Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

BETWEEN:

GUY WILLOUGHBY

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADA POST CORPORATION

Respondent

DECISION

MEMBER: Julie C. Lloyd

2007 CHRT 45
2007/10/26

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I. INTRODUCTION

[1] The complainant, Guy Willoughby, alleges that his employer, Canada Post Corporation (CP) discriminated against him on the basis of his disabilities, both physical and mental, in breach of either or both sections 7(a) or 7(b) of the *Canadian Human Rights Act* (*CHRA*). He alleges that CP engaged in a discriminatory practice first by placing him on a 3:30 a.m. to 11:30 a.m. shift on or about March 12, 2002, notwithstanding a medical direction that he work a regular day shift. He alleges that CP engaged in further discriminatory practice by refusing to continue his employment in or about April 12, 2002 and on or about February 14, 2003 as a result of his disabilities.

[2] The hearing extended 5 days in May of 2007. Both the complainant and the respondent participated at the hearing and were represented by legal counsel. The Canadian Human Rights Commission did not participate.

II. THE ISSUES

[3] The issues for determination in this complaint are as follows:

a) Has the complainant made out a *prima facie* case that CP engaged in a discriminatory practice by directing that he remain assigned to a 3:30 a.m. to 11:30 shift notwithstanding that one of the medical restrictions enumerated by his doctor was that he should work only a regular day shift?

b) Has the complainant made out a *prima facie* case that CP engaged in a discriminatory practice by refusing to continue his employment on or about April 12, 2002 as a result of his disabilities?

c) Has the complainant made out a *prima facie* case that CP engaged in a discriminatory practice by refusing to continue his employment on or about February 14, 2003 as a result of his disabilities?

d) If the complainant has made out a *prima facie* case of discrimination in respect of any or all of these allegations, has the respondent demonstrated that the decision or decisions made were the result of a *bona fide* occupational requirement under section 15 of the *CHRA*?

e) If one or more of the complaints is found to have been a discriminatory practice contrary to the *CHRA*, what remedies are appropriate?

III. THE EVIDENCE

A. Evidence of the Complainant

[4] Mr. Willoughby commenced his employment with CP in April of 1977. He was a mail service courier for approximately 13 years and was in 1990 promoted to the position of letter carrier supervisor. He last worked for CP on April 15, 2002.

[5] In the fall of 1997, Mr. Willoughby was working as a letter carrier supervisor in Depot 11 and was assigned to a shift that commenced at 3:30 a.m. and ended at 11:30 a.m. He began to have difficulty performing his job and attended at his doctor for a medical assessment. Mr Willoughby's doctor advised CP that he suffered from an injury to his knees and for this reason Mr. Willoughby should not be required to do excessive walking, standing or lifting. The doctor also advised that Mr. Willoughby was suffering from a sleep disorder and that he should be working a regular day shift and not the 3:30 a.m. shift.

[6] After some weeks of delay, Mr. Willoughby's medical requirements were accommodated by CP. He was assigned as the day shift supervisor in the Central Re-direction Centre (CRC). The CRC unit was described by several of CP's witnesses as a rehabilitation unit as all of the employees working in the unit had some permanent work restrictions and were in need of accommodation. The employees in this unit processed and sorted mail that required re-direction because a customer had registered a change of address notice. The jobs in the CRC unit were

largely sedentary and hence well suited for employees who had mobility restrictions. Mr Willoughby's placement in this unit was considered to be permanent.

[7] In the spring of 2000 the CRC unit was disbanded. The non-supervisory employees of the unit were re-deployed to the depots and performed their duties in those depots rather than in a single centralized location. As these employees were to report to the supervisors working in the depots to which they had been assigned, Mr. Willoughby's supervisory position became redundant.

[8] After the CRC unit was disbanded, Mr. Willoughby was assigned to an administrative project for a few weeks on a day shift. After this project concluded, he was re-assigned to the training office, again, on a day shift. His job in the training office was to assign employees to job vacancies. At the time, job vacancies were posted in the different CP depots and any employee who might want any particular job would apply for it. Positions were filled according to seniority and Mr. Willoughby's job was to fill the position by assigning the most senior applicant to the job.

[9] Mr. Willoughby testified that he was not consulted in advance about this assignment. He testified that he found the position to be difficult and that it did not suit either his experience or his abilities. He acknowledged that he made numerous mistakes. He testified that his workload was extremely heavy and that the position required that he work long hours. Mr. Willoughby testified that he advised his supervisor he thought his poor job performance might be the result of dyslexia. Many of his mistakes resulted because he would transpose digits in employee start dates, which dates defined an employee's seniority. Mr. Willoughby had not been diagnosed with dyslexia, but the disorder ran in his family. Dyslexia is a learning disability that is typically manifested by difficulties in reading and writing experienced by persons of at least average intelligence.

[10] Mr. Willoughby received a poor performance evaluation from the supervisor in the training unit in April of 2001. He was sent for a medical assessment. Mr. Willoughby went to Dr. Dodd, a general practitioner and his family doctor. In a letter dated April 7, 2001, Dr. Dodd stated that Mr. Willoughby might suffer from dyslexia and recommended that he be assessed at the Glenrose Hospital in Edmonton, Alberta.

[11] Dr. Dodd wrote a further letter to CP dated July 19, 2001. The doctor stated that Mr Willoughby had not received an assessment at the Glenrose Hospital, in part because of the cost involved and in part because he had been advised by Mr. Willoughby that his performance difficulties had resolved. He further advised that these difficulties had arisen as a result of the stress and fatigue he experienced as he learned a new job, and not from dyslexia.

[12] In July or August of 2001, Mr. Willoughby was removed from his position in the training department and was assigned back to the supervisor position in Depot 11. He was placed on the 3:30 a.m. to 11:30 a.m. shift; the shift he had before the 1997 medical direction that this shift was not appropriate in light of his medical condition. Mr. Willoughby testified that even though he knew that this assignment did not comply with his medical restrictions, he felt he had no choice but to accept the position or he would lose his job.

[13] Almost immediately upon returning to the Depot 11 position, Mr. Willoughby's job performance became quite poor. He testified that the increased physical demands of this position and the return to a night shift caused his health, both mental and physical, to deteriorate rapidly and that as a result, his job performance suffered. It was Mr. Willoughby's evidence that he had a meeting with his supervisor, Ms. Sample, in January of 2002. Ms. Sample had requested the meeting to discuss her concerns with his performance. It was Mr. Willoughby's evidence that he told his supervisor at this meeting that he had been seeing a psychologist and had been diagnosed with post traumatic stress disorder (PTSD). This condition, he thought, might be causing his job performance problems. CP directed Mr. Willoughby to obtain a new medical report.

[14] Mr. Willoughby's psychologist, Dr. Aprile Flickenger, wrote to CP in January, 2002. The psychologist confirmed that Mr. Willoughby suffered from PTSD and reported that he was making progress under her care. The psychologist described that the symptoms that Mr. Willoughby was experiencing as a result of this condition made daily functioning difficult. In particular, Mr. Willoughby suffered from nightmares and other sleep disturbances. He was also experiencing flashbacks of prior traumatic events in his life. The psychologist described that other symptoms experienced by Mr. Willoughby included feelings of isolation, low self-esteem and occasional paranoia. Dr. Flickenger identified that these symptoms were exacerbated by the

shift to which he had been assigned, being the 3:30 a.m. shift, and directed that he was to be assigned to a day shift.

[15] Dr. Dodd also wrote to CP in January of 2002. He confirmed that Mr. Willoughby was seeing a registered psychologist for treatment of PTSD and further advised that he was himself imposing no medical restrictions in respect of Mr. Willoughby.

[16] Mr. Willoughby remained on the 3:30 a.m. shift after CP had received this information from the psychologist.

[17] Dr. Dodd wrote a further letter to CP dated March 5, 2002. This letter was written in response to correspondence received from CP advising him that it found that his January, 2002 letter appeared to contradict the letter received that same month from Dr. Flickenger. Dr Flickenger, CP wrote, directed that Mr. Willoughby had medical restrictions, while his letter suggested that he had no restrictions. CP asked Dr. Dodd for clarification. Dr. Dodd, in his letter of March 5, confirmed that he supported the diagnosis and the medical restrictions imposed by the psychologist.

[18] Dr. Esmail of CP's occupations health services department, wrote a memo dated March 12, 2002, advising that in light of Dr. Dodd's most recent correspondence, the requirement of day shift only appeared to be reasonable in the circumstances. Dr. Esmail suggested that CP follow up with the psychologist in a month's time to see whether the restriction was still necessary.

[19] On March 19, 2002, after having received this memorandum from Dr. Esmail, Bill Stevenson, zone manager for CP, advised Dr. Esmail that Mr. Willoughby would remain on the 3:30 a.m. shift.

[20] By letter dated April 11, 2002, Dr. Dodd again wrote to CP directing that Mr. Willoughby should be working only day shift.

[21] On or about April 15, 2002, Mr. Willoughby met with Tom Duncan, a labour relations officer with CP. Mr. Willoughby testified that Mr. Duncan advised him CP had no positions available to meet his medical restrictions and that he should go on disability leave. Mr Willoughby went on sick leave for 95 days until his sick day credits had been exhausted. He then applied for and began to receive disability benefits from Sun Life Financial (Sun Life), CP's medical and disability benefit provider. In his application for disability benefits, Mr. Willoughby wrote the following in response to a question asking why he could not return to work: "I would have continued working. My doctor says, and Canada Post's doctor says I should work a normal day shift, but Canada Post says that there are no day shift positions that are within my physical limitations."

[22] Mr. Willoughby testified that in April of 2002 there were numerous jobs at CP that would accommodate his restrictions and that he could do successfully. His evidence was that if put on day shift in one of the larger of CP's depots, there were sedentary administrative tasks that could be bundled to afford him a productive position. He further testified that the day shift supervisor positions were already more sedentary as letter carriers left the building fairly early in the shift and so tasks that required a significant amount of walking, like monitoring the delivery and the processing of the mail and monitoring the attendance and the work of employees, would end early in the shift.

[23] Mr. Willoughby also testified that he could have performed the job held by the former CRC employees who had been re-assigned to individual depots. These positions were performed by members of the Canadian Union of Postal Workers (CUPW). Mr. Willoughby's union was the Association of Postal Officials of Canada (APOC). He further testified that there were positions performed by employees in the Public Service Alliance of Canada (PSAC) bargaining unit, which employees did primarily administrative work. He could, he testified, have been accommodated with a position in this bargaining unit.

[24] Mr. Willoughby testified that when he learned that CP took the position that it could not accommodate him, he was devastated. He felt abandoned by CP. He felt betrayed to learn that after 24 years of service with this company it could not find a way to continue his employment

and to accommodate his restrictions. Mr. Willoughby testified that he became extremely depressed, that the psychological symptoms described earlier by his psychologist as arising from PTSD worsened. He was unable to sleep, ate little and rarely left his home. He felt worthless, had no self-esteem and worried about his future ability to meet his financial needs. He continued to receive treatment from his psychologist.

[25] In October or November of 2002, Mr. Willoughby met with Sun Life to discuss a graduated back to work plan. Mr. Willoughby testified that he was anxious to get back to work. Sun Life had collected updated medical information from Mr. Willoughby's doctor and psychologist in advance of preparing the back to work plan. His psychologist, Dr. Flickenger, reported that his condition was improving and that his prognosis was good. She indicated that he still required a day shift and should not be placed in a supervisory position for the time being. Mr Willoughby's family doctor, Dr. Dodd, confirmed that he was to be assigned only to a regular day shift and further, that he not be made to walk or stand excessively or lift repetitively. The plan arrived at by Sun Life and communicated to CP in November of 2002 was as follows:

- That Mr. Willoughby start working four hour shifts, five days per week;
- That he work day shift;
- That he be placed in a non-supervisory position, at least for the time being;
- That he avoid excessive walking, standing and lifting.

[26] Mr. Willoughby testified that he did not hear anything from either Sun Life or CP in response to this proposal. He telephoned CP and asked that a meeting be set up to discuss the plan for his return to work. A meeting was held on February 14, 2003. At this meeting were Mr. Willoughby, Mr. Duncan, a CP payroll employee, a representative of CP's occupational health services, and a representative of Sun Life. Mr. Willoughby testified that he was advised by Mr. Duncan at that meeting that there were no positions available to meet his medical restrictions. Mr. Willoughby never returned to CP.

[27] Mr. Willoughby obtained employment at a car dealership in July, 2004 and resigned from CP. He testified that he was at first unable to look for work because of the emotional and psychological distress that CP's conduct had caused. He testified further that when he became able to look for work he was unable to find a job. Mr. Willoughby was using a cane during this period of time and testified that he believed this made prospective employers reluctant to hire him.

B. Evidence of the Respondent

[28] Mr. Duncan had, at the time of the hearing, been a labour relations officer for CP for approximately ten years. Mr. Duncan confirmed that CP had assigned Mr. Willoughby to the CRC unit as a day shift supervisor in 1997 to accommodate his physical restrictions and the medical direction that he work only a regular day shift.

[29] Mr. Duncan also confirmed that upon the CRC unit being disbanded, CP continued to accommodate Mr. Willoughby's requirements by assigning him first to a short term administrative project and then to the training office.

[30] Mr. Duncan did not know why Mr. Willoughby had been assigned back to Depot 11 on the 3:30 a.m. shift in July or August of 2001. The decision, he testified, was made by the zone manager, Mr. Bill Stevenson. He did not discuss the matter with Mr. Stevenson at any time. Mr. Stevenson died in or around 2003. Mr. Duncan also testified that Mr. Stevenson maintained a file on Mr. Willoughby that detailed the steps taken by CP to accommodate him since 1997. Mr. Duncan had never read the file and it had been lost by the time this hearing had commenced. Mr. Duncan speculated, however, that the 3:30 a.m. shift at Depot 11 was the only position available at the time.

[31] CP led no other evidence that would explain why Mr. Willoughby was assigned to the 3:30 a.m. shift and no evidence that would explain why he was not re-assigned to a day shift after CP received medical information in January and in March of 2002.

[32] Mr. Duncan testified that on or about April 15, 2002 he had a meeting with Mr. Willoughby and that at this meeting Mr. Willoughby expressed to him that he felt he was unable to work in any capacity at CP. He asked Mr. Duncan to help him obtain disability benefits. Mr. Duncan denied that he advised Mr. Willoughby that there were no positions available to accommodate him and so he should go on disability, as was Mr. Willoughby's evidence.

[33] Mr. Duncan also testified that even had Mr. Willoughby wanted to remain actively employed with CP, there were no positions available in April of 2002. Mr. Duncan testified that all of the positions available within his bargaining unit, APOC, required either a significant amount of walking and standing, which Mr. Willoughby could not do, or required either or both of an acute attention to detail and competence with computers. Mr. Duncan testified that he was convinced that Mr. Willoughby could not do any of these more sedentary jobs in part because in his experience, Mr. Willoughby had demonstrated an inability to perform administrative and other more sedentary jobs since he had been promoted to the position of supervisor in 1990 and did not possess adequate computer skills. Further, Mr. Duncan testified that Mr. Willoughby's poor performance in the training department was further evidence that he was unable to perform administrative jobs to an acceptable standard.

[34] Mr. Duncan testified that he was surprised to learn in 1990 that Mr. Willoughby had been promoted to letter carrier supervisor. He had worked with Mr. Willoughby before 1990 as a mail courier and testified that he had found his competence to be questionable in that position. In 1993 or 1994, Mr. Duncan and Mr. Willoughby worked together in the same depot. Mr. Duncan was the superintendent and superior to Mr. Willoughby, who was a supervisor. Mr. Duncan testified that Mr. Willoughby could not grasp even very simple concepts, that he was sloppy and neglectful at his duties, that he was unable to secure the necessary relationships with employees he was responsible for and that he made numerous administrative mistakes. He made, for example, numerous errors in vacation scheduling and would often fail to offer overtime to employees in the order dictated by the collective agreement. Under the collective agreement, if an employee is not offered overtime when it is his or her turn, CP was required to pay the employee anyway. Mr. Duncan testified that he took over some of Mr. Willoughby's administrative tasks because of the number of errors he made.

[35] Mr. Duncan also testified that Mr. Willoughby was "infamous" for damaging and deleting important computer software while attempting to modify or improve it. Mr. Duncan described that while he and Mr. Willoughby were in adjacent depots, Mr. Willoughby would regularly run in to his office in great distress having erased important system and other software. Mr. Duncan described that he constantly needed to call in technical support to fix computers damaged by Mr. Willoughby. Mr. Duncan described that computers were "irresistible" to Mr. Willoughby. He described an incident that had occurred in 1993 or 1994 while he was Mr. Willoughby's superintendent. Mr. Duncan had received a new laptop computer from CP for use at work. Mr. Duncan testified that he "begged" Mr. Willoughby not to touch his computer one day before leaving the depot. Mr. Duncan described that when he returned, "the computer was black" and that it never worked again: "It is black to this day."

[36] Mr. Duncan testified that he was also aware that Mr. Willoughby was performing poorly in the training department in 2001. Mr. Willoughby, he testified, would often come into his office and would express increasing distress and concern that he was unable to perform the training department position adequately.

[37] Ms. Gavin, a team leader in CP's training unit, gave further evidence of Mr. Willoughby's performance difficulties in the training department. She testified that Mr. Willoughby was easily distracted and made many mistakes during his tenure in the department. Ms. Gavin testified that she, together with Ms. Acton, the manager of CP's training unit, met with Mr. Willoughby in early April of 2001 to discuss their concerns about his performance. Ms Acton also gave evidence at the hearing. She testified that during this meeting, Mr. Willoughby acknowledged that his performance was poor, but that he was unable to give any adequate reason for his many mistakes. Mr. Willoughby described that he was suffering from some personal problems of long standing, though he did not elaborate any further on the nature of these problems. Neither Ms. Gavin nor Ms. Acton recalled Mr. Willoughby advising them that he thought he might be suffering from dyslexia.

[38] Ms. Gavin testified that after this meeting, she and Ms. Acton decided that Mr. Willoughby should be sent for a medical examination and was later told that CP had received

medical information advising that the difficulties giving rise to Mr. Willoughby's poor job performance had resolved. She testified that she felt she had no choice but to ask that Mr. Willoughby be transferred, there being no medical explanation for his continuing poor performance.

[39] Mr. Duncan testified that he was aware that Mr. Willoughby was not performing well after he had been transferred back to Depot 11 in the summer of 2001 on the 3:30 a.m. shift. Mr. Willoughby continued to visit him in his office on a regular basis and expressed that he was unable to meet the demands of this position.

[40] Ms. Sample, superintendent of Depot 11 when Mr. Willoughby was re-assigned to that depot in July or August of 2001, gave further evidence of Mr. Willoughby's performance problems in the depot. She testified that his job performance was well below the required standard almost immediately after he had been assigned to the depot. Ms. Sample testified that Mr. Willoughby was almost entirely unable to walk, and therefore could not adequately supervise the employees, and neither could he adequately supervise the delivery or the processing of mail. Further, he continued to make numerous mistakes in the administrative aspects of the position.

[41] Mr. Duncan testified that because of Mr. Willoughby's poor job performance and because of his medical restrictions there were no positions available at CP to accommodate him. Mr. Duncan canvassed numerous positions at CP, but found none that Mr. Willoughby could perform adequately. He could not, Mr. Duncan testified, continue to be a letter carrier supervisor because that position required that a person walk around the depot for about 90% of an eight hour shift. Mr. Duncan also testified that it would not be possible to bundle administrative tasks that other supervisors were performing to create an accommodative position for Mr. Willoughby as there was very little administrative work done by any supervisors. Bundling these jobs would not fill a day.

[42] Mr. Duncan testified that positions in CP's sales department also entailed a significant amount of walking. He also testified that the depot assistant positions, positions that he first described as being assigned as an accommodation for injured or aging employees, would be

unsuitable for Mr. Willoughby because they entailed significant walking and lifting: “They (the depot assistants) work harder than you and me put together”. He described data entry and other administrative functions done by APOC employees such as those done in the route management and postal code maintenance departments as being highly skilled positions that demanded a highly tuned attention to detail. Mr. Willoughby, Mr. Duncan and others testified, had demonstrated that he was unable to attend adequately to detail and so could not perform these administrative assignments adequately.

[43] Mr. Duncan gave evidence that CP did not formally canvass suitable positions that might be available in other bargaining units. Some of the job functions at CP were performed by employees who were members of the CUPW bargaining unit. As an example, the long and short letter sortation unit was described as a sedentary position assigned to injured workers. Mr. Duncan described that CP did not consider placing Mr. Willoughby in one of the CUPW positions because serious consequences would be visited on CUPW members should Mr. Willoughby be “parachuted” in to one of the CUPW positions. Mr. Duncan testified that should Mr. Willoughby be placed in a job outside his collective agreement, someone else would get “bumped out on to the street” if there were no vacancies in any particular unit. The only alternative should there be a full complement of workers would be to create a position for Mr. Willoughby and that, Mr. Duncan testified, is beyond any employer’s obligation when accommodating an employee. He did not know if there were any vacancies at the relevant time in the CUPW bargaining unit that would have been suitable for Mr. Willoughby. He had not checked.

[44] Mr. Duncan also gave evidence that at the relevant time there were five employees in the PSAC bargaining unit who were surplus. Members of the PSAC bargaining unit did primarily administrative functions, many of which were sedentary. The positions formerly held by these surplus PSAC employees had become redundant as CP began to computerize more and more of its operations. Under the terms of a collective agreement, CP had agreed to keep these people on payroll. Mr. Duncan describes that these people were kept busy doing “make-work projects,” working on tasks like data entry. These employees were also used to backfill job vacancies when they arose. Mr. Kordoban testified that CP had at one time cancelled a contract that it had with a

security company so that some of these PSAC employees could perform those functions while they remained surplus. Mr. Duncan testified that as CP was continuing to employ surplus workers, it was clear that there were no job vacancies in the PSAC bargaining unit.

[45] Mr. Duncan testified that in April of 2002, when he decided that accommodation was not possible, he had not reviewed any of the medical information contained in Mr. Willoughby's employment file. His estimation of Mr. Willoughby's medical restrictions came as a result of his observations of and his conversations with Mr. Willoughby. Mr. Duncan understood from these observations and conversations that Mr. Willoughby's only medical restriction was that he could not walk or stand much. He was unaware that Mr. Willoughby had been diagnosed with a sleep disorder, had been later diagnosed with PTSD, or that his doctor directed that he should work only a regular day shift.

[46] Mr. Duncan testified that in advance of his meeting with Mr. Willoughby in February of 2003, ten months after he had last seen him, he had not consulted Mr. Willoughby's employment file or read any medical reports. He was unaware of the Sun Life letter sent to CP in November of 2002 outlining Mr. Willoughby's medical restrictions and its proposal by which Mr. Willoughby could return to work. He testified that his understanding that there had been no change in Mr. Willoughby's restrictions came from the comments made at the meeting by a CP nurse.

[47] Mr. Duncan also testified that he had made no specific inquiries about available job positions at CP that might be available to accommodate Mr. Willoughby in advance of or after the February, 2003 meeting. It was his testimony that as he understood from the comments of the CP nurse that Mr. Willoughby's restrictions had not changed, CP's position had not changed: there was no work available.

IV. ANALYSIS

[48] Section 7(a) of the *CHRA* states that it is a discriminatory practice, whether directly or indirectly, to refuse to employ or to continue to employ any individual on a prohibited ground of

discrimination. Section 7(b) states that it is also a discriminatory practice, whether directly or indirectly, in the course of employment, to differentiate adversely in relation to an employee on a prohibited ground of discrimination. Disability is a prohibited ground of discrimination enumerated in section 3, and section 25 directs that this ground prohibits discrimination on the basis of either physical or mental disability.

[49] The onus is first on the complainant to establish a *prima facie* case of discrimination.

A. Has the complainant demonstrated a *prima facie* case of discrimination on the basis of disability?

[50] A *prima facie* case of discrimination is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favor, in the absence of an answer from the respondent employer. The respondent's answer is not to be considered when determining whether a *prima facie* case has been made out. (*O'Malley* v. *Simpson-Sears Ltd.* [1985], 2 S.C.R. 536 at para 28, see also *Dhanjal* v. *Air Canada*, (1997) 139 F.T.R. 37 at para. 6 and *Moore* v. *Canada Post Corporation and Canadian Union of Postal Workers*, 2007 CHRT 31 at para. 85). A complainant is not required to prove that discrimination was the only factor influencing the conduct which is the subject of the complaint. It is sufficient that a complainant make out a *prima facie* case that discrimination is a factor. (See *Basi* v. *Canadian National Railway Company*, (1988) 9 C.H.R.R. D/5029).

[51] Mr. Willoughby's allegations of discrimination are first that on or about March 12, 2002, CP continued his assignment to the 3:30 a.m. shift after having received a letter from his doctor directing that he required day shift assignments, and second, that CP refused to continue his employment in both April of 2002 and February of 2003 as a result of his disabilities.

(i) Has a *prima facie* case been made out in respect of the first allegation: continuing the 3:30 a.m. shift assignment in March, 2002?

[52] Mr. Willoughby alleges that when CP received the letter of Dr. Dodd in March of 2002, directing that he required a day shift assignment, its decision to continue his assignment to the 3:30 a.m. shift was a discriminatory practice. This allegation engages section 7(b) of the *CHRA* which directs that it is a discriminatory practice for an employer, in the course of employment, to differentiate adversely in relation to an employee on a prohibited ground of discrimination.

[53] In *Hutchinson* v. *Canada (Minister of the Environmen*t, [2003] F.C.J. No. 439 (FCA), Pelletier JA, writing for a three member panel of the Court, directs that when considering a complaint of discrimination that arises as a result of a course of conduct between an employer and employee, rather than from a discrete and coherent employment policy, the appropriate question to ask when considering whether a complainant has made out a *prima facie* case of discrimination under section 7(b) is whether the transaction between the parties taken as a whole discloses adverse treatment on a prohibited ground (see paragraphs 75 and 76). There is no specific test or analysis that applies where one is considering whether a *prima facie* case is made under section 7(b). This Tribunal must be flexible, not overly legalistic in order to advance one of the broad purposes of the *CHRA*, being the elimination of discrimination in the workplace (*Morris* v. *Canada Armed Forces* [2005] F.C.A. 154 at paragraphs 27 to 30). Analyses made under section 7(b) must be made on a case by case basis and in a manner sensitive to the factual context.

[54] I find that Mr. Willoughby has made out a *prima facie* case of discrimination. CP had accommodated his medical restrictions continuously since 1997, including his need to work day shifts. Then, abruptly, in the summer of 2001, CP assigned Mr. Willoughby back to the 3:30 a.m. shift. When CP received medical information in March of 2002 that Mr. Willoughby could work only a day shift, CP kept him on the 3:30 a.m. shift. There can be no question that CP's course of conduct visited an adverse effect on Mr. Willoughby on the basis of his disability: CP's decision was directly contrary to the clear direction of his doctor and caused his medical condition to worsen. I also find that Mr. Willoughby made out a *prima facie* case that he was treated not just adversely, but differentially on the basis of his disability. There is no free-standing right to accommodation under the *CHRA* as was recently observed by this Tribunal in *Moore* v. *Canada Post* 2007 CHRT 31 (paragraph 86). However, I find that Mr. Willoughby's evidence that his

employer received medical direction identifying a work restriction and that the restriction was not accommodated, makes out a *prima facie* case of differential treatment. I find that Mr. Willoughby has made out a *prima facie* case that he was treated adversely and differentially by CP on the basis of his disabilities.

(ii) Has a *prima facie* case been made out on the second allegation: CP's April, 2002 decision not to continue his employment?

[55] Mr. Willoughby testified that in April of 2002, Mr. Duncan advised him that there were no positions available to accommodate him and that he should apply for disability benefits.

[56] I find that a *prima facie* case has been made out in respect of this second allegation. Mr. Willoughby's evidence, if believed, would prove that CP's refusal to continue his employment on April 12, 2002 arose, at least in part, as a result of his disabilities in breach of section 7(a) of the *CHRA* in the absence of an answer from CP.

(iii) Has a *prima facie* case been made out on the second allegation: CP's February 14, 2003 decision not to continue his employment?

[57] Sun Life wrote to CP in November of 2002 advising that Mr. Willoughby was ready to return to work and proposed a gradual return to work plan that included a discrete list of work restrictions. In February of 2003, Mr. Willoughby testified that he was advised that there were no positions available at CP to accommodate his restrictions.

[58] I find that a *prima facie* case has been made out. Mr. Willoughby's evidence, if believed, would prove that CP's refusal to continue his employment on February 14, 2003, arose as a result of his disabilities in breach of section 7(a) of the *CHRA* in the absence of an answer from CP.

B. Is CP able to justify its *prima facie* discriminatory conduct?

[59] Section 15(1) of the *CHRA* directs that where an employer's decision or course of conduct is established by the employer to have resulted from a *bona fide* occupational requirement, the decision is not a discriminatory practice.

[60] Section 15(2) of the *CHRA* clarifies that for a practice or a decision to be considered to be based on a *bona fide* occupational requirement, the employer must establish that accommodating the needs of the employee would impose undue hardship on the employer considering health, safety and cost.

[61] The Supreme Court of Canada decision in *British Columbia (Public Service Employee Relations Commission)* v. *British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)* [1999] 3 S.C.R. 3 (*Meiorin*), sets out the analysis by which a *bona fide* occupation requirement must be assessed.

[62] To establish that its conduct was justified, or that the conduct arose as the result of a *bona fide* occupational requirement, the employer must prove:

- that the standard was adopted or a decision made for a purpose rationally connected to a legitimate work related purpose (*Meiorin, supra* at para. 58);
- that the standard adopted or the decision was made in an honest and good faith belief it was necessary to fulfill this work related purpose (*Meiorin, supra* at para. 60);
- that the standard adopted or decision made was on the evidence reasonably necessary to accomplish this work related purpose (*Meiorin, supra* at para. 62).

(i) Is CP able to justify its decision to continue the 3:30 a.m. assignment in March of 2002?

[63] CP did not lead any direct evidence that would explain why Mr. Stevenson decided to keep Mr. Willoughby on the 3:30 a.m. shift after CP received medical information directing that he required day shift assignments. Mr. Stevenson was deceased at the time of the hearing and the personnel file he had maintained in respect of Mr. Willoughby could not be located. Mr. Duncan speculated that the 3:30 a.m. shift may have been the only position available at CP.

[64] Once a complainant has satisfied his or her evidentiary burden, the employer must then satisfy its evidentiary burden: the employer must lead evidence to establish, on a balance of probabilities, each step of the *Meiorin* analysis. CP is unable to discharge its evidentiary burden in respect of any of the three arms of the *Meiorin* test. Mr. Duncan in his evidence speculated as to the considerations that might have informed Mr. Stevenson's decision to continue Mr. Willoughby's assignment on the 3:30 a.m. shift. An employer cannot discharge the evidentiary burden established in *Meiorin* by speculation (*British Columbia (Superintendent of Motor Vehicles)* v. *British Columbia (Council of Human Rights)*, [1999] S.C.J. No. 73 at para. 41). I find that CP has been unable to satisfy its evidentiary burden in respect of this allegation.

(ii) Is CP able to justify its decision not to continue Mr. Willoughby's employment in April of 2002?

[65] CP's evidence in respect of this allegation gives rise to a consideration that is preliminary to a consideration of whether its conduct was justified as contemplated in the *Meiorin* test. Mr. Duncan testified that Mr. Willoughby asked to be put on disability and that Mr. Duncan merely facilitated his request by assisting him in his application for benefits. Thus, there was no "refusal" to continue to employ Mr. Willoughby. Mr. Duncan's evidence is, of course, contrary to that of Mr. Willoughby, who testified that he was told that there was nothing for him at CP and that his only recourse was to apply for disability benefits. I find that Mr. Willoughby's evidence is more credible and accept it over the evidence of Mr. Duncan. I note in coming to this conclusion that in the disability insurance application form completed by Mr. Willoughby, he writes as follows: "I would have continued working. My doctor says, and Canada Post's doctor says I should work a normal day shift, but Canada Post says that there are no day shift positions that are within my physical limitations." In addition, an e-mail exchange was introduced into evidence at

the hearing of this complaint. Mr. Duncan was asked by CP in 2003 to summarize the manner in which Mr. Willoughby's accommodation was handled. In his response, Mr. Duncan did not report that Mr. Willoughby had requested that he go on disability. One would expect that had Mr. Willoughby asked to go on disability, or at least, had Mr. Duncan interpreted their discussion that way, this information would have been included in Mr. Duncan's report in 2003. It was not.

[66] Having found that Mr. Willoughby did not ask to be put on disability, I will review the evidence led by CP in the alternative, being that there were no positions available at CP to accommodate Mr. Willoughby.

[67] Turning to the first arm of the test in *Meiorin,* did CP establish that its decision was made for a purpose rationally connected to the performance of the work? It was CP's evidence that the combination of Mr. Willoughby's medical restrictions and his performance difficulties that led it to conclude that there were no positions available to accommodate him within his own bargaining unit. Further, that assigning Mr. Willoughby to a position outside his own bargaining unit would create undue hardship as it would require that CP create a position for him. CP's purpose, it would appear, was to preserve efficiency in its operations. I find that CP's decision was made for a purpose rationally connected to the performance of the work.

[68] Moving to the second arm of the analysis, did CP establish that its decision was made in an honest and good faith belief that it was reasonably necessary to satisfy its legitimate work-related purpose? I find that CP has not established this second arm of the test. I find that CP knew or ought to have known that it had not properly considered the question of whether its decision was reasonably necessary in the circumstances.

[69] CP's refusal to continue to employ Mr. Willoughby was made by Mr. Duncan. Mr. Duncan was an experienced labour relations officer with CP. He testified that he had significant experience in accommodation issues, dealing with employees and representing the company at arbitrations. I find that Mr. Duncan had, or ought to have had, an extensive understanding of the considerations applicable to a determination of whether a decision to refuse employment was reasonably necessary as contemplated by the Supreme Court of Canada in

Meiorin and that he had an extensive understanding of the procedural requirements imposed on employers as they consider whether they can accommodate the needs of an employee. I will deal with the procedural and substantive elements of the third arm of the test in *Meiorin* shortly, but I will observe in making this finding that it was Mr. Duncan's evidence that he did not, in advance of concluding that CP could not accommodate Mr. Willoughby, even review his file or any of the medical reports that had been written. Had Mr. Duncan reviewed the file, he might have noticed that Mr. Willoughby had been assigned to a shift that was contrary to his medical requirements. He might have realized that perhaps Mr. Willoughby's job performance difficulties in Depot 11 arose at least in part as a result of this assignment. As I will explore at greater length shortly, individual assessment is a critical first step that an employer must undertake when considering the accommodative needs of an employee. An experienced labour relations officer could not, in my view, hold a good faith belief that he or she was properly attending to the considerations necessary to an analysis of whether refusing to continue the employment of an employee was reasonably necessary, where such person failed to undertake such a fundamental preliminary inquiry.

[70] Turning to the third step of the *Meiorin* test we ask whether the employer has established, on a balance of probabilities, that its decision was reasonably necessary to accomplish its work-related objectives. The decision will be reasonably necessary if the employer is able to demonstrate that it cannot accommodate an employee without experiencing undue hardship (*Meiorin, supra,* at para. 62, see also *Grismer, supra*, at para. 20 and *Hutchinson, supra,* at para. 70).

[71] CP concluded that it could offer no position to Mr. Willoughby in April of 2002. Was this decision reasonably necessary in the sense contemplated in *Meiorin*? I find that it was not.

[72] We are directed in this third arm of the test, to look first at the process or procedures adopted by the employer to assess the issue of accommodation, and second, to look at the substantive content of the decision made (*Meiorin, supra,* at para. 66).

[73] An employer must demonstrate that the processes or procedures adopted to assess the matter of accommodation were appropriate. An employer must be sensitive to and respectful of

the skills, capabilities and potential contributions of employees requiring accommodation (*Meiorin, supra,* at para. 64); an employer must investigate alternative approaches to accommodation that might be less discriminatory, and demonstrate that any alternative approach considered was rejected only for appropriate reasons (*Meiorin, supra,* at para. 65); an employer must be innovative and practical in assessing accommodation issues.

a) Was CP sensitive to Mr. Willoughby's skills, capabilities and potential contributions?

[74] I find that CP was not sensitive to and respectful of Mr. Willoughby's skills, capabilities and potential contributions. This procedural requirement can be met only if the employer can establish that it has taken all necessary steps to ensure that they have fairly and properly assessed the employee's skills, capabilities and potential contributions. CP led no evidence that it undertook such an analysis in advance of considering Mr. Willoughby's need for accommodation

[75] CP did lead evidence of Mr. Willoughby's job performance difficulties. I find, however, CP's evidence regarding these difficulties to have been overstated. The conduct that was described by Mr. Duncan is of a nature that one would expect to be met seriously by an employer. CP failed to produce a single poor performance review other than the one performed in 2001 while he was in the training unit. It was also CP's evidence that no disciplinary actions were taken in respect of Mr. Willoughby. If Mr. Willoughby was constantly and against direct orders ruining computers and important CP software, if he was utterly derelict and incompetent in his supervisory duties, surely a performance evaluation would make some mention of these matters. It is also difficult to believe that not a single disciplinary action was taken if the misconduct was as serious and relentless in nature as alleged.

[76] Further, while medical reports were in the hands of CP, Mr. Duncan had not familiarized himself with these reports in advance of making his decision. Surely, taking the necessary steps to fairly and properly assess an employee's limitations is a necessary element of the employer's duty to be respectful of and sensitive to the unique capacities and circumstances of each employee and a necessary element of this procedural requirement.

[77] The decision not to continue Mr. Willoughby's employment in April of 2002 was based on the impression of Mr. Willoughby's condition formed by Mr. Duncan during his visits with him. The impression formed by Mr. Duncan was incomplete. He was unaware of the PTSD diagnosis and Mr. Willoughby's need to work a regular day shift. Without accurate preliminary information an employer cannot reasonably expect to be successful at accommodating an employee. This step of information gathering is crucial to the accommodation process and this step was ignored by CP.

b) Did CP carefully consider alternative approaches to Mr. Willoughby's accommodation?

[78] CP led considerable evidence regarding the nature of alternate positions that might have been available to accommodate him within the APOC bargaining unit. I find that CP overstated the rigors of at least some of these jobs. I find that Mr. Duncan was not a very credible witness in respect of fairly describing the demands of at least some of the different positions that might have been made available to Mr. Willoughby. His evidence about the rigors of the depot assistant positions, after describing them as positions used to accommodate the aging and the infirm was less than credible. Further, his evidence was at times contradicted by other employees. For example, Mr. Kordoban, manager of CP's production, control and reporting department, also gave evidence at the hearing. His department dealt with staffing and budgeting among other things. Mr. Kordoban described that the route management and postal code management units were often used to temporarily accommodate injured employees and further that they did not have to be highly skilled; they learned on the job.

c) Did CP conduct an adequate search for alternative employment?

[79] I find that CP failed to demonstrate that it had carefully considered alternative approaches to Mr. Willoughby's accommodation before deciding in April of 2002, that it was unable to accommodate him. CP led evidence that Mr. Willoughby could not perform any of the jobs available in the APOC bargaining unit. The letter carrier supervisor job required too much walking. Other APOC positions, for example data entry in the route management unit or the postal code maintenance unit, required an exquisite attention to detail. I found earlier that CP over-stated the rigors of many of the positions that might have been made available to

Mr. Willoughby in his own bargaining unit. I also found earlier that CP over-stated Mr. Willoughby's short-comings as a supervisor. I find that CP did not demonstrate that there were no positions available within the APOC bargaining unit that could have accommodated Mr. Willoughby.

[80] Further, CP did not demonstrate that it had made adequate inquiries in respect of positions that may have been available in other of its collective bargaining units. First, CP's evidence, through its labour relations officer, was that it had not made any careful investigation of whether there might be positions available within the CUPW bargaining unit. Mr. Duncan, it seems, assumed that if Mr. Willoughby was accommodated in that unit, some CUPW employee would be "bounced into the street." This impressionistic evidence simply fails to meet the employer's procedural duty when considering accommodation. Mr. Duncan also testified that since there were surplus workers in the PSAC bargaining unit, there could be no positions available. This is not adequate investigation. The mere existence of surplus workers in the PSAC bargaining unit does not lead inexorably to the conclusion that there could be no positions that might be made available to Mr. Willoughby. Perhaps there was a position, or positions, that the surplus workers could not do, but that Mr. Willoughby could do. CP did not make these inquiries.

[81] Further, unions have a role where an employer is seeking accommodation for an employee. A union has an obligation to become involved in matters of accommodation where such involvement is required to make accommodation possible, there being no other reasonable alternate resolution available to an employer (*Renaud* v. *Central Okanagan School District No. 23* (1992) 95 D.L.R. 4th 577 (S.C.C.)). While the decision in *Renaud* dealt with the duty of a union to cooperate with an employer in respect of its own members, I see no principled reason why, where an employer's operation includes more than one union, a duty of cooperation would not attach to another bargaining unit if such cooperation is found to be the only way to secure accommodation for an employee. Had CP discovered a position that would have accommodated Mr. Willoughby, they could then have requested that the union cooperate. I find that CP should have canvassed both of CUPW and PSAC carefully to search for an accommodative position for Mr. Willoughby and I find that they did not.

d) Was CP adequately flexible and creative?

[82] Employers must be innovative in their search to accommodate an employee. They must be flexible and creative. CP did not demonstrate adequate innovation, flexibility or creativity. CP dismissed out of hand any possibility that they could have bundled different tasks to provide an accommodative position for Mr. Willoughby. CP led evidence that there were insufficient administrative tasks performed by supervisors in a single depot to create a full time position for Mr. Willoughby. It did not, however, lead evidence that CP looked more broadly at its operations to determine whether there were other tasks that could be bundled to accommodate Mr. Willoughby.

[83] I find the decision in *Saunders* v. *Kentville (Town)* [2004] N.S.H.R.B.I.D. No. 9 to be instructive. In that case, a Nova Scotia Board of inquiry considered the complaint of a police officer alleging that she was not accommodated by her detachment because of her sex/pregnancy. Chair Deveau employed a *Meiorin* analysis in the context of a small police force in Nova Scotia. The Chair found that even in this small force of 12 to 14 officers, and even where accommodation would be awkward and inconvenient, the employer failed to discharge its duty to accommodate as it made little effort to assemble a number of duties and functions on a temporary basis in searching for ways of accommodating the claimant. The employer, he found, had a duty to fully and completely explore opportunities for light duties to the point of undue hardship. The employer had not proven that it had done that.

[84] CP is a much larger operation with hundreds of employees working in Edmonton and doing a wide range of different job functions. I find that CP, had it been properly innovative and flexible, could have attempted to create, modify or re-package one or more of these job functions to accommodate Mr. Willoughby. CP led no evidence that it had engaged in this type of inquiry.

e) Did CP demonstrate that accommodating Mr. Willoughby would have created undue hardship?

[85] Moving beyond the process employed by CP in considering its accommodation of Mr. Willoughby and viewing the substance of the decisions made, it is clear that CP failed to

demonstrate that its decisions were justified in the manner contemplated by *Meiorin*. CP led no evidence to suggest that it would suffer undue hardship should it have accommodated Mr. Willoughby.

[86] CP's position was that the only way it could accommodate Mr. Willoughby would be to create a position for him and that creating a position always amounts to undue hardship. First, I have found that CP did not establish that creating a position would be the only way that Mr. Willoughby could have been accommodated. However, even if that were true, such a requirement will not in every circumstance establish that the employer would suffer undue hardship.

[87] The *CHRA* directs in section 15(2) that undue hardship may be made out through the consideration of health, safety and cost. The section does not direct that undue hardship will be made out wherever an employer is required to create a position to accommodate an employee and nor, in my opinion, should this section be interpreted in such a manner. Whether any action that might be necessary to accommodate an employee would be creative of undue hardship by reason of undue cost must be determined on a case by case basis. CP led no evidence that the creation of a position would, given its financial circumstances, be creative of undue hardship by reason of the cost that would be involved.

[88] I find that CP has failed to discharge its evidentiary burden under section 15(1)(a) of the *CHRA*: it has not demonstrated that it would be impossible for it to accommodate Mr. Willoughby's restrictions without suffering undue hardship.

(iii) Did CP demonstrate that its decision to refuse to continue Mr. Willoughby's employment in February of 2003 was justified?

[89] In February of 2003, Mr. Willoughby attended at CP for a meeting to discuss his return to work. A return to work proposal had been prepared by Sun Life after consulting with Mr. Willoughby, his doctor and his psychologist. The return to work proposal identified four

restrictions. CP decided that it could not accommodate Mr. Willoughby. CP's reasons were the same as those that led it to decide it could not accommodate Mr. Willoughby earlier.

[90] Turning to the first arm of the test in *Meiorin*, I find, again that the purpose of CP's decision was efficiency and further that the purpose was a legitimate work-related purpose and that the decision was rationally connected to that purpose.

[91] Turning to the second arm of the test in *Meiorin*, I find that CP did not have an honest and good faith belief that its decision was reasonably necessary. By the time of the meeting in February of 2003, Mr. Willoughby had been off work for several months. It was Mr. Duncan's evidence that he did not, in advance of this meeting, review any of Mr. Willoughby's medical information. He was not aware that a return to work program had been designed to facilitate Mr. Willoughby's return. He had made no formal canvass of jobs that might be available to accommodate Mr. Willoughby. His evidence was that he understood Mr. Willoughby's restrictions had not changed and so CP's position had not changed. There were no positions available. The process undertaken by Mr. Duncan in advance of deciding that Mr. Willoughby's employment would not be continued was wholly inadequate. In the circumstances, I find that CP did not have an honest and good faith belief that its decision was reasonably necessary.

[92] With respect to the third arm of the *Meiorin* test, the evidence led by CP relevant to this part of the analysis in respect of the February, 2003 decision was the same evidence that was led in respect of the April, 2002 decision. Accordingly, my analysis of whether the decision was reasonably necessary is the same for both decisions. I repeat the earlier analysis and find that CP has not demonstrated that its decision not to continue Mr. Willoughby's employment in February of 2003 was reasonably necessary.

(iv) Finding of Discrimination

[93] For all these reasons, I find that Mr. Willoughby's complaint that he suffered discrimination on the basis of his disabilities in breach of both sections 7(a) and 7(b) of the *CHRA* has therefore been substantiated.

V. REMEDIES

A. Compensation for lost wages

[94] Mr. Willoughby has asked for compensation for lost wages pursuant to section 53(2)(c) of the *CHRA*. Section 53(2)(c) empowers a tribunal, upon having found a complaint substantiated, to compensate the victim for any or all of the wages that the victim was deprived of as a result of the discriminatory practice.

[95] The Federal Court of Appeal has recently considered the analysis appropriate to making awards in compensation for lost wages. In *Chopra* v. *Canada (Attorney General*), [2007] F.C.J. No. 1134, Pelletier J.A., writing for the Court, directs that the central consideration when considering such an award is to determine whether there exists a causal connection between the lost wages and the discriminatory act or acts. The principles that limit recovery in damage assessments in civil litigation, such as remoteness and foreseeability, have no application. A wrongdoer may be ordered to compensate its victim for losses caused by his or her conduct whether or not such losses could have reasonably been foreseen. Section 53(2)(c) gives the Tribunal discretion. The section directs that a tribunal may order compensation in respect of "any or all" of wages lost as a result of discriminatory conduct. This discretion must be exercised in a principled manner (*Chopra*, supra, at para. 37). Further, while a tribunal may consider whether a victim has taken steps to mitigate his or her damages, mitigation is not a mandatory consideration. Mitigation can be considered should the Tribunal consider it appropriate in the circumstances.

[96] Mr. Willoughby was unable to obtain employment until July of 2004. He testified that he was at first emotionally devastated by CP's conduct and that later he had difficulty finding employment because of his disabilities. I find that Mr. Willoughby made reasonable attempts to mitigate his damages by looking for alternate employment. I also find that CP's discriminatory conduct was the cause of the period of unemployment experienced by Mr. Willoughby before he was able to secure employment. Had CP not refused to continue his employment, Mr. Willoughby would have remained employed. Mr. Willoughby testified that he was able to secure alternate employment in July of 2004. I believe that an award for lost wages extending

from when he last worked for CP in April of 2002 until the day he commenced employment with Mill Woods Suzuki in July of 2004 is appropriate compensation for lost wages.

[97] Pursuant to section 53(2)(c) of the *CHRA*, I order CP to compensate Mr. Willoughby for wages that he has lost from his removal from service, April 15, 2002, until the date he commenced working in July of 2004. Any disability or other benefits and any employment income received by him will be deducted from the award or re-paid to the issuer. In addition, CP will pay to Mr. Willoughby any employment benefits he would have received during this time, including the amount, if any, that CP would have contributed to Mr. Willoughby's pension plan on his behalf.

[98] Mr. Willoughby has asked that he be compensated for 95 days of lost sick benefits. I heard no evidence to suggest that employees of CP are entitled to receive any monetary compensation for banked sick days upon their departure from CP's employ and accordingly I do not make this order.

B. Compensation for pain and suffering

[99] Mr. Willoughby testified that CP's refusal to assign him to a day shift in March of 2002, after having received a letter from his doctor containing that direction, caused his health, both his physical and his mental health, to continue to deteriorate.

[100] Mr. Willoughby also testified about the emotional impact of CP's refusal to continue his employment, first in April of 2002 and again in February of 2003. He described feeling devastated. He felt betrayed by his employer, felt wholly without value and depressed. He testified that his psychological symptoms became aggravated. Our courts have recognized the centrality of one's employment to one's sense of identity, self worth and emotional well being (*Reference re Public Service Employee Relations Act (Alta.)* [1987] 1 S.C.R. 313 at 368). I find that CP's conduct caused Mr. Willoughby to suffer serious pain and suffering.

[101] I order CP to pay Mr. Willoughby $10,000.00 in compensation for this pain and suffering.

C. Special Compensation

[102] The complainant asks for special compensation. Under the *CHRA,* the Tribunal has the jurisdiction to award a maximum of $20,000.00 upon finding that a respondent has engaged in a discriminatory practice willfully or recklessly (section 53(3)). I have found that CP knew or ought to have known that it had not attended to the matter of Mr. Willoughby's accommodation in a manner consistent with the principles established in *Meiorin*. CP's conduct was either willful or it was reckless. Special compensation is accordingly appropriate and I award $10,000.00.

D. Legal Costs

[103] The complainant asks for an order directing that the respondent pay the legal costs incurred by him during the course of this proceeding. Sections 53(2)(c) and 53(2)(d) both empower the Tribunal, where it finds that a complaint is substantiated, to make among other orders, an order that the respondent compensate the victim for 'any expenses incurred by the victim as a result of the discriminatory practice.'

[104] Chairperson Sinclair has recently made a careful review of Federal Court jurisprudence dealing with this issue (*Mowat* v. *Canada Post Corporation,* 2006 CHRT 49). He concludes that the predominance of authority from that court is that the Tribunal has the power to award legal costs under section 53(2).

[105] I agree with this conclusion and am further persuaded that this Tribunal has the jurisdiction to award legal costs for the reasons articulated by Chairperson Mactavish (as she then was) in her decision of *Nkwazi* v. *Canada (Correctional Service)*, [2001] C.H.R.D. No. 29). Chairperson Mactavish notes that human rights legislation, given its fundamental and quasi-constitutional status is to be given a liberal and purposive construction, not only in respect to the rights protected under such statutes, but in respect of the remedial powers conferred (*Nkwazi,* at para. 13; see also *Canadian National Railway Co.* v. *Cana*da [1987] 1 S.C.R. 1114 at 1136; *Robichaud* v. *The Queen*, [1987] 2 S.C.R 84).

[106] The Federal Court of Appeal decision in *Chopra* does not deal expressly with the matter of legal costs. The decision does, however, consider the proper interpretation of section 53(2)(c), which is one of the sections of the *CHRA* that confer upon this Tribunal the jurisdiction to award legal costs. Pelletier J.A. directs that the central consideration when making awards pursuant to this section is that of a causal nexus between the expenses incurred and the discriminatory conduct. Considerations such as remoteness, foreseeability, have no application, and mitigation can be considered where appropriate, but is not a mandatory element of the analysis.

[107] In this case, each of the three allegations was found to have been substantiated. I find that CP's discriminatory conduct caused Mr. Willoughby to incur legal expenses in the pursuit of his complaint. I find that in the circumstances it is appropriate that Mr. Willoughby's reasonable legal expenses incurred in relation to this complaint be paid, and I so order.

E. Interest

[108] Interest is payable in respect of all the awards made in this decision, except the award of legal costs, pursuant to section 53(4) of the *CHRA*. In denying interest in respect of legal fees, I am persuaded by the decision of Chairperson Sinclair, that interest is not an expense under section 53(2) of the *CHRA*. I heard no evidence that Mr. Willoughby paid any interest in respect of his legal expenses and so do not order that interest is payable in respect of this expense.

[109] In respect of the other orders, the interest shall be simple interest calculated on a yearly basis, at a rate equivalent to the Bank Rate (Monthly series) set by the Bank of Canada, per Rule 9(12) of the *Tribunal's Rules of Procedure*. With respect to the compensation for pain and suffering and the special compensation, the interest shall run from the date of the complaint.

F. Retention of jurisdiction

[110] The Tribunal will retain jurisdiction to receive evidence, hear further submissions and make further orders, if the parties are unable to reach an agreement with respect to any issues arising from the remedies ordered in the within decision. Should the parties require direction on any remedial matter they may request same within 60 days of the date of this decision.

"Signed by"

Julie C. Lloyd

OTTAWA, Ontario
October 26, 2007

CANADIAN HUMAN RIGHTS TRIBUNAL

PARTIES OF RECORD

TRIBUNAL FILE:	T1076/5705
STYLE OF CAUSE	Guy Willoughby v. Canada Post Corporation
DATE AND PLACE OF HEARING:	May 7 to 11, 2007 Edmonton, Alberta
DECISION OF THE TRIBUNAL DATED:	October 26, 2007
APPEARANCES:	
Ronald T. Smith	For the Complainant
(No one appearing)	For the Canadian Human Rights Commission
Zygmunt Machelak assisted by Renu Srai and Tom Duncan	For the Respondent