Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2023 CHRT 25
Date: June 27, 2023
File No.: T2225/4717

Between:

Jennifer Young

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

VIA Rail Canada Inc.

Respondent

Decision

Member: Kirsten Mercer

Table of Contents

I. Overview & Summary of Decision

[1] Ms. Jennifer Young (the "Complainant" or "Ms. Young") alleges that her employer, VIA Rail Canada Inc. (the "Respondent" or "VIA") is liable for harassment perpetrated against her on the basis of her sex by her fellow employee, Mr. Kevin Sawchuck, who is not a party to these proceedings. Ms. Young relied on the protections afforded by s. 7(b) of the *Canadian Human Rights Act,* RSC 1985, c.H-6 (the "Act") (against discrimination in the course of employment) and s. 14 of the Act (against harassment on the basis of sex in matters related to employment).

[2] There was no dispute before the Tribunal that Mr. Sawchuk had engaged in adverse and unprofessional conduct towards Ms. Young. In fact, VIA found that Mr. Sawchuk's treatment of Ms. Young breached VIA's Code of Conduct, and he was given significant discipline. VIA disputes, however, that Mr. Sawchuk's conduct was discriminatory within the meaning of the Act or included harassment on the basis of sex or sexual harassment. VIA also disputes that it is liable for Mr. Sawchuk's conduct.

[3] The Canadian Human Rights Commission (the "Commission") supported Ms. Young's discrimination complaint and argued that VIA was indeed liable under the Act for Mr. Sawchuk's conduct. In particular, the Commission argued that VIA had failed to adequately respond to Ms. Young's initial complaints about Mr. Sawchuk's conduct and that VIA's internal investigation was inadequate. Thus, the Commission argued that VIA was liable for Mr. Sawchuk's conduct.

[4] For the reasons below, I have determined that Mr. Sawchuk engaged in discriminatory conduct towards Ms. Young, in breach of the Act. Specifically, I have found that Mr. Sawchuk engaged in conduct that constitutes discrimination in the course of Ms. Young's employment and harassment on the basis of sex. I have found that Mr. Sawchuk's conduct was not of a sexual nature and have therefore not found a breach that engages the protections of s. 14(2) of the Act. I have further determined that VIA is not entitled to avoid statutory liability for the workplace conduct of its employee, Mr. Sawchuk, as it failed to exercise all due diligence to prevent or mitigate the discriminatory conduct.

II. Issues

A. Preliminary Issues

1. Historic and Continuing Gender Diversity at VIA

[5] The Tribunal takes judicial notice of the fact that, historically, rail work in Canada (including driving and servicing trains) was a predominantly male occupation.

[6] The Tribunal averted to this context at the hearing during closing arguments, and VIA elected to make supplementary written submission on this point.

[7] VIA argued that there was "no evidence" that the Toronto Maintenance Centre ("TMC") was a male-dominated workplace and argued that "women's presence in and contribution to the workplace at the Toronto maintenance Centre was well established." VIA conceded that the three managers involved with the facts of this case were all men but asserted that they had all received appropriate training regarding harassment and VIA's Code of Conduct.

[8] VIA noted that Ms. Leslie Selesnic played an important role in the workplace investigation conducted in this case and noted the involvement of Ms. Barbara Anne Blair.

[9] Despite VIA's arguments, the evidence supports a finding that the TMC, and specifically the night shift of locomotive attendants who are most directly implicated in the events at issue in this Complaint, represent an historically male group of workers. This does not mean that there are no women present, which is obviously not the case. Rather, it means that the Complaint is situated within a workplace context with norms and values that are shaped by the dominant culture of the workforce and the mostly male workforce which has historically held those roles.

[10] At the relevant time, the controllers were all men. The shift supervisor was a man, and, during his evidence, the senior manager of the TMC, Mr. Zeke Medeiros, identified that the historic and ongoing lack of gender diversity in this workplace was a problem that he was committed to addressing and identified the railway as a "male dominated industry."

[11] VIA's assertion that there is no evidence upon which the Tribunal could conclude that the TMC or rail work more generally has historically been a male work environment is simply inaccurate. In fact, I greatly appreciate the fact that Mr. Medeiros testified with sincerity about his concerns regarding gender diversity at VIA and the TMC specifically. He noted that, when Mr. Sawchuk started at the TMC in (around) 1985, there was only one woman working "back then" and for about a decade they went without any women in the department until Ms. Julie Trepanier and Ms. Teona Kindt were hired.

[12] Mr. Medeiros also testified that he was pleased when Ms. Young was hired into the locomotive attendant program, stating that "it was good to see a woman entering the program."

[13] When the Tribunal observes that the railways are historically male-dominated, it is because properly understanding the historical and normative context of the complaint can be relevant to understanding and addressing discrimination, if it is found to exist. The history does not excuse discrimination nor does acknowledging that history mean that a workplace is doomed to relive it in perpetuity.

[14] However, until we are able to name and identify the ways in which historical and ongoing privilege shape a workplace, we are limited in our ability to identify discrimination when it occurs and to respond adequately to address and prevent it.

[15] The Tribunal applauds the initiatives undertaken by VIA to ensure that its workplace continues to reflect the full gender diversity of the communities it serves, some of which were noted by Mr. Medeiros in his evidence. It is in that spirit of striving for discrimination-free work environments that the Tribunal renders its decision.

2. The Reasonable Woman vs the Reasonable Person in the Same Circumstances

[16] At the end of the hearing, having had the benefit of the parties' closing arguments, and based upon the Tribunal's consideration of the Federal Court of Appeal's decision in *Stadnyk v. Canada (Employment and Immigration Commission)*, 2000 CanLII 15796 (FCA) [*Stadnyk*], I asked the parties whether my analysis of the conduct detailed in the Complaint and whether it would or should have been seen as unwanted should be based on the

standard of the reasonable person or the reasonable woman, and if that distinction was important in this case.

[17] VIA argued that it would be prejudiced by the application of a *reasonable woman* standard in this case, as it would have lost the opportunity to call two of the other women who worked with Mr. Sawchuk, whose testimony about his conduct might have had some bearing on the Tribunal's analysis.

[18] I disagree.

[19] Whether one applies the *reasonable woman* standard articulated by the Tribunal and upheld by the Federal Court of Appeal in *Stadnyk* or the standard of the *reasonable person in the circumstances* articulated by the Tribunal in *Canada (Human Rights Commission) v. Canada (Armed Forces)*, 1999 CanLII 18902 (FC) [*Franke*], (upon which the Respondent purports to rely), in this case (and indeed in the preponderance of cases of sexual and gender harassment), the reasonable person in the circumstances should in fact be a woman.

[20] The issue of Mr. Sawchuk's relationships with his female co-workers, and in particular female co-workers who do not share Mr. Sawchuk's approach to the work of a locomotive attendant, was apparent to all parties to this proceeding from the outset. Numerous references to Mr. Sawchuk's relationship with Ms. Kindt and Ms. Trepanier, and other women with whom Mr. Sawchuk interacted in the workplace, were made throughout the hearing and in the parties' submissions, including in VIA's submissions.

[21] Despite this, VIA elected not to call either Ms. Trepanier or Ms. Kindt as a witness in these proceedings. This decision, made for reasons known only to VIA, meant that the assertions that had been made at the hearing about Mr. Sawchuk's working relationship with women in general, and with each of them, could not be put to these women nor could their answers be tested on cross-examination. Whether or not the parties were surprised by the Tribunal's questions about the *Stadnyk* decision, it is not credible to assert that any party lacked notice of the issue of Mr. Sawchuk's relationship with his female co-workers. The fact that VIA chose not to call any of Mr. Sawchuk's female co-workers, whatever its reasons may have been, does not now give rise to a suggestion that it would be prejudiced

by the Tribunal's consideration of what a reasonable woman (or a reasonable person in the circumstances) would perceive to be unwelcome conduct.

[22] Having said all of that, it is my view that the *reasonable person in the circumstances of this Complaint* is a *reasonable woman*. And, in any case, I find that it is open to the Tribunal to rely on the *Stadnyk* decision, which is binding authority on this Tribunal.

B. Main Issues

1. Does Mr. Sawchuk's conduct towards Ms. Young constitute a breach of the Act?
    a. Does Mr. Sawchuk's conduct constitute discrimination on the basis of Ms. Young's identity as a woman, or sex, in the course of her employment in the meaning of s. 7(b) of the Act?
    b. Does Mr. Sawchuk's conduct represent harassment on the basis of Ms. Young's identity as a woman in the meaning of s. 14(1)(c) of the Act?
    c. Does Mr. Sawchuk's conduct constitute sexual harassment in the meaning of s. 14(2) of the Act?
2. If the answer to any of a, b or c above is yes, is VIA liable for Mr. Sawchuk's conduct, by operation of s. 65 of the Act?
3. If so, what remedy should be ordered against VIA?

III. Applicable Law

[23] Throughout the course of the hearing into this Complaint, and in their closing submissions, the parties focussed their submissions on Mr. Sawchuk's conduct as harassment on the basis of sex within the meaning of s. 14 of the CHRA (sometimes conflating the idea of harassment on the basis of sex with sexual harassment). Ms. Young also relied upon s. 7(b) of the CHRA to complain about adverse treatment in the course of her employment related to her identity as a woman.

[24] Under s. 7(b) of the CHRA, it is a discriminatory practice, in the course of employment, to differentiate adversely in relation to an employee on a prohibited ground of discrimination. Section 14(1)(c) of the CHRA provides that it is a discriminatory practice, in

matters related to employment, to harass an individual on a prohibited ground of discrimination.

[25] The Tribunal's analysis of a complaint of adverse differential treatment in the course of employment (s. 7(b) of the CHRA) and its analysis of a workplace harassment complaint (s. 14 of the CHRA) are both concerned with identifying workplace conduct that discriminates against a complainant on the basis of a protected characteristic. However, the test employed in the Tribunal's analysis of each of the statutory grounds invoked in this complaint is somewhat different, so my reasons will analyze each of those claims below.

i. Discrimination in Employment (s. 7(b) of the CHRA)

[26] In the context of an inquiry into a human rights complaint, the burden of proof at the initial stage rests with the complainant. This analysis is often referred to as establishing a *prima facie* case of discrimination. The use of this Latin maxim is unnecessary, however, as it makes the law less accessible to Canadians and may even give rise to misunderstandings concerning the applicable law in matters related to discrimination (see similar comments in *Duverger v. Aeropro*, 2019 CHRT 18 (CanLII), at para 14 [*Aeropro*], *Simon v. Abegweit First Nation*, 2018 CHRT 31, at para. 51. See also *Emmett v. Canada Revenue Agency*, 2018 CHRT 23, at paras. 53 and 54 as well as *Vik v. Finamore (No. 2)*, 2018 BCHRT 9).

[27] Regardless of what this initial stage of the analysis is called, the applicable analysis remains the same: the complainant's burden is to make a case "[...] which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer" (*Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 SCR 536, at para 28).

[28] The three-step analysis for these claims of discrimination was established by the Supreme Court of Canada in *Moore v. British Columbia (Education)*, [2012] SCR 61 [*Moore*], at paragraph 33. According to this analysis, the complainant must demonstrate:

> (1) that they have a characteristic protected from discrimination under the CHRA;
>
> (2) that they experienced an adverse impact; and
>
> (3) that the prohibited ground of discrimination was a factor in the adverse impact.

[29] The analysis of a complaint alleging adverse differential treatment in the course of employment within the meaning of s. 7(b) of the CHRA will follow the *Moore* test (see, e.g., *Aeropro*).

[30] The evidence presented to the Tribunal must be analyzed on a balance of probabilities, and it is not necessary to demonstrate that the prohibited ground was the sole factor in the adverse impact experienced by the complainant (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, [2015] SCR 789 [*Bombardier*]).

[31] Direct proof of discrimination is not necessarily required, nor must the complainant demonstrate an intention to discriminate (see *Bombardier*, at paras 40 and 41). Discrimination is often not open or intentional. That is not the question before the Tribunal. Instead, the Tribunal must determine whether the conduct, regardless of intent, had an adverse differential impact on Ms. Young. In doing so, the Tribunal must consider all of the circumstances that gave rise to the Complaint in order to determine whether a subtle scent of discrimination is present (see *Basi v. Canadian National Railway Company*, 1988 CanLII 108 (CHRT) [*Basi*])

[32] The Tribunal can draw inferences from circumstantial evidence when the evidence presented in support of allegations make such an inference more probable than other possible inferences or hypotheses (see *Basi*). That said, the circumstantial evidence must be tangibly related to the impugned conduct (see *Bombardier*, at para. 88).

ii. Harassment on the Basis of Sex (s. 14(1)(c) of the CHRA)

[33] The Tribunal's analysis of a complaint made pursuant to s. 14 of the Act, although ultimately concerned with identifying discriminatory conduct, takes a somewhat different approach.

[34] Harassment is not defined in the CHRA. However, the case law of the Tribunal and the reviewing courts have framed the applicable analysis for a harassment complaint made pursuant to s. 14 of the Act.

[35] In *Morin v. Canada (Attorney General)* 2005 CHRT 41 [*Morin*], Member Hadjis wrote the following, in paragraphs 245 and 246:

> [245] It is a discriminatory practice, under s. 14 of the Act, to harass an individual on a prohibited ground of discrimination in matters related to employment.
>
> [246] Harassment, as proscribed under the Act, has been broadly defined as unwelcome conduct related to one of the prohibited grounds of discrimination that detrimentally affects the work environment or leads to adverse job-related consequences for the victims (*Janzen v. Platy Enterprises Ltd.* [1989] 1 S.C.R. 1252 at 1284; *Rampersadsingh v. Wignall (No. 2)* (2002), 45 C.H.R.R. D/237 at para. 40 (C.H.R.T.)). In *Canada (HRC) v. Canada (Armed Forces) and Franke*, [1999] 3 F.C. 653 at paras. 29-50 (F.C.T.D.) ("*Franke"*), Madame Justice Tremblay-Lamer articulated the test for harassment under the Act. In order for a complaint to be substantiated, the following must be demonstrated:
>
> > i. The respondent's alleged conduct must be shown to be related to the prohibited ground of discrimination alleged in the complaint (in the present case, the Complainant's colour). This must be determined in accordance with the standard of a reasonable person in the circumstances of the case, keeping in mind the prevailing social norms.
> >
> > ii. The acts that are the subject of the complaint must be shown to have been unwelcome. This can be determined by assessing the complainant's reaction at the time of the alleged incidents of harassment and ascertaining whether [they] expressly, or by [their] behaviour, demonstrated that the conduct was unwelcome. A verbal "no" is not required in all circumstances - a repetitive failure to respond to a harasser's comments constitutes a signal to [them] that [their] conduct is unwelcome. The appropriate standard against which to assess a

> complainant's reaction will also be that of a reasonable person in the circumstances.
>
> iii. Ordinarily, harassment requires an element of persistence or repetition, but in certain circumstances even a single incident may be severe enough to create a hostile environment. For instance, a single physical assault may be serious enough to constitute harassment, but a solitary crude joke, although in poor taste, will not generally be enough to constitute harassment since it is less likely, on its own, to create a negative work environment. The objective, reasonable person standard is used to assess this factor as well.
>
> iv. Finally, where a complaint is filed against an employer regarding the conduct of one or more of its employees, as in the present case, fairness demands that the victim of the harassment, whenever possible, notify the employer of the alleged offensive conduct. This requirement exists where the employer has a personnel department with a comprehensive and effective harassment policy, including appropriate redress mechanisms, which are already in place.

[36] In its *Morin* decision, the Tribunal relied on the Supreme Court of Canada's decision in *Janzen v. Platy Enterprises Ltd.* [1989] 1 S.C.R. 1252 [*Janzen*] and the *Franke* decision by the Federal Court, both of which were cited before me in this case.

[37] The *Morin* principles have been adopted by our Tribunal in various decisions (see for example, Aeropro, *Dawson v. Canada Post*, 2008 CHRT 41, *Hill v. Air Canada*, 2003 CHRT 9, *Alizadeh-Ebadi v. Manitoba Telecom Services Inc.*, 2017 CHRT 36, *Croteau v. Canadian National Railway Company*, 2014 CHRT 16, *Day v. Canada Post Corporation*, 2007 CHRT 43, *Stanger v. Canada Post Corporation*, 2017 CHRT 8 [*Stanger*], *Siddoo v. International Longshoremen's and Warehousemen's Union, Local 502* 2015 CHRT 21 [*Siddoo*], affirmed 2017 FC 678).

iii. Sexual Harassment (s. 14(2) of the CHRA)

[38] The Act does not include an express definition of sexual harassment. However, the Supreme Court of Canada has defined sexual harassment as "unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment" (*Janzen*, at 1284). This understanding of

the meaning of sexual harassment has been repeatedly confirmed in the decades since its articulation by the Supreme Court of Canada in courts, tribunals and by arbitrators across Canada, including in decisions of this Tribunal (see most recently, *Peters v. United Parcel Service Canada Ltd. and Gordon*, 2022 CHRT 25 [*Peters*].)

[39] In *Franke*, the Federal Court determined that the legal test in *Janzen* ought to be applied in decisions made by this Tribunal. The Federal Court rearticulated the elements of the test in *Janzen:*

> 1) unwelcome conduct;
>
> 2) conduct that is sexual in nature; and
>
> 3) either a pattern of persistent conduct or a single serious incident.

And it added a fourth requirement:

> 4) that the employee notify the employer of the alleged sexual harassment where the employer has a human resources department and a comprehensive and effective sexual harassment policy, including redress mechanisms in place.

iv. Liability for the Conduct of an Employee (s. 65 of the CHRA)

[40] If a complainant is able to meet the burden of proof for their case, the respondent may avail itself of a defence provided in the CHRA, when possible, or limit liability, where applicable, under subsection 65(2) of the CHRA. In this case, the Respondent seeks to rely on s. 65 to limit its liability in the event that the Tribunal finds that Ms. Young's Complaint is substantiated.

[41] Subsection 65(1) of the CHRA provides that "any act or omission committed by an officer, a director, an employee or an agent of any person, association or organization in the course of the employment of the officer, director, employee or agent shall be deemed to be an act or omission committed by that person, association or organization." According to subsection 65(2), this presumption will not apply "if it is established that the person, association or organization did not consent to the commission of the act or omission and exercised all due diligence to prevent the act or omission from being committed and, subsequently, to mitigate or avoid the effect thereof."

[42] In effect, if the Tribunal finds discriminatory conduct on the part of an employee, an employer can avoid being held liable for that conduct if it can demonstrate that it did not condone or consent to the conduct and that it responded in a reasonably effective manner to address or prevent the conduct.

IV. Analysis

A. Ms. Young Was the Subject of Discriminatory Conduct

[43] Ms. Young's Complaint is, essentially, that Mr. Sawchuk treated her in a way that discriminated against her as a woman. In her Complaint, her Statement of Particulars, throughout the course of the hearing and in her closing argument, Ms. Young described the adverse treatment as harassment, as did the Commission.

[44] As is detailed above, there are two sections of the Act that address the conduct that forms the basis of Ms. Young's Complaint: s. 7(b) and s. 14, both of which are identified in the pleadings in this matter. While the impugned conduct is the same in each case, the Tribunal's analysis of each statutory protection is somewhat different. Therefore, I will consider and make findings with respect to the facts alleged by Ms. Young and analyze that conduct first in light of the Tribunal's test for s. 7(b). I will then consider the same conduct in light of the Tribunal's test for harassment in relation to sex in matters related to employment (s. 14(1)(c)), and, finally, I will consider the specific test for sexual harassment established through the relevant Tribunal jurisprudence.

1. Adverse Differential Treatment in the Course of Employment (s. 7(b) of the CHRA)

[45] As I have already stated, the Tribunal's analysis of a complaint arising from s. 7 of the Act was set out in *Moore*. Each of the *Moore* factors are considered below, but, on the basis of the parties' submissions, the main questions before the Tribunal are (1) whether the conduct alleged by Ms. Young was established, on a balance of probabilities, and (2) whether it is more likely than not that Ms. Young's sex was a factor in Mr. Sawchuk's conduct towards her.

[46] Throughout the hearing and in its closing submissions, VIA repeatedly conflated the second and third elements of the *Moore* analysis (adverse treatment and a connection to a protected characteristic). For example, VIA states:

> The Respondent submits that although certain incidents described in the allegations could constitute workplace harassment disputes, there is no evidence of any adverse differential treatment or harassment based on sex or gender.

[47] Conflating these two steps of the analysis obscures the central issue in dispute in this Complaint: whether Ms. Young's sex was a factor in Mr. Sawchuk's conduct towards her.

[48] To make a proper determination about whether a complaint should be substantiated, each of these steps must be considered in turn.

[49] First, the Tribunal must consider if the Complainant possesses a characteristic that is protected by the Act. Second, the Tribunal must consider whether the Complainant experienced any adverse treatment, which is clear on the evidence presented in this case and which will be laid out in more detail below. And third, assuming the presence of adverse treatment, the Tribunal must consider whether the protected characteristic was a factor in the adverse treatment, recalling that it need not be the sole or even primary cause of the adverse treatment but merely a factor in the adverse treatment.

i. Protected Characteristic

[50] There was no dispute before me over the fact that Ms. Young's sex is female or that sex is a protected characteristic under the Act.

ii. Adverse Treatment

[51] Ms. Young's Complaint alleges more than twenty incidents that she claims constituted harassment on the basis of her sex. In the course of the hearing, some of the events were discussed in detail, others were only mentioned in passing, and still others were not mentioned at all. For the purpose of this analysis, I haven taken my cue from the parties

and will focus my reasons on those events or incidents which were emphasized at the hearing and those elements or aspects of the complaint that were most relevant or useful in making this decision (*Turner*, 2012 FCA 159 (CanLii) at para 40, *Constantinescu v. Correctional Services Canada*, 2022 CHRT 13 at para. 33).

[52] Based on the evidence presented at the hearing, and informed by VIA's own definition of harassment as "any unwelcome action which humiliates, offends or intimidates" as is laid out in the VIA harassment policy which was made an exhibit in these proceedings, I have considered eleven of the specific incidents alleged by Ms. Young and the Commission to constitute discriminatory conduct as well as the totality of the interactions between Ms. Young and Mr. Sawchuk about which the Tribunal heard evidence.

[53] There was no serious attempt to suggest that Mr. Sawchuk's conduct was not adverse to Ms. Young. In fact, in addition to VIA's own findings that Mr. Sawchuk's conduct constituted a breach of the Code of Conduct warranting significant discipline, witnesses, including VIA's own witnesses, called Mr. Sawchuk's conduct "boorish", "unprofessional", "vulgar" and "difficult."

[54] Despite the fact that the adverse nature of Mr. Sawchuk's treatment of Ms. Young was all-but conceded by VIA at the hearing and was substantiated by VIA's own internal workplace investigation, I will consider and make findings with respect to many of the specific allegations raised in the Complaint, as the details of those incidents are material to the discussion of the final step of the *Moore* test: the nexus or connection between the conduct and Ms. Young's sex or identity as a woman, which was contested by VIA.

(1) Individual Incidents Alleged in the Course of Mr. Sawchuk's Conduct

a. Surveillance and Photographing (January 2012)

[55] Ms. Young testified that the first incident detailed in her Complaint took place in January 2012. Mr. Sawchuk, she said, was watching her from inside his vehicle while Ms. Young and her partner, Mr. Kanelopoulos, worked at the fuel stand. Ms. Young also testified that Mr. Sawchuk was taking photos of her while she worked that his overall conduct was "creepy" and that it made her uncomfortable.

[56] Mr. Kanelopoulos also testified before the Tribunal and corroborated Ms. Young's testimony, though both witnesses conceded that they were quite far from Mr. Sawchuk at the time.

[57] Mr. Sawchuk testified before the Tribunal and admitted that he was at the location at the time of this alleged incident, but he denied taking any photos of Ms. Young. In response to questions from the Tribunal, Mr. Sawchuk testified that he has no recollection of what he was doing at the time of the incident. Mr. Sawchuk went on to testify that, upon being confronted about taking photos of Ms. Young by the shift supervisor, Mr. Gilbert Hamilton, he offered to allow VIA to review his phone, presumably to check for evidence of the photos. Mr. Hamilton declined to inspect Mr. Sawchuk's phone or otherwise determine whether any photos had been taken on the night in question.

[58] The Tribunal heard evidence from multiple witnesses, including Mr. Sawchuk himself, about Mr. Sawchuk's practice of observing the work performed by his colleagues during their shift and letting them or management know when he found their work to be lacking in some way.

[59] On the basis of the evidence before me, I find that Mr. Sawchuk was present at the fuel stand and was watching Ms. Young while she and Mr. Kanelopoulos performed their duties. I further find that this type of workplace surveillance by a peer or colleague with no supervisory responsibility over Ms. Young was unwelcome conduct that could humiliate, offend or intimidate.

[60] I am unable to make a finding, based on the evidence before me, that Mr. Sawchuk was taking pictures of Ms. Young, though I believe that Ms. Young believes this to be the case. This is not to say that I have concluded that Mr. Sawchuk did <u>not</u> take the photos. Rather, given how far away Ms. Young and Mr. Kanelopoulos were from Mr. Sawchuk, and in light of Mr. Sawchuk's testimony and Mr. Hamilton's failure to inspect Mr. Sawchuk's phone, I find that I am unable to make a factual finding either way about whether Mr. Sawchuk was taking pictures of Ms. Young on the night in question.

[61] A single incident of watching colleagues while they work, though perhaps unpleasant, unwelcome or (to use Ms. Young's term) "creepy", is unlikely to be sufficient to ground a

harassment complaint. However, I find that, taken in conjunction with other adverse or unwanted treatment, this conduct is adverse within the meaning of the Act.

b. Swearing (January 2012)

[62] Ms. Young testified that a week following the incident at the fuel stand, described above, she and Mr. Sawchuk had a disagreement about whether Mr. Sawchuk could ride along in the cab while she conducted a train movement. Mr. Sawchuk was, as was sometimes the practice in the train yard, getting a ride from one part of the yard to another on the vehicle that Ms. Young was assigned to move in the course of her duties.

[63] There is no dispute that Ms. Young was within her rights under the safety rules to ask Mr. Sawchuk to move out of the cab while she was conducting the train movement—a fact that Mr. Sawchuk would have known based on his detailed knowledge and understanding of the safety rules applicable to the work of a locomotive attendant.

[64] However, instead of acting in a respectful and collegial manner when asked by Ms. Young to leave the cab, the evidence before me was that Mr. Sawchuk responded with an outburst of frustration including the use of swear words.

[65] At the hearing before the Tribunal, VIA argued that Mr. Sawchuk was not swearing *at* Ms. Young but merely *in response* to Ms. Young's request that he leave her work environment while she was conducting the train movement. I do not find this distinction to be a meaningful one in the circumstances, and neither did VIA manager, Mr. Hamilton, who reprimanded Mr. Sawchuk for conduct that he found unacceptable.

[66] Although no witness was able to recall the words that Mr. Sawchuk used, I am satisfied that this incident constitutes intimidating behaviour by Mr. Sawchuk and find that it constitutes adverse treatment in the meaning of the Act.

[67] Following this incident, Ms. Young first reported Mr. Sawchuk's conduct to management. Mr. Hamilton asked Ms. Young to put her complaint in writing, which she did on January 2, 2012. Ms. Young alleged that Mr. Sawchuk had watched and photographed her at the fuel stand a week prior and had refused to leave the cab upon her request the

day prior while she was conducting a train movement. Ms. Young advised VIA that Mr. Sawchuk raised his voice and swore at her.

[68] I also note, as I will discuss in more detail in my analysis of VIA's liability for Mr. Sawchuk's workplace conduct, that this heightened response by Mr. Sawchuk to Ms. Young's request was brought to the attention of management. This kind of aggressive and unprofessional conduct on the part of an employee who is well aware of the rules and expectations of his job ought to have raised concerns for VIA about an underlying problem that warranted further monitoring, if not further investigation.

[69] However, when the matter (along with the alleged monitoring and photographing of Ms. Young at the fuel stand) was raised with Mr. Hamilton, he did not conduct a thorough investigation, he did not take any steps to actually determine whether or not photos had indeed been taken of Ms. Young (beyond relying on Mr. Sawchuk's denial) and it does not appear that VIA took any steps to investigate *why* Mr. Sawchuk responded in such an aggressive manner to his colleague's request that he leave the cab while she was conducting the train movement.

[70] While VIA's closing submissions state that Mr. Hamilton "investigated the matter and brought it to resolution," the events that followed suggest that the matter was far from adequately resolved.

c. Dangerous driving

[71] Ms. Young alleged that, in February 2012, shortly after Mr. Hamilton purported to resolve her initial complaint, Mr. Sawchuk drove a company vehicle in a reckless manner towards her in the train yard and proceeded to interfere with her effort to obtain supplies from the storage shed.

[72] Ms. Young also complained about a second incident of dangerous driving that she alleged had taken place in September 2013. This second incident was the subject of testimony from several witnesses and was identified by Ms. Young as a significant source of concern for her own safety.

[73] Ms. Young testified that around September 18, 2013, Mr. Sawchuk drove the company vehicle in a reckless manner at a level crossing where she was conducting a train movement. Ms. Young had a very distinct recollection of the events of that day and testified that her level of concern about safety was particularly heightened because of an incident that had occurred at a level crossing near Ottawa where a train had collided with a public transit vehicle, killing six people. Ms. Young noted that the stress level in the TMC yard that night was high, and she believed that Mr. Sawchuk was attempting to intimidate her while she performed the train movements that she had been assigned.

[74] Ms. Young's testimony about the September 2013 incident was corroborated by Mr. Kanelopoulos, who told the Tribunal that Mr. Sawchuk drove the company vehicle recklessly at the crossing, resulting in Mr. Kanelopoulos having to "dump the brakes" or stop suddenly. Mr. Kanelopoulos testified that he reported the incident to Mr. Hamilton.

[75] Mr. Sawchuk also testified about this event and denied that he drove at the crossing in a manner designed to intimidate Ms. Young. He corroborated the near miss incident but stated that he did not see the train as there were no lights at the back of the train and that he was not intending to intimidate Ms. Young.

[76] The Tribunal heard from many witnesses during the course of the hearing, and the observation that Mr. Sawchuk was fixated on what he perceived to be safety concerns and the Rules were consistently noted in the evidence. Mr. Sawchuk was repeatedly characterized as a "control freak" who was obsessed with safety and the Rules.

[77] Based on the totality of the evidence about Mr. Sawchuk's experience on the night shift, his vigilant conduct in the yard and his self-described fixation with safety, coupled with the heightened atmosphere of safety consciousness that night following a multiple-fatality collision between a train and a vehicle earlier that day, I do not find it credible that Mr. Sawchuk was approaching a level crossing in a vehicle and was not aware of the presence of a train.

[78] The evidence supports a finding that the near miss did occur and, while I do not think Mr. Sawchuk acted in a way that he believed would actually endanger himself or the train, I find that it is more likely that Mr. Sawchuk was conscious of what he was doing. While I

conclude that Ms. Young sincerely believed that Mr. Sawchuk's conduct was an intentional attempt to intimidate or threaten her, particularly in the heightened emotional context that she described on that shift, I do not have sufficient evidence to find that Mr. Sawchuk perpetrated such a reckless act intentionally to harm Ms. Young.

d. Standing behind Ms. Young While She Was bending over

[79] Ms. Young's complaint included reference to an incident that she alleged took place in April 2012. Ms. Young testified that Mr. Sawchuk, who was driving in the yard in a pick-up truck, pulled up his vehicle directly behind her while she was working as the grounds person during a train movement. Ms. Young was conducting an operation that involved aligning a coupling between two train cars, and Ms. Young explained that, in order for her to visualize this alignment, she had to bend at the waist so that her line of sight corresponded with the coupling joint. Ms. Young testified that she was uncomfortable, as a woman, bending over in this way, with Mr. Sawchuk sitting in a vehicle a few feet behind her. It was clear from Ms. Young's evidence that she felt exposed and vulnerable bending over in this way, particularly given her already strained relationship with Mr. Sawchuk.

[80] The fact of this interaction was not in dispute before me at the hearing. No witness contradicted Ms. Young's testimony that she asked Mr. Sawchuk to move away, but rather than comply with his colleague's request, Mr. Sawchuk refused to move and asserted that she had enough room to complete the manoeuvre. Ms. Young testified that Mr. Sawchuk ignored her request. When she again asked him to move, he refused. This evidence was not contested by any witness.

[81] Ms. Young testified that she then asked for help from Mr. Doré a manager who was nearby, and he dismissed the request remarking that she had enough space to execute the manoeuvre. Once again, Ms. Young's evidence was corroborated by the testimony of other witnesses.

[82] It was only when Ms. Young refused to continue with the train movement that Mr. Sawchuk finally drove away, and Ms. Young was then able to complete the task.

[83] The evidence that the Tribunal heard about the facts of this incident from numerous witnesses, including Ms. Young, Mr. Sawchuk and Mr. Doré, was remarkable in its

consistency. However, at the hearing, and in their closing submissions, VIA argued that this interaction was “inexplicable”, while Ms. Young was clear that the conduct was evidence of adverse differential treatment on the basis of her sex.

[84] Ms. Young testified that she was uncomfortable bending over in front of Mr. Sawchuk, a male colleague who made her feel uncomfortable and afraid and whose conduct she had found “creepy”. Neither Mr. Doré nor Mr. Sawchuk appears to have understood the reason for or the nature of Ms. Young’s concern and request for help.

[85] I find that Mr. Sawchuk refused to move when he was asked to do so by Ms. Young and that, when she asked Mr. Doré for assistance, she was refused help. I further find that the reasonable person in the circumstances should have understood that having a male co-worker, with whom you have a strained relationship, sit behind you in a vehicle and watch you while you bend over is conduct that can be considered adverse and unwelcome.

[86] While this interaction will be revisited in the analysis of the connection between the adverse treatment that Ms. Young experienced and her sex, it is clear that neither at the time of the incident, nor subsequently, did VIA understand what about this incident was distressing to Ms. Young; that is, bending over with her backside exposed to a male colleague with whom she had a strained relationship and about whom she had expressed discomfort.

[87] What’s more, I find that Mr. Doré’s failure to ascertain what was happening in front of him and his refusal of Ms. Young’s request for assistance compounded the impact of the situation, leaving Ms. Young with the sense that her concerns were being dismissed by her employer.

[88] Ms. Young testified, although only in passing, about another incident where Mr. Sawchuk’s physical proximity to her caused her distress in a similar manner.

[89] Ms. Young described an incident where she was coming down a ladder to disembark from the train, and Mr. Sawchuk began to climb the same ladder, placing himself immediately below her. It was clear from Ms. Young’s evidence that she felt exposed and vulnerable in this position.

[90] As the matter was not addressed by any other witness and was only mentioned in passing by Ms. Young, I find that it is more likely than not that this interaction occurred, but I will not place much weight on it in my reasons.

e. Rude and Demeaning Comments

[91] Ms. Young testified that she was repeatedly subjected to rude and demeaning comments made by Mr. Sawchuk about her, either in person or over the radio. She specifically testified that, in December 2012, Mr. Sawchuk made comments about her using the washroom and broadcasted these comments over the radio frequency used by all of the locomotive attendants on duty. Ms. Young's testimony about this incident was corroborated by other witnesses, including Mr. Al Arsenault, and VIA did not dispute or directly challenge this allegation.

[92] Mr. Arsenault, who was working with Ms. Young at the time, testified that he heard this exchange over the radio. When he picked Ms. Young up from the shop where she had been during the incident, he observed that she had been crying and testified that when he asked Ms. Young about what happened she told him she was embarrassed and uncomfortable.

[93] Based on the evidence before me, I find that it is more likely than not that this incident occurred as alleged, and I find that it constitutes adverse treatment in the meaning of the Act.

[94] Ms. Young also alleged that Mr. Sawchuk spoke in a demeaning and unprofessional manner to her about how she should conduct a train manoeuvre. Despite the fact that Mr. Sawchuk was not Ms. Young's supervisor, Ms. Young alleged that Mr. Sawchuk spoke to her rudely and told her that: "I will give you an instruction." Ms. Young testified that she understood this to be Mr. Sawchuk trying to assert his superiority and dominance over her, insisting that she conform to his ideas about how train manoeuvres should be conducted, despite the fact that, as the Tribunal heard, there is often more than one correct way to safely perform a task in the yard.

[95] VIA did not counter the allegation that Mr. Sawchuk behaved rudely towards Ms. Young, either in this specific incident or more generally. In fact, Ms. Young testified that

Mr. Doré had agreed with her at the time of that incident that Mr. Sawchuk's tone and communication were inappropriate. Mr. Doré corroborated Ms. Young's evidence on this point during his testimony. And Mr. Medeiros, during his cross-examination, confirmed that he had told Ms. Young that Mr. Sawchuk's behaviour was "harassment, absolutely." Mr. Medeiros testified that by the time he became involved in the situation between Ms. Young and Mr. Sawchuk, he knew that she was anxious being around Mr. Sawchuk and there was no question that she was upset and fearful of him.

[96] I find that Mr. Sawchuk repeatedly spoke in a rude and unprofessional manner about Ms. Young to her, in her presence and over the radio, and that this course of conduct constitutes adverse treatment under the Act.

f. Criticism of Ms. Young's Radio Voice (October 2012)

[97] Ms. Young testified that Mr. Sawchuk complained about her radio voice not being loud enough for him to hear her while they were working on the same shift but not partnered together. Ms. Young alleged that Mr. Sawchuk's criticism was targeted towards her as a female colleague and that it was intended to demean and belittle her. Ms. Young noted that other colleagues did not have any difficulty hearing and understanding her over the radio and that Mr. Sawchuk was picking on her in a manner that related to a sex characteristic: a female (softer) voice.

[98] Mr. Sawchuk admitted that he made the complaint about Ms. Young's radio voice repeatedly to numerous people and asserted that he was raising a valid concern about Ms. Young's non-compliance with radio protocol. Mr. Sawchuk testified that he has made this complaint about other locomotive attendants as well. This was supported by Mr. Medeiros' testimony that Mr. Sawchuk was a "stickler" for radio protocol.

[99] Despite Mr. Sawchuk's complaints, the Tribunal did not hear any evidence that this was a performance issue for Ms. Young or that her conduct was outside that which is expected of someone in her role. Absent any evidence that Mr. Sawchuk was raising a valid safety or performance issue, I find that his complaint to and about Ms. Young's voice to be adverse treatment in the meaning of the Act.

[100] It is worth noting that comments and behaviour that might appear to be neutral to someone who carries dominant culture privilege in a particular context can feel and in fact be excluding, othering and discriminatory to someone who does not hold the same privilege in that context.

[101] For example, comments about a sex characteristic, such as the tone of a woman's voice or the appropriateness of her clothing, in an historically male context may create an experience of "otherness" that has the effect of diminishing or demeaning someone on the basis of a protected characteristic. Or comments about a racialized person's family background, or physical characteristics (such as their hair) in a context where most people do not share those characteristics, can create discriminatory effects. These kinds of comments are increasingly understood as a form of discriminatory conduct called microaggressions.

[102] Mr. Sawchuk's complaint had the impact of conveying that the way Ms. Young speaks on the radio is wrong or incorrect (something that has not otherwise been raised as a performance issue by other colleagues or supervisors). And Ms. Young testified that she felt this conduct was targeted towards her and was part of a pattern of behaviour on the part of Mr. Sawchuk intended to assert control and dominance over her in the workplace. What's more, I find that Mr. Sawchuk made this complaint about Ms. Young to her supervisor and, by his own admission, to other colleagues. While I cannot assess whether it was a valid workplace concern from the perspective of the radio protocols and safety rules, I find that the conduct was at least unprofessional. On balance, in the context of the overall relationship and the course of conduct described in these reasons, I find that Mr. Sawchuk's comments and complaints about Ms. Young's voice over the radio were adverse treatment in the meaning of the Act.

g. Ignoring Communication and Insisting on Radio Communication (December 2012)

[103] Ms. Young testified that towards the end of 2012, after almost twelve months of what she described as unprofessional and degrading conduct by Mr. Sawchuk with minimal intervention by VIA, the situation between Mr. Sawchuk and Ms. Young had deteriorated considerably. Ms. Young testified that by this point, when she and Mr. Sawchuk were

partnered together on a shift, he insisted on broadcasting all communication between them over the shared radio frequency used by all of their colleagues on the shift, despite the fact that they were often just a few feet apart from each other and were well within speaking range. She testified that he also demanded that she do the same. This allegation was not contradicted by any witness, and I understand that this is not a normal practice among colleagues who are working together.

[104] The situation came to a head on December 7, 2012, when, according to Ms. Young's evidence, Mr. Sawchuk refused to acknowledge her when she was speaking with him in the cab of the train. Ms. Young responded by putting the train into an emergency stop, which I understand from the various witnesses who testified about this incident at the hearing to be a serious response to a perceived threat to safety in the train yard.

[105] Mr. Sawchuk responded to Ms. Young's actions by exiting the cab and slamming the door behind him.

[106] I find that Mr. Sawchuk's insistence that his colleague communicate with him only over the radio to be demeaning and controlling. While I heard testimony that this would have been within the parameters of the safety Rules and radio protocols, I am not convinced that there was a valid safety reason for Mr. Sawchuk to require Ms. Young to communicate with him only by radio. I find that Mr. Sawchuk was intending to control and embarrass Ms. Young and assert his dominance and perceived superiority over her by using conduct that was permitted by the rules to make her feel inadequate to his requirements, and that this conduct constitutes adverse treatment in the meaning of the Act.

[107] Ms. Young reported this incident to her supervisor, Mr. Doré, who testified that he was also concerned about Mr. Sawchuk's conduct. Mr. Doré characterized the deteriorating workplace dynamic as a safety hazard and, at this time, escalated his concerns about Mr. Sawchuk's behaviour (both with regard to this incident and more generally) to senior management, including Mr. Medeiros and Mr. Hamilton in an email dated December 8, 2012.

[108] Mr. Doré's email expressed a high level of concern about Mr. Sawchuk's conduct in light of the events described by Ms. Young. Mr. Doré's email conveyed alarm about Mr.

Sawchuk's interactions with a number of employees and stated, "How many more were there, and how many more are we going to tolerate?".

[109] Mr. Medeiros, who received the memo from Mr. Doré, testified that "it was all hearsay" and (despite admitting that he had received the email from on of his managers expressing alarm about Mr. Sawchuk's conduct and characterizing the situation as dangerous) testified that he concluded there had been no formal written complaint about Mr. Sawchuk. Both at the time and at the hearing, VIA downplayed the seriousness of Mr. Sawchuk's conduct and Ms. Young's concerns, taking the position that Ms. Young was overreacting to the harm that she was experiencing. VIA management was also focussed on the existence of formal written complaints and insufficiently concerned about the rapidly deteriorating and potentially dangerous situation unfolding in plain view between Mr. Sawchuk and Ms. Young.

[110] I find that, by December 2012, there was ample evidence confronting VIA management that the situation between Mr. Sawchuk and Ms. Young was dysfunctional and dangerous (particularly in light of it being a safety-sensitive workplace).

[111] Virtually every witness who testified before the Tribunal about Mr. Sawchuk's behaviour described him in unflattering terms. And VIA made no effort to counter Ms. Young's argument that Mr. Sawchuk was rude, controlling and unprofessional.

[112] The impact of VIA diminishing and downplaying the deteriorating situation, including the concerns raised in Mr. Doré's December 2012 email, was that the situation was getting increasingly out of hand. Certainly by this point, it ought to have been clear to VIA that Mr. Sawchuk and Ms. Young could not safely work together, particularly given the nature of their roles.

h. Mr. Sawchuk Observing the Women's Locker Room

[113] Ms. Young testified that Mr. Sawchuk was frequently present in the seating area outside of the women's locker room when she arrived at work for the start of her shift. Her evidence on this point was corroborated by Mr. Kalelopoulos and was admitted by Mr. Sawchuk.

[114] Ms. Young testified that she was concerned that Mr. Sawchuk was watching her arrival at work and taking photographs of her in the locker room. I believe that this was a real concern for Ms. Young and that she sincerely felt that Mr. Sawchuk was observing her while she was arriving and getting ready to work. In the context of the increasingly fraught and deteriorating relationship between Ms. Young and Mr. Sawchuk, I understand why Ms. Young found this to be adverse treatment.

[115] Mr. Sawchuk testified that he regularly sits in the seating area known as "the leathers" with colleagues when they are on a break from their duties in the yard and sometimes on his own. He also testified that he was not watching Ms. Young in the locker room or photographing her while she was getting ready for her shift.

[116] Based on images of the locker room that were entered into evidence at the hearing, I find that the locker room entrance is visible from the seating area, but I did not find sufficient evidence to support a conclusion that the interior of the locker room can be seen from the lounge chairs. The evidence presented at the hearing does not support a finding that Mr. Sawchuk was photographing Ms. Young in the locker room, despite her sincere fear that this was occurring.

[117] I find, based on the totality of the evidence, including Mr. Sawchuk's own testimony and Mr. Medeiros' characterization of Mr. Sawchuk's conduct as someone who routinely observed and commented on the workplace conduct of his colleagues, that it is more likely than not that Mr. Sawchuk was observing Ms. Young's comings and goings at work in a manner that was not required for his job.

[118] While this conduct, on its own, is not significant, it forms part of a course of conduct and contributed to an atmosphere in which Ms. Young felt watched and surveilled by Mr. Sawchuk. I find that Mr. Sawchuk was, in fact, watching and surveilling Ms. Young and that this conduct was adverse conduct directed towards Ms. Young.

i. Dispute Over Working With the Cab Door Open and Comments on Ms. Young's Attire (February 2013)

[119] Ms. Young testified that she and Mr. Sawchuk were working together in the cab of an engine in February 2013. Mr. Sawchuk was located near the door of the cab and insisted

on keeping the door of the cab open for a number of hours during their shift on a cold, winter day. Ms. Young testified that she was very uncomfortable with this situation and that Mr. Sawchuk was unwilling to accommodate her request that the door of the cab be closed.

[120] When Ms. Young asked her supervisor, Mr. Hamilton, for assistance in managing the situation with Mr. Sawchuk, he spoke with Mr. Sawchuk. The evidence before the Tribunal is that Mr. Sawchuk responded to Ms. Young's complaint by telling Mr. Hamilton that Ms. Young should "consider dressing more appropriately for the weather", implying that Ms. Young's request for the door to be closed during the winter was unreasonable or that she didn't understand how to dress herself for her job.

[121] Mr. Hamilton determined that it was up to the employee assigned as the driver on any given shift or manoeuvre to decide whether the door of the cab would be open or closed. The crewmember should follow the instructions of the driver.

[122] A further dispute occurred in March 2013. Ms. Young was assigned as driver on that shift, and Mr. Sawchuk was riding in the cab. Ms. Young testified that Mr. Sawchuk refused to close the door to the cab, despite being requested to do so by Ms. Young, and despite Mr. Hamilton's prior direction that the driver was authorized to decide whether the door would be open or closed.

[123] The facts surrounding these incidents were not in dispute before me. However, the characterization of the incident differed considerably.

[124] Ms. Young complained that Mr. Sawchuk's conduct was dismissive and his comments about her attire at work were demeaning and sexist.

[125] VIA argued that the dispute between the two co-workers was a simple dispute about comfort in the workplace and a difference of what the temperature should be in their work environment.

[126] Even if VIA's characterization of the first incident is plausible though unlikely in the overall context of the relationship between Mr. Sawchuk and Ms. Young, the reoccurrence of the dispute a few weeks later, despite the direction of their manager, is telling of Mr. Sawchuk's true intent. Insisting, over a colleague's objections, on keeping the door open on

a cold winter night is not a reasonable disagreement between co-workers about workplace temperature, particularly when it happens repeatedly despite clear direction from a supervisor. I find on a balance of probabilities that this conduct was an attempt by Mr. Sawchuk to assert control and dominance over Ms. Young and to take an opportunity to needle her and make her uncomfortable, which constitutes as adverse treatment in the meaning of the Act.

[127] I also find that Mr. Sawchuk's comment to their supervisor that Ms. Young should dress appropriately for the weather to be demeaning and patronizing.

[128] I do not agree that Mr. Sawchuk's comments about Ms. Young's clothing were sexualized or sexual harassment. However, as is discussed elsewhere in these reasons, comments designed to diminish or dismiss can nonetheless be discriminatory on the basis of sex—particularly where those comments are part of a pattern of behaviour aimed at establishing dominance and control and are related to a protected characteristic.

j. Undermining Ms. Young in Respect of a Train Movement

[129] The same night that the second incident with the cab door occurred in early March 2013, Ms. Young testified that Mr. Sawchuk (who was working on the ground) instructed her (as the driver) to complete a train movement, stating: "203, go ahead." This meant that Train 203 should proceed forward. Ms. Young testified that she then proceeded with the movement, as directed. Mr. Sawchuk then admonished her over the radio repeatedly for conducting the manoeuvre, denying that he had instructed her to do so.

[130] Ms. Young's evidence on this point was clear and specific. She testified that this event was tremendously concerning to her, as it could have given rise to serious consequences for her if anything had happened to the train or any other vehicle or person in the yard. Ms. Young's evidence on this point was not contradicted by any other witness. When asked about the incident, Mr. Sawchuk testified that he did not have a specific recollection of the events in question.

[131] On balance, I find that Ms. Young's evidence on this point is reliable. She testified about her clear recollection of the event, and her actions that immediately followed this incident corroborate her testimony that she was afraid of the safety and professional

consequences that might arise from an event like this, should it ever occur again. Furthermore, this testimony was consistent with the events as documented in her workplace complaint, her interview with Ms. Selesnic and her Complaint. Therefore, I find that Mr. Sawchuk did give Ms. Young a direction to move the engine and then admonished her over the radio for doing so, which constitutes adverse treatment in the meaning of the Act.

[132] When Ms. Young went to Mr. Hamilton stating that she was no longer willing to work with Mr. Sawchuk, he asked her to put her work refusal in writing. At this point, Ms. Young submitted nine letters of complaint to VIA detailing the events that had occurred from April 2012 to March 2013. These letters make it clear that the situation between Ms. Young and Mr. Sawchuk had reached the point where Ms. Young was afraid of the safety implications of Mr. Sawchuk's conduct and the resulting dysfunction in the workplace.

[133] At this stage, Mr. Medeiros became more directly involved with the situation and both Ms. Young and Mr. Medeiros testified that they viewed the situation as being one which engaged the VIA workplace harassment policy. A series of steps were put in place in March and April of 2013, including a formal workplace harassment investigation, conducted by Ms. Selesnic, another manager at VIA.

[134] The investigation conducted by Ms. Selesnic will be considered in more detail below. However, it is important to note at this point in my reasons that, following an internal workplace investigation (which was, in fact, a series of detailed interviews), Ms. Selesnic provided some form of a verbal report of her findings to Mr. Medeiros and Mr. Hamilton. It does not appear that a written report was prepared, and, in any case, none was presented in evidence before the Tribunal. Despite having initially been framed as a harassment complaint, at some point during the process, VIA recharacterized the process as being an investigation into "conduct unbecoming."

[135] Ultimately, following the investigation, VIA management decided that Mr. Sawchuk's conduct towards Ms. Young breached the Code of Conduct and required a serious disciplinary response.

[136] VIA's evidence was that the disciplinary steps taken in response to the investigation were:

(a) 25 demerit points were awarded against Mr. Sawchuk; and

(b) Mr. Sawchuk was directed to avoid contact with Ms. Young.

[137] While the Tribunal is not bound by the findings of an internal workplace investigation, the fact that VIA itself determined that Mr. Sawchuk had engaged in serious conduct in breach of the Code of Conduct is further evidence in support of the Tribunal's determination that Mr. Sawchuk was engaged in a course of conduct towards Ms. Young that was adverse in nature, both in terms of VIA's workplace policies and (as is detailed in these reasons) the Act.

k. Physical Contact at the Fuel Stand (September 2013)

[138] In her Complaint and at the hearing, Ms. Young dedicated considerable time to the question of whether Mr. Sawchuk made physical contact with her at the fuel stand during a shift when they were both working in September 2013.

[139] Ms. Young testified that Mr. Sawchuk entered the fuel stand while she and her partner were already there and proceeded to cross in front of her while she was servicing her engine. Ms. Young testified that, when she was working at the front of the train, Mr. Sawchuk made physical contact with her as he moved past her.

[140] Mr. Sawchuk denied that he made contact with Ms. Young.

[141] In considering the evidence on this point, I had the benefit of reviewing video footage as well as a number of photos. Following that review, and in consideration of the testimony of Ms. Young and Mr. Sawchuk, I conclude that Mr. Sawchuk goes out of his way to cross the tracks near Ms. Young, but there is no evidence upon which I can conclude that he made physical contact with her.

[142] In making this finding, I have not concluded that Ms. Young was dishonest in her testimony about this event. Based on the totality of the evidence and Ms. Young's testimony in particular, I am convinced that Ms. Young sincerely believes her evidence to be truthful despite the fact that I cannot make this finding based on my review of the evidence.

[143] By September 2013, Ms. Young's perception of events and Mr. Sawchuk's conduct may have been impacted by the genuine fear and trauma of her sustained experience of Mr. Sawchuk's abusive conduct. While this possibility is relevant to the weight I can place on Ms. Young's evidence, it does not fundamentally undermine her testimony, particularly as her evidence was, in many instances, corroborated by the testimony of other witnesses.

[144] While I am not prepared to prefer Ms. Young's perception of the event in question over my own review of photographic evidence or video footage, I do find that Mr. Sawchuk's conduct in the fuel stand that night was not consistent with the admonishment that he had received following the workplace investigation that he avoid Ms. Young. I find that Mr. Sawchuk clearly directed his path in such a way that he would pass extremely closely to Ms. Young, despite the fact that he could easily have chosen to afford Ms. Young more space by redirecting his path.

[145] Even without making contact with Ms. Young, I find that Mr. Sawchuk flouted the instructions he was given to avoid Ms. Young when he knew or ought to have known that doing so would make her uncomfortable. I find that this behaviour is consistent with the pattern of conduct evident in these reasons whereby Mr. Sawchuk attempted to assert control or dominance over Ms. Young, often with relative impunity, and that this constitutes adverse treatment in the meaning of the Act.

(1) The Overall Course of Conduct of Mr. Sawchuk

[146] In addition to analyzing individual incidents to determine the impact of an individual's conduct on the complainant, it is often important to take a step back and consider the overall course of conduct in its entirety. In many cases, including this one, the whole is indeed much greater than the sum of its parts.

[147] While many of the individual incidents alleged in Ms. Young's Complaint, taken on their own, might appear insignificant, the cumulative impact of Mr. Sawchuk's conduct over the course of almost two years, demonstrates a pattern of demeaning behaviour likely designed to assert control and which certainly had an adverse impact on Ms. Young.

[148] The Tribunal heard weeks of testimony from sixteen witnesses, virtually all of whom testified that it was challenging to work with Mr. Sawchuk, including Mr. Sawchuk himself.

The evidence painted a very clear and largely consistent picture of Mr. Sawchuk as a very capable locomotive attendant with a great deal of experience and knowledge about working with trains, who was difficult to work with on a day-to-day basis for many colleagues and supervisors.

[149] Witnesses used words like “bully,” “controlling,” “big trouble” in respect of Mr. Sawchuk to describe behaviour that the Tribunal would characterize as abusive and toxic, including hearing him shouting at employees and using vulgar language or swearing. Witnesses also described Mr. Sawchuk as someone who would watch his peers in the workplace and purport to correct their performance or to report performance that he deemed improper to the shift supervisors. Mr. Medeiros described Mr. Sawchuk as someone who likes to be right all the time and believes that he is the best at the job— that he believes that his way of doing things is always the best way.

[150] I heard evidence from numerous witnesses that Ms. Young did not defer to Mr. Sawchuk about how to perform her duties as a locomotive attendant. Several witnesses confirmed that there are numerous tasks where there is more than one right way to do the job, and locomotive attendants could successfully perform the duties of their job without necessarily following the approach espoused by Mr. Sawchuk. However, failing to defer to Mr. Sawchuk’s preferred approach meant that some employees, particularly those he viewed as inferior in skill and experience to himself, were targeted as the subject of his criticism, intimidation and control.

[151] Mr. Medeiros testified that Mr. Sawchuk took this approach with newer employees, a number of whom were women, and did not try to control the workplace conduct of the more seasoned locomotive attendants that he had worked with for a long time, all of whom were men.

[152] I find that, in this case, Mr. Sawchuk had disdain for the way in which Ms. Young approached her work as a locomotive attendant and did not respect her as a workplace peer. Ms. Young did not defer to Mr. Sawchuk’s attempts to train her in his approach to the job and thus attracted his ire. As a result, Ms. Young was subjected to a campaign of

harassment and abuse that, taken together, constitutes serious adverse treatment that ought to have been recognized and addressed by VIA.

Summary of Adverse Treatment

[153] It is not the Tribunal's role to comment on conduct that extends beyond the scope of the Complaint. Furthermore, the Tribunal does not purport to hold any particular expertise in the areas beyond the scope of the Act. However, given the evidence that was presented to the Tribunal, and the safety sensitive nature of the work being performed by locomotive attendants at the TMC, Ms. Young's Complaint illustrates the peril that can befall a workplace that fails to identify and eliminate toxic and abusive workplace behaviour.

[154] Having regard to the totality of the evidence, including the findings of VIA's own workplace investigation, the evidence of many witnesses including VIA's own witness, Mr. Medeiros, and the documents entered into evidence, I find that Mr. Sawchuk engaged in a pattern of belittling and demeaning behaviour towards Ms. Young from January 2012 until the end of 2013 when Mr. Sawchuk was removed from the night shift and they stopped working together.

[155] I find that Mr. Sawchuk's conduct towards Ms. Young, taken as a whole, constitutes adverse treatment in the meaning of the Act. On balance, this conduct meets the threshold necessary to satisfy the second step of the *Moore* analysis.

iii. The Protected Characteristic Was a Factor in the Adverse Treatment

[156] Having determined that Mr. Sawchuk engaged in a course of conduct that was adverse to Ms. Young, the Tribunal will now turn to an analysis of whether Ms. Young's sex was a factor in the adverse treatment that she experienced. It is fair to say that this is not a case where the discriminatory nature of the conduct is glaringly obvious. Indeed, in the language of this Tribunal's jurisprudence, it is a case where detecting the "subtle scent of discrimination" requires a careful examination of the events in their full context (*Basi*).

[157] Perhaps then, it ought not come as a surprise that this is the aspect of the Complaint that was the most contested between the parties. The Tribunal will summarize the position

of the parties with respect to the connection between the adverse treatment described above and Ms. Young's sex before outlining my reasons for finding that Ms. Young's sex was a factor in the adverse treatment that she experienced.

i. Position of the Complainant

[158] As has been detailed above, the Tribunal has concluded that Mr. Sawchuk attempted to assert dominance and impose a particular approach to the work of locomotive attendants that was consistent with his preferred approach. This conduct was primarily directed at "less seasoned" employees who did not defer to his views about how the work was to be performed. Ms. Young was one of these employees.

[159] Ms. Young repeatedly identified her gender or sex as a factor in her experience of Mr. Sawchuk's behaviour. Throughout the course of the hearing and in her submissions, Ms. Young identified four ways in which her identity as a woman was a factor in the adverse treatment she experienced:

> 1) Mr. Sawchuk responded more aggressively to women who resisted his attempts to control them than he did to men, who he would not dare to challenge;
>
> 2) Mr. Sawchuk engaged in several specific incidents where sex was a direct factor in the adverse treatment itself, including refusing to move from behind Ms. Young when she had to bend over, climbing the ladder behind her so that he was immediately behind her backside, complaining to management about her voice over the radio, and commenting in a patronizing way about Ms. Young not being dressed appropriately to do her job;
>
> 3) As a woman working at night in a large and often poorly lit train yard, Ms. Young's experience of fear and intimidation as a result of Mr. Sawchuk's conduct is connected to her identity as a woman; and
>
> 4) VIA's failure to identify and respond to the discriminatory nature of the situation between Ms. Young and Mr. Sawchuk led to her being dismissed and diminished by VIA's predominantly male management for too long.

ii. Position of the Respondent

[160] VIA's position was that Mr. Sawchuk was a difficult colleague who engaged in unprofessional conduct but that his conduct towards Ms. Young was unrelated to her identity

as a woman. While Mr. Sawchuk may have been impolite, uncivil or engaged in “conduct unbecoming”, as the workplace investigation concluded, Mr. Sawchuk’s behaviour was the product of a dispute between two groups of employees, and VIA argued in their closing submissions that “a reasonable person would not construe the conduct as adverse differential treatment or harassment based on sex or gender.”

[161] VIA submitted that Ms. Young’s enmity towards Mr. Sawchuk distorted her perception of his positive relationships with other women in the workplace.

[162] VIA also argued that Ms. Young presented vague and unsubstantiated allegations about Mr. Sawchuk’s prior working relationships with female colleagues and that the Tribunal should prefer Mr. Sawchuk’s evidence about his attitudes and behaviour towards women over the evidence presented by Ms. Young and their colleagues who testified at the hearing.

[163] In its closing submissions, VIA also highlighted portions of the evidence presented by several other witnesses (including Kirk Porter, Michelle Pitt and Mr. Arsenault) to support their position that Mr. Sawchuk had a good working relationship with some women.

[164] Finally, VIA called upon the Tribunal to reject the evidence of Mr. Arsenault, Mr. Micallef, Mr. Anroop and Mr. Cormier, who all testified that Mr. Sawchuk had difficulties with women—particularly women who did not submit to his approach about how to perform the duties of a locomotive attendant. Each of these witnesses specifically testified that they believed Mr. Sawchuk’s treatment of Ms. Young was, in part, due to the fact that she is a woman.

iii. Position of the Commission

[165] The Commission argued that the primary issue for the Tribunal to determine with respect to this Complaint is whether Mr. Sawchuk’s behaviour towards Ms. Young constitutes harassment based on the prohibited ground of sex under the CHRA. In its closing submissions, the Commission stated: “The question is whether his behaviour, in this circumstance had anything to do with Ms. Young’s gender.”

[166] The Commission's submissions identified that the evidence on this point is, at least in part, contradictory and that the Tribunal's answer to this question turns on an assessment of the credibility of the witnesses who appeared before the Tribunal.

[167] The Commission noted, on the one hand, that Ms. Selesnic and Mr. Medeiros both testified that they did not believe that Mr. Sawchuk's conduct was related to Ms. Young's sex, and Ms. Selesnic testified that, at the outset of the workplace investigation, Ms. Young had been focussed on workplace safety and not sex-based harassment.

[168] On the other hand, the Commission noted that Ms. Young testified that Mr. Sawchuk treated women differently than men and that, when she challenged him about how he felt she should be performing her work as a locomotive attendant, he responded to her in a manner that was different than how he responded to her male colleagues when they resisted his approach to the job.

[169] The Commission observed that Mr. Arsenault corroborated Ms. Young's evidence on this point and testified that Mr. Sawchuk treats women differently. Mr. Arsenault testified that Mr. Sawchuk likes to control how people work and that he will confront his female colleagues until they submit to working in his preferred way of doing things. The Commission also noted Mr. Sawchuk's generally controlling behaviour, noting that a number of witnesses referred to him as a control freak.

iv. Analysis of the Connection Between Mr. Sawchuk's Conduct and Ms. Young's Sex

[170] The Tribunal recalls that discrimination is often not overt and, in many cases, may not be intentional. However, to give meaning to the protections of the Act, the Tribunal is mandated to identify even a subtle scent of discrimination to determine whether a protected characteristic is a factor in the impugned conduct.

[171] Where evidence of discrimination is circumstantial, an inference of discrimination may be drawn where the Tribunal concludes that the evidence offered in support of such a finding renders the inference that such a conduct was more likely discriminatory than not, on a balance of probabilities.

[172] In addition to the submissions of the parties, the Tribunal has reviewed the transcripts of the hearing and the documents entered into evidence pertaining to the question of the connection between Mr. Sawchuk's conduct and Ms. Young's sex. On the basis of that review and having regard to both the specific incidents and the overall course of Mr. Sawchuk's conduct, I have concluded that there is sufficient evidence to find that there is a connection between Mr. Sawchuk's conduct and Ms. Young's sex.

[173] There are two main points upon which I have based this finding:

> (a) On balance, the evidence at the hearing favoured a finding that Mr. Sawchuk treated women who did not agree with his way of working, including Ms. Young, differently than he treated the men with whom he had similar disagreements; and
>
> (b) Ms. Young's sex was a factor in some of the specific incidents that the Tribunal has found to constitute adverse treatment.

[174] I will explain each of these points in more detail below.

(a) Mr. Sawchuk Treated Women Who Disagreed With Him Differently Than Men

[175] Several witnesses testified that Mr. Sawchuk behaved more aggressively towards women who disagree with him than he did men and was more likely to try to force his approach to the locomotive attendant job upon the female employees. This evidence was countered by witnesses from VIA who testified that they had not observed Mr. Sawchuk treating women differently than men.

[176] Several of the witnesses that Ms. Young called to testify painted a picture of Mr. Sawchuk as someone who had a problem with women. The evidence of these witnesses was consistent and corroborated Ms. Young's own testimony.

[177] The witnesses called by VIA, including Mr. Sawchuk, who testified about Mr. Sawchuk's interactions with women, either denied that he treated women and men differently or testified that they had not observed that behaviour in Mr. Sawchuk and did not recall specific incidents that were put to them on cross-examination.

[178] At least in part, the evidence from these two sets of witnesses cannot be reconciled. Therefore, I consider which evidence to prefer in reaching my decision. As both VIA and the

Commission pointed out in their closing submission, this critical question comes down to the Tribunal's assessment of the credibility of two incompatible sets of witness accounts.

[179] Ms. Young testified that she has observed Mr. Sawchuk treating her male colleagues differently than he treated her, even when they disagree with him, and that he treated women differently in general. Both Mr. Arsenault and Mr. Micallef also testified that Mr. Sawchuk treats women differently. Mr. Micallef testified that, when it comes to female employees, he will confront them until they acquiesce to doing their work in his preferred way.

[180] In response to a question from the Tribunal, Mr. Micallef stated:

> Yeah, well, when he has a problem with a male employee, he wouldn't come to us. He would go to the manager and have management come to us. Whether it (*sic*) substantiated or not, he just goes there and he complains about us. But with the women, they'll just -- he's just on them, badgering them. "You got to do it this way. You got to do it this way." But with us, he won't tell us that, especially (*sic*) we know our job.

[181] This account from Mr. Micallef is corroborated by the evidence from other witnesses, including VIA managers, who testified that Mr. Sawchuk frequently comes to them to complain about other employees. Even if part of the reason for his unwillingness to challenge his male colleagues directly is because he was mistreated by them in the past, which was alleged during Mr. Sawchuk's evidence, the resulting differential treatment towards Ms. Young, or other women who do not readily conform to his desired approach, is nonetheless discriminatory.

[182] Mr. Anroop testified about a gendered slur that Mr. Sawchuk used when speaking about Ms. Young and another female co-worker. Mr. Anroop testified that he heard Mr. Sawchuk refer to someone on board a train as a "fucking bitch", only to later see Ms. Young disembark from the train. Mr. Anroop testified that he understood that Mr. Sawchuk was talking about Ms. Young when he used the gendered slur. Mr. Anroop also described an incident where Mr. Sawchuk called another female co-worker "a fucking bitch." In response to a series of questions from the Tribunal, Mr. Anroop testified that Mr. Sawchuk disrespects women and puts women down.

[183] Mr. Sawchuk testified before the Tribunal and denied that he treated women colleagues differently, pointing to his relationship with two other female colleagues as evidence to support his testimony and stating that he has successfully worked with other women in the past. The Tribunal notes that, other than Ms. Young, none of the women who work directly with Mr. Sawchuk were called to testify at the hearing.

[184] Mr. Medeiros testified that he did not observe Mr. Sawchuk treating women differently, as did Ms. Selesnic, although both witnesses also testified that they did not work directly with Mr. Sawchuk very frequently or at all.

[185] Mr. Hamilton, who was the direct supervisor of the night shift, testified that he observed Mr. Sawchuk treating all people the same and resisted the proposition that Mr. Sawchuk treated women differently. However, despite being the manager, he did not appear to be aware of a number of incidents pertaining to Mr. Sawchuk's conduct about which other witnesses had testified. And on cross-examination he testified that he did not recall that a complaint had been made about Mr. Sawchuk's behaviour by another woman on the shift.

[186] VIA argued that the Tribunal should discount the evidence of Ms. Young, Mr. Anroop, Mr. Arsenault and Mr. Micallef because:

i. Ms. Young's perception of the fact was distorted by her disdain for Mr. Sawchuk; and

ii. The witnesses called by Ms. Young to testify about Mr. Sawchuk's behaviour towards women—and particularly women who disagree with him—are unreliable because of their animus towards him.

[187] VIA further argued that I should prefer Mr. Sawchuk's evidence to that of Ms. Young on this question.

[188] The Commission took no position on the credibility issues before the Tribunal.

[189] As a general matter, while the Tribunal has found that Ms. Young's evidence may not be reliable in certain instances or her response to a specific incident exaggerated, I found her evidence overall to be sincere and truthful and most of her testimony on this issue was corroborated by other witness accounts and documents or was uncontested by VIA.

[190] Mr. Sawchuk's evidence was also mixed. There are aspects of Mr. Sawchuk's evidence that I found to be sincere and truthful, for example, when he described his own experience of workplace harassment and mistreatment by some of his colleagues, and his frustration with management's inaction. However, his evidence was also inconsistent on a number of points. For example, in response to a question where VIA's counsel described washing train windows as "half-assed," Mr. Sawchuk testified that he would not use colourful language when speaking to his partners. But the Tribunal has found that Mr. Sawchuk did, in fact, swear at his colleagues and use profane language on several occasions. Mr. Sawchuk also testified that he did not understand the basis of the workplace investigation or for the disciplinary award that was made against him, despite having participated in the investigation and insisted that the union grieve the outcome of the investigation process all the way to arbitration—the third step of the grievance process.

[191] Even if the Tribunal were to set aside the evidence of Mr. Sawchuk and Ms. Young, each as potentially self-serving, the Tribunal is left, on the one hand, with the testimony of shift colleagues who worked with Mr. Sawchuk for many years who support Ms. Young's position and who testified about differential treatment and, in the case of Mr. Anroop, the use of a gendered slur to refer to both Ms. Young and another female colleague. On the other hand, the Tribunal has the testimony of two VIA managers, neither of whom worked directly with Mr. Sawchuk at the time in question. VIA elected not to call either Ms. Kindt or Ms. Trepanier (the other two women who worked on the night shift with Mr. Sawchuk at the relevant time) to testify at the hearing about their experiences working with Mr. Sawchuk, although it was clearly open to them to do so.

[192] The question before the Tribunal is not whether Mr. Sawchuk has disdain for all women, or whether he is unable to work with women at all. In fact, for discrimination to be established, Ms. Young's sex need not have even been the primary factor or an intentional cause of Mr. Sawchuk's actions—it need only be a factor.

[193] My observation of Mr. Sawchuk during the course of his evidence was that he may sincerely be unaware of the ways in which his actions are discriminatory on the basis of sex or the gendered nature of his actions in the workplace. For example, he described one female partner in positive terms saying that she "took direction well", which stood out as a

strange kind of compliment coming from someone who was not that person's manager or supervisor. I was also disturbed by the evidence about Mr. Sawchuk's repeated use of a gendered slur in anger directed at his colleagues.

[194] With respect to the specific allegations made against Mr. Sawchuk regarding his attitudes towards women, I am not prepared to disregard the sworn evidence of multiple witnesses who testified about their experience and direct observations about Mr. Sawchuk disrespecting women and treating them in a more aggressive manner than he does his male colleagues. The Tribunal is particularly persuaded by the testimony of Mr. Anroop, who provided specific evidence of his own observation of Mr. Sawchuk using sexist language. Mr. Anroop's credibility was also supported by VIA's own witness, Mr. Hamilton, who testified that he does not believe Mr. Anroop to be dishonest or to make up stories.

[195] In making this finding, I want to be clear that I am not questioning the credibility of either Mr. Medeiros' or Ms. Selesnic's evidence. Rather, their testimony about Mr. Sawchuk's working relationship with his female colleagues is merely less reliable as a result of the fact that they had not had many occasions to observe Mr. Sawchuk at work. Nor is Mr. Hamilton's credibility in question. Rather, these witnesses either had fewer occasions to observe Mr. Sawchuk or did not have a recollection of the specific events that they were asked about. As a result, I am unable to place as much weight on their evidence about Mr. Sawchuk's relationships with his female co-workers.

[196] I am inclined to agree that at some point during the course of Ms. Young's experience of Mr. Sawchuk's harassment, her fear and trauma (though I am not purporting to use that term in a clinical sense) may have given rise to a hypersensitivity to Mr. Sawchuk's actions and motivation. To the extent that this heightened sensitivity impacted her perception and characterization of the incidents that she experienced, I have factored that into the weight I gave her testimony on certain points. However, I am not prepared to conclude that this makes her untrustworthy as a witness. I believe it is more appropriate to understand Ms. Young's testimony as being animated by a heightened sense of fear, which actually reinforces, rather than undermines, the fact that what she experienced was of a significant and traumatic nature.

[197] Put another way, an event that someone else might characterize as a 3/10 (in terms of the level of disturbance) is experienced by Ms. Young as a 7/10. An example of this dynamic at play is in the September 5, 2012, incident at the fuel stand.

[198] Having said that, in many instances, Ms. Young's evidence was corroborated by other witnesses and was further supported by VIA's own finding that Mr. Sawchuk was engaged in unprofessional conduct in breach of VIA's Code of Conduct (resulting in a significant disciplinary penalty). While we do not have the benefit of a written report arising from the investigation or a rationale for the decision to discipline Mr. Sawchuk for his breach of the Code of Conduct, I find that the evidence arising from VIA's internal investigation is more consistent with Ms. Young's version of events than Mr. Sawchuk's.

[199] On a balance, the Tribunal finds that it is more likely than not that, overall, Mr. Sawchuk treated some female colleagues differently and more aggressively than his male colleagues.

(b) Sex Was a Factor in Some Specific Incidents

[200] In addition to the general evidence about Mr. Sawchuk's attitudes towards women, some of the incidents alleged in Ms. Young's Complaint are implicitly gendered and are based in conduct that I find the reasonable woman in the same circumstances would experience as adverse treatment based on sex.

[201] Specifically, I find that the incident where Mr. Sawchuk refused to move from behind Ms. Young, despite her discomfort and request that he do so, engaged issues of sex and Ms. Young's comfort in her female body, bending over in front of a male colleague.

[202] Similarly, the allegation that Mr. Sawchuk placed himself on the ladder, climbing up from the ground, when Ms. Young was descending the ladder from the cab, engaged issues of sex and Ms. Young's comfort in her female body descending over the head/face of Mr. Sawchuk.

[203] Ms. Young also testified that, as a woman, she experienced a heightened sense of fear and vulnerability in the large industrial area where she and Mr. Sawchuk worked. Some areas of the TMC were not well lit, and Ms. Young described a sense of fear for her safety.

Other witnesses, including Mr. Arsenault, testified that Ms. Young appeared afraid and uncomfortable being around Mr. Sawchuk in the train yard.

[204] While the Tribunal would never suggest that this kind of fear is the universal experience of all women, or even that it is the only response that would be warranted in the circumstances that Ms. Young described in her submissions, I agree with Ms. Young's submission that, as a woman, the kind of fear she experienced, in the vast, dark industrial train yard at night had a distinct and different impact on her than it did on her male colleagues. Put another way, Ms. Young had a gendered experience of Mr. Sawchuk's conduct towards her given the nature of their work and work environment.

[205] Perhaps more subtle are the allegations that pertain to being watched by a colleague with whom you have (at minimum) a strained relationship. Finally, as was described above, in workplaces that are characterized by historic privilege for one group over another, comments about gendered characteristics, such as a woman's voice or whether she is dressed appropriately for the workplace, also have a gendered element.

[206] On the basis of the forgoing analysis, I find that Ms. Young's sex was a factor in Mr. Sawchuk's adverse treatment of her.

[207] Having answered the three questions set out in *Moore* (whether Ms. Young has a protected prohibited ground of discrimination, whether she experienced an adverse impact and whether Ms. Young's protected prohibited ground of discrimination was a factor in the adverse impact) in the affirmative, I find that Mr. Sawchuk's conduct towards Ms. Young breached the Act by application of s. 7(b).

2. Harassment on the Basis of Sex (s. 14(1)(c) of the CHRA)

[208] Ms. Young and the Commission alleged that Mr. Sawchuk's conduct constituted harassment and as such was inconsistent with the protections afforded by s. 14 of the Act.

[209] I do not propose to repeat the discussion on Mr. Sawchuk's conduct as it has been outlined in detail above, and I have already made factual findings about the events alleged and the connection between those events and Ms. Young's identity as a woman. However, since harassment was specifically alleged by the Complainant and the Commission and

since the Tribunal's analysis of a complaint under s. 14 differs somewhat from the test set out in *Moore*, for the purpose of completeness, the Tribunal will briefly review the elements of the test for establishing a breach of s. 14 of the Act and will consider the application of that test to the specific facts of this case.

[210] The test for the application of s. 14(1)(c) was set out in *Morin*. Applying the four elements of the *Morin* test to this case, the Tribunal will determine whether:

i. Mr. Sawchuk's conduct is related to Ms. Young's protected characteristic (sex);

ii. Mr. Sawchuck's acts were unwelcome;

iii. Mr. Sawchuck's conduct had the required element of persistence or any single incidence was serious enough to constitute harassment; and

iv. Ms. Young notified VIA, the employer, of the alleged offensive conduct.

i. Mr. Sawchuk's Conduct Was Related to Ms. Young's Sex

[211] On the basis of the analysis outlined above regarding the connection between Mr. Sawchuk's conduct and Ms. Young's sex, I find that at least some of Mr. Sawchuk's conduct was related to a protected characteristic.

ii. Mr. Sawchuk's Conduct Was Unwelcome

[212] As is extensively detailed above, Ms. Young repeatedly made it clear to Mr. Sawchuk and to VIA that his conduct was unwelcome and that she was uncomfortable around him. There was no suggestion before the Tribunal that this element of the test was not established.

iii. Mr. Sawchuk's Conduct Was Persistent

[213] As discussed above, the series of events that underpin this Complaint constitute a lengthy and persistent course of conduct. Even where I have found that the evidence presented before the Tribunal is insufficient to ground a finding of fact, the evidence in this

case leaves no question that Mr. Sawchuk was engaged in a persistent course of conduct that was unprofessional, inappropriate and unwelcome. This finding is further corroborated by the findings of VIA's own internal investigation into Mr. Sawchuk's conduct, deeming it to be conduct unbecoming.

iv. Ms. Young Notified VIA About the Conduct

[214] The parties agreed that the matter was brought to the attention of the employer.

[215] VIA argued that it did not appreciate the severity of the complaints or see the problem as one of harassment when it initially received Ms. Young's January 2012 complaint (an issue which I will address in more detail below). It is accurate that, at the time the complaints were initially raised by Ms. Young, the situation was not nearly as serious as it would ultimately become before VIA took action. However, the Tribunal is satisfied that Ms. Young's initial letter of complaint, sent in January 2012, was sufficient to put VIA on notice of the existence of a problem between Ms. Young and Mr. Sawchuk and the possibility of the Act being engaged, including more than one incident of unprofessional conduct. Having been made aware of the situation, VIA ought to have taken proactive steps to monitor the situation between Ms. Young and Mr. Sawchuk to ensure that it did not continue to escalate. Instead, the evidence before the Tribunal suggests that Mr. Hamilton, who received Ms. Young's January 2012 complaint, saw the matter as resolved following his discussion with Mr. Sawchuk and took no further proactive steps to manage the situation.

[216] Ms. Young went on to make a detailed complaint, in March 2013, including nine letters of complaint describing numerous incidents, before VIA finally initiated an investigation.

[217] There is no question on the evidence before the Tribunal that VIA was notified of Ms. Young's concerns.

[218] On the basis of the forgoing analysis, I find that Mr. Sawchuk's conduct towards Ms. Young was harassment on the basis of sex, in breach of the protections of s. 14(1)(c) of the Act.

3. Sexual Harassment (s. 14(2) of the CHRA)

[219] At the hearing and in some of the closing submissions, the parties made reference to the Complaint as one of sexual harassment, and the Commission in particular made submissions in that regard.

[220] I have already made findings with respect to harassment on the basis of sex as a characteristic protected under the s. 14(1)(c) of the Act, but I think it useful to also address the allegations of sexual harassment through consideration of the test set out in *Franke*.

[221] The Tribunal will make a finding of sexual harassment where the evidence establishes that:

> 1) a party engaged in unwelcome conduct;
>
> 2) the impugned conduct is sexual in nature;
>
> 3) there existed either a pattern of persistent conduct or a single serious incident; and
>
> 4) the employee notified the employer of the alleged sexual harassment where the employer has a human resources department and a comprehensive and effective sexual harassment policy, including redress mechanisms in place.

[222] I have already found that Mr. Sawchuk was engaged in a course of harassing conduct that represented discrimination against Ms. Young on the basis of her sex, and I do not intend to repeat that analysis here.

[223] Mr. Sawchuk was engaged in a sustained and persistent pattern of unwelcome conduct that was, at least in part, related to Ms. Young's sex, satisfying the first and third elements of the test set out in *Franke*. I have also found that Ms. Young brought this conduct to the attention of her employer, as required by the fourth element of the test.

[224] However, I am not satisfied on the balance of the evidence that Mr. Sawchuk's conduct was sexual in nature.

[225] The Commission, in its submissions, argued that sexual harassment does not need to be sexual in nature and suggested that it can include gender-related conduct that is directed at one sex and not the other, such as offensive or humiliating behaviour that is

related to a person's sex, gender-related comments about an individual's physical characteristics or gender-related verbal abuse.

[226] It is clear that harassment on the basis of gender (or what the Act refers to as "sex") does not require conduct of a sexual nature, as I have already found to be the case in this Complaint. However, I think that clarity requires the distinction between gendered harassment (a form of discriminatory conduct related to a person's sex or gender in breach of s. 14(1)(c)) and sexual harassment (which, per s. 14(2), is a subset of harassment on the basis of sex, but which includes conduct of a sexual nature). I think it is important to distinguish between the two types of harassment: the latter being a distinct subset of the former.

[227] While I have held that Mr. Sawchuk's conduct constitutes gendered harassment (or, to use the language of the Act, harassment on the basis of sex), I do not believe that the evidence presented at the hearing supports a finding that that harassment was of a sexual nature, in the manner that I believe is meant in s. 14(2) of the Act.

[228] Therefore, I dismiss the allegations that Mr. Sawchuk's conduct represented a breach of the Act in the meaning of s. 14(2).

B. VIA is Liable for the Discriminatory Conduct Under s. 65 of the CHRA

[229] Having found that Mr. Sawchuck's workplace conduct breached the Act, the burden shifts to the Respondent, VIA, to demonstrate that it ought not be held responsible for Mr. Sawchuk's actions.

[230] Section 65 of the CHRA says that an employer is deemed responsible for the conduct of its employees unless it can be established that the employer:

i. Did not consent to the conduct;

ii. Exercised all due diligence to prevent the conduct; and

iii. Exercised all due diligence to mitigate or avoid the full negative effects of the conduct of the employee.

[231] The Tribunal's jurisprudence is evolving to be increasingly clear that, to avail itself of the protection afforded by s. 65, an employer would have to demonstrate that all three of these elements are present. In other words, these are not alternative defences. An employer must demonstrate that it has not consented to the conduct, has exercised due diligence to prevent the conduct **and** has also exercised all due diligence to mitigate or avoid the full negative effects of the conduct (See *R. L. v. Canadian National Railway Company* 2021 CHRT 33 at para 198, *Aeropro* at para 194).

4. The Position of the Respondent

[232] At the hearing, VIA introduced evidence documenting the existence of a harassment policy in place at the time of the events at issue. VIA also led evidence about the existence of various training courses provided to (and, in some cases, required of) its employees. And Ms. Selesnic, the VIA manager who conducted the internal investigation into Ms. Young's internal harassment complaint against Mr. Sawchuk, was called as a witness by Ms. Young. The Tribunal heard detailed evidence about the internal investigation that VIA eventually conducted and the discipline that was administered as a result.

[233] Although the parties did not focus on this point at the hearing or in their submissions, I am prepared to infer from VIA's submissions that it takes the position that it did not expressly consent to Mr. Sawchuk's conduct, and its submissions can be understood to deny any suggestion to the contrary.

[234] VIA argued that it diligently investigated, addressed and resolved each of the issues raised by Ms. Young, spending considerable time investigating the factual basis of the incidents that she raised. In its submissions, VIA highlighted Mr. Medeiros' evidence that he spent "about 100 hours" listening to radio tapes and manually transcribing them in an effort to get to the bottom of Ms. Young's concerns.

[235] VIA also argued that its "external investigation" (which was in fact internal to VIA but external to Ms. Young and Mr. Sawchuk's team on the night shift at the TMC) followed the rules of procedural fairness and produced a meaningful process that was commensurate with the investigation's findings.

[236] Finally, the Tribunal heard evidence about incremental restrictions that were placed upon Mr. Sawchuk, culminating in his removal from his role as a locomotive attendant on the night shift. VIA argued, in fact, that removing Mr. Sawchuk from Ms. Young's workplace to ensure that Ms. Young and Mr. Sawchuk were not in contact with each other exceeded any obligation it might have arising from the situation as an employer.

[237] VIA argued that, while not legally required, the restrictions imposed on Mr. Sawchuk (including restrictions that would have encroached on his seniority rights under the applicable collective agreement) demonstrated its appreciation of the seriousness of the situation and its efforts to accommodate Ms. Young.

[238] In its closing submissions, VIA relied on the CHRT's decision in *Cassidy v. Canada Post Corporation and Raj Thambirajah*, 2012 CHRT 29 (CanLII) [*Cassidy*] to support its argument that while its response may not have been perfect, it had nonetheless adequately discharged its obligation to exercise due diligence both before and in response to the events described in the Complaint.

5. The Position of the Commission

[239] In its closing submissions, the Commission focussed on two primary areas of concern regarding VIA's response to Ms. Young's complaints about Mr. Sawchuk's conduct: i. delay; and ii. flaws in the investigation process.

i. Delay

[240] The Commission argued that VIA failed to discharge its obligation to promptly investigate Ms. Young's concerns about Mr. Sawchuk's conduct, waiting over a year from the date of the initial complaint (in January 2012) before a serious effort was made to investigate.

ii. Flaws in the Investigation Process

[241] The Commission raised further concerns about the way in which the investigation was conducted, highlighting the fact that Ms. Selesnic's description of her mandate as

collecting information rather than conducting a harassment investigation, is inconsistent with the Commission's view of what is required of a diligent investigation.

[242] The Commission concludes that VIA failed to discharge its duty under s. 65 of the Act to conduct a timely, thorough and fair investigation of the allegations and put in place an appropriate solution.

6. The Position of the Complainant

[243] Ms. Young highlighted numerous concerns with VIA's response to her complaints about Mr. Sawchuk's conduct throughout the hearing, particularly with regard to VIA's identification, response and remediation of Mr. Sawchuk's harassment of Ms. Young. The areas of concern included:

> (a) The managers' ability to properly recognize harassment, including the gendered nature of some of the incidences outlined in the Complaint;
>
> (b) The sufficiency of the training provided to individuals who conduct investigations;
>
> (c) The delay in initiating the investigation; and
>
> A lack of transparency in the investigative process (including the shift from a harassment complaint to a Code of Conduct violation), and, importantly, the lack of any written documentation of the findings of the investigation (whether or not they were to be provided to the party who initiated the investigation).

[244] In her closing submissions, Ms. Young acknowledged that the harassment policy itself was thorough and well worded.

7. Analysis of the Respondent's Liability for the Discriminatory Conduct

[245] The Act is clear that an employer is liable for the discriminatory workplace conduct of its employee. Section 65(1) of the Act states:

> Subject to subsection (2), any act or omission committed by an officer, a director, an employee or an agent of any person, association or organization in the course of the employment of the officer, director, employee or agent

> shall, for the purposes of this Act, be deemed to be an act or omission committed by that person, association or organization.

[246] There was no dispute before me about the fact that the conduct detailed in Ms. Young's Complaint was conducted by an employee in the course of their employment.

[247] Section 65(2) of the Act provides an exception to this deemed liability:

> An act or omission shall not, by virtue of subsection (1), be deemed to be an act or omission committed by a person, association or organization if it is established that the person, association or organization did not consent to the commission of the act or omission and exercised all due diligence to prevent the act or omission from being committed and, subsequently, to mitigate or avoid the effect thereof.

[248] To meet this threshold, the response must be timely, mitigative and preventative.

[249] In the event the Tribunal were to substantiate Ms. Young's Complaint that she was the subject of discriminatory conduct in contravention of the Act, VIA invoked s. 65(2) of the Act as a defence against what would otherwise be liability for the act of an employee, pursuant to s. 65(1).

[250] The burden of proof rests on the respondent to demonstrate that it did not consent to the impugned conduct and that it acted with all due diligence to both prevent and mitigate the effects of the impugned conduct (see *Aeropro* at paras 208 and following)

Summary of the Relevant Facts

[251] For the most part, the material facts surrounding VIA's response to Mr. Sawchuk's conduct towards Ms. Young were not in dispute.

[252] VIA had a harassment policy in place at the time of the relevant incidents.

[253] VIA provided training with respect to the harassment policy to its employees.

[254] In January 2012, Ms. Young first raised concerns about Mr. Sawchuk's conduct (being watched, photographed and sworn at by Mr. Sawchuk) to VIA management in a letter

dated January 12, 2012. More than a month passed before VIA responded, and on February 17, 2012, Ms. Young testified that the manager who addressed Ms. Young's complaint engaged with the individuals involved in an informal manner and warned Mr. Sawchuk to "act more professionally in the future", to which Mr. Sawchuk reluctantly agreed.

[255] Despite Mr. Sawchuk's reluctant agreement, VIA did not provide any evidence that it followed up or took any steps to make sure that Mr. Sawchuk was indeed acting more professionally. Instead, as has been detailed extensively in these reasons, the situation continued to deteriorate. This deterioration is sometimes, but not always, brought to the attention of VIA management.

[256] The situation came to a head 14 months after Ms. Young's first letter of complaint.

[257] On March 7, 2013, Ms. Young notified Mr. Hamilton that she was no longer willing to work with Mr. Sawchuk. Whether or not a formal work refusal was filed, in the meaning of the Occupational Health and Safety Act, Ms. Young characterized the event in those terms. Mr. Hamilton told Ms. Young that she had to put her concerns in writing with supporting evidence.

[258] On March 13, 2013, Ms. Young submitted nine letters of complaint, detailing the events described in these reasons and alleging that Mr. Sawchuk had engaged in inappropriate and unsafe conduct.

[259] On March 21, 2013, Mr. Hamilton and Mr. Medeiros met with Ms. Young. Despite the wide range of incidents detailed in the letters of complaint, the focus of the meeting was the radio transmissions pertaining to some of the incidents raised in Ms. Young's March 13 complaint. VIA's harassment policy and mediation process were also discussed at this meeting.

[260] Ms. Young was clear that she did not want to be in a meeting with Mr. Sawchuk and was uncomfortable proceeding with mediation.

[261] Both Ms. Young and Mr. Medeiros testified that Mr. Medeiros appeared to be distressed about the allegations and the fact that she had not come to him earlier.

[262] The union became involved, and a decision was made to remove Mr. Sawchuk from the evening shift at the TMC, effective April 23, 2013.

[263] VIA also decided to proceed to a formal investigation at this time.

[264] On April 18, 2013, Ms. Selesnic initiated an extensive fact-finding investigation into the complaints that had been raised by Ms. Young and sent a notice to Ms. Young to that effect. Ms. Young was again asked to provide further clarification of her complaints to VIA.

[265] Mr. Hamilton provided a statement in the context of Ms. Selesnic's investigation in which he stated that he was aware that Mr. Sawchuk and Ms. Young did not get along but that he was not aware "that any harassment was taking place" and noted that "no further written complaints" were received between January 12, 2012, and March 13, 2013.

[266] Ms. Selesnic interviewed eleven VIA employees, including Ms. Young and Mr. Sawchuk. Ms. Young testified that her interview with Ms. Selesnic took over two 12-hour days.

[267] At some point during the investigation process, a decision was made that Ms. Young's harassment complaint would be adjudicated as a complaint under the Code of Conduct. There was no explanation provided at the hearing as to when or why the decision was made, or who made it. And I do not have sufficient evidence to make any findings with regard to those facts.

[268] The testimony regarding the conclusion of the investigation was unclear. However, I am able to find that, at the end of her investigation, Ms. Selesnic made a verbal report to Mr. Medeiros and Mr. Hamilton. VIA repeatedly advised that there was no written record of the findings or conclusions of the investigation.

[269] Ms. Selesnic testified that she was not involved in the decision about what conclusion would be drawn from the extensive investigation that she conducted. She further testified that despite having conducted the investigation, she did not make findings with respect to the allegations. Mr. Medeiros testified that he was directly involved in deciding what would happen as a result of Ms. Selesnic's investigation. The Tribunal reviewed an email from Ms. Blair, which summarized VIA's actions coming out of the investigation, but, during her

testimony, Ms. Blair's evidence was that Mr. Medeiros made the decisions about what, if any, disciplinary action would arise as a result of the investigation and Ms. Blair determined any other corporate responses that would arise, including training or policy changes.

[270] In late June 2013, Ms. Young had a meeting with Mr. Medeiros and Mr. Hamilton at which time Ms. Young was advised that the investigation was complete and that Mr. Sawchuk had been disciplined. Ms. Young testified that she was satisfied at this point that the matter had been addressed.

[271] Ms. Young testified that she requested a copy of Ms. Selesnic's report but was not provided a copy. She testified that, at the time, she was told that Ms. Selesnic was away and that her report was not available. VIA subsequently advised the Tribunal and the parties that no such report exists.

[272] Ms. Young testified that on July 15, 2013, Mr. Medeiros wrote to her to provide the results of the investigation. The July 15 letter was presented in evidence at the hearing, and the Commission included the following excerpt in its closing submissions:

> Pursuant to the examination of the facts ad the statements taken, I wish to inform that it was not possible to establish the allegations you made in your complaint. However, the appropriate corrective measure was taken toward Mr. Sawchuk. Please take note that management will monitor that the Code of Conduct and Harassment Policy are respected in the workplace. Mr. Sawchuk was advised of our conclusions and that any further instances of harassment, intimidation or retaliation shall be considered as misconduct and will not be tolerated.

[273] Following the investigation, Mr. Sawchuk was awarded 25 demerit points, and further measures were put in place to prevent any recurrence of Mr. Sawchuk's conduct.

[274] While the steps taken by VIA following the investigation did not entirely eliminate any issues between Ms. Young and Mr. Sawchuk, I find that the measures taken following the Selesnic investigation were a reasonable if belated response in the circumstances.

Analysis of VIA's Response to Mr. Sawchuk's Discriminatory Conduct

[275] At the hearing and in their closing submissions, the Complainant and the Commission focussed on two areas in which they allege that the Respondent failed to act with due diligence in respect of Mr. Sawchuk's conduct:

1. The long delay in the start of a formal investigation; and
2. The procedure employed in the investigation itself.

[276] As I have outlined above, to avail itself of the exemption from statutory liability for the conduct of an employee, VIA must establish on a balance of probabilities that (i) it did not consent to the impugned conduct; (ii) it acted with all due diligence to prevent the impugned conduct; and (iii) it acted with all due diligence to mitigate the impact of the impugned conduct.

[277] As VIA and the Commission correctly argued in their respective closing submissions, the standard is not one of perfection but one of reasonableness (*Laskowska v. Marineland of Canada Ltd.*, 2005 HRTO 30 [*Laskowska*] at para 60).

(i) Did VIA consent to Mr. Sawchuk's conduct?

[278] Although the terms of the 2007-harassment policy were in evidence before the Tribunal, the policy itself was not the subject of much testimony or dispute. The parties conceded that VIA's policy was adequate and that VIA, as an organization, does not condone or consent to harassment or discrimination.

[279] The evidence before me at the hearing with respect to the fact and frequency of training was inconsistent, and it was clear from the evidence before the Tribunal that many VIA employees, managers included, do not have a nuanced understanding of workplace human rights and the requirements of a discrimination-free working environment.

[280] The inability of more than one manager to recognize the gendered nature of Ms. Young's concerns and the way in which her experience of Mr. Sawchuk's conduct was being impacted by her identity as a woman leads me to conclude that more work and training

are required to ensure that issues of discrimination are being readily recognized in the workplace.

[281] In any event, although I have found that Mr. Sawchuk's conduct was in fact discriminatory, I am convinced that VIA, and particularly Mr. Medeiros, was concerned about Mr. Sawchuk's conduct despite not understanding it to be discriminatory at the time. The delay in VIA's formal response to Ms. Young's complaint is concerning as is the fact that a number of Ms. Young's concerns (expressed directly to management, albeit not in writing) and Mr. Doré's concerns about Mr. Sawchuk appear based on the evidence before me to have gone unanswered. This delay has contributed to my finding (below) that VIA failed to exercise due diligence to prevent Mr. Sawchuk's conduct. However, I am prepared to conclude on the basis of the evidence before me that VIA did not consent to Mr. Sawchuk's conduct.

(ii) Did VIA exercise due diligence to prevent Mr. Sawchuk's discriminatory conduct?

[282] The situation described in these reasons is not one that should have required a formal written complaint for the employer to become involved or to engage its obligations under the Act. While a written complaint can be helpful in considering issues of discrimination, several witnesses, including Mr. Medeiros and Mr. Hamilton, appeared to be under the impression that, unless a formal written complaint was received by VIA management, there was nothing that they could do about Mr. Sawchuk's conduct. Notwithstanding the content of any VIA policy or protocol, that understanding is not consistent with the obligations of an employer under the Act.

[283] Ms. Young made her initial complaint in January 2012. Clearly, the situation described in that initial complaint is much less serious than the many incidents included in the March 2013 complaint, but it is partly through VIA's own inaction that the situation worsened in the way that it did. Had VIA engaged more rigorously at the time of the initial complaint and acted more proactively to ensure that the relationship between Ms. Young and Mr. Sawchuk did not continue to deteriorate, it is unlikely that the situation would have become as serious as it did.

[284] The various concerns that were raised throughout the period from January 2012 to March 2013, including those concerns raised in the Doré Memo, were not taken sufficiently seriously, and it does not appear that Mr. Sawchuk's conduct and the deteriorating relationship between he and Ms. Young were being diligently addressed to prevent what was, at least in part, discriminatory conduct within the workplace.

[285] VIA has failed to discharge its burden to demonstrate that it exercised all due diligence necessary to prevent the discriminatory conduct.

(iii) Did VIA exercise all due diligence to mitigate or avoid the full negative effects of Mr. Sawchuk's conduct?

[286] It is in this phase of the analysis that I will consider the sufficiency of VIA's investigation and address the numerous concerns that were raised by the Commission and the Complainant about that process.

[287] As mentioned above, the employer's duty to investigate is held to a standard of reasonableness, not correctness or perfection. In *Laskowska*, the Human Rights Tribunal of Ontario (HRTO) set out the relevant criteria for an employer to consider its duty to investigate as:

> (1) *Awareness of issues of discrimination/harassment, Policy Complaint Mechanism and Training*: Was there an awareness of issues of discrimination and harassment in the workplace at the time of the incident? Was there a suitable anti-discrimination/harassment policy? Was there a proper complaint mechanism in place? Was adequate training given to management and employees;
>
> (2) *Post-Complaint: Seriousness, Promptness, Taking Care of its Employee, Investigation and Action*: Once an internal complaint was made, did the employer treat it seriously? Did it deal with the matter promptly and sensitively? Did it reasonably investigate and act; and
>
> (3) *Resolution of the Complaint (including providing the Complainant with a Healthy Work Environment) and Communication*: Did the employer provide a reasonable resolution in the circumstances? If the complainant chose to return to work, could the employer provide him/her with a healthy, discrimination-free work environment? Did it communicate its findings and actions to the complainant?

[288] The HRTO in *Laskowska* also stated the following at para. 60:

> While the above three elements are of a general nature, their application must retain some flexibility to take into account the unique facts of each case. The standard is one of reasonableness, not correctness or perfection. There may have been several options – all reasonable – open to the employer. The employer need not satisfy each element in *every case* in order to be judged to have acted reasonably, although that would be the exception rather than the norm. One must look at each element individually and then in the aggregate before passing judgment on whether the employer acted reasonably.

[289] In considering whether VIA's response to the conduct at issue in the complaint met the requirement to reasonably exercise all due diligence, there are two main problems identified by the Complainant and the Commission:

1. It took too long to intervene in a dangerous and deteriorating situation; and
2. The formal investigation fell short of the transparency and documentation necessary in the situation.

[290] Applying the *Laskowska* factors adopted by the Tribunal in *Cassidy*, we see that although VIA's ultimate response to Mr. Sawchuk's conduct was successful in eliminating the discriminatory impact of Mr. Sawchuk's conduct upon Ms. Young, it came after months of escalating harm. The investigation process employed by VIA in respect of the complaint leaves serious questions about transparency, independence and systemic considerations, leaving doubt about whether all due diligence was exercised to mitigate and avoid the harm arising from the discriminatory conduct.

[291] The Tribunal's ability to assess the adequacy of the investigation process is limited as a result of the lack of documentation regarding VIA's investigation process and of the details of this specific investigation. There was little if any evidence provided about the consideration and deliberation undertaken in response to information gathered by Ms. Selesnic, the weight that was given to the various statements taken, and how the decision was made that Mr. Sawchuk had violated the Code of Conduct and was found to have engaged in "conduct unbecoming", though it appears from the evidence that the decision was made by Mr. Medeiros and Mr. Hamilton following a briefing from the investigator, Ms. Selesnic.

[292] While the collection of statements was undertaken by an investigator outside of the TMC, it appears from the uncontradicted evidence that the final decision about what would happen as a result of the investigation was not made independently but was made by Mr. Medeiros and Mr. Hamilton, with broader organizational issues being considered and addressed by Ms. Blair (though there was no evidence that any organizational or systemic changes were made as a result of this investigation).

[293] This lack of independent decision-making is clearly not consistent with an independent investigation, particularly given that one of the areas of concern that has been raised before me (and that Ms. Young testified that she raised at the time) was about the inaction of VIA management, including Mr. Medeiros and Mr. Hamilton, in the 14 months following her initial complaint.

[294] Although Ms. Young purported to file a harassment complaint, it does not appear that the formal harassment policy was engaged, and the evidence before me leads me to conclude that, at some point in the process, a decision was made that Ms. Young's complaint did not engage the harassment policy. The Commission argued that VIA did not conduct an investigation under its harassment policy.

[295] The Tribunal's ability to make findings about what happened during the course of the investigation is severely limited due to the lack of documentary evidence produced. This, in and of itself, is a flaw in the investigation process. But, as the burden to demonstrate that VIA exercised all due diligence rests with the Respondent, this lack of evidence makes it difficult for VIA to satisfy this aspect of the Tribunal's analysis.

[296] While there is no doubt that the interview process was thorough and comprehensive, the Tribunal has no evidence that the decision-making process was equally rigorous. Ultimately, in absence of a written report or clear testimony explaining the outcome of the investigation, the reasons for the decision not to substantiate the harassment allegations, the decision to frame the complaint in terms of the Code of Conduct, or the disciplinary consequences that would be awarded as a result of the investigation, or, what went so very wrong in this case, and any changes that VIA might adopt in order to prevent any future

reoccurrence either with Mr. Sawchuk and Ms. Young, or any other employees, the Tribunal cannot satisfy itself that the investigation meets the necessary standards of due diligence.

[297] With respect to the measures eventually put in place to address what VIA had determined to be “conduct unbecoming”, the Tribunal finds that, from the period of June 2013 to December 2013, VIA engaged in progressively more restrictive measures to create distance between Ms. Young and Mr. Sawchuk, ultimately culminating in the removal of Mr. Sawchuk from the night shift.

[298] The Tribunal finds that these measures were responsive to the seriousness of the situation and were ultimately effective in preventing the discriminatory conduct by removing the offending party.

[299] However, the Tribunal notes that it does not appear that any steps were taken to address Mr. Sawchuk’s apparent lack of understanding about the nature of his conduct. Even as he testified before the Tribunal, several years after the events at issue, Mr. Sawchuk appeared to be totally unaware of any wrongdoing on his part and claimed that he had never received an explanation of what he had done to warrant the discipline that he received or the fact that he had been forced to change to the day shift.

[300] While the source of the conflict was effectively eliminated, Mr. Sawchuk’s testimony leaves open the question of whether the source of that conflict was meaningfully remedied or simply relocated.

[301] While I reiterate that the standard against which an investigation will be adjudicated is not one of perfection but one of reasonableness, there are structural and process flaws present in the approach employed in this case that present an insurmountable challenge for VIA in discharging its burden to show that it exercised all due diligence, either to prevent or mitigate the harm arising from Mr. Sawchuk’s conduct. For the foregoing reasons, I find that VIA has failed to prove that it more likely than not exercised all due diligence in respect of the issues raised in this Complaint.

C. Compensation and Policy Remedies Are Required to Prevent Reoccurrence

[302] Having substantiated the Complaint and found that VIA is not able to avail itself of the protection arising from s. 65(2) of the Act, I will now consider the remedies available pursuant to the Tribunal's remedial and preventative jurisdiction established by s. 53 of the Act.

[303] Ms. Young included a number of remedial requests that go beyond the scope of what the Tribunal can award, pursuant to its authority under the Act, including damages awarded pursuant to the Workplace Violence Policy or occupational health and safety legislation and the removal of stipulations in relation to discipline awarded outside of the matters adjudicated before the Tribunal

[304] Ms. Young and the Commission have, between them, identified five types of remedy that could be ordered by the Tribunal against VIA: (1) damages for injury to dignity; (2) damages for willful and reckless conduct; (3) compensation for lost wages; (4) costs incurred in pursuit of the Complaint; (5) interest payable on the amounts awarded; and (6) policy remedies.

1. Compensation for Pain and Suffering Pursuant to s. 53(2)(e) of the CHRA

[305] Ms. Young is claiming the maximum amount of $20,000.00 for the pain and suffering resulting from Mr. Sawchuk's harassment and the adverse treatment she experienced during her employment under paragraph 53(2)(e) of the CHRA.

[306] The Commission did not take a position with respect to the appropriate quantum of special damages to be awarded in this case, noting only that an award of special compensation was warranted in this case.

[307] The Tribunal has historically exercised its discretion in the adjudication of damages and awarded the maximum amount allowed under the CHRA, $20,000.00, for the most blatant cases of complaints (*Premakumar v. Air Canada*, T.D. 03/02, April 4, 2002; *Aeropro*, at paragraph 272). In addition, as has been noted several times in this decision in other respects, the complainant must demonstrate the causal connection between the damages

claimed and the discriminatory practice (*Chopra v. Canada (Attorney General)*, 2007 FCA 268, at paragraph 32 [*Chopra*]).

[308] Damages for pain and suffering are intended to compensate the complainant, to the extent possible, for the harm they have endured and the hardship they have experienced as a result of the discrimination, including any injury to their dignity (*Nielsen v. Nee Tahi Buhn Indian Band*, 2019 CHRT 50, at paragraph 142; *Beattie and Bangloy v. Indigenous and Northern Affairs Canada*, 2019 CHRT 45 (CanLII), at paragraph 206 [*Beattie and Bangloy*]; *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2019 CHRT 39 (CanLII), at paragraph 223).

[309] The Tribunal is convinced that Ms. Young experienced pain and suffering as a result of the discrimination she suffered.

[310] In her closing submissions, Ms. Young described her experience of fear, crying, increasing anxiety and stress as her concerns went unaddressed by VIA management. Ms. Young described the impact of such experience on her life outside of work as a mother in a manner that appeared sincere and heartfelt.

[311] At the hearing, the Tribunal was also able to observe what appeared to be the effects of the harassment and discrimination experienced by Ms. Young, even years later in the context of this proceeding. She sometimes had trouble being present in the hearing and appeared at times to be distressed and overwhelmed by the experience and by the evidence she was hearing. In addition, Ms. Young's testimony at the hearing was emotional and credible in terms of the impact that these events have had on her. When she told her story and talked about the events described in her complaint, it was clearly very difficult for her, and she (at times) appeared to want to physically withdraw into herself.

[312] It was evident to the Tribunal that the ongoing trauma and fear that Ms. Young felt as a result of Mr. Sawchuk's conduct impacted her experience of the events around her and caused her deep distress. I also note that Ms. Young was angry, testifying that she had repeatedly asked for help and support from her employer, but for a long time, none was given.

[313] Ms. Young's distress and frustration arising from her experience were palpable and were clearly demonstrated throughout the hearing process. While Ms. Young did not present medical evidence pertaining to her mental health, her testimony at the hearing left little doubt that the events described in her Complaint were serious and ongoing and had impacted her dignity and sense of well-being.

[314] Mr. Sawchuk's actions and the delay in VIA's response compounded the harm Ms. Young experienced as a result of her continued stress and fear and were an affront to her dignity.

[315] The pain and suffering are clear to the Tribunal, and it does not need any more convincing of the causal connection between Ms. Young's pain and suffering and the discriminatory practices (*Chopra*, above).

[316] Given the seriousness of the events and their significant impact on the Complainant, who, even at the time of the hearing, still appeared to be suffering from the consequences of the harassment and discrimination, the amount of $12,000 is appropriate in the circumstances (paragraph 53(2)(e) of the CHRA).

2. Compensation for Willful or Reckless Conduct Pursuant to s. 53(3) of the CHRA

[317] The Complainant requested $20,000—the maximum amount allowable under s. 53(3) of the CHRA—in special damages against VIA arising from its reckless conduct.

[318] The Tribunal spent 19 days hearing evidence about the workplace in which Ms. Young and Mr. Sawchuk were employed, and the testimony provided gave rise to serious concerns about the Respondent's level of tolerance for abusive and inappropriate workplace conduct. While a good deal of the conduct referred to was outside of the scope of the Tribunal's authority arising from the Complaint, and therefore beyond the Tribunal's jurisdiction, I find that VIA management did repeatedly fail to intervene in a situation that was clearly not functioning in an appropriate manner—and that situation has been found to be related to discriminatory conduct on the part of Mr. Sawchuk, VIA's employee. Even if VIA was unable to recognize that Mr. Sawchuk's conduct was discriminatory, there was no

meaningful attempt to argue that the conduct was not deeply problematic and the relationship between employees on the night shift at the TMC deeply dysfunctional.

[319] The fact that a festering conflict in the workplace between what was repeatedly referred to as "factions" was dismissed by management as a "family squabble" is deeply troubling to the Tribunal.

[320] In *Cassidy*, at paragraph 192, the Tribunal wrote the following:

> The goal of the *CHRA* and other anti-discrimination human rights statutes is to "make a complainant whole", to put that person in a position s/he would have been in "but for the discrimination" the complainant suffered. The *CHRA* is a remedial statute. Its goal is to compensate, not punish a respondent. That said, aggravating (as opposed to punitive) and mitigating factors are relevant to the award of compensation. The remedy must be reasonable and have a nexus or causal link to the discriminatory practice found to have occurred.

[321] In addition, in *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada*), 2015 CHRT 14 (CanLII), the Tribunal wrote, at paragraph 22:

> The Federal Court has interpreted this section as being a "…punitive provision intended to provide a deterrent and discourage those who deliberately discriminate" (*Canada (Attorney General) v. Johnstone*, 2013 FC 113, at para. 155, aff'd 2014 FCA 110 [*Johnstone FC*]). A finding of wilfulness requires "…the discriminatory act and the infringement of the person's rights under the Act is intentional" (*Johnstone FC*, at para. 155). Recklessness involves "…acts that disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly" (*Johnstone FC*, at para. 155).

[322] It should be added that, when the Tribunal decides whether to award special compensation, it analyzes the respondent's actions or inaction, not the effects of those actions on the complainant (*Beattie and Bangloy*, at paragraph 210).

[323] In this case, the Respondent's conduct was not of such a nature as to warrant an award of special damages at the high end of the range, as requested by Ms. Young. However, I am satisfied that VIA's diminishing of the abusive and dangerous conduct within the workplace during the night shift and its delay in providing an effective and comprehensive response to what was an increasingly toxic and harmful workplace dynamic

was “indifferent to the consequences.” And that indifference allowed conduct that has been found to be discriminatory to persist for too long.

[324] Since much of the most egregious conduct described before the Tribunal fell outside the scope of the adjudication of this complaint, and since I believe that the connection between Mr. Sawchuk’s conduct and Ms. Young’s identity as a woman was perhaps not obvious to VIA at the time that Ms. Young raised her complaints, the Tribunal’s award of special damages under s. 53(3) of the CHRA will be limited to $3000.

3. Damages for Lost Wages Pursuant to s. 53(2)(c) of the CHRA

Lost Overtime

[325] The Complainant argued that, as a result of Mr. Sawchuk’s harassment and the restrictions that were subsequently imposed on Mr. Sawchuk and Ms. Young working together arising from that harassment, she lost the ability to work overtime shifts that she would have worked over a period of seven years.

[326] VIA argued that although the Tribunal has the jurisdiction to award lost wages, no such award should be made in this case as the losses were not proven. Rather, VIA submits that Ms. Young made a personal choice to work less overtime than she had in the past. VIA also asserted that Ms. Young’s claim was asserted without precise evidence and that the Respondent was not liable for any wage loss.

[327] The Commission did not make closing submissions with respect to lost overtime, instead relying on its Statement of Particulars.

[328] Ms. Young testified that, starting in March or April 2012, she began to refuse overtime shifts to avoid working with Mr. Sawchuk. This testimony was supported by the documents tendered before the Tribunal.

[329] Ms. Young also testified that at a certain point she was being skipped on the overtime call list, which Mr. Medeiros verified in his testimony (though the two witnesses disagreed about the frequency of this occurrence). There were some documents entered in evidence at the hearing that also support the conclusion that, at least in some cases, starting in the first part of 2013, Ms. Young was being skipped on the overtime call list, and I am convinced

that, when this happened, it was related to VIA's decision to ensure that Ms. Young and Mr. Sawchuk were not working together.

[330] I also heard evidence from several other witnesses who worked at the TMC at the relevant time who testified that overtime was a fairly regular part of their work and that there were generally lots of overtime shifts available for locomotive attendants. This testimony was not contradicted by any other witnesses.

[331] In fact, whether Ms. Young missed out on overtime work because she was unable to be sure of her own safety on the job or because VIA had elected not to offer her overtime as a result of the concerns she had raised about Mr. Sawchuk, it is more likely than not that Ms. Young missed out on overtime shifts in 2012 and 2013 as a result of Mr. Sawchuk's conduct.

[332] Ms. Young has claimed damages for lost overtime over a period of seven years, though the evidence as to the amount claimed is somewhat speculative and inconsistent.

[333] While I have found that the overtime missed after the first quarter of 2012 and through 2013 can reasonably be attributed to Mr. Sawchuk's conduct and VIA's response to that conduct, by the end of 2013, I have found that the measures that VIA had put in place constituted a sufficient response to Mr. Sawchuk's conduct. While I appreciate that Ms. Young may have continued to have concerns about taking overtime shifts after 2013, the evidence supports a finding that VIA had addressed the conduct in such a way that Ms. Young should have been able to return to a normal pattern of work with a high degree of confidence that she would not be working with Mr. Sawchuk, who had been transferred to the day shift.

[334] The Tribunal has jurisdiction flowing from s. 53(2)(c) of the Act to award damages for lost overtime where it finds that this loss flows from the discriminatory conduct.

[335] In this case, I have concluded that Ms. Young lost overtime shifts in the last three quarters of 2012 through 2013 as a result of the discriminatory conduct that she experienced, either because she refused those shifts to avoid working with Mr. Sawchuk or because she was passed over by VIA on the overtime calling list.

[336] It is very difficult to establish with certainty what Ms. Young would have done if VIA had been able to address Mr. Sawchuk's conduct earlier, how much overtime would Ms. Young have been offered, or how often would she have accepted those shifts.

[337] There were weaknesses in Ms. Young's evidence and a certain degree of speculation or uncertainty about what would have happened were it not for Mr. Sawchuk's conduct. However, given my findings that Ms. Young did suffer a loss of overtime as a result of the discriminatory conduct, the Tribunal's response to the uncertainty ought not be to throw up its proverbial hands (*Kelsh v. Canadian Pacific*, 2019 CHRT 51 at para 153). Instead, as the Federal Court of Appeal adopted in *Public Service Alliance of Canada v. Canada Post Corporation* (2010 FCA 56, affirmed by the Supreme Court of Canada in 2011 SCC 57), Professor Waddams claims that the appropriate response is for the Tribunal to do the best it can with the evidence it has:

> If the amount [of a loss] is difficult to estimate, the tribunal must simply do its best on the material available, though of course if the plaintiff has not adduced evidence that might have been expected to be adduced if the claim were sound, the omission will tell against the plaintiff.

[338] The evidence before the Tribunal demonstrates that, in 2011, Ms. Young earned $3634.20 in overtime pay. While it may be an imperfect proxy, the full year prior to the start of the events described in Ms. Young's Complaint will serve as the base for my damages calculations. Therefore, I award Ms. Young damages for lost overtime in the following amounts:

1. 2012 (for ¾ of the year): $2725.65
2. 2013 (for the full year): $3634.20

for a total of $6359.85.

Lost Chance to Be Promoted

[339] Ms. Young alleged that she lost out on an opportunity to be promoted as a result of the Complaint. Ms. Young testified that she would have received the promotion but for the fact that she had complained about Mr. Sawchuk.

[340] Ms. Young's closing submissions include a claim under s. 53(2)(c) for

i. future earnings of $920,000 lost because she was not considered for a management position due to her Complaint, and

ii. a loss of increased salary of $27,000 per year for a period of 23 years as a result of discrimination that was left to fester for a total amount of lost future earnings of $621,000.

[341] Although Ms. Young provided some evidence about what she alleged to be the loss of an opportunity to compete in job competitions and her relative seniority or experience in relation to the successful candidates, I have very little testimony or documentary evidence to support her claims that she would have been entitled to be considered for a promotion but was not included. Ms. Young's claim rests on her speculation about why she was not included in a given hiring pool or chosen for a specific job.

[342] I am also mindful of the evidence that the TMC is a unionized workplace, and Ms. Young is represented by a union. Without clear evidence about the employment opportunity, the collective agreement, the hiring process or the factors that would have bearing on any job opportunity, I am not prepared to find that Ms. Young lost the opportunity to compete for a promotion or lost a promotion as a result.

[343] Neither VIA nor the Commission made submissions on this point.

[344] While the Tribunal has the jurisdiction under the Act to award damages for any loss that flows from the discriminatory conduct, including the loss of a promotion if a causal connection can be drawn between the discriminatory conduct and the loss claimed, I am not satisfied on the basis of the evidence provided at the hearing that Mr. Sawchuk's conduct is the reason Ms. Young was not awarded a promotion or was not included in the pool for any given opportunity at VIA.

[345] Therefore, the Tribunal does not have sufficient evidence to make an award of damages flowing from the claim of a lost promotion.

4. Costs Incurred in Pursuit of the Complaint

[346] The Complainant provided considerable documentation of the expenses she has incurred in the long journey of bringing her Complaint to the Tribunal and asserted a claim for $15,580 in administration and litigation costs associated with bringing her Complaint

before the Tribunal. (Although the total included in Ms. Young's written submissions was $158,805, I believe this was a typographical error because the amounts listed in her closing submission actually add up to a total amount of $15,580).

[347] VIA highlighted the case of *Stanger v. Canada Post Corporation* (2018 CHRT 14 at paras 43-45 [*Stanger*]) to argue that the Complainant's claim for an award of costs incurred in pursuit of the Complaint is outside of the Tribunal's remedial jurisdiction under s. 53.

[348] The Commission did not take a position on this issue.

[349] In *Stanger*, the Tribunal ruled:

> [43] Ms. Stanger has submitted various receipts for what she describes as "expenses that the complainant incurred in bringing forward" her complaint. The receipts are for items such as photocopies, postage, cell phone charges, binders, tabs and paper, and parking and meals while attending the hearing in Victoria.
>
> [44] In *Grant v. Manitoba Telecon Services Inc*. (sic) 2012 CHRT 20 (CanLII) ("*Grant*"), the Tribunal considered a similar request at para 20:
>
> > [20] The Complainant seeks compensation with regards to the expenses she incurred related to the hearing of this matter, and filed an expense chart in this regard at the July 10, 2012 hearing. The Complainant seeks $2,000 for lodging, meals, parking, and travel. In *Canada (Canadian Human Rights Commission) v. Canada (Attorney General*), 2011 SCC 53 (CanLII) [*Mowat*], the Supreme Court of Canada found that the text, context and purpose if the Act clearly showed that there was no authority in the Tribunal to award legal costs. According to the same reasoning in *Mowat*, and considering there is no link between the particular types of compensation described in s. 53 and the costs claimed by the complainant here, I fail to see any authority in the Act that would allow the Tribunal to award compensation for the expenses that the Complainant incurred in relation to the hearing of this matter. Therefore, no compensation can be provided for these costs.
>
> [45] I agree with the Tribunal's decision in *Grant*, *supra*, based on the Supreme Court of Canada's reasoning in *Mowat*, *supra*, in that the Act does not intend for these administrative costs, incurred in connection with presenting the complaint at hearing and beforehand, to reimbursed under section 53. Accordingly, I do not award any amount for the administrative expenses claimed.

[350] The Tribunal is the master of its own procedure and must have latitude to ensure that hearings being conducted before it are conducted in a manner that advances and safeguards both due process and human dignity. The law is clear that the CHRT does not have the authority to provide a cost award to the successful party in the manner sought by the Complainant (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 (CanLII), *Grant v. Manitoba Telecom Services Inc*., 2012 CHRT 20 (CanLII) 2012 CHRT 20).

[351] The Tribunal recognizes the extraordinary cost (in human and financial terms) that a hearing entails for all parties involved. The Tribunal further recognizes that an inability to recover the costs of participating in a hearing may limit the ability of parties to fully engage in the hearing process. Nevertheless, the Tribunal's recognition of this gap does not enable it to craft a remedy where it lacks the statutory authority to do so.

[352] While there may be a place for a cost award arising from the conduct of the parties in a hearing before the Tribunal in some circumstances, this is not such a case. Despite my finding that VIA failed to adequately prevent or respond to Mr. Sawchuk's conduct and as such is liable under the Act, there is no suggestion (nor is there any basis whatsoever in the evidence) that VIA participated in the hearing before the Tribunal with anything less than the utmost good faith and collegiality.

[353] I am aware of the heavy burden that is borne by an individual who brings forward a complaint to safeguard their rights under the CHRA and in fact to all parties to a proceeding before the Tribunal. And it is not lost upon me that most ordinary Canadians do not have the resources required to retain a lawyer for the arduous process of litigating a human rights complaint. As Ms. Young's submissions illustrate, even without retaining a lawyer, human rights proceedings are long, complex and expensive.

[354] That being said, the Supreme Court of Canada's analysis of the CHRA leaves no margin for debate in a case like this. The Tribunal does not have the statutory authority to award litigation costs (including administrative costs) as a matter of course to the successful party.

[355] Therefore, Ms. Young's claim for the costs associated with bringing forward and litigating her Complaint is denied.

5. Interest (s. 53(4) of the CHRA)

[356] As requested by the Commission in its Statement of Particulars, the Tribunal concludes that interest on compensation starting from the date that Ms. Young filed her Complaint with the Commission is warranted pursuant to subsection 53(4) of the CHRA.

[357] As set out in subsection 53(4) of the CHRA and rule 9(12) of the Tribunal's *Rules of Procedure* (03-05-04), the Complainant is entitled to interest on the compensation ordered, which accrues from the date that Ms. Young filed her Complaint with the Commission.

[358] However, in no case shall the accrual of interest on the awards made under subsection 53(2)(e) and 52(3) result in a total award that exceeds the statutory maximums these provisions allow (*Chopra*, at para 53; citing *Canada (Canadian Human Rights Commission) v. Canada (Attorney General),* 2011 SCC 53 (CanLII), at page 437.

[359] Interest will be simple interest calculated on a yearly basis at the Bank Rate (monthly series) established by the Bank of Canada.

6. Policy Remedies (s. 53(2)(a) of the CHRA)

[360] Having found that VIA failed to discharge its obligation to promptly address and respond to allegations of discrimination and failed to conduct a prompt, thorough and fair investigation of the allegations raised by Ms. Young, in addition to being mindful of the Tribunal's statutory mandate to prevent discriminatory conduct from reoccurring, I find that this case is one which invokes the authority to make remedial policy orders pursuant to s. 53(2)(a) of the Act, which states:

> **(2)** If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:
>
> > **(a)** that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including

> **(i)** the adoption of a special program, plan or arrangement referred to in subsection 16(1), or
> **(ii)** making an application for approval and implementing a plan under section 17;

[361] The Commission's request for policy remedies in this case are outlined in its Statement of Particulars. The policy remedies sought include:

a. An Order requiring VIA to work with the Commission to review and revise its harassment policy;

b. An Order requiring VIA, in consultation with the Commission, to retain independent and appropriate persons to conduct workplace training on harassment and discrimination for employees including managers, supervisors and employees responsible in (*sic*) conducting harassment investigations in the workplace;

c. An Order requiring VIA to make all new employees aware of the existence of the harassment policy and to provide the necessary training; and

d. An Order requiring that VIA complete the implementation of all the policy remedies sought within six months of the date of the Tribunals decision in this matter.

[362] Having considered the totality of the evidence, the seriousness of the conduct and especially the safety-sensitive nature of the work performed by locomotive attendants, I find it appropriate to make policy remedies to address the awareness of issues related to harassment and human rights within this workplace, the development of appropriate investigation procedures and training, and an accountability mechanism whereby VIA can learn about whether its policies, training and procedures are having the necessary and desired effect of preventing discrimination and harassment on the basis of a protected characteristic. These orders are detailed below at paragraph 369 of these reasons.

[363] The Commission has also asked that the Tribunal retain jurisdiction over this matter for a period of nine months from the date of my decision.

[364] The Tribunal has the authority to retain jurisdiction over a matter (see *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada*), 2020 CHRT 7, at paras 51 and following).

[365] It is not the ordinary practice of the Tribunal to make an order authorizing itself to retain jurisdiction following the issuance of its final decision on the merits. Although it has the jurisdiction to do so, and it may indeed be appropriate to do so in some cases, the Tribunal does not have sufficient resources, nor is it structured in a way that would permit it to supervise the implementation of its orders in most cases. And in the ordinary course, it is important for the parties to have finality and to be able to move forward from the litigation process.

[366] Having said that, in the circumstances of this decision, I am electing to exercise my discretion to retain jurisdiction over the policy remedies that I have ordered for two reasons:

1. VIA did not make meaningful submissions at the hearing or in its closing submissions about any steps taken since the hearing to address the issues raised in the Complaint, or to make the Tribunal aware of any actions taken which might render the Orders made in these reasons redundant or counterproductive.

2. In light of the length of time since the hearing, I want to permit the parties to address any issues that have arisen since the hearing that might be germane to the remedies ordered.

[367] To avoid any unanticipated negative consequences from the Respondent, I will retain jurisdiction for a period of six months, with respect to the policy remedies ordered.

V. Decision

[368] For all these reasons, I award Ms. Young:

1. an amount of $12,000 under subsection 53(2)(e) of the Act in respect of pain and suffering experienced as a result of Mr. Sawchuk's discriminatory conduct;

2. an amount of $3000 under subsection 53(3) of the Act in respect of VIA's reckless conduct;

3. an amount of $6359.85 pursuant to subsection 53(2)(c) of the Act in respect of lost overtime wages;

4. interest on these amounts, calculated at a simple rate on a yearly basis at the Bank Rate (monthly series) established by the Bank of Canada, calculated as of the date that the Complaint was filed with the Commission, November 15, 2013, up to the date of payment of compensation, provided that such amounts do not exceed the

maximum amounts allowed by the Act, that is $20,000 for each of the items 1 and 2 above.

5. The Tribunal further orders that VIA cease the discriminatory practices and take measures to prevent such practices from happening again in the future. Specifically, I order the Respondent

    i. within 6 months of the date of this decision:

    - to develop human rights and anti-harassment policies and procedures, in consultation with the Commission. Attention will be given in the development of these policies to identifying discrimination and implicit bias within the workplace as well as the impact of discrimination and bias within safety-sensitive workplaces;

    - after the creation of these human rights and anti-harassment policies to hire an external expert to train its employees, including all supervisors, on these new policies and procedures; and

    ii. within three years of the date of the revised human rights and anti-harassment policies and procedures:

    - to engage an external expert to conduct an audit of the human rights and anti-harassment policies and procedures as well as the level of training, comprehension and adherence to the policies by employees, with the results to be reviewed promptly by the Commission.

6. Finally, I order that the Tribunal remain seized of the policy remedies ordered in these reasons, for six months from the date that the orders are made.

VI. Conclusion

[369] Finally, I am grateful to the parties and to their counsel for the collegial and professional way in which this long hearing was conducted and for the patience of the parties with respect to the issuance of these reasons.

Signed by

Kirsten Mercer
Tribunal Member

Ottawa, Ontario
June 27, 2023

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2225/4717

Style of Cause: Jennifer Young v. Via Rail Canada Inc.

Decision of the Tribunal Dated: June 27, 2023

Date and Place of Hearing: September 19, 21, 27 and 28, 2018
October 10 to 12, 2018
November 19 to 23, 2018
January 8 to 11, 2019
February 25 and 26, 2019
June 24 and 25, 2019

Toronto, Ontario

Appearances:

Jennifer Young, on their own behalf

Ikram Warsame, for the Canadian Human Rights Commission

William Hlibchuk, for the Respondent