Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2017 CHRT 24
Date: July 14, 2017
File Nos.: T2041/4214 & T2042/4314

Between:

Keith Waddle

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian Pacific Railway
Teamsters Canada Rail Conference

Respondents

Decision

Member: Ricki T. Johnston

Table of Contents

I. Introduction

[1] This is a decision regarding two separate complaints dated April 13, 2012 and made by Mr. Keith Waddle (the "Complainant") to the Canadian Human Rights Commission (the "CHRC"). They allege the Respondents, Canadian Pacific Railway ("CP" or the "Employer") and Teamsters Canada Rail Conference ("TCRC" or the "Union") discriminated against him during the course of his employment on the grounds of disability and family status.

[2] On July 30, 2014, pursuant to section 44(3)(a) of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (the "*CHRA*"), the CHRC requested the Chairperson of the Canadian Human Rights Tribunal (the "Tribunal") institute an inquiry into the complaints at which time they were consolidated as they involved substantially the same issues of fact and law (the "Complaint").

[3] The Complainant, through his then counsel, filed a Statement of Particulars (the "SOP") setting out the details of his Complaint. The Respondents each filed a response to the SOP. The Complainant appeared at the hearing and gave evidence, initially with counsel and later representing himself. The Complainant also had an expert witness give evidence on his behalf. Each of the Respondents appeared at the hearing with benefit of counsel and called several witnesses. The CHRC did not attend the hearing and made no submissions.

II. Decision

[4] For the reasons set out below, I find no *prima facie* case of discrimination based on family status against either Respondent, and that portion of the Complaint is dismissed.

[5] I further find for the reasons set out below that the Complainant has shown a *prima facie* case of discrimination based on the ground of disability against each of the Respondents. However, the restrictions imposed on his employment were based on a *bona fide* occupational requirement ("BFOR"), and the Complainant was fully

accommodated at all relevant times to the point of undue hardship. The claim of discrimination on the ground of disability is dismissed.

III. Issues

1. Did the Complainant establish a *prima facie* case of discrimination by CP under section 7 of the *CHRA*, based on Family Status?

2. Did the Complainant establish a *prima facie* case of discrimination by CP under section 7 of the *CHRA* based on Disability?

3. Did the Complainant establish a *prima facie* case of discrimination under section 10 of the *CHRA* by TCRC based on Family Status?

4. Did the Complainant establish a *prima facie* case of discrimination under section 10 of the *CHRA* by TCRC based on Disability?

5. If the Complainant establishes a *prima facie* case of discrimination based on disability, can the Respondents or either of them prove that the impugned restrictions were based on a BFOR?

    a. Was the restriction on the Complainant's work adopted for a purpose rationally connected to the performance of the job?

    b. Was the restriction adopted in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose?

    c. Was the restriction reasonably necessary such that it was impossible to accommodate the Complainant without imposing undue hardship on the employer, having regard to health, safety and cost?

    d. Did the Respondent TCRC, by virtue of its duty as a third party in the accommodation process, accommodate the Complainant to the point of undue hardship?

6. Did the Complainant take reasonable steps to facilitate the accommodation process?

IV. Facts

[6] The Complainant began working for CP in 1986. In 2011 he was employed as a locomotive engineer (an "LE") at CP's terminal in Lethbridge, Alberta (the "Home Terminal") and was a member of the Respondent TCRC. In this job, he was driving trains from his home terminal to various other terminals in Southern Alberta (the "Away Terminals") and back.

[7] By 2011, the Complainant was in unassigned service. This meant he was required to be on-call during his shifts and would get a phone call during this on-call period, giving him at least two hours' notice of his start time. After arriving at the given start time, he would be required to operate a train for up to 12 hours to an Away Terminal, then would be allowed up to 8 hours of rest time, after which he was on-call again waiting to begin the up to 12 hour shift back to the Home Terminal.

[8] While employed by CP, the Complainant experienced a number of medical issues, including ongoing difficulty with his neck and spine and osteoarthritis in his knee. These conditions had been raised with Occupational Health and Safety ("OHS") at CP over the years but had not prevented the Complainant from carrying out the job of LE in unassigned service. By 2010, however, the Complainant was experiencing increased difficulties with sleeping, and increasing anxiety, while waiting to be called for a shift. As a result, he was forced to report medically unfit for work 59 times in 2010 and 33 times in the first half of 2011. He also reported to his physician that he had fallen asleep on two or three occasions while driving a train.

[9] The Complainant's evidence was consistently that, regardless of his medical status, he preferred to stay in unassigned service as an LE out of the Lethbridge terminal. A position with CP in assigned service as an LE, by contrast, involved set shifts in the yard at the Lethbridge terminal, with no call-out window.

[10] CP led evidence, unchallenged by TCRC and the Complainant, that the Complainant's position as an LE was Safety Critical. In a Safety Critical position, impaired performance due to a medical condition could result in a significant incident affecting the health and safety of employees, the public, property or the environment.

[11] The Complainant sought out an expert physician, Board Certified in Sleep Medicine, who was also a Sleep Medicine Consultant (the "Sleep Specialist") on April 11, 2011. The Complainant gave evidence, as did the Sleep Specialist, who was an expert witness for the Complainant, that he did not discuss with her the general working conditions or options at CP, and that she was not familiar with railway operations generally. Instead, the Complainant asked the Sleep Specialist to recommend to his Employer an LE position in unassigned service with a call-out window restricted to the period between 5 a.m. and 5 p.m. He asked for this schedule because it had worked for him when he was based in Calgary a number of years prior, at which terminal this particular call-out window was applied to all LEs in unassigned service.

[12] Based on her diagnosis of a suspicion of Circadian Sleep Rhythm Disorder, the Sleep Specialist recommended a call-out window of 5 a.m. to 5 p.m. for a three month trial period. The Sleep Specialist's evidence was that when she made this recommendation, she did not know what other options the Complainant had, nor did she know that the 5 a.m. to 5 p.m. call-out window could still have required the Complainant to drive a train overnight. She recommended it because the Complainant requested it.

[13] OHS sought and on June 20, 2011 received a clarification from the Sleep Specialist that the Complainant could work 12 hour shifts, and could work past 5 p.m., as long as he received the call to start work before 5 p.m. The Chief Medical Officer ("CMO") gave evidence that after considering the Sleep Specialist's report, her clarification and existing medical records on the Complainant's other medical conditions, OHS created a Fitness To Work Assessment Form ("FTWAF") that confirmed the Complainant could continue to work in the Safety Critical Position of LE, with a call out window between 5 a.m. to 5 p.m., 12 hour shifts, and lifting restrictions.

[14] OHS sent the FTWAF to CP's Return to Work (RTW) Committee, for consideration of an appropriate accommodation. On July 6, 2011, this FTAWF and a proposed accommodation plan were the subject of a RTW meeting involving the Complainant, a member of CP's RTW Committee, and two members of TCRC ("First RTW Meeting").

[15] The Complainant's evidence was that at the time of the First RTW Meeting, he wanted CP to create him a position as an LE in unassigned service at Lethbridge, with a restricted 5 a.m. to 5 p.m. call-out window. CP's evidence was that they rejected this option because the call-out window could not be managed at the Away Terminals, as no other employees at Lethbridge used it.

[16] The Complainant's evidence was that he thought everyone involved in his return to work process would understand the Sleep Specialists' 5 a.m. to 5 p.m. call-out restrictions would not apply at the Away Terminals, and that he told CP and TCRC at the First RTW Meeting that he would seek a further modification of his medical restrictions, to limit the 5 a.m. to 5 p.m. call-out window to the Home Terminal.

[17] Given, however that at the time of the First RTW Meeting, the Complainant was still restricted to a 5 a.m. to 5 p.m. call-out window at all locations, other potential accommodations were discussed. These included: office work—rejected because the Complaint could not read well; relocation—rejected because the Complainant was unwilling to relocate; mechanical engineering positions—rejected because of the need for displacement of a more senior employee; and finally, an accommodation within his own job—rejected due to his medical inability to manage the call-out windows during shifts.

[18] The Complainant's evidence was that he had asked his Union representatives at the First RTW Meeting to indicate on the RTW Plan that he was unwilling to relocate due to family obligations. Relocation was an issue in this accommodation process, as there were positions in Calgary in which the Complainant could have been accommodated. The original RTW Plan did not make reference to family obligations, but instead just stated that the Complainant was unwilling to relocate. The Complainant took significant issue with this at the hearing, and gave evidence that the failure to indicate family status obligations on this form was part of a plan to force him to relocate at some later date. TCRC's

witnesses refuted this. The Tribunal will not reproduce this evidence in detail, as the RTW Plan was ultimately revised to include family obligations as a reason for not relocating, and the Complainant was never required to relocate.

[19] At the conclusion of the First RTW Meeting, an RTW Plan was signed that included OHS' medical restrictions. The RTW Plan contemplated the Complainant working any of the day and afternoon shifts in assigned service, as an LE in the Lethbridge Yard. These shifts had no call-out window, and complied with his lifting restrictions, so he could work 5 shifts per week within his restrictions as they stood at that time.

[20] The Respondent CP did call evidence about its refusal to create a unique position in unassigned service, with a 5 a.m. to 5 p.m. call-out window at the Lethbridge terminal:

a. The 5 a.m. to 5 p.m. call-out schedule applied to all the unassigned LEs at the Calgary terminal. It did not exist in Lethbridge;

b. Additional employees would, depending on the time of call-out, be required to travel to an Away Terminal to bring back trains, should those trains be needed before the Complainant's call-out window;

c. The schedule would involve increased uncertainty for other employees, including the conductor, who travelled on the trains with the Complainant, as they would be required to wait additional amounts of time at the Away Terminal to support the call-out window;

d. The increased uncertainly in the scheduling of the employees could lead to safety concerns in their work, which was Safety Critical; and

e. It would likely result in a loss of income for the Complainant, as he would miss shifts that came outside his call-out window, that would then go to an LE with no such restrictions.

[21] I find creating a 5 a.m. to 5 p.m. call-out window for the Complainant in Lethbridge would have caused considerable expense to CP and would have posed a health and safety risk to other CP employees. The Complaint's suggestion during the

accommodation process that the call-out window could be applied only at the Home Terminal --and not the Away Terminal-- was medically counter-indicated, and could not be considered by OHS in light of the restrictions the Complainant's Sleep Specialist had recommended. I accept CP's CMO's evidence that a medical restriction, if necessary, must be applied consistently. However, I also find as a question of fact, based in particular on the Sleep Specialists' own evidence, that she would not have recommended this 5 a.m. to 5 p.m. call-out window if she had known it could have resulted in the Complainant driving a train overnight. This proposed accommodation was medically counter-indicated by the Complainant's own physician, and therefore does not warrant detailed consideration.

[22] Even though, as a result of the First RTW Meeting, an accommodation in assigned service had been developed for the Complainant, he continued to try to modify his medical restrictions to resolve the Employer's concerns about managing the 5 a.m. to 5 p.m. call-out window at the Away Terminals. He spoke to his Sleep Specialist, and asked her to confirm that he needed the 5 a.m. to 5 p.m. call out window restriction to apply only at the Home Terminal. She provided this confirmation.

[23] The CMO gave evidence that it was inconsistent with the Complainant's medical diagnosis to have a medical restriction that applied in one location, but not another. Given this, OHS did not relay the modified restriction to management and the Union, but instead asked the Sleep Specialist for clarification.

[24] While this discussion about restrictions between the Sleep Specialist and OHS was ongoing, on July 19, 2011, a letter of agreement was executed between CP and TCRC that allowed for the terms of the Complainant's RTW ("First RTW Agreement"). He was to work in assigned service in the Lethbridge Yard as an LE, and if needed, a more senior member of TCRC would be bumped to allow the Complainant to work the more senior employee's shifts. At this time, however, no bump would be required, because the Complainant's restrictions (which at this point still allowed for overnight shifts), would allow him to work five shifts a week within his seniority.

[25] Subsequent to this First RTW Agreement, the Complainant made a telephone call to an OHS nurse at CP, of which he made an audio recording. The Complainant, at the hearing of this matter, submitted a recording of several telephone calls he had had with members of CP management, employees with OHS, and his Union representatives. All the recordings were made without the knowledge of the other participants in the calls. These recordings had not been previously disclosed to either of the Respondents. The Respondents objected to their admission, based on issues of timeliness, reliability and credibility. Also, the Respondent TCRC raised a concern that allowing surreptitious recordings to be admitted as evidence in the hearing could stifle open discussions in the labour context.

[26] Despite the arguments of the Respondents, I allowed the tapes to be admitted, in accordance with section 50(3)(c), and subject to a subsequent assessment of their weight. I have considered their reliability and the credibility of the statements made within them, and I note a number of concerns. There is no ability for the Tribunal to assess the extent to which the participants in the calls felt the obligation to be truthful on those calls. Some of the recordings produced were of poor quality, and portions of the calls were inaudible. Some of the recordings were incomplete. The Complainant was able to provide only a general time period, rather than a particular date, for many of the calls. Furthermore, many of the statements made by the Complainant in the recordings were simply a repetition of his position before this Tribunal.

[27] With regard to TCRC's argument that admission of these tapes would stifle communications in labour matters, I reject same. These discussions, whether recorded or not, would to a large extent be admissible in this matter, based on the relevance of their content. The only distinction is how the evidence was given: by tape, rather than through testimony of a live witness.

[28] To the extent that the aforementioned concerns give rise to issues of both the reliability and credibility of the statements made therein, I have accorded little weight to the recordings. Also, to the extent that the recordings simply tend to replicate evidence the Complainant himself gave at the hearing, they did not assist the Tribunal in resolving any dispute of material fact.

[29] In the Complainant's recording of his conversation with the OHS nurse after the First RTW Agreement, the Complainant stated he had been open to working overnight in unassigned service on the road, but he could not work overnight in assigned service in the yard. The OHS nurse advised him, that according to his medical profile, he was not medically restricted from working overnight only from certain call-outs, and his medical restrictions would have to be updated to deal with overnight shifts.

[30] In August of 2011, the Complainant had his Sleep Specialist update his restrictions to allow him to work in the yard, provided he had a regular start time every day with no 'graveyard shifts'. It is only at this point that the medical restrictions changed from a restricted call-out to restricted shifts. The Sleep Specialist's evidence was that it was only at this point that the Complainant advised her as to the availability of assigned service.

[31] The CMO communicated these revised restrictions to the Complainant's manager and the Union. Given some confusion as to the meaning of a graveyard shift, the Complainant continued to be assigned two shifts requiring him to work past midnight. After communication by the Complainant with OHS, the RTW Committee, the Employer and TCRC, this restriction was ultimately applied appropriately by November of 2011.

[32] In or around September 2011, CP drafted a second RTW Agreement (the "Second RTW Agreement"), which included the restrictions of morning and afternoon shifts only. The Second RTW Agreement also required that TCRC bump a more senior person, if needed, to allow the Complainant to work within his restrictions. TCRC's evidence was that in order to allow the Complainant to have a guarantee of 5 shifts per week within his restrictions, a more senior LE who was very close to retirement, and had ongoing health issues, would have to be bumped. The Union did not sign the Second RTW Agreement.

[33] At all relevant times, shifts were assigned to employees of CP based on a bid-card they submitted, and their respective seniority. TCRC's evidence was that they repeatedly asked the Complainant to update his bid-card to ensure he got all the additional shifts he was entitled to, within his seniority (in addition to the three shifts he already had per week). TCRC's evidence was that completing this bid-card was a simple standard process with which all employees of CP would be familiar.

[34] Between late September and November of 2011, during which time the Complainant had three shifts per week in assigned service with the opportunity to bid for additional shifts, the Complainant continued to seek further accommodation, and in particular, to return to unassigned service. The records from his Sleep Specialist include the following annotations in November 2011:

> He would like to be eligible to work shifts on the road again, rather than being restricted to the yard only. As we had discussed, this was something that we had requested only because he did not think that there were any shifts on the road that would be able to meet his accommodation need…He has requested my support for several possible shifts. I made it clear to Keith that while I can make recommendations as to his start times, I would not be providing any recommendations in terms of the nature or location of work.

[35] The CMO's evidence was that the Complainant's case was one of the most complicated in the workplace. In the period between April and November of 2011, OHS and the Complainant's physicians were trying to clarify not only the new restrictions regarding his sleep disorder, but also the additional restrictions regarding his osteoarthritis in his knee (a changing and ongoing condition), as well as his lifting restrictions resulting from his C-spine injury. The efforts of OHS during this time were extensive, and the records show continual ongoing review of —and requests for— medical information and clarification. The records also show that the Complainant was in contact with OHS by telephone.

[36] During this time, TCRC, the Complainant and CP were engaged in discussions about three possible accommodation proposals, in addition to the assigned service shifts the Complainant had already been provided.

a. The union was asked to bump a more senior LE to allow Mr. Waddle all 5 shifts per week in assigned service as an LE in the Lethbridge yard. TCRC did not bump this senior employee.

b. CP was asked to create a position for the Complainant doing a bundle of tasks, or doing office work, to make up the two additional shifts each week. CP's evidence was that they could not find meaningful office work or bundled tasks for the Complainant.

c. CP offered the Complainant work as a yard foreman in assigned service, with a modification of duties and the addition of a helper. The discussion of this accommodation did not proceed, as the Complainant indicated he thought this would be too much work for the helper, and too difficult for him. In January of 2012, the Complainant provided additional medical evidence indicating he was restricted from the job of yard foreman, even as modified, as a result of his knee.

[37] A Second RTW Meeting between the Complainant, TCRC representatives, and CP took place on November 22, 2011. The accommodation options noted above were discussed, but little progress was made as the Complainant was seeking further medical documentation to confirm his medical restrictions, in particular, in relation to walking.

[38] In September of 2011, TCRC asked the Complainant for a release allowing them to review the Complainant's medical records, as part of the accommodation process. TCRC's internal documents tendered in evidence indicate that on September 9, 2011, CP had sent an email to TCRC indicating that the Complainant would now have to be accommodated by bumping a senior person. TCRC agreed in its evidence that it was only upon receipt of this email that access to the Complainant's medical records was requested.

[39] On September 14, 2011, TCRC executive members exchanged emails challenging the medical restrictions defined by OHS for the Complainant. The email exchange concluded with one TCRC officer noting: "We will (*not*) subrogate our seniority because person makes subjective complaints." (While the email itself omits the italicized "not" TCRC agreed in its evidence it was intended to be included.) TCRC also agreed in its evidence that they had had no one with any medical expertise to assess the Complainant's medical records, and that they did not obtain a third party medical review in this case. The Complainant, in the correspondence adduced, and in his testimonial evidence, expressed his concern at being compelled to provide confidential medical records to his Union.

[40] In late 2011, TCRC received an executed release from the Complainant. The Complainant's evidence was that it was provided only because he felt he had no other

option. TCRC performed its review of the Complainant's medical records. On January 3, 2012, TCRC executive members exchanged emails that challenged the conclusions of the CMO, OHS, and the Sleep Specialist. One such email read as follows: "What a great criteria for an accommodation; go complain to the doctor I have a problem sleeping so I can bump to that cozy day job. Dame (sp) too late I am already the senior guy. IT IS ALL SELF REPORTING."

[41] Shortly after this January 3, 2012 email, TCRC wrote to the Complainant's then counsel: "Your self-reported condition will not allow us to modify any position in Lethbridge based on your seniority. We are not able to adjust seniority on the basis of your self-reporting of a condition." TCRC then suggested in this letter that the Complainant should move to Calgary.

[42] Dave Abel, a witness for TCRC testified that bumping seniority was not uncommon, and in fact, he had done it on more than 17 occasions in one year. Based on the email correspondence, as well as the testimony before me, I find TCRC's perception of the nature of the Complainant's primary disability (which it viewed as being psychological rather than biological in nature) was, at least in part, the reason for TCRC's refusal to bump a more senior employee as part of the accommodation process. TCRC was not concerned solely with preserving the principle of seniority.

[43] I find that while TCRC was actively engaged in the Complainant's accommodation process, having, for example, participated in two RTW meetings, several phone calls, and active consideration of his accommodation needs, TCRC's participation was restricted by a bias against the Complainant. The Union believed that the Complainant's circadian rhythm sleep disorder somehow did not constitute a real disability deserving of accommodation, through the taking of such measures as bumping a more senior member of TCRC.

[44] Having reviewed the evidence about the steps taken by CP and TCRC to find an accommodation for the Complainant, I would also note shortcomings in the Complainant's participation in this accommodation process:

a. As a result of his focus on obtaining the 5 a.m. to 5 p.m. call-out window he desired, the Complainant provided the Sleep Specialist with inadequate information to determine appropriate medical restrictions. By designing his own preferred accommodation and seeking it directly, he made the process of arriving at a suitable accommodation more lengthy;

b. As will be discussed in depth below, I find the Complainant also failed to update his bid-card to ensure he obtained 5 shifts per week, as many times as possible between September of 2011 and February of 2012. TCRC led evidence that there were numerous shifts during this time to which the Complainant had been entitled, and which he would have been given if he had bid on them. I find below that the Complainant had no reasonable explanation for his failure to bid on these shifts.

[45] With respect to this last point, a significant issue in this matter is whether the Complainant updated his bid-card as requested, to ensure he received as many shifts as possible as part of the efforts to accommodate him. I have concerns regarding the credibility of the Complainant's evidence that he did complete an updated bid-card. In an October 24, 2011 letter to the Complainant's then counsel, TCRC had drawn attention to a full week of shifts to which the Complainant had been entitled during the week of October 17, 2011, but for which he did not bid. TCRC reiterated the Complainant's obligation to bid for positions within his restrictions, to ensure he obtained five shifts per week as often as possible.

[46] At the hearing of this matter, the Complainant introduced a photocopy of a document purporting to be a bid-card for this October 17, 2011 week of shifts. The Complainant's evidence was that he submitted this bid-card, but that the shift went to a less senior employee because of an error in the bid-card. He could not point out the error, and he could not produce a fax sheet confirming the card was submitted, although he

agreed it was standard practice for railway employees to retain the fax confirmation sheets generated in submitting any bid-cards.

[47] At the hearing, a witness for TCRC produced a summary of a number of other weeks of work between September of 2011 and February of 2012 to which the Complainant was entitled, but which he failed to obtain. These opportunities arose when a more senior employee with shifts within the Complainant's restrictions was absent on annual leave, sick leave, or for other reasons. That employee's shifts would become available to the most senior employee who had submitted a bid-card. There were numerous weeks between September of 2011 and February of 2012 when the Complainant was the most senior employee, but did not receive the work. Given that the bid-card, once submitted, would stay in place ensuring the Complainant would obtain these additional shifts, the Complainant had no explanation for why he did not obtain these shifts.

[48] I have concerns regarding the reliability and authenticity of the bid-card submitted into evidence by the Complainant. It simply defies logic that this bid-card would somehow have been overlooked on more than six occasions without explanation. Further, none of the witnesses for TCRC or the Complainant himself, despite being familiar with the bid-card system, was able to identify the alleged error in the bid-card. The Complainant also provided no explanation for why he did not correct the alleged error in the bid-card, when his failure to obtain a week of shifts was brought to his attention in October of 2011.

[49] I find on a balance of probabilities that the Complainant did not update his bid- card to ensure he received as many shifts in assigned service as possible. Rather, the Complainant worked the three shifts per week to which he was entitled, and continued to seek additional accommodation in unassigned service from CP and TCRC until February of 2012.

[50] The Complainant led evidence regarding his losses as a result of the alleged discrimination. He argued that employees of CP working as LEs in unassigned service told him they were making incomes much larger than those he earned in assigned service.

He called no witnesses on this point, and provided no records supporting the incomes to which he was comparing his own.

[51] CP led evidence and produced records, through its witness from its pension department, that the Complainant's income remained stable throughout 2011, and continued to increase as he worked in assigned service until his retirement in February of 2016. In the particular months coinciding with the accommodation process between June of 2011 and February of 2012, the Complainant gave evidence that he had lost 30% of his income, threatening his home ownership. In fact, CP's records revealed that his earnings each month were either higher than for the months in the previous years, or between 1-5% lower. The Complainant, despite being provided an opportunity by the Tribunal, did not challenge the accuracy of these records or the testimony given in relation thereto.

[52] I find as a fact that the Complainant, throughout the accommodation process in 2011 and early 2012, was able to sustain his earnings on a consistent basis. Some examples of this are as follows:

a. in a pay period falling within October of 2010, the Complainant's actual earnings were $4,638.44. In the same pay period in October of 2011, his actual earnings were $5,186.40;

b. in a pay period falling within March of 2010, the Complainant's actual earnings were $900 more than he earned in the same pay period in March 2012. However, in a pay period falling within April of 2012, the Complainant's actual earnings were $2,900 more than they were in the same period in April of 2010;

c. in 2010, the Complainant's lowest actual earnings in one pay period were $4,190.48 and his highest actual earnings in one pay period were $6,378.68. In 2011, the Complainant's lowest pay in a single pay period was $4,218.10 and his highest was $6,706.64. Both the highest and lowest amounts increased during the process of accommodation;

d. also the Complainant's annual income generally increased or remained stable each year following the accommodation process, and until his retirement.

Further, I find as a fact that the Complainant's five highest earning years for the purposes of calculating pension benefits, described as annual pensionable earnings, were in 2011, 2012, 2013, 2014 and 2015, namely years corresponding to this accommodation process and the period that followed it.

[53] The pension witness for CP was also able to determine that any impact on the Complainant's pensionable earnings would have arisen only through the accommodation period, as a result of the decision to describe some of the Complainant's missed shifts as "company business" rather than "medically unfit". This was done based on the Complainant's supervisor's mistaken belief that it would protect pensionable earnings. Instead, it resulted in a differential pension payment of approximately $7.03 per month, dropping the Complainant's monthly pension payment from $3,719.97 to $3,712.94.

[54] Such loss in pension amounts, however, would have been off-set by a subsequent increase in pensionable earnings, as the Complainant was able to increase his pensionable earnings from $71,333.71 in 2010, to $86,229.90 in 2014 and $82,617.59 in 2015. In the years from 2011 and up to and including 2015, the Complainant's average annual pensionable income was $80,226.55. The average income in the five years preceding was only $67, 373.88. Any impact to the Complainant's pensionable income, and therefore to pension amounts, from the accommodation process and switch to assigned service was minimal at most.

A. Family Status Ground

[55] The Complainant led limited evidence of his obligations to his parents in Lethbridge. In particular, he did not indicate, what, if any eldercare activities he carried out on either of their behalves. He led evidence his father was residing in a care facility, and had Alzheimer's disease, and his mother lived independently. They both lived in Lethbridge. He also led evidence that he had returned to live in Lethbridge to be near his parents. I would note that in his final argument, the Complainant indicated that if he moved to Calgary, his mother would have to sell her home. He led no evidence of this in the hearing, and I therefore decline to consider the point.

V. Preliminary Issues

A. Credibility of Witnesses

[56] At points, there was disagreement between the Complainant and the Respondents as to the facts in this matter. A number of elements of the Complainant's testimony raised concerns regarding the reliability of his evidence. While I found the Complainant made efforts to be truthful, I also found he tended to tailor his evidence so as to have it presented in a manner most favourable to him:

a. During examination in chief he was asked directly by the Tribunal if he had further tape recordings of telephone conversations that he had not produced. He denied it, but then admitted in cross-examination that he had many more tapes, but had excluded those that were not "as helpful".

b. The Complainant repeatedly stated he was close to losing his home as a result of a decline in his income. CP's evidence, however, showed his income had remained stable through the accommodation process in 2011, and had then increased in 2012 and 2013. The Complainant could not provide an explanation for this discrepancy.

c. The Complainant gave evidence in examination-in-chief that he had been forced to sit in the back of the room at the First RTW Meeting, but then admitted in cross-examination that the seating was changed to place him at the front and ensure his participation.

d. Several times during cross-examination, when faced with a fact not helpful to him, the Complainant avoided questions.

e. The Complainant's evidence about submitting his bid-card was inconsistent with the undisputed facts about how the bid-card system works.

[57] I further find that the four witnesses for the Respondent CP testified in a forthright, straightforward manner that was consistent with the records produced. Generally, where

the evidence of the Complainant differs from that of the Employer's witnesses, I prefer the evidence of the Employer's witnesses.

[58] I did find, in general, that the TCRC witnesses gave evidence in a truthful manner. As I have addressed above, I have found evidence of a bias within the TCRC towards the Complainant's disability, based on its psychological nature. However, TCRC's witnesses were not evasive when presented with this evidence at the hearing, and while they may have disagreed with the significance of the comments executive members had made in their own email records, their testimony in relation to them remained straightforward. As a whole, I find the witnesses for TCRC to be credible, and to the limited extent that their evidence differs from that of the Complainant, I prefer the evidence of the TCRC witnesses.

B. The Complainant's Withdrawal of His Admission that he had been Accommodated by February 2012 and his Proposed Addition of Claims Extending Beyond February or March of 2012.

[59] The Complainant's SOP, filed October 31, 2014, included an admission that the Complainant was fully accommodated by February of 2012. Prior to the original hearing dates in this matter scheduled on November 15 and 16, 2015 ("Original Hearing Dates") the Complainant, through his counsel, sought to raise claims not included in the SOP relating to ongoing discrimination from February of 2012 until late 2015.

[60] At the Original Hearing Dates, the Complainant's counsel indicated his desire to proceed with these claims for the period February 2012 to late 2015, and the Respondents objected. At that time, the Complainant, through his counsel, also requested leave to amend the SOP to add family status as a ground of discrimination.

[61] The Original Hearing Dates in this matter were adjourned for unrelated reasons. During a subsequent case management conference call ("CMCC"), the Tribunal directed the Complainant to bring an application seeking any amendments to the SOP he believed were needed, given the recently arising matters. The Complaint brought an application to amend the SOP to include family status as a ground of discrimination, and he was granted

leave to do so (see *Waddle v. CPR and TCRC* 2016 CHRT 8, "the *2016 Ruling*"). No other amendments were sought.

[62] The hearing in this matter resumed, based on the now amended SOP, on March 17, 2016 ("Resumed Hearing Date). In the examination-in-chief of the Complainant during the Resumed Hearing Dates, he sought to enter documents, not previously disclosed, to support a claim of discrimination in respect of events occurring after February of 2012.

[63] This additional claim would have significantly altered the amount of damages sought for loss of income, from the approximately $12,000 set out in the SOP, to nearly $1,000,000. In addition, the Complainant indicated he was retracting the statement, in his SOP, whereby he conceded that he had been fully accommodated by February of 2012. The Respondents argued, and I agreed, that this would give rise to the need for the Respondents to call additional witnesses, to further prepare the witnesses already scheduled, and to seek additional disclosure from the Complainant—all during the course of an ongoing hearing.

[64] In their oral submissions at the Resumed Hearing Date, the Respondents objected to the Complainant's request for leave to make further amendments to his SOP, on grounds that can be summarized as follows:

a. Any claim of discrimination beyond February of 2012 is outside the jurisdiction of the Tribunal because the Amended Summary of Complaint form, that was included in the referral of the matter to the Tribunal, limits the Complaint to the period ending in March, 2012. In support of this argument, the Respondents relied upon the *2016 Ruling*;

b. The amendment would cause prejudice, as it was inconsistent with the SOP on which the Respondents had been relying on; and

c. The amendment would cause prejudice, as the Complainant had been previously directed to seek any and all necessary amendments to the SOP, but did not use

this opportunity to request an extension of the period within which he alleged discrimination occurred.

[65] The Complaint itself in this matter does not restrict the time period of the discrimination alleged. The CHRC referred the Complaint to the Tribunal by way of letter dated July 30, 2014. The Complaint Form attached to the Letter of Referral itself does not restrict the time period of the alleged discrimination. Also attached to the Letter of Referral was an Amended Summary of Complaint Form, dated August 22, 2013. The Amended Summary of Complaint Form lists the date of the alleged discrimination as being the period June 2011 to March 2012. The SOP filed by the Complainant through his counsel on October 31, 2014, states that the failure to accommodate persisted only until February 7, 2012, and that the Complainant was fully accommodated after that time.

[66] Following oral submissions from the Complainant and each of the Respondents, and upon consideration of the *2016 Ruling*, I ordered that any disclosure not previously made, that dealt with a claim of discrimination occurring between March 2012 and December 2015, was admissible only to the extent that it was relevant to the question of the scope of damages arising from the periods of discrimination alleged in the SOP or the Amended Summary of Complaint Form, being June 2011 to March 2012. These new documents disclosed for the first time at the hearing, were not otherwise admissible. I denied both leave to raise new issues and introduce new documents under the Tribunal's Rules of Procedure ("Rule") 9(3)(a) and (c). I also denied leave to amend the SOP to add a claim of discrimination extending beyond February of 2012. The following are the reasons for that decision.

(i) Jurisdiction

[67] The CHRC's request for an inquiry into a matter defines the jurisdiction of the Tribunal. On the specific facts of this case, as set out in the *2016 Ruling*, both the Complaint Form and the Amended Summary of Complaint Form demarcated that jurisdiction. I will not repeat here the reasons given in the *2016 Ruling* for deciding that the

Amended Summary of Complaint Form serves as one of the jurisdiction - granting documents in this case, but I do note the relevance of the following passage at para. 31:

> As a result of the particular use of the Amended Summary of Complaint Form by the CHRC in this matter, the Tribunal concludes that it does form part of the Complaints and can help to define the scope of jurisdiction of the Tribunal.

[68] I was clear to specify in the *2016 Ruling* that I was not ruling as to whether the Amended Summary of Complaint Form would help define the scope of jurisdiction granted to the Tribunal in every case. It did in this case however, given the way the CHRC amended it, referred to it, and relied upon it. It was also the Amended Summary of Complaint Form alone that was relied upon by the Complainant to argue that the Tribunal's jurisdiction in this matter included a claim based on family status.

[69] The Amended Summary of Complaint Form in this case includes a time-limited period of discrimination running from July 2011 to March 2012. The Complaint, however, at the time it was filed in March of 2012, states the discrimination is ongoing. When read together, the Complaint and the Amended Summary of Complaint Form in this case grant jurisdiction over a claim of discrimination based on disability extending beyond March 2012.

[70] That said, for the reasons that follow, and in accordance with Rule 9(3)(a) and (c), I have declined leave to amend the SOP to raise the issues occurring post-March 2012, and I have also declined leave to introduce new documents connected with same.

(ii) Rule 9(3)(a) and (c) Leave

[71] The Respondents argued that the documents pertaining to the issue of discrimination extending beyond February or March 2012 are not admissible, as they are inconsistent with the SOP as filed. I reject this argument. In accordance with Rule 9(3)(a) and (c), leave may be sought to introduce at the hearing both issues not raised in the SOP and documents not previously disclosed. The question is whether that leave should be granted.

[72] Such leave to raise new issues and introduce new documents is to be granted if doing so would be consistent with the purposes of the CHRT Rules, as set out in Rule 1(1):

> 1(1) These Rules are enacted to ensure that
>
> (a) all parties to an inquiry have the full and ample opportunity to be heard;
>
> (b) arguments and evidence be disclosed and presented in a timely and efficient manner; and
>
> (c) all proceedings before the Tribunal be conducted as informally and expeditiously as possible.

[73] In the case of the Complainant's allegations regarding ongoing discrimination after February of 2012, this claim was expressly excluded from the SOP. Further, when these matters arose prior to the Original Hearing Dates, and during the Original Hearing Dates, the Complainant was directed to seek amendments to his SOP. This direction was discussed at the CMCC, and also placed into correspondence following the CMCC. At that time, the Complainant was still represented by counsel.

[74] The Complainant failed to seek this amendment, despite proceeding with a motion seeking another amendment to his SOP. At the Resumed Hearing Dates, he was unable to provide any reason for failing to seek this amendment other than that he hadn't been listening during the CMCC.

[75] The Respondents were justified in assuming they would not be dealing with a claim of discrimination extending beyond February or March 2012 at the Resumed Hearing Dates, and they indicated that they were unprepared to do so. It was clear that, in order to answer such a claim, additional witnesses would be required to be called by the Respondents. They would also require further disclosure from the Complainant, including additional medical documentation and financial records. The Respondents would likely have been forced to seek an adjournment of the Resumed Hearing Dates, which would have constituted the third adjournment either directly sought by the Complainant, or resulting from the Complainant's failure to amend his SOP. The Respondents expressed

their continued desire not to further adjourn the hearing. This placed the Respondents into a very difficult and unfair situation.

[76] Ultimately, the question to be asked is whether raising the issue of discrimination occurring after February of 2012, and the further disclosure necessitated by same, would accord with the purposes of Rules 9(3) and 1(1). The Tribunal considered this question in *Whyte and Richards v. CNR* 2009 CHRT 33, in which the Tribunal held the respondent was required to proceed with a motion in accordance with Rule 9(3) if it wished to raise "a completely new issue and particulars." The Tribunal noted at para. 12:

> The Tribunal would like to remind the parties that if they are seeking leave to raise new issues not addressed in their Statements of Particulars or in its Amended Statement of Particular [*sic*] they can only do so by seeking leave or authorization from the Tribunal under rule 9(3) of the Tribunal Rules of Procedure. Any party seeking such authorization will have to show how their request is not prejudicial to the other parties and to the Tribunal's process. It will also have to demonstrate that there was some valid justification for this late request.

[77] The Resumed Hearing Dates were scheduled after two previous adjournments of this matter, more than four years after the initial filing of the Complaint, and more than four years after many of the events at issue. The Complainant had been given ample opportunity to bring his SOP and his disclosure into alignment with his current view of his Complaint, but failed to do so. The Tribunal recently addressed this issue in the case of *Carpenter* v. *Navy League of Canada* 2015 CHRT 8, para. 57, when denying leave to amend an SOP under Rule 9(3):

> To suggest that the hearing is the correct place to raise an amendment or other new matter when the need for the amendment or the fact of the new matter is known to the requesting party well before the hearing, as is the case here, does not take into account the purpose of Rule 9(3). That purpose is to avoid what is called "trial by ambush" and the resulting waste of time, resources and added expense to all those participating in the hearing - the parties, counsel, witnesses - and the Tribunal.

[78] The addition of these allegations and disclosure would have made it extremely difficult for the hearing to proceed or be completed during the scheduled hearing dates, and the further passage of time necessitated by an adjournment could have had an impact

on the memory of the witnesses involved, causing prejudice to the Respondents. Further, the right to an expeditious hearing, as set out in section 48.9 of the *CHRA*, applies equally to the Respondents in this case, who have consistently expressed their desire to proceed in this matter.

[79] The amendment, to be granted, must ultimately "….serve the interests of justice." (*Canderel Ltd*. *v. Canada* 1993 CanLII 2990 (FCA), as cited in *Canada (A.G.) v. Parent,* 2006 FC 1313, para. 30. In this case, allowing the new issues and disclosure would neither meet the purposes set out in Rule 1(1), nor serve the interests of justice.

[80] In addition to its discretion under Rule 9(3) to allow new issues to be raised, the Tribunal may allow an amendment to the SOP upon application. This leave to amend can be granted even during the hearing. In this case, however, the Complainant's continued failure to make disclosure in a timely fashion, and his failure to adhere to directions of this Tribunal regarding amendments to the SOP, made granting leave to amend in this case inconsistent with the interests of justice.

VI. Decision on the Merits

A. Discrimination Based on Family Status

[81] The Complainant claims discrimination based on the prohibited ground of family status, as set out in section 2 of the *CHRA*. The discrimination based on family status is claimed pursuant to section 7 in respect of the Employer, and section 10 against the Union:

> **7.** It is a discriminatory practice, directly or indirectly,
>
> *(a)* to refuse to employ or continue to employ any individual, or
>
> *(b)* in the course of employment, to differentiate adversely in relation to an employee,
>
> on a prohibited ground of discrimination.
>
> […]

> **10.** It is a discriminatory practice for an employer, employee organization or employer organization
>
> *(a)* to establish or pursue a policy or practice, or
>
> *(b)* to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,
>
> that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

[82] This allegation of discrimination on the basis of family status as against both the Employer and the Union arises from within the accommodation process, and in particular, from the failure of TCRC to initially identify family status obligations in the RTW Plan, and further, from TCRC's suggestion in January of 2012 that the Complainant relocate to Calgary, despite his stated obligations to his parents in Lethbridge.

[83] The evidence of the Complainant at the hearing was that these two impugned family status related incidents involved actions or omissions of the Respondent TCRC. Meagre evidence was presented at the hearing to connect the allegations related to family status to the Respondent CP. The only allegation for which evidence was given was that a member of CP Management was at the First RTW Meeting and helped complete the initial RTW Form. I therefore conclude that the Complainant has failed to prove, on a balance of probabilities, a *prima facie* case of discrimination based on family status, as against CP.

[84] With regard to the claim of discrimination based on family status made against the Union, the TCRC relied on the test in *Canada (A.G.) v. Johnstone* 2014 FCA 110 ("*Johnstone*"), para. 93*,* for establishing a *prima facie* case of discrimination on this ground:

> …[I]n order to make out a *prima facie* case where workplace discrimination on the prohibited ground of family status resulting from childcare obligations is alleged, the individual advancing the claim must show (i) that a child is under his or her care and supervision; (ii) that the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice; (iii) that he or she has made reasonable efforts to meet

> those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible, and (iv) that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

[85] While none of the parties in this matter raised the decision of the Tribunal in *Hicks v. Human Resources and Skills Development Canada,* 2013 CHRT 20 ("*Hicks*-CHRT"), or the subsequent decision of the Federal Court of Canada in its judicial review of *Hicks* (*Canada (Attorney General) v. Hicks*, 2015 FC 599 (*Hicks*-FC)), the Tribunal's decisions may be more informative on the standard to be applied in assessing a family status claim as it relates to an obligation to parents.

[86] In *Hicks*-CHRT, the Tribunal did not have the benefit of the decision in *Johnstone, supra,* and did not therefore rely on the four part test. Nonetheless, the Tribunal member made clear that the obligations of a child to an elderly parent could also be recognized in the context of a family status claim (*Hicks*–CHRT, para 44). The Tribunal's finding on this point was upheld on judicial review to the Federal Court (*Hicks*-FC, para 66). The Federal Court in *Hicks*-FC had the benefit of the decision in *Johnstone, supra,* and agreed that its requirement for caregiving obligations to engage legal responsibility, as opposed to a personal choice, would be applicable to family status claims involving eldercare. The Federal Court held on this point, at paras. 69-70:

> The Federal Court of Appeal in *Seeley FCA* reiterated the principle identified in *Johnstone* on why the prohibited ground of discrimination of family status encompasses the childcare obligations at paragraph 41:
>
> > As found by this Court in *Johnstone*, the prohibited ground of discrimination of family status encompasses the parental obligations whose non-fulfillment engages the parent's legal responsibility to the child. The childcare obligations contemplated by the expression family status are thus those that have immutable or constructively immutable characteristics, such as those that form an integral component of the legal relationship between a parent and a child. As a result, the childcare obligations at issue are those which a parent cannot neglect without engaging his or her legal liability. This approach avoids trivializing human rights by extending human rights protection to personal choices.

> I find this similar rationale can be applied for the analysis of eldercare obligation in the instant case…

[87] In *Hicks*-CHRT, the complainant's family status claim was based on expenses he and his wife incurred in maintaining two residences, after he relocated to Ottawa and she stayed in Sydney, Nova Scotia to provide ongoing care for her mother. The complainant's evidence, as accepted by the Tribunal in *Hicks*-CHRT, was that his mother-in-law was ill, and living in an assisted-living apartment. With regard to his wife's obligations to care for her, the evidence was that third party caregivers could not provide the full necessary support, that the mother-in-law struggled to communicate without assistance from her daughter, that the daughter also checked in on her several times a day, purchased her groceries, arranged homecare, arranged for or prepared her meals, accompanied her on doctors' visits, communicated frequently with nursing home staff, and provided all her social interactions. The evidence in *Hicks*-CHRT was of a high level of interaction by the complainant's wife on his mother-in-law's behalf, and the decision suggests her playing a crucial role in her mother's care.

[88] In the current matter, the Complainant provided very limited evidence as to the nature or extent of any disabilities from which his parents might suffer, or as to any medical, social, homecare or other needs his parents might have had. He indicated that his father had Alzheimer's and lived in a medical facility, but provided no evidence as to the extent of his illness. He led no evidence regarding the scope of any medical, homecare, social, or other needs his mother might have had. Based on the evidence in this matter, the Complainant has not shown that at the relevant times, he had an obligation to provide care for his parents that was comparable to the legal obligation to provide care set out in *Johnstone, supra*. Moreover, given the failure to present any evidence as to the nature of the care he provided for his parents, the Complainant failed to show his obligation engaged his legal responsibility to his parents.

[89] The Complainant has also failed to show that he made efforts to obtain alternative care, whether through other family members, or third party care. This is significant, as in *Hicks*-CHRT, the Tribunal noted evidence about the inadequacy of third party caregivers, given the ill mother's specific needs. Also, the Tribunal in *Hicks*-CHRT cited the decision

in *Devaney v. ZRV Holdings Limited* 2012 HRTO 1590*,* in which the Human Rights Tribunal of Ontario decided a family status claim on the basis of eldercare obligations, and noted that there were no family members, other than the complainant in that case, who could provide the care.

[90] Without the evidence to satisfy the foregoing, the Complainant has not established that he had an eldercare obligation that engaged his legal responsibility. One arrives at this conclusion, whether the four part test in *Johnstone, supra* is applied strictly, or whether one applies the standard suggested by the criteria set out in *Hicks*-CHRT and *Hicks*-FC.

[91] Accordingly, the Complainant has failed to prove on a balance of probabilities that the Respondent TCRC discriminated against him based on family status under section 10.

B. Discrimination Based on Disability

(i) The *Prima Facie* Case

[92] A *prima facie* case of discrimination is one that "…covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent—employer." (*Ontario Human Rights Commission v. Simpsons-Sears Ltd.* [1985] 2 S.C.R. 536 at p. 558). To demonstrate *prima facie* discrimination, the Complainant is required to show that he had a characteristic protected from discrimination under the *CHRA,* that he experienced an adverse impact with respect to employment, and that the protected characteristic was a factor in the adverse impact (*Moore v. B.C. (Education)* 2012 SCC 61*,* para. 33). Moreover, the use of the expression "*prima facie* discrimination" must not be regarded as a relaxation of the Complainant's obligation to satisfy the tribunal in accordance with the standard of proof on a balance of probabilities, which he must still meet (*Québec (C.D.P.D.J) v. Bombardier Inc.,* 2015 SCC 39, para. 65).

[93] In the Complaint, discrimination based on disability is claimed against CP under section 7 of the *CHRA*, and claimed against the Union under section 10 of the *CHRA*, both as set out above. Given that the Complainant at all times remained employed by CP, only

subsection 7(b) is applicable. Also, given the allegations, as they relate to TCRC, are that it failed in its obligations as a party to the accommodation process, section 10(a) is the applicable provision.

[94] CP admits in its written argument that the Complainant has established a *prima facie* case of discrimination based on disability. Further, the undisputed evidence given was that the Complainant was barred from working in unassigned service as an LE, as a result of the restrictions arising from his medical disability. While CP was not specific in its submissions about which discriminatory practice it admitted to having engaged in, it did submit in its final argument that the Complainant had proven a *prima facie* case of discrimination based on disability. In light of the applicability of section 7(b), I find the admission relates to differentiating adversely in relation to the Complainant in the course of his employment.

[95] The TCRC's responsibility in the matter of this discrimination is engaged by the nature of its role in the accommodation process. In *Central Okanagan School District No. 23 v*. *Renaud*, [1992] 2 S.C.R. 970, 16 C.H.R.R. D/425, the Supreme Court set out the two ways in which a union could become a party to discrimination. The second, which is relevant in this matter, is that a union may become a party to discrimination if the union impedes, as is alleged here, the reasonable efforts of the employer to accommodate:

> If reasonable accommodation is only possible with the union's co-operation and the union blocks the employer's efforts to remove or alleviate the discriminatory effect, it becomes a party to the discrimination. In these circumstances, the union, while not initially a party to the discriminatory conduct and having no initial duty to accommodate, incurs a duty not to contribute to the continuation of discrimination. [at C.H.R.R. para. 37]

[96] In this case, the Respondent CP and the Respondent TCRC are both subject to the burden of showing that the duty to accommodate to the point of undue hardship was met. The Respondent CP has admitted that it engaged in *prima facie* discrimination within the meaning of section 7(b) of the *CHRA.* Moreover, I find that the Respondent TCRC engaged in *prima facie* discrimination within the meaning of section 7(b) of the *CHRA*, when it refused, during its participation in the accommodation process, to properly consider an option that impacted the seniority of another employee, based on its improper

consideration of the nature of the Complainant's disability. As I found above, the TCRC's actions were guided by a biased view that the Complainant's sleep disorder did not constitute a disability deserving of accommodation to the point of displacing a more senior employee. Accordingly, the Complainant is entitled to relief against both Respondents, unless they are each able to justify their impugned conduct as a BFOR.

(ii) The BFOR

[97] The *prima facie* discrimination based on disability having been admitted by the Employer and found as against TCRC, the matter turns to whether the *prima facie* discriminatory action is justified as a *BFOR*. "(*Ontario Human Rights Commission v. Etobicoke*, 1982 CanLII 15 (SCC), [1982] 1 S.C.R. 202, at p. 208; *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204, at para. 18. Sections 15(1)(a) and 15(2) of the *CHRA* provide that impugned adverse treatment is not a discriminatory practice where an employer establishes that it is based on a BFOR. In particular, it must be established that accommodation of the needs of affected individuals would impose undue hardship, considering health, safety and cost.

[98] The three part test to consider the discriminatory action and whether it constitutes a BFOR is as set by the Supreme Court of Canada, in *B.C.(PSERC) v. BCGSEU* ("*Meiorin*") [1999] 3 S.C.R. 3. At para. 54 of this judgment, the Court held that the employer may justify the impugned standard by establishing on the balance of probabilities:

> 1. that the employer adopted the standard for a purpose rationally connected to the performance of the job;
>
> 2. that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
>
> 3. that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

[99] An LE is a Safety Critical Position. CP led evidence which I accept that the Complainant, to work as an LE in unassigned service with irregular start times for shifts, would be required to maintain a level of alertness and cognitive functioning inconsistent with his diagnosis of Circadian Rhythm Sleep Disorder. It is significant that the Complainant's own physician and expert witness confirmed that he was not medically able to operate trains overnight. I find that the Employer's decision to prohibit the Complainant from working as an LE in unassigned service without restrictions was made for a purpose rationally connected to the performance of his Safety Critical position as an LE, and further that it was made in an honest and good faith belief that it was necessary to maintain safety, and was consistent with his diagnosed medical restrictions.

[100] This is not a case in which the employer refused to make any attempts at accommodation. The issue, therefore, is whether the efforts made to find employment for the Complainant, for which he was medically fit, amounted to reasonable accommodation. Where the employer proposes a reasonable accommodation, the complainant cannot insist on his or her preferred alternative accommodation (See *Croteau v. C.N.R.* 2014 CHRT 16, para. 44(2)).

[101] The dispute as between the parties as to whether the Complainant was fully accommodated raises five main issues:

1. Did the accommodation process and the work provided to the Complainant from July of 2011 until February of 2012 constitute reasonable accommodation? If not,

2. Did CP fail to meet its obligation to provide reasonable accommodation by rejecting the option of unassigned service with a 5 a.m. to 5 p.m. call-out window?

3. Did CP fail to meet its obligations to provide reasonable accommodation by not creating two shifts per week in an office, or by not creating other bundled work for the Complainant?

4. Did TCRC fail in its obligation to co-operate in the accommodation of the Complainant, by not bumping a more senior employee, to ensure the Complainant had 5 shifts per week in the Lethbridge yard within his medical restrictions?

    i. Did TCRC give honest and good faith consideration to altering seniority to accommodate the Complainant?

    ii. Was TCRC's request to review the Complainant's medical records reasonable, or did it impede good faith accommodation efforts?

5. Having regard to the pronouncements of the Supreme Court in *Renaud, supra,* did the Complainant fail in his obligations to facilitate the accommodation process, in particular, by:

    i. Failing to provide work-related information to medical practitioners, or failing to provide updated medical information to the Employer's medical advisors?

    ii. Failing to consider reasonable accommodation options, including a transfer to Calgary, or work as a yard foreman?

    iii. Failing to take steps to update his bid-card, to ensure access (within his seniority) to as many shifts in assigned service as he could work?

Issue 1: Was the Work provided to the Complainant from July 2011 to February 2012 reasonable accommodation?

[102] I find, with regard to both the Respondents, that the Complainant's position in assigned service as an LE in Lethbridge, with three shifts per week, amounted to reasonable accommodation. To constitute reasonable accommodation, the option need not be perfect. A complainant cannot expect a perfect solution (*Renaud, supra*, para. 44). Part-time work can, in some cases, satisfy this requirement (*Renaud, supra*, para. 43). This is particularly the case in this situation, as the Complainant experienced no loss of income in 2011, despite the change to three shifts per week in assigned service. Further, the Complainant was able to stay within his position as an LE, to stay in his preferred

location of Lethbridge, and to work within his medical restrictions, obtaining enough shifts to earn comparable and increasing annual incomes until his retirement.

[103] I further find that, given the Complainant was unable to establish a *prima facie* case of discrimination based on family status, the Respondents, or either of them, would have been entitled to require the Complainant to accept a transfer, as part of his accommodation. I find that the offer to transfer the Complainant to Calgary, which was available at all times, also constituted reasonable accommodation. While the Employer and the Union continued to participate in an accommodation process to find the Complainant a more desirable accommodation, their legal obligation to accommodate was satisfied by the offer of relocation.

[104] At all times during the process of evaluating the Complainant's medical disability, through to February of 2012 and ultimately to the date of his retirement in early 2016, the Complainant was fully accommodated through the efforts of his employer. He was working at least three shifts per week in assigned service, with capacity to obtain full-time work in the period running from August of 2011 until February of 2012, at which point he admits to having been fully accommodated, and to having worked full-time in assigned service until his retirement.

[105] The Complainant raised three primary alternatives for his accommodation that he felt would have constituted full accommodation, but these were rejected by either CP or TCRC. The Complainant argued that one of these options should have been utilized, and because none of them were he was not fully accommodated. While I have found above that the Complainant was fully accommodated, each of these options is considered below.

Issue 2: Should CP have accommodated the Complainant with a call-out window in unassigned service?

[106] The Complainant could not, given the safety critical nature of his work in unassigned service as an LE, and given his medical disability, continue to work as an LE in unassigned service from the Lethbridge terminal. This was not only the view of his own medical expert, but also that of the CMO.

[107] The modification of his job as an LE in unassigned service, by adding a 5 a.m. to 5 p.m. call-out window, was inconsistent with the medical restrictions to which he was subjected by his Sleep Specialist, once he had provided her with all the information she needed to assess the accommodation.

[108] While the 5 a.m. to 5 pm. call-out window was preferred by the Complainant, it was never a viable accommodation.

Issue 3: Should CP have accommodated the Complainant with bundled work or office work?

[109] The employer does not have a make-work obligation to assign unproductive work, in order to satisfy its duty to accommodate. (*Croteau, supra,* para. 44(4)). In this case, the Employer was not required to create office work or other bundled work for the Complainant, in order to fill the additional two shifts per week, where to do so would not provide the Complainant with meaningful work.

[110] I have considered and rejected TCRC's argument that the Employer was compelled to create office work or bundled work for the Complainant, based on its practice of doing so for employees in receipt of Workers' Compensation benefits. These arrangements are created in a completely different context of short-term assignments for employees injured in the workplace, in respect of which employees the Employer has distinct compensatory obligations created by a statute other than the *CHRA*. The existence of this practice in Workers' Compensation cases is not indicative of the reasonableness of such measures in the context of workplace accommodation pursuant to the *CHRA*.

Issue Four: Should TCRC have bumped a more senior employee to accommodate the Complainant?

[111] The efforts at accommodation made by the Employer in this case are a complete answer to the Complainant's claim of discrimination. Since the Complainant was fully accommodated at all times through the efforts of his employer, and the Union's co-operation was not ultimately required to achieve this result, no obligations of Union participation are triggered, as per *Renaud, supra,* paras. 37 and 40.

[112] However, in keeping with the Tribunal's statutory duty to "inquire into the complaint", I would note that some actions of TCRC officers during the accommodation process, while not creating any liability for discrimination, do warrant comment.

[113] Despite the arguments made by TCRC that their refusal to bump a more senior employee was motivated by a desire to protect the value of seniority, the evidence indicates otherwise:

1. TCRC clearly considered the nature of the Complainant's disability in making their decision not to consider bumping a more senior employee in order to accommodate the Complainant. They felt the Complainant was a less deserving candidate for bumping because of their belief that his diagnosis was less credible, based as it was on his own reporting of symptoms.

2. TCRC insisted that the Complainant disclose his medical records to the union, and withheld assistance in the accommodation process until he did so. A witness for the Union gave evidence that this was a request frequently made by the Union of its members. Yet the Union's evidence at the hearing was that it had no expertise or ability to assess those medical records, and that while the Union did on occasion retain medical experts to review its members' medical records, it did not do so in this case.

3. In their email communications, Union officials made disparaging comments about the nature of the Complainant's disability, admitting this was the reason why TCRC would not consider a bump.

[114] While these actions as set out above do not give rise to any liability in this case, and are not being considered here for that purpose, it is difficult to see how they would be consistent with the Union's obligations under the *CHRA*.

Issue 5: Did the Complainant fail in his duty to facilitate accommodation?

[115] While the accommodation provided by the Employer in this matter is a full answer to the Complainant's claim of discrimination based on disability, the Complainant's own failure to facilitate the accommodation process is also a full bar to any claim against the

Employer. That failure to facilitate the accommodation process is also a full bar to any claim against TCRC as per *Siddoo v. I.L.W.U Local 502*, 2015 CHRT 21, ("*Siddoo*") para. 42 although I would note that there is a judicial review application of the decision in *Siddoo, supra* which is pending: T-1742-15.

[116] The Complainant's failure to facilitate the accommodation process was three-fold: First, the Complainant was hesitant to provide complete information to his Sleep Specialist. Rather than providing her from the outset with a complete understanding of his workplace, and the options available, he merely provided her with only enough information at each stage of the process to ensure he obtained his most preferred accommodation at that time. It is clear that the efficacy of the Sleep Specialist's recommendations was undermined by the Complainant's failure to advise her fully of the nature of his work.

[117] The Complainant also failed in his obligations to provide ongoing and updated medical records to the Respondent CP, to allow for a more effective effort to return him to work. He tended only to update his medical information after he was presented with employment options that were inconsistent with his medical restrictions. This practice left the Respondents, and the Employer in particular, constantly one step behind in the accommodation process, and resulted in much wasted effort in trying to design a modified foreman position for the Complainant.

[118] Finally, the Complainant failed to update his bid-card appropriately, which prevented him from working as many shifts in assigned service as possible. Instead, he continued to argue for his preferred accommodation options.

VII. Compensation

[119] The Complainant, in his final oral arguments and in his evidence, set out a number of forms of compensation he is seeking:

a. the maximum compensation allowable under sections 53(2)(e) and 53(3) of the *CHRA*, being $20,000 under each provision;

b. recovery for lost wages under section 53(2)(c), being the difference between what the Complainant estimated he could have earned in full-time unassigned service, and what he actually made in assigned service; and

c. recovery for amounts by which his pensionable earnings were reduced, as a result of working in assigned rather than unassigned service.

[120] Given the findings on liability in this matter, it is not strictly necessary to address the question of remedy. However, it is important to note that should the findings on liability be incorrect, certain conclusions regarding remedy may be useful. As concerns compensation for lost wages under section 53(2)(c), the Complainant was unable to present any evidence showing that he experienced any loss of income, reduction in pensionable earnings, or a reduction in pension benefits. It is clear from the evidence of CP, which was undisputed by the Complainant, that the Complainant suffered no decrease in income, but rather was able to sustain and increase his earnings until his retirement. This is likely as a result of his ability to report to work consistently in assigned service, as opposed to unassigned service, where he had been forced to repeatedly miss shifts as a result of a lack of medical fitness.

[121] The Complainant's analysis of loss of income was based on his staying in unassigned service, on the road, until his retirement. As previously noted, the Complainant's own witness indicated he was medically unable to carry out this work. However, the Complainant continued to assess his loss by comparing what he earned in the 2011- 2015 time period with what other Lethbridge LEs in unassigned service told him they were earning.

[122] There are a number of issues with this position. The first is, assuming the other employees were truthful and accurate in their reporting of earnings to the Complainant, there was no evidence to establish how many hours these employees were working, and how many miles they were driving. The Complainant did not submit any documentary evidence to support this position, and did not call any of his co-workers to give evidence on this point. The actual number of hours worked and miles driven would have a considerable impact on earnings. The second issue is that, given that the 5 a.m. to 5 p.m.

call-out window does not exist at the Lethbridge terminal, none of these LEs were working that restricted shift. It is therefore impossible to assess the impact this type of restrictive shift would have had on their earnings. The Complainant himself has never disputed that he was unable to work in unassigned service without a restricted call-out window. Therefore, it is impossible to know how his income would compare with that of other LEs who had an unrestricted call-out. Thirdly, the Complainant, even when working unrestricted in unassigned service from Lethbridge, earned annual incomes vastly lower than the amount he suggested other LEs were earning. For example, the Complainant earned only $67,060.83 in 2009, working in unassigned service without medical restrictions, and prior to the emergence of his sleep circadian rhythm issues. Despite this, he argued his loss of income should be based on earnings of $120,000 or $110,000 per year. Both of these amounts vastly exceed anything he was able to earn while working unrestricted in unassigned service as an LE. This comparative wage claim is therefore unsupportable.

[123] The Complainant also made allegations regarding a loss in pensionable earnings arising from his reduced income between 2011 and 2015. This claim is also not supportable, and CP's evidence on this point, which was clearly and succinctly led, established that any loss to pensionable earnings arising through the accommodation process would be so extremely minimal as to be insignificant, amounting to only a few dollars per month. Such losses would have been offset by higher pension earnings generated as a result of his subsequent higher income earnings in an accommodated position. I further find that given the variability in the Complainant's income, which tended to fluctuate from month to month and year to year, both before and after this accommodation process, the impact on his pensionable earnings was within the inherent earnings range the Complainant had always experienced, and would always experience, as an LE at CP. In light of the foregoing, it is impossible to assess whether the Complainant would overall have had higher pensionable earnings and a higher pension, had he received a different accommodation.

VIII. Conclusion

[124] The Complainant's case of *prima facie* discrimination based on family status has not been made out. The evidence as led was insufficient to show the Complainant had any obligations of care to his parents that had to be satisfied by his remaining in Lethbridge. Further, while the reference to family status was initially excluded by TCRC from the RTW Plan, and while TCRC ultimately suggested a transfer, the Complainant was never forced to move, but was in fact accommodated at all times in Lethbridge.

[125] The Respondent CP admitted the Complainant's case of *prima facie* discrimination based on disability. Further, even without CP's admission, the Complainant has made out the *prima facie* case by establishing he was prevented from working as an LE without restrictions, based on his medical disability. As I have previously expressed, TCRC's duty to accommodate in this case was not triggered given that CP fully accommodated the Complainant. In the circumstances of this case, TCRC was not required to take any steps, or give any consideration to bumping an employee.

[126] The *prima facie* discriminatory restriction imposed by CP is, however, a BFOR adopted for the purposes of ensuring the safety of the Complainant and the public in his performance of safety critical work. Also, it was adopted in the honest and good faith belief that it was necessary to the fulfillment of these purposes. Further, the Complainant was at all times accommodated to the point of undue hardship. Reasonable accommodation was provided by the offer to relocate, by the three shifts per week in assigned service with the opportunity to bid for further shifts, and then, by the provision of five shifts per week in assigned service beginning in February 2012. Finally, given the efforts made by the Employer, the Complainant's failure to facilitate the accommodation process is a complete answer to his claim.

[127] If the conclusions regarding family status discrimination or disability discrimination—including the BFOR—are held to be incorrect, I find the Complainant has not proven that he incurred any wage loss or pension income loss as a result of the work restrictions placed on him by CP.

[128] The Complaints against the Respondents CP and TCRC are hereby dismissed.

Signed by

Ricki T. Johnston
Tribunal Member

Ottawa, Ontario
July 14, 2017

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2041/4214 & T2042/4314

Style of Cause: Keith Waddle v. Canadian Pacific Railway & Teamsters Canada Rail Conference

Decision of the Tribunal Dated: July 14, 2017

Date and Place of Hearing: November 16 - 17, 2015
March 17, 18, 21, 22, 23, 2016
April 22, 2016

Lethbridge, Alberta
Calgary, Alberta

Appearances:

Keith Waddle, for himself (as of March 17, 2017)

R. (Ron) McDonald, Q.C. and Heather Chan, for the Complainant

No one appearing, for the Canadian Human Rights Commission

Sylvie Lang, Paige Ainslie and Richard Tanner, for the Respondent, Canadian Pacific Railway

Ken Stuebing, for the Respondent, Teamsters Canada Rail Conference