CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DESD ROITS DE LA PERSONNE

SANDY CULIC

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADA POST CORPORATION

Respondent

REASONS FOR DECISION

MEMBER: Karen A. Jensen 2007 CHRT 01
2007/01/24

I. WHAT IS THIS COMPLAINT ABOUT?

[1] This complaint is about whether Canada Post discriminated against Sandy Lipp (née Culic) on the basis of her disability and gender (pregnancy) in 2000 and 2001 at the Mail Processing Plant in Regina, contrary to section 7 of the *Canadian Human Rights Act*.

II. WHAT ARE THE CIRCUMSTANCES GIVING RISE TO THE COMPLAINT?

[2] Sandy Lipp began work as a part-time postal clerk with Canada Post Corporation in Regina in 1991. Postal clerks carry out the important functions of sorting and dispatching mail in Canada.

[3] In 1995 and 1997, Ms. Lipp sustained injuries to her neck, shoulder and head areas. In March 2000, Canada Post acknowledged in a letter to Ms. Lipp that she was permanently partially disabled (PPD).

[4] As a result of her PPD status, Ms. Lipp had certain restrictions with regard to the tasks that she could perform as a postal clerk. One of these restrictions was that she could generally work only six hours per day.

[5] In June 2000, Ms. Lipp applied for a full-time postal clerk position on Shift 3, which is the evening shift at the Mail Processing Plant. Full-time postal clerks generally work eight hour shifts. Therefore, Canada Post required medical documentation establishing that Ms. Lipp could safely work past the six hour restriction that had been set out in her PPD letter.

[6] Ms. Lipp provided medical documentation from her physician stating that she could work full-time (eight hour) shifts on modified duties. Canada Post and Medisys, the medical consulting firm that handles Canada Post's occupational health and safety issues, had concerns about this information. Among those was the concern that the information did not provide an objective medical assessment of Ms. Lipp's restrictions and capabilities.

[7] Notwithstanding the concerns, Canada Post awarded Ms. Lipp the full-time position on Shift 3 in October 2000. She was permitted to work in that position on modified duties.

[8] Canada Post told her, however, that she would still be required to provide more medical documentation regarding her medical restrictions. Consequently, while she was working in the full-time position, Ms. Lipp was asked to attend an Independent Medical Examination (IME) in Regina. As a result of a miscommunication about the date, Ms. Lipp did not attend the IME in Regina in April of 2001.

[9] In that same month, Ms. Lipp went on disability leave. She was diagnosed as suffering from major depression and anxiety disorder.

[10] In the fall of 2001, Ms. Lipp informed Canada Post that she was fit and ready to return to work. Canada Post told her that before she returned to work, she would be required to attend two Independent Medical Examinations in Winnipeg. One of the IME's was with an occupational specialist and the other was with a psychiatrist.

[11] Ms. Lipp was pregnant at the time and told Canada Post that she could not travel as a result of difficulties that she was experiencing with her pregnancy. She refused to attend the IME's. Canada Post placed her on disciplinary leave without pay for her refusal to attend the IME's.

[12] On March 18, 2003, Ms. Lipp filed a complaint with the Canadian Human Rights Commission.

[13] Ms. Lipp also filed grievances alleging that Canada Post had violated the collective agreement by engaging in an unreasonable delay in returning her to the workplace, and in putting her on disciplinary leave without pay. On April 16, 2004, an arbitrator dismissed Ms. Lipp's grievances (*Canadian Union of Postal Workers v. Canada Post Corporation (Re Culic)* (16 April 2004), Regina, Union Grievance No's 820-00-00046 & 00051 (Norman).

[14] On September 28, 2005, Ms. Lipp's human rights complaint was referred to the Tribunal. Canada Post subsequently brought a motion requesting that the complaint be dismissed on the basis of the doctrine of *res judicata*. The Tribunal dismissed Canada Post's motion and ordered that the inquiry into the complaint proceed (*Culic v. Canada Post Corporation* 2006 CHRT 06).

III. WHAT ARE THE ISSUES IN THIS COMPLAINT?

[15] There was no issue during these proceedings as to whether Ms. Lipp's head, neck, and shoulder problems constituted a disability, and thus, a prohibited ground of discrimination according to the *Act*. Similarly, there was no issue as to whether Ms. Lipp was pregnant in the fall of 2001, and that differential treatment on the basis of pregnancy would constitute differential treatment on the basis of sex.

[16] During the hearing, however, an issue was raised as to whether the complaint should include the allegation that in refusing to return Ms. Lipp to work in the fall of 2001, Canada Post discriminated against Ms. Lipp on the basis of her psychological problems, or her perceived psychological problems. In written closing argument, counsel for Canada Post indicated that he had no objection to the addition of this allegation in the complaint. Therefore, I have included it in the allegations in this complaint.

[17] On the second day of the hearing, counsel for the Respondent sought to have the Arbitrator's award entered into evidence. I ruled that the award was admissible on the basis that it was relevant to the issues raised in the complaint, and there was strong judicial authority supporting such a decision (*Ford Motor Co. of Canada v. Ontario (Human Rights Commission)* (2001), 209 D.L.R. (4^{th}) 465). I stated however, that I would reserve my decision as to what weight I would accord to the arbitrator's findings until the final decision in the matter. Given that the arbitrator's findings are relevant to Canada Post's explanation for the allegedly discriminatory conduct, I will address the weight that I have accorded them in the part of my decision that deals with Canada Post's explanation.

[18] The issues, therefore, in this case are:

(1) Whether the requirements for medical information about Ms. Lipp's disability, including the requirement that Ms. Lipp attend an IME in Regina, were discriminatory;

(2) Whether the manner in which Canada Post handled its requirements for information was discriminatory; and,

(3) Whether the requirement that Ms. Lipp attend two IME's in Winnipeg before she could return to work in the fall of 2001 was discriminatory.

IV. WHAT MUST BE PROVEN TO ESTABLISH DISCRIMINATION IN THIS CASE?

[19] It is a discriminatory practice, directly or indirectly, to refuse to continue to employ, or, in the course of employment, to differentiate adversely in relation to an employee on the basis of a prohibited ground of discrimination (*CHRA*, s. 7).

[20] The complainant has the initial burden of establishing a *prima facie* case of discrimination. The Supreme Court of Canada decision in *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at para. 28 ("*O'Malley*") provides the basic guidance for what is required to make out a *prima facie* case. The Court stated that a *prima facie* case is one that covers the allegations made and which, if the allegations are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent.

[21] Thus, the question that must be answered with regard to the *prima facie* case is whether there is credible evidence to support Ms. Lipp's allegations of adverse differential treatment, contrary to s. 7(b) and/or a refusal to employ or to continue to employ Ms. Lipp, contrary to s. 7(a) of the *Act*.

[22] If that question is answered in the affirmative, the onus then shifts to the Respondent to provide a reasonable explanation that demonstrates either that the alleged discrimination did not occur as alleged or that the conduct was somehow non-discriminatory. If a reasonable explanation is provided by the Respondent, it is up to the Complainant to demonstrate that the explanation is merely a pretext for discrimination (*Basi v. Canadian National Railway Company (No.1)* (1988), 9 C.H.R.R. D/5029 at para. 38474 (C.H.R.T.)).

[23] Conduct may be found to be non-discriminatory if, in accordance with s. 15(1) of the Act, it is established that it constituted a *bona fide* occupational requirement (BFOR). Section 15(2) of the Act stipulates that to be considered a *bona fide* occupational requirement, it must be established that accommodation of the individual would impose undue hardship considering health safety and cost.

V. WHAT ARE THE ALLEGATIONS WITH RESPECT TO THE *PRIMA FACIE* CASE?

[24] Ms. Lipp's allegations relate to two distinct periods of time. The first set of allegations relates to the period from June 2000, when she applied for a full-time postal clerk position on Shift 3, until October 2001, when Ms. Lipp's disability leave ended. Ms. Lipp alleged that the following conduct on the part of Canada Post during the first time period constituted adverse differential treatment on the basis of her disability:

(1) Repeated questioning about her ability to perform tasks during pre-shift meetings;

(2) The requirement that she provide medical information regarding her ability to perform to work as a full-time postal clerk including the requirement that she attend an IME in Regina;

(3) Repeated negative communication regarding her restrictions and the provision of medical information regarding her disability;

[25] The second set of allegations relates to the period from October 2001, when Ms. Lipp informed Canada Post that she wanted to return to work, until December 2001, when she was placed on disciplinary leave without pay for refusing to attend the IME's in Winnipeg. Ms. Lipp alleges that the following conduct on the part of Canada Post during the second time period constitutes adverse differential treatment on the basis of her disability and/or perceived disability and/or her sex:

(4 The refusal to permit her to return to work in the fall of 2001 until she had attended two IME's in Winnipeg;

(5.) The imposition of disciplinary leave without pay.

VI. THE FIRST TIME PERIOD: JUNE 2000 - OCTOBER 2001

A. ALLEGATION NUMBER 1 - Repeated questions during pre-shift meetings constituted adverse differential treatment

[26] During the hearing, Ms. Lipp testified that she was singled out for questioning during pre-shift meetings about whether her medical restrictions would permit her to perform certain scheduled tasks. Pre-shift meetings are ten - fifteen minute meetings conducted by the shift supervisor prior to the start of each shift. Uncontested evidence established that the purpose of the meetings is to assign individual tasks to employees on that shift and to discuss general issues in the plant.

[27] In final argument, counsel for Ms. Lipp argued that the questioning of Ms. Lipp during pre-shift meetings constituted adverse differential treatment on the basis of her disability. Counsel for Ms. Lipp further alleged that the process by which tasks were assigned during pre-shift meetings was discriminatory because the schedules were computer-generated and did not take into account the functional limitations of employees. Therefore by its very nature, the process of scheduling employees necessitated the questioning of disabled employees about their abilities and this resulted in systemic discrimination against disabled employees.

[28] Canada Post objected to the fact that these issues had been raised for the first time during the hearing. It argued that the Tribunal should refuse to deal with them, given that their late disclosure had deprived Canada Post of an adequate opportunity to address the issues. Counsel for Canada Post said that had he known that the issue of the computer-generation of schedules was in question in this case, he would have called evidence specifically to deal with this point. Should the Tribunal agree to consider this allegation as part of the complaint, the fact that Canada Post was unable to call evidence on this issue because of its late disclosure would cause significant prejudice to Canada Post.

[29] I agree with the Respondent's position on this issue. As the Tribunal stated in *Uzoaba v. Correctional Services of Canada* (1994), 26 C.H.R.R. D/361, when considering whether to deal with allegations that do not form part of the initial complaint, the essential issue is whether the Respondent has been provided with adequate notice of the case that it has to meet, so as to comply with the requirements of procedural fairness. Subsequent decisions of this Tribunal have confirmed this point (see for example: *Parent v. Canada (Canadian Armed Forces* 2005 CHRT 37).

[30] Counsel for Ms. Lipp stated that the issue of pre-shift questioning was raised generally in the complaint form. There, Ms. Lipp stated that in July 1996, her doctor could not provide a date by which she would be fully recovered and able to return to regular duties. She then stated: "Subsequently, CPC asked me on a monthly basis, in front of co-workers, if I still required accommodation and to have my doctor complete and submit Occupational Fitness Forms and questionnaires".

[31] In my view, the above-noted allegation in the complaint form is not specific enough to constitute notice to the Respondent that the issues of questioning during pre-shift meetings and the computer-generation of work schedules would be raised during the hearing. The evidence presented during the hearing indicated that pre-shift meetings occurred on a daily basis. Ms. Lipp testified that she was asked three or four times a week

during pre-shift meetings about her ability to perform certain tasks. Thus, it seems to me that the statement made in the complaint form was not in reference to the allegations about pre-shift questioning or the computer-generated work schedules.

[32] Moreover, I was unable to find any other references in the pre-hearing material to the issue of pre-shift questions or the work schedule. In preparation for the hearing, the Complainant provided a cursory Statement of Particulars. The Respondent requested additional particulars. This was not provided.

[33] Rule 9(3) of the Tribunal's *Rules of Procedure* stipulates that, except with leave of the Tribunal, parties shall not be permitted to raise issues or adduce evidence during the hearing unless they have been disclosed prior to the hearing. During the hearing, counsel for the Respondent did not raise any objections to the admission of evidence on this issue. However, when counsel for the Complainant made the allegation for the first time in closing argument that the scheduling process and the pre-shift questioning were discriminatory, counsel for the Respondent raised his objections. I think it is fair to say that it may not have been until closing argument that counsel for the Respondent became aware of the use that was going to be made of the evidence on these points.

[34] The Respondent suffered prejudice as a result of the failure on the part of the Complainant to raise the issues of pre-shift questioning and the allegation of systemic discrimination based on the scheduling process prior to the hearing. As counsel for the Complainant herself stated, Canada Post provided no evidence about the scheduling process and in particular, it provided no evidence about any undue hardship that would result from adapting the computer program to obviate the need for questioning. The Respondent was not provided with sufficient notice that it was necessary to lead such evidence.

[35] Therefore, I will not consider the allegations of pre-shift questioning and systemic discrimination based on the scheduling process to be part of the complaint.

B. ALLEGATION NUMBER 2 - The requirement that Ms. Lipp provide medical information regarding her ability to perform the full-time postal clerk position constituted adverse differential treatment

[36] Ms. Lipp acknowledged that when she applied for a full-time postal clerk position in June of 2000, Canada Post was entitled to ask for assurances from her doctor that she could safely perform the requirements of a full-time postal clerk. However, when her doctor wrote a note on June 29, 2000, indicating that she was fit to work an eight hour shift on light duties, the requirement for further medical information should have ended, according to Ms. Lipp.

[37] She argued that Canada Post had ample information at its disposal confirming the validity of the information provided in the doctor's note. In particular, Canada Post had transferred Ms. Lipp to the full-time position, and she worked in that position for six months. This, she argued, established that she could work full-time on modified duties. The insistence, therefore, that Ms. Lipp provide further medical information and attend an IME in Regina was unreasonable and imposed a burden upon her that other employees in full-time positions did not have to bear.

(1) Is there credible evidence to support this allegation?

[38] Ms. Lipp testified that when a full-time postal clerk position came up on Shift 3 she applied for it. As the most senior part-time postal clerk she was entitled to the position, according to the collective agreement. However, Ms. Lipp testified that after she applied

for the position the Superintendent on Shift 3, Mr. David Slater, told her that she could not have the position because Canada Post needed someone who could perform the full range of duties in the full-time shift. She testified that Mr. Slater told her to get a doctor's note stating that she could work the eight hour shift.

[39] Ms. Lipp testified that she did this. She produced a note from her physician, Dr. Chooi, indicating that she could move: "from part-time to full time (8 hours/day) from 29 June 2000 light duty".

[40] A month after she produced her doctor's note, Medisys informed Ms. Lipp that more information was needed than had been provided in the note. Medisys asked her to take a set of questions that had been formulated by a Medisys physician, Dr. Lori Koz, to her doctor. This was known as an Acquisition of Medical Information (AMI). Ms. Lipp was to return the AMI to Medisys by August 31, 2000.

[41] Ms. Lipp testified that she did not understand why she was required to produce more information about her ability to work full-time. She testified that prior to applying for the full-time position she had worked eight-hour shifts on numerous occasions, notwithstanding her six-hour work restriction. This was because Canada Post had either offered her the additional hours, or had scheduled her to work eight-hour shifts.

[42] Ms. Lipp testified that she wrote Mr. Slater a letter dated August 21, 2000, asking why she was required to have an AMI completed. She asked Mr. Slater whether Canada Post had considered the fact that she had regularly been working an eight hour shift when she was part-time, thereby demonstrating her ability to work eight hours a day.

[43] Ms. Lipp testified that she did not receive answers to any of her questions. However, she proceeded to have the AMI completed by her physician, Dr. Chooi.

[44] In the cover letter to Dr. Chooi, Dr. Koz stated that there would be a number of job duties in the full-time postal clerk position that Ms. Lipp could not do if she was restricted to light duties. Dr. Koz indicated that Canada Post wanted clarification as to what factors had changed such that Ms. Lipp was now able to increase her hours of work, but not her duties, specifically sorting oversize letter mail. Dr. Koz stated in her letter that Canada Post wished to determine whether Ms. Lipp could now participate in a gradual return to work plan toward the full duties of a full-time postal clerk.

[45] In his response to the questions posed by Dr. Koz in the AMI, Dr. Chooi indicated that Ms. Lipp needed to work full-time in order to get enough pay to cope with her financial situation. He indicated that Ms. Lipp could not sort oversize mail and that she had reached her maximum medical improvement at this point in time. Dr. Chooi also indicated that he felt Ms. Lipp would suffer physical harm if she undertook a gradual return to work.

[46] The information from the AMI was provided to Medisys. Medisys reviewed the information from the AMI and evaluated it in the light of Ms. Lipp's medical file. Medisys then provided what is known as a "Field Report" to Canada Post. Uncontested evidence established that Field Reports are designed to protect the privacy of the employee by providing Canada Post with only the information that is needed to provide appropriate workplace accommodations or to otherwise respond to medical concerns that have been raised by the employee.

[47] In a Field Report dated September 20, 2000, Dr. Lori Koz of Medisys indicated the information provided by Dr. Chooi was consistent with the previous information on the file. Dr. Koz further stated that given that Ms. Lipp had had her medical conditions for a

number of years, the likelihood of a vast change in her restrictions at that point in time was unlikely. She stated that there might, therefore, be some merit in an IME.

[48] Ms. Lipp testified that on October 1, 2000, she was transferred to the full-time position on Shift 3. She testified that there was no indication from anyone at Canada Post or Medisys that her transfer to the full-time position was contingent upon the provision of any further medical information.

[49] Nonetheless, on October 18, 2000, Ms. Lipp was informed that she was required to attend an Independent Medical Examination (IME) in Winnipeg on October 30, 2000.

[50] Mr. Keith Jeworski, President of the Regina local of the Canadian Union of Postal Workers, testified that article 33.10(c) of the Collective Agreement provided that Canada Post could require an independent medical examination by a doctor selected by the Corporation. Mr. Jeworski testified, however, that IME requests were very uncommon in Regina at that time. Prior to Ms. Lipp, Canada Post had not, to his knowledge, made any other requests for an IME.

[51] Ms. Lipp asked Canada Post to reconsider the decision to send her to Winnipeg for the IME. Flying made her ill, and traveling by land on the highways was difficult for her because her first husband was killed on Highway One in an accident.

[52] Canada Post granted Ms. Lipp's request not to travel to Winnipeg and agreed to reschedule the IME at a later date in Regina. In the letter advising her that the appointment would be rescheduled, Mr. Dale Hippe, the Manager of Mail Operations, stated that Canada Post's ability to accommodate Ms. Lipp in any permanent modified duty position and particularly as it related to her "pending promotion to full time status" was dependent upon an understanding of her physical limitations and the impact of those limitations on Canada Post's Operations and Ms. Lipp's peers.

[53] Ms. Lipp testified that she worked in the full-time position on modified duties until April 2, 2001. She testified that she did not experience any difficulties performing the modified functions of her position. She did not take sick leave or any other time off to deal with problems arising from working full-time.

[54] On or about March 22, 2001, Ms. Lipp was informed that she was required to attend an IME in Regina on April 2, 2001, with Dr. Milo Fink. However, Ms. Lipp and Mr. Jeworski testified that, as a result of a miscommunication about a proposed change in the date of the appointment, Ms. Lipp did not attend the IME. Ms. Lipp subsequently went on sick leave. She testified that while she was on sick leave, she attended an IME appointment on July 30, 2001, that she had rescheduled after she missed the one in April. However, when she got to the appointment, she found that, unbeknownst to her, it had been cancelled.

[55] Ms. Lipp testified that she felt great emotional stress as a result of the demands to produce medical information and to attend appointments. She testified that it was difficult for her to arrange the appointments and to organize her schedule to attend them. She felt stress every time she received a letter requiring that she provide more medical information. She understood the need to provide medical information about her disability, but felt that Canada Post was asking her for medical information that was not necessary.

(2) The Tribunal's Findings and Conclusion Regarding the Prima Facie Case for Allegation # 2

[56] For the following reasons, I find that Ms. Lipp has established a *prima facie case* that Canada Post's insistence that she attend an IME in Regina constituted adverse differential treatment on the basis of her disability.

[57] While Ms. Lipp's testimony throughout the hearing was not always entirely credible, I find that the information she provided with regard to the above-noted allegations was credible. For example, her testimony that she had worked eight hour shifts on numerous occasions prior to applying for the full-time job was confirmed later by evidence provided by Mr. Slater indicating that between March and June of 2000, Ms. Lipp worked an eight hour shift on 22 occasions. Her testimony with regard to the above-noted allegations was straightforward, unembellished and consistent.

[58] Ms. Lipp provided medical information indicating that she could work full-time, but that she could not increase her duties beyond the modified duties that she had been performing. Canada Post then allowed Ms. Lipp to assume the full-time position on modified duties. She worked full-time for 6 months until she went on leave. There were no indications that Ms. Lipp was having any difficulty performing the modified functions of a full-time postal clerk.

[59] In spite of the fact that Ms. Lipp was working work full-time on modified duties, Canada Post continued to require that she provide more medical information to establish that she could do the job. She felt great emotional stress when she received requests to provide more information or to attend an appointment since they were communicated in such a way as to put her job security in question. Moreover, it was difficult for Ms. Lipp to provide the information and to attend the appointments.

[60] I find that Ms. Lipp has established a *prima facie* case that Canada Post's ongoing requirement to establish her fitness to work full-time constituted adverse differential treatment. She was treated differently from non-disabled employees in that her job security in the full-time position was contingent upon fulfilling the requirement, in a form acceptable to Canada Post, for satisfactory medical information about her disability. Given that the requirement stemmed from Canada Post's stated concern that her disability might prevent her from being able to perform the functions of a full-time postal clerk, I find that Canada Post's adverse differential treatment of Ms. Lipp was based on the fact that she is disabled.

(3) Does Canada Post have a reasonable explanation for its otherwise discriminatory practice?

[61] Once the *prima facie* case has been established, the onus then shifts to the Respondent to provide a reasonable explanation that demonstrates either that the alleged discrimination did not occur as alleged or that the conduct was somehow non-discriminatory. Conduct may be found to be non-discriminatory if, in accordance with s. 15(1) of the *Act*, it is established that it constituted a *bona fide* occupational requirement.

[62] Canada Post has argued that the requirement to attend the IME was a *bona fide* occupational requirement. In order to establish this, Canada Post must demonstrate that accommodating Ms. Lipp in the full-time position without the information provided by the IME would impose undue hardship on Canada Post, having regard to health, safety and cost (s. 15(2) of the *Act*).

[63] In determining whether a BFOR has been established, it is helpful to keep in mind the principles set out by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3 ("*Meiorin*")

and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 ("*Grismer*")).

(4) Does the evidence support the allegation that the requirement to attend an IME was a bona fide occupational requirement?

[64] Both Mr. Slater and Mr. Hippe testified about the events that led to the decision to require that Ms. Lipp attend an IME. Mr. Slater testified in a straightforward manner and candidly admitted that his recollection of the events was poor. He often said "we would have" or "I would have" before he provided his testimony of what he thought had occurred. Therefore, I have reduced the weight of his testimony in certain areas based on the fact that his recollection was poor and it appeared that he was, at times, trying to reconstruct what he would have done based on his review of the documentation during the hearing. However, I was impressed by the fact that Mr. Slater candidly admitted at times that there was a problem with the way things had been handled by Canada Post. Moreover, he did not appear to exaggerate or embellish any of the information he provided. Were it not for the fact that his memory of the events was so poor, I would have accorded his testimony significant weight.

[65] Mr. Hippe's memory of the events was somewhat stronger even though the extent of his involvement was less. He too testified in a straightforward and candid manner. His evidence with respect to this time period was internally consistent and held up well under cross-examination.

[66] I find, on a balance of probabilities and for the reasons that follow that the requirement that Ms. Lipp provide further medical information in the form of an AMI and that she attend an IME in Regina were *bona fide* occupational requirements.

(a) <u>The Requirement for medical information from an AMI and an IME is rationally connected to the functions of the position.</u>

[67] The first step in assessing whether the employer has successfully established a BFOR defence is to identify the general purpose of the impugned standard and determine whether it is rationally connected to the performance of the job (*Meiorin, supra*, at para. 57). The focus at this stage is not on the validity of the particular standard that is at issue, but rather on the validity of the general purpose.

[68] The evidence of Mr. Hippe and Mr. Slater was that Canada Post required objective medical information about employees' medical restrictions for a number of reasons: (1) to ensure that employees are able to safely perform the functions of their position; (2) to enable Canada Post to properly accommodate disabled employees; and, (3) to enable Canada Post to maximize the amount and variety of work that disabled employees could do within their restrictions.

[69] Mr. Slater testified that objective, concise medical information is needed from disabled or injured employees to enable Canada Post to ensure that they are safely working within their restrictions and that they are working productively.

[70] With respect to the third goal, Mr. Hippe testified that Canada Post requires employees to provide updated medical information whenever they change positions or their restrictions change so that Canada Post can determine how best to maximize the employee's work potential within their restrictions. Medical information about an employee's restrictions allows Canada Post to determine how to accomplish the goal of efficiency and productivity in the workplace without putting the safety and well-being of the individual employee or other employees at risk.

[71] On the basis of this evidence, I am satisfied that the requirement to provide medical information is rationally to the goals of employee safety, accommodation and productivity. Moreover, I am satisfied that all three goals are valid. Canada Post has an obligation to ensure that employee productivity and efficiency is achieved without compromising its obligation to accommodate disabled employees, and without putting employees' safety and health at risk. To do so, Canada Post requires medical updates on employees' restrictions as the restrictions change or as the work assignment changes.

(b) Canada Post required the additional medical information including the IME in the honest and good faith belief that it was necessary to achieve the above-noted objectives.

[72] Once the legitimacy of the employer's more general purpose is established, the employer must take the second step of demonstrating that it adopted the particular standard with an honest and good faith belief that it was necessary to the accomplishment of its purpose, with no intention of discriminating against the complainant (*Meiorin, supra, at para. 60*). The focus at this stage in the analysis of the BFOR is on evidence of the subjective views of the respondent with regard to the particular standard, which in this case, is the requirement for more medical information.

[73] The evidence established that Canada Post formulated the requirement that Ms. Lipp provide additional medical documentation and attend the IME in Regina in the honest and good faith belief that this was necessary to accomplish the goals set out above.

[74] Mr. Slater and Mr. Hippe testified that neither the note from Ms. Lipp's doctor nor the Field Report from Dr. Koz provided them with them with the clear, objective medical information that they needed to ensure that Ms. Lipp was being safely accommodated in the full-time position.

[75] The Field Report from Dr. Koz of Medisys, dated September 20, 2000, indicated that a significant number of Ms. Lipp's medical concerns were based upon subjective information provided by Ms. Lipp to her doctor. Dr. Koz questioned whether a vast change in her condition was likely given that Ms. Lipp had been working under medical restrictions for a number of years. She stated that there might be some merit in an IME prior to taking a final look at how to accommodate Ms. Lipp within Canada Post.

[76] Mr. Hippe testified that the Medisys Field Report would have been discussed at a weekly case management meeting with superintendents. He stated that he would have had concerns, as a result of the Field Report, that even with the AMI results Canada Post still had insufficient information to be able to accommodate Ms. Lipp in the full-time position.

[77] Mr. Slater candidly admitted that it was "unusual" to require an employee to provide further medical information once she had already assumed the position. However, Mr. Slater's evidence was that Canada Post continued to be concerned about Ms. Lipp's long-term capacity to work past her 6 hour restriction. That was why she was required to attend the IME even after she had been in the full-time position for six months.

[78] I find that Canada Post required the additional medical information including the IME in the honest and good faith belief that it was necessary to achieve the goals of safely accommodating Ms. Lipp in productive work.

(c) The Requirement for additional medical information was reasonably necessary having regard to health and safety.

[79] The final step in determining whether the requirement for additional information is a BFOR requires Canada Post to demonstrate that it was reasonably necessary to

accomplish the goals set out in step one. To do this, Canada Post must establish that it could not accommodate Ms. Lipp without experiencing undue hardship.

[80] Ms. Lipp argued that Canada Post had all the information it needed to establish that she could safely work full-time on modified duties. She argued that it would not, therefore, have created undue hardship to Canada Post to accommodate her in the position without the information from the AMI and the IME.

[81] Canada Post argued that it had an obligation to ensure that Ms. Lipp's health and safety would not be jeopardized by working past her restrictions. It further argued that the health and safety risks created by allowing Ms. Lipp to remain in the full-time position without this information would create undue hardship to Canada Post. I agree with this argument for the following reasons.

[82] Section 124 of the *Canada Labour Code* establishes that employers have an obligation to ensure that the health and safety at work of every person employed by them is protected (R.S.C., 1985, c. L-2, s. 124). The case law further indicates that when transferring an employee to another position, an employer is not only entitled to, but is also obliged to obtain reasonably complete medical information about the employee's condition to ensure that the employee can safely perform the functions of the position (*Metropolitan Toronto (Municipality) and C.U.P.E., Loc. 43, Re* (1991), 22 L.A.C. (4th) 216; *Belliveau v. Steel Co. of Canada* [1988] O.H.R.B.I.D. No. 11 (Q.L.) at para. 51; *Mazuelos v. Clark* 2000 BCHRT 1 at para. 46).

[83] Where the employee is seeking modified work, he or she has a corresponding duty to cooperate by providing the required information *(Canada Post Corp. and Canadian Union of Postal Workers (Reniak Grievance)* (1998), 73 L.A.C. (4th) 15). To the extent that the medical information provided by the employee is inadequate for the purposes of ensuring the employee's health or safety, an employer has the right to make further inquiries.

[84] The evidence in this case indicates that the work done by postal clerks can be physically demanding and repetitive. Mr. Hippe also testified that more is demanded of full-time postal clerks; they work longer hours than the part-time clerks and are expected to move through a greater range of duties. Mr. Slater explained that Canada Post rotated employees through as many different jobs as possible in mail processing to ensure that all employees had a good range of duties in order to avoid problems with repetitive strain. He testified that repetitive strain injuries at Canada Post were a concern.

[85] Ms. Lipp testified that her injuries involved rotator cuff problems, fibromyalgia, and cervical spine degeneration. Mr. Slater stated that, based on Ms. Lipp's medical conditions, there was a concern that going beyond six hours on a long-term basis would subvert the 6 hour restriction and put Ms. Lipp at risk. The fact that she had worked for 6 months in the full-time position did not alleviate his concerns about the long term impact of working full-time on Ms. Lipp. If Ms. Lipp were to injure herself on the job as a result of working beyond her physical capabilities, Canada Post would be responsible for the consequences.

[86] Ms. Lipp's own testimony was that when she was working full-time she would become exhausted and run down. Although she testified that she did not take sick leave or leave without pay during the period during which she worked full-time, Mr. Hippe testified that Canada Post was concerned that this could happen. Therefore, Canada Post

needed more information about Ms. Lipp's restrictions so that long-term health problems for Ms. Lipp could be avoided.

[87] The doctor's note that was initially provided to Canada Post simply stated that Ms. Lipp could go to full-time (8 hour) shifts on light duties. Mr. Hippe testified that it did not explain what factors had changed to allow Ms. Lipp to safely increase her hours to full-time. Canada Post had concerns about what "light duties" meant and whether Ms. Lipp could be asked to work beyond 8 hours a day as sometimes happened with full-time employees. In view of these concerns, Ms. Lipp was asked to have her physician complete an AMI questionnaire.

[88] The doctor's responses to the questions in the AMI were not particularly helpful. When asked what factors had changed to allow Ms. Lipp to increase her hours of work to eight hours, Dr. Chooi replied that Ms. Lipp needed to work full-time in order to get enough pay to cope with her financial situation. She was widowed and had difficulty in looking after herself. The doctor's statement that Ms. Lipp needed to work full-time did not respond to the question about what changes had occurred in her physical condition from March 2000, to October 2000, to enable her to work past the 6 hour restriction that had been set in March of 2000.

[89] On the basis of Dr. Chooi's answers, Medisys provided Canada Post with a Field Report in September 2000, which suggested that an IME might provide the objective information that was needed to answer this and other questions about Ms. Lipp's restrictions.

[90] Given the nature of the work that is done by postal clerks and the nature of Ms. Lipp's medical conditions and recently established restrictions, I am satisfied that Canada Post had a legitimate concern about safely accommodating Ms. Lipp in the full-time postal clerk position on a long-term basis. The information provided by Ms. Lipp's physician in the note and the AMI did not address Canada Post's concerns. Canada Post had an obligation to ensure that Ms. Lipp was not being placed in a situation where she might injure herself.

[91] Were there alternatives to the IME that could have been used to obtain the information that Canada Post needed to ensure that Ms. Lipp's health and safety was protected? Mr. Hippe and Mr. Slater testified that the process for obtaining medical information is as follows: a doctor's note is provided by the employee; if more information is needed regarding an employee's restrictions, the employee is asked to have his or her doctor complete an OFA; if that information is incomplete or unsatisfactory, the same physician is asked to complete an AMI, which is a series of questions regarding the employee's specific medical condition and limitations; if the information in the AMI does not provide the kind of clear and objective information that is needed to properly accommodate the employee, an IME is requested. Mr. Hippe testified that, as far as he knew once an AMI and an OFA had been provided, the IME was the only remaining means of obtaining objective medical information when the information provided by the employee's doctor was inadequate.

[92] I accept that during this first time period, Canada Post, together with Medisys, first explored and exhausted all possible means, other than an IME, to obtain the information that was needed to fulfill Canada Post's statutory obligation to protect Ms. Lipp's health. The IME was therefore, the only remaining means of obtaining the necessary information.

[93] Accordingly, I find that Canada Post has established that waiving the requirement for an IME would have caused it undue hardship: it would have deprived Canada Post of the only remaining means at its disposal of ensuring that it was fulfilling its obligation to protect Ms. Lipp's health and safety.

(5) The Tribunal's Conclusion Regarding Allegation Number Two

[94] Given the findings above, I conclude that the requirement that Ms. Lipp produce additional medical information and attend the IME in Regina was a *bona fide* occupational requirement.

C. ALLEGATION NUMBER 3 - Canada Post's repeated and negative communications with Ms. Lipp regarding her restrictions and the provision of medical information was discriminatory

[95] Ms. Lipp claims that she was subjected to frequent questions and comments about her limitations on the shop floor and unusually intense supervision of her work. She further claims that the Respondent's demands to produce medical documentation and to attend the IME were very often accompanied by threats of disciplinary action should she fail to produce the required information within the stipulated time period. This, she argues constitutes *prima facie* evidence of adverse differential treatment on the basis of her disability.

(1) Is there credible evidence to support this allegation?

(a) Questions and Comments Regarding Ms. Lipp's Disability on the Shop Floor

[96] Ms. Lipp testified that around the time that she applied for the full-time position in June of 2000, her supervisor approached her on the shop floor, crossed his arms and asked her "just what is it you're capable of? What can you do?" She said the workers around her stopped and looked at her. She felt humiliated and ashamed.

[97] Ms. Lipp testified that Mr. Slater would approach her on a daily basis to discuss her medical restrictions, the need to produce medical information or the need to attend a medical appointment. Sometimes he would ask her whether she had been to the doctor yet. She felt this was inappropriate.

[98] She also testified that Mr. Slater would come up to her when she was working by herself and threaten her that a failure to provide medical documents on time would mean disciplinary action. Ms. Lipp testified that Mr. Slater would hand her medical forms on the shop floor. She did not like this as it drew further attention to her disability.

[99] Ms. Janice Karchewski, a shop steward at Canada Post, testified on Ms. Lipp's behalf. Ms. Karchewski stated that the question "what can you do?" was asked of her on the shop floor when she too was on modified duties. She said that, as shop steward, she was aware that this question was quite frequently asked of people who were on modified duties. She stated that it made her and others feel very uncomfortable.

[100] Ms. Louise Shoeman also testified on behalf of Ms. Lipp. Ms. Shoeman has been employed at Canada Post for 27 years. She is also a postal clerk and worked on the same floor as Ms. Lipp on Shift Three. Ms. Shoeman testified that she observed the interactions between Ms. Lipp and Mr. Slater. She testified that Mr. Slater was "constantly berating and questioning Ms. Lipp" about her restrictions.

[101] Ms. Shoeman observed a confrontation between the two that began with Mr. Slater watching Ms. Lipp. He then approached Ms. Lipp and began to question her about her ability to do the full range of duties. Ms. Shoeman testified that when Mr. Slater spoke with Ms. Lipp he would lean over and move very close to her. His tone of voice was loud

and rough. Ms. Shoeman stated that Ms. Lipp was frequently in tears at the end of her conversations with Mr. Slater.

[102] Mr. Jeworski testified that there was a history of conflict between Ms. Lipp and Mr. Slater that related, to some extent, to Ms. Lipp's use of sick leave time in the past. Mr. Jeworski stated that Ms. Lipp was not the only employee who had problems with Mr. Slater's management style.

[103] Ms. Lipp testified that in January 2001, while she was working full-time on Shift 3, a full-time position opened up on the midnight shift (Shift 1) in Forward Letters. She bid for it, was transferred to the position and worked there until March 4, 2001, when she was transferred back to Shift 3. Canada Post's reason for transferring Ms. Lipp back to Shift 3 was that her restrictions could not be accommodated on Shift 1.

[104] Ms. Lipp testified that when she arrived for her first shift back on Shift 3, on March 4, 2001, she discovered that her co-workers had been informed, prior to her return, that she was coming back and that it was because of her disability. She stated that she felt humiliated and singled out for different treatment because she was disabled.

(b) Close Supervision

[105] Ms. Lipp testified that she felt she was more closely supervised than other employees. She described an incident where she saw Mr. Slater look at his watch when she went to the washroom and then check it again after she came out of the washroom. Ms. Lipp stated that she felt Mr. Slater was always watching her. Other people noticed this too and would make comments to her about it. Ms. Shoeman was one of the people who observed Mr. Slater watching Ms. Lipp. As indicated above, she testified about this.

[106] Ms. Lipp testified that she saw Mr. Slater hide behind pillars and watch her while she was working.

(c) Letters from Canada Post

[107] Ms. Lipp testified that she felt she was always getting letters from Canada Post about the need for more medical information and that more often than not, these letters were accompanied by threats of discipline. She testified that her perception of these communications was that Canada Post had a problem with her disability and was looking for a way to get rid of her. The communications that were alleged to be problematic were as follows:

(i) A letter dated August 14, 2000, from Mr. Slater, indicating that Ms. Lipp had not returned the AMI

[108] In this letter, Mr. Slater indicated that the AMI questionnaire regarding Ms. Lipp's ability to work full time, which was to have been returned by August 9, 2000, had not been returned. Mr. Slater stated: "It is important that you realize that uncertainty surrounding your medical status may inhibit our ability to accommodate you with your requests for advancement within the Corporation". He stated that: "If your decision is to not take the questions to your physician your current status of Permanently Partially disabled is all that we have to work with."

(ii) A letter dated November 17, 2000, from Mr. Dale Hippe indicating the IME in Winnipeg had been changed to a later date in Regina

[109] Mr. Hippe wrote to Ms. Lipp informing her that she would not be required to attend an IME in Winnipeg. He stated, however, that another examination would be scheduled in Regina in March 2001. Mr. Hippe added that Ms. Lipp's "pending promotion to full-time status" depended upon obtaining further information about her restrictions.

(iii) A letter dated March 26, 2001, from Mr. Slater informing Ms. Lipp that she was required to attend an IME on April 2, 2001

[110] Ms. Lipp testified that one day in March 2001, she was at her work station when her supervisor, Brian Kanciruk, approached her, crossed his arms and stated "Enlighten me. Are you going to this doctor's appointment?" Ms. Lipp did not know anything about an appointment and told Mr. Kanciruk that when she received the paperwork for the appointment she would let him know. She stated that she was embarrassed because her co-workers overheard the conversation.

[111] Ms. Lipp testified that the next day she received a letter from Mr. Slater dated March 26, 2001, stating that she was required to attend an IME on April 2, and that it was evident from her remarks to Mr. Kanciruk that she was considering not attending the appointment. In his letter, Mr. Slater indicated that a failure to report for the examination on April 2, 2001, at 15:00 could result in administrative action up to and including a change in Ms. Lipp's status from a full-time PO4 to that of a part-time PO4. In that letter, Mr. Slater stated that other administrative action affecting accommodation and employment might also be required until another examination could be scheduled. Ms. Lipp was instructed to express her intentions to either attend or not attend immediately.

[112] Ms. Lipp testified that she felt very upset by this turn of events. She had not told Mr. Kanciruk that she would not attend the IME. She stated that this was an example of why she refused to speak directly with Canada Post management; she felt that her words were misinterpreted and used against her. She preferred to communicate through the union.

(iv) A twenty-four hour Notice of Interview dated April 2, 2001 - The Missed IME Appointment on April 2, 2001.

[113] Ms. Lipp testified that she could not make the April 2, 2001, appointment for an IME. She had not been consulted about the date and had made personal plans for that date. She called Keith Jeworski to see if he could arrange to have her appointment switched with another Canada Post employee whom she knew had been scheduled to attend an IME with the same doctor on April 9. She subsequently received a memorandum from Darlene Black, a nurse with Medisys who worked in the Regina Mail Sorting Plant, confirming that her appointment had been changed to April 9. The memorandum was dated March 28, 2001, and was addressed to Mr. Slater with a carbon copy to Ms. Lipp.

[114] Ms. Lipp went into work in the afternoon as scheduled on April 2, 2001; her personal plans were for the early part of the day. She testified that her supervisor, Kevin Zimmerman immediately approached her, followed her out onto the work floor, and in a loud voice asked her what she was doing at work. When she replied that she was here to work, Mr. Zimmerman asked her why she was not at her doctor's appointment. Ms. Lipp testified that a little crowd of people had formed around the area and were listening to the conversation. Mr. Zimmerman continued to question her about the appointment. She was very embarrassed, burst into tears and said "speak to Keith, talk to Keith". ("Keith" was Keith Jeworski, the union president.) Ms. Lipp then went to her shop steward, Lindy Freegone, for help.

[115] Later that day, Mr. Slater approached her on the shop floor and handed her a notice indicating that she was to attend an interview with management to investigate her failure

to attend the IME on April 2, 2001. Disciplinary action was threatened for failure to attend the meeting.

[116] Ms. Lipp stated that she was very upset by this event. She could not believe that Canada Post was angry with her for not attending an appointment that had been rescheduled to another date. She left work after her shift and subsequently went on sick leave.

(v) A letter from Mr. Slater dated April 3, 2001, indicating that until Ms. Lipp provided medical documentation regarding her sick leave she would be on leave without pay.

[117] In this letter, Mr. Slater stated that a fully completed Occupational Fitness Assessment (OFA) was required by April 5, 2001, to support her sick leave. He stated that until this documentation was received, she would be considered to be on leave without pay. An OFA is a form that is filled out by the employee's doctor. It does not provide a medical diagnosis; the OFA simply sets out what the employee's limitations are and the expected duration of the limitations.

[118] Ms. Lipp provided the completed OFA by April 5, 2001.

(vi) A letter dated June 7, 2001, from Mr. Slater to Ms. Lipp regarding her "recent refusal to attend an IME" and the requirement that she attend a third IME appointment.

[119] On June 7, 2001, Mr. Slater wrote to Ms. Lipp "to clarify our position regarding your recent refusal to attend an IME". He stated that Canada Post was making a third attempt to schedule an IME and that she would be required to attend this one. Her attendance was to be confirmed within 48 hours of the receipt of the letter. The concluding paragraph read as follows:

This situation has put us in an administrative position that may jeopardize your employment with Canada Post Corporation. Please consider responding to this letter as soon as possible to reduce the possibility of further administrative or disciplinary action. You can contact me at 761-6304 if you have any further questions."

[120] Ms. Lipp testified that she was very distraught about this. She had not purposefully missed the appointment on April 2, 2001; she was under the impression that it had been rescheduled. Ms. Lipp testified that she took this letter to mean that if she did not attend the IME appointment on July 30, 2001, which she had rescheduled on her own, she would be fired. However, unbeknownst to her, the third IME appointment, scheduled for July 30, 2001, was cancelled by Medisys in June, 2001.

(vii) A letter dated June 8, 2001 from Mr. Dale Hippe, and a letter from Mr. Slater dated June 13, 2001 indicating that Ms. Lipp was required to provide an AMI.

[121] Ms. Lipp testified that on or about June 13, 2001, while she was on sick leave, she received a package from Canada Post that contained a sealed envelope and three covering letters. The first letter was from Medisys dated June 8, 2001, informing Ms. Lipp that she was required to have an AMI regarding her current fitness for work completed by her physician by June 26, 2001. The second letter was from Mr. Hippe on the same date. He too informed Ms. Lipp that she was to complete the AMI by June 26th. He said that if she needed any assistance with this she was to contact the Occupational Health Nurse directly.

[122] The third letter, dated June 13, 2001, was from Mr. Slater. In his letter, Mr. Slater stated that clarification was required regarding her current absence. She was required to have the AMI completed by June 25, 2001, a day earlier than the authors of the other two letters had required. Mr. Slater added that if Ms. Lipp failed to produce the

documentation and an acceptable explanation, "disciplinary action up to and including release from Canada Post" would follow.

[123] A copy of the June 13, 2001 letter from Mr. Slater to Ms. Lipp was sent to Sun Life Insurance Company and another copy was placed on her personal file. When she went on sick leave in April 2001, Ms. Lipp applied for disability benefits from Sun Life. Her application was initially denied, but then about a year and a half later, her appeal of that decision was granted.

[124] Ms. Lipp testified that the letter from Mr. Slater and the AMI package intensified the anxiety that she was feeling. She was required to attend an IME in July, and to provide an AMI within 12 days. Within eight days, Mr. Slater had written Ms. Lipp two letters demanding that she have an AMI completed and then that she attend an IME. Disciplinary action up to and including release from Canada Post was threatened for failure to comply. Ms. Lipp testified that she feared that, no matter what she did, she was going to lose her job.

[125] Furthermore, it appeared to her that the package from Medisys with the AMI material had been held back from June 8, 2001 until June 13, 2001, so that Mr. Slater could add his cover letter. Not only was the time for complying with the request reduced because of this delay, Mr. Slater had also reduced the deadline himself by one day from the June 26, 2001 deadline that had been provided by Medisys.

[126] In July 2001, Keith Jeworski wrote a letter of complaint to Dale Hippe about Mr. Slater's letter. He objected to the fact that the AMI package from Medisys was channeled through Canada Post management in order to permit Mr. Slater to include a covering letter. Mr. Jeworski stated that this not only violated Ms. Lipp's confidentiality, it also shortened the amount of time that she had to respond. More importantly, it included threats of discipline and release from Canada Post. Mr. Jeworski stated: "This seems to be a departure from management's usual procedure for seeking completion of a medical questionnaire. It further reinforces Ms. Culic's belief that Mr. Slater is acting on a personal animus." Mr. Jeworski requested that the threatening letter of June 13 be removed from Ms. Lipp's personal file and that steps be taken to ensure that this did not happen in the future.

[127] Mr. Jeworski testified that if an employee refuses to provide medical information through an AMI that would open up the possibility of a demand for an IME or other kinds of administrative action. However, failure to complete an AMI could not involve disciplinary action. There was no basis in the collective agreement or arbitral jurisprudence for this whatsoever. Therefore, he felt that Mr. Slater's letter was improper.

[128] The AMI was completed on June 15, 2001, and received by Medisys on June 22, 2001. The AMI indicated that Ms. Lipp was suffering from major depression and anxiety disorder which were related to the conflict she was experiencing at work. Ms. Lipp's physician indicated that a change of workplace or shift would hasten her recovery.

[129] In the Medisys Field Report summarizing the results of the AMI, Dr. Koz stated that Ms. Lipp was unfit for work at the present time. She further stated: "... we need to deal with the issues at hand which appear to have a large basis in the workplace as soon as possible. Failure to do so may result in a period of prolonged disability for Ms. Culic".

(2) The Tribunal's Findings and Conclusion Regarding the Prima Facie Case for Allegation # 3

[130] Overall, I find that the Complainant has established a *prima facie* case of adverse differential treatment with respect to this allegation. However, there are some aspects of the allegation which are not substantiated. Ms. Lipp's testimony seemed, at times, somewhat exaggerated and implausible. For example, her statements that Mr. Slater questioned her on a daily basis about her disability or her medical requirements and that he hid behind pillars to watch her work strained the limits of credulity. Furthermore, while it may be true that Mr. Slater timed her washroom breaks, I find no evidence of a link between such conduct and Ms. Lipp's disability, nor have I heard any evidence that Ms. Lipp was treated differently in that regard from other non-disabled employees.

[131] I find however, that there is credible evidence to establish a *prima facie* case that Canada Post management subjected Ms. Lipp to frequent, aggressive and negative questions and commentary on the shop floor regarding her disability and the need to provide further medical documentation or to attend appointments. Ms. Lipp's testimony in that regard was corroborated by Ms. Karchewski's testimony. I find that Ms. Karchewski's statements regarding the questions on the shop floor were convincing because she spoke from personal experience as well as from her experience as a shop steward. She spoke about the fact that she and others were frequently asked "what can you do?" by Canada Post management while they were on modified duties.

[132] Mr. Jeworski's testimony lent some support to that of Ms. Lipp. He indicated that there was a history of conflict between Ms. Lipp and Mr. Slater and that this conflict had continued into the present time. Ms. Shoeman gave credible evidence about the negative interaction between Ms. Lipp and Mr. Slater relating to Ms. Lipp's limitations.

[133] Thus, I find that there is credible evidence to establish a *prima facie* case that Canada Post's questioning and demands regarding Ms. Lipp's disability and the requirement to produce medical documentation were often done in an aggressive and disrespectful manner and often in public. As a result, Ms. Lipp felt singled out for negative treatment on the basis of her disability. Some of the evidence indicates that a significant cause of Ms. Lipp's depression and anxiety was the negative treatment that she received from Canada Post regarding her physical limitations and the requirement for further medical information.

[134] Similarly, with respect to Canada Post's other communications, and in particular the letters from Mr. Slater to Ms. Lipp, the Complainant has established a *prima facie* case that Canada Post focused an inordinate amount of negative attention on Ms. Lipp with regard to her disability and the requirements surrounding that condition. The demands to provide medical information, respond to questions and to attend appointments were peremptory and almost constantly threatened negative employment consequences for failure to comply. The nexus with her disabled status was always evident insofar as the questioning and demands for information related to medical information, appointments or accommodation of her disability. To the extent that they were purported notices of misconduct or insubordination, they almost certainly served to undermine Ms. Lipp's sense of job security.

[135] Accordingly, with regard to allegation three, I find that a *prima facie* case of adverse differential treatment on the basis of disability has been established.

(3) Does Canada Post have a reasonable explanation for its otherwise discriminatory practice?

[136] Canada Post essentially provided three responses to the *prima* facie case regarding this allegation: (a) it denied that Ms. Lipp was as frequently and as negatively questioned on the shop floor as alleged, or that confrontations occurred over the requirement for medical information and appointments; (b) it alleged that the communications by letter with Ms. Lipp and discussions with her on the shop floor, to the extent that they did occur, did not constitute adverse differential treatment on the basis of disability, but rather were necessary actions taken by Canada Post to deal with an uncooperative employee; and, (c) the close proximity of demands for information in June 2001, was the result of a breakdown in communication with Medisys

[137] For the following reasons, I find that the evidence does not support the Respondent's explanations with regard to the third allegation.

(a) The Denial of Frequent and Negative Questioning on the Shop Floor Regarding Ms. Lipp's Disability

[138] The evidence does not support Canada Post's denial of the frequent and negative questioning of Ms. Lipp on the shop floor regarding her disability. On the contrary, the evidence strongly supports Ms. Lipp's position.

[139] The evidence indicates that Mr. Slater was actively involved in managing Ms. Lipp's case. Mr. Slater himself testified that during 2000 and 2001, he was more actively involved in the management of the files of workers who were on modified duties than at the present time.

[140] The evidence also establishes that Canada Post supervisors and Mr. Slater had regular occasion to question employees about their restrictions on the shop floor. Mr. Slater's own testimony was that some supervisors may have told workers on the shop floor that, due to one employee's restrictions, another employee was going to have to cover some of their work.

[141] Mr. Slater stated that he spoke with Ms. Lipp from time to time about various issues including the need to provide medical information. He described Ms. Lipp as being defensive at times, but he denied that he had ever seen her in tears. He stated that he did not recall any confrontations with Ms. Lipp about her restrictions and the requirements to produce medical information.

[142] In contrast, Ms. Lipp and Ms. Shoeman clearly recalled confrontations regarding Ms. Lipp's restrictions and the requirement to produce medical information. They testified that Mr. Slater spoke in a very loud and angry voice to Ms. Lipp. Ms. Lipp testified that these confrontations occurred on a regular basis. Ms. Shoeman witnessed one such confrontation and felt she had to intervene because it had become so hostile.

[143] Mr. Slater's poor recall about the events meant that he was unable to provide evidence to rebut the *prima facie* case presented by the Complainant on this point. Similarly, Mr. Hippe did not present any evidence that rebutted the evidence presented on behalf of the Complainant. Therefore, I find that Ms. Lipp was frequently and negatively questioned and confronted by Canada Post management on the shop floor about her disability, her restrictions and the requirement to provide medical information.

(b) Lack of Cooperation from Ms. Lipp

[144] Canada Post argued that the letters to Ms. Lipp, discussions on the shop floor and threats of discipline did not constitute adverse differential treatment based on Ms. Lipp's disability, but rather were non-discriminatory actions taken to deal with a particularly uncooperative employee. Is there any evidence to support that contention?

[145] I have carefully examined the evidence on this point and have come to the conclusion, for the following reasons, that while Ms. Lipp was not always as cooperative with Canada Post as she should have been, her deficiencies in that regard do not explain the frequency and intensely negative nature of Canada Post's communication with her.
[146] The evidence indicates that Ms. Lipp did take some time to respond to the first request for an AMI. It was sent out by Medisys on July 21, 2000. Ms. Lipp testified that she did not understand why the request was being made given that she had provided a doctor's note indicating that she was fit to work 8 hour shifts and also that she had worked eight hour shifts prior to applying for the full-time position in June of 2000. For that reason, she formulated a letter to Mr. Slater dated August 21, 2000 asking him a number of questions.
[147] Mr. Slater testified that he did not receive this letter. In any event, Ms. Lipp finally attended her physician's office, and had the AMI completed and returned to Medisys by September 8, 2000. This was approximately a month and a half after the request was sent to her. I can understand that from Canada Post's perspective, it would appear that Ms. Lipp was not cooperating fully with them at this point in time.
[148] However, during the period from September 8, 2000, until Ms. Lipp requested a return to work after her sick leave in the Fall of 2001, I see little evidence of a refusal to cooperate with Canada Post's requests for further information regarding her disability. Moreover, Mr. Jeworski and Ms. Lipp both testified that neither of them had ever taken the position with Canada Post that Ms. Lipp would not attend an IME.
[149] It is true that Ms. Lipp and the union raised concerns when Ms. Lipp was informed on October 18, 2000, that she would be required to attend an IME in Winnipeg on November 27, 2000. Ms. Lipp and the union told Canada Post that it would be difficult for Ms. Lipp to attend the IME in Winnipeg because, among other reasons, Ms. Lipp had trouble traveling. Mr. Hippe reconsidered the requirement of an IME in Winnipeg, and on November 17, 2000, he indicated that it would be rescheduled in Regina.
[150] I do not consider this to be a refusal to cooperate. Ms. Lipp and the Union raised concerns which Canada Post accepted as sufficiently legitimate to warrant a change in the location for the IME.
[151] Subsequently, Ms. Lipp learned, through her supervisor, Mr. Brian Kanciruk, that she had been scheduled to attend an IME in Regina. Ms. Lipp's evidence of that encounter was uncontradicted. She testified that Mr. Kanciruk questioned her in a derogatory way about her intention to attend an IME in Winnipeg. Ms. Lipp stated that she had not received the paperwork yet and would let Canada Post know once she had. Ms. Lipp's testimony regarding this event was not challenged by any evidence to the contrary.
[152] Therefore, Mr. Slater's letter of March 26, 2000, in which he stated that it was apparent that Ms. Lipp was considering not attending the IME reflects an inaccurate portrayal of the situation. Ms. Lipp had not refused to attend the IME; she had indicated that she would consider the matter once she had received the paper work.
[153] As it turned out, through no fault of her own, Ms. Lipp failed to attend the IME that had been rescheduled in Regina for April 2, 2001. She had attempted, through her union, to have the appointment switched with another employee because the date conflicted with personal plans she had made. Canada Post did not consult with her before setting the

date. Therefore, I do not think it could reasonably be said that Ms. Lipp's attempts to switch her appointment with another employee constituted a refusal to cooperate.

[154] Mr. Jeworski candidly admitted that he had made a mistake in trying to arrange for the switch. It would appear that Canada Post was under the impression that Ms. Lipp would attend the appointment on April 2, 2001, while Ms. Lipp thought she was to attend on April 9, 2001. Mr. Jeworski spoke with Canada Post to indicate that it was his mistake and that Ms. Lipp was not to blame.

[155] However, in his letter of June 7, 2006, Mr. Slater characterized Ms. Lipp's non-attendance at the previous two scheduled IME's as refusals to attend. He then threatened dismissal if Ms. Lipp failed to attend a third scheduled IME on July 30, 2000. Ms. Lipp attended this appointment only to find that it had been cancelled without notice to her.

[156] On April 3, 2001, the day after Ms. Lipp went on sick leave, Mr. Slater wrote to Ms. Lipp indicating that she was required to produce a fully completed OFA form by April 5, 2001, or she would be considered on leave without pay. Mr. Slater testified that this kind of letter is not sent out to every employee who calls in sick. He stated that he could not explain why the letter was sent out, but that it was possibly because Canada Post was having trouble getting documentation back from this employee. Ms. Lipp provided the required documentation on April 5, 2001.

[157] My view of the evidence is that although Ms. Lipp was initially slow to cooperate with the request for an AMI in the fall of 2000, she subsequently complied with Canada Post's continued requests for information and attendance at appointments. It is true that she told Canada Post that she did not want to travel to Winnipeg for an IME. Her reasons for this were not frivolous, however. Moreover, Canada Post accepted them in agreeing to schedule the IME in Regina.

[158] Mr. Hippe's evidence strongly suggests that in fact, it was Ms. Lipp's inability to perform the full functions of her position that was a significant factor in Canada Post's negative conduct towards her. Mr. Hippe testified that Canada Post had always had difficulty with Ms. Lipp's inability to sort oversize mail. It was hoped that this restriction would change and therefore, Canada Post "continuously" sought information about her restrictions. Mr. Hippe quickly qualified his answer to indicate that "continuously" meant on a regular basis and that it was perhaps too "strong" to say that Canada Post had difficulty with the restriction. I found Mr. Hippe's statements and his obvious realization of the implications of those statements to be revealing. They strongly suggested that Canada Post's conduct was, to a large extent, motivated by an unwillingness to accept all of Ms. Lipp's physical restrictions.

(c) A Breakdown in Communication with Medisys

[159] Mr. Slater testified that the issuance of two requests for information, one on June 7, 2001, ordering that she attend an IME on July 30, 2001, and another on June 13, 2001, requesting that she provide an AMI should not have happened. Both letters threatened disciplinary action for failure to comply and both were written by Mr. Slater.

[160] When asked why he had done this, Mr. Slater admitted that it was odd that "we're asking for an IME and an AMI at the same time or very close to the same time". He stated that Canada Post had obviously not communicated with Medisys about this because if it had, one of the two requests for more information would not have happened. He stated that better communication might have avoided the problem.

[161] The fact remains, however, that it was Mr. Slater who drafted both letters regarding the requirement to attend the IME and the requirement to complete the AMI within days of each other. He issued the warning about disciplinary action. It can be inferred, therefore, that he knew that both requirements were being demanded. Any breakdown in communication with Medisys could easily have been remedied by a call to Medisys. For that reason, Mr. Slater's explanation that the issuance of two threatening letters within 6 days of each other was due to a communication breakdown with Medisys does not seem reasonable to me.

(d) Other Unexplained Communications with Ms. Lipp

[162] I find that there were other events for which Canada Post has failed to provide a reasonable explanation. For example, when Ms. Lipp did not attend the IME in Regina on April 2, 2001, Mr. Slater issued a 24 Hour Notice of Interview requesting her attendance to discuss and investigate why she did not attend the IME as requested. A warning was given that failure to attend that meeting could result in separate disciplinary action being taken.

[163] Mr. Slater testified that there would never be any such discipline. Canada Post had never disciplined anyone for not attending an interview. He admitted that the warning should be taken out of the notice and that the forms are not used anymore.

[164] When asked why he sent a copy of the June 12 letter to Sun Life, Mr. Slater stated that he may have been aware that an application had been made for disability benefits. It was not usual to send a letter such as this to Sun Life unless there was a request to do so. He stated that he has never received a request for such information. Therefore, he could not explain why he sent in the letter.

(4) The Tribunal's Conclusion Regarding Allegation Number Three

[165] I conclude, on the basis of this evidence that Canada Post has not provided a reasonable explanation to rebut the *prima facie* case raised by Ms. Lipp that Canada Post's conduct during the first period constituted adverse differential treatment on the basis of her disability. I do not accept Canada Post's assertion that the threats of discipline and frequent reminders about medical information were based entirely on the fact that Ms. Lipp was dilatory in providing information. Rather, I find that an important factor in the adverse differential treatment of Ms. Lipp was that Canada Post was having difficulty accepting the restrictions in her work functions arising from her disability.

[166] I accept that Canada Post needs to regularly solicit information from employees who have work limitations about the extent of their limitations and whether there have been any changes to those limitations that would affect their accommodation or allow for a more productive work effort. However, there is an important limit to observe here. The requests for information must be reasonable; they cannot be threatening, or so frequent that the burden on the employee becomes onerous.

[167] Repeated threats of discipline and discharge for failure to provide information about a disability that are not based on valid concerns about cooperation constitute adverse differentiation on the basis of disability, in my view. Similarly, frequent and unjustified questions and discussions with a disabled employee about her restrictions and the need to provide medical information constitute adverse differentiation on the basis of disability. They impose a burden on the disabled employee that is not imposed on non-disabled employees.

[168] Accordingly, I find that Canada Post engaged in *prima facie* discriminatory conduct in respect of which it was unable to provide a reasonable explanation.

VII. THE SECOND TIME PERIOD - MS. LIPP ASKS TO RETURN TO WORK

A. ALLEGATION NUMBER 4 - The refusal to permit Ms. Lipp to return to work until she had attended the IME's in Winnipeg was discriminatory

Overview

[169] In September 2001, Ms. Lipp called Canada Post to say that she was fit to return to work from sick leave. She provided a doctor's note and an Occupational Fitness Assessment attesting to her fitness to return to work on October 9, 2001. Thereafter she alleged that she was subjected to the same kind of treatment and requests for information that she underwent during the first time period, culminating in the requirement that she attend two IME's in Winnipeg. Ms. Lipp alleged that Canada Post's treatment of her during the second time period and the requirement that she attend the IME's constituted adverse differential treatment on the basis of her disability (including her psychological condition) and her sex (she was pregnant at the time the requirement of the IME was imposed).

(1) Is there credible evidence to support this allegation?

[170] Ms. Lipp testified that she found out that she was pregnant on or about July 14, 2001. She testified that toward the end of the summer she felt that she would be able to return to work. She also testified that she needed to return to work. Her claim for disability insurance had been denied (although this decision was subsequently overturned on appeal and she was awarded the benefits retroactively).

[171] Ms. Lipp stated that she calculated the number of weeks that she would have to work at a full-time rate in order to qualify for maternity benefits under the *Employment Insurance Act* and then determined when she should return to work.

[172] Ms. Lipp testified that on September 18, 2001, she telephoned Canada Post and advised them that she intended to return to work on October 9, 2001. Ms. Lipp was told that before she would be permitted to return to work, Canada Post required additional information that Ms. Lipp was fit to return. She first provided a note from her physician dated October 10, 2001, indicating that her anxiety and depression had cleared up and that she was fit to do her duty - short and long modified duties. ("Short and long" refers to the sortation of short and long sized letter mail.)

[173] Ms. Lipp also had an OFA completed by her physician on the same date. It indicated that her depression and anxiety had cleared up. In addition, Ms. Lipp's physician indicated that her physical capabilities were restricted to lifting and carrying 9 kgs. of weight from floor to waist level, lifting and carrying 2 kgs. of weight from waist to shoulder height, and an inability to lift or carry above shoulder level.

[174] Finally, Ms. Lipp had her physician complete an AMI. She testified that she did not have the AMI completed when asked because she thought that all that should be required of her was what had been done in the past - a doctor's note and an OFA.

[175] The AMI dated October 29, 2001, indicated that Ms. Lipp still had an anxiety disorder, but that it was well controlled. Ms. Lipp was no longer on medication but she was using natural stress control. In the AMI, Dr. Van Heerden stated that he no longer thought that a change in work was required. He stated: "Patient feels that she will be able to cope." He stated that the conflict with her boss was still an issue, but that Ms. Lipp had

been advised by her union that there would be no problem if the correct communication lines were followed.

[176] In the AMI, Dr. Van Heerden stated that, with respect to Ms. Lipp's physical restrictions, she could not lift heavy objects above shoulder height. No other restrictions were outlined and the doctor indicated that Ms. Lipp should be able to sort light letter mail. Dr. Van Heerden prefaced his remarks about Ms. Lipp's physical restrictions by indicating that he was not the treating physician for Ms. Lipp's shoulder injury or chronic rotator cuff condition.

[177] In her Field Report of October 30, 2001, Dr. Koz stated that the physical restrictions outlined by Dr. Van Heerden in the AMI were not consistent with the restrictions in the OFA that this same doctor had produced just 20 days earlier on October 10, 2001. Dr. Koz stated that she would have difficulty supporting the physical restrictions and limitations provided by Dr. Van Heerden in the AMI until the discrepancy was clarified.

[178] Mr. Hippe testified that he thought that the "discrepancy" to which Dr. Koz was referring in the Field Report was that in the OFA, Dr. Van Heerden had set out significant restrictions with regard to Ms. Lipp's physical capacity. However, in the AMI which was completed just 20 days after the OFA, Dr. Van Heerden simply stated that Ms. Lipp could not lift heavy objects over her shoulder and there were otherwise no restrictions. Mr. Hippe stated that if the AMI were taken at face value, this would mean that Ms. Lipp could be doing a greater rotation of duties.

[179] Thus, it would appear that when Dr. Koz stated in the Field Report that she would have difficulty supporting the restrictions outlined in the AMI, what she meant was that she was not willing to countenance an increase in Ms. Lipp's range of duties on the basis of what had been written in the AMI. Further clarification was needed before that could be done.

[180] Dr. Koz therefore recommended a meeting with Mr. Hippe and Canada Post superintendents to discuss the case and to select "a mechanism" to clarify the discrepancy. There was no indication of what was meant by a "mechanism". The Field Report did not indicate that there were any uncertainties with respect to Ms. Lipp's psychological condition.

[181] Canada Post then requested that Ms. Lipp attend a meeting on November 8, 2001, to discuss the Field Report. Ms. Lipp testified that Mr. Hippe, Mr. Slater, Ms. Karchewski, Mr. Jeworski and Ms. Darlene Black, a nurse from Medisys, were present at the meeting on November 8, 2001. She stated that Mr. Hippe led off the meeting by telling her that he wanted her to attend an IME appointment in Winnipeg. He stated that Canada Post would fly her there or send her by bus and that she could take a shop steward with her. Ms. Lipp replied that she was not a flyer and she didn't want to drive that far when she was pregnant. As well, she still had trouble with highway travel because of her husband's death on the highway.

[182] She testified that she told Mr. Hippe that her doctor had advised her not to travel because of the trouble she was having with uterine cramping. There was a family history of miscarriage; she didn't want to jeopardize her pregnancy.

[183] Ms. Lipp testified that she asked if she could avoid the IME in Winnipeg by rescheduling the appointment with Dr. Fink in Regina for a date before November 23rd. Ms. Lipp testified that Mr. Hippe's response was that he did not see a problem with that.

The Medisys nurse, Darlene Black, indicated however, that she did not think it would be possible to reschedule the appointment within such a short period of time.

[184] Ms. Karchewski, the shop steward, was present at this meeting. Her testimony about the meeting confirmed that of Ms. Lipp.

[185] Mr. Jeworski, who was also present at this meeting, testified that Ms. Lipp expressed her concern about going to Winnipeg because she was pregnant and that she had had difficulty with her pregnancy. He testified that Canada Post proposed a number of options to deal with Ms. Lipp's fear of traveling. But Ms. Lipp expressed another concern with regard to a conflict with an appointment with her gynecologist on the date of the IME. Mr. Jeworski testified that Canada Post was looking for confirmation from Ms. Lipp that she would attend the IME in Winnipeg. Although the option of attending an IME in Regina with Dr. Fink was discussed, no commitment was made by Canada Post to this option. Management did indicate that the proposal would be considered. Ms. Lipp indicated that she would consider the possibility of the IME in Winnipeg.

[186] On or about November 15, 2001, Ms. Lipp received a letter from Darlene Black from Medisys indicating that "as per the discussion held on November 8, 2001, Independent Medical Examinations have been arranged for you in Winnipeg with the following itinerary". The letter then indicated the time and place for two IME's in Winnipeg. Ms. Lipp testified that this was the first that she had heard that there was to be two IME's. It was not clear from the evidence exactly how Ms. Lipp determined that one of the two appointments was with a psychiatrist, but that information was somehow conveyed to Ms. Lipp after she received the letter from Darlene Black.

[187] Ms. Lipp testified that she was puzzled by the letter because, contrary to what Ms. Black stated in the letter, there had been no discussion during the November 8th meeting about the need for two IME's. The discussion about the IME on November 8, 2001 related to her physical restrictions, not her psychological state.

[188] Mr. Jeworski also testified that he was surprised to learn that Ms. Lipp would be required to attend an IME with a psychiatrist in Winnipeg as well as an occupational specialist before she could return to work. He stated that there had been no indication at the November 8 meeting that there would be an appointment with a psychiatrist in Winnipeg.

[189] Meanwhile, Ms. Lipp successfully rescheduled the appointment with Dr. Fink, the occupational physician, for November 16, 2001. She called Keith Jeworski and let him know this. Based on the discussions with Canada Post and Medisys during the meeting on November 8th, Ms. Lipp thought the appointment with Dr. Fink would obviate the need to travel to Winnipeg to see an occupational specialist.

[190] Mary Lou Woodfield, the second vice-president of the CUPW local, testified that she had a good rapport with Mr. Hippe and thought that she might be able to resolve the issue of the IME's. She stated that she met with Mr. Hippe and asked him whether he would consider bringing the doctors from Winnipeg to do the IME's. Mr. Hippe told Ms. Woodfield that he was not going to pay for the cost of a doctor to come to Regina. He said that he would not "go there".

[191] Ms. Lipp testified that she attended the appointment with Dr. Fink on November 16, 2001, thinking that this would result in the cancellation of at least one of the IME's in Winnipeg. Dr. Fink was a physician that Canada Post had used before for IME's. She had no reason to believe that he would not be acceptable to the company now.

[192] Ms. Lipp also attended an appointment with her physician on November 16, 2001. He wrote a note stating:

She is currently 23 week pregnant is experiencing some uterine cramping. We would thus prefer that you get another doctor and psychologist closer to home so that she does not have to travel that far. She has a fear of flying which has been accentuated by the recent events. Dr. J. Alton is an occupational physician who might be able to help.

[193] Ms. Lipp testified that this note was provided to Canada Post.

[194] Ms. Lipp testified that she received a letter from Mr. Slater dated November 18, 2001, indicating that if she did not attend the IME appointments in Winnipeg, she would be placed on disciplinary leave without pay. She testified that she did not attend the appointments because she was not willing to put her baby in jeopardy.

[195] On December 5, 2001, Ms. Lipp received notification that Canada Post had put her on disciplinary leave without pay. Mr. Slater also indicated in this letter that if Ms. Lipp's pregnancy did not enable her to attend the IME then she was required to supply documentation to that effect immediately. Alternate arrangements for the IME would then be made after her pregnancy.

[196] In a letter dated December 6, 2001, George Britton, Secretary-Treasurer of the Regina Local of CUPW, wrote to Mr. Slater stating that Ms. Lipp was willing to attend the IME's and had, in fact, attended an IME with Dr. Fink on November 16, 2001. Mr. Slater responded to Mr. Britton's letter on January 1, 2002, stating that Dr. Fink's IME could not be used since Ms. Lipp's physician made the referral, not Canada Post. Therefore, his examination could not truly be considered an independent medical examination.

(2) The Tribunal's Conclusion Regarding the Prima Facie Case for Allegation Number 4

[197] I find that the Complainant has established a *prima facie* case of adverse differential treatment with respect to the refusal to return Ms. Lipp to the workplace without first attending the IME's in Winnipeg. Ms. Lipp produced a doctor's note and an OFA indicating that she was fit to return to work on October 9, 2001. She then produced an AMI that was reviewed by Medisys. The AMI suggested that Ms. Lipp might have fewer physical restrictions than her doctor had stated in the previous OFA. However, Medisys's physician was not willing to support such a conclusion until the discrepancy between the OFA and the AMI had been clarified. There was nothing in the Field Report to suggest that Ms. Lipp should not be permitted to return to work.

[198] Nonetheless, Canada Post demanded that Ms. Lipp attend an IME in Winnipeg before she would be allowed to return to work. At first, it appeared that the IME was only with an occupational specialist in Winnipeg. Ms. Lipp assumed that it was to address the outstanding issues with respect to her long-term fitness to do full-time work. However, there was nothing in any of the medical information provided to Canada Post that would have raised questions about her physical capacity to return to full-time modified work as she had been doing in April of that same year. If anything, the AMI suggested that she might be capable of returning to work with fewer restrictions than in April 2001.

[199] It later became apparent that Canada Post had issues with respect to her psychological fitness to work since Ms. Lipp was being sent to see a psychiatrist in Winnipeg also. There was, however, nothing in the Field Report from Dr. Koz that indicated that Ms. Lipp's psychological condition was in issue. It would appear therefore

that, notwithstanding the lack of information at Canada Post's disposal indicating that Ms. Lipp continued to suffer from depression and anxiety disorder, Canada Post perceived that her psychological condition was a barrier to her return to work.

[200] It is well established that discrimination on the basis of disability encompasses differential treatment on the basis of a perceived disability (*Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)* [2000] 1 S.C.R. 665; *Milazzo v. Autocar Connaisseur Inc. & Motor Coach Canada* 2003 CHRT 37 at para's 82-88). I find therefore, that Ms. Lipp established a *prima facie* case that Canada Post's refusal to permit her to return to work until she had attended the IME's in Winnipeg, constituted adverse differential treatment on the basis of a perceived psychological disability and actual physical disabilities (neck, shoulder and spine problems and fibromyalgia).

[201] This however, does not end the analysis with respect to the *prima facie* case on this allegation.

[202] I find that there is also a *prima facie* case that Canada Post's insistence on the IME's in Winnipeg constituted adverse effect discrimination on the basis of Ms. Lipp's gender. Instead of permitting Ms. Lipp to have the IME done in Regina, as it had previously been willing to do, Canada Post required that Ms. Lipp attend two IME's in Winnipeg before returning to work. Ms. Lipp communicated to Canada Post that she was having difficulties with her pregnancy and did not feel that she could travel; she was concerned about a possible miscarriage. She obtained a note from her doctor dated November 16, 2001, indicating a preference that she not travel due to the uterine cramping she was experiencing. The doctor provided the name of another physician who might perform the IME in Regina.

[203] Ms. Lipp stated that this note was provided to Canada Post, although she did not say when or how. Mr. Slater testified that he did not recall receiving this information. However, at the hearing of this case, the note was produced in the Respondent's Book of Documents, not the Complainant's. Therefore, I accept Ms. Lipp's testimony that she provided the note about her pregnancy to Canada Post. I also find that both Ms. Lipp and the union were aware of the importance to Canada Post of providing timely medical information. Therefore, I find that Canada Post was provided with the note around the time that it was written, which was November 16, 2001.

[204] On the face of it, the requirement that Ms. Lipp attend an IME in Winnipeg would not appear to be discriminatory. As Mr. Jeworski testified, for many employees, traveling to Winnipeg would not be a problem. However, for Ms. Lipp this requirement was a problem given her concerns and those of her doctor about traveling during her pregnancy. This apparently neutral requirement had the effect of imposing a burden on Ms. Lipp that other employees would not have to bear: it forced Ms. Lipp to choose between her job and potentially putting her pregnancy at risk. Thus, even though the requirement did not single her out as a woman, it had an adverse effect on her on the basis of her gender. For that reason, I find that a *prima facie* case of discrimination on the basis of gender (pregnancy) has also been established.

***(3) Has the Respondent provided a Reasonable Explanation*?**

[205] The Respondent argued that it had reasonable grounds to doubt the validity of Ms. Lipp's physician's reports with respect to her psychological fitness. This, it argued, was conclusively determined by the arbitrator whose decision was entered into evidence.

Moreover, there was the outstanding issue of Ms. Lipp's capacity to work full-time and, on top of that, the discrepancy between the OFA and the AMI provided by Dr. Van Heerden in October 2001 that required clarification.

[206] On the basis of the uncertainty about Ms. Culic's mental and physical health, Canada Post argued that the requirement that she attend the IME's in Winnipeg before she returned to work was a BFOR. Canada Post further argued that there were no doctors in Regina who could perform the IME's. Therefore, Winnipeg it had to be.

[207] Finally, Canada Post argued that it had insufficient medical information to establish that Ms. Lipp required accommodation for her pregnancy. Thus, it was argued that Ms. Lipp failed in her duty to cooperate with the accommodation efforts.

[208] The Complainant argued that there was no evidence to support the need for further medical information. Moreover, there was no evidence to support the assertion that Canada Post would suffer undue hardship in returning Ms. Lipp to the full-time position.

[209] The Complainant and the Respondent have each provided case law that they claim supports their position. The Complainant relied on *Code Electric Products Ltd. v. International Brotherhood of Electrical Workers* [2005] B.C.A.A.A. No. 14, for the proposition that the safety and health risks must be serious before a requirement to produce medical information before returning to work will be seen as a BFOR. In that case, Arbitrator Burke considered whether the respondent's refusal to return the grievor to his duties as a machine operator without further medical information and a commitment to therapy was discriminatory. The grievor suffered from Bi-Polar disorder as well as cannabis and alcohol abuse problems. He provided equivocal medical evidence about his fitness to return to work. The arbitrator noted that, applying the *Meiorin* analysis, the requirement in issue in the case was that the grievor must prove his fitness before returning to work followed by successful completion of a course of therapy.

[210] The arbitrator found that the first two requirements of the *Meiorin* test were met. With respect to the question of accommodation to the point of undue hardship, the arbitrator noted the evidence of the doctors who testified in that case. They testified that there was a significant risk of impairment in the grievor's judgment if he were to suffer a psychotic episode. Given that he was working in an industrial enterprise in which he operated a machine that slices metal with a large blade at 30-40 slices a minute, the grievor's medical condition posed a serious risk. The arbitrator stated that this was unlike an office situation where very different issues of safety arise.

[211] The arbitrator found that, in light of the uncertainty in the grievor's medical situation, the severity of his condition and the nature of the work site, undue hardship would result should fitness to return to work not be adequately established.

[212] The Respondent relies on *Brimacombe v. Northland Road Services Ltd.* [1998] B.C.H.R.T.D. No. 34 (Q.L.). Brimacombe was a heavy-duty mechanic. He was diagnosed with chronic fatigue syndrome and experienced dizziness, fatigue and unsteadiness on the job. He went off work on sick leave and when he returned, he provided a doctor's note indicating that he could operate equipment such as driving a truck, but could not do manual labour. The note, however, did not explain his illness, capabilities, limitations and the risks of an accident due to his condition.

[213] The British Columbia Human Rights Tribunal found that the requirement that the complainant provide a more detailed doctor's note was justified and that returning him to work without it created a significant safety risk. The Tribunal stated that the magnitude of

the risk to the complainant and to his fellow workers was considerable. As a heavy-duty mechanic, Mr. Brimacombe worked on and around heavy machines, tractors, plows, graders, etc. To allow Mr. Brimacombe to return to work without a note that better explained his illness and his restrictions would have constituted undue hardship for the Respondent, his fellow employees and, in some circumstances, the general public. Furthermore, the Tribunal held that the employer had no way of properly structuring the job duties without medical information.

[214] These cases suggest that the requirement to provide further medical information and/or attend an independent medical examination before being allowed to return to the job will likely constitute a BFOR when the medical evidence available thus far is unclear, and there is a significant risk to the safety and/or health of the employee and others around him or her. Where safety is at issue, both the magnitude of the risk and the identity of those who bear it are relevant considerations (*Central Alberta Dairy Pool v. Alberta (Human Rights Comm.)* (1990), 12 C.H.R.R. D/417 at para. 63). However, risk cannot be considered an independent justification of discrimination; rather, it is part of the analysis as to whether forgoing the requirement for further medical information would create undue hardship (*British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights),* [1999] 3 S.C.R. 868, at para. 30).

[215] The nature of the disability and the workplace conditions are factors that should also be taken into account in assessing whether the requirement for an independent medical examination is a BFOR. Pursuant to s. 15(2) of the *Act*, the Respondent may also present evidence that the cost of accommodating the Complainant without the medical information constituted undue hardship.

(a) Steps One and Two of the *Meiorin* Analysis: Was the Requirement of the IME's in Winnipeg Rationally Connected to Legitimate Goals and Adopted in Good Faith?

[216] I think it makes sense in the context of this allegation to analyze the first two steps of the *Meoirin* analysis together.

[217] The arbitral case law in this area indicates that an employer is entitled to request evidence of medical fitness when an employee returns from an absence due to illness. The requirement for medical information has been found to be necessary in order to ensure the safety and health of the returning employee as well as that of fellow employees and to facilitate the accommodation process (*Re Firestone Tire and Rubber Company of Canada Ltd. and United Rubber Workers, Local 113* (1979) 3 L.A.C. (2d) 12; *Code Electric Products Ltd, supra,* at para. 100 *Brimacombe, supra,* at para. 83).

[218] In my analysis of the first part of these reasons, I found that the requirement of having Ms. Lipp attend an IME in Regina was rationally connected to the goal of ensuring that Canada Post was safely accommodating her in productive work in the full-time postal clerk position. I also found that the requirement to attend an IME in Regina was done in the honest and good faith belief that it was necessary to fulfill those goals. On the same basis, I am prepared to accept that attendance at the two IME's was rationally connected to the goals of ensuring that Ms. Lipp was safely and productively accommodated in the full-time position.

[219] The question now is whether the requirement of attendance at two IME's in Winnipeg before returning to work was done in the honest and good faith belief that they were necessary to achieve those goals.

[220] Both Mr. Hippe and Mr. Slater testified that Dr. Koz had told them that Ms. Lipp should not be in the workplace until she had provided the results of the IME's. They further testified that Dr. Koz had lost confidence in the IME provider in Regina, Dr. Fink. Mr. Hippe testified that Dr. Koz told him that there were no other doctors in Regina who could perform the IME's.

[221] On the basis of that evidence, I am prepared to accept that Canada Post formulated the requirement that Ms. Lipp attend the IME's in Winnipeg before she returned to work in the honest and good faith belief that it was necessary in order to ensure that Ms. Lipp was safely and productively accommodated in the full-time position.

[222] As is often the case, the more difficult question for the Respondent to answer is:

(b) Was the requirement that Ms. Lipp attend the IME's in Winnipeg reasonably necessary to the goal of ensuring that Ms. Lipp was safely and productively accommodated in her full-time position?

[223] At this stage, Canada Post must demonstrate that the requirement of sending Ms. Lipp to Winnipeg for the IME's was reasonably necessary in that it could not have accommodated Ms. Lipp without experiencing undue hardship (*Meiorin, supra,* at para. 62). Canada Post must demonstrate that it investigated alternatives to sending Ms. Lipp to Winnipeg for the IME's, and that any alternatives considered were rejected only for appropriate reasons (*Meiorin, supra,* at para. 65; see also, *Audet v. CNR* 2006 CHRT 25 at para 62). Impressionistic evidence of the cost of accommodating an individual is not acceptable; the respondent must demonstrate in real, concrete terms how the costs associated with accommodation impose undue hardship upon it (*Audet, supra,* at para 106).

[224] To analyze the third part of the BFOR test, I have divided the question into the following components:

(i) Was the psychiatric IME necessary?

(ii) Was the IME with the occupational specialist necessary?

(iii) Was it reasonably necessary to hold Ms. Lipp out of service until she provided the results of the IME's?

(iv) Was it reasonably necessary to require that the IME's be held in Winnipeg?

(i) Was the psychiatric IME necessary?

[225] Ms. Lipp produced a doctor's note indicating that she was fit to return to work. The arbitrator held that Canada Post, through its medical consultant, Dr. Koz, had reasonable grounds to doubt the validity of medical information provided by Dr. Van Heerden with regard to Ms. Lipp's psychological fitness to work.

[226] Dr. Koz was not called to testify at the hearing in this case. Mr. Hippe testified that Dr. Koz had told him that Ms. Lipp should not be in the workplace until the results of the IME's were in. However, he could not explain why Dr. Koz was of this view. Therefore, I was not privy to any information that Dr. Koz might have had to suggest that Ms. Lipp continued to suffer from a psychological condition that would have put herself or others around her at risk if she returned to work without first attending a psychiatric IME. The only evidence from Dr. Koz that was before me was the Field Report that she authored, dated October 30, 2001, wherein nothing was mentioned about Ms. Lipp's psychological status. In that report, Dr. Koz did not identify anything in the AMI provided by Dr. Van Heerden that would have caused her to question the doctor's statement that Ms. Lipp was psychologically fit to return to work.

[227] Mr. Hippe testified that the main reason that Canada Post questioned the validity of the medical information was that the company had somehow become aware that Ms. Lipp needed to come back to work for financial reasons; her disability benefits from Sun Life had run out. When asked why that would cause him to question whether Ms. Lipp was fit to return to work, Mr. Hippe replied that he thought she might be returning to work because she had to, not because she was able to. He stated that he did not think that her psychological condition had changed. However, I heard no evidence that would have been in Canada Post's possession at the time of her request to return to work, to support that statement.

[228] Therefore, I am not convinced, on the evidence that was before me, that it was necessary for Canada Post to require Ms. Lipp to attend a psychiatric IME in order to safely accommodate her in the postal clerk position. Nevertheless, even if I were to find that it was necessary, this would not end the analysis. I would still be required to examine whether Canada Post was justified in holding Ms. Lipp out of service and requiring that she go to Winnipeg for the IME. Therefore, I will proceed with the analysis as though it was necessary for Canada Post to require a psychiatric IME.

(ii) Was the IME with an occupational specialist regarding Ms. Lipp's physical restrictions necessary?

[229] In addition to the psychiatric IME, Ms. Lipp was required to attend an IME in Winnipeg with an occupational specialist to assess her physical limitations. Both Mr. Hippe and Mr. Slater testified that the requirement for an IME with an occupational specialist was based on the discrepancy between the OFA and the AMI provided by Dr. Van Heerden. Although it was not clear to me, on the evidence, that an IME was necessary to clarify this discrepancy, I am prepared to find that Ms. Lipp's attendance at an IME to clarify her physical restrictions with respect to the full-time postal clerk position continued to be necessary.

[230] Mr. Slater testified that this requirement was still an issue for Canada Post following her sick leave. Ms. Lipp had been off work for some time by the fall of 2001, and Canada Post continued to be concerned about her ability to work full-time and the exact nature of her restrictions. Therefore, for the reasons that I provided in the previous part of this decision dealing with the requirement to attend an IME, I find that the IME with an occupational specialist to clarify Ms. Lipp's physical restrictions, continued to be necessary.

(iii) Was it reasonably necessary to hold Ms. Lipp out of service until she provided the results of the IME's?

[231] Although the requirement to attend IME's with an occupational specialist and a psychiatrist may have been reasonably necessary, the obvious question that arises is whether it was necessary to hold Ms. Lipp out of service until she provided the results of those IME's. Given that prior to her departure on stress leave, Canada Post had been prepared to accommodate Ms. Lipp in the full-time position without first having the results of the IME, Canada Post must now show what factors had changed to justify holding her out of service in the fall of 2001.

[232] Mr. Hippe testified that he was told by Dr. Koz that Ms. Lipp should not be in the workplace until she had attended the IME's and provided the results to Dr. Koz. Unfortunately, however, as I noted above, Dr. Koz did not testify. Nor did any one else testify about the safety, health or cost issues that would or might arise if Ms. Lipp were

returned to the modified full-time position in which she had worked from October 2000, until April 2001.

[233] Therefore, there was no evidence as to why exactly Ms. Lipp should not be in the workplace pending the gathering of further medical information. Did she pose a particular health and safety risk to herself or others around her such that she could not be permitted in the workplace? If so, why was this the case in October of 2001, and not in October of 2000, when Ms. Lipp was transferred to the full-time position notwithstanding the fact that Medisys did not have the results of an IME? These questions were left unanswered during the hearing. The answers to the questions, however, were crucial to a finding as to whether returning Ms. Lipp to her full-time position on modified duties pending the completion of the requisite medical inquiries, would cause undue hardship to Canada Post.

[234] There was some suggestion by Mr. Hippe that the fact that the workplace conflict with Mr. Slater had not yet been resolved made it dangerous for Ms. Lipp to return to the workplace. However, in cross-examination, Mr. Hippe admitted that Canada Post did not see this as a barrier to her return to the workplace. He testified that the conflict resolution process would likely have been engaged once Ms. Lipp returned to the workplace. However, although the Field Report of July 10, 2001, written while Ms. Lipp was still on sick leave, indicated that this process should be commenced there was no indication in the Field Report of October 30, 2001, when she wanted to return, that conflict resolution was still needed.

[235] In fact, the evidence revealed that Ms. Lipp did not wish to meet with Canada Post upon her return to work to discuss the conflict with Mr. Slater. Instead, through her union she had demanded that Mr. Slater not come "within 10 feet of her" and that he be required to communicate with Ms. Lipp through the shift supervisor only.

[236] Mr. Hippe testified that the operational requirements of the Plant were such that it would create undue hardship for Canada Post to require Mr. Slater to communicate with Ms. Lipp only through the shift supervisor. He testified that if there was an emergency and the shift supervisor was out of the building, Mr. Slater had to be able to communicate with Ms. Lipp.

[237] Mr. Jeworski proposed to Canada Post what he thought would be a reasonable solution to the workplace conflict that had resulted in Ms. Lipp's departure on stress leave. He knew that a ten-foot rule was unworkable. Mr. Jeworski testified however, that for the most part, the objectives of conflict resolution and Ms. Lipp's successful return to work could be achieved by simply following the normal chain of command in the Mail Processing Plant. As a normal course of events, most communication on the shop floor flowed through the supervisor to the employee. Superintendents like Mr. Slater only became involved when the supervisor was out of the building or on a break, or when something out of the ordinary occurred.

[238] Mr. Jeworski testified that he made a suggestion to Canada Post that he thought represented a reasonable compromise. Ms. Lipp testified that she agreed with the proposal. It was this: Ms. Lipp would be allowed to return to work on the understanding that she would still be required to attend the IME's. Efforts would be made to find doctors who were in or closer to Regina, or Canada Post would wait until after her pregnancy. The normal lines of communication would be followed in the Plant; Mr. Slater would do what he could not to aggravate the situation with Ms. Lipp.

[239] Mr. Jeworski thought this plan would work because normally employers are anxious to have employees return to work. Moreover, this was not a radical suggestion; the union was not seeking to have Mr. Slater removed or moved to a different section. Ms. Lipp was not seeking to avoid the IME's. However, Canada Post had drawn a line in the sand and would not accept the proposal. 'The IME had to come before the re-entry" as far as Canada Post was concerned, Mr. Jeworski testified.

[240] I find that Mr. Jeworski's proposal was eminently reasonable. Canada Post led no evidence as to why it rejected the proposal. Furthermore, there was no evidence that such a proposal would have caused Canada Post undue hardship.

[241] I find, therefore, that Canada Post has failed to establish that the requirement of holding Ms. Lipp out of service pending the gathering of further medical information was reasonably necessary.

(iv) Was it reasonably necessary to require that the IME's be held in Winnipeg?

[242] On the assumption that the psychiatric IME and that the IME with the occupational specialist were reasonably necessary, the question then is whether it was reasonably necessary to require Ms. Lipp to attend these examinations in Winnipeg.

[243] Here again, the Respondent relies on the decision of the arbitrator, who heard and seemed to have accepted the evidence of Dr. Koz that were good reasons for her to have lost confidence in Dr. Fink. Those reasons were not set out in the arbitrator's decision. The arbitrator would then appear to have accepted evidence that there were no specialists in Regina who could perform the IME's. I was urged to accept these findings in lieu of evidence from Dr. Koz on these points and to find, therefore, that Canada Post had no alternatives to sending Ms. Lipp to Winnipeg.

[244] I have a number of concerns about this. Firstly, as I indicated in my ruling on the *res judicata* issue, it appears that the human rights issues were not argued at the arbitration nor considered by the arbitrator in his decision. Moreover, counsel for Ms. Lipp was not present at that hearing; only the union and Canada Post had standing. Therefore, counsel for Ms. Lipp did not have the opportunity to pose questions to Dr. Koz that were based on a human rights analysis of the case. For example, she did not have an opportunity to explore the nature of the hardship was that was alleged to result from having the IME's performed in Regina or the surrounding area.

[245] Secondly, there was evidence presented during the hearing in the form of the note from Ms. Lipp's physician indicating that another doctor by the name of Dr. Alport was able to perform at least one of the IME's in Regina. It is not clear from the arbitrator's decision as to whether this evidence was entered at the hearing and put to Dr. Koz. This evidence is, however, relevant to the question of whether there were reasonable alternatives to the requirement of traveling to Winnipeg for the IME regarding Ms. Lipp's physical restrictions. Given that Dr. Koz did not testify at the hearing into the present complaint, there was therefore no opportunity to question Dr. Koz about whether she had considered this and other alternatives.

[246] Finally, even if one accepts that there was no one in Regina who could have performed the IME with respect to Ms. Lipp's physical restrictions, the arbitrator's decision does not touch upon any evidence from Dr. Koz regarding the availability of someone in Regina to perform the psychiatric IME.

[247] For these reasons, I find that the arbitrator's decision with respect to the necessity of attending the IME's in Winnipeg is not applicable in the present case.

Did Canada Post investigate and consider alternatives to sending Ms. Lipp to Winnipeg?

[248] Mr. Hippe testified that Dr. Koz had told him that she was not aware of any doctors in Saskatchewan who performed IME's. However, Mr. Hippe also testified that he thought there might be one or two doctors in the province that performed IME's. Moreover, Canada Post was in possession of a note from Dr. Van Heerden dated November 16, 2001, suggesting that a physician by the name of Dr. Alport might be able to perform the physical IME. There was no evidence that Mr. Hippe looked into these possibilities or requested that Dr. Koz make the appropriate inquiries. He testified that because Dr. Koz was from Winnipeg, she had established relationships with doctors in that city who could perform IME's. Mr. Hippe indicated that he accepted Dr. Koz's statement that the IME's should be done in Winnipeg.

[249] Similarly, no evidence was provided regarding the efforts that were made to determine the availability of doctors in Regina who might perform the psychiatric IME. Thus, I find that the evidence does not establish that Canada Post seriously investigated or considered the availability of other doctors in Regina or Saskatchewan who might have performed the IME's.

Would accommodating Ms. Lipp have imposed undue hardship on Canada Post?

[250] Although I have found that several options for Ms. Lipp's accommodation were not considered by Canada Post, s. 15(2) of the Act provides that an employer may nonetheless justify adverse differential treatment of an individual by showing that accommodating the individual's needs would impose undue hardship on it, considering health, safety and cost.

[251] The evidence indicated that at one point in time, the union suggested that one way to accommodate Ms. Lipp's travel concerns would be for Canada Post to arrange for the Winnipeg doctors to travel to Regina to meet with Ms. Lipp. Ms. Woodfield testified that Mr. Hippe told her categorically that he was not willing to pay the costs.

[252] At the hearing, however, it was incumbent upon Canada Post to establish, by way of evidence that was more than just impressionistic or conjectural, that the cost of flying the specialists in from Winnipeg would cause Canada Post undue hardship. There was no such evidence presented at the hearing.

[253] Similarly, in December 2001, the union proposed that Canada Post accept Dr. Fink's IME Report in lieu of an IME report from an occupational specialist in Winnipeg. Canada Post replied that because Ms. Lipp's family physician had referred her to Dr. Fink, the report was no longer considered to be an IME report. Mr. Hippe also testified that Dr. Koz had also lost confidence in Dr. Fink and therefore, his report was not acceptable. However, Mr. Hippe could not say why Dr. Koz had lost confidence in Dr. Fink, and what the implications of accepting the report would have been for Canada Post.

[254] Again, in the absence of evidence as to what hardship would result to Canada Post from simply accepting Dr. Fink's recommendations instead of sending Ms. Lipp to Winnipeg, we are left with a number of unanswered questions that are crucial to the determination at this stage of the BFOR test. Would following Dr. Fink's recommendations have led to an unacceptable safety or health risk to Ms. Lipp or her fellow workers? Would it have created costs that were unmanageable for Canada Post? There was simply no evidence whatsoever that addressed these questions.

[255] For these reasons, I find that Canada Post has failed to establish that not sending Ms. Lipp to Winnipeg for the IME's would have caused it undue hardship.

Did Ms. Lipp refuse a reasonable solution to the accommodation issue?

[256] The courts have stated that an employee cannot refuse a reasonable accommodation on the ground that the alternative which he or she favours would not cause the employer undue hardship (*Hutchinson v. Canada (Minister of the Environment* 2003 FCA 133 at para. 77). Thus, if it can be shown that Ms. Lipp refused a reasonable accommodation that was offered to her by Canada Post, then it is immaterial whether Canada Post demonstrated that the above mentioned alternatives would have caused undue hardship.

[257] Canada Post argued that it made considerable effort to accommodate Ms. Lipp's travel concerns. Mr. Hippe testified that he made a number of offers to encourage Ms. Lipp to agree to travel to Winnipeg. For example, she would be paid from November 7, 2001, until she attended the IME's. In addition, various modes of transportation to Winnipeg were offered to her including bus, plane and car travel. She was also permitted to have a union representative attend with her. Finally, there was some suggestion that the expense of having Ms. Lipp's partner attend with her might be provided, although Ms. Lipp testified that she was never informed of this option.

[258] Canada Post argued that these efforts to accommodate Ms. Lipp were reasonable and that nothing further was required. I disagree. The options that were offered by Canada Post did not address Ms. Lipp's concerns about travel arising from her pregnancy.

[259] Mr. Hippe testified that he was aware that Ms. Lipp had had difficulty with previous pregnancies and that she may have miscarried in the past. He knew that she was concerned about her current pregnancy and did not want to travel as a result. Mr. Hippe testified that he may also have been in possession of some information indicating that Ms. Lipp was experiencing uterine cramping. However, he testified that when he spoke with Dr. Koz, she told him that uterine cramping was a normal part of pregnancy. On the basis of that statement from Dr. Koz, he formulated the opinion that Ms. Lipp should be able to travel to Winnipeg.

[260] The Supreme Court of Canada has emphasized the importance of taking into account the individual needs of the person requesting the accommodation (*Meiorin, supra*, at para. 62). Generalizations about normal pregnancies cannot, therefore, serve as the basis for a decision not to provide an individual with accommodation for her particular needs. While Dr. Koz's opinion was a factor to be considered in assessing Ms. Lipp's need for accommodation, it was only one among a number other factors that should have been taken into account.

[261] Ms. Lipp certainly had an obligation to inform Canada Post about the individual circumstances of her pregnancy (*Desormeaux v. O.C. Transpo* 2003 CHRT 2 at para. 110, aff'd 2005 FCA 311). However, the evidence established that she did so.

[262] Moreover, even without taking Ms. Lipp's pregnancy into account, I find that the accommodation offers made by Canada Post were not reasonable. In my view, the requirement that Ms. Lipp travel out of the province for a two-day IME should only have been imposed as a last resort. It was an onerous obligation that Ms. Lipp was required to comply with because she was a disabled worker. Canada Post, therefore, had a duty to thoroughly investigate all possible alternatives prior to sending her to Winnipeg for the IME's. The evidence indicates that Canada Post did not do so.

[263] In the light of this evidence, I find accordingly, that the offer of accommodation that was made to Ms. Lipp with regard to travel to Winnipeg was not a reasonable one.

(4) Tribunal's Findings and Conclusions Regarding Allegation Number Four

[264] For all of the above reasons, I find that Canada Post has failed to establish that the requirement that Ms. Lipp attend two IME's in Winnipeg before returning to work was a *bona fide* occupational requirement. Therefore, I find that Canada Post's refusal to return Ms. Lipp to work until she had attended the IME's in Winnipeg constituted discrimination on the basis of disability (perceived and actual) and gender.

B. ALLEGATION NUMBER 5 - The imposition of disciplinary leave without Pay

(1) The Prima Facie Case

[265] If Ms. Lipp had not been pregnant and disabled she would not have been placed in a situation where she had to choose between receiving the discipline and risking the health of her fetus. On that basis, I find that there is a *prima facie* case of differential treatment on the basis of disability and gender.

(2) The Respondent's Explanation

[266] Canada Post argued that it imposed the discipline for non-discriminatory reasons, that is, to discipline an employee for insubordination. In that regard, Canada Post relied on the reasoning of the arbitrator who held that Ms. Lipp made a tactical choice not to attend the IME's in Winnipeg. Her defiant stance in that regard justified the imposition of disciplinary leave without pay.

[267] The question before me is not, as it was in the arbitration, whether Canada Post was justified in imposing disciplinary leave without pay on Ms. Lipp. Rather, the question that I must answer is whether Canada Post has established, on the evidence, either that Ms. Lipp's status as a pregnant and disabled worker was not a factor in the decision to place her on disciplinary leave without pay, or that the discipline was a *bona fide* occupational requirement. Canada Post did not raise the latter argument. Therefore, I will not address that issue.

[268] Canada Post led no evidence whatsoever that challenged the Ms. Lipp's evidence that her refusal to attend the IME's in Winnipeg was not insubordination, but rather was a decision based primarily on a concern about the effect of travel on her pregnancy. Ms. Lipp testified that she was willing to attend the IME's, but she could not travel out of town for them. She expressed her concern to Canada Post and provided a doctor's note that substantiated her concern. Mr. Hippe was aware that Ms. Lipp had a history of difficulties with pregnancy, and was aware of her related concerns about traveling, but he chose instead to follow Dr. Koz's general statement to him that uterine cramping during the second trimester was normal. Canada Post did not lead any medical evidence in support of what would appear to be an argument that Ms. Lipp's concern about her pregnancy was just an excuse to avoid the IME.

[269] In light of the evidence of Ms. Lipp's concerns about her pregnancy and her communication of those concerns to Canada Post, I find that the allegation that Ms. Lipp's refusal to attend the IME's was insubordination, for which she was justifiably disciplined, did not constitute a reasonable explanation for Canada Post's conduct.

(3) Tribunal's Conclusion Regarding Allegation Number 5

[270] Accordingly, I find that the imposition of disciplinary leave without pay constituted discrimination on the basis of Ms. Lipp's disability and her gender.

VIII. WHAT IS THE TRIBUNAL'S CONCLUSION REGARDING LIABILITY?

[271] When Ms. Lipp applied for the full-time position on Shift 3, Canada Post was justified in requiring medical information establishing that she could safely perform the duties of the position and the extent of her restrictions in light of her statement that she

could now work past the six hour restriction. When Canada Post transferred Ms. Lipp to the position, it was justified in requiring that she attend an IME to determine the long-term safety of her work load.

[272] However, the manner in which Canada Post implemented these requirements was discriminatory. Canada Post's repeated, negative and threatening communication with Ms. Lipp about her disability and the need to provide medical information constituted adverse differential treatment on the basis of disability.

[273] Canada Post's continuing requirement that Ms. Lipp attend an IME regarding her physical limitations in the fall of 2001, after her period of sick leave was a *bona fide* occupational requirement. However, Canada Post's refusal to return Ms. Lipp to her former modified position until she attended two IME's in Winnipeg, one with a psychiatrist and one with an occupational specialist, constituted discrimination on the basis of disability and gender. Finally, the imposition of disciplinary leave without pay was discriminatory.

[274] Canada Post was provided with insufficient notice that allegation number one was going to be raised during the hearing. Therefore, I did not consider this allegation and it is dismissed.

IX. WHAT IS THE APPROPRIATE REMEDY?

A. An Order that Canada Post Return Ms. Lipp to Active Service

[275] Ms. Lipp seeks an order, pursuant to s. 53(2)(b) of the *Act*, directing Canada Post to return her to active service in her position as a full-time postal clerk, on the basis of the medical information that she has already provided. She states that her return would have to be gradual and include an orientation to any new processes and/or procedures that have been implemented since her departure from the workplace in April 2001.

[276] Section 53(2)(b) of the *Act* provides that where the Tribunal finds the complaint is substantiated, it may order a respondent to make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that were denied the victim as a result of the practice.

[277] I have found that Canada Post discriminated against Ms. Lipp on the basis of her disability and her gender when it refused to return her to work on October 9, 2001. I therefore, order Canada Post to return Ms. Lipp to active service in the full-time postal clerk position on Shift Three subject to the following conditions:

(1) Canada Post shall work with the union, Medisys and Ms. Lipp to implement a gradual return to work and an orientation program at the earliest reasonable opportunity;

(2) The return to work shall be implemented on the basis of the restrictions that were established in March 2000;

(3) Upon her return to work, Ms. Lipp is to cooperate with Canada Post to set the earliest possible date for an IME appointment with an occupational specialist to evaluate her current health status and to determine the extent of her current physical restrictions;

(4) Canada Post shall work with Medisys to secure an appointment with an occupational specialist in Regina, if at all possible, and if not, in the locale that is in closest proximity to Regina as possible.

(5) Once the results of the IME are obtained, Canada Post shall work with the union, Medisys and Ms. Lipp to determine the appropriate accommodation of Ms. Lipp in the full-time postal clerk position.

B. An Order that Canada Post Cease its Discriminatory Conduct and Address the Underlying Factors and Effects of the Conduct

[278] I have found that while Canada Post was justified in requiring further information from Ms. Lipp, the manner in which it went about doing this was discriminatory. Frequent and negative requests for information, negative questions and comments on the shop floor about work restrictions, and frequent threats of discipline accompanying these requests for information constituted adverse differential treatment in which Ms. Lipp's disability became the focus of Canada Post's negative attention toward her.

[279] To address these problems, Ms. Lipp has requested an order directing that Mr. Slater not communicate directly with her except in an emergency. On the basis of the evidence provided by Mr. Hippe and Mr. Jeworski, I find that this order is not appropriate. As Superintendent of Shift 3, Mr. Slater must be free to communicate with all of his employees when the need arises, not only in emergency situations. Although Mr. Jeworski's suggestion of following the normal lines of communication from superintendent to supervisor and from supervisor to employee is a good one, more is needed. It seems to me that what is needed in the present case is a remedy that will address the attitudinal and behavioural factors that gave rise to the discrimination in the first place. It was not only Mr. Slater who was involved in the actions that I have found to be discriminatory.

[280] In my view, Canada Post's treatment of Ms. Lipp suggests that some members of management in Regina's Mail Processing Plant felt that an aggressive and confrontational approach to managing employees with disabilities like Ms. Lipp was necessary. This is not appropriate, in my view. It is the responsibility of Canada Post, as the employer, to work cooperatively with the union and individual employees to provide a workplace that is free from discrimination.

[281] Therefore, in order to redress the discriminatory practice and to prevent the same from occurring in the future, pursuant to s. 53(2)(a), I order that:

(1) Canada Post must cease the conduct that was found to be discriminatory in this case, in particular, unnecessary requests for information about Ms. Lipp's disability including those that are accompanied by unwarranted threats of discipline;

(2) In consultation with the Canadian Human Rights Commission, Canada Post must provide sensitivity training to all members of Canada Post management at the Regina Mail Processing Plant with respect to the management and accommodation of persons with disabilities;

(3) In consultation with Ms. Lipp and the union, Canada Post must undertake to resolve the conflict between Ms. Lipp and Mr. Slater, and/or make available to Ms. Lipp the services of a counselor of Ms. Lipp's choice to provide her with supportive counseling for a reasonable period of time upon her return to work.

[282] Nothing in this order shall limit or restrict Ms. Lipp's obligation to cooperate, in a timely fashion, with Canada Post's requirement that she provide regular updates regarding her medical status, or the provision of information should her restrictions or position change. Moreover, nothing in this order shall limit or restrict Canada Post's right to request an Independent Medical Examination in accordance with the collective agreement in the appropriate circumstances.

C. Compensation for Lost Wages

[283] The burden of establishing entitlement to compensation is on the complainant (*O'Connor v. Town Taxi* (1987) Ltd., 2000 BCHRT 9 at para. 60). To establish such an entitlement, the complainant must show some causal connection between the discriminatory act and the loss claimed (*Canada (Attorney General) v. Morgan* (1991), 85 D.L.R. (4th) 473 (F.C.A.)). To discharge this burden, the complainant must prove only that there is a serious possibility that the respondent's discriminatory act caused the damage for which the complainant claims compensation. Proof of the extent of that damage is another issue. Any uncertainty regarding the extent of the damage must be factored into the assessment of the appropriate quantum of damages (*Chopra v. Health Canada* 2004 CHRT 27; aff'd *Chopra v. Canada (Attorney General)* 2006 FC 9).

[284] Ms. Lipp argues that she should be compensated for lost wages for the period from October 9, 2001, when her doctor advised that she was able to return to work, to the date when she actually returns to work pursuant to this Tribunal's order.

[285] I have divided the Complainant's claim for wage loss into discrete time periods for ease of analysis.

1. October 9, 2001 - December 5, 2001

[286] I have found that Canada Post's refusal to return Ms. Lipp to her full-time duties on October 9, 2001, was discriminatory. Therefore, Canada Post is ordered to pay Ms. Lipp all wages and benefits that she would have received from October 9, 2001 until she was placed on disciplinary leave, on December 5, 2001.

2. December 5, 2001 - March 16, 2005

[287] I have also found that the imposition of disciplinary leave without pay on December 5, 2001, was discriminatory. In principle, therefore, Canada Post would be liable for the wages and benefits that were not paid to Ms. Lipp during the period that she was on disciplinary leave without pay. However, the evidence is not clear as to the exact time frame of this leave. Ms. Lipp testified that she felt that even at the time of the hearing, she was still on disciplinary leave without pay. However, it was not clear from the evidence that this was, in fact the case. Moreover, for the following reasons, I find that there were intervening events in the chain of causality that make compensation for the loss of wages for the entire period from December 5, 2001 until present, too remote.

[288] Ms. Lipp was placed on disciplinary leave without pay effective December 5, 2001, pending receipt of the required medical information.

[289] On March 16, 2002, Ms. Lipp gave birth to her first child. Canada Post approved Ms. Lipp's request for maternity leave for the period from March 16, 2002, to March 16, 2003.

[290] Ms. Lipp testified that she received some statutory employment insurance benefits for the period of her maternity leave. However, she did not receive the full amount that she would have received had she been allowed to return to work on October 9, 2001. Moreover, she did not receive the "top-up" benefits from Canada Post that were provided for under the collective agreement for her maternity leave period.

[291] On April 7, 2003, Mr. Hippe wrote Ms. Lipp a letter indicating that her maternity leave had expired and that no further requests for leave had been received. The letter from Mr. Hippe indicated that if Ms. Lipp wished to return to work she would be required to first complete an OFA. If she did not return the completed OFA by April 21, 2003, Canada Post would consider that she was unwilling/unable to perform her duties at Canada Post.

[292] Instead of having the form completed and returning to work, Ms. Lipp testified that she applied for and was granted two one-year periods of unpaid leave for spousal relocation from March 16, 2003 to March 16, 2005. She was entitled to do so under Article 27.05 of the collective agreement.

[293] Ms. Lipp stated that her husband (to whom she was not married at the time) had moved to Weyburn because he had found a job there and also because the couple wanted a bigger house in which to raise their family. It was unclear when Ms. Lipp's husband moved to Weyburn, but it would appear to have been prior to April 7, 2003, when Canada Post requested notice of her intentions with respect to her return to work.

[294] Ms. Lipp testified that she wanted to be compensated for the salary that she did not receive during the spousal relocation leaves from March 16, 2003, to March 16, 2005. She testified that she would not have applied for a relocation leave to move with her husband to Weyburn had she been allowed to return to work in October 2001. It was because she had been without a full-time income since October 2001 that she was forced to sell her house and her cottage, and move with her husband to Weyburn. She stated that had she been allowed to return to work in October of 2001, she would not have had to sell her house in Regina, and could have stayed there until her husband was able to transfer back to Regina.

[295] Ms. Lipp stated that her relationship with her husband, who was her boyfriend at that time, was relatively new, and she was reluctant to move in with him so early in the relationship. As a result of being forced on disciplinary leave without pay, however, she had to move with him to Weyburn.

[296] I find that Ms. Lipp's testimony in that regard was somewhat contradictory and implausible. She stated that she would not have moved to Weyburn with her husband but for the financial problems caused by Canada Post. However, she also stated that her husband had moved to Weyburn both for the job, but also because the couple wanted a bigger home for their family. Ms. Lipp further testified that she moved to Weyburn with her husband because they were having a child together.

[297] On the basis of this evidence, I am not convinced that there was a serious possibility that but for Canada Post's discriminatory conduct, Ms. Lipp would not have applied for spousal relocation leave without pay. Rather, I find, on the basis of the evidence, that it is highly probable that Ms. Lipp would have applied for the relocation leave regardless of whether she had been permitted to return to work in October of 2001. Mr. Hippe's letter of April 7, 2003 invited Ms. Lipp to return to work. She chose not to do so. Therefore, I find that Canada Post is not liable for her wages during the period from March 16, 2003 to March 16, 2005.

[298] However, Canada Post is liable for the difference between the income and benefits that she would have received had she returned to work on October 9, 2001, and what she actually received for the period from December 5, 2001 to March 16, 2003.

3. March 16, 2005, to present

[299] Ms. Lipp testified that she and her family returned to Regina in March of 2005. By that point she had given birth to a second daughter. Ms. Lipp stated that she remembered filling out an application form for care and nurturing leave. The collective agreement provided for an unpaid leave of absence to care for preschool age children. Ms. Lipp also testified that by that point in time, the arbitration was underway, she had filed a human

rights complaint, and she just wanted to wait until the legal issues had been determined before she returned to work.

[300] Canada Post argued that it should not be required to compensate Ms. Lipp for wages that she would have earned from March 2005, until the present time because at no point during this period has Ms. Lipp indicated a willingness or readiness to return to work.

[301] In my view, the evidence established that Ms. Lipp made a choice not to return to work after March 2005. Although she stated that she felt that she was still on disciplinary leave without pay, Ms. Lipp was also aware that Canada Post was willing to consider her return to work upon completion of an OFA. She chose not to do this. The evidence established that from March 16, 2005, she chose not to return to work either out of a desire to stay at home and care for her children, as evidenced by her completion of the care and nurturing leave form, or a wish to see the legal issues resolved in this case before she returned, or for both reasons. Canada Post should not have to compensate Ms. Lipp for wages and benefits for a period during which she chose not to work. Therefore, no order for wage compensation will be issued for the period from March 16, 2005 to present.

Conclusion Regarding Compensation for Wage Loss

[302] In conclusion, therefore, I order that Canada Post compensate Ms. Lipp for any wage and/or maternity and other benefit loss that she incurred during the period from October 9, 2001, to March 16, 2003. While I heard some evidence regarding the amounts that should be considered in calculating the quantum of this award, it was incomplete. I am therefore, unable to set the quantum of the award. The parties are encouraged to reach an agreement on this issue. The calculation of the amounts owing should take into account statutory benefits, insurance payments and any other relevant remuneration received during the time period from October 9, 2001, to March 16, 2003.

[303] I shall retain jurisdiction over this aspect of the award in the event that the parties are unable to reach an agreement with respect to the appropriate quantum based on the above findings. The parties are to notify the Tribunal within 60 days of the receipt of this decision if an agreement has not been reached.

D. Compensation for Pain and Suffering

[304] Section 53(2)(e) of the *Act* states that the Tribunal may order the person found to have engaged in the discriminatory conduct to compensate the victim, by an amount not exceeding $20,000.00, for any pain and suffering that the victim experienced as a result of the discriminatory practice. On the basis of the following evidence, I find that Canada Post's discriminatory conduct caused Ms. Lipp significant pain and suffering.

[305] Ms. Lipp testified that when she went off work in April 2001, she was very upset. Ms. McCarron, the psychologist who treated Ms. Lipp, testified that when Ms. Lipp first attended at her office she was having trouble sleeping, there was some suicidal ideation, she was having nightmares, difficulty concentrating and feeling very afraid and alone.

[306] Ms. McCarron tested Ms. Lipp's anxiety and depression levels using the Burns Anxiety Inventory and the Beck Depression Inventory. She testified that Ms. Lipp scored in the severe level for depression, and was "extremely anxious". Ms. McCarron testified that discussions of the workplace environment during the counseling sessions would bring on panic attacks for Ms. Lipp.

[307] Ms. Lipp's family physician provided a diagnosis of major depression and anxiety disorder and indicated that the workplace conflict was a factor that would prevent her recovery. He stated that Ms. Lipp's anxiety was heightened just by mentioning the current workplace.

[308] Ms. Lipp testified that, with the exception of the time that she worked on the midnight shift from January 2001, to March 2001, she felt under constant stress at work. She felt humiliated by the questions and statements about her disability and the seemingly endless requirements to produce more medical information. However, Ms. Lipp also testified that by the fall of 2001, after six months away from the workplace, she was feeling much better. She was happy and anxious to get back to work. She testified that was no longer taking any medication, and was able to control her anxiety with natural stress reduction methods.

[309] Canada Post suggested that Ms. Lipp's reactions to the events in the workplace were exaggerated and unreasonable. However, the only evidence that was led in support of this contention was Mr. Slater and Mr. Hippe's testimony that Ms. Lipp had no reason to be so upset. This is insufficient to challenge Ms. Lipp's testimony regarding her suffering.

[310] I find that Canada Post's conduct created an extremely negative work environment for Ms. Lipp which resulted in a considerable amount of pain and suffering, and was a significant factor in the development of her depression and anxiety disorder.

[311] Ms. Lipp requested $20,000 in compensation for pain and suffering. While I agree that Ms. Lipp experienced considerable pain and suffering as a result of Canada Post's discriminatory conduct, the extent and duration of this suffering does not justify the maximum amount, in my view. Therefore, taking into account all of the circumstances that I detailed above, I order Canada Post to pay Ms. Lipp $12,000 in compensation for her pain and suffering.

E. Special Compensation - s. 53(3) of the *Act*

[312] Section 53(3) of the *Act* provides that the Tribunal may order a respondent to pay up to $20,000 in compensation to a victim of discrimination if the respondent engaged in the discriminatory practice willfully or recklessly. Counsel for Ms. Lipp argued that Canada Post's conduct was decidedly willful or reckless, particularly with regard to the treatment that Ms. Lipp received while she was on sick leave, and then when she tried to return to work in the fall of 2001. Ms. Lipp's counsel argued that Canada Post should be ordered to pay the maximum amount of compensation under this head.

[313] I agree that Canada Post's conduct in this case was reckless. Mr. Slater and Mr. Hippe both testified that there were aspects of Ms. Lipp's case that should have been handled differently. Mr. Slater admitted that he sent letters to Ms. Lipp that should not have been sent while she was on sick leave. As I stated earlier, the evidence suggests that Canada Post took a very aggressive and negative approach to managing Ms. Lipp's restrictions and participation in the workforce. I find that this was done in reckless disregard of the consequences that it might have on Ms. Lipp.

[314] However, I do not agree that Canada Post's conduct in this case was egregious enough to warrant the maximum allowable amount under the *Act*. In the circumstances of this case, I find that an order in the amount of $10,000 is appropriate. Therefore, I order Canada Post to pay Ms. Lipp the sum of $10,000 in compensation pursuant to s. 53(3) of the *Act*.

F. Letter of Acknowledgement

[315] Counsel for Ms. Lipp argued that while the Federal Court in *Stevenson v. Canada (Canadian Security Intelligence Service)* 2003 FCT 341, held that the Tribunal may not order the Respondent to provide an apology, the overall goals and intentions of the *Act* would permit the Tribunal to order the Respondent to acknowledge that its actions have led to a finding of discrimination by this Tribunal. In *Stevenson,* the Court held that although the Tribunal in that case had made a finding against CSIS, this did not mean that CSIS believed that the decision was necessarily correct, or that CSIS had discriminated against Mr. Stevenson. The Court stated that there was an element of coercion and punishment in the ordering of an apology. It held, therefore, that the authority to order that letters of apology be given to a successful complainant must be expressly provided for in the act or must be derived by necessary implication (an "inherent power").

[316] In my view, there is also an element of coercion involved in requiring the Respondent to provide Ms. Lipp with a letter acknowledging that its actions have led to a finding of discrimination by this Tribunal. Following the Court's reasoning in *Stevenson,* I find that I do not have the statutory authority under the *Act* to order that the Respondent issue such a letter.

G. Costs

[317] Ms. Lipp has asked that she be reimbursed on a solicitor client basis for the legal expenses that she incurred as a result of this dispute. In a recent decision, the Chairperson of this Tribunal held that the weight of judicial authority supports the Tribunal's power to award legal costs under s. 53(2) of the *Act* (*Mowat v. Canadian Armed Forces* 2006 CHRT 49 at para. 27). I agree that the Tribunal has the authority to award costs.

[318] I am not of the view, however, that the Tribunal has the statutory authority under the *Act* to order costs on a solicitor client basis. Rather, judicial authority suggests that s. 53(2)(c) authorizes the Tribunal to order the Respondent to pay the "reasonable" costs of counsel. In *Stevenson, supra,* the Federal Court adopted the words used by the Court in *Canada (Attorney General) v. Thwaites* [1994] 3 F.C. 38 (F.C.T.D.), indicating that paragraph 53(2)(c) of the *Act* was to be interpreted as granting the Tribunal the authority to award "reasonable costs for counsel". *Stevenson* dealt with an award of costs incurred prior to the referral of a complaint to the Tribunal. In *Attorney General of Canada v. Brooks,* 2006 FC 500, the Federal Court applied the reasoning in *Stevenson* to the awarding of costs incurred for ongoing legal representation up to and including representation at the Tribunal hearing.

[319] Accordingly, I order that Canada Post pay the reasonable costs to Ms. Lipp of retaining counsel both prior to and during the hearing in relation to the discriminatory practices that were alleged and found to be substantiated in this complaint.

[320] Counsel for Ms. Lipp did not lead any evidence on the issue of costs. Therefore, I am unable to make an order with respect to the quantum of this award. The parties are, however, encouraged to come to an agreement on the quantum of reasonable costs in this matter. I shall retain jurisdiction over this aspect of the award in the event that the parties are unable to reach such an agreement. The parties are to notify the Tribunal within 60 days of the receipt of this decision if an agreement has not been reached.

H. Interest

[321] Interest is payable in respect of all awards made in this decision pursuant to section 53(4) of the *Act*. The interest shall be simple interest calculated on a yearly basis, at a rate

equivalent to the bank rate (monthly series) set by the Bank of Canada, per Rule 9(12) of the *Tribunal's Rules of Procedure*. Interest with respect to compensation for lost wages and benefits is to run from the midpoint between October 9, 2001, and March 16, 2003. With respect to the compensation for pain and suffering and the compensation under s. 53(3), the interest shall run from the date of the complaint. In no case, however, should the total amount payable under s. 53(2)(e) including interest, exceed $20,000. Similarly, the total amount payable under s. 53(3), including interest, should not exceed $20,000.

"*Signed by*"

Karen A. Jensen

OTTAWA, Ontario

January 24, 2007

PARTIES OF RECORD

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DATE AND PLACE OF HEARING:	July 17 to 21, 2006 July 24 to 26, 2006 Regina, Saskatchewan
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APPEARANCES:	
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(No one appearing)	For the Canadian Human Rights Commission
Daniel P. Kwochka	For the Respondent