

**Canadian Human  
Rights Tribunal**



**Tribunal canadien  
des droits de la personne**

**Citation:** 2017 CHRT 37

**Date:** December 11, 2017

**File Nos.:** T1616/16210, T1783/1312

**Between:**

**Ashraf Karimi**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Zayo Canada Inc. (formerly MTS Allstream Inc.)**

**Respondent**

**Decision**

**Member: Susheel Gupta**

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## **I. Complaints**

[1] Pursuant to s. 7 of the *Canadian Human Rights Act* (the *Act*), Ms. Ashraf Karimi alleges her employer, formerly MTS Allstream Inc., now Zayo Canada Inc. (Zayo), singled her out and treated her adversely on the basis of her sex and disability. The adverse conduct she alleges includes unfair criticisms; assigning her an overwhelming volume of tasks and tasks beyond her disability related physical limitations; denying her training opportunities; and, ultimately, demoting her. Ms. Karimi claims this treatment caused her to suffer stress, anxiety and depression, and required her to go on short term disability multiple times. When her short term disability benefits were exhausted, she went on long term disability. Despite attempts to return to work thereafter, Ms. Karimi contends Zayo denied her all forms of accommodation.

[2] Ms. Karimi also alleges, under section 14.1 of the *Act*, that Zayo's unwillingness to accommodate a return to work is retaliation for her having filed a complaint about her alleged discriminatory treatment in the workplace.

[3] During closing oral submissions, counsel for Ms. Karimi raised, for the first time, an allegation of discrimination pursuant to paragraph 10(b) of the *Act*. As this ground does not form part of the original complaints filed by Ms. Karimi and since Zayo was not provided with a proper opportunity to respond as the issue was raised for the first time in closing submissions, the Tribunal finds it would be improper for it to address this issue. As such, the allegation of discrimination made pursuant to paragraph 10(b) of the *Act* is not dealt with in these reasons.

[4] For the reasons that follow, I dismiss Ms. Karimi's complaints.

## **II. Hearing Process**

[5] This matter was originally heard by former Member Bélanger. The evidentiary portion of the hearing was completed on September 17, 2014. Final submissions were provided in writing and were supplemented with oral final submissions in April of 2015. Sadly, Member Bélanger passed away on November 27, 2015.

[6] Shortly after Member Bélanger's death, the parties were contacted by the Tribunal Chairperson to notify them of his death and furthermore, to discuss how to move forward with this case. I was subsequently assigned to this case to carry it forward to completion. Written submissions were provided by each of the parties for a decision on whether the Tribunal could decide the case on a hearing *de novo* or based on the existing record. Upon receipt of the submissions, a series of Case Management Conference Calls (CMCCs) were held with the parties in order to discuss the submissions, seek/obtain clarifications and move forward with a decision on how to complete this matter.

[7] Before a decision was made by the Tribunal, the parties came to an agreement that a new evidentiary hearing would not be required and that the matter should proceed based on the record of the case. The parties agreed that the record of the case would include: all oral evidence presented at the hearing, all of the evidence (exhibits) previously tendered during the hearing, as well as, all oral and written submissions to date. Furthermore, my review of the evidence would be based on both the written transcripts and the audio recordings of the hearing.

[8] Ms. Karimi had sought to re-testify before me, but such request was withdrawn on May 30, 2016. There was an agreement by the parties that should I have any questions or require some clarifications upon completing my review of the evidence, that the parties would respond to such a request by, for example, facilitating the recall of a witness to answer the questions, and if that occurred, both parties would be given an opportunity to ask their own questions of the witness relating to my questions. Finally, it was agreed that parties would be given an opportunity to make opening statements, what was referred to as an "overview" of the case, before I commenced my hearing and careful review of all of the evidence, including the audio-recordings of the hearing presided over by Member Bélanger, and the written submissions filed by the parties. That overview occurred on October 26, 2016.

[9] Unfortunately, the oral closing submissions that had commenced before Member Belanger had not been completed before his passing. On November 9, 2017, after my completion of the review of the record of the case, including the said recordings, the

parties agreed that no further oral submissions were required. The parties agreed that their previously filed written closing submissions were sufficient.

### **III. Preliminary Matter**

[10] As a preliminary matter, I shall deal with Zayo's letter to the Tribunal dated April 8, 2015, which sets out its objection to Ms. Karimi's written Reply submissions dated March 31, 2015, on the grounds that the Reply is improper for introducing new arguments and for relying on facts that are not in evidence.

[11] Following a careful review of the record of the case, I agree with Zayo's characterization of Ms. Karimi's Reply. As such, the new arguments advanced by Ms. Karimi will not be considered for being improperly introduced in Reply. In any event, I find that the new arguments made in Reply are not material for the resolution of the complaints. The Reply arguments based on facts unsupported by evidence not in the record will not be considered either. Contrary to Ms. Karimi's assertions in her letter dated April 14, 2015, I am not convinced that exceptional circumstances exist in this case allowing for the application of special remedial measures as set out at paragraphs 64, 69-78 of *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian Affairs and Northern Development Canada)*, 2014 CHRT 2 (*Caring Society 2014*). In *Caring Society 2014*, the admissibility of over fifty thousand documents was at issue. It appears that the Tribunal in that case conceived of the remedy in large measure because of the sheer volume of potentially relevant documents. Moreover, at the time the Tribunal issued the remedial measure in *Caring Society 2014*, the evidentiary portion of the inquiry remained ongoing. In this case, the Complainant's request amounts to effectively asking the Tribunal to re-open the evidence gathering portion of the inquiry over six months following the close of same. I also note that Ms. Karimi seems to have abandoned the position taken in her letter dated April 14, 2015, as she more recently agreed that the matter ought to proceed on the record of the case alone (see para. 7 above). Moreover, based on my reading of the impugned Reply submissions, I find that in addition to being improper, even if the evidence supporting

same had been properly before me, it would not have affected my decision on the final outcome of the complaints.

#### **IV. Circumstances giving rise to the complaints**

##### **A. Critical treatment and scrutiny from manager**

[12] The company now known as Zayo provides communication and internet services to businesses. Ms. Karimi was hired in 2000 as a Level 2 Communication Technician (CT) and worked in the Internet Department, also referred to during the hearing as the CTAC Department. From 2000 to 2006, her performance reviews indicate she was rated as having met her expectations. Zayo used a low-solid-high rating system and Ms. Karimi appears to have rated in the “solid” range during this period.

[13] In December 2005, Mr. Paul Picard took over as manager of the Internet Department. As of April 2006, Ms. Karimi was the only female working in the Internet Department. It is at this time that Ms. Karimi alleges Mr. Picard began to single her out and began a campaign of unfounded criticism of her work performance and punctuality.

#### **Customer Complaints**

[14] Ms. Karimi gave evidence with regards to three customer file matters where she was subsequently spoken to by Mr. Picard, about her performance on those files. I have referred to the customers’ names using acronyms in order to protect their privacy interests as third parties to this proceeding. The three incidents were in relation to dealings with FA which occurred in February 2006, DEL which occurred in March 2006 and ABXL which occurred in March – April 2006. Ms. Karimi alleges she was unfairly criticized for errors or issues arising in dealings with these customers when in fact the errors or issues were caused by either other employees or the customers themselves.

[15] The FA matter arose from a complaint by the customer with regards to the setup and installation of network services in February 2006. Ms. Karimi was one of the individuals servicing this customer. One of the customer’s emails implied that Ms. Karimi

had not been provided all the information on the scope of the installation, which she required in order to complete the job. In that email from FA dated February 23, 2006 at 11:36 pm (email between two FA employees and subsequently forwarded to Zayo), it appears that after Ms. Karimi thought she had completed the work and had informed the customer, Ms. Karimi was surprised to learn (from the customer) that there was more that had to be done. The customer indicated that Ms. Karimi then became “mad” with him. The installation ultimately took several hours, instead of the 30 minutes that Ms. Karimi had anticipated. The following day, a Senior Manager of Zayo wrote to Paul Picard requesting he gather details on what the issue was so that the customer could be informed. Furthermore, the customer was not pleased with the cost of the installation which it felt should have been less had Zayo and its employees been properly prepared and informed of the scope of the installation of service.

[16] By email, the next day, Mr. Picard asked Ms. Karimi for her feedback on what the issue was on this file, as the customer had indicated that the installation could have been handled better. Notable from Ms. Karimi’s reply is that she considered the installation successful because the customer did not suffer any downtime. Mr. Picard also communicated with a co-worker of Ms. Karimi’s, who had also worked on the service installation. In an email to Mr. Picard, the co-worker indicated that the work was very complex, that he did not work directly with the customer, and thus had no comment on the customer’s view of the service. He added that there was always room for improvement and the company could use the customer’s feedback to try to make their next experience better.

[17] Mr. Picard wrote back to the Senior Manager indicating that he had spoken with Ms. Karimi and another co-worker, that there were issues with the installation, and that his group had not been aware of all the changes needed. Furthermore, Mr. Picard indicated that Ms. Karimi could improve her communication, and that she had admitted as much during a coaching session he held with her. Mr. Picard also indicated that they had received a subsequent email from the customer thanking Ms. Karimi for her help, and that everything was working. The Senior Manager replied back with a thank you to Mr. Picard

and made it clear he was not looking for anyone to punish or point fingers at, but rather, an opportunity for improvement.

[18] Mr. Picard, in his testimony, indicated that he took customer complaints very seriously, as the company had experienced and was still experiencing difficult times financially when he was employed there, and it could not afford to lose any customers. While he could not recall the specifics of any meeting with regards to this incident that occurred between him and Ms. Karimi, he did indicate that he would have met with Ms. Karimi in his cubicle, and that it was his usual practice to follow-up discussions with an email to confirm what had been discussed. Mr. Picard indicated that part of his responsibilities were to follow-up with employees about customer complaints, in order to address performance issues, provide coaching, lead, guide and correct. Finally, no other actions were taken as a result of this incident.

[19] The DEL matter arose in March 2006 and involved a customer whose service installation was in jeopardy of not being completed in time by Zayo. Ms. Karimi cited this instance as evidence of unfair criticism, since she had done all she could on this file and she was not to blame for any errors. Through a series of emails between Ms. Karimi and Mr. Picard, Ms. Karimi brought to his attention that there would be consequences for both the client and Zayo if the service could not be installed the next day. Ms. Karimi requested that Mr. Picard escalate the matter, as she took the position she did not have the authority to do so. Mr. Picard suggested that Ms. Karimi escalate the matter and subsequently told Ms. Karimi who she should get in contact with. The email exchange continued, with Ms. Karimi indicating she could not escalate, as escalation had to be from manager to manager. Mr. Picard then requested that another employee take over the file. On March 29, 2006, after Mr. Picard had asked Ms. Karimi to give the details of the DEL matter over to her colleague, Ms. Karimi wrote to that colleague and indicated there was "...no guaranty [*sic*] that we can get a tech without a higher push".

[20] Mr. Picard subsequently, in a discussion with Ms. Karimi, raised Ms. Karimi's performance on this customer file as an example of a file that demonstrated Ms. Karimi's need to improve her performance. On April 12, 2006, Mr. Picard wrote to Ms. Karimi indicating that he was following up on discussions the two of them had with regards to



Ms. Karimi's need for improvement on her performance. DEL and another customer (ABXL, discussed below) was mentioned in the email. Specifically, Mr. Picard wrote that Ms. Karimi's performance was below standard, that she needed to take accountability for the status of her orders, to ensure that the customer and sales teams were proactively communicated with, and that she should focus on making improvements.

[21] The ABXL customer incident occurred in March and April 2006, and involved a customer service request that had been dealt with incorrectly by another employee of Zayo, at the incoming customer ordering stage. It appeared that another employee had mistakenly coded or processed the file initially, and had not forwarded it properly to the CTAC Department. Thus, the customer was not going to have installation on the day it had requested and needed it. Ms. Karimi had received the file on March 22, 2006.

[22] Ms. Karimi gave evidence that she was not to blame for any errors on this customer file, and that management was at fault for not paying closer attention to the order requirements. Mr. Picard testified that he was concerned as the customer had spoken to Ms. Karimi on March 30, 2006 and thus, Ms. Karimi should have done a better job at keeping the customer informed of the status of its requested service.

[23] No other witnesses gave evidence regarding how or whether, when compared to Ms. Karimi, they were treated differently by Mr. Picard in respect of any mistakes or issues on customer installations and files.

### **Punctuality emails**

[24] Ms. Karimi also alleges that she was singled out and frequently criticized for her lack of punctuality in front of other employees. According to Ms. Karimi, this did not occur to other employees. The evidence showed that on two occasions, April 20, 2006 and April 24, 2006, Mr. Picard wrote to Ms. Karimi after her 8 am start time had come and passed and indicated to her that she was to call if she was going to be late. It was Mr. Picard's testimony that it had been his practice to send follow-up emails after having had conversations with employees about performance issues. In the email of April 24, 2006, Mr. Picard followed up on a conversation he had with Ms. Karimi that day, where he wrote

that should she not be able to make it for 8 am, they could discuss and try to adjust her shift schedule if that was needed. Mr. Picard testified that Ms. Karimi was the only employee scheduled, and on duty, between 8 am and 9 am.

[25] Ms. Karimi replied by email to Mr. Picard stating that the April 24, 2006 conversation had not occurred in private, that she felt she was being singled out for being late, and this had an impact on her health. Mr. Picard replied back on the same day, indicating that their discussions had been in private. Mr. Picard testified that others would not have been able to hear discussions in his cubicle, even if the volume of the conversation was louder than average, because his cubicle had higher walls than others, it was surrounded by empty cubicles, and because of where the Internet Department was located.

#### **Other Alleged Unfair Criticism**

[26] On April 12, 2006, Mr. Picard sent an email to Ms. Karimi outlining very briefly a number of performance issues, including the observation that Ms. Karimi had been found asleep at her desk which was not acceptable. Mr. Picard testified that he had been walking around the cubicle area and had found Ms. Karimi with her arms folded and head down, and that she had been startled when she woke up. Ms. Karimi testified that she had not been asleep. Rather, she was not feeling well and had her arms folded, with her head on her arms. No further actions were taken by Mr. Picard or management as a result of this incident.

[27] During a meeting on April 25, 2006, Ms. Karimi complained to Mr. Picard about his treatment of her. According to Ms. Karimi, Mr. Picard told her that it would not help her to go to her union to discuss employment issues. Ms. Karimi grieved this incident to her union. Mr. Picard denied that he had told Ms. Karimi not to go to the union. The grievance was denied and not subsequently pursued by the union.

[28] In an email on April 26, 2006, with the subject line "Disruptive Behaviour", Mr. Picard wrote to Ms. Karimi, indicating that the day previous marked the second occasion on which Ms. Karimi had yelled at him during a discussion, that there were

mutual respect policies in place, and that yelling was not acceptable. Mr. Picard wrote that the “yelling episodes” disrupted the team, that this type of behaviour had been discussed previously, that Ms. Karimi needed to work on controlling her anger, and that should she wish to discuss issues in a calm manner, a time could be arranged to do so.

[29] Only one witness recalled there ever having been yelling between Ms. Karimi and Mr. Picard. Mr. Muktar was a colleague of Ms. Karimi’s. He worked for the Data Group while Ms. Karimi worked for the Internet Department. Both groups reported to Mr. Picard. Mr. Muktar’s cubicle was closest to Mr. Picard’s. Mr. Muktar indicated that he had one recollection of Ms. Karimi going to Mr. Picard’s cubicle, after which Mr. Picard could be heard yelling at Ms. Karimi. Under cross-examination, he indicated that Ms. Karimi was probably yelling too, and furthermore, that he could not hear what subject matter the yelling was about.

[30] Except for Mr. Muktar, no other witnesses gave any evidence with regard to any yelling or any excessively loud discussions between Ms. Karimi and Mr. Picard.

[31] According to Ms. Karimi, her interactions with Mr. Picard caused her much stress and anxiety and resulted in her having to go on short term disability benefits for ten days beginning April 27, 2006. She returned to work on May 8, 2006.

**B. Assignment of an overwhelming volume of tasks and tasks beyond disability-related physical limitations**

[32] Upon her return on May 8, 2006, Ms. Karimi claims Mr. Picard overwhelmed her with a large volume of work. The evidence tendered on this point was an email Mr. Picard sent to all members of the Internet Department (including Ms. Karimi), wherein he asked other members of the team to return Ms. Karimi’s orders to her, along with an indication of their status. The email went on to thank everyone for covering the orders on top of their regular workload, and further thanked everyone for their teamwork and customer service.

[33] That same afternoon, Ms. Karimi testified, Mr. Picard also assigned her the task of router inventory which involved heavy lifting, that she could not perform based on her physical disabilities. Ms. Karimi had a previous medical restriction which limited her

physical abilities. This task involved providing assistance to Peter Allaert, who had been Ms. Karimi's manager from 2002 – 2005, and at the time of the request was the Senior Manager of the Internet Provisioning Group. Mr. Picard indicated to her that the task was a good fit due to Ms. Karimi's morning shift. Ms. Karimi replied to Mr. Picard by email, that due to her back and wrist condition it was not a suitable task for her. She went on to indicate that if the assistance did not require heavy lifting, she would be happy to help.

[34] Mr. Picard had been unaware that Ms. Karimi had any medical limitations. Upon receiving Ms. Karimi's email, Mr. Picard wrote to Mr. Allaert, asking if there was a medical note on file and also enquired what the lifting requirements were for the task. The following morning, May 9, 2006, Mr. Picard also wrote to a Senior Manager in Human Resources (HR) asking if there was a medical note on file with respect to Ms. Karimi's medical conditions. Later that same day, prior to receiving the medical confirmation from HR, Mr. Picard wrote to Ms. Karimi with more details on the types of routers that he required someone to handle on the morning shift. Those details had been provided by Mr. Allaert. Mr. Allaert had written to Mr. Picard that the equipment was identical to the equipment that Ms. Karimi was currently handling, and he provided a manual which set out the specifications of each type of router, including physical size and weight.

[35] On May 10, 2006, Mr. Picard was provided confirmation from HR that there was a medical note on Ms. Karimi's file confirming she had some restrictions. Both Mr. Picard and Mr. Allaert testified that the routers involved were the same ones that Ms. Karimi had already been provisioning and handling since 2000. Mr. Allaert agreed that the assistance request came from himself, and that it was Mr. Picard who had assigned the employee. Ms. Karimi testified that despite confirming that she had a doctor's note in her employee file regarding her physical limitations, Mr. Picard repeated his request that she engage in work relating to router inventory. Ms. Karimi added that this function was normally performed by another department.

[36] Mr. Picard's testimony was that the 8 am shift was a less busy time in the call centre, and that he tried to keep employees productive. He selected Ms. Karimi to assist with router inventory because of her 8 am start time. He indicated the task was a "shift

specific” task, as opposed to a person specific task. Had someone else been working during that shift, they would have been assigned the task.

[37] A week after the initial task assignment had been made, on May 16, 2006, Ms. Karimi and Mr. Allaert were still discussing the task. Mr. Allaert indicated that he would ensure there was no heavy lifting involved, and that the routers would be brought to her desk and removed from her desk upon being dealt with. These discussions, via email, led to Ms. Karimi indicating that due to her own workload, she could not assist. Evidence from Ms. Karimi and Mr. Picard confirmed that Ms. Karimi did not end up performing the task.

[38] The next incident giving rise to an allegation of discrimination occurred almost one year later.

### **C. Reassignment and denial of training opportunities**

[39] On April 23, 2007, Ms. Karimi was temporarily reassigned from the Internet Department to the Design Department. At the time of her reassignment, Ms. Karimi was still the only female employee in the Internet Department. Zayo submits that the manager of the Design Department, Tim Richardson, requested that an employee with internet experience be moved into the department to do cross-training. Emails from Anna Di Nuccio, Mr. Richardson’s Director, show that some responsibilities from the Internet team had been moved to the circuit design team a year earlier. In the Calgary office, a decision was made to train someone to do the work. Now, the goal was to align Toronto’s operations with Calgary and the thought was it would be easier to bring someone in with the knowledge and skillset rather than train a new individual from scratch. Furthermore, it was felt this would be a good developmental opportunity and Ms. Karimi would be a good candidate for it. Tim Richardson, Peter Allaert, Paul Picard and Anna Di Nuccio testified to the reasoning behind the assignment, *i.e.* to align operations in Toronto with Calgary, to introduce skillsets from the Internet Department, to expand the work and expertise in the Design Department, and to cross-train individuals. As Ms. Karimi had expressed a desire to develop her skills, a decision was made to offer her the opportunity to be temporarily reassigned to the Design Department. According to Zayo, Ms. Karimi was under no

obligation to accept the temporary reassignment, but voluntarily agreed to it, along with her union.

[40] While Ms. Karimi expressed some concern, via email, to her union officials in going to the Design Department on the re-assignment, she asked the union officials not to convey that to management, as she did not want to appear to have been forced to take the position. She indicated she would accept the re-assignment. A union official did indicate informally to management that Ms. Karimi was not interested in expanding her skills, but, the union and Ms. Karimi took no further steps to discuss the matter with Zayo management. Thus, Ms. Karimi never informed management that she did not want to take the temporary assignment.

[41] She claims that while her collective agreement provided for reassignments based on seniority, she was selected by Mr. Picard for the reassignment despite having more seniority than other male colleagues in the Internet Department. The testimony of shop steward Dylan Gadwa, and the documentary evidence of union officials Camilla Leblanc and Ken Burton, indicated there was no seniority requirement when it came to temporary assignments within the collective agreement. The documentary evidence consisted of emails between Ms. Karimi and her union officials, wherein they provided their interpretation of the applicable collective agreement provisions. Mr. Gadwa was both a colleague of Ms. Karimi's, working within the same occupational classification, and in the same workgroup.

[42] Ms. Karimi was concerned about her seniority rights and status, should there be lay-offs in the Design Department. She sought assistance from her union in order to confirm her rights. Zayo submits that its HR Department made it clear to Ms. Karimi that as the reassignment was temporary she was still part of the Internet Department. Zayo further confirmed that should there be any restructuring at Zayo, such as lay-offs in the Design Department, Ms. Karimi would return to her home position/department. Ms. Karimi had also expressed a concern that she would have lower seniority within the Design Department as she was the newest member of that group.

[43] According to Ms. Karimi, Mr. Picard told her that on reassignment her skill set would be used, and that she would get training and development opportunities. However, Ms. Karimi claims she was assigned unskilled tasks and was denied training opportunities afforded to male colleagues. Specifically, she claims that male colleagues in the Internet Department received further training that Ms. Karimi missed by virtue of being in the Design Department. Furthermore, she argues she was not afforded training equivalent to her male colleagues in the Design Department.

[44] Zayo submits that the reason why Ms. Karimi was not getting formal or course delivered training was because part of the rationale for the temporary assignment was to provide internet knowledge to the Design Department. However, she did receive informal training in the form of job shadowing. Zayo also submits that, while Ms. Karimi wanted to do more complex design work, she failed to appreciate or accept that before she could learn the more complex work, she first had to learn the less complex design work.

[45] Tim Richardson testified that the method of training that was primarily given in the Design Department was side-by-side shadowing or training. There was no formal training program or series of courses that one ordinarily took to work in the Design Department. There may have been the occasional course when a new technology or product was involved. Mr. Richardson further testified that all others in the Design Department would have been trained the same way, that is, via side-by-side training. Ms. Karimi provided evidence that she was not happy with this form of training, and that she preferred instructor-led courses or courses that came with some sort of certification; she found it difficult to learn by spending time with co-workers. That being said, the parties led no evidence of any training that had been offered to others in the Design Department, either prior to Ms. Karimi joining the department or during her time there, and that had been denied to Ms. Karimi. There was uncontradicted evidence introduced during the hearing showing that Ms. Karimi was trained the same way as any individual who had previously joined the group or would join the group.

#### **D. Demotion/Rebalancing**

[46] Ms. Karimi claims she was demoted to the position of a Level 1 CT on November 28, 2007. Zayo described the transfer as a rebalancing of the workforce. Ms. Karimi claims, based on seniority, that more junior male colleagues should have been demoted before her.

[47] According to Zayo, the work change was a form of business-related “rebalancing” carried out pursuant to the collective agreement. The rebalancing was announced to the Internet Department via an email on November 14, 2007. Under the rebalancing exercise, two employees were moved from the Internet Department to the Order Management group because there was a need for additional resources in that group. In accordance with the provisions of the collective agreement, in the absence of volunteers for the rebalancing, the junior employees (those with the lowest seniority) in the affected department were rebalanced to the other area. Ms. Karimi and a male colleague, as the two most junior employees in the Internet Department, were rebalanced. As the new work they would be performing was at a different classification from their previous jobs, they were reclassified from CT2s to CT1s. However, they benefitted from salary protection, ensuring that Ms. Karimi would continue to be paid as a CT2.

[48] Ms. Karimi filed a grievance over the rebalancing, but it was withdrawn by her union after Zayo and the union discussed the matter at a grievance meeting and the union was satisfied that the rebalancing had been carried out in accordance with the provisions of the collective agreement.

[49] While Ms. Karimi’s complaint alleged she was higher up the seniority list and thus, should not have been rebalanced, during her testimony, she acknowledged that she was indeed one of the two most junior employees on the seniority list. This was also confirmed by the testimony of Mr. Gadwa, who was her union representative at the time.

[50] Mr. Picard testified that he played no role in who got rebalanced as the exercise was based on seniority. Furthermore, he did not have a role in making the decision to rebalance, as that decision was made by a higher level of management within Zayo.



[51] Jennifer Bazinet, Manager of Service Delivery – Data and Internet, testified that rebalancing occurred because the Order Management group was going to be taking on additional functions, some of which had been previously performed by the CTAC Department. The Order Management group fell under her area of responsibility. Under the rebalancing, some of the tasks performed by CTAC at the completion of an order would now be done by the Order Management group. The tasks in question were similar to work already being performed by Order Managers (OM), and Zayo felt it was more appropriate for it all to be handled by the Order Management group. The transfer of tasks from CTAC to the Order Management group necessitated the rebalancing of employees between these groups.

[52] After the rebalancing, Ms. Bazinet became Ms. Karimi's direct manager in the Order Management group. Ms. Bazinet described Ms. Karimi as having been reluctant and at times contradictory when it came to training. There were times when Ms. Karimi would say she needed training. At other times she indicated she knew what she was doing and did not need training, as she had worked in CTAC when the Order Management group did not even exist, and CTAC had performed a similar function. However, Ms. Bazinet testified that the work in the Order Management group was different with different systems, different methodologies and different groups.

[53] The training provided was job shadowing or side by side, with experienced OM's sitting with less experienced OM's as they performed basic orders. Then, gradually, the number of orders and the complexity of orders would be increased for the new OM. This is how all new OM's were trained. The other employee rebalanced at the same time as Ms. Karimi was trained in the same way. Ms. Bazinet testified that there had been in the past another employee from CTAC who had been rebalanced in, for whom it had taken about a year to learn the job. Ms. Karimi was progressing slowly compared to others, according to Ms. Bazinet.

[54] Ms. Bazinet described how at various points in time, several months after Ms. Karimi had started in the section, Ms. Karimi had asked for several orders to be reassigned, as Ms. Karimi was not working with the specific technologies. Ms. Bazinet felt that at that point in time, Ms. Karimi was behind where she should have been in her

knowledge, as she was still working on basic orders. Furthermore, the volume of orders that Ms. Karimi was working on was minimal, compared to how many Ms. Bazinet thought she should have been taking on. Finally, Ms. Bazinet testified as to errors and mistakes that Ms. Karimi made in handling some files during this period, which Ms. Bazinet described as basic errors tied to knowing the function of the job. Ms. Bazinet found it discouraging that two months into the position, Ms. Karimi was making such errors.

[55] Ms. Bazinet testified that in conversations with Ms. Karimi, Ms. Karimi expressed the view that the work was below her skill level. Ms. Bazinet attempted to reassure Ms. Karimi that the decision to move her had not been personal, but a business decision.

#### **E. Failure to accommodate and retaliation**

[56] Following Ms. Karimi's demotion/rebalancing, she began experiencing symptoms of depression. In or about April 2008, she went on sick leave and, following a brief return to work for one week, went on short-term disability from around July 8, 2008.

[57] One day in early October 2008, Ms. Karimi provided Zayo with three separate medical notes, which can be summarized as follows:

1. A July 2008 note indicating that Ms. Karimi required modified duties on a permanent basis;
2. A note dated September 2, 2008, indicating that Ms. Karimi could not work for the foreseeable future at her usual workplace; and,
3. A note dated October 2, 2008, from Dr. Aaron Malkin indicating that she could gradually return to work by the end of that month. This note indicated that it would be necessary for Ms. Karimi to work from home in order to return to work.

Zayo relied on the most recently dated note in assessing possible accommodation for Ms. Karimi and ultimately found that it could not accommodate Ms. Karimi working from home. She remained on short-term disability benefits for approximately 8 months, until March 2009.

[58] According to Zayo, it could not accommodate Ms. Karimi's request to work from home because of operational requirements. Zayo indicated that Ms. Karimi had only

received three months of training on her new duties prior to her sick leave, which was not enough training to enable her to perform the work independently. She had also been progressing in her training very slowly.

[59] Mr. Van Horne, who had held various HR positions within Zayo, including as an HR Advisor and Senior Manager of Labour Relations, gave evidence on behalf of the Respondent. Mr. Van Horne testified that Ms. Karimi's accommodation request could not be met, and that she also did not qualify for the Teleworking Policy. However, he acknowledged that the company's Workplace Accommodation Policy did allow for an employee to work from home. The two policies were separate and independent from each other.

[60] Ms. Bazinet and Mr. Van Horne discussed the accommodation request together, before communicating to Ms. Karimi. Ms. Bazinet testified that Ms. Karimi did not meet some of the key criteria under the Teleworking Policy such as; (i) that the employee be a self-motivated worker; (ii) that the employee does not require a high level of supervision; (iii) that the employee be comfortable working in isolation, and; (iv) that the employee's past and current performance must meet or exceed expectations. Ms. Bazinet testified that:

- Ms. Karimi was not able to work independently without a high level of supervision;
- Ms. Karimi had not been fully trained;
- the training was not in a classroom environment, as it was on the job training which would require Ms. Karimi to be in the office;
- the training usually took 6 months or more;
- Ms. Karimi had performance issues during her first 3 months and would need the immediate support of her peers to help her as she learned the process, and how to handle any problems with orders that might arise.

[61] Under the Workplace Accommodation Policy, similar criteria were considered to find that Ms. Karimi could not be accommodated to work from home under that policy either.

[62] For these reasons, Zayo made the decision that Ms. Karimi could not be accommodated to work from home.

[63] Furthermore, Ms. Bazinet testified that Ms. Karimi had not been performing well during the 3 months she had worked in the Order Management group. There were new systems and new processes for her to learn and while there were some similarities with her former department, there were many differences as well. Zayo says it further determined that it could not provide Ms. Karimi with a gradual return to work in her regular role, because work in the Order Management group was highly time-sensitive, with a significant potential for very costly errors. Each order was handled by an individual employee who was the only contact person for the customer, and who had to be available in order to address any errors. OMs were required to carry the file from the beginning to the end. Accordingly, the Order Management team could not accommodate a part-time employee.

[64] On or about March 30, 2009, Ms. Karimi exhausted her short-term disability benefits and applied for long-term disability benefits. On March 30, 2009, Ms. Karimi returned to work at Zayo pursuant to an Individual Work Plan/Return to Work Plan that had been prepared by Great-West Life, which still required approval and discussion with Zayo. Ms. Karimi's return to work was unexpected by Ms. Bazinet, as no one from Great-West Life had informed her that Ms. Karimi would be returning. Only that afternoon did Ms. Bazinet and a representative of Great-West Life speak, at which time it was confirmed that Ms. Karimi would return to work. Ms. Bazinet claimed she had not seen the Individual Work Plan on the day Ms. Karimi returned. Ms. Bazinet, who was still Ms. Karimi's manager, offered Ms. Karimi short-term computer database clean-up work, to be performed three days a week, which accorded with Ms. Karimi's limitations.

[65] According to Zayo, this was a temporary work assignment created for the purpose of accommodating Ms. Karimi in the short-term, and was not intended to be permanent. Zayo submits Ms. Karimi accepted the accommodation and performed the work without any apparent difficulty. Ms. Karimi says she was given the unskilled task of record clean-up, when she could have been given some training, as was provided for in the Individual Work Plan/Return to Work Plan. Ms. Bazinet testified that such work provided an

opportunity for Ms. Karimi to become familiar again with the various systems and orders, while Zayo waited for her to return to full-time Order Management duties. Ms. Bazinet described the assignment as the exact same type of work an OM would do, but without the time sensitivity and customer impact. Thus, she viewed the assignment as a type of training. Ms. Bazinet indicated that Ms. Karimi was not assigned OM customer order work because of the nature of the work. The work required one OM to manage or “own” the order from start to finish; customers and other departments involved were to have a single point of contact should any issues arise, which would not have been possible had Ms. Karimi been working on the orders part-time and only several hours a day.

[66] On October 26, 2009, Ms. Bazinet told Ms. Karimi that she would have to return to work on a full-time basis the following week. Zayo had been informed by Great-West Life that Ms. Karimi no longer qualified for short-term disability, and there were no further medical concerns that necessitated her to be on an accommodated schedule. Around this time, Ms. Bazinet determined that there was no further computer clean-up work available to be performed. The evidence was not clear on whether the information from the insurance provider arrived first or whether it arrived subsequent to the near completion of the records clean-up work.

[67] According to Ms. Karimi, at that time she could not physically or mentally tolerate full-time duties in the workplace. A problem, Ms. Karimi submits, that could have been avoided had she been entitled to work from home.

[68] On October 27, 2009, Ms. Karimi, through her legal counsel, advised Zayo that she was not able to return to work full-time, and provided a copy of a note from her treating physician, dated October 22, 2009, advising that she “...is in no physical or mental condition to return to work full-time. She should be on long-term disability.” A meeting was subsequently scheduled between Ms. Karimi, management and her union.

[69] On November 19, 2009, Ms. Karimi met with Zayo representatives and a representative of her union. Zayo informed Ms. Karimi that it would no longer accommodate her working 3 days per week, as it had done since March 31, 2009. Zayo

told Ms. Karimi that she was expected to return to work full-time starting December 7, 2009, failing which she would not be allowed to work at all.

[70] Given that Ms. Karimi was still pursuing long-term disability benefits (Ms. Karimi was appealing the insurer's findings that she did not qualify for long-term disability benefits), Zayo submits it was willing to place Ms. Karimi on a temporary unpaid leave of absence until: (i) there had been a decision on her claim/appeal; or, (ii) she could return to work full-time; or, (iii) Zayo was able to identify an alternative accommodation for her with a 3 day work week. In order to provide Ms. Karimi with an income bridge during her appeal process, Zayo provided evidence it had advised Ms. Karimi that she would be permitted to use her outstanding vacation pay. Zayo also placed Ms. Karimi on a paid leave of absence from December 29, 2009 to January 1, 2010, in order to permit her to address difficulties with her medical documentation.

[71] Zayo says it actively undertook an accommodation search for suitable positions for Ms. Karimi. As part of the accommodation process, on December 2, 2009, Zayo offered Ms. Karimi a part-time position involving evening hours during the week, and night hours on the weekend, at another location (in Etobicoke). At the same time, despite having allowed her to work 3 days per week for over 8 months without requiring medical documentation, Ms. Karimi provided evidence that Zayo demanded medical documentation from her before it would permit her to do any more work. According to Ms. Karimi, the offer of a part-time position in Etobicoke was a feeble attempt by Zayo to appear accommodating. She claimed she declined the position because the position was far from her home, and claimed her back condition prevented lengthy travel, and sleep problems prevented her from working night shifts.

[72] According to Zayo, the offer was a legitimate offer to accommodate her with part-time work, and as far as it was aware, the position met Ms. Karimi's medical restrictions. When the accommodation offer was made, Zayo did request Ms. Karimi to obtain and provide medical confirmation that she was able to work. This was because the most recent medical information it had in its possession, the October 22, 2009 note, indicated that she was not able to work full-time and she should be on long term disability. Following Ms. Karimi declining the position in Etobicoke, Zayo submits it was unable to identify another

position that accommodated her previously-stated restrictions of part-time work with some physical limitations. According to Zayo, it was therefore unable to permit Ms. Karimi to return to work in any capacity after December 4, 2009, absent new medical documentation with respect to her restrictions. Zayo would continue to look for accommodated positions and if one were found, then Ms. Karimi would be required to provide updated medical documentation.

[73] With respect to the medical documentation request, Zayo indicated that it required such documentation, given that Ms. Karimi was pursuing her long-term disability claim on the basis that she was totally disabled from working, while at the same time requesting accommodation to return to work. Witnesses for Zayo testified that they were unclear about the Complainant's ability to work.

[74] On December 7, 2009, Zayo informed Ms. Karimi that she would be paid for three days per week until the end of 2009, through a combination of vacation and holiday pay. Despite Ms. Karimi's objection to using her vacation and holidays in such a way, Zayo indicated she had no say in the matter, and was not welcome at work unless she received medical clearance. December 9, 2009, was Ms. Karimi's last day of work at Zayo, and she has been on a leave of absence since then.

[75] On December 17, 2009, Ms. Karimi, through her legal counsel, sent Zayo a note from her doctor, a portion of which reads as follows:

First, let me re-state my advice dated Oct. 22/09 that Ms. Karimi should be on long term disability. Since this position appears to be unacceptable to her employer, I am prepared to suggest the following compromise.

I am prepared to support Ms. Ashraf Karimi working three days per week, with flexible hours, on a trial basis under my observation at a location other than her current workplace. Working significant hours at her current location would exacerbate her condition. An alternative location closer to home would be helpful in light of her physical limitations.

[76] Ryan Stammer, a Labour Relations Specialist with Zayo at the time, had been working on Ms. Karimi's matter since the summer of 2009. It was his role to become involved with any matters that could result in a matter becoming a labour relations issue,

for example, by ensuring that any steps taken by a manager complied with the collective agreement. With respect to finding an accommodated position for Ms. Karimi in December 2009, Mr. Stammer took a number of steps as part of the accommodation search. These steps included emailing various HR colleagues across the company to ask if any had vacancies within their business units, if any had work that could be performed by an employee working from home, or if they were aware of any job duties that could be combined from multiple jobs or separated from existing jobs. He testified that he followed up at least once a week, seeking positions that could accommodate Ms. Karimi, with no success. He attributed part of the lack of success to there having been a number of lay-offs in the company leading up to that time period, and therefore, there were fewer positions within the company.

[77] Mr. Van Horne had testified about the number of lay-off notices that had gone out from late 2008 to early 2010. In his estimation, there were significant lay-offs. Approximately 20% or more of the various CT positions (CT1 to CT3) were eliminated, representing over 100 employees. Mr. Stammer testified that he did not continue to look for further accommodating positions beyond February 2010, when Ms. Karimi's disability benefits were reinstated and she was approved for long-term disability.

[78] On January 11, 2010, Ms. Karimi filed a grievance alleging ongoing disability discrimination by Zayo and a refusal to accommodate. The grievance was denied by Zayo at step 1 and the union did not progress the grievance to step 2.

[79] Ms. Karimi was ultimately approved for long-term disability benefits in or around February 2010, retroactive to July 6, 2009. She has been in receipt of those benefits since that date.

## **V. Issues**

The questions I was called upon to decide can be summarized as follows:

- a. Was the Complainant discriminated against by the Respondent, Zayo, on the basis of sex and/or disability contrary to s. 7 of the *Act*, pursuant to her first complaint?



- b. If the Complainant establishes a *prima facie* case of discrimination based on sex and/or disability, can the Respondent prove that the impugned restrictions were based on a *bona fide* occupational requirement (“BFOR”) pursuant to paragraph 15(1)(a) and ss.15(2) of the *Act*?
- c. Was the Complainant discriminated against by Zayo on the basis of disability pursuant to her second complaint?
- d. If the Complainant establishes a *prima facie* case of discrimination based on disability, can the Respondent prove that the impugned restrictions were based on a BFOR pursuant to paragraph 15(1)(a) and ss. 15(2) of the *Act*?
- e. Was the Complainant retaliated against by Zayo within the meaning of s. 14.1 of the *Act*?

## VI. Legal Framework

[80] Ms. Karimi has the burden to establish a *prima facie* case of discrimination. A *prima facie* case 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 favour in the absence of an answer from the respondent-employer...” (see *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 SCR 536 at para. 28, 23 DLR (4th) 321).

[81] To establish *prima facie* discrimination under s. 7 of the *Act*, complainants are required to show that they: (1) have a characteristic or characteristics protected from discrimination under the *Act*; (2) that they experienced an adverse impact with respect to employment under s. 7 of the *Act*; and, (3) that the protected characteristic or characteristics were a factor in the adverse impact (see *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33, [2012] 3 SCR 360). All three elements must be established on a balance of probabilities (see *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at paras. 56, 65, [2015] 2 SCR 789 (*Bombardier*)).

[82] Similarly, to establish a *prima facie* case of retaliation, complainants are required to show: (1) that they previously filed a human rights complaint under the *Act*; (2) that they

experienced an adverse impact following the filing of their complaint; and, (3) that the human rights complaint was a factor in the adverse impact (see *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (Representing the Minister of Indian Affairs and Northern Development Canada)*, 2015 CHRT 14 at paras. 3-30 (*Caring Society 2015*); and, *Millbrook First Nation v. Tabor*, 2016 FC 894 at paras. 54-64, 270 ACWS (3d) 451 (*Tabor FC*)).

[83] A respondent may defend against an allegation of *prima facie* discrimination by calling evidence to show its actions were not discriminatory, by establishing a statutory defense that justifies the discrimination, or by doing both (see *Bombardier* at para. 64). In response to Ms. Karimi's allegations of discrimination on the basis of sex, during the period leading up to her request for accommodation, Zayo submits its actions were not discriminatory. With respect to her allegations of discrimination based on disability, Zayo argues it did not retaliate against Ms. Karimi and invokes paragraph 15(1)(a) of the *Act*, which provides that it is not a discriminatory practice if "any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement". Subsection 15(2) of the *Act* further provides that, for any practice mentioned in paragraph 15(1)(a) to be considered a *bona fide* occupational requirement, Zayo must establish that accommodation of Ms. Karimi's needs would impose an undue hardship on it, considering health, safety and cost.

## VII. Analysis

### A. Was the Complainant discriminated against by the Respondent, Zayo, on the basis of sex and/or disability contrary to s. 7 of the *Act*, pursuant to her first complaint?

[84] Before going into the merits of the complaint, the Tribunal notes the position expressed by Zayo in its Statement of Particulars (SOP) that discrimination based on disability did not form part of the first complaint referred to the Tribunal. Zayo indicated, prior to the commencement of the evidentiary portion of the hearing, that it intended to argue the issue on the first day of the hearing. It did not do so. Following a review of

Ms. Karimi's complaint form, I am prepared to accept that it alleges disability based discrimination, but only with respect to the incident involving the assignment of work following her return to work from medical leave and the router inventory task assignment. Therefore, I find that disability based discrimination on those two issues are properly before the Tribunal. However, the Complainant's closing submissions only highlighted these issues under the ground of sex discrimination. Despite this, the Tribunal will consider these instances through the lens of both sex and disability discrimination.

**a. Critical treatment and scrutiny from manager**

[85] Ms. Karimi claims that, as the only female employee in the Internet Department, Mr. Picard singled her out and treated her differently, including criticizing her performance and punctuality, assigning her an overwhelming volume of tasks and denying her training opportunities made available to male colleagues. Ultimately, she says her gender influenced the decision to reassign her to the Design Department and to demote her. In terms of disability, Ms. Karimi also claims Mr. Picard overwhelmed her with work, and assigned her work involving heavy lifting when he knew she had disability related limitations that prevented her from doing such tasks.

[86] Zayo submits Mr. Picard did not engage in unfounded criticism of Ms. Karimi's work or punctuality. While Mr. Picard did speak to Ms. Karimi periodically about the need to attend work on a timely basis, it was because her punctuality was poor. Despite this, there was never any written or other discipline imposed on Ms. Karimi, whether for performance or punctuality reasons. Any critique of her work and punctuality was done on an informal basis, as with any other employee. Overall, Zayo submits Ms. Karimi had a high opinion of her abilities, and had difficulty getting along with co-workers and managers who critiqued her work, both before and after the arrival of Mr. Picard.

[87] Zayo takes the position that there were additional female employees who reported to Mr. Picard from the Data Section, and that CTAC Data and Internet operated together. Regardless of whether they were operating together, there were additional female employees who reported to Mr. Picard. None were called to testify.

[88] Sex is a prohibited ground of discrimination under the *Act*. While the first two criteria are met, the Tribunal finds that Ms. Karimi failed to meet her burden on the third aspect of the *prima facie* test, *i.e.* she failed to establish a connection between her gender and the treatment she experienced.

[89] The Tribunal understands and sympathises with Ms. Karimi's precarious position at Zayo, as she was working there at a time when the company was under economic stress and undergoing much re-organization, which required her to move between departments and learn new tasks. However, there was insufficient evidence provided by Ms. Karimi to demonstrate that gender was a factor in any of the adverse impacts she experienced. The fact that she may have been the only female working within the Internet Department, does not, on its own or in combination with any of the other evidence in this case, meet the balance of probabilities threshold required to demonstrate that decisions were made adverse to her interest and that her gender was a factor in those adverse impacts. There was no evidence, direct or indirect, presented which established that Ms. Karimi's gender played any role in the differential treatment she received.

### **Customer Complaints**

[90] With respect to the allegations of improper scrutiny of Ms. Karimi's work, specifically with respect to the criticisms of Ms. Karimi's performance on the various customer files discussed earlier in this decision, I see no evidence that her gender was a factor in such scrutiny. While some of the criticism may have been incorrectly placed, in that it appears Ms. Karimi was not to blame for some of the errors, again, there was no evidence before me, other than the subjective feelings of Ms. Karimi, indicating that gender was a factor in the treatment she received from Mr. Picard. The evidence is clear to me that there were some issues with Ms. Karimi's performance, and it was appropriate for her Manager, Mr. Picard, to address them with her. For example, in the DEL matter, the email messages between Ms. Karimi and Mr. Picard demonstrate that she did have the authority to escalate the matter, but simply felt that pressure from someone higher would be better. In fact, Ms. Karimi acknowledged in an email to her union, dated April 13, 2006, that she

could have escalated the matter, but didn't because she felt the request would have been acted upon more quickly had a manager made the request.

[91] Zayo provided reasonable explanations for why Mr. Picard felt it important to bring to the attention of Ms. Karimi that there had been mistakes made and lapses in correctly servicing those specific files and customers. The email evidence, which captured the concerns of the customers, was quite clear. Mistakes were made, the customers were unhappy, and the customers' concerns needed to be followed up on.

[92] Zayo gave evidence that it took customer complaints very seriously as there was much competition from other businesses and it was important to improve customer service in order to retain customers. Following a careful review of the email exchange between Mr. Picard and Ms. Karimi, it is my view that the tone and focus of Mr. Picard's messages to Ms. Karimi did not appear to be about laying blame on an employee with the end goal of punishing or penalizing. Rather, the focus was on identifying issues so that practices could be improved, and ensuring that customers had a positive experience. For example, with regards to the DEL matter, following the re-assignment of the matter to one of Ms. Karimi's colleagues, Mr. Picard requested from Ms. Karimi a summary of the key dates, in order to assess how service on customer files could be improved. There were no repercussions or reprimands rendered against Ms. Karimi.

[93] Additionally, the chain of emails involving the FA incident clearly demonstrates that Mr. Picard, and the Senior Manager responsible for the customer account, were focused on improving service going forward, and not on gathering any information for the purposes of reprimand. Ultimately, there was no further action taken by Zayo in respect of any of Ms. Karimi's performance issues.

### **Punctuality emails**

[94] With respect to the various interactions involving her punctuality, I cannot find any evidence to support the allegation that Mr. Picard was critical of such punctuality in whole or in part based on Ms. Karimi's gender. I find that Mr. Picard was concerned with ensuring that Ms. Karimi was at work at the start time of her shift, and that he had an employee

available to perform duties for the Internet Department during the appropriate time. Ms. Karimi was the only employee scheduled to work between 8 am and 9 am, and he needed to ensure someone was available to take customer calls. Furthermore, Mr. Picard indicated in one of his email messages that if there was a substantive issue that interfered with Ms. Karimi from arriving at work on time, the two of them could discuss a possible shift change if applicable. No evidence was presented that Ms. Karimi sought such a shift change.

[95] Ms. Karimi, during the hearing, requested that Zayo conduct a search of its records of Mr. Picard's emails in order to find examples of Mr. Picard sending similar emails to other employees when they were late for work or had any issues with respect to punctuality. Zayo consented and conducted a search which resulted in no such emails being found. Zayo indicated a number of possible reasons for the negative search results, including, that Mr. Picard ceased employment with Zayo in 2012, and company policy was that former employee emails are deleted within 3 months. Other technical explanations were also offered. Ms. Karimi asks that I draw an adverse inference from the negative search result. I decline to do so as I find that Zayo's explanation that such emails were no longer available due to company retention policies was reasonable. Moreover, while there was no documentary evidence provided by Zayo indicating that other employees received similar emails for being late for work, Mr. Picard's testimony regarding his communication practices on punctuality was not contradicted by any other witness at the hearing.

[96] In light of the foregoing, I find that the evidence does not establish, on a balance of probabilities, that gender discrimination was a factor in the alleged adverse treatment (*Bombardier* at paras. 56, 65).

### **Other Alleged Unfair Criticism**

[97] With respect to the allegation that Mr. Picard attempted to dissuade Ms. Karimi from speaking to the union, the evidence is inconclusive as to the accuracy of Ms. Karimi's characterization of this event. Ultimately, she did grieve the incident and such grievance was denied and not further grieved to the next level.

[98] With respect to the incidents involving the disruptive behaviour and yelling, the evidence is that they both may have yelled at each other. Mr. Picard invoked the workplace respect policies when he followed up with Ms. Karimi via email.

[99] Regarding the incident when Ms. Karimi was communicated to about her having slept at her desk, or simply having had her head down in her arms, it was appropriate for Mr. Picard to raise the incident as a performance issue.

[100] In addition to viewing these incidents individually, when all these incidents of critical treatment are considered as a whole, I cannot conclude that gender was a factor in the treatment Ms. Karimi received from Mr. Picard.

[101] While it may be that Mr. Picard and Ms. Karimi did not like each other, or that one or both of them had personal challenges when dealing with the other, nothing leads me to believe that such challenges or issues had any connection to discriminatory grounds.

#### **b. Reassignment and denial of training opportunities**

[102] The Tribunal again notes that both Ms. Karimi's initial complaint and SOP characterized the denial of training as sex discrimination. However, her closing submissions only dealt with training as part of the disability and refusal to accommodate portion of her second complaint. Despite this, the Tribunal considered whether Ms. Karimi was denied training based on both sex and disability discrimination while she was working within the Design Department.

[103] With respect to the re-assignment of Ms. Karimi to the Design Department, I find there to be no evidence that the decision was made in relation to Ms. Karimi's gender. While Ms. Karimi did call a witness, Ian Cameron, to testify about whether the collective agreement was applied properly, I give his evidence little weight. He was not directly involved in any of the events giving rise to Ms. Karimi's complaints, he did not have all the facts to assess the situation, and he did not handle grievances involving the interpretation of collective agreement provisions. This witness ultimately agreed that seniority was not a consideration when it came to an employee being temporarily assigned to another department. Furthermore, evidence presented of communications between the union Vice-

President and a Senior Manager of Labour Relations demonstrates that the appropriate provisions were followed, and that seniority was not a consideration when selecting who to temporarily re-assign to Design. I therefore accept that the collective agreement rules were properly followed.

[104] Zayo provided convincing evidence as to the business rationale behind the decision as outlined in paragraph 39 above. Moreover, Ms. Karimi had an opportunity to voice objections to the re-assignment, yet she did not clearly and unambiguously do so. While an official from Ms. Karimi's union did unofficially inform management that Ms. Karimi was not interested in the assignment, Ms. Karimi did not take any steps to inform management officially nor request that the union take any formal actions to grieve the decision of re-assigning her. Instead, Ms. Karimi indicated to Mr. Picard that she was looking forward to the assignment as evidenced by an email she sent to Mr. Picard where she stated that she "loved the learning opportunity". As previously stated, the burden is on the complainant to demonstrate that gender discrimination was a factor in the temporary assignment to Design. That link has not been demonstrated in this case.

[105] I find that Ms. Karimi was not denied any training while she was in the Design Department for any reason related to her gender or disability. The evidence was clear that Ms. Karimi was being trained using the exact same methodologies that had been used to train other employees in Design. There was no evidence of training that had been provided to other Design Department employees, which was denied to Ms. Karimi. The evidence did show that Ms. Karimi was unhappy with the method of training, but there was no evidence she was denied the training necessary to do the work in the Design Department and no evidence that she was denied training based on her gender.

[106] During the temporary assignment of Ms. Karimi to the Design Department, she was for all intents and purposes a member of that department. As such, had there been some training offered to her colleagues in the Internet Department, she would have missed out on such training. No evidence was provided by Ms. Karimi on what, if any, training she missed out on, and what the possible impacts on her were. Therefore, I find that while on assignment, she experienced no adverse impact in the form of missed training.



### **c. Demotion/Rebalancing**

[107] Ms. Karimi admitted that she was one of the two most junior employees in terms of seniority in the Internet Department, and as such, was properly identified for rebalancing by Zayo according to the collective agreement.

[108] I accept Zayo's explanation that the rebalancing of personnel was for reasons related to the restructuring of its business operations. The rebalancing notice indicated that 4 employees were to be rebalanced. The first two employees to be rebalanced were clearly identifiable as they were the lowest on the seniority list (Ms. Karimi and a male colleague). While there was a discussion by Mr. Picard and Mr. Van Horne about targeting two additional employees (employees 3 and 4) for rebalancing, that discussion was clearly not about Ms. Karimi. Accordingly, I find that the Complainant has failed to demonstrate that gender was a factor in Zayo's decision to restructure its operations, which necessarily resulted in a rebalancing of employees (both Ms. Karimi and a male colleague were rebalanced), including the amalgamation of various groups.

### **d. Assignment of an overwhelming volume of tasks and tasks beyond disability-related physical limitations**

[109] With respect to the assignment of work upon Ms. Karimi's return to work on May 8, 2006, I find nothing improper about Mr. Picard re-assigning Ms. Karimi's original files back to her. There was no evidence that Ms. Karimi was assigned more files than usual, or more than what any other employees were carrying in their workload. She simply had her files returned to her, now that she was back at work. There did not appear to be anything arbitrary, punitive or malicious in the return of her files. Despite Ms. Karimi's claim that she felt overwhelmed, no evidence was presented that Ms. Karimi required or requested a gradual return to work, or had any new limitations that could impact her workload. Again, I find no link between Ms. Karimi's gender or disability, and her being given back her files upon returning to work after her sick leave.

[110] To the extent that Ms. Karimi claims disability and gender discrimination as a result of the router inventory assignment, I find that she has not established that she suffered an

adverse effect as a result of this assignment. Ultimately, she did not perform the task, nor was she forced to perform the task.

[111] It is clear that Ms. Karimi did have an accommodation need due to her medical condition (her back and wrist condition restricting heavy lifting). Zayo provided reasonable explanations for why Ms. Karimi was asked to perform the router inventory task, namely, that the work was shift specific, and that Ms. Karimi was the only person who worked that shift. Furthermore, once Mr. Picard had been notified and received confirmation that Ms. Karimi did have a condition in need of accommodation, he attempted to accommodate Ms. Karimi. The device manuals were checked for the weight of the routers to ensure that they were similar in weight to what Ms. Karimi had already been dealing with. Finally, Mr. Allaert took steps to ensure Ms. Karimi could perform the task without any heavy lifting, as he arranged for someone else to bring her the routers and remove them once configured.

[112] I accept the evidence of Mr. Picard and Mr. Allaert that the task was assigned to Ms. Karimi because it was a shift-specific task. While Ms. Karimi claimed that the beginning of her shift was a busy period for her, due to her being the only employee working at that time. I accept the evidence of Zayo that it was not a particularly busy time receiving incoming calls from customers. Had that been the case, I expect that Zayo would have had more employees scheduled to start at 8 am. Furthermore, the email communications at the time demonstrated that Ms. Karimi raised the physical limitations issue as her reason for not being able to perform the task; she had in fact indicated that she would have liked to assist with the task, had it not been for her physical limitations. Given the above, I find that there was no evidence that Ms. Karimi was treated adversely because of her disability. Also, there was nothing that Mr. Picard or Mr. Allaert said or did, directly or indirectly that could possibly lead one to believe Ms. Karimi was requested to do the task because of her gender. In the end, the key element lacking here is the alleged adverse effect on Ms. Karimi, because she never did perform the task and did not experience an adverse impact for failing to perform same.

**B. Was the Complainant discriminated against by Zayo on the basis of disability pursuant to her second complaint?**

[113] For the disability aspect of Ms. Karimi's complaint, as already found and not disputed, Ms. Karimi did develop an additional disability: depression. She suffered an adverse impact in that she was not permitted to work from home after her request in 2008 and, subsequently, was not allowed to continue working beyond November 2009. Despite requests to accommodate her disability-related limitations, she was not allowed to return to work. Therefore, I find that Ms. Karimi has met her *prima facie* burden as her disability was a factor in the adverse treatment she experienced.

**C. If the Complainant establishes a *prima facie* case of discrimination based on disability, can the Respondent prove that the impugned restrictions were based on a BFOR pursuant to paragraph 15(1)(a) and ss. 15(2) of the Act?**

[114] To establish a BFOR and corresponding undue hardship, Zayo must, on a balance of probabilities, prove (i) that it adopted the standard in question, for a purpose rationally connected to the performance of the job; (ii) that it 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, (iii) 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 (*British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3 at para. 54). The Supreme Court of Canada further clarified in *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43 at para. 16, [2008] 2 SCR 561 (*Hydro-Québec*), that the standard is not one of impossibility:

The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it

can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.

[115] Moreover, in *Canada (Human Rights Commissions) v. Canada (Attorney General)*, 2014 FCA 131 at para. 21, [2015] 3 FCR 103 (*Cruden*), the Federal Court of Appeal clarified that there is no separate procedural right to accommodate under the *Act*.

[116] The Complainant argues that the Teleworking Policy, and more specifically, the criterion of requiring an employee to have 2 years of experience in a position before being allowed to telework, is the standard that must be assessed. I disagree. Teleworking is a form of accommodation, and as such I find that the standard that must be analyzed is Zayo's standard of requiring OMs to train and work from the office.

[117] I find that Zayo's standard of requiring OMs to train and work from the office to be rationally connected to the functions of the job, in that it serves to minimize potentially costly errors on customer matters. Zayo believed that OMs required training, guidance and support from their peers within the OM Group that could only be provided "on the job", and that such training, guidance and support could only be given at Zayo's premises due to the nature and pace of the work. Zayo's goal was to minimize errors to customer services and/or orders while new employees were being trained. OM's trained on live customer orders, not closed or old files.

[118] I further find that Zayo adopted the standard in good faith. The nature of the work in the OM Group was similar to a call centre environment. Calls came in from customers, various software systems had to be checked, orders logged, instructions noted, tasks coordinated and assigned between various sections of Zayo, and both hardware and software had to be configured. There were a multitude of issues that could arise on any given order, and it was only after spending time working with the support of colleagues that someone would become sufficiently proficient to handle the job on their own. Ms. Bazinet's experience was that it took at least 6 months for an employee to get a good grasp of all the various issues that one could encounter when performing the tasks. In some instances, it could take 2 years to fully learn the role to the point that one was "self-sufficient". There was no standard duration for training. Much of the training for this role involved one OM learning side by side from another OM. Additionally, with the Complainant working from

home, physically out of the office, she would not have the ability to turn to a colleague beside her and simply ask for assistance, should an issue arise while speaking with a customer or a technician. The Tribunal accepts the uncontradicted testimony of Ms. Bazinet that this aspect of the work environment was crucial for the performance of the job. Customers' orders were time sensitive in many instances, and customers generally needed to speak to the OM who was handling their order from beginning to end, in order to minimize errors, as well as to ensure a functioning service. Commercial customers whose orders or connections were not serviced properly could potentially lose revenue if they were without the necessary internet services required to conduct their business. Some businesses had threatened Zayo with lawsuits for errors committed by Zayo.

[119] Looking at Ms. Karimi specifically, in the few months that Ms. Karimi had been learning her new OM role, Zayo considered Ms. Karimi to be progressing slowly with her training. According to Ms. Bazinet, the Complainant was still making errors at a basic level, had not progressed to more complex files, and finally, had not progressed to a level of understanding such that she could perform the role on her own, with minimal support or without direct supervision. Ms. Bazinet also gave detailed evidence about errors made by Ms. Karimi that demonstrated Ms. Karimi was not able to function proficiently and that she required the support and supervision of colleagues at Zayo's premises. The Tribunal finds that there was no reason to believe that Ms. Karimi would perform better without any on-site support and supervision, had she been working from home. Ms. Bazinet testified that Ms. Karimi could not be provided with peer support, had she been working and training from home, because other OM's could have been on their own calls at the time Ms. Karimi may have needed assistance via email or phone. Thus, Zayo considered whether Ms. Karimi could be both trained at home, and work as an OM from home. There was no evidence provided by Ms. Karimi that contradicted Ms. Bazinet's assessment of Ms. Karimi's performance, or that disputed other aspects of Ms. Bazinet's testimony.

[120] While there was evidence provided that another Zayo employee working in the OM Group was allowed to work from home, those circumstances were completely different. Ms. Bazinet testified to this other employee having worked from home. That employee was

an experienced OM who had been working in the group and on the OM systems for a decade. While the employee did work in the OM group, their job was quite distinct and very different from all the other OMs. The employee was an expert on a specific task, having performed it for many years. The employee was not someone new to the OM group who required training, guidance or support in order to perform the required tasks. Furthermore, in 2008, an attempt was made to train the employee to work from home on some of the same tasks that Ms. Karimi and other OMs performed. The employee found the training too difficult to accomplish from home, and as such, the training was abandoned.

[121] Moreover, Zayo did not look at accommodating Ms. Karimi in another role or at another location at this time, as the latest medical note provided by Ms. Karimi dated October 2, 2008 was quite clear that it would be necessary for her to work from home in order to return to work on a gradual basis.

[122] Given the above, I find that Zayo met its burden of demonstrating that requiring an OM to work and train from the office location was reasonably necessary to the accomplishment of its legitimate work related purpose, namely, to both minimize errors (and the costs associated with those errors), and to assist OMs in gaining proficiency to carry out the job. Accordingly, I find that it would have caused Zayo an undue hardship to accommodate Ms. Karimi by allowing her to train and work from home as an OM.

[123] After Zayo notified Ms. Karimi that it could not accommodate her to work from home in her OM position, Ms. Karimi made no further communications to Zayo. The accommodation process required all parties involved, here the employee and the employer (and perhaps the union, but that was never argued by either of the parties), to engage in discussions about needs, limitations and options. Ms. Karimi argued that Zayo had a responsibility to explore other accommodation options including whether Ms. Karimi could work from another location or another position. The Tribunal rejects this argument, because accommodating Ms. Karimi at another location (other than her home) was contrary to the medical restriction communicated to Zayo by her doctor. Had Ms. Karimi's circumstances changed so that she would have been able to work in a different location or

position, then Zayo's duty to accommodate may have been re-engaged. That is simply not the case here.

[124] Ultimately, Ms. Karimi continued receiving disability benefits after her request to work from home was denied. Great-West Life prepared the Individual Work Plan/Return to Work Plan prior to Ms. Karimi returning to work on March 30, 2009. The next time Ms. Karimi was in contact with Zayo was in March 2009, when she returned to work on a gradual basis, working three days per week in accordance with the terms of the Individual Work Plan/Return to Work Plan.

[125] Upon Ms. Karimi returning to work with restrictions on a graduated basis, the Tribunal finds that Zayo made every effort to accommodate Ms. Karimi. It provided her with records clean-up work for over eight months, in order to accommodate her restrictions. This work was with the same systems she would have been using had she been working full-time in Order Management, and thus, it allowed her to train on those systems in an environment without the time sensitivity of dealing with live files.

[126] As described previously, there were two reasons why the accommodated work and position came to an end. First, Great-West Life had concluded there were no longer any medical restrictions that supported Ms. Karimi requiring accommodated work and it communicated this conclusion to Zayo. Secondly, the accommodated work task that Zayo had assigned was complete. When no additional records clean-up work was available to be performed, Zayo engaged in discussions with Ms. Karimi and undertook an accommodation search. Subsequently, Ms. Karimi was offered on December 2, 2009, part-time work in a Control Desk position at another location (Etobicoke), which met her medical conditions of part-time reduced hours, which Zayo was still willing to honour. However, Ms. Karimi refused to accept that accommodation, for she claimed the position was far from her home, and claimed her back condition prevented lengthy travel, and that sleep problems prevented her from working night shifts. However, the Tribunal finds that there was nothing in her previously filed medical documentation to indicate these further limitations or restrictions.

[127] In any event, Zayo did indicate, at the time of offering the accommodated position, that it required Ms. Karimi to provide updated medical clearance to work, since previous medical documentation indicated that Ms. Karimi should be on long-term disability. I find that Ms. Karimi had an opportunity and an obligation to provide further information on her restrictions at this point. To put it simply, Zayo was confused. Ms. Karimi was requesting accommodated part-time work, thus indicating that she was able to perform work, while she was also claiming long-term disability benefits through Great-West Life. According to Zayo, it was entitled to confirmation that Ms. Karimi could safely return to work, as well as information that would enable it to meet its duty to accommodate. I agree, as it is to be recalled that the "... goal of accommodation is to ensure that an employee who is able to work can do so" (*Hydro Québec* at para. 14 relying on *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, 2000 SCC 27, [2000] 1 SCR 665).

[128] Zayo submits that Ms. Karimi should have accepted the offered Control Desk work at the Etobicoke location, because it was a reasonable accommodation that met her restrictions. According to Zayo, Ms. Karimi is entitled to reasonable accommodation, not perfect accommodation; and, Zayo should not be required to create or maintain non-productive work for Ms. Karimi. I agree (see *Hydro Québec* at paras. 14-16; and *Waddle v. Canadian Pacific Railway et al*, 2017 CHRT 24 at para. 109).

[129] Ms. Karimi had plenty of time to have articulated via her medical documentation what her restrictions and limitations were. Nothing in the medical documentation provided up to that point indicated that there was any type of driving distance limitation, night shift limitation or other limitation that would interfere with Ms. Karimi working in the Etobicoke position. I conclude this was a reasonable accommodation offer, made with the best of intentions, which was based on the last medical note provided by Ms. Karimi dated October 22, 2009, and that, subject to updated medical documentation showing that Ms. Karimi was capable of fulfilling the position, ought to have been accepted by Ms. Karimi. As stated in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 SCR 970 at p. 995, 95 DLR (4th) 577:



When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. ...The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in *O'Malley*. The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.

[130] Other than an assertion by Ms. Karimi's union representative, there was no evidence that Zayo knew the Etobicoke position was a bad fit due to location. Furthermore, Ms. Karimi, by email to her union representative, Mr. Gadwa, indicated on December 1, 2009, that if Markham was not an option, then any other location than her current location was an option.

[131] Evidence of discussions between Ms. Karimi and her union representatives with Zayo showed that Ms. Karimi had a preference for a position in the Markham office. Both the employer and Ms. Karimi's union representative took steps to inquire into positions and work at the Markham location, and both concluded that the work at that location involved heavy lifting and responsibilities beyond Ms. Karimi's limitations. I find that in making this inquiry, Zayo fulfilled its duty to make reasonable efforts to accommodate Ms. Karimi at the Markham location.

[132] Ms. Karimi, through her lawyer at the time, provided a medical note on December 17, 2009, that supported Ms. Karimi returning to work part-time at a location other than her current position, and went on to indicate that an alternative location for work closer to home for Ms. Karimi would be helpful due to her physical limitations. This note, which came several weeks after the offer of the Control Desk position, triggered a new duty to accommodate for Zayo.

[133] Zayo submits that it diligently searched for another position that would accommodate Ms. Karimi's restrictions, but was unable to find or create such a position. It specifically disputes Ms. Karimi's allegation that there were other positions available that met her restrictions. Evidence was provided by Ryan Stammer of the steps he took to look for accommodated positions. These steps included reaching out to various Zayo business units, asking if anyone had vacancies, whether any section had duties that could be

bundled together to create a position, or separated from other duties in order to allow an employee to work at home, or to work at any other location other than the Complainant's current work location. Mr. Stammer testified that he followed up with managers weekly, on both the union and non-union side. His explanation for why there may not have been positions was that Zayo had gone through many lay-offs and cutbacks due to a decline in business.

[134] The Tribunal is cognizant that Zayo was under financial hardship at the relevant time, and that it was in the process of cutting staff. Despite its financial difficulties and having had to cut over 100 CT positions which represented 20% of the bargaining unit, Zayo continued to seek out ways in which it could provide Ms. Karimi with work that accommodated her limitations. Unfortunately no other position at Zayo was capable of accommodating Ms. Karimi's needs. The Tribunal is satisfied that Zayo made reasonable efforts to accommodate Ms. Karimi's disability to the point of undue hardship.

[135] For these reasons, I find that Zayo has met its duty to accommodate.

**D. Was the Complainant retaliated against by Zayo within the meaning of s. 14.1 of the Act?**

[136] It is important to recall that complainants are not required to adduce any particular type of evidence in establishing a *prima facie* case of retaliation:

Rather, in each case, it is a question of mixed fact and law whether the evidence adduced is sufficient to establish a *prima facie* case of retaliation (see *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2005 FCA 154 (CanLII), at para. 27). If sufficient evidence is presented to establish a *prima facie* case of retaliation, it is then the Tribunal's role to consider the complainant's evidence, alongside any evidence presented by the respondent, to determine whether it is more probable than not that retaliation has occurred.

(see *Caring Society 2015* at para. 29)

[137] Following the alleged discriminatory treatment by Zayo, Ms. Karimi claims she developed a severe depression. After a leave of absence to deal with her depression, she claims Zayo failed to provide her with a suitable work environment and/or the opportunity

to work from home. She also claims the refusal to accommodate her medical condition was in retaliation for having filed a complaint against the treatment of her manager Paul Picard. In this regard, she says Zayo tried to eliminate her from the workforce by causing her financial hardship and mental distress. By preventing her from working at home, this limited her to working 3 days per week and denied her a full income. Further, she claims Zayo tried to force her back to work full-time when it was physically and mentally impossible for her to do so according to her physician.

[138] Ultimately, Ms. Karimi submits that she was involuntarily placed on an unpaid leave of absence at the very time that Zayo knew she was not yet receiving disability benefits. Zayo also unilaterally determined what days would be used for Ms. Karimi's vacation time. Ms. Karimi submits that this was a cold and calculated plan by Zayo, in an effort to move her out of the workforce by putting her in a precarious position, where she would be forced to accept a severance package. Ms. Karimi claims Zayo's failure to accommodate her disability caused her to become further isolated from her former field, that was technical and rapidly changing in nature, and exacerbated her depression, that was caused by the circumstances leading to the original complaint.

[139] There is no dispute that Ms. Karimi had previously filed a human rights complaint on October 28, 2008. Nor is it disputed that she suffered an adverse impact in that she was not permitted to work from home after her request in 2008, and that she was not allowed to continue working on an accommodated basis beyond November 2009.

[140] While proof of intent is not necessary to make out a retaliation complaint, Ms. Karimi had the burden to provide the Tribunal with complete and sufficient evidence to demonstrate that her human rights complaint was a factor in the alleged adverse treatment she received from Zayo following the filing of her complaint, whether based on her reasonable perception thereof or otherwise (*Caring Society 2015* at paras. 4, 29; *Tabor FC* at paras. 63-64).

[141] In this case, Ms. Karimi did not provide any testimony in support of her allegation of retaliation. Despite this, I found no evidence, intentional or unintentional, that Zayo made any decisions wherein it factored in the filing of Ms. Karimi's first human rights complaint.

Ms. Karimi argues that Mr. Van Horne was directly involved in both complaints. The fact that Mr. Van Horne was involved in the first complaint, and various events related to that complaint, does not lead me to conclude that Zayo made decisions due to Ms. Karimi having filed her first complaint. The inherent role of Mr. Van Horne as an HR Advisor and/or Senior Manager of Labour Relations (he held various roles within Zayo at various times, all within HR) would require him to be involved, as his role entailed providing advice to various business unit managers and directors on matters pertaining to the collective agreement, various employer policies, and other HR related matters. Overall, I find that the filing of the first human rights complaint was not a factor in any subsequent decisions or actions taken by Zayo, nor could it reasonably be perceived to have been a factor.

[142] As discussed above, Zayo made every effort to accommodate Ms. Karimi up to the point of undue hardship. Rather than showing that Zayo was intentionally trying to remove Ms. Karimi from the work force, the evidence demonstrates that Zayo continued to attempt to provide Ms. Karimi with accommodating work, so long as she could show that she was capable of working. In fact, Ms. Karimi is still employed by Zayo today. Accommodation efforts only ceased once Ms. Karimi went on long-term disability and her benefits were reinstated in February 2010. There was no evidence of a link between the failure of attempts at accommodation and the filing of the first complaint. Rather, no suitable position was found that could accommodate Ms. Karimi.

[143] To paraphrase paragraph 54 of the Tribunal's recent decision in *Tabor v. Millbrook First Nation*, 2015 CHRT 18, an individual who feels they have been discriminated against may perceive all actions that impact them negatively as being retaliation for having filed a complaint. But, it is not necessarily the case that every adverse effect following the filing of a complaint is retaliation. That Ms. Karimi perceived that decisions taken by Zayo were due in part to her having filed a complaint is not enough to establish a finding of retaliation. As indicated by the Federal Court, the complainant's perception that retaliation has occurred must be reasonable. This was not the case here (*Tabor FC* at para. 64).

**VIII. Complaints dismissed**

[144] As a result, the two complaints, filed on October 28, 2008 and December 20, 2010, respectively, in this matter are dismissed.

*Signed by*

Susheel Gupta  
Tribunal Member

Ottawa, Ontario  
December 11, 2017

## Canadian Human Rights Tribunal

### Parties of Record

**Tribunal Files:** T1616/16210, T1783/1312

**Style of Cause:** Ashraf Karimi v. Zayo Canada Inc. (formerly MTS Allstream Inc.)

**Decision of the Tribunal Dated:** December 11, 2017

**Dates and Place of Hearing:** July 8 to 12, 2013;  
August 19 to 21, 2013;  
November 28 and 29, 2013;  
March 10 and 11, 2014;  
September 16 and 17, 2014;  
April 15 to 17, 2015;  
October 26, 2016.  
Toronto, Ontario

### Appearances:

Olanyi Parsons, for the Complainant  
No one appearing, for the Canadian Human Rights Commission  
Paul Young, for the Respondent