Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2019 CHRT 29
Date: August 13, 2019
File No.: T2149/2316

Between:

Corey Willcott

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Freeway Transportation Inc.

Respondent

Decision

Member: Gabriel Gaudreault

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I. Complaint overview

[1] Corey Willcott is a truck driver who works for Freeway Transportation Inc. This company operates in the Greater Toronto Area and among other locations. Mr. Willcott believes that his employer did not provide him with a work environment free of harassment (paragraph 14(1)c) of the *CHRA*), which he alleges was committed by the company's General Manager, James Marshall. He also deems that Freeway Transportation Inc. did not provide him with an environment free of sexual harassment (paragraph 14(1)(c) and subsection 14(2) of the *CHRA*), which he alleges was committed by Nicole McNab, a dispatcher. He also considers his termination to be discriminatory (paragraph 7(a) of the *CHRA*). Lastly, he believes that he was subject to adverse differential treatment in the course of employment (section 7 of the *CHRA*), particularly by being forced to take leave when it was not his turn, and then upon his reinstatement. He further believes that the employer failed to fulfill its duty to accommodate.

[2] Mr. Willcott alleges that the employer's discriminatory practices were committed because of his sex, disability, national or ethnic origin, and race (subsection 3(1) of the *CHRA*). These are the reasons for which he filed a complaint with the Canadian Human Rights Commission against Freeway Transportation Inc.

[3] For these discriminatory practices, Mr. Willcott is seeking monetary compensation (subsections 52(2) and (3) of the *CHRA*). He is claiming:

- $20,000 total in damages for pain and suffering (paragraph 53(2)(e) of the *CHRA*);
- $20,000 total in special compensation for willful or reckless discriminatory practices (subsection 53(3) of the *CHRA*);
- lost wages and reimbursement of drug costs (paragraph 53(2)(c) of the *CHRA*).

[4] During the hearing, I heard from only two witnesses: the Complainant himself and Ms. Crawford, the company's representative. The parties filed concise documentary evidence, namely two binders identified as C-1 and R-1.

[5] I must base my decision on the testimonial and documentary evidence presented to me at the hearing. For the reasons that follow, I allow Mr. Willcott's complaint in part (subsections 53(1) and 53(2) of the *CHRA*).

II. Issues

[6] The issues are as follows:

1) Did Mr. Willcott meet the burden of proof for his case—hat is, was he able to prove the following three elements?

    a. Mr. Willcott has one or more prohibited grounds of discrimination protected by the *CHRA*.

    b. Mr. Willcott suffered one or more adverse impacts (termination of employment, adverse differential treatment in the course of employment, harassment (sections 7 and 14 of the *CHRA*)).

    c. One prohibited ground of discrimination (sex, disability, national or ethnic origin, race) was a factor in the adverse impact.

2) If yes, was the employer able to present a defence (section 15 of the *CHRA*) or limit its liability (section 65 of the *CHRA*)?

3) If not, what remedies should the Tribunal order (subsection 53(2) of the *CHRA*)?

III. Applicable law

[7] The purpose of the *CHRA* is to guarantee that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices (section 2 of the *CHRA*).

[8] In the adjudication of complaints within the Tribunal, the Complainant is required to meet the burden of proof for his or her case (traditionally referred to as a *prima facie* case of discrimination; see, for example, *Brunskill v. Canada Post Corporation* [*Brunskill*], 2019 CHRT 22, at paras. 56 to 58). Mr. Willcott must therefore present sufficient proof, on the balance of probabilities and in the absence of evidence to the contrary, that there is discrimination. To echo the words from the decision in *Ont. Human Rights Comm. v. Simpsons-Sears* (*Simpsons-Sears*), [1985] 2 SCR 536, at para. 28:

> . . . 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.

[9] The Supreme Court of Canada, in the decision in *Moore v. British Columbia (Education)* [*Moore*], [2012] SCR 61, at para. 33, developed a three-step analysis of discrimination. Mr. Willcott must therefore show:

(1) that he has a prohibited ground of discrimination protected by the *CHRA* (in the case at hand, he is reffering to disability, national or ethnic origin, race or sex, or a combination of these grounds);

(2) that he experienced an adverse impact—that is— he was treated differentially in the course of employment or harassed in respect of employment, pursuant to sections 7 and 14 of the *CHRA*;

(3) that the prohibited ground of discrimination (disability, national or ethnic origin, race or sex) was a factor in the adverse impact experienced.

[10] As noted in the decision of *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)* [*Bombardier*], [2015] SCR 789, the evidence presented at the hearing must be analyzed based on the balance of probabilities. There is no need to demonstrate that the prohibited ground of discrimination was the only factor in the adverse impact that the Complainant allegedly suffered. Lastly, direct evidence of discrimination is not necessarily needed just

as proof of the intention to discriminate is not mandatory (*Bombardier*, at paras. 40 and 41).

[11] There have been repeated reminders that discrimination is not usually committed overtly or with intent. The Tribunal must therefore analyze all of the circumstances of the complaint in order to determine whether there is a subtle scent of discrimination (see *Basi v. Canadian National Railway* [Basi], 1988 CanLII 108 (CHRT)). Circumstantial evidence can also help the Tribunal draw inferences when the evidence that was offered in support of the allegations renders such an inference more probable than the other possible inferences or hypotheses (see *Basi*, above). The circumstantial evidence offered must nonetheless be tangibly related to the respondent's decision or conduct (*Bombardier*, above, at para. 88).

[12] I am of the opinion that when the Tribunal analyzes the evidence in order to determine whether a complainant has met the burden of proof for his or her case, it must consider the evidence in its entirety, which can include evidence filed by the respondent (*Brunskill*, above, at para. 64). The Tribunal could also conclude that the complainant failed to meet his or her burden of proof if the evidence that he or she presented is not sufficiently complete to show that discrimination exists, in the absence of evidence to the contrary (*Simpsons-Sears*, at para. 28). The Tribunal can also dismiss the complaint if the respondent is able to present evidence that, for example, refutes the complainant's allegations, thus preventing the latter from meeting the burden of proof for his or her case.

[13] If, on the contrary, the complainant meets the burden of proof for his or her case, the respondent has the opportunity to use one of the defences provided for in section 15 of the *CHRA* or can try to limit its liability under section 65 of the *CHRA*, as applicable. In the case at hand, Freeway entered the defence provided for in section 15 of the *CHRA*.

[14] Regarding harassment, the *CHRA* does not offer a specific definition as to what constitutes harassment. Thus, the guides and principles developed by the different courts and tribunals are quite useful. Pursuant to the *CHRA*, harassment is defined in general terms as unwelcome conduct that detrimentally affects the work environment or leads to adverse job-related consequences for the victim (*Janzen v. Platy Enterprises Ltd.*, [1989] 1

SCR 1252, at p. 1284). My colleague Edward P. Lusting summarized various elements to analyze when it comes to harassment in his decision at para. 163 of *Alizadeh-Ebadi v. Manitoba Telecom Services Inc.*, 2017 CHRT 36 :

i. the conduct has to be unwelcome by the victim and related to a prohibited ground of discrimination that detrimentally affects the work environment or leads to adverse job related consequences for the victim;

   Morin, above.

ii. the gravamen of harassment lies in the creation of a hostile work environment which violates the personal dignity of the complainant;

   Dawson v. Canada Post Corporation, 2008 CHRT 41 ("*Dawson*").

iii. in certain circumstances a single incident may be enough to create a hostile work environment and in others some element of repetition or persistence is required.Accordingly, the nature of the conduct should be calculated according to the inversely proportional rule: the more serious the conduct and its consequences are, the less repetition is necessary; conversely, the less severe the conduct, the more persistence will have to be demonstrated;

   Dawson, above.

iv. harassment does not include expressions that are rude and offensive but not connected to a particular characteristic.Conduct can be offensive and based on personal circumstances, but not repetitive enough or serious enough to constitute harassment under the *CHRA*;

   Morin, above.

v. in determining whether the conduct is unwelcome, an objective standard must be applied based on what a reasonable person would perceive from the perspective of the victim;

Hill, above.

vi. in assessing the "reasonableness" of the conduct at issue, the touchstone is the usual limits of social interaction in the circumstances.The following more specific factors are relevant in the determination:the nature of the conduct; the workplace environment; the pattern of prior conduct between the parties; whether the alleged harasser is in a position of authority over the complainant; and whether an objection has been made.

Hill, above.

vii. by virtue of section 65 of the *CHRA* any act or omission committed by an employee of an association or organization, in the course of employment of said employee, shall, for the purposes of the *CHRA*, be deemed to be an act or omission committed by that association or organization.This remains the case unless the association or organization did not consent to the commission of the act or omission and exercised all due diligence to prevent the act or omission from being committed and subsequently, to mitigate or avoid the effect thereof;

viii. employers have an obligation to their employees to create and maintain a discrimination-free work environment and their duty of diligence exists once it becomes aware of an act that, by reason of its intrinsically offensive, humiliating or degrading character, would likely degenerate into harassment if it were subsequently repeated.

Dawson, above.

ix. the existence of an anti-harassment policy itself is not enough to release the employer from all due diligence.There is a positive duty upon an employer to take prompt and effectual action when it knows or should know of the conduct in the workplace amounting to racial harassment and to avoid liability, the employer is obliged to take reasonable steps to alleviate, as best it can, the distress arising

> within the workplace and to reassure those concerned that it is committed to the maintenance of a workplace free of racial harassment.
>
> *Hinds v. Canada,* 1988 CarswellNat 993.
>
> [Member Lustig makes reference to the following decisions: *Morin v. Canada (Attorney General),* 2005 CHRT 41 and *Hill v. Air Canada,* 2003 CHRT 9]

[15] Actions or conducts of harassment must be sexual in nature to be deemed as sexual harassment (see Franke, *supra*).

[16] Finally, the undersigned also concluded in *Duverger v. 2553-4330 Québec Inc. (Aéropro),* 2019 CHRT 18 that when Tribunal analyses allegations of harassment in matters related to employment, the creation of a hostile or a poisoned work environment is not necessarily a factor to consider. This will depend on the circumstances. In some instances, the question lies in determining if a sufficient nexus exists between the allegations of harassment and the employment context. This interpretation allows to include, for example, cases of post-employment harassment under the umbrella of the *CHRA*.

[17] Bearing these principles in mind, and given our Tribunal's many reminders, I will analyze Mr. Willcott's complaint (see, among others, *Morin v. Canada (Attorney General)*, 2005 CHRT 41, at paras. 245 and 246; *Alizadeh-Ebadi v. Manitoba Telecom Services Inc.*, 2017 CHRT 36, *Stanger v. Canada Post Corporation*, 2017 CHRT 8, *Siddoo v. International Longshoremen's and Warehousemen's Union, Local 502*, 2015 CHRT 21, decision affirmed 2017 FC 678, *Duverger v. 2553-4330 Québec Inc. (Aéropro)*, 2019 CHRT 18).

IV. Complaint background: who are Freeway and Mr. Willcott?

[18] Freeway Transportation Inc. is a trucking and freight transportation company headquartered in Brampton, Ontario. They operate in various locations, including in Brampton, Cambridge and Hamilton. They have only one client, a company called ABF, which is separate from Freeway; they have their own staff, their own clients and their own

equipment. This company takes care of their clients' freight, provides trailers, and ships and distributes goods.

[19] Freeway's role is to provide trucks so that their only client, ABF, can attach trailers to them. They are also responsible for supplying truckers whose licenses are in good standing, in addition to training them.

[20] The relationship between the two companies seems vital because without Freeway, ABF would not be unable to ship and distribute goods as they would have no trucks to pull its trailers. Conversely, without ABF, Freeway would have no trailers to attach to their trucks. Lastly, ABF also acts as a dispatcher for Freeway.

[21] Freeway is a small company that, at the time of the incidents, employed approximately 45 to 50 employees. Of this number, nearly all were labourers. This included truck drivers, mechanics and loading dock employees.

[22] Since ABF is Freeway's only client, not many employees are required for administrative tasks. In 2013, just two employees performed this type of task, which included invoicing and accounts payable. Some other individuals had tasks that were rather organizational or managerial in nature. One example is Freeway's owner, Stewart Crawford, and his daughter, Caitlyn Crawford.

[23] Mr. Willcott is a professional truck driver. His license allows him to drive semi-trailers. In the past, he worked for Freeway as a truck driver on three separate occasions. It was not until May 27, 2011, that he began to work there regularly.

[24] In October 2013, Mr. Willcott was involved in an accident between his truck and another vehicle. This accident occurred during his work hours. Unfortunately, the accident caused him to sustain serious injuries to his neck, shoulder and left arm on the left side.

[25] During the hearing, Mr. Willcott and the Freeway representative explained that the relationship between them was good initially. Ms. Crawford testified that Mr. Willcott was, all in all, a good truck driver. However, some problems emerged in 2012, particularly between Mr. Willcott and some other individuals in the workplace.

[26] The situation deteriorated in 2013, mainly as a result of various incidents cited by Mr. Willcott that are part of the present complaint. These incidents involved, among others, James Marshall, the General Manager of Freeway, and Nicole McNab, the ABF dispatcher.

[27] Another part of Mr. Willcott's complaint pertains to his termination of employment in November 2013 as well as his attempted reinstatement in June 2014. This reinstatement was the result of an arbitral award made by arbitrator Diane Gee, to whom the dispute had been submitted under the *Canada Labour Code*. When Mr. Willcott tried to return to work in June 2014 following this award, he was prevented from doing so for two reasons. He was still suffering from the effects of his 2013 truck accident, which is what he told Freeway. It was not until October 2016 that Mr. Willcott was able to undergo an independent medical assessment to confirm that he was fit to return to work. And, despite this positive medical report, it was at this time that Freeway learned that Mr. Willcott used medicinal marijuana to alleviate his pain. In response to this information, they asked Mr. Willcott to provide more information in that regard before they would allow him to work. Therefore, Mr. Willcott could not actively resume work. He alleges that this constitutes discrimination based on disability.

[28] The parties made my task difficult because the evidence is based solely on documentation filed at the hearing and on Mr. Willcott's and Ms. Crawford's testimony. I could not hear testimony from Ms. McNab or Mr. Marshall because they were not called to testify at the hearing. These individuals would likely have shed light on some of the specific aspects of the case. Lastly, another individual with considerable involvement in the various alleged incidents, Jeff Felix, was not called as a witness either. Like the others, his testimony could have been useful to me.

[29] That said, Ms. Crawford and Mr. Willcott were, in my opinion, honest and forthcoming in their testimony. Both were answering questions in a succinct and frank manner, such that I did not question their credibility. Some elements in their testimonies seemed less reliable to me, but I reiterate that credibility and reliability are two different things. A witness can testify in a credible manner about facts that he or she believes to be

true, but some of the information may not be reliable for various reasons (for example, the time elapsed, memory loss, stress and anxiety).

V. Analysis

A. Does Mr. Willcott have one or more prohibited grounds of discrimination protected by the *CHRA*?

[30] Yes, Mr. Willcott demonstrated that he has prohibited grounds of discrimination protected by the *CHRA*. These grounds are sex, race, national or ethnic origin, and disability.

[31] Mr. Willcott is a man who identified himself as Aboriginal. Freeway did not file evidence refuting these aspects.

[32] The fact that the Complainant had a road accident in October 2013 involving his truck and another vehicle is also not contested. An ABF dispatcher had cargo to deliver to a client and assigned this task to Mr. Willcott. After reaching the client, the cargo was to be unloaded from the trailer. Mr. Willcott and the client noticed that a pump truck was missing for unloading the goods. The evidence shows that the dispatcher is normally responsible for enquiring about the client's needs. This way, the dispatcher can ensure that the truck driver and the client have all the equipment they need to unload the goods.

[33] Since the cargo could not be unloaded, Mr. Willcott continued on his way. Despite driving carefully because the trailer was loaded with heavy goods, Mr. Willcott was forced to hit the brakes because another road user had crossed a street illegally. The goods began to move, striking the back of the trailer with full force. The impact caused a nerve in Mr. Willcott's neck to get pinched. This nerve was damaged, sending pain all the way to the fingertips of his left hand.

[34] Despite the pain, the Complainant continued to work after the accident. Freeway suggested that he see a doctor, but Mr. Willcott refused.

[35] The evidence shows that Mr. Willcott ultimately saw a doctor shortly after because he underwent extensive medical tests. A specialist issued a diagnosis of a pinched nerve

in his neck, leading to chronic pain in his neck, left shoulder and left arm, all the way to his fingertips. Mr. Willcott said that at the time, the pain was also disturbing his sleep.

[36] In the case at hand, Mr. Willcott's injury and resulting chronic pain are a disability within the meaning of the *CHRA*. The evidence is clear in this regard and shows that Mr. Willcott's injury and the pain sustained caused functional limitations (section 25 of the *CHRA*; see also *Desormeaux v. Ottawa (City)*, 2005 FCA 311; *Audet v. Canadian National Railway*, 2005 CHRT 25, at para. 39; *Temple v. Horizon International Distributors*, 2017 CHRT 30, at paras. 38 to 40).

B. Did Mr. Willcott sustain one or more adverse impacts (sections 7 and 14 of the *CHRA*), does a link with a prohibited ground of discrimination exist and what is Freeway's justification (section 15 of the *CHRA*)?

[37] I will now analyze Mr. Willcott's various allegations to determine whether he sustained an adverse impact under section 7 or 14 of the *CHRA*. At the same time, I will determine whether one of the prohibited grounds of discrimination put forward was a factor in this adverse impact.

[38] Lastly, I will analyze whether Freeway was able to provide a justification for the alleged conduct or whether they were able to limit their liability.

(i) Incidents involving Mr. Marshall

(a) Racist insults and threats on March 6, 2013

[39] During the hearing, Mr. Willcott explained that incidents prior to 2012 had occurred in the workplace. Clearly, this is not part of the complaint before me. Nonetheless, it offers a better understanding of the context surrounding the case. It appears that Mr. Willcott had had interpersonal problems for some time with certain people at work, particularly Mr. Marshall.

[40] Since only the facts beginning in March 2013 fall within the scope of the complaint, I will address Mr. Willcott's allegations against Mr. Marshall and Freeway from that point forward.

[41] It is important to note that at the time of the allegations, according to the evidence, Mr. Marshall was the General Manager at Freeway. He was therefore not only involved in the company's activities, but also held a supervisory role.

[42] Mr. Willcott testified that on March 6, 2013, an incident occurred between him and Mr. Marshall when he was supposed to make a delivery with trailer number 2022. This trailer had some defects. Mr. Willcott informed Mr. Marshall of the issues. However, other deliveries had to be made with the same trailer the same day. Mr. Marshall asked Mr. Willcott to make the deliveries with trailer 2022 anyway, which Mr. Willcott refused because he felt that it was not safe to do so.

[43] Mr. Marshall became angry with him, yelled and spat in his face. He also assumed a threatening posture against him. It was during this altercation that he made racist remarks about Mr. Willcott, calling him a *dirty Indian*. He also said that no one cares for him and his *kind*. Mr. Marshall went even further by saying that it was pointless for Mr. Willcott to complain to the company's owner, Mr. Crawford, because he too hates his *kind* of people. Lastly, Mr. Marshall threatened Mr. Willcott with reducing his work hours or even ensuring that he would be the first dismissed from the company.

[44] Mr. Willcott stated that he reported the issues he was having with Mr. Marshall to Freeway, but feels that the company did not do what they should have to rectify the situation. This inaction on Freeway's part angered Mr. Willcott.

[45] Ms. Crawford testified that she had no knowledge of this incident and that she only learned what had happened from reading the complaint. She stated that neither Mr. Willcott nor any other employee had reported this event. After reading the complaint, she looked into the situation to understand what might have happened with the trailer. She also questioned Mr. Marshall, who denied making such comments. In addition, she asked Mr. Felix whether he remembered what had happened, but he said that he did not.

[46] The evidence shows that Ms. Crawford was not on site at the time of this incident. She speculated that other employees must have been present on the loading docks who might have seen this altercation. Therefore, hypothetically speaking, there would have been witnesses to the scene. Since Ms. Crawford was absent, this type of speculation is not really useful for the Tribunal.

[47] That said, Ms. Crawford remembers having certain discussions with Mr. Willcott. These discussions were about the workplace, Mr. Marshall and the fact that Mr. Willcott found it unfair that his work hours were reduced. She explained that she had already checked company records to understand what was going on. She tried to show Mr. Willcott that his hours had not actually been reduced by Mr. Marshall.

[48] During her testimony and with the help of documents filed during the hearing, Ms. Crawford explained that the work hours of all employees decreased between 2012 and 2013. Based on these data, she concluded that Mr. Willcott's hours had not been reduced more than those of other drivers.

[49] She also remembers meeting Mr. Willcott in the office to give him an opportunity to voice his concerns. She stated that he was agitated and unstable, and that he was unable to continue the meeting. She also suggested that he meet with a third party to offer him assistance, particularly if he did not feel comfortable with other people at work. Mr. Willcott declined this offer.

(b) Incidents involving forced leave on June 7 and October 25 and 27, 2013

[50] Mr. Willcott also raised another incident, again involving Mr. Marshall, that allegedly occurred on June 7, 2013. He explained that Freeway makes it a practice to rotate truck drivers and to force them sometimes to take a day off.

[51] Mr. Willcott was forced to take leave when it was not his turn in the rotation. He spoke about it to Mr. Felix, who agreed that it was in fact not his turn. On June 10, 2013, Mr. Willcott also walked in on a conversation between Mr. Marshall and Mr. Felix during which they were discussing this situation. Mr. Felix asked Mr. Marshall why Mr. Willcott

was forced to take another day off when it was not his turn. Mr. Marshall answered that he wanted to irritate Mr. Willcott.

[52] Mr. Willcott finally decided to talk to Mr. Felix about what he had heard. Mr. Willcott testified at the hearing that Mr. Felix had a very good understanding of what was going on between him and Mr. Marshall, along with the interpersonal problems and Mr. Marshall's abuse.

[53] In the same vein, Mr. Willcott also testified that he was forced to take leave on October 25 and 27, 2013. Again, it was not his turn in the truck driver rotation.

(c) Incidents involving incitement to sell drugs

[54] On September 12, 2013, Mr. Willcott walked in on another conversation at work between Mr. Marshall and another worker. During this conversation, Mr. Marshall said that he wanted Mr. Willcott to be dismissed from the company.

[55] This same worker then sent Mr. Willcott a text message asking if he could sell him drugs, which he refused to do. He approached him again when Mr. Willcott was in his truck. He asked him the same thing, but Mr. Willcott again declined. Mr. Willcott informed Mr. Felix of the situation and the ploys of this individual and Mr. Marshall. Mr. Felix told him that he agreed the situation had to stop and that he was going to talk to Ms. Crawford about it.

(d) Conclusions as to the incidents involving Mr. Marshall and Freeway's possible justifications

[56] With respect to the incidents involving Mr. Marshall, I must determine, on the balance of probabilities, whether Mr. Willcott was the subject of adverse differential treatment in the course of employment and whether he was harassed in matters related to employment. Are Mr. Willcott's allegations, if believed, complete and sufficient enough to justify a verdict in his favour, in the absence of a reply from Freeway? I think they are.

[57] Part of Mr. Willcott's evidence as to Mr. Marshall's actions was not contradicted by the Respondent. I also have no reason to doubt Mr. Willcott's testimony about these incidents.

[58] As for Ms. Crawford, she was unable to testify about most of the alleged incidents because she did not have personal knowledge of them. She was therefore limited to saying that she did not know anything and that she had not been made aware of many of the incidents.

[59] Freeway did not file any other evidence to refute Mr. Willcott's allegations. Nor did they call the main party concerned, Mr. Marshall, to testify. Mr. Felix was not called to testify either, even though he could have had relevant information to offer the Tribunal. I am therefore limited to the evidence before me.

[60] I believe, on the balance of probabilities, that Mr. Marshall did make the racist remarks on March 6, 2013. Although Ms. Crawford stated that she had asked Mr. Marshall about it and he denied making such comments, this is not enough to refute the testimony of the main party concerned, Mr. Willcott, because he was present during this incident.

[61] I am therefore of the opinion that Mr. Marshall did indeed make racist remarks about the Complainant when he called him a *dirty Indian* and told him that it was pointless telling Freeway's owner because the latter did not like his *kind* of people either. I believe that these comments referred to the Complainant's Aboriginal background. I also accept as proven the threats Mr. Marshall made towards Mr. Willcott regarding reducing his work hours and his desire to see him leave the company. I consider all these comments to have been made in connection with Mr. Willcott's Aboriginal origin.

[62] The terms used by Mr. Marshall (*dirty Indian*) are provocative and racist, as is the expression *those of your kind*. How can a Human Rights Tribunal remain insensitive to such prejudicial comments? Nor can I ignore the fact that these words were spoken by the company's General Manager, a member of senior management.

[63] As the Supreme Court of Canada pointed out, judicial notice is taken of the systematic and historical factors affecting First Nations, which include the fact that

Aboriginal peoples are victims of racial prejudices (see *R v. Williams*, [1998] 1 SCR 1128, and cited in *Commission des droits de la personne et des droits de la jeunesse v. Blais* [*Blais*], 2007 QCTDP 11 (CanLII)).

[64] Not only were racially prejudicial words used, but also Mr. Marshall's actions following this incident were equally consistent with this state of mind. The evidence reveals, based on the balance of probabilities, that Mr. Marshall had something against Mr. Willcott. Their relationship was not good, and Mr. Marshall used his position to discriminate against him.

[65] This includes the event of June 7, 2013, during which Mr. Willcott was forced to take leave when it was not his turn in the truck driver rotation. Mr. Marshall told Mr. Felix that the aim was to irritate the Complainant. I consider these actions to be planned and devious.

[66] The Complainant was also forced to take off October 25 and 27, 2013, when it was also not his turn in the rotation. I did not hear any other evidence to refute these allegations.

[67] I add that the conversation between Mr. Marshall and another individual to entrap Mr. Willcott and have him sell drugs to the latter was also unacceptable. This evidence also was not contradicted by the Respondent, and I have no reason to doubt the Complainant's testimony.

[68] Not only was Mr. Willcott discriminated against in the course of employment by Mr. Marshall for the incidents on June 7 and October 25 and 27, 2013, but I also conclude that Mr. Marshall's overall conduct constitutes harassment in matters related to employment within the meaning of the *CHRA*. The repetition and persistence of Mr. Marshall's harassing actions were established on the balance of probabilities. Mr. Willcott felt persecuted, singled out and targeted within the company. His frustrations grew, just like his feeling of injustice. I am convinced that due to the General Manager's actions, the workplace became hostile and unhealthy for Mr. Willcott. He clearly sustained an adverse impact as a result of this man's actions due to his race and his national or ethnic origin.

[69] That being said, it is difficult for Freeway to present a justification for Mr. Marshall's actions, especially since the latter was part of the company's senior management. The fact that Ms. Crawford was not aware of the situation is not a justification, in my opinion.

[70] Freeway demonstrated that in March 2013, it adopted a policy for the prevention of violence and harassment in the workplace, and that they provided training about this policy to their employees. Both Ms. Crawford and Mr. Willcott testified to that effect, specifying that the trainer was Ms. Crawford herself. That makes sense considering that her role within the company is that of a coordinator of both occupational health and safety, and human resources.

[71] Mr. Willcott explained that during the training, he had tried to draw Ms. Crawford's and the group's attention to certain problems he had noticed within the company. These problems were targeted and specific. He also took the opportunity to call the training *bullshit*. Ms. Crawford intervened at that moment, particularly due to the inappropriate language. In addition, since the training was on violence, prevention and harassment, she felt that this was neither the time nor the place to discuss this type of specific situation. She informed Mr. Willcott that he could discuss his concerns with her in private. Although annoyed, Mr. Willcott nonetheless completed the training successfully. However, he did not ask to speak with Ms. Crawford after the session to raise his concerns.

[72] When I check Freeway's policy on the prevention of violence and harassment in the workplace, it is clear that an employee must report any situation involving violence or harassment to Freeway's management. Despite that, the policy does not contain any specific guidance for employees for reporting such situations. The policy does not explain who is in management or what positions or individuals are considered part of the company's management.

[73] The policy also does not specify who —in management— is responsible for receiving information from employees on violence and harassment in the workplace. For example, if Freeway expects employees to complain to Ms. Crawford as the one responsible for human resources, the policy should perhaps specify that employees must file their complaint with her.

[74] I add that the policy does not address cases where an employee is harassed by a member of management. There is no clear channel for the employee in this type of situation. Since Mr. Marshall was part of management, to whom was Mr. Willcott supposed to turn? The policy could be clarified in this regard to say that the employee must then report to the person responsible for human resources.

[75] Moreover, Mr. Willcott reported different events to Mr. Felix. The Respondent tried to prove that Mr. Felix was not a member of management and that Mr. Willcott should instead have reported the events to Ms. Crawford directly, like he had done in the past.

[76] However, a letter sent on October 29, 2013, by Mr. Felix himself was disclosed into evidence. In this letter, he informed the Complainant that he was being temporarily laid off considering the decrease in the company's activities. Mr. Felix's title in this letter is **Operations Manager**.

[77] It is not clear to me whether, between March and October 2013, Mr. Felix changed positions and ended up in a managerial position later that year. Freeway did not provide me with any explanations in that regard. I believe that Mr. Felix did, in actual fact, play a higher role than Freeway tried to demonstrate to me during the hearing. He may not have been the highest ranking member of the company (unlike Ms. Crawford, Mr. Marshall or Mr. Crawford), but he nonetheless had a more important role than that of the truck drivers. I add that the letter of October 29, 2013, falls within the sequence of events specific to this complaint. It is therefore more likely that Mr. Felix was a manager when Mr. Willcott reported the various incidents to him.

[78] It is also worth pointing out that Mr. Willcott had, at different times, expressed his concerns to Mr. Felix, who told him that he was going to discuss the situation with Ms. Crawford. The evidence also shows that when there were problems with the truck driver rotation and the forced leave, the Complainant again spoke to Mr. Felix about them. The latter then discussed the situation personally with Mr. Marshall. Again, this reinforces the evidence that Mr. Felix had a more important role within Freeway than the company tried to disclose into evidence.

[79] When Mr. Felix informed Mr. Willcott that he was going to speak with Ms. Crawford about the various situations, I believe that Mr. Willcott was right to believe that the situation would be raised and potentially resolved. Yet, Ms. Crawford was never made aware by Mr. Felix of what was going on in the company. Lastly, if Mr. Felix was not a resource person who could receive the type of information that Mr. Willcott reported to him, such as complaints and incidents, he could very well have referred him to the right people who could have received such complaints.

[80] Mr. Willcott also filed a letter dated July 14, 2016, written by Ms. Crawford. This letter was a follow up to the road test completed by Mr. Willcott at Freeway's request. During this test, the instructor selected by Freeway reported that Mr. Willcott had said something unacceptable to a group of drivers. Mr. Willcott found that his words had been misreported by the instructor to his employer. He therefore wanted to file a complaint against him. It is in this context that Ms. Crawford encouraged him to file a formal complaint with her or, alternatively, with the **Operations Manager**, who was now Mr. Sylvain (and not Mr. Felix).

[81] I reiterate that this is the role that Mr. Felix had in 2013. A contradiction therefore exists in Freeway’s evidence as to who is able to receive complaints from employees. The evidence rather supports the contention that an employee can file a complaint with both Ms. Crawford and the Operations Manager. That is exactly what Mr. Willcott did when he reported the incidents to Mr. Felix in 2013.

[82] In terms of fairness, it generally requires an employee to inform his or her employer of problems in the work environment so that the latter has the opportunity to correct the situation (*Franke*, above, at paras. 47 to 50). Nonetheless, this requirement exists when the employer “. . . has a personnel department and a comprehensive and effective sexual harassment policy, including appropriate redress mechanism” (*Franke*, at para. 48). Even though the case in *Franke* pertained to allegations of sexual harassment, the principles set out in that decision are relevant before our Tribunal.

[83] The requirement in *Franke* necessarily entails a certain form of proportionality. Not all companies have a personnel department, just like not all companies have a

comprehensive harassment policy. Moreover, the Federal Court states that this policy must also be effective. Consequently, the employee's reporting requirement must be weighed against these elements.

[84] While Freeway has a policy on the prevention of violence and harassment in the workplace, I am of the opinion that the policy is not entirely effective. Although a person responsible for human resources was in place, the policy certainly lacks detail.

[85] Aside from the general mention that an employee can report an incident to Freeway management, the policy is not **specific** as to the identity of the person to whom an employee can report such incidents. If Freeway's intention at the time of the events in 2013 was for incidents to be reported to the person responsible for human resources —in this case Ms. Crawford— then that should have been clearly stated in the policy. If, on the contrary, Freeway wanted to give employees alternative solutions, the policy should have stated as much.

[86] The policy is not as clear as Freeway claims. Consequently, since the policy's effectiveness is reduced, the employee's reporting requirement as set out in *Franke* also is reduced. As previously mentioned, Mr. Willcott nevertheless reported the incidents to Mr. Felix. He had every reason to believe that Mr. Felix would take steps to correct the situation. That is precisely what Mr. Felix made Mr. Willcott believe.

[87] Lastly, I reiterate that acts or omissions committed by an employee in the course of his or her employment are deemed to be committed by the employer (subsection 65(1) of the *CHRA*). Mr. Marshall's actions in the course of his work are deemed to have been committed by Freeway, thus engaging its liability. The Respondent did not file evidence allowing for its liability to be excluded under subsection 65(2) of the *CHRA*.

[88] For all these reasons, I conclude that Mr. Willcott was the subject of discrimination, more specifically adverse differential treatment in the course of employment (subsection 7(b) of the *CHRA*) and harassment in matters related to employment (subsection 14(1)(c) of the *CHRA*) based on his national or ethnic origin and his race. Remedies will be discussed in section VI of this decision.

(ii) Antifreeze incident of June 11, 2013

[89] Another incident occurred on June 11, 2013. When Mr. Willcott opened the door of his truck while making a delivery to a client, he noticed that the handle was covered in a greenish substance. Because of its colour and smell, he knew that the substance was antifreeze. This is a toxic substance. The event was reported to Ms. Crawford on June 12, 2013.

[90] The evidence shows that Ms. Crawford investigated the events surrounding the antifreeze incident, which she included in an incident report. This report was filed at the hearing. Mr. Willcott believed that someone from Freeway had followed him and applied this substance to his handle. She followed up with him to find out whether the situation recurred later; it had not. She asked him to tell her if it ever happened again, but it never did. The investigation was therefore closed.

[91] I find no evidence to determine that Mr. Marshall was the one who orchestrated this incident. There is also nothing in the evidence that leads me to conclude, in any way, that this event constitutes differential treatment in the course of employment or harassment in matters related to employment within the meaning of the *CHRA*. I am also satisfied that Freeway responded promptly and appropriately to this incident.

[92] For these reasons, I conclude that Mr. Willcott did not meet the burden of proof for this case as to this aspect of the complaint.

(iii) Termination in November 2013

[93] As I stated, in October 2013, Mr. Willcott was involved in an accident with his truck that caused him severe injuries and pain. Mr. Willcott explained that at the end of October 2013, Freeway began to give him less and less work. He ultimately received a letter on October 29, 2013, signed by Mr. Felix explaining that the company had to lay him off temporarily for economic reasons. The letter stated that after three months, Freeway would reassess the situation. He would then be informed of his potential return to work or his permanent termination.

[94] On November 28, 2013, Mr. Willcott received a second letter exactly 30 days later. This time, the letter was signed by Mr. Marshall—the General Manager of Freeway. It was a notice of permanent termination. The same reasons were given; that is, a shortage of cargo and the fact that the company was going through a difficult time of year.

[95] Mr. Willcott challenged this termination, deeming it unjustified. That is why an arbitrator was appointed under the *Canada Labour Code*. Arbitrator Diane Gee issued an arbitral award on June 18, 2014, in which she ordered Mr. Willcott's reinstatement in his old position. She ordered compensation for lost wages between October 24, 2013, and June 18, 2014. Lastly, she rendered a second decision on January 8, 2015, concerning monetary compensation because the parties did not agree on the damage amounts. After this decision, Mr. Willcott was reinstated at Freeway on June 20, 2014.

[96] The termination was addressed by the arbitrator pursuant to the *Canada Labour Code*. The arbitrator was to determine whether the termination was unjustified. This decision therefore does not discuss any aspects related to discrimination. Under the *CHRA*, the question that I must ask myself instead is whether Mr. Willcott's termination was discriminatory.

[97] Mr. Willcott was laid off by Mr. Marshall as the General Manager of Freeway in his letter of November 28, 2013. It was neither Ms. Crawford nor Mr. Felix nor Mr. Crawford who laid him off. I find that there is a subtle scent of discrimination in this termination. On the balance of probabilities, I believe that Mr. Willcott's national or ethnic origin and race were a factor in his termination.

[98] The event of March 6, 2013, becomes particularly significant because that is when Mr. Marshall made racist remarks to Mr. Willcott. It was during that altercation that Mr. Marshall threatened to reduce his hours and arrange to have him be the first dismissed by the company. Effectively, that is exactly what happened.

[99] Following this incident, it is difficult to dissociate Mr. Marshall's racist remarks from his other actions and conduct as a whole. Nor can I ignore the discussion that Mr. Willcott overheard between Mr. Marshall and Mr. Felix. He told him he was doing it to irritate

Mr. Willcott. I can certainly see from the sequence of events and Mr. Marshall's conduct that he had something against Mr. Willcott.

[100] That said, as the Supreme Court of Canada explained above in *Bombardier* at para. 64, a respondent has three options when it comes to the complainant meeting his or her burden of proof: (1) present evidence refuting the allegations as to the complainant's burden of proof (see *Moore*), (2) present a defence justifying the discrimination (in the case of the *CHRA*, section 15), and (3) present both.

[101] Freeway tried to refute Mr. Willcott's allegations by explaining that his termination had nothing to do with his race or his national or ethnic origin. More specifically, Freeway explained that Mr. Willcott had been laid off due to a decrease in the company's activities, his seniority and his anger.

[102] According to Ms. Crawford, Mr. Willcott's behaviour before his termination was disturbing. Ms. Crawford explained, among other things, that Mr. Willcott had hastily left a meeting with her and that he was agitated and easily triggered. She also spoke about the comments Mr. Willcott made during the training. Mr. Willcott apparently also made threatening comments to Mr. Marshall. This evidence was already explored by the arbitrator, Ms. Gee, who did not accept this argument. In the end, she determined that the termination was unjustified.

[103] In a sense, I agree that Mr. Willcott behaved in an agitated manner. However, as Mr. Willcott explained during the hearing, he was angry because Freeway did nothing to manage the various incidents that had occurred at work—even though he had notified Freeway's Operations Manager. Mr. Willcott was also harassed by Freeway's General Manager and suffered adverse differential treatment. Despite that, no action was taken to set things right within the company.

[104] The evidence shows that Ms. Crawford offered Mr. Willcott assistance, particularly by referring him to a therapist. I do believe this offer was something good. However, Freeway postulates that it was Mr. Willcott who had a behaviour and anger problems, not that something serious was going on in their work environment. Ms. Crawford must have

also wondered about the company's work environment, which had become hostile and unhealthy.

[105] As for the decrease in Freeway's activities, I am of the opinion that Ms. Crawford established that the company's activities had indeed decreased. She submitted evidence that a widespread reduction in activities had swept through the company in 2012 and 2013. This affected truck drivers' work hours, inevitably leading to wage cuts.

[106] Ms. Crawford filed a work table at the hearing showing the hours and wages of eight truck drivers, including Mr. Willcott (see R-1, Tab 10). She is the author of this document. This table is based on data from the truck driver payroll list (see R-1, Tab 11). She was thus able to analyze comparable data for various truck drivers, that is, those who worked full time for Freeway.

[107] Following her analysis, she noted that the truck drivers' hours had generally decreased between 2012 and 2013, but that Mr. Willcott's hours had not been reduced more than those of the other truck drivers. She explained that in 2012, Mr. Willcott's salary, compared to that of his colleagues, was one of the highest.

[108] However, Freeway made no attempts to explain why Mr. Willcott was laid off so hastily when the first letter sent to him on October 29, 2013, suggested a reassessment **before or within the next three months**. Why make this decision exactly 30 days after the first letter? The termination letter of November 28, 2013, also stated that Mr. Willcott's personal effects would be sent to him separately. It is surprising that Freeway did not offer Mr. Willcott the opportunity to collect his personal effects himself. Rather, the letter states that his effects would be sent to him separately, which seems drastic to me.

[109] Freeway attempted to present another argument to justify Mr. Willcott's termination. According to Freeway, he was the truck driver with the least seniority. However, Mr. Willcott testified that he was not the truck driver with the least seniority in the company. He also said that he had had a conversation with Mr. Felix, during which the latter had apparently told him that three other truck drivers had also been laid off—two with less seniority than him and another one with medical problems.

[110] It is not clear to me whether other truck drivers were laid off before, at the same time as or after Mr. Willcott. Freeway, which raised the seniority justification, did not provide evidence that other truck drivers had been laid off, just like Mr. Willcott. If that is the case, did he have more or less seniority? Were they laid off for other reasons? I have no evidence from Freeway to that effect.

[111] Ms. Crawford also stated that Mr. Willcott was, all in all, a good truck driver. Lastly, she confirmed that according to her calculations, despite the reduction in activities and therefore work hours, Mr. Willcott nonetheless did well in 2013. What is surprising is that Ms. Crawford also confirmed during her testimony that the company did not have strict rules about seniority. Everything about this seniority argument therefore seems vague and unsubstantiated to me.

[112] The person responsible for the conduct or action does not have to base his or her decision solely on the prohibited ground of discrimination. It is enough for this decision to be only partially based on this ground (*Bombardier*, above, at para. 48). Looking at the evidence in its entirety, I am not convinced that **the only reasons** that led Mr. Marshall to lay off Mr. Willcott were a decrease in the company's activities, his growing anger or even his seniority as Freeway alleged.

[113] This termination has a subtle scent of discrimination (*Basi*, above). The sequence of events and their temporality as well as Mr. Marshall's various lay-off threats, racial prejudices, actions and tactics must all be taken into account in my analysis of Mr. Willcott's termination.

[114] I am of the opinion that Freeway was not successful in refuting Mr. Willcott's allegations; consequently, on the balance of probabilities, Mr. Marshall's decision to lay off Mr. Willcott was partially based on his race and his national or ethnic origin.

[115] For these reasons, I conclude that the Complainant was discriminated against under section 7(a) of the *CHRA* based on his national or ethnic origin and his race.

(iv) Incident involving Ms. McNab and alleged sexual harassment

[116] Mr. Willcott feels that Freeway did not provide him with a work environment free of sexual harassment. This sexual harassment was allegedly committed by Ms. McNab, an employee and dispatcher at ABF.

[117] Freeway and ABF are two separate companies; Ms. McNab is not a Freeway employee. Given her role as a dispatcher, Mr. Willcott deals with her on a regular basis.

[118] Firstly, the Complainant testified that Ms. McNab could swear and be vulgar with him sometimes. I do not believe that these are the most determining factors under the circumstances. Vulgar jokes, even in bad taste, are not generally in and of themselves harassment (see *Morin*, above, at para. 246). In my opinion, other events are more central in Mr. Willcott's complaint.

[119] Mr. Willcott testified that an event took place on May 21, 2013. While Ms. McNab was informing him of his next delivery, she stroked his forearm with her fingernails. The Complainant quickly withdrew his arm and gave her a disgusted look. This situation made him uncomfortable. The following day, Ms. McNab told him to never again repeat what he had done the day before, a comment that Mr. Willcott completely ignored.

[120] Another event occurred a few days later, on May 23, 2013. Ms. McNab told Mr. Willcott, while informing him of his next delivery, that they should go out and grab a drink one of these days, which he declined. He also told her that he did not date people from work and left the room. He discussed the situation with Mr. Felix, who was supposed to talk to Ms. Crawford about it. However, Mr. Willcott cannot confirm whether Mr. Felix did actually do so.

[121] Mr. Willcott testified that a few days after these events, he met with Ms. Crawford and Mr. Felix to inform them of this ABF employee's behaviour. Mr. Willcott explained that after this meeting, Mr. Marshall approached him, told him that he was a troublemaker and threatened to make him lose his job.

[122] He also testified that he had discussed the situation with Mr. Marshall and the owner of ABF, Mr. Lachapelle. That said, Mr. Willcott did not elaborate very much on the

content of this meeting or the date on which it allegedly took place. In cross-examination, he explained that he had met these individuals in February 2013 and that when he raised Ms. McNab's sexual harassment, Mr. Marshall allegedly interrupted him. However, the first event in his complaint relating to the allegations of sexual harassment by Ms. McNab is rather dated May 2013. Considering the inconsistency in the sequence of events and dates, and the considerable lack of details, I find that Mr. Willcott's testimony in this regard is not reliable.

[123] Mr. Willcott also testified to another incident on June 16, 2013. While Ms. McNab was informing him of his next delivery, she stepped in front of him and placed her hand on his chest, sliding it down. Mr. Willcott pushed Ms. McNab away and asked her what she was doing. Ms. McNab tried to justify her actions saying that she had a medical condition, the name of which Mr. Willcott cannot provide. He then left the room. He testified that he had informed someone of Freeway about the situation, but cannot confirm to whom he had allegedly talked to nor when it happened.

[124] Ms. Crawford testified that she had not been made aware of any of the events raised by Mr. Willcott in his complaint. She added that Ms. McNab was a friendly employee. Consequently, it is possible that this friendliness may have been perceived, by some people, as flirtation.

[125] Ms. Crawford explained that Mr. Willcott had already complained to her about other events involving Ms. McNab, particularly in January 2013. Ms. Crawford had asked him to send an email explaining what had happened, which he did (see Exhibit R-1, Tab 3). A meeting therefore took place between ABF, Freeway and Mr. Willcott to resolve the situation.

[126] Ms. Crawford mentioned that she found it strange that Mr. Willcott did not come to her personally to talk about these other events. She also did not recall Mr. Willcott complaining about anything else involving Ms. McNab nor her receiving other complaints about this ABF employee.

[127] Whether or not Freeway or ABF were made aware of these incidents is not a determining factor under the circumstances, in my opinion. Before even tackling the

reporting issue, I must first be convinced that the actions taken constitute sexual harassment within the meaning of the *CHRA*.

[128] In that respect, I am not convinced that Ms. McNab's actions constitute sexual harassment. Sexual harassment was defined as ". . . unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment" (see *Janzen*, p. 1284). The events are not sufficiently persistent or repetitive, or serious enough, to constitute sexual harassment, as noted above in *Morin* at par. 246.

[129] I understand that Ms. McNab's actions were unwelcome and unsolicited. Mr. Willcott was clear in that respect. The quick withdrawal of his arm and his look of disgust during the first event support the idea that the gesture was unwanted. During the second event, Mr. Willcott pushed Ms. McNab away and let her know that what she did was not welcome. Mr. Willcott was also clear about not wanting to have a drink with her and about not dating his colleagues from work. These are the only events submitted into evidence by Mr. Willcott. Following these clear warnings, no further acts were committed, according to the evidence.

[130] For sexual harassment to exist, repetition or persistence, or a sufficiently serious factor is required to create a hostile work environment. These events must be analyzed from the point of view of a reasonable person in the same circumstances (see *Morin*, above, at para. 246).

[131] In the case at hand, the repetition, persistence or even seriousness factor is not present. Having one's arm touched is not very serious in itself. However, having one's torso touched is more intrusive, in my opinion. Nonetheless, Mr. Willcott was clear that the gesture was not welcome, and Ms. McNab never did it again.

[132] I also understand Mr. Willcott's discomfort when his arm or torso was touched. He also did not appreciate being asked out for a drink. Far be it from me to approve of a person touching another without their consent. That said, is this sexual harassment within the meaning of the *CHRA*? Not necessarily.

[133] Based on the evidence filed at the hearing, I cannot conclude that these gestures created a hostile and unhealthy environment. Mr. Willcott continued to work at Freeway and deal with Ms. McNab because she was the dispatcher. In addition, between the time-bound events of May 2013, no other event occurred before his termination in November 2013 or after his reinstatement in June 2014.

[134] For these reasons, on the balance of probabilities, I conclude that Mr. Willcott was unable to meet the burden of proof for his case as to the allegations of sexual harassment.

(v) Reinstatement in June 2014 and exclusion from the truck driver position due to disability

[135] As stated earlier, Mr. Willcott returned to work on June 20, 2014 following the decision issued by arbitrator Diane Gee. The issue now is whether he was subject to adverse differential treatment in the course of employment after this reinstatement (section 7(b) of the *CHRA*).

[136] As a result of his accident in October 2013, Mr. Willcott sustained nerve damage, causing him pain in the neck, shoulder and left arm. When he returned to work on June 20, 2014, he told Freeway that he was unable to resume work immediately because of this injury.

[137] Ms. Crawford said she recalled that Mr. Willcott described the pain to her, particularly the numbness in his left arm, shoulder and neck. He also had difficulty holding the truck's steering wheel because the vibrations from the heavy weight were uncomfortable.

[138] It is at this point that Ms. Crawford and Mr. Willcott discussed the next steps prior to a return to work, including obtaining more information on the extent and nature of the injury. They concluded that it was preferable for him to return to see his attending physician. Ms. Crawford asked that a functional abilities form be completed, which was Freeway's internal administrative form. She also suggested that Mr. Willcott fill out a Workplace Safety and Insurance Board (WSIB) claim, which he did. The WSIB could have

given him access to paramedical services, such as physiotherapy. Unfortunately, the claim was rejected on July 11, 2013. Obviously, Freeway had no control over this decision.

[139] After this initial discussion, during which she asked Mr. Willcott for a medical form, Ms. Crawford recalls that he called her to tell her that his physician would not fill out the functional abilities form. He also said that the damage was likely permanent and that he might no longer be able to drive trucks.

[140] Nonetheless, on July 2, 2014, Mr. Willcott sent Ms. Crawford a medical note written by Dr. B. Pardis dated June 27, 2014. This note states that Mr. Willcott has chronic tension in the left shoulder and that he can only lift or move objects weighing up to 15 pounds with his left hand. Dr. B. Pardis also states that there is no restriction in the right hand.

[141] On July 14, 2014, Ms. Crawford informed Mr. Willcott that she could help him apply to Freeway's long-term disability insurance program. She also explained that once he was medically cleared, he would be able to actively return to his position as a truck driver. Moreover, she asked him for additional medical information that could be provided by the specialist who had diagnosed his injury or by his attending physician. Lastly, she sent him a record of employment to be filled out.

[142] On July 29, 2014, Mr. Willcott wrote to Ms. Crawford again to tell her that he would not be applying to the company's long-term disability insurance program. He also told her that he did not understand why the record of employment that he had been sent stated that the injury was not job-related. According to Mr. Willcott, the injury was clearly job-related. Lastly, he said that he was able to work, but simply needed modified tasks that involved not lifting more than 15 pounds.

[143] Ms. Crawford nonetheless requested more details on Mr. Willcott's injuries. The note from Dr. B. Pardis did not clearly specify the severity of the pain and the consequences of Mr. Willcott's injury. Ms. Crawford found the note vague. She was of the opinion that this was not enough and wanted to ensure that Mr. Willcott was medically cleared to return to his position as a truck driver.

[144] After she made the request, Mr. Willcott provided a second medical note on August 12, 2014. According to him, he was able to actively return to work. This note was written by Dr. Kachooie. It states that the patient could return to his regular job if he followed the restriction to not lift more than 20 to 25 pounds.

[145] Again, Ms. Crawford found that this note was very short and still did not address all the problems raised by Mr. Willcott in June 2014 (numbness, problems with vibrations, etc.). She still had not received the functional abilities form filled out by a physician.

[146] A few days later, on August 15, 2014, Dr. B. Pardis produced another medical note in which he wrote that Mr. Willcott had chronic cervical radiculopathy and could not lift more than 20 pounds.

[147] That same day, Ms. Crawford wrote to Mr. Willcott. In her correspondence, she summarized what had happened between Mr. Willcott's reinstatement on June 20, 2014, and August 15, 2014. This correspondence sheds light on what occurred during this period. Among other things, it refers to their discussions, the severity of the injuries and the next steps. Ms. Crawford also explained that Mr. Willcott could not return to his position due to the lack of medical information provided by doctors because the notes did not contain any information on Mr. Willcott's nerve damage or the tension on his left side. She also stated that based on his explanations, she had the impression that this was a permanent disability.

[148] According to the evidence presented to me, it is clear that despite Mr. Willcott's reinstatement on June 20, 2014, he could not return to his position as a truck driver because of his injury. In my view, even though Mr. Willcott reported the situation to Freeway himself, he was nonetheless **excluded** from his position due to his disability. This is formally confirmed in Ms. Crawford's email of August 15, 2013, informing Mr. Willcott that he cannot return to his position because of a lack of specific medical information.

[149] The exclusion of an employee from his or her position, by an employer, may constitute adverse differential treatment under section 7(b) of the *CHRA*. This is what the Tribunal explained in the decision in *Brunskill v. Canada Post Corporation* [*Brunskill*], 2019

CHRT 22, when it read paragraph 15(1)(a) of the *CHRA* in conjunction with subsection 7(b).

[150] While this exclusion from the position is linked to the employee's disability, the decision test from *Moore* is no longer necessary:

1) the Complainant has a prohibited ground of discrimination protected by the *CHRA*;

2) he sustained an adverse impact; and

3) there is a link between the ground and the adverse impact.

[151] Care must be exercised because this does not necessarily mean that this adverse differential treatment is in itself discriminatory. For adverse differential treatment based on a prohibited ground of discrimination to be discriminatory, there must be no justification (within the meaning of subsections 15(1) and 15(2) of the *CHRA*). It is when there is no justification that the Tribunal, for the purpose of the analysis, can declare that discrimination took place.

[152] In the case at hand, I do not need more to be convinced that Mr. Willcott met the burden of proof for his case. He was indeed subject to adverse differential treatment because of his disability (subsection 7(b) of the *CHRA*). If not for his disability—his injury caused by the accident and the related physiological pain—he would have returned to his position as a truck driver as planned.

[153] Now, I must determine whether Freeway was able to justify Mr. Willcott's exclusion under section 15 of the *CHRA*. For the reasons that follow, I am of the opinion that Freeway failed to meet its burden of proof between April 28, 2015, and February 1, 2016.

[154] The evidence shows that Mr. Willcott was reinstated on June 20, 2014, but did not actively return to his position as a truck driver due to his injury. Despite some of the steps taken by Mr. Willcott to clarify his medical condition, Freeway had little, if not contradictory, medical information from different physicians. Freeway also did not receive from Mr. Willcott, at its request, a completed functional abilities form.

[155] I am of the same opinion as Freeway, that is, that the damage described by Mr. Willcott in June 2014, that is, nerve damage, numbness in his arm, hand and fingers, difficulty holding a truck steering wheel, and discomfort caused by vibrations, appears significant and worrisome.

[156] I also agree with Freeway that between October 2013—the period of time the accident occurred—and June 2014—the time of the reinstatement—close to eight months had elapsed. Mr. Willcott's medical situation in June was not optimal. Freeway genuinely believed that his injury was very severe, serious and even potentially permanent, based on what Mr. Willcott had told them.

[157] I believe that Freeway was justified in asking for additional medical information. A physician could have completed the functional abilities form to clearly identify Mr. Willcott's medical needs and restrictions. The form also included a rehabilitation plan and an expected recovery or follow-up date, as appropriate. Unfortunately, these medical details were not provided to Freeway.

[158] Yet, in her email of August 15, 2014, Ms. Crawford clearly wrote that she potentially had modified work for Mr. Willcott. What she needed was more medical information that would have been included on the functional abilities form, among others. She reiterated this request on August 22.

[159] I heard the debate concerning this functional abilities form. The parties tried to explain why they were considering whether or not Mr. Willcott's medical situation was job-related. I believe that the characterization of this form (whether or not job-related) is not a determining factor in this case. Freeway was requesting, among other things, sufficient medical information to clarify his actual medical restrictions. They also needed to know whether Mr. Willcott had a rehabilitation plan and an expected recovery date. That is all. The form's characterization adds nothing more to the debate, in my opinion.

[160] Freeway received a first note from Dr. B. Pardis dated June 27, 2014. This note is short and mentions a restriction on lifting objects weighing more than 15 pounds with the left arm. Then, a second note was provided on August 12, 2014, written by Dr. Kachooie. This note is even shorter than the one before and increases the restriction to a maximum

of 20 to 25 pounds. Lastly, Mr. Willcott sent a final medical note from Dr. B. Pardis on August 15, 2014. In this note, the restriction on lifting objects is a maximum of 20 pounds.

[161] It is true that none of the three medical notes referred to the numbness in his arm, nerve damage, difficulty holding a steering wheel, sensitivity to vibrations and so on. These notes do not specify the rehabilitation plan nor the recovery date, if there is one.

[162] It is this lack of medical information and the contradictions in the notes that prompted Freeway to request a comprehensive independent medical assessment conducted by a neutral physician. On October 14, 2014, Ms. Crawford requested this assessment so that a physician would thoroughly examine Mr. Willcott's abilities in light of his specific medical situation. Freeway had also planned to provide the physician with the necessary documentation, including the job description and an analysis of the physical requirements, so that the assessment would be properly targeted.

[163] I am of the opinion that Freeway's requests were entirely reasonable in the context of the complaint. They tried to show that a truck driver, Mr. Willcott, has a safety-sensitive job and that this must be taken into account in the analysis of subsection 15(2) of the *CHRA* and the safety criterion. I fully agree with Freeway representatives that truck drivers who operate large commercial vehicles, among other things, on highways have a job that entails considerable risk. I do not believe that Mr. Willcott's position as a truck driver needs to be characterized as safety-sensitive. For the purposes of the undue hardship analysis, it is sufficient to say that the truck driver position entails major risks. These risks exist not only in relation to the safety of the truck driver him or herself, but also the safety of road users and the general public.

[164] During the hearing, Freeway filed *Ontario Regulation 340/94: Drivers' Licences*, under the *Highway Traffic Act*, R.S.O. 1990, c. H.8. This regulation provides that the holder of a driver's licence must not suffer from ". . . any mental, emotional, **nervous** or **physical condition or disability** likely to **significantly interfere with his or her ability to drive a motor vehicle** of the applicable class safely" (paragraph 14(1)(a) of the Regulation).

[165] The provincial legislature of Ontario decided to implement guidelines and obligations for holders of driver's licences in connection with their ability to drive a motor vehicle with the required caution. These standards were not implemented for no reason: safety is an obvious concern.

[166] I completely understand that after the medical information provided by Mr. Willcott, the lack of specifics and details from physicians, and the contradictions in the medical notes, Freeway had concerns about his actual ability to drive a motor vehicle safely as a result of his health. Ms. Crawford expressed her concerns in her correspondence of August 22, 2014: Mr. Willcott's nerve damage could jeopardize his safety and that of the public if he were to get back on the road in this state. In cross-examination, Mr. Willcott also confirmed that driving a commercial truck can be risky and that the driver must be in an appropriate mental, emotional and physical state to drive at all times.

[167] The notion of risk is a factor that must be considered in accommodation and undue hardship analysis. The safety criterion provided for in subsection 15(2) of the *CHRA* takes into account both the significance of the risk and the identity of the persons exposed to it (see *Day v. Canada Post Corporation* [*Day*], 2007 CHRT 43, at para. 58, as well as *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights) [Grismer]*, [1999] 3 S.C.R. 868, at para. 30, *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* (1990), 12 C.H.R.R. D/417, at para. 62).

[168] Considering that driving a commercial truck entails significant risk, Freeway wanted to ensure, not only for Mr. Willcott's safety, but also for the safety of the general public, that he was fully fit to drive.

[169] From that moment on, Freeway's responsibility was to obtain and collect all of Mr. Willcott's medical documents since the October 2013 accident. A number of exchanges took place between him and Ms. Crawford. Among other things, these exchanges pertained to payment of medical fees for the collection of these documents, the search for an institute that could conduct the sought medical assessment and the arrangement of an appointment with Mr. Huggins for Mr. Willcott's anger management. These various steps took time. Some problems also arose in December 2014 with a

doctor's bill that had to be paid by Freeway. This situation was resolved on December 16, 2014.

[170] After the holidays in 2014–2015, on January 6, 2015, Ms. Crawford continued her efforts to access Mr. Willcott's medical documents. It was also at this time that parties again met with the arbitrator, Ms. Gee, to determine the damages payable to Mr. Willcott as a result of his wrongful dismissal.

[171] The evidence shows that on January 8, 2015, Mr. Willcott's medical condition was no better. This was confirmed by Ms. Gee in her decision. Mr. Willcott confirmed during this hearing that it was impossible for him to return to his position as a truck driver at that time because of his injury. He also said that he agreed with the procedures undertaken by Freeway to obtain clarifications as to the nature and extent of his limitations. He also confirmed to the arbitrator his participation in the independent medical assessment.

[172] The evidence also supports the fact that Mr. Willcott was in the process of obtaining long-term disability insurance benefits. These benefits were provided by Freeway's insurance company. I recall that Mr. Willcott had initially decided not to apply for it. Since Mr. Willcott was applying for disability benefits, Freeway deemed that they did not have to continue their efforts to obtain an independent medical assessment for the time being. This makes sense because in order to receive long-term disability insurance benefits, Mr. Willcott would have to not work because of his disability.

[173] On April 20, 2015, Mr. Willcott informed Ms. Crawford that he was denied long-term disability insurance benefits. Freeway explained that they then suggested that he apply for Government of Canada disability benefits. On April 28, 2015, Mr. Willcott informed Freeway that he did not qualify for these types of benefits and would therefore not apply.

[174] Aside from the proceedings before arbitrator Gee and the application for long-term disability insurance, Ms. Crawford testified that after January 2015, the parties were also involved in an investigative process before the *Canadian Human Rights Commission*.

[175] Between June 20, 2014, and April 20, 2015, I note that the situation was handled well by the parties and progressed. The parties submitted well-substantiated evidence of

the situation to me. A plan was established between Freeway and Mr. Willcott, which was confirmed in the decision issued by the arbitrator, Ms. Gee, on January 8, 2015. The situation is not perfect, I understand that. The various steps take time. That being said, I believe that Freeway was proactive in the efforts made between June 20, 2014, and April 20, 2015.

[176] However, after April 28, 2015, the testimonial or documentary evidence submitted to me by the parties was no more complete. The evidence resumes on February 1, 2016, when Ms. Crawford sent correspondence to Mr. Willcott. In this correspondence, she detailed all the steps the company had taken since June 2014. She also confirmed that she received the report from the *Canadian Human Rights Commission*. In light of this report, she asked him to provide her with an update on his medical situation in order to assist them in discussions regarding an active return to work. She asked him to have his physician fill out a functional abilities form and confirmed that Freeway would cover the costs of such a request.

[177] Mr. Willcott and Ms. Crawford had a few conversations between March and June 2016. For example, on March 9, 2016, Mr. Willcott informed Ms. Crawford that the functional abilities form was being completed. However, in an email on April 29, 2016, he explained to Freeway that his physician, Dr. B. Pardis would be away from the office for a few weeks.

[178] On May 25, 2016, Mr. Willcott told Ms. Crawford that he was still waiting for his physician to return so that he could fill out the necessary documents granting a return to work. He mentioned that his physician should be back during the week. In the meantime, the parties were also arranging a road test for Mr. Willcott and were handling administrative tasks, such as transmitting Mr. Willcott's Commercial Vehicle Operator Registration.

[179] On June 16, 2016, Mr. Willcott provided Ms. Crawford with the functional abilities form completed by Dr. B. Pardis, as requested. What is strange is that two versions of this form exist. Freeway submitted to me a form completed and signed by Dr. B. Pardis dated March 9, 2016. Mr. Willcott also filed a form completed and signed by Dr. B. Pardis, also

dated March 9, 2016, but containing more information and details. According to him, this was the version he had sent on June 16, 2016.

[180] It appears that these two versions are not entirely different. Mr. Willcott's version includes the same basic information as Freeway's version, but contains additional medical information. It seems that the form was modified. The new information contains "B.P." annotations. It looks like these additions are initials. The doctor's name on the form is Dr. B. Pardis. It seems logical then that his initials would be B.P. Lastly, the title of the more detailed version was also modified by Mr. Willcott. He acknowledged being the one who struck the word "not" from "not job related". He denies changing anything else on the form.

[181] Freeway suggested that it was Mr. Willcott who had changed the form so his version would appear medically less restrictive than the first. I am not sure that the evidence supports Freeway's submission. In all honesty, it is difficult for me to determine who modified the form. The additions with the initials B.P. lead me to believe that Dr. Pardis added this information himself. I am even wondering whether Dr. B. Pardis had not filled out the first form on March 9, 2016, then was away from the office, as explained by Mr. Willcott, and then finalized the form upon his return. Mr. Willcott then allegedly sent the final version to Freeway on June 16, 2016.

[182] Nevertheless, I do not believe the existence of two different forms is fatal to the case, either for Freeway or for Mr. Willcott. The evidence shows that on June 16, 2016, Freeway finally had access to the form they had requested in June 2014.

[183] On June 17, 2016, Mr. Willcott had a driving evaluation with an evaluator chosen by Freeway. In this evaluation, the evaluator reported that Mr. Willcott made inappropriate remarks about drivers of Indian nationality. Various conversations took place between Ms. Crawford and him in this regard, causing some delays. More details on these events are not required because this is not relevant to the dispute.

[184] At the end of August 2016, Freeway arranged an appointment for an independent medical assessment for Mr. Willcott. Some exchanges took place between the parties, particularly regarding the location of the assessment and the dates. The first scheduled

dates were September 14 and 15, 2016. Mr. Willcott confirmed being available. A few days later, he asked Ms. Crawford if it would be possible to have the assessment at the CBI Health Centre in Oshawa, Ontario. Ms. Crawford informed him that she would see what she could do.

[185] On September 7, 2016, she informed him that the spots available in Whitby, Ontario (right next to Oshawa), were on September 27 and 28, 2016. Mr. Willcott replied on September 8, 2016, telling her in that case: he would take September 14 and 15, 2016, because he wanted to return to work as quickly as possible. He also assumed that the CBI Health Centre was the one in Brampton.

[186] That same day, Ms. Crawford told him that the schedule for the assessment had slightly changed and that she would confirm the exact location of the centre. A few days later, Mr. Willcott asked Ms. Crawford to confirm the exact location of his assessment. On September 15, 2016, Ms. Crawford answered that someone from the office would be contacting him to discuss the next steps. In the end, the assessment did not take place.

[187] The parties did not manage to clearly explain why this assessment attempt failed. It seems that there was a misunderstanding as to the exact location of the assessment. I am also wondering whether Ms. Crawford had not understood that Mr. Willcott had agreed to September 14 and 15, 2016. That being said, it is clear that the parties quickly resolved the situation. Another appointment was set up in the days that followed, and the dates selected were October 4 and 5, 2016. The assessment took place and the CBI Health Centre produced a report dated October 11, 2016.

[188] However, before determining whether an employee can be accommodated for his or her disability, the employer must have a minimum of reliable and consistent information about its employee's medical situation. Freeway had to know what Mr. Willcott's medical condition was in order to determine whether it would interfere with his physical ability to drive a commercial vehicle. They had to ensure that their employee complied with regulations and the Ontario *Highway Traffic Act* (see in particular *Ontario Regulation 340/94: Drivers' Licences*, under the *Highway Traffic Act*, R.S.O. 1990, c. H.8, section 14).

[189] In the accommodation process, the search for a compromise involves a number of parties; namely the employee, the employer, and sometimes the union. It is recognized that the employee also has a role to play and has a duty to facilitate the accommodation process (*Central Okanagan School District No. 23 v. Renaud* [Renaud], [1992] 2 S.C.R. 970). In the case of a disability, facilitating the accommodation process requires the employee to comply with the employer's reasonable requests. These reasonable requests can include the provision of the necessary medical information to obtain a clear understanding of the employee's limitations and restrictions. An employer that has sufficient information can then propose accommodation that meets the employee's specific needs (*Breast. v. Whitefish Lake First Nation* [*Breast*], 2010 CHRT 10, at para. 36; *Roopnarine v. Bank of Montreal* [*Roopnarine*], 2010 CHRT 5, at para. 64).

[190] Freeway was unfortunately unable to evaluate possible accommodation that would be reasonable for Mr. Willcott due to a lack of medical information from the latter and inconsistencies in the medical notes.

[191] Freeway was certainly proactive in managing this situation upon Mr. Willcott's return in June 2014 and in the months that followed. I add that in January 2015, when Mr. Willcott's medical situation was not improving and it was possible that the damage was permanent, Freeway suggested various steps for him to take so that he could receive different disability benefits, either through their insurer or through the Government of Canada. There was therefore no discrimination between June 20, 2014, and April 28, 2015, in light of this.

[192] However, a problem arose after April 28, 2015. On April 20, 2015, Mr. Willcott sent Ms. Crawford an email informing her that the insurance company had rejected his application for long-term disability insurance benefits. A few days later, on April 28, 2015, Mr. Willcott informed Ms. Crawford that he could not qualify for Government of Canada disability benefits either. I am surprised that Freeway did not provide me with any evidence, from that date forward, to explain the next steps they intended to take to accommodate Mr. Willcott.

[193] More than nine months had elapsed before the process resumed. It was not until she received the *Canadian Human Rights Commission* report on February 1, 2016, that Ms. Crawford decided to write to Mr. Willcott to ask him for an update on his medical condition. The process resumed as of that date. This process ultimately led to the CBI Health Centre report of October 11, 2016.

[194] I find it difficult to understand why Freeway let time pass since April 28, 2015, without continuing the steps undertaken beforehand. They knew that the insurance company had rejected Mr. Willcott's application for long-term disability insurance benefits and that he did not intend to apply for Government of Canada benefits. Up to that moment, Freeway had always been proactive. Why did they suddenly stop their efforts on April 28, 2015, only to resume them after receiving the *Canadian Human Rights Commission* report on February 1, 2016?

[195] Although Freeway was still waiting for more medical information on Mr. Willcott's condition, the plan was to have the latter assessed by a neutral doctor. Mr. Willcott was still employed by the company. Even though his condition was not much better, Freeway still needed his medical information. With this information, they would have been able to determine if accommodation was possible. Why then postpone the process?

[196] I can understand it was logical to stop the procedures, when Mr. Willcott was in the process of obtaining long-term disability benefits from the insurer or the government. This makes sense since it is impossible for an employee to work and receive these types of benefits at the same time.

[197] However, when the insurer rejected the application, I believe that the Respondent should have resumed the efforts they had undertaken. Freeway did not offer me any reason as to why so much time had elapsed without any action between April 28, 2015, and February 1, 2016.

[198] At this stage of the analysis, the burden of proof lies on the Respondent. That is, the employer is required to show that they made reasonable efforts to accommodate its employees and to the point of undue hardship. It was up to Freeway to explain and show the Tribunal the reasons why nothing could be done after April 28, 2015. It is my view that

they did not meet this burden, leaving me no other option but to conclude that they failed to meet their burden of proof under section 15 of the *CHRA*.

[199] That being said, I believe that on February 1, 2016, Freeway became proactive once again in their efforts, thereby meeting their burden of proof under section 15 of the *CHRA*. I am of the opinion that an employer can rectify their approach in the future, which Freeway did on February 1, 2016 (*Brunskill*, above, at para. 151).

[200] After February 1, 2016, various steps were taken by the parties. These steps take time. Some delays resulted for various reasons, including the time it took for Mr. Willcott to obtain an appointment with his attending physician, the physician's absence for a period of time, delays in transmitting the functional abilities form, a death in Mr. Willcott's family, delays in arranging meetings with the CBI Health Centre and so on.

[201] I understand that all these steps take time. The parties therefore acted diligently, in my opinion, and I cannot accept Mr. Willcott's submission that Freeway should be held responsible for these delays. On the contrary, I believe that Freeway was proactive in the process as of February 1, 2016.

[202] In sum, I conclude that Mr. Willcott was not discriminated against by Freeway between June 20, 2014, and April 28, 2015. After April 28, 2015, until February 1, 2016, I believe that he was discriminated against under paragraph 7(b) of the *CHRA*.

(vi) Return to work, use of medicinal marijuana and exclusion from the truck driver position in October 2016

[203] Mr. Willcott was assessed by the CBI Health Centre at the beginning of October 2016 so that his functional abilities could be evaluated in connection with the truck driver position. The assessment was filed at the hearing and dated October 11, 2016. Neither the submission of the report nor its conclusions were contested at the hearing.

[204] Without going into the details of the report, the professionals conclude that Mr. Willcott had the functional abilities to return to his position as a truck driver.

Ms. Crawford also confirmed that the report was satisfactory and that Mr. Willcott had the physical abilities required to return to his position.

[205] Nonetheless, Mr. Willcott did not actively return to his position as a truck driver in October 2016. The evidence shows that the CBI Health Centre assessment referred to Mr. Willcott's medical history. It appears that Mr. Willcott was using medicinal marijuana to manage his neck pain on an as-needed basis. It states that this medication was not necessary during work hours.

[206] Ms. Crawford explained that while Mr. Willcott was fit to return to work, she first had to address his use of medicinal marijuana with him. She stated that she therefore wanted to obtain a physician's opinion on the subject. The purpose was to understand whether it was safe for Mr. Willcott to use medicinal marijuana and drive a commercial truck. She wanted Freeway, the physician and Mr. Willcott to work together to ensure that there was no risk for Mr. Willcott himself or for other road users.

[207] At this stage, I must determine whether the Complainant was subject to adverse differential treatment in the course of employment because of a prohibited ground of discrimination (paragraph 7(b) of the *CHRA*) when Freeway refused to reinstate him in his position because of his use of medicinal marijuana. This medicinal marijuana was a treatment for managing his neck pain. His neck pain was caused by his truck accident in October 2013. Therefore, if not for his disability, Mr. Willcott would not have needed to be prescribed medicinal marijuana. Consequently, there is necessarily a link between the adverse deferential treatment and his disability. I therefore conclude that Mr. Willcott met the burden of proof for his case (*Moore*, above).

[208] However, the exclusion from his position due to his disability is not automatically discrimination. Discrimination exists when the employer cannot justify its decision. Was Freeway able to provide proof within the meaning of section 15 of the *CHRA*?

[209] The exclusion of an employee from his or her position can be justified if it arises from occupational requirements (paragraph 15(1)(a) of the *CHRA*). To meet its burden, Freeway must demonstrate that the accommodation that needed to be put in place to meet Mr. Willcott's needs imposed undue hardship in terms of cost, health and safety

(subsection 15(2) of the *CHRA*). Freeway convinced me that for safety reasons, Mr. Willcott's exclusion from his position as a truck driver was justified.

[210] It appears that Freeway was not aware that Mr. Willcott had been prescribed medicinal marijuana. They only learned this from the CBI Health Centre report of October 11, 2016. Although the CBI Health Centre professionals state that Mr. Willcott was fit to return to his position as a truck driver, this consumption raised new questions for Freeway regarding Mr. Willcott's abilities.

[211] As I stated already, driving a commercial vehicle inherently entails risks. Truck drivers must operate long, heavy motor vehicles loaded with cargo. They must share public roads such as highways as well with all other public road users.

[212] According to the regulations and the Ontario *Highway Traffic Act* (see in particular *Ontario Regulation 340/94: Drivers' Licences*, under the *Highway Traffic Act*, R.S.O. 1990, c. H.8, section 14) filed at the hearing by Freeway, it is mandatory for a holder of a driver's licence to be fit to drive a vehicle. He or she must not be addicted to alcohol or drugs if that is likely to significantly interfere with his or her ability to drive a motor vehicle safely. In light of this provision, it is clear that the Ontario legislator's concern is safety. In the Tribunal's analysis of undue hardship on safety, the importance of risk and the identity of the persons exposed to it are factors requiring consideration (see *Day*, above at para. 58).

[213] Mr. Willcott explained that he made certain to use medicinal marijuana outside of work hours, notably in the evening after work. He also said that he made sure that he was able to drive the following day, believing that he was no longer under the effect of medicinal marijuana when he took the wheel. Mr. Willcott also summarized, in his own words, the different substances present in marijuana, for example THC, its effects, the oil versus the plant, and so on. He also entered into evidence documents from the Health Canada website, including on the use of these types of drugs.

[214] No other medical evidence was submitted by Mr. Willcott to support his claims. No experts, doctors or specialists were called at the hearing to explain more precisely everything surrounding the consumption of medicinal marijuana. I would certainly have benefited greatly from the explanations of an expert regarding this type of medication, its

effects, its impact on the human body, the dosages, the recommendations, the risks associated with using the drug and driving a vehicle, and so on.

[215] For example, in the decision in *Milazzo v. Autocar Connaisseur Inc. et al.*, 2003 CHRT 37, members Mactavish, Doucet and Deschamps heard evidence from two doctors who testified, among other things, about positive drug tests and the risk factors according to a study by the *Société d'assurance automobile du Québec* as well as about the risk of an accident associated with the consumption of cannabis. I cannot base a decision upon the conclusions of those doctors because the cases are very different. The point is that I did not benefit from such expertise at the hearing. All I heard was Mr. Willcott's testimony telling me, on the whole, that he made certain that he was able to drive despite his use of medicinal marijuana. This evidence is not sufficient, in my opinion.

[216] Mr. Willcott also referred Freeway to various Internet links so that it could learn more about medicinal marijuana use. He also explained that his physician, Dr. B. Pardis, had told him to follow the rules established by Health Canada. Freeway did not find these explanations convincing. It requested a clear medical confirmation that he was 100% fit to drive a commercial truck while using medicinal marijuana for his pain.

[217] I understand that the consultation of a website, such as that of Health Canada, may be useful since it can contain relevant information for the reader. That said, relying solely on the content of such a site seems hasty and reckless to me. This cannot replace the opinion of an expert or a physician who is able to prescribe this type of medication. In that respect, the Health Canada website filed by Mr. Willcott clearly states that the effects can last up to six hours if marijuana is smoked or vaped. However, this information contains an asterisk indicating some effects could last as long as 24 hours. All this does is confirm that this content is for information purposes only and is not formal and absolute.

[218] Mr. Willcott seems to assume that the Tribunal takes judicial notice of the impact of marijuana use on the ability to drive heavy vehicles. Yet, facts that fall within [*translation*] "judicial notice [are] those that will be understood as known to judges and will therefore not have to be presented to them in accordance with the rules of evidence" (Danielle Pinard, "La notion traditionnelle de connaissance d'office des faits" (1997) 31

R.J.T. 87, p. 96). I consider that the Tribunal does not take judicial notice in this regard. When the Tribunal considers whether it can take judicial notice of a certain "fact," it must ask:

> . . . whether the alleged fact would be accepted by reasonable people who have properly informed themselves on the topic as not subject to reasonable dispute *for the purpose for which it is to be used*, keeping in mind that the need for reliability and trustworthiness increases directly with the centrality of the "fact" to the disposition of the issue in question.
>
> *R. v. Spence*, [2005] 3 SCR 458, 2005 SCC 71, at para. 65.

[219] I am of the opinion that judicial notice is taken when alcohol and drugs can impair a person's abilities (see for example *Pinto v. The Queen*, EYB 2006-101859, para. 31 (C.A.); *R. v. Leblanc*, EYB 2007-124042, para. 12 (C.S.), *R. v. Ross*, 2011 QCCM 263, para. 76). However, all the other details that Mr. Willcott attempted to enter into evidence, such as the difference between the substances, their effects and their duration, are not facts of which judicial notice can be taken. Mr. Willcott explained that he is fit to drive if he uses marijuana in the evening and that he takes to the road the following day as usual. All of this is not as clear as he appears to claim. The more relevant the "fact" to the dispute, which is the case in the matter at hand, the greater the credibility and reliability requirements. Mr. Willcott is credible, yes, but the information provided is clearly unreliable. The evidence that Mr. Willcott presented to me is insufficient.

[220] Considering the situation, I am of the opinion that Freeway's request for additional information was justified and that Mr. Willcott had a duty to provide the medical information sought by the company. An employer has every right to ask for additional and specific information if they know that their employee uses medicinal marijuana and works in a position that entails risk, such as that of a truck driver. The risk in our case is not only to the employee himself, but also to all other road users and the general public. As long as the employer's request is reasonable, the employee must comply with it; it is part of his or her duty to cooperate in the accommodation process (*Breast*, above, at para. 36; *Roopnarine*, above, at para. 64; *Renaud*, above).

[221] I fully understand why Freeway, when it found out this information, wanted to ensure that Mr. Willcott was 100% fit to drive his truck. Freeway tried to access this information in the weeks that followed the production of the CBI Health Centre report. For example, on October 20, 2016, Ms. Crawford asked Mr. Willcott to provide her with more information about the physician who had prescribed the medicinal marijuana to him so he could send her the necessary information in that regard. Ms. Crawford repeated this request on December 6, 2016, explaining to Mr. Willcott that Freeway had to ensure that he was fit to drive despite using it. Ms. Crawford was still waiting for more medical details. Mr. Willcott then informed Ms. Crawford that his attending physician was no longer practising family medicine. This complicated the situation.

[222] In February 2017, Ms. Crawford informed Mr. Willcott that she had found a health clinic—*Rose Nursing Care Inc*—that could take Mr. Willcott and handle the medicinal marijuana use portion. Mr. Willcott did not follow up on Ms. Crawford's offer, which put an end to Freeway's efforts.

[223] The employer was proactive in resolving this final element. Everything was in place for Mr. Willcott to return to work, but this new significant piece of information had to be addressed. Unfortunately, Mr. Willcott withdrew from the process and stopped cooperating—which cannot be attributed to Freeway (*Renaud,* above).

[224] For these reasons, I conclude that the events surrounding Mr. Willcott's use of medicinal marijuana do not constitute discrimination within the meaning of the *CHRA*.

VI. Remedies

[225] Now that I have determined the existence of certain specific discriminatory practices, what must be addressed are the remedies that the Tribunal can order (subsections 53(2), (3) and (4) of the *CHRA*).

A. Discrimination under sections 7 and 14 of the *CHRA* involving Mr. Marshall

(i) Forced leave

[226] I have already determined that it was discriminatory to force Mr. Willcott to take three days off when it was not his turn in the truck driver rotation (June 7 and October 25 and 27, 2013). These three days of wages are compensable under paragraph 53(2)(c) of the *CHRA*.

[227] The parties do not agree on the annual salary on which I should base my calculations. Mr. Willcott believes that 2012 should be the year used, whereas Freeway believes that 2013 is more representative.

[228] Ms. Crawford filed documents at the hearing detailing the salaries of various truck drivers, including Mr. Willcott (Exhibit R-1, Tabs 10s and 11). For these calculations, she used the transactions in the payroll system for each truck driver. Mr. Willcott did not contest the reliability of these documents, and I have no reason to question their content. I will therefore use the amounts found there.

[229] In 2012, Mr. Willcott was earning $59,186.59. In 2013, considering the decrease in the company's activities, he earned $42,322.59 between January 1, 2013, and October 31, 2013, over a period of 321 work days. Through a simple calculation, I am able to determine that Mr. Willcott would have earned $48,123.82 had he worked all of 2013 (a period of 365 days).

[230] I am of the opinion that the reasonable way to calculate Mr. Willcott's salary is to take an average of year 2012 and 2013. This is the middle ground between a good work year (2012) and a more difficult work year following a slowdown in Freeway's activities (2013). I am therefore setting Mr. Willcott's notional salary at $53,655.21 annually. I must now calculate Mr. Willcott's daily wage. Mr. Willcott worked full time, five days a week. There are 52 weeks in the year, which allows me to calculate that there are approximately 260 work days in a full year. Dividing $53,655.21 by 260 work days yields a notional daily wage of $206.37. Therefore, for the three days of forced leave that Mr. Willcott had to take when it was not his turn in the rotation, I will compensate him $619.11.

[231] I add that the preponderance of evidence seems to show that Mr. Marshall's actions were willful. A willful action means that the discriminatory practice and the infringement on Mr. Willcott's rights were intentional (*Canada (Attorney General) v. Johnstone* [*Johnstone FC*], 2013 FC 113 and *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)* [*Child and Family Caring Society*], 2015 CHRT 14, at para. 21). The evidence shows that Mr. Marshall wanted to irritate Mr. Willcott; that is what he told Mr. Felix when he raised the matter of the forced leave with him. Mr. Marshall knew that it was not Mr. Willcott's turn. He willfully made the decision to force him to take time off because of Mr. Willcott's personal characteristics and his dislike of him.

[232] In this context, I will award $500 in special compensation for this discriminatory practice under subsection 53(3) of the *CHRA*.

(ii) Mr. Marshall's harassment

[233] With respect to the harassment committed by Mr. Marshall in the course of employment, I believe that Mr. Willcott is entitled to receive compensation for pain and suffering as well as special compensation.

[234] The insults uttered by Mr. Marshall are particularly despicable, especially considering the historical discrimination against First Nations. Mr. Marshall showed total disregard for the Aboriginal context by the use of these words. The Tribunal takes judicial notice of the systemic and historical factors affecting First Nations, which includes the fact that Aboriginal peoples are victims of racial prejudice (*Blais*, above). I cannot ignore this specific situation afflicting First Nations and, necessarily, Mr. Willcott.

[235] Mr. Willcott demonstrated that he was deeply offended by these racial insults. The Tribunal is not required to receive medical evidence or proof of absenteeism from work to order compensation for pain and suffering. The Tribunal relies on all of the evidence filed at the hearing, including the complainant's testimony, to determine whether moral damages must be ordered (see *Communications, Energy and Paperworkers Union of Canada v. Bell Canada*, 2005 CHRT 9, at paras. 9 and 10).

[236] Mr. Willcott felt humiliated and personally targeted by the insults. He saw it as an attack on his person, his personal characteristics and his cultural roots. His dignity and self-esteem were directly attacked by Mr. Marshall (see *Polhill v. Keeseekoowenin First Nation*, 2017 CHRT 34, at paras. 51 and 52). I recall that the latter was the General Manager of Freeway.

[237] The evidence shows that Mr. Marshall's actions and statements caused Mr. Willcott significant frustration, which grew with every passing day. This was confirmed by both Mr. Willcott himself and Ms. Crawford during the hearing. Mr. Willcott testified that he felt that Freeway was not doing what they should have to correct the situation. He stated that he did not feel supported by his employer.

[238] I also have evidence that Freeway offered Mr. Willcott assistance to manage his frustrations. Ms. Crawford felt that Mr. Willcott had repressed frustrations and that he was becoming agitated over time. She offered him help, particularly that of a therapist. Yet, Freeway seems to attribute responsibility for the situation to Mr. Willcott alone. The strained relationship between Mr. Willcott and Mr. Marshall is not something that just happened one day. It is because of, among other things, Mr. Marshall's attitude, remarks and actions that Mr. Willcott acted that way. However, it does not seem that Mr. Marshall's attitude, remarks and actions were questioned.

[239] I am not of the opinion, as Freeway claims, that Mr. Willcott was unable to demonstrate that he suffered as a result of the situation. This suffering is there and is definitely palpable. That said, I understand that this suffering does not justify maximum compensation of $20,000, as permitted by paragraph 53(2)(e) of the *CHRA*. I will therefore order $2,000 in compensation for pain and suffering.

[240] I also consider that Mr. Marshall's actions were willful and reckless. Mr. Marshall was the General Manager of Freeway. We need not go on at length about the fact that these types of racial insults are highly reprehensible in a democratic society such as Canada. This is all the more true when these racial insults come from the management of a company.

[241] Freeway developed a policy for the prevention of violence and harassment in the workplace. In order to comply, the General Manager should have observed the high standards, as required by the policy created by his own management.

[242] The special compensation must meet the overall preventive and remedial purpose of the *CHRA*. Deterrence and discouragement, among other things, help achieve this objective. As the Tribunal wrote in *Duverger v. 2553-4330 Québec Inc. (Aéropro)*, 2019 CHRT 18, at paras. 305, 307 and 308:

> [305] The Tribunal is well aware that human rights statutes, including the *CHRA*, are not punitive; they are instead intended to be remedial and preventive (see *Schrenk*, above, at para. 31). Indeed, the deterrent nature of subsection 53(3) of the *CHRA* and its discouraging effects on those who engage or would like to engage in discriminatory practices in a reckless or willful manner are consistent with the preventive objective of the *CHRA*.
>
> . . .
>
> [307] I find that the Tribunal has broad discretion when assessing the special compensation necessary under subsection 53(3) of the *CHRA* to achieve the objectives of deterrence, discouragement and prevention. Therefore, it can take several factors into consideration that may differ based on the circumstances of each case. For example, the Tribunal may consider the gravity and the nature of the act, which has traditionally been a preferred approach. It may also take into account the financial situation of the party required to pay special compensation. The Tribunal may also consider other compensation previously awarded to the victim in the context of other proceedings, if such compensation was also awarded to achieve the objectives of deterrence, discouragement and prevention. This list is not exhaustive. It is also important to understand that what serves as a deterrent for one person may not necessarily be the same for another.
>
> [308] It is important to remember that the preventive function of the *CHRA* requires, among other things, that the Tribunal send a clear message indicating that it is undesirable for discriminatory conduct to be repeated, both for the perpetrator of the act and for society in general. Therefore, when a trier of facts highlights, through special compensation, that the willful or reckless discriminatory practice engaged in by a respondent party is particularly deplorable, it helps maintain the effectiveness of the preventive role of the *CHRA*.

[243] In the case at hand, I believe that Mr. Marshall's insults, expressing racial prejudices against First Nations, are highly reprehensible. The message must be clear that

uttering such insults is to be avoided and discouraged. I find that $2,000 in special compensation for this reckless act is sufficient to meet these objectives under subsection 53(3) of the *CHRA*.

B. Discrimination under section 7 of the *CHRA* in relation to the termination

[244] The evidence shows that Mr. Willcott had already been compensated for lost wages as a result of his termination. This is confirmed by the decision issued by the arbitrator, Ms. Gee, on January 8, 2015. This compensation puts Mr. Willcott in the situation in which he would have been had he not been laid off. This prevents me from compensating him for this discriminatory practice because that would constitute double recovery and would unduly enrich him (see *Brunskill*, above, at para. 157, and *Yaffa v. Air Canada*, 2016 CHRT 4, at para. 29).

[245] With that said, the arbitrator did not order special compensation or compensation for pain and suffering under paragraph 53(2)(e) and subsection 53(3) of the *CHRA*. Considering that the termination was also discriminatory, Mr. Willcott can receive compensation under the *CHRA*.

[246] As explained in the preceding paragraphs, Mr. Willcott experienced considerable frustration as a result of the events involving Mr. Marshall, including his termination. When he attempted to discuss it with Mr. Felix, Mr. Willcott tried to understand the situation. He sincerely believed that Mr. Marshall had dismissed him because he had something against him.

[247] He also testified that he did not have a job immediately following his termination. Because of that, he lost his apartment and was forced to seek a consumer proposal process. Mr. Willcott also explained that he lived in his truck in February 2014, until ultimately being able to stay with a friend.

[248] I cannot ignore these events. It is clear to me that all of this stems from his termination, among other things. The Tribunal must take this into account in determining the amount of compensation to pay for pain and suffering. Mr. Willcott has the right to be compensated for his suffering.

[249] Again, it is my opinion that this case does not warrant the maximum $20,000 in damages provided by the *CHRA*. Considering the circumstances, I deem $3,000 to be reasonable (paragraph 53(2)(e) of the *CHRA*).

[250] As for the special compensation, I cannot ignore the events that occurred before Mr. Willcott's termination, particularly Mr. Marshall's racial and discriminatory insults.

[251] The evidence shows that Mr. Marshall decidedly had something against Mr. Willcott, particularly because of his race and his national or ethnic origin. Mr. Marshall stated, at various occasions, that he would make sure Mr. Willcott was the first to leave the company. Mr. Marshall also tried to irritate Mr. Willcott in various ways. I cannot ignore these elements. In the end, Mr. Marshall achieved what he wanted: Mr. Willcott was the first truck driver to be let go from the company.

[252] I conclude that Mr. Willcott's termination by Mr. Marshall, Freeway's General Manager, was willful. It would be difficult to conclude otherwise. I will award Mr. Willcott $2,000 in special compensation under subsection 53(4) of the *CHRA*.

C. Discrimination under section 7 of the *CHRA* following reinstatement

[253] I have already determined that between June 20, 2014, and April 28, 2015, Freeway fulfilled its obligations under the *CHRA*.

[254] However, Freeway was unable to convince me that they had fulfilled their obligations under the *CHRA* from April 28, 2015, to February 1, 2016. As a result, Mr. Willcott is entitled to be compensated for the wages he lost during this period.

[255] As I said earlier, I determined Mr. Willcott's annual salary to be $53,655.21. This is the middle ground between a good work year (2012) and a work year that was not as good (2013).

[256] Mr. Willcott filed all of his Government of Canada income tax statements (T4s) for 2015 and 2016. This enables me to determine his income for those two specific years. Mr. Willcott worked for various companies in 2015 and 2016, which leads me to conclude that he tried to limit his damages (*Premakumar v. Air Canada*, 2002-02-04, D.T. 03/02, at

para. 92; *Canada (Attorney General) v. Morgan*, [1992] 2 F.C. 401; *Canada (Attorney General) v. McAlpine*, [1989] 3 F.C. 530).

[257] Moreover, it is recognized that the Tribunal cannot pay double recovery to a complainant (see *Yaffa v. Air Canada*, 2016 CHRT 4, at para. 29; *Palm v. International longshore and Warehouse Union, Local 500*, 2011 CHRT 12, at para. 17). However, I can indemnify Mr. Willcott for the wages he lost as a result of the discrimination. This is also consistent with paragraph 53(2)(c) of the *CHRA,* which provides that the member of the panel may compensate the "victim **for any** or all of the wages and expenses incurred as a result of the discriminatory practice".

[258] Between April 28, 2015, and December 31, 2015, Mr. Willcott can be compensated for 177 days of work. Between January 1, 2016, and February 1, 2016, Mr. Willcott can be compensated for 22 days of work.

[259] For the calculation of lost wages to be fair and reasonable, I must calculate Mr. Willcott's earnings and income for each year (2015 and 2016). Then, the shortfall in wages he would have received had it not been for the discrimination will have to be paid by Freeway. I reiterate that his average notional annual salary was established at $53,655.21.

[260] Therefore, in 2015, Mr. Willcott earned the following income:

- Trebor Personnel Inc.
    - $6,105.97
- C&R Paving Inc.
    - $1,458.24
- Witzke's Greenhouses LTD
    - $8,382.46
- Freeway Transportation Inc.
    - $3,302.67

[261] His employment income in 2015 totalled $19,249.34. Since his notional salary is $53,655.21, the shortfall is $34,405.87. The wages lost must therefore be prorated for

177 days of work, considering that a full year has approximately 260 work days. The lost wages therefore amount to $23,422.46.

[262] In 2016, Mr. Willcott earned the following income:

- Witzke's Greenhouses LTD
    - $11,413.20
- Trebor Personnel Inc.
    - $344.08
- Freeway Transportation Inc.
    - $2,171.32

[263] His employment income in 2016 totalled $13,928.60. Since his notional salary is $53,655.21, the shortfall is therefore $39,726.61. Again, the wages lost must therefore be prorated for 22 days of work in 2016, considering that a full year has approximately 260 work days. The lost wages therefore amount to $3,361.48.

[264] According to the evidence filed at the hearing, Mr. Willcott's lost wages for the period between April 28, 2015, and February 1, 2016, total $26,783.94, which must be paid to him under paragraph 53(2)(c) of the *CHRA*.

[265] Mr. Willcott must be fully reimbursed for the wages he lost in 2015 and 2016. However, it is important to note that the evidence shows that Mr. Willcott received **Employment Insurance benefits in 2015 and 2016**. It will be up to him and Freeway to comply with the *Employment Insurance Act* [*EIA*], S.C. 1996, c. 23, particularly the possible return of the Employment Insurance benefits that Mr. Willcott received (see, for example, sections 45 and 46 of the *EIA*).

[266] As for the special compensation under subsection 53(3) of the *CHRA*, I am of the opinion that nothing in the evidence supports the idea that Freeway acted willfully or recklessly between April 28, 2015, and February 1, 2016.

[267] With respect to pain and suffering, it is indeed my view that Mr. Willcott is entitled to receive compensation in that regard. That said, the situation does not warrant $20,000 in compensation as claimed by Mr. Willcott (paragraph 53(2)(e) of the *CHRA*).

[268] From the emails filed at the hearing that had been sent by Mr. Willcott to Ms. Crawford on April 20 and 28, 2015, it is clear to me that Mr. Willcott wanted to return to work. He found it difficult to understand how the process could take so long. He sincerely believed that Freeway was unduly and unfairly drawing out the process. He also explained this during his testimony. He felt that the company treated him differentially and asked that the various abuses against him stop. He also expressed the stress that the situation was causing him. In April 2015, he reiterated this suffering and lack of understanding, and expressed his desire to return to work in his correspondence with Ms. Crawford.

[269] I believe that the evidence submitted to me is sufficient to determine that Mr. Willcott suffered as a result of the situation after his reinstatement in June 2014. However, he can only be compensated as of April 28, 2015, which is the moment from which I decided that discrimination began.

[270] I would remind that the purpose of the *CHRA* is to allow individuals to make for themselves the lives that they are able and wish to have (section 2 of the *CHRA*; see also *Brunskill*, above, at paras. 96 and 97). Mr. Willcott suffered because he was unable to make for himself the life he wished and was able to have. What he wanted was to return to work for Freeway, which did not happen.

[271] Under the circumstances, I will award $2,000 for his discriminatory practice under paragraph 53(2)(e) of the *CHRA*.

D. Reimbursement for medicinal marijuana prescription

[272] Mr. Willcott asked the Tribunal to order Freeway to reimburse him for his medicinal marijuana prescriptions totalling $7,967.45.

[273] Mr. Willcott did not file into evidence how these damages stemmed from Freeway's discriminatory practices. The Tribunal can grant the victim the "rights, opportunities or privileges that were denied the victim as a result of the practice" (paragraph 53(2)(b) of the *CHRA*). The Tribunal can also compensate the victim for expenses incurred as a result of the practice (paragraph 53(2)(c) of the *CHRA*).

[274] Whether I analyze the claim under one or the other of these paragraphs, nothing in the evidence allows me to conclude that reimbursement for Mr. Willcott's medicinal marijuana prescriptions is in any way connected to Freeway's discriminatory practices.

[275] Mr. Willcott was still considered an employee of Freeway and therefore could use his employer's benefit plan, including insurance. Mr. Willcott filed the email from Freeway's insurer, MDM Insurance Services Inc., at the hearing. This email indicates that medicinal marijuana is not covered by his insurance plan. It is the insurer, not Freeway, that made this decision in light of Mr. Willcott's plan. Therefore, this has nothing to do with the complaint itself and Freeway's discriminatory practices.

[276] For these reasons, I dismiss this claim filed by Mr. Willcott.

VII. Interest

[277] Pre-judgement interest is not a separate category of damages that a complainant can claim. Interest is part of the claim as a whole. Therefore it does not need to be claimed expressly because it naturally arises from the original loss.

[278] Interest is a component of the compensation process. The purpose of awarding damages is to restore the aggrieved person to where he or she should have been in the first place had the harm not occurred (see *Apotex Inc. v. Wellcome Foundation Ltd.* [*Apotex*], [2001] 1 FC 495, at paras. 120 and 121).

[279] In addition, interest:

> . . . on compensation has the objective of, among other things, preventing the person found to have engaged in a discriminatory practice from benefiting from deadlines triggered by the quasi-judicial process and especially, to fairly compensate the victim of the discriminatory practice for the prejudice he or she has suffered and consequently, for the delay in being compensated.
>
> (*Duverger v. 2553-4330 Québec Inc. (Aéropro)*, 2019 CHRT 18, at para. 318. The same idea is expressed in *Apotex*, above, at para. 122).

[280] The member of the panel has the discretion to award interest on damages and the amount granted (see *Brunskill*, above, at para. 168). Subsection 53(4) of the *CHRA* reads as follows:

> Subject to the rules made under section 48.9, an order to pay compensation under this section **may** include an award of interest at a rate and for a period that the member or panel considers appropriate.
>
> [Emphasis added]

[281] The Tribunal also has rules for calculating interest on damages. In that respect, Rule 9(12) of the *Rules of Procedure* (03-05-04) provides that:

> 9(12) Unless the Panel orders otherwise, any award of interest under s. 53(4) of the *Canadian Human Rights Act*
>
> a. shall be simple interest calculated on a yearly basis at the Bank Rate (monthly series) established by the Bank of Canada; and
> b. shall accrue from the date on which the discriminatory practice occurred, until the date of payment of the award of compensation.

[282] The combination of subsection 53(4) of the *CHRA* and Rule 9(12) of the *Rules of Procedure* clearly inform the parties that when they appear before the Tribunal, the member of the panel has the discretion to order interest on the compensation. They are also aware of the manner in which interest could be calculated and the date from which interest will accrue, that is, **the date on which the discriminatory practice occurred**, until the date of payment of the award of compensation.

VIII. Decision

[283] For all these reasons, I conclude that Mr. Willcott's complaint is partially founded. Consequently, I order Freeway Transportation Inc. to pay Corey Willcott the amounts below.

[284] Compensation for lost wages (paragraph 53(2)(c) of the *CHRA*):

1. $206.37, with interest accruing as of June 7, 2013;

2. $206.37, with interest accruing as of October 25, 2013;

3. $206.37, with interest accruing as of October 27, 2013;

4. $26,783.94, with interest accruing as of April 28, 2015;

[285] Compensation for pain and suffering (paragraph 53(2)(e) of the *CHRA*):

1. $2,000, with interest accruing as of March 6, 2013;

2. $3,000, with interest accruing as of November 28, 2013;

3. $2,000, with interest accruing as of April 28, 2015;

[286] Special compensation (subsection 53(3) of the *CHRA*):

1. $500, with interest accruing as of October 27, 2013;

2. $2,000, with interest accruing as of March 6, 2013;

3. $2,000, with interest accruing as of November 28, 2013.

[287] All interest is simple interest calculated on a yearly basis at the Bank Rate (monthly series) established by the Bank of Canada (subsection 53(4) of the *CHRA* and Rule 9(12) of the *Rules of Procedure of the Canadian Human Rights Tribunal* (03-05-04)).

Signed by

Gabriel Gaudreault
Tribunal Member

Ottawa, Ontario

August 13, 2019

English version of the Member’s decision

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2149/2316

Style of Cause: Corey Willcott v. Freeway Transportation Inc.

Decision of the Tribunal Dated: 13 August 2019

Date and Place of Hearing: November 19 – 23, 2018

Toronto, ON

Appearances:

Corey Willcott, for the Complainant

No one appearing for the Canadian Human Rights Commission

Joseph Morrison, for the Respondent