Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2021 CHRT 33
Date: September 3, 2021
File No.: T2265/2018

Between:

R.L.

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian National Railway Company

Respondent

Decision

Member: Colleen Harrington

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I. Overview

[1] In May of 2014, R.L. [the "Complainant"] attended an information and screening session held by Canadian National Railway ["CN" or the "Respondent"] for the position of Train Operator (Freight Conductor) in Surrey, British Columbia. She had been working in sales and was looking for a job with a stable income and benefits that would take her to retirement. She was 44 years old. She applied and was accepted into CN's conductor training program.

[2] On November 14, 2014, after 5 months of classroom, in-the-field, and on-the-job training in both Winnipeg and Vancouver, the Complainant was disqualified from the conductor training program. This occurred immediately after a night shift during which she injured herself.

[3] CN says it disqualified her from the program because she was not progressing through the training in a satisfactory manner and had breached its safety protocols on more than one occasion. The Complainant disputes CN's position. She says she was the victim of harassment and discrimination by several male coworkers, both in Winnipeg and British Columbia. She believes her disqualification from the training program was the result of her refusal to stay quiet about the harassment. In November of 2015 she filed a complaint with the Canadian Human Rights Commission [the "Commission"] alleging discrimination and harassment in employment on the basis of disability, age, family status, sex, marital status and sexual orientation, contrary to sections 7, 10 and 14 of the *Canadian Human Rights Act* [the "*Act*" or "*CHRA*"].

II. Preliminary Issues

A. Confidentiality Motion

[4] At the outset of the hearing, the Complainant asked that her name be anonymized in the proceedings as she was concerned that being publicly associated with the complaint could affect her ability to obtain future employment. She argues in her closing submissions that employees who have been subjected to harassment are uniquely vulnerable and

requests that her name be redacted from the decision and all materials filed prior to the hearing, as well as from all evidence entered at the hearing. She asks that her name be replaced by “employee” so that she may find stable employment.

[5] The Respondent opposes the Complainant’s request, saying she has not provided an adequate reason as to why the Tribunal should depart from the open court principle. In particular it says she has not provided any evidence of a real and substantial risk of undue hardship that should lead the Tribunal to make a confidentiality order pursuant to section 52(1)(c) of the *Act*. The Respondent says the Complainant has not provided any evidence that she is searching for employment, nor how not anonymizing her name will cause her difficulty finding employment in the future. CN also points out that she objected to its earlier Motion to anonymize the names of its witnesses, and she has not extended her request to CN’s witnesses.

[6] During the Tribunal’s Case Management proceedings, CN filed a Motion requesting that all of its witnesses’ names be anonymized in these proceedings, noting that it would also consent to the Complainant’s name being anonymized. The Respondent had argued that it would be embarrassing for its witnesses to be associated with the Complainant’s allegations of sexual harassment, even though not all of the witnesses were accused of engaging in such behaviour. The Complainant opposed the Respondent’s request and I denied the Motion because I considered it to be speculative and overbroad. However, I indicated that I would be willing to consider the issue again based on the evidence received at the hearing.

[7] The Respondent is correct that the Tribunal must comply with the open court principle, which means that its inquiries shall be conducted in public. The *Act* allows the Tribunal to consider exceptions to this requirement on a case-by-case basis. Section 52(1)(c) of the *Act* states that the Tribunal may take any measures and make any order necessary to ensure the confidentiality of the inquiry if it is satisfied that, by holding the inquiry in public, “there is a real and substantial risk that the disclosure of personal or other matters will cause undue hardship to the persons involved”. The need to prevent disclosure must outweigh the societal interest in a public hearing. Exceptional conditions of sensitivity or privacy necessitating anonymity should generally be present before such an order is

granted by the Tribunal (*Mancebo-Munoz v. NCO Financial Services Inc.,* 2013 HRTO 974 (CanLII) at para 6).

[8] The hearing itself, conducted by Zoom, was held in public. None of the evidence was heard *in camera*, nor is there a ban on the publication of any evidence. I understand the Complainant's concern to be that a prospective employer could search her name and find this decision, which she believes could affect her ability to become employed again.

[9] Unlike earlier in the process, when the Respondent made its confidentiality Motion, the Tribunal has now received and considered evidence submitted by the parties. This includes evidence that the Complainant has not worked since her last shift with CN. Part of the reason she has been unable to work is related to her mental health, as set out in a psychological report she filed with the Tribunal. I note that the psychological report contains information of a very sensitive and personal nature.

[10] In *T.P. v. Canadian Armed Forces,* 2019 CHRT 10 (CanLII) [*T.P.*] at paragraphs 24–29 the Tribunal agreed that the complainant's concern about the impacts of a public hearing on his feelings of self-worth and possible future job prospects was valid, given that there is still a societal stigma surrounding mental illness, real or perceived.

[11] In the present case, the Complainant's mental health concerns were apparent during the hearing. She experienced a great deal of anxiety, even having to go to the hospital at one point due to a panic attack. The psychologist's report outlines her struggles with anxiety and depression and links them mainly to the injury she suffered to her back and to the loss of her job with CN. There is no evidence that the Complainant suffered from such debilitating mental health problems prior to her injury. While her prospects of returning to work at the time of the psychological report were very low, one would hope that she will recover sufficiently to be able to apply for employment again.

[12] In the case of *N.A. v. 1416992 Ontario Ltd. and L.C.*, 2018 CHRT 33 (CanLII) it was noted that a Tribunal, as master of its own proceedings, can determine the issue of whether to publish identifying information (at para 27, citing *Guzman v. T*, 1997 CanLII 24824 (BC HRT) at paras 9, 10).

[13] Pursuant to section 52(1)(c) of the *CHRA*, I am satisfied that the public disclosure of the Complainant's mental health struggles could result in undue hardship relating to her ability to obtain future employment if her identity is not anonymized in this Decision. As such, I agree to refer to the Complainant as "R.L."

[14] With respect to the Respondent's witnesses, I have now heard all of the evidence and have not found that the majority of them engaged in discriminatory practices with respect to the Complainant. As set out in the decision below, I find that the actions of two of the witnesses constituted contraventions of the *Act* for which CN is liable. The complaint was filed against CN and not against these individuals. CN has never asked that its name be anonymized. As in *T.P.*, I am of the view that anonymizing the names of the witnesses in this case will not impact the public's ability to understand the nature of the complaint, the relationship between the parties, or the evidence and issues considered by the Tribunal.

[15] I am of the view that an order anonymizing the names of all witnesses, including the Complainant, properly balances their privacy interests with the public interest in human rights hearings. All CN employees referred to in this Decision, whether they were witnesses at the hearing or not, will be referred to by their initials.

[16] The anonymization order applies only to this Decision. In addition, the Tribunal on its Motion has determined that the psychological report (Exhibit C13) should be sealed and not released if there is a request for access to the official record.

B. Discriminatory Practices under the *CHRA*

[17] In the Complainant's closing submissions, she argues that CN contravened sections 5, 7, 8, 9, 10, 11, 12, 14 and 14.1 of the *CHRA*. She also refers to section 13, relating to hate speech, which was repealed in 2013.

[18] In its closing submissions, the Respondent says that sections 7, 10 and 14, "in pertinent part, describe the only discriminatory practices in relation to employment that have been put in issue by the Complainant's allegations." It submits that there are no alleged facts that bring any of the other sections she has raised into issue in these proceedings. I agree.

[19] All of the Complainant’s allegations relate to her employment with CN, not to her accessing goods, services, facilities or accommodations from CN as a member of the public. As such, I will not consider whether the Complainant experienced discrimination contrary to section 5 of the *CHRA*.

[20] Further, the Tribunal’s jurisdiction to inquire into this complaint comes from the Commission’s referral pursuant to sections 44(3)(a) and 49 of the *CHRA*. Nothing in the Commission’s referral would indicate that the Tribunal should inquire into allegations relating to sections 8, 9, 11, 12 or 14.1. Further, nothing in the evidence presented to the Tribunal during the hearing would bring sections 8, 9, 11, 12 or 14.1 into issue in these proceedings. As such, I have not considered them in making my decision about this complaint.

III. Issues

[21] The issues for the Tribunal to decide are:

1. Has the Complainant established that she was discriminated against contrary to sections 7, 10 or 14 of the *Act*? Specifically, I must decide whether:

    a. One or more prohibited grounds of discrimination were a factor in the Respondent’s decision to disqualify the Complainant from the conductor trainee program, thus ending her employment with CN, contrary to section7(a) of the *Act*;

    b. In the course of employment, the Respondent differentiated adversely in relation to the Complainant on the basis of a prohibited ground of discrimination, contrary to section7(b) of the *Act*;

    c. CN had a policy, practice or agreement relating to recruitment or hiring that could deprive the Complainant of an employment opportunity based on her sex, contrary to section 10 of the *Act*;

    d. The Complainant was harassed on a prohibited ground of discrimination contrary to section14(1)(c) of the *Act*; and

    e. The Complainant was sexually harassed in relation to employment, contrary to section14(2) of the *Act*.

2. If I decide that the Complainant experienced discrimination or harassment on a prohibited ground, I must determine whether the Respondent is liable for the discrimination pursuant to section 65 of the *Act*.

3. If the complaint has been established and the Respondent is unable to rebut the presumption of liability pursuant to section 65(2) of the *Act*, what remedies should be awarded that flow from the discrimination?

IV. Decision

[22] I agree that the Complainant experienced harassment on the basis of her sex through the comments of two CN employees who trained her in Vancouver, contrary to section 14(1)(c) of the *CHRA*. As CN failed to properly investigate these complaints in accordance with its Harassment Free Environment Policy, it did not rebut the presumption that it is liable for this discriminatory harassment under section 65(2) of the *Act*, and the Complainant is entitled to a remedy.

[23] I also agree that the Complainant experienced sexual harassment by one of her instructors in Winnipeg, contrary to section 14(2) of the *Act*. However, I do not find that CN is liable for this discriminatory harassment, as the Complainant did not report the harassment to the employer as required.

[24] I do not find that the Complainant's disqualification from the conductor training program was related to her sex or disability or any other prohibited ground of discrimination. As such, the complaint under section 7(a) of the *CHRA* is dismissed.

[25] I also find that the Respondent did not contravene sections 7(b) or 10 of the *Act* in relation to the Complainant, and therefore dismiss these complaints.

V. Legal Framework

[26] In order to establish what is referred to in the case law as a *prima facie* case of discrimination, the Complainant must establish on a balance of probabilities:

1. that she had one or more of the identified characteristics protected against discrimination under the *Act* at the relevant time (in this case disability, sex, age, family status, marital status, or sexual orientation);
2. that the Respondent's actions adversely impacted her in relation to employment contrary to section 7 (adverse treatment or termination), section 10 (hiring), or section 14 (harassment); and

3. that one or more of the protected characteristics was a factor in the Respondent's treatment of her. (See *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Centre)*, 2015 SCC 39 (CanLII) [*Bombardier*] at para 63 and *Moore v. British Columbia (Education),* 2012 SCC 61 (CanLII) at para 33)

[27] A *prima facie* case of discrimination is "…one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer" (*Ontario Human Rights Commission and O'Malley v. Simpsons-Sears*, 1985 CanLII 18 (SCC) at para 28).

[28] A protected characteristic need only be a contributing factor, not the sole factor, in the adverse treatment or decision (*Holden v. Canadian National Railway*, 1990 CanLII 12529 (FCA) at para 8). A causal connection is not required, nor is proof of intention to discriminate (*Bombardier, supra* at paras 56, 40, 44). In fact, the Tribunal has previously concluded that, as discrimination is not generally practised either overtly or intentionally, it must consider all of the circumstances of the complaint to determine whether there is a "subtle scent of discrimination" (*Basi v. Canadian National Railway*, 1988 CanLII 108 (CHRT)).

[29] In determining whether discrimination occurred, the Tribunal must consider the evidence of both parties. As in this case, a respondent may present evidence in an effort to refute an allegation of *prima facie* discrimination. Where a respondent takes this approach, its explanation for the impugned conduct must be reasonable, it cannot be a "pretext" - or an excuse - to conceal discrimination (*Moffat v. Davey Cartage Co.(1973) Ltd.,* 2015 CHRT 5 (CanLII) at para 38).

[30] Conversely, if a complainant is able to meet their burden of proof, the respondent may put forward a defence justifying the discrimination under section 15 of the *Act* or, as in this case, argue that its liability is limited pursuant to section 65(2) of the *Act*.

VI. Analysis

(i) Prohibited Grounds of Discrimination

[31] The Complainant alleges that, while she was employed by CN, she was treated in an adverse differential manner in relation to her age, sex, family status, marital status, sexual orientation and disability, all of which are prohibited grounds of discrimination under section 3(1) of the *CHRA*.

[32] By alleging discrimination on the basis of her sex, she asserts that she experienced adverse differential treatment or harassment because she is a woman.

[33] Regarding the allegation of discrimination on the basis of disability, I find that the Complainant suffers from a disability stemming from an injury that she sustained during her last shift with CN prior to being disqualified from the conductor training program. She testified that, during the overnight shift of November 13 to 14, 2014, she injured her back using a bull switch and also slipped and injured her knee. She says this has resulted in permanent pinched nerves and no feeling in her left big toe. She testified that she has undergone different treatments, that she has been told that surgery is not an option, and that she has reached maximum recovery. As a result of this disability, she has been in receipt of workers' compensation benefits for many years. The Complainant's evidence about her physical disability was not refuted by the Respondent. Further, while I accept that the Complainant currently suffers from a mental disability, there is no evidence that this was present at the time of the alleged discrimination.

[34] With respect to her age, marital status and family status, the Complainant testified that she was 44 years old and a single mother of a teenager when she to applied to the conductor trainee program and throughout her employment with CN. The Complainant did not testify about her sexual orientation during the hearing. She provided no evidence or argument with respect to discrimination on any of these 4 grounds. Therefore, the complaints that CN contravened the *CHRA* on the basis of the Complainant's age, family status, marital status and sexual orientation are not substantiated and are dismissed.

[35] As such, I will only consider whether the Complainant experienced discrimination or harassment on the basis of sex and disability.

(ii) Section 10 – Discriminatory Hiring Practice

[36] The Complainant alleges that, in May of 2014, an interviewer with CN told her that she had a better chance of being hired than a man, because CN had a mandate to hire women. She alleges that this contravenes section 10 of the *Act*, which says that it is a discriminatory practice for an employer to have a policy or practice, or to enter into an agreement, affecting recruitment or hiring (or any other matter relating to employment or prospective employment), that deprives an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

[37] While I appreciate that such a comment being made in front of a group of men who were also applying to work for CN would be unwelcome, I do not agree that it contravenes section 10 of the *Act*. Even if there is a policy, practice or agreement in place at CN with respect to recruiting or hiring more women – which, presumably, the Complainant would actually be in favour of given her repeated evidence about the lack of women working for CN – such a policy would not deprive her of an employment opportunity, because she is a woman. Indeed, most federally regulated industries are legislatively required to have plans in place in order to correct conditions of disadvantage in employment for certain designated groups, including women.

[38] The Complainant failed to establish how a comment by a CN employee about the company having a mandate to hire more women adversely impacted her in relation to her application for employment with CN, given that she was hired by them. She has not proven on a balance of probabilities that she was discriminated against under section 10 of the *Act* and so I dismiss this complaint.

(iii) Uncontested Facts

[39] The following uncontested evidence provides some context for the remainder of the Decision.

[40] According to the job description submitted as evidence at the hearing, conductors supervise train operations as well as move, switch and inspect railcars. Switching activities include "coupling and uncoupling of railcars, getting on and off moving equipment, climbing ladders on railcars, operating switches and other track components, as well as operating remotely controlled locomotives" by way of a device called a "belt pack". The working conditions of a freight conductor are described as: "irregular hours, including nights, weekends, holidays, and overtime" and working "outdoors in varying weather such as snow, rain, extreme temperatures and environmental conditions." Shifts are up to 12 hours in duration.

[41] The Complainant started her training to be a conductor at the CN Campus in Winnipeg in mid-June of 2014 where she completed around 6 weeks of classroom and field training.

[42] After this, on or about August 4, 2014, the Complainant returned to the Vancouver area to complete on-the-job training which, according to the job description, consists of a minimum of 45 to 60 trips as an extra person on a crew to enhance one's knowledge and skills. This portion of the training program consisted of some classroom learning and then working shifts with on-the-job trainers, who were experienced CN conductors. This allowed the trainees to put their newly acquired skills into practice.

[43] L.V. was the on-the-job Training Coordinator for Greater Vancouver at the relevant time. He was responsible for scheduling the trainees to work with various trainers. Each trainer was required to provide comments and to rate the trainees they worked with on various skills performed during the shift. These ratings and comments were entered into each trainee's Student Conductor Performance Report ["Performance Report"]. The Complainant's Performance Report, which was admitted as evidence at the hearing, indicates that she was trained by approximately 20 different trainers between August 18, 2014 and November 13, 2014. Some trainers she worked with only once and some she trained with for multiple shifts.

[44] On October 27, 2014, Assistant Superintendent M.P., who testified as a witness at the hearing, called a meeting with the Complainant to discuss concerns he had with some

of the comments made by trainers on her Performance Report. L.V. also attended the meeting. The Complainant recorded this meeting on her telephone and the audio recording was admitted as evidence at the hearing.

[45] On October 31, 2014, which was around the mid-point of her on-the-job training, the Complainant and the other conductor trainees participated in an evaluation session with L.V. and a CN conductor named D.L. who was assisting him. The Complainant also recorded this meeting on her telephone and the recording was submitted as evidence at the hearing. CN called L.V. to testify at the hearing, although it did not call D.L. as a witness.

[46] The Complainant was still doing this on-the-job training on November 14, 2014, the date of her disqualification from the program. As such, she was still considered by CN to be a probationary employee.

(iv) Section 14(2) - Sexual Harassment

Positions of the Parties

[47] The Complainant alleges that she was sexually harassed in the course of her employment with CN, contrary to section 14(2) of the *Act*. She testified that one of her trainers in Winnipeg, R.M., made a number of sexually explicit comments to her. For example, she testified that one afternoon during training they were outside having a break and she was eating a banana and he said to her in front of the whole group: “You’ve probably heard this before but you have white stuff around your mouth”. She understood him to be implying that she had performed fellatio. She said that was not how she wanted to feel in a safety critical workplace made up mostly of men. She testified that R.M. also said to her, “my wife would like you, we should have a threesome, you should come on our boat”. She said that when another CN employee asked R.M. who she was, he answered, “that’s [R.L.], she’s a whore.” The Complainant noted that R.M. was in a supervisory role and should have known that such comments were unwelcome and inappropriate.

[48] The Complainant testified that she asked R.M. to stop making such comments to her and suggested that she would start keeping notes about them, but he said to her “who will they believe – me or you?” The Complainant says she did not report R.M.’s behaviour to CN

while in Winnipeg because, in addition to his comment that she would not be believed, she had also been told during her training that “snitches end up in ditches”. She said she knew the training in Winnipeg was only for a short period of time and she just wanted to get on with her new career with CN in Vancouver.

[49] In his testimony, R.M. denied making the comment about wanting to have a threesome with the Complainant and his wife or inviting her on his boat. He said his boat was not operational at the time, although he spent his time off fixing it and would probably have mentioned that to the group.

[50] R.M. denied calling the Complainant a whore and said he did not recall her asking him if she needed to start taking notes, although he remembered that she carried a notebook.

[51] R.M. agreed at the hearing that he had pointed out in front of a group of trainees that the Complainant had something around her mouth and realized it could have been embarrassing for her, so he apologized. He believed she accepted his apology. He said he did not intend the comment to be sexual. Also, R.M. said the Complainant made a similar joke to him the next day when he was eating peppermint lifesavers and he had some white foam in the corners of his mouth, so he thought “it was all fun and games.”

[52] CN says R.M. admitted he made a mistake in making this comment and promptly apologized, and argues that it does not rise to the level of harassment under the *CHRA*, as it was not serious or persistent. CN also argues that R.M. was a credible witness, as he was firm in his recollection and did not resile from his position on cross-examination. It says this is in contrast to the Complainant’s exaggerations and refusal to concede, in some circumstances, patently false points, and so R.M.’s evidence should be preferred.

[53] The Complainant also testified that one of her belt pack trainers in Vancouver, N.E., told a story about an employee who had touched a female employee’s breast while using her radio, and kept his job while the woman was fired. She said N.E. demonstrated the story on her by touching her breast while reaching for her radio. The Complainant testified that this incident happened during the week of October 26-30, 2014. When the Respondent’s counsel suggested she actually did her training with N.E. the week prior (October 20-24),

she denied this, saying she had done her classroom training on belt pack the week of October 20, and trained with N.E. in the field the week of October 26.

[54] The Complainant claimed she told L.V. about this incident with N.E. There is no mention of N.E. in any of the recordings she submitted as evidence at the hearing. When asked why she did not report the incident to M.P., she said “it didn’t come up.”

[55] N.E. testified that it was common to tell stories during belt pack training. He said the story about the person who touched a female employee’s breast was one that was told in the workplace as a warning. N.E. testified in his direct examination that he did not know who told the story to the Complainant’s training group or why it came up. He also testified that he had his own radio at all times and would not have used the Complainant’s because he knew it would be inappropriate. In cross examination, N.E. agreed that he had, in fact, told the story to the Complainant’s group.

[56] CN says that, while the Complainant’s and N.E.’s evidence are directly contradictory, N.E. did not resile from his position on cross-examination and was credible, and so his evidence should be accepted. It says that the Complainant’s belt pack training with N.E. occurred before both of the recorded meetings the Complainant had with her supervisors. However, she did not mention N.E. or this alleged incident in any of her recorded conversations where she discussed allegations of harassment by other trainers.

Complainant’s Credibility as a Witness

[57] CN argues that the Complainant was not a credible witness, submitting that, “where her evidence directly conflicts with the evidence of CN’s witnesses, CN’s evidence should be preferred.”

[58] No witnesses to any of the harassment alleged under section 14 were called by either party. The Tribunal must weigh the oral testimony of all witnesses and assess the reliability and credibility of each witness and make findings of fact based on these assessments. In doing so, I have considered *Faryna v. Chorny*, 1951 CanLII 252 (BC CA) [*Faryna*], in which Mr. Justice O'Halloran stated at p. 357:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[59] CN argues that the Tribunal should consider the Complainant's demeanour while testifying, in comparison with that of its witnesses. It argues that she "frequently got angry or upset, was evasive and attempted to avoid answering questions, and refused to make admissions even when it was apparent that her testimony was inaccurate." As an example, it says she refused to admit she owned a home because she has a mortgage and so the bank actually owns the home. It also says she refused to concede in cross-examination that she had reasons for wanting to leave her previous job, despite testifying to this in her direct evidence.

[60] I find that the Complainant was a generally credible witness. With respect to her demeanour during the hearing, while she may have become upset at times, it was also clear that she was experiencing a great deal of anxiety. This anxiety was with her throughout the hearing, requiring her to take many breaks, yet she saw the hearing through to the end, giving her own evidence and cross-examining all of the Respondent's witnesses. She was self-represented against experienced and capable counsel for the Respondent who, I note, was very kind and accommodating when it came to the Complainant's health issues.

[61] I find that the Complainant's evidence about why she left her previous job in which she earned a commission from sales was consistent from her direct evidence to her cross-examination. She testified that there were financial stresses associated with earning a living from sales, as not every pay cheque was the same. She testified that she was not 100% satisfied with this, although if she had not gotten the job with CN, which had consistent pay and better benefits, she would have stayed in the sales job because she was a single mother with a mortgage and expenses. She did not refuse to concede in cross-examination that she had reasons for wanting to leave her previous job as the Respondent argues. She explained why she applied for the job with CN quite clearly.

[62] CN argues that the Complainant was also prone to exaggeration because she had told a psychologist that she became homeless after losing her workers' compensation benefits, from November 2017 until sometime after July 2018. CN says the Complainant testified that she currently owns real property and that she had been "sitting on" the proceeds of the sale of her home in White Rock from November 2017 until she purchased a new home in May 2018. It argues that telling the psychologist that she was "homeless" was an exaggeration because, when "someone advises that they are homeless, transitioning to the purchase of a new home is not typically what people understand that term to mean."

[63] The Complainant's evidence was that she was cut off of her workers' compensation benefits in November 2017 and, as she feared going into foreclosure by failing to make her mortgage payments, she chose to sell her condo in White Rock. After the sale of the condo in November 2017 she did not have enough money to buy another place outright and could not get another mortgage because she had no income. Then, because she had nowhere else to live, she spent the next several months living in various places, including a trailer, an Air B&B, her car, and a room in someone's house. She also underwent treatment for her back on Vancouver Island during this time.

[64] She eventually had her workers' compensation payments reinstated and, in May 2018 she was able to obtain another mortgage and she purchased a home on Vancouver Island, where real estate was more affordable than in the Lower Mainland. She testified that she could not move in until August 2018.

[65] I agree that the Complainant was not very cooperative in answering the Respondent's questions on this topic. However, I do not find that her testimony about this affected her overall credibility as a witness. She testified that she had worked hard as a single mother to be able to buy the condo for her and her daughter and was obviously very upset to have lost it due to her financial situation in 2017. She became distraught when testifying about having to sell it and had to take a break.

[66] CN also notes that the Complainant told the psychologist that, prior to injuring herself, she loved her job and was good at it. It points out that she omitted the important fact that, prior to the shift during which she was injured, she had decided to leave that job. I agree

that this is disingenuous on her part, as it is clear from the evidence that she did not love being a conductor trainee and that she was actively seeking to leave that job and find another one within CN even before she was injured or disqualified from the training program. I accept, however, that the Complainant saw CN as a company that she wanted to work for until her retirement because she believed she would have a good salary and benefits with them.

Sexual Harassment – The Legal Test

[67] The Supreme Court of Canada, in *Janzen v. Platy Enterprises Ltd.*, 1989 CanLII 97 (SCC), [1989] 1 S.C.R. 1252 at 1284, described sexual harassment as follows:

> Without seeking to provide an exhaustive definition of the term, I am of the view that sexual harassment in the workplace may be broadly 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. […] Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.

[68] The Federal Court expanded on the reasoning in *Janzen* in *Canada (Human Rights Commission) v. Canada (Armed Forces)*, 1999 CanLII 18902 (FC), [1999] 3 FC 653 [*Franke*]. The Court held that, for a sexual harassment allegation to be substantiated, the following must be established:

> (1) The acts that form the basis of the complaint must be unwelcome, or ought to have been known by a reasonable person to be unwelcome;
>
> (2) The conduct must be sexual in nature;
>
> (3) Ordinarily, sexual harassment requires a degree of persistence or repetition, but in certain circumstances even a single incident may be severe enough to be detrimental to the work environment (paras 32-40).

Findings of Fact and Decision Regarding Sexual Harassment

[69] I find that R.M. did make the comments as alleged by the Complainant. I have no reason to believe that the Complainant fabricated these allegations. She has been consistent about them since she filed her human rights complaint with the Commission in 2015. She was not shaken on cross-examination by CN's counsel. She was clearly distressed when testifying about the comments made to her by R.M.

[70] I find that R.M. said to the Complainant, "you've probably heard this before, but you have white stuff around your mouth" and that this was clearly meant as sexual innuendo. If he genuinely meant to let her know that she had food on her face, he would not reasonably have prefaced it with "you've probably heard this before."

[71] I find that such a comment would be unwelcome to a reasonable person in the Complainant's circumstances, in this case one of only 3 or 4 women in a group of approximately 20 people who were training to work in a male-dominated workplace. Even if she made the same joke back to him the next day, it does not diminish the fact that he should have known it was inappropriate and would be unwelcome to her as one of his trainees. He was in a position of authority over her.

[72] I also find that R.M. called her a "whore" and that he made comments of a sexual nature relating to her and his wife. Although he denied making these comments during his direct examination, when the Complainant suggested to him in cross-examination that he did make these statements and was now embarrassed about it, his reply to her was "is there a question here?"

[73] R.M. is still employed by CN and would not likely want to admit having made such comments to a trainee.

[74] I find that the combined effect of R.M.'s comments, along with his comment to her that if she reported him she would not be believed, was sufficiently severe to have detrimentally affected or poisoned the Complainant's work environment such that it undermined her sense of personal dignity. While R.M. testified that he liked to joke around with his trainees, and the Complainant may have participated in this behaviour to some

extent, I find that taking this further by referring to her as a “whore” and suggesting he would like to engage in sexual activity with her would have resulted in a hostile work environment for any reasonable person in the Complainant’s circumstances. She was one of only a few women trainees in a male-dominated workplace. She had to complete the training in Winnipeg in order to move on to the next stage of the conductor training program back in British Columbia, which was her goal. Having this added burden of sexual harassment on top of an already stressful training environment would most certainly have been unwelcome.

[75] With regard to the allegations about N.E., I find that he did tell the story about the male employee touching a female employee’s breast while trying to use her radio. However, I do not find that N.E. did the same thing to the Complainant. N.E. testified that he taught the Complainant the classroom portion of belt pack training the week of October 20, and that the following week he was actually in training to become an engineer. His schedule corroborates his evidence. As such, he could not have been training her the week of October 26 as she testified. I accept that the Complainant did her belt pack training with N.E. the week of October 20-24, 2014, putting it shortly before her recorded meetings with M.P. and L.V.

[76] I agree with the Respondent that the Complainant did report certain allegations of misconduct by trainers to her supervisors in the meetings she recorded on October 27 and 31. However, she did not mention N.E. touching her breast which would presumably have been very offensive since it would involve actual physical contact. I find it more probable than not that she would have mentioned in her recorded meetings with her supervisors an incident of inappropriate physical contact that happened very recently, given that she mentioned comments made by trainers she had worked with several weeks prior.

[77] In conclusion, I find that the Complainant was sexually harassed by R.M. in the workplace contrary to subsection 14(2) of the *CHRA*.

(v) Section 14(1)(c) – Harassment on the Basis of Sex

Positions of the Parties

[78] In addition to the sexual harassment described above, the Complainant says that she was harassed by her coworkers on the basis of her sex contrary to subsection 14(1)(c) of the *CHRA*, through a negative comment about women in the workplace and also comments that disparaged her as a woman.

[79] The Complainant testified about incidents with three coworkers (an unnamed foreman, C.W. and B.C.) that she says contributed to creating a hostile work environment for her as one of very few women working for CN in the yards and on the trains.

[80] First, she alleged that, early on in her training in Vancouver, she worked a shift that required dumping coal onto a train car on the waterfront. She said it was a hot and windy day in August and there was coal dust everywhere. She said she asked her foreman if coal dust was toxic and suggested they should be wearing masks or protective equipment. She testified that this was met with extreme hostility and she was told she was a princess and maybe she should just quit.

[81] Second, she testified that, while working with her on-the-job trainer C.W., he insisted that she tie up hoses between the train cars while the train was still moving, which she did not want to do because it was dangerous and contrary to the training she had received in Winnipeg. She says C.W. yelled at her and told her this was why women should not work on the railroad. She says that he then gave her an unfair review of her training with him.

[82] The Complainant says that another trainer named V.P. witnessed this incident and was upset about it because it was dangerous, and he told her to report it. In one of her recordings, she is heard telling someone she did not want to report the incident because she did not want to be seen as a “rat”, but that she was being called in to a meeting about the incident anyway. This was the October 27, 2014 meeting called by M.P. to discuss feedback from various on-the-job trainers.

[83] In this meeting, M.P. tells her that not all of the trainer feedback he brings up is from C.W., but most of it is and the Complainant says, “Of course because he doesn’t want

women working here.” M.P. told the Complainant he would speak to C.W. about this alleged comment.

[84] The Tribunal also heard that, after the Complainant told M.P. and L.V. about what happened with C.W. in training, C.W. started harassing her “non-stop” and would say “it smells like cheese” every time he saw her, implying that she was a rat.

[85] C.W. testified at the hearing. He said the Complainant refused to go between the rail cars to tie up the hoses, claiming the cars were still moving and she could have gotten squished. He testified that they had received confirmation from the engineer that the cars were not moving. He said he would never ask someone to do something he would not do himself and he was offended by her accusation that he had asked her to go between moving cars.

[86] C.W. denied that he made the statement that women should not work at CN and said he was offended by this accusation. He said being a conductor is not about strength but about leverage and he thinks some of the best conductors on the railway are women. He also denied saying “it smells like cheese” when he saw her.

[87] CN argues that the Complainant’s evidence about C.W. should not be believed because, even though she said one of her interactions with him was witnessed by V.P., she did not call him as a witness to corroborate her version of events.

[88] Third, the Complainant alleges that another trainer she worked with, B.C., called her a “bitch” and a “fucking bitch” and would say “it smells like cheese” whenever she was around, implying that she was a rat. She believes that C.W. told B.C. that she was trying to get him fired, which was untrue. She told M.P. about this in the October 27 meeting and he testified that he spoke to B.C. about her allegations.

[89] In her recording of the October 31, 2014 meeting with L.V., the Complainant is heard saying that B.C. told others she was a “fucking bitch writing letters to the company trying to get me fired” and that she was a ”fucking rat” who will write letters to try to get you fired.

[90] B.C. testified at the hearing and denied that anyone told him the Complainant was trying to get him fired. He also denied calling her a bitch or a rat and denied saying she

smelled like cheese. He said he did not remember M.P. talking to him about the Complainant.

[91] B.C. was asked about a telephone call he had with an employee from the Commission in 2017, who was investigating the Complainant's human rights complaint. He testified that he recalled telling the Commission that he had heard the Complainant was a troublemaker from the start because someone who had been in her class in Winnipeg told him that she had been recording her classmates and that the union had gotten mad at her for doing this. He could not recall who had told him about this.

[92] The Respondent notes that, although the Complainant said B.C. made these disparaging comments to her in front of others, she failed to call any witnesses to corroborate her evidence. It argues that B.C. was unshaken on cross-examination and so should be believed over the Complainant.

[93] Further, CN argues that there is no link between the Complainant's allegations and her sex or gender, as the reference to being a rat is not gendered. It also argues that calling her a "fucking bitch" does not rise to the level of a breach of the *CHRA*.

[94] In addition, CN argues that, although it had been over two months since she had trained with B.C. or C.W., the Complainant first raised her allegations about them after receiving negative feedback from M.P. about her own performance. It suggests that she had an incentive to deflect from her negative review. CN argues that this is a further indication that, at a minimum, her allegations are doubtful.

Discriminatory Harassment – The Legal Test

[95] In order to make out a *prima facie* case under section 14(1)(c) of the *Act*, the Complainant must establish that the impugned conduct was:

a. related to a prohibited ground of discrimination;
b. unsolicited or unwelcome; and
c. persistent or serious enough to create a hostile or negative work environment that undermined the Complainant's dignity (*Nielsen v. Nee Tahi Buhn Indian Band,* 2019 CHRT 50 (CanLII) at paras 116, 117).

Findings of Fact and Decision Regarding Harassment Under 14(1)(c) of the CHRA

[96] Considering again the Respondent's arguments about the Complainant's general credibility as a witness, and the guidance offered by *Faryna*, I make the following findings of fact with respect to each of the allegations above.

[97] With respect to the Complainant's testimony that her foreman told her she was a princess and maybe she should quit, I note that the coal train incident was mentioned by her trainer in her Performance Report, where he stated: "She was really upset about getting dirty while doing the coal train and thought that we should have masks … ." This was one of the comments M.P. discussed with the Complainant during his evaluation meeting on October 27, 2014, although I note that, when it was raised with her, the Complainant did not mention that her trainer or foreman had called her a "princess" or told her she should quit. Rather, she told M.P. she thought they should have had masks because they were being showered with coal, and other than that she would have worn a long-sleeved shirt. When asked by M.P. if it was an issue or if she refused to do the job, she said "absolutely not" and that she had done it twice.

[98] I find that, by the time of this meeting, the Complainant was comfortable reporting unwelcome comments that had been made to her, as this was the meeting where she told M.P. about C.W. and B.C., yet she did not mention being called a princess or being told to quit. Nor did she mention it in her human rights complaint filed with the Commission in 2015. I believe it is more probable than not that, if these comments had actually been made by her trainer or foreman, she would have reported them to L.V. and M.P. She did not do so. As such, I find on a balance of probabilities that these comments were not made to her.

[99] With respect to whether C.W. made the comment that women should not work at CN, I accept the Complainant's evidence that this comment was made. It was clear from C.W.'s testimony that he did not care for the Complainant and his comments in her Performance Report became more negative with each day of her training, with many of them relating to her not conforming to his view of how a good trainee should behave. For example, he remarked that, "not once has she mentioned that her goal is to be the best conductor she can be and to get everything she can out of the conductor training program."

[100] On his final day of training her, he made the following comment: "I believe her distorted view's (*sic*) and obvious attitude problems do not fit the mold of a transportation employee and in the future [she] will cause problems with supervisors and co-workers as the railroad does not cater to those who feel the need to be special." In his testimony C.W. stated that he recommended she not be employed on the railway.

[101] The evidence shows that the Complainant came into a new workplace with no practical experience on the job in order to learn from people with many years of experience, and then disagreed with several of them about whether they were following the rules. Some of them, including C.W., did not appreciate this. He was not the only trainer who commented that she had difficulty listening or was not receptive to instructions, or that she had difficulty with peer-to-peer communication.

[102] In the recording of her meeting with L.V. and D.L. on October 31, in response to L.V. saying there is a "perception coming off of" her that she knows the rules better than her trainers, she replies that she does not know the rules better than them, but she had just gotten out of rules class. She describes her approach to some trainers as follows: "I try to dumb it down though and ask".

[103] While it was clear that the Respondent's witnesses did not want to say anything negative about C.W., and rather stressed that he was an experienced trainer with a good safety record, the evidence shows that at least D.L. and L.V. had had some negative interactions with him. L.V. is heard on the October 31 recording saying, "I know [C.W.] bad mouths people and the company, he's a mouthpiece." D.L. is heard on the same recording saying the Complainant was not alone in her concerns about C.W., saying other trainees had had difficulties with him as well. D.L. goes on to say, "I don't know if it's because you're female or good looking or a strong independent woman, some guys have issues with that". He says that the previous week he had told C.W. not to call him again unless he had a rules question.

[104] Also, although the Respondent suggested that the Complainant should have called V.P. as a witness to corroborate her evidence, D.L. also says in the October 31 recording that C.W. "was completely wrong" and that "[V.P] was very angry about what happened"

and brought his concern to D.L. and L.V. In the recording, D.L. commended her for sharing what had happened with C.W.

[105] Neither party called V.P. as a witness, although the Tribunal heard evidence that he is still an employee of CN. I note also that CN did not call D.L. as a witness, despite the fact that he was also still employed by CN. Unlike V.P., D.L. participated in a meeting that was recorded by the Complainant and became evidence at the hearing.

[106] The Complainant has been consistent in her description of her interaction with C.W. and his comment that women should not work on the railroad, both in her recordings, her human rights complaint, and in her evidence before the Tribunal. She was not shaken on cross-examination. Even if she mentioned C.W.'s comment to M.P. and L.V. in response to criticisms about her performance, this does not mean it did not occur and did not deserve to be taken seriously. C.W. testified that he was frustrated with the Complainant as a trainee and that he recommended she should not remain employed by CN. While I do not find that C.W.'s concerns with the Complainant were not legitimate, I find it entirely probable that, in expressing his frustration with her, he made the comment, "this is why women shouldn't work here."

[107] I also accept that, after M.P. spoke to C.W. following the October 27 meeting, it is more probable than not that C.W. accused the Complainant of being a rat, given his negative pre-existing views of her.

[108] With regard to the Complainant's allegation that B.C. called her a "bitch" or a "fucking bitch" and a "rat" and said "I smell cheese" when she was around, I accept her evidence that he made these comments. While he testified initially that he did not remember having any conflicts with the Complainant and did not know why she would want to get him fired, and that he did not hear anyone make any comments about her in the workplace, when questioned about his call with the Commission's investigator, he agreed he had told her that he heard the Complainant was a troublemaker from the start. He could not recall who had told him about her recording conversations in Winnipeg. He also could not remember M.P. talking to him about her, which I accept occurred, although he did remember very specific

details about working with the Complainant on two occasions in 2014, including that she had offered him cookies from her lunch.

[109] The Complainant was consistent in her version of what was said to her by B.C. from the time of her recording in October 2014 to her human rights complaint to her testimony at the hearing. She was not shaken on cross-examination. Simply because she may have raised B.C.'s comments to her with her supervisors for the first time in October of 2014, during a meeting at which her own performance was being evaluated, does not mean the comments had not been made to her or did not have an effect on her, or that they did not deserve to be taken seriously by her employer.

[110] I find that it is more probable than not that her conversation with C.W. about B.C. being unsafe got back to B.C. and that he called her a "bitch" or a "fucking bitch" and a "rat" and said she smelled like cheese.

[111] The Respondent has argued that, even if I believe all of the Complainant's evidence, she has not established a *prima facie* case of discrimination. In particular it argues that C.W. and B.C. calling her a "rat" and saying "I smell cheese" when she was around, are not related to a prohibited ground of discrimination. I agree.

[112] With respect to B.C. calling her a "bitch" or a "fucking bitch" when he saw her, I find that such comments were unsolicited and unwelcome and are related to the prohibited ground of sex. "Bitch" is not a word that would be directed at men in the workplace, except with the intention to insult and belittle or feminize them, and I find that being called a bitch on more than one occasion, in a workplace where the Complainant was one of only a small number of women working as a conductor trainee, was enough to create a hostile work environment that undermined her dignity.

[113] I find C.W.'s comment that "this is why women shouldn't work here" was serious enough on its own to constitute harassment, even if it was made only once in the heat of the moment or out of exacerbation with the Complainant for not following his directions. It was a clearly hurtful comment from a trainer in a workplace where none of her trainers or supervisors were women and she was one of only a handful of women in a male-dominated workplace.

[114] In conclusion, I find that the Complainant was harassed on the basis of her sex contrary to section 14(1)(c) through the comments made by C.W. and B.C. which contributed to creating a negative environment that impacted her dignity as a woman in the workplace.

(vi) Section 7(b) – Adverse Differentiation in Employment

[115] Section 7(b) of the *Act* says that it is a discriminatory practice, "directly or indirectly, in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination."

[116] The Complainant argues that there is a culture in the CN workplace, a "boys club mentality" that she experienced throughout her time there, including from Human Resources and Management. She argues there were efforts made to intimidate and humiliate women in order to push them out of the workplace and keep the jobs for themselves. She says this culture of sexism is clear from the audio recording she made of her conversation with M.P. on October 27 in which he agreed with her suggestion that people can group together and try to push someone out.

[117] What M.P. actually says to the Complainant in the recording is that they are not trying to push her out, that he wants the Complainant to work there and that he will support her. He encourages her to stay out of the workplace politics and to just come to work, do her job safely and go home. He acknowledges that there are not many women in the workplace and he applauds her for doing this and acknowledges that being a woman in a male-dominated workplace is not easy. She tells him she has worked in male-dominated industries her whole life, which is why she refused to file a report with Human Resources in Winnipeg when a fellow student threatened her. Rather than supporting her viewpoint on this, M.P. and L.V. encourage the Complainant to report anything that happens to her right away, and not to wait a month to do so.

[118] While I agree that the Complainant experienced some harassment on the basis of sex while she worked at CN, she has not proven that there was an overall culture of sexism that operated to push women out of the workplace. Rather, the recordings show her

supervisors recognizing that, as a woman, she may face some difficulties in the workplace but, rather than trying to push her out, they are supportive of her as a woman in the workplace and want her to be successful.

[119] In addition to the alleged unfavourable treatment mentioned above, and her disqualification from the training program discussed below, the Complainant also testified that the way she was treated by a classroom instructor at the CN Campus in Winnipeg was discriminatory. She says she asked A.M. for some extra help preparing for an exam, which he ignored or refused, so she approached another instructor to help her instead. As a result, she says A.M. confronted her in an angry manner and accused her of saying that he was a bad instructor.

[120] A.M. testified and said that he did spend extra time after hours helping the Complainant prepare for the exam, and then he received a call from another instructor who said the Complainant had told him A.M. had not covered certain subjects and he was sending his class into the exam unprepared. A.M. said the other instructor found it awkward that she had gone to him, so A.M. said he would meet with her instead to find out why she had made such an allegation. A.M. brought another instructor to his meeting with her as a witness because he felt something was off.

[121] A.M. said when he walked into the room to meet with her the Complainant was quiet and averted her gaze. He said it was an awkward conversation, but that he did not close the door or yell at her or act in a threatening way as she alleged.

[122] A.M. testified that, while the Complainant, along with a handful of other students, did not pass the exam, she was permitted to rewrite it the following day. He testified that, when he told her she had passed the second exam, she hugged him, which caught him off guard.

[123] CN argues that A.M. was a more credible witness than the Complainant and that his evidence should be believed. It also argues that, even if the allegations about A.M. are true, there is no nexus between what the Complainant described as unfavourable treatment and her sex. Also, there was no adverse consequence to her, as she passed the classroom training portion in Winnipeg and moved on to on-the-job training. It says there is also nothing to support that she reported this to anyone at CN with authority.

[124] I agree with CN that, even if I accept the Complainant's version of her interaction with A.M. as true, there is no reason to believe that what happened had anything to do with her being a woman, and so was not discriminatory.

[125] I do not agree that the Complainant has proven on a balance of probabilities that she experienced adverse treatment on the basis of her sex contrary to section 7(b) of the *Act*. As such, this complaint is dismissed.

(vii) Section 7(a) – Discriminatory Termination of Employment

[126] Section 7(a) of the *Act* says that it "is a discriminatory practice, directly or indirectly, to refuse to employ or continue to employ any individual, on a prohibited ground of discrimination."

[127] The Complainant argues that her disqualification from the conductor training program by the General Superintendent F.B. on November 14, 2014 was related to one of the prohibited grounds of discrimination.

Sex

[128] It is the Complainant's position that she was fired by CN because she would not stop asking for the harassment against her to stop.

[129] F.B. testified that her complaints about harassment played no role in the decision to disqualify her because he did not know about them.

[130] F.B. testified that, as the Superintendent in charge of operations for the region in 2014, he was responsible for the conductor training program. He followed up with the on-the-job trainers and considered the trainees' Performance Reports. Based on his assessments, he would recommend whether to keep or disqualify a candidate. As part of his evaluation of the trainees, he considered their willingness to learn, interest in the job, safety, ability to follow the rules, and their willingness to accept feedback. He stressed that all these factors are important because safety is so fundamental to the job of a conductor, as they work with live, heavy equipment in an environment that is loud and exposed to the

elements. He testified that there are many things to learn during the training stage from a technical perspective, and if someone fails to learn they can become unsafe. He stated that the potential consequences of not doing one's job properly, and not being properly trained, are derailments, crashes, injury to one's self or others including the public, and fatalities.

[131] F.B. decided, following his evaluation and recommendations by the rest of his team, which included M.P., M.M. (another Assistant Superintendent who testified at the hearing), and two train masters who had interacted with the Complainant or evaluated her, that she should be released. He said the reason for disqualifying her from the conductor training program was an overall safety issue, as he was not seeing an improvement and all of the reports about the Complainant were trending the wrong way. He testified that he paid more attention to her file after receiving a report that she had chosen to ride a rail car across the yard in a dangerous fashion, which caused her to injure her arm and led him to be concerned that she could have fallen under the wheels of the train. This occurred on November 2, 2014.

[132] F.B. had also received reports that the Complainant always had an excuse for everything and argued with her supervisors instead of accepting the feedback given. She had also failed an efficiency test conducted by one of the train masters on November 10, 2014, by contravening one of the "life critical rules" employees must follow. These are rules that, if not followed, lead to a higher likelihood of injury on the job. He testified that she should have known about the rule by this point in her training, after having completed so many trips. This added to his concern that she was not learning the basics of the job.

[133] The Complainant argues that her Performance Report actually showed that she was meeting or exceeding expectations for the most part. She suggests that any negative comments or lower scores were from trainers who did not like her or who had harassed her, such as C.W.

[134] F.B. testified that, even though she was meeting expectations with regard to certain tasks or skills, the scores on the Performance Reports do not necessarily reflect the reality of a particular shift. As the jobs on each shift are different, not all skills are utilized or practiced each time. As such, F.B. looked more to the comments section of the Report, to see what the trainers were saying about the trainee's performance.

[135] On November 12, 2014 F.B. sent an email recommendation to his superiors which was entered into evidence at the hearing. The email describes his reasons for recommending the Complainant be disqualified, including a lack of focus which led to risky behaviours, and her attitude when performing the work. His superiors agreed that she should be disqualified and so, when he learned that she already had a meeting scheduled with M.M. on November 14 to discuss other jobs within CN, F.B. asked to meet with her instead.

[136] This November 14 meeting, between the Complainant, F.B. and a Human Resources representative (S.Z.), was also recorded by the Complainant and entered as evidence at the hearing. F.B. testified that he told the Complainant she was "disqualified", which meant she was not part of the training program anymore but they would work with her to find other employment within the company, as opposed to being "dismissed", which would mean she no longer worked for the company. While he and S.Z. talked with her about other opportunities with CN and offered to work with her to find another role, it was up to the Complainant to follow up with S.Z. However, she did not do so and did not apply for any other jobs.

[137] F.B. testified that approximately 10% of trainees do not move past the training program to become conductors, as each new class that goes through the program would have a couple of trainees disqualified. He agreed that probably fewer than 10% of the conductors at Thornton Yard - where the Complainant worked - out of a few hundred total conductors are women, but that between 2 and 5 women do qualify as conductors every year. He testified that CN has women employees in all safety critical roles within the company, although there are certainly more men in these roles. He testified that CN is a company that is known for trying to diversify as much as possible by recruiting women.

[138] F.B. also testified that, despite meeting with L.V. weekly and with M.P. daily, no one told him that the Complainant had raised allegations of harassment by C.W., B.C. or anyone else. He said her harassment allegations should have been reported to him as there is a protocol they should have followed and he would have expected them to bring this to his attention. I have no reason to disbelieve F.B.'s evidence that he was unaware of these

allegations. Neither L.V. nor M.P. testified that they had told F.B. about the harassment allegations.

[139] The Complainant agreed that she did not mention the harassment in her conversation with FB on November 14 because she felt blindsided by the meeting, which she was not expecting or prepared for.

[140] F.B. said he formed the opinion that the Complainant agreed with his analysis that she was not a good fit for the conductor training program because she had made the appointment with M.M. to discuss other employment opportunities. While the Complainant testified that she had expected to stay with CN until her retirement and, had she not been terminated, she would now be an engineer or train master, nothing in the evidence presented supports this view. In fact, during her meeting with F.B. on November 14, 2014, when he suggested to her that the job was not a good fit for her she stated, "it's dangerous". Following the meeting she told a colleague she had been disqualified and said: "it's better than staying in a dangerous job" and "well it's definitely not the job for me".

[141] The last 5 comments in the Complainant's Performance Report, for her shifts from November 9 to 13, 2014, were all written by D.B., who the Complainant liked and considered to be a good trainer. The first 2 of those days are mostly positive comments. However, D.B.'s comments about the Complainant's last 3 shifts speak to her difficulties performing physical tasks, difficulty with listening and a willingness to learn, and her not being receptive to instructions. D.B. says that, considering the number of trips the Complainant has made during training, she needs immediate attention, as she was unable to line a couple of bull switches and she told him she was afraid of the equipment. He said she also told him she has nightmares about working there and says she fears "being squished". DB concluded: "I am sorry to say but if she still has such fear, maybe this isn't the right position for her. She showed the ability to be safe in the yard and she had a good attitude, but doesn't show any initiative to improve and her fear of the job worries me."

[142] During the hearing the Complainant questioned whether D.B. actually wrote these comments, suggesting that CN had added them after the fact to justify her termination. I note that F.B. testified that he made his decision to recommend she be disqualified on

November 12, and this was the date he sent his email to his superiors indicating his recommendation. He did not specifically mention the comments of D.B. in his testimony and D.B. was not called as a witness. However, D.B.'s comments are consistent with the Complainant's view that the workplace was dangerous.

[143] In her closing submissions, the Complainant stated that she felt the workplace was unsafe, saying that, as a single mother, she could not risk being dismembered or dying on the job, so she decided to pursue other employment opportunities within CN.

[144] I find that the Complainant has not established on a balance of probabilities that her sex was a factor in the decision to disqualify her from the conductor training program. I accept that F.B. was unaware of her allegations of harassment by C.W. and B.C. and so this did not factor into his decision. I also accept that CN had legitimate concerns about the Complainant's progress in the conductor training program which are supported by the evidence. I accept that CN's reason for disqualifying the Complainant was not a pretext to conceal discrimination.

Disability

[145] The Complainant also argues that she was disqualified from the training program immediately after being injured on the job and so her disability was a factor in the decision to end her employment.

[146] With respect to disability, F.B. testified that he was unaware that the Complainant had suffered an injury during her last shift, which she had finished just prior to his meeting with her on the morning of November 14, 2014. F.B. testified that he did not learn about the Complainant's injury until November 17, 2014, and that he had made the decision to disqualify her from the training program on November 12th, before she even sustained the injury.

[147] The Complainant agreed that she did not disclose that she had been injured to F.B. and S.Z. during the November 14 meeting. She says she did not have the opportunity to do so, as she was unprepared for the meeting with F.B. instead of M.M. She described herself as feeling "shellshocked" during the meeting, which was over very quickly.

[148] I find that the Complainant has not established on a balance of probabilities that her disability was a factor in the decision to disqualify her from the training program.

[149] In conclusion, I dismiss the complaint under s.7(a) of the *Act*.

(viii) Section 65 – Employer Liability for Employee Conduct

[150] The Complainant did not file her complaints against any of the alleged perpetrators of the discrimination, but rather has filed against the employer CN. CN takes the position that, if the Tribunal finds that the Complainant was the victim of a discriminatory practice under the *Act*, it should be absolved from liability for the discrimination by virtue of section 65(2) of the *Act*.

[151] Section 65(1) says that any discriminatory act committed by an employee in the course of their employment shall, for the purposes of the *Act*, be deemed to be an act committed by the employer. Section 65(2) says that an employer can avoid liability for the actions of its employees if it is established that the employer did not consent to the discrimination and exercised all due diligence to prevent it from happening and, subsequently, to mitigate or avoid the effect of the discrimination.

[152] As I have found that the Complainant has proven on a balance of probabilities that she was the victim of certain discriminatory practices under section 14 of the *Act*, the Respondent will be deemed responsible for the harassment unless it can rebut the presumption of liability under section 65(2) of the *Act*. The Respondent bears the evidentiary burden at this stage of the analysis.

[153] It is well accepted that human rights law is meant to be remedial and not punitive, and that only an employer can remedy the undesirable effects of discrimination by providing a healthy work environment (*Robichaud v. Canada (Treasury Board)*, 1987 CanLII 73 (SCC) [*Robichaud*] at para 15). Although an employer is not obliged to maintain a “pristine working environment”, section 65(2) places a duty on an employer to take “prompt and effectual action when it knows or should know” about employee conduct that amounts to discriminatory harassment. “A response that is both timely and corrective is called for and its degree must turn upon the circumstances of the harassment in each case” (*Hinds v.*

Canada (Employment and Immigration Commission), 1988 CanLII 109 (CHRT), 1988 CarswellNat 993 (WL Can) at para 37).

[154] Included in the employer's duty to respond to discriminatory conduct and to mitigate its effect in the workplace, is a requirement to investigate complaints of discrimination and harassment. "It is well established in the Tribunal's jurisprudence that an employer may be held liable for the way in which it responds to a complaint of discrimination" (*Sutton v. Jarvis Ryan Associates*, 2010 HRTO 2421 (CanLII) at paras 130-33).

[155] When discussing an employer's duty to investigate a complaint of discrimination, the Tribunal often refers to the Human Rights Tribunal of Ontario ["HRTO"] case of *Laskowska v. Marineland of Canada Inc.*, 2005 HRTO 30 (CanLII) [*Laskowska*], in which the HRTO stated at para 53:

> It would make the protection under subsection 5(1) to be a discrimination-free work environment a hollow one if an employer could sit idly when a complaint of discrimination was made and not have to investigate it. If that were so, how could it determine if a discriminatory act occurred or a poisoned work environment existed? The duty to investigate is a "means" by which the employer ensures that it is achieving the Code-mandated "ends" of operating in a discrimination-free environment and providing its employees with a safe work environment.

[156] In *Laskowska*, the HRTO set out the relevant criteria to consider in determining whether an employer complied with its duty to investigate at paragraph 59:

> 1. Was there an awareness of issues of discrimination and harassment in the workplace at the time of the incident? Was there a suitable anti-discrimination or harassment policy with a complaint mechanism in place? Was adequate training given to management and employees;
>
> 2. Once an internal complaint was made, did the employer treat it seriously? Did it deal with the matter promptly and sensitively? Did it reasonably investigate and act; and
>
> 3. Did the employer provide a reasonable resolution in the circumstances? Could the employer provide a healthy, discrimination-free work environment? Did it communicate its findings and actions to the complainant?

[157] The Tribunal in *Laskowska* also stated the following at paragraph 60:

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

[158] Before evaluating CN's actions in light of the three-part *Laskowska* test, I must first determine whether the Complainant notified the employer about the harassment. The Federal Court in *Franke* stated, with respect to sexual harassment specifically, that "fairness requires the employee, whenever possible, to notify the employer of the alleged offensive conduct" (*supra*, at para 43). Where an employer has a personnel department and "a comprehensive and effective sexual harassment policy" with appropriate redress mechanisms, the victim of the harassment must notify the employer of the alleged offensive conduct. The Court noted that the goal of such policies is to achieve a healthy workplace and "the sooner action is taken to eliminate harassing conduct, the less likely it is that any such conduct will become detrimental to the work environment" (*supra,* at paras 45, 46).

[159] CN says the Complainant never reported R.M.'s comments to anyone until after her disqualification from the training program despite having reported the alleged harassment by C.W. and B.C.. For this reason CN claims it cannot be held liable for any discrimination committed by R.M.

[160] The Complainant entered CN's Human Rights Policy: Harassment Free Environment [the Policy] as evidence. The objective of the Policy is "to ensure that all employees are treated fairly and equitably in a harassment-free environment". The Policy states that harassment is considered employee misconduct and is not tolerated.

[161] CN's Policy sets out the steps an employee should take to report incidents of harassment. First, it recommends an employee speak to the harasser as soon as the offensive behaviour happens and request that they stop. The Complainant's evidence was that she did tell R.M. to stop making inappropriate sexual comments to her. When she told

him she would start taking notes if he did not stop, he said to her, “who will they believe, me or you?”

[162] The Policy says that, if speaking to the harasser fails, the employee should speak to a supervisor, manager or Human Resources representative.

[163] The Complainant did not report R.M.’s comments to anyone in Human Resources or management at CN in Winnipeg, despite being aware that the Human Resources department was available for her to do so. She recorded herself telling L.V. and M.P. that, when she was approached by Human Resources in Winnipeg to file a complaint about a fellow student who had been overheard threatening her, she said, “no I’m not filing a report, I’ve been around boys all my life.” She also testified that she had been told during her training in Winnipeg that “snitches end up in ditches” which contributed to her reluctance to file a complaint.

[164] I understand that she did not want to cause waves while she was still in training in Winnipeg, because she wished to move on to the next stage of the training in British Columbia. However, once she was in British Columbia, she did become comfortable enough to report inappropriate comments made to her by trainers there. L.V. also testified that, in her first week in Vancouver, the Complainant mentioned to him that a trainer in Winnipeg had made inappropriate comments to her, although she did not name him. In the recording of the October 27, 2014 meeting, L.V. is heard agreeing with her that the trainer in Winnipeg was “out of line.”

[165] L.V. testified that he did not consider what the Complainant told him about R.M. to be his concern, as it had happened in Winnipeg, and so had nothing to do with his training program in Vancouver. He considered her to be a peer because he was not management, but was a unionized worker like her, who had additional responsibilities as the on-the-job training coordinator. He testified that it was not his job to deal with complaints or human resources issues and, if a complaint was made to him, he would refer employees to M.P. or F.B., who were managers. It was clear from the Complainant’s recordings that he encouraged her to let M.P. know about any problems she had in the workplace. I accept

that, in telling L.V. about R.M. the Complainant was not making a formal complaint pursuant to the Policy.

[166] The Complainant knew that she could make a complaint to Human Resources in Vancouver or Winnipeg, and she also could have made a complaint about R.M. to M.P. However, when she brought up R.M. in her meeting with M.P., she did not mention his name or what he had said to her. She also stated to M.P.: "This is between me and you and I really truly hope it doesn't go any further." It seems clear from this statement that she had no intention to formally report R.M.'s conduct to management or Human Resources at CN.

[167] I find that the Complainant did not notify CN about R.M.'s sexually harassing behaviour, despite being aware of how to do so. As such, I find that CN is not liable for R.M.'s sexual harassment of the Complainant because it did not consent to the discrimination. Additionally, through its HR department and Harassment Free Environment Policy, CN acted reasonably to ensure that, if sexual harassment occurred in the workplace, employees such as the Complainant knew how to report it. If employees choose not to engage the protections available to them, they cannot reasonably expect to hold the company liable for such discriminatory practices.

[168] With respect to the harassment the Complainant experienced by C.W. and B.C., I find that she did report their conduct to Management, as required by the Policy, when she told M.P. about their comments on October 27, 2014.

[169] I will now consider whether CN reasonably dealt with the Complainant's report of discriminatory behaviour by C.W. and B.C. in light of the three-part test from *Laskowska.*

[170] With regard to the first step of the test, I accept that the Complainant was aware of CN's Harassment Free Environment Policy, as she entered it as evidence at the hearing. The Policy states that CN "will act promptly to investigate, resolve and remedy cases of harassment brought to its attention, whether they are made informally or formally" and will "ensure they are resolved quickly, confidentially, and fairly." The Policy defines harassment and sexual harassment, recognizing that such conduct impacts the dignity of those who experience it and "threatens to adversely affect the work performance or the employment

relationship of the individual and creates an intimidating, hostile or offensive" atmosphere known as a poisoned work environment.

[171] The Policy sets out a Complaint Procedure, which gives employees the responsibility to report incidents of harassment to their supervisors, managers or Human Resources. Once a complaint is made, Management is to respond quickly by following these steps: review the allegations and consult with a Human Resources representative; notify the person identified as a harasser that a complaint has been made; individually interview both the complainant and alleged harasser as soon as possible, which could include involving the union; interview witnesses identified by the employees involved or likely to have been present; document the situation accurately and completely; render a decision as quickly as possible and advise the parties of the resulting action; ensure all information concerning the case is kept confidential. If the complaint is determined as founded, the personal file of the harasser is to be documented accordingly. The harasser will be asked to apologize, will be offered counseling, and discipline will be assessed as appropriate. If the complaint is determined as unfounded, nothing will be recorded on the personal file of either the complainant or alleged harasser, unless it is found to be frivolous or malicious on the part of the complainant, in which case disciplinary action may be taken against them.

[172] Although the Respondent did not provide evidence about training given to management and employees about the Policy, I accept that CN had a suitable anti-harassment policy with a complaint mechanism in place at the relevant time.

[173] With respect to the second part of the *Laskowska* test, I find that CN did not treat the complaints with the seriousness they deserved.

[174] I find that M.P.'s views about C.W. as a trainer affected how seriously he took the Complainant's complaint. M.P. testified that he considered C.W. to be a safe and experienced trainer who always gave very detailed and straightforward feedback. He felt he was efficient but did not cut corners. While C.W. would not "sugar coat" his comments, M.P. did not consider him to be unprofessional.

[175] After reading C.W.'s comments about the Complainant in her Performance Report, M.P. was concerned that she was not receptive to instructions and was not rule compliant and he saw these as red flags.

[176] As such, M.P. decided to set up a meeting with the Complainant to find out if there was a personality conflict between her and C.W., because he knew that C.W. was a strong personality and he wanted to know if she was as well. M.P. testified that he wanted to get her feedback and point of view on the concerns that C.W. raised and, if they were true, then he knew he needed to provide her with support, as the training process is very extensive. He testified that, when he called the meeting, he did not know she was alleging harassment.

[177] When M.P. started going through C.W.'s comments, she told him about C.W. yelling at her and that he made the comment that women should not work on the railway. M.P. testified that the Complainant contradicted all of C.W.'s comments, and stated that she would never do something unsafe. M.P. testified that, rather than taking responsibility for her actions in the situations described, she denied everything C.W. said and instead suggested he had an issue with her as a woman. M.P. thought the Complainant was motivated to protect her job and this was why she responded as she did. Given his positive experience with C.W., he did not understand why CW would be motivated to make such comments in the Performance Report if they were all untrue.

[178] M.P. told the Complainant in the meeting that she needed to approach the job with a level of humility, as it is a dangerous job. He testified that he had been a new conductor himself and felt that humility means that if people with more experience are giving you coaching, the more you learn from them, the more safe you are in doing your job. He felt the trainees should be receptive to job-related feedback. He testified that did not mean she had to put up with harassment, however.

[179] In this same October 27 meeting, the Complainant also brought up B.C. and said he called her derogatory names and said he did not want to work with her. M.P. testified that he was surprised by these allegations. Although he had not dealt with B.C. a lot, he found him to be "positive and happy." M.P. testified that, while he questioned the Complainant's allegations about B.C., he did not discount them.

[180] The Respondent entered as evidence a document called an "employee dashboard" in which managers could make entries about employees. In the Complainant's dashboard, M.P. made notes on October 27, 2014, following his meeting with her stating that he brought up his concerns from reviewing her performance records and she "highlighted that there were a few trainers who she had personality conflicts with". He indicated that she felt she was being singled out by one of her trainers and his friends within the union. He wrote: "She never once took responsibility for her conflicts and for the multiple accounts of negative feedback that she had received. She was quick to blame everyone else and did not approach the meeting with me with a sense of humility", but rather countered with allegations of her own against each person who had provided the negative feedback. I note that this is not entirely correct, as B.C. had not provided negative feedback in her Performance Review. She brought him up independently of the feedback about her performance.

[181] M.P. also wrote in the dashboard entry that he had followed up with C.W. about telling the Complainant to couple air hoses while the train was still moving. C.W. told him he knew that the trains were not moving and it was safe to perform the action. M.P. does not indicate whether he talked to C.W. about the Complainant's allegation that he said "this is why women should not work here."

[182] M.P. stated in the recording of the October 27 meeting and in the dashboard that he would keep in mind that the Complainant was the common denominator in all of the scenarios and reviews that were discussed, and that she "had every reason to make allegations in order to take the attention off what had been highlighted" about her performance. He said he explained to her that "those who were training her had nothing to lose by giving a bad review but that she had everything to lose because of it. She would therefore be naturally motivated to protect her job and do and say whatever she thought necessary to do so."

[183] M.P. did not include in his dashboard comments that the Complainant made allegations of harassment or discrimination, although CN's Policy requires that such complaints be documented.

[184] M.P. testified that he did follow up with both B.C. and C.W. and they both denied the Complainant's allegations. He testified that, as such, he did not believe either party. He felt there were no facts to confirm her allegations, although he admits he did not speak to a foreman who she said had been present when B.C. called her a "bitch" and a "rat". He also did not follow up with V.P. to determine who might be telling the truth about C.W. telling her to couple the hoses. He said that V.P. knew he had an open-door policy, so if he was upset about it, he could have come to him about it. I note, however, that CN's Policy specifically mentions interviewing witnesses during an investigation.

[185] M.P. testified that he did not disbelieve the Complainant, but he also did not know why B.C. and C.W. would act as she had alleged. He felt she had the most incentive to be untruthful because she was trying to protect her job. He also testified that, because she raised her concerns about C.W. and B.C. in the context of discussing her own performance concerns, this affected her credibility as far as he was concerned. While he questioned the Complainant's motivation for complaining, he did not question their possible motivation for denying the allegations. M.P. did concede under cross examination that B.C. would have been motivated to lie to him by saying he had not made the comments as alleged, in order to keep his job.

[186] M.P. testified that, as both B.C. and C.W. had different versions of the stories she told, he wanted to ensure that, if there was a personality conflict between them, they would not work together again. CN argues that this was a corrective action following a reasonable investigation.

[187] L.V. also testified that, although it was not his job to investigate her complaints, he tried to make the Complainant's work environment more comfortable by not placing her with C.W. and B.C. again during training. Instead, he scheduled her to work with D.B. and V.P., two trainers she liked. He testified that he tries to avoid "personality conflicts" through scheduling.

[188] M.P. said that he did not follow up with the Complainant about his conversations with B.C. and C.W. but left it open for her to come to him with any further allegations. He had told her he would support her if what she was saying about C.W. and B.C. was true, and he gave

her his card. He testified that he was not saying this was 100% correct, but she only worked for 10 more days following their meeting anyway, so there was not a lot of time to meet with her again when he was responsible for three to four hundred other employees.

[189] M.P. testified that he did not have any further interactions with the Complainant after November 3, when he met with her briefly to discuss her injuring her arm while riding a box car across the yard. In this interaction he says he talked to her about safety only. CN argues that, because the Complainant did not raise any further concerns about B.C. or C.W. at the November 3 meeting, the reasonable inference is that the matter was resolved and this shields CN from liability pursuant to section 65(2).

[190] L.V. testified that, when he met with the Complainant on October 31, he tried to talk to her about his concerns with her as a trainee, but the meeting took a different direction to talking about C.W. and B.C. and their reviews of her. He said she spoke about them being bad trainers and dangerous, and that it made him feel uncomfortable to be talking about other employees during the meeting. He testified that he tried to come back to the review but could not get his comments across to her.

[191] I note, however, that in the recording of the group meeting that occurred prior to her individual meeting with L.V. and D.L. on October 31, L.V. told the group of trainees that if they have had a personality clash with a trainer, they should tell him about it in private, and if the same name keeps coming up, he will know it is not actually a personality issue, but rather a problem with the trainer.

[192] Also, in the recording from October 31, M.M. told the group they should openly talk amongst themselves and mention the names of bad trainers because then they will know "it's not you, it's the trainer".

[193] While trainees were encouraged to speak out about problems they had with trainers, when the Complainant did so, her motives for doing so were questioned. I find that M.P. did not take her report of harassment on the basis of her sex by C.W. and B.C. seriously. Instead he viewed her as having a "personality conflict" with them. The fact that he does not even mention her allegations of discriminatory harassment in his entry in her dashboard confirms that he did not take her complaints as seriously as he should have. While I appreciate that

the Complainant may have downplayed the impact of these comments on her by telling M.P. and L.V. that she had worked in male-dominated industries all her life and so could handle it, they still should have taken her concerns seriously and dealt with them in accordance with the Policy.

[194] I am of the view that a reasonable person in M.P.'s position should have considered that the Complainant was one of very few women in the workplace (according to L.V., 6 or fewer employees out of about 200 who work in the terminals are female), and conducted a proper investigation in order to show that CN takes such allegations of discrimination seriously.

[195] If he was unable or unwilling to conduct such an investigation himself, he should have involved Human Resources for assistance, as required by the Policy. F.B. also testified that "protocol" had not been followed because the harassment allegations were never reported to him. As far as M.P.'s November 3, 2014 meeting with the Complainant goes, this was obviously a brief discussion about her injured arm and being safe. If anything, it would have been an opportunity for M.P. to update her on his discussions with B.C. and C.W., which clearly did not happen.

[196] The Policy also requires that the parties be notified about the outcome of the investigation, which obviously was not done, as M.P. testified that he did not speak to the Complainant again, but rather expected her to come and speak to him if the alleged behaviour continued. This was not an adequate response to her allegations of discrimination, particularly in light of the retaliatory nature of some of the comments, where she was accused of being a rat for complaining.

[197] I am of the view that CN did not meet the requirements of the second or third parts of the *Laskowska* test, in terms of taking the complaint seriously and investigating it properly, and keeping the complainant informed of its findings and actions following her complaint. I find that CN failed to conduct a reasonable investigation into the Complainant's allegations of discrimination. It did not take all reasonable steps to alleviate, as best it could have, the distress arising within the work environment for the Complainant and to reassure her that it was committed to the maintenance of a workplace free of harassment on the basis of sex.

[198] CN's response was not corrective as required given the circumstances of this case. As such, while I find that CN did not consent to the discriminatory practices, as evidenced by its Harassment Free Environment Policy, it did not exercise "all due diligence" to prevent the discrimination and to mitigate or avoid its effect, as required by section 65(2) of the *Act*, in order to avoid liability.

[199] I find that CN is liable for the discriminatory practices under section 14(1)(c), relating to C.W. and B.C.

VII. Remedy

[200] Having found that the Respondent CN is liable for the discriminatory harassment committed by two of its employees under section 14(1)(c) of the *Act*, the Tribunal may make an order pursuant to section 53 of the *Act*. The Complainant has asked the Tribunal to award her lost wages and associated employment benefits (53(2)(c)), damages for pain and suffering (53(2)(e)), and damages for wilful and reckless discrimination (53(3)).

(i) Lost wages

[201] With regard to the request for lost wages, it is accepted that there must be a causal link between the discriminatory act and the wage loss claimed (*Chopra v. Canada (Attorney General),* 2007 FCA 268 (CanLII) at para 37). As I have not found that the Complainant's disqualification from employment was for a discriminatory reason, no lost wages will be awarded.

[202] The only discriminatory practice from which remedies may flow is the harassment on the basis of sex contrary to section 14(1)(c), being the comments made by B.C. and C.W.

(ii) Compensation for pain and suffering

[203] Section 53(2)(e) of the *Act* allows the Tribunal to award compensation to the victim of the discrimination "for any pain and suffering that the victim experienced as a result of the discriminatory practice", up to an amount of $20,000.

[204] The Complainant argues that she should be compensated the maximum amount available under the *Act*. She argues that the stress of the last 6 years fighting for justice and navigating physical and mental injuries has had a tremendously negative impact on her health and her life, which merits an award of $20,000.

[205] As the Respondent points out, the Tribunal will only award $20,000 for the most egregious of cases (*First Nations Child & Family Caring Society of Canada et al v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39 (CanLII) [*First Nations Caring Society*] at paras 13, 128).

[206] The aim of a remedial order under section 53(2) is not to punish the Respondent but to eliminate, to the extent possible, the discriminatory effects of the practice (*Robichaud, supra* at para 13).

[207] The Tribunal's case law with respect to damages for pain and suffering makes it clear that there must be evidence that a complainant experienced pain or suffering, and there must be a causal link between this and the discriminatory practice.

[208] The Complainant entered as evidence a psychological report from June of 2018. The report was prepared at the request of the British Columbia Workers' Compensation Board. The psychologist concluded that the Complainant was suffering at that time from Major Depressive Disorder and anxiety with intermittent panic attacks, which resulted from her workplace injury, the termination of her employment, and her ongoing physical impairment. CN has argued that I should accord very little weight to the opinion in the report, as the psychologist was not called as an expert witness at the hearing.

[209] In my view, the report simply supports both what I observed of the Complainant during the hearing and her evidence about her mental health. As stated earlier, her anxiety was present throughout the hearing, including one serious panic attack that required a trip to the hospital.

[210] While the report identifies the injury and termination as the main contributing factors to the Complainant's mental health, it also references the harassment the Complainant experienced at CN by her male coworkers as one of the only women on the job. C.W.'s

comment about why women should not work there is specifically mentioned. The Complainant told the psychologist that she had reported her concerns to a supervisor and she was told it would be taken care of but that the harassment continued, including the comments about her being a rat. She told the psychologist, “it’s a safety critical position, you can’t be looking over your shoulder.”

[211] The fact that the Complainant brought this up with the psychologist speaks to the impact that the harassment had on the Complainant and supports her evidence that the harassing comments caused injury to her dignity, feelings and self-respect. During the hearing, she became visibly upset discussing the harassment that I have found contravened the *Act*.

[212] I accept that the Complainant did not suffer from any serious mental health issues at the time that she experienced the harassment. She said that she is a strong person who has been through some bad stuff, but never had problems with anxiety before this experience.

[213] In addressing the Complainant’s claim for damages for pain and suffering, the Respondent refers to the case of *Hunt v. Transport One Ltd.*, 2008 CHRT 23 (CanLII) [*Hunt*], which it says is similar to this case. In *Hunt*, there were 2 instances of sexual harassment involving comments and the touching of the complainant’s breast under the guise of zipping up her jacket, as well as sexual propositions by supervisors. The complainant in that case was awarded $6,000 for pain and suffering, as the tribunal found that some of her physical and emotional distress was not related to discrimination but to other factors in the work environment (at para 47).

[214] As in *Hunt*, not all of the Complainant’s pain and suffering is attributable to the discriminatory conduct she experienced. She admits that her mental health issues were caused by many factors, including “the unresolved and hostile workplace harassment she experienced in a potentially deadly work environment”, her termination, her back injury, and dealing with her human rights complaint for many years.

[215] I have found that CW’s comment “this is why women shouldn’t work here” and B.C.’s comments that she was a “bitch” or a “fucking bitch” constituted the discriminatory

harassment for which CN is liable. C.W.'s comment was made one time and B.C.'s comments were made more than once, over a period of two months. These are not the most serious instances of sex-based harassment in the workplace, in terms of their content or persistence. Still, in a workplace where safety was critical, the Complainant was entitled to learn and focus on the job without fear of discrimination. Being one of only a few women in the training program would also make such comments particularly unwelcome and hurtful. I find an award of $10,000 for pain and suffering is appropriate in the circumstances.

(iii) Compensation for willful or reckless discrimination

[216] Section 53(3) of the *Act* states that, if the Tribunal finds that the Respondent has engaged in the discriminatory practice wilfully or recklessly it may order them to pay compensation to the victim in an amount not exceeding $20,000. The Complainant argues that she is entitled to the maximum award under this section.

[217] The Respondent is correct that, as with an award for pain and suffering, an award of $20,000 for wilful and reckless discrimination should also be reserved for the worst cases (*First Nations Caring Society, supra* at para 230).

[218] In determining the appropriate award under this section, the Tribunal must focus on the Respondent's conduct, and not on the effect that the conduct has had on the Complainant (*Beattie and Bangloy v. Indigenous and Northern Affairs Canada,* 2019 CHRT 45 (CanLII), aff'd 2021 FC 60 (CanLII) [*Bangloy*] at para 210).

[219] In *Canada (Attorney General) v. Johnstone*, 2013 FC 113 (CanLII), aff'd 2014 FCA 110 (CanLII) at paragraph 155, the Federal Court stated the following with regard to section 53(3):

> This is a punitive provision intended to provide a deterrent and discourage those who deliberately discriminate. […] Recklessness usually denotes acts that disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly.

[220] If the Tribunal finds that the Respondent "acted in reckless disregard of the consequences of" its actions, it can award damages under this section (*Warman v. Winnicki,*

2006 CHRT 20 (CanLII) at para 174). The more egregious the Respondent's conduct is found to be, the higher the award should be (*Bangloy* at para 211).

[221] The Respondent argues that there was no evidence provided to the Tribunal to support a claim under this section. It says it had a harassment policy and the complaints were taken seriously and investigated.

[222] While it is true that the Respondent had a Harassment Free Environment Policy with comprehensive complaint and investigation guidelines, the evidence shows that M.P. did not follow the Policy in any meaningful way when dealing with the Complainant's reports of discrimination. As I have found, the investigation was not conducted in a reasonable manner. Although the discrimination reported by the Complainant was not the worst example of harassment, in this case, where the Complainant was one of very few women in the workplace complaining about sex-based discrimination by coworkers, the Respondent had an obligation to take the complaints seriously and investigate them in compliance with its Policy.

[223] I do not find, based on the evidence and the circumstances of the case, that the Respondent intended to discriminate against the Complainant such that the discrimination was willful. However, I do find that it acted recklessly, in that its conduct showed disregard or indifference for the consequences of its actions, or in this case its failure to act in accordance with the Policy. However, the Respondent's conduct was not so egregious as to warrant an award of special compensation at the high end of the range.

[224] I find an award in the amount of $5,000 is appropriate in the circumstances of this case.

(iv) Additional Order under Section 53(2)(a) of the *CHRA*

[225] Although the Complainant did not specifically request an award pursuant to section 53(2)(a), she did stress that she does not want others to experience what she did in the workplace in terms of not having her complaints of harassment taken seriously.

[226] As the Respondent noted in its closing submissions, the Tribunal in *Hunt* made an award under section 53(2)(a) as follows:

> [48] In order to prevent harassment of the nature experienced by Ms. Hunt from occurring in the future, it is necessary to make an order requiring the Respondent to take certain measures. At a minimum, information (whether in the form of Policies and Procedures, or simply a statement by a company official) should be provided to everyone in the workplace which explains what harassment is, that harassment will not be tolerated, and sets out the procedures that will be followed in the event that harassment does occur. It goes without saying that any such information is only effective in preventing harassment if it is fully understood by everyone in the workplace. To that end, information sessions or sensitization programs are useful to provide employees, supervisors and company directors with the knowledge that is needed to make anti-harassment policies work.

[227] In order to prevent discrimination of the nature experienced by the complainant in that case, the Tribunal in *Hunt* went on to order that the Respondent provide any sexual harassment policies or procedures to the Commission for review or, if it did not have any policies or procedures, that it develop some in consultation with the Commission. The Tribunal also ordered training for employees, directors and officers of the company to "sensitize them to the issue of sexual harassment" in consultation with the Commission (at para 49).

[228] I note that the respondent company in *Hunt* was very small compared to CN, which is a very large company with Human Resources departments across the country. It already has an anti-harassment policy, although the Tribunal did not receive any evidence about how employees and managers are notified about the existence of the Policy and whether they receive training on how to comply with it.

[229] A true commitment to diversity would ensure that all trainees and employees feel safe in the workplace. As such, I order that CN ensure, within 6 months of the date of this Decision, and in a manner determined by its Human Resources Department, that information be provided to everyone in the workplace explaining what harassment is, that harassment will not be tolerated, and that there are policies and procedures that will be followed in the event that harassment does occur. I am certain that CN's Human Resources professionals are better equipped to determine the most appropriate fashion by which its

employees and members of management are to be reminded of its human rights-related policies. There is no requirement that CN work with the Commission in carrying out this order.

VIII. Orders

[230] As R.L.'s complaint is substantiated in part, the Tribunal hereby orders:

- The names of all witnesses who appeared at the hearing of this complaint, including the Complainant's, shall be anonymized. They shall be referred to by their initials in this Decision;
- The Complainant's psychological report entered as Exhibit C13 at the hearing shall be sealed and not released if there is a request for access to the official record;
- Within 6 months of the date of this Decision, and in a manner determined by its Human Resources Department, CN shall ensure that information is provided to everyone in its workplaces explaining what harassment is, that harassment will not be tolerated, and that there are policies and procedures that will be followed in the event that harassment does occur;
- CN shall pay to the Complainant compensation for pain and suffering in the amount of $10,000;
- CN shall pay to the Complainant special compensation in the amount of $5,000;
- Simple interest shall be payable on the monetary awards at the average annual bank rate established by the Bank of Canada, pursuant to section 53(4) of the CHRA and Rule 9(12) of the Tribunal's Rules of Procedure (03-05-04). The interest will run from October 31, 2014 until the date of payment of the awards of compensation.

Signed by

Colleen Harrington
Tribunal Member

Ottawa, Ontario
September 3, 2021

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2265/2018

Style of Cause: R.L. v. Canadian National Railway Company

Decision of the Tribunal Dated: September 3, 2021

Date and Place of Hearing: November 23 to 27 and November 30to December 4, 2020

By videoconference

Appearances:

R.L., for herself

Matthew Sveinson, Counsel for the Respondent and

Tomasz Cerazy, Articled Student for the Respondent