Hours of Service. The criteria of approximately 140 insurable hours or more simply was a flag for further investigation.

[124] Similarly, in his cross-examination, Mr. Butler made it a point to testify that although the Respondent flagged Spare drivers who earned more than $3,000 bi-weekly for further investigation, that flagging did not automatically cause the Respondent to request a BIRC Hours of Service Audit. There had to be further inquiries done on those drivers to see if there were reasonable explanations for the amounts earned. I find that Mr. Davidson, who was the Respondent manager most directly involved in the investigations, confirmed this in his testimony. For example, when Mr. Davidson testified about his reasoning about the Pay Period ending January 2, 2010, he took into account that the statutory holiday of January 1 would result in higher pay and would be a reasonable explanation for that higher pay.

[125] Mr. Butler testified that the investigation was an ongoing one that took several weeks. He acknowledged in cross-examination that regarding the last page of the Driver Earnings Report, which set out various drivers' earnings for the bi-weekly Pay Period ending February 27, 2010, the high earnings of a specific driver who Mr. Butler identified as a visible minority individual would have been a red flag which could warrant Greyhound looking further into his earnings. Mr. Butler also acknowledged that in Exhibit R1-29, there was no Audit of that driver for the Pay Period ending February 27, 2010. He did not know if one was done. I find that Exhibit R1-29 showed that BIRC had done Audits for that same driver for other Pay Periods, and those Audits found him compliant with the Hours of Service.

[126] I find that a driver being "flagged" in the Respondent's process because he earned a lot of Overtime, earned more than $3,000 per Pay Period or had insurable hours

approaching or more than 140 did not automatically mean the driver was audited by BIRC. I accept Mr. Butler's and Mr. Davidson's testimony on this. I find that what a flag did was trigger a further investigation, usually by Mr. Davidson, to see if there was a rational explanation for the amount of pay. Mr. Butler and Mr. Davidson both testified that there could be reasonable and acceptable explanations for a driver earning $3,000 or more during a Pay Period – for example, one such driver had been off on an extended sick leave, and when he returned, he received a catch-up payment which put him over the $3,000 amount – but he had not violated his Hours of Service. Another example was that a driver may have put one or more Payslips from a previous Pay Period into the next Pay Period, causing a red flag earnings amount. As set out above, it was only when Mr. Davidson could not find a reasonable explanation for higher earnings or too many insurable hours that he requested a BIRC Hours of Service Audit on the driver.

[127] Mr. Butler testified that what the Respondent referred to as an "investigative hearing" in some of the documentary evidence, as did some of its witnesses, was a meeting among the Respondent's management, a driver who had violated the Hours of Service or broken another serious rule, and a Union representative to represent the driver, in accordance with the Collective Agreement. Mr. Butler testified that the purpose of this type of meeting was to give the driver an opportunity to know the case against him, and to give his side of the alleged violation. Its purpose was also for the Respondent to find out the "who, what, when, and why" of the violations, and to see if the driver expressed remorse if he did in fact violate. This Decision calls these meetings Investigative Meetings rather than investigative hearings to avoid any confusion with the Tribunal hearing.

VII. The Commission and the Complainant's Positions and Arguments

(i) The lack of progressive discipline

[128] The Commission submitted in its opening statement that the fact that Greyhound did not apply progressive discipline to the Complainant for his Hours of Service violations and Log Infractions but rather went directly to firing him was an indication that Greyhound fired him on the prohibited ground of his Russian national or ethnic origin. The Complainant

submits that because all five complainants who were terminated for their Hours of Service violations were either immigrants or racialized persons demonstrates that their national or ethnic origin was a factor in Greyhound's decision to terminate them.

(ii) The reduction in Greyhound's services in Canada, including Ontario

[129] One of the Complainant's and the Commission's main submissions was that in late 2009, the Respondent was losing money in various parts of Canada, including Ontario. Therefore, it planned to reduce services by cutting routes and would need fewer drivers. To deal with its need to have fewer drivers, the Respondent picked the Complainant and the Settling complainants to fire because they were immigrants; their Hours of Service violations were simply a pretext to mask the Respondent's discriminatory method of getting rid of drivers it no longer needed.

[130] The Complainant and the Commission relied partly on the Respondent's September 3, 2009 Employee Announcement that it was ceasing operations in Manitoba and Northwestern Ontario by December 2, 2009 to establish this allegation. They also relied on various articles from newspapers quoting CBC news reports and other sources about the proposed route cuts mainly in Ontario and also in Manitoba that were to occur in about April, 2010.

[131] The Settling complainant Mr. X testified in direct testimony that he thought that in around the winter of 2009 – 2010, there was much "talk" about the Respondent cancelling routes north of Barrie, Ontario. The Toronto drivers were concerned about what would happen to them in terms of their job security because there were "a lot of senior drivers" who would have to be transferred to Toronto. When asked in direct testimony if he was aware of what the impact of the reduction of services was, he responded that people came from the Barrie Board to the Toronto Board, and he thought that out of the total jobs available, the jobs "per capita" were reduced because driver numbers increased. However, he testified that the reductions had no impact on him – he asserted that he was on the Dispatchers' "good side" and was given "good routes".

[132] The Respondent's witness David Butler testified that if the Respondent had needed to reduce the number of Toronto Spare drivers, there was a method for doing so in the Collective Agreement, under the layoff provisions in Clause G-19 and the Respondent had to follow that process. He also testified that since 1996, Greyhound had not needed to lay drivers off because it needed them to work. I think it is reasonable to infer that Mr. Butler meant that Greyhound had enough work for the drivers to do and did not need to lay them off. Mr. Butler further testified that he himself had never participated in a layoff.

[133] Mr. Butler testified that Greyhound's proposed reductions of services in Manitoba and Northern Ontario would not have affected the Toronto drivers because the drivers in Manitoba and Northern Ontario are in a different Union Local than the Toronto drivers, and drivers in one Union Local cannot be transferred into an area governed by another Union Local. This was not disputed, and I accept this testimony as reliable.

[134] Mr. Butler explained that the route cuts which could affect the Toronto terminal drivers were the route cuts that impacted the Respondent's drivers in Barrie. He also testified that the addition of approximately four drivers to the Toronto terminal was positive because that terminal had needed more Spare drivers.

[135] There was no evidence, either in the Complainant's testimony or in any documentary evidence on his earnings in the relevant period that the Complainant's income was less because there came to be more Spare drivers on the Toronto Spare Board.

[136] Although I find that the evidence established that there were route cuts that caused approximately four drivers to be placed on the Toronto Spare Board in around April, 2010, I also find that the presence of these four drivers did not affect the Complainant's earnings. I also find that the Respondent wanted more Spare drivers in Toronto. I conclude that the evidence failed to establish that the Respondent needed to terminate the employment of some Spare drivers in Toronto on account of its 2010 route cuts in southern Ontario and therefore fired the Complainant using his Hours of Service violations and how he dealt with his Logbook as pretexts for discrimination.

(iii) Timing of the Respondent's knowledge of the Complainant's and the Settling complainants' Hours of Service violations

[137] The Complainant submitted that the Respondent knew in 2009 that the Complainant (and the Settling complainants) were violating the Hours of Service but did nothing about it until it was convenient for the Respondent to use the pretext of their Hours of Service violations to fire the Complainant in 2010, as a cover for discrimination. He submitted that Mr. Davidson's undated notes in Exhibit R4-160 about the Complainant's Logbooks which included notes on his January and February 2009 Logbooks established this fact. Therefore, the Complainant argued, Mr. Davidson knew in 2009 that the Complainant was violating but sat back and did nothing about it except watch out for when the Respondent could fire the Complainant and Settling complainants when it wished to do so.

[138] Mr. Davidson testified that he made the notes during his review of the Complainant's Logbooks and that his review was done after the Complainant's first Investigative Meeting. There was no dispute and I find that this First Investigative Meeting took place on April 22, 2010. After this Investigative Meeting, the Complainant was asked to provide Mr. Davidson with his Logbooks for the last 12 months. The evidence did not establish whether January and February 2009 were included in those Logbooks.

[139] Mr. Davidson testified that he investigated the Logbooks by cross-referencing them with the top copies of the Logbooks the Complainant had submitted daily to the Respondent in order to be paid – that is, his Payslips. Mr. Davidson wrote the notes in Exhibit R4-160 as he went along in his investigation.

[140] The Complainant did not put to Mr. Davidson in cross-examination that he knew the Complainant was violating the Hours of Service in 2009 but did nothing about it until April 2010 because it suited the Respondent's purposes to wait until then. Therefore, I must weigh the Complainant's submission about when Mr. Davidson knew the Complainant was violating against Mr. Davidson's testimony about the circumstances around his investigation into the Complainant's Logbooks.

[141] Having said that, I find that page one of Mr. Davidson's four pages of undated notes contain the word "VIOLATIONS" at the top of the left margin. The notes then start with "JAN

17 2009", with a description of the number of hours and other notes. The notes then continue to list dates and notes for every month thereafter to and including the month of March 2010.

[142] I accept Mr. Davidson's testimony that he wrote the notes after the Complainant's First Investigative Meeting on April 22, 2010 during his investigation into the Complainant's Logbooks. Therefore, I find that Mr. Davidson wrote the notes after April 22, 2010.

[143] There was no testimony from any witness, including the Complainant, that the Respondent had notified the Complainant before April 2010 that he was violating the Hours of Service, and no evidence that any Dispatcher had audited one of the Complainant's Recaps, or that BIRC had done any Hours of Service Audit on the Complainant's Logs before April 2010.

[144] The Complainant further submitted that another way the Respondent knew that he had driven beyond the Hours of Service was through its Payroll Department: he recorded his actual driving times on the Payslips which he submitted to the Dispatchers, who then submitted them to Payroll. There had never been an issue with the Complainant being paid for the hours he actually drove. Therefore, he argued, the Respondent knew and did not object to the hours he drove, even if some of those hours violated the Hours of Service.

[145] Settling complainant Mr. X testified that the Respondent's Payroll Supervisor, Ms. Saju, was quick to return drivers' Payslips if there was an error in them, and that other drivers complained that she refused their Payslips, sometimes noting logging errors, even though she was not supposed to be involved in reviewing Hours of Service.

[146] Mr. Butler testified that the Payroll Supervisor's mandate did not include monitoring the drivers' Hours of Service portion of the Payslips; she had no training on the Hours of Service Regulations and was not expected to enforce them. He explained that over a two-week period, Payroll would receive between 3,500 and 4,000 Payslips for the drivers of the area which was Ms. Saju's responsibility, and it would have been impossible for her and her staff to check the drivers' Hours of Service given that volume, even if she had had the training, which she did not. Payroll's job was to check administrative items in the Payslips – for example, was the Payslip completely or correctly filled out, did the driver use the correct code for the particular item for which he was requesting pay; should the driver be paid an

expense which he claimed, and so on. This is also confirmed in Ms. Saju's 2010 email to Mr. Butler and others asking them to tell Ian Laird, then Union President, that it was not her job to monitor Hours of Service.

[147] I therefore conclude that the evidence failed to establish that Mr. Davidson or any other Respondent manager or Payroll knew before mid-April 2010 that the Complainant or the Settling complainants were violating their Hours of Service.

(iv) The Complainant's submissions about Mr. Davidson's testimony

[148] The Complainant submitted that the Tribunal should not accept as reliable Mr. Davidson's testimony about the steps he took and his method in deciding which drivers' Logbooks to send to BIRC for Hours of Service Audits. The Complainant's reason was that Mr. Davidson's testimony was inconsistent about the meaning and consequences of his comments in blue type in the Comments section of the Driver Earnings Report. The Complainant submitted that Mr. Davidson had first testified that blue comments meant the driver's Logbooks for that period were sent to BIRC for an Hours of Service Audit; then, that later, Mr. Davidson changed his testimony in cross-examination and said that blue comments meant the driver was flagged for further investigation, not for an immediate Audit.

[149] I find that Mr. Davidson's testimony on what the blue type in the Comments meant was consistent throughout – that the blue meant that there had to be further investigation of that driver's circumstances to see if there was a reasonable explanation for an unreasonable amount of pay in that Pay Period or too many Hours of Service in that Pay Period. Only if there was no reasonable explanation would the Respondent (usually in the person of Mr. Davidson) request an Hours of Service Audit on that driver from BIRC.

(v) The order in which the Respondent took the Complainant and the Settling complainants out of service established discrimination against the Complainant

[150] The Complainant also argued that the order in which Greyhound took the Complainant and the Settling complainants out of service was key in establishing that

Greyhound discriminated against himself and the other two Russian Settling complainants because of their Russian national or ethnic origin.

[151] He also tied this submission into what the Respondent said was a “red flag” for further investigation: a driver who made over $3,000 in bi-weekly regular earnings.

[152] In furtherance of this argument, the Complainant submitted that Greyhound took the three Russian complainants out of service first, and only afterwards took the two non-Russian Settling complainants out of service, notwithstanding that at least one of the non-Russian Settling complainants made more money in at least one of the bi-weekly Pay Periods than the Complainant or the Russian Settling complainants. Therefore, he submitted, it was not the higher than $3,000 bi-weekly income that flagged the Complainant and the other two Russian Settling complainants, but the sole fact that they were of Russian national or ethnic origin. He contended that if Greyhound had really taken the Complainant and the Settling complainants out of service based on their earnings, he and the other two Russian Settling complainants would have been the last and not the first to be taken out of service. In other words, the allegation of an unreasonably high bi-weekly income was simply a pretext for Greyhound’s discriminatory practice against the Complainant and the two other Russian Settling complainants.

[153] During his testimony, the Complainant did not independently remember the date he was taken out of service. He arrived at a date based on the combined evidence in Exhibit C9, his Bi-weekly Payroll Summary from the Respondent’s Payroll department which showed him as driving a charter trip on April 19, 2010; then being shown as “booked off” on April 20 and 21, and then starting to receive flat pay on April 22, 2010, which was also the date of his first Investigative Meeting with Greyhound. From that evidence, he submitted that the Respondent took him out of service on April 19, 2010 when he returned from the charter trip.

[154] The Complainant relied on Exhibit C6, the Settling complainant Mr. X’s Bi-weekly Payroll Summary, which showed him as starting to receive flat pay on April 15, 2010. The Complainant submitted that the Respondent started paying the flat rate to any driver it had

taken out of service at least one day after the actual removal from service, and therefore, contended that the Respondent took Mr. X out of service on April 14, 2010.

[155] The Complainant submitted that Exhibit C10 showed that the Respondent began paying the other Russian Settling complainant the flat rate on April 18, 2010 and because the Exhibit showed him as “Booked Off” on April 16 and April 17, this timeline established that the Respondent removed him from service on April 15, 2010. He relied in the same way on Exhibits C7 and C8 for the two non-Russian Settling complainants to assert that one of them was taken out of service on April 20, 2010 and the other on April 22, 2010.

[156] The Complainant submitted that had the Respondent’s criteria truly been grounded in looking at those who made more than $3,000 bi-weekly, it should have taken the two non-Russian Settling complainants out of service first, because they made more than, for example, the Complainant.

[157] Mr. Butler’s and Mr. Davidson’s testimony was that Greyhound did not take anyone out of service during these investigations simply because their bi-weekly earnings were at least $3,000. Their testimony was that Greyhound took the Complainant and the Settling complainants out of service when the BIRC Audits found Hours of Service violations.

[158] The Respondent’s witness Rob Davidson testified that on April 15, 2010, he received the Hours of Service Audit results for December 2009 and January 2010 on the other Settling complainant of Russian national origin. The Audit found that this Settling complainant was not in compliance with the Hours of Service. Mr. Davidson testified that this driver would have been taken out of service on April 15, 2010 pending further investigation and an Investigative Meeting, as reflected in David Butler’s April 15, 2010 email to Mr. Davidson and others.

[159] Mr. Davidson testified and the documentary evidence confirms that on April 15, 2010, he also received an email from a different BIRC auditor who had completed an Hours of Service Audit on Russian Settling complainant Mr. X for the period January 26 to February 28, 2010 and that Audit found Mr. X not compliant with the Hours of Service. The BIRC auditor suggested and Mr. Davidson concurred that BIRC also do an Audit on Mr. X for

March 2010. Mr. Davidson testified that Mr. X would have been taken out of service on April 15, 2010 pending further investigation and an Investigative Meeting.

[160] Mr. X testified that a Dispatcher had called him three or four days before his first Investigative Meeting to tell him he was being taken out of service with pay. His first Investigative Meeting took place on April 19, 2010.

[161] Mr. Davidson testified that he could not remember the order in which he sent his requests to BIRC for Audits on various drivers, including the Complainant and the Settling complainants.

[162] I find that the evidence does not support the Complainant's submission that the Respondent took Mr. X out of service on April 14, 2010. I accept the testimony of Mr. Butler and Mr. Davidson that it was not until Mr. Davidson received the Hours of Service Audits back from BIRC that he removed the Settling complainants and the Complainant from service. Mr. X testified, and I accept, that a Dispatcher called him three or four days before his first Investigative Meeting on April 19, 2010 to tell him he was taken out of service with pay. This means that the Dispatcher's phone call to Mr. X would have been on April 15 or April 16, 2010. The testimony of both Mr. Davidson and Mr. Butler was that a driver's removal from service was based on there being Hours of Service violations in a BIRC Audit. I find that the documentary evidence confirmed Mr. Davidson's testimony that he received the BIRC Audit on Mr. X on April 15, 2010. The combination of the foregoing facts establishes, and I conclude, that the Respondent removed Mr. X from service on April 15, 2010, notwithstanding that he began receiving flat pay as of the same day.

[163] The other Russian Settling complainant did not testify. However, Mr. Davidson's testimony aligns with the documentary evidence that on April 15, 2010 he received an Hours of Service Audit from a different BIRC Auditor showing Hours of Service violations by the other Russian Settling complainant. The evidence also established that the other Russian Settling complainant also had his first Investigative Meeting on April 19, 2010. Exhibit C10 shows him as booked off on April 16 and 17, 2010 and the Respondent starting to pay him the flat rate on April 18, 2010. However, this does not establish that he was taken out of service on April 16 or 17. Mr. Butler's and Mr. Davidson's testimony was that because of Mr.

Kendrick's direction that managers had to immediately remove drivers whose BIRC Audits found Hours of Service violations, they did so immediately, and I accept that testimony, which is confirmed by Mr. Kendrick's email to that effect. I find it more likely than not that because Mr. Davidson received the other Russian Settling complainant's Hours of Service Audit on April 15, 2010, he removed him from service on April 15, 2010.

[164] When the Complainant testified about this, his testimony was that he did not remember exactly when he himself was removed from service. He extrapolated from Exhibit C9, his own Bi-weekly Payroll Summary, that it had to have been on April 19, 2010 when he returned from completing a charter; also, he was shown as being booked off on April 20 and 21, so according to his analysis, that meant he was taken out of service on April 19. The Respondent began paying him flat pay on April 22, 2010. The Complainant's submission was that the Respondent would only start paying the flat rate at least one day after it removed a driver from service.

[165] Mr. Butler and Mr. Davidson testified, and the documentary evidence confirmed, that they received the BIRC Hours of Service Audit on the Complainant and the two non-Russian Settling complainants on April 20, 2010. Those Audits showed Hours of Service violations for all three.

[166] Mr. Butler identified and confirmed his April 20, 2010 responding email to the BIRC auditor, and, among others, to Mr. Kendrick and Mr. Davidson (Exhibit R2-34), in which he stated that "All three operators have been removed from service…".

[167] Mr. Butler and Mr. Davidson both testified that the Respondent removed the drivers from service based on the Hours of Service violations in BIRC's Audits. I find that the evidence established that BIRC completed its first Hours of Service Audit on the Complainant and the two non-Russian Settling complainants on April 20, 2010. I have accepted Mr. Davidson's and Mr. Butler's testimony that the drivers were removed from service based on Hours of Service Audit violations found in the Hours of Service Audits. Therefore, I find that the evidence has established that the Respondent took the Complainant and the two non-Russian Settling complainants out of service on April 20, 2010.

[168] To summarize, I find that the evidence established that the order and timeline of the Complainant and the Settling complainants being taken out of service was as follows: Mr. X and the other Russian Settling complainant on April 15, 2010; the Complainant on April 20, 2010; and the two non-Russian Settling complainants on April 20, 2010. I find that the time span from April 15 to April 20, 2010 was six days.

[169] I conclude that given the short time period between the date the Respondent took Mr. X and the other Russian Settling complainant out of service (April 15, 2010) and the date the Respondent took the Complainant and the two non-Russian Settling complainants out of service (April 20, 2010), the evidence failed to establish any underlying strategy of the Respondent to take the Complainant and the two Russian Settling complainants out of service first because of their national or ethnic origin. I conclude that the Respondent simply took the five complainants out of service in the order in which Mr. Davidson received their Hours of Service Audits from BIRC. I conclude that the evidence failed to establish that the order in which the Respondent took the complainants of Russian national or ethnic origin out of service signified a discriminatory practice based on their national or ethnic origin. I find that nothing discriminatory can be inferred from the order or sequence in which the Respondent took the Complainant and the four Settling complainants out of service.

(vi) Was the use of the nicknames “Spirit” and “Yellow” to refer to two of the original five complainants discriminatory?

[170] Exhibit R2-36 contains a series of emails dated April 20, 2010. The first one is from a BIRC auditor to Greyhound’s Stuart Kendrick and states that at Mr. Davidson’s request, BIRC has completed Audits on the five complainants. Mr. Kendrick then emailed Mr. Pat Kightley, the Respondent’s then Regional Safety Manager to ask him what “the plan” was for the complainants. In his email response, Mr. Kightley stated, among other things, that he was “…only aware of…” two of the five complainants, whom he and Mr. Davidson had interviewed the day before (April 19th). Mr. Kightley referred to these two complainants as “Spirit” and “Yellow”, even though none of the complainants had such surnames.

[171] On April 19, 2010 the Respondent had held its first Investigative Meeting with Russian Settling complainant Mr. X and the other Russian Settling complainant. I consider

it reasonable to find that Mr. Kightley's reference to "Spirit" and "Yellow" referred to these two drivers because there were only five drivers who the BIRC auditor referred to in her email, who were the five complainants - and further, because the Complainant and the two non-Russian visible minority Settling complainants had not yet had their first Investigative Meetings with Respondent management. Finally, the words "Spirit" and "Yellow" also contain some letters similar to letters in Mr. X's and the other Russian Settling complainant's names. I also take into account that the Respondent did not deny that "Spirit" and "Yellow" referred to the two Russian Settling complainants.

[172] In its direct examination of Mr. X, the Commission asked him what his response would be if the Respondent referred to one of the Russian Settling complainants as "Spirit" and to Mr. X as "Yellow". Mr. X felt that he could not answer for the other Russian Settling complainant but testified that if he himself had been called "Yellow" to his face, he would have been outraged. He testified that his family background of having had grandfathers who were high-ranking officers in the Russian army and parents who fought during the Second World War against an enemy who forced people to wear yellow stars and killed them because of who they were had a profound effect on him. That was why he would have found the appellation "Yellow" so outrageous. I accept Mr. X's testimony on this.

[173] Mr. Kightley was then the Respondent's Regional Safety Manager. He had been brought in to assist in conducting the Investigative Meetings with at least two of the five complainants; he was corresponding directly with Mr. Kendrick, the most senior Respondent executive in Canada; he was part of the discussion when other senior Respondent managers such as Randy Padley and David Butler were discussing the situation in various emails which are in evidence – therefore, I think it is reasonable to find that Mr. Kightley was part of the Respondent's senior management.

[174] There was no other evidence as to what motivated Mr. Kightley to use the "Spirit" and "Yellow" words. Although Mr. Butler spontaneously testified that because he knew Mr. Kightley, he felt that there was no malicious intent whatsoever in his using those words, I do not take his testimony into account, because it was speculation on Mr. Butler's part – well-intended and honestly felt speculation, but speculation nonetheless.

[175] What I do take into account is that there was no other evidence that provided any context to Mr. Kightley's use of these words. The law does not require that there be intent to discriminate in order to find that there has been a discriminatory practice (*Robichaud, supra*). The law does however require evidence to find a discriminatory practice, and I conclude that in the circumstances, where there is no other evidence other than the use, twice, of two capitalized words that in and of themselves do not have negative meaning, there is no objective evidence to establish that their use was a discriminatory practice by Greyhound senior management.

(vii) Mr. Cadieux's testimony, credibility and the evidentiary issue about his recording

[176] The Complainant also relied on the testimony of his witness, Mr. Brian Cadieux, to support the allegation that even though other drivers, like Mr. Cadieux, violated the Hours of Service, the Respondent did not fire them. According to the Complainant, this was because these drivers were Canadian. He believed that at times, even senior Greyhound managers encouraged Spare drivers to violate their Hours of Service when it suited their purposes. Mr. Cadieux testified that at the G20 in Toronto in June 2010, Mr. Butler told him to work beyond his Hours of Service and that Mr. Butler would find a way to compensate him for his work. Mr. Cadieux' understanding was that Mr. Butler had told him that he had to be available at any time during the G20 to drive the RCMP wherever they had to go. Mr. Butler's testimony was that he had told Mr. Cadieux that he had to be on call and not to go anywhere where Greyhound could not reach him, but not that Mr. Cadieux had to be on duty, driving 24-7 during the G20. When submitting his Payslips for the G20, Mr. Cadieux requested compensation for 24 hours for each day. The Respondent denied him the compensation and disciplined him with a 5-day suspension and a 2-day re-training because Mr. Butler decided after Mr. Cadieux' Investigative Meetings that although Mr. Cadieux' violations were serious, he had made an honest mistake because he honestly misunderstood what Mr. Butler had told him.

[177] Mr. Cadieux testified in cross-examination about a private conversation he had with his Regional Manager, Wayne Binda at the end of his first Investigative Meeting on the G20

issue, which took place on July 29, 2010. In direct examination, Mr. Cadieux had testified that Mr. Binda was a family friend who knew Mr. Cadieux' brothers and the family well and who had worked with his brother "R" for many years at Greyhound. He testified that after everyone else had left the Investigative Meeting, Mr. Binda had asked him in French why Mr. Cadieux had not altered his Logbooks to appear compliant with the Hours of Service like Mr. Cadieux's brothers knew how to do. Mr. Cadieux testified in cross-examination that he had actually recorded both the Investigative Meeting and Mr. Binda's private comments on his phone, without the knowledge of the other participants, and that he had the recording with him at the Tribunal hearing. Mr. Cadieux also testified that the recording revealed Mr. Butler admitting that he had told Mr. Cadieux to work beyond the Hours of Service at the G20.

[178] Mr. Cadieux' recording raised the evidentiary issue of whether it was admissible into evidence. The hearing was adjourned to deal with this issue. The Tribunal had the recording transcribed and translated into both French and Russian and provided the transcripts to the parties. After the parties made written and oral submissions on the issue of the recording transcript's admission, the Tribunal ruled that the transcript of the recording was not admissible because there were many gaps in it, and too many places which could not be transcribed because they could not be heard; every single time Mr. Butler spoke on the recording, it was identified as "inaudible" in the transcript. The transcript was therefore unable to be used for the purpose of confirming that Mr. Butler had admitted during Mr. Cadieux' Investigative Meeting that he himself had ordered Mr. Cadieux to drive illegal hours during the G20. Further, none of the recorded speakers except Mr. Butler were identified and it was only through the Respondent's confirmation that it was Mr. Butler on the speakerphone that brought about that identification. The conversation that Mr. Cadieux alleged he had privately with Mr. Binda about altering his Logbooks was not captured in the recording. The Tribunal therefore found that the transcript was not coherent and would have no probative value. The Tribunal also noted that Mr. Cadieux' testimony about the nature and content of his discussions with both Mr. Binda and Mr. Butler was on the official record of the Tribunal.

[179] I find that Mr. Cadieux' testimony about what Mr. Binda said to him in French, asking him why he had not falsified his Logbooks, is unreliable. I conclude this partly because Mr. Cadieux back tracked in cross-examination about the close relationship his family supposedly had with Mr. Binda - his family was not so close to Mr. Binda in cross-examination. His testimony that his brothers had never told him that he should alter his Logbooks to be successful at Greyhound also does not align with the good relationship Mr. Cadieux said they had. Further, Mr. Cadieux acknowledged in cross-examination that at least one of his brothers was still working at Greyhound. If that brother or the other brother had been falsifying their Logbooks as Mr. Binda allegedly told Mr. Cadieux in 2010, it is reasonable to assume that the Respondent's random BIRC Hours of Service Audit program which started in early 2010, would have audited the brothers at least once by the time Mr. Cadieux was cross-examined in December, 2015. There was no evidence that either of Mr. Cadieux' brothers were found to be in violation of the Hours of Service.

[180] I also find that it makes no reasonable sense that Mr. Binda would have this tête-à-tête with Mr. Cadieux after the end of the first Investigative Meeting on July 29, 2010 and then, at Mr. Cadieux' next Investigative Meeting in August, 2010, behave hostilely towards him, in a way, as Mr. Cadieux described it, as if their private discussion had never happened. Even there, this means that Mr. Binda would have taken the risk that Mr. Cadieux would tell his Union representative about their discussion, who in turn could have told the other managers present what Mr. Binda had said to Mr. Cadieux.

[181] I realize that Mr. Cadieux' testimony alleging his private discussion with Mr. Binda is the only evidence on the record. Further, the Respondent did not produce Mr. Binda as a witness. Nevertheless, for the reasons set out above, I do not find Mr. Cadieux's evidence on the alleged contents of his discussion with Mr. Binda to be credible or reliable.

[182] With respect to Mr. Cadieux' allegation that Mr. Butler told him to drive beyond the Hours of Service at the G20, I prefer the evidence of Mr. Butler that he did not do so and that Mr. Cadieux misunderstood what he was saying. I found Mr. Butler to be a truthful, forthright and honest witness throughout his testimony, who was consistent in his testimony, and I found his testimony to be reliable. His testimony about what he said to Mr. Cadieux at the G20 is also consistent with the discipline he decided on for Mr. Cadieux – a 5-day

suspension and a 2-day re-training rather than termination of his employment – because he honestly thought that Mr. Cadieux was mistaken about what he had said to him. On the other hand, I found that at times Mr. Cadieux exaggerated and changed or modified his testimony in cross-examination.

[183] I find that even if I would have found that Mr. Cadieux' evidence established that Mr. Binda as a manager encouraged Mr. Cadieux and his brothers to falsify their Logbooks, this issue has no relevance to the question of whether the Respondent discriminated against the Complainant through its Dispatchers or otherwise unless the evidence established a link or connection from the Dispatchers' pressure to the Complainant's protected status as a person of Russian national or ethnic origin.

[184] As set out above, the evidence has failed to establish that link or connection.

[185] I also found that when in 2011, Greyhound decided that Mr. Cadieux was not being honest in how he logged, it terminated his employment, which was no different than how it treated the Complainant when it decided he was not being honest in his logging.

(viii) Who is responsible for a Spare driver's compliance with the Hours of Service?

[186] One of the Complainant's other main arguments was that the Dispatchers were at least as responsible as the Spare drivers for ensuring that Spare drivers complied with the Hours of Service, and conversely, were at least equally responsible for any Hours of Service violations the Spare drivers committed. He pointed out that the Respondent's oversight responsibility was in the legislation – for example, in Ontario Regulation 555/06, which requires carriers such as Greyhound to monitor their drivers' compliance with the Hours of Service Regulations.

[187] The Complainant testified and submitted that the Dispatchers knew from the Daily Dispatch Log when a Spare driver arrived at work and when he finished, and therefore knew how many hours the Spare driver had worked, which in turn demonstrated whether that driver had worked beyond his permitted Hours of Service. Therefore, according to the

Complainant, the Dispatchers were at least equally as responsible as the Spare drivers for ensuring that the Spare drivers complied with their Hours of Service.

[188] The Complainant further submitted that because the Dispatchers know the Spare driver's Hours of Service, they should not assign a driver a piece of work which would put him in violation of his Hours of Service.

[189] The Commission's witness Mr. Al-Khafajy and the Respondent's witnesses David Butler, Rob Davidson, David Hickie and Raymond Palmer all testified on this issue. I note that Messrs. Butler, Davidson, Hickie and Palmer were either former Dispatchers or in the case of Mr. Palmer, a former Dispatcher who was Manager of the Respondent's Burlington Consolidated Dispatch when he testified. All of them testified that although sometimes Dispatchers could tell from the Daily Dispatch Log what a particular Spare driver's Hours of Service were for that particular day, many times the Dispatchers could not. One of the reasons they gave was that if a Spare driver went from one Spare Board to another Spare Board in the course of a day, the Dispatchers in the first Spare Board would not necessarily know the driver's Hours of Service.

[190] Another reason was that Dispatchers worked in eight-hour shifts and although, as Mr. Palmer testified, they left each other notes about what was going on when they changed their shifts, it was still not always possible for a fresh Dispatcher to know the hours a specific driver had driven before the Dispatcher's shift. Further, unless they saw the driver's Logbook, they would not know the hours of rest he took or the breaks he took. With respect to knowing the driver's Hours of Service for a week or a month, this was not possible without having either the driver's Logbook or the driver's Recap in front of them. Mr. Al-Khafajy also testified that in order to ascertain with certainty whether a driver was in compliance with or violating the Hours of Service, one would have to have the driver's Logbook. The Respondent's witnesses all testified that it was the driver's ultimate responsibility to tell the Dispatcher whether he had the Hours of Service available to complete the route.

[191] I made certain findings above on the reliability of the Complainant's witness Brian Cadieux on certain aspects of his testimony. Although Mr. Cadieux testified that he loved the job of driver itself, I also found that he was critical of Greyhound as an employer for

various reasons which do not touch on discrimination based on national or ethnic origin but relate to other aspects of the employer/employee relationship. I found it telling, however, that Mr. Cadieux, in criticizing the methods of the Respondent and the Dispatchers, testified that he felt that sometimes, he was “helping the Dispatchers” do their job because they were always asking him about his Hours of Service – that is, where he was in his Hours of Service that day. I find that this particular testimony is consistent with both the testimony that Dispatchers do not necessarily know how many Hours of Service a driver has, and with the testimony that it is up to the driver to tell the Dispatcher if he does not have sufficient Hours of Service to compete the route the Dispatcher seeks to assign him.

[192] I conclude that it is the responsibility of the driver to keep track of his Hours of Service so that he is in compliance with the Regulations on the Hours of Service.

[193] The Complainant and the Commission also posited that the Complainant had submitted his true Hours of Service to the Respondent’s Payroll department by way of the Dispatchers, and because he was paid, notwithstanding that he violated the Hours of Service, this constituted the Respondent’s tacit permission to violate the Hours of Service. I find that the evidence does not support that position because there is an email from Ms. Saju, the Payroll Administrator, in April of 2010, asking senior management to tell Mr. Laird, Union President, that it was not Ms. Gulzar’s job to monitor the Hours of Service of the drivers. Mr. Butler’s testimony confirmed this.

[194] I therefore conclude that although the Complainant may have thought that the Respondent was giving him the proverbial “green light” to violate his Hours of Service by paying him, the evidence failed to establish this position and did not take away from the driver’s responsibility to ensure that he was in compliance with the Hours of Service.

(ix) Complainant’s submissions about his Union representation

[195] The Complainant further submitted that the Union was “selective” in who it represented, and that Mr. Marsh and Mr. Laird did not properly represent the Complainant and the two other Russian Settling complainants during the Investigative Meetings with Greyhound. He contrasted the Union’s treatment of him and the other Russian Settling

complainants with its support and pursuit of a grievance it took to arbitration for a Mr. M., another Spare driver who Greyhound had fired for Hours of Service violations in August 2010. The Complainant believes that the Union properly represented Mr. M, since the arbitrator ordered his re-instatement, but that the Union did not offer the same support to himself and the four Settling complainants when the issue of their Hours of Service violations arose and Greyhound decided to fire them. The Complainant believes this was because they were of Russian national or ethnic origin.

[196] In any event, whether the Union was "selective" in how it chose to represent or not represent the Complainant, Mr. X and the other Russian Settling complainant, or whether it represented them properly and even whether the Union engaged in a discriminatory practice against the Complainant and the other Russian Settling complainants on account of their national or ethnic origin (which the evidence did not establish) is not relevant to this inquiry because the Union is not a respondent in this Complaint. The only Respondent is Greyhound.

(x) The Complainant's allegation that Greyhound did not support his family needs

[197] In his Complaint and testimony, the Complainant referred to occasions when his young children were ill and needed his care. He asked Dispatchers to assign him work in Toronto or bring him back to Toronto from other cities so it would be easier to care for his children, but they did not do so. He therefore asked then Toronto Operations Manager Mr. Davidson for assistance. His Complaint and testimony were that Mr. Davidson told the Complainant that he knew what he had signed up for and would not assist him. The Complainant felt that Mr. Davidson did not assist him because he was a new immigrant.

[198] The Complainant's witness Anastasia Meicholas testified that it was very difficult to obtain days off, and that after she had sustained a work-related injury and had to be on modified duties, either a Dispatcher or manager named Davidson once told her that he would make her life a "living hell" because of modifications that had to be made to her duties. It was not clear whether Ms. Meicholas was quoting Davidson or whether she was

summarizing, but I find that what she sought to convey in her testimony was that she felt that the Respondent did not treat her properly when she was injured on the job.

[199] The Respondent's witnesses Rob Davidson and David Butler testified that during information meetings which the Respondent held for people interested in becoming Respondent drivers, the Respondent tells them that working for the Respondent as a passenger bus driver means being away from their families on many weekends and holidays – as Mr. Butler put it, when the driver is bringing others to their families during evenings, weekends and holidays, the driver is away from his own family. Mr. Davidson testified that when he went to his own information meeting, he brought his spouse so she could hear about the kind of job driving was and the Respondent had encouraged those wanting to attend to do so.

[200] I find that this allegation falls within the ground of discrimination based on family status as set out in subsection 3(1) of the *Act (supra).* The Complainant is alleging that the Respondent did not accommodate him by giving him assignments to make it easier for him to tend to his children when they were sick and he only had his wife to assist. This ground is not specifically named in the Complaint, which sets out national or ethnic origin as the ground of discrimination.

[201] Having said that, in the interests of addressing the substance rather than the formalities of classification, paragraph two of the Complaint and the Complainant's testimony dealt with the concept of this ground, as did the testimony of the Respondent's witnesses Butler and Davidson. Notwithstanding all this testimony, I find that the evidence on this ground was scant and lacking in specifics. The Complainant did not specify when these incidents happened, and Mr. Davidson did not remember the Complainant approaching him about it. The Complainant continued to work for the Respondent. There was no evidence of its impact on the Complainant and how that impact was adverse. Paragraph two of the Complaint described the Respondent's denial of assigning him the routes he wanted as "heartless" and its impact on the driver as not being able to perform at his best. There was no documentary evidence on these incidents, or the family issue nor was there any testimony or documentary evidence on how the Complainant could not perform at his best. There was also no evidence that he took the matter further, for example

to the Respondent's human resources or to the Union. I find that the evidence did not establish the required relevant facts about these incidents.

[202] I take into account the testimony of Ms. Meicholas that it was difficult to get days off from work and that she felt that the Respondent did not treat her properly when she suffered a work injury. There was nothing in her testimony about this subject that alleged that her difficulties were because of any prohibited ground of discrimination – her testimony simply was that it was difficult for her to deal with the Respondent on those issues.

[203] Taking into consideration the lack of evidence to establish the basic facts of the Complainant's allegation concerning time off for his family situation, together with Ms. Meicholas' evidence which did not mention any discriminatory ground for her difficulties, I conclude that there was no evidence supporting the Complainant's allegation that the Respondent discriminated against him because he was an immigrant when it did not assign him the routes he wanted so he could be closer to his family when his children were sick. I conclude that the evidence failed to establish a *prima facie* case of discrimination based on this allegation.

VIII. The Respondent's Arguments

[204] Having addressed every argument made by the Complainant and the Commission, I conclude that the Complainant did not meet his burden of establishing that there was a nexus or connection between the adverse treatment he suffered at the hands of the Dispatchers and his national or ethnic origin. In analyzing the Complainant's arguments, I have already addressed the arguments and evidence presented by the Respondent. However, as I want to ensure that everything I considered in writing this Decision is clearly explained, I will briefly summarize the Respondent's response to the Complainant's allegations.

[205] The Respondent's position throughout the Tribunal process and the hearing has consistently been that the employment of the Complainant and the Settling complainants was terminated because of their Hours of Service violations and the results of the investigations the Respondent conducted after it received their Hours of Service Audits, and

that no discriminatory factor influenced its decision. Mr. Butler testified about the seriousness of Hours of Service violations as compared to Log Infractions. He explained that Hours of Service violations were considered safety violations. That was why they were viewed as much more serious than Log Infractions, because Hours of Service violations risked the safety of Greyhound's drivers, its passengers and the general public. Further, Hours of Service violations can negatively impact Greyhound's publicly available Carrier Profile and the "R-Factor" – the Risk factor - which in turn, has the potential to impact the amount of business a carrier like Greyhound can do.

[206] Mr. Hickie testified that in the most extreme cases where Hours of Service violations cause an accident in which people are injured or killed, a company can lose its right to operate, as happened to a Canadian company which in December 2012 was responsible for a fatal accident in Oregon. The American Federal Motor Safety Administration issued an order which prohibited that company from operating in the United States. Mr. Hickie testified that the significance of an incident like this for Greyhound was that the results of extreme Hours of Service violations represent catastrophic risk to itself, its passengers and to the public. Greyhound's Carrier Profile R-Factor was very good, as was its Safety Fitness Rating, and inspections or audits by authorities which found Hours of Service violations would negatively impact both those criteria.

[207] The Respondent's witnesses Rob Davidson, Frank Marsh and David Butler all testified that they assessed the Complainant as having intentionally violated the Hours of Service. Mr. Davidson, Mr. Levandoski and Mr. Butler, as senior Greyhound managers, were particularly upset at what they viewed as the grievous breach of the trust relationship that was supposed to exist between Greyhound and its drivers – a trust that had to exist because the drivers spent the majority of their working day operating alone. These managers felt that the Complainant's actions in falsifying his copy of the Logbooks so that his Hours of Service would look legal, which he admitted at the Investigative Meetings, and what they viewed as his lack of remorse about those violations and actions had irretrievably broken that trust – it could not be repaired. Greyhound management could not overlook what it saw as repeated dishonesty that had gone on for a significant period of time. For Greyhound, there was no salvaging the relationship – it could no longer trust the

Complainant. Therefore, management decided that its only option was to terminate his employment for cause. I also note and take into account that his Union representative Frank Marsh also thought that in the circumstances, there was no chance for the Complainant to either keep his job or succeed at arbitration.

[208] Mr. Butler testified that all five drivers who were investigated had very little seniority but knew how to log, admitted to being trained properly on Hours of Service Regulations, knew the expectation that they were to maintain the driver's Logbook and admitted that they knew what they were doing was wrong and unlawful. Furthermore, according to Mr. Butler, all five committed these serious Hours of Service violations for extended periods of time and four of them were deliberately falsifying their Logs or maintaining two Logbooks for the same time periods. The Complainant was one of those four. Further, none of the five showed any remorse and they all admitted to doing so for monetary gain.

[209] Mr. Butler further testified that Greyhound's conclusion was that these drivers engaged in a wilful, deliberate process to manipulate, deceive and hide from Greyhound very serious Hours of Service violations. As a result, Greyhound management viewed these drivers as having no regard for the rules and laws. Mr. Butler testified that Greyhound never discussed the Complainant's or the Settling complainants national or ethnic origin or race, and Mr. Butler firmly denied that those were factors in Greyhound's decision to terminate their employment. Greyhound made the decision to terminate their employment because the managers felt they could never trust any of them again, because of the level of deceit in hiding what they were doing from their employer, and because they wilfully chose to ignore Greyhound's instructions. Greyhound management felt that these drivers had forever broken the trust Greyhound could have in them. With respect to the Complainant, and for the same reasons, Mr. Butler decided he could never trust him again and these same reasons were why the Respondent terminated his employment.

[210] Frank Marsh, the Complainant's Union representative who was present at the Investigative Meetings as the Complainant's Union representative, testified about his participation and his recollection of events. He testified, and I accept, that after the first Investigative Meeting with Greyhound, he did his own investigations of the Complainant's Logbooks and those of Mr. X and the other Settling complainants. Before starting his

investigation, he testified that he had asked the Complainant and Mr. X (and the other Settling complainants) if there was anything they wanted to tell him about their Logbooks. They both said they had nothing to say.

[211] Mr. Marsh testified that after his review, which he testified took many hours, he was disappointed because the review revealed that the Logbooks the Complainant and Mr. X gave him did not correspond with the Payslips they had submitted to the Respondent. Mr. Marsh testified that once his investigation was over, he could say that he had never seen so many Hours of Service violations in his approximately 20-year career.

[212] I have already discussed the Driver Audit Spreadsheet and the work done by BIRC earlier in this Decision. However, I wish to address what Mr. Butler said in direct examination when he was asked why Greyhound did not fire other drivers who it found by its Audits as shown on the Driver Audit Spreadsheet as having violated the Hours of Service. Mr. Butler responded by going through the list of Spare drivers in the Driver Audit Spreadsheet who had violated the Hours of Service. When he knew a driver personally and knew his or her national or ethnic origin because the topic had come up in his conversations with that driver over the years, Mr. Butler testified about the driver's national or ethnic origin. The Commission's witness, Mr. Al-Khafajy, also testified about the national or ethnic origin of many of the drivers on the Driver Audit Spreadsheet. However, in cross-examination, he acknowledged that sometimes he had made assumptions about their national or ethnic origin based on their lack of accent and their being Caucasian when he had not discussed their national or ethnic origin with the individual. I find that these were honest assumptions on Mr. Al-Khafajy's part, made without any negative intent. However, Mr. Butler identified the national or ethnic origin of an individual driver if he knew what it was from speaking with that driver about it. Therefore, unless Mr. Butler and Mr. Al-Khafajy agreed on the national or ethnic origin of a particular individual, I prefer the testimony of Mr. Butler on that identification. I wish to add that I found Mr. Al-Khafajy to be an honest witness, but because of his desire to protect the privacy of individuals when he felt it necessary to do so as President of the Union (not about their national or ethnic origin, but other matters), I found that he was not always a forthright witness.

In this part of his testimony, Mr. Butler did not testify about the Complainant and the Settling complainants. The parties, including the Commission, had consented to an order concerning the Driver Audit Spreadsheet, which I granted on October 17, 2013 (Driver Audit Spreadsheet Order). The Driver Audit Spreadsheet Order provides that the contents of the Driver Audit Spreadsheet is the property and confidential information of the Respondent and the information therein is only to be used as part of the inquiry into the Complaint and not for any other matter or legal proceeding, except that it can be used in any judicial review or appeal proceeding. The Driver Audit Spreadsheet Order provides that once the Tribunal issues a final Decision in the Complaint, and on either the expiry of the time for an application for judicial review of the Decision and any other appeal, the Complainant and the Settling complainants shall either immediately return all copies of the Driver Audit Spreadsheet in their possession, including in their Exhibit Books, to the Respondent or shall destroy them and provide confirmation of the destruction to the Respondent.

[213] The Respondent had advised that the document referred to in paragraph 1 of the Driver Audit Spreadsheet Order became the Driver Audit Spreadsheet that constitutes Exhibit R1-29, another copy of which is Exhibit HR1-31. The Respondent and the Complainant agreed during final submissions that the Decision would identify any drivers in the Driver Audit Spreadsheet to which the Decision referred by citing the page number and numerical position of the driver but not his name. The Decision can also refer to the national or ethnic origin of the driver as applicable, whether the driver had Hours of Service violations and/or Log Infractions and the discipline, if any, the Respondent decided on imposing. Therefore, in my description of testimony about the Driver Audit Spreadsheet, I do not use any of the drivers' names or other identifying information, except as described above.

[214] I find that the first six pages of the Driver Audit Spreadsheet set out the names of drivers whose Audits revealed that they were compliant with the Hours of Service. A number of those drivers had Log Infractions, and the Spreadsheet's "Comments on Infractions" column would sometimes describe the number or type of infraction and that the driver should be told to correct them.

[215] The last driver on page six and the drivers on pages seven through almost the end of page ten had Hours of Service Audits which found that they were not compliant with the Hours of Service. These drivers included the Complainant and the Settling complainants.

[216] The Decision does not describe Mr. Butler's testimony on why Greyhound did not fire certain violating visible minority drivers, because once the two Settling complainants who were also alleging discrimination on the ground of race or colour withdrew their complaints, discrimination on that ground was no longer an issue in the inquiry. Suffice it to say that the evidence established that there were such visible minority violating drivers and that the Respondent disciplined the vast majority of them short of terminating their employment.

[217] Mr. Butler testified about drivers on whom BIRC had done Hours of Service Audits and who had been found to have been compliant with the Hours of Service and had no Log Infractions, or who were Hours of Service compliant with Log Infractions. Here are some relevant examples:

- On page 2 of the Driver Audit Spreadsheet, the second driver was of Russian national origin, and his Hours of Service Audit dated March 28, 2010 for January 2010 showed him to have only minor Log Infractions; he received a Commendation;

- On page 3, the eighth driver was known to be of Lithuanian national origin by both Mr. Butler and Mr. Al-Khafajy, and the BIRC Audit for the month of March 2010 revealed that he was Hours of Service compliant, with Log Infractions, and needed to be reminded to enter plate numbers;

- On page 3, driver number 18 was known to Mr. Butler and Mr. Al-Khafajy to be of Polish national origin, and although Hours of Service compliant, had 26 plate infractions on his BIRC Audit for the month of January 2010;

- On page 4, driver number 26 was known to Mr. Butler as being of Polish national origin, as the driver had tried to teach Mr. Butler a few Polish words. That driver's Audit was done February 17, 2010 for the month of December 2009, and showed him to be Hours of Service compliant and with no Log Infractions, for which he received a Commendation letter;

- On page 1, driver number 1 was an immigrant from Iraq, for whom the BIRC Audit dated January 18, 2010 for the month of November 2009 revealed that he was Hours of Service compliant but had Log Infractions. Drivers who had a number of Log Infractions but were Hours of Service compliant did not receive discipline, but depending on the number of infractions, could be told to do better at record-

keeping, and this instruction was in the Comments section of the Driver Audit Spreadsheet.

- On page 13, driver number 3, the same driver of Lithuanian national origin as above, had another BIRC Audit done later, for the month of February 2011, which was a perfect Audit, for which he received a Commendation letter.

[218] There were also drivers who were visible minorities who had been audited and were Hours of Service compliant but for the reason previously stated, the Decision does not give details about them.

[219] Further, there were drivers who were of Canadian national origin who had been audited and were Hours of Service compliant, with some also having Log Infractions and some having no or very few Log Infractions, generating Commendation letters.

[220] Mr. Butler also went through many of the drivers listed in the Driver Audit Spreadsheet who had committed Hours of Service violations and explained why the Respondent disciplined those drivers as it did. For example, in the specific case of a French-Canadian driver who violated the Hours of Service during the G8 and the G20 in Toronto in 2010, Mr. Butler testified that he gave phone instructions to that driver who in Mr. Butler's opinion, had honestly misunderstood those instructions. This misunderstanding led the driver to commit Hours of Service violations. Mr. Butler testified that although the driver's Hours of Service violations were serious, because Mr. Butler had decided that the driver had honestly misunderstood the instructions, Greyhound did not fire him. Instead, it suspended him for five days and had him take re-training. Mr. Butler described a five-day suspension – and a suspension is without pay – as the most severe form of discipline other than firing.

[221] Another example was the last driver on page 8, who Mr. Butler knew and knew that his national origin was Polish. This driver had been found to have violated the Hours of Service because he worked for 20 days in a row without the required 24 hours off. Mr. Butler testified that the driver was an 11-year employee, who at the Investigative Meeting was very remorseful about the error and was upset at himself. Mr. Butler also took into account that it was a one-time incident and that he was satisfied that the driver had made a mathematical error. Those were the factors the Respondent took into account in deciding that the discipline would be a warning letter.

[222] Mr. Butler gave more examples of drivers who committed Hours of Service violations and were not fired. I find from both his testimony and that of Rob Davidson, as well as the information in the Driver Audit Spreadsheet, that if the drivers who had committed Hours of Service violations were first-time or one-time violators, showed remorse, were not found by the Respondent as having fraudulent or deceitful intentions (for example, by altering the Logbooks), had made an honest mistake, or had not gained monetarily from the violation, the Respondent did not fire the them. The Respondent would instead impose suspensions from one to five days, re-training, or place a warning letter in the driver's file. In other words, the discipline fell short of firing.

[223] When asked in direct examination if the Respondent found any other drivers who violated to the same extent as the Complainant and the Settling complainants, Mr. Butler responded: "Not even close". The documentary evidence, including the Driver Audit Spreadsheet, and Mr. Butler's testimony, established that no other drivers except the Complainant, the Settling complainants and a French-Canadian driver in 2011, had falsified their Logbooks. The Respondent also terminated the employment of the French-Canadian driver in 2011. With respect to the firing of this French-Canadian driver, the Complainant and the Settling complainants alleged that Greyhound only fired him in 2011 because the Complainant and the Settling complainants had referred to him not only in their Complaints but in their SOP as an example of a driver who Greyhound did not fire because he was a Canadian, notwithstanding that he committed Hours of Service violations. The evidence failed to establish this allegation.

[224] I find that the evidence established the following: that the Respondent's BIRC department did Hours of Service Audits on many drivers in the period starting in approximately January, 2010 to May 2010; that BIRC continued to do Hours of Service Audits afterwards, as shown in the Driver Audit Spreadsheets and the Hours of Service Audits in evidence; that both during the time that BIRC did Hours of Service Audits on the Complainant and the Settling complainants and afterwards, the other drivers on whom BIRC did Hours of Service Audits were of many different national or ethnic origins, including Canadian and non-Canadian; that the national or ethnic origin of drivers who the Audits found were Hours of Service compliant and received either Commendation letters or were

not disciplined were varied and included non-Canadian and Canadian national or ethnic origin; that the national or ethnic origin of drivers who were found Hours of Service compliant but had Log Infractions was also varied and included individuals of Canadian and non-Canadian origin; and finally, that the national or ethnic origin of drivers who the Hours of Service Audits found had violated the Hours of Service and who received some form of discipline was likewise varied and included individuals of Canadian and non-Canadian national or ethnic origin.

[225] Mr. Butler testified that another factor Greyhound took into account in its decision to fire the Complainant was that he had been violating the Hours of Service for a long period of time. On May 6, 2010, Greyhound's Mel Levandoski emailed Mr. Davidson asking for how long the Complainant and the two Russian Settling complainants had been violating their Hours of Service (Exhibit R2-52). Mr. Davidson's May 6, 2010 email answer with respect to the Complainant was "during [sic] 12 months". The Complainant objected to this e-mail being produced through Mr. Butler because it was not to or from Mr. Butler. Mr. Butler testified that he knew how long the Complainant had violated because Mr. Davidson had told him when they were discussing the investigation. The Tribunal admitted Exhibit R2-52 into evidence.

[226] The Complainant and the Commission submitted that the Respondent singled out the Complainant (and the Settling complainants) to be fired and that the evidence for this was that other drivers had committed the same Hours of Service violations without having their employment terminated by the Respondent. The Complainant and the Commission submitted that the Hours of Service violations were simply a pretext for discrimination on the ground of national or ethnic origin. The Decision only makes a definitive conclusion about the Complainant on this ground, as the Settling complainants withdrew their complaints. I conclude that with respect to the Complainant, the evidence failed to establish that any other driver committed the same number of Hours of Service violations as the Complainant and for as long a period of time, and I further conclude that the evidence failed to establish that any other driver in the time period of the Complainant and up to April, 2011 (except the Settling complainants and the French-Canadian driver described above, whose employment was also terminated) falsified his copy of the Logbook to appear compliant with the Hours of Service or for some other reason. I therefore conclude that the Respondent did

not single out the Complainant because of his national or ethnic origin when it terminated his employment, rather, it did so based on objective, credible evidence of what the Complainant had done.

(i) The Respondent's criteria of remorse

[227] Mr. Butler acknowledged in cross-examination that he was not at the Complainant's Investigative Meetings with Respondent management. Mr. Butler testified that he was told that at no point did any Respondent manager who did attend the Meetings - Mr. Davidson, Mr. Kightley or Mr. Pettigrew or anyone who interviewed the Complainant - state that he expressed or showed any remorse. Mr. Butler also testified that he had never directly asked an employee in any disciplinary hearing he had conducted if they were remorseful or sorry for what they did, because he would expect a certain answer. He expected an expression of remorse to come voluntarily from the individual. Mr. Davidson testified that the Complainant had not expressed remorse during the Investigative Meetings.

[228] The Complainant testified in cross-examination that he did not offer an apology at his Investigative Meetings.

[229] I made a finding, above, that in deciding what type of discipline to levy on a driver who had committed Hours of Service violations, one of the factors the Respondent took into account was whether the driver was remorseful – that is, whether the driver expressed that he was sorry for what he did, or whether he apologized. I conclude that the Respondent was entitled to decide the criteria on which to base its discipline decisions, so long as, for the purposes of this Tribunal, such criteria did not constitute a discriminatory practice. I also conclude that it is irrelevant for the purposes of this Tribunal inquiry whether one of the criteria for Greyhound's firing of the Complainant was whether he expressed remorse or apologized for violating the Hours of Service and handling his Logbook as he did. The Respondent was entitled to weigh that factor into its decision on discipline, but I find that the presence or absence of remorse or apology has no relationship, no link or connection to a discriminatory ground, and therefore no relevance to what this Tribunal must decide, which

is whether the Respondent's termination of the Complainant's employment constituted a discriminatory practice contrary to the *Act*.

(ii) Observations

[230] I wish to make some further observations. The evidence established that the Complainant altered his Logbooks so that if he was stopped by any authority who could ask for those Logbooks to see if he was complying with the Hours of Service, he would look legal and avoid a large fine. The Respondent viewed this as deceitful and contrary to the legislation about not altering or destroying Logbooks and not recording the same time periods in more than one Logbook.

[231] However, the evidence also established that when the Complainant submitted his Payslips to the Respondent in order to get paid, he submitted the Hours he actually drove. The evidence, and the Respondent, did not find that the Complainant billed for work he did not do. In other words, the Complainant worked for his pay. Indeed, Mr. Butler honestly and forthrightly acknowledged this. It did not excuse the Complainant's intentional altering his Logbooks and violating his Hours of Service for an extended period of time or driving when the legislation required that he should have been resting. The finding that the Complainant did not submit Payslips for work he did not do should not be interpreted as the Tribunal implying that the Respondent should have "caught" the Complainant sooner. This finding is also not meant to minimize the Complainant's responsibility for what he did; nevertheless, the Decision acknowledges the undisputed fact that the Complainant worked for what he earned.

IX. Conclusion

[232] I conclude from the totality of the evidence that the fact that Greyhound terminated the Complainant's employment rather than applied progressive discipline had nothing to do with the fact that he was a new immigrant, or with his national or ethnic origin and was not a pretext for discrimination. Rather, there was objective, credible evidence that the fact that the Respondent terminated his employment was a reflection of what the Respondent

considered to be the Complainant's intentional, multiple, severe Hours of Service violations, along with what the Respondent considered deceitful behaviour in altering the carbons in his Logbooks to be within the Hours of Service in case he was stopped by the police or another authority, which all combined to irretrievably break the Respondent's trust in him.

Orders

[233] Pursuant to the Driver Audit Spreadsheet Order, the Tribunal confirms and orders that the parties are to handle and treat the Driver Audit Spreadsheet as required in the Driver Audit Spreadsheet Order, and without limiting the generality of the foregoing:

a) Exhibit HR1-31, titled "Driver Audit Spreadsheet", being 13 pages plus one cover email from the Respondent's counsel is subject to and governed by the Driver Audit Spreadsheet Order;

b) Exhibit R1-29, titled "DRIVER AUDIT SPREADSHEET", being 13 pages, and which is the same document as Exhibit HR-31, except without a cover email and printed in a larger format, is subject to and governed by the Driver Audit Spreadsheet Order;

c) The Tribunal shall keep each of Exhibits HR1-31 and R1-29 in an envelope marked "Confidential", which envelope will itself be kept in a red folder marked "Confidential";

d) The Tribunal shall otherwise deal with Exhibits HR1-31 and R1-29 in accordance with the Driver Audit Spreadsheet Order.

[234] The Tribunal dismisses the Complaint.

Signed by

Olga Luftig
Tribunal Member

Ottawa, Ontario
July 29, 2020

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1853/8312

Style of Cause: Dmitri Izrailov v. Greyhound Canada Transportation Corp.

Decision of the Tribunal Dated: July 29, 2020

Date and Place of Hearing: February 9 to 27, 2015
November 16 to 18, 2015
December 14 to 16 2016

Toronto, Ontario

Appearances:

Dmitry Izrailov, for himself

Giacomo Vigna, for the Canadian Human Rights Commission

Joyce A. Mitchell, for the Respondent