Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Doris Cassidy

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canada Post Corporation

- and -

Raj Thambirajah

Respondents

Decision

Member: Matthew D. Garfield
Date: November 23, 2012
Citation: 2012 CHRT 29

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I. Introduction

[1] These are my Reasons for Decision in the Complaints of Doris Cassidy against Raj Thambirajah ("Personal Respondent"), a co-worker and Union shop steward, and Canada Post Corporation ("Canada Post"), her employer. The allegation against Mr. Thambirajah is that he sexually harassed the Complainant, contrary to subsection 14(2) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 as amended ("*CHRA*"). The Complaint against him was also amended to include three incidents of retaliation during the course of the hearing, contrary to section 14.1 of the *CHRA*. The Complaint against Canada Post is that it differentiated adversely against Ms. Cassidy and failed to provide a harassment-free workplace based on the ground of sex, contrary to subsections 7(b) and 14(2) of the *CHRA*, respectively. The Complaints were combined into a single hearing. The Canadian Human Rights Commission ("Commission") did not participate in the hearing.

II. Decision

[2] The Complaints are substantiated in part.

III. Delay and Length Of Proceeding

[3] The genesis of the Complaints goes back to on or about November 9, 2005 (the Complainant does not remember the exact date) when Mr. Thambirajah is alleged to have sexually harassed the Complainant by way of inappropriate touching and comments in the workplace. The Complainant filed her Complaints on March 27, 2007. The Commission referred them to the Canadian Human Rights Tribunal ("Tribunal) on May 26, 2009. The Complaints were case-managed and then assigned to me for a hearing. The first day of hearing was February 1, 2010; the last day was October 11, 2011. The proceeding closed when the Complainant counsel's request to re-open the hearing was denied on January 19, 2012.

[4] This was too long for a proceeding to take place – seven years after the cause of action arose. I won't comment on the lapsed time from when the Complainant filed a Complaint to the Commission's referral to the Tribunal. But I can and will comment on the carriage of the matter before the Tribunal.

[5] In the many years that I have been adjudicating human rights cases, in the federal and Ontario jurisdictions, this case is unique and was more difficult than others, for many reasons. First, there were time consuming disclosure and production matters that arose during the hearing. These involved the six journals/diaries of the Complainant. To preserve her privacy and confidentiality, I agreed to vet or review them for arguable relevance. There were hundreds of pages to meticulously go through. When I ordered certain parts produced to the Respondents, and other journals be returned to the Complainant, there was a mix-up. The Complainant or her representative gave the non-produced documents to Mr. Machelak, Canada Post's counsel (but not to Mr. Platt, the Personal Respondent's representative). The Complainant was upset that Mr. Machelak had confidential parts of the journals that were ordered redacted and accused him of taking them from her belongings in the hearing room. Understandably, counsel took umbrage at this accusation. And yet again, there were problems with the proper copies being made by the Complainant. The copies given to each of the Respondents, the Registry Officer, and the copy on the witness stand, did not match.

[6] I should add for the record that, as the Complainant was rightly agitated about intimate, private matters in her journals being disclosed to the Respondents, particularly the Personal Respondent, I also made an Order sealing certain documents and ordering the Respondents to return certain productions of the Complainant upon the end of the proceeding and any judicial review/appeal thereto. Ms. Cassidy's concern was palpable and I hope that I achieved the right balance in the review of the journals and the issuance of the Order.

[7] There was also a fair bit of shuffling of witnesses, even before their testimony was completed, in order to accommodate scheduling issues, and I thank the parties for their co-operation. That prevented the loss of hearing days. There was also the passage of time with the not uncommon difficulty in finding common available dates for the parties, their counsel/representatives and the Tribunal.

[8] The hearing itself took longer in part - 22 hearing days, not including the many Case Management Conference Calls that I held with the parties to deal with various issues/events that arose during the course of the proceeding - because the Complainant's testimony took longer than anticipated. As will be discussed later, the Complainant was sometimes evasive, other times not evasive but still having problems answering the questions, particularly in cross-examination. There was also a mediation in the middle of the first week of the hearing between the Complainant and Canada Post, conducted by the Chair of the Tribunal. The matter settled, but within a day, the Complainant indicated that she wished to "tear up" the agreement and proceed with the hearing against the two Respondents.

[9] Other exceptional events that lengthened the hearing were motions. There was a motion to amend the Complaint against Mr. Thambirajah to add an allegation of retaliation in regard to three incidents that occurred during the first week of the hearing. There was also a motion to allow similar fact evidence.

[10] Of greater significance was the motion to re-open the Complainant's case after it closed on May 28, 2010 and to add an allegation of retaliation against Canada Post. This wasn't resolved ultimately until March 14, 2011 – some 10 months later. And during this time, there was a change in Ms. Cassidy's representation from Julie Marshall (agent) to William Kelly (counsel) to the Complainant being self-represented briefly, after counsel went off the record. (He then re-appeared as counsel on April 25, 2011 and for the remainder of the hearing.)

A. Motion to Re-open the Complainant's Case and Subsequent Events

[11] The genesis of the motion to re-open the Complainant's case was the alleged meeting between Ms. Cassidy and her supervisors on the day of the November 9, 2005 incident of sexual harassment by Mr. Thambirajah. This will be discussed further in these Reasons. Ms. Cassidy indicated for the first time on May 31, 2010 that there was a witness who took her to and sat in on the meeting. She did not remember this because, she claimed, she has been suffering from Post Traumatic Stress Disorder ("PTSD") since that day in November of 2005, right through to May 28, 2010. I set dates for motion materials to be filed and argument to be made, including an expert report by a psychiatrist. She had not been seen by a psychiatrist or diagnosed with PTSD by a physician. I discussed with the parties the legal test to re-open a party's case, as stated in *Johnson v. Canadian Broadcasting Corporation*, 1994 CanLII 284 (CHRT)("*Vermette*"), aff'ed 1996 CanLII 3858 (FC). The hearing was adjourned to the motion date.

[12] Several events then transpired. Ms. Marshall advised on a Conference Call that the Complainant had "checked herself into" the psychiatric unit of Lakeridge hospital after the May 31, 2010 hearing date. She was now under the care of a psychiatrist, Dr. Malamed. The Complainant missed her first deadline for filing motion materials. The Tribunal Registry Officer was unable to reach Ms. Marshall or the Complainant. After several weeks had passed, Ms. Marshall finally contacted the Tribunal. I then gave the Complainant additional time to file. When those materials arrived on October 8, 2010, they failed to adhere to one of the requirements as discussed on May 31, 2010: that in order to meet the legal test, the moving party would have to show that she suffered from PTSD for the entire period from the cause of action to the end of her case at the hearing. Also, she would have to demonstrate that she exercised due diligence in preparing her case (i.e., she could not have been aware of this witness because of the PTSD diagnosis). The hospital psychiatrist's letter (not adhering to the requirements of an

expert's report under the Tribunal's *Rules of Procedure*) did not include a PTSD diagnosis from November 9, 2005 to May 2010.

[13] Exit Ms. Marshall; enter counsel Kelly. I should add that this was a difficult case and Ms. Marshall, not being trained as a lawyer, represented her friend Ms. Cassidy on a volunteer basis. She did a competent job in that context. Mr. Kelly was then retained and so advised the Tribunal on November 10, 2010. I held a Conference Call with the parties on November 29, 2010. To the opposition of the Respondents, I allowed, yet again, the Complainant to re-file her motion materials, by January 25, 2011. I had hoped that, with Complainant counsel's arrival to the proceeding, the motion materials would be filed properly and the motion heard as soon as possible. My hopes were unrealized.

[14] I should add that, before Mr. Kelly was retained, in order to move the process faster, and with the parties' approval, I had directed on May 31, 2010 that we would first hear from the proposed witness to the alleged November 9, 2005 meeting, A.B., before requiring the moving party to file an expert psychiatrist's report and the other parties potentially filing a rebuttal expert report. There was a dispute as to whether the witness was even at the Canada Post depot in question on November 9, 2005 – the day of the incident and alleged meeting with the Complainant and her supervisors. I heard A.B.'s evidence on that point and Canada Post's witnesses on July 20, 2010. Parties had agreed that I could use the evidence on the motion for purposes of the "on-the-merits" main hearing too, if necessary, in order to avoid having A.B. called back as a witness in the "main" hearing.

[15] The January 25, 2011 filing deadline for the Complainant's motion materials passed, with no word from Complainant counsel. Weeks passed. Complainant counsel did not answer correspondence and voice-mail messages from the Tribunal indicating the deadline had passed. Messrs. Machelak and Platt did not hear from him either. On February 2, 2011, I directed the Tribunal Registry to send out a letter indicating that I had interpreted counsel's failure to file as

abandoning the motion to re-open the case (as well as the other motion to add an allegation of retaliation against Canada Post). The hearing was scheduled to resume on March 14, 2011.

[16] One week before the resumption of the hearing, the Tribunal received a letter from Complainant counsel asking that the hearing be adjourned and permission to continue with the motion and re-file materials. The other parties opposed the request. I denied the request. On March 9, 2011, Complainant counsel wrote in again requesting that the Tribunal reconsider its refusal of his adjournment request. I directed that he "may speak to this matter [in-person] when the hearing resumes on March, 14, 2011…" Complainant counsel subsequently attended at a medical clinic and sent in a doctor's note indicating that he would not be able to attend the hearing. I then directed that he send someone in-person to the hearing to speak to the adjournment request, or if he could not attend, we could arrange for a Conference Call with him, the parties and me in person in the hearing room. He chose the latter. So on March 14, 2011, the hearing resumed in Toronto, with Complainant counsel (and his client) participating via teleconference.

[17] What transpired on this date was truly bizarre. Complainant counsel explained that he had been ill with "stomach flu" for a month and that is why he missed the deadlines and didn't contact the Tribunal or the other parties. He also indicated that, despite the 3 ½ months that had transpired from the date of the Conference Call when his client was given additional time yet again to re-file motion materials to the date of this hearing date of March 14, 2011, he still did not have an expert's report from Dr. Malamed. The reason?: counsel had written a letter to the psychiatrist, but just learned that it was never actually sent to Dr. Malamed. He also indicated that if I did not grant the adjournment and the right to continue with the motion, he would have to go off the record, and put his insurer on notice of a possible negligence claim. The other parties agreed to a short adjournment (as Ms. Cassidy was in Oshawa with her counsel, and not in the hearing room) for the Complainant to retain new counsel, but vehemently opposed the Complainant being allowed to continue with the motion. The other parties submitted that I had

given enough chances to the Complainant to file her materials, that 9 ½ months had transpired since the motion to re-open her case was first raised on May 31, 2010, and that Complainant counsel had returned to work and certainly, should have had his assistant contact the Tribunal and the other parties, if counsel was unable to do so himself. I agreed. I granted a one-month adjournment for Ms. Cassidy to get new counsel and to advise by then if she had done so. A hearing date would then be set. The motion would not proceed. I gave oral reasons.

[18] The month passed, and no word from Ms. Cassidy or her new counsel, contrary to my Order. I then directed the Registry Officer to send a letter to the parties (Ms. Cassidy now being self-represented) arranging for a Case Management Conference Call to set new hearing dates. The Tribunal subsequently received a response from the parties, including Mr. Kelly, who indicated that he was now back on the record. I held the Conference Call and set new hearing dates for October 2011 to finish the hearing.

[19] October came and the hearing proceeded relatively smoothly. We completed the evidence part. The parties asked that they be able to provide written final submissions, followed by brief oral argument via teleconference. I agreed. Filing deadlines and the Conference Call date for final submissions were set. I should add that Complainant counsel's conduct was fine during the hearing. My issue has been with his conduct before and after the October 2011 hearing.

[20] The November 1, 2011 filing deadline for final submissions passed with no submissions received by the Complainant, or any communication for that matter. Once again, I directed the Registry Officer to contact Complainant counsel to find out what had happened; no response. I directed the other parties to file their written submissions on time, which they did. On November 28, 2012, the Tribunal finally heard from Complainant counsel, in the form of a letter asking for an extension (well after the November 1 deadline) to file written submissions and to adjourn the December 6, 2011 oral argument Conference Call, as he was to be in the Ontario

Superior Court in Oshawa that day, notwithstanding the Tribunal date had been set first. The other parties vehemently opposed, indicating that this was the same type of behaviour from Complainant counsel as he had demonstrated in the past. They had suffered prejudice and wanted a conclusion to this hearing. I granted Complainant counsel's request to adjourn the Conference Call for oral argument with the condition that he contact Messrs. Machelak and Platt to find a replacement date for December and advise the Tribunal by December 9, 2011. I denied his request to file written submissions, but indicated that he would be allowed to make oral submissions. Not having heard from Complainant counsel as previously directed, the Tribunal wrote the parties on December 16, 2011 that if it does not hear back from Complainant counsel by December 19, "it will deem the hearing concluded and begin writing its Reasons for Decision." I also instructed the Registry Officer to telephone Complainant counsel and if he was not available, to leave a voice-mail message indicating the contents of the letter. She spoke with his receptionist who confirmed the email address to which the Tribunal sent this and previous correspondence. She said that Complainant counsel would be in the office on December 19, 2011 and thus would be able to reply to the Tribunal's letter. On December 21, 2011, the Tribunal received a faxed letter dated the previous day from Complainant counsel indicating *inter alia* that he was "in discoveries all day today" but would respond tomorrow. He claimed that he never received the December 5, 2011 letter from the Tribunal. He subsequently wrote on December 23, 2011 that he would undertake to speak with the other representatives in January 2012 with a view to arriving at a January date for the final argument conference call. I then had the Tribunal send out a letter seeking the other parties' position. The other parties opposed the request. As Mr. Machelak had aptly stated, "Mr. Kelly chose to ignore that letter [of the Tribunal] as he has ignored other time lines set by the Tribunal." On January 19, 2012, a letter was sent to the parties indicating that I had denied the Complainant's request to re-open the hearing. The hearing remained closed.

[21] I wish to state that I am very mindful of the difficulty and seriousness of concluding a hearing without receiving submissions from *all* parties. Indeed, in the over 14 years that I have

adjudicated human rights cases at the federal and Ontario tribunals, and as an arbitrator/mediator in private practice, this is the first time such an occurrence has taken place. However the key here, I believe, is not so much *receiving* final submissions from all parties, but having given a *reasonable opportunity* to all parties to make final submissions. And I believe that I have been more than fair to the Complainant to present her best case, and to the Respondents to mount their best defence. But at some point, enough is enough, after which, prejudice befalls a respondent and the Tribunal process itself. It *almost* becomes an abuse of the Tribunal's process and its ability to control its own process. The case law is replete with examples of courts dismissing cases (which is not the case here) for failing to follow their rules of procedure.

[22] Furthermore, the case before me is one of sexual harassment. In our rights-based society, there is an inherent stigma attached to those accused of sexual harassment. Often the public does not even differentiate between allegations of sexual harassment and criminal sexual assault. In *Blencoe v. British Columbia (Human Rights Commission)*, 1998 CanLII 13300, rev'ed 2000 SCC 44, the B.C. Court of Appeal wrote at para. 57: "Despite the often heard characterization of human rights adjudication as a mediative and conciliatory process aimed at remedying discrimination and making the victim whole as opposed to punishing the perpetrator, the fact remains that unproven charges of sexual harassment and sexual discrimination are, in our society, charges accompanied by high stigma. Such charges have the power to destroy lives." Not only is this of significance to Mr. Thambirajah, but there are employees (and former employees) at Canada Post whose reputations are left twisting in the wind regarding allegations involving their action (or inaction) in the handling of Ms. Cassidy's Complaint against the Corporation.

[23] I also should add that the continuation of the motion to re-open the Complainant's case because of PTSD is really a moot point, given my finding later in these Reasons that A.B. was not at Willowdale Station "D" ("Willowdale D") after the touching/comment incident occurred at noon on November 9, 2005; therefore, she could not have attended the alleged meeting

between her, Ms. Cassidy, and Messrs. Tidman and Sultan. Thus, the moving party would not have satisfied the third branch of the legal test in *Vermette*, *supra*. The three branches are:

> (1) It must be shown the evidence could not have been obtained with reasonable [due] diligence for use at the trial;
>
> (2) The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and
>
> (3) The evidence must be such as presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

[24] Notwithstanding I did not receive final submissions from the Complainant, the *viva voce* and documentary evidence at the hearing, along with the Statements of Particulars and the actual Complaint forms, were sufficient for me to make findings of fact and law and determine issues of liability and remedy. One final note: *mea culpa* – I have taken ten months from the closing of the proceeding on January 19, 2012 to complete and issue my Reasons for Decision. I thank the parties for their patience.

IV. Credibility

[25] I refer to the often quoted case of *Faryna v. Chorney*, [1952] 2 D.L.R. 354 (B.C.C.A.) on the issue of credibility:

> …
>
> Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors combine to produce what is called credibility.
>
> …

> The test must reasonably subject his [witness'] story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[26] I have attempted to follow the above approach. As an adjudicator, I am mindful that the hearing room is an artificial environment where witnesses react in individual and different ways to the stresses of giving testimony, etc. Accordingly, their demeanour is used as only one *indicium* of credibility. More important is the content of their testimony and what they did, said and wrote (as documentary evidence is important too) regarding past events that form the basis of the subject matter of the Complaint before me, and how their evidence fares in the context of the totality of the evidence presented. I also wish to add that finding a witness credible or not does not mean necessarily that everything the witness says or writes is accepted or rejected. A witness may be testifying honestly, but still be mistaken in fact. I have tried to make sense of all the evidence and make findings of fact about what actually occurred.

[27] I will make findings of credibility when dealing with various allegations in these Reasons. However, I wish to state that I had serious concerns about the credibility/reliability of the evidence of the two key witnesses in this case: Ms. Cassidy and Mr. Thambirajah. Ms. Cassidy was evasive at times, and required questions to be repeated often. Witness Cam Tidman said she is not the "best communicator". I have taken this into account. I also find that there were key areas where she had conflicting evidence and omissions in her evidence. What she said at the hearing did not match what she had told Canada Post or the Commission, verbally and in her documents. Examples will be given in these Reasons. In some matters, I have no choice but to conclude that she fabricated, embellished or exaggerated things. My concern is such that I am hesitant to accept her evidence on key, controversial issues without cogent, corroborative evidence.

[28] With regards to Mr. Thambirajah, I also have concerns about his credibility/reliability. On some issues, he contradicted himself even within his own testimony. One example relates to the retaliation allegation in the parking lot during the hearing. Another is what actually happened on November 9, 2005. While English is not his first language, I am satisfied that he is sufficiently proficient in the English language to have participated in the hearing, including the giving of evidence. It is true that he is heavily accented and counsel, witnesses and I had difficulties understanding him. However, being heavily accented should not be confused with a lack of comprehension or proficiency in a language. Mr. Thambirajah has been in Canada for over 30 years, worked at Canada Post for 22 years and has been a shop steward with the Canadian Union of Postal Workers ("CUPW") at Canada Post since 1998. In that capacity, he is interpreting complex legal documents like the Collective Agreement and a multitude of corporate and union policies and rules. He communicates in English and writes his journals and work documents in English too.

[29] Another witness whose testimony caused me concern was John Pyziak. While some of his evidence was credible and reliable, in other areas that was not the case. For example, he provided four varying accounts of what took place on November 9, 2005, as found in: his statement to Canada Post's human rights investigator Kelly Edmunds; his statement to the Commission's investigator; his statements in a recorded meeting with Mr. Thambirajah; and his testimony at the hearing.

[30] In contrast to the above, I find that Canada Post's witnesses were credible and their evidence fairly reliable or accurate. In particular, Ms. Edmunds and retired Superintendent Cam Tidman testified at great lengths and were key actors in the events herein. They were credible witnesses.

V. Findings of Fact

[31] Ms. Cassidy was a Relief Letter Carrier with Canada Post in 2005, stationed at Willowdale D. She remains with Canada Post to this day. She would fill in for regular letter carriers on their routes as the need arose. She did not "own" her route; she could be moved around on different routes and in different depots. Mr. Thambirajah was a Letter Carrier with Canada Post in 2005 at the same location as Ms. Cassidy. He was also the Union shop steward there.

A. November 9, 2005: Touching/Comment Incident

[32] This is the genesis of Ms. Cassidy's Complaints. On or about November 9, 2005, she was at the Station talking with co-worker John Pyziak. Ms. Cassidy does not remember the exact date and did not record it anywhere. However she testified that she was "sure it was in early November" of 2005. From documentary evidence too, including calendars, I find that it most likely took place on November 9, 2005. The Complainant said, "It was around noon…in the afternoon after the [mail] walk…Raj [Thambirajah] stayed around the Station after his work often." The timing is relevant as will be discussed later with the evidence of witness A.B. who testified that it was early in the morning before the carriers went out on their route. I find that it was indeed around noon when the incident occurred.

[33] Ms. Cassidy indicated that the first description of the November 9, 2005 incident (including the actual date) was in one of her journals/diaries. I reviewed the six of them that were produced. They were hundreds of pages in total. I saw no description of the event or date. She testified that it was in the journal that she gave to Detective Cecile. She stated that he did not return the journal. Detective Cecile testified that he reviewed the journals for relevancy regarding her request that Mr. Thambirajah be charged with sexual assault for that day's event. The detective testified that he did not remember any reference to an exact date or description of the events in the journal. Had he seen such a reference, he would have been obliged to refer to it in his report and provided it to the Crown to give to the defence and would have indicated the

specific date in the police report. He said he checked with the "property/evidence" room; the journal was not there either. I accept his evidence.

[34] The first written account of the November 9, 2005 incident entered into evidence may be found in her April 25, 2006 written complaint to Canada Post. In it, she wrote that Mr. Thambirajah approached her and Mr. Pyziak:

> During this time my co-worker asked him why he was staring at my chest. Then, when my co-worker looked down and noticed a button was undone on my shirt my co-worker informed me of this. As I turned to fasten my shirt up Raj said- "I wasn't staring at her chest, she has no tits to stare at." While he was saying this, he pulled down my shirt as to look down into my shirt. I was so mad, embarrassed and in shock of what just took place.

[35] In her Complaint to the Commission she wrote: "In November of 2005, while I was working at Willowdale D a co-worker (Raj Thambirajah), pulled my shirt open in front of another co-worker."

[36] As described by Ms. Cassidy at the hearing, she was talking with Mr. Pyziak, with whom she was on friendly terms. She was joking around with him. At one point, Mr. Thambirajah came in and according to the Complainant:

> Raj was staring at me. Johnny asked him what he was staring at…He [Mr. Thambirajah] said she has no breasts to stare at. He [John Pyziak] said my buttons are undone. As I turned, he [Raj] took his fingers and pulled my shirt down…and looked into my shirt…One button popped open. I was embarrassed and humiliated…My breasts were exposed. I told him never to touch me again, called him an ass. He pulled my shirt open, at that point, I just wanted to run. I was humiliated. Raj said, "She's got no boobs to look at." I said it doesn't matter, he shouldn't have touched me.

[37] In cross-examination she was asked if she had said something to the effect of "I have small boobs, I was always bugged in high school about that." She said she could not remember.

But she reiterated that Mr. Thambirajah pulled her shirt open with his fingers and looked down her shirt. Regarding her breasts having been exposed, she said she was wearing a "half-cup bra". On the stand, she also physically demonstrated what had happened using a Canada Post shirt as a prop. She clearly showed the button being ripped open as Mr. Thambirajah "ripped" open her shirt.

[38] In the police report of October 14, 2006 for the sexual assault charge (R1-33), it states:

> [After Mr. Thambirajah joined the conversation with the Complainant and Mr. Pyziak] During this time [redacted by police] notice that [redacted] was staring at Cassidy's chest, [redacted] then looked at Cassidy and saw that a button on her shirt was undone, Cassidy quickly turned around to button up her shirt and that's when [redacted] said, "I wasn't staring at her chest, she has no tits to stare at". While Thambirajah was saying this [redacted] reached in front of Cassidy grabbed the top of her shirt with [redacted] hand and pulled it downward and in doing so a third button came undone. Cassidy was so embarrassed and shocked she turned to walk away and called [redacted] an ass hole and also stated "This is just another reason why nobody likes you in this station."

Mr. Thambirajah's Evidence on this Point

[39] Mr. Thambirajah's evidence on what, if anything, happened on that day changed by the end of the hearing. When questioned by Kelly Edmunds in her investigation in June 2006, he denied anything had happened. His Statement of Particulars filed at the hearing indicates: "The Respondent acknowledges inappropriate touching took place in November 2005 but denies any sexual assault on the Complainant's body and recalls the incident only as joking between co-workers." In explaining his client's theory at the hearing, Mr. Platt remarked: "The workplace conflict in April 2006 triggered the Complaint [about the November 9, 2005 incident]. The November 9, 2005 incident occurred, but not in the way described by Ms. Cassidy. It was consensual; flirtation." In his final submissions, Mr. Platt wrote at para. 6 of his Summary: "Neither the Complainant nor any of the witnesses, including Mr. Pyziak, reported a sexual

assault to Canada Post in November of 2005 because there wasn't one unless the brushing of Ms. Cassidy's blouse by the Respondent is considered to be a sexual assault."

[40] In chief, Mr. Thambirajah testified that, "In November 2005 nothing happened." When asked if it was possible he made the comment on November 9 about her breasts, he answered, "No, I never do [*sic*] that. Maybe the swipe with the hand." Later, in chief, he was asked that, assuming the account of November 9, 2005 was accurate and he did in fact inappropriately touch and commented on the size of Ms. Cassidy's breasts, if he regretted it. He replied in the affirmative. "Would you apologize? asked Mr. Platt. Mr. Thambirajah replied, "I apologize if anyone thinks it was my intention to touch you for sexual purpose, a thousand times."

[41] In his testimony under questioning by Mr. Machelak, Mr. Thambirajah averred:

> Touching may have occurred, but not in a sexual way. For some reason, Johnny, who was a good friend made a sweet deal with management…to get me out of the station…["swipe"] happened before or after November 8 or 9. My hand did not make any contact with her shirt, maybe a swipe toward Johnny.

When counsel asked why he said in-chief that something may have happened and he apologized, the Personal Respondent answered, "…may be possible I swiped Johnny Pyziak, may be possible I touched her hand. Johnny was holding her in an embrace. Possible I touched her on the arm."

[42] In cross-examination, Mr. Thambirajah agreed that the touching/comment, allegedly occurring on November 9, 2005, is inappropriate conduct if it occurred. However, he maintained that, "It didn't happen." What exactly he meant by "it" is not clear: i.e., if the touching and comment never happened; or the touching for a sexual purpose didn't happen; or the comment (about her breast size, etc.) did not take place. When Mr. Kelly suggested he is not really apologizing because he is saying he didn't do anything wrong, Mr. Thambirajah agreed. "Why apologize then?" asked counsel. The Personal Respondent replied, "It's possible it may have

happened before April 10 [2006]. We were joking around, laughing…each other swearing." Pushed by counsel that it's possible the touching and comment on November 9 occurred, Mr. Thambirajah reacted, "No. I was asked to apologize [by Mr. Platt]. Better to apologize if I had done it. Never sorry because I never accept what I didn't do. No one lives in a perfect world…Again, if it happened. I will apologize. English is not my first language. If I touched her body, but not her breast, I would apologize." Later, he remarked: "I would be sorry if I intentionally touched her." He also stated that he was the "victim" in this matter and the "whole story will come out."

[43] Mr. Thambirajah then said it's possible, as Mr. Pyziak had claimed, that Mr. Thambirajah had "swiped" her chest with his hand: "He may be correct by his recollection." He then states that he could "guarantee" and is "100 percent sure" that it didn't occur on November 8 or 9, 2005 as it was not recorded in his journal [or hers for that matter]. His journal had an interaction between him, Ms. Cassidy and the late Ann Jones, a co-worker, on November 8, but no noted interaction with Ms. Cassidy on November 9.

John Pyziak's Evidence on this Point

[44] Mr. Pyziak was the only third party who saw what happened that day. Mr. Thambirajah said that he was "best friends" with Mr. Pyziak and that the latter had been his campaign manager in the shop steward election. Mr. Pyziak said that he was friends with the Respondent until the latter "changed" after he became shop steward. He still remained on friendly terms with Mr. Thambirajah thereafter. Mr. Pyziak was also friendly with the Complainant.

[45] Mr. Pyziak testified that on the day in question:

> Raj wanted to go for cigarettes with me…He didn't mean to, but he put his hand on her shirt…I was just shocked. I don't know where Raj's mind was then. Doris reacted, "My family was flat-chested, in a funny way, but she was red-faced,

> shocked, she was embarrassed. She didn't slap him or anything…She was nervous about it. She nervously laughed.

Mr. Pyziak stated that after the incident, he went to the back dock with Mr. Thambirajah and the Respondent said, "Ah, it's nothing. He just shoved it off."

[46] Mr. Pyziak testified under cross-examination that he told Canada Post in an interview: "I was shocked what he did. He reached out and jokingly said she had nothing there…He sort of just did a swipe. His hand made contact with her shirt." At another moment in cross-examination, he averred: "He took a swipe at her, said she's got nothing there, his hand went down on her chest. He did not grab her. He touched her top." When put to him that he didn't know if it might have been accidental, and Ms. Cassidy didn't slap the Respondent, indeed she made a joke, why did you consider it "totally inappropriate," he answered, "What Raj did – glancing touch and "nothing there" comment, was inappropriate. I was shocked what he did." He also admits that he did not stay with her after the incident: "I would have gone to her if she was upset."

[47] In Ms. Edmunds' notes of the interview with Mr. Pyziak dated July 12, 2006, she records him as saying:

> He [Mr. Thambirajah] was staring at Doris (in the chest area). She realized her button was undone so when she did it up Raj reached over towards her and with his index finger he touched her blouse, pulled it forward and looked down her top. Doris didn't know what to do or say so I believe as a nervous reaction she started saying, Oh I have small boobs. I was always bugged about it in high school…" or something similar to that. After that, he walked away. I looked at Doris and said can you believe that he just did that to you. Shortly after this on the dock I saw Raj and I said to him "I can't believe you did that". I think Raj realized what he had done and just tried to fluff it off by saying "Oh this was nothing" and he just made light of it.

[48] Mr. Pyziak's written statement to the Commission dated September 19, 2007 was provided by Ms. Cassidy as part of her letter to the Commission after her Complaint was filed. In it, Mr. Pyziak writes:

> I notice him staring down her shirt so I asked him what he was looking at. He reply [*sic*] "nothing, she as [*sic*] no breast to look at", I couldn't believe what he had done. As I turn around I noticed that Doris's top button was undone and informed her. Embarrassed she quickly turned to button it up but didn't have time before Raj reached out and ripped another button undone exposing her…

In the Interview Notes of the Commission investigator dated September 12, 2008, it states that Mr. Pyziak indicated: "…I was talking to her and Raj put his finger in her shirt an [*sic*] pulled it back and said "nothing there" Doris turned all red and she was embarrassed…"

[49] In cross-examination, Mr. Pyziak acknowledged that his September 19, 2007 written statement sent by Ms. Cassidy to the Commission was different in its recollection of the events of November 9, 2005 than his statement to Canada Post and to the Commission investigator. It was put to him that the statement to the Commission dated September 19, 2007 "embellished" the events. He replied, "I didn't type it. I don't recall who gave it to me," although he acknowledges that it's his signature on it. The part "…Raj had reached out and ripped another button undone exposing her [breasts]" is not what he indeed saw that day. He answered, "Exactly." Counsel then said, "But you signed it." "I could have," retorted Mr. Pyziak. "Doris wrote it and asked you to sign it and sent it to the Canadian Human Rights Commission," stated counsel. "I don't recall," was the witness' answer.

[50] Also entered into evidence were taped conversations of September 7-8, 2006 (unbeknownst to Mr. Pyziak) between the Personal Respondent and Mr. Pyziak. The quality of the tape is not good and there are parts that are inaudible. However, one can clearly hear Mr. Thambirajah quizzing Mr. Pyziak about what had happened on November 9, 2005. On the first part, Mr. Pyziak says that Mr. Thambirajah "didn't grab her. It didn't bother her. It's

bullshit…four months later she wants to charge you" [it was actually 5 ½ months between the November 9, 2005 incident and Ms. Cassidy's April 25, 2006 written complaint to Canada Post]. On the tape the following day [again, Mr. Pyziak does not realize their meeting is being recorded] he repeated: "You didn't grab her…Nothing is going to happen. Too long ago….She comes back later because she's mad about something [being disciplined along with Mr. Thambirajah for shouting/profane language in April 2006]. Mr. Thambirajah then states, "She does this for an advantage…undo my union work…I don't want to be the victim because of my union work." Mr. Pyziak later remarks, "It's fucking bullshit…Why didn't she complain to management? That's all you have to say." Later, Mr. Pyziak states, "Ann Jones, that fucking witch…you had problems with her. She [Ms. Jones] pushed that woman [Ms. Cassidy]." Mr. Thambirajah replied, "That's the way it is."

[51] In cross-examination about the taped conversation on September 8, 2006, Mr. Pyziak was asked what he meant by his constant comment "this is bullshit…" He replied, "He asked me thirty times, constant questioning by him about what happened…He doesn't give up: thirty-two times he asked, "How did I touch her?" When put to the witness that he said at least eight times it was "a joking" incident, yet he told Canada Post and the Commission a different story, he responded:

> I will give in to Raj…I was being harassed by him to do it his way…To get him off my back, agreeing with him, this is the kind of man he is…he threatened me one day, my job…it's part of the world he's from, the man rules…[turning to Mr. Thambirajah in the hearing room he stated] Why didn't you just apologize for what you did? Not in his personality...To get this guy off your back, you had to play in his world. That's the truth...I was surprised he showed up [in-person on September 8]. That's how you deal with this guy. You go with the flow.

However, as Mr. Machelak pointed out to the witness, he had invited Mr. Thambirajah to meet with him on September 8.

[52] When I asked him what he meant by "this is bullshit," the witness said it was not that Ms. Cassidy's complaint and allegation regarding November 9, 2005 were "bullshit," but that it referred to Mr. Thambirajah's harassment of Mr. Pyziak on the taped conversations: i.e., asking him what happened thirty times. Mr. Machelak questioned him on this point: "Are you saying he turned off the tape recorder and then you said '…stop harassing me' and he cut it out of the tape and only left in the part, 'it's bullshit…four months,' that he manipulated the tape?" Surprisingly Mr. Pyziak answered, "He is very capable of doing that. I was agreeing with whatever he wanted to hear. That's why I never get into problems with him. I always agree with him." Mr. Pyziak also testified that the Respondent probably turned off the tape in parts.

B. Canada Post's Investigation Report

[53] In her investigation report and findings dated September 1, 2006, Ms. Edmunds found that Ms. Cassidy's complaint had merit. She stated that the account of "witness A" (Mr. Pyziak) "substantiates" Ms. Cassidy's version of the November 9, 2005 incident. She wrote:

> This witness also substantiates that the Respondent did reach out, pull her blouse his index finger and look down her top. Although the Witness could [*sic*] [not] recall any words being utter [*sic*] by the Respondent such as "I wasn't staring at her chest, she has not tits to stare at", he does recall the Complainant looking dumbfounded and shocked in disbelief…

[54] Ms. Edmunds in her report also notes that Mr. Thambirajah denied the event ever occurred and that he was away from Willowdale D for part of the month of November 2005. Ms. Edmunds writes in her report that Canada Post attendance records for the month of November 2005 show that Mr. Thambirajah was at Willowdale D every day in full or in part, except November 2 and 21 only.

C. Findings About What Happened on November 9, 2005

[55] Based on the foregoing, I do not accept in their entirety the version of any of the three principal actors in this episode – Ms. Cassidy, Mr. Thambirajah and Mr. Pyziak. Ms. Cassidy's testimony does not match her prior statements and other documentary evidence. Mr. Pyziak's testimony lessens what occurred: a "swiping" of her shirt over the chest area vs. Mr. Thambirajah grabbing her shirt with his index finger, pulling it toward him and looking down her shirt. It is clear from the taped conversations that Mr. Pyziak was indeed telling Mr. Thambirajah what he wanted to hear: e.g., "it's bullshit Raj," meaning her complaint was being raised for the first time in April 2006. Mr. Pyziak was clearly being disingenuous. As well, what he told Ms. Edmunds is somewhat different from his testimony.

[56] What about Mr. Thambirajah's account of November 9, 2005? It goes from outright denial to quasi-admission of touching. I put aside Mr. Platt's submissions which vary greatly at the start of the hearing to his final submissions, and what is in the Statement of Particulars. Mr. Thambirajah in his testimony contradicted himself, in his direct examination and cross-examination and even within parts of his cross-examination. I am left with the view that, he goes from a complete denial of the event in his statement to Ms. Edmunds, to testifying that the touching or "swiping" of Ms. Cassidy's blouse over the chest area might have been accidental. However, according to him, if he did do that, he did not have the *intention* of touching her *in a sexual way*. And hence his "non-apology apology" as stated in his direct examination and cross-examination by Mr. Kelly. I conclude that Mr. Thambirajah made a *de facto* admission that some form of touching occurred as evidenced in his testimony. As well, Mr. Pyziak testified that in the recorded conversations in September 2006 the Personal Respondent asked him thirty-two times how he touched Ms. Cassidy. Regarding the "she has no tits to look at" comment, he flatly denied that. There was no quasi-admission, even a nuanced or qualified one, regarding it.

[57] Based on the foregoing, I am satisfied that on or about November 9, 2005, Mr. Thambirajah did touch Ms. Cassidy's shirt over her chest area with his hand, while making a comment about the size of her breasts. There was definite physical contact between his hand and

her shirt over the chest area. I need not decide if it was a “swipe” or “glancing touch”. It was not an accident. It was an intentional inappropriate touching of her shirt on the chest area along with an inappropriate sexual comment about the size of her breasts. I will deal with the legal implications of this further on in these Reasons.

Ms. Cassidy’s Reaction

[58] I am satisfied that Ms. Cassidy did make a joke about her family members having small chests, but also let Mr. Thambirajah know that his touching/comment were not welcomed or appreciated. I also accept that Mr. Pyziak made some comment at the time to Ms. Cassidy and afterward in the dock with Mr. Thambirajah that unequivocally conveyed to both of them that Mr. Pyziak was “shocked” at what had happened. Ms. Cassidy testified that she, on that same day, made a complaint against Mr. Thambirajah to her supervisors, Cam Tidman and Moe Sultan. I will deal with this issue later in this section.

D. November 10, 2005 – April 9, 2006: Interaction Between the Complainant and Respondent

[59] There was some interaction between Ms. Cassidy and Mr. Thambirajah during this period following the touching/comment incident. In her testimony, Ms. Cassidy stated that he was bothering or “harassing” her frequently: “pretty much every day at work he did something [from November 9, 2005 to 2006]. She claims that in December 2005 she nearly fell over a mail “tub” in the depot and Mr. Thambirajah said, “At least you have an ass.” Mr. Thambirajah denied this. There is no corroboration of this event. I am not prepared to find that it occurred.

[60] What was their relationship like before November 9, 2005? I find that the Complainant and Personal Respondent were on good, friendly, cordial terms. They were not in a constant state of conflict in the workplace. Neither disputes that, before November 9, 2005, this was the case. For example, I accept the entry as being accurate in Mr. Thambirajah’s journal for

November 8, 2005 (one day before the touching/comment incident): "…Doriss [*sic*] pass by Joke around with me…"

[61] Regarding post-November 9, 2005 through to April 10, 2006 (when the conflict escalated), what was the state of their workplace relationship? There was conflicting evidence about this. Notwithstanding the events of November 9, 2005 to which I have found Ms. Cassidy did not welcome, I find that Ms. Cassidy and Mr. Thambirajah were not in a constant state of conflict. As Canada Post points out, she did not take off a single day of work because of the November 9 incident and did not claim any such days in her "lost wage" claim against Canada Post during this time period (Exhibit C1-31). The first day claimed there is April 12, 2006. The detailed clinical notes of her family doctor, Dr. Ung, do not demonstrate conflict between her and Mr. Thambirajah during that time period.

[62] As well, I find that she sought Mr. Thambirajah's assistance several times during this period, despite her claims that she was afraid of him during this period. For example, Mr. Thambirajah testified that on November 15, 2005 – less than one week after the November 9 incident – Ms. Cassidy approached him to help her fill out a leave form (Exhibit RT1-10, p. 10). The handwriting on the form is his. She denied that she ever sought his assistance during this time period. However, in cross-examination she replied, "I don't know, it's not my writing." Later, she said, "Not a writing expert, could be possible. I definitely wouldn't have asked him because of the event that happened that month [November 9]." Further yet she stated, "I would not go to Raj to help me. Would have asked Jim Steward, Ann Jones or Cam…I did not ask him [Mr. Thambirajah]." I do not accept that Mr. Thambirajah would have filled out that form for no reason and without Ms. Cassidy's request for assistance. The form is signed by Ms. Cassidy.

[63] I also accept the evidence that Mr. Thambirajah assisted her on December 29, 2005. His journal entry for that date says, "Dorris [*sic*] claimed she has migraine headache so I arranged to cover her PM". This reinforces that Ms. Cassidy was not fearful of Mr. Thambirajah at this time

and was on cordial terms with him, notwithstanding what had occurred on November 9. She sought his assistance as shop steward. I should add that there was nothing improper about her seeking the assistance of her shop steward and co-worker.

[64] Entries in Mr. Thambirajah's 2006 journals for the days of January 3 and 10 show that he was assisting Ms. Cassidy. The January 10 entry involved Ms. Cassidy making an inappropriate comment about a disabled co-worker. Mr. Thambirajah had her apologize and he did not report the incident to management. The Complainant admits to this incident having occurred. If the relationship had been poisoned at this point, it would have been an opportune time for Mr. Thambirajah to have reported Ms. Cassidy to management. He did not.

[65] On January 19, 2006 to March 20, 2006, the Complainant was away from work due to a shoulder injury.

E. The Conflict Intensifies in April 2006

[66] Mr. Thambirajah's theory of his defence includes the proposition that the conflict between him and Ms. Cassidy began in April 2006. I have already found that the unwelcome, inappropriate touching/comment incident took place on November 9, 2005. I also find that for the most part, their relationship was a cordial one from that period until April 10, 2006. That is when the conflict intensified between them. What happened?

[67] On April 10, 2006 it is undisputed that the Complainant and Personal Respondent got into a swearing match over the delivery of flyers. Ms. Cassidy was covering for Mr. Thambirajah on his route. The Personal Respondent testified that Ms. Cassidy told him to "fuck off" when asked to deliver the flyers. She testified that he responded in kind. The following day they got into an argument at a union meeting wherein Ms. Cassidy demanded of another member that he bring Mr. Thambirajah outside or she was going to have him "charged".

On April 12, 2006, again they got into a verbal argument. Mr. Thambirajah swore at Ms. Cassidy and she booked off sick the rest of that day.

[68] On April 18, 2006, Ms. Cassidy alleges that Mr. Thambirajah "touched, slapped me on the backside" and said, "At least you have an ass." At another time, she said that he used the term "grabbed" [her buttocks]. She said this was the most upsetting of his wrongs against her after the November 9, 2005 incident. Mr. Thambirajah denies the accusation. In cross-examination she was asked why this serious incident of touching her buttocks was never documented in her April 25, 2006 written complaint to Canada Post (only the comment was), or indeed why she didn't have him criminally charged. She replied, "Sometimes you hit a brick wall, no use to pursuing it." However, as pointed out, she was assertive in pursuing her rights at other times and for less serious infractions. Indeed, she did not even mention the "slapping/grabbing" incident in her evidence-in-chief. She eventually said that with regard to her failure to put it in her April 25, 2006 complaint to Canada Post, "…If I didn't, it was a big oversight on my part." Later she testified that "more likely" the "back-slapping" took place in December 2005, not on April 18, 2006, "because that's when everything was happening." Counsel noted that she only worked with Mr. Thambirajah for two days in December of 2005 and may not have even seen him on those two days. I find that she was evasive in this part of her testimony and her answers lacked believability. A sexual touching incident like this she does not remember, but only the less invasive verbal comment. And yet she also remembers much less serious wrongs against her by Mr. Thambirajah (i.e., not involving touching) in her April 25, 2006 complaint. On a balance of probabilities, I am not willing to find that this event occurred as described by Ms. Cassidy.

[69] The next significant event took place on April 19, 2006. Ms. Cassidy and Mr. Thambirajah were overheard by co-workers yelling and swearing at each other in the hall at Willowdale D. It was so bad that Superintendent Cam Tidman got complaints from other workers. He intervened. Mr. Tidman called in both of them for interviews and proceeded to

discipline them. He issued a warning to them and placed it in their respective files. Ms. Cassidy testified that she was quite upset about this, saying it was not fair that she got disciplined for this, even though she admits to having sworn at the Personal Respondent in the hallway. She was upset because of what she claims he had been subjecting her to previously, specifically, the November 9, 2005 incident and "ongoing harassment".

[70] Mr. Tidman testified that Ms. Cassidy's response to him about the April "swearing" episodes was, "You expect me to deliver the walk and he's not co-operating." There was no mention of the November 9, 2005 incident or Canada Post not dealing with it "in-house" as promised. Mr. Tidman said he could not ignore and fail to act on the yelling/swearing incident of April 19, 2006. And this is no more serious than the November 9, 2005 touching and comment incident.

F. April 25, 2006 Written Complaint to Canada Post

[71] This is a significant date in this matter. On this date, Ms. Cassidy presented Mr. Tidman with a written complaint regarding the November 9, 2005 touching/comment incident and other allegations of ongoing harassment by Mr. Thambirajah. Ms. Cassidy said that she had waited 5 ½ months since November 9, 2005 for Canada Post to deal with this incident, but to no avail. She said when she complained about it on November 9 to Messrs. Tidman and Sultan, she was told that they would handle it and to keep it "in-house". Mr. Sultan did not testify. For Mr. Tidman's part, he was vehement in his testimony that April 25, 2006 was the first time he learned of the November 9, 2005 incident.

G. Did Canada Post Know About the November 9 Incident Before April 25, 2006?

[72] Ms. Cassidy was adamant in her testimony that she went *by herself* into the shared office of Messrs. Tidman and Sultan on November 9, 2005 and told them what had happened. I note

that there is no mention of this in her voluminous, detailed journals. I will deal later with her allegation on May 31, 2010 after she had closed her case at the hearing, that an employee from another depot, A.B., had taken her to Messrs. Tidman's and Sultan's office and attended that meeting with her.

[73] Mr. Tidman was examined in-chief and in cross quite extensively on this point. He did not relent from his position that April 25, 2006, not November 9, 2005, was when he first learned of the incident, and he was floored by it. He stated:

> She didn't come in [on November 9, 2005 or at anytime] and definitely no one said anything about a sexual assault or touching. Moe and I were in the same office…No, not at all [to the question of whether Moe Sultan had ever talked to him about this incident or whether Ms. Cassidy had ever come in to see him]. Moe and I had a good relationship. If there was a problem, I would have heard about it.

He did say Ms. Cassidy would come in to talk to him, but about her personal problems, like her daughter's chronic illness.

H. Mr. Tidman's Actions Upon Receiving the April 25 Complaint and the "Comedy of Errors"

[74] Mr. Tidman averred that April 25, 2006 was, "My first exposure to the incident and it shocked me. I never had to deal with this in my working life. I sent an email to Kelly [Edmunds] saying I have a human rights complaint, bigger than what we would normally deal with…so leave it to the experts."

[75] Mr. Tidman also stated that the problem between the Complainant and Personal Respondent "first became evident in April 2006 with the shouting match. I was not aware of the touching [on November 9, 2005] until the complaint in April. I would have been over the wall if someone said someone assaulted Doris physically." He said that his and Moe Sultan's strategy

of handling conflict was to have the employees try to work it out themselves. If they couldn't, Mr. Sultan or he would step in and impose a solution. However, he was quite adamant that that approach did not apply to serious matters, such as "fights, sexual harassment and sexual touching." This was in keeping with Canada Post's harassment policy. Such "serious matters" would "turn on the radar" for him. He said, "When I got her complaint in April, I read it three times, to get my brain unscrambled." He also denies that the late Ann Jones ever came to him about the November 2005 incident.

I. Stressors in Ms. Cassidy's Life

[76] Mr. Tidman was candid about a change in Ms. Cassidy's demeanour that he noticed from November 2005 to April 25, 2006: "She was less easy going, more stressed. I associated some of this to her daughter…Doris was different..." As will be discussed later, Ms. Cassidy during this time period and beyond, up to 2009, as demonstrated in her testimony, her journal notations and Dr. Ung's clinical notes, was experiencing great stress from a number of sources. She was also prescribed Prozac to deal with depression. This stress included family problems with her common law partner, her daughter's illness and other health issues, her workplace injuries and absences from work in 2006, her fear of being fired from Canada Post, sleeping problems, and chronic migraine headaches. And of course she became increasingly stressed from her allegations of ongoing harassment by Mr. Thambirajah, which will be discussed later, intensifying after April 2006 and continuing up to 2009. While I find that she was dealing with great stress in her life during this time – personal and work-related - I note that there is no notation in Dr. Ung's clinical notes from November 17, 2005-February 2, 2006 referring to stress at work. He acknowledged at the hearing that from the period of November 2005-May 5, 2006, she had not mentioned the issue of sexual harassment by Mr. Thambirajah to him, for if she did, he would have documented it, as he had with other issues, including stressors like her daughter's illness and other health issues.

J. The Alleged Meeting Between Ms. Cassidy and Her Supervisors (and A.B.)

[77] As indicated above, Ms. Cassidy has consistently maintained that on the day of the touching/comment incident on November 9, 2005, she went to the office of Superintendent Tidman and Supervisor Sultan to file a complaint. She says that she was told that they would handle it and to keep it "in-house". Mr. Tidman denies this. Mr. Sultan did not testify.

[78] It was only after her case closed in-chief that on May 31, 2010 - for the first time in the almost five years that had elapsed - that Ms. Cassidy indicated that there was another person in that meeting, A.B., an employee from another depot who happened to be at Willowdale D on November 9, 2005. Ms. Cassidy said that on the weekend after her case had closed, she was at her friend's house – George and Pattie Tomaszewski, both witnesses at the hearing - and A.B. had asked the Complainant why she hadn't called her as a witness at the hearing. Ms. Cassidy asked why? The witness replied because she was in a meeting with the Complainant and her supervisors complaining about Mr. Thambirajah's sexual harassment of her on November 9. Ms. Cassidy then sought to re-open her case and call A.B. to testify. Ms. Cassidy said that she never remembered anything about A.B. being there because she – Ms. Cassidy – was suffering from Post Traumatic Stress Disorder ("PTSD").

[79] Canada Post disputed the above, including whether A.B. was even at Willowdale D that day. I agreed as a preliminary step to the motion to hear from A.B. and Canada Post's witnesses on this issue to determine if she was even in the depot on the day in question.

A.B. and the November 9 Incident at Willowdale D

[80] In November of 2005, A.B., a close friend of Patti Tomaszewski who is a close friend of the Complainant, was a relief letter carrier at Thornhill station, known as West Beaver Creek.

She testified that on the day in question – she could not remember the exact date and never made a written note of the events – she was asked by a supervisor (she cannot remember which one) to pick up or drop off "mis-sorts" in the morning, between 7:30 and 9 a.m. at Willowdale D. When she arrived, she ran into the Complainant who appeared "upset" and "agitated" and was crying. She told her what had happened with Mr. Thambirajah. The witness then insisted that they go to Mr. Tidman's office and report the incident. A.B. said she sat in the meeting with them when the Complainant told Messrs. Tidman and Sultan what had happened.

[81] In cross-examination, counsel for Canada Post made the point that she never made notes of that day, including the alleged meeting. She replied "I didn't think it was important." He suggested that the other Canada Post witnesses indicated that it would not make sense from a financial perspective to have sent her to Willowdale D and back when the practice was to send a taxi one-way to collect or drop off mis-sorts or to have it sent downtown to be redistributed for the next day. She replied, "I did what I was asked. Did what I was told. I was a relief letter carrier. If a supervisor tells you, even pulls you off a route, you did it, 'do you what you are told, grieve later.'" "But you didn't claim overtime here…and in a claim for overtime form you would state the reason why," retorted Mr. Machelak. "Yes, you must have a detailed reason why you are claiming it [overtime]…I always put it down in very detailed form," said the witness. However that was not the case here. Counsel then put it to her that the records filed at the hearing showed that she covered route 51 that week, a foot walk and didn't mention going to Willowdale D to pick up or drop off mail mis-sorts. A.B. said that it took almost twenty minutes by van to reach Willowdale D at around 8 a.m.

[82] Counsel came back to the point: "It makes no sense to pay a carrier overtime to do that when the normal practice was to send a taxi, only a 1-way trip. And you don't recall putting in for overtime and this would not be considered eligible for 'emergency over time'." A.B. retorted, "Then I have been robbed of a lot of overtime." Counsel then remarked that the witness had claimed for overtime for November 8 and 9, writing "volume" and "union meeting".

Counsel said union meetings are usually in the mornings. She responded, "Not always." But the point was that A.B. did not mark down on the form the trip to Willowdale D. I asked the witness, "Why didn't you put 'pick up mis-sorts' or something to that effect on the overtime form?" A.B. replied, "I can't begin to tell you. Sometimes I changed locks but didn't put it down. If today, I would put specifics and 'mis-sorts'."

[83] On the question of the timing of the incident on November 9, 2005, counsel put it to A.B. that the Complainant testified that the incident with Mr. Thambirajah occurred at noon. A.B. answered, "That surprises me. I remember being there in the morning." Counsel stated, "Willowdale D is a very small station. At 8 a.m. wouldn't she be surrounded by co-workers. But none of them comes to her and say 'Doris why are you crying?' You say it takes a stranger to come to her and ask her why?" "I didn't see any co-workers around her," replied A.B.

[84] Mr. Machelak then asked: "You wrote that you stayed with Ms. Cassidy for another 15 minutes, 40 minutes there and back, a smoke break 10 minutes, 10 minutes in the office with Mr. Tidman, etc., and another 15 with her after that. When you came back, no one questioned you about the time away, longer than expected?" She agreed.

[85] Canada Post called Christopher Moore to give evidence. He is a supervisor currently at Willowdale depot 2 (not to be confused with Willowdale D) and was the "LC supervisor" at Thornhill station, in November of 2005. This was the station where A.B. was posted at that time. He described what mis-sorts are and the process for dealing with them. Simply put, "mis-sorts" are items of mail that arrive at the wrong Canada Post facility. They are brought to a supervisor's attention in the morning. The policy/practice is for the depot to call a taxi company, fill out a taxi chit, give it to the "cabbie" with the mail and s/he would deliver it to the right depot. "That was the quickest way to get it to the other station. You're trying to get it out so it's not miscommitted for that day. From 8:30-9:30 the letter carriers go out. Get the mis-sorts there before 8 a.m." He said they were cognizant of the cost implications too.

[86] When A.B.'s assertion was put to him, Mr. Moore responded:

> If Willowdale D supervisor called me, I would say 'put it in a cab.' I wouldn't send an employee or put an employee in a cab. I would have to pay a 2-way trip and wouldn't take a letter carrier off their route and [A.B.] was scheduled to work route 51… Would never have done that, taken the LC off the route. The LC would expect over time.

[87] Mr. Machelak told Mr. Moore that the alleged incident took place at noon on November 9, 2005 at Willowdale D: "If there were mis-sorts at Willowdale D, would anyone pick them up at noon to bring them back to the other station?" The witness, looking surprised, responded: "No, they would already be miscommitted for that day and would just sit there to the next day…Just send it back downtown and send it out on truck the next day between midnight and 8 a.m."

[88] In cross-examination, the witness was asked, "Are you saying that no employees were ever asked to go out to get mis-sorts?" He responded, "I don't know any who did. I certainly didn't send any out. Carriers were sent to other stations if they need someone else to do a route, 'up or down staffing' that morning, but not to deliver mis-sorts."

[89] Canada Post also called Gwen Kenyon to testify. She is the Superintendent for Thornhill and before that was the Superintendent for training for the division and prior to that, the Superintendent of sortation plants. She worked at Canada Post for 34 years. She searched Canada Post's computer database for any overtime claimed by A.B. from November 7-9, 2005. The database shows that she claimed for overtime, but not for attending at Willowdale D. The entries show she worked at Thornhill station during those three days, regular or overtime. The witness was asked: if A.B. had gone to Willowdale D to pick up mail causing her to incur overtime, would that be listed along with the reason? Ms. Kenyon replied in the affirmative. In cross-examination, the witness was asked if it's possible that the supervisor would ask the letter carrier "as a favour" to drop this off to another depot? The witness answered, "For free? Don't

know any of those employees. They wouldn't get paid for it…And in 2005, claiming for overtime was more aggressive than now…makes no sense, time and dollar wise, never heard of it…"

[90] Ms. Kenyon also corroborated Mr. Moore's testimony regarding the system for dealing with "mis-sorts."

[91] I find that A.B. did not attend at Willowdale D on November 9, 2005, the day of the incident for the following reasons:

(1) As the Complainant herself testified, the incident took place at around noon. A.B. testified that she arrived there in the morning around 9 a.m.;

(2) I accept the evidence of Canada Post's witnesses that a supervisor would not have sent a carrier to pick up or deliver "mis-sorts". S/he would have used a one-way taxi fare; and

(3) Had A.B. attended on that day, she would have claimed overtime for her attendance at Willowdale D, as she did for other tasks that day.

K. When Did Canada Post First Learn of the November 9 Incident?

[92] On the important question of when Canada Post first became aware of the November 9, 2005 touching/comment incident, I find that Canada Post first learned of it on April 25, 2006 when Ms. Cassidy gave her written complaint to Mr. Tidman. I find Mr. Tidman to be a credible witness and his evidence reliable. He was candid about the less than perfect response to Ms. Cassidy's complaint post-April 25. He is retired and no longer employed by Canada Post.

[93] As well, I accept the evidence that both Mr. Sultan and Ms. Edmunds had asked Ms. Cassidy on different occasions – the former on May 16, 2006 and the latter when she spoke to Ms. Cassidy on May 14, 2006 – why she had not reported it earlier. In neither conversation

did the Complainant correct them and say that she had in fact reported it to Messrs. Tidman and Sultan on the day of the incident. Ms. Edmunds testified, and consistent with her September 1, 2006 investigation report, that when she asked the Complainant why she had waited over five months to report it to Canada Post, "Ms. Cassidy stated that she didn't want to pursue the matter further because she was shocked and dumbfounded that Mr. Thambirajah would even have had the nerve to have done what he did and secondly he was the steward in the facility and he could cause a lot of difficulties for her…"

[94] Mr. Tidman had acted on less serious matters, including calling Ms. Edmunds on April 12 or 13, 2006 regarding the swearing/language incidents. Ms. Edmunds testified about her dealing with him for ten years, including his practice of calling her on certain human rights matters less significant than the November 9 touching/comment incident. Mr. Tidman and other managers were trained to call the Human Rights Officer at Canada Post if a *CHRA*-type matter arose. As well, I do not believe that Messrs. Tidman and Sultan would have had Ms. Cassidy "cover" for Mr. Thambirajah's route in April 2006 if they had been aware of the November 9 incident.

L. What Happened After April 25, 2006: The "Comedy of Errors" and Miscommunication

[95] Mr. Tidman, who has since retired from Canada Post, was candid about its handling of Ms. Cassidy's April 25, 2006 complaint. He was asked how long it took management to respond to the complaint after he sent the email to Ms. Edmunds on that same day. He remarked, "The emails tell the story. I was disappointed by the slow response with people I was dealing with. Kelly wasn't in the office for awhile. I wished things had worked out differently…My hands were tied…The wheel didn't turn…"

[96] I accept Mr. Tidman's evidence that he immediately mailed Ms. Cassidy's April 25 complaint to Ms. Edmunds. To my surprise, he stated that Willowdale D did not have a fax

machine or scanner back in November 2005. He also sent an email to Ms. Edmunds "saying I have a human rights complaint and need direction." After he hadn't heard anything for 4-5 days, Mr. Tidman sent a follow-up email to Ms. Edmunds" and copied to acting zone manager Joanne Coe. On May 12, he sent a further email to Ms. Edmunds to "expedite" the complaint as Ms. Cassidy was complaining of stress with Mr. Thambirajah.

[97] Why hadn't Ms. Edmunds responded? She testified that she had been away from the office from April 28 to May 16, 2006 on business. The complaint that Mr. Tidman had mailed apparently arrived on approximately April 28. Ms. Edmunds had no assistant, so the envelope was left in her office unopened, until she returned on May 16. Coinciding with this were the swearing/verbal altercations between the Complainant and Personal Respondent between April 10-19, 2006. Ms. Edmunds had spoken with Mr. Tidman about these at the time. The "Comedy of Errors" – to use Ms. Edmunds' phrase during her testimony – was that when Mr. Tidman had left voice mail and email messages for her, she had (incorrectly) assumed they were about the April swearing incidents, and not about the touching incident that had happened some six months earlier. And so when Mr. Tidman on May 3 had emailed her: "Doris Cassidy is asking where things stand now. Any feed-back?" her response on May 9 was, "Cam, I have no updates right now. In fact, I have been out of the office tied up with opther [*sic*] cases. I will call you tomorrow to discuss further." And again on May 12, Mr. Tidman emailed Ms. Edmunds: "I have Doris in my office as I write this. She is telling me that the stress surrounding her concerning this issue and her daily contact with "Raj" is affecting her at and after work. Can anything be done to expedite this complaint?" At this point, Ms. Edmunds testified that she was still unaware of the April 25 complaint regarding the November 9, 2005 incident and thought Mr. Tidman was referring to the April 2006 swearing/verbal altercations between them. I accept her evidence on this point. Further in my Reasons, I write about the legal implications of this "comedy of errors".

[98] It was not until the following weekend that Ms. Edmunds became aware of what Mr. Tidman's emails were all about. On Sunday, May 14, she got a call at home from a frantic Ms. Cassidy. It was during this conversation that Ms. Edmunds got an "aha" moment, realizing this was not about the April swearing incidents. After questioning her, Ms. Edmunds became aware of the November 9, 2005 allegations for the first time.

[99] Ms. Edmunds began her investigation in June 2006, conducting interviews with witnesses to the November 9 incident in June and July. Her investigation report with findings and recommendations is dated September 1, 2006. She found in Ms. Cassidy's favour regarding both groups of allegations against Mr. Thambirajah: first, the November 9 "inappropriate touching" incident; and second, "allegations regarding inappropriate behavior and language," including profanity and "interfering with her movement in and around the workplace." She made some recommendations of discipline.

Missing the 10-Day Period

[100] Ms. Edmunds testified that she could not impose discipline on employees. She made recommendations and it was up to the appropriate managers to impose any discipline. Importantly, Article 10 ("Discipline, Suspension and Discharge") of the Collective Agreement imposes a requirement that management must give 10 days' notice after the "alleged infraction" in question or of its "coming to the attention" of the employer to impose discipline. The 10-day period for the April 25, 2006 triggering notice was approximately May 5, 2006 according to Ms. Edmunds. I also heard evidence that management could "freeze the clock" if certain steps were taken. They were not done in this case. So, because of the "comedy of errors," the 10-day period was missed. What was the impact? First, Ms. Edmunds testified that she would have recommended that Mr. Thambirajah be suspended without pay for five days. The other recommendations – training, letter on file for one year, etc. – were also not binding on Mr. Thambirajah. However, he did agree to take a human rights training course (two years

later). He was on "company time" and paid while taking this course. The letter stayed in his file for one year only, under the terms of the Collective Agreement.

[101] From May 15-October 16, 2006, Ms. Cassidy was off work from an injury, unrelated to her interactions with Mr. Thambirajah. Mr. Thambirajah's last day at Willowdale D was on May 18, 2006. He was transferred to another station as part of an accommodative measure, unrelated to his interactions with Ms. Cassidy. From that period on, they never worked at the same station again. I also accept the evidence that from April 25-May 23, 2006, the Complainant and Personal Respondent did not interact even once.

M. Other Actions Taken by Canada Post After April 25, 2006

Bidding/Transferring Out of Willowdale D

[102] Ms. Cassidy alleges that she repeatedly asked Candace Carpenter, staffing officer for seven stations, and had asked Joanne Coe, acting zone manager at the time, to transfer her out of Willowdale D because of the harassment by the Personal Respondent.

[103] Ms. Carpenter testified the Complainant called her on numerous occasions and had met with her. She indeed asked to be transferred, but not because of her conflict with Mr. Thambirajah. That was never raised. The witness said the reason was she wanted to be closer to home and her ill daughter: "It was never about Raj, [it was] about her kids…It's such an easy thing to do to bid, such an easy thing [for her] to get closer to home." Ms. Carpenter averred that she told the Complainant to put in a transfer form and with her seniority, she would be successful. She even offered to fax the bid/transfer form to her and to help her complete it. The witness said it's a simple 1-page form. To her surprise and bewilderment, it became a bit of *déjà vu*. Each and every time the Complainant would come back, raising the same issue, and Ms. Carpenter would explain that she had to put in a transfer form. And each time, the

Complainant went away, but didn't complete and hand in a form. Ms. Carpenter did not know why. I heard evidence that it may have been because she didn't want to get a "bad route."

[104] Eventually, Ms. Cassidy was "placed" in a position to accommodate her regarding her ongoing problems with Mr. Thambirajah. She did not have to fill out a bid form for this. As will be discussed later, Ms. Edmunds was responsible for this transfer.

[105] I heard evidence that an employee could "bid" into another location within the local or "transfer" to another location in a different local. There is a "bid" form, distinct from a "transfer" form. The "bid" sheets entered into evidence clearly show that Ms. Cassidy would have been successful in her bid application if she had applied in the months after the November 9, 2005 incident. Article 56.07 of the Collective Agreement also provided: "Upon written request by the complainant and following consultation and agreement, the Corporation may grant the complainant the right to be assigned to another assignment or position on a temporary basis." Ms. Cassidy neither requested nor was asked by Canada Post if she wanted a "temporary" transfer.

[106] On May 17, 2006, she went in-person to meet with Ms. Carpenter and also dropped by the office of Ms. Coe. At this time, the Complainant was off work for an Injured on Duty claim until October 16, 2006 and Mr. Thambirajah was about to be transferred to a different station and city as a disability accommodation measure. I note that in Ms. Cassidy's journal, she writes that she went to see Ms. Coe on that day not because of her conflict with the Personal Respondent, but rather, because she was concerned Mr. Sultan was going to dispute her I.O.D. claim.

[107] Ms. Coe testified that her understanding was that the Complainant was "frustrated she didn't have a route, but Candace [Carpenter] said she wasn't bidding to get a route." She corroborates Ms. Carpenter's testimony that Ms. Cassidy never mentioned she wanted to bid out of Willowdale D because of Mr. Thambirajah. Furthermore, Ms. Coe testified that on May 17,

"After her meeting with Candace about the bidding process, she [Ms. Cassidy] told me about her daughter's illness. She was quite upset."

[108] Ms. Coe was asked when Canada Post was made aware on April 25, 2006 about the November 9, 2005 incident what urgency did she feel there was in separating the Complainant and Respondent. She answered, "Not a high level. I wasn't aware of other incidents. Let the investigation take its course." Of course, there were the name-calling/shouting incidents in April 2006.

[109] Ms. Edmunds corroborated the evidence of Ms. Coe and Ms. Carpenter that the Complainant had never indicated that Mr. Thambirajah was the reason for a bid/transfer; rather, it was sought because of concerns about her daughter's illness and being closer to home. However, eventually, Ms. Cassidy did leave Willowdale D, on a successful "bid" to 101 Placer Court on September 20, 2006. Thereafter, she was transferred to Oshawa, on the initiative and assistance of Ms. Edmunds. The witness averred that:

> At some point, I asked her if she would like to leave Willowdale D…I called Arthur, the staffing officer…to hold the position for her. I told Doris, so your paths don't cross with Raj, what about Oshawa? It's not easy to move someone from one zone to another, the union doesn't like it, it affects seniority rights, it was a temporary assignment. I had to work with both unions, it bypassed Article 56…I was living this with her.

Later she added: "I went to two locals and got their permission to be a temporary accommodation…Oshawa is closer to her home. I don't know if she had enough seniority to normally have gotten that transfer…Doris never asked me to move. On my own initiative I got her to Oshawa. She told me about her daughter's medical problem…" This was one example of the caring, compassionate and proactive actions that Ms. Edmunds took for the benefit of the Complainant.

[110] I accept the evidence of the three Canada Post witnesses with regards to the issue of bidding/transferring out of Willowdale D. They were credible in this regard; Ms. Cassidy was not.

Offering Employee Assistance Program to Ms. Cassidy

[111] Ms. Edmunds testified that she called the Complainant to advise her of the privacy violation involving the bid sheets being inadvertently sent to Mr. Thambirajah. During that call, she asked the Complainant if she needed Employee Assistance Program (EAP) assistance. Ms. Cassidy stated that she did not; rather, she would speak to her friend who is a psychologist.

Two Weeks Free Vacation Pay

[112] Ms. Edmunds also averred that the Complainant had called her after the "dead rat" incident in December 2006. She testified: "I was really upset. She had me by the heartstrings for the entire time until we got the stuff from the Commission. I read her stuff and thought, 'That's not what happened'." Ms. Edmunds said that she went in December to the Director to authorize giving the Complainant two weeks pay after the rat incident "as if she had been at work."

Alerting Corporate Security

[113] Ms. Edmunds testified about contacting Canada Post corporate security department to have them "keep an eye" on Ms. Cassidy when she was transferred to Oshawa, including following her at random times. This was due to Ms. Cassidy's allegation of ongoing harassment and fear of the Personal Respondent.

December 8, 2006 Interview with Mr. Thambirajah

[114] Mr. Tidman had sent an email to Ms. Coe and Ms. Edmunds dated October 17, 2006. In it he wrote that Ms. Cassidy had come in to see him the previous day, raising "a number of allegations about Raj that should be put on the record". One of them involved Mr. Thambirajah being "before the courts with respect to physical attacks on his former wife. Doris gives her source as the police." She told the same story to Ms. Edmunds. Ms. Edmunds had Corporate Security look into this and they responded that there was no merit to this allegation. Mr. Tidman also indicated in the email that the Personal Respondent had been "charged" and was served with a peace bond. Mr. Tidman also said that Anne Jones had told him that she was receiving hang-up calls, as was he. Mr. Tidman was not examined about the last matter and so I give it no weight.

[115] As a result of the above, Canada Post held an "interview" with Mr. Thambirajah "to inform the employee of the statements made about him by another employee and the narrative of the meeting will be placed on his file." Mr. Thambirajah grieved and lost.

N. Incidents After the Complainant and Personal Respondent No Longer Worked Together

[116] Part of Ms. Cassidy's *CHRA* Complaints involve allegations of harassment *after* she and Mr. Thambirajah no longer worked together at Willowdale D.

Car Scratched at Union Meeting

[117] On September 19, 2006, Ms. Cassidy attended a union meeting. Mr. Thambirajah was also in attendance as were many people. When she left, she noticed that someone had "keyed" her car, scratching "fuck off" into the paint. Understandably, she was quite upset. She immediately suspected Mr. Thambirajah, although she had no direct proof. She filed a police

report. Mr. Thambirajah denies any responsibility for the car "scratching/keying" incident. I find that the incident did occur. However, on a balance of probabilities, I am unable to find that Mr. Thambirajah, as a matter of fact, was responsible for that incident. There is no evidence – e.g., eye-witness account, video surveillance, etc. – other than the "circumstantial" evidence of his attendance at the union meeting that night and his strained relationship with Ms. Cassidy during that time. I acknowledge that circumstantial evidence can suffice in some cases. However, the circumstantial evidence here is too weak to support the desired inference.

Sexual Assault Complaint Filed with Police; Charges Laid

[118] On September 28, 2006, Ms. Cassidy filed a Sexual Assault complaint with the police, regarding the November 9, 2005 incident. Charges were laid and Mr. Thambirajah was arrested on November 8, 2006. She also went to court to have a peace bond posted against Mr. Thambirajah. The sexual assault charges were withdrawn by the Crown on March 31, 2008. Detective Cecile testified that he had met with Ms. Cassidy and explained to her that the Crown, after reviewing the evidence, did not feel there was a reasonable prospect for a conviction on those charges and thus would be withdrawing them.

Punctured Tires After Court Appearance

[119] On November 1, 2006, Ms. Cassidy and Mr. Thambirajah appeared in the Ontario Court of Justice. As she was driving home, Ms. Cassidy testified: "My tires blew. I almost killed another women and child" as she lost control of her car. She managed to drive home and take the car to Canadian Tire and go shopping. She claims that Mr. Thambirajah is responsible for the incident. She stated that she saw a young Indian man come into the courtroom and talk to Mr. Thambirajah, looking and grinning at her.

[120] Her friend, Sue Baird, testified that she called the Complainant after the incident and Ms. Cassidy was in tears. Ms. Cassidy filed a police report. She told the police that she thought Mr. Thambirajah was responsible. No charges were ever laid.

[121] Mr. Thambirajah denied any involvement and says the person to whom he was speaking in the courtroom was his lawyer. Canada Post's counsel cross-examined the Complainant about the incident, revealing discrepancies in her testimony (e.g., involving her claim to have almost killed a woman and her child on the highway).

[122] I am satisfied that Ms. Cassidy's tires were punctured on that day. The mechanic's report from Canadian Tire corroborates that all four tires were punctured, although he does not indicate whether the puncturing of the tires was deliberate or by accident (e.g., by driving over sharp objects). However, I am not prepared, on a balance of probabilities, to find that Mr. Thambirajah was responsible. While it is "possible" that he was culpable, I am not willing to find that it was "probable" based on the circumstances alone.

"Dark Complexioned People" and "Indian" Following the Complainant in November 2006

[123] I heard evidence from the Complainant that she got permission from Canada Post to allow her nephew, Scott Parsons, to accompany her on her route. She was fearful of harassment and retribution from Mr. Thambirajah at this time, notwithstanding that they no longer worked in the same depot or area, as of May 2006. On November 17, 2006, the Complainant and her nephew noticed an "Indian" person following them in a car while Ms. Cassidy was on her route. They did not take down the licence plate number. As well, she and Mr. Parsons both testified that on November 8, 2006, they noticed a car leaving Ms. Cassidy's driveway in the country in Durham Region. Mr. Parsons stated that there were "two dark complexioned people [in the car]

pulling out of the driveway" as Ms. Cassidy and he arrived. They did not take down the licence plate number.

[124] For his part, Mr. Thambirajah denies that Ms. Cassidy and Mr. Parsons were even followed or that the car in the driveway incident even occurred, let alone that he was responsible for their being followed.

[125] I am willing to find the events as described above by the Complainant and Mr. Parsons did take place in fact (e.g., a car pulled out of Ms. Cassidy's driveway), but not that it involved the "following" of them or harassment or intimidation of them. Furthermore, based on the evidence, on a balance of probabilities, I will not go so far as to find that Mr. Thambirajah was connected to the "car on the mail route" or "car in the driveway" incidents.

"Rat in the Mailbox" Incident

[126] On December 4, 2006, Ms. Cassidy claims that either Mr. Thambirajah or someone acting on his instructions, put a dead rat in an envelope in her rural mailbox. The Complainant testified that, at the time, she was living at her common law spouse's home in the country on a 180 acre lot, with farm land on three sides. On the morning in question, she said that she went to her mailbox, opened it and found an envelope (she said "brown bag" in her journal entry). Inside was a dead rat (or mouse). "I tossed it on the ground on our property (later she testified that she threw the rat in the bushes); the rat could still be there today…" She then ran inside the house screaming. Her nephew was there and her daughter was sleeping. Surprisingly, she did not wake up with all the commotion. Later, her daughter wanted to get the rat, but Ms. Cassidy wouldn't let her out. When they left later, upon their return, they did not look for the rat. She testified that, "I knew Raj did this…" She said that she later received a phone call from Mr. Thambirajah: "Did you get the rat? It's not over yet."

[127] To this day, no one saw the dead rat except for the Complainant. I find it strange that she would not have had either her nephew or daughter witness what had happened, or taken a picture of the dead rat with a camera or cell phone to show the police. This is particularly surprising given the fact that by this time in December of 2006, by her own account, her conflict with Mr. Thambirajah had escalated. I do not accept that the dead rat incident or the follow-up call from Mr. Thambirajah occurred. In the alternative, even if I were to find that an envelope containing a dead rat was placed in the Complainant's mailbox, I would not extend my finding that Mr. Thambirajah was responsible for that act.

Threatening Phone Calls

[128] One of the allegations is that either Mr. Thambirajah, or someone else instructed by him, made a series of threatening phone calls to the Complainant over the course of three years. The Complainant testified at first that "he started calling me when Kelly Edmunds started investigating." At one point in her testimony, she said something different, that Mr. Thambirajah started calling her shortly after the November 9, 2005 incident. When asked how often he called, she replied, "As high as six or ten times a day; some days nothing…I know Raj's voice. He would say things like 'how many lives do you have?' 'next time you won't be so lucky, it will be your face.'"

[129] Ms. Cassidy's friend, Sue Baird, testified that she was with the Complainant "multiple times" (later she said 3 or 4) when she received threatening phone calls. Ms. Cassidy told her it was Mr. Thambirajah and held the phone to both of their ears so that Ms. Baird could hear. Ms. Baird testified that it was a male voice with an accent. She said she couldn't hear clearly but once heard something to the effect of "about your face" and then "….lives do you have."

[130] In cross-examination, Ms. Baird was asked if she ever heard Mr. Thambirajah's voice before. She replied "no." Ms. Cassidy had told her it was Mr. Thambirajah. The witness stated, "I have no idea who it was."

[131] Corinne Pearce, another friend of the Complainant, testified that Ms. Cassidy was at her house a few times when Mr. Thambirajah called her, saying things like "rat in the mail box, how do you like your present, next time may be you." Ms. Cassidy held the phone to the witness' ear so she could hear. When asked if she understood the caller, the witness responded, "I understood him clearly, an accent, but not a big one, an East Indian one, I could make out all of the words." On the second call, she stated that the caller said, "…How do you like the scrape on your car; next time it could be your face."

[132] Mr. Machelak asked Mr. Thambirajah in the hearing room to repeat the words from the two alleged threatening phone calls that the witness claims to have heard. He did so for the witness. "That was clear?" asked counsel. "Yes, and that was the accent," came the response from the witness. Looking astonished, Mr. Machelak put it to the witness that the hearing had been going on for a week and that the parties and counsel had difficulty understanding Mr. Thambirajah, yet the witness said he only had a "little bit of an accent." The witness replied, "Yes, I can say I could understand [Mr. Thambirajah]. I used to date East Indian people and I understand their accent better than other people do." Ms. Pearce acknowledged that she had never met Mr. Thambirajah before the hearing.

[133] What then transpired was quite interesting. Mr. Thambirajah himself cross-examined the witness. He asked five questions. To three of them, the witness answered, "What, pardon?" When I pointed out to the witness that she said "pardon" several times to his questioning indicating that she could not understand him, the witness responded, "I can understand what he said, but not what he meant." She also said, "Yes, I got confused a bit, about what he meant." I do not accept her explanation. I find on the evidence that the person she could clearly

understand on the phone with a "little bit of an accent" was not the same person - Mr. Thambirajah - that she had great difficulty understanding at the hearing.

[134] Ms. Marshall, who acted as Ms. Cassidy's agent/representative for a good deal of the proceeding, also gave evidence. She is a close friend of the Complainant. Ms. Marshall stated that close to the commencement of the hearing, Mr. Thambirajah "persisted" in making threatening calls to Ms. Cassidy. Ms. Marshall claims to have heard one call, but only parts of it. The Complainant put the cell phone to Ms. Marshall's ear. "I heard 'you think you're safe, you can't hide.' It was an Indian gentleman. I live in an East Indian neighbourhood." The witness also averred that on October 21, 2009, when submissions were due to the Tribunal, Ms. Cassidy came to her house crying, saying that Mr. Thambirajah had just called her and made a joke about Ann Jones having died, something like "your witness is dead, and you're next…I made a comment on the bottom of the page [in the letter to the Tribunal] that he needs psychiatric treatment and is a cruel person."

[135] Ms. Marshall's contempt for the Personal Respondent was quite palpable during the hearing. She is a close friend of the Complainant and has spent considerable time – on a volunteer basis – acting as Ms. Cassidy's representative/agent in the proceeding. She indicated at the hearing that she had suffered abuse herself and wanted to ensure that justice was done in the case of Mr. Thambirajah's ongoing harassment of the Complainant.

[136] Neither Ms. Baird, Ms. Pearce, Ms. Marshall, nor the Complainant knew of the exact dates of the calls. They did not write down the dates. And despite claiming to have received over 30 threatening phone calls, some as frequently as "six or ten per day," the Complainant never recorded a single call, did not contact the police (although she did for less serious matters, such as damage to her property), did not contact the phone or cellular company to see if a "trace" could be put on her phone, etc. Neither her nor Mr. Thambirajah's phone records were entered into evidence. I am left with her evidence and those of close friends who attest to have heard an

"Indian" voice on some calls, sure that it was Mr. Thambirajah. While it is *possible* that Mr. Thambirajah did indeed make threatening calls, on a balance of probabilities, and lacking cogent evidence, I am not prepared to make a finding on such a serious matter that even if these calls were made, that they were made by Mr. Thambirajah himself or someone else acting on his instructions.

Payroll Issue

[137] Ms. Cassidy alleges that Mr. Thambirajah was responsible for a payroll error in September 2006 whereby she was over-credited. She claims that Mr. Thambirajah told her that he "would make my life miserable, that he had a friend in payroll." Mr. Thambirajah denies this. Canada Post's counsel put the following to the Complainant: "If I said that payroll issues are a huge issue at Canada Post, underpayment and overpayment, there are over 60,000 employees and errors do happen." The Complainant answered, "I also had pay deductions that were too much. Raj told me he had a friend in payroll and that's just the start of it."

[138] Ms. Edmunds testified about the payroll problem. She said that Ms. Cassidy made an allegation of "pay tampering" – overpayment and that she was also owed money in regard to sick leave time. Ms. Edmunds, Penny Comport, the supervisor at her then-station (101 Placer Ct.) and the union steward, Mark Sinclair met with Ms. Cassidy on May 4, 2007 to discuss the sick leave under-payment issue. The supervisor explained the reason for the "sick time" error, and that upon investigation, it was determined that Ms. Cassidy was not underpaid, but was in fact *overpaid* and owed Canada Post two days plus. Canada Post just "forgot about it" and did not demand re-payment.

[139] Based on the evidence presented, I do not find that Mr. Thambirajah was responsible for the payroll errors described above.

Privacy Breach: Complainant's Phone Number Inadvertently Given to Mr. Thambirajah

[140] The Complainant alleges that Canada Post improperly gave her phone number to Mr. Thambirajah. At Willowdale D, Mr. Thambirajah was allowed to share part of the filing cabinet in the office of Messrs. Tidman and Sultan to store his union documents. On October 26, 2006, when Mr. Thambirajah was no longer the shop steward there and had been transferred to Unionville, a Canada Post employee inadvertently sent the contents to him at his new location. This included many "leave form requests" of employees, including Ms. Cassidy. Mr. Thambirajah reported this error and turned over the envelope with the leave forms to the Union which then sent them to management. Ms. Cassidy claims that her phone number was on the leave forms. However, upon review of the ones tendered into evidence, it appears that she had put the number for Willowdale D on the form. On one form, it looked like she had scratched out another number and put in the Station number. Canada Post advised Ms. Cassidy of the privacy breach on December 15, 2006 and apologized.

[141] The above incident clearly upset the Complainant. She felt that Mr. Thambirajah had gotten her phone number from the leave forms. She also filed a complaint with the Privacy Commissioner of Canada and filed a grievance.

O. Three Allegations of Retaliation During the Hearing

[142] On February 19, 2010, I granted the Complainant's motion to amend her Complaint against Mr. Thambirajah by adding three incidents of retaliation under section 14.1 of the *CHRA*. As I stated in my oral reasons at the time, the granting of the motion, with its low threshhold, does not mean that a finding of liability will be made out against Mr. Thambirajah at the conclusion of the hearing. Below are my findings of fact only with respect to the three incidents.

First Incident: The Parking Lot on February 2

[143] This was the first of the three incidents during the hearing. Both Ms. Cassidy and Ms. Marshall testified that at the conclusion of the second day of the hearing on February 2, 2010, Ms. Cassidy, her partner and Ms. Marshall were in their car in the parking lot across from the building where the hearing was being held. It was snowing lightly. Ms. Cassidy testified:

> …Julie [Marshall] looked up and said, 'There he [Mr. Thambirajah] is.' He was staring at my licence plate. He looked up at me and grinned. I fell apart. My boyfriend was really upset. I started to cry, couldn't believe he was still doing it: harassment, intimidation, trying to show me in his way he can still get to me and it doesn't matter where…He was standing there right in front.

She stated that she was seated on the front passenger side. In her Notice of Motion, she writes: "Julie watched him cross back over four lanes of traffic and proceed to walk north on Bay Street, with his bag and carry tray."

[144] Ms. Marshall corroborates the Complainant's evidence. She stated that she walked to the Complainant's car, parked across the street from the hearing on the west side of Bay Street and "jumped into the back seat". She averred:

> The wipers were going, light snow melting off the windows, Doris and George were there, talking about what was said in court…I looked to my left and said, 'Oh my God, there he is'…Raj was walking in between the lanes. We were on the south side. He was in between the next set of two, in the parking lot. She started shaking and crying…I watched him walk straight to the car to Doris on the passenger side, looked down at the licence plate, looked up at Doris and smiled, little grin and walked away. The closest he came was approximately six feet away from the front of the car, standing in front of the bumper on the passenger side. He walked straight back, crossed four lanes of…walked north on Bay.

She stated that Mr. Thambirajah did not have his case with him when he was in the parking lot: "Doris was hysterical, shaking, crying. I swore, called him a nasty name. He has big balls to do something like that. I said I would bring it to your attention right away." Ms. Marshall stated that she telephoned the parking lot owner, The Hospital for Sick Children, three times to see if

there was a surveillance tape, but they did not return her calls. She did not request an Order of production from me.

[145] The above incident was raised in "open tribunal" the following day, February 3. Mr. Thambirajah (not sworn) stated that "I forgot where I was". He said his car was indeed parked in a different lot than Ms. Cassidy's. He got lost. He said that he used his remote to try to find his car. He did not deny being in the parking lot where Ms. Cassidy's car was parked.

However, he averred: "I didn't even see who they are, what they are…was full of [sic] snows." He denied smiling at them. I indicated when this was first raised in the hearing that their unsworn comments would not form part of the evidence or my findings, or any Order, "at this time". I indicated that it may become relevant at a future date. That came to fruition as the Complainant subsequently brought a motion to amend her Complaint against the Personal Respondent. Upon hearing the motion, I granted it and gave oral reasons.

[146] In his sworn testimony on the second last day of the hearing, Mr. Thambirajah was asked if he approached Ms. Cassidy's vehicle in the parking lot. He responded, "I didn't do that. I was there, parked in the same lot, going to my car. I didn't look at her [licence] plate." I asked the Respondent to clarify his evidence at the end of the re-examination. He stated that he was parked in the same parking lot as Ms. Cassidy, but in a different aisle, specifically, "two aisles from them up front facing the hospital." He averred, "I didn't know where they were parked and who was in the car until the following day [when the Complainant first raised the issue in the hearing]. It's all a made-up story. I didn't see them or their car…" I then asked the Respondent, "How did you know you were in the same parking lot in a different aisle if you didn't see their car or them?" The Respondent answered, "It was the only parking lot there." Mr. Kelly followed that up by asking, "In Court [on February 3] you advised the Tribunal that you were parked two blocks away down the street, in a different parking lot." Mr. Thambirajah's answer was difficult to understand, given his accent. He stated that he was not familiar with the area, but that the

parking lot was "two aisles behind the Tribunal [building on Bay Street]. He confirmed the parking lot was on the Northwest side of the Bay and Elm St. corner, beside a construction site.

[147] When I examine Mr. Thambirajah's unsworn comments when the incident was first raised on February 2, 2010, and his testimony (in-chief, cross-examination and re-direct, including my questions) on October 7 and 11, 2011, I have some difficulty understanding exactly what happened. He appears to have contradicted himself. First he says he was parked in a different parking lot from Ms. Cassidy, got lost and ended up in the parking lot where her car was parked, but that he was never in front of her car, and thus did not smile at her or look at the licence plate. At the hearing, he avers that he was parked in the same parking lot as she, but did not go in front of her car, stare or smile at her and didn't even know where she was parked. He then states that he was there, his car being two aisles away from hers but did not look at her or the licence plate. His answers are convoluted and contradictory. Even if I were to give the best interpretation to his answers, and find that he was parked in the same parking lot as Ms. Cassidy, that he got lost and ended up in front of Ms. Cassidy's car unknowingly, I would have to stop there. I could not accept the rest of his version of the events. I find that he was in front of Ms. Cassidy's car after the hearing with the snow coming down. I believe Ms. Cassidy and Ms. Marshall that he looked down at her licence plate and looked back up at Ms. Cassidy, smiling or grinning. He then left the parking lot walking north, no doubt to the other parking lot where he was indeed parked. I accept Ms. Marshall's evidence that, after he left their car, "He walked straight back, crossed four lanes of traffic [on Bay Street], picked up his carrying bag, and walked north on Bay." His parking in the lot north of the Tribunal building and northeast of where Ms. Cassidy was parked is consistent with his original statement and Ms. Marshall's testimony and I so find as a matter of fact. I will deal later in these Reasons with whether his actions constituted "retaliation" within the meaning of section 14.1 of the *CHRA*.

[148] After the Complainant first raised the parking lot incident in the hearing on February 2, I admonished the parties and directed that they not have any contact with each other and to deal

with each other through their representatives at the hearing. Notwithstanding this direction, two other alleged incidents arose.

Second Incident: The Hearing Hallway on February 16

[149] Ms. Cassidy alleges that the Respondent "further verbally harassed me when I left the court room. We had brought up in court, the possibility of having a new witness summoned – Marcia Busarello (Iunni). When I left the courtroom Raj said to me – when no one else was in ear range – "wait to [till] Iunni gets here" furthering his intimidation against me." The Complainant testified that she "felt this was another way of him getting to me, hurting me." No one can corroborate her evidence; the Complainant was alone. Mr. Thambirajah denies this interaction ever occurred. On a balance of probabilities, I am not willing to find that this event occurred as described by the Complainant. Furthermore, even if it did occur, the Respondent saying "wait till Iunni gets here" in and of itself and based on the totality of the evidence, does not amount to retaliation under the *CHRA*.

Third Incident: On Bay Street Outside the Tribunal Building on February 17

[150] The third allegation took place on February 17. The Complainant's Notice of Motion states: "I went outside 655 Bay Street, to have a cigarette. I was strolling down the street, and Mr. Thambirajah came out from behind a pillar and said to me "You'll get yours". I was very distraught and came and advised you [the Tribunal] immediately…" She testified that she, Ms. Marshall and Ms. Baird were having a cigarette outside: "I walked away, Raj was behind the pillar…he made a comment 'you'll get yours'. I walked back and said, 'I can't even have a cigarette and escape from him' and told them what had happened." Ms. Marshall confirms that the Complainant told her what had happened moments after it allegedly occurred. But no one saw the actual interaction between Ms. Cassidy and Mr. Thambirajah. Mr. Thambirajah

testified: "She walked to me. I was on a break, standing beside the pillar. She tried to provoke something…I said nothing." He said there was no verbal/visual exchange.

[151] Based on the testimony of the Complainant and Personal Respondent, I find that they did interact beside the pillar. However, on a balance of probabilities, I do not find that he made the threatening comment that she alleges. I also decline to find that "she tried to provoke something" from him. I say this mindful of the credibility issues that both have had throughout the hearing,

VI. The Law

[152] The initial onus of establishing a *prima facie* case of discrimination under the *CHRA* rests with a complainant or the Commission: *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Limited*, [1985] 2 S.C.R. 536, at para. 28. Once that is established, the burden then shifts to the respondent to establish a justification or explanation for the discriminatory practice or action. The respondent's explanation should not figure in the determination of whether the complainant has made out a *prima facie* case of discrimination: *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204, at para. 22.

[153] Also relevant to human rights tribunal cases is the legal principle that: "It is not necessary that discriminatory considerations be the sole reason for the actions in issue in order that the complaint may succeed. It is sufficient that the discrimination be one of the factors for the employer's decision": *Morris v. Canada (Armed Forces)* (2001), 42 C.H.R.R. D/443 (C.H.R.T.), at para. 69; *Holden v. Canadian National Railway Co.* (1991), 14 C.H.R.R. D/12, at para. 7.

[154] The standard of proof in discrimination cases is the ordinary civil standard of the balance of probabilities. According to this standard, discrimination may be inferred where the evidence offered in support of the discrimination renders such an inference more probable than the other

possible inferences or hypotheses: *Premakumar v. Air Canada (No. 2)* (2002), 42 C.H.R.R. D/63 (C.H.R.T.), at para. 81. As Member Craig wrote in *Naistus v. Chief*, 2009 CHRT 4, at para.72: "Evidence must always be clear, convincing and cogent in order to satisfy the balance of probabilities test."

A. Sexual Harassment

[155] Paragraph 14(1)(c) of the *CHRA* states that it is a discriminatory practice to harass an individual on a prohibited ground of discrimination, including the ground of sex, "in matters related to employment". Subsection 14(2) specifies that "sexual harassment shall, for the purposes of that subsection, be deemed to be harassment on a prohibited ground of discrimination."

[156] In the seminal case dealing with sexual harassment decided by the Supreme Court of Canada, *Janzen v. Platy Enterprises Inc.*, [1989] 1 S.C.R. 1252, at 1284., sexual harassment was described as "unwelcome conduct of a sexual nature that is detrimental to the work environment." Other courts or statutes have defined it as engaging in a course of vexatious sexual comment or conduct that is known or ought reasonably to be known to be unwelcome. This exact or similar language is legislatively mandated in many human rights statutes in Canada. Notably, the *CHRA* is not one of them.

[157] In a complaint of sexual harassment pursuant to sections 7 and 14 of the *CHRA*, Tremblay-Lamer J. expanded on the dicta in *Janzen*, *supra* in *Canada (Human Rights Commission) v. Canada (Armed Forces) et Franke*, 1999 3 FC 653. For a sexual harassment allegation to be substantiated, the following items must be shown:

(1) The acts that form the basis of the complaint must be unwelcome, or ought to have been known by a reasonable person to be unwelcome;

(2) The conduct must be sexual in nature. That does not encompass only physical contact or touching (e.g., sexist remarks, gender-based insults, and comments about appearance, dress and sexual habits);

(3) Ordinarily, sexual harassment requires a degree of persistence or repetition, but in certain circumstances (such as a serious physical assault), even a single incident may be severe enough to create a hostile or poisoned environment. The Court also applied "the inversely proportional rule": The less serious the conduct, the more persistent it must be. The more serious the conduct, the less persistence need be shown. The objective "reasonable person" standard is used to assess this factor as well; and

(4) Where the sexual harassment takes place in an employment context, the victim of the harassment must notify the employer of the alleged offensive conduct.

B. Corporate (Vicarious) Liability: Section 65 of the *CHRA*

[158] A corporate (including governmental) respondent (analogous to vicarious liability under tort law) may be held liable for the discriminatory acts or harassment committed by its officers, directors, employees or agents acting in the course of their employment, pursuant to section 65 of the *CHRA*. This is so unless the respondent employer can show it did not consent to the discriminatory practice, and exercised "all due diligence" to prevent it and mitigate or avoid its effect. I should add that, in my view, the modifier "all" before "due diligence" does not require a standard of "perfection" in the exercise of its due diligence. Rather, the modifier requires that the corporate respondent exercised "reasonable" due diligence all of the time. In *Hinds v. Canada (Employment and Immigration Comm.)*(1988), 10 C.H.R.R. D/5683 (C.H.R.T.), at para. 41611, applying s. 48(6) of the *CHRA* [s. 65(2) as it then read], the Tribunal wrote:

> Although the C.H.R.A. does not impose a duty on an employer to maintain a *pristine working environment*, there is a duty upon an employer to take prompt and effectual action when it knows or should know of coemployees' conduct in the workplace amounting to racial harassment…To avoid liability, the employer is obliged to take *reasonable steps* to alleviate, *as best as it can*, the distress arising within the work environment and to reassure those concerned that it is committed to the maintenance of a workplace free of racial harassment. A

> response that is both timely and corrective is called for and its degree must turn upon the circumstances of the harassment in each case. [Emphasis added.]

[159] Included in this duty to mitigate is an examination of the steps taken by a corporate respondent to investigate, make findings and impose a resolution. In *Sutton v. Jarvis Ryan Associates et al.*, 2010 HRTO 2421, at paras. 130-33, the Human Rights Tribunal of Ontario dealt with a corporate respondent's duty to investigate a complaint of discrimination or harassment:

> It is well established in the Tribunal's jurisprudence that an employer may be held liable for the way in which it responds to a complaint of discrimination.
>
> The rationale underlying the duty to investigate a complaint of discrimination is to ensure that the rights under the *Code* are meaningful. As stated in *Laskowska v. Marineland of Canada Inc.*, 2005 HRTO 30 (CanLII) ("*Laskowska"*), at para. 53:
>
> > It would make the protection under subsection 5(1) to be a discrimination-free work environment a hollow one if an employer could sit idly when a complaint of discrimination was made and not have to investigate it. If that were so, how could it determine if a discriminatory act occurred or a poisoned work environment existed? The duty to investigate is a 'means' by which the employer ensures that it is achieving the *Code*-mandated 'ends' of operating in a discrimination-free environment and providing its employees with a safe work environment.
>
> The Tribunal's jurisprudence has established that the employer's duty to investigate is held to a standard of reasonableness, not correctness or perfection. In *Laskowska*, the Tribunal set out the relevant criteria for an employer to consider in its duty to investigate as:

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

The Tribunal in *Laskowska* also stated the following at para. 60:

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

C. Retaliation: Section 14.1 of the *CHRA*

[160] Section 14.1 of the *CHRA* provides that it is a discriminatory practice for a person against whom a complaint has been filed to retaliate or threaten retaliation against the individual who filed the complaint.

[161] In *Witwicky v. Canadian National Railway*, 2007 CHRT 25, Member Doucet sets out and analyzes the two competing schools of thought about whether "intention" is required to establish a section 14.1 complaint. *Witwicky* is the most recent analysis of this area by the Tribunal. There are conflicting decisions at the Tribunal level, as well as in some provincial human rights tribunals and provincial appellate and superior courts. The Federal Court, Federal Court of Appeal and the Supreme Court of Canada have not waded into this issue as of yet.

[162] In *Witwicky*, at the following paragraphs the Tribunal writes as follows:

> [121] This Tribunal has taken two slightly different approaches to the legal framework under which a claim of retaliation should be examined. These approaches are illustrated in two cases: *Wong v. Royal Bank of Canada*, [2001] C.H.R.D. No.11 and *Virk v. Bell Canada (Ontario)*, [2005] C.H.R.D. No.2. The primary difference between these two approaches is the emphasis placed on the intention of the alleged retaliator.
>
> [122] In *Wong*, the Tribunal determined that given the remedial nature of the Act, the complainant should not be required to prove that the respondent intended to retaliate against the complainant. Rather, the focus of the analysis is on the perception of the complainant and whether or not the complainant could reasonably have viewed the respondent's conduct as an act of retaliation:
>
> [124] The other approach is set out in the *Virk* case [at paras. 155-57]:
>
> Under section 14.1 of the Act, it is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.

> Retaliation implies some form of wilful conduct meant to harm or hurt the person who filed a human rights complaint for having filed the complaint. This view departs in part from those expressed in previous decisions of this Tribunal on the issue of retaliation (Wong v. Royal Bank of Canada, [2001] CHRT 11; *Bressette v. Kettle and Stony Point First Nation Band Council*, 2004 CHRT 40 (CanLII).
>
> In *Wong* and *Bressette*, the views expressed are to the effect that a complainant does not have to prove an intention to retaliate and that if a complainant reasonably perceived the impugned conduct by the respondent to be in retaliation to the human rights complaint, this could amount to retaliation quite apart form any proven intention of the respondent.

[163] I agree with the reasoning in *Virk*, *supra* and other judicial and tribunal decisions requiring an element of intention. "Intention" includes wilful and reckless thought and action to retaliate against or punish a complainant for having filed a human rights complaint. While the *CHRA* does deem "retaliation" to be a discriminatory practice, it is different from the prohibition against discrimination and harassment in that "retaliation" need not be linked to a prohibited ground under the *CHRA*. As will be seen later in these Reasons, the application of either the *Virk* or *Wong* approach regarding intention would yield the same result herein.

VII. Liability

A. Liability vis-à-vis the Complaint Against Mr. Thambirajah

Allegation #1: November 9, 2005 Touching/Comment Incident

[164] Based on my findings of fact, I am satisfied that Mr. Thambirajah knew or, at the very least, ought to have known that his touching of Ms. Cassidy's shirt over the chest area along with his comment about her breast size were "unwelcome". His position on what happened, including at first a straight denial to Canada Post's Ms. Edmunds, to his changing position at the hearing, puts his credibility in issue. At a minimum, at one point, he admitted to the comment, and to the touching, but not with a sexual intent attached. It was not a "sexual assault" according to the

Respondent. Of course, I have no jurisdiction to deal with a criminal or civil sexual assault allegation. My bailiwick is "sexual harassment" as set out in the *CHRA*.

[165] Mr. Thambirajah's physical contact with his hand was on a sexual part of the female body, the Complainant's breasts or chest area. As well, his contemporaneous comment about the size of her breasts was of course sexual in nature. I am also satisfied that the touching, coupled with the comment, triggers liability under the *CHRA*. While it occurred only once, the physical contact aspect over her chest area is serious enough to trigger liability. It was no mere joke. This is evident from Ms. Cassidy's and Mr. Pyziak's reaction and what a "reasonable person" objectively would think. While the purpose of the *CHRA* and the Tribunal is not to sanitize all behaviour in the workplace to the point where it becomes a sterile, human-less environment, there are boundaries. And Mr. Thambirajah clearly crossed the boundary of acceptable and non-*CHRA* triggering behaviour. He clearly sexually harassed the Complainant on November 9, 2005. This is even more disturbing given his position as a Union shop steward. As Mr. Tomaszewski, himself a union official, testified, shop stewards are held to a higher standard. They are the "buffer" between the union, the employee and management. They are elected by their fellow members. It is a position of trust. One would expect shop stewards would be the exemplars of human rights, not the perpetrators of sexual harassment. This will be addressed further under the remedial section of these Reasons.

Allegation #2: Fall on Mail Tub/"Grabbed (or Slapped) My Ass" Incidents

[166] As I stated in the section "Findings of Fact", the Complainant's *viva voce* and documentary evidence were contradictory on this issue. It certainly was not "clear, convincing and cogent." At one point, she seemed to be indicating that they were two separate incidents: one involving falling on a mail tub and Mr. Thambirajah making the "at least you have an ass..." comment (see her Statement of Particulars) and the other, involving the actual touching of her buttocks while making the same comment. She contradicted herself as to the date:

December 2005 versus April 18, 2006. It may be that this was indeed one event. In any event, pursuant to my findings of fact, I do not accept that these events occurred as described by her, and for the reasons stated therein. Consequently, there is no finding that the *CHRA* provisions have been violated.

Allegation #3: April 10-19, 2006 Swearing/Inappropriate Language Incidents

[167] The findings of fact surrounding these incidents do not support a finding of liability. The swearing, shouting and inappropriate language were not of a sexual nature (or linked to the prohibited ground of sex) or of a serious enough nature to attract *CHRA* liability. The behaviour by both the Complainant and Personal Respondent were of the nature of pejorative, high-schoolish name-calling. They were appropriately dealt with by Mr. Tidman.

Allegation #4: Car Scratched/Keyed at Union meeting: September 19, 2006

[168] I have made a finding of fact that Ms. Cassidy's car was indeed scratched/keyed with profanity during the Union meeting. On a balance of probabilities, I was unable to find that Mr. Thambirajah (or an accomplice at his instruction) was responsible. Accordingly, I need not determine whether he is liable under the *CHRA* for this incident, including whether such action even constitutes "sexual harassment" under the *CHRA*.

Allegation #5: Punctured Tires Incident

[169] I made a finding of fact that her car tires were punctured on November 1, 2006. Again, on a balance of probabilities, I was not convinced that Mr. Thambirajah (or his accomplice) was responsible, based on the evidence before me. Thus, the *CHRA* provisions are not engaged here.

Allegation #6: Complainant Followed on Mail Route and Car in Her Driveway Incidents

[170] Based on my earlier findings of fact, on a balance of probabilities, I am not satisfied that Mr. Thambirajah was responsible for these incidents or for that matter, whether they even constitute sexual harassment under the *CHRA*.

Allegation #7: Rat in the Mail box: December 4, 2006

[171] I have found that this event did not occur as described by the Complainant. I have serious concerns about the credibility and reliability of her evidence on this point, as described earlier. In the alternative, if the dead rat was placed in her mail box as she described, I found that there was an insufficient evidentiary basis to conclude that Mr. Thambirajah was responsible for this, on a balance of probabilities. I did not accept as a finding of fact that he had made a "follow-up" threatening phone call to the Complainant about the dead rat. Based on my findings of fact, I need not decide whether there is a legal basis for finding that the Respondent has violated her rights under the *CHRA* regarding this incident.

Allegations #8: Threatening Phone Calls

[172] My findings of fact illustrate my concern that the evidence was not "clear, convincing and cogent" in this area. I had serious credibility/reliability concerns regarding said evidence. I set out these concerns in the section entitled "Findings of Fact". I found that the Complainant had exaggerated the number of said calls. Even if some of them were made, on a balance of probabilities, I was not able to find that Mr. Thambirajah (or an individual acting on his behalf)

made them. Accordingly, the *CHRA* provisions are not triggered. Had I made such a finding, it is more likely that a finding of "retaliation" would have been more appropriate than one of "sexual harassment".

Allegation #9: Payroll Tampering

[173] Earlier in these Reasons I made a finding of fact that, after a thorough investigation by Canada Post including a meeting with the Complainant, management and her Union representative, it was clear that her payroll had not been tampered with. Indeed, she was "over-credited" with an amount, and her employer did not seek reimbursement. As well, I found that the evidence was such that it did not warrant a finding that Mr. Thambirajah was responsible for tampering with her payroll records. Thus, I need not go to the next step of determining whether he had infringed her rights under the *CHRA*.

Allegations #10-12: Three Retaliation Incidents During the Hearing

[174] I ordered the Complaint against the Personal Respondent amended to include three instances of retaliation that allegedly occurred during the course of the hearing. Regarding the first one – the "parking lot" incident – I have made a finding of fact that Mr. Thambirajah indeed appeared in front of the Complainant's vehicle, looked down at her licence plate, then looked up at her, smiled or grinned, then left. I also found that he was not parked in the same parking lot.

[175] Regardless of whether I apply the "intention" requirement or not to the facts at hand, the result would be the same: Mr. Thambirajah "retaliated" against the Complaint for the filing of her sexual harassment claim against him. I am satisfied that "intention" includes "wilful" or "reckless" behaviour. Applying the objective test of the "reasonable person", I find that, at a minimum, Mr. Thambirajah was reckless in his actions in the parking lot. He was aware of the Complainant's agitated feelings toward him and the stress experienced by her, both of which

were demonstrably clear during the hearing. He gave contradictory evidence during the hearing about what happened in the parking lot. He was not believable or more apt, I did not know what to believe from his evidence. That left me with the corroborated evidence of the Complainant and Ms. Marshall.

[176] Another element to this is the importance to the administration of justice that parties and witnesses feel safe in the confines of a trial or hearing before a court or tribunal of justice. Participants should expect that they will not be subjected to threats or intimidation, implied or otherwise, from participating in a trial/hearing. In this case, a complainant should not be subjected to retaliation or punishment for going through with a *CHRA* complaint. I am satisfied that a reasonable person, looking objectively at these facts, would conclude that Mr. Thambirajah did what he did in the parking lot to get back at and punish Ms. Cassidy for filing her *CHRA* complaint against him, including the accompanying matters like the pressing of sexual assault charges. Even if he did not "intend" this as the effect of his actions, he knew they could have been interpreted in this way by the Complainant and did not care (or turn his mind to the likely consequences of his actions). His actions had a harmful impact on her that evening and into the next day at the hearing. Accordingly, I find that he infringed her rights under section 14.1 of the *CHRA*.

[177] With regards to the other two allegations of retaliation, as a finding of fact, I have concluded that those events did not transpire in the way the Complainant alleges. Consequently, I am unable to find that Mr. Thambirajah retaliated against her in those instances.

B. Liability vis-à-vis the Complaint Against Canada Post

[178] The main thrust of the Complaint against Canada Post is that it failed to provide a harassment-free, safe work environment for the Complainant. Specifically, it was allegedly aware of the November 9, 2005 touching/comment incident on the same day and did nothing to

address it. It then continued to fail to properly address the escalating conflict between the Complainant and Personal Respondent thereafter. Although the Commission referred the Complaint to the Tribunal on the basis of an alleged violation of sections 7 and 14 of the *CHRA*, the parties, in their Statements of Particular and the presentation of evidence and argument (the Complainant did not make final submissions) at the hearing, focussed on section 14 only. Therefore, I deem the alleged violation of section 7 abandoned.

[179] I have made numerous findings of fact regarding these issues. I will address the issue of liability by analyzing the application of the law regarding section 65 of the *CHRA* – corporate/vicarious liability. That section provides that an act or omission shall not be deemed to be an act or omission of the "person, association or organization" if it can be shown:

(1) It "did not consent to the commission of that act or omission";

(2) It "exercised all due diligence to prevent the act or omission from being committed"; and

(3) It exercised all due diligence "subsequently to mitigate or avoid the effect thereof."

[180] I have made findings of liability against Mr. Thambirajah for the November 9, 2005 touching/comment incident and the "parking lot" retaliation incident in February 2010, the latter of which does not form part of the Complaint against Canada Post. A corporate respondent can only be held liable under the *CHRA* for failing to provide a harassment-free workplace in instances where a finding of harassment has been made out. Section 4 of the *CHRA* says that, in order to be the subject of a remedial order under section 53 or 54, a respondent must be found to have engaged in a discriminatory practice. Accordingly, my analysis herein will address the above three branches of the section 65 test vis-à-vis my finding against Mr. Thambirajah for the November 9, 2005 touching/comment incident only.

The First Criterion: Canada Post Did Not Consent to the Harassment

[181] I am satisfied that Canada Post did not consent to Mr. Thambirajah's sexual harassment of the Complainant on November 9, 2005. First, I have made a finding of fact that it did not become aware of it until Ms. Cassidy's April 25, 2006 written complaint which she gave to Mr. Tidman on that day. Canada Post has contracted with CUPW anti-discrimination/harassment provisions, including processes for dealing with said complaints, in their successive Collective Agreements. Canada Post has in place extensive policies/procedures dealing with this area. I heard evidence about the training that is given to managers and workers regarding same. Furthermore, Canada Post had no way of preventing Mr. Thambirajah's actions. Indeed, as a shop steward, it would not expect such behaviour on his part.

[182] Mr. Tidman's and Ms. Edmunds' reaction and action upon learning of the November incident on April 25, 2006 illustrate the seriousness with which they took this matter and that the Corporation would never consent, condone or support such behaviour. Such behaviour is clearly in violation of Canada Post's anti-discrimination/harassment policies and a breach of Mr. Thambirajah's responsibilities and obligations as an employee.

The Second Criterion: It Exercised Due Diligence to Prevent the Act From Being Committed

[183] My comments above also show the due diligence on the part of Canada Post to prevent such acts from occurring.

The Third Criterion: It Exercised Due Diligence Subsequently to Mitigate/Avoid the Effects

[184] Canada Post did many positive things in furtherance of this third criterion, some of which went above and beyond *CHRA*-mandated requirements. However, there were many other glaring examples where it failed to meet the due diligence threshhold in addressing the November 9, 2005 incident, for which I must find it liable.

[185] First, I will discuss the positive actions. At the outset, I must commend the actions of Mr. Tidman and Ms. Edmunds. They were the principal Canada Post management people who dealt with this issue. Some of the things that they did to "mitigate the effects" of the November sexual harassment incident were:

(1) Mr. Tidman immediately attempted to contact Ms. Edmunds, the Human Rights Officer;

(2) They both showed compassion and sensitivity dealing with Ms. Cassidy. Mr. Tidman made several attempts to see about the status of the investigation. Ms. Edmunds spoke frequently with her, comforting her. She was empathetic toward the Complainant, "feeling" for her. I accept her evidence that, until she questioned what had occurred as a result of reading Ms. Cassidy's March 2007 Complaint to the Commission, "Doris had me by the heart strings";

(3) On her own initiative, Ms. Edmunds spearheaded Ms. Cassidy's transfer out of Willowdale D to Oshawa in October 2006. I mention this notwithstanding Mr. Thambirajah had been transferred to another location – Unionville – by this time;

(4) Ms. Edmunds' investigation report and findings were fair and reasonable, subject to my specific misgivings as described below.

[186] There were other actions that were decent, thoughtful and mitigating, such as: providing two weeks' "free vacation pay" to Ms. Cassidy; alerting Corporate Security to watch over her in Oshawa, etc. These were more out of response to the "ongoing harassment" that Ms. Cassidy complained of, which I have not found to be discriminatory under the CHRA as a result of my findings of fact and/or law. However, one could argue that these mitigating measures address, and owe their genesis to, the incident that started off the conflict: the November 9, 2005 touching/comment incident.

[187] What wasn't done to *CHRA*-standards vis-à-vis the November 9, 2005 incident? To answer this question, I focus on the following: the "comedy of errors and miscommunication" to quote Ms. Edmunds. There is no question that there was a profound miscommunication between

Mr. Tidman and Ms. Edmunds in the period of April 25-May 14, 2006. It was inadvertent, but it occurred nevertheless and could have been prevented. What was the result of this miscommunication:

(1) The 10-day period to discipline Mr. Thambirajah was missed. What is its significance? First, had it not been missed, Ms. Edmunds' recommendation in her September 1, 2006 Investigation Report of a 5-day "major misconduct suspension" without pay against Mr. Thambirajah would have been implemented by management. Along with the other disciplinary recommendations, this would have properly addressed the wrong that had been done to Ms. Cassidy on November 9, 2005 as well as sent a signal to Mr. Thambirajah and others about what is surely unacceptable behaviour: sexual harassment in the workplace. Employee complainants, such as Ms. Cassidy, had a reasonable expectation that said terms and conditions in the Collective Agreement negotiated between Canada Post and CUPW would be met. Furthermore, the other disciplinary recommendations could have been enforced by Canada Post, including those that occurred only by way of consent of Mr. Thambirajah;

(2) The investigation could have begun three weeks earlier and concluded earlier too, rather than providing the Report and Recommendations to the parties in September 2006. The Union had, not unjustly, complained on August 2006 about the delay. Article 56.05 (Investigation) of the Collective Agreement reads:

> (a) When the Corporation receives a signed complaint, it shall commence an investigation within a reasonable time and at all times, use its best efforts to commence its investigation within three (3) working days.
>
> (b) The Corporation shall ensure that the investigation is completed within a reasonable time.

(3) Canada Post should have been proactive sooner and asked Ms. Cassidy if she wished to be temporarily transferred out of Willowdale D, pursuant to Article 56.07 of the Collective Agreement. After all, by the time Ms. Cassidy gave her written complaint to Mr. Tidman on April 25, 2006, he (and therefore Canada Post) was aware of the recent swearing/verbal altercations in April

between the Complainant and Personal Respondent, which resulted in their both being disciplined.

What Could Have Prevented the Miscommunication?

[188] I appreciate that "hindsight is 20/20". However, there is a benefit to examining this, not just from the perspective of learning what went wrong, but also to prevent its re-occurrence. The latter is provided for in the Tribunal's "future practices" remedial powers found in paragraph 53(2)(a) of the *CHRA*.

[189] First, I appreciate that the miscommunication occurred between two intelligent and experienced people. Secondly, the miscommunication was due to human error and facilitated by technology or the lack thereof. Finally, other circumstances aided in this, such as Ms. Edmunds being out of the office on business during this critical period after April 25, 2006. It could have been avoided if Mr. Tidman had specifically stated in his email and telephone calls to Ms. Edmunds that he was now contacting her with regards to a previously undisclosed allegation of sexual harassment: i.e., the touching/comment incident on November 9, 2005, and not about the April 10-19, 2006 swearing/language incidents. And of course, from Ms. Edmunds' end, she might have reasonably suspected, or at least had cause to investigate, whether his email and voice mail messages were about something different, given that it had been two weeks (April 12 or 13) since he had called her about the swearing/language incidents.

[190] The lack of a fax machine or scanner at Willowdale D and no "automated absence message" for Ms. Edmunds' email account also contributed to the miscommunication. As well, while Ms. Edmunds was away, the envelope with the April 25 complaint that Mr. Tidman had mailed was sitting unopened in her office for three weeks. She had no assistant or alternative person in place to deal with urgent matters in her absence, or if she did, Mr. Tidman was not aware of that person.

C. Union Involvement in this Matter

[191] CUPW was not named as a party respondent in this proceeding. Accordingly, I have not made any adverse findings against it, including its handling of such member vs. member/shop steward allegations of harassment.

VIII. REMEDY

[192] Having found the Complaints against Mr. Thambirajah and Canada Post substantiated in part, I turn now to the question of remedy under section 53 of the *CHRA*. The goal of the *CHRA* and other anti-discrimination human rights statutes is to "make a complainant whole", to put that person in a position s/he would have been in "but for the discrimination" the complainant suffered. The *CHRA* is a remedial statute. Its goal is to compensate, not punish a respondent. That said, aggravating (as opposed to punitive) and mitigating factors are relevant to the award of compensation. The remedy must be reasonable and have a nexus or causal link to the discriminatory practice found to have occurred.

A. Remedy vis-à-vis the Complaint Against Mr. Thambirajah

"Pain and Suffering" and "Wilful and Reckless" Compensation For the Sexual Harassment

[193] I have reviewed the following Tribunal sexual harassment jurisprudence dealing with compensation "for any pain and suffering that the victim experienced as a result of the discriminatory practice" up to a limit of $20,000 and "special compensation" for discriminatory practices that have been engaged in wilfully or recklessly up to a limit of $20,000, pursuant to sections 53(2)(e) and 53(3) of the *CHRA*, respectively. In addition to authorities filed by the parties, I reviewed the following decisions: *Woiden v. Lynn*, 2002 CanLII 8171; *Bushey v. Sharma*, 2003 CHRT 21; *Des Rosiers et al. v. Barbe*, 2003 CHRT 24; *Goodwin v. Birkett*, 2004

CHRT 29; *Mowat v. Canadian Armed Forces*, 2005 CHRT 31; *Hunt v. Transport One Ltd.*, 2008 CHRT 23; and *Naistus v. Chief*, 2009 CHRT 4.

[194] Regarding the issue of "wilful" and "reckless" discriminatory conduct, I am satisfied that such an award is appropriate in this matter. Mr. Thambirajah ought to have known that his actions and words on November 9, 2005 were "unwelcome" by Ms. Cassidy. I believe he did know that such conduct was unworthy of a co-worker and especially, a union shop steward. At the very least, his actions and words constituted sexual harassment against Ms. Cassidy done in a "reckless" fashion, with no regard as to the consequences.

[195] To this end, I am awarding compensation for pain and suffering in the amount of $5,000 and "special compensation" in the amount of $2,500 to the Complainant. I determined the quantum upon reviewing the awards in the sexual harassment cases listed above. Here it was a single event and the physical contact was of a brief duration and of a relatively less severe nature than in other cases.

"Pain and Suffering" and "Wilful and Reckless" Compensation For the Retaliation

[196] The prohibition against retaliation under section 14.1 of the *CHRA* is a separate, specialized type of "discriminatory practice". It calls for the consideration of a separate head of damages in the form of compensation. I expressed earlier the importance of complainants being able to file a *CHRA* complaint with the Commission and pursue their rights under the *CHRA* to be free from discrimination and harassment without the fear of retaliation or reprisal. This is especially so during the conduct of the proceeding before the Tribunal. Thus, the violation of her right to be free from retaliation attracts compensation for Ms. Cassidy's "pain and suffering". I also find that Mr. Thambirajah retaliated against her (i.e., the parking lot incident) "wilfully" or at the very least "recklessly". Given the history that he had with Ms. Cassidy leading up to and

during the hearing, he should have been nowhere near her vehicle and her after the hearing, let alone looking at her licence plate, then looking back at her with a smile or grin.

[197] In this regard, I am awarding compensation for pain and suffering in the amount of $2,000 and "special compensation" in the amount of $500 to the Complainant. The quantum reflects the relatively limited impact that the discriminatory act of retaliation had on the Complainant.

Other Remedies Sought by the Complainant

[198] In her Statement of Particulars, the Complainant requested the following additional remedies against the Personal Respondent: that he be dismissed from his job at Canada Post, or in the alternative, be disciplined; and that he "be stripped of all his union committees" and his position as shop steward.

[199] It is unclear whether I have the jurisdiction to grant these requested remedies, given the lack of submissions on this point from the parties. This is separate from the issue of whether these remedies would be appropriately linked causally to the discriminatory acts of sexual harassment and retaliation which I have found. As well, CUPW is not a party to these proceedings and would no doubt be impacted from said remedies as they relate to the Collective Agreement negotiated between it and Canada Post. For the foregoing reasons, I decline to order said remedies.

B. Remedy vis-à-vis the Complaint Against Canada Post

[200] Canada Post's counsel argues at para. 88 of his final submissions: "As Ms. Cassidy made no submission whatsoever as to remedy, the Corporation submits that it is too late for her to now seek any remedy with respect to wages or compensation for pain and suffering." I disagree.

While it is true the Complainant did not make any final submissions (for the reasons enumerated in detail in this Decision), Canada Post (and Mr. Thambirajah) were put on notice of her requested remedies early on in the proceeding, as listed in her Statement of Particulars. There is also ample evidence – *viva voce* and documentary – pertaining to said requested remedies, and on which Mr. Machelak cross-examined. Indeed, counsel addresses the merits of her claim for lost wages at paras. 89-90 of his final submissions.

"Pain and Suffering" and "Wilful and Reckless" Compensation

[201] I outlined earlier in the Liability section my findings against Canada Post. They were related to the November 9, 2005 touching/comment incident only. And so the remedy must match the discriminatory conduct so found – the "causal link". I have also factored in mitigating circumstances, including the many positive, ameliorative things Canada Post did for the Complainant, mostly at the direction of Ms. Edmunds. Furthermore, I have considered the lack of action and "mixed signals" sent by the Complainant in matters such as bidding/transferring out of Willowdale D. As well, I do not believe that any violation of her rights by Canada Post was engaged in wilfully or recklessly and so no such award will be made. I wish to add that, just because an employer did not exercise "all due diligence", does not mean *per se* that the employer was "reckless" or "wilful", attracting such compensation pursuant to section 53(3) of the *CHRA*.

[202] Consequently and based on the foregoing, I am awarding compensation for "pain and suffering" to the Complainant by Canada Post in the amount of $5,000. The quantum has been arrived at considering the emotional impact and anxiety on the Complainant as a result of Canada Post's lack of due diligence.

Lost Wages

[203] By the end of Ms. Cassidy's cross-examination, she was claiming for lost wages for 17 days, beginning on April 12, 2006 and concluding on November 30, 2007. No claim was made for days between November 9, 2005 and April 11, 2006. During the hearing, the Complainant, both directly and through her representative Ms. Marshall, made it clear that she is claiming as against Canada Post for lost wages, not as against Mr. Thambirajah.

[204] As with other remedial heads, any order for lost wages to be paid must be linked to the violation of her rights under the *CHRA* by Canada Post. Even if I were to assess this particular remedial request from the perspective of section 65 (1) - i.e., Canada Post "standing in the shoes" of Mr. Thambirajah – the days claimed as lost wages would still have to be causally linked to the discriminatory practices found against Mr. Thambirajah (i.e., the November 9, 2005 touching/comment incident and the retaliation incident). The first day claimed – April 12, 2006 – was the day both she and the Personal Respondent engaged in inappropriate language and name-calling. I have not found Canada Post liable for their handling of the swearing/language behaviour of the Complainant and Personal Respondent during the period of April 10-19, 2006, nor have I found the Personal Respondent liable for these incidents. Accordingly, Canada Post is not liable to compensate her for using a vacation day on April 12, 2006.

[205] The 16 other claimed days, beginning on November 15, 2006 and ending November 30, 2007 all occurred after the April 25, 2006 notification by Ms. Cassidy of the November 9, 2005 incident. They were taken, according to the Complainant, as a result of the stress and "ongoing harassment" by Mr. Thambirajah. They are not tied or linked to the items for which I found Canada Post lacking in due diligence – e.g., missing the 10-day discipline period, not being more proactive and acting sooner with regards to separating the Complainant and Personal Respondent, etc. Nor are they causally linked to or "as a result of the discriminatory practices" that I have found against the Personal Respondent. Accordingly, I decline to make an order against Canada Post for compensation of those lost wages.

Complainant and Personal Respondent Never Working Together Again

[206] To prevent a future re-occurrence of harassment or retaliation by Mr. Thambirajah against Ms. Cassidy while the two are employees of Canada Post, I am granting her request for an Order that Canada Post ensure that Ms. Cassidy and Mr. Thambirajah are never placed in the same station/depot again. I am satisfied that such an Order falls within my broad remedial jurisdiction under the *CHRA*.[1]

Her Own Designated Mail Route

[207] In her Statement of Particulars, the Complainant requested an Order requiring Canada Post to assign a designated mail route to Ms. Cassidy. She wrote, "I feel that I have earned it after what I have been subject [*sic*] to endure in the last 4 years, and would like to have the freedom of choice." I decline to grant this remedy because there is no causal link established between the remedy requested and the discriminatory practices that I have found against Canada Post (or the Personal Respondent for that matter).

C. Interest on Compensation Awards Payable by the Respondents

[208] Simple Interest, calculated on a yearly basis, and at a rate equivalent to the Bank of Canada rate (monthly series), shall be awarded on all compensation ordered. The interest period shall run from the date of the filing of the Complainant's *CHRA* complaint with the Commission to the payment of said compensation awards with respect to the "harassment" findings of

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[1] See similarly the decision of the Ontario Board of Inquiry (Human Rights) in *McKinnon v. Ontario (Ministry of Correctional Services (No. 3)* (1998), 32 C.H.R.R. D/1 which included an Order for the re-assignment of a respondent supervisor from the same Correctional Centre as the complainant and that said supervisor and another one would never work in the same facility as the complainant in the future. Said Order was not disturbed by the courts.

liability. With respect to the compensation for “retaliation”, the interest period shall run from the date of the granting of the motion to amend the Complaint to include allegations of retaliation to the payment of said compensation award.

D. Retention of Jurisdiction

[209] I shall remain seized to deal with any implementation issues for a period of three months from the date of this Decision and Order.

IX. ORDER

[210] Having found the Complaints of Doris Cassidy against Raj Thambirajah and Canada Post Corporation substantiated in part, the Tribunal orders that:

Compensation

(1) Mr. Thambirajah shall pay the Complainant compensation for pain and suffering for the sexual harassment in the amount of $5,000 and “special compensation” in the amount of $2,500;

(2) Mr. Thambirajah shall pay the Complainant compensation for pain and suffering for the retaliation in the amount of $2,000 and “special compensation” in the amount of $500;

(3) Canada Post shall pay the Complainant compensation for pain and suffering in the amount of $5,000;

Complainant and Personal Respondent Never Working Together Again

(4) Canada Post shall ensure that Ms. Cassidy and Mr. Thambirajah are never placed in the same station/depot again;

Interest on Compensation Awards Payable By the Respondents

(5) Simple Interest, calculated on a yearly basis, and at a rate equivalent to the Bank of Canada rate (monthly series), shall be awarded on all compensation ordered. The interest period shall run from the date of the filing of the Complainant's *CHRA* complaint with the Commission to the payment of said compensation awards with respect to the "harassment" findings of liability. With respect to the compensation for "retaliation", the interest period shall run from the date of the granting of the motion to amend the Complaint to include allegations of retaliation to the payment of said compensation award; and

Retention of Jurisdiction

(6) The Tribunal shall remain seized to deal with any implementation issues for a period of three months from the date of this Order.

Signed by

Matthew D. Garfield
Tribunal Member

OTTAWA, Ontario
November 23, 2012

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1415/4109 & T1416/4209

Style of Cause: Doris Cassidy v. Canada Post Corporation & Raj Thambirajah

Decision of the Tribunal Dated: November 23, 2012

Date and Place of Hearing: February 1-3, 5, 16-19, 2010
April 7-9, 2010
May 26-28, 31, 2010
July 20, 2010
March 14, 2011
October 4-7, 11, 2011
January 19, 2012
(Request to re-open hearing denied)

Toronto, Ontario

Appearances:

Julie Marshall,
(to November 10, 2010)
William Kelly
(November 10, 2010 – March 14, 2011;
April 25, 2011 – present)
Doris Cassidy(March 14, 2011 – April 25, 2011), for the Complainant

No one appearing, for the Canadian Human Rights Commission

Zygmunt Machelak, for the Respondent, Canada Post Corporation

Mark Platt, for the Respondent, Raj Thambirajah