Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2025 CHRT 106
Date: November 7, 2025
File No(s).: T2201/2317

Between:

Tesha Peters

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

United Parcel Service Canada Ltd. and Linden Gordon

Respondents

Ruling About How Remedies Including Compensation Should Be Ordered When Section 65 Applies to Related Respondents

Member: Kathryn A. Raymond, K.C.

Table of Contents

I. Overview of Ruling About How Remedies Including Compensation Should Be Ordered When Section 65 Applies to Related Respondents

A. The Issues

[1] In this ruling, I address the Tribunal's statutory authority regarding whether the Tribunal is authorized to award remedies between "related respondents", as that has been defined below, and if so, how, when section 65(1) of the *Canadian Human Rights Act* R.S.C., 1985, c. H-6 (the CHRA) applies to a complaint.

[2] Below, I consider whether the answer may be discerned from Tribunal jurisprudence. Concluding that it cannot, I consider the wording of section 65(1) of the CHRA, other provisions in the CHRA that are to be read consistently with section 65, the legislative scheme of the CHRA, and comparative aspects of the different legislative scheme in British Columbia, the latter for illustrative purposes. I also consider what the Supreme Court of Canada decided in *Robichaud v. Canada (Treasury Board)*, 1987 CanLII 73 (SCC), [1987] 2 SCR 84 [*Robichaud*] and in *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62 [*Schrenk*], two decisions where the Court commented about which respondents a human rights tribunal should order remedies against in a harassment complaint.

[3] I also decide how each of the specific remedies available in section 53 of the CHRA should be awarded by the Tribunal under the CHRA when section 65(1) applies and there are related respondents. The Supreme Court of Canada determined how specific remedies should be awarded against the parties in *Robichaud* but without consideration of section 65. The Court's decision on this issue has not been re-visited by the Tribunal to consider the impact of section 65 and the nature of the statutory liability it creates.

B. The Decision

[4] Based on my conclusions about the Tribunal's authority pursuant to the provisions of the CHRA, I conclude that the Tribunal does not have unfettered discretion when it comes to applying compensatory awards in the CHRA to related respondents. In the case of related

respondents, when section 65(1) applies, the Tribunal's authority extends to holding the respondent employer responsible for compensation it decides to order.

[5] The key point of analysis rests within the legislative scheme of the CHRA, specifically the operation of section 65(1) of the CHRA as a deeming provision, such that UPS, as the employer, becomes liable instead of Mr. Gordon. This deeming provision, in essence, transfers liability from the individual who engaged in the discriminatory practice to the employer, making the employer liable for the purpose of remedies instead of the employee. The analysis of "anyone" in section 4 of the CHRA and "the person found to be engaging or to have engaged in the discriminatory practice" in section 53(2) of the CHRA are both to be determined in relationship to section 65(1). Section 53(2) (and sections 53(3) and 53(4), but the analysis is the same) cannot be interpreted as authorizing remedies against an individual employee when the provision refers to "the person who engaged in the discriminatory practice" when section 65(1) applies, because that provision makes it the employer who engaged in the discriminatory practice. Section 53(2) cannot be interpreted in a way to always refer to the individual in all complaints, despite section 65(1), as that would negate the language of section 65(1).

[6] This conclusion is reinforced by the assessment of *Robichaud* and its determination that the employer is responsible for the remedies under the CHRA, considering of course that *Robichaud* was determined based on facts that arose prior to the enactment of the current section 65(1). On the other hand, *Schrenk* may be distinguished because it is based on a different legislative scheme and different statutory wording.

[7] Section 65(1) applies to all discriminatory practices and is not limited to harassment cases. There is an implicit inference in the statutory scheme as written that does not permit treating individual employees who violate the CHRA differently based on whether their actions are more along the lines of discrimination under section 7 in the course of their core job duties (i.e. failing to offer proper accommodations) or clearly not related to their job duties (i.e. sexual harassment under section 14). In other words, the statutory scheme does not allow discretion to hold individual employees who violate the CHRA liable in some but not all cases (where section 65(2) is not established, of course).

[8] Remedies may be awarded against an individual respondent when section 65(2) of the CHRA applies. In situations involving an insolvent corporate respondent employer, there may be a rationale, separate from section 65, for finding the employer and the owner/operator jointly liable. However, neither of these situations arise on these facts.

[9] As this ruling interprets and applies section 65 of the CHRA post-*Robichaud*, I also decide how each of the specific remedies in section 53 of the CHRA should be awarded by the Tribunal under the CHRA when there are related respondents. I conclude that *Robichaud* continues to be binding law on this Tribunal about how the specific remedies under section 53 of the CHRA are to be awarded when a complaint is substantiated.

[10] In this case, the Respondent, United Parcel Service Canada Ltd. ("UPS"), the employer of both Tesha Peters, the Complainant ("Ms. Peters") and the Respondent, Linden Gordon, ("Mr. Gordon"), are related respondents. UPS is responsible for payment of any compensation that may be ordered to be provided to Ms. Peters pursuant to section 65(1) of the CHRA in relation to this complaint.

[11] Ms. Peters requested various types of compensation pursuant to section 53 and asked that these all be ordered against the related respondents jointly and severally. The Tribunal has the authority to order compensation, but not jointly and severally against both related respondents. Also, the Tribunal does not have the authority or the discretion to order all of the various types of compensation that Ms. Peters asked to be ordered against Mr. Gordon because of the decision in *Robichaud*.

[12] Further, the Tribunal would not excuse Mr. Gordon from liability due to his impecuniosity, nor would it hold him liable to pay for a separate award of damages for UPS's conduct that the Tribunal has already determined it does not have the authority to award, nor would the Tribunal hold him liable for discrimination related to disability in which he was not materially involved.

II. Context of this Ruling

[13] Ms. Peters filed a human rights complaint which the Tribunal found to be substantiated against both the individual Respondent, Mr. Gordon and the employer

Respondent who employed them both, UPS, in *Peters v. United Parcel Service Canada Ltd. and Gordon*, 2022 CHRT 25 (CanLII) (the "Liability Decision"). In the Liability Decision, the Tribunal determined that Ms. Peters had been sexually harassed pursuant to section 14 of the CHRA by Mr. Gordon and had been discriminated against by UPS based on the protected characteristic of disability pursuant to section 7 of the CHRA. Alternatively, the Tribunal reached the same conclusion based on the intersectionality recognized in section 3.1 of the CHRA between the grounds of disability and sexual harassment pursuant to section 7 and 14. However, for ease of reference, I have included this finding of discrimination against UPS in these reasons as "disability-based discrimination."

[14] The Liability Decision served as a preliminary decision, addressing liability broadly, based on whether there was any liability established pursuant to sections 14, 7 and 3 of the CHRA. If liability was established, the number of compensatory awards was subject to a decision by the Tribunal on a pre-hearing motion by Ms. Peters which placed in issue how many discriminatory practices occurred for purposes of the Tribunal theoretically awarding compensation to her pursuant to the CHRA in relation to this complaint. Ms. Peters submitted that there were five separate discriminatory practices. The motion concerned how compensation should be ordered by the Tribunal and the interpretation and application of the statutory cap to the compensation that may be ordered pursuant to sections 53(2)(e) and 53(3) of the CHRA.

[15] In the Liability Decision, the Tribunal also decided how to interpret and apply section 65(2) for purposes of determining whether UPS could avail itself of the statutory defence in that section or is liable pursuant to section 65(1) for its employees. UPS was unsuccessful in establishing a statutory defence pursuant to section 65(2) of the CHRA. As a result, UPS was found liable, in general, for the conduct of its employees including Mr. Gordon pursuant to section 65(1) of the CHRA in the Liability Decision. I say "in general" because Ms. Peters' positions raised issues about what UPS should be liable for, in theory, in terms of payment of compensation under the remedial provisions of the CHRA, and, accordingly, what Mr. Gordon should be responsible for paying for, as well.

[16] The Tribunal reserved jurisdiction to decide the remaining issues concerning remedy which included, but were not limited to, the remedial issues arising from Ms. Peters' motion

concerning the interpretation and application of the statutory cap in sections 53(2)(e) and 53(3) of the CHRA on the compensatory awards in those provisions including her submissions about how many compensatory awards pursuant to sections 53(2)(e) and 53(3) could be ordered in relation to the complaint. As noted, this motion and the positions that Ms. Peters took in her submissions for the complaint about the compensatory remedies she should be granted put in issue the Tribunal's authority to award compensation and other remedies under the statute, as did some of the positions taken by UPS and Mr. Gordon in response.

[17] Of importance to this ruling, Ms. Peters submitted that the five discriminatory practices for which she sought compensation, whether arising from Mr. Gordon's conduct or that of other UPS employees, should all be ordered against both UPS and Mr. Gordon on a joint and several basis.

[18] The initial issues raised by Ms. Peters' motion and certain aspects of her position about how compensation should be awarded under the CHRA were resolved in a series of related remedial rulings issued in advance of this ruling and what will be the final decision respecting remedy: *Peters v. United Parcel Service of Canada Ltd. and Gordon*, 2024 CHRT 140 (CanLII) (the "Statutory Cap Ruling"), *Peters v. United Parcel Service Canada Ltd. and Gordon*, 2025 CHRT 2 (CanLII) (the "Statutory Cap on Interest Ruling"), and *Peters v. United Parcel Service Canada Ltd. and Gordon*, 2025 CHRT 7 (CanLII) (the "Ruling on Separate Damages Against the Respondent Employer"). Together these are described as the "Related Rulings" on remedy in this ruling. The Liability Decision and the Related Rulings are relied upon by the Tribunal and form part of the reasons for this ruling in the interests of efficiency.

[19] Ms. Peters' motion about the Tribunal's remedial authority focussed on compensation for any pain and suffering Ms. Peters experienced by reason of discrimination pursuant to section 53(2)(e) of the CHRA and compensation for wilful or reckless conduct of a respondent pursuant to section 53(3) of the CHRA. Ms. Peters' submissions respecting remedy also requested compensation for loss of income pursuant to section 53(2)(c) of the CHRA, compensation for expenses pursuant to section 53(2)(d) of the CHRA, and interest pursuant to section 53(4) of the CHRA. As noted, the compensatory issues include

Ms. Peters requested relief that all requested instances of compensation for alleged discriminatory practices be awarded against UPS and Mr. Gordon jointly and severally.

[20] It should be noted that, while these provisions of the statute use the wording "compensation" and not "damages", the parties describe the compensation available pursuant to section 53(2) of the CHRA as "general damages" for discrimination and the compensation payable for wilful or reckless conduct pursuant to section 53(3) as "special damages". I have referred to them as such as well at times, in the Related Rulings and in these reasons.

[21] In Ms. Peters' motion, she submitted that compensation for sexual harassment pursuant to section 53(2)(e) and section 53(3) of the CHRA should be awarded on a "per proven allegation" basis against Mr. Gordon and UPS, jointly and severally. In contrast, Ms. Peters took the position that the Tribunal should order one compensatory award for disability-based discrimination, despite the fact that various UPS employees were involved in the discrimination that occurred. Ms. Peters asks that both UPS and Mr. Gordon be held jointly and severally liable for disability-based discrimination.

[22] In the Statutory Cap Ruling, the Tribunal determined that the number of compensatory awards pursuant to sections 53(2) and 53(3) of the CHRA that may be ordered in relation to a complaint hinges upon the number of discriminatory practices the Tribunal finds, subject to the criteria and certain caveats explained in the reasons for that ruling. It denied Ms. Peters' request to find that five separate discriminatory practices could be established in this complaint.

[23] Because Ms. Peters sought interest pursuant to section 53(4) of the CHRA, and there was a divergence in opinion in the Tribunal jurisprudence about whether the statutory cap applied to any interest awarded on compensation pursuant to section 53(2) and section 53(3) of the CHRA, I issued the Statutory Cap on Interest Ruling. I decided that the statutory caps do not apply to any interest awarded by the Tribunal pursuant to section 53(4) of the CHRA.

[24] The Ruling on Separate Damages Against the Respondent Employer concerns an issue about the interpretation and application of section 65(1) of the CHRA to UPS as the

respondent employer. Ms. Peters argued that, in addition to and apart from UPS's liability for Mr. Gordon's conduct for sexual harassment, separate awards of compensation pursuant to section 53(2)(e) and 53(3) of the CHRA should be issued against UPS for its failed response to the sexual harassment she endured from Mr. Gordon and for UPS failing to maintain a workplace free of sexual harassment. Ms. Peters submitted both that UPS's conduct should give rise to a separate award of compensation for UPS's conduct but also that this compensation should be ordered against UPS and Mr. Gordon jointly and severally.

[25] In the Ruling on Separate Damages Against the Respondent Employer, I considered sections 14, 65, 53(2)(e) and 53(3) and the legislative scheme of the CHRA in general in this regard. I determined that the Tribunal lacks the statutory authority to make separate awards of compensation pursuant to sections 53(2)(e) and 53(3) against UPS for sexual harassment on the basis suggested by Ms. Peters.

[26] In deciding the Ruling on Separate Damages Against the Respondent Employer, I applied the Statutory Cap Ruling. In doing so, I finalized the preliminary decision in the Liability Decision regarding how many discriminatory practices occurred for purposes of theoretically awarding compensation pursuant to the CHRA in relation to this complaint. I concluded that there can only be one discriminatory practice of sexual harassment pursuant to section 14 in relation to the complaint and, therefore, one award of compensation for pain and suffering arising from sexual harassment pursuant to section 53(2)(e) of the CHRA. Likewise, I concluded that there can, in theory, only be one award of compensation for wilful or reckless conduct in relation to sexual harassment pursuant to 53(3) of the CHRA, if warranted.

[27] Ultimately, I concluded that the CHRA authorized a finding of two different discriminatory practices within this substantiated complaint, one based on sexual harassment pursuant to section 14, and another based on disability-based discrimination pursuant to section 7. The issue of the intersectionality between disability and sexual harassment pursuant to section 3.1 of the CHRA is implicitly included; section 3.1 does not constitute a separate discriminatory practice. While Ms. Peters did not argue on her motion that there was more than one discriminatory practice concerning disability, and I made no express ruling, by extension I found implicitly that there can only be one discriminatory

practice of disability-based discrimination in relation to the complaint and, therefore, one award of compensation for that type of discrimination pursuant to section 53(2)(e), and, likewise, one award of compensation pursuant to 53(3) of the CHRA for disability-based discrimination, if warranted.

[28] UPS and Mr. Gordon have been determined to be "related respondents" by operation of section 65(1) of the CHRA: Ruling on Separate Damages Against the Respondent Employer, at paras 88, 100, and 132-133. The term "related respondents" describes the respondent employer and its employee who engaged in discrimination in the course of employment under the CHRA when both are named respondents. "Related respondents" is used as a defined term in the Related Rulings and in this ruling.

[29] There is a need to complete the analysis of the Tribunal's authority and discretion pursuant to section 65(1) of the CHRA about how the Tribunal is authorized to issue compensatory awards as between UPS and Mr. Gordon, as related respondents. This was noted in the Related Rulings (see, for example, paras 71 and 165 of the Ruling on Separate Damages Against the Respondent Employer). I advised the parties that I expected to include this ruling in the final remedy decision. However, given the extent of issues and reasons engaged in addressing this issue, it is more easily reviewed as a separate ruling.

III. The Requested Individual Remedies

[30] As a result of the remedies requested by Ms. Peters, the Liability Decision and the Tribunal's interpretation and application of the CHRA's provisions thus far in the Related Rulings, the following remedies are in issue:

1) In relation to the Tribunal's finding in Liability Decision that Mr. Gordon sexually harassed Ms. Peters contrary to section 14 of the CHRA:

    a) "general damages" or compensation in the maximum amount of $20,000 for pain and suffering caused by Mr. Gordon's conduct pursuant to section 53(2)(e) of the CHRA; and

    b) "special damages" in the maximum amount of $20,000 for wilful or reckless conduct by Mr. Gordon pursuant to section 53(3) of the CHRA.

2) In relation to the Tribunal's finding in the Liability Decision that UPS discriminated against Ms. Peters contrary to section 7 of the CHRA, compensation in the maximum amount of $20,000 for pain and suffering caused by UPS's discriminatory conduct pursuant to section 53(2)(e) of the CHRA [special damages not having been requested].

3) Interest on all monetary awards pursuant to section 53(4), it having been determined that interest is available on any compensatory awards and is not subject to the statutory caps: Statutory Cap on Interest Ruling.

[31] The following remedies have not yet been addressed directly in the Related Rulings but are requested by Ms. Peters. Their merits will be addressed in the final decision on remedy:

1) Compensation for loss of wages pursuant to section 53(2)(c).

2) Compensation for expenses associated with relocation of Ms. Peters and her young family to the United States.

IV. The Issue

[32] As noted, Ms. Peters asks that the Tribunal award all compensation for both discriminatory practices in this complaint jointly and severally against both UPS and Mr. Gordon. When Ms. Peters asks that the Tribunal find that Mr. Gordon and UPS are jointly and severally liable for all compensation awarded to her, this means that she requests that the Tribunal find that both Respondents share responsibility for paying all damages to her; the "severally" portion of the order also means that each Respondent would be held separately responsible to pay her all compensatory damages awarded against both Respondents. In practice, this does not usually happen unless one respondent is unable to pay.

[33] That is an issue in this case, because Mr. Gordon asserts that it would cause him undue financial hardship to be ordered to pay compensation along with UPS.

[34] To recap, the Tribunal found in the Liability Decision and the Related Rulings that, as a result of the application of section 65(1) of the CHRA to UPS, UPS is liable for the acts of Mr. Gordon, and UPS and Mr. Gordon are related respondents. As noted, “related respondents” is a defined term when used in these reasons.

[35] In the Ruling on Separate Damages Against the Respondent Employer, I explained that section 65(1) of the CHRA establishes the liability of the employer for the acts of its employee. However, section 65(1) is silent about how it is to be interpreted and applied to related respondents when the Tribunal orders remedies and assigns responsibility for them pursuant to sections 53(2), 53(3) and 53(4) of the CHRA, which would include any compensation ordered by the Tribunal. As explained, this ruling continues the analysis of section 65(1) begun in the Related Rulings and follows it to its conclusion for purposes of the Tribunal’s decision about how responsibility for payment of any compensation in this case should be assigned, given Ms. Peters’ position that both related respondents should be held jointly and severally responsible for compensation.

[36] This silence about how section 65(1) is to be interpreted and applied to related respondents, in part, constitutes an ambiguity. I say “in part” because it is unambiguous that UPS becomes liable for Mr. Gordon’s acts and omissions by operation of section 65(1) of the CHRA based on the wording of that section. UPS is, therefore, legally responsible for remedies including payment of compensation for what Mr. Gordon did. The ambiguity lies in a lack of express wording in section 65(1) about how that provision allows the Tribunal to award compensation when it applies, whether against UPS “instead of” Mr. Gordon, or “in addition” to Mr. Gordon.

[37] If the former applies, the Tribunal is authorized to award compensation against UPS instead of Mr. Gordon. This would mean that the Tribunal is not authorized by the provision to award compensation jointly and severally against both related respondents, rather only against UPS. If compensation may be awarded against UPS in addition to Mr. Gordon, or against Mr. Gordon in addition to UPS, the Tribunal has the authority to award compensation jointly and severally against the related respondents, as Ms. Peters asks, because the Tribunal has the authority to award compensation against UPS in addition to Mr. Gordon, and *vice versa*.

[38] It appears that there has not been a decision by the Federal Courts directly considering how section 65 of the CHRA is to be interpreted and applied for purposes of this issue. To my knowledge, the Tribunal also has not directly considered the wording of section 65(1) of the CHRA and decided the issue in this ruling. Further, the Tribunal has not consistently awarded damages jointly and severally when there are related respondents. Had the Tribunal done so consistently, this could have created a legal basis for me to be assured that the Tribunal possesses this authority and that I may simply exercise my discretion in this regard. Nor has the Tribunal established a consistent pattern respecting against whom it assigns responsibility for payment of the distinct types of compensation that are available for the Tribunal to order pursuant to the applicable legislation, a matter which I explain below.

[39] Ms. Peters' requests that Mr. Gordon be responsible for payment of the multiple awards she seeks against both respondents, and that UPS be responsible for payment for all compensation awarded as well as Mr. Gordon, place the issue of the Tribunal's authority and how section 65(1) of the CHRA applies to related respondents for purposes of remedy directly in issue. I conclude that there is a need for the Tribunal to clarify whether it has the statutory authority pursuant to section 65(1) to apply the remedial provisions in section 53 of the CHRA to the two discriminatory practices in this case jointly and severally against the related respondents, and, to do so: 1) in the manner requested by Ms. Peters for each discriminatory practice and 2) for each type of compensatory remedy she seeks for the particular discriminatory practice.

[40] I have noted that Ms. Peters claims include a request for an order of compensation against the related respondents for UPS's failure to protect Ms. Peters from harassment in the workplace. This claim was denied in the Ruling on Separate Damages Against the Respondent Employer because I concluded that there is a lack of authority in the CHRA for this type of award. However, for the sake of the completeness of this ruling respecting Ms. Peters' positions respecting remedy, I indicate whether I would have concluded that the Tribunal has the authority to award this compensation jointly and severally against both related respondents.

[41] The following is a list of the issues raised by Ms. Peters' requests about responsibility for remedies that engage the issue of the Tribunal's authority in light of its determination that section 65(1) of the CHRA applies in this case:

1) Whether Mr. Gordon and UPS are responsible jointly and severally to pay any compensation awarded for pain and suffering to Ms. Peters pursuant to section 53(2)(e) of the CHRA for Mr. Gordon's sexual harassment;

2) Whether Mr. Gordon and UPS are responsible jointly and severally to pay any special compensation awarded for wilful or reckless conduct in relation to Mr. Gordon's sexual harassment pursuant to section 53(3) of the CHRA;

3) Whether (in theory) Mr. Gordon would have been found responsible jointly and severally with UPS to pay compensation for pain and suffering to Ms. Peters pursuant to section 53(2)(e) of the CHRA for UPS's conduct in respect of its inadequate response to the sexual harassment;

4) Whether (in theory) Mr. Gordon would have been found responsible jointly and severally with UPS to pay any special compensation awarded for wilful or reckless conduct for UPS's conduct in respect of its inadequate response to the sexual harassment pursuant to section 53(3) of the CHRA;

5) Whether Mr. Gordon and UPS are jointly and severally responsible to pay any compensation for pain and suffering to Ms. Peters pursuant to section 53(2)(e) of the CHRA for UPS's discriminatory conduct in respect of disability-based discrimination (there being no request made by Ms. Peters for special damages for wilful or reckless conduct pursuant to section 53(3) of the CHRA in this regard);

6) Whether UPS and Mr. Gordon are jointly and severally responsible to pay any compensation for loss of wages (from UPS and Costco) and/or expenses claimed by Ms. Peters for Mr. Gordon's discriminatory practice based on sexual harassment pursuant to section 53(2)(c) and section 53(2)(d) of the CHRA;

7) Whether UPS and Mr. Gordon are jointly and severally responsible to pay any compensation for loss of wages (from UPS and Costco) and/or expenses for

UPS's discriminatory practice based on disability pursuant to section 53(2)(c) and section 53(2)(d) of the CHRA, and

8) Whether both related respondents are jointly and severally responsible for payment of interest to Ms. Peters on any awards made pursuant to section 53(4) of the CHRA, and, if so, in relation to which pecuniary awards their responsibility lies.

[42] The focus in this ruling is on remedies involving payment of compensation because Ms. Peters focuses on compensation in the relief she seeks. Ms. Peters does not request that the Tribunal order Mr. Gordon to cease and desist his discriminatory practice pursuant to section 53(2)(a) of the CHRA. Ms. Peters also does not advance a request pursuant to section 53(2)(b) that the Tribunal include a term in its order to restore any rights, opportunities or privileges that were denied to her as a result of the discriminatory practices she endured. In other words, Ms. Peters has not asked to be re-instated to active employment with UPS. Nonetheless, this ruling will include general comments about remedies that may be ordered pursuant to sections 53(2)(a) and 53(2)(b) for purposes of the Tribunal's analysis of how remedies should be ordered when section 65 applies. This is because it would not be reasonable for the Tribunal to decide how to interpret and apply section 65 for the purpose of remedies based solely on consideration of what the CHRA authorizes about compensatory remedies.

[43] I also address the issue raised by Mr. Gordon respecting whether Mr. Gordon's alleged impecuniosity should relieve him of responsibility for payment of any damages awarded.

[44] In this ruling, I discuss different practices about naming respondents before this Tribunal to provide context for the Tribunal's jurisprudence and for the analysis. However, this ruling concerns remedies, not the addition of parties. This ruling does not decide the issue of who should be a named respondent in this type of complaint. Both matters may overlap to some degree when a person is named a respondent where the complainant seeks a remedy against that person, but the policy considerations and legal criteria for both issues are different.

V. Positions of the Parties

[45] While Ms. Peters took the position that each type of compensation she claims should be awarded jointly and severally against the related respondents, she did not provide submissions specific to those requested terms respecting responsibility for payment in her proposed order. Ms. Peters had an opportunity to provide submissions about the Tribunal's authority to order the compensatory remedies as she requests and an opportunity to make submissions respecting when and how the Tribunal should exercise any discretion it possesses in this regard pursuant to the CHRA.

[46] The Commission appears to agree with Ms. Peters that the Tribunal has the authority to order all requested monetary remedies against both Respondents jointly and severally in respect of discriminatory practices. The Commission did not identify any difficulty with Mr. Gordon being held responsible for remedies for UPS's conduct in addition to UPS or with UPS being held responsible for remedies for Mr. Gordon's conduct in addition to Mr. Gordon. The Commission had an opportunity to provide submissions to support its position that the Tribunal has authority and to raise any issues it had with the remedies requested by Ms. Peters or to offer submissions respecting her positions.

[47] In its submissions, UPS's primary position was that no remedies should be awarded against it because it was not liable. UPS denied that Mr. Gordon sexually harassed Ms. Peters. UPS took the position that, if there was any harassment, UPS should not be responsible for remedies for that harassment because it had met its statutory obligations of due diligence to prevent and mitigate the harassment, arguing that it could rely on the statutory defence available to respondents in section 65(2) of the CHRA in this regard. UPS also took the position that it should not be held responsible for any remedies for disability-based discrimination because it was not liable, asserting that Ms. Peters could not establish a *prima facie* case of discrimination in this regard

[48] As explained, the Tribunal has since found that Ms. Peters established that she was discriminated against in the Liability Decision. The Tribunal also determined in the Liability Decision that UPS did not establish a statutory defence pursuant to section 65(2) of the CHRA.

[49] UPS relied heavily on its position that it could not be held responsible for remedies because it was not liable for discrimination. UPS otherwise did not take positions respecting remedies apart from the issue of the quantum of any compensation awarded. In this regard, UPS disagreed with the amounts of compensation requested by Ms. Peters and offered its own positions in this regard. These will be addressed in the final decision respecting remedy. UPS did not make submissions about other issues that are relevant to how the Tribunal decides to award compensation. UPS had an opportunity to raise any issues it had with the remedies requested by Ms. Peters including her position that all compensation should be awarded jointly and severally against both related respondents regardless of whose conduct was involved, and to dispute the positions taken by Mr. Gordon.

[50] There are two possible exceptions concerning the Tribunal's authority. UPS took issue with the idea that the Tribunal should award Ms. Peters the compensation she requested for expenses. To be clear, I treated a specific statement by UPS to the effect that Ms. Peters should not be awarded compensation for expenses (this type of compensation) as an objection to the authority of the Tribunal to award the requested expense. This will be addressed in the final decision respecting remedy.

[51] Also, as noted above, while not raised by UPS as an issue concerning the Tribunal's authority, UPS objected to Ms. Peters receiving compensation for her lost wages from Costco. UPS did not provide submissions to support its position on this matter. I will address this issue further in the final remedy decision in the course of assessing Ms. Peters' loss of wages claim respecting her employment with Costco. I need to satisfy myself that I have the authority to award compensation for the wages Ms. Peters claims from Costco and that I should do so in this case. In this ruling, I decide the basic question of how compensation for loss of wages should be awarded against related respondents.

[52] UPS did not disagree with Ms. Peters' position that it is responsible for payment of compensation when section 65(1) of the CHRA applies to UPS. For example, UPS did not suggest that it should not be responsible as Mr. Gordon's employer for paying compensation arising from Mr. Gordon's sexual harassment, if the Tribunal found that Mr. Gordon engaged in sexual harassment, except to the extent that UPS relied on section 65(2) of the CHRA. UPS did not suggest that only Mr. Gordon should be responsible to pay compensation for

sexual harassment if the Tribunal concluded that Mr. Gordon harassed Ms. Peters, assuming the Tribunal also found that UPS could not rely on the statutory defence in section 65(2) of the CHRA.

[53] UPS did not argue that section 65(2) would apply as a statutory defence if the Tribunal found that Ms. Peters was discriminated against based on disability. UPS took no issue with the premise advanced by Ms. Peters that, if section 65(1) applies, any of the compensation awarded by the Tribunal should be payable jointly and severally by UPS and by Mr. Gordon. It did not take a position about whether it should share responsibility with Mr. Gordon. UPS also did not suggest that the UPS employees who were involved in those matters should be personally responsible instead of or in addition to UPS. UPS did not suggest that, if it is liable for disability-based discrimination, it should in some way be relieved of responsibility for payment of compensation for that discriminatory practice.

[54] The fact that UPS did not object to being held jointly and severally responsible with Mr. Gordon for compensation is significant because UPS heard Mr. Gordon assert that he was not in a financial position to pay any compensation to Ms. Peters. UPS did not take a position in response respecting responsibility for payment. UPS had notice that there was a risk that it would ultimately be solely responsible for payment of any compensation awarded by the Tribunal to Ms. Peters for the discrimination she experienced. But UPS did not question the Tribunal's authority to order compensation in the manner requested by Ms. Peters pursuant to section 65(1) of the CHRA or otherwise. And UPS did not suggest that Mr. Gordon should be solely responsible for payment of compensation for harassment if UPS could not establish a statutory defence pursuant to section 65(2) of the CHRA.

[55] Mr. Gordon, who, in general, did not take positions on legal issues, took the position that he should not be required to pay any compensation. He did not provide any legal submissions in response to Ms. Peters' position that compensation should be awarded jointly and severally against both respondents; he simply took the position that he should not be required to pay compensation. Mr. Gordon did not question the Tribunal's authority to order compensation jointly and severally pursuant to section 65(1) of the CHRA. For example, Mr. Gordon did not suggest that he should not be responsible for what UPS did that was discriminatory. Mr. Gordon did indicate that his personal circumstances left him

unable to pay. He suggested that awarding compensation against him personally would constitute an unreasonable hardship.

VI. The Tribunal's Obligation

[56] No party objected to the request that all compensation be awarded jointly and severally against both UPS and Mr. Gordon regardless of whose conduct was involved or suggested that it was inappropriate. No one raised an issue in this regard. However, the Tribunal is obligated to satisfy itself that it has the authority pursuant to section 65(1) to order compensation against related respondents jointly and severally, just as it has decided the other issues relevant to the interpretation and application of section 65(1) of the CHRA that arise from Ms. Peters' motion, her submissions for the hearing and their implications for this complaint.

[57] *J.N. v. Durham Regional Police Service*, 2012 ONCA 428 at paras 22-25 demonstrates just how foundational this obligation is. In that case the Ontario Court of Appeal disposed of an appeal based on a jurisdictional issue that had not been raised by a party before the application judge:

> [24] J.N. argues that the appellants ought not to be able to raise the argument for the first time on appeal, relying on a well-accepted line of jurisprudence to the effect that issues ought not to be asserted for the first time at this level. That line of jurisprudence cannot assist J.N., however, because the problem that must be addressed is whether the court below had jurisdiction to determine the issues in the first place.
>
> [25] Some may view this approach as technical and as a failure by this Court to address what are admittedly important issues. The law has long been clear, however, that jurisdiction is fundamental to a court or tribunal's authority to deal with a matter. Jurisdiction is not optional, cannot be conferred by consent, cured by attornment, or assumed voluntarily just because there is an interesting and significant issue to be considered: see *McArthur v. Canada (A.G.),* 2008 ONCA 892, 94 O.R. (3d) 19, at para. 3, aff'd 2010 SCC 63, [2010] 3 S.C.R. 626; *Rothgiesser v. Rothgiesser* (2000), 2000 CanLII 1153 (ON CA), 46 O.R. (3d) 577 (C.A.), at paras. 18-19 and 33-39.

[58] I considered in a preliminary way the findings in the Related Rulings, including that that UPS and Mr. Gordon are related respondents by virtue of the application of

section 65(1) of the CHRA, that UPS is responsible for compensation in whatever way is required by section 65(1) of the CHRA and that section 65(1) seemed to be silent about its effect on Mr. Gordon. It was not plain or obvious to me that I did have the authority under the CHRA to order that UPS and Mr. Gordon were each responsible for payment of any compensation ordered to be paid to Ms. Peters on a joint and several basis or that it was appropriate to order all compensation in this way, as requested by Ms. Peters. For example, it was not clear to me that Mr. Gordon, as a co-worker, should be responsible for paying compensation for loss of wages. As explained, the parties appeared to assume that I have complete authority and discretion in this regard. However, I have an obligation to assure myself that I have the authority to make a requested order: *R. v. 974649 Ontario Inc.*, 2001 SCC 81 at para 25 and *Zemer et al. v. Toronto District School Board*, 2025 ONSC 4551 [*Zemer*] at para 59. This is to ensure that I order any compensation that, in theory, I may award, in a manner consistent with the legislative scheme of the CHRA. I therefore prepared this ruling on my own initiative to satisfy my legal obligation to satisfy myself I have the requisite statutory authority. As noted at para 59 of *Zemer*, statutory decision-makers like human rights tribunals are responsible "…for discerning the legislative intent behind their grant of authority and must interpret the scope of their authority in a manner consistent with the text, context and purpose of that legislation: *Vavilov*, at para. 121". Failing to undertake this exercise concerning their grant of authority, as found in *Zemer,* is unreasonable.

[59] I also proceeded on the basis that the parties had a full opportunity to bring forward any submissions or case law they wished on any issue related to Ms. Peters' requested remedies, including her submissions respecting how compensation should be awarded as between UPS and Mr. Gordon. As well, they had notice from the Related Rulings that I intended to decide how section 65(1) applies to the Respondents; as noted, I found that they were related respondents in the Ruling on Separate Damages Against the Respondent Employer. The issue of how section 65 should be interpreted and applied to related respondents includes what type of liability the provision creates for the respondent employer and the individual respondent and how that impacts remedies. I found that section 65(1) engages the respondent employer's liability and thereby responsibility for remedies, but I did not fully determine how section 65(1) applies to related respondents for purposes of

remedies in the Related Rulings. I explained that I would be deciding what the effect of that finding is on an individual respondent respecting their responsibility to pay any damages awarded: Ruling on Separate Damages Against the Respondent Employer, at paras 71 and 165.

[60] As well, UPS heard Mr. Gordon allege that financial challenges would impede his ability to pay compensation such that he should not be ordered to pay any compensation due to undue hardship. UPS was represented by experienced counsel and is taken to know that, in theory, UPS could end up severally (solely) responsible for compensation, for several reasons.

VII. Legal Context

A. Statutory Authority for Remedies

[61] The statutory provisions identifying remedies that are theoretically available to be ordered by the Tribunal as terms of an order are found in sections 53(2)-(4) of the CHRA:

> Complaint substantiated
>
> 53(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:
>
> (a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including
>
> (i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or
>
> (ii) making an application for approval and implementing a plan under section 17;
>
> (b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;

> (c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;
>
> (d) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and
>
> (e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.
>
> Special compensation
>
> (3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.
>
> Interest
>
> (4) Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.

[62] If the Tribunal finds that a complaint is substantiated, section 53(2) of the CHRA allows the Tribunal to issue an order containing terms to provide compensation to offset monetary losses that are statutorily authorized to be compensated in section 53(2)(c), section 53(2)(d), section 53(2)(e), section 53(3) and section 53(4) of the CHRA. In the *Public Service Alliance of Canada v. Canada Post Corporation*, 2010 FCA 56 at para 299, aff'd 2011 SCC 57, the Court held that the purpose of remedies is to put the complainant back in the position they would have been in but for the discrimination.

B. The Exercise of Remedial Discretion

[63] The language of section 53 states that the terms that are statutorily authorized "may" be ordered by the Tribunal. I interpret "may" in this context to be discretionary. The Tribunal has the discretion to select appropriate terms to be included in the order. The need for the Tribunal to have discretion in this regard is consistent with the Tribunal's obligation under

the CHRA to fashion remedies appropriate to the complaint. The Supreme Court of Canada has highlighted that the CHRA is remedial legislation: *Robichaud*.

[64] The Tribunal exercises its discretion in ways that extend beyond the selection of which terms to include in an order, for example, when the Tribunal determines the quantum of any compensation to be ordered. However, the Tribunal's discretion is not without limits. Some of the wording of the remedial provisions in section 53 of the CHRA limit the authority of the Tribunal to order that remedy; the statutory caps that apply to compensation for pain and suffering provide one example.

[65] Even where the Tribunal appears to have unfettered discretion to make an award, such as the Tribunal's authority to award "any or all wages" in section 53(2)(c), the Tribunal's discretion is to be exercised on a principled basis to be reasonable. For example, it is reasonable for the Tribunal to require that there be a causal link between the discriminatory practice and the loss claimed. That is a limit on the Tribunal's discretion to award "any or all wages". As stated in *Cruden v. Canadian International Development Agency & Health Canada*, 2011 CHRT 13 (CanLII) at para 165:

> Although the Tribunal has remedial flexibility and discretion under section 53, this discretion is not unlimited. In the context of discussing the limit on the liability for compensation under the *CHRA*, the Federal Court of Appeal in *Chopra v. Canada (Attorney General)*, 2007 FCA 268 [*Chopra*], stated:
>
> > The first limit is that recognized by all members of the Court in *Morgan*, that is, there must be a causal link between the discriminatory practice and the loss claimed. The second limit is recognized in the Act itself, namely, the discretion given to the Tribunal to make an order for compensation for any or all of wages lost as a result of the discriminatory practice. This discretion must be exercised on a principled basis.
>
> (*Chopra* at para. 37)
>
> Stated more generally:
>
> > ...The remedy must be commensurate with the breach. The orders also must be reasonable and the remedial discretion exercised in light of the evidence presented.
>
> (*Hughes v. Elections Canada*, 2010 CHRT 4 [*Hughes*] at para. 50)

[66] There is another key point about the Tribunal's discretion to award remedies. As I explained in the Related Rulings, the Tribunal's authority to exercise discretion is subject to the caveat that the Tribunal cannot assume that principles of law about damages established in the common law by the courts are applicable under the CHRA. For example, in *Chopra,* at para 40, cited in the quote above, the Federal Court of Appeal explained that there is nothing in the CHRA that requires that the common law principle of mitigation be applied to compensatory awards for loss of wages. The Tribunal may apply the principle of mitigation to an award of lost wages in its discretion but is not required to do so.

[67] It will be apparent from the Related Rulings that Ms. Peters' remedial claims and her motion respecting the number of discriminatory practices and the application of the statutory caps to complaints in some ways challenge the Tribunal's approach to remedies. When an issue has arisen respecting the Tribunal's authority or discretion because of the remedies claimed by Ms. Peters or because of issues raised by any party concerning a requested remedy, I have not assumed that the principles of law established by the courts are applicable under the provisions of the CHRA. I have considered the authority provided to the Tribunal by the CHRA, determined the extent and nature of that authority and considered the extent of my discretion in that light.

C. The Starting Point with Multiple Respondents

[68] In a complaint where a person is found to have engaged in discrimination but did not do so in their capacity as an employee, or in a way related to an employment relationship and where multiple respondents are named parties, the Tribunal determines which respondent(s) is liable for any discriminatory practice established on the evidence. Section 65(1) of the CHRA does not apply to the complaint. I have explained in the Related Rulings that, where a complaint is not related to employment, truly legally separate respondents may be found responsible for separate compensation and in different amounts based on the Tribunal's findings about liability for compensation.

[69] Where a person/respondent individual is an employee, has acted in the course of employment, whether authorized or not, or where the complaint is in any way related to their

employment relationship, the Tribunal will need to determine, whether expressly or implicitly, whether the respondent employer and the respondent employee are related respondents by the application of section 65(1) of the CHRA: Ruling on Separate Damages Against the Respondent Employer at paras 138-139. As explained in that ruling, this is because section 65(1) applies in this situation, unless section 65(2) applies: see para 59.

D. Introductory Principles for the Analysis

[70] The courts have the inherent authority to award damages as deemed appropriate, against any liable party, whether jointly and severally, or otherwise. Because the courts have the inherent authority to award damages, they also possess the discretion to structure awards as they see fit in accordance with the legal principles in the case law. However, as was explained in the Related Rulings, the Tribunal has no inherent jurisdiction, like a court. The Tribunal may only proceed as it is authorized to do by its statute.

[71] The fact that the Tribunal finds that a complaint is substantiated does not authorize an award of compensation against any particular respondent. The fact a person is a named party does not mean that any particular remedy available under the CHRA should be ordered against that person. A complainant may also name a person as a party in their complaint because they seek a remedy against that person or for other reasons. In every complaint and in relation to every named respondent, the Tribunal still must decide whether a remedy should be ordered, and, if so, what remedy should be ordered and against whom. To the extent that the Tribunal has a significant degree of discretion within its authority, this discretion is to be exercised on a principled basis, and always in a manner consistent with the language of the CHRA. I touched upon the concepts of authority and the exercise of remedial discretion above.

E. What We Know from Settled Case Law

[72] The Supreme Court of Canada has not yet decided how section 65 of the CHRA should be interpreted and applied. I explained in the Related Rulings, however, that in *Robichaud*, the Supreme Court of Canada did consider whether the respondent employer

may be held liable for the unauthorized acts of its employee based on the CHRA. This was for the purpose of the period involving complaints before the CHRA contained section 65. In doing so, the Court considered the law as it stood prior to the amendment of the CHRA to add what is now section 65.

[73] The complaint at issue in *Robichaud* was filed in 1980. In 1980, there was no express language in the CHRA holding the employer liable for the acts of its employee. The CHRA was amended in 1983 to include sections 48(5) and 48(6) of the CHRA which are now sections 65(1) and 65(2) of the CHRA. *Robichaud* was decided in 1987. The sole issue was whether the respondent employer could be held liable for the unauthorized sexual harassment of its employee.

[74] It is important that the Court decided the issue based on the language of the CHRA before it was amended to include former sections 48(5) and 48(6) [what is now section 65]. In fact, as I explain further below, the Court expressly declined to decide how what is now section 65 should be interpreted and to decide the nature and extent of the liability that provision created for the employer. Because *Robichaud* does not decide how sections 48(5) and 48(6) [now section 65] should be interpreted, it does not directly resolve the issue of whether, as a result of the application of section 65(1), remedies are to be awarded against the respondent employer instead of the harasser/employer or in addition to the harasser/employee. *Robichaud* is (obviously) not a binding decision on the Tribunal concerning the interpretation and application of what is now section 65 of the CHRA.

[75] However, the Supreme Court of Canada did provide some instruction for the Tribunal and the courts about what they should consider when interpreting what is now section 65. These instructions have informed my approach in the Related Rulings and in this ruling. The Court cautioned against assuming that the new provision was the same thing as vicarious liability under the common law at paras 7-13. It is similar in that it holds the employer liable for its employee, but it should not be assumed to be the same.

[76] This point in *Robichaud* was discussed in *Daley v. B.C. (Ministry of Health) and others*, 2006 BCHRT 341 (Can LII) [*Daley*] at paras 49-50:

> While not directly on point, the Court's decision in *Robichaud* tends, in my view, to suggest that the common law principles discussed in *Morriss, Bingo City* and *Edwards* are likely to be of little assistance in determining questions of respondent liability under the *Code*. In *Robichaud*, La Forest J. noted that much time had been spent in argument in considering theories of the liability of an employer for the acts of its employees, such as vicarious liability in tort and strict liability in the quasi-criminal context. He rejected the latter as being "completely beside the point", and also rejected the theory that liability of an employer should be based on tortious theories of vicarious liability: at paras. 7 – 13. Overall, La Forest J. urged that questions of liability must be determined by reference to human rights legislation, and not to common law principles….
>
> Rather, the focus of the enquiry is properly on the purposes of the Code, and how they are most likely to be furthered. As explained in *Robichaud*, those purposes are predominantly remedial and are aimed at eradicating the conditions which give rise to discrimination and at ameliorating its effects. In the employment context, this means that the employer, against whom meaningful remedies can be directed, and which has the capacity to itself remedy discrimination in the workplace, is liable for all acts of its employees in the course of their employment. In this connection, "in the course of their employment" is broadly interpreted to include any acts "being in some way related or associated with the employment": *Robichaud*, at para. 17.

[77] I note that the Supreme Court of Canada in *Robichaud* stated that the new provision, now section 65, had no obvious name or label but rather was a form of "statutory liability", the nature and extent of which was to be decided. I am, therefore, taking the approach in this ruling that I should not assume that Parliament intended that the common law principles will apply via the statutory language in section 65. Instead, I should decide how to interpret and apply section 65 of the CHRA based on the wording of the provision, other relevant content in the CHRA (the legislative scheme) and the stated purpose of the legislation and how that purpose has been interpreted by the Courts.

[78] The Supreme Court of Canada in *Robichaud* assessed and determined the purpose of the CHRA. In my view, that aspect of the decision is binding on this Tribunal and must guide the interpretation of the CHRA's provisions in this ruling. At paras 8-10, Justice La Forest wrote:

> 8. The purpose of the Act is set forth in s. 2 as being to extend the laws of Canada to give effect to the principle that every individual should have an equal opportunity with other individuals to live his or her own life without being

> hindered by discriminatory practices based on certain prohibited grounds of discrimination, including discrimination on the ground of sex. As McIntyre J., speaking for this Court, recently explained in *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd*., 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536, the Act must be so interpreted as to advance the broad policy considerations underlying it.…
>
> 9. It is worth repeating that by its very words, the Act (s. 2) seeks "to give effect" to the principle of equal opportunity for individuals by eradicating invidious discrimination. It is not primarily aimed at punishing those who discriminate. McIntyre J. puts the same thought in these words in *O'Malley* at p. 547:
>
> > The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant.
>
> 10. Since the Act is essentially concerned with the removal of discrimination, as opposed to punishing anti-social behaviour, it follows that the motives or intention of those who discriminate are not central to its concerns. Rather, the Act is directed to redressing socially undesirable conditions quite apart from the reasons for their existence. *O'Malley* makes it clear that "an intention to discriminate is not a necessary element of the discrimination generally forbidden in Canadian human rights legislation" (at p. 547).

[79] These comments suggest that the CHRA is not so concerned with punishing the person who discriminates based on their culpability but with ensuring that individuals have an equal opportunity to live as a member of Canadian society without being held back by discriminatory practices.

[80] I adopt, as well, *Daley's* summary, at para 30, of the Supreme Court of Canada's decision in *Robichaud* regarding the purpose of the CHRA:

> …[T]hose purposes are predominantly remedial, and are aimed at eradicating the conditions which give rise to discrimination and at ameliorating its effects. In the employment context, this means that the employer, against whom meaningful remedies can be directed, and which has the capacity to itself remedy discrimination in the workplace, is liable for all acts of its employees in the course of their employment.

[81] I also take note that *Robichaud* clarified the meaning of the wording "in the course of their employment" in section 7 of the CHRA, which is the provision considered by the

Supreme Court of Canada in that case. The wording “in the course of employment” is repeated in section 65 of the CHRA. The Court concluded that this wording is to be broadly interpreted to include any acts “being in some way related or associated with the employment”, at para 17, dispensing with any requirement that the acts in issue be authorized by the employer.

[82] A similarly broad interpretation of the wording “regarding employment” was given to these words by the Supreme Court of Canada in *Schrenk* in 2017. The Court concluded that the meaning of the words “regarding employment” was not limited to an employment relationship in a traditional sense but rather included situations where there is a sufficient nexus with the employment context, at paras 3 and 37-38. Based on the facts in *Schrenk*, the words extend to include an employee of another employer in the same work environment as the complainant; and they can extend to an individual who has a connection with the complainant through employment but who is no longer an employee in that environment.

[83] These are the basic legal principles that are settled law on which I rely for the analysis.

VIII. Practice Under the Common Law & Before the Tribunal

A. Common Law

[84] As a point of reference, under the common law, where multiple, legally separate defendants are held liable in a civil case, and damages are awarded, the defendants may be held liable jointly, sharing responsibility for payment, or they may be held jointly and severally liable, where they share responsibility for payment, but each defendant is also individually responsible for all payments if the other defendants fail to pay. Damages for a loss may also be apportioned individually between legally separate defendants based on the extent to which they contributed to the loss caused to the harmed party.

[85] Under common law principles of vicarious liability, the employer is a named defendant and individual employees who engaged in the events in the ordinary course of

their duties and responsibilities, following their usual responsibilities, are usually not named as separate defendants. The employer takes responsibility for remedies.

[86] However, sometimes exceptions are made under the common law in the context of tort such that the employee is named a party and remedies are awarded against that person too. A tort involves a wrongful act or omission that results in harm or injury to another person. As *Daley* explained at para 45, “actions may properly proceed against individual defendants either if the statement of claim discloses an allegation of individual tortious conduct or if it discloses conduct which suggests that the actions in issue exhibited a separate identity.” However, as noted, in most civil cases this does not arise and the legal action proceeds against the employer who will be responsible for all remedies ordered by the court.

[87] The Tribunal regularly issues awards in discrimination cases where only the employer is named a respondent. There are many sexual harassment cases before the Tribunal where the respondent employer is the only named respondent, and all remedies are issued against the respondent employer. There is no rule requiring that the employee who engaged in the discriminatory practice be named a party. For that matter, there is no express rule that the complaint must be brought against the respondent employer, although this is the practice. [But see *Bilac,* at para 2 and 6, where the Commission referred a complaint to the Tribunal where the owner/operator of the Respondent, NC Tractor Services Inc., and another employee were found to have had engaged in harassment of the complainant. The two respondent employees had been employed by a different employer that had previously operated out of the same location as the Respondent, NC Tractor Services Inc. (the former company appears to have no longer existed). Some of the harassment by the two respondent employees occurred during the period they worked for the different employer. Only NC Tractor Services Inc, the most recent employer, which was owned by the owner/operator, and the other employee were named as respondents.]

[88] In those cases where only the employer is a named as a respondent, the issue of whether damages should be awarded jointly and severally does not arise. There is no practical need to engage in an analysis of section 65(1) of the CHRA. The Tribunal must find that the employer is liable for the discrimination pursuant to section 65(1) because it is the only respondent. In this category of case law, there appears to have been no case where

the Tribunal had reason to question how section 65(1) applies and what the Tribunal's authority is to award remedies in this regard.

[89] To be clear, I agree that section 65(1) must be interpreted as holding the respondent employer liable for remedies alone when the Tribunal finds the complaint to be substantiated, and the respondent employer is the only respondent. When the Tribunal assumes in these cases that remedies are required to be ordered against the respondent employer, it mirrors a key rationale of the Supreme Court of Canada's decision in *Robichaud*: the CHRA as remedial legislation is to be interpreted as intending to provide effective remedies.

[90] Where only the employer is named a respondent, the respondent employer becomes responsible for remedies "instead of" the employer's errant employee who engaged in a discriminatory practice. This includes that the respondent employer becomes responsible for paying any compensatory awards the Tribunal makes for the discriminatory acts and omissions of its employees. The Tribunal implicitly decides that the employer steps into the shoes of its errant harassing employee pursuant to section 65(1) of the CHRA for purposes of liability and the remedial consequences of such liability; in this way the respondent employer becomes responsible for payment of any compensation awarded.

[91] When only the employer is a named respondent, the respondent employer is also held responsible by the Tribunal to ensure that the harassment ceases, and for taking measures to "redress the practice or to prevent the same or a similar practice from occurring in future….", terms that are typically ordered pursuant to section 53(2)(a) of the CHRA. As well, the respondent employer is responsible for any other non-monetary terms imposed by the Tribunal in its order. For example, an award may be issued pursuant to section 53(2)(b) to restore the victim's rights, opportunities or privileges denied because of the discrimination. The Tribunal proceeds on the expectation that these remedies offered by the CHRA, including the award of any compensation, will be effective when ordered against the respondent employer.

[92] Any issues respecting the enforcement of an order of the Tribunal is addressed by section 57 of the CHRA which provides for enforcement of an order by the Federal Court.

In many harassment cases, therefore, the parties, including the Commission, have not found it necessary or in the interests of justice for the harasser be a named respondent as a precursor for the remedies under the CHRA to be available or effective.

[93] One exception typically concerns owner/operators of small businesses. This is discussed below. It is significant to note this point: in general, all complaints pursuant to the CHRA, where it is an employee who has allegedly engaged in discrimination in relation to employment, but where the case does not involve harassment, proceed to a hearing by the Tribunal on the basis that the employee does not need to be a named party. There is no anticipation of a need for the Tribunal's remedies to be ordered against the employee personally to hold the employee who discriminated personally accountable or to ensure in advance that the remedies will be effective because they will be paid by the employee should the employer be unable to pay. As noted, I will return to address the occasional exception of owner/operators of small businesses below.

[94] In theory, I could conclude that the employer is responsible for damages "instead of" the harassing employee based on the Tribunal jurisprudence where only the respondent employer is named. However, I cannot draw any definitive conclusion in this regard based on Tribunal jurisprudence. There continues to be a practice in some cases before the Tribunal of naming the alleged harasser as a party. The practice appears to be limited to sexual or racial harassment cases. [When I refer to the "harassing employee" or to harassment cases or sexual harassment cases, I include those cases where the harassment is based on racism.] It seems more helpful to consider the Tribunal's jurisprudence where the harasser is a named party in addition to the respondent employer to seek clarity about how the Tribunal has applied section 65(1) of the CHRA to related respondents.

[95] I was unable to find any decision where the Tribunal addressed the implications of this difference in practice about naming the harasser that occurs sometimes in harassment cases compared to cases involving other types of discrimination where the practice in cases before the Tribunal is that only the employer is named as a respondent in a complaint.

[96] A reminder about the history of employer liability pursuant to the CHRA, touched upon in the Related Rulings, will help to frame the issues when there are related respondents. Before the CHRA was amended to include what is now section 65 of the CHRA, and at the time that *Robichaud* was decided by the Supreme Court of Canada, it had become a frequent practice before the Tribunal to name the harasser as a respondent in addition to the employer. Sexual harassment by an employee is an unwelcome social harm that is not considered to be authorized by the employer or part of the employee's responsibilities. The Tribunal was likely to conclude that the harassment did not occur in the course of the employee's employment, leading the Tribunal determine that it could not hold the employer liable, and thereby to dismissal of the complaint against the employer. This was a practical problem because, historically, the employer has been recognized to be the party with deep pockets, in that the employer would be expected to be in a much better position to pay compensation than a co-worker, and thereby a necessary respondent to best ensure recovery of compensation.

[97] As a result, it was also the case that a failure to name the harasser as a respondent in addition to the employer could leave the complainant at risk of being left without a viable remedy at all, despite having a valid complaint, in the event the complaint was dismissed against the employer. In theory, naming the harassing employee as a respondent secured a further means for the complainant to obtain recourse to the CHRA's compensatory remedies.

[98] *Robichaud* resolved this problem. It confirmed the liability of the employer for all the acts and omissions of an employee, and, therefore, liability for all conduct that constitutes prohibited discrimination under the CHRA, absent section 65, including harassment.

[99] The addition of section 65(1) of the CHRA in 1983 has been interpreted as allowing the Tribunal to hold the employer liable if the harassment occurs "in matters related to employment", full stop. No doubt these developments, and particularly the addition of what is now section 65(1) of the CHRA, explain why many harassment complaints are referred to the Tribunal for hearing where only the respondent employer is a named respondent; yet the practice of naming the harasser as a separate respondent has continued to occur in some harassment cases before the Tribunal.

B. Parties Before the Tribunal

[100] Who the named respondents are in cases before the Tribunal is largely a function of who is named as a party at the stage that the complaint is before the Commission. Unlike some provincial jurisdictions that allow complainants direct access to the relevant human rights tribunal, all federal human rights complaints are filed with the Commission. The Commission exerts some control over how the complaint is prepared by providing complaint forms to complainants, and access to Commission staff. The Commission has an opportunity to influence who is a named respondent if it concludes that the complainant is not completing the form accurately. The Commission is influential, as well, because it screens complaints and decides which complaints are referred to the Tribunal for hearing and decision.

[101] Most of the complaints involving harassment arrive before the Tribunal from the Commission and there is no further discussion of who the parties should be. This includes both cases where only the respondent employer is a named respondent and where the employer and the alleged harasser are named respondents.

[102] A few notable decisions in other jurisdictions have discussed the policy considerations respecting the addition of parties. The ones I selected to refer to involve the *British Columbia Human Rights Code*, R.S.B.C. 1996, c. 210 (the “British Columbia Code”).

[103] The British Columbia Code allows the public direct access to the Tribunal. Practically speaking, this means that complainants file their complaint as they see fit with the Tribunal in British Columbia. There is no Commission to help decide how a complaint should be framed or to advise who the named respondents should be and to determine whether the complaint should be referred to this tribunal for hearing. Complainants, who are often unrepresented, will file complaints with all configurations of parties. The tribunal in British Columbia is often called on to determine who the parties should be after the complaint is filed.

[104] *Daley* is a leading case in British Columbia in this regard. In deciding these issues, the tribunal relied on section 27(1)(c) of the British Columbia Code which allows complaints to be dismissed by the tribunal if there is no reasonable prospect that the complaint will be

successful. (In comparison, under the legislative scheme of the CHRA, the Commission decides whether complaint should be allowed to proceed to the Tribunal under specific criteria in the CHRA.)

[105] *Daley* considered whether a complaint should be dismissed against individual respondents. Their employer submitted that their acts and omissions were in the course of their employment and there was no reasonable prospect that the complaint would succeed against them (as the employer would be liable and there was no need to name them individually.). The tribunal in *Daley* focussed its attention on the addition of parties. The tribunal pointed out that there are sound policy reasons both for adding and for not adding the alleged harasser to a human rights complaint under the British Columbia Code. Its comments about these differing policy considerations are at paras 51-62.

[106] Since *Daley* was issued, these paragraphs are often quoted by the tribunal in British Columbia as it frequently is asked to issue rulings about whether individual respondents should be named parties. In fact, the Supreme Court of Canada Court commented on the policy considerations in favour of bringing a complaint against the individual described in paragraph 53 of *Daley* in *Schrenk,* a point I will return to below.

[107] I mention *Daley* and *Schrenk*, although they were decided pursuant to the British Columbia Code, to illustrate that who should be a named party and in what circumstances is a significant issue. This is not only for the direct access model respecting human rights in British Columbia but for all human rights complaints in general.

[108] This Tribunal issued a ruling adding Mr. Gordon to this proceeding before the hearing at the request of Ms. Peters in *Peters v. United Parcel Service Canada Ltd. and Gordon*, 2019 CHRT 15. The issue of whether the Tribunal should add Mr. Gordon to this complaint was decided by Member Mercer, at para 54, for several reasons. In part, Mr. Gordon was added as a party when the complaint reached the Tribunal because of the prospect of UPS's statutory defence pursuant to section 65(2): "…to avoid the futility of a Complaint in which the Tribunal finds that harassment has occurred, but that UPS has discharged its statutory obligations and was therefore shielded from liability by operation of s. 65(2) of the Act." I will

return to the application of section 65(2) to the parties to a complaint for purposes of remedies below.

[109] For now, it is of background interest to mention that Member Mercer pointed out at para 47 that the factors considered in a motion to add a proposed respondent in the jurisprudence under the CHRA "…differ considerably from those considered by Human Rights Tribunals in other jurisdictions in Canada". No doubt Member Mercer recognized that there is a key difference between direct access tribunals such as those in Ontario and British Columbia and those tribunals like this Tribunal where the Commission has a screening role.

[110] In this ruling, I am considering the remedial implications of Mr. Gordon's inclusion as a named respondent. Mr. Gordon's involvement as a party is for purposes of the complaint in its entirety because Ms. Peters' requests that Mr. Gordon be responsible for all compensatory remedies jointly with UPS respecting both discriminatory practices pursuant to section 7 and section 14 of the CHRA.

[111] The other UPS employees who engaged in discriminatory practices contrary to section 7 of the CHRA are not named respondents. Ms. Peters does not explain why Mr. Gordon should be ordered to pay compensation for discriminatory practices pursuant to section 7 of the CHRA. Ms. Peters does not explain, in general, why Mr. Gordon should be ordered to pay damages personally along with UPS, or why Mr. Gordon should potentially be held severally liable for all compensation, should UPS be unable to pay. (I appreciate that the latter is a theoretical point, there being no suggestion that UPS would be unable to pay compensation). Ms. Peters did not seek to have the managers or other employees who engaged in disability-based discrimination named as parties so that she could ask the Tribunal to make an order against them personally, jointly and severally, for payment of compensation.

[112] Ms. Peters' difference in approach to potential individual respondents in this case may be explained by her extensive contact with Mr. Gordon and her (understandable) emotional reaction to his conduct as her harasser. As well, in an employment context, decisions that are discriminatory and harmful are sometimes made by a manager or corporate officer without the employee being informed of the identify of the person who is

the perpetrator or origin of the decision. That happened in this case when someone decided that UPS had no obligation to communicate with Ms. Peters about her employment status after she began medical leave. In contrast, Mr. Gordon's conduct was obvious to Ms. Peters and their acrimony personal.

[113] It is probable that Ms. Peters wanted Mr. Gordon to be a named respondent because he engaged in a culpable manner with her through the harassment she experienced. Perhaps Ms. Peters perceived that Mr. Gordon's acts were intentionally harmful, and the acts of other employees were not. However, I did not have the impression from her testimony that Ms. Peters thought that the actions of anyone at UPS had been unintended.

[114] In any event, how conduct should be characterized is to be determined by the Tribunal, not a party. In the Liability Decision, the Tribunal found that other managers or employees engaged in acts and omissions that were also culpable. They were not always identified or called as witnesses. But their acts and omissions led to the finding of a discriminatory practice by the Tribunal too, contrary to section 7 of the CHRA.

[115] All discriminatory practices under the CHRA are equally prohibited. There is nothing in the CHRA to suggest that greater individual culpability attaches to some discriminatory practices or to harassment specifically, more than other discriminatory practices. How harmful an act or omission is, is contextual and fact specific in each complaint. The discriminatory practices in sections 5-14.1 are defined as such by the CHRA without any suggestion that one is inherently worse than the other. There is nothing elsewhere in the CHRA to suggest that Parliament intended that harassment be perceived as worse or different than other discriminatory practices defined in the legislation.

[116] Some of the acts and omissions that constitute the discriminatory practices engaged in by other UPS employees based on disability appear purposeful and to have elements of culpability, although the acts and omissions occurred within the parameters of their authority as employees. For example, to the extent that UPS employees portrayed her to the short term disability insurer as a problematic employee, these employees provided negative, biased information to the short term disability insurer about Ms. Peters. In the Liability Decision, I found that UPS's communications about the cause of Ms. Peters' mental health

issues likely led to a perception by the insurer that Ms. Peters' explanation was not genuine and thereby impugned her credibility as an applicant for benefits. UPS's communications in this regard were not accidental. These statements by UPS employees were intentional. After these communications occurred, the short term disability insurer concluded, despite the medical evidence it had to the contrary from Ms. Peters, that her need for medical leave was not medically supported, when it was. At the same time the insurer denied her claim on the basis that her disability was caused by harassment in the workplace. Such negative communications were predictably likely to be harmful to Ms. Peters' interests in receiving benefits and do appear to have interfered with her receipt of benefits because they were denied by the insurer. The argument can be made that UPS employees attempted to interfere with Ms. Peters' receipt of short term disability benefits. In any event, the point is that the conduct of these UPS employees appears to involve elements of culpability.

[117] Some of the other acts and omissions of UPS employees were discriminatory based on disability and led to adverse impacts on Ms. Peters. The involved UPS managers and employees either made a standalone decision to not reach out to Ms. Peters at all, although UPS was in possession of a medical note from a physician putting her off work for medical reasons related to issues at work, or failed to do so or perhaps followed some undisclosed internal policy to not reach out to her. No matter the reason, they refused or failed to find out how Ms. Peters was, to inquire about her health status or her intentions to return to work, or to have anything further to do with her. I found that this was an ongoing discriminatory practice in the circumstances.

[118] As well, Mr. Ghanem disregarded her medical note and other UPS employees sent a 72-hour notice letter to Ms. Peters unilaterally informing her that, if she was not back to work in a few days, she would be deemed to have given up her employment. These employees then failed to correct that letter. Those employees who participated in these omissions have some culpability for their discriminatory actions and attitudes. Yet they are immune from their culpability in this proceeding because they are not named respondents. They were not all called as witnesses or even identified by UPS. Some names of UPS employees simply appeared in the file relating to short term disability in notes and records of communications with the insurer.

[119] As I have pointed out, some discriminatory omissions by UPS managers and/or employees appear intentional. One or more of UPS's employees decided that UPS would not initiate further contact with Ms. Peters about her health, her complaint of harassment, or her return to work despite UPS's obligations as her employer to the contrary. The decisions made by these employees do not appear on the evidence to have been inadvertent or unintentional; UPS offered no evidence and did not suggest that these specific acts and omissions were unwitting mistakes or accidental omissions.

[120] I highlight the point that other employees of UPS discriminated against Ms. Peters contrary to the CHRA but are not at risk of being required to make compensatory payments to her personally to illustrate that there can be inconsistencies if it is assumed that the practice of naming individuals as parties before the Tribunal should be based on culpability.

[121] I emphasize that I provide these comments as context for the Tribunal's jurisprudence where the harasser is a named respondent and for this ruling. I do not intend to imply that every employee who has engaged in culpable conduct in relation to a discriminatory practice should be a named respondent in a complaint pursuant to the CHRA. The Tribunal's proceedings would, in many instances, grind to a near halt if this were the case due to the added complexity this would create for complaints.

IX. Tribunal's Jurisprudence When Employer and Harasser are Named

A. Context

[122] To recap, in cases that do not involve harassment, there is no practice before the Tribunal whereby both the respondent employer and the employee who discriminates are named respondents. The respondent employer is the named respondent. Section 65(1) of the CHRA has in all cases been interpreted by the Tribunal as holding the respondent employer liable and therefore responsible for remedies instead of the employee who engaged in the discrimination.

[123] There is an inconsistent practice before the Tribunal with regard to naming both the respondent employer and the harasser/employee as respondents in harassment cases. The

Tribunal has not directly addressed this inconsistency. In this case, Member Mercer suggested that the Tribunal should engage in further analysis of the circumstances in which parties should be added in proceedings pursuant to the CHRA, recognizing that legislative schemes under human rights statutes can have significant differences and that the CHRA has its own relevant differences.

[124] The Tribunal's jurisprudence, as I will describe below, demonstrates a range of approach to awarding compensation once section 65(1) of the CHRA applies, a range that appears to be unfettered. This could confirm that the Tribunal does in fact possess this extent of discretion on this topic. However, I have explained why, in my view, there is a need for the Tribunal to clarify how section 65(1) of the CHRA applies to related respondents for purposes of sorting out its own statutory authority. This includes whether the provision permits the Tribunal to exercise such a range of discretion. This is especially so since the issue of how the Tribunal should interpret and apply section 65(1) when there are two named respondents in a harassment complaint has not yet been directly addressed by the Tribunal.

[125] The issue of how section 65 of the CHRA should be interpreted and applied is important to the legislative scheme in the statute. I stand by my stated concern about the inefficiencies of naming other potentially culpable employees as respondents. However, there is nothing in section 65 that limits its application to harassment cases. Section 65 applies to any act or omission committed by an officer, a director, an employee or an agent of any person, association or organization in the course of their employment in the context of a discriminatory practice pursuant to the CHRA.

B. "Instead Of"

[126] *Hunt v. Transport One Ltd*., 2008 CHRT 23 [*Hunt*] is an example of a case where a general manager and a dispatcher engaged in sexual harassment and the respondent employer was held responsible for remedies. The Tribunal noted the application of the language of section 65(1) of the CHRA to the complaint at para 37. The Tribunal did not suggest that the two harassers should be parties to be held responsible for remedies. It held at para 42:

> (42) For these reasons, I find that Transport One Ltd. did not exercise all due diligence to prevent the sexual harassment of Ms. Hunt and to mitigate or avoid the effects of it on her. Transport One Ltd. is, therefore, liable under s. 65(1) of the Act for the actions of Mr. Dibbley and Mr. Wadhwa.

[127] The Tribunal held the respondent employer alone responsible for remedies, including compensation for pain and suffering. *Hunt* and cases like it are consistent with the proposition that, because the employer is deemed to have committed the acts of the employees by section 65(1) of the CHRA, remedies should be ordered against the respondent employer "instead of" the harassing employees.

C. Jointly and Severally

[128] Compensatory awards have been made jointly and severally against both the respondent employer and the harasser, as Ms. Peters' requests, in a number of cases: see, for example, *Opheim v. Gagan Gill and Gilco Inc*., 2016 CHRT 12 [*Opheim*]. In cases where damages are awarded jointly and severally against the respondent employer and the employee, it appears that the Tribunal implicitly decides that the respondent employer should be held liable "in addition" to the harasser.

[129] With one exception, I could not find a complaint where the Tribunal made awards against related respondents jointly and severally based on having directly considered the statutory interpretation of section 65(1) of the CHRA and its application for purposes of responsibility for remedies. I do not find the cases that ordered compensation jointly and severally without that analysis persuasive.

[130] The exception is a complaint where the Tribunal engaged in a partial analysis of the issue: *Bouvier v. Metro Express*, 1992 Can LII 1429 (CHRT) [*Bouvier*]. This is a case where the Tribunal appeared poised to conclude that section 65(1) held the employer responsible for remedies instead of the harasser/employee. The Tribunal drew from the Supreme Court of Canada's decision in *Robichaud* where the Supreme Court of Canada determined in its reasons that the remedies available pursuant to the CHRA were the responsibility of the employer, before the addition of what is now section 65(1) to the CHRA. The Tribunal concluded at p. 38 as follows:

> All of the provisions of the Act relating to remedies deal with the employers' liability. Section 65 in particular, which expands that liability by creating a presumption, clearly provides that discriminatory acts committed by an employee of any person, association or organization shall be deemed to be an act committed by that person, association or organization.

[131] After referencing *Robichaud* in this manner, the Tribunal in *Bouvier* concluded that all the remedial provisions in the CHRA deal with the employer's liability. However, despite appearing about to apply *Robichaud*, the Tribunal did not hold the respondent employer fully liable. Instead, the Tribunal in *Bouvier* held both the respondent employer and the harassing employee jointly and severally liable for payment of compensation for pain and suffering, loss of income and interest. The Tribunal did not explain why it concluded that it could continue to hold the individual harasser responsible for remedies in addition to the respondent employer, given its assessment that the Supreme Court of Canada decided that remedies under the CHRA would need to be awarded against the employer in *Robichaud*. Further, the Tribunal in *Bouvier* did not engage in a contextual analysis of section 65(1) within the CHRA. Instead, it merely quoted the provision. Consequently, I do not find *Bouvier* to be persuasive on this point.

D. Owner/Operator Cases

[132] I mentioned above that sometimes exceptions are made by the Tribunal about who is responsible for remedies in harassment cases. These exceptions involve complaints with the following features: there is an owner/operator of the corporate respondent employer who is (obviously), as the operator, working for the respondent employer, the owner/operator is the person or one of the individuals found by the Tribunal to have engaged in harassment and there is a legitimate concern about whether the corporate respondent employer has the means to satisfy a compensatory award. These cases seem to involve small businesses where there are few, if any, employees beyond the owner/operator.

[133] Tribunal decisions that hold the owner/operator who is the harasser personally responsible do not explain the legal basis for doing so. I do not find them persuasive authorities for the Tribunal's statutory authority to order the owner/operator to pay compensation because of the lack of explanation for this approach.

[134] I can guess at a possible rationale that I would, in theory, find persuasive but it has little to do with section 65(1) of the CHRA. This “guess” has not been articulated in a case, to my knowledge, as the rationale.

[135] Owner/operators of a corporation are legally protected from personal liability for the acts of the corporation by the very existence of the corporation, which serves as a legal shield. Therefore, they would not typically be held personally responsible. In those situations where the Tribunal has awarded remedies against the owner/operator, the Tribunal has found that the owner/operator personally engaged in the harassment, the respondent employer is liable for the harassment engaged in by the owner/operator pursuant to section 65(1) of the CHRA but that the respondent employer is no longer operating or is bankrupt and unlikely to pay any compensation awarded against it. In these circumstances, it seems that, without saying so, the Tribunal has implicitly decided to pierce the corporate veil and hold the owner/operator personally responsible for the acts and omissions of the corporate employer. (I note that the corporate employer’s responsibility in these cases mirrors the owner/operator’s own acts and omissions as an employee, and, where applicable, may include the acts of other employees). In these situations, the Tribunal has treated the owner/operator of the respondent employer as if they stand in the shoes of the respondent employer. The owner/operator may appear to become responsible for remedies in addition to the respondent employer, but the owner/operator is really being held responsible for the respondent employer. This approach appears to align with piercing the corporate veil, although it has not been identified by the Tribunal as such.

[136] In any event, this approach to securing a remedy against an employee cannot be authorized by section 65(1) of the CHRA. Section 65(1) holds the corporate employer responsible for the acts and omissions of its harasser/employee, not the other way around.

[137] In these owner/operator cases, the Tribunal takes an opposite approach to what section 65(1) mandates. Any exception to the way remedies are awarded by the Tribunal in these cases cannot have been authorized by the application of section 65(1) of the CHRA. Section 65(1) is only applicable at the point of the analysis where the Tribunal finds that section 65(1) applies to the respondent employer and that the respondent employer is, therefore, responsible for the acts and omissions of its employees. The issue of whether an

owner/operator should be responsible for the corporate employer is a separate issue and it must be primarily unrelated to the Tribunal's authority pursuant to section 65(1), given what section 65(1) states.

[138] The Tribunal has awarded compensation against the owner/operator/harasser and the respondent employer jointly and severally. In part, *Bilac* is an example of such a result, although an amount was awarded against a harassing employee personally who was not the owner/operator, as well. However, respecting the respondent employer, first, the respondent employer was held liable for the harassment conducted by its employees because of section 65(1) of the CHRA. At para 130, the Tribunal stated, "[p]ursuant to section 65(1), I find that the discriminatory harassment conducted by Ms. Abbey when she was an employee of NC Tractor and by Mr. Currie when he was the owner of NC Tractor, are deemed to be discriminatory acts conducted by NC Tractor itself." The Tribunal then concluded that the respondent employer was unlikely to pay compensation for which it was responsible. On this basis, the owner/operator, Mr. Currie, was held responsible for the respondent employer's remedies as well as the respondent employer being held responsible. The Tribunal did not identify that it was piercing the corporate veil, but it took an approach consistent with this likely being the rationale when it found the respondent employer to be responsible for the compensation ordered but then ordered that the respondent employer and the owner/operator were responsible for payment of all compensation that was found to be the responsibility of the respondent employer.

[139] With the greatest of respect, I am not persuaded by the result in *Bilac* at para 195. The complainant requested that the compensation awarded be divided into percentages. The Tribunal awarded 80% of the compensation pursuant to section 53(2) of the CHRA against the respondent employer and the owner /operator. It held Ms. Abbey personally responsible to pay the remaining 20% of that compensation. The Tribunal does not explain why section 65(1) does not apply to that specific award. Accordingly, while I understand that the Tribunal found that Ms. Abbey engaged in culpable behaviour, I am not persuaded by this aspect of the remedial decision. However, I am persuaded by the apparent rationale that an owner/operator should be responsible when the respondent employer is unable to pay the compensation awarded.

[140] In these owner/operator cases where there is an inability of the respondent employer to pay, the analysis follows a sequence. The Tribunal takes specific action to secure an effective remedy after finding that section 65(1) of the CHRA applies to the respondent employer and after concluding that the respondent employer is, therefore, responsible for the acts and omissions of its employees (including the owner/operator). The issue the Tribunal really addresses next is the inability of the respondent employer to pay, and, where an owner/operator is available to do so, ordering that result, as well. However, cases where the Tribunal makes exceptions to address impecunious corporate employers may be distinguished and do not resolve the issue respecting the Tribunal's authority in this ruling.

E. Severally Only

[141] In other cases, the Tribunal has held that a section 65(2) defence is not available to the respondent employer and/or it has found that section 65(1) applies to the respondent employer, as happened in *Hunt*. However, the Tribunal has not held the respondent employer responsible for the compensation awarded for the discrimination engaged in by its employee.

[142] In some cases, despite finding that section 65(1) of the CHRA applies, the Tribunal has ordered a separate compensatory award against the harasser and a separate award against the respondent employer without explaining how it can, or a separate award against the harasser alone. The Tribunal appears to proceed as if it is free to not apply section 65(1) of the CHRA. I do not see how this is correct unless the provision has no application to the complaint.

[143] *N.A. v. 1416992 Ontario Ltd. and L.C.*, 2018 CHRT 33 (Can LII) [*N.A.*] is an example of the Tribunal proceeding in a manner inconsistent with section 65(1) of the CHRA in various ways. The Tribunal ordered separate awards of compensation against the respondent employer and the harassing employee for pain and suffering, and for wilful and reckless conduct. The Tribunal awarded these amounts separately; the Tribunal did not recognize that the respondent employer and the harassing employee were related

respondents by reason of the application of section 65(1) or identify that section 65(1) had any impact on how compensation was awarded in that case.

[144] The Tribunal did not intend to share responsibility for payment between the respondents. This fact is apparent from the amount of the awards of compensation. The Tribunal awarded the maximum allowable amount of $20,000 for wilful or reckless conduct under the statutory caps pursuant to section 53(3) separately against each respondent for a total of $40,000. These awards would not be permissible under the statute unless they were each separate awards. (See for additional implications the Ruling on Separate Damages Against the Respondent Employer for discussion of *N.A.* and the Tribunal's conclusion that it does not have the authority to make a separate award against the employer for its own conduct under the CHRA.) The Tribunal in *N.A.* engaged in no analysis of its authority to issue separate awards against related respondents. The Tribunal in *N.A.* did not explain why it concluded that it had the authority to award separate damages against the harasser/employee that were not also the legal responsibility of the respondent employer, despite finding that section 65(1) of the CHRA applied. Nor did the Tribunal explain why it declined to require the respondent employer to pay all compensation awarded instead of the harasser, as was the case in *Hunt*. And it did not explain why it did not decide to award these damages jointly and severally, as in *Opheim*.

[145] When it came to awarding compensation for lost wages, the Tribunal in *N.A.* changed course, it appears, within its reasons, and with respect, without a transparent reason. The Tribunal indicated that the respondents would share responsibility for lost wages. This seems to suggest that damages were going to be awarded jointly. However, the Tribunal ordered the respondents to "share" responsibility by each being separately liable for 50% of the total loss of wages. That is not, with respect, what joint liability is. That is apportionment of liability as between two legally separate respondents.

[146] The application of section 65(1) of the CHRA, which holds the employer liable for its employee, was effectively ignored by the Tribunal in *N.A.* The Tribunal created two smaller awards for loss of wages for which each respondent was severally (and solely) liable. This is not the obvious effect of section 65(1) of the CHRA when it applies or certainly was not explained by the Tribunal. Because each respondent had a separate order made against

them for their half of the lost wages, the potential “joint” or “shared” responsibility aspect of the award was nullified. In *N.A*., the Commission had specifically requested that compensation for lost wages be awarded jointly and severally against the employer and the harasser. The Tribunal did not explain why it rejected this request.

[147] The Tribunal did not address its failure to apply section 65(1) of the CHRA to the complaint. It did not reconcile its different approaches to making awards against the parties as between awards. The Tribunal in *N.A.* appears to implicitly conclude that it has an unfettered discretion to determine how to assign responsibility for remedies irrespective of section 65(1) of the CHRA. I am not persuaded that N.A. should be followed as an authority respecting how section 65(1) of the CHRA applies to a sexual harassment complaint. In my view, with respect, *N.A.* is an example of a case that demonstrates why the interpretation and application of section 65(1) requires specific analysis by the Tribunal. Parties to complaints before this Tribunal need to know what to expect and are entitled to consistency on a transparent basis.

[148] The Tribunal has been selective in other ways in other cases, awarding some remedies against either the respondent employer or the harasser but not the other. In *Naistus v. Chief*, 2009 CHRT 4 (Can LII) [*Naistus*] at para 117, having found that the respondent employer had not established a section 65(2) defence, the Tribunal ordered the respondent employer to compensate the complainant for all lost wages as a result of the conduct of the harasser. This aspect of the award is consistent with *Hunt*. In this regard, the Tribunal attached responsibility to the respondent employer for lost wages instead of the named harasser. Further, at para 126, the respondent employer was likewise ordered to pay compensation for pain and suffering. However, at para 122, the Tribunal’s approach to how section 65(1) applies changed without explanation. Only the harassing employee was required to pay damages for wilful or reckless conduct; the employer was not held responsible or jointly and severally responsible for this award. The Tribunal’s reasons do not explain why it implicitly decided that section 65(1) did not apply to compensation for wilful or reckless conduct of an employee pursuant to section 53(3) of the CHRA. There is nothing in section 65(1) or 53(3) of the CHRA that exempts the employer from liability for the wilful or reckless conduct of its employee.

[149] In *Cassidy v. Canada Post*, 2012 CHRT 29 (Can LII) [*Cassidy*], the Tribunal again appeared to not fully address the role that section 65(1) of the CHRA plays in relation to remedy. The Tribunal made a procedural decision about two complaints that significantly impacted its later selection of which respondent was responsible for payment of compensation without considering the application of section 65(1). The two complaints, one against the harasser and the other against the respondent employer, were filed with the Commission. A complaint of retaliation was added against the harasser. The two original complaints arose out of the same alleged acts of discrimination. The Tribunal decided to hear the three complaints together, which was appropriate. However, it is apparent from the results that the Tribunal did not substantively consolidate the complaints because it did not apply section 65(1) when it decided remedies.

[150] This appears to have been a change in course. When the Tribunal addressed the complaint against the respondent employer, it expressly stated that it was considering section 65(1) in relation to the harasser's conduct, at paragraph 180. In fact, the Tribunal in *Cassidy* found that the employer was unable to establish a due diligence defence pursuant to section 65(2) of the CHRA, at para 184. This result should have led the Tribunal in *Cassidy* to find that section 65(1) applies to the respondent employer as required by section 65(1) of the CHRA and therefore led the Tribunal to conclude that the respondent employer is liable for the acts of the harasser/employee. However, in awarding compensation, the Tribunal treated the complaints as if they were separate, as if both respondents were unrelated by section 65(1) of the CHRA. The Tribunal did not hold the respondent employer liable for the harassment committed by its employee, and the Tribunal did not clearly explain why it did not. The Tribunal did not openly consider section 65(1) in its reasons when it assessed responsibility for remedies. What are omissions in analysis, in my view, may have occurred because the complaints were not considered by the Tribunal to be fully substantively consolidated. However, if the Tribunal did in fact consider the implications of its decision to not treat the cases as consolidated, it did not say so or explain why section 65(1) did not apply.

[151] In the result, the respondent employer was required to pay a separate amount of compensation for pain and suffering for the separate complaint against it about its own

conduct in response to the harassment. [As noted, I respectfully disagree that the Tribunal has the jurisdiction to award damages against a respondent employer for wrongful conduct that is not a discriminatory practice pursuant to the CHRA: Ruling on Separate Damages Against the Respondent Employer.] The harasser/employee was ordered to pay separate amounts for the complaints against him and the employer was not held responsible for these amounts despite the anticipated application of section 65(1) of the CHRA because there were named related respondents.

[152] The Tribunal's apparent decision to treat the complaints as separate complaints appears to have effectively nullified the application of section 65(1) to the respondent employer. The Tribunal does not acknowledge this or that its procedural decision effectively relieved the employer of responsibility for the harasser's conduct. This is the only way I can account for the fact that the Tribunal recognized the relevance of section 65(1) at the outset of its analysis but then failed to apply the section to the case.

[153] This is not without consequence; section 65(1) holds a place of importance within the legislative regime. As a result, the Tribunal unnecessarily and arbitrarily limited the complainant's ability to recover damages from the respondent employer. The Tribunal's decision created the risk that, if the harasser were unable to pay the ordered compensation, the complainant would be left without recourse to an effective remedy for the complaints made against the harasser. This is the problem that the Supreme Court of Canada tried to fix in *Robichaud*.

[154] In *Cassidy*, the Tribunal also ordered an award of compensation for wilful or reckless conduct only against the harassing employee. The Tribunal concluded that the respondent employer had not engaged in wilful or reckless conduct. The Tribunal failed to address why the respondent employer was not liable for the wilful or reckless conduct of the harasser pursuant to section 65(1) of the CHRA.

[155] Likewise, beginning at paragraph 179 in *Cassidy*, compensation was awarded against the harasser for retaliation, but not against the employer. The Tribunal noted that the retaliation complaint was only against the harasser. The Tribunal failed to reconcile this result with the fact that it was hearing all of the complaints, that the employer was a named

respondent and could have been held responsible for the retaliation complaint but for the fact that the Tribunal chose to treat the complaints as separate, as a procedural matter. Again, the Tribunal does not appear to have considered that its procedural decision had the effect of circumventing part of the legislative scheme in the CHRA concerning section 65(1) which holds the employer liable for the acts of its employee, including in respect of retaliation. I am not prepared to follow cases where the Tribunal has failed to acknowledge or address section 65(1) of the CHRA.

F. Conclusion From Tribunal Jurisprudence

[156] These cases demonstrate the extent of the Tribunal's differing approaches to the assignment of remedies when both the respondent employer and the individual harasser are named respondents in a harassment case. It is not necessarily the case that compensation is ordered jointly and severally against related respondents. One could even conclude from some of these cases that the Tribunal is not required to apply section 65(1) of the CHRA, a proposition with which I, respectfully, strongly disagree.

[157] At the outset, I pointed out that the range of approach in the Tribunal's jurisprudence could lead to the conclusion that the legislative scheme in the CHRA bestows a broad range of authority and discretionary options on the Tribunal about how it interprets and applies section 65(1) for purposes of responsibility for payment of compensation in each case. However, none of the cases cited reach this conclusion expressly, none have engaged in analysis of whether remedies should be awarded jointly and severally or determined the extent of the Tribunal's underlying authority and discretion in awarding remedies when section 65(1) applies. The Tribunal has not consistently applied section 65(1) of the CHRA. There has been no detailed consideration by the Tribunal of how to interpret and apply section 65(1). The cases do not explain how the Tribunal has the statutory authority and discretion to issue separate awards against the harassing employee while not finding the employer liable instead pursuant to section 65(1) or jointly and severally liable for that same compensation along with the harassing employee.

[158] For these reasons, I am not persuaded that I can draw any specific conclusions overall from the Tribunal's jurisprudence where the respondent employer and the harasser are both named respondents.

X. Interpreting the CHRA

[159] For these reasons, involving both the ambiguity in the wording of section 65(1), and the mixed approaches by the Tribunal, it is necessary to clarify the interpretation and application of section 65(1) to related respondents to determine whether the section impacts how compensation may be awarded. In short, how does section 65(1) of the CHRA apply to related respondents?

[160] While discussed in the Related Rulings, the proper approach to statutory interpretation was eloquently explained by the Supreme Court of Canada in *Schrenk* at paras 30-32. I rely on these explanations. The issue in this ruling is to be resolved based on the language in section 65(1), with consideration given to the context provided by other relevant provisions in the CHRA, the legislative scheme of the CHRA, the purpose of the legislation and any case law that is binding on the Tribunal.

A. Mandatory Application to the Employer

[161] Above, I explained my expectation that section 65(1) makes the respondent employer liable and therefore responsible for remedies, including compensation, when it applies, whether "instead of" or "in addition to", the respondent employee. Because not all Tribunal decisions have held the respondent employer responsible for all compensatory awards on at least a shared basis with the harasser, I have concluded that this point requires further clarification.

[162] The wording of section 65(1) is that "[s]ubject to subsection (2), any act or omission committed by an officer, a director, an employee or an agent of any person, association or organization in the course of employment of the officer, director, employee or agent shall, for the purposes of this Act, be deemed to be an act or omission committed by that person, association or organization." [Emphasis added.] I The key point of section 65(1) of the CHRA

may be paraphrased as, “any act or omission of an employee in the course of their employment shall be deemed to be an act or omission committed by the employer.”

[163] I underline the words “shall, for the purposes of this Act” in section 65(1) above. The word “shall” is mandatory in nature. There is nothing in the language of what is now section 65(1) (formerly section 48(5)) to indicate that “shall” is, in fact, intended by Parliament to be read as “may”. The Tribunal can be quite certain that Parliament added what is now section 65(1) to the CHRA to remove any doubt that the respondent employer is required to be responsible for remedies because the Supreme Court of Canada identified and addressed the ambiguity in the CHRA respecting the employer’s liability for its employees in *Robichaud* and explained that this led to the amendment. The Supreme Court of Canada has decided why the CHRA was amended to include what is now section 65.

[164] Parliament could have used the word “may” in section 48(5) [what is now 65(1)] because it would also make sense, in theory, to bestow discretion on the Tribunal to make a choice. But Parliament did not use that language. Parliament must be presumed to have chosen the word “shall” intentionally.

[165] Accordingly, the word “shall” results in the mandatory application of section 65(1) of the CHRA to all respondent employers and thereby creates mandatory liability, and, as a result, mandatory responsibility for all remedies that may be granted by the Tribunal pursuant to the CHRA against an employer, unless section 65(2) applies.

[166] This conclusion can be stated with confidence, as well, because of the wording “for the purposes of this Act” in section 65(1). “For the purposes of this Act” makes the point that section 65(1) applies to the CHRA in its entirety.

[167] Accordingly, section 65(1) should be treated by the Tribunal as part of the fabric of the CHRA and relevant to the overall application of all of its provisions in cases where the “person” allegedly engaged in discriminatory acts or omissions “in the course of employment”, as the Supreme Court of Canada has interpreted that phrase. The wording, “shall, for the purposes of this Act” confirms that the Tribunal has no authority to exclude the respondent employer from a finding of liability when section 65(1) applies. Because of the mandatory nature of section 65(1) when it applies, the Tribunal does not have any discretion

about whether it awards compensation against a respondent employer. Given this statutory language, in my view, those Tribunal cases that fail to apply section 65(1) of the CHRA to the respondent employer, when section 65(2) does not apply, are not pervasive authorities on the subject of how the Tribunal's authority and discretion should be exercised to award remedies.

[168] In this regard, I return to my earlier point that I cannot agree with the Tribunal's decision in *Cassidy* to not award damages against the respondent employer. I add that, from review of the Tribunal's reasons in *Cassidy*, the employer persuaded the Tribunal that it did not intend to breach the CHRA. Intention to discriminate is not required pursuant to the CHRA.

[169] This is a key point in this ruling. The respondent employer in *Cassidy* may not have engaged in discrimination directly through its managers or officers, but its employee did engage in harassment. The respondent employer's responsibility pursuant to the CHRA is created by section 65(2) and requires the employer to protect the workplace environment from discrimination and to prevent and mitigate discrimination, including harassment in the workplace. The respondent employer in *Cassidy* failed to meet that responsibility with the result that section 65(1) applied, yet the Tribunal did not apply section 65(1), despite its mandatory application to the employer. In my opinion, the respondent employer's lack of intention is not relevant to the application of section 65(1) of the CHRA. In my view, the Tribunal in *Cassidy* erred in its decision to not award any damages against the respondent employer due to a lack of intention to discriminate by the employer. The mandatory application of section 65(1) does not depend on whether the employer intended to discriminate.

[170] I can think of no basis to exclude the respondent employer from responsibility for payment of compensation awarded by the Tribunal, even if there is an issue about whether the respondent employer can satisfy the award. Even if it is quite certain that the respondent employer will not be able to pay, ordering the award of compensation against the respondent employer still holds symbolic value for the enforcement of human rights.

[171] The extent of my reasoning for disagreeing with *Cassidy* is recorded because it is relevant to the larger analysis of the issue in this ruling. To summarize the analysis to this point, the Tribunal does not have the authority to award compensation solely or severally only against an employee for conduct in the course of their employment when both the respondent employer and the harasser are named respondents and section 65(1) of the CHRA applies. The wording in section 65(1) of the CHRA covers any conduct of the employee "in the course of employment".

[172] At para 17 of *Robichaud*, the majority of the Court stated: "I would conclude that the statute contemplates the imposition of liability on employers for all acts of their employees 'in the course of employment', interpreted in the purposive fashion outlined earlier as being in some way related or associated with the employment." In *Robichaud*, the Supreme Court of Canada clarified that "in the course of employment" includes both authorized and unauthorized acts and omissions. Therefore, in every case where an employee engages in discrimination or a harasser harasses in the course of employment, and, in doing so, commits unauthorized acts, the respondent employer must be held liable and is responsible for remedies pursuant to section 65(1) of the CHRA. In these circumstances, depending on how section 65(1) is to be interpreted, the Tribunal is either to award compensation against the respondent employer instead of the employee, or, against the employer in addition to the employee. If it is the latter case, logically, said compensation must be awarded jointly and severally against both.

[173] In theory, an award may only be made by the Tribunal against the employee alone when the respondent employer successfully establishes a defence pursuant to section 65(2) of the CHRA. In that circumstance, and that circumstance alone, any compensation that is appropriate for the Tribunal to award pursuant to section 53 of the CHRA may be awarded solely against a named individual respondent where appropriate. I will return to address this aspect of the ruling below, including what compensation may be appropriate to award against a named individual respondent when section 65(2) applies.

B. The Wording of Section 65(1)

[174] To paraphrase section 65(1) again for ease of reference, “any act or omission by an employee of any employer in the course of their employment shall, for the purposes of this Act, be deemed to be an act or omission committed by that employer”. On its face, it seems simple: the acts of the employee are deemed to be committed by the employer.

[175] Several portions of the statutory language in section 65(1) have been judicially considered. We know what “person” means in section 65(1); “person, association or organization” is contextual but always includes the employer of the employee by reason of the words that follow, “in the course of employment”. The words reflect the fact that an individual may be an employer and, as well, that pursuant to section 35(1) of the *Interpretation Act*, RSC 1985, c I-21, “person” includes corporations such as an employer. I point out that this wording identifies to whom liability attaches when section 65 (1) applies. This is a different issue than how broadly the term “in the course of employment” should be interpreted, which has been the subject of judicial decisions.

[176] As explained above, the term “in the course of employment”, that appears in what is now section 65(1) of the CHRA, was considered by *Robichaud* but in the context of section 7(b) of the CHRA, which is one of the provisions in the CHRA which protects the work environment from discrimination. Section 7(b) includes the language that: “It is a discriminatory practice, directly or indirectly …(b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.” In *Robichaud*, Justice La Forest defined the term “in the course of employment” in section 7(b) as meaning “work or job-related” and “as being in some way related or associated with the employment” at paragraphs 12 and 17. As also noted, the words “in the course of employment” are used again in what is now section 65 of the CHRA. It is presumed that words in a statute mean the same thing when they are used in different provisions of the same legislation, unless something in the context indicates otherwise. In my view, *Robichaud* effectively decided what “in the course of employment” means in section 65(1) when it decided what the term means for section 7(b) of the CHRA.

[177] Accordingly, in the context of this complaint, section 65(1) should be read as stating: "…any act or omission committed by Mr. Gordon, and by any of the other involved officers and employees of UPS, in some way related or associated with their employment shall, for the purposes of this Act, be deemed to be an act or omission committed by UPS." As I explained above, the meaning of the descriptors within section 65(1) is settled law.

C. Section 65(1) is a Deeming Provision

[178] This is to point out that the key operative word remaining in section 65(1) of the CHRA is "deemed". The meaning and effect of this provision does not appear to have been considered or determined by a court for purpose of the CHRA. The lack of direct consideration of the word "deemed" in section 65(1) of the CHRA is a significant point in these reasons. The word is required to be considered. The fact it has not been considered by the Tribunal is a key reason why I am not persuaded by Tribunal jurisprudence that applies section 65(1) of the CHRA to a complaint, having not considered the meaning and effect of this word.

[179] The word "deem" is a legal term. It can be used to change facts from what they are in reality to something else. The word "deemed" can also be used to change the application of legislative provisions so that the provision applies in ways the provision would not otherwise apply. [For information regarding the definitions of "deem" used in different statutory and regulatory contexts, see https://www.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/legistics/p1p5c.html, which is a webpage of the Department of Justice for Canada concerning deeming provisions in federal statutes.] The two purposes of a deeming provision to which I refer in this paragraph as examples are taken from this description of the use of deeming provisions in federal statutes because they are relevant here.

[180] Of the available definitions of "deemed", I find the most applicable to be an intent to change the facts. This is because section 65(1) deems the acts or omissions of the person who engaged in a discriminatory practice (as defined by the applicable definition of discriminatory practice in sections 5-14.1 of the CHRA) to be the act or omission of the respondent employer. Changing the facts about who committed the acts or omissions in

question changes the facts about who committed the discriminatory practice. The “person” who committed the acts and omissions becomes the employer. As a deeming provision, section 65(1) of the CHRA requires (by use of the word “shall”) that any act or omission committed by Mr. Gordon, and by any of the other involved officers and employees of UPS, in some way related or associated with their employment with UPS, be deemed to be an act or omission committed by UPS for purposes of the CHRA.

[181] This highly relevant factual change when section 65(1) applies is key to the application of provisions in the CHRA concerning remedies such as section 53(2). The change in the fact of who committed the acts and omissions in turn changes the application of these legislative provisions so that they apply differently than they otherwise would. Whomever engages in the discriminatory acts and omissions engages in a discriminatory practice. By deeming the facts about who committed the acts and omissions that are discriminatory to be changed to the employer, section 65(1) effectively deems the employer to have committed the discriminatory practice. This means that the “person” in section 53(2) who is found to have engaged in the discriminatory practice becomes the employer.

[182] In other words, the deeming provision in section 65(1) changes not only the facts but changes the application of section 53(2) from the employee to the respondent employer. [I will continue the analysis of section 53(2) below when I consider how section 65(1) and section 53(2) should be interpreted together when both are applicable.] In short, section 65(1) of the CHRA not only changes the facts but also changes the application of legislative provisions such as section 53(2) that are related to section 65(1) so that they apply in ways that they would not otherwise apply but for the application of section 65(1).

[183] It seems clear that Parliament intended that section 65(1) would have further effect within the legislation. As a deeming provision, section 65(1) states that it applies “for the purposes of this Act.” The employer becomes the person who committed the discriminatory practice for all purposes in the CHRA by reason of the deeming effect of section 65(1) of the CHRA.

[184] To put it another way, the Tribunal assigns liability in a complaint based on who engaged in the acts or omissions that give rise to a discriminatory practice and thereby the

legal liability under the CHRA. Section 65(1) of the CHRA expressly targets liability by changing the very facts on which liability is required to be assigned by the Tribunal.

[185] The wording of the provision is not that the employer is deemed to be responsible for the acts and omissions of the harasser/employee or for the liability of the harasser/employee but rather that the discriminatory act or omission is deemed to be committed by the employer. The impact on liability is unavoidable and complete. Liability is fully transferred from the employee to the employer by the simple reason that the facts about who committed the discriminatory practice are changed. There is nothing in section 65(1) to permit an alternate interpretation that both employee and the employer are deemed to have committed the acts and omissions and therefore both committed the discriminatory practice.

[186] This initial impression of the effect of section 65(1) of the CHRA is reinforced by the wording in section 65(1) that “any” act of an employee is deemed to be “an” act committed by the employer. The words “any” act and “an” act in section 65(1) seem to indicate that anything - from multiple discriminatory acts to a single act of an employee – related to employment, is deemed to be committed by the employer. This wording is consistent with a complete factual change regarding who committed the acts and omissions and thereby the discriminatory practice, which is consistent with the fulsome transfer of liability to the employer, without remainder in the employee.

[187] I use the word “transfer” as opposed to “adding” the employer as a liable party because the “deeming” action required by section 65(1) is that the discriminatory act is deemed to be “committed by” the employer. The words “committed by” likewise appear to convey an intention by Parliament to substitute the employer for the employee as the statutory actor.

[188] Section 65(1) of the CHRA does not appear to make the employer an additional person who commits the discriminatory practice, who would also be liable as a result. Because section 65(1) factually changes “the person” who engaged in the discriminatory practice and thereby changes to whom liability attaches, section 65(1) does not appear to increase the number of liable parties. Section 65(1) does not appear to increase the number of compensatory awards that the Tribunal may make.

[189] Parliament could have chosen to have what is now section 65(1) expressly indicate that the employer is deemed to have committed the discriminatory practice, as well as the employee. But there is no wording in section 65(1) of the CHRA implying that both the employer and the employee commit the discriminatory act or that the employer's liability is added to the liability of the employee.

[190] Parliament did not make any further changes to what is now section 65(1) of the CHRA or elsewhere in the legislation to adjust the result of the deeming provision, once section 65(1) applies, to indicate that the employee remains the person found to have engaged in the discriminatory practice and is liable too. If Parliament intended to change factual reality for the employer, which is the effect of the deeming provision, but keep it the same for the harasser/ employee, I would expect to see some indication of that in the wording of the CHRA.

[191] The most that can be said about the extent that section 65(1) maintains the personal liability of the harasser/employee is that section 65(1) is silent about what happens to the liability of the individual employee who committed the act or omission when the provision applies. But this is silence after section 65(1) changes the facts.

[192] As well, section 65(1) exists in the context of the CHRA which does not prohibit any person from being named a respondent, but it is left to the Commission and to the Tribunal in its discretion to decide who the parties to a complaint are (and, in any event, there are assorted reasons why parties are named respondents). As I explained, being a named respondent in a successful complaint alone does not require or necessarily lead to it being appropriate for the Tribunal to issue a remedial order. The inclusion of a named respondent requires the Tribunal to engage in consideration of the relevant issues.

[193] I also considered that there may be cases where there is a compelling argument that the harasser should be held personally responsible, even if their employer failed to meet its obligations to try to prevent harassment in the workplace and will be held responsible pursuant to section 65(1) of the CHRA. There are cases where a harasser engages in intentional and highly culpable conduct, which contributes to their degree of legal culpability and which, in relation to harassment, cannot be reasonably seen as part of their

responsibilities at work. But what could be a compelling argument in this regard still seems to contradict the wording in section 65(1) of the CHRA and the expressed legislative intent of Parliament to change who committed the discriminatory practice and to change who is liable, there being nothing stated in section 65(1) or elsewhere to make it remain the case that the harasser committed the discriminatory practice and nothing to indicate that both respondents have committed the discriminatory practice. The argument that the harasser should still be held personally liable truly is based on silence about what happens to the liability of the employee who engaged in the discriminatory practice when section 65(1) applies. I add the reminder that if section 65(1) does not apply, any person may be personally liable for discrimination, to underscore, once again, the significance of section 65(1) as a deeming provision. It is not as if a person/harasser cannot be personally liable for discrimination when section 65(1) does not apply. This is the result only when it does apply.

[194] Accordingly, the weakness of this alternate interpretation, whereby liability is expanded to the employer as the second respondent, as opposed to transferred to the employer, is that it is based only on silence in the statutory wording of section 65(1). I struggle to reconcile this interpretation with the deeming effect of section 65(1), the use of the words “committed by” in the provision and with the specification that this applies for purposes of the CHRA. In my view, the interpretation of actual wording in the CHRA should be given more weight than what is not stated.

[195] I considered whether section 65(1) by necessity implies that the employer is deemed to have committed the act of the employee “in addition” to the employee, rather than instead of. Content in a statute can be implied by necessity, which is usually apparent because the provision will not make sense when it is applied to a factual situation. However, as I explained at the outset, the Tribunal hears and decides many complaints where only the respondent employer is a named party. It is not inherently unreasonable for Parliament to intend that section 65(1) hold the respondent employer liable and thereby responsible for remedies instead of its employees. The same can be said about a decision to hold the harasser who is an employee personally responsible. It is open to Parliament to make that choice and decide which one it considers more reasonable than the other. The implication

that the employee is also required to remain liable and responsible for remedies such as payment of compensation is not required for section 65(1) of the CHRA to be read reasonably. This is especially the case since the legislative scheme of the CHRA is intended to ameliorate the harmful effects of discrimination, which *Robichaud* found requires the remedial involvement of the employer. The primary purpose of the CHRA is not to punish the wrongdoer.

[196] In the alternative, if I were to be persuaded that the silence of section 65(1) about its effect on the harasser/employee in fact speaks to the liability of that person remaining, I would still be compelled to conclude that the employee must share liability with the employer because of the mandatory nature of section 65(1). This alternative interpretation would be patently unreasonable on its face if it included retaining the separate personal liability of the employee, as this would ignore any deeming effect of the words of the provision. Section 65(1) does not create two separate sources of redress.

[197] There is another difficulty with interpreting the silence in section 65(1) about the individual respondent as permitting their personal liability. As explained above, Tribunal jurisprudence demonstrates that complainants sometimes try to hold harassers personally liable. In contrast, it would be rare, if it happens at all, that a complainant tries to hold an employee who is not a harasser personally liable. This is the approach that Ms. Peters took in this case to Mr. Gordon compared to other UPS employees. However, the desire of a complainant to hold a harasser liable does not change the most reasonable interpretation of the wording of section 65(1) of the CHRA, which the Tribunal is required to follow. I use the term “harasser/employee” deliberately throughout the remaining reasons as a reminder that the interpretation of section 65(1) of the CHRA in this ruling impacts all employees. The CHRA does not use the term “harasser” in section 65(1) or anywhere else, to justify a different approach as between a harasser and an employee in the interpretation of section 65(1) of the CHRA or elsewhere in the statute. There is only so much that the Tribunal can, in theory, read into the silence in section 65(1) about how it preserves and applies to the liability of employees, assuming it did. There would need to be some wording consistent with authorizing the Tribunal to treat harassment differently than other types of discrimination.

D. Recourse to Remedy

[198] I also have considered the interpretation of section 65(1) of the CHRA in light of the content and effect of section 65(2). As noted, Member Mercer recognized in an early ruling in this case that, if discrimination occurred, and if the respondent employer is able to establish a statutory defence pursuant to section 65(2), and the harasser/employee is not a named respondent, the complainant will be left without recourse to a remedy. This could arguably be a poor outcome to a complaint where harassment has occurred despite the fact that the employer did what they should to prevent, address and mitigate the harassment pursuant to section 65(2).

[199] I use the situation in *Schrenk* as an example of what else can happen. The employer went as far as to terminate the harasser, but that did not stop the harassment. Sometimes an errant employee may be uncontrollable, like the harasser in *Schrenk*.

[200] But this poor outcome does not entitle the Tribunal to interpret section 65(1) of the CHRA to find authority for itself to order remedies against the harasser/employee that is not apparent in the wording of this provision or the legislation. I cannot read words into section 65(1) that are not there.

[201] In this regard, I am cognizant that “instead of” may be viewed as a narrower interpretation of section 65(1) than “in addition to”, if it is assumed that it is always better to be able to hold more than one related respondent responsible for remedies. I am acutely aware that the courts have directed the Tribunal to give provisions in the CHRA as broad an interpretation as the words may reasonably bear, while respecting the words that Parliament included in the provision and respecting what it did not include. Section 65(1) does not include language to maintain the harasser/employee’s responsibility for remedies. As well, section 65 was added to the CHRA at a time when the Supreme Court of Canada considered it more reasonable to ensure that the employer was responsible for remedies to facilitate the effectiveness of the CHRA as remedial legislation. The Court did not consider its interpretation of the CHRA in this regard (without section 65) as too narrow.

[202] I point out that an interpretation of section 65(1) that holds the respondent employer liable for its employees does not have to increase the risk that the complainant will be left

without a remedy. The Tribunal's Rules of Procedure require disclosure of this type of information about a party's position or the respondent employer will not be able to rely on section 65(2) of the CHRA at the hearing, unless granted permission by the Tribunal. In my view, the parties and Tribunal can identify through the Statements of Particulars filed by the parties and in case management whether the respondent employer has an intention to rely on section 65(2) of the CHRA, as occurred in this case. If so, if appropriate, they can discuss whether the employer has a reasonably possible prospect of successfully establishing a section 65(2) defence. In that event, the harasser may be named as a respondent, and, if the Tribunal finds that section 65(2) applies to the complaint, the harasser/employee may be held personally liable.

[203] My, at this point, preliminary conclusion (subject to completion of the analysis) that section 65(1) of the CHRA transfers liability to the employer is not necessarily a narrow interpretation of the provision, or of the CHRA as remedial legislation. Perhaps the most obvious reason why is because so many complaints are brought solely against the respondent employer. There is no case law suggesting that this constitutes a too narrow interpretation of the CHRA or of the Tribunal's statutory authority, by unreasonably curtailing its remedial authority. Even the argument that any conclusion that section 65(1) of the CHRA transfers liability to the employer is a narrow interpretation of section 65(1) can only be made where both the employer and the harasser/employee are named respondents. When the employer is the named respondent, an interpretation of section 65(1) whereby the employer is liable instead of the employee is not presumed to be narrow in remedial effect. Even in the cases where there are related respondents, it cannot be assumed that this preliminary conclusion is a narrow interpretation of section 65(1) for purposes of access to remedies. Parties may be named as respondents for reasons that go beyond accessing a remedy.

[204] I am concerned about basing a conclusion about how section 65(1) should be interpreted on the fact that there is a practice in some cases before the Tribunal of naming the employer and the harasser too. That strikes me as allowing a procedural choice or practice to decide the interpretative question about how section 65(1) should be interpreted rather than allowing the words of the provision to do so.

[205] As noted, the Tribunal has also been directed in the case law not to make an interpretative finding based on wording that is not there. The most important rule of statutory interpretation is to have regard for the wording used in the provision. I find myself compelled to err on the side of interpreting section 65(1) based on the words that Parliament chose to include for this reason. In this regard, it seems clear that Parliament used a deeming provision in section 65(1) to change the reality of what happens when an employee engages in acts or omissions in the course of their employment for the purpose of providing the complainant with the safest and most effective access to remedies.

E. Distinguishing the Deeming Provision in *Daley*

[206] Before concluding this focus on the wording of section 65(1), I wish to return to address a comment made by the tribunal in *Daley* that contradicts my preliminary conclusion about the wording of section 65(1) and the effect of this provision as a deeming provision. The British Columbia Code contains section 44(2) which also uses the word "deemed" and holds the employer liable for its employees.

[207] In *Daley* the tribunal commented, albeit briefly, about section 44(2), explaining that section 44(2) makes corporate respondents liable for the acts of their employees at paragraph 48. In doing so, the tribunal commented about the state of the harasser/employee's liability when the employer is liable for those actions pursuant to section 44(2). It is to this comment in *Daley* that I wish to return:

> [Section 44(2)] fulfils several important Code purposes, as it both ensures that corporate and institutional respondents are legally responsible for the acts of their employees and other representatives, and that such respondents, who are most likely to be able to provide remedies under the Code, are obligated to do so. In this regard, s. 44(2) reinforces and gives statutory expression to the principles enunciated by the Supreme Court of Canada in *Robichaud v. Canada*, 1987 CanLII 73 (SCC), [1987] 2 S.C.R. 84, holding an employer liable for the unauthorized discriminatory acts of its employees. <u>It does not, on its face, render the employees and other representatives acting on their behalf free from personal liability.</u>
> [Emphasis added.]

[208] I highlight the comment that section 44(2), "…does not, on its face, render the employees… free from personal liability" given the issue in this ruling. I note that the tribunal

in *Daley* was careful to state, “on its face.” The tribunal did not proceed further to explain why it concluded that section 44(2) of the British Columbia Code would need to state that employees are free from personal liability for that to be the case.

[209] Perhaps the tribunal considered such express wording to be necessary because the legislative scheme of the British Columbia Code is one of direct access and the complainant is given the statutory responsibility to frame their complaint and name their parties. The tribunal seems to make an implicit assumption that complaints will be brought against the harasser, and that section 44(2) should be interpreted as supporting that approach.

[210] There is a reason for an implicit assumption in this regard because of a difference in the language of section 44(2) and the legislative scheme in British Columbia, compared to section 65(1) of the CHRA. The language in section 44(2) is not identical to section 65(1) of the CHRA. Section 44(2) of the British Columbia Code applies to the acts of an employee “within the scope of the person’s authority”. In other words, the employer is responsible for the acts of their employee that fall within their employment responsibilities. This wording allows for the personal liability of harassers to remain in complaints involving harassment because harassment is considered to be outside the scope of employment. This is in part why individual harassers are named as respondents in British Columbia. This is fundamentally different than section 65(1) of the CHRA which applies to all acts and omissions in any way related to employment, whether authorized or not: (see *Robichaud* above for the definition of “in the course of employment” in the CHRA at para 12).

[211] In any event, *Daley* did not consider the interpretation and application of the word “deemed” in section 44(2), whether it was significant that the word “deemed” was used and if so, what effect that word has. Accordingly, I do not consider *Daley* to be helpful in interpreting the statutory language and the effect of the deeming provision in section 65(1) of the CHRA. *Daley* is not a persuasive authority that section 65(1) must contain an express exclusion of the harasser/employee from liability to be interpreted as relieving employees from personal liability.

F. Summarizing My Preliminary Assessment of Section 65(1)

[212] By reason of section 65(1) of the CHRA as a deeming provision, the “person” who committed the act or omission, found by the Tribunal to be a discriminatory practice, is changed to the employer. That deemed factual change impacts how related remedial provisions such as section 53(2) should be interpreted. The “person” who committed the acts and omissions becomes the respondent employer. It follows that that it is the employer that committed the discriminatory practice.

[213] As this conclusion is based on the statutory wording of section 65(1) of the CHRA, if Parliament intended that this factual change was to have some other impact on related provisions such as section 53(2), some express or implied statutory direction would have been included n the CHRA to negate the effect of the factual change regarding who committed the discriminatory practice. If Parliament intended that section 65(1) would add the employer as a liable party and maintain the liability of the harasser/employee, while holding the employer liable for the discriminatory practice of its harasser/employee, there should be some indication in the wording of the statute that the harasser/employee continues to be considered to be the person who committed the act or omission that is the discriminatory practice after section 65(1) is found to apply or, if not that exactly, something to that effect.

[214] Instead, the statutory wording “deemed” and “committed by” in section 65(1) changes the facts. That express mechanism appears to weigh in favour of liability transfer over an alternative reading of the provision based on some implicit authority to proceed otherwise or based on silence.

[215] I emphasize that, at this stage of the analysis, I am primarily focussed on the wording of section 65(1) of the CHRA. My conclusions may evolve or change as other provisions in the CHRA and the case law are considered. However, it is my preliminary conclusion that, if Parliament intended that both respondents be considered by the Tribunal to have engaged in the same acts and omissions, I would expect section 65(1) to be worded differently. If Parliament intended that related respondents would share liability for remedies, it would have been a simple matter for it to say so. Based on statutory interpretation of section 65(1)

of the CHRA, it seems that Parliament intended the employer to become responsible for the discriminatory act “instead of” the employee, not “in addition” to the employee.

[216] I will re-assess my preliminary conclusion after considering section 65(1) of the CHRA in light of the wording of other relevant provisions in the CHRA such as section 4, section 53(2) and section 65(2) and then return to the decisions of the Supreme Court of Canada in *Robichaud* and *Schrenk* to complete their review.

G. Section 4

[217] Section 4 of the CHRA provides: “A discriminatory practice, as described in sections 5 to14.1, may be the subject of a complaint under Part III and anyone found to be engaging or to have engaged in a discriminatory practice may be made subject to an order as provided in section 53.” The Supreme Court of Canada in *Robichaud* pointed out section 4 in its analysis at p. 92. The Court noted that the provision states that anyone who is found to be engaging or to have engaged in a discriminatory practice may be made subject to an order under what is now section 53(2) of the CHRA.

[218] The Supreme Court of Canada did so in the process of considering whether there was authority in the CHRA to award remedies against the employer. The Court had the opportunity to find that section 4 conclusively authorized the Tribunal to award the remedies in section 53(2) against anyone found to have engaged in a discriminatory practice, and that this included the employer. In writing for the majority, Justice La Forest did not decide that remedies could be awarded against the respondent employer based on the wording of section 4.

[219] This is likely because section 4 does not fully address the issue of liability for discriminatory practices and, as a result, the availability of remedies, for purposes of the CHRA. Section 4 is clearly relevant, but the Supreme Court did not find that section 4 alone provided the authority for the employer to be held liable for a discriminatory practice by its employee nor did the Court suggest that section 4 would make the employer liable for unauthorized discriminatory practices of an employee. Instead, the Court turned its attention

elsewhere in the CHRA to determine whether the employer was implicitly considered to have engaged in a discriminatory practice.

[220] The court moved on to section 41(2) and (3), finding them, in comparison, “particularly relevant” at p. 93. As a reminder, these sections became section 53(2) and 53(3) of the CHRA. The Court decided that the employer must be liable for its employee’s discriminatory practices based on its interpretation of those provisions, specifically basing this conclusion on the nature of the remedies the statute made available through them. The Court found that the CHRA implicitly required that the employer be treated as if it engaged in the discriminatory practice because 1) the employer can only act through its employees and 2) the remedies in section 53 had to be available against the employer to be effective. The Court did not consider section 4 to answer the question regarding whether remedies could be ordered against the employer, and, if so, how remedies should be ordered when there are related respondents. I am not persuaded that I should find that section 4 resolves these matters when the Supreme Court of Canada did not.

[221] Because the Court expressly declined to decide how sections 48(5) and 48(6) [now section 65] should be interpreted, obviously, the Court did not consider how section 48(5) [now section 65(1)], section 4 and section 53(2), and thereby how section 53(3) should be interpreted when section 65(1) applies. Section 4 of the CHRA is a general provision in Part I of the CHRA. The complaint process and the available remedies are in Part III of the CHRA. Specific limitations, inclusions and statutory directions about the application of the CHRA are contained in Part III of the CHRA, in sections 62-65 of the CHRA, and in Part IV of the CHRA, in section 66. Notably, section 65(2) excludes employers from liability that meet certain criteria, and, in doing so, excludes these employers from the broad group of “anyone” who may be the subject of an order described in section 4.

[222] Section 65(2) cannot be intended to contradict section 4, and section 4 cannot be intended to contradict section 65(2). The way these sections may be read harmoniously together is to interpret section 4 as a provision that points to the availability and potential application of the remedial provisions in section 53(2) of the CHRA (for example) to anyone who has engaged in a discriminatory practice (within the jurisdiction of the Tribunal). Section

4 is a statement of principle, one that is subject to the remainder of the CHRA. Section 4 is not intended to delineate the application of the remedial sections in section 53 of the CHRA to “anyone” in every case but to “anyone” in theory. It is intended to permit an order to be made against the person found by the Tribunal to be engaging in or to have engaged in a discriminatory practice.

[223] I do not interpret the word “anyone” in section 4 as determining the application of section 65(1) in general or to related respondents. For all of these reasons, I conclude that section 4 of the CHRA does not resolve how section 65(1) applies to related respondents in this case.

H. Reading Section 65(1) Together with Section 53(2)

[224] I am required to give full meaning and effect to section 65(1) of the CHRA. This has particular significance when I further consider section 53(2) of the CHRA. As explained in the Related Rulings, section 53(2) is the provision in the CHRA that links discriminatory practices to the remedies that may be awarded. Section 53(2) has two functions in this regard. As explained, the provision authorizes the Tribunal to make an order of remedies against the person found to be engaging in or to have engaged in the discriminatory practice. As I have also explained. the provision also specifies terms may be included in the order. It states what most of the remedies are that are available to be ordered under the CHRA.

[225] Section 53(2) does not reference section 65(1). As pointed out before, section 65(1) does not directly reference section 53 either (there is only an implicit reference from the wording “for purposes of this Act”). How they work together for purposes of this ruling is not expressly addressed by the CHRA and has not been decided in a case, to my knowledge. As both are remedial provisions, how they work together is obviously an important issue in the analysis of how section 65(1) should be interpreted and applied and, in general, how the remedial provisions apply to parties including to related respondents.

[226] As noted, section 53(2) of the CHRA states that “the member or panel may… make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel

considers appropriate….” [Emphasis added.] Sections 53(3) and 53(4) of the CHRA operate likewise; they are based on section 53(2) and do not change the application of these remedial provisions to something other than “the person found to be engaging or to have engaged in a discriminatory practice”. Therefore, the conclusions drawn about how section 65(1) and 53(2) are to be read together throughout this ruling apply to sections 53(3) and 53(4), as well. In the interests of simplicity, I have focussed on section 53(2) for the analysis and will continue to do so for its remainder. Section 53(2) contains the most complete wording for purposes of the Tribunal’s authority and the remedies that may be ordered.

[227] As a reminder, in general, complaints may concern discrimination by an individual respondent that does not occur in the course of employment or in relation to employment, in which case section 65(1) will not be engaged, or by a person in the course of employment where the respondent employer is potentially subject to section 65(1), and by a person in the course of employment where the respondent employer is able to successfully rely on the statutory defence in section 65(2) and will not be liable. Section 65 will also apply in cases where the discriminatory practice occurred in relation to the respondent’s employment where there is one named respondent and where there are related respondents or more than one legally separate respondent.

[228] Because of these variable situations, I considered whether the wording in section 53(2) “the person found… to have engaged in the discriminatory practice” means that the Tribunal has the authority pursuant to this provision to make an order against the individual employee who engaged in a discriminatory practice. If section 65(1) is removed from consideration, in theory, I may have presumed that this is permitted by section 53(2) of the CHRA. In part, I may have presumed this because employers act through their employees. In *Robichaud*, Justice La Forest, in writing for the majority of the Court, highlighted that an employer may only act through the individuals it employs at para 19:

> I agree with the following remark of Marshall, J., who was joined by Brennan, Blackmun and Stevens, JJ., in his concurring opinion in the United States Supreme Court decision in *Meritor Savings Bank, FSB v. Vinson*, 106 S. Ct. 2399 (1986), at pp. 2410-11 concerning sexual discrimination by supervisory personnel:

> An employer can only act through individual supervisors and employees; discrimination is rarely carried out pursuant to a formal vote of a corporation's board of directors. Although an employer may sometimes adopt company-wide discriminatory policies violative of Title VII, acts that may constitute Title VII violations are generally effected through the actions of individuals, and often an individual may take such a step even in defiance of company policy.

[229] The reference to this quote could suggest that the Court was about to conclude that the actions of employees are what should be addressed under the CHRA and that remedies should be awarded against employees under the CHRA. As a reminder, *Robichaud* was decided based on the CHRA prior to its amendment to include what is now section 65. However, while Justice La Forest recognized that an employer can only act through its employees, he concluded that the remedies in the CHRA are intended to be awarded against the employer. In doing so, the Supreme Court of Canada found a difference between the apparent liability of the employee and the remedial response to that liability under the legislative scheme of the CHRA.

[230] In reaching this conclusion, the Court considered the nature and purpose of each of the remedies available in former sections 41(2) and 41(3) of the CHRA, which are now sections 53(2) and 53(3) of the CHRA. Justice La Forest underscored the practical need for the employer to be responsible for the remedies provided in the CHRA in the interests of remedial effectiveness and efficiency. This conclusion was reached by the Court excluding any consideration of section 65 which seems to hold the employer responsible based on the remedial nature of the CHRA.

[231] It should be undisputed that, whatever form of statutory liability was created by Parliament through the addition of sections 48(5) and 48(6) [now section 65], both section 53(2) and section 65 should be read harmoniously together because of *Robichaud*. Section 53(2) must be read in a manner that is consistent with the form of statutory liability Parliament chose, which in theory could have represented change to the state of the law prior to the amendment or not have changed anything.

[232] I addressed the interpretation of section 65(1) above and that of section 65(2) in the Liability Decision. What is clear is that, following the amendment to add what is now section 65, the wording in section 53(2), that the order is made against "the person found to

be engaging… in the discriminatory practice", must be interpreted in a manner that is consistent with either section 65(1) or section 65(2) given the circumstances found by the Tribunal in the complaint.

[233] When section 65(1) applies, section 65(1) requires that the acts and omissions of the employee be deemed to be the acts and omissions of the employer. In my view, in complaints where section 65(1) applies, section 53(2) most likely cannot be reasonably interpreted as authorizing the Tribunal to award remedies against the harasser/employee because of section 65(1) and for reasons related to its application.

[234] The wording in section 53(2) is "the person found to be engaging… in the discriminatory practice". When section 65(1) of the CHRA applies, the Tribunal does not automatically issue an order against the person who "actually" engaged in the discriminatory practice. When section 65(1) applies, in order to be read harmoniously with section 53(2), (I paraphrase here) "the person who is found to have engaged in the discriminatory practice" must be interpreted as being the respondent employer. This is because section 65(1) has changed the facts about who committed the acts and omissions in issue.

[235] Similarly, when section 65(1) does not apply, the facts about who committed the discriminatory practice are not changed and, therefore, the acts and omissions of an employee are not deemed to be the acts and omissions of the employer. "(T)he person found to be engaging… in the discriminatory practice" can be the individual person who actually engaged in the discriminatory practice.

[236] In other words, section 53(2) requires a contextual interpretation. It is not possible to interpret the word "person" in section 53(2) as always meaning the individual who engaged in the discriminatory practice. That would negate the application of section 65(1) of the CHRA which holds the respondent employer liable in those complaints where that provision applies.

[237] It is also the case that, because the CHRA allows for the exculpation of the employer for liability pursuant to section 65(2) of the CHRA, when the statutory defence pursuant to section 65(2) is established, the "person" found to be engaging in or to have engaged in the discriminatory practice cannot be interpreted as being "the employer". This is the result of

the application of section 65(2) even though the word “person” includes a corporate employer. (As explained, this latter point is made clear by the definition of “person” in the *Interpretation Act* in section 35.) The existence of section 65(2) means that not every employer named a respondent in a complaint, whose employee engages in discrimination in the course of employment, can be held liable for remedies ordered by the Tribunal pursuant to section 53(2). This is because not every respondent employer under the CHRA is necessarily “a person” for purposes of a remedial order pursuant to section 53(2). In those cases where section 65(2) applies and the employer is exculpated, the meaning of the word “person” in section 53(2) reverts naturally to the person who “actually” engaged in the discriminatory practice, assuming that they are a named respondent. It is in those circumstances that an individual employee becomes “the person” for purposes of section 53(2) and not the employer.

[238] My conclusion that the Tribunal’s authority in section 53(2) is contextual also derives from two operative factors: 1) the wording of section 53(2) authorizes an order to be made against “the person found to be engaging… in the discriminatory practice”, and “found to be” engages the Tribunal’s decision-making role about who that person is, and 2) the implicit requirement in the CHRA that section 53(2) be interpreted and applied by the Tribunal in a manner consistent with three potential circumstances: section 65 not applying to the complaint, section 65(1) applying to the complaint and section 65(2) applying to the complaint. For complaints related to employment, section 65(1) creates the possibility that the Tribunal will not have the authority to order remedies against the employee in every case. Section 65(2) injects the premise that the Tribunal will not have the authority to order remedies against the employer in every case.

[239] In my view, the wording “found to be” in section 53(2) has specific significance. It means that where a complaint is substantiated, the Tribunal must determine who “the person” is who it finds to have engaged in the discriminatory practice for purposes of section 53(2) of the CHRA. Because of the variable circumstances that arise in complaints pursuant to the CHRA, this cannot be assumed to be whomever the Tribunal wishes. The words “found to be” may seem superfluous or appear limited to the need for a determination by the Tribunal about whether a person engaged in a discriminatory practice. After all,

section 53(2) only applies when the complaint is found to be substantiated by the Tribunal, which means that the Tribunal will have found that a person engaged in a discriminatory practice. However, Parliament is presumed to not use superfluous language. Parliament did not simply state in section 53(2) that its remedies may be included in an order issued against (again, I am paraphrasing) "the person who engaged in the discriminatory practice". The wording "found to be" in the provision must be afforded significance. In my view, section 53(2) of the CHRA is to be interpretated in a manner that affords that wording its due significance within the remedial scheme.

[240] I conclude that the words "found to be" in section 53(2) provide an operational link between section 53(2) and section 65, when section 65 applies, allowing them to operate harmoniously together. The significance of the words "found to be engaging in" or "found to have engaged in" in section 53(2) of the CHRA is to accommodate the different circumstances that may arise from a substantiated complaint for purposes of remedies under the legislative scheme of the CHRA.

[241] The words "found to be" in section 53(2) require that there be a finding by the Tribunal pursuant to section 65 in any case where a person engages in a discriminatory practice in relation to their employment, before section 53(2) is applied by the Tribunal to award remedies. The same can be said about section 4, which also uses this wording. That finding by the Tribunal must apparently be that the person who is about to be made subject to a remedial order is legally responsible for engaging in or for having engaged in a discriminatory practice by the Tribunal in accordance with the legislative scheme in the CHRA. If the discriminatory practice is subject to section 65, that must be part of what the Tribunal considers.

[242] This interpretation reconciles the apparent silence in the CHRA about the effect of section 65 and how it should be applied along with section 53(2) of the CHRA. The Tribunal needs to decide that.

[243] The amendment of the CHRA to add what is now section 65 was made by Parliament during a period of confusion about the extent of the employers' responsibilities under the CHRA, because *Robichaud* was not yet decided. It appears that what is now section 65 was

intended to turn the remedial focus to the employer. This includes that section 65(1) holds the employer responsible for both authorized actions and unauthorized harassment in the workplace. It seems that these intentions informed the nature of the statutory liability Parliament decided to create when it enacted what is now section 65.

[244] It seems that Parliament also most likely intended that the Tribunal would read sections 53(2) and section 65 together and determine that it is required to make a finding that the person who is to be made subject to a remedial order is legally responsible for engaging in the discriminatory practice. That section 53(2) creates a step in the process itself implies that section 65 may change the factual and legal outcome of a discriminatory practice, depending on the circumstances in a complaint.

[245] That there are variable outcomes is best illustrated by considering the relevant statutory language in each of the circumstances that may arise where a complaint is substantiated:

1. Where a person engages in a discriminatory practice that is unrelated to employment, the wording “found to be engaging in” requires only a finding by the Tribunal that a person (as defined in the *Interpretation Act*) engaged in the conduct defined as a discriminatory practice in sections 5-14.1 of the CHRA. Section 53(2) allows the Tribunal to order remedies against that person.

2. Where a person engages in a discriminatory practice in relation to employment, section 65(1) applies and deems the respondent employer to have committed the acts or omissions of the harasser/employee and thereby the discriminatory practice. The reference to “the person” in section 53(2) is to be interpreted as stating “the employer found to be engaging in the discriminatory practice” and the Tribunal is to order remedies against the respondent employer instead of the employee who in reality engaged in the discriminatory practice.

[246] It seems to me that, in the second circumstance, in those cases where the employer and the harasser/employee are named respondents, the person who is legally responsible, who is “found to be engaging… in the discriminatory practice” by the Tribunal, is still required to be the employer for purposes of section 53(2). Section 65(1) makes the employer liable

for the acts of the harasser/employee regardless of who is a named respondent. In my view, the statutory language does not suggest that the Tribunal may conclude that “the person found to be engaging or to have engaged in the discriminatory practice” in section 53(2) describes the harasser (in these circumstances). When section 65(1) applies, the respondent employer is responsible for remedies in the CHRA.

[247] The Tribunal would apply section 53(2) twice to the complaint, if the Tribunal were to find the “person” to be the employer but also make a finding that the harasser is the “person” found to be engaging in the discriminatory practice, as well as the employer. Since they are related respondents and the employer will be responsible for remedies for the employee’s conduct pursuant to section 65(1), this seems unlikely to be the intended approach. This interpretation would have the Tribunal apply section 53(2) to related respondents twice, for one discriminatory practice. This is quite a different situation than where there are two legally separate respondents, and each is liable separately. An assumption that section 53(2) may be applied twice to related respondents could potentially lead to inconsistent approaches in the Tribunal’s jurisprudence. I conclude that Parliament intended the Tribunal to apply section 53(2) once to related respondents. Otherwise, the Tribunal would effectively circumvent the deeming provision in section 65(1) of the CHRA. This is not a minor point. If the Tribunal applies section 53(2) twice because the harasser/employee is a named respondent, this seems to circumvent the wording of section 65(1) as a deeming provision.

[248] Nonetheless, I considered whether the wording in section 53(2), “the person found to be engaging” can be read as authorizing the Tribunal to apply the remedial provisions to the respondent employer and again to the harasser/employee who engaged in the discriminatory practice because of the word “person”. The word “person” in the singular can include the plural, and thereby be interpreted as “persons”, by virtue of section 33(2) of the *Interpretation Act*. Without consideration of context, the word “persons” can include the respondent employer and the harasser/employee as related respondents. I considered whether this meant that the Tribunal could apply section 53(2) to a complaint for each related respondent. It can also mean two or more legally separate respondents named in a complaint.

[249] However, in the legislative context of this complaint, it seems more likely that the "person" or "persons" found to be engaging in the discriminatory practice in section 53(2) initially refer to an employee or multiple employees who engaged in the acts or omissions that compose the discriminatory practice, but because section 65(1) has been applied by the Tribunal, the respondent employer is substituted for the appropriate person or those persons whom the employer employs.

[250] In this complaint, there is one respondent employer, UPS, two discriminatory practices, one pursuant to section 14 and another pursuant to section 7, one named harasser/employee, Mr. Gordon, and an unknown number of UPS employees who engaged in the acts or omissions that comprise one of the discriminatory practices. I see nothing in sections 65 and 53(2) or elsewhere in the CHRA to indicate that Mr. Gordon should be treated differently than the other "persons" who engaged in a discriminatory practice. It does not seem intended that Mr. Gordon would be held personally liable in addition to UPS while UPS is deemed fully liable for his conduct and indeed liable for all the other employees' acts and omissions.

I. "Committed By" in Section 65(1)

[251] Before moving on from the analysis of section 53(2) and section 65(1) of the CHRA, I should address the different wording that Parliament used in sections 53(2) and 65(1). The wording in section 53(2) uses the wording "engaging in" or "to have engaged in" the discriminatory practice. The wording in section 65(1) uses the wording "committed by". I consider this difference in wording to have significance. I touched on this subject indirectly above.

[252] Our ordinary understanding of the wording in section 53(2) "engaged in" appears to refer to conduct. "Committed by" in section 65(1) describes conduct too but seems more legally specific, in the sense that "committed by" as it is used here serves to designate an act as conduct by the employer. In comparison to "engaged in", "committed by", placed within section 65(1) as a "deeming" provision, is a fairly strong indication that Parliament

intended to create the legal fiction that the employer did the act or omission instead of the employee.

J. Reading Section 65(1) Together with Section 65(2) & Section 53(2)

[253] I previously explained that section 65(2) is intended to achieve a key purpose of the CHRA: see the Ruling on Separate Damages Against the Respondent Employer. Section 65(2) offers an enticement to employers to engage in due diligence to provide workplaces free of harassment by allowing them to be exculpated from legal responsibility for discrimination; section 65(2) entirely blocks the application of section 65(1), which deems the employer legally responsible, when it applies. The opportunity for the employer to be completely exculpated from liability if it establishes a statutory defence pursuant to section 65(2) seems to be quite extra-ordinary. Because it completely exculpates the employer, it appears more likely that, when section 65(1) does apply to a substantiated complaint, the employer will be responsible for all employee conduct.

[254] As a reminder, if the harasser/employee is a named respondent in a complaint and the respondent employer successfully raises a defence pursuant to section 65(2), the Tribunal will find “the person found… to have engaged in the discriminatory practice” in section 53(2) to be the harasser/employee and the remedies available pursuant to section 53(2) will apply to the harasser/employee to the extent they can (see the discussion of *Robichaud* regarding the application of remedies to parties below).

K. The CHRA as Unique Legislation

[255] Obviously, the preliminary conclusions here are based on the statutory language of the CHRA. Not all other jurisdictions have legislation that requires the relevant human rights tribunal to engage the same analysis of legal responsibility for remedies after finding that discrimination occurred. Other legislative schemes may not contain the equivalent of section 65(1) which, when applicable, seems to make the respondent employer responsible for remedies instead of the employee and not the employee, or of section 65(2), a provision completely exculpating the employer from liability, and thereby from the application of

remedial awards, in other circumstances. There may be no potential issue of inclusion or of exclusion from liability by reason of the statute for the tribunal to consider and no effect on the interpretation of related provisions concerning remedy as a result.

[256] I have used the British Columbia Code as a comparator in this ruling to help illustrate what is different about the legislative scheme on the CHRA. The British Columbia Code essentially provides in section 44 that a "person" who discriminates may have an order made against them by the Tribunal. I explained above that this can be an employee or an employer, anyone who discriminates. The wording of this provision and other related provisions is different than the provisions in the CHRA discussed in this ruling.

[257] By reason of section 44(2) of the British Columbia Code, it is always possible for the tribunal to interpret "the person" as the employer in any given complaint. There is a direct link in the statutory language between the person (by definition including the employer) who discriminates, the discrimination itself, and the available remedies. The employer will always be liable for its employees. This contrasts with the contextual remedial authority to hold the employer liable for its employees bestowed on the Tribunal by sections 65(1) and 53(2) which, for discriminatory practices in the course of employment, require additional analysis specific to the CHRA. The British Columbia Code also does not have a provision like section 65(2) of the CHRA. There is no provision mandating that the employer may avoid liability by due diligence.

[258] It is important for the Tribunal to ensure that any legislative differences are taken into account.

L. Preliminary Conclusion Based on Statutory Interpretation

[259] On the issue of whether section 65(1) holds the employer liable instead of or in addition to the harasser/employee, it seems that the relevant statutory language of the provision itself is weighted in favour of "instead of" for the reasons provided, rather than the alternative. This impression is not altered when section 65(1) is considered in the context of section 65(2) and other relevant provisions of the CHRA, including section 53(2).

[260] However, this is a preliminary conclusion based primarily on my reading of the statutory language in the CHRA.

XI. The Supreme Court of Canada on Responsibility for Remedies

[261] In these reasons I have referred to two decisions where the Supreme Court of Canada discussed responsibility for remedies under human rights legislation in a way that is or could have been potentially relevant to this ruling: *Robichaud* and *Schrenk*. As a reminder, in *Robichaud* the court concluded that the employer is responsible for the remedies under the CHRA, albeit without considering what is now section 65. What is left to consider is whether *Robichaud* or *Schrenk* changes anything of significant relevance to this ruling in relation to my interpretation of section 65 of the CHRA and its related provisions.

[262] I also will consider these decisions more specifically because the Supreme Court of Canada commented in *Robichaud* about which remedies the Tribunal should order against the respondent employer in a harassment complaint. I need to ascertain whether the Supreme Court of Canada in *Schrenk* changed any of the conclusions the Court reached in *Robichaud* about how remedies should be awarded by the Tribunal under the CHRA.

[263] I conclude that *Robichaud* is still binding on this Tribunal in certain respects that include how remedies are to be awarded by the Tribunal. To the extent that *Schrenk* differs, the case may be distinguished because the differences are based on the different legislative scheme and statutory wording in British Columbia.

A. *Robichaud*

[264] Justice La Forest explained in *Robichaud* that the CHRA was amended to fix an ongoing problem. The courts were declining to hold employers liable for the acts of their employees based on the lack of content in human rights legislation authorizing this result. For example, in *Re Nelson and Byron Price & Associates Ltd.* 1981 CanLII 415 (BCCA), at para 21, the court stated that “the operative words in s. 17(2) [of the British Columbia Code at that time] were the ‘person who contravened this Act’”. The tribunal concluded that aggravated damages could only be awarded against that person, not their employer,

notwithstanding the remedial nature of the legislation and the court's agreement that it should adopt a broad and liberal interpretation of the statute. The importance given to the words of the statute in interpreting the Tribunal's authority are highlighted by this case.

[265] *Robichaud* is relevant for other reasons, but, as I have explained, the Supreme Court of Canada declined to decide how what is now section 65 should be interpreted and applied within the remedial scheme of the CHRA. *Robichaud* cannot be a binding decision on the Tribunal about how section 65 should be interpreted and applied. However, aspects of the Court's decision provide relevant direction and context for this ruling.

[266] As noted*, Robichaud* was decided in 1987, after the amendment to add what is now section 65. But Justice La Forest emphasized that the Court was not considering the amendments when he wrote at para 20:

> Finally, it was argued that the Act, as it existed when the incidents complained of occurred, should be interpreted so as to conform to s. 48(5) and (6) enacted in 1983. These expressly impose liability upon an organization for the conduct of its employees, subject to a defence of due diligence on its part. I do not see the relevance of these provisions to the pre-existing situation. They were obviously enacted to redress the prevalent approach of the courts (see, for example, *Re Nelson and Byron Price & Associates Ltd*. (1981), 122 D.L.R. (3d) 340 (B.C.C.A.)) In subsequently taking legislative action to correct this approach, Parliament was free to adjust liability in any way it wished, whether by imposing a greater or lesser burden on an employer than would have been the case before the amendments. Precisely what balance was achieved by these new provisions, I need not consider. They do not operate retrospectively and all we are concerned with here is the law as it existed when the activities complained against took place.
>
> [Emphasis added.]

[267] All that the Supreme Court of Canada stated in *Robichaud* about what is now section 65 is that the provision imposes liability upon an employer for the conduct of its employees, subject to a defence of due diligence on its part. The Court specified that the type of liability created by what is now section 65 could have been adjusted by Parliament from the concept of vicarious liability at common law, in any way that Parliament wished. As a reminder, under the common law (in a civil law context), generally the employer is liable for what its employee does, except in certain circumstances that I briefly refer to above. In

those circumstances, both the employer and the employee are held liable, usually jointly and severally.

[268] *Robichaud* focussed on the liability of the employer because the issue in the case concerned whether the employer could be held liable for the unauthorized culpable acts of its employee despite the lack of any express language to this effect in the CHRA (excluding consideration of what is now section 65). Because of the Court's focus on the issue it was asked to decide, *Robichaud* did not decide whether the harasser/employee would share responsibility for remedies with the respondent employer.

[269] The respondent harasser was not involved in the judicial review before the Court, but the Supreme Court of Canada was aware that the harasser/employee remained a party. The Court also knew that the Review Tribunal that heard the case had postponed the assessment of damages until further argument could be heard. Nothing had been decided by the Review Tribunal about remedies to be impacted by the Court's decision (see para 4).

[270] A comment by Justice Le Dain in brief additional reasons at para 23 seems to suggest that he thought that the respondents would share responsibility for remedies. However, as I have noted, the Court was not asked to decide anything about the respondent harasser and the majority made no comment or decision in this regard. The Court therefore did not consider the general issue of whether remedies should be available against the employee "instead of" or "in addition" to the employer.

[271] *Robichaud* also does not state that the harasser has no responsibility for remedies. It may be the case that the majority of the Court in *Robichaud* assumed that some or all remedies would issue against both respondents and did not say so. However, it would not be appropriate, in my view, to draw an inference from what the majority of the Court did not decide, as opposed to an inference that could be reasonably drawn from what a court did decide or address. What a court does not decide leaves open more possibilities and is more likely to be a guess (and inaccurate) than an inference should be. I do not consider it reasonable to draw an inference from what *Robichaud* did not decide either way about the impact of the decision on the harasser/employee.

[272] It will be apparent from the discussion of *Robichaud*'s treatment of remedies below that, if I were to draw an inference from what the Court did decide or address, and this would be in the context of the Court's comments about how the remedies under the CHRA should be ordered, I would infer that the Court did not assume that some or all remedies would issue against both respondents, with one possible exception, and, in general, likely did not intend for the harasser to be responsible for remedies.

[273] In any event, *Robichaud* provides some implicit direction about how this Tribunal is to interpret section 65 because the Court concluded that: 1) common law principles of vicarious liability do not apply to the statutory liability created for an employer by the CHRA unless section 65 (in theory) makes that the case, 2) the main approach of the CHRA is not to punish those who discriminate (at para 9) and its remedies are not punitive, rather the goal of the CHRA is to ameliorate the harmful effects of discrimination. As stated at para 9 in *Robichaud*:

> McIntyre J. puts the same thought in these words in *O'Malley* at p. 547:
>
> > The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant.

[274] *Robichaud* is otherwise relevant for its conclusion that the remedies available pursuant to the CHRA run against the respondent employer. The Supreme Court of Canada concluded in *Robichaud* that, in general, the remedies available pursuant to the CHRA would need to be implemented by the employer by their very nature. It found that the employee who actually engaged in the discriminatory practice would not be in a position to implement the remedies provided by the CHRA or was not likely to be able to do so. In short, the Court upheld the principle that the CHRA is remedial legislation and that the remedies under the CHRA have to be the responsibility of the employer to be effective. As highlighted above, the Supreme Court of Canada was so persuaded that the nature of the remedies in the CHRA require that the employer be held liable, it concluded that the CHRA allowed the Tribunal to find the employer liable for remedies despite the absence of any express wording in the CHRA at the time stating this.

[275] The conclusion in *Robichaud* that the employer is generally responsible for remedies is, in my view, all the more significant because the harasser/employee was a named party to the complaint. The importance of the Court's finding cannot be diminished on the basis that the employer was the only respondent.

[276] Except for one amendment to the remedial provisions, the remedies that were the subject of the Court's conclusions in *Robichaud* remain available to be ordered today pursuant to sections 53(2) and section 53(3) of the CHRA. Compensation for feelings and self-respect, formerly in section 41(3) of the CHRA, has been replaced by section 53(2)(e), which allows compensation for pain and suffering. Any other changes to the wording of these sections are not relevant to how they should be applied as between related respondents.

[277] The Court did not state unequivocally that the employer will be responsible for all remedies "instead of" the individual respondent when there are related respondents, but *Robichaud* strongly implies that the employer is responsible for all remedies under the CHRA in the interests of ensuring the legislation's remedial effectiveness. This implication is reflected at several points of the decision.

[278] At para 15, Justice La Forest indicated his agreement with the comment of MacGuigan J., at page 845 of the decision of the Court of Appeal [1984] 2 F.C. 799 under review by the Court, that there were provisions in the CHRA that could only be fulfilled by the employer. Justice La Forest agreed with this premise even though MacGuigan, J. considered the harasser, Mr. Brennan to be the directing mind and will of the corporation for purposes of the complaint. The comment of Justice MacGuigan is found within this quote at para 15 of *Robichaud*:

> The broad remedies provided by section 41, the general necessity for effective follow-up, including the cessation of the discriminatory practice, imply a similar responsibility on the part of the employer. That is most clearly the case with respect to the requirement in paragraph 41(2)(a) that the person against whom an order is made "take measures, including the adoption of a special program, plan or arrangement… to prevent the same or a similar practice occurring in the future". Only an employer could fulfil such a mandate.

[279] The concept of shared liability by Mr. Brennan as the directing mind and will of the corporation suggested by Justice MacGuigan was not the point of the quote and was not followed by the Supreme Court of Canada. The key point, that remedies must be the responsibility of the employer, because only the employer could address and prevent discrimination, was adopted by the Court. Justice La Forest concluded at para 15:

> MacGuigan J.'s comment equally applies to an order to make available the rights denied to the victims under para. (b). Who but the employer could order reinstatement? This is true as well of para. (c) which provides for compensation for lost wages and expenses. Indeed, if the Act is concerned with the effects of discrimination rather than its cause (or motivation), it must be admitted that only an employer can remedy undesirable effects; only an employer can provide the most important remedy-a healthy work environment.

[280] The implicit premise that the employer will be responsible for all remedies "instead of" the individual respondent is also reflected in *Robichaud* where Justice La Forest quotes section 41(2) and section 41(3) in their entirety [now section 53(2) and 53(3)] at para 14 of the decision. He concludes his comments about these remedial provisions with this statement at para 15: "It is clear to me that the remedial objectives of the Act would be stultified if the above remedies were not available as against the employer."

[281] It is clear, therefore, that all of the remedies in the CHRA are available to be ordered against the respondent employer. The fact that the majority of the Court agreed that the remedial objectives of the CHRA would be stultified if the remedies are not available against the employer suggests that the Court concluded that there was a significant risk that remedies would be stultified if they were ordered against the harasser/employee.

[282] However, while it is clear that all the remedies are able to be ordered against the employer, with the greatest of respect to the Court, the conclusion that remedies are required to be ordered against the respondent employer and not the harasser/employee is not as clear as it could be, despite the Court's conclusion that "… if the Act is concerned with the effects of discrimination rather than its cause (or motivation), it must be admitted that only an employer can remedy undesirable effects" at para 15. The Court underlined remedies in the CHRA that it said would have to be the responsibility of the employer to

implement, to illustrate its point that remedies apply by necessity to the employer. But there is one remedy that the Court did not underline.

[283] To further explain this, the Court underlined the following remedies in former sections 41(2) and 41(3) of the CHRA in its list of examples of what the employer would have to be responsible for.

> 41….
> (a) …such person cease such discriminatory practice and, in consultation with the Commission on the general purposes thereof, take measures, including adoption of a special program, plan or arrangement….;
> (b) …[such person] make available to the victim of the discriminatory practice on the first reasonable occasion such rights….[denied the victim];
> (c) [such person compensate the victim]…for any or all of the wages…and any expenses incurred….

[284] The Court also underlined "wilful or reckless" in section 41(3)(a) of the CHRA and thereby implicitly included wilful or reckless conduct in the category of would have to be the responsibility of the employer. [The Court did not explain why.]

[285] It is clear in *Robichaud* that the Court concluded that the remedies it underlined are intended to be ordered against the respondent employer. It is in relation to former section 41(3)(b) of the CHRA that the Court's decision could, with the greatest respect, benefit from clarification.

[286] Justice La Forest did not underline former section 41(3)(b). That provision authorized the Tribunal to order compensation for suffering "in respect of feelings or self-respect". The Court did not underline the words "in respect of feelings or self-respect". The absence of any underlining of these words may suggest that this remedy did not necessarily need to be the responsibility of the respondent employer. To be clear, I am assuming that this may have been the Court's intent when it did not underline this wording because I presume that the lack of underlining is not an error or oversight. However, the only "content" in *Robichaud* that indicates that the employer would not be solely responsible for compensation for pain and suffering is the absence of underlining. There are no reasons to this effect.

[287] To the opposite effect, as I pointed out above, the Court also quoted all of the remedial provisions in section 41 including section 41(3)(b), at para 14 of *Robichaud*, and

concluded at para 15 that these remedies would need to be the responsibility of the employer, without noting any exceptions for hurt feelings or loss of self respect. What I see as an apparent contradiction in the reasons within paragraphs 14-15 is not acknowledged or reconciled by the Court. Accordingly, it is also possible that I may be reading more into the lack of underlining than what the Court intended. Perhaps the Court did not intend to underline all the examples.

[288] I note, as well, that the Court's conclusion at para 17 does not hold out exceptions:

> Hence, I would conclude that the statute contemplates the imposition of liability on employers for all acts of their employees "in the course of employment", interpreted in the purposive fashion outlined earlier as being in some way related or associated with the employment. It is unnecessary to attach any label to this type of liability; it is purely statutory. However, it serves a purpose somewhat similar to that of vicarious liability in tort, by placing responsibility for an organization on those who control it and are in a position to take effective remedial action to remove undesirable conditions.

[289] Despite this conclusion, this issue about the lack of underlining of hurt feelings and self-respect is not fully resolved in my mind. It may create an ambiguity about whether the Court meant to say that the employer is required to be responsible for all remedies that are awarded to redress a complaint under the CHRA.

[290] This potential ambiguity aside, to the extent that *Robichaud* decided in 1987 that certain remedies in the CHRA were to be awarded against the employer to be effective, because those same remedies exist in sections 53(2) and 53(3) of the CHRA, it appears that *Robichaud* may be a binding decision on the Tribunal about how these remedies are to be awarded, unless its conclusions have been altered by section 65 of the CHRA or a more recent decision of the Supreme Court of Canada that applies to the CHRA.

[291] If there is an ambiguity because of the lack of underlining of damages in respect of feelings or self-respect in the Court's reasons, it can be argued that *Robichaud* implies that this compensation may be awarded against the individual harasser/employee even when the employer is liable, but that this is based on the wording of the CHRA as it stood without section 65. In theory, the lack of underlining of this one remedy means that if this case were being decided prior to the inclusion of section 65 in the CHRA, any damages for hurt feelings

or loss of self-respect would be awarded jointly and severally against both related respondents.

[292] As a result of *Robichaud*, I conclude that, absent consideration of section 65 of the CHRA, based on the statutory language of the remedies themselves: 1) all of the remedies in the CHRA may be awarded against the employer; and 2) all remedies with the possible exception of compensation for feelings and self respect were required by the Court to be ordered against the employer for reasons of remedial effectiveness.

[293] *Robichaud* illustrates that, when the Court had to interpret the CHRA in the absence of express statutory language on the issue before it, the Court drew its conclusions from the remedial nature of the CHRA and the nature of the remedies themselves. I should place significant weight, as well, on these same considerations when I interpret section 65 in my conclusion below.

B. Analysis of *Schrenk* & *Robichaud*

[294] The issue in *Schrenk* was not about how damages should be awarded against related respondents. The Supreme Court of Canada decided that a harassment complaint could proceed against an individual respondent pursuant to the British Columbia Code who the complainant had named a respondent although they had no supervisory authority over the complainant. This was the issue. As will be apparent from my earlier comments about *Daley* and the human rights regime in British Columbia, this issue was decided under different legislation than the CHRA. There are significant, relevant differences between the legislative models in the British Columbia Code and under the CHRA, some of which I have explained above. *Schrenk* is not a binding decision on the Tribunal about how the CHRA should be interpreted. This includes, specifically, that *Schrenk* does not decide how section 65 should be interpreted, and how remedies in the CHRA should be awarded when section 65 applies.

[295] The Supreme Court of Canada concluded in *Schrenk* that the complaint could proceed against the harasser despite the lack of a supervisory relationship between the complainant and the harasser. One of the reasons the Court gave for this conclusion is its

assessment that there are remedies that can be awarded against an individual respondent pursuant to the British Columbia Code. Because remedies under both the British Columbia Code and the CHRA are similar, I considered whether the Supreme Court of Canada made determinations in *Schrenk* about how remedies should be awarded in the context of the British Columbia Code that may also be appropriate to consider in deciding how the remedies available under the CHRA should be applied.

[296] Much as it had in *Robichaud,* the Court in *Schrenk* used the nature of the remedies available under the legislation as part of the basis of its rationale, concluding that the individual harasser should remain a party because some of the remedies in the British Columbia Code could be awarded against the individual harasser, whereas in *Robichaud*, the Court in part relied on the nature of the remedies under the CHRA to conclude that the employer was required to be held liable for the acts of its employee for purposes of remedy.

[297] Just as *Robichaud* focussed on holding the employer liable for the employee's actions, without directly addressing the liability of the harasser/employee, *Schrenk* focussed on holding the individual harasser/employee liable without much emphasis or analysis of the employer's liability, apart from noting section 44(2) of the British Columbia Code which contains express language that holds the employer liable in each case regarding employment where the complaint is upheld. I expect that this is because it is implicit in the British Columbia Code that the employer and the harasser/employee will share liability in every compliant if the employee is liable given the wording of the British Columbia Code. The employer will always be liable in these circumstances, and while *Schrenk* did not frame the issue as I have, the individual harasser/employee named as a respondent will be liable in addition to the employer.

[298] The difference in emphasis as between these two decisions of the Supreme Court of Canada may be attributed to the specific issue the Court was asked to decide in each case and to differences between the two statutes. These factors also appear to have influenced the Court's assessment of the remedies available pursuant to each legislation. I say this for the following reasons.

[299] Because the human rights legislative model in British Columbia is based on direct access, complainants carry the legal responsibility to frame their complaint, and, as explained in *Daley*, the Tribunal usually respects the wishes of the complainant. The employer and the harasser/employee are often named respondents. There is no entity like the Commission, as there is under the CHRA, to formulate or screen complaints, where the Commission plays a key role in deciding who the parties are. The British Columbia Human Rights Tribunal in *Daley* explained the Tribunal's direct access model this way at paras 51 and 52:

> Under the direct access system of protecting human rights, complainants are charged with the responsibility of framing their complaints, including naming the respondents against whom they wish to proceed. Section 21(1) of the Code indicates that this is the complainant's responsibility, in saying that "any person or group of persons that alleges that a person has contravened this Code may file a complaint with the tribunal…." This stands in contrast to a commission system, where the commission, as the complaint receiving and investigating body, frames the complaint and determines who the appropriate respondents are….
>
> The Tribunal's case law has generally respected complainants' choices in naming respondents. There have been a number of decisions in which the Tribunal has declined to dismiss complaints against individual respondents, saying it was sufficient for the complaint to proceed against them if there were allegations against them which could contravene the Code….

[300] As I explained above, *Daley* is frequently cited for the policy reasons discussed in that case regarding why an individual should be permitted to remain a party in the context of the legislative scheme in British Columbia. *Schrenk* is one such case that cited *Daley* for this purpose.

[301] I explained, as well, that the tribunal in *Daley* also reviewed some of the policy reasons for bringing the complaint against the employer, rather than the individual, and *vice versa*. For example, at paragraph 54, the Tribunal stated this about the policy reasons for bringing the complaint against the employer:

> …in light of the fact that it is the employer or other institutional respondent which is most likely to be able, in both a practical and financial sense, to satisfy any remedial orders the Tribunal might make, it is usually not necessary to hold individual respondents liable in order to provide effective remedies to complainants.

[302] At the conclusion of its explanation of the competing policy reasons both for and against proceeding with a complaint against the individual employee instead, the Tribunal commented that the change in the legislative scheme in British Columbia from a commission-based system to one of direct access had the effect of diminishing the importance of the policy considerations in favour of proceeding against the employer, as opposed to individual employees, at paragraph 55: “These latter concerns have not been prominently reflected in the Tribunal’s case law since the introduction of the direct access system.”

[303] *Daley* indicates that the change to a direct access system in British Columbia shifted that tribunal’s focus from the policy reasons for choosing to proceed against the respondent employer instead of the harasser/employer to the reasons in favour of proceeding against the individual employee to whom the complainant attaches blame for their allegedly discriminatory experience.

[304] The Tribunal in British Columbia is often called upon to issue rulings about whether a complaint should proceed against the individual respondent who has been named by the complainant. I take judicial notice of the fact that *Daley* has thus far been cited in several hundred British Columbia human rights rulings. Most rulings favour the individual remaining as a respondent based on the favourable policy outcomes for that side of the equation described in *Daley*, consistent with the tribunal’s comment in *Daley* that in British Columbia the complainant’s wishes about how to frame their complaint are generally respected.

[305] But the number of rulings on this issue, including those since *Schrenk* was decided, suggests that this issue is not resolved for the parties. This issue appears to take up a significant amount of tribunal resources. Complainants in human rights cases, including those before this Tribunal, often self-represent. They are often not knowledgeable about how to frame their case from a legal perspective. In British Columbia, this includes that they may not know that the employer’s legal responsibilities extend to the acts or omissions of its employees because of section 44(2) of the British Columbia Code. Individual claimants may not realize in advance that the employer is likely going to be the party that is able to fulfill remedial obligations imposed by the Tribunal, as opposed to their alleged harasser. They

may not know anything in advance about what it means for the proceeding about their complaint when they decide to name their harasser instead of calling them as a witness.

[306] It is against this backdrop, and consistent with the issue the Court was asked to decide in *Schrenk*, (whether the individual respondent should remain a party), that the Supreme Court of Canada noted the policy reasons that were described in *Daley* in favour of proceeding against the individual employee, without addressing those policy reasons (such as procedural efficiency, one of the reasons identified in *Daley*) against it. The Supreme Court of Canada in *Schrenk* was not asked to consider the issue of who should be a party, only to determine whether the complaint could continue against the individual harasser/employee who objected. I have observed that the case was decided in the context of a direct access system and that the Supreme Court of Canada afforded significant weight in *Schrenk* to the wishes of the complainant, just as the tribunal's case law in British Columbia prioritizes the complainant's wishes.

[307] The impact of the legislative scheme on the decision in *Schrenk* is perhaps most notably demonstrated by the Court's analysis of the purpose of the British Columbia Code, which the Court then used to guide its interpretation of the wording in section 13(1)(b) of the statute, which was, in essence, the issue to be resolved. Section 3 of the British Columbia Code states that the statute has several purposes. In particular, section 3(e) states: "(e) to provide a means of redress for those persons who are discriminated against contrary to this Code." The Supreme Court of Canada considered this purpose and the legislation as a whole and concluded that the purpose of the British Columbia Code was to hold individuals accountable, at paragraph 56:

> In my view, while the person in control of the complainant's employment may be primarily responsible for ensuring a discrimination-free workplace — a responsibility that is recognized in s. 44(2) of the Code — it does not follow that only a person who is in a relationship of control and dependence with the complainant is responsible for achieving the aims of the Code. Rather, the aspirational purposes of the Code require that individual perpetrators of discrimination be held accountable for their actions. This means that, in addition to bringing a claim against their employer, the complainant may also bring a claim against the individual perpetrator.

[308] I note the Supreme Court of Canada's statement: "the aspirational purposes of the Code require that individual perpetrators of discrimination be held accountable for their actions." In *Schrenk*, the Supreme Court of Canada focused on the cause of the harm when it emphasized that the purpose of the British Columbia Code is to hold culpable individuals accountable.

[309] In contrast, in *Robichaud*, the Court reviewed the purpose of the CHRA and held that its purpose is to address the harmful effect of the discrimination no matter the cause of the harm. Section 2 of the CHRA, the provision that states the purpose of the CHRA, does not state that the purpose of the CHRA is to provide a means of redress for those persons who are discriminated against. The purpose provision states nothing about holding individuals accountable for their culpable behaviour. The accountability in the CHRA created by section 2 lies in requiring the employer to make effective changes to the work environment to ensure that the discriminatory practice does not happen again.

[310] Obviously, the CHRA provides for redress of the harmful effects of discrimination for successful complainants through the complaints process. As well, its remedies include those that benefit the individual complainant personally, such as compensation. But holding culpable individuals accountable is not the overall purpose of the CHRA, as determined by the Supreme Court of Canada in *Robichaud*, and that purpose should not dominate the interpretation of section 65. The purpose of the CHRA as stated by the Supreme Court of Canada in *Robichaud* should guide that interpretation.

[311] This is a key point in this ruling. If the purpose of human rights legislation is to hold the cause of the harm accountable to the complainant, it makes sense that the Court will find it an implicit requirement of the statute that a complaint be able to proceed against the employer and the harasser/employee in every complaint unless there is a sufficient reason not to have that happen. If, as was found by the Court in *Robichaud* about the CHRA, the purpose of the legislation is to address the harmful effects of the discrimination no matter the cause of the harm, it makes sense that the Court will focus on the employer's responsibility to address the harmful effects of discrimination because the employer is the party in a position to exert control over the work environment.

[312] The CHRA is also aspirational in its own right, but it achieves that goal in a different manner. This includes the procedural aspect of having the Commission frame complaints and influence or decide who the parties should be before the Tribunal becomes involved. This includes, as well, the CHRA's substantive remedial emphasis which focuses on ensuring that 1) workplaces are free of discrimination and 2) that workplaces serve as places where employees (who are members of the public) are educated about human rights. Unlike the British Columbia Code, the CHRA is not intended to be primarily concerned with personal culpability. As was clarified by the court in *Robichaud*, the overall purpose of the CHRA is not to punish the wrongdoer.

[313] This difference in purpose is demonstrated by the fact that section 65 of the CHRA offers the employer the inducement of avoiding liability completely if it is sufficiently proactive in preventing and ameliorating the harmful effects of discrimination by its employees. As explained, a provision like section 65(2) is absent from the legislative scheme in British Columbia. In that jurisdiction the respondent employer will always be liable if named a respondent in an established complaint.

[314] This difference in legislative purpose and as between the two statutes, in my view, also accounts for the few differences in result about how the Supreme Court of Canada perceived some human rights remedies as between *Robichaud* and *Schrenk*.

[315] In *Schrenk*, the Court concluded that the tribunal can order certain remedies against the harasser/employee because it concluded that some remedies can be ordered by the tribunal against the individual respondent more effectively than by the employer to the harasser/employee. This reason presupposes that the employer will order the employee to do or to refrain from doing certain things but that the tribunal's order will be more effective than the employer's direction.

[316] As a reminder, in *Schrenk*, the employer of the harasser terminated the harasser over his discriminatory conduct. The employer was not able to successfully correct the employee's behaviour. After termination, the harasser continued to harass the complainant. Essentially, *Schrenk* involves a complaint where the employer was not able to control the harasser. At para 58, the Supreme Court of Canada stated:

> Once alerted to the discriminatory conduct, an employer will presumably discipline the co-worker who has harassed the complainant for multiple years and may even terminate their employment. But the Tribunal could go further. The Tribunal can, like the employer, order that the harasser cease his or her discriminatory behaviour (Code, s. 37(2)(a)), but it can also order the harasser to "ameliorate" their discriminatory harm (s. 37(2)(c)(i)); order the harasser to pay compensation to the complainant (s. 37(2)(d)(iii)) [to compensate that person for injury to dignity, feelings and self respect]; and declare the conduct discriminatory, which can have symbolic significance (s. 37(2)(b)). These remedies go beyond those available to the employer and further the purposes of the Code.

[317] The Supreme Court of Canada explicitly found that the tribunal in British Columbia has the authority to order the harasser to cease the discriminatory behaviour (as can the employer). In *Robichaud,* similar wording in the CHRA in section 53(2)(a), authorizing the Tribunal to order a person to cease their discriminatory conduct, was underlined by the Court as being the responsibility of the employer. I expect that this is because the employer is in a position to take a range of actions within the workplace, including disciplinary action, and that the Court presumed in *Robichaud* that the employer was best able to manage its employees.

[318] The Court in *Schrenk* also held that the tribunal in British Columbia can order the harasser to ameliorate the discriminatory harm they caused the complainant. A notable difference between *Robichaud* and *Schrenk* is the implicit conclusion by the Supreme Court of Canada in *Schrenk* that the harasser/employee is in a position to "ameliorate the discriminatory harm" that they caused the complainant. This is a remedy under the British Columbia Code but is not a remedy in section 53(2) of the CHRA. Pursuant to section 53(2)(a) of the CHRA, a person can be ordered to cease the discriminatory practice and to "take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in the future…." But this is understood to apply to the respondent employer.

[319] The Court in *Schrenk* did not explain in what way the tribunal could order the harasser/employee to ameliorate the harmful effects of the discrimination on the complainant. "Ameliorate" seems to imply something other than providing compensation to the complainant or another specific remedy. Perhaps the Court in the context of *Schrenk*

concluded that the tribunal may be able to order the harasser to do something to ameliorate his harm to the complainant because the harasser had been terminated and no longer had a presence or ongoing connection with the work environment. Under the CHRA, this is the responsibility of the employer.

[320] In my view, ordering a harasser/employee to ameliorate the harm they caused the complainant is likely to require some interaction between the two parties. This seems to go beyond payment of compensation. On the facts in *Schrenk*, I would be concerned about requiring the harasser to have any further interaction with the complainant given that the harasser would not stop harassing the complainant despite being terminated by his employer for his harassment. In my view, avoiding further emotional harm to the complainant is a first priority when the Tribunal decides how to apply the remedies under the CHRA to achieve the overall legislative goal of addressing the harmful effects of the discrimination. A remedy requiring that the harasser do something to offset the harassment of the complainant may be consistent with the legislative goal of holding the perpetrator accountable, but, in my view, avoiding further harmful effects to the complainant is the dominant and over-riding consideration under the CHRA.

[321] The Court in *Schrenk* concluded that the tribunal can order the harasser/employee to provide compensation for injury to dignity, feelings and self-respect to the complainant and that the tribunal may declare the harasser's conduct to be discriminatory. As explained, whether the Court concluded that the harasser/employee can be ordered to pay compensation for hurt feelings and loss of self-respect is not clear in *Robichaud* but may be the case.

[322] In any event, whatever may be discerned from *Robichaud* on this point, the decision did not consider section 65. In my view, whether *Schrenk* has now clarified this point for complaints pursuant to the CHRA depends on whether remedies may be ordered against the harasser/employer in addition to the respondent employer when section 65(1) of the CHRA applies, which is the primary issue in this ruling. Obviously, the remedy of compensation for pain and suffering pursuant to section 53(2)(e) of the CHRA may be ordered against the harasser/employee when section 65(2) of the CHRA applies to the respondent employer.

[323] Equally notable is what the Supreme Court of Canada in *Schrenk* did not include in its list of remedies that may be awarded against the harasser. The Court did not include the remedies described in section 37(2)(d)(i) and (ii) of the British Columbia Code which provide as follows:

> (i) make available to the person discriminated against the right, opportunity or privilege that, in the opinion of the member or panel, the person was denied contrary to this Code;
>
> (ii) compensate the person discriminated against for all, or a part the member or panel determines, of any wages or salary lost, or expenses incurred, by the contravention….

[324] The Court did not consider it effective to order the harasser/employee to restore a right, opportunity or privilege to the complainant and concluded that the employer should pay and lost wages or statutorily authorized expenses. *Robichaud* and *Schrenk* both conclude that these two remedies are the responsibility of the respondent employer.

[325] In *Schrenk,* the Supreme Court of Canada did not directly address its previous conclusions in *Robichaud* about the purpose of the CHRA or respecting how remedies should be awarded. The CHRA was not relevant in *Schrenk* because the Court was concerned with different legislation. *Schrenk's* analysis of the purpose of the British Columbia Code does not change the Court's earlier analysis of the purpose of the CHRA in *Robichaud*. That purpose places the focus on the employer's obligation to prevent the same or a similar discriminatory practice from occurring in the future (unless section 65(2) of the CHRA applies.) I do not see a legal basis in *Schrenk* to conclude that the Court intended to change the approach it took in *Robichaud* to remedies under the CHRA, when the Court placed remedial responsibility on the employer. The Court did not state any disagreement with its earlier decision in *Robichaud*.

[326] It is also arguably more procedurally efficient for human rights complaints to proceed against the employer rather than naming the harasser which can make the proceeding more difficult. Mr. Gordon could have been a witness which is in and of itself a consequence arising from his actions. No one wants to be involved in testifying in a human rights complaint, least of all the harasser. In this case, Ms. Peters was cross-examined for several days by her harasser, Mr. Gordon. Her counsel referenced the toll that took on Ms. Peters

in her submissions. Had UPS accepted responsibility for Mr. Gordon's conduct and had Mr. Gordon been called as a witness, Ms. Peters' cross-examination would have been by UPS's counsel.

C. *Schrenk* on the Interpretation of Statutes

[327] It is also important to consider *Schrenk* because it illustrates how the majority of the Supreme Court of Canada addressed a difficult question of statutory interpretation, as am I in this ruling.

[328] The difficulty of the issue before the Court is illustrated by the differing opinions expressed by members of the Court. As a reminder, in *Schrenk*, the individual respondent was a co-worker of the complainant at the same worksite but was not employed by the same employer. The individual respondent relied on the fact that he was neither the complainant's employer nor his superior in the workplace; he was a co-worker but employed by another employer. This issue engaged the Court in an exercise of statutory interpretation to determine the meaning of "regarding employment" in section 13(1)(b) of the British Columbia Code, the provision that recognizes employment-related discrimination in that statute.

[329] The wording "regarding employment" is capable of more than one interpretation. The individual respondent argued that the wording "regarding employment" required a relationship between himself and the complainant such as being his employer or superior. The majority of the Court called this a "relational interpretation". In contrast, the complainant submitted that "in relation to employment" required a "contextual interpretation" involving only some connection with the workplace, one that did not require that a legal relationship exist between the complainant and the harasser.

[330] The Supreme Court of Canada faced a difficult choice between two reasonable interpretations of "regarding employment" in the British Columbia Code. The interpretation submitted by each party was reasonable based on the wording of section 13(1)(b) of that statute, the legislative context, the purpose of the British Columbia Code and its available remedies. However, at para 59, the Court concluded that the broader interpretation of "regarding employment" should prevail:

> In the end, a relational approach leaves complainants with access to too few remedies and narrows the range of actors who can be held accountable for their conduct. The unfortunate consequence of this is that individual perpetrators like Mr. Schrenk may be immunized from liability before the Tribunal simply because they do not share a common employer with the victim of their harassment. The contextual approach I propose, by contrast, gives employees greater scope to obtain remedies before the Tribunal. This aligns with the remedial purposes of the Code. Insofar as both the relational and the contextual interpretations of "regarding employment" are plausible, the interpretive approach set out in our jurisprudence relative to human rights laws favours the more generous reading.

[331] *Schrenk* is a helpful reminder that when this Tribunal is faced with two reasonable interpretations of statutory language, it should adopt the more generous interpretation. I also considered the Court's comment that, when faced with a choice between two reasonable interpretations of statutory language in the British Columbia Code, the interpretative approach that "…gives employees greater scope to obtain remedies before the Tribunal" should be preferred.

[332] I raised this interpretative approach earlier when I considered whether I was faced with two equally reasonable interpretations of section 65(1) of the CHRA; namely, whether the interpretation that the respondent employer is liable "instead of" the harasser/employer and whether the interpretation whereby the respondent employer is liable "in addition to" the harasser/employee are both of similar reasonableness, but will address this issue further given these comments by the Supreme Court of Canada.

[333] This situation is different from the issue in *Schrenk*, where the Court found that the phrase, "regarding employment" within section 13(b) of the British Columbia Code was capable of two reasonable interpretations, one relational and one contextual. For all the reasons above, I cannot conclude that there are two reasonable interpretations of the wording in section 65(1). The wording of section 65(1) cannot be reasonably interpreted as saying that the employee committed the acts or omissions of the employee. The provision states that the employer committed the acts or omissions of the employee.

[334] I also am mindful of the fact that Parliament enacted section 65 to give employees with human rights complaints greater scope to obtain remedies before the Tribunal, so that complainants would not be left without an effective remedy because the Tribunal's order

was made against another employee. The wording of section 65 reflects Parliament's choice in this regard.

XII. Overall Conclusion About the Tribunal's Authority

A. The Limits of Implicit Authority

[335] In *Robichaud*, the Supreme Court of Canada found implicit authority in the CHRA to award remedies against the employer. This was based on the wording of the remedies, the remedial nature of the legislation, and its purpose. These three factors were related: the nature of the available remedies required that they be implemented by the employer, the remedies provided by the CHRA needed to be effective and, in articulating the purpose of the CHRA, Parliament intended that the remedies in the CHRA be applied to ameliorate the harmful effects of the discrimination and prevent its repetition. The Court found that these factors provided the Tribunal with the implicit authority to order the CHRA's remedies against the employer absence any express language stating so.

[336] I considered whether I could take the same approach to the liability of the harasser/employee and award remedies against the harasser/employee based on implicit authority in the CHRA. There are cases where the Tribunal may award remedies under the CHRA against the harasser/employee. But I am not persuaded that I can find that implicit authority remains in the CHRA for the Tribunal to award remedies against the harasser/employee when section 65(1) of the CHRA applies.

[337] I emphasize that section 65(1) expressly provides that the acts or omissions of the harasser/employee are deemed to be committed by the employer. The Tribunal is required to apply the words of the statute. It seems to me that Parliament has expressly addressed the specific issue of legal responsibility when there is a respondent employer or when there are related respondents by enacting section 65. Implicit statutory authority can be relied on in the absence of applicable, express statutory authority. But the CHRA has express wording. In part, Parliament appears to have decided that there should be a presumption that the employer will take responsibility for the liability of its employees and created what is now section 65(1) to achieve this effect.

[338] The Supreme Court of Canada in *Robichaud* explained that when Parliament amended the CHRA to address liability for discrimination in the context of employment, it had an opportunity to make a decision about the nature and extent of the liability it wished to create for the employer for its employees, including those errant employees who engage in the unauthorized and culpable practice of harassment. If I were to rely on implicit authority in the face of express statutory language, I would substitute my opinion for what Parliament decided was the appropriate form of statutory liability for respondents pursuant to this legislation. In other words, I am not persuaded that I can find both explicit and implicit statutory authority co-exist in the statute on the same point in issue when Parliament provides express language on the point. That does not seem a reasonable approach to a legal issue when I am being directed by the words of the statute. The plain wording of section 65(1) changes the facts: the employer has committed the acts or omissions of the employee. I do not believe that I can apply the CHRA as if the employee committed the acts in question when section 65(1) applies.

B. The Scope of Section 65's Application

[339] I also cannot conclude that there is implicit authority to award the CHRA's remedies against the harasser/employee because section 65 does not apply to all complaints, or because it only applies to the employer. Parliament stated in section 65 that it applies to the CHRA for all purposes. Section 65(1) applies to all parties "in the course of employment" which has been defined by the Supreme Court of Canada as being in some way related to employment.

[340] Section 65(1) does not apply only to the employer. It is just that section 65(1) makes only the employer responsible for remedies. The section itself refers to both employees and employers. Section 65(1) deems the employer to have committed the acts or omissions of the employee and thereby holds the employer liable for remedies when the employee would otherwise be liable for any remedies. Section 65(1)'s transfer of liability to the employer obviously impacts the employee too.

[341] The effect of this approach protects the harasser/employee from personal liability for compensation when section 65(1) applies, but this is to reflect the priority given to remedial effectiveness. By their very nature; the employer will be the party in the best position to implement the remedies in the CHRA: *Robichaud.* The Supreme Court of Canada found this to be the case with every remedy available pursuant to the CHRA. (I will return to the remedies that may be awarded against the harasser/employee below).

[342] At the same time, the harasser/employee is not unaffected. The acts or omissions of the employee will be found by the Tribunal to be a discriminatory practice pursuant to the CHRA; the employee will be held accountable for their actions in that sense, in a public proceeding, resulting in a published decision, whether they are a party or a witness. But the employer is deemed responsible for those actions by section 65(1) to ensure that the complainant receives any personal remedies that they are awarded and that remedies in the public interest are implemented. There is no benefit to the complainant or to the public for the Tribunal to award remedies including those that remove discrimination, improve the workplace or restore the complainant's rights, or, for example, that provide compensation for lost wages to the complainant, against a party that is not in a position to implement the awards the Tribunal makes or is likely not to be.

[343] If Parliament wanted section 65(1) to make the employer responsible for the acts of its employee and have no effect on the employee's responsibility for remedies, it would have said that or provided wording to identify that the employer is responsible in addition to the employee or something to that effect.

[344] Likewise, Parliament had the opportunity to create exceptions to what is now section 65(1). It did so in what is now section 65(2). Parliament turned its mind, so to speak, to the issue of exceptions. If Parliament thought that there should be an exception to section 65(1) permitting the harasser/employee to be held personally liable by the Tribunal too, in addition to the employer when section 65(1) applies, it would have said so. And I expect it would have identified the circumstances when that exception would arise in the wording of the exception. Parliament did not create an exception to the deemed liability of the employer created by section 65(1) by providing that a harasser/employee may be held personally liable, separate and apart from their employer, or jointly with the employer, when

their actions are sufficiently wrongful or culpable to warrant that result, or, as is the case here, their actions give rise to a substantiated sexual harassment complaint.

[345] Parliament added one exception to section 65(1), namely section 65(2). It chose an exception which voids the liability of the employer that is deemed by section 65(1) with these words: "…if it is established that the person, association or organization did not consent to the commission of the act or omission and exercised all due diligence to prevent the act or omission from being committed and, subsequently, to mitigate or avoid the effect thereof". These words create the employer's obligation to maintain a healthy work environment free of discrimination. They provide the employer with an opportunity for complete exculpation from liability when they establish a statutory defence pursuant to section 65(2). This is the one exception to section 65(1) that Parliament chose to create. I cannot create another exception by finding that the Tribunal may order remedies against the harasser/employee based on implicit authority in the CHRA when section 65(1) applies, not without countermanding what I conclude to be the intention of Parliament.

[346] The presumption that, in every substantiated complaint related to employment, liability is transferred to the employer by section 65(1) is balanced by the opportunity presented by section 65(2) for the employer to exculpate itself completely from responsibility. That potential exculpation is complete. When the defence in section 65(2) is established, the employer will not be required to share liability for remedies with the employee notwithstanding the fact that the person is their employee and engaged in a discriminatory practice in relation to employment. Parliament appears to have intended that such due diligence and preventive conduct by the employer should be rewarded.

[347] Section 65 may take an all or nothing approach to remedies, but it is balanced and fair. I provide a theoretical example to illustrate that there is a problem with the reasonableness and fairness of the alternative interpretation of section 65(1) of the CHRA. If I were to instead interpret section 65(1) of the CHRA as meaning that the employer shares liability jointly with the harasser/employee, given that section 65(2) provides the employer with the opportunity to be exculpated entirely from responsibility, I would interpret section 65 in a manner that strongly favours employers over employees, at least in relation to compensatory remedies. In this scenario, employers would share liability with their

employee for compensatory awards pursuant to section 65(1), or, not have any liability for them at all pursuant to section 65(2). In contrast, the employee would share liability with the employer pursuant to section 65(1) and be fully liable if section 65(2) applies. This alternate interpretation does not strike a reasonable balance between the two related respondents respecting the theoretical award of compensatory remedies. As well, this alternative interpretation does not seem reasonable given my conclusion that Parliament enacted section 65 to ensure that the employer is responsible for discrimination or acts responsibly to prevent and ameliorate discrimination.

C. Liability in Context

[348] Analysis of other statutory provisions in the CHRA included in this ruling are consistent with the conclusion that section 65(1) transfers the potential personal liability of the employee to the employer. There is no language in the CHRA indicating that the harasser/employee maintains their direct, personal liability for remedies pursuant to section 53 of the CHRA once the deeming provision in section 65(1) is found to apply to their actions. There is no express language in the CHRA to clarify that the Tribunal is still authorized to order remedies against the harasser/employee when section 65(1) applies and deems the employer liable. The wording of section 65(1) places the employer in the shoes of the employee. Parliament chose to require that the employer becomes the person found to have engaged in the discriminatory practice for purposes of section 53(2) instead of the employee.

[349] As noted, the other relevant provisions include section 4, but it is subject to section 65, as well. While section 4 recognizes the potential culpability of every person in the federal jurisdiction pursuant to the CHRA, not every individual who has engaged in a discriminatory practice will have remedies ordered personally against them by the Tribunal because of section 65(1) of the CHRA. But in every case where an employee engages in a discriminatory practice, and section 65(1) applies, the employer will be responsible for the remedies ordered pursuant to the CHRA for those actions. And no employer that establishes a statutory defence pursuant to section 65(2) will have remedies awarded against them on account of the actions of its employees who engaged in the discrimination.

[350] The transfer of liability to the employer is reinforced by the Supreme Court of Canada's conclusion in *Robichaud* that the remedies in the CHRA are intended to be awarded against the respondent employer to be effective. It is consistent with the purpose of the legislation, which is to remove discrimination and address the harmful effects of the discrimination, not punish the wrongdoer for their antisocial behaviour: *Robichaud* at para 10. It is reinforced, as well, in practice before the Tribunal by reason of the many complaints referred to the Tribunal by the Commission where the harasser/employee is not a named respondent, and remedies are awarded in an efficient and straightforward manner against the respondent employer, unless section 65(2) applies.

D. The Employer is Liable for Remedies

[351] I stated at the outset of the conclusion to this ruling that there are complaints where the Tribunal does have the authority pursuant to the CHRA to award some (not all) of the remedies in section 53(2) against the harasser/employee. It is not the case that personal liability is irrelevant in human rights complaints under this legislation. If the individual employee has been educated about human rights and yet defies the policies and instructions of the employer by engaging in discriminatory acts or omissions, despite efforts by the employer that rise to the level required to establish a section 65(2) defence, the individual should face personal liability and appropriate remedial outcomes. In my view, it is this nature and degree of personal culpability created by section 65(2) under the CHRA that warrants a finding of personal liability against the harasser/employee. The Tribunal's authority to order remedies against the harasser/employee arises when section 65(2) applies to the respondent employer.

[352] This is based on a contextual reading of section 53(2) of the CHRA. As is the case in every other human rights complaint where section 65(1) does not apply, the Tribunal has the authority to find that "the person found to… have engaged in the discriminatory practice" for purposes of section 53(2) is the harasser/employee. To put it simply, section 53(2) authorizes the Tribunal to order remedies against the harasser/employee personally when the employer establishes a section 65(2) defence.

[353] In this case, UPS did not educate Mr. Gordon adequately about human rights. The evidence is that, as a part-time supervisor over a period of many years of employment, Mr. Gordon did not receive the education about human rights that UPS afforded its full-time managers, leaving aside the deficiencies in the content of that training. Mr. Gordon did not, therefore, receive anything close to adequate instruction from his employer on this subject, yet he was employed in a position where he had authority over other employees. Because I found that UPS did not establish a statutory defence pursuant to section 65(2) of the CHRA in the Liability Decision, section 65(1) holds UPS liable for the acts and omissions of Mr. Gordon and should ensure that any remedy that may be ordered is effective.

[354] Had UPS met the criteria to establish a statutory defence pursuant to section 65(2), that defence would have included a finding by the Tribunal that Mr. Gordon received appropriate education and instruction from UPS. I would have found Mr. Gordon personally liable for his own culpability in the face of such education and instruction. I would not have hesitated to award appropriate remedies against him personally based on his culpability. However, while I would have been required to order any authorized remedies against Mr. Gordon personally, I would have been concerned about his ability to pay compensation in full.

[355] I recognize that sexual harassment is a highly harmful discriminatory practice for its victims. Mr. Gordon engaged in two incidents of physical sexual harassment of Ms. Peters, one of which I found in the Liability Decision to be an assault. I considered whether I could order that Mr. Gordon pay compensation to Ms. Peters personally for his personal culpability in this regard. There is no justification for his conduct on these two occasions by reason of a lack of training. Mr. Gordon should have known that touching Ms. Peters' buttocks and attempting to force himself on her in her car was reprehensible conduct.

[356] It is with significant reluctance that I conclude that I do not have the authority to hold Mr. Gordon personally liable for his own culpability in regard to these incidents. Section 65(1) states that Mr. Gordon's acts on these occasions are deemed to be committed by UPS. When Parliament determined the wording of section 65, it was aware that sexual harassment includes sexual assault under the CHRA.

[357] As I have highlighted, tribunals in jurisdictions with different legislative schemes do award remedies against harassers based on their personal culpability. *Daley* was decided in light of legislation where the tribunal is authorized to make awards against the employer and the harasser jointly and severally in any substantiated complaint. The tribunal pointed out that this allows the complainant to have the satisfaction of holding the harasser accountable for their culpability and commented at para 53 that "in the case of a sexual harasser, it seems appropriate for him or her to be named individually to reflect that culpability".

[358] When I began this analysis, I thought that there was a need to decide what "culpability for a discriminatory practice" means in the context of the CHRA and when it rises to a level that warrants personal liability of the harasser/employee. However, I have come to the conclusion that personal liability does not depend on the degree of personal culpability under the CHRA. All acts and omissions of the employee are deemed to be committed by the employer pursuant to section 65(1) no matter how reprehensible they are. In this legislative scheme, personal liability is not determined by the personal culpability of the harasser/employee but by whether section 65(2) applies to the complaint.

[359] I also struggled with the decision respecting Mr. Gordon's personal liability for these incidents and for his overall conduct because sexual harassment of this nature is not conduct that is reasonably considered to be conduct in the course of employment. The tribunal in *Daley* wrote about how the culpability of an individual employee in the course of employment is relevant for purposes of liability. At para 61, the tribunal stated that: "… consideration should be had as to whether the conduct alleged was within the course of that person's employment or whether there is anything in the allegations made against that person which would take his or her conduct outside of the normal scope of his or her duties." The tribunal concluded that whether the acts and omissions of the individual have a "measure of individual culpability" is an appropriate consideration at paragraph 62. The tribunal wrote in that paragraph:

> The clearest example of such conduct is where an individual is accused of sexual harassment or other similar behaviour. In such a case, no plausible argument can usually be made that the harasser was acting within the scope of his or her authority. While the employer is, in such cases, still liable for the

> harassment engaged in, as it occurred in the course of the harasser's employment, broadly defined, the individual harasser also has a measure of individual culpability. Such a person is not merely performing the duties of their employment, albeit in a manner which is ultimately found to have resulted in discrimination. It tends to further the purposes of the Code in such circumstances for the individual harasser to be subject to individual liability.

[360] But *Daley* was decided based on the British Columbia Code. The tribunal is authorized pursuant to section 44(2) of the Code to make a distinction between conduct within the scope of employment and conduct outside the scope of the employment for purposes of findings regarding liability. Section 44(2) provides that "an act or thing done or omitted by an employee, officer, director, official or agent of any person within the scope of the person's authority is deemed to be an act or thing done or omitted by that person." It is no surprise that sexual harassment was not considered in *Daley* to be part of the scope of the person's authority. But the tribunal in *Daley* is not directed by the applicable legislation to hold the employer liable for the employee's misconduct outside the course of their employment. Because the tribunal in *Daley* is not so directed, it appears that the tribunal adopted the common law view of vicarious liability that exists in the courts which, in general, holds the employer liable but also allows for the personal liability of employees for their own separate wrongful acts outside the course of their employment, based on section 44(2) of the British Columbia Code.

[361] The point of law that, pursuant to the CHRA, the respondent employer is liable for the unauthorized acts of its employee, has been long settled by the Supreme Court of Canada. I return to Justice La Forest's statement about vicarious liability under the CHRA in para 12 in *Robichaud*:

> …[T]he liability of an employer ought [not] to be based on vicarious liability developed under the law of tort. …For in torts what is aimed at are activities somehow done within the confines of the job a person is engaged to do, not something, like sexual harassment, that is not really referable to what he or she was employed to do. The purpose of the legislation is to remove certain undesirable conditions, in this context in the workplace….

[362] And at para 17:

> …[T]his type of liability; it is purely statutory. However, it serves a purpose somewhat similar to that of vicarious liability in tort, by placing responsibility

> for an organization on those who control it and are in a position to take effective remedial action to remove undesirable conditions.

[363] I see nothing in the wording of section 65 or in the legislative scheme read in conjunction with section 65 to suggest that the addition of section 65(1) altered these findings of the Court: the type of liability created by the CHRA is similar to vicarious liability in that it places responsibility on the employer for the acts of its employees. However, the fact that a harasser/ employee engages in conduct outside the scope of their employment is not a relevant consideration for purposes of liability under the CHRA based on *Robichaud*. I cannot make a finding of personal liability against Mr. Gordon on the basis that his conduct falls outside the scope of his employment with UPS and no party suggested that I could.

[364] In my view, the finding of the Supreme Court of Canada that an employee's conduct outside of the scope of their employment is the responsibility of the employer dispenses with the need for the exceptions recognized in vicarious liability under the common law where the employer is normally responsible, but, if the employee's act is outside the scope of their employment (as is the case with harassment), the individual employee will be held liable for remedies.

[365] Further, to further counter the significance of personal culpability, the Supreme Court of Canada made it clear that discrimination under the CHRA does not need to be intentional. I return to the passage at para 10 of *Robichaud*:

> Since the Act is essentially concerned with the removal of discrimination, as opposed to punishing anti-social behaviour, it follows that the motives or intention of those who discriminate are not central to its concerns. Rather, the Act is directed to redressing socially undesirable conditions quite apart from the reasons for their existence.

[366] Because discrimination does not need to be intentional, in my view, a person's degree of culpability does not matter for liability purposes (except for purposes of section 53(3)). What is relevant for purposes of liability under the CHRA is whether the person engaged in a discriminatory practice as that is defined in the CHRA. Under the CHRA, section 65(1) deems the person to be UPS in this complaint.

[367] For these reasons, I conclude that the degree of personal culpability of the employee cannot be used as a measure to find the harasser/employee personally liable when section 65(1) applies. Every act and omission of the employee is deemed to be committed by the employer by section 65(1). The degree of personal culpability is not relevant to liability. It does, however, remain relevant for purpose of assessing the Tribunal's remedial response to the finding of a substantiated complaint.

[368] In describing the issues to be determined in this ruling above, I listed a series of questions to be answered reflecting Ms. Peters' various requests for compensation, each of which required analysis of the Tribunal's authority. In summary, by reason of the application of section 65(1) of the CHRA to this complaint and the decision in *Robichaud*, the Tribunal does not have the statutory authority to make an order pursuant to section 53 against Mr. Gordon personally with the terms requested by Ms. Peters. Specifically, I conclude as follows:

1) The Tribunal is not authorized to order that Mr. Gordon is jointly and severally responsible along with UPS to pay any compensation awarded for pain and suffering to Ms. Peters pursuant to section 53(2)(e) of the CHRA for Mr. Gordon's sexual harassment, or to pay any special compensation awarded for wilful or reckless conduct pursuant to section 53(3) of the CHRA in relation to Mr. Gordon's sexual harassment; this is the responsibility of UPS.

2) The Tribunal is not authorized to order that (in theory, the Tribunal not having authority to find a separate, additional discriminatory practice based on UPS's conduct in this regard) Mr. Gordon would have been responsible jointly and severally with UPS to pay compensation for pain and suffering pursuant to section 53(2)(e) of the CHRA for UPS's conduct in respect of its inadequate response to the sexual harassment of Ms. Peters or for any special compensation awarded for wilful or reckless conduct pursuant to section 53(3) of the CHRA for UPS's conduct in this regard.

3) The Tribunal is not authorized to order that Mr. Gordon is jointly and severally responsible to pay any compensation for pain and suffering to Ms. Peters pursuant

to section 53(2)(e) of the CHRA for UPS's discriminatory conduct in respect of disability-based discrimination; that is UPS's responsibility.

4) The Tribunal is not authorized to order that (in theory, there being no request for same) Mr. Gordon would have been jointly and severally responsible to pay any compensation for wilful or reckless conduct pursuant to section 53(3) of the CHRA for UPS's discriminatory conduct in respect of disability-based discrimination; had such compensation been requested by Ms. Peters, that would have been UPS's responsibility.

5) The Tribunal is not authorized to order that Mr. Gordon is jointly and severally responsible to pay any compensation for wages and/or expenses claimed by Ms. Peters for either Mr. Gordon's discriminatory practice based on sexual harassment or UPS's discriminatory practice based on disability pursuant to section 53(2)(c) and section 53(2)(d) of the CHRA; that is UPS's responsibility.

6) The Tribunal is not authorized to order that Mr. Gordon is jointly and severally responsible for payment of interest claimed by Ms. Peters; because UPS is liable for any compensation awarded, UPS is liable for payment of any interest pursuant to section 53(4) of the CHRA on any awards that the Tribunal may make.

E. What Remedies May be Awarded Against the Harasser/Employee

[369] Above I explained that all of the remedies in the CHRA may be awarded against the respondent employer: *Robichaud*. What I considered in the course of the ruling but have yet to address are the conclusions I drew from *Robichaud* and *Schrenk* about what remedies under the CHRA are appropriate to award against the harasser/individual when the respondent employer establishes a statutory defence pursuant to section 65(2) of the CHRA and no remedies may be issued against them.

[370] Because I have found that section 65(2) does not apply to this complaint, these are my comments. But they are relevant to this ruling because they put the outcome of the ruling

in perspective based on the practicalities of what is available to be ordered against the harasser/employee when they are an individual respondent.

[371] Based on *Robichaud*, if section 65(2) applies to the complaint and the Tribunal has the authority to issue an order with awards of remedies against the harasser/employee pursuant to sections 53(2), 53(3) and 53(4) of the CHRA, the Tribunal may award the following:

> Section 53(2)(a) that the person cease the discriminatory practice;
>
> Section 53(2)(e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.
>
> 53(3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.
>
> 53(4) Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.

[372] I appreciate that the Supreme Court of Canada concluded in *Robichaud* that compensation pursuant to section 53(3) is to be awarded against the respondent employer. The Court provided no reasons for this conclusion. In my view, the lack of explanation allows me to conclude that the Court thought that this would be the responsibility of the employer in a case where the employer is liable. But if the employer is not liable pursuant to section 65(2), it seems to me that the Tribunal is free to consider whether this remedy should be awarded against the harasser/employee. I need not decide this here, however, this is my initial inclination and rationale.

[373] In contrast, the remedies in section 53(2)(a) and in section 53(b) are aimed at the removal of discrimination. The harasser/employee is not in a position to implement these remedies:

> 53(2)(a) …and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including

> (i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or
>
> (ii) making an application for approval and implementing a plan under section 17;
>
> 53(2)(b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice….

[374] Further, because the Supreme Court of Canada decided in both *Robichaud* and *Schrenk* that lost wages are the responsibility of the employer, I conclude that the Tribunal may not make an order against the harasser/employee pursuant to section 53(2)(c): "that the person compensate the victim for any or all of the wages that the victim was deprived of…." The Court in *Robichaud* seemed to take this as a given, and, in *Schrenk*, appears to continue to agree with this premise. I expect that lost wages by reason of discrimination are assumed to be the responsibility of the employer to pay because the responsibility to pay wages for work performed rests on the employer, not another employee. A human rights complaint is not treated by the Supreme Court of Canada as if it is a negligence claim where any party who has harmed the plaintiff through negligence is responsible for any lost wages. Given that two separate Supreme Court of Canada decisions agree on this point, and one concerns the CHRA directly, the result on this point is binding on this Tribunal. I need not comment further about this issue.

[375] A more challenging question is whether the Tribunal may order the harasser/employee to compensate the victim of discrimination "…for any expenses incurred by the victim as a result of the discriminatory practice…." It appears that the tribunal's authority to order the requested expenses are in issue in this case. I will issue a ruling in the remedy decision in response to UPS's objection to Ms. Peters request that certain expenses be reimbursed by UPS.

XIII. Should Mr. Gordon have been excused from responsibility for compensation for undue hardship?

[376] In addition to considering Ms. Peters' request that compensation be awarded against UPS and Mr. Gordon, I also considered Mr. Gordon's request that he not be ordered to pay

any damages given his limited financial circumstances. I considered Mr. Gordon's submission that he is of limited financial means as if it was his testimony. The Tribunal is empowered by section 48.3(9) of the CHRA to consider any information it receives as evidence, unlike a court which is subject to legal rules of evidence.

[377] This submission is the extent of the evidence before the Tribunal, except for Mr. Gordon's references to having had health issues and not working during discussions between the parties and the Tribunal. Mr. Gordon provided no evidence of his personal finances or inability to pay.

[378] I would not have relieved Mr. Gordon of the obligation to pay any damages in this case because of his financial situation. The Tribunal is not persuaded that Mr. Gordon should, in theory, be permitted to escape the financial consequence of being ordered to pay damages without evidence of impecuniosity. Mr. Gordon failed to provide evidence to establish that he would suffer undue hardship should he be ordered to pay damages.

[379] I expressed the view above that it does not make sense for the Tribunal to award remedies against a party that is not in a position to implement the award. Nonetheless, in my view the Tribunal should not allow respondents to avoid responsibility for payment of compensation for reasons of financial constraints. The Tribunal is not in a position to police enforcement of monetary awards (authority is given to the Federal Courts in this regard) and is most certainly not able to do so over a prolonged period of time during which the personal circumstances of an individual respondent may change.

XIV. Should Mr. Gordon pay compensation for UPS's conduct in relation to sexual harassment?

[380] Mr. Gordon has faced a demand from Ms. Peters for an award of damages for his sexually harassing conduct. I have determined that UPS will be responsible for this award. The award itself will be addressed in the final remedy decision. Ms. Peters asks that Mr. Gordon also be found jointly and severally responsible for the separate damage award she requests be ordered against UPS for UPS's failure to prevent, address and mitigate the effects of his sexual harassment on her.

[381] It is not necessary to address this issue because the Tribunal has determined that a separate award for sexual harassment against UPS cannot be ordered: Ruling on Separate Damages Against the Respondent Employer. Because the Tribunal lacks the authority to make a separate award against UPS, there can be no separate award against Mr. Gordon for UPS's conduct in relation to sexual harassment. This issue is effectively moot by reason of the Tribunal's earlier ruling in the Ruling on Separate Damages Against the Respondent Employer. At para 161 of that ruling, I noted that because the Tribunal is not authorized by the CHRA to award separate damages against UPS for its failure to prevent, address and ameliorate the sexual harassment that occurred, it is not necessary to decide whether UPS and Mr. Gordon could be jointly and severally liable for a separate award against UPS for sexual harassment by UPS.

[382] It is also moot because of this ruling.

[383] However, in the event that the conclusions in these rulings are found to be in error, I will explain that I would not have ordered that Mr. Gordon be held responsible to pay damages for UPS's conduct, if such damages were awarded, either jointly or severally, in any event.

[384] UPS's responsibility as the employer is to exercise due diligence to prevent, address and mitigate the harmful effects of sexual harassment upon Ms. Peters and upon the workplace itself, as explained in the Liability Decision. UPS did not do so and, as a result, is liable for Mr. Gordon's sexually harassing conduct pursuant to section 65(1) of the CHRA. The converse is not true. Section 65(1) makes the employer responsible for the acts of its harassing employee. There is no language in section 65(1) to make the harassing employee responsible for the acts of the employer. Mr. Gordon cannot be held liable for UPS's conduct.

[385] There is also no factual basis to hold Mr. Gordon legally responsible for UPS's conduct in relation to the finding of sexual harassment engaged in by Mr. Gordon. UPS engaged in separate conduct from Mr. Gordon.

[386] While Mr. Gordon was a part-time supervisor, that meant he was responsible for supervising the work on the floor by the employees within his department. He was in a position of authority at UPS for purposes of his role, but not for purposes of the issues in this

complaint. He does not appear to have had any real management authority. For example, there is no evidence that he held the authority to hire or fire employees, nor did he participate or contribute to decision-making respecting UPS's workplace policies, training or its response to the sexual harassment. His role in the workplace concerning sexual harassment was limited to repeating a speech about discrimination that UPS management gave him to read at brief worksite meetings with his department subordinates about once a year. These speeches were prepared for him by UPS to read to the other employees in attendance.

[387] I agree with UPS that Mr. Gordon was not forthcoming with relevant information when interviewed by UPS about Ms. Peters' complaint of sexual harassment. Mr. Gordon is not free of moral blame for his response to UPS's eventual investigation of the complaint. Mr. Gordon's obfuscations made the investigation of Ms. Peters' complaint more difficult for UPS. His conduct in withholding information from his employer was wrong. Employees have an obligation to be honest and forthright with their employer. This conduct also made it harder for Ms. Peters to have her complaint receive the response it warranted from UPS.

[388] However, it was UPS's legal responsibility to conduct an investigation into the complaint, not Mr. Gordon's responsibility as the harasser. When allegations between co-workers raise issues of credibility for an employer, it is part of the due diligence expected of the employer to make credibility assessments and to consider relevant facts. It was UPS's responsibility to decide who to believe and what conclusions it should draw from the information it collected, not Mr. Gordon's.

[389] The Tribunal concluded in the Liability Decision that UPS failed to conduct a reasonable investigation into the complaint and thereby failed to meet its obligations to Ms. Peters as her employer. This included that UPS failed to ask key follow up questions when interviewing Mr. Gordon. For example, UPS concluded that Mr. Gordon had contravened the company's policy respecting professionalism because Mr. Gordon and Ms. Peters met for dinner outside of work in November 2014. According to Mr. Gordon, the two had other interactions outside the workplace. It would have been reasonable for Mr. Greenway to ask Mr. Gordon to provide detailed information about this and to question whether Mr. Gordon's denial of any harassment was consistent with the evidence that he had, as determined by UPS, engaged in unprofessional conduct. Mr. Greenway's questions

were not thorough and did not test the cohesiveness and internal consistency of the responses provided by Mr. Gordon.

[390] In short, UPS did not appear to reasonably consider whether Mr. Gordon was being fully truthful or forthcoming when he was first interviewed for the complaint. UPS accepted Mr. Gordon's limited explanation and concluded that Mr. Gordon had not engaged in sexual harassment, even though Mr. Gordon admitted to having had dinner outside of work with a female subordinate and although the explanation itself was contrary to UPS's professionalism policies. UPS should have been more alive to these undisputed facts about Mr. Gordon's behaviour and viewed them more objectively.

[391] I conclude that UPS considered Ms. Peters' credibility to be lacking because of her behaviour in relation to call-ins and absences, which involved conduct outside of the alleged facts of her complaint, as explained in the Liability Decision, but failed to consider the reliability of Mr. Gordon's direct response to the complaint with equal scrutiny.

[392] UPS's investigation was flawed in several key respects as found in the Liability Decision, which I will not repeat here. The point is that Mr. Gordon is not responsible for what UPS did.

[393] For these reasons, I would not have held Mr. Gordon jointly or severally responsible for compensation to Ms. Peters for UPS's conduct in relation to the discriminatory practice of sexual harassment, had the issue not been moot, and had the Tribunal possessed the authority to award separate damages for sexual harassment against UPS.

XV. Should Mr. Gordon pay damages for UPS's conduct in relation to disability-based discrimination?

[394] The same issue and above reasons apply to Mr. Gordon's responsibility for UPS's conduct in relation to disability-based discrimination. Mr. Gordon should not be required in any event to pay damages for UPS's acts and omissions respecting its handling of Ms. Peters' disability-related absences from work. He was not involved in decisions about any of Ms. Peters medical leaves or other absences. The evidence is clear that he was not involved in what happened. To illustrate just how removed Mr. Gordon was handling

disability issues, as explained in the Liability Decision, when Ms. Peters was on an extended leave in 2014 due to her car accident, Mr. Gordon did not know what had happened to her that would explain her absence from the workplace.

[395] Other UPS managers and employees participated in the events that comprise the disability-based discriminatory practice that UPS was found to have engaged in as determined in the Liability Decision. These other managers and employees are not named respondents. Even if I had the authority to do so, it would be unreasonable and unfair to hold Mr. Gordon personally responsible for the acts and omissions of managers and employees of UPS that directly caused UPS to be found by the Tribunal to have engaged in a disability-based discriminatory practice when the managers and employees who were involved in that discrimination are not named respondents and are not being held personally responsible for payment of damages. It appears that at least several other UPS employees were involved in this discriminatory practice. They were not called by UPS as witnesses.

[396] It is recognized that Mr. Gordon's harassment of Ms. Peters contributed to her inability to work and need to go on medical leave. I considered whether, for this reason, if I had the authority to order remedies against Mr. Gordon personally, it would be appropriate to require Mr. Gordon to share responsibility for payment of compensation awarded against UPS for UPS's conduct in relation to disability-based discrimination because of the impact Mr. Gordon's actions had on Ms. Peters health.

[397] If I had the authority to order remedies against Mr. Gordon personally, I would not have a legal basis to hold him responsible for the discriminatory practice committed by UPS contrary to section 7 of the CHRA. Section 7 concerns how UPS reacted to and addressed Ms. Peters' disability, not how her disability arose. What is relevant is how UPS managed her disability and related absences. How Ms. Peters' disability arose is of factual interest as background, but it is not legally relevant to this issue.

[398] Ms. Peters' physician put her on medical leave with an indication in the medical note that the medical leave would continue until UPS addressed and resolved the issues experienced by Ms. Peters at work. The discriminatory practices in which UPS engaged are its responsibility as the employer.

[399] There is a link between Mr. Gordon's harassment of Ms. Peters, and her disability, because his behaviour caused or contributed to her disability. However, this complaint is not a civil claim for damages. Ms. Peters experienced a disability-based discriminatory practice because of UPS's intervening acts and omissions in response to her disability. Mr. Gordon should not be ordered to pay damages for UPS's conduct in relation to a discriminatory practice UPS committed under the CHRA.

XVI. Order

[400] For these reasons, I order that UPS is responsible for any compensation that may be awarded to Ms. Peters in the final remedy decision.

Signed by

Kathryn A. Raymond, K.C.
Tribunal Member

Ottawa, Ontario
November 7, 2025

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2201/2317

Style of Cause: Tesha Peters v. United Parcel Service Canada Ltd. and Linden Gordon

Ruling of the Tribunal Dated: November 7, 2025

Date and Place of Hearing: September 8-11, September 14-15, November 2-5, 2020, January 26-27, February 17-18, 2021

By Videoconference

Appearances:

Laura Lepine, David Baker and Claire Budziak, for the Complainant

Sasha Hart and Ikram Warsame, for the Canadian Human Rights Commission

Seann McAleese, for United Parcel Service Canada Ltd.

Linden Gordon, for the individual Respondent