

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2021 CHRT 43

Date: December 9, 2021

File No.: T2504/6120

Between:

Natalia Boukailo

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canada Post Corporation

Respondent

Ruling

Member: Kathryn A. Raymond, Q.C.

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I. Introduction

[1] Canada Post Corporation (“Canada Post”), the Respondent, believes that the Complainant, Ms. Boukailo, is attempting to expand her complaint of discrimination by asserting new allegations that were not part of Ms. Boukailo’s original complaint and which are “not connected to the central issues in dispute between the parties.” Canada Post has brought a motion for an Order striking out content in the Statement of Particulars filed by Ms. Boukailo and the Reply she filed in response to Canada Post’s Statement of Particulars. In the alternative, Canada Post requests an order requiring Ms. Boukailo to provide better particulars.

[2] For the reasons that follow, the motion is granted, in part, and is dismissed in other respects. Certain particulars are ordered to be disclosed.

II. Overview of Complaint

[3] At the time of the allegations in the complaint, Ms. Boukailo was employed full-time as a supervisor for Canada Post. On August 14, 2014, she injured her hand at work and was off work for a number of weeks on workers compensation benefits. She returned to her supervisor role with modified duties on October 29, 2014. Ms. Boukailo alleges that her supervisory position was ended prematurely and on only verbal notice on December 1, 2014 while she was still recovering from her injury. She says that she applied for another supervisory role in February 2015 and that during the interview she was asked questions about her injury. She was not selected for the position. Ms. Boukailo asserts that she was forced to return to work as a postal clerk on February 25, 2015, rather than being accommodated in a supervisor position and that Canada Post did not adequately accommodate her in the postal clerk position. She alleges that subsequently she was unsuccessful in other job competitions.

[4] The Commission referred the complaint in its entirety to the Tribunal for inquiry.

III. Alleged New Allegations

[5] In summary, Canada Post submits that Ms. Boukailo raised new allegations in the Statement of Particulars (the “SOP”) that she filed by alleging that Canada Post caused her workplace injury, that Canada Post should pay wage loss benefits, that her signature was forged on certain documents, that Canada Post has retaliated against her for filing the complaint and that she is fearful for her job security and is, therefore, seeking future lost wages and pension payments to the date of her retirement.

[6] Canada Post submits that Ms. Boukailo’s Reply contains further details respecting the alleged new allegations respecting forged signatures and retaliation that should likewise be struck.

IV. Legal Framework for the Issues

[7] The Tribunal’s jurisdiction to conduct an inquiry pursuant to the *Canadian Human Rights Act*, RSC 1985 c H-6 (the “Act”) is founded on the Commission’s referral of a complaint. The entire original complaint was referred to the Tribunal. In this motion, the Tribunal must decide whether Ms. Boukailo has incorrectly expanded the scope of her complaint through additional allegations in her SOP and Reply.

[8] One of the reasons that amendments to a complaint may not be allowed, that the scope of a complaint may be limited, or that content in a SOP may be struck by an Order of the Tribunal, is because of the requirement in the Act that the Commission decide whether to forward a complaint for inquiry to the Tribunal, and, if so, what is referred. It is the Commission that decides whether any complaint or component of a complaint is referred to the Tribunal. Potential complainants have no right of direct access to the Tribunal. Amendments are not permitted where they allow a party to circumvent the Act by creating new complaints before the Tribunal that were not screened by the Commission.

[9] Canada Post acknowledges that Ms. Boukailo is entitled to further explain and elaborate upon the allegations in her complaint in her SOP and Reply. In fact, she is required to do this by the Tribunal’s Rules of Procedure (the “Rules”). However, Canada Post submits

that she can only elaborate upon the original allegations in her complaint. Canada Post relies upon *Karas v Canadian Blood Services and Health Canada*, 2021 CHRT 2 (“*Karas*”). At paragraph 24, the Tribunal in that case explained that “the substance of the Statement of Particulars must reasonably respect the factual foundation and original allegations of discrimination as set out by the complainant in the original complaint.”

[10] Canada Post submits that the legal test to be applied is whether the alleged new allegations have a link or nexus to the allegations underlying the original complaint filed with the Commission (*Casler v Canadian National Railway*, 2017 CHRT 6 (“*Casler*”) at para 7). In this regard, Canada Post asserts that “an amendment or new allegations must be connected to the original complaint filed and required to enable the Tribunal to inquire into the real issues in dispute (*Casler* at para 10).”

[11] The most obvious nexus or relevance is where new proposed content applies to the same grounds of discrimination and fits within the same discriminatory practices or types of practices already identified in the complaint. In this case, the same ground of discrimination is alleged with respect to all the alleged new content, except in relation to the complaint of retaliation, which is addressed separately below. Therefore, the analysis of the issue respecting “nexus” begins with deciding whether the disputed content fits within the same discriminatory practices or types of practices already identified in the complaint. If it does, the Tribunal will then decide whether the proposed new facts are entirely unrelated to the facts in the original complaint or are consistent with and necessary to the factual narrative of the complaint.

[12] Another important aspect of the legal framework for a motion to amend a complaint is whether there is real and significant prejudice to the other party associated with allowing the addition of information to the complaint (*Casler* at para 11, *Letnes v Royal Canadian Mounted Police*, 2019 CHRT 41 at paras 6 and 8.). This is necessary to ensure that this proceeding occurs in accordance with natural justice and procedural fairness. Accordingly, the issue of prejudice is also to be considered.

V. Analysis Respecting Each New Allegation

[13] Except for retaliation, each allegation that is alleged to be new will be assessed in relation to the existing discriminatory practices contained in the complaint. The discriminatory practices in the complaint may be summarized as follows: 1) that Ms. Boukailo's position as supervisor was terminated without notice; 2) that she was required to return to work in a lower position as a postal clerk; 3) that her disability was not accommodated; and, 4) that she was denied other positions because of her disability.

[14] Apart from retaliation, the Canadian Human Rights Commission (the "Commission") did not take a position on this motion. That is why the Commission's position is not addressed beyond the retaliation section in these reasons.

A. Allegations Respecting the Complainant's Work-Related Injury

(i) Submissions

Canada Post's Position

[15] Canada Post alleges that Ms. Boukailo has raised new allegations with respect to the work-related injury that she suffered on August 14, 2014 in paragraph 2 of her SOP. Canada Post says that Ms. Boukailo is now asserting that she was injured due to unsafe work conditions that were created by Canada Post.

[16] Canada Post asserts that Ms. Boukailo does not explain how allegedly working in unsafe conditions amounts to discrimination. It submits that, in general, she does not suggest that her injury occurred because she was discriminated against.

[17] Canada Post submits that permitting evidence on this issue will not help the Tribunal determine the real issues in dispute, which involve human rights, not workplace injury.

[18] Canada Post further submits that the Tribunal is not the proper forum to raise a complaint about allegedly unsafe working conditions. It submits that Ms. Boukailo had the right to file a grievance with her Union. She also had the right to refuse to perform unsafe

work pursuant to Part II of the *Canada Labour Code*, RSC 1985, c L-2 and/or the *Workplace Safety and Health Act*, CCSM c W210. Canada Post highlights that these statutes have procedures that workers are required to follow to refuse to perform unsafe work. These procedures create an opportunity for an employer to investigate what happened. It says that Ms. Boukailo did not follow these procedures, it did not have an opportunity to investigate, and she should not be permitted to raise this allegation five years later.

Ms. Boukailo's Position

[19] Ms. Boukailo submits that the discrimination that she has experienced is part of a chain of events. She submits that the facts and associated evidence are all interconnected and demonstrate the full scope of discrimination that she believes she has experienced.

[20] Ms. Boukailo alleges that the first link in the chain of events in her complaint were the unsafe working conditions at Canada Post, which she attributes to insufficient staffing arrangements for supervisors over the week her injury occurred. In her response to the motion, Ms. Boukailo asserts that Canada Post breached its own Health & Safety Policy by having her work double duties due to the absence of other supervisors, in an effort to save costs. She submits that her workplace injury occurred as a result of these unsafe working conditions. She also says that this proves the existence of her disability.

[21] Ms. Boukailo states that Canada Post did have an opportunity to investigate the unsafe working conditions. She offered to provide the names of the supervisors who were absent. She also stated that she did not report the unsafe working conditions at the time "in fear of losing her job."

[22] She also asserts the following: "...allegations regarding 'unsafe and stressful work conditions' that resulted in me getting an injury, were made in Statements, dated October 25, 2018 (page 3) and August 28, 2019 (Par.8 and in the conclusion)." As explained below, it appears that these were statements in submissions Ms. Boukailo made to the Canadian Human Rights Commission (the "Commission") during its investigation of her complaint.

(ii) Reasons**Past History of Complaint**

[23] When the complaint was filed with the Commission in 2015, there was no suggestion by Ms. Boukailo that her complaint included the issue of Canada Post's potential responsibility for unsafe work conditions or that Canada Post caused her workplace injury. Ms. Boukailo indicates, however, that she made statements respecting "unsafe and stressful work conditions" during the investigation stage before the Commission in 2018 and 2019. The documents with these statements were not provided with her motion materials in support of her response.

[24] It appears that the statements to which Ms. Boukailo refers are submissions that she made to the Commission. The Commission filed a List of Documents from its own file with the Tribunal as part of the Tribunal's disclosure process. The Commission's list contains one document with the date of October 25, 2018, which is described as the Complainant's submission to a Section 40/41 Report at the Commission stage. Likewise, there is one document dated August 28, 2019. This is identified by the Commission as Ms. Boukailo's rebuttal to the defence to the complaint filed by Canada Post. The Tribunal concludes that the alleged statements are likely contained in these submissions.

[25] The Tribunal is not prepared to consider this information. Even if the content of the statements is confirmed to the Tribunal and is true, it is not relevant to the analysis in this case. The fundamental issue in this motion is "what was referred for inquiry by the Commission?" The Commission referred the original complaint to the Tribunal for inquiry. The original complaint was attached to the letter informing the Chair of the Tribunal of the Commission's referral. The original complaint did not contain these statements or any reference to an unsafe workplace.

[26] When Ms. Boukailo asks that the Tribunal consider statements in submissions she made to the Commission during its investigation, she effectively requests that the Tribunal consider the past history of the complaint. Ms. Boukailo does not allege that there is any ambiguity in relation to what the Commission decided to refer to the Tribunal. If any

ambiguity in this regard was found by the Tribunal, that could open the door to consideration of the past history of the complaint. However, there being no ambiguity about what was referred, there is no basis for the Tribunal to consider the history of the complaint before its referral.

[27] If there was a legal basis to consider the past history of this complaint, the Tribunal would not consider submissions made by a party to Commission staff during the investigation to properly be the “past history of the complaint”. The Tribunal should not consider anything other than decisions made by the Board of Commissioners of the Commission regarding the Commission’s assessment of the complaint and its decision about what is referred for inquiry. Only the Board of Commissioners has the authority to make these decisions. Unless a party’s submission is adopted in a decision by the Board of Commissioners of the Commission, it has no special standing post-referral, after the decision is issued. It is the formal decision of the Commission respecting what is referred that is determinative of the Tribunal’s jurisdiction, not what is contained in submissions made by a party to the Commission.

No Amendment at Commission Stage

[28] Ms. Boukailo apparently did not request amendment of her complaint before the Commission to include an allegation that the Respondent caused her workplace injury. Based on the Commission’s decision to refer the entire complaint, as filed, the Tribunal concludes that the Commission did not decide to expand or amend the complaint.

Nexus

[29] The Tribunal considered whether the allegation that the Respondent caused Ms. Boukailo’s injury could fall within her complaint, i.e., whether there was a nexus to her complaint even though there is no reference to unsafe working conditions in the complaint. The complaint states that:

The discrimination applies on the grounds of a temporary disability that had an impact on my ability to perform my job. The discrimination took place during

my recovery following an injury that I sustained while at my place of work in Winnipeg, Manitoba.

[30] The complaint states that the discrimination took place during her recovery from the injury. This timing would exclude the circumstances of the injury. It appears, therefore, that, on its face, the new allegation is beyond the original complaint from a timing perspective.

[31] The complaint begins with the fact of the injury. The complaint states:

I got injured at work (wrist fracture) on August 14, 2014 during my Supervisor term. My injury required a visit to the Emergency Room where I stayed overnight until August 15, 2014.

[32] There is no content to tie the new allegation to the original complaint in a substantive manner, other than this reference which does not assign blame to the Respondent. The discriminatory practices alleged in the original complaint all relate to the Complainant suffering an adverse effect in relation to access to employment positions and accommodation because of her disability.

[33] Statements that Ms. Boukailo may have made to Commission staff during the investigation about Canada Post causing a workplace injury are distinct in nature from the other allegations in her original complaint. Unsafe work conditions do not fit within the same discriminatory practices or types of practices already identified in the complaint.

[34] The cause of the injury that Ms. Boukailo suffered to her hand at work and the existence (or not) of unsafe work conditions have no apparent relevance to Ms. Boukailo's human rights. The fact that she injured her hand is relevant. That is the first event in the original complaint and the beginning of the alleged chain of events that are relevant to her complaint. How she injured her hand is not relevant to her human rights complaint. Not everything that happened in Ms. Boukailo's life prior to her human rights complaint is relevant to her human rights complaint.

[35] The Tribunal concludes that content alleging Canada Post's responsibility for unsafe work conditions or allegations that Canada Post caused Ms. Boukailo's workplace injury clearly go beyond the scope of the original complaint. The Tribunal is not persuaded that

this new allegation is required to be included to enable this inquiry to address the real issues in dispute.

Forum

[36] The impugned content in paragraph 2 of the SOP is a distinct allegation by reason of its legal implications. The Tribunal notes that Ms. Boukailo's SOP does not identify the "unsafe work conditions" issue in the "Issues" section of her SOP or the "Remedy" section. It is not, therefore, technically an allegation for which a remedy is sought in her SOP. However, in her response to the motion, Ms. Boukailo expands upon the allegation in paragraph 2 of her SOP, and, at para 23, she submits that the "Respondent failed to comply with the Health and Safety Policy, by creating unsafe and stressful work conditions, which in turn led to a workplace injury, which happened on August 14, 2014, and has affected my entire life." (emphasis added). Ms. Boukailo does not explain in her response to the motion what she would like to have happen as a result of the workplace injury alleged to have been caused by Canada Post. However, it seems clear that she intends for this content in paragraph 2 to be an allegation and an important allegation, given her assertion that this affected her entire life. Accordingly, the Tribunal concludes that paragraph 2, and, in particular, the sentence "The Respondent failed to provide proper staffing and created unsafe work conditions" to be not only alleged additional facts but a significant allegation against Canada Post.

[37] The new allegation is an allegation that, in theory, gives rise to its own cause of action and remedy in our legal system. It is legally capable of giving rise to its own legal proceeding. That another legal process was commenced is acknowledged in the complaint as the complaint states: "A case file with the Workers Compensation Board of Manitoba was opened following this incident."

[38] Workers' compensation is available in Canada through statutory regimes in each jurisdiction and applies to any injury that occurs at work, regardless of fault. The purpose of the compensation is to provide financial support to employees injured on the job. Employees do not need to bring legal proceedings against their employers to obtain compensation or

benefits, which would be very difficult for many employees to do. A primary feature of workers compensation regimes is the idea that, if an employer causes an employee's injury, compensation can be available without the need to go to court. Instead, the employee has access to the workers compensation program. It seems that when Ms. Boukailo seeks to amend her human rights complaint to allege that Canada Post caused the injury that occurred at work, she is erroneously attempting to obtain compensation through the Tribunal that she is required to obtain through workers compensation.

[39] The Commission and Tribunal have a different jurisdiction, one that concerns the subject matter of human rights as required by the Act. There is nothing in the Act about unsafe work conditions or work-place related injuries that occur outside of harms said to arise from discrimination. The Tribunal is not persuaded that the allegation that Canada Post caused Ms. Boukailo's injury to her wrist is relevant or appropriate to address in this complaint. This is not the appropriate forum.

[40] Other legislation, namely the *Canada Labour Code* and the *Workplace Safety and Health Act*, specifically apply to workplace safety and work-related injuries. They are of direct relevance. If there are unresolved disputes in this regard, recourse is available pursuant to this legislation to other tribunals that do have jurisdiction.

Proof of Disability

[41] Ms. Boukailo further submits that the fact that the unsafe working conditions resulted in the injury to her hand proves her disability. The fact that a workplace injury occurred does not prove that Ms. Boukailo has a disability, as she suggests. Not all workplace injuries give rise to a disability. Many do, but not all. For some injuries resulting in disability, the disability is temporary. What matters is whether Ms. Boukailo had a disability or a perceived disability at the time relevant to her complaint. The issue of whether a disability existed at the relevant time for purposes of the complaint will be determined based on the evidence presented at the hearing.

Should the Content be Struck?

[42] The next issue is whether it is appropriate to strike the following three sentences in paragraph 2 of the Complainant's SOP on the basis that they are not legally relevant to the legal issues in the case:

The Respondent failed to provide proper staffing and created unsafe work conditions. I had to work under a lot of stress and pressure because I was asked by management to cover for two other supervisors that were off that week, on top of my own responsibilities. Being overworked, in turn, led me to my accident in the workplace.

[43] Striking content from an SOP can be a blunt approach for a tribunal to take to resolving problematic content. One approach could be to allow the content to stay although it is irrelevant, subject to conditions about its use for purposes of the merits of the case. For example, the allegation could be allowed to remain in the SOP but not be used for purposes of liability.

[44] This allegation, if allowed to remain in the SOP, will become part of the public record. This is because human rights cases are open to the public at the hearing stage. The allegation that Canada Post caused this injury carries an obvious reputational implication, based on the reasons alleged, including it being deliberate in the sense that cost was put ahead of employees. This allegation could create a negative perception for Canada Post that is unrelated to this complaint in a public domain.

[45] The Tribunal has decided that this allegation will not be ruled upon for purposes of liability or even as part of the Tribunal's fact-finding exercise, because it is not relevant to the complaint. Canada Post will not be required to provide evidence in respect of this issue.

[46] Canada Post will, therefore, not have an opportunity to defend itself against this allegation. In the result, this allegation will not be in anyway dispelled by the Tribunal's ruling on the merits. It is not fair to Canada Post to leave a significant allegation of wrongdoing in Ms. Boukailo's SOP that carries reputational implication that will not be resolved by this proceeding and is immaterial to it, beyond leading up to the fact of injury, which is material to this complaint. The three sentences in paragraph 2 of Ms. Boukailo's SOP are struck and, therefore, are to be removed from Ms. Boukailo's SOP.

[47] The Tribunal will grant Ms. Boukailo some leeway in the course of telling her story at the hearing, for purpose of providing information about what occurred as background only, because she is self-represented. That said, Ms. Boukailo is to try her best to begin with her injury and her assertion of disability as she did in her written complaint. If, as a self-represented person, Ms. Boukailo strays from the fact of her injury and the alleged facts regarding how it occurred on August 14, 2014 and advances an allegation that Canada Post caused her injury in the course of her evidence, Canada Post may object. The Tribunal will address the objection.

(iii) Ruling

[48] The three sentences in paragraph 2 of Ms. Boukailo's SOP identified above will not be ruled upon by the Tribunal as they are irrelevant to the complaint. They are deemed to be struck from the Complainant's SOP.

B. Claim that Canada Post Should Pay Wage Loss/Benefits

(i) Introduction

[49] It appears that the Workers' Compensation Board of Manitoba (the "WCB") paid Ms. Boukailo benefits when she was originally on medical leave due to the injury she sustained at work in August 2014. Ms. Boukailo appears to allege in her SOP at paragraph 13 for the first time that, for a period after April 11, 2015, she was not fit for "full-time" duties and had a wage loss. In paragraph 33(c) of her SOP, she indicates that she is seeking an Order from the Tribunal that Canada Post pay "return to work wage loss in the amount of \$3033.31". (emphasis added) No other explanation or detail is provided in her SOP.

(ii) Submissions

Canada Post's Position

[50] Canada Post takes the position that the amount claimed in paragraph 33(c) is unpaid wage loss benefits that were declined by WCB, not a wage loss *per se*. Canada Post

provided a decision from WCB respecting Ms. Boukailo's appeal of a denial of wage loss benefits by WCB. Her appeal was unsuccessful. Canada Post believes that Ms. Boukailo is claiming that Canada Post should pay the amount that she believes should have been paid to her by WCB.

[51] Canada Post's first submission is that it will not assist the Tribunal to call evidence on this issue to determine the real issues in dispute in this complaint. As a reminder, the allegations involve the termination of Ms. Boukailo's supervisor position, her return to a lesser position, a failure to award her another supervisor position or to allow her progression to other positions, and a failure to accommodate her.

[52] Canada Post submits that the remedy Ms. Boukailo seeks in paragraph 33(c) falls exclusively within the jurisdiction of the WCB. It submits that Ms. Boukailo has not explained how the Tribunal has the jurisdiction to award her this compensation as a remedy. Given the preliminary ruling below, it is not necessary to relay the details of Canada Post's submissions respecting jurisdiction at this time. Canada Post requests that both paragraphs 13 and 33(c) be struck.

Ms. Boukailo's Position

[53] By way of background, in paragraph 33(a) of her SOP, Ms. Boukailo claims a wage loss from Canada Post from the time of the alleged discrimination until her retirement. It appears that this is related to her claim that her full-time position as a supervisor was taken from her and she was required to work at a lower-level position as a postal clerk on a part-time basis.

[54] The new allegation in paragraph 33(c) of the SOP is that a "return to work wage loss" is being claimed. At paragraph 13, Ms. Boukailo states that there was "a wage loss that I was entitled [to] during the Return to Work beyond April 11, 2015, that WCB refused to accept." She also states that "there were medical conditions and duty restrictions from my doctor that did not allow for full-time regular work." It appears that Ms. Boukailo is saying that she had a wage loss after April 11, 2015 arising from her disability as a postal clerk that

is separate and distinct from her wage loss claim in relation to the loss of her supervisor position.

[55] In her submissions in response to the motion, Ms. Boukailo has a section entitled “Wage loss beyond April 11, 2015.” She submits at paragraph 24 that Canada Post failed to accommodate her by forcing her “to start unmodified duties as a postal clerk without medical clearance, which aggravated the condition of my hand and significantly delayed my recovery.” She refers to alleged medial restrictions by her physician continuing beyond May 25, 2015. Ms. Boukailo further asserts in her submissions that she is entitled to a partial wage loss benefit beyond April 11, 2015 without stating what benefit this is or who the benefit provider is supposed to be. Ms. Boukailo also says that the wage loss claimed is relevant to her case because “(a)ccording to the information provided by WCB Admin. Support at Canada Post ‘a temp employee in a full-time supervisory position gets paid by CPC.’” She did not provide further details or evidence in this regard.

(iii) Reasons

[56] In general, the issues are not clearly identified or articulated by Ms. Boukailo, nor is the Tribunal prepared to accept, at this time, the manner that the issues are framed by Canada Post.

[57] What exactly is being claimed in paragraph 33(c) is not clearly identified. It is not clear whether it is wage loss benefits in the same amount that Ms. Boukailo hoped to receive from WCB for the period after April 11, 2015, that she believes ought to be paid by Canada Post now that they have been denied by WCB, or, a wage loss that allegedly should have been covered by Canada Post that is distinct from the wage loss that is already claimed in paragraph 33(a).

[58] Ms. Boukailo does not fully explain why the loss is compensable. She does not detail how the allegation that the Respondent failed to accommodate her is said to give rise to the specific amount in paragraph 33(c) of the SOP. Ms. Boukailo refers to a lack of accommodation of her hand injury by Canada Post in the postal clerk position at paragraph 22 of her SOP and to a failure to accommodate her during a return-to-work program in that

position at paragraph 23. She says that she suffered a psychological impact because of the discrimination that extended her recovery at paragraph 27. This suggests that she believes that her hand injury was exacerbated, or her recovery was delayed because of her hand and/or because of the psychological impact from not being accommodated and other alleged adverse effects of discrimination. It seems that she may be attempting to hold Canada Post responsible for any uncovered wage loss on this basis.

[59] On the other hand, if she is trying to hold Canada Post responsible for an amount that was the sole and exclusive obligation of WCB to pay, post April 11, 2015, as Canada Post states, she does not explain her logic for expecting Canada Post to pay it. If she is asserting that someone within WCB Administrative Support at Canada Post informed her that, if she had remained in her temporary supervisor position, she would not be covered by WCB but would be paid by Canada Post, she is not clear about that. She does not appear to have sought additional information from this person about the basis for this alleged assertion or, in general, respecting this issue for the hearing.

[60] As indicated, Ms. Boukailo claims that when she returned to work in February 2015, it was to a part-time position, not a full-time position. However, Ms. Boukailo states that her physician did not approve her for full-time regular work after April 11, 2015. What occurred in the meantime is not explained by her. What occurred after April 11, 2015 is not explained.

[61] Not even the relevant period of time is specified for paragraph 33(c). The Tribunal has only been informed that the relevant period began on April 11, 2015, not when it ended.

[62] There is no explanation of what wage loss benefits are, whether they equate to 100% replacement of a wage loss or the legal basis upon which they are paid. WCB operates on essentially a no-fault basis. Assessments of the amount of payments owed to an employee are not based on determinations of liability as they are before this Tribunal.

[63] Resolution of the dispute concerning paragraph 33(c) depends upon whether all potential compensation payable to Ms. Boukailo for the period covered by paragraph 33(c) is the sole and exclusive responsibility of WCB or is something that Canada Post is responsible for. There are too many unanswered questions in this regard.

[64] The Tribunal is not prepared to adopt whatever facts, findings or conclusions appear in the WCB decision at face value for purposes of this motion, as Canada Post seems to encourage. It appears from the WCB decision that Ms. Boukailo was working restricted hours based on medical advice and that she had a wage loss. The WCB decision determined whether WCB was responsible for payment of wage loss benefits to Ms. Boukailo after April 11, 2015. It concluded that it was not responsible. It did not determine whether Canada Post is responsible for any payments after April 11, 2015. The WCB decision did not consider whether there was a failure to accommodate or whether a failure to accommodate delayed Ms. Boukailo's recovery. The WCB tribunal operates in a separate regime, under different legislation. In short, the WCB decision does not consider the same issues or consider them in the same way as this Tribunal.

[65] The WCB decision also identified two medical problems. However, it focussed on the injury to Ms. Boukailo's hand. It appears to have accepted that this injury occurred at work and assessed whether she was able to work "full" hours after April 11, 2015 with that injury. There was some indication in the decision that the second medical issue, which was psychological in nature, was not considered to have occurred at work or at least was not WCB's responsibility. Accordingly, the WCB decision did not determine whether and to what extent Ms. Boukailo could or could not work in relation to both medical issues, rather only the extent of WCB's responsibility for payment of wage loss benefits after April 11, 2015 for the injury it considered had occurred at work.

[66] WCB determined it had no obligation to Ms. Boukailo, but she may be asserting that there is some other benefit or compensation owed to her by Canada Post for the relevant period. If WCB is not responsible for any wage loss following the April 11, 2015 period respecting the postal clerk position, based on the wrist injury, it is not clear that Canada Post has no responsibility either. Ms. Boukailo needs to provide particulars of her claim in this respect. This includes that Ms. Boukailo should clarify whether she is saying that there is a legal basis for Canada Post to cover a wage loss during a return to work concerning a disability over and above what WCB may provide or whether the obligation exists respecting a disability that is not work-related, or whether Canada Post has an obligation to her pursuant to some other relevant benefit under the collective agreement or any applicable

insurance plan(s). The jurisdictional issues must be considered once the background facts are clarified.

[67] Canada Post's first submission is that answering the issue raised by paragraph 33(c) does not assist the Tribunal in resolving the central issues in this case. One of the significant issues in dispute in this case is the issue of remedy. Paragraph 33(c) is relevant to the issue of remedy. It would assist the Tribunal to have evidence to establish the facts and clarify the nature of the claim so that the Tribunal may accurately determine whether paragraph 33(c) concerns a relevant and compensable form of requested remedy and, therefore, whether to order payment of this amount.

[68] Canada Post submits the Tribunal does not have the jurisdiction to award Ms. Boukailo compensation in this regard as a remedy because the remedy she seeks falls exclusively within the jurisdiction of the WCB. As is explained above, there is no evidence to establish that the amount specified in paragraph 33(c) is solely an amount that Ms. Boukailo expected WCB to pay or that WCB, alone, is responsible to pay this.

[69] Typically, the Tribunal would decide a jurisdictional issue as a preliminary matter. However, the Tribunal is not in a position to make factual findings about what occurred during this period or to fully assess the issue of liability for lost wages that Canada Post may possibly owe Ms. Boukailo, including for the relevant period of time after April 11, 2015, without the benefit of the evidence at the hearing. The Tribunal does not have comfort that it has a complete and correct basis to determine the facts upon which the jurisdictional argument would be argued

[70] Further, unless Ms. Boukailo establishes a *prima facie* case of discrimination at the hearing, it will not become necessary for the Tribunal to deal with the issue of remedy. On this point, Ms. Boukailo must first prove, in the face of any evidence advanced by the respondent, that she has a protected characteristic, that she suffered an adverse impact in relation to her employment, and that there is a link between the protected characteristic (disability in this case) and the adverse impact she suffered. The Tribunal will make determinations respecting whether Canada Post is liable for any of the allegations substantiated during the hearing. Assuming liability is established, remedy becomes an

issue to be determined by the Tribunal. That is because remedy flows from liability. It is in the context of liability that Ms. Boukailo must prove that she has what are, in theory, compensable losses permitted under the Act pursuant to section 53. To be awarded compensation, however, she must also prove that her alleged losses flow from the liability found by the Tribunal.

[71] For the above reasons, and, in the interests of efficiency, therefore, it is premature to deal with this issue as a pre-hearing motion. To be clear, Canada Post is free to pursue the argument in its submissions respecting jurisdiction in the future, if required.

(iv) Ruling

[72] If there is a legal basis for Canada Post to provide additional compensation in relation to the postal clerk position, separate from any amount that is exclusively owed by WCB for the same period of time, as alleged in paragraph 33(c) of the SOP, that issue will be addressed at the hearing in relation to Ms. Boukailo's wage loss claim. The Tribunal is not prepared to make a finding on this issue until all the evidence has been submitted at the hearing and when it is appropriate to address the issue of remedy.

[73] The impugned content in paragraph 33(c) and 13 of the SOP may remain. Paragraph 13 includes a statement that Ms. Boukailo had medical conditions and restrictions from her doctor that did not allow full-time work. There is nothing impermissible about this content. It may remain regardless.

[74] The issue in the motion respecting the remedy requested in paragraph 33(c) is adjourned. The Tribunal makes no ruling respecting the jurisdictional issues at this time and reserves the right to do so, if appropriate.

[75] The parties are to engage to determine whether this issue may be resolved without the need for a ruling ultimately by the Tribunal. To this end, Ms. Boukailo is to provide particulars. These particulars are to answer the following questions:

1. Ms. Boukailo is to advise Canada Post of the relevant period of any loss for purposes of paragraph 33(c);

2. Ms. Boukailo is to explain exactly what she is claiming, to include whether she is claiming a wage loss or wage loss benefits and include whether it is for a work-related or non work-related injury or medical condition;
3. If claiming a benefit, she is to identify whether it is available pursuant to a provision of the collective agreement or an applicable insurance plan, and identify the benefit provider and benefit plan, in any event;
4. If claiming a benefit, she is to identify what the benefit is for and explain whether it is calculated the same as a “straight-up” wage loss or differently, and explain how it is calculated, if she can access that information;
5. If she is seeking compensation solely for nonpayment of wage loss replacement benefits that are only paid by WCB, and if she is claiming no wage loss or benefit from Canada Post, she is to clearly confirm this in writing;
6. If Ms. Boukailo is claiming a specific wage loss in paragraph 33(c) from Canada Post in relation to the postal clerk position, she is to explain any alleged gap in compensation related to wages or benefits or any compensation impacted by reduced wages for the relevant period arising from her employment with Canada Post and how that amount is calculated.

C. Allegation that Ms. Boukailo’s Signature was Forged

[76] Canada Post asks that paragraph 29 from the Complainant’s SOP and paragraph 2(g) of her Reply, both of which allege forgery, be struck. It is undisputed that Ms. Boukailo’s term as a temporary supervisor was extended a number of times by letter. Ms. Boukailo alleges at paragraph 29 of her SOP that her signature was forged on two documents. At paragraph 2(g) in her Reply, Ms. Boukailo clarified that these were letters from Canada Post extending the term of her supervisory position. The letters were dated August 12, 2014 and October 14, 2014. The signatures are respectively dated September 2, 2014 and October 15, 2014.

[77] In her response to the motion, Ms. Boukailo further suggests that the letters themselves were created after the fact, shortly before a 2017 meeting between Canada Post and the Complainant’s Union concerning a grievance, for which these documents would have been relevant.

(i) Submissions

Canada Post's Position

[78] Canada Post asks that the content respecting forgery be struck from the Complainant's SOP and Reply on the basis that it is a new allegation and an attempt by Ms. Boukailo to expand her complaint. Canada Post's main point is that the issue respecting alleged forgery is completely unrelated to the substance of the complaint and that the allegations respecting forgery will not assist the Tribunal in determining the central issues between the parties. In short, Canada Post asks that this content be struck because it is irrelevant.

[79] Canada Post began its submissions by stating at paragraph 37 of its motion that the substance of the complaint is that the Respondent prematurely terminated Ms. Boukailo's temporary supervisor position in November 2014 because of her disability and subsequently failed to accommodate her in the postal clerk position. At paragraph 38 of its motion, Canada Post characterizes the crux of the dispute in the original complaint as follows: "The crux of the dispute between the parties is whether the Corporation discriminated against the Complainant by failing to extend her temporary supervisor position again after November 29, 2014."

[80] Canada Post continues that there is no nexus between the allegation that Ms. Boukailo's signature was forged on the letters of August 12, 2014 and October 14, 2014 and the complaint. It submits that, "[e]ven if the Complainant's signature was forged on the August 12, 2014 and October 14, 2014 letters...this will not assist the Tribunal to determine whether the Corporation discriminated against the Complainant by terminating her temporary supervisor position on November 30, 2014.

[81] Canada Post's second argument is that there is no claim that the alleged forgery of Ms. Boukailo's signature was based on a prohibited ground or related to her protected characteristic of disability and was discrimination. It submits, therefore, that the allegation is unrelated to the complaint.

[82] Canada Post further submits that this proceeding is not the proper forum to adjudicate an allegation that Canada Post forged Ms. Boukailo's signature. First, it submits that Ms. Boukailo should have filed a grievance under the collective agreement to challenge any document in her personnel file. Second, it points out that forgery is a criminal offence under the *Criminal Code* R.S.C., 1985, c. C-46. It submits that the Tribunal has no jurisdiction to determine whether forgery occurred.

[83] In the Reply it filed for the motion, Canada Post asserts that there is an alleged new material fact in Ms. Boukailo's response to the motion that is highly prejudicial. This new content is that the letters of August 12, 2014 and October 14, 2014 were created by Canada Post after the fact, in 2017, for the grievance. Canada Post submits that this should be disregarded by the Tribunal.

Ms. Boukailo's Position

[84] Ms. Boukailo says that the actions of Canada Post, including the handling of the documents about her, are relevant because they illustrate ways that she has been treated unfairly due to her temporary disability, and, to paraphrase her, "the impacts she has encountered and endured".

[85] Ms. Boukailo states she could not include the allegation of forgery in her original complaint because she did not receive the letters in question until March 2017 when she received a file from Canada Post with all her extension letters. She says that the file materials were only provided to her shortly before a meeting between her Union and Canada Post about a grievance that included issues referenced in her human rights complaint. [The Commission found that the grievance did not preclude Ms. Boukailo's complaint from being investigated and referred to the Tribunal.]

[86] Ms. Boukailo claims in her SOP that she discovered documents that she did not sign. Specifically, she says that she did not sign these letters on September 2, 2014 and October 15, 2014 because of her injury. She says that her dominant writing hand was the hand injured in the accident. She alleges that on September 2, 2014, she had a cast on her hand. On October 15, 2014, her cast had only been removed for a few days. She says that she

had “very minimal ability with my writing hand” at that time. She alleges that her signature on these documents looks identical to her signature on another document. For these reasons, she states that she believes that her signature was forged.

[87] In her response to the motion to strike, Ms. Boukailo indicated that she did not receive these letters at the time they should have been sent and did not receive them before her supervisor position was terminated. She claims she received the letters with her forged signature only in March 2017 in advance of the grievance meeting and believes that the letters were created for the meeting with the Union in March 2017.

(ii) Reasons

[88] Canada Post seeks to have content respecting the allegation of forgery struck because it is irrelevant. Relevance, therefore, is the key issue. It is important to correctly frame the key issues in this case, as the issues determine what documentation is relevant. The Tribunal notes that Canada Post has framed the first key issue in the complaint in two different ways in its submissions. At first, Canada Post correctly identifies that the substance of the complaint is that the Respondent prematurely terminated Ms. Boukailo’s temporary supervisor position in November 2014 because of her disability. However, Canada Post then strays from this characterization and reframes the primary issue as being whether it discriminated by failing to extend Ms. Boukailo’s temporary position again after November 29, 2014.

[89] The allegedly forged documents, if authentic, would have been written earlier, in August and October 2014. They dealt with the termination date of Ms. Boukailo’s temporary position, not its renewal after November 29, 2014. If the only issue to be determined concerned the renewal of the temporary position, the documents would be of questionable, if any, relevance. However, the lack of renewal of the temporary position is not the first main point asserted by the Complainant in her complaint.

[90] The main and first point in contention in the original complaint is the allegation that the supervisory position was terminated prematurely by Canada Post, without notice, on December 1, 2014. Ms. Boukailo alleges that the position was not due to end on that date

(or November 29, 2014 as alleged by Canada Post) and/or that she did not have notice of the termination date of the position in advance. Premature termination of a position of employment without notice is a different issue than non-renewal or non-extension of a temporary position or the suggestion that Canada Post should have ultimately found another similar supervisory position for Ms. Boukailo. The first point to resolve in relation to Ms. Boukailo's temporary position is, therefore, whether there was a termination date and whether Ms. Boukailo received notice of that date in advance. Whether the contract should have been renewed or extended following its termination date (assuming the existence of a termination date is proven) is a sequential issue.

[91] Canada Post submits that the issue respecting alleged forgery is completely unrelated to the substance of the complaint. However, Canada Post does not reconcile this submission with content in its defence of the complaint. In paragraphs 14, 15, 21 and 22 of its SOP, Canada Post alleges that Ms. Boukailo's temporary position was regularly extended by written letters and that in each case she was informed of the anticipated end date. Canada Post asserts that Ms. Boukailo was given the end date of her temporary position in the Fall of 2014. It says that this was communicated to her via the "final extension letter dated October 14, 2014", from which it then quotes, stating "your extension in this role... is expected to continue until November 29, 2014." Canada Post further asserts that Ms. Boukailo's allegation that she did not receive a written notice regarding the expiry of her temporary term "is not true." Whether Ms. Boukailo received and signed the letter of October 14, 2014 is highly relevant. If Ms. Boukailo did not receive the letter of October 14, 2014, whether she received the letter of August 12, 2014, and its contents, and signed that document, is highly relevant. The letters of October 14, 2014, and earlier similar letters, in particular, the letter of August 12, 2014, are directly relevant, if not foundational, to Canada Post's defence in its SOP.

[92] Canada Post may choose to change its defence. However, it appeared to the Tribunal that Canada Post was poised to rely upon the signatures on the letters to establish that Ms. Boukailo received the letters and acknowledged receiving notice of the extension of her position from August through to November 2014 and, therefore, that she had notice that the term position of supervisor would terminate on November 29, 2014. Canada Post

appeared to intend to rely upon these documents to defend the allegation that it prematurely terminated Ms. Boukailo's position on December 1, 2014, without notice to her. The documents appear to be key evidence to its assertion that it did not terminate the supervisor position for discriminatory reasons and that, instead, the position came to an end on its maturity date. Canada Post further submits that the position of supervisor was not renewed for business reasons. The letters appear in its List of Documents, in which parties are required to disclose all arguably relevant documents.

[93] Accordingly, the Tribunal assumed that Canada Post would wish to have these letters admitted into evidence at the hearing. However, in its Reply to Ms. Boukailo's submissions for the motion, Canada Post states that, if it seeks to rely upon the letters at the hearing before the Tribunal, it will have to establish the authenticity of the documents to have them entered as exhibits.

[94] Canada Post's submission on this point includes the possibility or implication that it may not put these documents into evidence. Canada Post may choose to not put the letters into evidence in support of its defence. If so, the issues about these letters may not need to be determined. However, if Canada Post chooses not to rely upon the letters, that does not necessarily mean that the letters will not be submitted as evidence. Ms. Boukailo, who received the letters from Canada Post, may request to submit the letters into evidence to support her allegations.

[95] Returning to the issue of relevance to the substance of the complaint, based on the information available to the Tribunal, the letters in question are directly relevant to the issue of whether there was a termination date and whether Ms. Boukailo received notice of that termination date, and, if so, when. It would be patently incorrect to conclude that these documents are ancillary to or of no relevance to the substantive issues in the complaint, and that, therefore, the forgery allegation is ancillary or irrelevant.

[96] At the very least, it cannot be assumed at this stage that the documents are irrelevant or that they will not be offered as evidence. It, therefore, cannot be assumed that the issues around these letters will not need to be determined. The Tribunal is not prepared to strike the allegation of forgery of these letters in these circumstances.

[97] Before leaving the point that relevance arises from Canada Post's defence, the Tribunal wishes to return to the submission made by Canada Post respecting the burden of proving relevance. Canada Post submits that Ms. Boukailo has not explained in her documents how a forged signature on a letter extending her temporary position is related to her allegations of discrimination. Given Canada Post's defence and the fact it brought this motion, the burden of persuasion is upon Canada Post.

[98] Further, the submission that the Complainant has not established how the alleged forged signatures are discriminatory or related to a prohibited ground under the Act is a "straw person" argument. Forgery is relevant to the potential alteration of relevant evidence. Forgery does not necessarily have to be a specific form of discrimination, it is relevant to whether Canada Post proceeded in good faith in this proceeding; but to the extent it is an allegation of discrimination it is obviously said to be related to disability and Ms. Boukailo need not explain, any more than she has, how a forged signature on a letter extending her temporary position is related to her allegations of discrimination. Given the defence articulated in its SOP, Canada Post has not explained how a forged signature on these letters is not related to Ms. Boukailo's allegation that it was a discriminatory practice for Canada Post to terminate her supervisor position prematurely. In any event, the allegation is relevant to key potential evidence.

[99] Canada Post submits that, even if the signature on the letters is forged, that is not proof of discrimination. This is a further argument by Canada Post that forged signatures on key evidence is not relevant. It is not persuasive in this latter regard.

[100] The Tribunal agrees that proof of forgery of these letters is not necessarily proof of discrimination. The reason for such forgery, assuming it is proven, may have nothing to do with discrimination. However, depending on the circumstances, proof of forgery could have implications for issues that are dependent upon credibility. If proven, forged signatures on business records could be evidence of bad faith and unfair dealing and, therefore, be consistent with or circumstantial evidence of discrimination. If proven, forgery of a complainant's signatures could be a discriminatory practice, depending on the reason and motivation. The use made of the documents could be relevant to the claim of discrimination. Further, if it is proven that a complainant did not sign significant documents, this could be a

basis for a submission that someone within the respondent engaged in a discriminatory practice wilfully and that special damages should be awarded pursuant to section 53(3) of the Act.

[101] The issue is not whether forgery may or may not be proof of discrimination at this stage of the proceeding. What is relevant is whether documents that are highly relevant to a human rights proceeding have been altered or created outside of their purported use.

[102] The Tribunal turns to Canada Post's submissions that the Tribunal lacks jurisdiction to deal with this allegation or should leave it to be referred elsewhere. The Tribunal is required to make evidentiary determinations and assess alleged material facts in proceedings before it. The Tribunal has undisputed jurisdiction to determine the authenticity, validity, and reliability of any document or signature or evidence arguably relevant to a complaint. This extends to determinations of whether documentary evidence has been tampered with or altered. This includes the issue of whether there is a forged signature on these letters.

[103] Ms. Boukailo is not required, as is suggested by Canada Post, to refrain from making this allegation, which is arguably relevant to her complaint. She is not required to pursue instead what is likely a time-barred opportunity to grieve the inclusion of the impugned letters in her personnel file. Similarly, the Tribunal does not overstep its jurisdiction and wrongfully assume the jurisdiction of a criminal court, as suggested by Canada Post's submissions, in assessing the authenticity of evidence and drawing factual and legal conclusions about whether evidence was forged or altered in proceedings before it.

[104] Lastly, Canada Post asserts that there is a new alleged material fact in Ms. Boukailo's response to the motion that the letters of August 12, 2014 and October 14, 2014 were created by it for the grievance, in 2017. It submits that this is highly prejudicial and should be disregarded by the Tribunal.

[105] From the filing of her SOP, Ms. Boukailo has been consistent in her allegation that she did not receive the letters at the time they should have been sent, according to their date. She has provided further particulars in her response to the motion respecting how she says she acquired possession of these letters in 2017.

[106] Canada Post objects to Ms. Boukailo's expression of belief that these letters were created for purposes of the grievance rather than created at the relevant time for her complaint. It asks the Tribunal to disregard the allegation because it is prejudicial. Canada Post does not explain how the allegation itself is prejudicial. Perhaps the prejudice is thought to be arise because there is an implication that tampered evidence or business records were used by Canada Post in the grievance process before being used here. However, there is no specific assertion respecting the use of the documents in the grievance process, rather the allegation concerns a motivation for the alleged creation of the documents. In this regard, the most important issue is whether the letters were prepared, delivered and signed around the time they are dated.

[107] The evidence at the hearing may be that the letters were not forged at all. The evidence may be that the letters were created on or before their stated date. However, if either of these letters were created after the fact, that is relevant. The timing of the creation of the letters is, therefore, relevant. If the evidence is that the letters were created after the fact, the motivation for their creation could be relevant. On the other hand, it could be irrelevant. That would be determined, if required.

[108] The point is that Ms. Boukailo's expression of belief concerning the creation of these documents for the grievance arises from and does not appear to be any more prejudicial than the original allegation that her signature was forged on the letters presumably for purposes of her human rights complaint. The Tribunal is not prepared to strike alleged arguably relevant facts that are pled in advance of the hearing, before receipt of any evidence in this regard.

[109] The Respondent further asks the Tribunal to disregard an allegation, which, if proven, is relevant. A request to disregard such an allegation should fail where the objecting party has not offered evidence respecting the merits of the issue or the prejudice it alleges. A request that the Tribunal disregard an allegation in advance of the hearing invites the Tribunal to proceed unfairly against the opposing party. That the Tribunal will not do.

(iii) Ruling

[110] For the above reasons, the Tribunal declines to grant Canada Post's motion to strike paragraph 29 of Ms. Boukailo's SOP and paragraph 2(g) of her Reply.

D. Allegation that Canada Post Retaliated**(i) Introduction**

[111] As noted above, Canada Post's motion requests that content in Ms. Boukailo's SOP respecting a new allegation of retaliation be struck. In the alternative, Canada Post requests an Order requiring Ms. Boukailo to provide better particulars of her allegation.

[112] Canada Post advanced three procedural objections during its motion in addition to submissions respecting the merits of its motion. It also took the position that it would not provide particulars to indicate its specific position respecting certain issues at this time. These matters are appropriate to address at this juncture, within the context provided by the retaliation allegations.

[113] Canada Post says it is objecting to what it describes as many alleged new material facts in Ms. Boukailo's response to the motion. It says that most of these concern the issue of retaliation. The new allegation of retaliation is being selected to explain and illustrate the Tribunal's reasoning respecting Canada Post's objections, where relevant for this decision, and the Tribunal's determination to not act on those objections in this motion. The Tribunal will then address the merits of the request to strike the retaliation allegations.

(ii) The Objections by Canada Post

[114] Canada Post's first objection is that Ms. Boukailo's submissions in response to the motion do not directly respond to the legal issues that are relevant to a motion to strike content in her SOP. For example, she does not address the law concerning when it is appropriate to strike content from a SOP and when it is not.

[115] In the same vein, at para 3 of its Reply, Canada Post submits that her response “largely repeats and reiterates her position on the merits of the Complaint, rather than establishing how the new allegations raised in her SOP and Reply are connected to the Complaint and ought to be heard by the Tribunal”. Canada Post took the position on several occasions in its submissions that it was up to Ms. Boukailo to explain her position to counter its initial submissions in the motion. It implied that there was a burden upon her to do so that was not met and that, therefore, it should be successful on its motion.

[116] Canada Post does not merely argue that Ms. Boukailo’s approach is legally incorrect and point to the impact of this approach. Canada Post submits that the appropriate result is that the Tribunal ought to disregard Ms. Boukailo’s submissions in response to the motion on the basis that they relate to the merits of the complaint. The reason offered by Canada Post, also at para 3 of its Reply, is that “(t)he Tribunal does not consider the merits of new allegations when it determines whether to allow a motion to strike or a motion to amend the original complaint”.

[117] Beyond its first objection that Ms. Boukailo has not responded with applicable legal arguments or established how the new allegations raised in her SOP and Reply are connected to the Complaint, Canada Post objects that Ms. Boukailo wrongly included additional new material facts in her response to the motion that were not in the complaint, her SOP or the Reply she filed to Canada Post’s SOP. At para 4 of its Reply submissions, Canada Post submits that Ms. Boukailo is “not entitled to raise new material facts and particulars in support of her Complaint at this stage of the Tribunal’s proceeding, nor is it appropriate to do so in response to the Corporation’s motion to strike.” Canada Post objects to Ms. Boukailo’s reliance on these new facts at the hearing, because they are “untimely”, and Canada Post has not had an opportunity to respond.

[118] Canada Post submits that the Tribunal should disregard these new material facts in the response to the motion in deciding how to rule on its motion to strike. Canada Post states that it will not respond to these new material facts at this time. However, it reserves its right to respond further.

[119] Canada Post also states the following at para 5: “Some of these new material facts and particulars also relate to aspects of the Complaint that the Respondent agrees the Tribunal ought to inquire into and are irrelevant to the motion to strike.”

[120] In its third objection, Canada Post argues in its Reply submissions that the new retaliation allegations should not be permitted because the same allegations are being addressed in a different forum. Canada Post says that in paragraph 32 of Ms. Boukailo’s response to the motion she acknowledges that her Union has filed two grievances. Canada Post says that Ms. Boukailo alleges that her supervisor retaliated against her by issuing essentially a letter of discipline on September 1, 2020, at paragraph 15 of her SOP, and at paragraph 8(a) of her Reply, complains that he was performing individual work measurement upon her on October 15, 2020. Canada Post alleges that the grievances involve substantially the same facts and issues as Ms. Boukailo’s retaliation allegations. It points out that at paragraphs 27 and 30 of her response to the motion, she claims that the alleged retaliation violated the collective agreement. Canada Post states that the Complainant is seeking a number of remedies through the arbitration including remedies for lost wages, benefits and damages that could be awarded by the Tribunal. Canada Post asserts that both grievances are active and its expectation that they will be scheduled to go to arbitration.

[121] Canada Post submits that Ms. Boukailo should not be permitted to pursue both a human rights complaint and procedures available pursuant to the collective agreement at the same time over the same alleged discriminatory practices. Canada Post submits that the Commission has the authority under section 41(1)(a) of the Act to decline to address a complaint if a complainant should exhaust grievance procedures available to them, but the Commission did not have an opportunity to consider the retaliation allegations. Canada Post submits at paragraph 16 of its Reply to Ms. Boukailo’s response to the motion that the Tribunal should proceed on the basis that it is the intent of the Act to ensure that complainants do “not pursue parallel proceedings in two different forums simultaneously for the same alleged violations.” Canada Post suggests that the Tribunal should dismiss the retaliation allegations.

(iii) The Tribunal's Approach to Procedural Objections

Practical & Legal Implications

[122] The Tribunal agrees that, in her response to the motion, Ms. Boukailo's focus is upon the alleged merits of the claim of discrimination, including retaliation. This comment may be made about most if not all of the submissions that she filed in response to the motion. The issue is what practical and legal impact this has on this motion.

[123] Canada Post's submission goes beyond arguing that the other party is incorrect and explaining why. Canada Post asks that the Complainant's submissions be disregarded. This has implications for procedural fairness.

[124] With respect to its objection to what it submits is the inclusion of a "significant amount of new material facts", Canada Post did not identify in its Reply what it alleged were new material facts in Ms. Boukailo's response to the motion that were not in her complaint, her SOP, or her Reply, with one exception. The one exception is in relation to the issue of forgery, where Canada Post identified that it objected to the specific allegation that the reason it forged Ms. Boukailo's signature was for purposes of the grievance. This issue is addressed in the proceeding section of these reasons. Otherwise, apart from indicating that much of the many new alleged material facts concern the issue of retaliation, Canada Post does not indicate what it considers to be the new and objectionable material facts in Ms. Boukailo's response to the motion for purposes of its objection. The implication of this is that when Canada Post asks the Tribunal to disregard the Complainant's submissions, it is essentially asking the Tribunal to disregard most or all of her response to its motion.

Rulings Upon Objections

[125] Canada Post placed significant focus on what Ms. Boukailo did that was "wrong" in her response to the motion. That self-represented parties or under-represented parties with no effective legal knowledge or skills sometimes take positions or seek relief without fully explaining their legal basis or expressly identifying all factual details without some direction at first is not uncommon. The use of active adjudication in proceedings where that is in the

interests of justice and procedural fairness is also common. The Tribunal still must make a decision, despite the challenging circumstances, and will employ active adjudication where warranted to address the real issues in dispute between the parties, as required by Rule 1(1) and (2) of the Rules. The Tribunal is conscious of the obligation to provide self-represented parties who lack either expertise or experience in legal matters with appropriate procedural supports to ensure their case is heard on the merits.

[126] The Respondent's focus is upon persuading the Tribunal to disregard Ms. Boukailo's submissions for not being relevant to the motion. It says that the Tribunal ought to disregard her submissions. It also submits that she is not entitled to provide additional material facts in her response to the motion and that this is not appropriate. The implication is that the Tribunal should disregard that new information. The Tribunal is, therefore, addressing this requested remedy first. Usually, the Tribunal's initial focus is on the issue of whether the Respondent has been persuasive respecting the merits of its motion. In this case, the Tribunal's initial focus would typically be on Canada Post's explanations respecting why content in the Complainant's SOP should be struck. It only becomes necessary for the Tribunal to act upon or make a ruling about the Complainant's submissions for the motion when those submissions may be determinative of the outcome of the motion.

[127] As explained, Canada Post's first objection is that Ms. Boukailo's submissions do not directly respond to the legal issues on a motion to strike and that she does not establish in her submissions how the new allegations raised in her SOP and Reply are connected to the Complaint. Canada Post emphasizes that the Tribunal should disregard the complainant's submissions because, by focusing on the merits of the complaint rather than the motion, they are not legally relevant. By "disregard", it is not entirely clear whether Canada Post is asking the Tribunal to not be influenced by Ms. Boukailo's submissions, or to decline to continue to read and consider her submissions. It does seem that the use of the word "disregard" in the context of the Respondent's submissions is dismissive of the need to consider the Complainant's submissions. In either event, the Tribunal does not agree that the objections by Canada Post lead to the conclusion that Ms. Boukailo's response should be disregarded. There are both substantive and procedural reasons for this.

[128] The substantive reason for rejecting Canada Post's submission on this point is explained below in the context of the merits of the motion to strike the retaliation allegations. Essentially, Ms. Boukailo's submissions have some relevance to this motion for the reasons provided.

[129] The procedural reasons for not disregarding Ms. Boukailo's response lies in the requirement of fairness. For one thing, as outlined elsewhere in these reasons, Canada Post addresses the merits of allegations in the complaint on occasion in its motion. It does so below in relation to the retaliation allegations. It also provides additional facts in its motion materials. Nonetheless, the Tribunal is considering Canada Post's submissions for purposes of this motion. It would be unfair to not do the same thing for Ms. Boukailo.

[130] The Tribunal does not accept Canada Post's position that Ms. Boukailo is not entitled to raise new material facts and particulars in support of her complaint at this stage of the Tribunal's proceeding. The Tribunal does not accept that it is inappropriate for her to do so in response to the motion to strike. Parties are permitted to submit evidence and additional information in addressing a motion. That is precisely what Canada Post did, for example, in providing copies of grievances with its motion materials. Apart from the allegation that Canada Post caused her injury, there is nothing that is irrelevant to the complaint or untoward in Ms. Boukailo's response to the motion such that she should not be allowed to rely on this material for the motion. Whether anything provided by a party in their motion materials is persuasive is one thing; whether material should be disregarded for being inappropriate or for lack of entitlement to present it is another. Everyone is entitled to a fair opportunity to present their case.

[131] While it is correct that the Tribunal does not consider the merits of the complaint in a motion of this nature, that does not equate to disregarding the relevance of a party's submissions. The Tribunal has an obligation to fully consider the submissions of each party, and the implications of those submissions, otherwise, it would proceed contrary to the principles of natural justice. In the process of considering the motion, it would be procedurally unfair to disregard relevance within the Complainant's submissions because of what they do not contain. Similarly, it would be unfair to disregard the Complainant's submissions because of what they do contain, without a persuasive case being made out by Canada

Post that it is prejudiced by the inclusion of alleged objectionable material and that there is no other procedural remedy to alleviate that prejudice. The Tribunal's decision will be based upon what is relevant, but the Tribunal will not decline to consider submissions because a party alleges that they are not relevant. The suggestion that some or all of a submission is not relevant does not justify ignoring any parts, aspects or implications of a submission that may be relevant. That content is "not relevant" in one respect does not justify seeking the remedy of "disregarding" that content, particularly when it is relevant in another respect. For similar reasons, the Tribunal will not decline to consider submissions because a party alleges that they are inappropriate without demonstrating why.

[132] It would be particularly unfair for the Tribunal to disregard Ms. Boukailo's submissions respecting the merits of her complaint as Canada Post requests, as, by failing to particularize its objection to irrelevance, Canada Post essentially asks the Tribunal to disregard most or all of Ms. Boukailo's response to its motion. As explained below, her response is responsive to the motion at least in part.

[133] At the same time as it advances this objection, Canada Post conversely explains that some of the new material facts and particulars do relate to the complaint and are not included in the motion to strike. As explained, Canada Post did not identify what content in Ms. Boukailo's response falls into the category of new facts that it believes should be the subject of inquiry and which do not. It has not identified the specific subject matter of its objection. While not identifying the alleged new material facts relevant to its objection, Canada Post also submits that Ms. Boukailo should not be able to rely upon them when the hearing on the merits proceeds.

[134] Canada Post does not provide reasons for its decision to not identify the specific subject matter of its objection respecting the introduction of new material facts in the Complainant's response to the motion. As indicated, Canada Post states that it will not respond to the new material facts but reserves its right to respond further. Having brought a motion, with respect, the Respondent should not assume that it is free to not address issues that are or may be required for determination of the motion now.

[135] Canada Post is ably represented by counsel. The Tribunal will not guess what Canada Post's position is respecting what should remain nor how its objections could apply to each piece of content, across the board, in the Complainant's response to the motion. Further, when objections arise during a motion, the Tribunal should have an opportunity to decide how material those objections are to its ruling on the motion and whether the new issues can or should be separated from the motion.

[136] Lastly, as explained, Canada Post objects to the inclusion of retaliation allegations because it alleges that the same allegations are being addressed in a different proceeding, namely through grievances filed pursuant to a collective agreement. Canada Post is taken to know about grievances within its organization and certainly should be knowledgeable about grievances it describes as "active" that it expects will be scheduled for arbitration. Canada Post had notice that the retaliation allegations concerned what it describes now as "the same facts and issues" in the grievances because Ms. Boukailo included materials facts about the retaliation alleged on September 1, 2020 and October 15, 2020 in her SOP at paragraph 15 and in her Reply at paragraph 8(a) respectively. Canada Post references this content in its motion submissions and clearly had possession of this information when the Complainant's SOP was filed. Canada Post likewise has had notice of what the grievances concerned, based on the grievance forms it submitted with its Reply to the motion. Canada Post should have raised its argument respecting the proper forum for the retaliation allegations in its motion, and not waited until Ms. Boukailo filed her response to the motion. Because Canada Post did not include this argument in the initial submissions and materials for its motion, Ms. Boukailo has had no opportunity to respond to this issue. That is procedurally unfair. The Tribunal declines to uphold Canada Post's objection to forum as it is not procedurally fair to Ms. Boukailo.

[137] This objection is also over-ruled based on its merits. These grievances were filed after September 1, 2020 and October 15, 2020, after this complaint was referred to the Tribunal on July 9, 2020. The Tribunal is seized of the complaint by virtue of the Commission's referral. It follows that the Tribunal is seized with all matters related to this complaint including any related retaliation allegations that may arise.

[138] It goes without saying that any retaliation allegations that arise after a complaint is referred to the Tribunal will not have been considered by the Commission. This is not a reason for the Tribunal to decline to hear the allegations, as explained below in relation to the merits of the motion to strike the retaliation allegations. The Respondent has offered no authority for the proposition that it would be legally appropriate to sever retaliation allegations relevant to a complaint properly before the Tribunal because a grievance involving the same facts and issues in relation to retaliation has been filed pursuant to a collective agreement.

[139] The Tribunal also notes that over a year has passed since the grievances were filed. The Respondent has not provided evidence to the Tribunal to establish that the grievances were formally referred to arbitration, which requires the consent of the Union, and has not advised the Tribunal that the arbitrations have been scheduled for hearing since. Should these grievances proceed to arbitration and hearings be scheduled, if there is an issue of overlap or mootness given this proceeding, that can be raised with the arbitrator.

[140] Further, the Tribunal is not prepared to find that the grievances involve the same facts and issues based on the materials filed for the motion. This consists of the Respondent's submission to this effect, a copy of each grievance and a portion of the applicable collective agreement. Grievance forms are not pleadings. They are often written informally, in broad, non-specific terms, with every possibly relevant provision in the collective agreement listed by the Union so that it is positioned to argue that content is relevant at the hearing, which appears to be the case here. There is no express reference to discrimination on the grievance forms, and no description of alleged discrimination in the factual description or in relation to the remedies requested, only a reference to sections of the collective agreement and a general reference to "other legislation". The sections referenced in the collective agreement are those which preclude discrimination and harassment in the workplace and are commonly included on grievance forms.

[141] The grievance forms are not reliable evidence of what is properly within the subject matter of whatever issue ends up before an arbitrator, assuming the cases go to arbitration. The Tribunal is not prepared to conclude that it is the wrong forum to hear and decide the retaliation allegations or that the grievances are a reason to not permit the retaliation allegations to be added to an existing human rights complaint.

[142] Finally, the Tribunal is resolving the objections related to Canada Post's motion on their merits, including the objection to forum, based on the materials and information already offered by the parties, rather than requesting further submissions from Ms. Boukailo, and reply. This approach is the most expedient means of resolving the procedural issues that were fully identified by the Respondent, to move this case forward to hearing.

(iv) The Relevant Content Respecting Retaliation

[143] The first step is to consider whether Canada Post has met its burden of establishing that the new allegations are not connected to the complaint, as the party bringing this motion. The content respecting retaliation is in paragraphs 15, 28 and 32 of the Complainant's SOP and in paragraphs 8(a) and (b) of her Reply to the SOP filed by Canada Post.

[144] At paragraph 15, Ms. Boukailo alleges that, after she declined mediation at the Tribunal, she was given a letter of instruction, said to be a form of discipline, by her supervisor and that he started treating her differently than other workers, as of September 1, 2020. Paragraphs 28 and 32 state, respectively, that "the Respondent has begun to retaliate against me" and reference "retaliatory practices in the workplace" because she filed a human rights complaint. In the Reply she filed to Canada Post's SOP, Ms. Boukailo further alleges in paragraphs 8(a) and (b) that on October 15, 2020 she was "accused of things that were not done", that Canada Post is "harassing, intimidating and singling" her out, that Canada Post is performing individual work measurements on her alone in the workplace and that she has been disciplined without reason.

(v) Submissions

Canada Post's Position

[145] Canada Post submits that Ms. Boukailo was obligated to clearly outline the scope of her complaint when she filed it. It submits that she should not be permitted to enlarge the scope of her complaint at this stage of the proceeding. Canada Post asserts that these are new allegations that are not truly related to the original complaint and that including these

allegations will not assist the Tribunal in determining the disputed issues between the parties.

[146] Canada Post acknowledges that the Tribunal has held that it can be appropriate to allow a complainant to amend their complaint or to add allegations of retaliation. Canada Post acknowledges that refusing an amendment should only occur where it is plain and obvious that the retaliation allegations cannot succeed. However, it submits that there are three conditions that must be met. At paragraph 43 of its submissions, it suggests that these conditions are:

- (1) The retaliation allegations must be linked to the allegations giving rise to the original complaint;
- (2) The allegations must disclose a tenable claim of retaliation; and
- (3) The respondent must have sufficient notice of the allegations so that it is not prejudiced by the addition of the same.

[147] Canada Post relies upon *Letnes v Royal Canadian Mounted Police*, 2019 CHRT 41 at paras 17-18, *Saviye v Afroglobal Network Inc. and Daramola*, 2016 CHRT 18 at paras 16-17, and *Simon v Abeweit First Nation*, 2018 CHRT 31 (“*Simon*”) at para 53, in this regard.

[148] Canada Post made submissions in relation to two of the three above conditions to inclusion of a retaliation complaint in an existing complaint. First, Canada Post submits that there is no link between the retaliation allegation and the allegations giving rise to the initial complaint. Second, Canada Post submits that certain retaliation allegations are untenable based on the content of Ms. Boukailo’s SOP and Reply. Canada Post did not make submissions respecting the issue of prejudice.

[149] While acknowledging that the Tribunal should not consider the merits of the retaliation allegations, Canada Post offered submissions respecting what Ms. Boukailo would need to establish at the hearing to successfully prove that Canada Post retaliated against her based on the *Simon* decision at paras 50-51. It made related submissions to the effect that Ms. Boukailo had not established certain facts in order to be successful. In this regard, it alleges that the necessary information or explanation was not provided in the retaliation allegations as drafted in her SOP and Reply.

[150] Canada Post further submits that the Tribunal should disregard new material facts in Ms. Boukailo's response to the motion and must determine whether the allegations are tenable based on the material facts in her SOP and Reply. Specifically, Canada Post submits that Ms. Boukailo must establish that her complaint was a factor or reason for her supervisor taking adverse actions such as issuing a letter of discipline. Canada Post says that Ms. Boukailo has not established this and has not referenced anything in her SOP or Reply that establishes the connection between the alleged retaliation and her complaint. Canada Post relies on *Brickner v Royal Canadian Mounted Police*, 2018 CHRT 2 ("*Brickner*") to argue that the allegation of retaliation should not be permitted because it was insufficiently particularized.

[151] As indicated, Canada Post asks that the allegations respecting retaliation be struck from Ms. Boukailo's SOP and her Reply because they are general and unparticularized. Alternatively, Canada Post requests that Ms. Boukailo be required to provide further and better particulars of her allegations of retaliation.

The Commission's Position

[152] The Commission submits that the allegations of retaliation relate to events that occurred after the Commission referred her complaint to the Tribunal, that they were raised on a timely basis and that there is no basis to strike them. The Commission argues that striking the allegation of retaliation is inappropriate. It suggests that ordering further and better particulars is a more appropriate measure, one that is aligned with the Act's objective that the Tribunal ensure that the parties have a full and ample opportunity to be heard. The Commission submits that Canada Post will have a sufficient opportunity, at this preliminary stage of the process, to disclose relevant documents and to respond.

[153] The Commission elaborates that it "would be impractical, inefficient and unfair to require individuals to make allegations of reprisals only through the format of separate proceedings": *Polhill v Keeseekoowenin First Nation*, 2017 CHRT 34, para 17 ("*Polhill*"). The Commission suggests that, accordingly, the Tribunal should in general "authorize an

amendment to add an allegation of retaliation unless it is plain and obvious that the allegations in the amendment sought could not possibly succeed”: *Polhill*, para. 17.

[154] The Commission asks that the Tribunal dismiss Canada Post’s motion to strike Ms. Boukailo’s retaliation allegations. Alternatively, it argues that Ms. Boukailo should be required to provide further particulars.

(vi) Reasons & Ruling

[155] The Tribunal agrees with *Polhill* that it would be “impractical, in efficient and unfair” to require that an allegation of retaliation proceed through a separate proceeding.

[156] This brings us to the Respondent’s argument that retaliation is a new allegation that is not truly related to the original complaint. It points out that retaliation is not mentioned in the original complaint.

[157] Retaliation is a stand-alone discriminatory practice and breach of the Act pursuant to section 14.1. Section 14.1 states: “It is a discriminatory practice for a person against whom a complaint has been filed... to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.” (emphasis added) Retaliation is defined in section 14.1 to be a discriminatory practice by a person against a complainant because they filed a complaint. This discriminatory practice can only occur after a complaint is made. An objection by a respondent that a complaint did not include retaliation when it was filed with the Commission is not a reason to disallow such content afterwards given what is stated in the Act.

[158] Retaliation is a unique, stand-alone discriminatory practice. However, Canada Post submits that the retaliation allegations must be linked to the allegations giving rise to the original complaint. To the extent that retaliation is said to occur in response to the filing of a complaint, the same protected characteristic is implicitly engaged. Retaliation is for making a complaint that arises from a protected characteristic. Filing a complaint of retaliation is by its nature related to the original complaint based on its protected characteristic(s), and, in that way, is causally linked to the grounds of discrimination in the complaint.

[159] The premise that it is a pre-condition that retaliation allegations be linked to the allegations giving rise to the original complaint must be considered in the context of how retaliation is defined in the Act. As a standalone discriminatory act, retaliation need only be said to arise as a result of the existence of a complaint. Retaliation may occur in many different ways than the original discrimination is alleged to have occurred. The specific allegations of retaliation do not have to fit within the same discriminatory practices or types of practices already identified in the complaint. There is nothing in the Act that limits retaliation to repeated conduct. Retaliation is a discriminatory practice in its own right and can arise based on its own facts.

[160] Canada Post complains that new information respecting retaliation is provided in Ms. Boukailo's response to the motion. Retaliation is by its nature a new allegation. All the allegations respecting retaliation in her SOP are new allegations that were not in the complaint when it was filed with the Commission. Likewise, allegations included in Ms. Boukailo's submissions to the motion to explain the merits of her retaliation allegation, beyond what was stated in her SOP and Reply, are new particulars. They fall under the umbrella of the new allegation of retaliation. Canada Post's argument that the retaliation allegations must be linked to the allegations giving rise to the original complaint, which implies that something more is required as a link, is not a persuasive basis to strike the allegation of retaliation from Ms. Boukailo's SOP. The original allegations and the retaliation allegation are sufficiently linked by reason of the complaint being filed, of it being attributed as the cause for her supervisor's alleged conduct and by the provision of at least some particulars of the specific allegations.

[161] A significant portion of Canada Post's submissions concern the merits of the allegation of retaliation, to the effect that the retaliation allegations, as drafted in the SOP and Reply, cannot establish retaliation. Canada Post is, with respect, blurring the line between whether the allegation is tenable and whether Ms. Boukailo can establish the allegation on its merits at the hearing.

[162] Canada Post refers to Ms. Boukailo's allegation that retaliation relates to her refusal of mediation. Canada Post states that it had no knowledge she had refused mediation. First of all, other paragraphs in her SOP make it clear that the allegation of retaliation is said to

have begun after the complaint was filed. Secondly, Canada Post's knowledge respecting her refusal of mediation is a matter that requires evidence at the hearing. It is not sufficient for Canada Post to state facts in its submission that are not supported by evidence and which invite a degree of inference and speculation by the Tribunal. For example, the Tribunal is invited by Canada Post's submissions to assume that no one advised anyone at Canada Post that Ms. Boukailo declined mediation. Alternatively, its position invites the Tribunal to assume that no one at Canada Post figured out that Ms. Boukailo declined mediation because she did not participate in mediation after it was offered to the parties or through some other means.

[163] Canada Post complains that Ms. Boukailo does not state how her supervisor became aware that she declined mediation. Complainants are not privy to everything that occurs in their workplace and do not need to know exactly how a particular person found out about a human rights complaint or a refusal of mediation to proceed with an allegation that the person is retaliating because a complaint was filed. Most often a complainant would not have access to how a manager or supervisor acquired information. That is not a required evidentiary standard, at least at this stage. For purposes of this motion, the question is whether the allegation, if true, is tenable. The Tribunal is able to draw an inference based on a temporal connection between two alleged events or facts because of their proximity in time and does so when it is appropriate. In this case, Ms. Boukailo states in her SOP that her supervisor had recently started retaliating against her "right after I refused the option of a Mediation session." (emphasis added) Ms. Boukailo made a temporal link in her allegation. The Tribunal need not consider the merits of this allegation. It only need be satisfied that it presents a tenable claim of retaliation. It does.

[164] Ms. Boukailo has made several factual connections between the allegation of retaliation and her complaint and has provided two examples involving her supervisor. If the alleged retaliator is a supervisor or manager, it is a plausible inference that they may have knowledge that a complaint has been filed because of internal discussions or investigation. Whether they do or not is a matter for evidence at the hearing.

[165] Ms. Boukailo asserts in her response to the motion that the retaliation is ongoing and that she is "required to work under the management group that I have grieved against." She

alleges that her supervisor “works under the same Management group that is part of the discriminatory practice”. She has inferred that the supervisor has knowledge from this factual basis. For purposes of the motion, where the test involves whether the allegation is tenable, this is sufficient.

[166] Ms. Boukailo asserts that her supervisor having no knowledge of her complaint “does not absolve from responsibility.” It is not clear exactly what she means by this. However, if she means that her supervisor does not need to have knowledge of her complaint in order for the Tribunal to make a finding that the supervisor engaged in retaliation of his own volition, she is mistaken. Canada Post correctly points out that to establish retaliation at the hearing, there must be a finding by the Tribunal that a respondent or person within the respondent who was involved in a subsequent incident had knowledge that a complaint was filed. Canada Post’s error lies in its inference that this is the extent of Ms. Boukailo’s submission, when it is not.

[167] As noted, Canada Post also places reliance on *Brickner* where the Tribunal found that allegations were not sufficiently particularized to establish a claim and did not permit the complainant to have a further opportunity to amend to correct the situation. The facts in *Brickner* were quite different. The complaint already included allegations of retaliation. The complainant sought to add more allegations of retaliation, after an unsuccessful attempt at a further Order for disclosure from the Tribunal. The Order for disclosure was declined based on relevance. The complainant then brought a motion to add to the allegations of retaliation which would have altered what was relevant and re-opened the disclosure issue. At para 36, the Tribunal explains that the complainant had been advised earlier by the Tribunal during case management of the importance of providing specific details in her allegations. The Tribunal found that the complainant had already been given a fair opportunity to amend her SOP, at para 37, and did not believe that the complainant would perfect her allegations if she were afforded another opportunity, at para 9. Those are not the circumstances here. *Brickner* is distinguishable.

[168] There is no basis to strike the allegation of retaliation here. As opposed to striking her allegation, there is a reasonable and fair procedural alternative, namely the provision of further particulars, to the extent that may be required, as requested in the alternative by the

Respondent. In general, unless there is good reason to proceed otherwise, where additional information is believed necessary to allow a party to prepare for the hearing, that party should first bring a motion for particulars. Motions to strike are most often more appropriate where a complainant has been ordered to provide particulars and has failed to do so.

[169] Canada Post sought certain particulars in this motion, in the alternative. Ms. Boukailo provided additional particulars in the process of responding further about the merits of the complaint. Canada Post objects to these new material facts. Canada Post does not fully acknowledge the significance of Ms. Boukailo providing additional particulars in the process of responding to the merits of its motion. To be clear, Canada Post did note in its submissions that some of the new material facts and particulars in her response to the motion did relate to the complaint and are not included in the motion to strike. However, as noted, it did not identify this content, leaving the Tribunal unable to fully address this issue.

[170] It may have been accidental that Ms. Boukailo provided further particulars in responding to the motion, but she responded and explained her case with this effect. Pursuing a motion to strike when party has addressed outstanding issues to some degree is a harsh position and needlessly adds delay and complexity to a proceeding. It is expected that parties will not persist with objections to the extent that they have been addressed by the opposing party, even if it is addressed at the last minute. While it can be frustrating for the moving party that a motion was necessary, the motion will have had the desired effect. The moving party should clearly spell out what remains in issue.

[171] The particulars Ms. Boukailo provided may or may not be complete, but she appears willing to provide particulars. The Tribunal agrees that ordering further and better particulars is a reasonable measure that will ensure that the parties have a full and ample opportunity to be heard. Canada Post is not prejudiced by such an Order, as it will be given a sufficient opportunity to disclose relevant documents and to respond.

[172] Accordingly, the Tribunal declines the request in the motion to strike the allegation of retaliation. Instead, Ms. Boukailo's complaint is deemed to be amended to include the allegation of retaliation.

[173] Ms. Boukailo is ordered to provide further and better particulars of the allegation of retaliation. In the interests of efficiency, the Tribunal intends to consider the additional details in Ms. Boukailo's submissions in response to the motion as particulars. The Tribunal also notes that Ms. Boukailo has referred to numbered documents that are not filed with the Tribunal for this motion. Particulars are typically written out in such a manner that they provide an explanation of alleged material facts, as opposed to referring the reader to other documents. Reference to the relevant documents is an added feature here that should be of assistance to the other parties and the Tribunal. However, it would be helpful to have all of Ms. Boukailo's particulars respecting retaliation explained in one document, namely in an Amended SOP that she will file. Further directions respecting the preparation of particulars will be provided through case management.

E. Claim for Compensation for Future Loss and Pension Payments

[174] This issue involves a request by Canada Post that the Tribunal strike paragraphs 32, 33(a) and 33(d) of Ms. Boukailo's SOP.

[175] Ms. Boukailo did not number the pages or paragraphs of her response to Canada Post's submissions. In the future, Ms. Boukailo is to ensure that this is done with each document she prepares. In these reasons, reference will be made to the chronological page that content in her submissions appears.

(i) Submissions

Canada Post's Position

[176] Canada Post submits that, at paragraphs 32, 33(a) and 33(d) of her SOP, Ms. Boukailo seeks remedies for future loss of wages and pension payments for the first time. Canada Post states that the facts alleged in the Complainant's SOP do not suggest how Ms. Boukailo could ever be entitled to a future wage loss remedy. It offers the examples that Ms. Boukailo has not stated that 1) she is unable to work as a result of her disability, or 2) she continues to require accommodation for her work-related injury that Canada Post has failed to provide, or 3) even that she continues to have work restrictions.

[177] Canada Post submits that Ms. Boukailo's claim for future loss of wages and pension payments is untenable because "(t)here are no facts pled in the Complainant's Statement of Particulars to even suggest that she *could* be entitled to a future wage loss remedy" (emphasis added), at paragraph 54. Canada Post submits that the relevant paragraphs in the SOP should be struck. In the alternative, Canada Post requests an order for further particulars.

[178] At paragraph 55, Canada Post asserts that the relevant period of the complaint is December 2014 until September 2015. It states that the allegations respecting failure to accommodate appear to arise after Ms. Boukailo's return to her postal clerk position on February 25, 2015. Canada Post states: "Since the Complainant has not pled that she continued to be limited in her ability to work full-time, regular duties as a Postal clerk because of her disability..., there is no basis to connect the Complaint to these claimed remedies."

[179] Canada Post asserts in paragraph 56 that the Complainant is alleging a failure to accommodate "clearly limited to a short term period following February 2015 and into July 2015." Canada Post further states in paragraphs 56 and 57 that:

[56] ...The Complainant did not allege in her Complaint or in her SOP that she is unable to work on a permanent basis. Nor has she alleged that the Corporation has continued to fail to accommodate her. The Complainant has not alleged anywhere that her disability is ongoing and that she continued to have work restrictions related to the same.

[57] It is evident that the Complainant cannot succeed with her requested remedies in paragraphs 32, 33(a) and 33(d) of the Complainant's SOP, as she is asking for future remedies several years into the future, when she has not pled any basis for the Tribunal to award the same. The Complainant continued to be employed by the Corporation as a Postal Clerk and is earning wages for the same. The Complainant has not pled any basis upon which she would be entitled to future remedies, nor has she established how these requested remedies are connected to the Complaint.

Ms. Boukailo's Position

[180] Ms. Boukailo points out in the second page of her submissions that she was discriminated and retaliated against on grounds of a temporary disability. She alleges that Canada Post terminated her full-time position of supervisor and that this was a

discriminatory practice. On the third page she alleges that she was purposely failed at an interview for another supervisory position and that this was a discriminatory practice. As well, she alleges that Canada Post did not provide modified duties in the workplace for her disability-related restrictions.

[181] On the third page of her submissions, Ms. Boukailo indicates that, because she was not returned at the end of her medical leave to her pre-accident, full-time position, she lost wages. She explains that she was placed in a part-time position at a lower wage scale. She also says that she subsequently lost job opportunities, and specifically identifies a lost opportunity to obtain a permanent full-time job with Canada Post. Ms. Boukailo also claims that she has been passed over for full-time job opportunities as retaliation.

[182] On the third page, Ms. Boukailo further states that her complaint is about the wrongful termination of her full-time position due to an injury she sustained. She alleges that the discrimination took place during her recovery. She alleges that the Respondent created an artificial break in service which she claims is a discriminatory practice.

[183] On the sixth page, Ms. Boukailo returns to the allegation that Canada Post purposefully failed her when she applied for a full-time supervisor position in February 2015 and again alleges that she was not given the opportunity to take on her pre-injury job due to her temporary physical limitations.

[184] On the ninth page, Ms. Boukailo claims that she was forced to take a position with unmodified duties as a postal clerk without medical clearance late February 2015 and that this aggravated her injury and delayed her recovery. She alleges that after April 11, 2015 she still had limited functionality. She claims that Canada Post required her to scan packets. On the tenth page she explains that scanning packets is a job that takes two hands. She says that because she had ongoing limitations, she worked reduced hours. She alleges that because of this she had an ongoing wage loss beyond April 11, 2015. As indicated above, there is a dispute respecting this issue that may need to be determined at the hearing.

[185] Subsequent pages in her submissions address the retaliation allegations. On the eleventh page, Ms. Boukailo returns to the allegation that she unfairly lost her fulltime

supervisor position. She alleges that, over the years since, she has been passed over for supervisor positions because of filing a complaint of discrimination.

[186] On the twelfth page of her submissions, she states that her goal was to obtain full-time employment and continue working for Canada Post until her retirement. On the thirteenth page, she explains that she is seeking her lost wages and lost pension payments that would have been made by Canada Post until the date of her retirement from Canada Post, which will be May 24, 2027. This claim is based on several things, including that the discrimination is ongoing and has impacted her salary and employment opportunities within the organization, and continues to do so.

[187] In paragraph 1 of her SOP Ms. Boukailo states that she has remained a part-time postal clerk.

[188] Ms. Boukailo's complaint was filed on October 22, 2015. On page 5 of the complaint form, Ms. Boukailo indicates that the discrimination began on December 1, 2014 and is "ongoing". At the beginning of the narrative of her complaint, Ms. Boukailo explains that her complaint of discrimination concerns a refusal to employ or to continue to employ or unfair treatment in the workplace. She explains that the discrimination is ongoing and has negatively impacted her salary and her employment opportunities within the organization.

[189] The alleged discriminatory practices identified in the SOP are stated in the complaint. Ms. Boukailo asserts in the narrative of her complaint that she "should be able to get back the job that I was doing prior to my injury and...am not being given the opportunity to do so." She further alleges that Canada Post "not only made my recovery extremely stressful and has negatively impacted my mental health, the actions and decisions of company representatives have also had a significant negative impact on my salary and benefits." She further asserts in the narrative that all of the term supervisors that were hired with her in 2013 received full-time permanent status in 2014 and that she is the only one who has not yet received a permanent position.

[190] At the end of her narrative in the complaint, Ms. Boukailo alleges that:

...I have been discriminated against in the area of employment on the grounds of a temporary disability that was the result of a workplace injury. This has

negatively impacted my stress levels, my mental health, my salary, and my employment opportunities with the organization, and continues to do so. (emphasis added)

(ii) Reasons

[191] Canada Post's submissions respecting these paragraphs are entitled "Allegations that the Complainant has lost future job opportunities due to a loss of ability to work" (emphasis added). The labelling of the issues by Canada Post in paragraph 32 and 33 is incorrect. As well, some of Canada Post's submissions do not accurately state the facts for the motion.

[192] First, the relevant paragraphs do not relate solely to lost future job opportunities. These paragraphs do not relate solely to a future loss of income or to loss of pension benefits claim. A future loss of income is not raised for the first time by Ms. Boukailo in her SOP, as is alleged by Canada Post.

[193] In the original complaint Ms. Boukailo wanted her supervisor position back and stated that the actions of the Respondent's representatives had a "significant negative impact on my salary and benefits". The alleged impact on her salary and benefits is by inference ongoing and is identified as such. Canada Post is not accurate when it asserts that at no point does Ms. Boukailo identify that her complaint is ongoing. This is stated in her complaint.

[194] Ms. Boukailo does not claim that she has currently lost the ability to work. The reference to "due to a loss of ability to work" is a characterization added by Canada Post. This is not what Ms. Boukailo stated. Ms. Boukailo's future loss claims arise from and are related to the ongoing alleged loss of her fulltime supervisory position and are further continued by her retaliation complaint, which alleges ongoing issues in this regard.

[195] The Tribunal acknowledges that many human rights cases involve situations where a complainant is unable to work in the future because of their disability. However, if an employee loses a fulltime position for reasons that are found to be discriminatory, has periods of unemployment and ultimately only ever works part-time subsequently, that employee has arguably suffered a wage loss. In this case that loss is said to be ongoing. An ongoing loss gives rise to a claim of a future loss of income. In this case, Ms. Boukailo is

entitled to advance a claim for future loss of income and pension loss if Ms. Boukailo remains in her part-time position until she retires. The claim may or may not be successful at the hearing, depending on the evidence, but she is entitled to make the claim.

[196] Canada Post correctly points out that Ms. Boukailo is still working for Canada Post, although it does not acknowledge that she is saying that this is part-time work or at a lower level than the position she held at the time of her injury. Its submissions seem to imply that she would have to lose her employment with Canada Post to have a claim for a future loss of income. If Ms. Boukailo loses her job with Canada Post, she may, in theory, have a greater loss of future income claim. The basis for her future loss of income claim is explained above.

[197] If Ms. Boukailo is still employed by Canada Post at the time of the hearing, she will not have a basis to say that she lost her position as a postal clerk because she will not have lost her position as a postal clerk. At this point, she is expressing insecurity in her particulars. It is not at all uncommon for an employee to experience job insecurity if they believe that they are being retaliated against.

[198] Ms. Boukailo says that the complaint cannot protect her. Ms. Boukailo is self-represented. She is apparently concerned that she will lose her job or that she will be moved to a new position that is not appropriate for her by Canada Post that she cannot perform as a punitive action. This is all speculative. The only point for present purposes is that she is effectively giving Canada Post notice that she will seek the full extent of any claim for losses into the future that become applicable. The amount of any future loss is by its very nature speculative because it concerns future events. That does not preclude a claim being advanced for a future loss.

[199] In this regard, Canada Post acknowledges that Ms. Boukailo states in her SOP that she “will have to reject any possible job position or opportunity” from Canada Post. This statement follows paragraphs in her SOP where she provides particulars of her allegations of retaliation, which had not arisen at the time she filed her complaint. Upon a plain reading of the SOP, it is apparent that Ms. Boukailo fears for her job security and perceives, rightly or wrongly, that she is no longer in a position to accept further job opportunities from Canada Post. She is also clearly concerned, which is reasonably inferred from her statements, that

in the longer term she will not remain employed by Canada Post for whatever reason and will suffer a future loss of income and loss of pension benefits. Canada Post's position that the facts alleged in the Complainant's SOP do not suggest how Ms. Boukailo could ever be entitled to a future wage loss remedy fails to acknowledge the relevant facts in her SOP identified above that do exactly this.

[200] Canada Post's submissions do not address the fact that Ms. Boukailo advanced a claim for ongoing and significant negative impacts upon her salary and benefits in her complaint. Its submissions also do not acknowledge that Ms. Boukailo claims a future loss because of retaliation. In the Tribunal's view, Canada Post has taken a position that unreasonably and unfairly isolates the claim for future loss of wages and pension from its context in the complaint and in the SOP. Canada Post's submissions that Ms. Boukailo seeks remedies for future loss of wages and pension payments for the first time or that the facts alleged in the Complainant's SOP do not suggest how Ms. Boukailo could ever be entitled to a future wage loss remedy are not borne out by the content of the documents she has filed.

[201] On a related note, in its motion materials, Canada Post takes the position that Ms. Boukailo is only asserting a lack of accommodation after she was returned to the part-time postal clerk position in February 2015, in relation to that position, and asserts that the relevant time period for the complaint is limited in time until September 2015. In fact, Ms. Boukailo's allegation that Canada Post failed to accommodate her is general. It is not limited by date. It arises from the decision to terminate the full-time supervisor position on November 29, 2014 or December 1, 2014. Ms. Boukailo claims that the supervisor position was suitable, given her hand injury, whereas working as a postal clerk handling letters and a scanner all day was not. It is clear that Ms. Boukailo is saying that a return to her supervisor position or to another supervisor position was a form of accommodation that she ought to have been provided. This alleged job loss claim is ongoing beyond September 2015.

(iii) Ruling

[202] The Tribunal declines to strike paragraphs 32, 33(a) and 33(d) from the Complainant's SOP.

[203] Ms. Boukailo is to provide further particulars regarding any alleged ongoing loss of income claim and loss of pension before the hearing at a time to be set by the Tribunal in case management. This is to include an explanation of how she arrives at the amount of compensation she seeks. Should Ms. Boukailo's employment with Canada Post not continue between now and the hearing, she would be entitled to advance a further future loss of income claim in that respect and will be required to provide particulars of that.

VI. Summary

[204] The Complainant is to file an Amended SOP in accordance with the directions provided in this ruling. The preparation of an Amended SOP will be discussed in a case management conference with the Tribunal and further directions respecting its preparation will be provided, if necessary. A date will be set for the filing of the Complainant's Amended SOP at the case management conference to allow for any accounting or actuarial advice to be obtained by the Complainant respecting alleged income loss and alleged lost pension calculations.

[205] The Respondent is to respond to the Amended SOP with an Amended SOP on its behalf on a date to be determined through case management.

[206] The Complainant will have an opportunity to file an Amended Reply on a date to be determined during case management.

[207] Canada Post's motion to strike content from the SOP filed by Ms. Boukailo is granted in relation to paragraph 2 in relation to the following content:

The Respondent failed to provide proper staffing and created unsafe work conditions. I had to work under a lot of stress and pressure because I was asked by management to cover for two other supervisors that were off that week, on top of my own responsibilities. Being overworked, in turn, led me to my accident in the workplace.

[208] This content is to be removed from the Amended SOP that Ms. Boukailo will file. The Respondent's motion to strike in relation to the remainder of paragraph 2 is dismissed.

[209] The Respondent's motion in respect of paragraph 33(c) of the Complainant's SOP is adjourned. The issues raised respecting paragraph 33(c) will be determined by the Tribunal, if necessary, in the context of a renewed motion by the Respondent at the hearing, following the submission of all evidence, and completion of submissions by all parties.

[210] The Complainant's Amended SOP is to provide particulars to Canada Post respecting the nature and extent of any claim for lost wages or benefits potentially owed to the Complainant by Canada Post during the relevant period in relation to paragraph 33(c). In providing particulars respecting paragraph 33(c), the Complainant is to answer the following questions:

1. Ms. Boukailo is to advise Canada Post of the relevant period of any loss for purposes of paragraph 33(c);
2. Ms. Boukailo is to explain exactly what she is claiming, to include whether she is claiming a wage loss or wage loss benefits and include whether it is for a work-related or non work-related injury or medical condition;
3. If claiming a benefit, she is to identify whether it is available pursuant to a provision of the collective agreement or an applicable insurance plan, and identify the benefit provider and benefit plan in any event;
4. If claiming a benefit, she is to identify what the benefit is for and explain whether it is calculated the same as a "straight-up" wage loss or differently, and explain how it is calculated, if she can access that information;
5. If she is seeking compensation solely for nonpayment of wage loss replacement benefits that are only paid by WCB, and if she is claiming no wage loss from Canada Post for the period in question, she is to clearly confirm this in writing;
6. If Ms. Boukailo is claiming a specific wage loss in paragraph 33(c) from Canada Post in relation to the postal clerk position, she is to explain any alleged gap in compensation related to wages or benefits or any compensation impacted by reduced wages for the relevant period arising from her employment with Canada Post; and explain how that amount is calculated.

[211] The content in paragraph 13 of the Complainant's SOP may remain.

[212] The allegations of forgery in relation to the letters of August 12, 2014 and October 14, 2014 in paragraph 29 of Ms. Boukailo's SOP and paragraph 2(g) of her Reply may remain in the Amended SOP. The Respondent's motion to strike is dismissed in this regard.

[213] The Respondent's motion to strike content in relation to the issue of retaliation from Ms. Boukailo's SOP in paragraphs 15, 28 and 32 and from her Reply at paragraphs 2(g), 8(a) and (b) is dismissed. Ms. Boukailo's complaint is deemed to be amended to include the allegation of retaliation. The Tribunal considers the additional details in Ms. Boukailo's submissions in response to the motion to be particulars. However, Ms. Boukailo is required to provide all particulars of each instance of alleged retaliation by Canada Post in her Amended SOP so that all particulars are complete and within one document. Further directions will be provided during case management.

[214] The Respondent's motion to strike paragraphs 32, 33(a) and 33(d) with respect to remedies for future loss of wages and pension payments from the Complainant's SOP is dismissed. This content may remain in the Complainant's Amended SOP.

[215] The Respondent's motion for further and better particulars regarding any future loss of income claim and future loss of pension benefits is granted. As this consists of an alleged existing claim, the Complainant is to include particulars of her loss of income claim and loss of pension benefit claim to the date of this decision in her Amended SOP and she is to identify and update any further alleged future losses in either respect in advance of the hearing.

VII. Orders

[216] It is hereby Ordered that:

1. The following content in paragraph 2 of the Complainant's Statement of Particulars is to be struck and will not be considered by the Tribunal for purposes of liability:

The Respondent failed to provide proper staffing and created unsafe work conditions. I had to work under a lot of stress and pressure because I was asked by management to cover for two other supervisors that were off that week, on top of my own responsibilities. Being overworked, in turn, led me to my accident in the workplace.

2. The Respondent's motion in relation to paragraph 33(c) is adjourned. The Respondent may renew its motion respecting paragraph 33(c) at the hearing of the merits of the complaint.
3. The Complainant's complaint is amended to include an allegation of retaliation.
4. The Complainant is to file an Amended Statement of Particulars with further particulars of her claim at paragraph 33(c), her claim of retaliation and her existing and future loss of income and lost pension claim in her Statement of Particulars.
5. The remainder of the Respondent's motion is dismissed.

Signed by

Kathryn A. Raymond, Q.C.
Tribunal Member

Ottawa, Ontario
December 9, 2021

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2504/6120

Style of Cause: Natalia Boukailo v. Canada Post Corporation

Ruling of the Tribunal Dated: December 9, 2021

Motion dealt with in writing without appearance of parties

Written representations by:

Natalia Boukailo, for herself

Sarah Chênevert-Beaudoin, for the Canadian Human Rights Commission

Lauren Ditschun, for the Respondent