Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2025 CHRT 67
Date: July 11, 2025
File No.: T2252/0718

Between:

Stacy White

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian Nuclear Laboratories Ltd.

Respondent

Decision

Member: Jennifer Khurana

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I. OVERVIEW

[1] Stacy White, the Complainant, was hired to work for the Respondent, the Canadian Nuclear Laboratories Ltd. (CNL), as an Administrative Assistant. Things were going well until she was promoted to the position of Cost Controller less than a year later. On August 1, 2013, her colleague, Sue Fleming, put her hands around Ms. White's throat (the 'Workplace Incident'). Following the Workplace Incident, Ms. White was off work for several weeks. When she returned, she was relocated to a different floor and did not have to interact face-to-face with Ms. Fleming. She hoped things would stay that way. But after 6 months CNL required Ms. White and Ms. Fleming to resume direct contact.

[2] According to Ms. White, the Workplace Incident and previous interactions with Ms. Fleming caused disabling mental health disabilities that required her to avoid direct contact with Ms. Fleming. Ms. White alleges that CNL failed to accommodate this disability-related need in requiring her to resume face-to-face contact with Ms. Fleming. Ms. White left CNL in 2015 for health reasons which she attributes to CNL's failure to accommodate her disability and has not returned. She claims compensation for her losses totalling $796,661, including $450,000 in legal fees, $116, 327 of disbursements, $190,334 in lost wages, as well as damages, interest and a number of public interest remedies and orders.

[3] The Commission agrees with Ms. White and argues that the medical evidence establishes that Ms. White suffered from post-traumatic stress disorder (PTSD) at the relevant time which limited her ability to work face-to-face with Ms. Fleming. It submits that CNL knew or ought to have known that Ms. White had a disability requiring accommodation and that it failed to meet its duty to accommodate when it required Ms. White to resume contact with Ms. Fleming. It seeks a number of public interest remedies including policy review and training.

[4] CNL denies the discrimination and argues that Ms. White has not established a *prima facie* case as she did not have a disability that prevented in-person interaction with Ms. Fleming during the period of August 2013 to March 2015. It disputes that the Workplace Incident caused a disabling health condition and maintains that avoiding Ms. Fleming was a preference rather than being medically required.

II. DECISION

[5] Ms. White's complaint is dismissed. Ms. White has not established that she had a disability with the functional limitation of avoiding Ms. Fleming during the relevant period. As she has not established that CNL discriminated against her, Ms. White is not entitled to any remedy under the *Canadian Human Rights* Act, RSC 1985, c H-6 (the "Act").

III. ADMISSIBILITY OF DR. GOJER'S REPORT

[6] Ms. White seeks to rely on an expert report that Dr. Gojer produced after he conducted an in-person examination of Ms. White and conducted an interview with Ms. White and her spouse. CNL argues that it would be procedurally unfair to admit Dr. Gojer's report because of a ruling I made in 2020 CHRT 37 denying its request to compel Ms. White to undergo a 4-6 hour retrospective psychiatric evaluation of her medical condition from 2013 to 2015, conducted by Dr. Bloom. CNL had wanted Dr. Bloom to be able to interview third parties such as the complainant's spouse, her co-workers and friends. It says that since my ruling, Ms. White engaged Dr. Gojer, who she did allow to interview her and her spouse, and that it would be unfair to allow Ms. White to rely on a report that includes an in-person examination whereas CNL cannot do so.

[7] CNL argues that for an expert report to be admissible, it must meet the preconditions set out in *R. v. Mohan,* 1994 CanLII 80 (SCC), [1994] 2 SCR 9*, R. v. Abbey,* 2009 ONCA 624 and *White Burgess Langille Inman v. Abbott and Haliburton Co.,* 2015 SCC 23, and says that an expert report can be excluded on the grounds of unfairness to the opposite party, relying on *Christoforou v John Grant Haulage Ltd*., 2016 CHRT 14 at para 68. It argues it is not relitigating the same issue I already ruled on because the factual foundation underlying that motion changed when Ms. White engaged Dr. Gojer after my ruling. It argues that the fact that both Ms. White and the Commission attempt to note the weakness of Dr. Bloom's report as it not based on an in-person examination of Ms. White in contrast to that of Dr. Gojer, highlights the unfairness of admitting the report.

[8] Ms. White argues that CNL's request is a rehash of its previous motion, and that it should have raised this earlier in the process, and not in closing submissions. Similarly, the

Commission submits that CNL is attempting to relitigate the same issue the Tribunal already determined.

[9] CNL's request is dismissed. While it argues that I need not determine this request if I find that Dr. Gojer's report does not support Ms. White's claim that she had a disability-related limitation and medically-required need during the relevant period, I am denying its request in any event.

[10] The Tribunal is not bound by traditional rules of evidence and can be far more flexible (s. 50 (3)(c) of the Act*)* though it must be persuaded that the benefits of admitting the evidence outweigh the costs. In my view, even if Ms. White obtained Dr. Gojer's expert opinion and granted him access to interview her and her spouse, I can admit the report and allow the parties to make submissions about the weight I should accord to any of their evidence. In the Tribunal's context, it can be appropriate for the parties to make these arguments in their closing submissions when they have a better picture of the overall evidence of the case.

[11] A decision maker's task is to critically analyse and assess the totality of the evidence before her, and this includes considering the context and circumstances in which evidence is obtained.

[12] I am not persuaded that CNL suffered prejudice or unfairness that would outweigh the probative value of the report. Dr. Gojer is a medico-legal expert, like Dr. Bloom, and his expertise is of benefit to the Tribunal and to my findings, even if I am dismissing the complaint. The parties had ample opportunity to test each other's evidence, and to make submissions on how I should weigh and contextualise the evidence before me.

IV. FACTUAL CONTEXT

A. The parties

[13] CNL is a federally regulated private sector company responsible for the management and operation of nuclear sites, facilities, and assets on behalf of Atomic Energy of Canada Limited. Its head office is in Chalk River, Ontario, but it conducts business at different

locations in the province, including the Port Hope Area Initiative (PHAI) where Stacy White was employed. Approximately 100 people worked at the PHAI office at the relevant time. There are two stories at the PHAI building where Ms. White worked.

[14] Stacy White first started working at PHAI on January 3, 2012 as a Property Value Protection Administrative Assistant. In September 2012, Ms. White changed roles and started a position as a Cost Controller, responsible for providing support and administration to various financial and cost cutting groups. There were other Cost Controllers in her group, including Sue Fleming. Marty Kapitan was their supervisor until the end of 2014 when he was replaced by Laura Wilson (née Dykstra). Until she was promoted to Cost Controller, Ms. White worked in a cubicle next to Ms. Fleming.

B. The Workplace Incident

[15] The Workplace Incident occurred on August 1, 2013. The parties agree that an incident occurred, and that Ms. Fleming put her hands on Ms. White's neck. Ms. White reported the incident to her manager, Mr. Kapitan, that same morning. Later that day, Ms. White sent Mr. Kapitan an email saying that Ms. Fleming had apologised to her several times. While she was sure Ms. Fleming felt bad, Ms. White felt she was in an awkward position because this didn't change what happened nor would it prevent it from happening in the future. Ms. White wrote:

> I just spoke with her and I think that she thinks that the real issue is the trouble, we, as a team, have been having with Robert (errors, attitude, etc). I'm less confident that was the issue at play. She clearly expressed frustration with me personally.. then sent me this message earlier…
>
> > 2:56 p.m. Fleming, Susan
> > I cant come talk to you as I am in a cry baby mood. I feel so bad as I took all my frustrations out on you. I want you to know that I really enjoy working with you and consider you a great team player and counter part. I promise you that I will FORCE myself to think before I react going forward. I really apologise.
> > It has been a rough day with some other personal stuff and I need to keep that at check when at work etc…
>
> I will leave this for you to handle as you see fit.
>
> Thaks for time this morning.

Stacy

[16] Ms. White called in sick the following day. She did not return to work until August 21, 2013. She was paid her full salary and did not have to use sick days during her absence from the workplace.

[17] On August 2, 2013, Ms. White submitted a formal complaint about the Workplace Incident to the Ethics and Disclosure Office and made other allegations of workplace harassment against Ms. Fleming. The Ethics and Disclosures Office was responsible for assessing and investigating complaints of discrimination, harassment and violence in the workplace. Dan Sullivan, a Disclosures Officer, acknowledged Ms. White's complaint, and interviewed her. The same day, Robert Henderson, Employee Relations Specialist, interviewed Ms. Fleming about the Workplace Incident.

[18] Mr. Sullivan's investigation report concluded that Ms. Fleming had committed "an act of workplace violence by grabbing Stacy White around the neck in a threatening manner". It also found that Ms. White was done significant harm, and that the attack resulted in extreme emotional hardship. During the August 2, 2013 phone interview, Ms. White frequently broke down in tears and became emotionally upset when recounting the events of the previous day. CNL disciplined Ms. Fleming with a five-day unpaid suspension.

[19] On August 19, 2013, Barry Lamirande, CNL's Respectful Workplace Specialist, emailed Ms. White information on harassment and conflict resolution.

[20] Prior to the Workplace Incident, Ms. White worked on the first floor of the two-story building at the PHAI Office with Ms. Fleming. Upon her return to the office on August 21, 2023 after the Workplace Incident, Ms. White was assigned to a workstation on the second floor whereas Ms. Fleming remained on the first floor. CNL determined that all communications between Ms. White and Ms. Fleming would occur via email rather than face-to-face.

[21] On August 22, 2013, Caroline Allen, Human Resources Generalist, emailed Ms. White to ask how things were going on the second floor. Ms. White replied that all was going well, that she felt welcomed, and that she had some doctor's notes to provide.

[22] On August 28, 2013, Ms. White emailed a formal complaint about Ms. Fleming to Ms. Allen, which Ms. Allen forwarded to Barry Lamirande, and Susan Haywood, Director of Employee Relations and HR Services. In her complaint, Ms. White wrote that she felt it was traumatic to relive the months of bullying and that she had recorded many incidents in her journal. She also wrote that while she returned to the job she enjoyed and showed Ms. Fleming that bullies don't win, she was still anxious and sick, no matter how welcoming her co-workers were or how accommodating management had been. She said that she has been damaged by the inappropriate behaviour of another person, that she continues to take anti-anxiety medication, receiving counselling and seeing her family doctor on a regular basis.

[23] In October 2013, Mr. Kapitan raised the issue of Ms. White resuming face-to-face working arrangements with Ms. Fleming through their weekly departmental meetings.

[24] On November 5, 2013, Ms. White asked to meet Ms. Allen. The following day, Ms. White emailed Mr. Kapitan and Ms. Allen and told them that she had seen her doctor the previous day. As a result of the Workplace Incident, she was still experiencing health issues that required her to see her doctor monthly and take prescription medicine. She wrote that as her condition had not yet improved, her physician recommended that she avoid face-to-face contact with Ms. Fleming and not attend an upcoming planned meeting that would include her. Ms. White asked if a doctor's note would be required to excuse her presence from the meeting.

[25] Ms. Allen and Ms. White met later that day. Mr. Kapitan also replied to Ms. White on November 7, 2013, indicating that he respected Ms. White and her doctor's recommendation. He did not request a doctor's note.

[26] Ms. White and Ms. Allen exchanged emails on November 12, 2013 about the investigation into Ms. White's harassment complaint and arranged to meet.

[27] In early December 2013, CNL tried to initiate a mediation between Ms. White and Ms. Fleming with a view to having them resume face-to-face contact. On December 4, 2013, Ms. White sent Mr. Kapitan an email advising that her doctor maintained his recommendation that she avoid contact with Ms. Fleming. She also indicated that she was

to return to see her physician on January 17. CNL cancelled the planned face-to-face facilitated meeting with both Ms. White and Ms. Fleming that had been scheduled for December 12, 2013. Ms. Allen later wrote to Mr. Kapitan requesting a meeting to discuss a path forward.

[28] On December 19, 2013, Mr. Kapitan wrote to Andrea Denby, Director of Business Operations, about challenges related to the ongoing physical separation of Ms. White and Ms. Fleming. In that email Mr. Kapitan wrote that the accommodations provided to Ms. White resulted in hours of verification of financial information when that task would normally be performed by Ms. White as a key function of her position as a Cost Controller. He also referred to errors that were detected, such that having Ms. White sit upstairs resulted in many emails being exchanged between all members of the Project Cost team which was not cost effective, and did not foster a team work attitude.

[29] Ms. Denby responded and asked Mr. Kapitan if he had explicitly required Ms. White to work with Ms. Fleming. He replied that he had not done so, under the circumstances. Ms. Denby advised Mr. Kapitan that going forward, he should request Ms. White to do that work if he needed her to do it – every time, adding that if she refused, they would have a path forward, but at that as of now, they did not have one.

[30] Ms. Denby forwarded Mr. Kapitan's email to Ms. Allen and noted other issues and challenges she attributed to the accommodation arrangement whereby 'Stacy refuses to work with Sue'. She noted that the difficulties were compounded by Ms. White's mistakes, and the extensive hours required to fix them due to the accommodation.

[31] Ms. Allen responded that they would formalise "the path forward" that had been previously discussed.

[32] At the end of January 2014, Ms. White met with Sandra Faught, an employee representative, who Ms. White had informed about the alleged harassment, assault and the accommodation she had received, as well as about her health issues related to seeing Ms. Fleming at work. Robert Thistle, from CNL's Human Resources department, organised a meeting with Ms. White, Vandana Paliwal and Mr. Lamirande. They encouraged her to return to the first level and to resume working with Ms. Fleming.

C. Ms. White's resumption of face-to-face contact with Ms. Fleming

[33] In late February 2014, Mr. Kapitan discussed Ms. White's relocation to the first floor with her. On February 25, 2014, Mr. Kapitan emailed Ms. White and asked her to pack her belongings to facilitate the move.

[34] On February 28, 2014, Ms. White wrote to Mr. Thistle and said that she had spoken with Sandra Faught earlier that month to follow up on a harassment complaint and assault she reported against Ms. Fleming in August. She indicated that her manager, Mr. Kapitan, told her that she had been accommodated long enough and that she was told to pack her desk and move back downstairs. She felt she was being punished for complaining and said that she was still experiencing debilitating anxiety for which she takes prescription medication, and that she had spoken to her manager about prior bullying and harassment. She ended her letter by asking if there was a set time for workplace accommodation.

[35] Ms. White returned to the first floor on Monday March 3, 2014. A meeting space separated her workstation from Ms. Fleming's.

[36] In May 2014, Ms. White and Ms. Fleming had a disagreement about a cheque requisition.

[37] In or around August or September 2014, Ms. Fleming got a new job as a Contracts Officer in a different department on the second floor of the building. Mr. Kapitan advised Ms. White about the transition plan.

[38] On February 17, 2015, Ms. White sent CNL a medical note indicating she would be absent from work for three weeks. She has not returned to the office since February 16, 2015.

[39] On March 5, 2015, Ms. White emailed Karry Beblanc at CNL and explained that she had been experiencing several health issues for the previous five months, including fatigue, nausea, numbness in her face, all of which required rest. She explained that her family doctor had been investigating several possibilities for these symptoms, and that for the first two weeks of February, she had experienced severe nausea on a daily basis. She noted that on February 16 she had gone to the Emergency Room due to numbness in her face

and arms. The email concludes with the statement that “[m]y health is not work-related, but quite possibly neurological. I anticipate a diagnosis soon and the ability to return to work”.

[40] From February 16, 2015 to March 5, 2015, CNL paid Ms. White 75% of her gross regular wages as sick benefits. As of March 5, 2015, Ms. White has been in receipt of Loss of Earnings (LOE) benefits from the Ontario Workplace Safety and Insurance Board (WSIB), as wage loss compensation stemming from the Workplace Incident. LOE benefits are calculated at 85% of a worker’s net weekly earnings. They are not subject to income tax and they are indexed so the amount of LOE increases over time.

[41] From February 16, 2015, CNL has maintained Ms. White’s group benefits, paying both its portion of the coverage, but also Ms. White’s portion, a practice adopted by the company for employees on disability-related leave, including WSIB.

[42] As of the time of the hearing in this matter, Ms. White was still an employee of CNL.

V. THE HEARING AND THE SCOPE OF THE COMPLAINT

[43] In case management, I worked with the parties to define the temporal scope of this complaint. The parties agreed that the relevant time period is August 2013 through March 2015. Any events prior to that date are included as context for the alleged discrimination.

[44] Ms. White testified, and she also called Brett Miller, a former colleague at CNL, as well as her family physician Dr. Durante, and two mental health experts, namely, Dr. Gojer and Dr. Jeeva. CNL called its own expert, Dr. Bloom, but did not call any fact witnesses.

VI. ISSUES

[45] I have determined the following:

1. Has Ms. White established a prima facie case of discrimination under section 7 of the Act because CNL required her to resume face-to-face contact with Ms. Fleming?

2. If yes, has CNL established a valid justification for its otherwise discriminatory actions?

3. If CNL cannot establish a justification, what remedies should be awarded that flow from the discrimination?

4. Did CNL have a duty to inquire into Ms. White's health conditions and her medical needs?

VII. CREDIBIILTY

[46] In assessing credibility and reliability in this case, I have applied the traditional test set out by the British Columbia Court of Appeal in *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354. When making credibility findings, I have considered whether the witness's account of the facts in relation to each issue is "in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable" in the circumstances.

[47] I have considered the following factors in assessing whether a witness's testimony is in "harmony with the preponderance of the probabilities":

> • The internal consistency or inconsistency of evidence;
> • The witness's ability and/or capacity to apprehend and recollect;
> • The witness's opportunity and/or inclination to tailor evidence;
> • The witness's opportunity and/or inclination to embellish evidence;
> • The existence of corroborative and/or confirmatory evidence;
> • The motives of the witnesses and/or their relationship with the parties; and
> • The failure to call or produce material evidence.
>
> (see *McWilliam v. Toronto Police Services Board*, 2020 HRTO 574 (CanLII), at para 50, citing *Shah v. George Brown College*, 2009 HRTO 920 at paras 12-14; *Staniforth v. C.J. Liquid Waste Haulage Ltd*., 2009 HRTO 717 at paras 35-36) [*McWilliam*].

[48] Where credibility is concerned with a witness's sincerity, reliability is concerned with the accuracy of a witness's testimony. The accuracy of a witness's testimony involves considering issues such as their ability to accurately observe, interpret and recount events (*McWilliam v. Toronto Police Services Board* at para. 51).

[49] Ms. White presented as a strong, articulate and intelligent woman. She kept detailed accounts of most interactions she had in the workplace. She recorded events involving co-workers, including Ms. Fleming, when she felt she witnessed harassment or inappropriate behaviour in the workplace. However, at times Ms. White's testimony was not in balance with other parts of the record, and evidence of her varying accounts of the Workplace Incident impacted my assessment of her credibility. Where there are divergences between her contemporaneous written notes and her oral testimony, I prefer the documentary evidence. I have set out my specific findings below.

[50] Three medical experts testified in these proceedings: Drs. Jeeva, Gojer and Bloom. All three were qualified as expects, and I find all discharged their duty to the Tribunal professionally and impartially. Dr. Durante, Ms. White's family physician, was similarly forthright and testified to the best of his abilities. In some instances, given the passage of time and the volume and scale of his patient list, his evidence regarding details of clinical issues was not reliable. He admitted his memory was faulty, and for that reason where his oral evidence is at odds with the documentary record of his clinical visits, I prefer the latter.

[51] CNL argues that Ms. White could have called another individual regarding a cheque requisition incident in May 2014 involving Ms. Fleming and Ms. White. Ms. White argued in closings that this individual could not testify due to a serious family health issue. I do not draw any adverse inference from Ms. White's failure to call this witness given the reasons provided.

[52] The Commission relies on the case of *Dicks v. Randall,* 2023 CHRT 8 [*Dicks*] in support of its claim that I should find Ms. White credible. It argues that as was the case in *Dicks*, the complainant's evidence was unchallenged. This is inaccurate and mischaracterises CNL's participation in this proceeding in contrast to the respondent in *Dicks*, who did not appear and therefore did not challenge the complainant's evidence. Here,

CNL participated fully in the proceedings and cross-examined Ms. White and her witnesses at length. Her evidence was tested and challenged, and the Commission conflates the notion of unchallenged or untested evidence with a respondent's decision not to call rebuttal evidence. I draw no adverse inference from CNL's decision not to call any fact witnesses, as it has no burden of proof and there is no free-standing duty to accommodate or to inquire in the federal sector. CNL chose to focus only on refuting Ms. White's claim that she had a protected characteristic under the Act, namely a disability. That was its choice to make, but that does not mean that Ms. White's evidence went unchallenged.

VIII. REASONS AND ANALYSIS

A. Legal Framework

[53] Ms. White alleges discrimination in relation to employment based on disability, contrary to section 7 of the Act.

[54] The complainant has the onus of proving the existence of a *prima facie* case. A *prima facie* case of discrimination is one that covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent employer (*Ontario Human Rights Commission v. Simpsons-Sears Ltd.* [1985] 2 S.C.R. 536 at para. 28).

[55] The use of the expression "*prima facie* discrimination" must not be seen as a relaxation of the complainant's obligation to satisfy the tribunal in accordance with the standard of proof on a balance of probabilities, which she must still meet (*Québec (C.D.P.D.J) v. Bombardier Inc.,* 2015 SCC 39, at para. 65 ["*Bombardier*"]).

[56] To establish a *prima facie* case, the complainant has to prove that it is more likely than not that she meets all three parts of this test: 1) she had a characteristic protected from discrimination under the *CHRA; 2)* she experienced an adverse impact with respect to employment; 3) the protected characteristic was a factor in the adverse impact (*Moore v. B.C. (Education)* 2012 SCC 61*,* at para. 33).

[57] The protected characteristic need not be the only factor in the adverse treatment, and a causal connection is not required (*Bombardier* at paras 44-52).

[58] In determining whether discrimination has occurred, the Tribunal may consider the evidence of all parties. The respondent can present evidence to refute an allegation of *prima facie* discrimination, put forward a defence justifying the discrimination under s. 15 of the Act, or do both (see *Bombardier* at paras. 64, 67, 81; *Emmett v. Canada Revenue Agency*, 2018 CHRT 23 at paras. 61, 63-67).

[59] If the complainant establishes a *prima facie* case of discrimination, the respondent must justify its decision or conduct based on the exemptions set out in the Act or developed by the courts (*Bombardier* at para 37).

[60] There is no free-standing right to accommodation under the Act (*Moore v. Canada Post Corporation*, 2007 CHRT 31 (CanLII) at para 86; *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2014 FCA 131 at para 21 [*Cruden*]; *Canada (Attorney General) v. Duval*, 2019 FCA 290 at para 25 [*Duval*]).

[61] The Act does not require accommodation in the absence of discrimination and the failure to accommodate is neither a prohibited ground of discrimination nor a discriminatory practice under the CHRA. It is only if a complainant establishes a *prima facie* case of discrimination that the respondent would put forward a defence to try to justify the discrimination under s.15(2) of the Act as an exception to what would otherwise be discrimination in the employment context under s.7 (*Chisholm v. Halifax Employers Association*, 2021 CHRT 14 at para 84). Whether a respondent has adequately accommodated an employee does not figure into a determination of whether a *prima facie* case of discrimination has been established.

B. Disability

[62] A “disability” under the Act means any previous or existing mental or physical disability...” (s. 25 of the Act). The Act does not contain a list of “disabilities”. Disability in a legal sense consists of a physical or mental impairment, which results in a functional limitation or is associated with a perception of impairment (*Desormeaux v. Ottawa (City),*

2005 FCA 311 (CanLII) at para 15, citing *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28 at para 34 [*Granovsky*]).

[63] A disability does not have to be permanent, and it is not only the most serious or most severe mental disabilities that are entitled to the protection of the Act. However, sufficient evidence still needs to be presented to support the existence of a disability (*Mellon v. Canada (Human Resources Development)*, 2006 CHRT 3, at para. 88). The Act also prohibits discrimination in the workplace on the basis of a perception or impression of a disability and requires accommodation by the employer unless it constitutes undue hardship (*Dupuis v. Canada (Attorney General),* 2010 FC 511 at para. 25).

[64] Parties are not required to adduce any particular type of evidence in order to prove they have experienced discrimination (*Chisholm v. Halifax Employers Association,* 2021 CHRT 14 at para 87). Expert medical evidence by a physician is not required to prove the existence of a disability in the human rights context (*Marshall v Membertou First Nation*, 2021 CHRT 36 at para 125). A disability may exist even without proof of physical limitations or the presence of an ailment but there needs to be more than just a bare statement that one suffers from a disability to meet the test. There has to be evidence that the disability is there. This evidence can be drawn from the medical information and from the context in which the impugned act occurred (*Mellon* at para 82).

C. Issue 1: Has Ms. White established a prima facie case of discrimination under section 7 of the Act because CNL required her and Ms. Fleming to resume face-to-face contact?

[65] Ms. White must first show she had a characteristic protected from discrimination under the Act to establish a *prima facie* case. This is the central issue in this case.

Does Ms. White qualify for protection from discrimination because she had a disability during the relevant time?

[66] No. I do not find that Ms. White established that it was more likely than not that she had a disability at the relevant time. The evidence does not support Ms. White's claim that she had PTSD from August 2013 to March 2015 with a medical requirement to work apart

from Ms. Fleming. Even if Ms. White had a disability from August 2013 until she was required to resume contact with Ms. Fleming in March 2014, CNL accommodated her during that period.

[67] Ms. White does not argue that she had a perceived disability, but rather that she had an actual disability, which she alleges prevented her from working face-to-face with Ms. Fleming.

[68] CNL submits that as a result of Ms. White taking this position, she must prove an impairment that functionally limited her from working with Ms. Fleming.

[69] I agree. It is not sufficient to rely on extensive medical evidence and assume that even a diagnosis of a medical condition such as PTSD by a physician, or multiple physicians, will result in a finding that the complainant had a disability within the meaning of the Act. Something more is required, namely a functional limitation, and in this case, the very specific one Ms. White claims. In some cases, the functional limitation flowing from the medical condition is so obvious such that the analysis is essentially trivial and unnecessary. That is clearly not the case here in light of the nature of the functional limitation Ms. White has claimed.

[70] Ms. White and the Commission argue that the medical evidence establishes a consensus among the medical professionals, including multiple WSIB doctors, that Ms. White had been suffering from PTSD or other mental disorders triggered by Ms. Fleming and by CNL's requirement that she resume face-to-face contact with her. They also argue that even CNL's expert witness, Dr. Bloom, conceded that Ms. White may have been exhibiting PTSD symptoms which could have hindered her ability to work with Ms. Fleming in person and that she experienced symptoms from the beginning.

[71] CNL argues that Ms. White's testimony and notes are an unreliable foundation for her claim of a disability, and that Dr. Durante's clinical notes show Ms. White was progressively able to tolerate face to face interactions with Ms. Fleming with no discernible negative impact on her health. It disputes the Commission and Ms. White's characterisation of Dr. Bloom's evidence. Most importantly, it submits that there is nothing in the extensive

medical record in this file during the relevant period linking the resumption of in-person contact with Ms. Fleming to Ms. White's symptoms and medical condition.

[72] I have no doubt that Ms. White suffered from a number of health conditions and had to contend with a complex and challenging constellation of symptoms. I feel considerable empathy for her as a young woman with children and a spouse with a serious illness. It must have been extremely difficult and quite frightening to have so many symptoms and not to know what was causing them. It would also be frustrating to try many treatments, pharmacological and otherwise, and to still face a guarded prognosis. My findings do not take away from what must be a very difficult health reality for her.

[73] But my job is to respect the legislative framework that I am bound to apply, and a disability within the meaning of the Act and the relevant caselaw requires a complainant to establish more than they had an illness or a medical condition, or even symptoms - whether physical or mental, or both. It requires a functional limitation with a resultant medical need during the time of the alleged discrimination, not years later. Ms. White has not claimed she had other functional limitations, like an inability to perform certain functions, or to work a full workday, for example. She has tied her complaint and her allegations of discrimination against CNL to a very specific claim of a medical limitation and resultant need, namely avoiding face-to-face contact with one particular co-worker. And this is the limitation that is not borne out by the evidence.

[74] As I have set out below in my analysis of the evidence, I cannot reconcile the after-acquired medical evidence with the fact that as of March 2014 when CNL required Ms. White to resume working with Ms. Fleming, through to February 2015, when she went on leave, the contemporaneous record does not show that Ms. White was functionally limited in the way she contends or that she had symptoms of PTSD. Ms. White's own notes from that time do not reflect concerns with Ms. Fleming, which I also find particularly probative. Rather than establishing a functional limitation resulting in a medical need to avoid Ms. White, the record shows that Ms. White's return to in-person contact with Ms. Fleming was working, even if it was not her preferred choice. On balance, the after-acquired medical evidence may establish that Ms. White had symptoms of PTSD at the time the specialists examined her,

but I do not find that it establishes on a balance of probabilities that those symptoms were present during the relevant time period.

[75] Below I have first set out the most salient aspects of the extensive medical and non-medical record, before my findings on Ms. White's health prior to employment with CNL, her relationship with Ms. Fleming leading up to the Workplace Incident and the various accounts of that incident by Ms. White given the parties' submissions on these factual issues and their relevance to the ultimate PTSD diagnosis. I conclude with my findings on the alleged disability, including Ms. White's specific claims that she suffered from PTSD and was restricted from personal contact with Ms. Fleming.

Dr. Durante

[76] Dr. Durante was Ms. White's primary care physician from 2002 until his retirement in 2021. According to Dr. Durante's medical notes, in November 2012 Ms. White began to have respiratory issues and some digestive and migraine issues. In December 2012 he wrote that Ms. White was "just not herself for the past few months with what is described as continuous respiratory illnesses". She improved thereafter but had some symptoms of unwellness in March 2013 but "has been unable to pinpoint any specific triggers".

[77] On August 6, 2013, during the first medical visit after the Workplace Incident, Dr. Durante diagnosed Ms. White with Adjustment Reaction Disorder and Stress anxiety, and prescribed Lorazepam. His notes state that 'work issues are the precipitant for a mental breakdown. Her immediate supervisor is described as an overbearing caustic hostile control freak, who is not sharing the work or achievements and is and has been verbally and physically assaultive." The notes also indicate that "on one occasion last week she put Tracey (sic) in a neck choke. Frequent shouting and verbal abuse is a chronic occurrence". Dr. Durante also noted that Ms. White reported the behaviour and was tearful, distressed and "emotionally destroyed", that she cried easily, and was horrified at returning to an environment where the offender may be present and was justifiably concerned about assault, both verbal/psychological and physical.

[78] On August 14, 2013, Dr. Durante wrote that Ms. White had calmed with her time off, and that she was no longer using Lorazepam during the day. He recommended she stay off work until her employer resolved the issue, and noted that Ms. White was more relaxed, thought the underlying theme remained one of anxiety, and that she would only return to work if she was satisfied with her employer's proposals. Dr. Durante maintained the diagnosis of Adjustment Reaction Disorder.

[79] In September 2013, Dr. Durante diagnosed Ms. White with Generalised Anxiety Disorder (GAD), situational disturbance, and other health conditions. His October 8, 2013 clinical note indicates that Ms. White's work disruption "seems to have been resolved. She has avoided contact with the offensive worker and has been sociable to her on one occasion. She is happy that things are as they are." Dr. Durante suspected Ms. White would be able to reduce her medication in the near future.

[80] In November 2013, Dr. Durante's clinical notes state that Ms. White was 'distraught and distressed' because her immediate supervisor suggested a meeting "with her and her nemesis", which upset Ms. White and made her think it would cause more problems. He recommended that Ms. White stand firm while waiting for the results of the investigation before going to an uncomfortable meeting that will heighten her anxieties and stress.

[81] At the hearing, Dr. Durante testified that it seemed "sensible to me that she not have any face to face confrontation or meeting with her assailant' when asked about the November 5, 2013 clinical note.

[82] In January 2014, Dr. Durante wrote that Ms. White "described in length her current status at work. She is functioning well and is courteous without being involved with her offensive co worker. Her mental status is more contented and pleasant and she talked at length about her work. She is animated and good to high pressure of speech."

[83] On March 4, 2014, the day after Ms. White was required to resume face-to-face contact with Ms. Fleming, Dr. Durante wrote:

> She updated me on her work place issues. She has returned to the lower floor and is near but not adjacent to her offending coworkers. She surreptitiously records all work conversations for the entire day. **Mood wise she has come**

> **to adapt to her new realities and has learned coping mechanisms.** Occasionally sees EAP and uses alprazolam prn. It is renewed. See in two months to keep appraised of her issues (emphasis added).

[84] Ms. White returned two months later. Dr. Durante's May 6, 2014 note read as follows:

> Is off alprazolam. Things are going well at work and she has taken to recording all her conversations at work with her computer or a audio recording watch. She appeared much more grounded and continues to work full time and admits she enjoys her job. We left the next appt open. Her affect is upbeat and positive and so no further action on my part are needed at this time.

[85] Ms. White did not return to see Dr. Durante for 4 months. His September 15, 2014 note indicated as follows:

> Work issues first. She is back on alprazolam for increased anxieties over some new work responsibilities. She is focused on light headedness, and presyncope.

[86] On September 30, 2014, Dr. Durante wrote that Ms. White is "[m]uch improved. Is successfully transitioning to new employment responsibilities." He also noted that she has tolerated the new medication she is on, has some finger numbness, but that her "affect, mood and demeanor are all much more pleasant and pleasing" and he does not need to see her for another month "unless issues intervene".

[87] Dr. Durante did not see Ms. White until the following month, on October 31, 2014, when he reviewed her medications, said her blood pressure was normalised, and on November 10, 2014 said "she is at a loss to explain her unwellness. She describes just not being right, and at times light headed and weak". He sent her for some labs, and contemplated other follow-up. Follow up notes referenced elevated cortisol, normal MRI and lab results, and on December 16, 2014, Dr. Durante wrote that Ms. White was "very anxious about the significance of her elevated cortisol so I agreed to make an endocrine referral".

[88] On February 5, 2015, Dr. Durante's note referred to other lab work, and he indicated that he did not need to see Ms. White and canceled the consult.

[89] On February 20, 2015, Ms. White wrote to Dr. Durante and said that she went to the ER because numbness in her mouth and lower arms and hands spread to her face and upper arms. All tests were normal, and “not knowing what is wrong with me has increased my stress levels and anxiety and the Dr. provided me with a medical note for 3 weeks”. Her spouse also wrote to Dr. Durante and asked if her cortisol levels could be caused by sleep apnea. Ms. White again wrote to Dr. Durante and said that she had her first good day in four months and described a number of other physical symptoms like light-headedness, low blood pressure, face flushing, headaches, nausea, numbness, frequent urination, and neck stiffness. She did not know what the sum of the symptoms meant but wrote that although “I feel like I am not under extra stress right now, life is stressful, especially with work”. At the time, she said she exercised moderately and usually got enough sleep. She queried whether she should see an internal medicine specialist.

[90] Dr. Durante’s next clinical note, dated March 5, 2015, indicates that Ms. White remained symptomatic with intermittent and variable numbness, that she went to the ER, and appeared quite anxious. He queried GAD and said he would await an MRI and a specialist appointment.

[91] On March 24, 2025, Dr. Durante wrote that Ms. White continues to have headaches, shoulder and arm dysfunction and is unable to concentrate or perform, and that her exam continues to be normal, though she is anxious. He arranged a neurology consult, and he noted that her MRI showed a white matter lesion on the right frontal lobe, for which he queried the significance.

[92] Dr. Durante’s next clinical note on March 30, 2015 includes communications from Ms. White where she describes an inability to move, headaches, nausea, pain in her face and ears, and eventually a health information summary written in the first person that notes that on August 22, 2014, she found out that the coworker who harassed and bullied her for 10 months, physically assaulted her on August 1, 2013 and who she had to work with for over a year after the assault was moving to a different department and she would have to do her job as well as her own indefinitely. It then goes on to list a number of other events from September 2014, which relate to her physical health concerns or family stressors. There is no mention of Ms. Fleming.

[93] On June 4, 2015, after many physical examinations, tests and referrals to rule out other conditions, Dr. Durante diagnosed Ms. White with PTSD, following an email Ms. White sent to him suggesting she may be suffering from the condition.

[94] Dr. Durante testified that PTSD symptoms can vary in severity and presentation among patients, and that Ms. White's symptoms were diverse and included both physical and psychological manifestations, including difficulty maintaining focus and completing tasks due to mental and physical exhaustion.

Dr. Jeeva

[95] Dr. Durante referred Ms. White to Dr. Jeeva, a psychiatrist who first examined her in January of 2016 and confirmed the PTSD diagnosis. He also diagnosed her with major depressive disorder and possible somatic symptom disorder. He noted no major mental illness prior to the 'persecution she experienced in the workplace'.

[96] Dr. Jeeva assessed Ms. White a second time on October 27, 2016. He did not connect her symptoms to CNL or Ms. Fleming. Rather, he wrote about the process of applying for disability benefits, her discontent with an occupational therapist meeting and her children being home for the summer. He also noted at the time that she was doing "considerably better" and wanted to come off the medication, and that apart from her mild dysphoria, she seemed outwardly normal. He found at the time that her PTSD was partially resolved. She was able to enjoy some activities, and reported an improvement in her concentration and memory, though her energy was down.

[97] By his third report dated May 22, 2018, Dr. Jeeva wrote that there had been little improvement since he saw Ms. White in November 2016. Nonetheless, he agreed on cross-examination that her avoidance and hypervigilance could also be consistent with being angry with the workplace and not wanting to see colleagues. He also agreed that the way Ms. White was presenting at the time would not necessarily mean that a mental disorder was present. He suggested increasing her therapy rather than changing medications and referred her to a trauma clinic for specialised care.

[98] At the hearing, Dr. Jeeva testified that he concluded Ms. White had a disability after his consultations with her and that she had major mental illness, and severe anxiety disorder that prevented her from being able to problem-solve, multitask or think clearly. He testified that Ms. White's ability to engage with others and control her emotions, given her anxiety and avoidance behaviour, would have been impaired. Dr. Jeeva believed that the stressors were a violent act that she experienced, as well as ongoing bullying and emotional abuse in the workplace. He testified that she endorsed features of PTSD, and that her disability is still connected to the initial work-related stressor. When asked about whether she should be put in a situation where she would interact with Ms. Fleming, Dr. Jeeva said that he thought it most likely that it would further harm her or worsen her symptoms because there is avoidance behaviour because reminders of the trauma are too difficult for her.

WSIB physicians

[99] On July 30, 2018, Ms. White was assessed by Dr. Aleem, a psychiatrist, along with Dr. Bury, a psychologist, and Ms. Sekely, a student, as part of an independent WSIB medical examination to determine her ability to return to work. The report concluded that Ms. White was not able at that time to engage effectively in a return to work program, and she was diagnosed with MDD, Single Episode, in Full Remission, as well as PTSD, with a prognosis of partial functional recovery. The assessment also found Ms. White's ability to cope was moderately high, with a moderate level of problem solving, distraction from negative thoughts, and seeking social support.

[100] On March 14, 2019, Dr. Gratzer, a psychiatrist mandated by WSIB to review Ms. White's medical records, reported on the most appropriate work-related diagnosis, whether her somatic symptoms align with the work-related injury, the status of her diagnosis and any recommended interventions, investigations or treatment. Dr. Gratzer opined that Ms. White must likely have had PTSD and MDD with a somatic preoccupation and that her symptoms are consistent with the work-related injury. He suggested non-conventional medications for PTSD and MDD, a referral to a trauma programme and other consultations and the use of non-typical medications and neurostimulation.

Dr. Gojer

[101] Dr. Gojer, a psychiatrist, assessed Ms. White and issued a report on August 14, 2021. He described Ms. White's reaction to the Workplace Incident as an Adjustment reaction. He did not find that PTSD captured all the symptoms Ms. White exhibited and especially her somatic presentation. He stated that a more appropriate diagnosis capturing her symptomatology would be complex trauma state, and diagnosed her with Other Specific Trauma and Stressor-Related Disorder. He concluded that Ms. White's physical symptoms were all related to the time period when she was distressed at work and that worsened after the assault. From February 2015, the worsening of her symptoms was also related to how she perceived her stressful situation at work. He also opined that Ms. White was keen to return to work but that her fear of reexperiencing further conflict and exposure to the original provoking stimuli was the likely cause of the perpetuation of and development of new symptoms.

[102] Dr. Gojer testified that Ms. White's disorders would have interfered with her ability to function in the workplace. When asked whether she had a disability at the material times, Dr. Gojer responded that he very much believed so. He diagnosed Ms. White as suffering from a trauma syndrome, a somatic symptom disorder and conversion disorder and concluded that all her symptoms are trauma related. Dr. Gojer did not find any evidence of malingering or fabrication.

[103] At the hearing, Dr. Gojer explained that sometimes patients are diagnosed later after a triggering event, and that if the patient is seen by a general practitioner, physicians often want to first rule out medical causes because they realise they are dealing with a trauma syndrome. He explained that individuals may develop a full-blown post-traumatic stress disorder even six months after the trauma and later, and that while initially trauma survivors may have coped with the trauma, later events may trigger more prominent symptoms, called a delayed post-traumatic stress disorder.

[104] Dr. Gojer further testified that the family doctor looked at some of Ms. White's symptoms and first tried to rule out causes for physical symptoms. He explained that a more seasoned psychiatrist may have looked at a stressful event and thought these could be

reactions to that trigger, but that medicine is such that before you start considering psychiatric conditions you want to rule out medical causes.

[105] Dr. Gojer opined that Ms. White reported multiple somatic symptoms complaints, but these were understood to be part of a trauma syndrome, making it difficult to determine if they were exaggerated or over-reported. When asked about Ms. White's different accounts of the Workplace Incident, Dr. Gojer replied that the trauma is essentially the same, and that how the event is reported depends on the person receiving the information. He acknowledged there are minor changes or variations, but at the end of the day the ingredients of the accounts of the Workplace Incident appeared consistent to him.

Dr. Bloom

[106] Dr. Bloom reviewed Ms. White's extensive medical records, and issued a report dated May 17, 2021. He concluded Ms. White was already vulnerable at the time of the events in question due to her past history of Reflex Sympathetic Dystrophy (RSD)/Complex Regional Pain Syndrome (CRPS), which had received little attention in her medical files. Dr. Bloom went on to suggest that this condition may have made her more susceptible to future health problems and potentially contributed to PTSD symptoms with a significant somatic overlay. He also noted that Ms. White's illness in 2014 and 2015 and inability to work was a significant background stressor and that this was unexplored in the various expert reports and medical data that he reviewed.

[107] Dr. Bloom referenced the PTSD diagnosis in 2015 and the similar diagnosis offered along with chronic major depression and possible somatic symptom disorder by Dr. Jeeva. He also opined that the diagnosis was made retrospectively, and initially, based on a hypothetical premise, namely because Ms. White's clinical picture (multiple somatic complaints) could not be tethered to a known medical diagnosis, such that stress and PTSD became the presumptive diagnosis, and once posited, "the various symptoms needed to meet the criteria for the condition were expanded and clearly set out over time". He goes on to note that Dr. Jeeva intimated that PTSD had become a default diagnosis of sorts in his

January 13, 2016 report where he wrote “anxiety is now manifesting in physical symptoms that cannot be explained by underlying generally medical etiologies”.

[108] When asked explicitly whether Ms. White suffered from any medical condition that medically prevented her from having face-to-face interactions with Ms. Fleming from August 1, 2013 until February 16, 2015 (Ms. Fleming’s last day at work), Dr. Bloom indicated it was somewhat difficult to answer in light of the file information, but wrote that if the PTSD diagnosis is correct and the symptoms reach as far back as August 1, 2013 it could be seen as preventing Ms. White from having face-to-face interactions with Ms. Fleming, though he notes that PTSD symptoms were not disclosed until considerably later on in 2015. He went on to write that “[t]he available medical notes…for the most part disclose that Ms. White, however unhappy she was with the need to have contact with Ms. Fleming, was dealing with it, and the notes do not reflect any medical condition in that timeframe that could be construed as a medical contraindication to meeting with Ms. Fleming”.

[109] In response to CNL’s question as to whether Ms. White’s post-August 1, 2013 symptoms and inability to work past February 16, 2015 could be explained by RSD or other health conditions not related to CNL and their requirement that she resume face-to-face contact with Ms. Fleming, Dr. Bloom wrote that it would be too difficult to answer this conclusively. He did indicate that the bulk of Ms. White’s symptoms during the timeframe in question, and for some time thereafter, are multiple somatic symptoms that could justify a diagnosis of somatic symptom disorder, noting that on Dr. Jeeva’s second visit with Ms. White, she thought the PTSD symptoms had improved, but the somatic symptoms persisted, which other clinicians observed as well.

[110] Finally, when asked to comment on psychiatric diagnoses rendered by other physicians (Dr. Gojer’s was not available at the time), Dr. Bloom responded that there was a fair degree of consensus on a diagnosis of PTSD, though some posited Major Depressive Disorder either current or in the past, and the possibility of somatic symptom disorder. Dr. Bloom concluded that his principal concern was that Ms. White’s PTSD diagnosis was not made contemporaneous with the events in question, nor for some time thereafter. Dr. Bloom wrote as follows:

> Indeed, Ms. White's principal caregiver, Dr. Durante, who has known Ms. White since 2006, saw her over the timeframe during which the events occurred and did not make any entries in his clinical notes that even retrospectively supports a diagnosis of PTSD until the spring of 2015, when Ms. White made the case for that condition through her own analysis and investigations. **Although I must concede the possibility that she had PTSD symptoms from the time of the event or soon thereafter, Dr. Durante's clinical notes do not bear that out, and indeed, the most prominent clinical picture, as per the medical notes, is of diffuse and recurrent somatic complaints** (emphasis added).
>
> Once Ms. White herself, and then Dr. Durante posited the diagnosis, subsequent assessments by psychiatric and psychological experts brought PTSD and its symptoms into the foreground.
>
> Consequently, while it is difficult for me to outrightly refute a diagnosis of PTSD made by colleagues who actually assessed Ms. White, I have found it difficult, for reasons described above, to unquestioningly support that diagnosis. If I had assessed Ms. White, I would have delved more deeply into her background, obtained further records, and interviewed collaterals, all of which would have allowed me the diagnostic acuity to have outrightly supported or outrightly refuted PTSD or any other diagnosis.
>
> *Ms. White*

[111] Ms. White testified that in the weeks she was off work in August 2013 after the Workplace Incident, she was anxious, shocked and traumatised, and could barely leave her house and cried all the time.

[112] She was only able to return to work after the assault because of the accommodation CNL offered and said she needed it to stay in place until her health improved. At the hearing she testified that she never had a chance to heal, and that within a month of being back at work, she was told her accommodations were temporary. She testified that that once her accommodations were removed, her health worsened, her anxiety increased and that she continues to suffer from those symptoms today.

[113] After she returned to the office, Ms. White communicated only via email with Ms. Fleming. She testified that once Mr. Kapitan broached the topic of resuming face-to-face contact with Ms. Fleming in October 2013, she talked to Dr. Durante and her nausea and

other symptoms worsened. Prior to that she said she was anxious and prone to panic attacks and was hypervigilant and afraid of running into Ms. Fleming.

[114] According to Ms. White, Ms. Fleming continued to hinder her work. In one incident, Ms. White alleged that Ms. Fleming ordered the receptionist not to send out cheque requisitions that Ms. White produced, contrary to procedure. According to Ms. White, when she stopped working on the first floor in December 2014, Ms. Fleming continued to visit her every day to tell her how awful she looked, to belittle and criticize her and interfere with her work and that this impacted her health, which she reported to Mr. Kapitan.

Brett Miller

[115] Brett Miller, who worked at the Port Hope office as of 2012 until 2016, testified that he would eat lunch with Ms. White and interacted regularly with her. He had found her positive and professional but noticed a change in her responsiveness and disposition starting after the Workplace Incident. Upon her return from leave in August 2013, Mr. Miller found her to be distant and withdrawn. He testified that he shared his concerns with his then manager and advised him that he was worried about Ms. White. He also shared these concerns with Ms. Allen, Mr. Kapitan, and Ms. Denby. He said the managers told him they would follow up with things and took no further action.

FINDINGS ON MS. WHITE'S ALLEGED MEDICAL CONDITION, FUNCTIONAL LIMITATION AND MEDICAL NEEDS

[116] I do not find that Ms. White was medically limited from working face to face with Ms. Fleming from March 3, 2014 when CNL required her to do so, until March 2015 when she went off on leave. Even if I accept that working in direct contact with Ms. Fleming was medically contraindicated when she initially returned to work after the Workplace Incident, CNL kept the two employees apart for six months, from August 2013 until March 3, 2014. During that time. Ms. White did not interact with Ms. Fleming in person and largely communicated by email. Neither Ms. White nor the Commission suggest there were any medical consequences or restrictions on Ms. White's indirect interactions with Ms. Fleming.

[117] Ms. White and the Commission submit that the evidence unquestionably supports a finding that Ms. White had a disability within the meaning of the Act at the relevant time. The Commission relies on *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (Ville); Québec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand* (Ville), 2000 SCC 27 [*Mercier*], in support of its position that disability does not only mean a mental or physical disability resulting in functional limitations, and should be interpreted broadly using the subjective element of discrimination on that ground. It argues that the distinction, exclusion or preference should be assessed rather than the specific cause or origin of the disability.

[118] I agree that the specific cause or origin of a disability is not what is material, but in my view *Mercier* does not stand for the proposition that no functional limitation is required to establish that a complainant had a "disability". In *Mercier*, the Supreme Court of Canada held that "a "handicap" may be the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all of these factors. In other words, a disability is not limited to proof of physical limitations or the presence of an ailment and can include an actual or perceived "handicap". The Court found that "it is the combined effect of all these circumstances that determines whether the individual has a "handicap" for the purposes of the Charter" (*Mercier* at para 79). and that it is necessary to consider "the circumstances in which a distinction is made" and "whether an actual or perceived ailment causes the individual to experience "the loss or limitations of opportunities" (*Mercier* at para 80).

[119] I do not find that *Mercier* is at odds with *Desormeaux* or *Granovksy,* released after *Mercier* (2000 SCC 27), or with the requirement to have a functional limitation to establish the existence of a disability. *Mercier* recognizes that disability can go beyond actual limitations and include subjective ones, such that consideration of whether a person has a disability requires a multidimensional analysis that considers not only an individual's condition, but also the circumstances in which a distinction is made (*Mercier* at paras 80 and 83).

[120] Ms. White does not argue that she had a perceived disability. Rather, she alleges that she had an actual disability, with a very specific functional limitation, which is her onus to establish.

[121] I also distinguish this case from the facts in *Desormeaux* where the Tribunal rejected the employer's argument that the complainant did not establish a disability on account of headaches. The Tribunal found that however Ms. Desormeaux's headaches were classified, whether as migraines or as some other headaches, the effect of the complainant's symptoms and her medication on her ability to function was unchallenged. The Tribunal concluded that the complainant's condition caused her to become significantly incapacitated and interfered with her ability to do her job. The Federal Court of Appeal found that there was evidence before the Tribunal upon which it could reasonably find there was a disability, and that the physicians' reports did not really conflict (*Desormeaux* at paras 13-15). In contrast, in Ms. White's complaint, I do not have persuasive evidence before me establishing a functional limitation during the relevant period, and therefore cannot conclude that she had a disability.

Ms. White's health prior to working with CNL does not establish that she had a functional limitation at the relevant time

[122] Ms. White and the Commission submit that Ms. White was healthy before working at CNL. They say this is material as it supports finding that Ms. White's interactions with Ms. Fleming were the triggering event that caused her PTSD and permanent disabling health conditions. Ms. White testified that her health problems began in November 2012, which she attributes to Ms. Fleming's treatment of her, starting in October 2012.

[123] CNL argues that Ms. White had pre-existing health concerns and that her health problems were not caused by Ms. Fleming, or by its eventual decision to require them to resume face-to-face interaction. It says that the medical evidence shows that Ms. White had a number of psychologically significant events and that her baseline personality and health concerns were a constant in her life before starting at CNL.

[124] To the extent that the state of Ms. White's health prior to her work at CNL is material to a finding about her specific functional limitations in the workplace at relevant time, I do not find that the evidence about Ms. White's heath prior to employment with CNL supports her allegation that her health conditions all originated with Ms. Fleming and CNL's decision to make them resume working together. Ms. White had a history of health issues and significant stressors in her life, and was a 'moderate consumer of medical services' as Dr. Bloom wrote. She was not in perfect health prior to her employment with CNL, and she faced other stressors in her life while she was employed by CNL.

Ms. White's relationship with Ms. Fleming prior to the Workplace incident

[125] Ms. White alleges that a 'prior and prolonged history of harassing treatment' by Ms. Fleming caused her to develop mental health disabilities. She testified that Ms. Fleming began to harass her in the fall of 2012, approximately a month after she started as Cost Controller, and that this behaviour escalated until the Workplace Incident. According to emails dated November 21, 2012 Ms. White reported issues she was having with Ms. Fleming to Mr. Kapitan, noting that Ms. Fleming was "very angry" with Ms. White after she noted some discrepancies in her work. She reported that Ms. Fleming once yelled at her in Mr. Kapitan's presence outside of the copier room and that the harassing behaviour escalated after that, culminating in the Workplace Incident.

[126] CNL submits that I cannot take Ms. White's claims about Ms. Fleming's degree of 'harassing' behaviour at face value or assume that this conduct primed Ms. White for a disability or a mental injury. It argues that Ms. White's notes from her time at CNL are suspect, even if they are more reliable than her testimony. It submits that in cross-examination it became clear that Ms. White embellished her story about the Workplace Incident over time. If she has been shown on more than one occasion to constantly edit, add to and develop her story, CNL argues it is questionable how reliable her original story about Ms. Fleming could be. CNL further maintains that even taking at face value Ms. White's notes between October 2012 and the August 1, 2013 Workplace Incident, they do not objectively support a finding of harassment that could reasonably be said to have any impact on the disability issue.

[127] While I am not making any finding on alleged harassment during this period, the interactions Ms. White had with Ms. Fleming prior to the Workplace Incident are relevant context to determining the potential impact of the Workplace Incident and whether Ms. White had a functional limitation and medically required need to remain separate from Ms. Fleming.

[128] I accept that Ms. White and Ms. Fleming clearly had challenges working together, however, and that Ms. White's manager, Mr. Kapitan, was well aware of those tensions. Ms. White was new to the Cost Controller role, whereas Ms. Fleming was more experienced, and Ms. White's notes suggest Ms. Fleming was critical of her work at times. Ms. Fleming allegedly called Ms. White's work "garbage", got angry, and "screamed" at the copier that Ms. White was "perfect and didn't do anything wrong".

[129] I accept however, that as with many human relationships, interactions are often more nuanced and are not always black and white. I agree with CNL that Ms. White's characterisation of Ms. Fleming as unidimensional is not accurate. Not all was bad with Ms. Fleming or her relationship with Ms. White, and the evidence supports a more balanced finding, particularly in light of my findings below about the reliability and credibility of Ms. White's accounts of her interactions with Ms. Fleming. Ms. White and Ms. Fleming managed to work together successfully on some tasks, in addition to training, both before Ms. White took on the Cost Controller role and afterwards. Ms. White agreed on cross-examination that she had to interact a good deal with Ms. Fleming prior to the Workplace Incident, including working side-by-side with a common computer screen, and that she attended meetings where Ms. Fleming was present. Further, Ms. White reported to the WSIB physicians Drs. Aleem and Bury that she was working closely with Ms. Fleming and was regularly involved with her in group projects. Ms. White agreed on cross-examination that Ms. Fleming sent her flowers as a Christmas gift in December 2012 and picked her up at home and drove her to and from off-site planning workshops in July 2013.

[130] They clearly had some civil exchanges, and Ms. White's notes from March 8, 2013 to August 2013 do not detail any alleged harassment by Ms. Fleming.

[131] I agree with CNL that if these events happened, they were perhaps inappropriate for an office setting but could not reasonably be characterised as so pervasive and severe as to cause, or materially contribute to a disabling mental injury. Further, Dr. Durante's clinical notes do not mention any harassment in the period predating August 2013.

[132] The evidence does not bear out a finding that the relationship was only a negative one and I do not find that their relationship prior to the Workplace Incident, while potentially tense and somewhat fraught, is probative in establishing that Ms. White had a medically required need to avoid Ms. Fleming during the relevant time period.

The Workplace Incident and Ms. White's varying accounts of what happened

[133] Although I am not making any findings of liability regarding the Workplace Incident which pre-dates the temporal scope of the complaint and did not relate to a protected characteristic, the parties argue, for opposing reasons, that the event is material because a finding about the severity of the incident could reasonably be said to have an impact on the disability issue that is before me.

[134] Ms. White takes the position that the incident impacted her so significantly and was the trigger for her PTSD and other health conditions. She also argues that because CNL was aware of the Workplace Incident, it reasonably should have known about her disability-related need to avoid Ms. Fleming and inquired about any accommodation.

[135] CNL's position is that the Workplace Incident and Ms. Fleming's interactions with Ms. White did not cause psychological injury or a disabling health condition such as PTSD. While it acknowledges the Workplace Incident occurred and that a report was issued by Dan Sullivan, it submits that I should give Ms. White's contemporaneous communications more weight than her testimony at the hearing about how upset and distraught she was as a result of the Workplace Incident. It further argues that Ms. White has embellished her account of the incident over time and made it sound more severe than how she first described it immediately after it occurred. It argues that Ms. White's subsequent accounts to the psychiatrists she consulted paint an increasingly serious picture of the Workplace Incident, which also undermines her credibility.

[136] In light of the manner in which Ms. White's descriptions appear to have changed, I prefer the account that followed the incident and what she included in her contemporaneous notes. Ms. White's handwritten noted dated August 1, 2013 states that Ms. Fleming was "MAD" and that she told Ms. White she is often frustrated with her and "actually grabbed me by the neck". Ms. White spoke to Mr. Kapitan about the incident but stayed at work that day. She wrote Mr. Kapitan an email at the end of the day saying she felt she was in an awkward position despite Ms. Fleming's apologies, and that she was leaving this to Mr. Kapitan to handle as he saw fit. The following day Ms. White filed her official complaint, which for the first time referenced Ms. Fleming 'verbally attacking her', yelling at her, and putting her hands on her neck and making a grunting noise. The report also notes that Ms. White was sitting down, and that she leaned back when Ms. Fleming touched her, at which point Ms. Fleming released her hands and "stalked off". Ms. White reported being really shaken and immediately telling her manager about the incident, which she said followed months of bullying and being physically sick every day, and she concluded by stating that she was considering her legal options. Ms. White also wrote that she felt like the "battered wife of an abusive husband", though she admitted at the hearing she has never suffered spousal abuse.

[137] CNL cited other examples of how Ms. White's account of the Workplace Incident appeared to worsen as she spoke to various medical professionals. I will not review them all, but when Ms. White saw Dr. Jeeva, his report indicates that Ms. White described Ms. Fleming as having screamed at her. In submitting a timeline of events to the Commission in the context of her human rights complaint in 2017, Ms. White wrote that Ms. Fleming barged into her cubicle screaming and ranting, physically assaulted her, put her hands around her neck, shook her and growled, and that Ms. White struggled to escape her grasp. She also wrote that after the incident no one came to talk to her and she worked the rest of the day in a fog, which is it odds with the email she sent to Mr. Kapitan hours after the incident, noting that Ms. Fleming apologised to her and thanking Mr. Kapitan for speaking with her.

[138] Ms. White appears to have reported to Drs. Farreel, Alleem and Bury in 2018 that Ms. Fleming came up behind her, put her hands on her neck and shook her, and also told Dr. Gojer in 2021 that Ms. Fleming screamed "why are you doing this work"?

[139] When asked about these discrepancies and others on cross-examination, Ms. White agreed none of her earlier reports said that Ms. Fleming approached her from behind and shook her, though she maintains that she told all her doctors that she was approached from behind, but also denied telling her doctors that Ms. Fleming shook her.

[140] I agree with CNL that it is improbable that Ms. White did not tell some of her doctors that Ms. Fleming shook her by the neck given that she wrote that same thing in her timeline for her human rights complaint and that three different medical professionals noted this specific detail. While Ms. White testified that she thought the doctors misconstrued her story, I do not find it plausible that multiple individual physicians would mischaracterise her account in the identical way. CNL submits that Drs. Farrell, Aleem and Bury were assessing Ms. White in relation to her WSIB benefits and that Ms. White had a motive to "lay it on thick" and that the same may be said of her interview with Dr. Gojer who was retained to support her human rights claim.

[141] In my view, Ms. White's inconsistent, and sometimes escalating accounts of the incident over time do not bolster her credibility about the impact of the incident, or her testimony about the impact of working with Ms. Fleming during the relevant period.

Was the Workplace Incident severe enough to be a trigger for PTSD?

[142] The Commission argues that it is not for me to determine whether Ms. White suffers from PTSD or another medical condition. It submits that Dr. Durante first diagnosed her with a mental health condition, namely GAD, situational disturbance disorder as early as August 2013, other medical disorders PTSD, mild and major depressive disorder, somatic disorder, conversion disorder or situational disorder. It argues that it is not my role to step into the shoes of a physician and that the medical evidence is irrefutable.

[143] I agree that my role is not that of a clinician. But I accept CNL's argument that it is only if Ms. White suffered from PTSD at the relevant time that she would have had the medical need of avoiding Ms. Fleming given the triggering event for her PTSD was the Workplace Incident. This entire case turns on Ms. White's claim that she had the disability-related need to avoid Ms. Fleming. There is therefore a need to assess whether the medical

evidence that has been presented can establish, on a balance of probabilities, that she has a disability in the sense of the Act.

[144] Dr. Bloom explained that a PTSD diagnosis requires a violent, severe and triggering incident. I find that the Workplace Incident could have been the triggering event. There is no dispute that Ms. White was off work between August 2 and August 21, 2013. The investigation report described the incident and its impact as follows: “[t]he act of wrapping one’s hands in a threatening manner around someone’s throat after verbally abusing them would have an extremely detrimental effect on the person”. The incident clearly had a significant impact on Ms. White

[145] While CNL argues that Mr. Sullivan’s internal investigation report was based only on Ms. White’s subjective accounts of the incidents, I agree with the Commission that statements were made by Ms. White, Ms. Fleming, and also Ms. Denby and Mr. Kapitan. The report also notes that Ms. White “broke down in tears” and “became emotionally upset”, concluding that Ms. Fleming had committed an act of violence that caused “significant harm” to Ms. White that was both emotional and psychological.

[146] I also agree with the Commission that CNL did not lead evidence to contradict the investigation’s findings or call any witnesses to dispute the report or how the incident was characterised. I accept that the incident was significant for Ms. White and CNL was aware of it. However, I acknowledge that the medical evidence suggests that Ms. White’s accounts of the incident changed over time and may well have grown in severity, which I will address below.

[147] Most importantly, even if the Workplace Incident was serous enough to be a trigger event for a diagnosis of PTSD, the evidence does not establish that Ms. White actually exhibited PTSD symptoms at the relevant time, nor that she had a medically-required need to avoid the trigger, Ms. Fleming.

Ms. White has not established that she had PTSD at the relevant time

[148] While I agree with CNL that Dr. Durante only considered a possible diagnosis of PTSD after Ms. White mentioned it in an email at the end of May 2015, and that the mental

health specialists were basing their assessments, at least in part, on her self-reporting, they did, however, evaluate her and still concurred in this diagnosis. They did so despite their limited access to her full history in some cases, and their limited investigation of other possible causes.

[149] The fact that the suggestion originated with Ms. White herself is not the primary concern I have with the PTSD diagnosis. It is rather that, even taking that diagnosis at face value, the specialists do not speak about symptoms that existed *at the relevant time* that would substantiate a diagnosis of PTSD and a functional limitation and medically required need to avoid Ms. Fleming when CNL required the two employees to resume working together. In other words, while it may be that PTSD and related symptoms were present at the time the experts examined Ms. White, there is not a sufficient basis in the medical record to find on a balance of probabilities that PTSD and related symptoms were present during the period that is material to this case.

[150] While I accept that the Workplace Incident was of sufficient severity to be a trigger event, I do not find that Ms. White established that she had PTSD at the relevant time, namely from the time she was forced to resume contact with Ms. Fleming in March 2014 until she stopped working at CNL in March 2015. The August 12, 2013 investigation report. while reflecting the significant impact the Workplace Incident had on Ms. White, is, as CNL argues, a snapshot of Ms. White's condition and is not an accurate description of her health during the entirety of the period relevant to the case, namely from August 2013 to March 2015.

[151] CNL argued that in some cases where medical evidence has been adduced, the Tribunal has nonetheless found that disability was not proven, after having taken a critical look at the medical evidence. It relies on *Beauregard v. Canada Post Corp*., 2004 CHRT 4 at paras 213-234 [*Beauregard*], aff'd 2005 FC 1384 in which the Tribunal found there was no disability because the contemporaneous medical notes did not show the complainant had the symptoms typically associated with the complainant's claimed psychiatric conditions and the doctors' opinions were based on erroneous assumptions about the nature and severity of an alleged stressor (a workplace conflict). The Tribunal held that it is not enough for a physician to state that a person has a condition, and that evidence still has to be

presented in support of the trait specific to this pathology that leads to the conclusion that the illness exists (*Beauregard* at para 214). In *Hopps v. Shadow Lines Transportation Group*, 2020 CHRT at paras 47-55, the Tribunal decided the legal test for disability had not been met because the final medical report did not identify long-term functional limitations and reports showed that an employee's condition had improved such that he could return to work without accommodation.

[152] The Commission argues that CNL is asking me to ignore the medical evidence in this case, and the fact that there is largely a consensus among the mental health specialists who evaluated Ms. White after she stopped working that she had PTSD. It submits that even Dr. Bloom agreed that if Ms. White had PTSD, it could have hindered her ability to work face-to-face with Ms. Fleming. I agree with the Commission about this general consensus about a diagnosis of PTSD, but to characterise the evidence that way is to leave out key elements of the evidentiary record.

[153] Dr. Bloom's opinion was more nuanced and balanced, which also added to his credibility as an expert in my view. He conceded that the PTSD diagnosis was possible, but the Commission's submissions do not acknowledge the rest of his opinion on this point, which weakens their position: "[a]lthough I must concede the possibility that she had PTSD symptoms form the time of the event or soon thereafter, Dr. Durante's clinical notes do not bear that out, and indeed, the most prominent clinical picture, as per the medical notes, is of diffuse and recurrent somatic complaints".

[154] There was also variance among the health professionals about the specific diagnosis. Dr. Bloom did not refute the PTSD diagnosis, but questioned whether other conditions warranted further investigation, such as somatic symptom disorder, as Ms. White has had multiple somatic symptoms for a long time that had distressed her and disrupted her daily living. Dr. Gratzer opined that the somatic symptoms were consistent with the work-related injury, and that the worker most likely had diagnoses of PTSD, Major Depressive Disorder with a somatic preoccupation and ongoing PTSD. Dr. Gojer testified that it was possible that Ms. White's symptoms were due to the work-related stress she had experienced, but it is also possible that it was due to other causes. As the Commission itself acknowledges in its submissions, Dr. Gojer stated the diagnosis of PTSD does not capture

all the symptoms that Ms. White had and especially her somatic presentation. A more appropriate diagnosis that would capture the psychiatric symptomatology would be a complex trauma state, and the diagnosis of Other Specified Trauma – and Stressor Related Disorder.

[155] Even taking at face value the statement that there was a consensus about PTSD it is not enough to say that an employee has a medical condition, and to assume from that that they are impaired or have some functional limitation requiring accommodation. My task is to critically examine all of the medical evidence, and not simply assume that having a medical condition is sufficient. As the Court held in *Granovsky*, not all physical or mental impairments give rise to functional limitations (Granovsky at para 36).

[156] In my view, such an assumption about persons with health conditions is also contrary to the purpose of the Act which states that "all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society" (s. 2 of the Act). It is not because an employee has a health condition that employers should assume they are incapable of performing a particular function in the workplace. In my view, this is exactly the sort of assumption that the Supreme Court of Canada found to be discriminatory in *Mercier* because it is based on unfounded assumptions. As the Commission itself argues, the Act's purpose is to support people seeking to live lives to their fullest.

[157] I found Dr. Bloom's evidence on this point compelling. Dr. Bloom explained that a diagnosis of PTSD does not necessarily extrapolate to impairment unless specifically investigated and determined. He testified that a lot of individuals who have a PTSD diagnosis or even another mental health impairment such as schizophrenia, are functioning in the working world, and that is of course, a good thing. It respects the dignity and potential of all individuals and does not assume that someone with a health condition is functionally limited from participating in the workplace in a particular way.

[158] I accept Ms. White and the Commission's submission that the medical evidence does not suggest that Ms. White was malingering. Dr. Durante testified that he thought Ms. White

was honest and forthright, and that he always believed her. Further, Ms. White was tested for malingering and Drs. Aleem and Bury from WSIB verified that the test results indicated that Ms. White was not malingering, and there was no evidence of over endorsing based on Ms. White's score on the test. Dr. Gojer did not find evidence of malingering either. But malingering is not why Ms. White's claim fails and I have no difficulty finding that she was dealing with various health challenges. Rather, her claim fails because of the gaps in the record that do not allow Ms. White to substantiate her claim she was suffering from PTSD, and as set out below, that she was medically prevented from working with Ms. Fleming.

The evidence does not establish a functional limitation and medical need to avoid Ms. Fleming

[159] I find particularly probative that there is no mention of Ms. Fleming or Ms. White's "co-worker" at all by Dr. Durante in his clinical notes from March 2014 until March 2015. Given that Ms. White had clearly spoken about Ms. Fleming in the past, describing her after the Workplace Incident as "an overbearing caustic hostile control freak", in my view it is not plausible that Ms. White would have neglected to mention problems with her colleague if they were truly impacting her health given how freely she had spoken about work stressors in the past.

[160] Dr. Durante's clinical notes from March 4, 2014 make it clear that he was well aware of the new arrangement with Ms. Fleming but yet he did not give any medical order against it. Rather, Dr. Durante stated that "moodwise she has come to adapt to her new realities and has learned coping mechanisms". In May 2014, Dr. Durante wrote "things are going well at work and she has taken to recording all her conversations at work"; Ms. White's "affect is upbeat and positive and so no further action on my part are (sic) needed at this time". These are not the words a physician uses to describe someone who is medically required to avoid her colleague.

[161] Further, Ms. White's medical visits and medication ceased from May to September 2014, following which Ms. White began to experience stress due to increased work responsibilities as Ms. Fleming was leaving the department. Ms. White therefore experienced increased stress at a time when she had reduced interactions with Ms. Fleming,

not as a result of them. The record fails to demonstrate that Ms. White's somatic symptoms from this time were connected to Ms. Fleming, and Ms. White's health conditions could have had other causes.

[162] Neither Ms. White nor the Commission could explain this absence from Dr. Durante's notes. In reply, Ms. White referred to sick leave she took, with reference to emails she sent to Mr. Kapitan, and to the fact that Dr. Durante noted the impact of the Workplace Incident in the fall of 2013. But my concern is with the time that CNL removed the alleged accommodation, and the absence of any mention of that as a medical concern in Dr. Durante's notes. In any event, I do not find that Ms. White's absences establish anything about their cause, nor did Ms. White lead evidence to demonstrate that those absences were out of the ordinary or excessive, suggesting significant health concerns.

[163] Dr. Durante was asked by the Commission if he recommended at any time during 2013 or 2014 and until Ms. White left her work not to have face to face contact with Ms. White, and he responded "[w]orking from memory I think I did. I probably would have done that. I don't know if any notes say that specifically. But I thought it reasonable. It's the one thing she should avoid".

[164] CNL argues that Dr. Durante's oral evidence on these points should not be given any weight given that his memory was faulty and his evidence is unreliable. Dr. Durante admitted on cross-examination that he could not recall the specifics of any clinical meeting without seeing his clinical notes. He acknowledged that physicians have a legal and professional obligation to make clinical notes in a way that captures any professional advice given, and that such notes are medical-legal documents. He also admitted that a typical workday would include 25-30 patients a day and that his patient roster was between 1100 and 1400 patients.

[165] I find that Dr. Durante was credible and forthright. However, in light of the passage of time and Dr. Durante's candid admission that he could not recall the details of visits without checking his notes, I find his clinical notes from that time period to be more reliable in contrast to any oral evidence during which he was attempting to recall from memory only. This is particularly the case given that the material question is not just whether he advised

Ms. White not to work with Ms. Fleming at some point, but whether he did so for the period from March 2014 to March 2015. The Commission question was worded more broadly about as to whether he recommended she avoid Ms. White at any time in 2013 and 2014 after the incident happened.

[166] Dr. Durante testified to the best of his abilities, and it is understandable that he could not recall the specifics of visits that dated back a decade or more, particularly given the volume of his patient load.

[167] In any case, even accepting Dr. Durante's evidence about what he might have said at the relevant time at face value, CNL argues that at best this establishes a recommendation, not a medically required limitation. In support of this point, CNL relies on cases where arbitrators have found that a griever's request to work closer to home, or to have a different supervisor were not medical necessities (*Toronto District School Board v. Canadian Union of Public Employees, Local 4400 Unit C*, 2010 CanLII 29128 (ON LA) and *Toronto Children's Aid Society v. Canadian Union of Public Employees*, 2017 CanLII 89178 (ON LA) at para 282).

[168] I agree that Ms. White has not demonstrated that avoiding Ms. Fleming was more than a preference, and the medical record does not support a finding of a true medical need. Dr. Durante's notes in particular are silent on a nexus between a medical necessity involving Ms. Fleming and any of Ms. White's health issues during the relevant time period. Even the after-acquired specialist evidence does not demonstrate that the arrangement from which Ms. White seeks relief, namely working with Ms. Fleming, medically harmed Ms. White.

[169] Turning now to the expert evidence, CNL argues that if any of the 1300 pages of medical evidence had indicated that Ms. White was medically restricted from working with Ms. Fleming at the time CNL required the two to resume face-to-face work together, it would have appeared in Ms. White and the Commission's closing submissions. CNL submits that neither party could highlight such a medical need, because none of the doctors' reports specifically confirm that Ms. White could not work face-to-face with Ms. Fleming during the relevant time. Specifically, CNL argues that the medical evidence does not draw any

connection between an alleged failure to accommodate and Ms. White's health and symptoms.

[170] According to CNL, when the medical specialists such as Dr. Jeeva and Dr. Gojer and others saw Ms. White in 2016 and onwards, and she presented with PTSD, none of them say it is because she had to resume working with Ms. Fleming. If anything, they tie it back to the Workplace Incident and Ms. White's claims of preceding harassment.

[171] I acknowledge that Dr. Gojer concludes that Ms. White's physical symptoms were related to the time period when she was distressed at work and leading up to the assault on her. He also opines that they worsened after the assault, and then comments that from February 2015 onwards, her symptoms worsened again, in his view as a result of how she perceived her stressful situation at work. It is notable to me, however, that Dr. Gojer does not speak to the actual period during which Ms. White was required to resume face-to-face contact with Ms. Fleming, namely March 2014 to March 2015, nor to her being medically restricted from working with Ms. Fleming in person.

[172] Both Dr. Bloom and Dr. Gojer agreed that there were no symptoms mentioned in the medical notes prior to June 4, 2015 that would justify a PTSD diagnosis. CNL submits that even if I accept that Ms. White had certain symptoms and was on medication from August 2013 to March 2015, that alone does not show a functional limitation from working face-to-face with Ms. Fleming.

[173] I agree that workplaces are challenging, can lead to moments of stress, and even distress at times. But a diagnosis of anxiety, or depression, or physical illness, does not necessarily mean that an individual enjoys the protections of the Act. Not all workplace actions by employers that employees disagree with are discriminatory. Not all workplace stressors mean that an individual has a disability within the meaning of the Act, even if a doctor has provided a diagnosis. In *Hughes v. Canada (Attorney General),* 2021 FC 147 at paras. 83-86, the Federal Court held that not all ailments are disabilities and even stress, and some forms of depression may not reach the level of disability attracting protection under the Act.

[174] I return to the central point that even Dr. Gojer, an experienced mental health professional and expert witness who examined Ms. White and testified credibly, professionally, objectively and to the best of his abilities, did not opine that Ms. White had a functional limitation or indicate that his retrospective diagnosis meant that Ms. White was medically prevented from working face to face with Ms. Fleming during the relevant period. As CNL argued in closing submissions, in examining Dr. Gojer's report, one would search in vain for a statement that Ms. White could not work with Sue Fleming.

[175] CNL argues that Dr. Jeeva was not asked to opine on whether Ms. White was medically restricted from working with Ms. Fleming at the relevant times, and was rather engaged for treatment recommendations around a history of PTSD related to persecution in the workplace because Ms. White was struggling with anxiety and PTSD symptoms. It notes that in Dr. Jeeva's first report he makes a single stray comment about the fact that it is hard to imagine that Ms. White was required to interact with the woman who abused and assaulted her. CNL asks me to put little to no weight on this comment given that Dr. Jeeva admitted that his report was based on Ms. White experiencing a serious threat of violence and emotional abuse by Ms. Fleming. It also asks me to put little weight on Dr. Jeeva's opinion as he did not review Ms. White's medical record, her notes or Dr. Durante's notes of the alleged harassment, and therefore did not verify her allegations.

[176] Dr. Jeeva wrote his first report in January 2016, years after the August 1, 2013 incident. CNL argues that Dr. Jeeva also erroneously assumed that Ms. White had been put back with Ms. Fleming in November 2013, and also assumed no underlying etiology, even though evidence suggests that there were some unexplored stressors in Ms. White's life, such as adjusting to a new and challenging job, her husband's serious health issues, and the stress of caring for her children and working outside the home.

[177] The Commission argues that Dr. Jeeva testified that he did not solely rely on self-reporting and conducted his own mental status exam. He also stated in response to a question about whether Ms. White should be put in a situation to interact with Ms. Fleming that he found it hard to imagine how that could happen, and said: "I think it most likely is going to further harm her, and worsen her symptoms. I mean she will clearly be – there's avoidance behaviour because reminders of the trauma are too difficult for her. This isn't a

reminder, this is putting her straight back into the environment with the person who committed the act".

[178] While I do not doubt that Dr. Jeeva's opinion was founded on his professional expertise, the reality from the contemporaneous medical record is that what he testified would happen if Ms. White and Ms. Fleming were brought back together did not actually occur. Ms. Fleming and Ms. White resumed working in person together, as of February 2014, and as I have already outlined above, neither Dr. Durante's, nor Ms. White's notes from that time period report further harm, or trauma, or the worsening of symptoms. On the contrary, Dr. Durante actually noted an improvement in the workplace for Ms. White.

[179] I acknowledge that PTSD can involve a delayed onset but regardless of that, the after-acquired medical evidence does not establish that Ms. White was symptomatic at the relevant time, that she had PTSD the relevant time, and most importantly, that she had a medical need to avoid Ms. Fleming at the relevant time. What Ms. White's expert evidence does demonstrate is that she was symptomatic when the specialists examined her but not during the period that is material to this complaint.

[180] Beyond the gaps in the medical record during the relevant time, from November 2014 through February 2015, the rest of the evidence does not support Ms. White's claim that having to work with Ms. Fleming was tied to her health conditions either.

[181] To the extent that Ms. White's oral evidence speaks to a functional limitation and requirement to avoid Ms. Fleming and is at odds with the documentary evidence, I prefer her own contemporaneous written notes and her family doctor's clinical notes that post-date March 2014, when she was required to resume contact with Ms. Fleming.

[182] Ms. White had a face-to-face meeting with Ms. Fleming in December 2013, and yet made no note about this having had a negative impact on her. A January 23, 2014 note also says that Ms. Fleming helped her with a few questions, and they had a civil conversation. CNL cites these as instances as being the exact opposite of true trauma symptoms such as hypervigilance and avoidance.

[183] It also argues that after Ms. White and Ms. Fleming resumed face-to-face contact, Ms. White did not include anything in her contemporaneous notes to document difficulties with Ms. Fleming, in stark contrast to her notes, taken prior to the Workplace Incident. Further, Ms. White's testimony and allegations about ongoing harassment by Ms. Fleming are not supported in any contemporaneous note, email or clinical note.

[184] I also find particularly probative that in March 2015, Ms. White wrote to Ms. Leblanc of CNL and wrote that her health issue was not work related. No mention is made of Ms. Fleming. On cross-examination Ms. White explained this by drawing a distinction between 'old' and 'new' symptoms', arguing that she had not yet connected her 'new' symptoms to Ms. Fleming. As CNL argues, she did not explain the difference between these categories of symptoms, other than to say that the 'new' symptoms included "numbness, chest pain and things". But earlier in her testimony Ms. White testified about symptoms, including numbness, that she was experiencing in September 2014 and described them as a continuum. Further, Ms. White had reported chest pain to Dr. Durante as early as 2012, and numbness on September 30, 2014. Dr. Durante's February 20, 2015 clinical note includes Ms. White's own email referring to 4 months of symptoms, including numbness.

[185] I do not find this distinction between old and new symptoms credible, and do not accept Ms. White's explanations in oral evidence. Where his oral evidence is at odds with her written note, I prefer the latter, namely Ms. White's contemporaneous statement, which is also bolstered by the fact that by March 2015, Ms. Fleming had moved to a different team on another floor.

[186] Finally, Mr. Miller's evidence does not assist in establishing whether Ms. White had a disability at the relevant time. I need not even engage with the question of the employer's knowledge of Ms. White's disability in the absence of a *prima facie* case, and his evidence does not help establish that Ms. White was restricted from working with Ms. Fleming between August 2013 and March 2015. To the extent that Mr. Miller's evidence suggests that Ms. White was worse off when she was forced to resume working with Ms. Fleming, as already indicated, this is not reflected in Dr. Durante's clinical notes or even Ms. Fleming's notes and I prefer the documentary evidence to this oral testimony.

Did the complainant suffer an adverse impact with respect to employment?

[187] No. Although my finding that Ms. White did not have a disability is dispositive, I have briefly set out why I also do not find that Ms. White suffered an adverse impact in having to work with Ms. Fleming.

[188] Ms. White had to resume face-to-face contact with Ms. Fleming, and she alleges this worsened her health, and ultimately, she stopped working for medical reasons. While Ms. White eventually stopped working in 2014, the theory of the case presented by Ms. White and the Commission focused on her interactions with Ms. Fleming as the adverse treatment.

[189] For similar reasons to those I set out above in finding Ms. White did not have a disability with the functional limitation of avoiding Ms. Fleming, I do not find that she experienced an adverse impact by having to resume contact with her. Many people in the workplace have to work with people they do not like or would prefer not to be around. But simply having to resume face-to-face contact with Ms. Fleming is not automatically adverse differential treatment.

[190] As already set out above, not every interaction with Ms. Fleming was negative, and in any event, I did not find sufficient medical or other evidence of Ms. White harassing or otherwise adversely impacting Ms. White even when they had to resume in-person contact. Ms. White testified that Ms. Fleming continued to bother her, but her own notes and Dr. Durante's clinical records do not reflect any concern with Ms. Fleming after March 2014, with the exception of the cheque requisition dispute, which I do not find establishes any harassing behaviour either.

[191] I do not find it plausible that Ms. White, who kept detailed notes of her interactions with staff, and who also told Dr. Durante that she had a device to record interactions with her colleagues, would not have noted down concerns about Ms. Fleming. Further, as the Court held in *Mercier*, it is necessary to look at the "effects of the distinction, exclusion or preference", and here Ms. White did not present evidence establishing that she suffered an adverse effect during the relevant period (*Mercier* at para. 81).

D. Issue 2: If yes, has CNL established a valid justification for its otherwise discriminatory actions?

[192] As Ms. White did not establish a *prima facie* case, CNL has no case to answer.

E. Issue 3: If CNL cannot establish a justification, what remedies should be awarded that flow from the discrimination?

[193] Ms. White is not entitled to any remedies under the Act as she did not establish that CNL discriminated against her.

F. Issue 4: Did CNL have a duty to inquire into Ms. White's health conditions and her medical needs?

[194] No. I have already found that Ms. White has not established a *prima facie* case, which is dispositive of the complaint.

[195] However, as the Ms. White and the Commission spent much time on the question of whether CNL had a duty to accommodate, inquire or investigate, I will briefly address the issue of CNL's knowledge.

G. There is no free-standing duty to accommodate and no 'duty to inquire'

[196] Both Ms. White and the Commission referred in their submissions and throughout this proceeding to a 'duty to inquire' and argued that CNL could not claim ignorance of Ms. White's disability and medical needs. Given my finding that Ms. White's medical conditions did not constitute a disability within the meaning of the Act, CNL did not ignore her disability or any discrimination due to her medical conditions. Furthermore, there is no employer duty to inquire or a duty to accommodate in the absence of a *prima facie* test.

[197] Ms. White and the Commission rely on *Mellon v. Human Resources Development Canada*, 2006 CHRT 3 at paras 97-100 and 113, in support of their argument that CNL knew or ought to have known that Ms. White had a disability because of comments and behaviours exhibited in the workplace. They also cited *Lafrenière v Via Rail Canada Inc*.,

2019 CHRT 16 [*Lafrenière*] for the principle that the duty to accommodate includes the duty to inquire to understand the extent of the accommodation required. Ms. White relies on provincial caselaw from the Human Rights Tribunal of Ontario, such as *Wall v. Lippé Group*, 2008 HRTO 50 and the Commission relies on *Leblanc v Akrami Visa Inc o/a Akrami & Associates*, 2021 HRTO 365 in support of its submission that CNL had an onus to inquire further and therefore that the duty to accommodate was triggered. It argues that CNL should not be allowed to claim ignorance of Ms. White's disability. Regardless of what other provincial human rights tribunals may have found in their respective regimes, there is no such duty to inquire, to investigate or to accommodate in the absence of discrimination at the federal level. I will not go into a further review of the case law that Ms. White and the Commission relied on, or repeat their submissions, other than to recall that all of that is irrelevant in the absence of a *prima facie* test.

[198] An employer's knowledge is not part of the *prima facie* analysis because Ms. White alleged her employer ignored her functional limitation, not that her employer acted based on an assumption her medical condition would limit her. The employer's knowledge is, however, relevant when a complainant has established a prima facie test. The whole framing of this case by the Commission and Ms. White as being about a 'duty to inquire' or about wilful blindness to Ms. White's health is not the starting point for determining liability in this case. As Ms. White did not establish that she had a disability at the relevant time, her claim fails regardless of what CNL may have known or ought to have known.

[199] To put it bluntly, there is no obligation for an employer to do anything in the absence of a *prima facie* test in the federal regime. However, by choosing not to follow a particular procedure, or electing not to follow up or inquire with an employee, an employer is rolling the dice. That is, if the Tribunal were to determine after the fact that a complainant did in fact have a disability at the relevant time and the employee established a *prima facie* case, the employer would have the opportunity to justify their conduct. An employer who has not made appropriate inquiries is likely to have a harder time demonstrating that accommodating the employee would cause undue hardship.

[200] If it turned out however, as is the case for Ms. White, that the complainant did not establish a *prima facie* case, the employer would not be liable for anything, and what they knew, or ought to have known, or did or did not inquire about is all irrelevant.

[201] While *Lafrenière* was a federal CHRT decision, unlike in Ms. White's case, the Tribunal found that the complainant had a disability with respect to the third incident in that case, which then triggered some analysis as to the employer's actions and knowledge.

[202] The Commission referred to *Canada (Attorney General) v. Gallinger,* 2022 FCA 177 in its reply submissions, arguing that the Court of Appeal held that *Cruden* and *Duval*, relied on by CNL in this case, do not apply where the employer did not establish that it could not accommodate the employee without undue hardship. The Commission argues that *Cruden* and *Duval* do not support CNL's position because this is not a case where an employer has demonstrated that it could not accommodate the employee without undue hardship.

[203] But this submission and the reliance on *Gallinger* misses the point entirely. CNL relied on *Cruden* and *Duval* in support of its argument that were I to find that Ms. White did not have a disability, and therefore did not meet her onus to establish a *prima facie* case, then it had no duty to inquire, or accommodate, regardless of what it knew or did not know in the absence of a procedural duty to accommodate at the federal level. That is an accurate statement of the law in my view. The analysis in *Gallinger* arises in an entirely different context, where there was no doubt that the employee had established a *prima facie* case (paras 25-26).

[204] Had Ms. White established a *prima face* case, and CNL attempted to defend itself under s.15(2) of the Act, perhaps with evidence of undue hardship, then this analysis may have come into play. At that stage CNL's efforts to inquire and investigate Ms. White's needs and its attempts to reasonably accommodate her disability would have been in issue.

IX. ORDER

[205] The complaint is dismissed.

Signed by

Jennifer Khurana
Tribunal Member

Ottawa, Ontario
July 11, 2025

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2252/0718

Style of Cause: White v. Canadian Nuclear Laboratories Ltd.

Decision of the Tribunal Dated: July 11, 2025

Date and Place of Hearing: January 17-19, 24-26, 31, 2023; February 1, 7-9, 14-16, 21, 2023; March 28-30, 2023; May 19, 2023 by videoconference

Appearances:

Christine Roth, for the Complainant

Ikram Warsame, for the Canadian Human Rights Commission

Kevin MacNeill and Emma Harmer, for the Respondent