

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2023 CHRT 30
Date: August 14, 2023
File No.: HR-DP-2789-22

Between:

Amir Jafari Ebrahim Abadi

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

TST Overland Express

Respondent

Decision

Member: Athanasios Hadjis

Table of Contents

| | | |
|-------|--|----|
| I. | Introduction | 1 |
| II. | Decision | 1 |
| III. | Harassment allegation | 2 |
| A. | Issues..... | 2 |
| B. | Analysis..... | 4 |
| (i) | Mr. Abadi experienced the conduct that he alleges in support of his harassment complaint | 4 |
| (ii) | The conduct was related to national or ethnic origin, religion, and race | 10 |
| (iii) | The conduct was unwelcome | 11 |
| (iv) | The conduct was persistent and repetitive, which created a poisoned work environment..... | 13 |
| (v) | Mr. Abadi did not need to notify the employer of the harassment in the circumstances | 14 |
| (vi) | TST did not establish its defence under section 65(2) of the <i>Act</i> | 21 |
| (vii) | TST did not establish its defences linked to the alleged late filing of the complaint | 24 |
| IV. | Termination allegation..... | 31 |
| A. | Issues..... | 31 |
| B. | Analysis..... | 33 |
| (i) | Facts leading up to Mr. Abadi’s termination..... | 33 |
| (ii) | Mr. Abadi has protected characteristics under the <i>Act</i> —disability, race, national or ethnic origin and religion..... | 43 |
| (iii) | Mr. Abadi experienced an adverse impact—his employment was terminated | 46 |
| (iv) | Mr. Abadi’s disability was a factor in the termination | 46 |
| (v) | TST has not established a legal defence (<i>a bona fide</i> occupational requirement) to justify the disability-based discriminatory practice | 47 |
| (vi) | Race, national or ethnic origin, and religion were not factors in the termination | 53 |
| V. | Remedies..... | 55 |
| A. | Lost wages..... | 56 |

| | | |
|-----|---------------------------------------|----|
| B. | Pension contributions..... | 61 |
| C. | Vacation leave | 62 |
| D. | Pain and suffering..... | 62 |
| E. | Special compensation (s. 53(3)) | 63 |
| F. | Interest..... | 64 |
| VI. | Order..... | 65 |

I. Introduction

[1] The Complainant, Amir Jafari Ebrahim Abadi, is a truck driver who was employed by the Respondent, TST Overland Express (TST). He is originally from Iran. While on leave from work on a trip to Iran in 2019, he asked his employer to extend his return date by a couple of weeks. TST denied the request and terminated his employment when he did not show up for work for three consecutive days.

[2] Mr. Abadi claims that the termination was discriminatory because his absence was due to a disability and that race, national or ethnic origin, and religion were factors in the decision as well. He also alleges that he was harassed throughout his employment with TST based on these same grounds other than disability.

[3] TST denies that any prohibited grounds of discrimination were factors in the decision to end his employment. It claims that Mr. Abadi misled management about the reasons for the extension request and never provided documentation of the disability. TST also denies that he was harassed and claims that, even if he did experience such treatment, he never notified his employer of it and TST should not be held accountable for the actions of others. Furthermore, TST contends that Mr. Abadi's harassment claim should be dismissed because he took too long to make it.

II. Decision

[4] For the following reasons, Mr. Abadi's complaint is substantiated. I find that he was harassed at TST based on national or ethnic origin, race, and religion. I also find that he was discriminated against in his termination based on his disability, but not on the other grounds alleged.

[5] This case has two components—the harassment allegation and the alleged discriminatory termination of Mr. Abadi's employment. I address the harassment allegation in the first part of this decision and deal with the other claim afterwards.

III. Harassment allegation

A. Issues

[6] Mr. Abadi must establish that he was harassed based on one or more discriminatory prohibited grounds. He must show that it is more likely than not that he was harassed (known in legal terms as proving on a *balance of probabilities*). The Tribunal must also weigh any evidence provided by TST and “consider the evidence as a whole, including the respondent’s evidence, in deciding whether a complainant has made their case” (*Emmett v. Canada Revenue Agency*, 2018 CHRT 23 (CanLII) at para 61). The evidence must be “sufficiently clear, convincing and cogent” to satisfy the balance of probabilities test (*F. H. v. McDougall*, 2008 SCC 53 (CanLII) at para 46).

[7] Section 14 of the *Canadian Human Rights Act*, R.S.C. c. H-6 (*Act*), says that it is a discriminatory practice to harass an individual on a prohibited ground of discrimination in matters related to employment. In *Janzen v. Platy Enterprises Ltd.*, 1989 CanLII 97 (SCC), [1989] 1 S.C.R. 1252 at 1284, the Supreme Court of Canada broadly defined harassment as unwelcome conduct related to one of the prohibited grounds—in that case, sex—that detrimentally affects the work environment or leads to adverse job-related consequences for the victims.

[8] In *Canada (HRC) v. Canada (Armed Forces)*, 1999 CanLII 18902 (FC), [1999] 3 F.C. 653 (F.C.T.D.) (*Franke*), the Federal Court explained the test to apply in sexual harassment cases. This test also extends to harassment that is based on other prohibited grounds of discrimination (see, for instance, *Rampersadsingh v. Wignall*, 2002 CanLII 23563 (CHRT); *Morin v. Canada (Attorney General)*, 2005 CHRT 41 (CanLII), *London v. New Brunswick Aboriginal Peoples Council*, 2008 CHRT 49 (CanLII); *Chaudhary v. Smoother Movers*, 2013 CHRT 15 (CanLII)). The prohibited grounds of discrimination are set out in s. 3 of the *Act* and include race, national or ethnic origin, religion, and disability.

[9] The *Franke* test is as follows:

- a) The conduct must be unwelcome;

- b) The conduct must be shown to be related to a prohibited ground of discrimination;
- c) There must be a pattern of persistent or repetitive conduct or, in certain circumstances, a single serious incident that is enough to create a poisoned work environment;
- d) Where a complaint is filed against an employer regarding the conduct of one of its employees and the employer has a personnel department along with a comprehensive and effective harassment policy, fairness requires that the victim of the harassment, whenever possible, notify the employer of the alleged offensive conduct.

[10] The fourth element of the test relates to an employer's liability for its employees' conduct. Section 65 of the *Act* similarly deals with employers' liability, stating that while they are accountable for the acts and omissions of their employees (s. 65(1)), they will not be held responsible if they establish that they did not consent to the act or omission and exercised all due diligence to prevent it and, afterwards, to mitigate or avoid its effect (s. 65(2)).

[11] TST contends that the *Franke* test was not met and, moreover, that the Tribunal should not deal with the harassment claim at all because it was filed after the one-year period found in s. 41(1)(e) of the *Act*. TST also argues that because Mr. Abadi took so long to make his complaint, the equitable doctrine of laches shields it from being held liable.

[12] Thus, the issues to be determined about Mr. Abadi's harassment claim, in a slightly modified order from *Franke*, are:

- 1) Did Mr. Abadi experience the conduct that he alleges in support of his harassment claim?
- 2) Was the conduct related to race, national or ethnic origin, or religion?
- 3) Was the conduct unwelcome?

- 4) Was the conduct persistent or repetitive, and if not, was it so serious that it immediately created a poisoned work environment?
- 5) If Mr. Abadi was harassed, did he have to notify the employer of the conduct and if so, did he?
- 6) Did TST establish its defence under s. 65(2) of the Act by proving that it did not consent to the conduct and that it exercised due diligence to prevent the conduct and mitigate or avoid its effect afterwards?
- 7) Even if the harassment claim is well founded, should the Tribunal refuse to deal with it because it was filed more than one year after the alleged events?
- 8) Can TST establish a defence under the doctrine of laches?

B. Analysis

(i) Mr. Abadi experienced the conduct that he alleges in support of his harassment complaint

[13] Mr. Abadi testified about the incidents giving rise to his harassment complaint. TST denies that they occurred as he alleges, but, as I explain below, I find that he did experience them, as he claims.

[14] Mr. Abadi immigrated to Canada from Iran in 1996. In 2006, he was hired by the Kingsway trucking firm, which continued its business as TST Overland Express until around 2018 and then as TST-CF Express since March 2020. During his employment, which was based out of TST's Ottawa terminal, Mr. Abadi was a member of the Teamsters Local Union No. 91 (the Union), which signs collective bargaining agreements with TST.

[15] Mr. Abadi stated that throughout his employment, he was ridiculed by co-workers and managers because of his accent and origin. English is not his first language, and he speaks it with an accent. He claims that he was made fun of as an immigrant.

[16] Around 2009 or 2010, posters with pictures or drawings about him began appearing on letter-size photocopy paper on the bulletin board situated in front of the dispatcher's office at the trucking terminal in Ottawa for all to see. Mr. Abadi recalls that it was around the time when the news was reporting beheadings in the Middle East by terrorists, who many at work would refer to as Mr. Abadi's "cousins," that these posters began appearing. He retained either copies or the originals of some of the posters and entered them into evidence. They can be described as follows:

- a. A clipping from a Sun Media newspaper with a photograph of a heavily overloaded truck in Kandahar, Afghanistan. The newspaper caption describes the truck as being "decked out in chains and sheets [which] add a dash [of] colour" to the potholed roads out of the city. At the top of the poster, someone has handwritten "Amir Transport". Amir is Mr. Abadi's first name.
- b. A poster with Mr. Abadi's photo on the left and on the right a photo that is copied from an unknown source. It appears to be a man with a dark complexion, with what may be ammunition belts across his chest, shouting with his hands up in protest. There is a crowd behind him, a flag and signs written in what appears to be Arabic script. Underneath the clipping appear the words, "BREADMAN, the impenetrable." Whoever created the poster typed in at the top of the sheet, "Truck Driver by day – Bread Man by night." Mr. Abadi testified that his image on the left is from the photo taken by TST management for his company access card. He recalls that, at that time, the TST morning dispatcher, who I need only refer to in this decision by his first name, Eddy, had learned Mr. Abadi's brother was involved in the bread business in Iran, and the poster was an attempt to relate the printed image to that.
- c. A poster with the same access card photo of Mr. Abadi with the following words typed at the top: WILL DISPOSE OF YOUR PLUTONIUM OR URANIUM FOR FREE CALL 1-800-JIHAD ASK FOR AMIR.
- d. A poster on which at the right is a pre-printed caricature drawing of a dark-complexioned man on his knees with his hands clasped in front of him as if he is praying and with tears flowing. To the left of this image, someone has drawn by hand in blue ink a two-humped camel and added a caption above the man to indicate that he is saying, "PLEASE CAMEL START." The camel's behind is above the man's face. Mr. Abadi interprets the image as suggesting that the camel is relieving itself into the person's mouth. To the right of the man's image is written in the same blue ink "AMIR CAMEL JOE."
- e. A poster where the same access card photo of Mr. Abadi appears on the left. On the right, there is a photo of Osama Bin Laden. At the top of the poster, the following words have been typed in: I WILL MISS YOU MY FATHER!! Mr. Abadi recalls that this poster appeared after Bin Laden was killed by American forces in Pakistan.

- f. A poster with a photograph of a camel being ridden on a racetrack by a helmeted jockey. The caption above the photo says, "It took a while...but I'll be back home....." The caption below the photo says, "Love... Prince Amir."

[17] According to Mr. Abadi, Eddy, the company dispatcher, printed these posters in the office and posted them on the bulletin board. Mr. Abadi described him as the mastermind of the posters, especially since they contained official company photographs of him. After Eddy's death in 2015, the posters stopped appearing.

[18] The bulletin board was in the hallway facing the office where the dispatcher's desk was located. The dispatcher could see the bulletin board through a window. There was an open area next to the dispatcher's office where other office staff worked. Behind the dispatcher's office was the office of the terminal manager, Langis Sergerie, who is still employed at TST.

[19] According to Mr. Abadi, all the office staff would walk back and forth past the bulletin board. Mr. Sergerie would post many documents on the board such as refreshed seniority lists, leave lists, and newsletters. Mr. Abadi submits that Mr. Sergerie had to have seen the posters on the bulletin board. He recalls specifically that while waiting to pick up a bill of lading from the driver's area, he saw Mr. Sergerie with Eddy looking through the window from inside the dispatch room and laughing at the Bin Laden and the 1-800-JIHAD posters.

[20] Mr. Abadi got fed up with these types of posters and began collecting them about eight months after they had first appeared. He explained that when he saw them on the bulletin board, he would try to take the originals down but that sometimes Eddy would not let him. Instead, Eddy allowed him to use the office photocopier to make a copy, as was the case with the Bin Laden poster. He would put them in his locker. He claims that he had collected and stored many more posters other than the six in evidence but that, after he was terminated, TST deactivated his access to the premises, and he never recovered them from his locker. He happened to have kept the six posters submitted into evidence in his car.

[21] Mr. Abadi maintains that the harassment went beyond the posters. From even prior to the appearance of the posters, people at work would call him Abu, which was the name of the pet monkey in the Disney cartoon film "Aladdin." Whenever some incident arose in the news involving former Libyan leader, Muammar Qaddafi, remarks would be made about

what is going on with his “Uncle Muammar.” People at work also called him Camel Joe, which I take notice of as being the name given to a well-known cartoon camel used to advertise an American brand of cigarettes.

[22] Mr. Abadi recalls that the poster with the camel at the racetrack appeared around the time that the news had shown coverage of Saudi sheikhs walking their prize camels at a show. He was approached by others at work, who addressed him as Camel Joe and asked that he explain what was going on.

[23] Until the end of his employment, he experienced these types of epithets and comments at the hands of most of the other drivers—as many as 85% of the roughly 17 or 18 drivers who worked there on average. Right up to his last day of work, he was called Abu. It got to the point that for years he bid on overnight driving shifts to places like Toronto to avoid coming into the terminal and dealing with the comments from other employees.

[24] Mr. Abadi stated that the workforce at TNT’s Ottawa terminal was almost entirely made up of people born in Canada. Mr. Sergerie acknowledged in his evidence that when Mr. Abadi was terminated in 2019, he was the last person “of another ethnicity” to be employed at the facility. He explained that this was often the outcome of the mergers of trucking firms. People with more seniority retained their jobs, which meant that more-recently hired immigrant employees may not have ended up remaining with the company. He pointed out during his testimony, given in December 2022, that the Ottawa terminal had only just hired two immigrant employees.

[25] Mr. Abadi testified that it was not just other employees and supervisors who insulted him based on his background and identity. He claims that, in 2010, he was in Mr. Sergerie’s office asking for approval for a leave to attend his sister’s wedding in Iran. The conversation took place in front of the then president of the Kingsway trucking firm. According to Mr. Abadi, Mr. Sergerie jokingly responded, “I hope it is not a terrorist camp, and you come back a terrorist.” Mr. Abadi says he reacted by keeping his mouth shut and just left the office.

[26] In his testimony, Mr. Sergerie did not recall having made the “terrorist camp” remark, suggesting that it must have been someone else who said it. He generally did not recall any name-calling about Mr. Abadi. He did remember a single occasion where Eddy said

something to Mr. Abadi that Mr. Sergerie did not like. But he claims that after the remark was made, Mr. Abadi said, "That's OK, it's all in fun."

[27] Mr. Sergerie also said that he first saw the posters in evidence when they were shown to him by TST's lawyer in the context of these proceedings. He acknowledged that the picture of Mr. Abadi in the posters seemed to be from the TST access card photo. He pointed out that his office did not face the hallway with the bulletin board where Mr. Abadi said the posters had been posted. Only the supervisors in the dispatch office could view it, and no one ever reported to him that they had seen racist posters there.

[28] TST did not call any other witnesses who were employed there at the same time as Mr. Abadi. TST pointed out that Eddy, who was the morning shift dispatcher, died in 2015. A person, who I need only refer to as Maria, was employed as assistant manager in the dispatcher's office and replaced Eddy after his death. She retired in January 2020. Another person who was the afternoon shift dispatcher retired in December 2019. TST did not explain if or why these persons or a couple of other office employees mentioned in evidence were unavailable to testify on these allegations.

[29] Mr. Abadi, however, called as witnesses two former truck drivers with whom he had worked. Robert Brownrigg was employed at TST from 2001 to 2010. He recalled that insensitive and offensive jokes and other remarks linking Mr. Abadi to terrorists or bombing were made about him. With the passage of time, he could not remember who specifically was making these remarks. He did not recall seeing the posters in evidence but remembered seeing similar ones. He questioned how management could tolerate such behaviour. Mr. Brownrigg said Mr. Abadi was a good worker and got along well with others.

[30] Claude Clanthier testified as well. He was employed as a truck driver at TST for about five years, until 2010 when he was laid off. He readily recalled seeing posters about Mr. Abadi that were "flabbergasting" and that made him look like a "killer." In cross-examination, he was shown the posters in evidence and spontaneously responded that he specifically remembered seeing the Breadman and 1-800-JIHAD posters. He also vaguely recalled the "Amir Transport" poster.

[31] He remembers being so shocked by the first two posters that he wondered if Mr. Abadi had posted them since he could not imagine anyone else would be so bold as to publicly post such images. Mr. Clanthier was not with Mr. Abadi when he saw these posters at the time, so they did not speak to each other about them. They were all too busy working to have time to talk. He noted that Mr. Abadi was the hardest worker of all. Mr. Clanthier also confirmed that management would have been able to view the posters since they were posted on the bulletin board. He recalled seeing them in the driver's locker room, which is just up the hall from the dispatcher's room.

[32] TST drew attention to this last comment from Mr. Clanthier to suggest that it contradicted Mr. Abadi's testimony that he had seen the posters on the bulletin board outside the dispatcher's office and that I should therefore infer that they were never actually posted. However, Mr. Abadi explained that although posters were placed on both bulletin boards, the ones that he had retained and produced in evidence were from the board facing the dispatcher's office. In any event, I do not consider this variance in the recollection of the witnesses as being material. Clearly, the other two drivers confirmed what Mr. Abadi had testified to; posters of the sort filed in evidence were placed in public view at the workplace.

[33] During TST's cross-examination of Mr. Abadi, a slight difference was identified between what was presented as the original of one of the posters and a copy. On one poster, there was a pinhole where it was supposedly pinned to the bulletin board, but the other poster (the camel drawing) had no similar hole. However, Mr. Abadi pointed to the dot on the photocopied version, indicating where the hole had been. He explained that since Eddy did not let him have the original, he was only permitted to make a copy of it using the office photocopier. Eddy wanted to keep the original on the bulletin board saying, "It's OK, it's funny." I am satisfied with Mr. Abadi's explanations.

[34] TST also suggested that even if the posters were placed on the bulletin board, it may have been by persons other than its employees. The workplace consisted of TST's reception and office area at the north end of the building behind which was a large warehouse storage area separated into several sections, the first of which was occupied by TST. The other storage areas were used by other transport companies. Mr. Sergerie testified that most of the tenants had access to the side door, which led to the hallway going to TST's employee

locker room and the dispatch office. However, he acknowledged that he did not remember if any non-TST employees used it. The most he could say is that workers from the other companies could come to the lunchroom.

[35] I do not find this argument at all persuasive. At the time, TST's lunchroom and dispatch areas were used exclusively by TST staff. I find it absurd to suggest that someone from one of the neighbouring trucking companies, who did not even know Mr. Abadi, would have designed and printed these posters, which included an official TST staff photo of Mr. Abadi, and then placed them on the bulletin boards.

[36] I am satisfied that the evidence is more than sufficient to establish that the posters in evidence were placed on the TST bulletin boards by someone employed at TST, even if Mr. Sergerie does not recall seeing them.

[37] I am also satisfied that the comments and name-calling that Mr. Abadi testified about occurred. I find his evidence credible. He was forthright in his answers. Whenever a slight potential discrepancy was highlighted in cross-examination, such as the absence of a pinhole in an exhibit, or other questions relating to his discriminatory termination claim, he provided a sound and logical explanation. In sum, I find TST's efforts at undermining his credibility are without merit.

[38] For these reasons, I find that Mr. Abadi did experience the conduct upon which he bases his harassment complaint.

(ii) The conduct was related to national or ethnic origin, religion, and race

[39] There is no question that the alleged harassing conduct was about Mr. Abadi's actual or perceived religion and national or ethnic origin.

[40] As I mentioned, Mr. Abadi is originally from Iran. He did not specify if he is a practising Muslim. However, the posters, names, and insults directed at him assumed he identifies as someone who is Muslim and from the Middle East or North Africa. They mocked him as being linked to terrorists who are regrettably often associated in the public discourse with persons from these regions and of this faith.

[41] The posters, comments, and name-calling are thus related to Mr. Abadi's perceived, if not actual, national or ethnic origin and religion.

[42] As the Supreme Court of Canada noted in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 S.C.R. 665, 2000 SCC 27 (CanLII), a distinction will be discriminatory if it is based on the victim's actual or perceived identification with a prohibited ground. It is irrelevant if Mr. Abadi in fact practised Islam or was from the specific Middle Eastern country to which he was being connected.

[43] In addition, I find that Mr. Abadi experienced the conduct as a racialized person. As I recount in the second part of this decision, he testified about how, as a result of his dismissal, the workplace composition became non-immigrant and "very white." The caricatures of him as depicted in the posters had dark complexions. In emails that he sent after the termination, he accused TST of being "racially motivated" in terminating him. Basically, the notion of race was subsumed in his identity as a person of his origin and background. The *Act* confirms that discriminatory practices include practices based on more than one prohibited ground of discrimination or on the effect of a combination of grounds (s. 3.1).

[44] I therefore conclude that the conduct he experienced was related to the grounds of national or ethnic origin, race, and religion.

(iii) The conduct was unwelcome

[45] In *Franke*, the Federal Court explained what should be considered in determining if the conduct is unwelcome. The Tribunal could look at a complainant's reactions at the time the incidents occurred and assess whether they expressly, or by their behaviour, demonstrated that the conduct was unwelcome. If the evidence shows that a complainant welcomed the conduct, the complaint will fail. This determination largely turns on questions of credibility and may present real problems of evidence for the Tribunal.

[46] The degree of difficulty in making the determination depends on the type of activity involved. In the context of sexual harassment, which was the issue in *Franke*, a pressing

sexual advance will normally bring a quick refusal. More subtle solicitations or "verbal" innuendos may be ignored and as such simply endured by the complainant.

[47] Thus, the proper inquiry will not require a verbal "no" in all cases. The complainant must nonetheless establish, for instance, by their body language or by their repetitive failure to respond to the comments, that they had in some way signalled to the harasser that the conduct was unwelcome. However, in certain limited circumstances, an employee may be forced to endure objectionable conduct for reasons such as the fear of losing a job. In these cases, the appropriate standard against which to assess the conduct will be that of the reasonable person in the circumstances.

[48] In my view, Mr. Abadi's case falls within these exceptional circumstances.

[49] No reasonable person would think that someone with Mr. Abadi's background would ever welcome these posters that stereotyped and insulted him. These were not micro-aggressions; they overtly mocked his perceived origin and faith. As Mr. Brownrigg noted in his evidence, the posters and jokes that he observed were insensitive, offending and simply "not right."

[50] Mr. Abadi testified that throughout his employment at TST, he was never advised or trained on its harassment policy and did not know that he could complain about what he was experiencing. But he added that he did not see how he could, given that supervisory staff and the manager were engaging in the practices. Eddy, the dispatcher, was printing the posters. He was insisting that they were "funny." Mr. Abadi saw Mr. Sergerie laughing at the posters along with Eddy. Mr. Sergerie made the terrorist camp comment in the presence of the then company president.

[51] Mr. Abadi explained that Mr. Sergerie managed with an "iron fist" and that he feared repercussions if he complained to him. He was afraid of losing his job if he said anything. In his testimony, Mr. Sergerie acknowledged having heard Eddy say something once that he did not like but claimed that Mr. Abadi said that it was OK and in fun. However, as the Federal Court noted in *Franke*, an employee may be forced to endure what is objectively unacceptable behaviour just to keep their job.

[52] Mr. Abadi, in his final submissions, referred me to *Ahluwalia v. Metropolitan Toronto Board of Commissioners of Police (1983)*, 1983 CanLII 4719 (ON HRT), at para. 131 (Ont. Bd.Inq.). The Board of Inquiry found in that case that the complainant did not approve of, and did not like, being called by a racial epithet. Although he did not complain to his superiors expressly about the name-calling until later, the Board of Inquiry had no doubt that he resented the name-calling and found it hurtful. It is not enough for supervisors, being aware of the racial name-calling, to simply excuse it on the basis that the victim is not expressly complaining. The Board of Inquiry observed, “any astute individual with any common experience would have known that he found it hurtful and did not like it,” nor approve of it.

[53] I believe the same can be said here. Any reasonable person would conclude that the posters, jokes, and comments that Mr. Abadi endured at the workplace were unwelcome.

(iv) The conduct was persistent and repetitive, which created a poisoned work environment

[54] Six of the posters are in evidence, and Mr. Abadi testified that others were posted over the years, which he did not manage to take, keep, or make copies of. Mr. Brownrigg and Mr. Clanthier both recalled seeing similar posters on the bulletin boards. Mr. Brownrigg also recalled hearing the jokes and names used to refer to Mr. Abadi.

[55] While acknowledging that the posters ceased appearing after Eddy died, Mr. Abadi stated that he was still being called terms like Abu and Camel Joe right until his termination.

[56] While one could arguably find that viewing even one of those posters on the public bulletin board would have been serious enough for Mr. Abadi or another person like him to reasonably feel their work environment has been poisoned, I find that their persistent appearance over several years as well as the injurious remarks and names are more than sufficient to conclude that the third *Franke* condition was met. It was a poisoned environment in which Mr. Abadi had to work, so much so that for several booking periods he sought out overnight driving shifts to Toronto when he would not have to see other TST employees to avoid having to deal with it.

[57] I therefore conclude that Mr. Abadi was harassed based on the prohibited grounds of national or ethnic origin, race, and religion in the TST workplace over the course of his career there.

[58] However, additional questions must be addressed before I can find that TST, as the employer, must be held responsible for the harassment. The first concerns whether Mr. Abadi had to notify TST of the harassment, and the second relates to whether TST has a valid legal defence under s. 65 of the *Act*.

(v) Mr. Abadi did not need to notify the employer of the harassment in the circumstances

[59] The fourth *Franke* element (set out at paras. 47-50 of the judgment) deals specifically with the employer's liability for harassment conducted by its employees. This is the requirement that the person alleging harassment give notice to the employer.

[60] The Tribunal in *Peters v. United Parcel Service Canada Ltd.*, 2022 CHRT 25 (CanLII) (*Peters*) at paras 316-331, recently explored the implications of this fourth element. The Tribunal observed that reporting and giving notice to the employer was initially stated in *Franke*, at para. 47, to be a complainant's obligation "whenever possible." However, the Federal Court clarified that the requirement applies where "the employer has a personnel department along with a comprehensive *and effective* sexual harassment policy, including appropriate redress mechanisms, which are already in place" (at para 49, emphasis in the original text).

[61] As observed in *Peters*, *Franke* thus emphasized that the employer's policy and redress mechanisms must be *effective* for the reporting requirement to apply. It is not sufficient to merely confirm that an employer has, for example, policies and a Human Resources (HR) department to presume that they are "effective."

[62] The employer should be notified of the harassment by the employee where the employer has invested in and developed effective, comprehensive tools and resources to prevent, address and mitigate the effects of harassment. From a fairness perspective, if an

employer has done what is required to meet its obligations under the *Act* to address harassment, it ought to be given the opportunity to do so.

[63] Fairness also applies when the converse is true: where the employer does not have comprehensive and effective policies, including appropriate redress mechanisms, to address harassment, it would not be reasonable to dismiss a harassment complaint against an employer because a complainant failed to report it.

[64] For the following reasons, I find that TST did not have an “effective” harassment policy in place to trigger the notice requirement referred to in *Franke*.

[65] Mr. Sergerie was shown a three-page document at the hearing entitled “Discrimination and Harassment Policy” (the “2005 Policy”). He testified that it was posted “somewhere around 2005 and 2006.” It bears the signatures of the then president of the Kingsway trucking firm and a human resources counsellor. The policy lists the prohibited grounds of discrimination under the *Act* and states that the employer adheres to a policy to provide a work environment that is free from all forms of discrimination or harassment. It goes on to define discrimination and harassment and adds that it is important for employees to file complaints when they believe they are being harassed. It does not specify to whom a complaint should be made but notes that the employee must provide precise and detailed information to the employer’s “designated representative.” It assures employees that their immediate superior or the designated HR counsellor will undertake a private inquiry as soon as possible.

[66] The 2005 Policy states that it is management’s responsibility to ensure the conduct of all employees is not discriminatory and does not constitute harassment. It concludes by declaring that if management team members witness sexual harassment, “they must react immediately, without waiting for a complaint to be made.” Interestingly, this direction does not appear to extend to harassment on other prohibited grounds of discrimination.

[67] Mr. Sergerie testified that his understanding of how a complaint would be treated under the 2005 Policy is that employees would come forward and report a complaint to management. The complaint would then go to the HR department and upper management.

The employee involved would be brought up and disciplined accordingly. The employees involved would also be brought together to have a discussion and try to resolve the situation.

[68] TST called Graham Howarth to also testify on this question. Mr. Howarth is the current senior manager of safety and compliance and is based out of Toronto. He has only been with the company since December 2018. He referred to another three-page document entered in evidence entitled “Bullying, Harassment and Discrimination” dated August 2013 (the “2013 Policy”). It sets out a policy statement that TST is committed to developing and promoting a workplace culture that is free from bullying, harassment, and discrimination, which it later defines. It directs employees to report incidents in writing to their immediate supervisor or a member of management, who in turn would advise the “Director or Human Resources” about it. TST would then conduct an impartial investigation.

[69] Mr. Howarth testified that he found this document in the policy manual when he joined TST. The document is meant to be a synopsis of the policy that the *Canada Labour Code*, R.S.C., 1985, c. L-2, requires of federally regulated employers. He produced a newer version of this document in which only the date appears to have been changed to May 2021. He published this document after verifying that it complied with the current requirements of the *Canada Labour Code*.

[70] Mr. Howarth did not know if the 2013 Policy was posted on a bulletin board before he joined TST. When he did visit the Ottawa location on two occasions after 2018, he saw it on display along with other health and safety policy documents.

[71] Mr. Howarth also produced a one-page document called “Violence in the Workplace Policy” (the “Workplace Violence Policy”). It is posted on the wall where visitors to TST’s facilities enter to advise them that there is a workplace violence policy in place. This policy is reflective of the principles set out in the May 2021 document, including a statement that all employees should be treated with courtesy and respect. A similar but undated document was entered into evidence. It seemingly was created earlier since it bears the signature of a former TST president. Mr. Howarth did not mention if this document was posted at the same spot as the Workplace Violence Policy or when it may have been posted.

[72] Mr. Abadi adamantly maintained that TST never showed him or drew his attention to any of these policies. He does not recall ever seeing them on the bulletin boards. He only saw documents containing things like occupational health information, symbols for chemical cargo that the drivers would ship and so on. He claims TST never provided to him, or any of the other drivers, any harassment policy training. The only training that he ever received was directly work-related like defensive driving and operating a fork-lift and air brakes. As a result, he had no idea how or to whom he could complain about the bullying and harassment he was experiencing. Mr. Brownrigg stated in his evidence that he could not recall “one way or another” if he received any harassment training over the nine years he was employed as a driver at Kingsway, ending in June 2010. He recalled receiving training relating to driving. Mr. Clanthier worked for five years at Kingsway and did not know of any harassment policy.

[73] TST argues that even if Mr. Abadi were unfamiliar with the policies, he should have known that he could report the harassment. Mr. Clanthier agreed in cross-examination that reporting it to supervisors would be the “logical thing to do,” and Mr. Brownrigg said that he had suggested to Mr. Abadi that he report it to management.

[74] These may seem to be reasonable reactions, but Mr. Abadi testified that he could never contemplate complaining to management. It was his superiors (“bosses”) themselves who were engaging in the harassment. How could he speak to them? He maintains that he knew nothing about any harassment policies or that he could complain elsewhere within TST, like to HR staff, who were not located in Ottawa. His only points of contact with the company were Eddy, Mr. Sergerie and the other three to four persons in the office of the Ottawa terminal. He did not make leave requests to HR, but rather to Mr. Sergerie or other individuals in the office. He never dealt with anyone else.

[75] Mr. Abadi testified that Maria, the assistant manager who later took over for Eddy, would tell the drivers, “Guys, stop harassing this guy” and calling him names, but Mr. Abadi said her remarks were to no effect. The harassment did not stop.

[76] He testified that the only person he thought he could turn to about the harassment was the Union representative, Brad Reid, but the outcome of that effort only served to reinforce his sense that he had no recourse or means to stop it. Mr. Abadi could not recall

the exact date but some time after 2012, after seeing another poster on the bulletin board and hearing Eddy tell him, "Hey Camel jockey, take this run today," he felt so upset that, in his words, he "lost it." On his way home from work, he was passing near the Union's offices. He went in and met with Mr. Reid, who testified and confirmed at the hearing that he is the Union's secretary-treasurer and business agent.

[77] Mr. Abadi said that he told Mr. Reid about the harassment, including Mr. Sergerie's remark that he should not go to a terrorist camp while attending his sister's wedding.

[78] During their one-hour meeting, Mr. Abadi watched Mr. Reid telephone Mr. Sergerie and tell him that this was an inappropriate comment. According to Mr. Abadi, despite this call, nothing changed at work. In fact, he now felt that there was a "target" on his back because he had complained about his manager. The Union did not suggest that he file a grievance.

[79] Given the outcome of this effort to end the harassment, he says he just felt numb and resigned himself to the fact that he could not do anything against people at work.

[80] Mr. Abadi testified that about six months later, while attending a Union vote meeting, he approached Mr. Reid again to tell him that nothing had changed since his call to Mr. Sergerie. Mr. Reid advised him to wait and "give it time." He again did not suggest or recommend that Mr. Abadi file a complaint or grievance.

[81] TST called Mr. Reid as its last witness in this case, after Mr. Abadi had completed his evidence in chief, to challenge Mr. Abadi's claims. He did not recall Mr. Abadi ever having come to his office and claims that he had never heard of his complaint about Mr. Sergerie's "terrorist camp" comments. Mr. Reid does not think he ever made a call to Mr. Sergerie about this. He testified that Mr. Abadi first raised the harassment issue with him at a Union vote meeting on June 23, 2019, (i.e., about four months before he was terminated), when he claims Mr. Abadi showed him pictures of the posters. Mr. Reid states that he advised Mr. Abadi to complain to the terminal manager, Mr. Sergerie, as he would tell any employee in similar circumstances to do. Mr. Reid acknowledged that he did not attempt to contact anyone at TST about Mr. Abadi's concerns thereafter.

[82] I find Mr. Abadi's evidence on this issue to be far more convincing. He explained in great detail the circumstances of his meetings with Mr. Reid; he even described Mr. Reid's office and its location in an industrial park. I note that in an email that Mr. Abadi sent to Mr. Reid on December 2, 2019, seeking the Union's support after being terminated, he recounted the harassment he experienced over the years and referred to his meetings with Mr. Reid exactly as he presented them repeatedly throughout the course of his testimony in this case.

[83] During his evidence in chief, Mr. Abadi referred to portions of the Canadian Human Rights Commission's (Commission) investigation of his complaint, including the Commission investigator's notes from questions she had asked Mr. Reid, one of which was about Mr. Abadi's claim that on two occasions he had raised with him the co-workers' discriminatory behaviour. The investigator wrote that Mr. Reid said he had only spoken to Mr. Abadi at the Union vote meeting and did not remember speaking to him about harassment at work. According to the notes, Mr. Reid said that he saw pictures of the posters and heard about the "boss's" discriminatory jokes only after Mr. Abadi was terminated in November 2019, which would contradict his testimony at the hearing.

[84] The investigator's notes are clearly hearsay evidence, which the Tribunal can admit (s. 50(3)(c) of the *Act*). However, although Mr. Abadi referred to the notes in his evidence in chief, neither TST nor he questioned Mr. Reid about them during the latter's testimony. For this reason, I assign little weight to this apparent contradiction.

[85] Nevertheless, considering the clarity and consistency in Mr. Abadi's remarks overall, I prefer his recollection over Mr. Reid's. It is understandable that Mr. Reid's recall is incomplete. He represents many Union members, and it would make sense if he did not remember a one-hour visit made ten years earlier by a member with whom he had virtually no other dealings. Mr. Abadi testified that he never filed a grievance before he was terminated, and Mr. Reid stated that he probably only saw Mr. Abadi at Union vote meetings in the presence of many other Union members.

[86] Mr. Reid's recollection of discussing the matter at a Union vote meeting could in fact be the one to which Mr. Abadi referred in his testimony. Mr. Abadi categorically denies bringing up the harassment problem at the Union vote meeting on January 23, 2019.

[87] I therefore accept that Mr. Abadi did in fact contact the Union in an effort to address the harassment. Frustrated with the treatment he was receiving, he turned to the Union for help. This supports his argument that he had no knowledge of any policy directing that he address his concerns to someone in the company other than his Ottawa terminal manager, Mr. Sergerie.

[88] For these reasons, I find that TST did not have an *effective* policy that would trigger the obligation by Mr. Abadi to report and give notice under the fourth element of the *Franke* test. The policy was never properly communicated to him, if at all. TST did not produce any document or other evidence that Mr. Abadi or any other employee had received training on the policy. All we have is Mr. Sergerie's testimony merely asserting that he remembered seeing that the 2005 Policy was posted. Mr. Howarth could not confirm if anyone had received anti-harassment training before his arrival in December 2018.

[89] In *Willcott v. Freeway Transportation Inc.*, 2019 CHRT 29 (CanLII) at para. 85, the Tribunal held that a policy that does not specify the identity of whom to report an incident to cannot be considered "effective." Both the 2005 Policy and the 2013 Policy only specified that complaints could be made to supervisors and the terminal manager (i.e., Mr. Sergerie). Yet, Mr. Sergerie and the supervising dispatcher condoned, if not actually participated in, the conduct, and certainly can be considered to have notice of it. No other reporting option is given. Furthermore, a policy that is only shared with employees by posting it on a bulletin board among other documents, without any additional communication or training, is not an effective policy.

[90] Accordingly, I find that TST did not have an effective policy within the meaning of the fourth *Franke* element. Therefore, Mr. Abadi did not have an obligation to formally report and notify TST of the harassment.

(vi) TST did not establish its defence under section 65(2) of the Act

[91] According to s. 65(1) of the *Act*, any act or omission committed by an employee in the course of their employment is deemed to be an act or omission committed by the employer. As explained in *Peters*, at para. 334, this notion of vicarious liability means employers are responsible for the wrongful acts of their employees whether or not they have knowledge of and agree with the employees' actions or have given permission for what they do.

[92] Applied to the present case, Eddy, the other TST drivers, and Mr. Sergerie were all acting in the course of their employment when engaging in or condoning harassing conduct towards Mr. Abadi. TST is thus deemed to have committed the same acts or omissions as its employees. However, s. 65(2) of the *Act* provides means for an employer to exculpate itself from this vicarious liability.

[93] An act or omission of an employee is not deemed to be committed by the employer if it establishes:

- a) that the employer did not consent to the harassment;
- b) that the employer exercised all due diligence to prevent the harassment from being committed in the first place; and,
- c) that the employer exercised due diligence after the harassment to mitigate or avoid the effect of the harassment.

(a) TST did not prove that it did not consent to the harassment

[94] TST argues that it did not consent to the harassment since Mr. Abadi failed to report it. However, as pointed out in *Peters*, the condition of an employer not to have consented is not solely dependent upon a complainant having reported the harassment.

[95] As observed in para. 371 of the *Peters* decision, a failure to not consent can also occur by an employer's failure to act when the employer knows that harassment is occurring

and allows it to continue without doing anything about it. Condoning harassment is another way of consenting or failing to not consent to harassment through inaction.

[96] The evidence shows that the harassing conduct was prevalent and evident for all to witness. The posters included photos of Mr. Abadi that were generated by TST, and the supervising dispatcher was clearly linked to their creation since they ceased after his death. On at least one occasion, the highest-ranking manager at the Ottawa terminal, Mr. Sergerie, was observed laughing at one of the posters. As indicated earlier, I accept Mr. Abadi's account of his meeting with the Union representative, Mr. Reid, who called Mr. Sergerie about the harassing conduct and the "terrorist camp" comment, in particular. As previously stated, Mr. Abadi convincingly spoke of being called names like Abu, Camel Joe, and Camel Jockey throughout his employment at TST.

[97] The workplace was not very large and the office where Mr. Sergerie, the dispatcher and other staff worked was just down the hall from the drivers' lunchroom. The bulletin board where the posters were placed was right across the dispatcher's office and separated only by a window.

[98] I am therefore satisfied that TST's on-site management was aware of the harassment that Mr. Abadi was enduring but did nothing to stop it. TST did not lead any evidence showing that it intervened in any way. Mr. Sergerie recalled one incident when he heard the dispatcher say something inappropriate, but he let it go because Mr. Abadi said it was okay. Yet, this was not the only incident by far. Furthermore, just because an employee who is looking to preserve their employment says that inappropriate conduct is okay does not mean that management should do nothing about it. It should have intervened, consistent with the harassment policies that it claims were in force.

[99] Yet, Mr. Abadi's persuasive evidence is that nothing ever changed, other than the posters, which ceased upon the dispatcher's passing.

[100] For these reasons, I find that TST condoned the harassment of which its senior management on site was aware. Therefore, it has not established that it did not consent to the harassment.

(b) TST did not prove that it exercised all due diligence to prevent the harassment from being committed

[101] TST notes that the *Act* does not impose a duty on an employer to maintain a “pristine working environment,” as the Tribunal observed in *Hinds v. Canada (Employment and Immigration Comm.)*, 1988 CanLII 109 (CHRT), 10 CHRR T.D. 13/88 at para. 41611, which dealt with the predecessor provision to s. 65. To avoid liability, an employer is obliged to take reasonable steps to alleviate, as best it can, the distress arising within the workplace and reassure those concerned that it is committed to maintaining a workplace free of harassment.

[102] TST submits that it did exercise due diligence within this meaning. It adopted the 2005 and 2013 Policies, which were posted on the bulletin board. It points out that even if Mr. Abadi claims that he was not familiar with the policies, the employer is still exculpated from liability by demonstrating that it acted with due diligence to inform all employees that bullying and harassment would not be tolerated. Because Eddy passed away, TST argues that it is prevented from showing that it had conveyed this message to him.

[103] However, Eddy’s absence did not prevent TST from adducing other evidence to establish how it had trained employees that harassing and bullying conduct would not be tolerated or how it otherwise prevented it.

[104] Mr. Howarth testified about the training that he has implemented since his arrival in December 2018 and of new policies adopted since the *Canada Labour Code* was amended in 2021. He could not confirm what training was done prior to his arrival, though he said he saw “signoffs” in files about training of this sort prior to his arrival without elaborating on what this meant. Mr. Sergerie explained his understanding of the 2005 and 2013 Policies and that they were available for viewing on the bulletin board. However, he did not give any evidence as to how all employees were trained on it, including the office staff.

[105] Although Eddy is deceased, the other two office employees, including Maria who took over as morning dispatcher after Eddy’s death, left the company within the last two years before the hearing. TST did not give any reason why they were not available to testify. For that matter, TST did not call any of its employees to testify other than Mr. Sergerie and

Mr. Howarth. The evidence suggested that due to the various corporate mergers at TST, the most senior employees (those that Mr. Sergerie referred to as being non-immigrant) tended to be retained. Yet, no one was invited to give evidence about the degree to which TST tried to prevent harassment in the workplace, particularly during the period of Mr. Abadi's employment.

[106] Meanwhile, Mr. Brownrigg could not recall if he had any harassment training, and Mr. Clanthier testified that he did not know of any harassment policy.

[107] For these reasons, I find that TST has not established that it exercised all due diligence to prevent the harassment from being committed.

(c) Due diligence after the harassment to mitigate or avoid the effect of the harassment

[108] Given my first two findings, TST has not established its defence under s. 65(2) of the *Act*, and there is consequently little point in exploring the third criterion. I need only reiterate my earlier conclusions that TST management and supervisors on-site knew of or were engaged in the harassment when it occurred and did not do anything to stop it then and thereafter. Mr. Abadi testified that other employees continued to use inappropriate nicknames right until his trip to Iran that led to his termination.

[109] For these reasons, I find that TST did not establish that it satisfied the criteria set out in s. 65(2) of the *Act* and is therefore not exculpated under this provision from its liability for the acts of its employees.

(vii) TST did not establish its defences linked to the alleged late filing of the complaint

[110] TST raised two additional arguments in its defence. Both are linked to the length of time between when Mr. Abadi experienced the harassment and when he filed this human rights complaint. The first relates to the Commission's decision to deal with the complaint even though it is about facts that occurred before the one-year period referred to in s.

41(1)(e) of the *Act*. The second refers to the doctrine of laches by which a person may be denied their recourse basically because they took too long to exercise it.

(a) Section 41(1)(e) of the Act

[111] Section 41(1)(e) of the *Act* provides that the Commission shall deal with any complaint filed with it unless, in respect of that complaint, it appears to the Commission that the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period as the Commission considers appropriate, before receipt of the complaint.

[112] TST submits that the posters in evidence were likely placed on the bulletin board no later than 2011, and Mr. Abadi acknowledged that there were no posters after Eddy's death in 2015, more than four years before he filed the complaint. TST submits that any further evidence of discrimination is scant and lacks particularity and timelines, especially given Mr. Abadi's "great" work evaluations. The complaint was filed with the Commission on February 12, 2020. Consequently, TST submits that the Commission referred the harassment portion of the complaint well over one year after the occurrence of the alleged discriminatory acts and omissions. I would point out that I have determined in my earlier findings that the discriminatory name-calling did continue until Mr. Abadi's termination and hence would fall within the one-year period. However, TST's submissions would still potentially be relevant to the posters, for instance, since Mr. Abadi acknowledges that they ceased in 2015.

[113] TST recognizes that the Tribunal does not have the authority to review or "overrule" the Commission's decisions, which is the exclusive purview of the Federal Court of Canada (see *Pequenezza v. Canada Post Corporation*, 2016 CHRT 21) (*Pequenezza*).

[114] However, TST argues that the Tribunal is nevertheless not precluded from determining, based on the evidence before it, whether there is a reasonable justification for "depriving the respondent of the benefit of the limitation period" in s. 41(1)(e) of the *Act*. TST submits that it would run counter to the interests of justice for the Tribunal to be bound by what is essentially a preliminary determination of the Commission made pursuant to a partial analysis of the evidence.

[115] In support of this submission, TST referred me to the decision in *Singh v. Statistics Canada*, 1998 CanLII 3996 (CHRT), at pages 66-67 of the online PDF version. This passage deals with an argument raised by the respondent in that case based on a Federal Court (Trial Division) decision in *Canada (C.H.R.C.) v. Canadian Broadcasting Corp. (re Vermette)*, 1996 CanLII 11865 (FC) (*Vermette*). However, the passage in question merely references the respondent's submissions in that case. At page 68 of *Singh*, the Tribunal states that the respondent's argument is rejected. Moreover, as elaborated in *Pequenezza*, the discussion in *Vermette*, which was made in *obiter dictum* (i.e., as an incidental remark), has been uniformly rejected by subsequent cases in the decades that followed.

[116] I see no basis to hold any differently. The Commission exercised its discretion under s. 41 to deal with the harassment complaint and decided to refer this complaint to the Tribunal for inquiry pursuant to s. 49. I have no authority to revisit that decision.

(b) Laches

[117] TST also invoked the doctrine of laches in its defence, relying on what it referred to as the leading case, the Supreme Court of Canada's decision in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, 1992 CanLII 31 (SCC) at 76-80. The Court explained that historically the doctrine was developed as a defence in the courts of equity. It provides that a defendant can successfully resist a claim if they can demonstrate that the plaintiff, by delaying the institution or prosecution of the case, has either (a) acquiesced in the defendant's conduct or (b) caused the defendant to alter their position in reasonable reliance on the plaintiff's acceptance of the *status quo*, or otherwise permitted a situation to arise that it would be unjust to disturb.

[118] The Court observed that mere delay is insufficient to trigger laches under either of these two branches. The doctrine considers whether the plaintiff's delay constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable.

[119] To begin with, I am not convinced that the Tribunal has any inherent or statutory authority to apply doctrines and remedies developed in courts of equity. It is a statutory

tribunal and derives all its authority from the *Act* and any other relevant statutes (e.g., *Pay Equity Act*, S.C. 2018, c. 27, s.416, *Accessible Canada Act*, S.C. 2019, c. 10, etc.). The *Act* does not assign to the Tribunal the powers of courts of equity, in contrast, for instance, to the Federal Court, which under s. 4 of the *Federal Courts Act*, R.S.C., 1985, c. F-7, is an “additional court of law, equity and admiralty.”

[120] However, even if I have the authority to address this defence, I find that TST failed to substantiate its claim under either of the doctrine’s two branches.

1) Acquiescence

[121] The Court defined acquiescence in the context of the first branch of laches. This is when a plaintiff stands by and watches the deprivation of their rights and does nothing, or where, after the deprivation of their rights and in the full knowledge of their existence, delays instituting their case, which leads to an inference that their rights have been waived.

[122] It is not enough that a plaintiff knows of the facts that support a claim; they must also know that those facts would give rise to a claim. Knowledge of one’s right to a claim is measured against an objective standard. In other words, is it reasonable for a plaintiff to be ignorant of their rights given their knowledge of the underlying facts relevant to a possible legal claim.

[123] TST submits that no reasonable person would suspect that they had not been wronged after seeing the posters. By not filing a complaint at the time, likely around 2011, Mr. Abadi acquiesced to the conduct, or should be deemed to have done so, and accordingly waived his rights to file the present complaint.

[124] However, this argument fails to consider my earlier findings in this case. The posters and name-calling were clearly and objectively unwelcome but, in Mr. Abadi’s circumstances, the fact that he did not file a complaint is understandable and justifiable. It is reasonable for him not to have been aware of these rights.

[125] First, as he convincingly testified, he did not know what his rights were under TST’s policies; they were never properly communicated to him or other employees. He spoke about his situation as an immigrant to this country who was not familiar with its laws in

general. He does not have the ease of reading or writing in English. He tolerated and endured the teasing and bullying to keep his job. These were breaches of his human rights, but he said nothing, just so he could work. It cannot be inferred from these circumstances that he was waiving his rights. He did not know what his rights were, but, more importantly, these are not just ordinary rights like a tort claim that the courts may have dealt with in the development of the laches doctrine. These are quasi-constitutional human rights. At the point when he finally felt he was pushed too far, he turned to the only option that he thought he had: the Union's support. But that proved fruitless too and left him feeling even more alone.

[126] Mr. Abadi did not acquiesce to the harassment that he experienced at the workplace, and I do not accept the argument that Eddy or the other employees who participated in the harassment "altered" their position (i.e., decided to continue harassing Mr. Abadi) in reasonable reliance on his acceptance of the *status quo*. Their conduct was clearly discriminatory and in violation of TST's harassment policies, and no measure of "acceptance" by a victim of these discriminatory practices can be converted into a licence to discriminate.

2) Unreasonable prosecution

[127] TST also contends that even if Mr. Abadi did not acquiesce to the harassment, the circumstances of this case make its prosecution unreasonable.

[128] TST submits that the passage of time is inherently prejudicial. It has been a decade and a half since the alleged harassment began and over a decade since the posters were placed in the workplace. TST argues that it is unreasonable to require it to respond to such dated allegations. The passage of time inherently impairs people's memory and various individuals who may have had relevant knowledge have come and gone from the workplace.

[129] TST adds that the issue of delay is one of natural justice and fairness. If circumstances have evolved to the point that a fair hearing can no longer be assured, the Tribunal will effectively be without jurisdiction to proceed (*Grover v. National Research Council of Canada*, 2009 CHRT 1 (CanLII) (*Grover CHRT*) at para. 94).

[130] However, as was also noted in *Grover CHRT*, everything depends on the circumstances of each case. A tribunal may find that a delay of many years does not hinder a party's ability to respond to a complaint. This point was reiterated by the Federal Court's decision in judicial review of *Grover CHRT*, *Grover v. Canada (Attorney General)*, 2010 FC 320 (CanLII) (*Grover FC*), at para. 30, where the Court stated that the mere passage of time will not be sufficient to justify a stay of proceedings. There must also be proof of a significant prejudice. When that prejudice is said to result from a party's inability to have a fair hearing, that party must be prepared to adduce evidence to substantiate its claim.

[131] TST contends that there is real prejudice stemming from the lengthy passage of time. None of the three supervisors that Mr. Abadi reported to at the time of the harassment is working for TST any longer to facilitate an investigation or answer questions. In fact, the one person among them who Mr. Abadi has identified as being most responsible, Eddy, died in 2015. If these allegations had been raised at the time they allegedly occurred, TST would have had an opportunity to investigate and fully defend itself against them on a complete evidentiary record. Mr. Abadi did not formally inform the employer about these allegations until after he was terminated in 2019.

[132] Indeed, Mr. Abadi did not formally complain in writing about the harassment until December 5, 2019, when he sent a detailed letter to Mr. Sergerie objecting to his recent termination, as I will elaborate upon later in this decision. He wrote about how upset he was at being summarily terminated after enduring "14 years of suffering, name calling, post it all kinds of stupid thing" (*sic*). He referred to Mr. Sergerie's training camp remark and the "pictures and comments on bulletin board" (*sic*) which the manager never questioned because he was "enjoying it too like the rest of the people."

[133] However, I am not persuaded that TST has presented proof of significant prejudice that prevents it from having a fair hearing. The name-calling continued until Mr. Abadi's termination. At that point, two of the supervisors in the office (Maria and the other dispatcher) were still employed at TST, and, as I mentioned earlier in this decision, no explanation was given for why they were not called as witnesses. Presumably, some or most of the drivers employed at the time of Mr. Abadi's termination are still employed at TST, especially given Mr. Sergerie's evidence that drivers with greater seniority are more likely to be retained as

employees. Yet, none was called to testify to confirm what, if anything, they recall about the allegations. No evidence was presented to explain why any of them was unavailable.

[134] In contrast, in *Grover FC*, at para. 31, the Federal Court noted that considerable evidence was adduced before the Tribunal relating to the issue of delay and the diminished recollection of potential witnesses. The respondent in that case filed affidavits of nine of those witnesses, seven of whom were cross-examined on their affidavits before the Tribunal (*Grover CHRT*, at para. 2).

[135] As for the posters, even though Eddy has passed away, nothing prevented any of the other employees, including his office colleagues who were employed at TST up until Mr. Abadi's termination, from testifying about whether they saw the posters. Certainly, Mr. Sergerie had no difficulty testifying about his recollection of the policies in place as far back as 2006 and whether he saw the posters. Both of Mr. Abadi's witnesses (Mr. Clanthier and Mr. Brownrigg) were able to recall the harassment that took place.

[136] Therefore, I am not persuaded that TST suffered real prejudice from the passage of time from when the harassment started, but which continued in various forms until Mr. Abadi's termination in November 2019, and about which he filed a human rights complaint with the Commission only a few months later, on February 12, 2020. TST has not established the defence of unreasonable prosecution.

[137] For all these reasons, I find that Mr. Abadi's harassment complaint is substantiated. He has demonstrated on a balance of probabilities that he was harassed by TST employees in matters related to his employment on the grounds of national or ethnic origin, race, and religion, for which TST must be held liable.

[138] I will address the remedies to which Mr. Abadi is entitled later in this decision, after my reasons regarding his termination-related discrimination claim.

IV. Termination allegation

A. Issues

[139] TST terminated Mr. Abadi's employment on November 1, 2019, while he was on authorized leave in Iran. He alleges that disability as well as religion, national or ethnic origin, and race were factors in the termination decision, which are prohibited grounds of discrimination under s. 3 of the *Act*.

[140] Section 7(a) of the *Act* says that it is a discriminatory practice, directly or indirectly, to refuse to continue to employ an individual on a prohibited ground of discrimination.

[141] Mr. Abadi must show that the alleged discriminatory practice was, on its face, discriminatory, which is more formally referred to as establishing a *prima facie* case of discrimination.

[142] To establish a *prima facie* case, in accordance with the test described in *Moore v. British Columbia (Education)*, 2012 SCC 61, at para. 33, Mr. Abadi must show that it is more likely than not (i.e., on a balance of probabilities) that:

- 1) he has a characteristic protected under the Act (i.e., a prohibited ground of discrimination);
- 2) he experienced an adverse impact with respect to his employment; and
- 3) the prohibited ground of discrimination was a factor in the adverse impact.

[143] Mr. Abadi is not required to prove that TST intended to discriminate against him (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Centre)*, 2015 SCC 39 (CanLII) ("*Bombardier*") at paras. 40-41). It is the result, or the adverse impact or effect, that is significant (*Ont. Human Rights Commission v. Simpsons-Sears*, [1985] 2 SCR 536, 1985 CanLII 18 at paras. 12, 14).

[144] The protected characteristic need not be the only factor in the adverse treatment, and a causal connection is not required (*First Nations Child and Family Caring Society of*

Canada v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada), 2016 CHRT 2, at para. 25).

[145] To determine if discrimination occurred, the Tribunal considers the evidence of all parties. If the complainant proves the three *prima facie* elements of discrimination on a balance of probabilities, then the burden shifts to the respondent to justify the discrimination. In employment cases, the commonly claimed justification is that there is a *bona fide* occupational requirement, meaning a genuine or real occupational requirement, that justifies the discrimination (*Bombardier*, at paras. 36-38). If the respondent does not establish a justification, the complaint is substantiated (*Bombardier*, at para. 64).

[146] Accordingly, the issues to be determined with respect to Mr. Abadi's allegation of discriminatory termination of employment are:

- 1) Has Mr. Abadi established a *prima facie* case of discrimination? That is,
 - a. Does Mr. Abadi have a characteristic protected under the Act?
 - b. Did Mr. Abadi experience an adverse impact with respect to employment?
 - c. Was Mr. Abadi's protected characteristic a factor in the adverse impact?
2. If Mr. Abadi established a *prima facie* case of discrimination, did TST establish a valid justification for the discriminatory practice, and particularly a *bona fide* occupational requirement?

[147] In my analysis below, I initially concentrate on Mr. Abadi's allegation of discrimination based on disability and find that this part of his complaint is substantiated. I follow up with an analysis of the discrimination claim based on national or ethnic origin, religion, and race, and find that it is not substantiated.

B. Analysis

(i) Facts leading up to Mr. Abadi's termination

[148] Before dealing with each of the issues to determine if Mr. Abadi's termination was discriminatory, I need to detail the facts that preceded his termination.

[149] In 2019, Mr. Abadi was approved to take the four weeks vacation leave to which he was entitled that year. The leave was to extend until Friday, October 25, 2019, inclusively. He testified that his intention was to go to Iran alone and visit his family, particularly his aging mother. His return flight was to be on Sunday, October 27, 2019, and he was to start work again the following day.

[150] He flew out on Friday, September 27, 2019. Several days after arriving in Iran, he noticed that his lower extremities, from his knees to his feet, began swelling up. His condition did not stop and worsened every day. He had experienced slight swelling in the past, but it was never for more than a couple of days and not as severe as this. This was worse, and it scared him.

[151] On October 16, 2019, he visited a physician in Iran. The physician's report along with an official translation from Persian to English that was prepared after he returned to Canada were filed in evidence. The report notes that Mr. Abadi had a failure of the circulatory system and severe swelling of the legs. The physician told Mr. Abadi that his problem could be related either to a heart or a kidney condition. The physician lacked the specialization to further address the illness. He noted in the report that Mr. Abadi needed to be referred for further examination to a "relevant physician," which he told Mr. Abadi would be a cardiologist to determine if the matter is heart-related and to a urologist to see if it is kidney-related.

[152] Mr. Abadi explained in his evidence that he told the physician he needed to fly the following week, but the physician told him that until the possibility of a heart problem is ruled out, he should not fly. He needed to first be checked out by a cardiologist. The physician wrote in his report that, as of the date of the examination, Mr. Abadi is unable to take a "long flight."

[153] Mr. Abadi eventually was able to book an appointment with a cardiologist for November 7, 2019. He explained that it can take some time in Iran to get an appointment with a specialist. In the meantime, the swelling got worse.

[154] He contacted his airline and asked that his ticket for the return flight be extended for two more weeks, until November 12, 2019. He testified that he asked for two weeks to cover the period when he would get to see the cardiologist and the possibility that the specialist would not clear him to fly immediately.

[155] On October 25, 2019, at a little after midnight Ottawa time given the time zone differences, Mr. TST sent an email to TST's operations support clerk at the Ottawa terminal, who I need only refer to in this decision as A.V. This employee's functions included keeping track of payroll. Abadi asked for an extension of his leave of absence, claiming that international trade sanctions were preventing flights out of Iran. The extended leave would be unpaid. The email said the following:

with due respect and humble submission to state that, I would like to extend my apology for not being able to come back as planned after my 4-week vacation. I would like to request for the extension of my leave of absence for 2 weeks.

Iran has New Sanctions and some of Airline stop service to Iran.

I will be back to work on November 13 that the time I could find ticket to go back to Canada

Thank you very much

Sincerely Amir Abadi

(sic throughout)

[156] Mr. Abadi explained that he waited until almost the last day to tell TST about the leave extension request because he did not know if he would see the specialist before then or if his condition would improve before his scheduled departure allowing him to fly out.

[157] A.V. forward the email to Mr. Sergerie who in turn sent it on to Richard Malone, the line haul manager at TST's central dispatch centre. Line haul refers to the movement of freight between terminals, which is the kind of work Mr. Abadi was doing at the time. Mr.

Malone checked with the airline and learned that there were no sanctions preventing flights from leaving Iran. He conveyed the information to TST's HR director, Stephen King, and Rob Petryszyn, Vice-president of Operations. According to Mr. Sergerie, the managers discussed this information with each other, and Mr. Malone decided to deny the leave extension request.

[158] Accordingly, in the afternoon of October 25, 2019, Mr. Sergerie wrote back to Mr. Abadi to tell him that, since there are return flights available, the extension request was denied. The email reads as follows:

Amir, our information is that there are plenty of flights available out of Iran to Toronto. Unless you provide additional verifiable information we have to deny your request at this time.

Langis

[159] TST did not receive a response to this email and Mr. Abadi did not report to the Ottawa terminal on his expected return-to-work date, October 28, 2019. According to Mr. Sergerie, after a discussion between the managers, it was decided to send a notice by email to Mr. Abadi informing him that he had to report to work within three days, or else his employment would be terminated. Mr. Sergerie sent him an email on October 29, 2019, at 2:20 p.m., which was after midnight in Iran. The email said the following:

Amir, since we have not heard back from you following my email dated Friday October 25, 2019 at 1:57 pm, please find attached herewith your notice to report for duty within three (3) days from the date of this letter or provide documentation acceptable to the company to substantiate any continued absence from the workplace.

Regards,

[160] A notice in the form of a letter signed by Mr. Sergerie was attached to the email, the text of which read as follows:

At this time as you have been absent from the workplace without authorization since October 28, 2019. [*sic*]

You are being given this one opportunity to report for duties within three business days from the date of this letter or **provide documentation**

acceptable to the company to substantiate any continued absence from the work place.

Failure to report for duties or provide acceptable documentation justifying continued absence will result in your employment being terminated at once.

We trust you will conduct yourself accordingly.

Regards

(emphasis in original)

[161] The letter said that copies of it were also being sent to Mr. Reid and the Ottawa terminal's union steward as well as to Mr. Malone and Mr. Petryszyn.

[162] Mr. Abadi saw the email the following morning, Wednesday, October 30, 2019, in Iran. He testified that, at the time, he only looked at the email message, which he viewed on his phone, and not at the letter that was attached, which he only read after he was terminated and had returned to Canada. Mr. Abadi responded the same day to Mr. Sergerie's email, at 6:07 a.m. Ottawa time, with a copy to Mr. Malone, in which he explained that he had a "health issue" related to the swelling of his feet. He attached pictures and videos of his feet.

The email read as follows:

Hi Langis

The reason I mentioned the flight problem I thought is better this way.

I have a health issue since I got here my foot swallowing both of them they are double size.

I did not planned to have a vacation with this much problem on my head. I'm sending pictures and video shows what is my situation today I hope you guys understand thank you.

(sic throughout)

[163] The attachments consisted of three digital photos of swollen feet along with a video of the feet that pans up and shows Mr. Abadi's face before panning back down to the feet. Mr. Sergerie acknowledged in his testimony that he understood the misspelled word "swallowing" to have meant "swelling."

[164] TST implied a few times during the hearing process that the photos might not be of Mr. Abadi's feet. However, it is evident from the video that they are his. Moreover, the file numbers generated by the smartphone that took these images clearly indicate that they

were taken on October 30, 2019. They are obviously images of his feet and legs taken on that day.

[165] As appears from Mr. Abadi's email, he basically acknowledged that it was not flight sanctions that prevented him from returning to Canada. He wrote that he provided that reasoning to TST because he "thought [it] is better this way."

[166] Mr. Abadi explained what he meant by this at the hearing. He referred to the countless incidents of harassment and bullying that he experienced throughout his employment at TST. He was consequently afraid to disclose his sickness to the persons back at the TST terminal, and especially the pictures of his grossly swollen feet. He knew he would be laughed at, and he imagined the jokes people would make about his feet. So, rather than expose himself to this ridicule and further harassment, he thought it "better," as he wrote in his email, to just provide an impersonal reason for the extension to cover the period that he needed until the specialist could see him and hopefully clear him for his return flight in a couple of weeks.

[167] Mr. Abadi was not sure if his first email had gone through, so he sent it again seven minutes later, according to the time stamp. He attached two of the first photos plus a new video of his feet. He wrote an additional message in which he explained that he had not checked his emails over the last few days and had only learned of TST's email the previous night. His message said:

I send earlier email I'm not sure if you guys got it I didn't have a chance in last
3/4 days to check my email I just got it last night
I spray my reason
Thank you very much

(sic throughout)

[168] Mr. Abadi did not get any response to either of these emails, so the next day, on October 31, 2019, at 10:53 p.m. Ottawa time, he forwarded his prior email to A.V., stating that he was unsure if Mr. Sergerie received the earlier email. He requested that A.V. forward the current email to Mr. Sergerie.

[169] The only response Mr. Abadi received to these emails was the termination letter on November 1, 2019, signed by Mr. Sergerie. Its subject heading was “Job Abandonment Termination,” and it stated that his employment was being terminated for job abandonment because he failed to report for duty or provide acceptable documentation to justify his absence. The text of the letter read as follows:

Our letter to you dated October 29, 2019, was clear that failure to report for duties or provide acceptable documentation justifying your continued absence would result in your employment with TST Overland Express being terminated at once.

As you have not reported for duties or provided acceptable documentation to justify your continued absence you are hereby advised that your employment with TST Overland Express has been terminated for job abandonment.

[170] Mr. Sergerie explained that when Mr. Abadi did not show up for work on November 1, 2019, management decided the same day to terminate his employment, in accordance with s. 9.6(e) of the collective agreement. This section provides that an employee’s employment shall be terminated if they are absent from work for more than three consecutive working days without securing a leave of absence. Mr. Sergerie said it “would have been” a joint decision between him, Mr. Malone, and Mr. Petryszyn, though HR instructed him to issue the letter. They had not received any medical documents or other “acceptable documentation” to explain his absence. Mr. Sergerie did not consider the pictures and video to be acceptable. He testified that they did not know whose feet those were, and he gave his opinion that swollen feet do not prevent you from flying.

[171] Mr. Abadi testified that he was shocked to receive this termination letter. He had explained why he could not yet fly back to Ottawa, and if TST wanted additional information, he was prepared to provide whatever they would ask for. Instead, they just terminated him. He responded on November 1, 2019, at 11:38 p.m. Ottawa time, by email to Mr. Sergerie, with a copy to Mr. Malone, to express his shock at being terminated. He wrote:

Hi Langis

I send you 4 emails I did not get any response from you I sent evidence I'm not fit to fly and still you send me termination letter this is clearly wrongful termination.

With this situation I am I did not need any more pressure or stress I appreciate very much we will talk when I get back.

Thank you very much.

(sic throughout)

[172] Mr. Abadi attached to this email one of the previously sent photos along with two newer photos of his swollen feet, which from their file names appear to have been taken on October 31, 2019.

[173] TST did not respond to Mr. Abadi's email. Mr. Sergerie testified that HR advised him not to respond to Mr. Abadi's correspondence but to instead proceed directly to the termination.

[174] In the meantime, on November 3, 2019, Mr. Abadi sent an email to the terminal's union steward telling him what happened, attaching photos of his legs and feet, and asking the Union to help him regarding the dismissal. He explained that in his October 25, 2019, email to Mr. Sergerie, he did not want to disclose information about his health issue "for so many reasons," which, as I previously mentioned, included a fear of being ridiculed and harassed. In the email, he recounted his first visit to the physician, the potential causes of his illness (kidney or heart), and the physician's direction that he should not fly for the time being. The account of events in this contemporaneous email is consistent with his evidence at the hearing.

[175] On November 7, 2019, Mr. Abadi was examined by the cardiologist in Iran. Electrocardiogram and ultrasound tests were administered, as appear on the translated medical reports in evidence. The cardiologist informed him that the swelling was not heart related and confirmed that he could travel by airplane. Mr. Abadi was prescribed medication to reduce the swelling.

[176] Although his feet were still swollen to some extent, having received the medical clearance to fly again, Mr. Abadi boarded his flight on November 12, 2019, and returned to Ottawa that evening.

[177] Before leaving, he sent an email to the union steward confirming that he would arrive that evening and asking if there was any update about his case. The union steward replied that his case had not been raised because they needed to file a grievance first. The union steward presented the grievance the following day, which simply gave as its details “wrongful dismissal.” Mr. Abadi testified that the Union presented the grievance late, after the eight-day period provided for in the collective agreement, even though he had notified the union steward about the termination on November 3, 2019.

[178] The next morning, on November 13, 2019, Mr. Abadi sent an email to Mr. Sergerie, with copies to Mr. Malone and Mr. Reid. He stated that he arrived the previous night and was available to start that evening on his regular run as he did not accept being “dismissed wrongfully,” adding that he had provided all his information about why his return was delayed. The message read as follows:

I arrived last night and I'm available to start tonight on my regular run as I do not accept that I was dismissed wrongfully. I gave all my information why I was delayed coming back. It is not my intention that I was indisposed at that time. I am waiting for your reply regarding this matter. Your decision will determine the path I will take next.
I will see a doctor for further diagnosis that I can do my job at a 100% capacity.

Thank you.

Amir Abadi

[179] Mr. Abadi explained at the hearing that this and other messages that he sent from Ottawa contained fewer grammatical errors as they were typed out by his spouse, who had not travelled with him to Iran.

[180] The same morning of November 13, 2019, Mr. Abadi went to a local Ottawa medical clinic to be examined. On the clinic’s advice, he went immediately to the emergency room at the hospital. The hospital’s report says that he was seen for “edema leg.” According to the *Oxford Learner’s Dictionaries*, online (<https://www.oxfordlearnersdictionaries.com/us/>), edema is a condition in which liquid collects in the spaces inside the body and makes it swell.

[181] He was given medication and told to follow up with his family physician within one week.

[182] His physician in turn directed that he be examined by sonogram as soon as possible, which was done on November 18, 2019. The results showed the possible presence of adrenal adenoma in relation to his right kidney, which Mr. Abadi was told is a type of tumour. Since this diagnosis, he has been visiting a specialist two times per year and has undergone what he described as a “stack” of tests. He is on medication and has been advised to avoid stress.

[183] On November 25, 2019, Mr. Abadi contacted Mr. Reid to ask if he had any news about his situation. Mr. Reid said he would try to arrange a meeting but pointed out that Mr. Abadi was currently terminated from TST and that he should look for work elsewhere until they see what happens. He advised Mr. Abadi not to go to the TST terminal until a formal meeting with the Union had been arranged.

[184] The meeting with TST took place on November 29, 2019, at the Ottawa terminal. Mr. Reid recounted in some detail what took place. Mr. Sergerie was there in person along with Mr. Abadi, Mr. Reid, and the union steward. Mr. King and Mr. Petryszyn joined by telephone. Mr. Reid testified that he had prepared some questions relating to the grievance, which were initially discussed. Copies of the Iranian medical reports, written in Persian, were presented. According to Mr. Abadi, Mr. King accepted copies of the medical reports and said he would get them translated to English.

[185] However, according to Mr. Reid, TST set aside these items and did not discuss them at length. Instead, Mr. King said that this information is all well and fine, but TST was not really interested in it. What they really wanted to see was the original flight booking. If it was provided, TST would “consider” hiring Mr. Abadi again.

[186] Mr. Reid testified that he often sees employers question extended leave requests from immigrant employees holidaying in their country of origin and want to see proof of their original flight bookings. Mr. Reid said that TST management did not openly accuse Mr. Abadi of lying, as they were “far more professional” than that.

[187] However, that is exactly how Mr. Abadi testified that he interpreted TST's position. He claims that when he presented the Iranian medical reports at the meeting, he was laughed at, though Mr. Reid denied that anyone laughed. Mr. Abadi took great offence at the suggestion that he was a liar and TST's lack of concern or interest in the illness that had prevented his return. For him, the original flight bookings were irrelevant, and he refused to provide the flight information.

[188] On December 2, 2019, Mr. Abadi sent an email to Mr. Reid, in which he wrote that after the meeting, he decided that he had had enough and that he would not "beg" anymore to be reinstated. He felt undervalued as a human being at the meeting and by how TST handled his situation. He reminded Mr. Reid about how he had told him several times over the years about the harassment, bullying and name-calling he had experienced. He referred to some of the names he was called (Camel Jockey and Abu) and Mr. Sergerie's terrorist training camp statement.

[189] He noted that he was a good employee with a perfect disciplinary record despite having to work under these conditions. And yet, TST dismissed him for making an extension request due to an illness, for which he was still undergoing treatment. He attached pictures of some of the posters that had been placed on the bulletin board. He informed Mr. Reid that he was going to take up the matter with the Commission.

[190] On December 5, 2019, Mr. Abadi also expressed his frustration directly to Mr. Sergerie in a detailed email. He cited his good working record and commendation from clients about jobs well done. Yet, when he asked for a two-week extension for leave without pay, after unnecessarily sharing personal information about his illness, TST terminated him. Mr. Abadi went on to cite how rudely he had been treated while working at TST, referring specifically to the terrorist training camp statement and the pictures and comments that had been posted about him. He also claimed in the email that other non-immigrant employees were treated favourably and not dismissed even though they broke laws. He concluded his email by saying he would be filing a human rights complaint.

[191] Later that day, Mr. King responded to Mr. Abadi's email asking that all communications be directed to him from now on. He would look into any concerns, evidence,

or human rights complaint that Mr. Abadi would raise. Mr. Abadi remarked pointedly in his testimony that other than the termination letter of November 1, 2019, this was TST's first correspondence with him following his emails about his health issues and the accompanying images. Mr. Abadi replied curtly to Mr. King's email, saying he did not see the point in communicating with him since he, as HR manager, fired him without any warning or suspension. Mr. Abadi added in his testimony that given his detailed email to Mr. Sergerie earlier that day, he did not see the point in saying anything else to them.

[192] On February 12, 2020, Mr. Abadi filed the present human rights complaint with the Commission and, on February 24, 2020, Mr. Reid forwarded to TST Mr. Abadi's email of December 2, 2019, "not to pursue reinstatement" along with a notice that the Union was withdrawing the grievance "on a without prejudice or precedent basis."

[193] In the same month of February 2020, Mr. Abadi filed a complaint with the Canadian Industrial Relations Board (CIRB) against the Union alleging a breach of its duty of fair representation. The complaint was unsuccessful, and a reconsideration request was dismissed.

(ii) Mr. Abadi has protected characteristics under the Act—disability, race, national or ethnic origin and religion

[194] The first element needed to establish a *prima facie* case of discrimination is to determine if the complainant has a protected characteristic under the *Act*. I already found in the first part of this decision dealing with the harassment allegation that Mr. Abadi was a racialized person perceived to be of Middle Eastern or North African origin and a Muslim. I deal with Mr. Abadi's claim of discrimination on the grounds of race, national or ethnic origin, and religion later in the decision, but I will first address the allegation of discrimination based on disability.

[195] Did Mr. Abadi have a disability within the meaning of the *Act*? Section 3 includes disability as a prohibited ground of discrimination. Section 25 defines disability as any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug.

[196] The Federal Court of Appeal, in *Desormeaux v. Ottawa (City)*, 2005 FCA 311 (CanLII), at para. 15, elaborated on this definition by stating that disability in a legal sense consists of a physical or mental impairment, which results in a functional limitation or is associated with a perception of impairment.

[197] I find that while in Iran, Mr. Abadi developed a physical impairment that resulted in a functional limitation. His feet and lower limbs swelled up significantly, as is evident from the images that he sent. As I already stated, TST's suggestion that the photos and videos were not of him is unfounded. Mr. Abadi testified that he had difficulty moving around. His physician in Iran instructed him not to fly, at least until he was seen by a specialist and a heart problem was ruled out.

[198] He was out of the country on authorized annual leave, and the physical impairment that he developed prevented him from returning home to Canada to work. Upon his return, his local clinic in Ottawa referred him immediately to the emergency ward of the hospital for further examination. Ultimately, he was diagnosed with a form of tumour near his kidney. The swelling went away at some point, but he remains on constant medication.

[199] TST questioned the genuineness of the medical evidence and claimed it was insufficient to establish a disability. It pointed out that no medical letter or report was produced showing that Mr. Abadi's condition improved by November 13, 2019, or that the physician approved his flying to Canada. However, I do not see these facts' significance. Mr. Abadi testified that the cardiologist said his condition did not prevent him from flying home. Having been told that he can travel, why would he need a document to say the same thing? He was cleared to leave.

[200] TST also argued that none of the Ottawa reports prescribed that he needed to rest. TST even questioned one of the photos taken at the hospital in Ottawa on November 13, 2019, showing his feet in shoes.

[201] These arguments are not persuasive either. The November 13, 2019, hospital notes confirm that he was seen that day for "edema leg", and the subsequent note of November 18, 2019, from the imaging centre that took the sonogram states that Mr. Abadi's indication is "recent bilateral edema." Perhaps rest was not prescribed, but the edema was noted. As

for the shoes in the photo, a close look shows that they are athletic shoes that are loosely resting on his feet with the laces all untied and loose. This would be entirely consistent with someone who has swollen feet but is wearing some footwear to be able to move around. Neither observation serves to contradict Mr. Abadi's claim of swollen feet and limbs.

[202] In general, TST argues that not all medical conditions qualify as a disability, especially without supporting documents. In some instances that may be true, but here the medical condition clearly consisted of very swollen feet and limbs along with directions in a medical note that until his condition was further examined by an expert, he could not fly back to Canada. This was an impairment that functionally limited his ability to return to Canada to work. It meets *Desormeaux's* definition of disability.

[203] TST argues that Mr. Abadi could not be considered to have been disabled when he was terminated because he had not "reported" a disability to the employer at that time. This is not a convincing argument either. Mr. Abadi, of course, maintains that his emails accompanied by photos and videos sufficiently reported the existence of his disability. However, more on point, the mere absence of a notice does not mean he was not in fact disabled. This sort of evidence is relevant to the question of whether an employer has sufficient information to compel it to accommodate the employee's needs or inquire further about their status, not whether a disability exists. The alleged failure to notify is not in itself sufficient to negate the evidence adduced by Mr. Abadi of the swelling he experienced and of the physicians' observations.

[204] I am therefore satisfied on the balance of probabilities that from at least mid-October until mid-November 2019, the swelling in Mr. Abadi's legs and feet prevented him from returning to Canada to perform his work as a truck driver. This was a functional limitation and constitutes a disability within the meaning of the *Act*.

[205] Accordingly, along with my earlier findings about race and Mr. Abadi's actual or perceived national or ethnic origin and religion, I find that he possessed the protected characteristic of disability when TST dismissed him.

(iii) Mr. Abadi experienced an adverse impact—his employment was terminated

[206] The adverse impact that Mr. Abadi experienced is evident. His employment was terminated on November 1, 2019, while he was still in Iran. The second element of the *prima facie* case is therefore established.

(iv) Mr. Abadi's disability was a factor in the termination

[207] On its face, Mr. Abadi's disability was clearly a factor in his termination. TST said it terminated him because he was absent from work for three consecutive days after his vacation leave ended, without first securing a leave of absence. Mr. Abadi was prevented from returning to Canada to work on account of his disability and the first physician's order that he not fly. His disability was thus a factor in the decision to terminate him for failing to present himself for work.

[208] TST argues Mr. Abadi's disability played no role in its decision to terminate him. It claims that it had no option but to terminate him. Section 9.6 of the collective agreement says an employee's employment "shall" be terminated if one of the listed events occurs, including, at s. 9.6 c), if they are absent from work for more than three consecutive working days without securing a leave of absence. Some of the other listed events in s. 9.6 include situations involving employees who are laid off and where employees take another job while on a leave of absence. TST submits that the clause is not permissive; it is mandatory. There was therefore nothing discriminatory in its application.

[209] I find no merit in this argument. The employer certainly has the option not to terminate an employee, particularly if a prohibited ground of discrimination is a factor in the decision to fire them. It is absurd to suggest that the employer has no alternative when one of the events in s. 9.6 occurs. The clause simply means that an employer has the right to terminate an employee if one of those events occurs, but it can certainly choose to waive that right, especially if its exercise would give rise to a discriminatory practice.

[210] In sum, on the balance of probabilities, the evidence shows that Mr. Abadi had a disability, that he was terminated for not showing up to work for three days, and that the

disability is what prevented him from coming to Canada and going to work. TST has not succeeded in refuting this evidence. The *prima facie* case of discrimination based on disability has been established.

(v) TST has not established a legal defence (a *bona fide* occupational requirement) to justify the disability-based discriminatory practice

[211] According to ss. 15(1)(a) and 15(2) of the *Act*, a “refusal” or “expulsion” by an employer is not a discriminatory practice if it is based on a *bona fide* occupational requirement. Employers can only demonstrate the practice is based on a *bona fide* occupational requirement if they establish that accommodating the needs of the individual affected would impose undue hardship on them, based on health, safety, and cost.

[212] In Mr. Abadi’s case, the accommodation he sought in relation to his disability was permission for unpaid leave for just over two more weeks until he had medical clearance to fly home.

[213] TST argues that the accommodation process in this case was not so simple. Mr. Abadi had a duty to facilitate the search for accommodation as well, which he failed to meet. As the Supreme Court of Canada held in *Central Okanagan School District No. 23 v. Renaud*, 1992 CanLII 81, [1992] 2 S.C.R. 970 at 994, the search for accommodation is a multi-party inquiry. There is a duty on complainants to assist in securing an appropriate accommodation.

[214] TST contends that Mr. Abadi failed in this duty by not providing a physician's note or any other clear medical justification to secure additional leave. Mr. Sergerie stated that it is common knowledge that employees must provide this information. As a result, TST had no knowledge of any disability.

[215] I do not agree. Mr. Abadi’s email plus the photos and videos that he provided sufficiently conveyed his notice that he could not return to work for “health issues.” In other words, he informed TST about a potential disability. A physician’s note is not necessary to at least signal the existence of a health issue.

[216] I note that s. 9.8 of the collective agreement stipulates that an absence due to a *bona fide* illness or injury “shall not be cause for discharge” provided that TST is notified of the illness or injury. There is no requirement that a medical note be provided from the outset. The provision states that TST *reserves the right to require a doctor’s note* after three consecutive days of absenteeism. When this provision was shown to Mr. Reid at the hearing, he testified that, in Mr. Abadi’s case, TST did not seem interested in the Iranian medical information that he presented at the meeting of November 29, 2019. Mr. Reid remembers Mr. King just saying, “Forget about all that medical stuff, just show us your original flight ticket.”

[217] This attitude is consistent with Mr. Sergerie’s recollection about the discussion that he, the other managers and HR had when they decided to terminate Mr. Abadi’s employment. The “health issue” reference in Mr. Abadi’s email was not even discussed by the group, according to Mr. Sergerie.

[218] If TST really needed more information about his health issues to better understand his extension request, they could have asked him. Instead, they never communicated with him again, despite his repeated efforts to contact TST management. They terminated him as soon as the third day had passed.

[219] In effect, with his emails and the attached photos and videos, Mr. Abadi informed TST of a disability that prevented him from returning to work at the scheduled time. He simply sought to be accommodated by moving his date of return by a couple of weeks until his doctors would clear him to get on a plane. I find his email messages, together with the photos and videos, were sufficient notice of his illness. At that point, TST could either have accommodated him by letting him stay on unpaid leave for two more weeks as he requested or at the very least inquired further into his health situation if it needed more information.

[220] Instead, TST just fired him after the three days. Why did it terminate him so swiftly? It is evident from Mr. Sergerie’s evidence that the managers’ actions were influenced largely, if not entirely, by the fact that Mr. Abadi did not tell the truth in his first email. From that moment on, they were sceptical of everything Mr. Abadi told them. TST argues that the bond of trust was lost.

[221] However, Mr. Abadi tried to explain in his subsequent email the reason for his withholding the truth in the first email (“I thought [it] is better this way”). He could have been more explicit in his response, but his rationale was completely understandable. Given the harassment and bullying he experienced at work, disclosing an embarrassing illness like his swollen feet and legs could certainly have been devastating.

[222] Despite the photos and videos that Mr. Abadi sent showing what was causing his functional limitations, TST’s managers basically opted not to believe what they were seeing in those images and instead promptly terminated him. Mr. Sergerie testified in cross-examination that he and the other managers looked at the swollen feet and “deemed” that they were “not an acceptable excuse” not to fly back to Canada. Mr. Sergerie acknowledged in further questioning that neither he nor the other managers had medical degrees to make that assessment. There is no evidence that they sought any independent medical advice either. It was during this same line of questioning that Mr. Sergerie suggested that the videos of Mr. Abadi’s feet and face were not actually of him—a completely unfounded assertion, given that the video pans from Mr. Abadi’s face to his feet.

[223] Just because his illness or disability was not so evident does not mean that TST had any less responsibility to consider accommodating the extension request for a “health issue” or at least to investigate further.

[224] Although Mr. Sergerie testified that he did not recall Mr. Abadi ever having lied to him before, the managers were convinced that he was lying about everything, which explains why Mr. King later said TST might “consider” reinstating him if he produced his original ticket. Management believed that he purchased the ticket for a November 13 return from the outset before he left for Iran.

[225] For instance, according to TST, if Mr. Abadi was telling the truth, he would have switched his ticket back to a November 8 departure after the cardiologist cleared him for travel on November 7. I see no merit to this argument. He was scheduled to fly out a few days later, and the employer had already fired him. In these circumstances, it was reasonable for him not to have tried to change his ticket again to advance his return flight by just a couple of days. He testified that his elderly mother was very concerned about his

health and that those remaining few days also enabled him to reassure her before he left for Canada.

[226] TST also points to an email that Mr. Reid sent to Mr. Abadi on February 6, 2020, responding to Mr. Abadi's declared intention to file a CIRB complaint against the Union and how it handled his case. In the email, Mr. Reid referred to the meeting of November 29, 2019, recounting that Mr. King said that if Mr. Abadi produced the original airline ticket, TST would "definitely look at it." This would be proof of the employee's intention to return to work after his vacation. Mr. Reid wrote that during a break, Mr. Abadi told him that someone had "ratted him out," explaining that before going on vacation, he had said to some fellow employees that it would be nice to have an additional two weeks of vacation. Mr. Reid continued in his email to say that he encouraged Mr. Abadi to produce the original ticket, but that several days later, on December 2, 2019, Mr. Abadi wrote that he decided not to beg anymore for his reinstatement. The Union then withdrew the grievance. Mr. Reid wrote that he assumed Mr. Abadi was unable to find the original ticket. He testified that the account in his email is an accurate representation of what happened and recalled Mr. Abadi saying it would be difficult for him to obtain a copy of the ticket because of how he booked it. Mr. Abadi denies making the statement and ever telling anyone that he planned to take an extra two-week vacation.

[227] Mr. Abadi maintains as well that Mr. King was not nearly as open-minded as Mr. Reid suggests. Mr. Abadi recalls Mr. King saying that his employment was "done" and that TST "might look" at the airline information, which is why Mr. Reid advised him to immediately begin looking for another job.

[228] According to TST, Mr. Abadi's alleged admission, coupled with the fact that he never provided a copy of his ticket, supports its suspicion that he tried to mislead management. TST submits that an employer is entitled to dismiss an employee for lying about the reason for requesting leave. The lie vitiates the employer's responsibilities in the accommodation process. It referred to the decision in *Galati v. Highland Farms Inc.*, 2012 HRTO 2235 (CanLII), where an employee needed a leave of absence to enter a drug rehabilitation program. However, he lied to his employer and said that he required the leave of absence for back surgery. The employee was dismissed. He claimed discrimination based on

disability, but the Human Rights Tribunal of Ontario denied his claim, holding that the employer rightly believed that the applicant lied about why he needed the leave of absence.

[229] *Galati*, of course, is not binding authority on me, but, more importantly, it can be distinguished from this case. The tribunal's reasoning turned principally on the fact that the employee never corrected his lie and intended to deceive the employer through to the end (see para. 42 of the decision). In the present case, Mr. Abadi immediately corrected the initial misinformation and told TST about his real illness two days before TST terminated him. He sent TST photos and videos of his illness. The managers knew that he was declaring a medical problem, but rather than put off their decision and consider extending him an unpaid leave, they fired him without even asking him for more information if they were not satisfied with what he had provided. Mr. Sergerie testified that HR did not do any follow-up investigation after the exchange of emails between Mr. Abadi and Mr. King on December 5, 2019.

[230] Besides, although TST's decision may have been largely influenced by what it considered to be Mr. Abadi's lie, this is not why it claimed it terminated his employment. TST did not rely upon any of the disciplinary provisions set out in the collective agreement. Interestingly, Mr. Abadi pointed to Appendix C of the collective agreement which sets out the disciplinary measures for various offences. Section 7 – Attendance states that only after a fourth offence of being absent without a reasonable explanation would an employee be subject to dismissal. In Mr. Abadi's case, he had a perfect disciplinary record. Mr. Sergerie testified that he rated his work 9 out of 10. Yet, they fired him simply because he did not show up for work for three consecutive days. As I have found, the absence was due to the disability that had emerged while he was in Iran, which prevented his return.

[231] Moreover, on the balance of probabilities, I am not persuaded by the argument that Mr. Abadi's failure to produce his airline tickets demonstrates that he never planned to return by October 28, 2019. He explained that he was so offended by TST's accusations at the meeting that he simply refused to provide them with his airline tickets. In any event, he claims that Mr. King told him during the meeting that his employment was "done" and that TST would never rehire him voluntarily. This whole affair would end up affecting his mental health so much, especially after the CIRB dismissed his complaint against the Union in 2021, that

he claims he just “lost it”. This led him to destroy much of the material relating to this case, including anything documenting his flight bookings. It was only several months later, when the Commission’s investigation into his human rights complaint began advancing, that he regained hope and began putting together the material available to him. But that did not include the flight tickets, and no copies were filed in evidence.

[232] TST is effectively arguing that its intention or motive was not to fire Mr. Abadi because he had a disability that had caused swelling in his feet and limbs. It was simply because he did not show up for work for three consecutive days without securing a leave of absence. However, as noted in *Bombardier*, at paras. 40-41, intent is not a factor when it comes to human rights and discrimination. Whether TST intended to discriminate against Mr. Abadi is immaterial. It is the effect that must be considered. He was terminated because he did not appear at work for three days. The reason he did not appear was because his disability prevented him from attending. Thus, his disability was a factor in the termination.

[233] Returning to the requirements of s. 15(2) for the establishment of a *bona fide* occupational requirement defence, did TST establish that it could not accommodate Mr. Abadi’s needs by allowing him to remain on unpaid leave until November 13, 2019, without experiencing undue hardship based on health, safety, or cost?

[234] TST did not adduce any evidence to demonstrate undue hardship. It did not present any information about what their staffing situation was like at the time. Mr. Abadi was able to produce a seniority list from 2018. He did not have access to the list from 2019, but he testified it was unchanged. It showed that there were at least two other drivers on the list with less seniority than Mr. Abadi, suggesting that they could step in for him in his absence. There is no indication that TST was short-staffed due to Mr. Abadi’s absence.

[235] In addition, Mr. Abadi pointed out that the collective agreement details the methodology for calling up replacement drivers when people are on leave (Article 31 – Casual Help). In his evidence about the employment that he sought after the termination, Mr. Abadi described how he became a driver working for agencies that would send him to various trucking companies when they needed a driver. This suggests that TST would have had access to such services if it was short-staffed.

[236] Indeed, Mr. Sergerie confirmed that, when they are short of drivers, he calls agencies for additional help. In 2019, the availability of drivers was “pretty tight,” particularly when several drivers took vacation at the same time, but he could not recall if there was better availability in the autumn of 2019.

[237] In any event, TST did not present any evidence about the impact of Mr. Abadi’s absence. Indeed, one wonders if there was any concern about that given its readiness to terminate him immediately after the expiry of the three-day notice.

[238] TST has therefore not established a valid justification for its otherwise discriminatory actions. Since the three *prima facie* elements of discrimination relating to disability were proven on a balance of probabilities, Mr. Abadi’s complaint that he was discriminated against based on a disability when TST terminated his employment is substantiated.

(vi) Race, national or ethnic origin, and religion were not factors in the termination

[239] Mr. Abadi argued that race and his perceived origins and religion were also factors in the decision to terminate him. However, I find that on a balance of probabilities he has not established this claim.

[240] He contends that other TST drivers in similar circumstances were treated differently than him. In his email that he sent to Mr. Sergerie on December 5, 2019, Mr. Abadi said that his termination was “racially motivated” and gave examples of unnamed “Canadian” drivers who lost their appropriate licences and were still allowed to drive for the company, or others who were allowed to work “under the table” for years. He claimed that “non-immigrant” drivers were allowed to take stress leave for “bogus reasons,” but he never did. He maintained that even though he had a perfect employment record, since he was the last immigrant among the Ottawa drivers, Mr. Sergerie grabbed the first opportunity to dismiss him and turn the area “very white.”

[241] Mr. Abadi also testified about a confrontation he had with Mr. Sergerie two weeks before leaving for Iran. He was in the lunchroom speaking to the union steward when Mr. Sergerie showed up and, after rudely “shushing” Mr. Abadi, he began his own conversation

with the union steward. Mr. Abadi was offended and spoke up, telling Mr. Sergerie to stop treating him like a child. He claims that Mr. Sergerie replied that he would show him “who’s boss” and that Mr. Abadi “would get it.” Mr. Abadi is convinced that Mr. Sergerie terminated him a few weeks later in retaliation. Mr. Sergerie testified that he had no recollection of this incident, noting that he has many interactions with employees every day.

[242] Mr. Abadi points to the years of bullying and harassment that he experienced at the workplace, which Mr. Sergerie allowed to occur. He questions why TST decided to check up on his claim about flights out of Iran being cancelled, implying perhaps that non-immigrant employees would not have been subjected to equal scrutiny. Mr. Reid did mention that employers from time to time, without referring specifically to TST, get extension requests from employees while on leave to the country that they emigrated from. Mr. Abadi also claimed that at the meeting of November 29, 2019, TST management mocked his medical reports because they were written in Persian, although Mr. Reid testified that he did not observe this.

[243] Mr. Abadi submits that, taken together, these incidents demonstrate that race, national or ethnic origin, and religion were factors in the decision to terminate his employment. I am not persuaded.

[244] He did not lead any specific evidence in support of his allegations that other drivers were treated differently. No names or other details were provided. While his confrontation with Mr. Sergerie may demonstrate how strained their relationship was, a link to these discriminatory grounds is not evident in the confrontation. The evidence about how the medical reports were received is contradictory and as for the scrutiny assigned to his initial extension request, one must acknowledge the unconventionality of the reason he gave for his inability to return. I am not convinced that race, national or ethnic origin, or religion were factors in the decision to inquire further.

[245] More significantly, these incidents do not demonstrate that these discriminatory grounds were factors in the termination itself. As I elaborated on in the previous section of this decision, I find that aside from Mr. Abadi’s failure to present himself at work for three consecutive days, TST’s decision to dismiss him was largely influenced by the managers’

perception that he tried to mislead them. They no longer put any faith in him, despite the evidence of his disability that he presented afterwards. TST's perception of him was unfortunate and ultimately unwarranted, but I am not convinced on a balance of probabilities that race, national or ethnic origin, or religion were factors in the perception.

[246] As a result, the third component of the *Moore* test for discrimination based on these grounds has not been established. Mr. Abadi has not shown that race, national or ethnic origin, or religion were factors in the decision to terminate his employment.

[247] For these reasons, I find that Mr. Abadi's termination was discriminatory based on disability but not on any of the other grounds alleged in his complaint.

V. Remedies

[248] Mr. Abadi's human rights complaint has been substantiated, which means that the Tribunal can order one or more of the remedies set out in s. 53 of the *Act*.

[249] As the Tribunal noted in *Christoforou v. John Grant Haulage Ltd.*, 2021 CHRT 15 (*Christoforou CHRT*) at paras. 37-39, aff'd 2022 FCA 182 (*Christoforou FCA*), the purpose of these remedial provisions is to make a victim of discrimination whole and to put them back in the position they would have been in had the discrimination not occurred. In an employment context, this can include reinstating the victim and compensating for losses that flow from the discriminatory conduct, including lost wages (ss. 53(2)(b) and (c) of the *Act*). The calculation of the loss is determined by assessing the circumstances of each case. There must be a causal link between the discrimination and the loss claimed. The onus is on the complainant to establish that it is more likely than not that this causal connection exists.

[250] *Christoforou CHRT* also observed, at paras. 52-54, that the Tribunal must exercise its discretion to award lost wages on a principled basis. The amount of the loss is determined by the circumstances of each case, and the Tribunal can impose a limit to losses caused by the discriminatory practice suffered.

[251] One such principle is mitigation (see *Chopra v. Canada (Attorney General)* 2007 FCA 268 (CanLII), at para. 40). In *Tahmourpour v. Canada (Attorney General)*, 2010 FCA 192 (CanLII), at para. 46, the Federal Court of Appeal confirmed the necessity to take into account a complainant's obligation to mitigate their losses. This means that the victim of discrimination must look for and accept "comparable employment." An employer is not obliged to pay the victim of discrimination for loss of income that could have been avoided by the reasonable efforts of the victim to obtain comparable employment. The respondent has the burden of establishing that a complainant failed to mitigate their damages (*Christoforou FCA*, at paras. 6-7).

[252] Another principle is the rule against double recovery. A complainant cannot recover more than what was sufficient to compensate the losses flowing from the discriminatory conduct (*Hughes v. Canada (Attorney General)*, 2019 FC 1026 (CanLII), at para. 46).

[253] The victim may claim up to \$20,000 for any pain and suffering they experienced as a result of the discriminatory practice (s. 53(2)(e)). In addition, the respondent may be ordered to compensate the victim up to \$20,000 if the Tribunal finds that it engaged in the discriminatory practice wilfully or recklessly (s. 53(3)).

[254] At the hearing, Mr. Abadi withdrew several of his original remedial claims including reinstatement. As a result, he only seeks compensation for his lost wages and benefits and his pain and suffering as well as the special compensation set out in s. 53(3).

A. Lost wages

[255] Mr. Abadi asked for the difference between the wages that he would have earned at TST and what he actually earned until the hearing, which was held in December 2022, consistent with the rule against double recovery. Attempting to calculate a wage loss can be difficult as some figures inevitably are only estimates. Mr. Abadi produced his Canada Revenue Agency *T4 - Statements of Revenue Paid* forms (T4) reflecting his income over this approximately three-year period, which are helpful in making these calculations.

[256] In the 10 months up to the termination date, November 1, 2019, Mr. Abadi earned \$80,416 at TST. By dividing that figure by 10 and multiplying the result by 12, the total

estimated income for the year would be \$96,499. Thus, at first view, his estimated lost earnings at TST would be \$16,803 (i.e., the difference between what he would have earned and what he did earn).

[257] Mr. Abadi testified that throughout 2019, he had been working a “side job” driving for a hospital linen delivery service, usually 10 hours/week at \$22/hour. Having lost his TST job in November, he asked to work more hours at the linen delivery service. He estimates that he was working 40 to 50 hours/week after his return to Canada until the end of 2019. The T4 for the linen delivery service was produced, but it obviously does not separate out the sums earned after he took on the extra hours. Assuming that he worked the median of his 40 to 50 estimated hours of weekly work (i.e., 45 hours/week) and deducting the 10 hours that he still would have been working at the linen delivery service if TST had not dismissed him, Mr. Abadi can be estimated to have earned the \$22/hour salary for 35 hours/week in the remaining 6 weeks of 2019. That works out to a total of \$4,620. In keeping with the principle of mitigation, this sum would need to be deducted from his claim of lost earnings in 2019 (i.e., \$16,083 - \$4,620 = \$11,463).

[258] As noted in *Christoforou CHRT* at para. 73, when a complainant obtains comparable employment to their previous job, the causal link between the discrimination and the wage loss is broken. TST contends that Mr. Abadi’s job at the hospital linen delivery service was comparable to his TST job and that, consequently, the causal link to the discrimination was severed. However, this argument is based on a mistaken assessment of the evidence. TST assumed that the \$21,049 appearing on the 2019 T4 for the linen delivery job represented income earned in the six weeks after his termination. In fact, as I explained in the previous paragraph, he was working for this service throughout the year and his additional income in those six weeks after he was fired is estimated to be only \$4,620. His monthly TST income when averaged out was \$8,041, significantly more than the income from the linen service. Moreover, the TST work was steady, mostly line haul when he was terminated, and covered by a collective agreement that secured him leave and other benefits. At the linen service, the work was considered part-time, his hours were variable, and he had no benefits or leave entitlements. The work was not comparable. The causal link was not broken.

[259] Mr. Abadi stopped driving for the hospital linen delivery service at the end of January 2020. TST argued that this was a breach of his duty to mitigate his damages. This submission is again based on the erroneous assumption that this employment was comparable to the TST job.

[260] In addition, his departure from that work was justified. He explained that because his illness had depressed his immune system, his physician advised him to avoid exposure to contagions found in hospitals and to the soiled material he was handling. In other words, he really had no option but to end that work. He would not have had to leave his TST job for the same risk.

[261] He then took up work as an on-call driver for a trucking agency in February 2020, which was for less pay. He explained that there is less demand for truck drivers over the winter months. Mr. Sergerie acknowledged in his evidence that winter is normally TST's slow season, and they do not need to hire additional drivers. Presumably, the situation is similar for other Ottawa trucking firms.

[262] On March 16, 2020, Mr. Abadi began working exclusively for a trucking company as a salaried employee, but on August 8, 2020, he left this job because the work was extremely hard, requiring that he physically carry bags of flour up stairs to restaurants. He was around 54 years old at the time. This work was far more strenuous than his job at TST, and I do not consider it comparable work. He left this trucking company one month before he would have become entitled to benefits.

[263] Afterwards, Mr. Abadi began taking on-call work again for another trucking agency until September 20, 2020, when he began working exclusively for another trucking company. He did not receive any pension or other benefits while he worked at this company.

[264] The T4s show that his total income in 2020 was \$63,321, which when deducted from his 2019 estimated TST income amounts to a net loss in revenue of \$33,268.

[265] Mr. Abadi stayed with this last trucking company for just under six months but left the job because of concerns with its operations as well as for personal reasons. The company was regularly being cited by transportation authorities for operating with overweight vehicles,

which was a safety hazard. Driving these vehicles was also putting his trucking licence at risk.

[266] He testified that these concerns, coupled with a personal situation that had developed at home, compelled him to leave the job on March 7, 2021. This was shortly after he learned that his CIRB complaint against the Union was denied. He testified that he felt he was at a dead end. The termination and its ensuing effects had created a tremendous strain in his family. Their savings had been drained, and they maximized their line of credit. The couple became at odds with each other and decided it would be best if they separated. Running two households was financially untenable, and they agreed that it would be best for him if he took some time to be with his relatives who are all in Iran. Consequently, in March 2021, he went to Iran and remained there until September 2021. That is when he learned that the Commission was advancing its investigation into his human rights complaint, and he felt motivated enough to come back. His emotional state had improved, and he felt good enough to return to work.

[267] As soon as he got back in September 2021, he did not try returning to the previous trucking company due to the safety and licencing concerns, so he found work with an agency. In November 2021, he shifted to another trucking agency for which he continues to work to this day.

[268] Mr. Abadi's total earnings in 2021 were \$28,810, which represents a net difference from his 2019 TST estimated income of \$67,789. He did not earn any income while he was out of the country for six months during the year, but Mr. Abadi argues that he should nonetheless be compensated for lost income even when he was away. He claims that it was because of TST's discriminatory practice in terminating him that he fell into the depression that led to his departure from Canada.

[269] I do not agree that Mr. Abadi is entitled to be compensated for this period away. While I accept that his state of mind and his relationship with his family was impacted significantly by TST's discriminatory practice, I am not persuaded that his departure from Canada resulted from this discriminatory practice. Accordingly, his lack of income while in Iran cannot be attributable to the discriminatory practice.

[270] His absence from Canada meant that he ceased being able to make any reasonable efforts to obtain comparable employment. As a result, the causal link between the discrimination and any further employment related losses was broken. The evidence of his job search upon returning to Canada strongly suggests that had he never left for Iran, he probably would have been able to quickly find other work as a truck driver after leaving the other job and earn a significant income, even if slightly less than what he was earning at TST. For instance, for the year 2022, Mr. Abadi produced a letter from the trucking agency that he still works for. It showed that his total earnings until October 11, 2022, (i.e., about 9 months) were \$55,438, which works out to about \$6,160 per month. Annualized, the total is \$73,920.

[271] While I appreciate that he had personal reasons for leaving the country, and that he cannot be faulted not wanting to continue at the prior job due to safety concerns, the fact is that when he went to Iran for six months, he stopped fulfilling his duty to mitigate his losses. He was required to continue exploring options to earn income.

[272] Mr. Abadi's 2021 income at that job until he left it on March 7, 2021, the 66th day of the year, was \$18,228. The estimated TST income for the same period would have been \$17,440 (i.e., \$96,449 x 66/365). This means that had he continued to be employed at TST, his estimated income would have been less than what he actually earned. Consequently, there are no net lost wages for this period (January 1 to March 7, 2021).

[273] Thus, Mr. Abadi's total claim for lost wages would be calculated as follows:

| Year | Net lost wages |
|--------------|-----------------------|
| 2019 | \$11,463 |
| 2020 | \$33,268 |
| 2021 | 0 |
| TOTAL | \$44,731 |

[274] In final submissions, TST also argued that its liability for lost wages and other damages should end on November 29, 2019, at the meeting when Mr. Abadi did not produce a copy of his airline ticket. TST noted that an employer can retroactively reassess a situation and had Mr. Abadi provided his ticket, this whole dispute would have ended earlier. In effect, TST claims he was refusing to participate in the accommodation process. This

misrepresents the facts. TST said they might “consider” rehiring Mr. Abadi if he presented the ticket. They had lost trust in him due to his first email, and there is no guarantee that he would have been rehired. Besides, the matter of the ticket was ultimately irrelevant to the issue before me. He provided a copy of his medical reports at the meeting. Yet, TST did not reassess their position, even after learning of his medical condition. A request to be accommodated for a disability was made and the employer refused to deal with it. Instead, Mr. Abadi was fired.

[275] I therefore find that Mr. Abadi is entitled to be compensated for the wages that he was deprived of due to TST’s discriminatory termination of his employment, from November 1, 2019, until March 7, 2021, in the total amount of \$44,731.

B. Pension contributions

[276] Mr. Abadi pointed out that under the collective agreement, TST matched his contributions to the Union’s pension fund. Since the termination, he has not had a job where he could contribute to that fund nor has he benefitted from the employer’s contributions. None of his positions have been “union jobs.” He asks that TST be ordered to “contribute to his pension plan” until his age of retirement at age 65.

[277] If Mr. Abadi had not been terminated, he would have continued to benefit from these contributions to the pension plan. However, it is speculative to suggest that he would have remained employed at TST for another decade and that he would have been receiving these benefits until age 65. Furthermore, Mr. Abadi did not lead any evidence of an actuarial nature to calculate the amount of this loss.

[278] Nonetheless, he did lose this benefit between the termination date and when he ended his job on March 7, 2021, and went to Iran for six months. He is entitled to be compensated for this loss of the employer’s contributions to the pension plan until that date. The parties are directed to work together to calculate this sum. Mr. Abadi is directed to provide any information required by TST to confirm this amount and to facilitate its compliance with this order.

C. Vacation leave

[279] Mr. Abadi testified that he was entitled to four weeks of annual paid vacation leave when he was terminated. Since his dismissal, he has worked for agencies and companies that do not offer vacation leave or provide lower leave entitlements because he is a new employee. Like his pension claim, Mr. Abadi has asked to be compensated for the loss of the additional vacation leave until age 65. He did not lead any evidence for how the claim for any future loss is to be calculated.

[280] The Tribunal cannot award an amount for any future loss for the same reasons given about the pension contributions claim. However, he must be compensated for the difference in vacation leave entitlements for the period between the dismissal and the date when he ended his job on March 7, 2021, and went to Iran for six months. The parties are directed to work together to calculate this sum. Mr. Abadi is directed to provide any information required by TST to confirm this amount and to facilitate its compliance with this order.

D. Pain and suffering

[281] The Tribunal can order up to \$20,000 for any pain and suffering that Mr. Abadi experienced because of TST's discriminatory practices (s.53(2)(e) of the *Act*). As observed in *Christoforou CHRT*, at para. 98, the Tribunal tends to reserve the maximum amount of \$20,000 for the very worst cases or the most egregious of circumstances.

[282] Although I have found that Mr. Abadi's allegations of discriminatory practices under s. 7 and s. 14 are substantiated, he did not split his claim for pain and suffering between the two allegations. I will therefore consider his claim as a whole. It would be procedurally unfair to TST to deal with them separately as the claim was not presented that way.

[283] Regarding the harassment, Mr. Abadi testified about the emotional impact of having to endure the mocking, jokes, and name-calling for so many years, just to earn a living. He felt embarrassed at how he was treated, so much so that he never even mentioned to his spouse or daughter the drawings and other insults he experienced until after he was dismissed. He just felt ashamed. He adjusted his work life as well, by taking overnight shifts,

just to avoid the harassment, which had an impact on when he was home with his family. He felt particularly hurt because he gave so much to the company. He never filed any grievance and barely ever took any sick leave during the 13 years that he worked there.

[284] This reality compounded the pain and suffering he felt when he was abruptly dismissed on discriminatory grounds, after enduring the years of bullying while offering a level of service that Mr. Sergerie rated 9 out of 10. Mr. Abadi described the treatment as inhuman.

[285] As a result of the dismissal, he had to bounce from one job to another, without the security and benefits to which he was entitled at TST. The work he has taken on has been significantly more difficult and tiring, ranging from having to lift heavy bags up stairs to driving unsafe vehicles. His finances were hit hard as well. He had to maximize his line of credit to support his family, with whom the relationship became strained due at least in part to the circumstances he was thrust into. Because of the stress he was experiencing, he found himself giving the others a hard time, and it eventually contributed to the couple's separation for several months. Mr. Abadi also claims that the financial hardship caused by the loss of the TST job meant that his daughter had to postpone her college entry by one year, after graduating from high school, though no documents were produced in support of this assertion.

[286] Mr. Abadi seeks the maximum amount of \$20,000 in compensation. I find given the extent of the pain and suffering that he experienced over an extended period that an award near the higher end of the scale is warranted, in the amount of \$17,000.

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

[287] The Tribunal can order up to a maximum of \$20,000 in special damages if it finds that the respondent has engaged in the discriminatory practice willfully or recklessly (s. 53(3) of the *Act*).

[288] The Tribunal in *Christoforou CHRT*, at paras. 106-111, gave an overview of the law for this type of damages. They are punitive and intended to provide a deterrent and discourage those who deliberately discriminate. A finding of wilfulness requires an intention

to discriminate and to infringe a person's rights under the *Act*. Recklessness usually denotes acts that disregard or show indifference to the consequences, such that the conduct is done wantonly or needlessly. A finding of recklessness does not require proof of intention to discriminate. In determining the appropriate award under this section, the Tribunal must focus on the respondent's conduct and not on the effect that the conduct has had on the complainants.

[289] Mr. Abadi asks that the Tribunal award the maximum allowable amount of \$20,000.

[290] The harassment that he experienced was at the hand of supervisors and was tolerated by his manager. No serious effort was made to stop it despite the existence of an anti-harassment policy. This demonstrates an indifference to the consequences of having an employee endure years of harassment and bullying. TST's management and employees thus engaged in the discriminatory practice recklessly, and a significant award of special compensation is warranted.

[291] With respect to the termination, although it is evident that TST management was indifferent to the fact that Mr. Abadi's absence was linked to a disability, I do recognize that the employer's approach was influenced in large measure and disproportionately by his initial misleading email. This fact mitigates somewhat the wantonness of TST's approach in dealing with Mr. Abadi. Accordingly, a less significant amount of special compensation is warranted in relation to the termination.

[292] Taking all these factors into account, a total sum of \$12,000 in special compensation is justified.

F. Interest

[293] Mr. Abadi has asked for interest on the sums awarded.

[294] The Tribunal can make an award of interest on an order to pay compensation (s.53(4) of the Act). Rule 46 of the *Canadian Human Rights Tribunal Rules of Procedure, 2021*, SOR/2021-137 (the "*Rules*") provides that interest awarded under s. 53(4) must be simple interest that is equivalent to the bank rate established by the Bank of Canada and must

accrue from the day on which the discriminatory practice occurred until the day on which the compensation is paid.

[295] I order an award of interest on all the compensation ordered in this case, to accrue from the date of the termination, November 1, 2019, with respect to all the sums awarded. I realize that a portion of the pain and suffering and special compensation is linked to the harassment that occurred over a decade or more, but as the harassment claim was formally attached to the claim of discrimination in the termination, it is appropriate for me to vary the terms of Rule 46 somewhat to secure a fair determination of the inquiry, as provided in Rules 5 and 8 of the *Rules*.

[296] A final note, in passing. Mr. Abadi also requested a letter of apology from TST. As was explained to him during the hearing, the Federal Court in *Canada (Attorney General) v. Stevenson*, 2003 FCT 341 (CanLII), at paras. 27-35, found that the *Act* does not empower the Tribunal to make such an order. Mr. Abadi's request for an apology is therefore denied.

VI. Order

[297] Within 90 days of this decision, TST is ordered to pay the following to Mr. Abadi:

- a. \$44,731 in compensation for lost wages, subject to any withholdings for statutory deductions;
- b. Pension contributions to be calculated and confirmed by the parties in accordance with this decision;
- c. Vacation pay to which Mr. Abadi would have been entitled, to be calculated and confirmed by the parties in accordance with this decision;
- d. \$17,000 for pain and suffering experienced as a result of the discriminatory practices (s. 53(2)(e));
- e. \$12,000 in special compensation (s. 53(3)).

[298] Simple interest will accrue beginning November 1, 2019, on all payable compensation at a rate equivalent to the bank rate established by the Bank of Canada.

[299] In the event of any disputes among the parties regarding the calculation or implementation of any of the remedies awarded in this decision, I direct the parties to work together to resolve them.

[300] I retain jurisdiction over the calculation of the orders for pension contributions and vacation pay, on the following condition: If the parties are unable to agree on these amounts, either party may seek resolution from the Tribunal by communicating with the Registry no later than 60 days after the date on which this decision is communicated to that party.

[301] I do not retain any other jurisdiction in this case.

Signed by

Athanasios Hadjis
Tribunal Member

Ottawa, Ontario
August 14, 2023

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: HR-DP-2789-22

Style of Cause: Amir Jafari Ebrahim Abadi v. TST Overland Express

Decision of the Tribunal Dated: August 14, 2023

Date and Place of Hearing: December 12 to 16, 2022
December 20, 2022
January 27, 2023

Ottawa, Ontario

Additional final written submissions: February 3, 2023

Appearances:

Amir Jafari Ebrahim Abadi, for himself

No one appearing, for the Canadian Human Rights Commission

Lyndsay Hone and Patrick James Blaine, for the Respondent