Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2022 CHRT 25
Date: August 15, 2022
File Nos.: T2201/2317

Between:

Tesha Peters

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

United Parcel Service Canada Ltd.

Respondent

- and -

Linden Gordon

Respondent

Decision

Member: Kathryn A. Raymond, Q.C.

Table of Contents

I. Overview

[1] Tesha Peters, the Complainant, alleges that she was sexually harassed at work contrary to section 14 of the *Canadian Human Rights Act,* RSC 1985, c H-6 (the "Act") by her supervisor, Linden Gordon, the individual Respondent. She states that this occurred while she was employed by United Parcel Service Canada Ltd. or "UPS", the corporate Respondent. She alleges the sexual harassment happened both in and outside the workplace, that it was ongoing over a prolonged period and that it included two instances of sexual touching/assault.

[2] Mr. Gordon vehemently denies that any such sexual harassment took place. He alleges that Ms. Peters has set him up with false allegations in order to secure a financial recovery from UPS for disciplinary action taken against her because of a history of unacceptable absenteeism.

[3] The Respondent, UPS, disputes that any sexual harassment occurred. However, UPS's primary defence is that, as an employer with a strict anti-harassment policy, Ms. Peters had an obligation to notify it of any harassment so that it could address the situation. UPS submits that it did not receive notice and, therefore, cannot be held legally liable for any sexual harassment by Mr. Gordon. UPS says that when it did learn of the harassment complaint, it conducted a reasonable investigation and took appropriate action. UPS argues it should not be liable for any finding of sexual harassment against Mr. Gordon and relies upon its compliance with section 65(2) of the Act.

[4] Based on the evidence, the Tribunal finds that Mr. Gordon did sexually harass Ms. Peters. He is liable for his conduct. UPS received sufficient notice that there was a complaint of sexual harassment. UPS is liable for Mr. Gordon's sexual harassment for not exercising all due diligence to prevent or mitigate the effects of discrimination pursuant to section 65(2) of the Act.

[5] Ms. Peters also brought a complaint of discrimination based on disability against UPS pursuant to section 7 of the Act which was disputed by UPS. However, the actions of UPS employees involved in this issue and certain of UPS's practices respecting absent employees led UPS to discriminate against Ms. Peters based on disability.

[6] Respecting remedy, Ms. Peters raised a legal issue concerning the Tribunal's remedial powers under the Act by pre-hearing motion. The motion was adjourned as the issues raised did not need to be decided unless a finding of discrimination was made at the hearing stage and because the Tribunal believed that the motion should be decided after all the evidence has been heard. As the Tribunal has concluded that sexual harassment occurred in this case, the Tribunal will be addressing the Complainant's motion.

[7] The issue in the motion relates to the total amount of "general damages" that could theoretically be awarded pursuant to the Act. Section 53(2)(e) and section 53(3) of the Act establish a $20,000 "cap" on damages that may be awarded under each section. With limited exception, damages for discrimination have historically been ordered by the Tribunal based on one established complaint, regardless of the number of proven allegations. Ms. Peters' motion argues that, if the Act is properly interpreted, damages for "pain and suffering" from discrimination pursuant to section 53(2)(e) should be awarded for each substantiated allegation of discriminatory practice in the complaint that is upheld by the Tribunal. Similarly, Ms. Peters asks that damages be awarded to respond to each separate finding of reckless and wilful conduct pursuant to section 53(3) of the Act. Ms. Peters seeks a total award of general damages of $420,000, both jointly and severally against each of the Respondents, based on multiple alleged discriminatory practices.

[8] The Tribunal has determined to issue separate reasons for its decision respecting the issues relevant to remedy, inclusive of its ruling respecting Ms. Peters' motion about damages. The reasons here are restricted to the Tribunal's findings in the adjudication of the case on the merits. This includes rulings on process and evidentiary issues and its decision respecting liability with respect to sexual harassment, discrimination based on disability and UPS's statutory defence pursuant to section 65(2) of the Act.

II. Approach to Preparation of Reasons Respecting Liability

[9] There were 14 days of hearing, many exhibits and written submissions, as well as numerous issues raised. This included the requests for various rulings relevant to the merits and procedure.

[10] The Tribunal has the statutory authority to exercise procedural discretion over its own processes in section 50 of the Act. This includes a reasonable exercise of discretion by the Tribunal in the preparation of reasons, while meeting the obligation of transparency for the parties, for any reviewing court and to enhance the public's understanding of human rights. Because the rulings and findings lead to lengthy reasons, discretion is being exercised in preparing these reasons in the following ways.

[11] Not all the evidence has been repeated or summarized. To illustrate, the Tribunal did not prepare summaries of each witness's testimony or of the evidence respecting UPS's internal education efforts respecting sexual harassment. The lack of reference to any piece of evidence does not indicate that the evidence was not considered and weighed by the Tribunal. Detailed descriptions of the evidence are provided where the conclusions reached are pivotal. Where corroborating direct or indirect evidence was available, the evidence and the Tribunal's findings received detailed explanation. The analysis in these reasons is also more extensive where the Tribunal concluded it was reasonable to draw inferences based on the preponderance of probabilities respecting what most likely occurred.

[12] All submissions from the parties have been considered, as well. In some instances, arguments have been summarized rather than taking an itemized approach, and the analysis has focused on the most emphasized or persuasive arguments. The Tribunal wishes to thank the parties for their submissions, which were helpful.

[13] A ruling respecting spoliation of evidence is addressed in the context of sexual harassment because this objection is relevant to the overall assessment of evidence respecting this issue. Other rulings are addressed in a separate section devoted to procedural rulings below.

[14] The issues respecting sexual harassment are addressed next, followed by the issues respecting discrimination based on disability. UPS's section 65(2) defence is addressed in both contexts but primarily in relation to sexual harassment. In raising a section 65(2) defence to the disability-related allegations, UPS did not provide detailed submissions.

[15] The Tribunal is not making a ruling on two points. Although identified in the complaint, the case was not argued as a claim of adverse differential treatment based on sex pursuant

to section 7 of the Act. The final submissions of Ms. Peters and the Commission refer to discrimination based on sex in section 7. However, the submissions did not address this issue in any detail. This includes that they did not explain how the legal test to make a finding pursuant to section 7 on the basis of sex was applicable in this case. The Tribunal is unable to make a finding in this regard given that this argument was not adequately advanced.

[16] The complaint also included allegations that Ms. Peters' compensation had not been adjusted appropriately by UPS following a change in her assigned position and that UPS had failed to correct its error, despite notice. This issue was resolved between the parties.

III. Procedural Rulings

[17] As indicated, the parties raised objections and requested various procedural rulings shortly in advance of, during and after the hearing. These concerned an anonymization and confidentiality order, redactions to exhibits, the addition of a witness during the hearing and the addition of exhibits after the hearing concluded. As indicated, the issue respecting spoliation of evidence was raised in the context of sexual harassment and is addressed in that section of these reasons.

A. Motions for Anonymization and Confidentiality Order

[18] Ms. Peters brought a motion pursuant to section 52 of the Act a week before the hearing commenced. She requested an order from the Tribunal that her name be anonymized in the decision and in any public records in this proceeding. The motion also requested a confidentiality order prohibiting public disclosure of the evidentiary record in this proceeding whether by sealing the record or by way of redaction.

[19] Mr. Gordon made essentially the same motion based on section 52 of the Act.

[20] Both provided written submissions respecting their requests. All parties agreed to these requests.

[21] Section 52 (1) states, in part:

52. (1) An inquiry shall be conducted in public, but the member or panel conducting the inquiry, may, on application, take any necessary measures and make any order that the member or panel considers necessary to ensure the confidentiality of the inquiry if the member or panel is satisfied, during the inquiry or as a result of the inquiry being conducted in public, that	52. (1) L'instruction est publique, mais le membre instructeur peut, sur demande en ce sens, prendre toute mesure ou rendre toute ordonnance pour assurer la confidentialité de l'instruction s'il est convaincu que, selon le cas :
….	…
(c) there is a real and substantial risk that the disclosure of personal or other matters will cause undue hardship to the persons involved such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public….	c) il y a un risque sérieux de divulgation de questions personnelles ou autres de sorte que la nécessité d'empêcher leur divulgation dans l'intérêt des personnes concernées ou dans l'intérêt public l'emporte sur l'intérêt qu'a la société à ce que l'instruction soit publique…

[22] As identified above, this case involves allegations of sexual harassment including assault. Ms. Peters submits that her allegations and the evidence should not be available to her children, friends, family and be widely available to the public. She says that the personal nature of the sexual harassment allegations will result in undue harm to her.

[23] Ms. Peters asks that her identity in this proceeding be anonymized. She asks that previously published preliminary decisions of the Tribunal be retroactively anonymized.

[24] She submits that the order that she is requesting from the Tribunal will not constitute an undue or unreasonable restriction on the principle that courts are open to the public, because she is not requesting a full publication ban. She is simply asking that her identity be protected. The facts and analysis respecting the case would remain available to the public.

[25] Ms. Peters further submits that the Tribunal should order that the evidentiary record be confidential because the record discloses significant personal, medical and financial details, disclosure of which would result in hardship to her. In this regard, Ms. Peters says that public access to the evidentiary record will jeopardize her anonymity. She further

submits that public disclosure of this information would violate her privacy to the point of undue hardship.

[26] Specifically, Ms. Peters has disclosed her complete medical history for the period relevant to her complaint. These records include treatment for mental and reproductive health issues. She has also provided available financial records, some of which concern personal information that should remain private, including her social insurance number and other specific biographical information. She argues that the Tribunal should order that the evidentiary record in this proceeding be confidential, either by means of sealing the record or redaction of personal information in documents.

[27] Likewise, Mr. Gordon requests that the identity of the parties involved in this matter by anonymized in the Tribunal's decision. Mr. Gordon says that there is a real and substantial risk that he will be caused undue hardship by reason of his name being used when this complaint heard and decided by the Tribunal in relation to his potential efforts to obtain employment.

[28] Mr. Gordon says that he also makes this request out of consideration for the parties' children (his own and that of Ms. Peters). He submits that by using acronyms for the parties' names, the risk of stigmatization of and other repercussions for these children will be significantly minimized when the sensitive details of this matter are posted publicly.

[29] As noted, all parties agree that the Tribunal should grant these orders.

[30] In a case management call, the Tribunal explained to the parties that motions for confidentiality and anonymization were not simply granted upon consent of the parties. Section 52(1) makes it clear that "[a]n inquiry shall be conducted in public…." The open court principle is, therefore, a statutory requirement that applies to proceedings before this Tribunal. The parties cannot circumvent this statutory requirement upon consent.

[31] Section 52 allows for a potential confidentiality order to be issued by the Tribunal, but the parties must first persuade the Tribunal that the situation meets the test for granting such an order set out in section 52(1). The Tribunal is required to ensure that the proceeding occurs in accordance with the Act.

[32] It was further explained to the parties that section 52 of the Act recognizes the important societal interest at stake respecting the transparency of our judicial system when motions for confidentiality orders are brought to the Tribunal. The Tribunal is required to conduct an analysis of the evidence and submissions filed in support of any motion to derogate from the open court principle to determine whether that principle should not apply in any respect. In this case, neither moving party had provided any evidence in support of their claim of undue hardship. The parties were given an opportunity to make additional submissions and to file any evidence at the commencement of the hearing in support of their respective motions. Ms. Peters and Mr. Gordon clarified that they wished for their motions to be considered and decided based on the written submissions that they had already filed. The parties were advised that the Tribunal's rulings in respect of these motions would be provided at the commencement of the hearing.

[33] At the outset of the hearing, the parties were informed that Ms. Peters' and Mr. Gordon's motions for anonymization and confidentiality, as well as Ms. Peters' motion for an order that the evidentiary record be sealed, were denied. The Tribunal provided directions to permit individual documents to be redacted on a case-by-case basis. The parties were advised that the reasons for its rulings would be included with the Tribunal's decision respecting the merits.

[34] Once a complaint is referred to the Tribunal, the complaint and the names of the parties become public. The Tribunal begins to maintain its record of the proceeding. This record is a public record.

[35] The parties had a history of communications with the Tribunal on the record. Long before these motions were brought, the Tribunal published preliminary written rulings about the case with the parties' names on its website and CanLII. The Tribunal publishes the dates that hearings are held and had published the fact that this case was going to hearing, citing it by name. As explained, the motions were filed a week before the hearing was scheduled to start. They were not timely. The names of the parties involved in this case were already a matter of public record. Published case law respecting this case was available on the internet.

[36] The principles applicable to motions of this nature have been canvassed in other decisions of this Tribunal: *N.A. v. 1416992 Ontario Ltd. and L.C.*, 2018 CHRT 33; *Mr. X v. Canadian Pacific Railway*, 2018 CHRT 11; *T.P. v. Canadian Armed Forces*, 2019 CHRT 10; *White v. Canadian Nuclear Laboratories*, 2020 CHRT 5; and *Woodgate v. Royal Canadian Mounted Police*, 2021 CHRT 20. As well, the Supreme Court of Canada provided an overview of the case law respecting derogations to the open court principle in *Sherman Estate v Donavan*, 2021 SCC 25.

[37] Neither Ms. Peters nor Mr. Gordon provided evidence or submissions to satisfy the Tribunal that there would be undue hardship to these parties, or their children, should the information they seek to have redacted be public. Ms. Peters asserted that her anonymity would be jeopardized. However, she did not explain why she was entitled to anonymity or how a loss of anonymity constitutes undue hardship.

[38] Ms. Peters was concerned about public access to medical records confirming that she had mental health issues and reproductive issues, but she is asserting that she has a disability by reason of those mental health issues. When parties claim that they have a disability, that can consequently place their medical history in issue, in which case any content in a complainant's medical records may be arguably relevant at the hearing. Ms. Peters did not provide evidence to satisfy a confidentiality or anonymization order in this regard.

[39] Beyond alluding to fears of reaction and alleged stigmatization of their children, the submissions did not provide a persuasive case about what that alleged undue hardship would be. They did not explain how the undue hardship would come to arise. For example, it was not explained how children would likely access the Tribunals' decision or public record or learn about what happened from others. Mr. Gordon provided no evidence he was actively seeking employment. He has a history of not working for health reasons since the events in this complaint.

[40] "Undue hardship" requires something more than some hardship, embarrassment, or the normal stresses of being a party in a public legal proceeding. There is an aspect of accountability, as well, coincident with the expectation that our public legal system will be

transparent. “Undue hardship” requires something more than the discomfort that parties may feel respecting the prospect of third-party judgement of and societal interest in their acts, omissions, allegations and defences in a manner that is attributed to them.

[41] Anonymization of proceedings is only permitted to occur when a party demonstrates a real and substantial risk of undue hardship. The need to prevent disclosure because of likely or foreseeable significant harm to an individual must be sufficient to outweigh the societal interest that the inquiry be conducted in public.

[42] Furthermore, the fact that the complaint includes allegations of sexual harassment does not automatically or presumptively equate to undue hardship. It depends on what the allegations are and how disclosure will impact the individuals involved. In this case, sexual assault is alleged, but the parties filed Amended Statements of Particulars (“SOP’s”) detailing and responding to these allegations. These have been on record since they were filed. The allegations are not of such a nature to generate alarm or concern in advance of testimony about what happened. Ms. Peters did not offer any evidence or information to support her assertion that she would suffer undue hardship if the details of her allegations or Mr. Gordon’s response in this regard became more publicly associated with her name by reason of the hearing and subsequent decision. Neither did Mr. Gordon.

[43] Subject to the exception below, the moving parties failed to persuade the Tribunal that there is a real and substantial risk that the disclosure of the parties’ names or other personal matters will cause undue hardship to them or their children such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public.

[44] The exception is this. The Tribunal ordered that documents or parts of documents could be redacted subject to specific restraints. In this regard, it may be the case that documents entered into evidence will contain irrelevant personal information, including medical or financial information. Any irrelevant information is obviously not needed to decide this case. The parties were encouraged to discuss the issue of redaction of irrelevant personal information amongst themselves to determine whether there was agreement to redact documents or parts of documents based on irrelevance.

[45] The parties did so. As the hearing progressed, the parties agreed that private and irrelevant personal information should be redacted in certain exhibits and redacted exhibits were provided to the Tribunal. The Tribunal provided oversight of these issues and remained available to issue a ruling in the event the parties were not able to reach agreement respecting the redaction of any document. For its part, the Tribunal has prepared these reasons without including personal information unless it is necessary to understand its decision.

B. The Addition of a Witness at the Hearing

[46] Ms. Peters requested leave pursuant to Rule 9(3) of the Tribunal's Rules of Procedure (the "Rules") to add Mr. Serghei Klimov as a witness during the hearing. Rule 9(3) provides:

9. (3) Except with leave of the panel, which leave shall be granted on such terms and conditions as accord with the purposes set out in section 1(1), and subject to a party's right to lead evidence in reply, … (b) a party who does not, under Rule 6, identify a witness or provide a summary of his or her anticipated testimony shall not call that witness at the hearing…	9. (3) À défaut d'obtenir l'autorisation du membre instructeur, laquelle doit être accordée à des conditions conformes au fins énoncées au paragraphe 1(1), et sous réserve du droit d'une partie de présenter des éléments de preuve en réplique, … b) une partie ne peut faire témoigner à l'audience un témoin qu'elle n'a pas identifié conformément à la règle 6 et pour lequel elle n'a pas fourni de résumé du témoignage prévu…

[47] Mr. Klimov had not been identified as a witness by Ms. Peters at the disclosure stage of this proceeding. Ms. Peters asked that he be added because she did not have many witnesses who were co-workers and who could offer relevant observations respecting the alleged sexual harassment in the workplace. Mr. Klimov would be speaking to a different period of time than the other witnesses who were co-workers.

[48] UPS objected, stating that it was prejudiced in its ability to prepare to question this witness. UPS objected, as well, on the basis that this witness had not been interviewed at

the investigation stage by the Commission. UPS also indicated that it objected to any evidence this witness would provide.

[49] The Tribunal considered not only Rule 9(3), but also Rule 1(1), as it is required to do. Rule 1(1) states:

1. (1) These Rules are enacted to ensure that	1. (1) Les présentes règles ont pour objet de permettre
(a) all parties to an inquiry have the full and ample opportunity to be heard;	a) que toutes les parties à une instruction aient la possibilité pleine et entière de se faire entendre;
(b) arguments and evidence be disclosed and presented in a timely and efficient manner; and	b) que l'argumentation et la preuve soient présentées en temps opportun et de façon efficace;
(c) all proceedings before the Tribunal be conducted as informally and expeditiously as possible.	c) que toutes les affaires dont le Tribunal est saisi soient instruites de la façon la moins formaliste et la plus rapide possible.

[50] The Tribunal was satisfied that any prejudice to UPS's ability to prepare could be addressed by affording UPS time to prepare within the existing schedule of the hearing. Because of the length of the hearing, it was possible to provide extra time easily, without impacting the timeliness, efficiency or schedule of the hearing. The hearing was already set to be held over periods of days with ample breaks in between.

[51] There is no rule that a witness must be interviewed at the investigation stage before the individual can be a witness at the hearing. Commission investigations serve only to generate information upon which the Commission screens complaints to determine whether there is a basis for referral of the complaint to the Tribunal for inquiry. The Commission would be unable to investigate as many complaints as it does if it had to interview every potential witness. There is no requirement for the Commission to identify and interview all witnesses at the investigation stage.

[52] With respect to UPS's potential objections to the testimony of this witness, the Tribunal was disinclined to make any evidentiary ruling before any evidence was offered.

[53] The witness was scheduled to appear at a time that UPS agreed afforded sufficient time to prepare. The Tribunal directed that any objections to the testimony of this witness could be raised at the time the disputed testimony was offered and that arguments could be made about what, if any, weight should be placed on all or part of this evidence.

[54] When Mr. Klimov testified, his evidence was quite limited. It focused upon his account that an interaction with Ms. Peters occurred at work in which she described being harassed and that UPS's Human Resources ("HR") was not doing anything about the harassment. He testified that she was very upset and frustrated. Shortly afterwards she was no longer at work. No further objections were raised by UPS.

C. The Request to Add Additional Exhibits After the Hearing

[55] The parties were provided with an updated List of Exhibits prior to final submissions. The Tribunal intended to remove all documents from the joint Book of Documents provided for the hearing that were not made exhibits in order to create a Book of Exhibits for its review based on the List of Exhibits generated at the hearing. Only documents that are accepted into evidence as exhibits during the hearing are to be considered for purposes of the Tribunal's decision. The parties were provided with a list of the documents that were to be removed and were given an opportunity to identify any possible errors regarding what was being removed as a further means of re-confirming the accuracy of the record of exhibits.

[56] Ms. Peters and the Commission advised that they saw no errors with the List of Exhibits and that the appropriate documents had been properly removed from the record because they had not been made exhibits during the hearing.

[57] Mr. Gordon advised that he wished to add one document to the List of Exhibits, namely Tab 28 of Document 28 in the Joint Book of Documents. He also advised that a portion of a document not on the List of Exhibits, namely Tab 4 of Document 125, should be included as part of the record of the proceeding as it had been marked as an exhibit.

[58] UPS wished to add two other documents to the List of Exhibits, namely Tab 170 and 172. This was on the basis that they were referred to by one or more of the parties and "form part of the record of this litigation as required by the Tribunal's rules." The Tribunal's Rules

require each party to file an SOP that includes a list of witnesses and a will-say statement for each witness. It is in this manner that the Tribunal ensures pre-hearing disclosure of all arguably relevant information. The documents in question were will-say statements of Ms. Peters and one of her witnesses, Ms. Jeffers.

[59] Mr. Gordon agreed to UPS's requested additions.

[60] Ms. Peters' counsel agreed that Mr. Gordon had correctly identified that Tab 4 of Document 125 had been made an exhibit and helpfully referenced the location on the recording of the hearing. Ms. Peters' counsel objected to the addition of Documents 170 or 172 to the List of Exhibits on the basis that they were not made exhibits. Counsel stated that she had reviewed her notes from witness examinations and the closing submissions of the parties and found no reference to these documents. She objected to the addition of these documents as exhibits after the hearing had concluded. Ms. Peters' counsel did not take a position respecting Mr. Gordon's wish to ensure that Tab 28 of Document 28 was an exhibit.

[61] UPS did not correct Ms. Peters' assertion that the documents had not been addressed by any witness during the hearing or during final submissions and took no position respecting Mr. Gordon's request.

[62] The Tribunal decided to postpone its ruling respecting the objection to these additional documents until it had an opportunity to consider the case in its entirety, with the intent to advise the parties of the outcome in its final decision.

[63] The expected and usual process in a hearing before this Tribunal is that the parties will tender all evidence that they wish to ask the Tribunal to consider in making its decision at the hearing and will request that all documentary evidence be entered into the Tribunal's record of the proceeding as exhibits within the time set for the hearing. Hearings have a clearly demarcated beginning and end during which evidence may be submitted. Bringing closure to the hearing is necessary for the timeliness and efficiency of the proceeding and is in the interests of finality and certainty. In this case, the parties had been reminded to bring forward any unmarked documents that had been discussed with a witness in testimony that they wished to be entered into evidence while the hearing was ongoing. The parties were

not asked by the Tribunal to indicate whether there were any documents that they wished to have added to the List of Exhibits after the hearing concluded.

[64] In legal proceedings, after a hearing ends, but before the decision is issued, motions can be made to request that additional evidence be considered. Typically, parties that bring these motions allege that there is new evidence that was not available or known at the time of the hearing. Submissions are required and an evidentiary basis via affidavit evidence is provided by the party seeking such relief to establish that the evidence is, in fact, “new”, as is defined in relevant case law.

[65] It is most often the case that, when motions are brought in legal proceedings to add evidence, if the evidence was available and could have been submitted during the hearing, it is not permitted to be added after the fact. In this case, the documents identified by UPS and Mr. Gordon had been in the possession of the parties all along.

[66] These parties had not raised an issue regarding any omission on their part to submit documentary evidence. They made a request to add documents that were not made exhibits at the hearing in response to a request by the Tribunal that they confirm that documents were being accurately removed because they were not exhibits. There was no intent by the Tribunal to re-open the issue of what formed part of the Tribunal’s evidentiary record.

[67] UPS seeks to introduce into evidence documents that were will-says filed with Ms. Peters’ original SOP in meeting her disclosure obligations. These are part of the Tribunal’s procedural record of the proceeding; however, they are not part of the Tribunal’s evidentiary record of the hearing. The Tribunal’s decision must be based only upon what is offered in evidence before the Tribunal at the hearing and made part of the evidentiary record by the Tribunal.

[68] Further, Ms. Peters and Ms. Jeffers were not questioned about the content of their will-says during the hearing. It is not fair to permit the addition of evidence respecting what a witness allegedly said in a prior statement without putting that statement to them during their testimony so that they have an opportunity to confirm, deny or explain their statement.

[69] The Tribunal has considered all issues associated with the additional proposed evidence and what was important evidence to the Tribunal's decision in this case. The Tribunal has concluded that the proposed exhibits do not materially impact the findings or outcomes it has arrived upon in this case based upon all the evidence. None of these documents were referred to in final submissions by the parties. Accordingly, their inclusion as exhibits is not a requirement in the interests of justice.

[70] The inclusion of Mr. Gordon's extra document was not addressed by the other parties. However, the document Mr. Gordon has identified is a copy of UPS's Professional Working Relationships Policy that was signed by Mr. Dambrosio. The policy itself is part of UPS's policy book given to new employees to sign which is an exhibit. There is no dispute about what that policy says or necessity that this particular signed copy of it be an exhibit. Mr. Gordon's request is denied.

[71] The requests of UPS and Mr. Gordon to add documents to the Tribunal's evidentiary record of the hearing that were not offered as exhibits during the hearing are denied.

IV. The Legal Test for Sexual Harassment

[72] In 1989, the Supreme Court of Canada defined sexual harassment as "unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment" (*Janzen v. Platy Enterprises Ltd.,* [1989] 1 SCR 1252 at 1284, 1989 CanLII 97 (SCC) ["*Janzen"*]). This decision has been repeatedly confirmed since its issuance by courts, tribunals, and arbitrators, including this Tribunal.

[73] In 1999, the Federal Court determined that the legal test in *Janzen* applies to decisions of this Tribunal in *Canada (Human Rights Commission) v. Canada (Armed Forces)*, [1999] 3 FC 653, 1999 CanLII 18902 (FC) ["*Franke"*]. The Federal Court repeated the same elements of the test in *Janzen:* 1) unwelcome conduct; and 2) sexual in nature; but clarified that the legal test required either 3) a pattern of persistent conduct or a single serious incident. *Franke* also added a fourth requirement, that the employee notify the employer of the alleged sexual harassment where the employer has a human resources

department and a comprehensive and effective sexual harassment policy, including redress mechanisms in place.

V. Application of the Burden of Proof in This Case

[74] Ms. Peters was required to prove that she experienced sexual harassment during her employment in this proceeding. The burden of proving sexual harassment falls upon the complainant.

[75] The burden of proof placed upon Ms. Peters was to establish what is sometimes referred to as a *prima facie* case. This means she needs to provide proof of each of the allegations she is making, which, if believed, is complete and sufficient to justify a finding in her favour: *Ontario Human Rights Commission v. Simpson-Sears*, 1985 CanLII 18 (SCC), [1985] 2 SCR 536 at para 28.

[76] Accordingly, the first issue is whether any sexual harassment occurred. The burden of proof is upon Ms. Peters. It is not on Mr. Gordon or on UPS.

[77] To make a finding of sexual harassment, the Tribunal needs to find that the evidence Ms. Peters provided meets the legal test for establishing sexual harassment. In other words, for Ms. Peters to prove that the alleged conduct occurred she needs to establish that: the conduct was unwelcome; 2) that the conduct was of a sexual nature; 3) that the alleged conduct either involved a pattern of persistent conduct or a single serious incident; and that 4) what occurred detrimentally affected the work environment or led to adverse job-related consequences for her.

[78] In considering whether Ms. Peters has met the burden of proving her case of discrimination, Ms. Peters' testimony is subject to an assessment of credibility, reliability, cogency and consistency with the evidence and circumstances of the complaint as a whole. All matters relevant to the persuasive capability of her evidence are considered. This is of particular importance here. There were no eyewitnesses to the most significant events and to most of the alleged communications between Ms. Peters and Mr. Gordon.

[79] As well, her personal evidence is not viewed in isolation in assessing whether she has met her burden of proof. In this case, evidence was offered through the testimony of other witnesses to the extent that they were able to potentially corroborate aspects of the evidence respecting whether sexual harassment occurred.

[80] In considering Ms. Peters' case, the Tribunal must also weigh any evidence provided by Mr. Gordon. The Tribunal is to "consider the evidence as a whole, including the respondent's evidence, in deciding whether a complainant has made their case" (*Emmett v. Canada Revenue Agency*, 2018 CHRT 23 (Can LII) at para 61; see also *Quebec (Commission des droits de la personne et des droits de la jeunesse) c. Bombardier Inc.*, 2015 SCC 39 (CanLII) at para 58; *Lally v. Telus*, 2014 FCA 214 (Can LII) at para 31). In a sexual harassment case, the alleged harasser has an opportunity to challenge the complainant's evidence or to offer evidence to refute the allegation of *prima facie* discrimination. In other words, in a sexual harassment case, the individual respondent's defence is an "evidentiary defence." The individual respondent offers evidence to be weighed by the Tribunal in its assessment of whether the complainant has established that sexual harassment occurred. The individual respondent will usually try to defend a complaint by providing evidence to demonstrate that a wrongful act did not occur, as alleged, or that their behaviour towards the complainant was not unwelcome. In this case, Mr. Gordon sought to prove that his ongoing communications with Ms. Peters were not unwelcome and that the more serious alleged incidents did not occur.

[81] In some instances, the Act provides a statutory defence, which is a separate issue from an evidentiary defence. A statutory defence is a defence that is available to a respondent because it is a defence permitted by and written into the Act. In this case, a statutory defence is available to UPS, not Mr. Gordon.

[82] In sexual harassment cases, there is no statutory defence available to alleged harassers for alleged instances of harassment in the Act. Sexual harassment is unlawful in all circumstances. However, there are some statutory defences available to respondent employers. This includes that an employer may not be liable for the acts of an employee who has been found to have engaged in harassment if the employer can meet the requirements in section 65(2) of the Act.

[83] However, as will be seen, when a respondent wishes to rely upon a statutory defence that is available to them, the burden of proof shifts from the complainant to the respondent when the Tribunal considers any aspect of the statutory defence. In this case, the burden of proof shifted to UPS to the extent that it tried to rely upon section 65(2) of the Act.

[84] Given the legal framework and burden of proof applicable to sexual harassment cases before the Tribunal, the most central issue in this case is whether Ms. Peters has proven that sexual harassment occurred, considering the case she presented, Mr. Gordon's case in response to this issue and, in theory, any evidence or position presented by UPS. UPS did not provide any evidence on the issue of whether sexual harassment occurred but did take positions respecting the evidence that was presented. Most of UPS's evidence was offered to meet its burden of proof to establish a statutory defence pursuant to section 65(2) of the Act, namely, that it should not be liable for any finding of sexual harassment.

VI. Standard of Proof

[85] Ms. Peters was required to prove a *prima facie* case of sexual harassment on a balance of probability. This standard of proof is not the criminal standard of "beyond a reasonable doubt" in criminal trials nor a standard of evidentiary perfection. Rather, to succeed she had to provide sufficient proof for the Tribunal to conclude that, in view of all the evidence, including an assessment of the credibility and reliability of the evidence, her version of events is more likely to have occurred than not. As stated by the Supreme Court of Canada, the evidence must be "sufficiently clear, convincing and cogent" to tip the balance of probabilities to a finding of fact that supports a legal finding of sexual harassment. (F. *H. v. McDougall*, 2008 SCC 53 (CanLII) at para 46).

[86] Similarly, UPS was required to prove that it met the requirements of section 65(2) of the Act on a balance of probabilities for purposes of the statutory defence it raised.

VII. Assessing Credibility & Reliability of Evidence

[87] In sexual harassment cases, very often there are no eyewitnesses to the alleged harassment. Tribunals may be faced with a "he said-she said" situation. In this case,

Ms. Peters and Mr. Gordon's version of events were, for the most part, widely disparate, and, as indicated, there were effectively no eyewitnesses to the direct and impugned communication and incidents between them. Assessing witness credibility and reliability was a key issue in this case.

[88] The Tribunal was guided by the often-referenced case of *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 DLR 354 ["*Faryna"*] at 357 where Justice O'Halloran wrote:

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

VIII. Chronology of Alleged Events

[89] UPS in Canada is a subsidiary of United Parcel Service, Inc. and provides delivery throughout Canada and internationally. A former manager estimated that UPS has about 15,000 employees in Canada. UPS employees include managers and full-time and part-time supervisors. The supervisors have the most direct contact with employees.

[90] Ms. Peters and Mr. Gordon met through their employment with UPS sometime in 2012 at the UPS location known as the Toronto Hub. Mr. Gordon had been employed by UPS since 2006 and, at the time material to the complaint, was a part-time supervisor of an area known as the "box lines" which involved parcel sorting and loading operations in the Charge Department. Mr. Gordon worked an overnight shift for about 25–30 hours a week and usually supervised about 15–18 employees. He reported to a full-time supervisor, Mr. Fred Ghanem, who is also a witness.

[91] Ms. Peters joined UPS in 2012 and, by 2013, worked in the car wash department. Ms. Peters began to experience unfortunate and significant personal and family issues in 2013. These continued into much of 2014. These events culminated in a motor vehicle accident in July 2014 while she was in the United States visiting an ill family member, which

required an extended recovery. Ms. Peters had various absences from work over the 2013–2014 period for reasons that include family issues and her own health issues. Her absences continued in 2015. The chronology of events related to her health and absences from work are addressed in the section of these reasons that pertain to discrimination based on disability.

[92] In the summer of 2014, UPS concluded that Ms. Peters had abandoned her position. While the details about what happened were disputed, Ms. Peters did return to employment with UPS in November 2014 with the support of her union. She was offered a position sorting parcels in the Charge Department on one of the box lines. Mr. Gordon became her direct supervisor.

[93] Ms. Peters worked a shift from 11:00 p.m. to 4:00 a.m., although she was often allowed to leave earlier and frequently finished at 3:30 a.m. Ms. Peters had a second job at Costco and was raising a young family at the time. Her evidence was that her UPS shift allowed her to manage her family commitments.

[94] Ms. Peters says that Mr. Gordon engaged in a course of frequent sexual harassment. She says it began when she was working in the car wash area in 2013, but significantly increased once she returned to work at UPS in November 2014 under his supervision.

[95] Mr. Gordon maintains that he and Ms. Peters were friends but not more and that nothing untoward occurred.

[96] On January 15, 2015, Mr. Gordon's manager, Mr. Ghanem, had a meeting with Ms. Peters and her union representative, Ms. Sophia Thompson. Mr. Ghanem arranged the meeting to discuss Ms. Peters' alleged absenteeism issues. Ms. Peters says that she reported the harassment to Mr. Ghanem at that meeting. Mr. Ghanem disputes this, asserting that Ms. Peters only complained about performance management by Mr. Gordon.

[97] Ms. Peters also says that she attempted to report the harassment to HR and through a UPS sponsored helpline but was unable to access assistance. She testified that she had previously discussed Mr. Gordon's harassment of her with her union representative, Ms. Thompson, and had shown her evidence of the harassment in the content of messages

from Mr. Gordon. She claimed that other co-workers knew of Mr. Gordon's inappropriate comments about her. She alleged two incidents at the workplace involving alleged touching and assault by Mr. Gordon. As indicated, UPS says that it did not receive any notice of sexual harassment.

[98] On February 3, 2015, Ms. Peters began a medical leave with her physician's approval, allegedly because of an inability to work due to adjustment disorder, stress, anxiety and other medical issues arising from the experience of being harassed by Mr. Gordon. Her doctor's note of February 3, 2015 put her off work "…due to current medical issues involving her health and work situation… until the end of February 2015 until these issues can be addressed." At the end of February, she provided a further medical note from her physician stating that her medical leave was extended indefinitely until further notice due to the ongoing medical concerns and issues he was following.

[99] Ms. Peters filed a human rights application against UPS, Mr. Gordon, Mr. Ghanem, and another manager, Mr. Dambrosio, with the Human Rights Tribunal of Ontario (the "provincial complaint"). The precise date that the provincial complaint was received by them was not in evidence but it was in their possession by March 23, 2015.

[100] In April 2015, a claim for short-term disability benefits made by Ms. Peters was denied. Ms. Peters claims to have continued to be unable to work at UPS. She received no income from UPS after February 3, 2015.

[101] In July 2015, Ms. Peters stopped working at her part-time job at Costco. Ms. Peters attributes this to health problems arising from Mr. Gordon's harassment at UPS. Also, in July 2015, Ms. Peters filed the current complaint with the Canadian Human Rights Commission (the "Commission"), having learned the correct jurisdiction for her complaint.

[102] Ms. Peters subsequently took her children and moved to the United States. In the United States, she and her children were supported entirely by her sister.

[103] It was agreed at the hearing that Ms. Peters is still technically an employee of UPS, her employment having not been officially terminated since the commencement of her medical leave in February 2015. UPS submitted that she abandoned her position or that the

employment contract was frustrated in its final submissions. She has never returned to active work at UPS.

[104] In September 2015, UPS conducted an investigation into Ms. Peters' complaint of sexual harassment. UPS says it did not interview Ms. Peters during this investigation primarily because she had filed a human rights complaint. UPS did not conclude from its investigation that sexual harassment occurred. However, Mr. Gordon was found to have breached UPS's policy respecting professional relationships by having had dinner with Ms. Peters. He was reprimanded. Ms. Peters was not informed of the outcome.

[105] In 2017, Ms. Peters returned to Canada and participated in the Commission's investigation process into her human rights complaint.

[106] Through disclosure in the human rights complaint process before the Commission, UPS obtained evidence from Ms. Peters that included a recording of voicemail messages from Mr. Gordon to Ms. Peters on December 1 and 2, 2014. UPS renewed its investigation. UPS did not conclude from its second investigation that Ms. Peters had been sexually harassed by Mr. Gordon. However, in 2018, Mr. Gordon's employment was terminated by UPS purportedly because he had acted without integrity by failing to disclose the extent of his interactions with Ms. Peters when he was interviewed earlier by UPS respecting their dinner together.

IX. The Alleged Acts of Sexual Harassment

A. The Allegations

[107] Ms. Peters claims that the sexual harassment consisted of ongoing comments by Mr. Gordon in the workplace, stalking behaviour (including trying to find her at work and on one occasion calling Costco to find out her schedule), repeated calls outside of work, voicemail messages and texts. She says that, beginning sometime in 2013 and continuing into 2014, Mr. Gordon would come looking for her at work. He would tell her many times that he liked her, that she was beautiful, and would make comments to other co-workers about her, such as "She's my baby," that he missed her and that he wanted to "hold and

squeeze her." She testified that when she worked in the car wash, she would try to avoid him when he came looking for her by hiding in one of the trucks. Ms. Lawes-Newell, a co-worker in the car wash department, testified that Mr. Gordon would ask for Ms. Peters and that he made such comments to her about Ms. Peters. She testified that Ms. Peters did not like his behaviour.

[108] Ms. Peters alleged that this behaviour escalated after Mr. Gordon became her supervisor in November 2014. Ms. Peters testified that she was propositioned by Mr. Gordon while having, what she understood to be, a work-related dinner with him in November 2014. She says that she rejected his request for a relationship. She testified that Mr. Gordon continued to text her, leave messages repeatedly on her phone and would ask her to go out on dates with him.

[109] Ms. Peters claimed that, in the weeks that followed, Mr. Gordon began to supervise her too closely and complain about her work. She said he frequently stood uncomfortably close to her. She alleged that on one occasion he touched her buttocks while purporting to supervise her on the box line (the "alleged touching incident"). She also testified that Mr. Gordon followed her to her car in UPS's parking lot without her knowledge and suddenly assaulted her by forcibly trying to kiss her in her car (the "alleged assault"). She could not recall the exact dates or times of these alleged incidents.

B. Overview of Available Evidence

[110] The most direct evidence regarding whether sexual harassment occurred was the testimony of Ms. Peters and that of Mr. Gordon, as well as the recording of voicemails that Mr. Gordon left for Ms. Peters. Other evidence as to whether sexual harassment occurred consisted of the following:

1) the testimony of Ms. Peters' physician, Dr. MacDonald, and her relevant medical files; Ms. Peters says that she informed Dr. MacDonald of the harassment; she asserts that he treated her for the resulting medical symptoms she experienced and placed her off work; Dr. MacDonald testified about these matters and the medical records confirm that this occurred;

2) the testimony of Ms. Lawes-Newell, primarily about her recollection of Mr. Gordon's behaviour towards Ms. Peters, including comments he made about Ms. Peters; she confirms that Ms. Peters would hide in the trucks being washed in reaction to Mr. Gordon's presence in the car wash area;

3) the testimony of Ms. Jeffers, a friend of Ms. Peters, who says that she was on the phone with Ms. Peters when the alleged assault occurred in the parking lot and that she overheard the alleged assault; she testified about other discussions with Ms. Peters concerning the alleged harassment and about helping her preserve recordings of Mr. Gordon's voicemails;

4) the testimony of her co-worker, Mr. Serghei Klimov, about an alleged discussion he had with Ms. Peters after she had transferred to the box line in which she spoke of being harassed, without identifying Mr. Gordon, and said that she had gone to HR but that no action had been taken;

5) the testimony of Ms. Sophia Thompson, the union steward, who was called as a witness by UPS; she testified about her knowledge of what occurred between Ms. Peters and Mr. Gordon and about the allegation that the harassment was reported to UPS; and,

6) co-workers Ms. Carol Blackburn, Ms. Cosetta Evans, Ms. Cuzanne Bridgeman and Ms. Jude Burke who testified that Mr. Gordon did not harass them and that they had not observed him harassing Ms. Peters.

C. Potential Evidence That Was Not Available

[111] Ms. Peters testified that she received many texts and messages from Mr. Gordon, but she only provided recorded voicemail messages from December 1 and 2, 2014 at the hearing. Ms. Peters testified about her inability or failure to have produced more recorded evidence.

[112] Ms. Peters explained that she lost voicemails from Mr. Gordon because she had a very limited plan on her phone. Voicemail messages were automatically deleted after four days. She testified that she was not very knowledgeable about technology. She stated that she did not know how to make recordings of the messages on her phone. The December 2014 recording of voicemails introduced into evidence is the result of assistance she received from Ms. Jeffers and family members who knew how to make recordings off a cell phone. She confirmed that the recording of the messages on December 1 and 2, 2014 was the only recording of Mr. Gordon's voicemails that was made.

[113] Ms. Peters testified that she no longer had her phone soon after the events in her complaint, and, therefore, could not produce the texts from Mr. Gordon.

[114] In addition, there was clear, uncontroverted evidence from employee witnesses, including from Ms. Peters, that UPS had security cameras in areas where the most egregious incidents were alleged to have occurred, such as the parking lot for UPS employees and inside the building in the box line area. There was signage posted about the video surveillance. Ms. Peters did not approach UPS at the material time to ask that the videos be reviewed or preserved.

D. The Spoliation Issue

[115] UPS argued that, if Ms. Peters had reported what occurred at the time, UPS could have accessed evidence such as video surveillance, text messages, additional voicemails and other witnesses. UPS suggests that it was prejudiced in its investigation and is prejudiced in its defence. UPS submits that the Tribunal should draw an adverse inference against Ms. Peters with respect to her accusations due to her failure to preserve voicemail messages and texts. UPS also claims that an adverse inference should be drawn due to Ms. Peters' failure to immediately report the incidents of alleged touching and assault in the workplace, while video surveillance would have still been available. UPS cites the legal principle of spoliation of evidence to support its argument that the Tribunal should draw an adverse inference against Ms. Peters regarding the missing evidence. UPS asks that the Tribunal conclude that the evidence would undermine or negate her case.

[116] Spoliation is defined in *Black's Law Dictionary* as "the intentional destruction, mutilation, alteration or concealment of evidence…. If proved, spoliation may be used to establish that the evidence was unfavourable to the party responsible" (Bryan A. Gamer, ed, *Black's Law Dictionary*, 11th ed (Thomson Reuters, 2019) sub verbo "spoliation"). The leading case on spoliation is from the Alberta Court of Appeal in *McDougall v. Black & Decker Canada Inc*., 2008 ABCA 353 (CanLII) ["*McDougall CA"*] where spoliation was pleaded as a tort. However, the principal concepts are still applicable. At para 18 of the decision, the court wrote:

> Spoliation in law does not occur merely because evidence has been destroyed. Rather, it occurs where a party has intentionally destroyed evidence relevant to ongoing or contemplated litigation in circumstances where a reasonable inference can be drawn that the evidence was destroyed to affect the litigation. Once this is demonstrated, a presumption arises that the evidence would have been unfavourable to the party destroying it. This presumption is rebuttable by other evidence through which the alleged spoliator proves that his actions, although intentional, were not aimed at affecting the litigation, or through which the party either proves his case or repels the case against him.

[117] It is not disputed that evidence consisting of texts and voicemail messages was destroyed in this case. The loss of video surveillance is another matter, as explained below.

[118] The first issue here is whether the principle of spoliation applies to these facts. It was up to UPS to establish that it did.

[119] UPS had to demonstrate that Ms. Peters intentionally destroyed evidence relevant to ongoing or contemplated litigation in order to affect that litigation. The evidence demonstrates that the loss of voicemails was due to Ms. Peters' cell phone plan and not her own actions. Ms. Peters cannot be faulted for not having anticipated needing a plan that allowed her to retain voicemail messages for a longer period in case someone chose to harass her by calling her repeatedly. Similarly, there is no evidence that Ms. Peters' loss of texts and voicemail messages or the loss of her phone was deliberate on her part. In this regard, Ms. Peters was neither questioned during her testimony nor cross-examined by UPS about how her phone became inaccessible to her.

[120] During his later testimony, Mr. Gordon indicated his belief that Ms. Peters' phone had been destroyed by her partner at the time (based on a discussion he implied he had with Ms. Peters sometime in 2015). If Mr. Gordon's explanation is true, the act of destruction would have been beyond Ms. Peters' control. No alternative evidence about the circumstances under which the phone ceased to be available to Ms. Peters was presented.

[121] Accordingly, there is no evidence that Ms. Peters destroyed the text evidence or deliberately did away with her phone. She was not under a legal obligation to preserve text messages as she received them. With respect to the voicemails and texts, there is insufficient evidence to conclude that the principle of spoliation could apply.

[122] With respect to the alleged availability of video recordings, one witness on behalf of UPS confirmed that there would no longer be any camera footage available. Mr. Greenaway, a UPS manager, mentioned that video recordings would not be available after 22 days. That was the extent of evidence offered by UPS relevant to its objection. There was no evidence to confirm that video evidence from relevant cameras would, in fact, have existed and been available to UPS had Ms. Peters asked UPS to retrieve the footage within 22 days. UPS offered no evidence to confirm that its cameras would have caught the activity because of their placement and that the relevant cameras were working at the time.

[123] The Tribunal is not in a position to conclude based on the evidence that the video would have been available for a reasonable length of time after the events. There is insufficient evidence for the Tribunal to conclude that video evidence existed. The Tribunal is not prepared to infer that there was video footage that would have assisted the Tribunal without the basic factual groundwork first being established by UPS.

[124] Further, the Tribunal is not persuaded that the principle of spoliation could apply to any video surveillance that may have existed because there is no evidence that Ms. Peters destroyed video footage or intentionally did not ask to have the video reviewed so that the video would be destroyed.

[125] Even if there were video footage of the touching incident and the parking lot incident, spoliation applies where there is ongoing litigation or the contemplation of litigation. The alleged incidents likely occurred in January 2015. Ms. Peters did not begin any legal proceeding until approximately March 2015 when she filed her provincial complaint. This is reinforced by UPS's position that Ms. Peters did not report the sexual harassment to it before filing a human rights complaint. If true, this means that there was no litigation and no contemplated litigation at the likely time of the loss of the voicemails and any video footage.

[126] Accordingly, there is no evidentiary basis for the Tribunal to conclude that any evidence was destroyed by Ms. Peters (or deliberately lost to effect destruction) to affect the litigation. The Tribunal will not, accordingly, draw an adverse inference against Ms. Peters.

[127] That evidence was lost is a fact in this proceeding. UPS's related allegation, that it was prejudiced in its investigation of the complaint because of the loss of evidence, remains

an issue. The Tribunal will return to the matter of destroyed or unavailable evidence in the context of UPS's submissions respecting its investigation of the complaint. However, the Tribunal will first explain its assessment of the evidence that was available respecting whether sexual harassment occurred.

E. Preliminary Comment Respecting Ms. Peters' *Prima Facie* Case

[128] Ms. Peters' testimony, if accepted, is *capable* of establishing a *prima facie* case of sexual harassment to the extent that its factual content fulfills all parts of the legal test for sexual harassment in *Janzen*. To be clear, at this point in the analysis the Tribunal is not accepting all or part of Ms. Peters' testimony. The relevance, credibility, reliability and ultimately the weight to be given to Ms. Peters' testimony and all other relevant evidence she presented requires assessment. The Tribunal will equally consider and assess Mr. Gordon's evidence to determine whether sexual harassment occurred in this case, as well as any information from UPS.

F. Overview of Mr. Gordon's Evidentiary Defence

[129] The sexual nature of the alleged conduct by Mr. Gordon is not in dispute. Mr. Gordon also did not assert that he had a consensual romantic or sexual relationship with Ms. Peters. For example, he does not allege that the more significant events (such as allegedly trying to forcibly kiss Ms. Peters) occurred but were welcome. There is no suggestion from him that the two had a prior sexual relationship that went awry. Mr. Gordon maintains that he had a pleasant friendship with Ms. Peters. It was his evidence that she confided in him about personal matters and that they discussed family, politics and work-related problems. Mr. Gordon's testimony is that he did not make inappropriate comments about Ms. Peters and the alleged serious incidences did not occur at all.

[130] Mr. Gordon says that he had no inkling there was any issue between himself and Ms. Peters until he learned in March 2015 that she had filed an application with the Human Rights Tribunal of Ontario in which he was named as the alleged harasser. Mr. Gordon appears to have been quite hurt by the accusation and expressed some anger towards

Ms. Peters. He suggests that Ms. Peters was looking for compensation from UPS as matters relating to her employment had come to a head (because of Ms. Peters' absenteeism and the related disciplinary actions taken by UPS, explained below). He submits that Ms. Peters set him up by unexpectedly raising harassment allegations based on their friendship in the hopes that UPS would be found guilty of allowing harassing or discriminatory conduct in the workplace.

G. UPS's Position Respecting Ms. Peters' and Mr. Gordon's Evidence

[131] UPS urged the Tribunal to find that Mr. Gordon was an entirely credible witness based on his demeanor during the hearing, submitting that his testimony carried the "conviction of truth" and was consistent with the "preponderance of the probabilities." UPS described Mr. Gordon as giving evidence that was internally consistent, "coherent, plausible" and suggested that he freely acknowledged some deficiencies on his part in hindsight (Mr. Gordon's acknowledgments of relevant deficiencies were not identified by UPS in its submissions).

[132] UPS took the position that, in contrast, Ms. Peters was not credible in many respects. UPS suggested that Ms. Peters' evidence should not be believed, based on her demeanor during her testimony. UPS described her as "quite firm, even argumentative during her testimony and certainly accepted no responsibility for anything, not even her failure to call in absences… Peters even laughed at some points during her testimony regarding what should have been difficult subject matter…." As further evidence that Ms. Peters was not credible, UPS referenced inconsistencies between Ms. Peters' written complaint to the Canadian Human Rights Commission and her oral evidence, as well as inconsistencies between her evidence and the evidence of Ms. Jeffers and Ms. Thompson.

[133] In its submissions, UPS provided an example of a case where the Tribunal applied *Faryna* and found the testimony of certain witnesses, including the complainant, either not credible or not reliable. In *Faryna*, the Tribunal decided not to accept the complainant's evidence "on key, controversial issues without cogent, corroborative evidence," while concluding that the corporate respondent's witnesses were credible and their evidence fairly

reliable (*Cassidy v. Canada Post Corporation & Raj Thambirajah*, 2012 CHRT 29 (CanLII) ["*Cassidy*"] at paras 25–30). UPS asks the Tribunal to not accept Ms. Peters' testimony on key issues unless it is confirmed by cogent, corroborative evidence.

[134] UPS supported Mr. Gordon's position that Ms. Peters had used Mr. Gordon or set him up to further her own claims against UPS. UPS submitted that "Gordon's belief that he was collateral damage in Peters' vendetta against UPS Canada has an air of reality…." UPS suggested that the union representative, Ms. Thompson, had a similar complaint with Ms. Peters, referring to testimony from her to the effect that she felt used by Ms. Peters.

[135] As indicated, UPS found no evidence of sexual harassment by Mr. Gordon in its first investigation of Ms. Peters' human rights complaint in 2015. As well, UPS conducted a second investigation to ascertain whether there had been sexual harassment after the recordings of Mr. Gordon's voicemail messages to Ms. Peters in December 2014 were disclosed to UPS. UPS did not conclude that Mr. Gordon had engaged in sexual harassment based on what it heard in those messages. UPS terminated Mr. Gordon's employment in January 2018 for the stated reason that he had not disclosed information to it during the first investigation. At the hearing, UPS urged the Tribunal to accept Mr. Gordon's explanations for what occurred in the workplace, including his explanation of the content and tone of the recorded voicemail messages that he left for Ms. Peters.

H. Demeanor

(i) Mr. Gordon's Demeanor

[136] Mr. Gordon denied having engaged in sexual harassment in a credible manner. He presented as a professional and sincere person, with a somewhat formal demeanor. He appeared to be a person who would not engage in frivolity. The evidence about his time with UPS suggested that he was a responsible and dedicated employee of UPS. He did not demonstrate animus towards UPS, despite having been terminated by UPS and having filed a wrongful dismissal suit against them.

[137] While an UPS employee, he helpfully drove four employees to work and back each shift, including a disabled employee who had no means of getting to work. These employees are listed above as witnesses for Mr. Gordon. They testified about his character based on their interactions as co-workers.

[138] Mr. Gordon vehemently assured the Tribunal with every appearance of his sincerity that he did not sexually harass Ms. Peters. He maintained his testimony in that regard even after the recordings of his voicemail messages to Ms. Peters were played at the hearing and did not waiver under cross-examination by the Complainant, the Commission, and the Respondent, UPS.

(ii) Ms. Peters' Demeanor

[139] At certain points, Ms. Peters was quite inexpressive in her testimony, most noticeably when she testified to being assaulted in the parking lot. At other times, she was argumentative. For example, on occasion she responded to Mr. Gordon that a factual proposition he put to her on cross-examination was a "flat-out lie." She laughed at a point that seemed a little out of place. Some of her conduct, in particular being argumentative, could lead the Tribunal to negative conclusions about her demeanor and ultimately the credibility or reliability of her testimony.

(iii) Conclusions Respecting Demeanor in This Case

[140] Upon close reading of UPS's submissions, the Tribunal concludes that UPS's submissions respecting credibility assessment placed significant emphasis on its perceptions of witness demeanor. Witness demeanor, therefore, was an indirect but key pillar of its defence to the allegation that any sexual harassment occurred.

[141] As explained in *Faryna*, demeanor is not a solid foundation upon which to assess credibility. It could lead to a miscarriage of justice if it becomes a distraction in a case such as this, where credibility and reliability are so central. The Tribunal has placed more emphasis on cogency and consistency with the "preponderance of probabilities" than demeanor.

[142] UPS identified signs in Ms. Peters' demeanor during her testimony as measures of credibility. The Tribunal finds Ms. Peters was not, in general, overly or unreasonably argumentative. Ms. Peters testified for four days, much longer than any other witness. She was cross-examined extensively by Mr. Gordon, her accused harasser, for over two days. She was also cross-examined by UPS's experienced and able legal counsel at length. It was apparent that she found the experience of testifying very trying and, at times, draining. There were moments she was "testy," at other times she appeared to understate matters.

[143] For example, her initial account of the alleged assault in the parking lot during direct examination was striking in its understatement. Her demeanor became notably unexpressive. There was no sense of theatre from her in the telling of the account of what she says happened. The subject matter of her testimony was the sudden and unexpected intrusion of her supervisor into her car, attempting to forcibly kiss her, when she was alone in a dark area of a parking lot. However, Ms. Peters testified without drama or embellishment.

[144] The medical exhibits demonstrate that Ms. Peters had a history of depression and anxiety in the past. She has experienced a significant number of personal challenges. At the hearing, she was facing subject matter she testified that she had tried hard to forget. In the circumstances, a laugh that seemed a little out of place from someone with her history is not a lynchpin for credibility assessment. She was not a perfect witness. But her demeanor most likely reflected all of her circumstances. There was nothing about her presentation of evidence that would warrant discounting the content of what she said.

[145] The Tribunal's assessment of the cogency and consistency of Ms. Peters' testimony are addressed separately.

I. The Recordings

(i) Approach to Analysis

[146] Because of the central importance of credibility in this case, the Tribunal selected the recordings of Mr. Gordon's voicemails as the starting point to sort out the conflicting accounts from Mr. Gordon and Ms. Peters.

[147] The authenticity of the recordings is not in question. There is no dispute that they are recordings of Mr. Gordon and that the messages were intended for Ms. Peters. The recordings are reliable, corroborative evidence of what occurred between Mr. Gordon and Ms. Peters at a highly relevant time within the chronology of events—about two weeks after they had a dinner together on November 14, 2014. The parties agreed upon the most accurate transcript of the recordings and that version was used by the Tribunal.

[148] The recordings were significant evidence respecting the issue of overall witness credibility because Ms. Peters and Mr. Gordon disagreed about what the messages were about, even though they both heard the content again at the hearing and, no doubt, in preparation for the hearing. The reliability and credibility of the testimony of these parties as witnesses were squarely put in issue by their disagreement about why those messages were left for Ms. Peters and what the messages were truly about.

[149] For these reasons, the recordings became an aid to the Tribunal's assessment of whose testimony was more likely to be reliable and credible about other disputed facts, assuming the Tribunal also found that the evidence in question had "consistency with the probabilities that surround the currently existing conditions" (*Faryna* at para 357).

[150] Arguably, the recordings demonstrated that Mr. Gordon likely sexually harassed Ms. Peters on their face. From that standpoint, evidence concerning the nature of the relationship between Mr. Gordon and Ms. Peters leading up to that point could have been considered irrelevant. However, Mr. Gordon urged the Tribunal to assess the recordings in the context of the alleged friendship between himself and Ms. Peters. Given the potential significance of this evidence, it would not have been appropriate for the Tribunal to take the position that "the recordings speak for themselves." The Tribunal fully considered

Mr. Gordon's explanation of the recordings' content and tone, and the potentially relevant context provided by the nature of their existing relationship.

(ii) Mr. Gordon's Explanation of the Recording

[151] Mr. Gordon offered a "two-part explanation" of the content and tone of the messages he left for Ms. Peters on December 1 and 2, 2014. Mr. Gordon said he was angry with Ms. Peters in the voicemails of December 1 and 2, 2014 because he thought he and Ms. Peters were friends, she had asked him to call her, and she would not answer his call or call him back after she had asked him to call her. He thought she called him because she was having a problem and he was very concerned. Mr. Gordon described himself as being "cheesed off" with Ms. Peters as a result. The Tribunal gained the impression that Mr. Gordon was trying to convey that he felt as if he had been "played" on the day in question.

[152] Mr. Gordon's position was that the background story to the calls provided a reasonable explanation for the anger or frustration heard on the tapes during the call to Ms. Peters and accounted for his multiple attempts to reach her in response to a request for a call-back.

(iii) The Framework for Assessing the Recordings

[153] Mr. Gordon's explanation is characterized by the Tribunal as a "two-part" explanation because it requires two things to be true: 1) that Ms. Peters called Mr. Gordon, not the other way around; and 2) that Mr. Gordon and Ms. Peters had a friendship outside of work, such that Ms. Peters would ask Mr. Gordon to call her at home to discuss a personal matter, that Ms. Peters would wish for Mr. Gordon to keep trying when he could not reach her, and that Mr. Gordon was justified in his personalized reaction when she did not call him back.

(iv) The Content

[154] There is a chain of five recorded messages, four on December 1, 2014, and one on December 2, 2014. There is no evidence of an emergency, or urgency or a need for multiple

messages, given the content of the messages. These messages were clearly “social” in nature.

[155] The first message begins: “Tesha Peters, this is Lindell Gordon calling again. Today is the first of December, I left you a message earlier, so same message. You take care, God bless, and ahh… hope to hear from you soon. I just hope to hear from you soon, take care, bye.”

[156] There is nothing in this message to indicate that Mr. Gordon is responding to a call from Ms. Peters. He says that he is calling again. He does not say he is calling her back or returning her call. He indicates he had called before this chain of messages. He confirms he already left a message for her. He is leaving the same message. He did not wait for Ms. Peters to call back. The content of the first message is inconsistent with Ms. Peters having called Mr. Gordon and having asked him to call her.

[157] The first message is, in fact, the second message of the day, according to the content of Mr. Gordon’s message. Considering that there were four recorded messages on December 1, 2014, that means there were at least five messages left by Mr. Gordon for Ms. Peters on December 1, 2014.

[158] Mr. Gordon says that he hopes to hear from Ms. Peters soon, and immediately repeats, “I just hope to hear from you soon.” This is consistent with having an existing concern about Ms. Peters because she has indicated to Mr. Gordon that she has a problem. It is also consistent with Mr. Gordon pursuing a relationship with Ms. Peters.

[159] When testifying, Mr. Gordon was not specific in his explanation about when the first call from Ms. Peters was allegedly made or about when the chain of message attempts and related communications between the two began or ended. It is possible that Ms. Peters had called Mr. Gordon even before he left the earlier message referenced in his first recorded message. However, it is more likely that Ms. Peters had not called him at all, and that he was trying to reach her. This is more probable because there is no indication in anything Mr. Gordon said in any of his messages on December 1 and 2 to the effect that Ms. Peters was having a problem and that this is why he was trying to reach her. To the contrary,

Mr. Gordon stated that he wants to "meet up" with Ms. Peters for dinner, a coffee or a drink. Mr. Gordon's second message to Ms. Peters on December 1, 2014, was this:

> My name is Lindell Gordon. My number is [provides phone number]. I was talking to you, just calling you today, December 1, Monday. I was calling to see if since you weren't working at… ah… Costco today and you were basically at home just getting stuff done, I wanted to find out from you if you wanted to… umm… leave from work early tonight and if you wanted to meet up early tonight say maybe about 7:30, 8:00? Ah…. And maybe we could have dinner if you care to, or we could just sit down and… and… and chat… ah… over coffee or a drink or whichever, it's your choice. I just wanted to know if that interested you in any way. Call me back, let me know. If I don't hear from you by certain time, I'll assume you're not interested… Leave me a message. Thank you, enjoy your day, bye.

[160] Mr. Gordon asked Ms. Peters to spend time with him one-on-one outside of work. He was not responding to a call from her to help her with a personal problem.

[161] Mr. Gordon mentioned that Ms. Peters was not working at Costco that day. This is consistent with Ms. Peters and Mr. Gordon having enough of a friendship that he knew her schedule. However, other evidence suggests another possible explanation. Ms. Peters did not remember when this happened, but she testified that she was informed by a co-worker at Costco that a man had called looking to see if she was at work. Based on what she learned, Ms. Peters believed it was Mr. Gordon who had called Costco. This is part of her allegation that Mr. Gordon engaged in stalking behaviour. Her friend, Ms. Jeffers, testified that she recalled Ms. Peters reporting her belief that Mr. Gordon had called Costco to obtain information about her schedule. However, Ms. Jeffers had no specific recollection of when this occurred. The stalking allegations are addressed below.

[162] The content of the third message (the fourth that day) from Mr. Gordon to Ms. Peters provides further confirmation that Mr. Gordon did not receive a call from Ms. Peters asking him to call her. He begins:

> Yes, Tesha Peters, I called you since early, very early today a message for you…! I asked for the possibility of seeing you later today!

[163] Mr. Gordon once again confirms that he called Ms. Peters and the purpose of his call. His frustration was not reasonable nor proportional. The remainder of his third recorded message was:

> I TOLD YOU TO GET BACK TO ME…, YOU CALLING ME AT 8:15 IN THE NIGHT TO TELL ME THAT YOU JUST FINISHED WORK! I don't understand how this could be, Tesha Peters, I just don't understand that… I just don't think you want to make up with me! That's fine, but you know that you calling me, you sending me a text that you just finished work! You calling me and telling me there's no answer. I JUST DON'T EXPECT TO HEAR FROM YOU AT 7:00 AT NIGHT, ABOUT… I TOLD YOU, MEETING AT 7:30! YOU CALL AT 8:15 TO TELL ME…. I JUST DON'T UNDERSTAND THAT! I really don't understand that. I'm really sorry, but I don't understand that! Anyhow, I'm sorry I didn't get a chance to pick up your call when you did call…, but yah… I guess we'll talk about that tomorrow, or some other time if you're going to talk about it. But you have a good night and God bless and take care.

[164] On the tape, Mr. Gordon has a raised and angry voice which peaks and then subsides to "you have a good night and God bless and take care." Capital letters are used to denote Mr. Gordon having a noticeably raised voice. In the recording, Mr. Gordon sounds quite different from his demeanor at the hearing.

[165] Mr. Gordon's attempt to be controlling of Ms. Peters is highlighted by his insistence: "I TOLD YOU TO GET BACK TO ME" and "I TOLD YOU, MEETING AT 7:30!" The time that Ms. Peters called him back appears to have further angered him because they no longer had time to go out together.

[166] Despite indicating to Ms. Peters that he was letting the issue go and leaving further discussion as her choice, Mr. Gordon left a fifth message for Ms. Peters on December 1, 2014 telling her to call him right away. He stated:

> Peters, I told you I was gonna call you back, I just wanna talk to you just now. I need you to pick up your phone. I DON'T UNDERSTAND why you're dealing with me like that? From now on I guess there's your side. Call me now, call me, [provides phone number]. You can call me, I've been waiting for your call.

[167] It appears that Mr. Gordon and Ms. Peters worked the same shift at UPS overnight. On December 2, 2014, Mr. Gordon's message to Ms. Peters was:

> Yes, good morning. This is Lindell Gordon, [phone number provided], call me please. I was trying to… I was trying to…umm… contact you… before I left, but… umm… unfortunately I think maybe you were somewhere else in the building, so I didn't get to contact you so yah… anyhow, CALL ME!

[168] This message confirms that Mr. Gordon was searching for Ms. Peters while she was at work before he left work, most likely to continue his demands. The message confirms that, when Mr. Gordon could not find her at work, his reaction was to, essentially, call her again at home and command that she call him back.

[169] The Tribunal finds Mr. Gordon's testimony about his reason for calling Ms. Peters and for being frustrated to be untrue based on the content of the recordings. It is also not the case that Mr. Gordon's messages demonstrate that there was another reasonable, non-harassment-related explanation for Mr. Gordon's anger toward or frustration with Ms. Peters.

[170] The Tribunal will return to its assessment of the above evidence after considering the available evidentiary context respecting the prior relationship between Ms. Peters and Mr. Gordon.

(v) Alleged Prior Friendship Between Ms. Peters and Mr. Gordon

[171] The evidentiary issue seemed to be whether there was persuasive evidence that the two had a relationship that led Mr. Gordon to think it was appropriate to command Ms. Peters to call him and to become so angry when she did not, or that would justify his anger. A further question was whether the voicemails were typical of their relationship and, therefore, whether this type of behaviour was accepted by Ms. Peters.

[172] In support of his position that Ms. Peters confided in him, Mr. Gordon testified that he knew in 2013 that Ms. Peters was having marital problems and that there were illnesses within her family. He said that he learned this from Ms. Peters at the time. However, Ms. Peters' medical file was an exhibit in these proceedings. That file contains information about her marital difficulties. Mr. Gordon also could have found out this information from other co-workers. How Mr. Gordon learned these things is a matter that was not fully

explored at the hearing. Mr. Gordon's knowledge that Ms. Peters had marital problems and illnesses among family members is not a particularly reliable indicator of the nature of their prior relationship.

[173] There was some evidence that Ms. Peters did not consider Mr. Gordon to be a friend and that a personal relationship with him was specifically unwelcome. As noted, Ms. Peters testified that Mr. Gordon made her feel uncomfortable at work. She testified that he would come looking for her and that he would say things about her to co-workers that she found embarrassing. She relayed her discomfort with comments he made that include her being "his baby" and about her being "beautiful." There was her evidence that when she worked in the car wash, she hid in the trucks when Mr. Gordon came looking for her. It is unlikely that Ms. Peters would have discussed her marital difficulties with a co-worker she considered to be harassing her at the time or with someone she thought was "weird," as she testified she thought Mr. Gordon was at the hearing.

[174] Ms. Lawes-Newell corroborated that Mr. Gordon's behaviour was not appreciated by Ms. Peters. She confirmed both that if Ms. Peters saw him coming, she would hide in a truck, and the nature of the comments Mr. Gordon made. Ms. Lawes-Newell said that she would tell Mr. Gordon that Ms. Peters was not there when Mr. Gordon asked for her. She also testified that she would tell Mr. Gordon that she did not know where Ms. Peters was, even if she did, because she was worried for Ms. Peters' safety. It was her opinion that Mr. Gordon had a crush on Ms. Peters. Ms. Lawes-Newell was asked on cross-examination whether she thought that Ms. Peters had a crush on Mr. Gordon. She indicated that she asked Ms. Peters about that. Ms. Peters apparently responded, "I don't know what that man wants with me." She described the interactions between Mr. Gordon and Ms. Peters as "forced," not friendly.

[175] Ms. Peters' evidence on this point and Ms. Lawes-Newell's corroborating testimony are inconsistent with there being a comfortable friendship between Ms. Peters and Mr. Gordon while she worked in the car wash, whereby they would discuss personal matters.

[176] Mr. Gordon was questioned about whether he ever looked for Ms. Peters when she worked in the car wash. He answered: “I won’t say I never looked for her, but I never sought her out.” He denied calling her his “baby” and asking Ms. Lawes-Newell for her. He acknowledged texting a car wash supervisor once on an unknown date to say that he had not seen Ms. Peters around and was wondering what was going on.

[177] Mr. Gordon admitted that he may have suggested that Ms. Peters was beautiful. This was the one admission by Mr. Gordon respecting any alleged statement he made to Ms. Peters. His explanation is that he believed, from comments Ms. Peters made, that due to events in her marriage, Ms. Peters did not feel beautiful anymore and that she was forming a negative impression of men. Mr. Gordon testified, with emotion, that he said to Ms. Peters that he did not see her as “having a problem in that department.” Mr. Gordon implied that he attempted to persuade her otherwise, as a friend would do. The plausibility of this explanation requires a finding that the comment was made by Mr. Gordon divorced from any personal sexual interest in Ms. Peters.

[178] Ms. Peters testified that Mr. Gordon said to her that he was “not like other men.” The comment, if made, is consistent with the “beautiful” comment, in that both comments could have been intended by Mr. Gordon to contrast himself to her partner at a time that they were having marital difficulties.

[179] Mr. Gordon also testified that Ms. Peters suggested that they “hang out” outside the workplace when she worked in the car wash. He says that he responded that he did not think he could because, when he finished work, he had challenges in his life he had to address. This was denied by Ms. Peters. Neither Mr. Gordon nor Ms. Peters suggested that, in fact, the two spent any time together outside of work.

[180] Mr. Gordon said he was intending to travel to the United States to take a child to camp and told Ms. Peters this. He says that Ms. Peters indicated that she wished to go to the United States to see an ill family member. He testified that Ms. Peters told him that she was not supposed to drive and asked if she could drive to the United States with him. He said that he agreed but told her that she would have to leave when he left.

[181] Ms. Peters denied any desire to drive with Mr. Gordon to the United States. She testified that she declined an offer Mr. Gordon made to drive her. Perhaps most telling, Ms. Peters did travel to the United States around that time but did so without Mr. Gordon.

[182] Mr. Gordon provided no explanation regarding why Ms. Peters did not travel with him in his car. Mr. Gordon's evidence lacked other essential details, such as why they would have been travelling to the same location in the United States at the same time. In all the circumstances, it seems most likely that Mr. Gordon offered to drive Ms. Peters because he was hoping to spend time with her and that she declined the offer.

[183] Mr. Gordon further testified that Ms. Peters discussed wishing to renew her religious beliefs with him and that he offered to assist her in relation to attending church. Ms. Peters appeared offended by Mr. Gordon's evidence on this point and denied that she needed any assistance from Mr. Gordon in relation to her religious beliefs. Ms. Peters called this a "flat-out lie."

[184] There was evidence that Mr. Gordon and Ms. Peters had work-related discussions. Mr. Gordon knew that Ms. Peters had a problem with her former supervisor in the car wash and that she wished to become a union steward. Ms. Peters and Mr. Gordon had each other's cell phone numbers in 2013. However, the fact that he repeatedly offered his phone number to her in his messages of December 1 and 2, 2014 indicates that she did not have his phone number at the time of his messages.

[185] Mr. Gordon testified that, at the time that Ms. Peters was given a position on the box line in November 2014, there were two part-time supervisors. He testified he was told that Ms. Peters was happy that Mr. Gordon would be her supervisor as he would "treat her fairly." Mr. Gordon suggested that Ms. Peters had selected him as her preferred supervisor. He pointed out that, if she thought he was harassing her, she would have objected and asked to have the other person be her supervisor. Ms. Peters did not object to Mr. Gordon becoming her supervisor.

(vi) Conclusions About Extent of Friendship up to November 2014

[186] It is difficult for the Tribunal to make findings of fact solely from the testimony of Ms. Peters and Mr. Gordon as to the extent and nature of the personal relationship between them in 2013 and the first half of 2014 because not much detail was provided.

[187] However, Mr. Gordon's denial that he sought out Ms. Peters at work was not persuasive. There is also the testimony of Ms. Lawes-Newell that is consistent with Ms. Peters wishing to minimize her contact with Mr. Gordon when she worked in the car wash. On the balance of probability, it does not appear that Mr. Gordon and Ms. Peters had a relaxed, mutual friendship in the workplace. They did not spend time together outside of work. Accordingly, it seems unlikely that, when Ms. Peters worked in the car wash, they had the kind of ongoing, personal discussions that one associates with a friendship. The Tribunal concludes that it is most likely that Ms. Peters did not share truly personal information with Mr. Gordon.

[188] This is borne out by the fact that, in the summer of 2014, Ms. Peters went to the United States to be with her ill family member. Significantly, Mr. Gordon appeared unaware of what happened to Ms. Peters after that.

[189] As noted, Ms. Peters had a car accident on July 3, 2014, while she was in the United States. A dispute subsequently developed between Ms. Peters and UPS about whether she had abandoned her job when she was in the United States.

[190] Mr. Gordon did not know that Ms. Peters had been in a car accident, that she had been injured, that she was unable to work for an extended period or even that she had returned to Canada. Mr. Gordon was not involved in the dispute about Ms. Peters' return to work at UPS. If Mr. Gordon had any idea of what was happening in Ms. Peters' life and was friendly with her, he would have likely known about such significant events. By his evidence, Mr. Gordon's next interaction with Ms. Peters was introducing her to her new role on the box line in November 2014. None of these facts are consistent with there being a friendship between Mr. Gordon and Ms. Peters.

[191] Further, Mr. Gordon's testimony that Ms. Peters was happy to learn that he was her supervisor was contradicted by Ms. Thompson, the union steward who was involved in returning Ms. Peters back to work. Ms. Thompson did not testify that Ms. Peters expressed happiness at the prospect of having Mr. Gordon as her supervisor, nor did Ms. Peters choose Mr. Gordon as between the two part-time supervisors of the box lines. Ms. Thompson testified that she was the one who favoured Mr. Gordon's selection because she did not believe that the other supervisor and Ms. Peters could work together. Ms. Peters did not object to Mr. Gordon being her supervisor. However, her re-instatement was something of a favour requested by Ms. Thompson of management and was only reluctantly granted. There were also limits on the hours that Ms. Peters could work. It is understandable that Ms. Peters did not object at the outset in these circumstances.

[192] Considering the evidence, Mr. Gordon failed to establish that the two had an ongoing personal relationship. It seems unlikely that, in early December 2014, after he had become her supervisor, Ms. Peters would have called Mr. Gordon and asked him to call her back at home about a personal problem outside of work. The Tribunal is also not persuaded that the two had the kind of pre-existing relationship that might account for why Mr. Gordon became so annoyed with Ms. Peters when she did not call him back on December 1 and 2, 2014.

(vii) Their Relationship Between November 4, 2014 and December 2, 2014

[193] The Tribunal also considered the evidence of what occurred between the time Mr. Gordon became Ms. Peters' supervisor on November 4, 2014 and the time he left his voicemail messages on December 1 and 2, 2014 to ascertain whether their relationship had changed. It was not disputed that Ms. Peters and Mr. Gordon had dinner together on November 14, 2014. That event could have reflected a change in their relationship.

[194] Before the dinner, Mr. Gordon made a point of telling Ms. Peters, as her new supervisor, that he would not show her any favouritism because he knew her. She agreed with that.

[195] Mr. Gordon and Ms. Peters disagreed about who invited whom and about what happened the evening of the dinner. Ms. Peters testified that Mr. Gordon suggested that they meet up for dinner. She testified that she agreed because she was under the impression it was to discuss work and to receive work-related advice given that she was new to the box line position. She testified that she was also interested in becoming a union steward and understood that this was something they would discuss.

[196] Ms. Peters testified that the dinner began with work-related discussion, namely her interest in becoming a union steward. However, she said it changed. She testified that Mr. Gordon came on to her, tried to touch her hand, and said things such as that she was "beautiful" and that he wanted a relationship with her. She testified that she corrected him and pointed out that he was married. She says that she got the waiter's attention when they finished eating and paid for the meal because she did not want Mr. Gordon to believe that she owed him anything. She did not keep the receipt. Ms. Peters testified that she was disgusted and upset by what happened at dinner. She said she became very uncomfortable working under Mr. Gordon's supervision afterwards.

[197] Mr. Gordon testified that going out was Ms. Peters' idea. He testified that Ms. Peters suggested they hang out and catch up. He agreed that she paid for dinner but says that she gave him the receipt and told him to hold on to it "to remember the night." He kept the receipt for about a year. Mr. Gordon also testified that the dinner was Ms. Peters' idea because it had been her birthday and she wanted to celebrate with him.

[198] The Tribunal does not believe that Ms. Peters would ask Mr. Gordon to celebrate her birthday. Ms. Peters' birthday had occurred five months earlier. This would only be believable if the two were good friends and the dinner happened around her birthday. Neither was the case.

[199] It is more probable that the dinner was Mr. Gordon's idea because of the other evidence to the effect that Mr. Gordon would initiate contact with Ms. Peters. It is more likely than not that he did proposition Ms. Peters at the dinner given the issues with the credibility of his evidence.

(viii) Conclusion Respecting the Recordings

[200] Mr. Gordon and Ms. Peters did not have the kind of prior relationship that could account for Mr. Gordon's voicemails, as Mr. Gordon suggested. Whatever prior relationship they did have did not justify Mr. Gordon's behaviour towards Ms. Peters on December 1 and 2, 2014.

[201] Mr. Gordon's angry tone and commands were an attempted exercise of sexualized authority over Ms. Peters and, in making them, Mr. Gordon abused his supervisory power over his subordinate employee. When Ms. Peters did not comply, he spoke to her in a demeaning manner by pointing out that she had not obeyed him. This behaviour is exactly what the Supreme Court of Canada emphasized in *Janzen*: 1) that sexual harassment is an abuse of power, and 2) that sexual harassment is a demeaning practice. At para 33, the court wrote:

> When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employee forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.

The recordings are clear and confirming evidence of sexual harassment of Ms. Peters by Mr. Gordon.

[202] Mr. Gordon asserted that he would not have repeatedly called Ms. Peters if he had known that his interactions with Ms. Peters were unwelcome. Mr. Gordon should have known that his behaviour towards Ms. Peters on December 1 and 2, 2014 would be unwelcome. No reasonable person would welcome the behaviour exhibited in those voicemail messages. The Tribunal is unable to conclude that it was welcomed by Ms. Peters.

[203] Mr. Gordon is taken to know what he has done in the past. Yet he implied that he knew what sexual harassment was and that he was certain that he had not harassed Ms. Peters. Even in his final submissions, Mr. Gordon described his own behaviour in

repeatedly hounding Ms. Peters to “hang out” with him as “trying to fulfill her request” that he call her, which was a misrepresentation of what occurred. Mr. Gordon testified that, “if what he did was sexual harassment, he did not know what sexual harassment was.” Mr. Gordon did not acknowledge any deficiencies on his part. He may not have understood what sexual harassment was at the time of the events. However, Mr. Gordon knew what sexual harassment was at the hearing. This issue was thoroughly canvassed prior to the hearing and its definition was addressed correctly by Mr. Gordon in his submissions. The reasonable conclusion drawn from these facts is that Mr. Gordon was not prepared to acknowledge or take any responsibility for his actions.

(ix) Mr. Gordon’s Allegation that Ms. Peters’ Call Was a Set-Up

[204] Mr. Gordon suggested that Ms. Peters set him up for the complaint by calling him and recording his messages of December 1 and 2, 2014. This suggestion is part of Mr. Gordon’s defence that he is being used by Ms. Peters to cause legal problems for UPS. Even if she did leave a message for him, Ms. Peters did not “cause” Mr. Gordon to act as he did in response. Mr. Gordon is blaming Ms. Peters for his own conduct. His allegation that Ms. Peters “set him up” is without evidentiary foundation.

J. Whether There Were Repeated Harassing Communications From Mr. Gordon to Ms. Peters

[205] The next factual dispute concerns whether Mr. Gordon repeatedly called or left messages or otherwise attempted ongoing contact with Ms. Peters on dates other than December 1 and 2, 2014. The Tribunal has found that Mr. Gordon exhibited “over the top” persistence in asking Ms. Peters for a date through six phone messages on December 1 and 2, 2014. The Tribunal is inclined to believe that descriptions of similar conduct by Mr. Gordon, specifically those contained in Ms. Peters’ statements, are accurate, because of Mr. Gordon’s evidence and position respecting the December 1 and 2, 2014 recordings and the Tribunal’s related findings.

[206] After making five attempts in one day to speak with Ms. Peters by phone, Mr. Gordon tried to see her in person while she was working the next shift at UPS but could not find her.

That Mr. Gordon tried to find her in person after making those earlier calls makes it more probable that Mr. Gordon repeatedly sought her out in the car wash and on the box line on other occasions.

[207] As the supervisor of the box lines, Mr. Gordon was free to walk around the floor. He should not have had any problem finding Ms. Peters. Employees are not permitted to walk away from an operating box line whenever they wish. In fairness to Mr. Gordon, Ms. Peters, whose memory about dates and timing was not always accurate or precise, did not testify about hiding from Mr. Gordon at work after receiving the messages that were recorded. However, the Tribunal concludes that Ms. Peters did hide from Mr. Gordon repeatedly at the car wash. Ms. Peters also testified that she would leave as soon as she could at the end of her shift on the box line to avoid Mr. Gordon. That Mr. Gordon could not find Ms. Peters on December 2, 2014 suggests that Ms. Peters successfully avoided Mr. Gordon at work after having received repeated messages from him. From his failure to find her, the Tribunal concludes that Ms. Peters preferred the risk of discipline for leaving the box line and/or left her shift as soon as possible to avoid an encounter with Mr. Gordon. Her behaviour is consistent with Ms. Peters engaging in avoidance management, which appeared to the Tribunal to be in response to a continued pattern of behaviour by Mr. Gordon.

[208] As noted, Ms. Peters testified that she believed that Mr. Gordon had called Costco to find out her schedule because she was told by other Costco employees that a man had called about her schedule. There was no evidence about the timing of this. Her belief that Mr. Gordon was the one who had called Costco for information about her schedule had the initial appearance of pure supposition on her part because she did not hear the caller's voice. Ms. Peters apparently did not recall that Mr. Gordon had mentioned Costco in one of his voicemail messages to her of December 1, 2014, because she did not point to this information in her testimony. The voicemail recording in question confirms that Mr. Gordon was informed of Ms. Peters' schedule at Costco.

[209] The factual issue of whether Mr. Gordon called Costco to find out Ms. Peters' schedule is quite significant. If he did, that is an uninvited intrusion on her privacy outside of UPS's workplace. It is stalking behaviour. It certainly drew the attention of whomever took

the call at Costco because they reported this to Ms. Peters, although the caller left no message.

[210] Mr. Gordon and Ms. Peters did not have the kind of relationship by December 1, 2014 that is consistent with Ms. Peters sharing her other work schedule with Mr. Gordon. During his testimony, Mr. Gordon failed to acknowledge the reference to Costco in his voicemail message of that date, although he had been accused of calling Costco to get her schedule. He offered no evidence of any alternative source of information available to him about Ms. Peters' schedule at Costco. The Tribunal concludes that Mr. Gordon most likely did call Costco for information about Ms. Peters' schedule and that he did so on December 1, 2014.

[211] As her supervisor, Mr. Gordon's action in contacting Costco was an unwanted intrusion on her privacy. Mr. Gordon then used the information about her schedule in one of his messages to Ms. Peters to indicate that he knew she was not working at Costco and would be available to go out with him. This was an attempt by Mr. Gordon to exercise authority outside of work over a female subordinate for sexual reasons.

[212] As explained previously, Ms. Peters also testified that she received harassing texts from Mr. Gordon. Ms. Peters testified that she showed text messages to certain witnesses, namely her friend, Ms. Jeffers, her doctor, and Ms. Thompson, at the material times of her complaint. That Ms. Peters shared texts from Mr. Gordon she found upsetting was corroborated by Ms. Jeffers. Dr. MacDonald could not recall reading texts, although he testified that he recalled discussions with Ms. Peters where she alleged that she was being sexually harassed at work. Ms. Thompson did not testify that she saw texts from Mr. Gordon, but she did confirm that Ms. Peters shared voicemail messages with her.

[213] The Tribunal will not go through the evidence respecting the texts from Mr. Gordon to Ms. Peters in detail because the evidence respecting frequency and content is similarly alleged to consist of efforts by Mr. Gordon to engage Ms. Peters. The text messages were not preserved as evidence because they were lost when Ms. Peters' previous phone was apparently destroyed. However, the existence of texts was corroborated by the testimony

of Ms. Jeffers. The Tribunal concludes that it is more probable than not that Mr. Gordon not only called Ms. Peters but texted her, as well.

[214] Given the nature of Mr. Gordon's behaviour in instances where it could be corroborated, it is more probable than not that Mr. Gordon engaged in a course of repeated, unwelcome conduct of a sexual nature towards Ms. Peters. It seems that this exacerbated dramatically after he became her supervisor. It is also more probable than not that Mr. Gordon engaged in some behaviours that Ms. Peters reasonably perceived to be stalking in nature, such as calling Costco and repeatedly seeking Ms. Peters out in the workplace.

K. Alleged Need for Close Supervision & Touching Incident

(i) The Alleged Touching

[215] When Ms. Peters worked on the box line, she had a scanner in her hand to keep track of numbers. As indicated, the box line was fast-paced work. She was expected to scan a high volume of packages each hour by postal code.

[216] Ms. Peters explained that once trained, a supervisor does not need to "be in your face." Ms. Peters complained that Mr. Gordon was often in her face, meaning he would stand close to her in her work area.

[217] Ms. Peters said that one occasion she bent over to pick up a box and that Mr. Gordon touched her buttocks. She says that the incident startled her sufficiently that she injured her finger. She testified that Mr. Gordon apologised and said it was an accident. It was her assertion that, because a supervisor does not need to be standing close to you, a situation of accidental touching should not occur. She stated that this is why she told "the manager," by whom she meant Mr. Ghanem, that Mr. Gordon did not need to be so close.

[218] Ms. Peters testified that this incident was very upsetting to her. She said she knew that Mr. Gordon's explanation was a lie because there was no reason for him to be standing so close to her in her workspace. She further testified that when Mr. Gordon apologised, he said that she had a "big bum" and laughed.

[219] Mr. Gordon testified that all he did was supervise Ms. Peters on the box line. He denied having ever touched Ms. Peters' buttocks. He denied making any statement about the size of her buttocks and laughing. He testified that it was not funny or right for anyone to touch someone's buttocks in the workplace.

[220] Mr. Gordon immediately followed this denial by pointing out that UPS has many cameras in the workplace to address theft. He testified that Ms. Peters was well aware of the cameras and that she was not bashful or shy. He opined that she would have gone to any length to get the evidence on those cameras if the event had happened. He also testified that there were three other employees working on the box lines who could have been called as witnesses. On cross-examination, he clarified that normally two or three people worked on that box line and sometimes only one. In any event, it was Mr. Gordon's view that, if the incident happened, Ms. Peters should have possession of corroborating evidence, such as video recordings or witness testimony.

(ii) The Need for Close Physical Supervision

[221] The Tribunal considered the evidence provided respecting Ms. Peters' need for supervision and the nature and extent of supervision required on the box line. This was to assist the Tribunal in considering Mr. Gordon's testimony that he had to supervise Ms. Peters in close proximity but did not touch her buttocks.

(a) Mr. Gordon's Evidence Respecting the Need for Supervision

[222] There were a number of box lines in the box line area. Mr. Gordon testified on direct examination that he trained Ms. Peters on Box Line One when she started to work in that department in November 2014. He also said that he moved her to Box Line 4 the next night as that was a busy line and she was needed there. He described Box Line 4 as a heavy box line with a lot of packages.

[223] Mr. Gordon testified that, around mid-December, he questioned another employee under his supervision about that employee's underperformance. Mr. Gordon testified that this employee claimed that he was falling behind in production because "the new girl was

not pulling her weight." Mr. Gordon's testimony and actions at the time indicate he accepted this statement as accurate and fair. Mr. Gordon also mentioned that "the guys were saying that she asks them to lift heavy packages." Mr. Gordon concluded that Ms. Peters required additional training and supervision. Mr. Gordon did not explain why the other employee's accusation was immediately accepted, nor did he suggest that he considered or explored any alternate explanations for the other employee's assertion.

[224] Almost all of the approximately 3000 employees at the Toronto Hub were male. Ms. Thompson testified that there were 5-10 female employees at the time of these events. All the employees who worked on the box line with Ms. Peters were male. In testifying about the co-worker's complaint, Mr. Gordon had no hesitation in relaying that Ms. Peters, who is a mature female, and who was not a new UPS employee, but only new to the box line, was referred to as "the new girl." The implication was that the new girl was not a good team member. However, when cross-examined on this subject, Mr. Gordon adjusted his description. He described the co-worker's allegation as a "young lady not pulling her weight." It appeared that Mr. Gordon realized, while testifying for the second time about what was said by the other employee, that describing Ms. Peters as "a girl" when she is a mature female might not be well received. He altered his choice of words to a more respectful description. Mr. Gordon was being asked about what another person said and changed the content of his testimony; there was no evidence that he was concerned about the "new girl" comment at the time it was made. This did not enhance the appearance of his credibility.

[225] Mr. Gordon also made a generalized statement to the effect that Ms. Peters' production rate was significantly low, without reference to a timeframe. There was no documentary evidence to corroborate that Ms. Peters was consistently underperforming in mid-December or otherwise. Mr. Gordon did not indicate that he and the full-time supervisor, Mr. Ghanem, had any discussions about Ms. Peters requiring performance management. Ms. Peters was not given a negative performance review, placed on a performance improvement plan or disciplined for lack of performance.

[226] Mr. Gordon testified that he spoke to Ms. Peters about her rate of production before the December holidays. He said he told her he would show her some things she could do to speed up her scanning rate. He did not testify that this additional training would take a

long time to do. However, as explained below, this training appears to have become an ongoing event.

[227] After the holidays in December, the volume of packages was still high. Mr. Gordon testified that “they” wanted Ms. Peters to be placed on a different line. He testified that he said no and gave assurances that she would get up to speed. His account of the reason close supervision was necessary changed from there being one employee who complained to creating the impression that there was agreement among co-workers on the box line where she worked that she was not a good employee. That is a different matter than one employee complaining that she was not keeping up or male employees complaining about being asked to help with heavy packages.

[228] Mr. Gordon testified that, after the holidays, “I continued to spend time with her monitoring her.” By this statement he confirmed that his monitoring began in December and continued into January.

[229] Mr. Gordon’s testimony about the rationale for his ongoing supervision of Ms. Peters on the box line initially lacked important details, for example, the names of the employees who complained about her work performance. Mr. Gordon had to be pressed for an explanation about what the alleged problems were and why close supervision was necessary.

[230] Mr. Gordon alluded to safety concerns during later questioning. However, the reference was non-specific. As well, safety was not identified as a concern during his direct testimony when he first explained why additional monitoring and training were needed. It appeared to the Tribunal that Mr. Gordon added reasons to his evidence as he was pressed for an explanation.

[231] Mr. Gordon also testified during cross-examination about Ms. Peters making a mistake. Mistakes are made by employees. There was no evidence beyond Mr. Gordon’s testimony that Ms. Peters had a pattern or ongoing practice of doing her job improperly.

[232] Conversely, Mr. Gordon also testified that he did not “stress much” about Ms. Peters missing a lot of time from work. This is not the reaction one would expect from a supervisor who is highly concerned by Ms. Peters’ low production rates.

[233] As noted, there was no suggestion that Mr. Gordon was engaged in a formal performance management plan or was involved in any progressive disciplinary action respecting Ms. Peters that could provide confirmation of the likely need for his close, ongoing supervision of her over an extended period. His explanation lacked sufficient detail and clarity. It was not persuasive.

[234] Mr. Gordon acknowledged that Ms. Lawes-Newell made a comment to him to the effect that he should treat Ms. Peters like any other handler working on the box line. He professed to not understand what she meant. If anything, this is consistent with it appearing to at least Ms. Lawes-Newell that Ms. Peters was being supervised differently than her co-workers on the line.

[235] Mr. Gordon acknowledged that his supervision of Ms. Peters involved working in close proximity with her on the box line. Mr. Gordon pointed out that they were both standing in a narrow passageway along the box line. On cross-examination, he stated that sometimes they were just a person’s space apart. He agreed that they were within “touching distance.” However, he denied “breathing down her neck.” On cross-examination, Mr. Gordon explained that you have to be in close proximity to teach people. He implied that there were privacy considerations in commenting on someone’s work with other employees nearby. Photographic evidence and descriptions of the area indicate that usually no other handler would have been standing close by.

[236] Ms. Peters’ last day of active service was February 3, 2015. Mr. Gordon did not testify that his monitoring and ongoing training of Ms. Peters came to an end before the commencement of her medical leave.

(b) Analysis of Alleged Need for Close Physical Supervision

[237] From this evidence, the Tribunal concludes that, when Ms. Peters was at work from mid-December until she began a medical leave at the beginning of February, her work was

directly supervised by Mr. Gordon on a regular basis. To be clear, it was not suggested that Mr. Gordon worked beside Ms. Peters every shift she worked, and trained her constantly, but by his evidence, he continued to monitor her closely over the mid-December/January timeframe.

[238] Mr. Gordon's supervision, monitoring and training did not result in any documented corrective measures to address Ms. Peters' performance. As noted, there is no evidence that Mr. Gordon was in contact with Mr. Ghanem, to whom he reported, to discuss any problems with Ms. Peters' performance or to provide an update, develop a plan or to take any action. UPS did take action, through Mr. Ghanem, with respect to Ms. Peters' absenteeism and her failure to call in absences. It recorded information and provided a letter of reprimand that was issued in January 2015. However, UPS took no recorded action to address Ms. Peters' significant underproduction, as alleged by Mr. Gordon. The lack of any evidence of Mr. Ghanem's involvement in addressing the alleged performance issues, as compared to the absenteeism issues, and the lack of documentation about Mr. Gordon addressing the alleged performance issues, suggests that Mr. Gordon supervised Ms. Peters without having to account to Mr. Ghanem. There is no persuasive evidence that Mr. Ghanem had any knowledge of what was happening to Ms. Peters in this regard. He testified that no one ever complained to him about her performance.

[239] In the circumstances, it does not appear probable that Ms. Peters' performance was such that she required monitoring that involved close-proximity instruction by her supervisor over such an extended period. The Tribunal accepts that the volume of packages scanned by Ms. Peters may have been lower than that of other employees. However, as noted, there is no written evidence to corroborate that Ms. Peters had safety or performance issues in the way she did her job on the box line.

[240] It is difficult to conceive from the evidence how any of the alleged problems with her performance translated to a requirement for what seems to be an exceptional amount of one-on-one training by Mr. Gordon. Ms. Peters' job involved using a scanner to record numbers and placing packages appropriately. It was highly repetitive. This role does not seem complex enough to require the nature and extent of monitoring or training described by Mr. Gordon.

[241] Significantly, when she started in November 2014, Ms. Peters was put on a busy box line after one shift by Mr. Gordon. If the issue was that she did not know how to perform the tasks of working on the box line properly, and needed extra training, it seems unlikely that she would have been moved to such a busy line by Mr. Gordon and left there. The Tribunal infers that she must have demonstrated an early and satisfactory degree of required competence and demonstrated that she could work safely to have been moved to Box Line 4.

[242] To be clear, the evidence offered about Ms. Peters' performance is not directly relevant to whether Mr. Gordon touched her buttocks accidentally or otherwise while he was closely monitoring her activities on Box Line 4. The Tribunal has provided its assessment of Mr. Gordon's explanation for his admittedly close supervision of Ms. Peters because it must assess the credibility and reliability of Mr. Gordon's assertion that the alleged touching incident did not happen at all. As there are no eyewitness or video evidence, both Ms. Peters' and Mr. Gordon's versions of events are in issue.

[243] The Tribunal fully considered whether Ms. Peters fabricated the touching incident and the related comment about her buttocks to get Mr. Gordon into trouble, whether as part of a plan to seek compensation from UPS or not. The Tribunal must decide what is more likely to have happened based on the balance of probabilities, considering all the evidence and relevant circumstances.

[244] The Tribunal also considered Mr. Gordon's assertion that Ms. Peters could have obtained video surveillance or witnesses to corroborate her evidence, had the incident happened. Mr. Gordon had a copy of a written human rights application to the Human Rights Tribunal of Ontario which detailed Ms. Peters' complaint as of mid-March 2015, in which he was personally named as a respondent. Mr. Gordon knew about the video cameras too. There is no evidence that he made an effort to secure evidence to corroborate his version of events. He did not ask management to ensure that any video footage be preserved, and he did not explain why he did not. As a further example, as a supervisor, he should have been able to obtain a copy of the work schedule for January to have a record of who worked on the box line and could, therefore, possibly be a witness. There is no evidence that Mr. Gordon even went to UPS when he received the complaint to provide his version of

events. He did nothing until he was later questioned during UPS's investigation. Mr. Gordon's complaint that Ms. Peters did nothing at the time to corroborate her evidence appears to apply equally to him.

[245] In any event, it is not appropriate to conclude that either Ms. Peters or Mr. Gordon, who are laypersons, made a deliberate choice to fail to collect possible evidence. Likewise, it is not appropriate for this Tribunal to conclude that Ms. Peters made up the allegation that Mr. Gordon touched her buttocks because she did not obtain corroborating evidence.

[246] The Tribunal does not accept Mr. Gordon's explanation for being in close proximity to and within touching distance of Ms. Peters over an extended period. When working in a somewhat confined space, one would need to allow space for the other employee's movement such as twisting, turning and bending and for the movement of the scanner and packages on the box line. It seems unreasonable and unnecessary for a supervisor to at times stand only "a person's space apart" from the other employee. In a confined space, where the employee must move a scanner and boxes to do their job, it would have been almost inevitable for touching to occur if Mr. Gordon stood within touching distance of Ms. Peters.

[247] The explanation offered to justify this physical closeness was that of employee privacy during supervision. If Mr. Gordon was training Ms. Peters on the box line appropriately, this need for privacy seems overstated. Also, he could have met with her privately elsewhere in the building, away from the box line, if he wished.

[248] Mr. Gordon propositioned Ms. Peters at dinner despite her previous demonstrated lack of personal interest in him. He harassed Ms. Peters by phone and lost his temper when she would not see him outside of work. Given the evidence of what occurred at the dinner and the content of the voicemail messages, it seems likely that there was a strained relationship between them. It would have been reasonable for Ms. Peters to feel trapped by having Mr. Gordon standing in such close proximity to her on the box line, within touching distance. It was reasonable for Ms. Peters to describe it as Mr. Gordon "breathing down her neck." Mr. Gordon should have known that his proximity would be unwelcome. It seems

most likely that Mr. Gordon's ongoing, personal, physically close and probably unjustified supervision of Ms. Peters was a form of sexual harassment, on the facts of this case.

[249] It also appears that the harassment of Ms. Peters became increasingly negative in nature. Ms. Peters said that Mr. Gordon became very critical of her. She attributes this ongoing criticism to Mr. Gordon being upset because he had been rejected by her.

[250] Under cross-examination, Mr. Gordon said that he did not berate Ms. Peters about her work. He provided objective criticism. He testified that he did the same thing with any employees who were "not following safe work methods." As noted, the explanation that Ms. Peters was not working safely is not the first reason offered by Mr. Gordon. His addition of this rationale leads the Tribunal to find that his explanation is not credible. It is more likely than not that his criticism of Ms. Peters was not objective. In all the circumstances, it appears that Mr. Gordon became very critical of Ms. Peters because he was annoyed with her after she failed to engage in the relationship he wanted. The Tribunal finds that the Mr. Gordon's ongoing criticisms of Ms. Peters' performance was an aspect of the sexual harassment that occurred in this case.

(iii) Analysis Concerning Alleged Touching

[251] This brings the Tribunal to the matter of whether Mr. Gordon touched Ms. Peters' buttocks. There is no direct corroborating evidence. This issue must be decided based on credibility, reliability and the preponderance of the evidence as a whole. Based on all the relevant evidence, the Tribunal believes that the version of events described in Ms. Peters' testimony is more probable than Mr. Gordon's version.

[252] Mr. Gordon's testimony appeared to be driven by self-interest, as illustrated by some examples above, including the changes to details he provided over the course of his testimony. This is in addition to the more apparent inconsistencies in Mr. Gordon's evidence. The Tribunal refers here to Mr. Gordon's evidence that he and Ms. Peters maintained a friendship until the time she seemingly disappeared from work on February 3, 2015 without him having any idea of what was going on with her. His oppressive supervision of her is also inconsistent with the friendship he asserts. Mr. Gordon's evidence about his relationship

with Ms. Peters lacks credibility in key respects and leads the Tribunal to conclude that his accounts of what happened should not be accepted. In all the circumstances, the Tribunal does not have confidence in Mr. Gordon's denial that he touched Ms. Peters' buttocks.

[253] The Tribunal concludes that the touching was likely not an accident. If the touching had been accidental, it seems more reasonable to infer that Mr. Gordon would have admitted that the touching happened at the hearing and explained that it was an accident.

[254] The Tribunal finds, therefore, that Mr. Gordon touched Ms. Peters on the buttocks while supervising her. The Tribunal further believes Ms. Peters' testimony that, at the time, Mr. Gordon said it was an accident, apologised, and then blamed it on the size of Ms. Peters' buttocks. The Tribunal finds that Mr. Gordon engaged in sexual harassment by touching Ms. Peters' buttocks and by making the comment about her buttocks.

L. Alleged Assault in the Parking Lot

(i) Overview of the Allegation

[255] Again, Ms. Peters could not recall the date or time of the alleged assault by Mr. Gordon. She testified that she had tried very hard to put these events out of her mind. If this is true, although it is understandable, it did make addressing the issues respecting this allegation more difficult for all parties and the Tribunal.

[256] During her direct examination, Ms. Peters testified that, at the end of her shift, she went to her car in the parking lot to drive home. She says that, as the supervisor, Mr. Gordon would not normally leave work at the same time as her. However, she testified that they exited security at the same time with other employees on that night. She describes that she was parked in a dark area of the lot and was alone. Ms. Peters says that Mr. Gordon came in through the car door and attempted to kiss her. She testified that she told him to stop and that he said, "Come on, why don't you like me?" She claims that she was trying to close the car door and managed to push him away, shut the door and rapidly drove away in a panic. She says she did not go to the police, which she says she regrets, and instead drove home

to her kids as fast as she could. Ms. Peters added that at the time of the incident she was talking to her friend, Petra Jeffers, on her cell phone.

[257] If Ms. Peters' testimony is to be believed, her testimony is sufficient to warrant a finding by the Tribunal that Mr. Gordon sexually assaulted Ms. Peters. That she had to push him away indicates that Mr. Gordon was forceful. Kissing someone against their will is assault.

[258] There were no eyewitnesses. Ms. Jeffers, who was called as the first witness, testified that she was on the phone with Ms. Peters when the incident occurred. She spoke about what she claims to have heard over the phone and about subsequent discussions she had with Ms. Peters regarding the alleged assault.

[259] Ms. Peters testified that, besides talking to Ms. Jeffers, she talked to family members, and her co-worker, Ms. Lawes-Newell, about the incident afterwards. She informed her doctor, Dr. MacDonald. She says that she advised her union steward, Ms. Thompson, sometime later. There is no evidence that Ms. Peters reported the incident to UPS management. Ms. Peters does not suggest that she did.

[260] Dr. MacDonald testified and provided Ms. Peters' medical file. It had content relevant to this incident. The evidence from Dr. MacDonald confirms that he was informed about the incident at the time. Ms. Thompson recalled being informed about the assault, likely after the January 15, 2015 meeting. Ms. Lawes-Newell was not questioned during her testimony about whether Ms. Peters told her about the alleged assault.

(ii) Mr. Gordon's Evidence and Submissions

[261] Mr. Gordon denies that there was any incident in the parking lot. He took the position that the evidence demonstrated that the incident did not and could not have occurred. The Tribunal also considered Mr. Gordon's overall submission that he was used and set up by Ms. Peters for purposes of securing compensation from or as retribution against UPS.

[262] It was Mr. Gordon's evidence that he typically does not leave work at the same time as Ms. Peters. As the supervisor, he had to remain until the end of the shift. He would usually

stay until 4:00 a.m., sometimes 5:00 a.m. He insisted that Ms. Peters usually left earlier than him, around 3:30 a.m.

[263] Mr. Gordon also testified that, when he goes to the parking lot, he is accompanied by several employees. These are employees that he drives to and from work. As indicated above, Mr. Gordon called these employees as witnesses. They corroborated that they drove to and from work with Mr. Gordon and that they waited for him inside the building at the end of their shifts, if necessary, until he was able to depart.

[264] Mr. Gordon maintains that the assault could not have happened because he would not have been in the parking lot when Ms. Peters went to her car at the end of her shift. He also says that when he was in the parking lot, he was accompanied by others. Mr. Gordon pointed out, as well, that he was generally busy at work and would not leave to go outside during his shift. Further, he had equipment that he was responsible for as the supervisor that he had to turn in at the end of his shift. He implied that he could not let this equipment leave his possession.

(iii) Analysis of Mr. Gordon's Position

[265] The difficulty with evidence about what typically happens is that evidence of this nature is not conclusive. The evidence about what typically happens in this case does not negate the possibility of Mr. Gordon and Ms. Peters finishing work at the same time, as she claims occurred on this occasion. Considering all the evidence, this could have happened occasionally. The hours of both varied somewhat. Ms. Peters' shift did not end officially at 3:30 a.m. It ended later. She often left earlier. However, the two could occasionally finish work at or around the same time.

[266] Evidence of what typically happens does not negate the possibility that Mr. Gordon could follow Ms. Peters out to the parking lot if he chose to do so. There was no evidence of anything that would definitively prevent or stop Mr. Gordon from going outside into the parking lot during his shift. For example, he could have left his equipment someplace safe in the building or in the security office that employees pass through on their way to and from the parking lot. If the alleged assault occurred, it did not involve more than a few minutes of

time. The short duration of the alleged event is consistent with the possibility that the event and/or Mr. Gordon's absence from the building could have gone unnoticed.

[267] The points made by Mr. Gordon are all matters that impact the likelihood that the assault happened. The Tribunal agrees that they lessen that likelihood. However, they do not rule out the possibility that the assault occurred, as Mr. Gordon suggests. The assault could have occurred if Mr. Gordon left work at approximately the same time as Ms. Peters and temporarily left his co-workers at his vehicle or elsewhere. It could have occurred on a night when Mr. Gordon was not driving the other employees home. There was no evidence that Mr. Gordon drove the others home every shift he worked. The assault could have occurred if Mr. Gordon chose to walk out to the parking lot for a few minutes when Ms. Peters left work and then returned inside to continue working. The issue respecting Mr. Gordon's response to the allegation is whether the evidence as a whole rules out the probability that the assault occurred.

[268] As pointed out above, Ms. Peters' inability to recall the exact evening that she says the assault occurred presented challenges. For example, it was not possible to confirm via scheduling documentation what hours were worked by Mr. Gordon and Ms. Peters on the allegedly relevant shift. However, even if the date of the relevant shift could have been ascertained, it does not rule out the possibility that Mr. Gordon ensured that he left the building the same time as Ms. Peters and approached Ms. Peters' vehicle before she left.

(iv) Reliance on Inconsistent Testimony

[269] Mr. Gordon's defence placed great emphasis on his submission that there was a significant inconsistency between Ms. Peters' account of the incident and that of Ms. Jeffers. He relies upon this inconsistency to argue that the assault did not occur.

[270] As indicated, Ms. Jeffers testified that she overheard the assault because she was on the phone with Ms. Peters at the time of the incident, as confirmed by Ms. Peters. Ms. Peters testified that Mr. Gordon came in through the driver's door and that she pushed him out and pulled the car door shut. Mr. Gordon highlighted that Ms. Jeffers did not testify that she heard a car door slam during the alleged scuffle she claims to have overheard.

Mr. Gordon asserts that the fact that she did not hear a car door slam is an inconsistency and establishes that the event did not occur. Mr. Gordon submits that, because of this inconsistency, Ms. Peters' testimony respecting the alleged assault should be rejected as lacking credibility and that his testimony that the incident did not occur should be believed.

(v) Analysis Respecting Alleged Inconsistent Testimony

[271] Mr. Gordon correctly points out that Ms. Jeffers did not testify that she heard a car door as Ms. Peters describes. While on the phone, Ms. Jeffers testified that she heard Ms. Peters jump, which the Tribunal understood as meaning that she was suddenly "startled," making a noise. Ms. Jeffers subsequently heard a scuffle, Ms. Peters screaming, and things said by Ms. Peters and allegedly stated by Mr. Gordon. On direct examination, she testified that she heard someone say, "Hey sexy, are you waiting for me?" She testified she heard Ms. Peters say, "Linden get off of me, stop, you're not kissing me." Ms. Jeffers testified that she started yelling into the phone.

[272] Mr. Gordon pointed out that, if Ms. Jeffers could hear a scuffle, she should have heard the car door shut as Ms. Peters described. In fact, Ms. Jeffers indicated her belief that Mr. Gordon came in at Ms. Peters through an open window of the car, which contradicts Ms. Peters' account.

[273] It appears that Mr. Gordon startled Ms. Peters. A scuffle of sorts occurred between Ms. Peters and Mr. Gordon during which the phone connection appears to have cut off. The phone was likely touched where it disconnects or was dropped. Ms. Jeffers did not testify that she heard the car door shut, as Mr. Gordon correctly points out. If the door was closed as firmly as is suggested by Ms. Peters' evidence, it seems likely that Ms. Jeffers would have heard the car door shut.

[274] This raises the question of whether Ms. Jeffers overheard the alleged event in its entirety. One key fact in common between Ms. Jeffers and Ms. Peters' testimony is that the phone disconnected during the incident. It took some time for them to reconnect. During this period of interrupted contact, they both describe being in a state of panic or fear.

[275] The Tribunal finds that Ms. Jeffers did not hear everything that occurred in the car because the call disconnected. It is entirely plausible that the car door slammed or that the door was pulled shut after the call terminated, which is why Ms. Jeffers did not hear it. That the call disconnected before the car door was shut is consistent with Ms. Jeffers' statement above that she heard "ruffling but then the phone cut off," which suggests that Ms. Peters had not yet succeeded in pushing Mr. Gordon from the vehicle and closing the door.

[276] To rely upon an inconsistency, Mr. Gordon must first prove that the inconsistency exists. As explained, Mr. Gordon submits that Ms. Jeffers' evidence that she did not hear a car door shut is an inconsistency. For this to constitute an inconsistency, Ms. Jeffers would need to have overheard the incident in its entirety to its conclusion when Ms. Peters drove away. The Tribunal finds that the apparent inconsistency identified by Mr. Gordon is not proven in the face of a reasonable and likely explanation regarding why Ms. Jeffers did not hear a car door shut.

[277] Ms. Jeffers provided an earlier statement to the Commission during its investigation in which she stated that Mr. Gordon entered the interior of the car through the window. Mr. Gordon did not argue that this was inconsistent with Ms. Peters' testimony that he reached her through the door, and that this was another inconsistency that suggested that the event did not occur. However, the Tribunal noted this inconsistency and considered it in the interest of completeness.

[278] In her statement to the Commission, Ms. Jeffers indicated that Ms. Peters had her on speaker phone while she was in her new car, as Ms. Peters was not good with technology, and that she was trying to connect Ms. Jeffers' call to the car sound system via Bluetooth. Ms. Jeffers stated that Mr. Gordon tried to put his head through the window to reach Ms. Peters; she stated that she did not hear a car door open. The statement received by the Commission reads:

> I heard him say I know you were waiting for me…. He tried to put his head through the window (I did not hear a car door open).She screamed. I heard her say: you can't kiss me. I hear some ruffling but then the phone cut off. She did say his name. Get off of me Linden. I am yelling Tesha and of course she couldn't hear me. When we got disconnected, she called me back 5–10

> minutes later. I was ringing her the whole time. I did not know if he had gotten in the car. She was completely distraught.

[279] Ms. Jeffers could not see what was happening. She could only hear what she could hear through the phone. Ms. Jeffers did not hear a car door open, neither did she testify that she heard a sound associated with a car window opening. Ms. Jeffers could not see how the alleged assault began; she could only hear Ms. Peters react and, allegedly, Mr. Gordon. She had no way of knowing how or exactly when Mr. Gordon allegedly entered the interior of the vehicle. Ms. Jeffers may have assumed that Ms. Peters had her car window open and that Mr. Gordon physically contacted Ms. Peters through the window because she did not hear a car door open or shut when she realized that an incident was in progress. Ms. Jeffers also recalled that Ms. Peters told her after the incident that Mr. Gordon tried to get through the window to kiss her and tried to open her car door. It is unlikely that Ms. Peters was sitting in her car in late January with her car window open. It is more likely that the car door was opened by Mr. Gordon and that Ms. Jeffers' recollection is not correct. In any event, for there to be a true inconsistency between the testimony of Ms. Peters and Ms. Jeffers respecting how Mr. Gordon allegedly reached Ms. Peters in her car, Ms. Jeffers would have had to have been in a position to observe when and how the assault began and ended.

[280] The differences in their accounts fall within the typical discrepancies that are common when there is more than one witness to an event, each experiencing what they perceive is a traumatic event from a different perspective. The differences in their testimony do not appear motivated by self-interest. Such inconsistencies do not help Ms. Peters' cause. The differences are not a reason to conclude that the event did not occur or that Ms. Peters or Ms. Jeffers were not each telling their own account. Furthermore, the main aspects of Ms. Peters' description of the event were corroborated by Ms. Jeffers. The Tribunal is not persuaded that Ms. Peters' testimony that she was assaulted by Mr. Gordon should be rejected as lacking credibility and that Mr. Gordon's statements and reasons why the event did not happen should be believed and afforded more weight in comparison.

(vi) UPS's Submissions Respecting the Alleged Assault

[281] The issue of discrepancies between witness accounts in Ms. Peters' case was also raised by UPS in relation to the alleged assault. UPS maintained that Ms. Peters' testimony is inconsistent with her complaint to the Commission and should not be believed. Likewise, UPS submits that Ms. Peters' and Ms. Jeffers' testimony concerning the alleged assault should not be believed because of differences between their testimony and prior statements they made during this proceeding to the Commission. UPS submitted that there were contradictions between Ms. Jeffers' testimony, the informal statement she gave to the Commission during its investigation and Ms. Peters' accounts.

(vii) Analysis of UPS's Submissions

[282] The Tribunal has carefully reviewed the testimony of Ms. Peters and Ms. Jeffers, as well as Ms. Peters' complaint form, interview notes of Ms. Peters taken by the Commission during its investigation, Ms. Jeffers' informal statement which was quoted in the Commission's Investigation Report and what Ms. Peters stated in her Amended SOP, each of which were exhibits. There are inconsistencies. However, dulling of the recollection of detail is expected given the passage of time in this case. This complaint was filed with the Commission in 2015. It is not reasonable to hold Ms. Peters and Ms. Jeffers to the high standard of recollection and consistency that one would expect of a seasoned or professional witness. Further, Ms. Peters and Ms. Jeffers had reason (by virtue of friendship) to be aligned in interest and motivation to avoid discrepancies between their testimony and prior statements. It seems more likely that they did not spend any significant time reviewing past statements before testifying. This is an indication that the two were not concocting a tale so that Ms. Peters could obtain compensation from UPS.

[283] The Tribunal also believes that some differences in Ms. Peters' Amended SOP and her testimony are the result of counsel making erroneous assumptions and Ms. Peters not catching those assumptions to have them corrected, for whatever reason. For example, in Ms. Peters' Amended SOP, at para 26, there is a statement that, in mid-January 2015, Mr. Gordon was berating Ms. Peters for her work and that he would stand close behind her

at her desk, breathing over her shoulder and down her neck for long periods of time. At the time, Ms. Peters worked on the box line. Ms. Peters did not have a desk. She did not work in an office.

[284] As another example, at para 28, the Amended SOP states, “Ms. Peters informed Mr. Ghanem about Mr. Gordon’s sexually harassing comments made towards her.” This could mean that Ms. Peters relayed the content of sexually harassing comments allegedly made by Mr. Gordon to Mr. Ghanem. However, Ms. Peters did not say that in her statement to the Commission and she did not testify to that at the hearing. In the latter two, she states that she told Mr. Ghanem she was being harassed and, when he asked her what she meant, she replied, “inside and outside of work.”

[285] As a further example, during her cross-examination by UPS, Ms. Peters was questioned about why her Amended SOP did not mention any harassment by Mr. Gordon until November 2014. Ms. Peters asserted that she did complain about Mr. Gordon before he became her supervisor. When it was pointed out to her that she was just being asked about what was indicated in her Amended SOP, Ms. Peters indicated that this is when she obtained counsel and explained that “her counsel started saying these things,” apparently meaning that the document was prepared by counsel.

[286] The key issue addressed here is whether or not an alleged assault occurred. The issue is whether Mr. Gordon assaulted Ms. Peters by touching her in her car without her consent, not whether Ms. Peters failed to describe the details in an identical fashion when she or the counsel she eventually hired was required to rewrite her story in this process. If the Tribunal is persuaded that the assault occurred on a balance of probabilities, the Tribunal must make a finding that an assault occurred.

[287] In this case, the Tribunal has focused on the overall probabilities respecting what occurred. It is not persuaded that any inconsistency is sufficiently material to render the testimony of either Ms. Peters or Ms. Jeffers concerning this alleged event entirely unreliable, which is the result sought by Mr. Gordon and UPS. Neither is the aggregate of any differences sufficient to do so, considered in the context of all the evidence in this proceeding.

[288] The Tribunal is also influenced by its observations at the hearing. Here, its observations included that Ms. Peters' demeanor became flat and unemotive when she spoke of this alleged incident, compared to her usual degree and pattern of animation during her testimony. She appeared to find it difficult to speak about what happened. She provided less detail than she had provided in written statements before. It appeared that she provided less detail because she found it difficult to testify about this event. The Tribunal believes that this accounts for some of the differences, as opposed to a lack of credibility.

[289] The Tribunal notes that Ms. Peters' physician, Dr. MacDonald, also noted on occasion that Ms. Peters appeared "emotionally flat with limited range" and on another visit "seems a bit emotionally flat." These physician visits involved stressful discussions in January and February 3, 2015. They concerned Ms. Peters' experiences at work including conversations about the alleged assault. In the Tribunal's view, Ms. Peters withdrew during difficult parts of her testimony and reverted to "the bare bones."

[290] Also, the evidence does not suggest that Ms. Peters was going out of her way to try to help her own case. For example, she had been present for Ms. Jeffers' testimony about the phone call. However, when she finally had the chance to tell her story during direct examination, her testimony was focused on the alleged assault and her reaction, not on pointing out that Ms. Jeffers overheard the same thing and could corroborate her evidence. Her description of the assault was minimal. Ms. Peters cannot be accused of using the hearing to exaggerate, elaborate and expand upon her allegations against Mr. Gordon.

[291] Ms. Peters struggled at times to recall, include and articulate detail, but she was unshaken in her testimony that the assault occurred, despite days of cross-examination. The Tribunal found her testimony believable with some allowance for error given the passage of time.

[292] These factors lead the Tribunal to conclude that Ms. Peters' testimony that an assault occurred and Ms. Jeffers' corroborating testimony that it did should be believed and not be discredited because of the differences between their testimony and prior statements.

(viii) Fairness

[293] Finally, in the view of the Tribunal, UPS's submissions—namely that Ms. Peters' testimony should be disregarded due to its inconsistencies with her prior statements—should be considered from the perspective of fairness in this proceeding. Ms. Peters provided far more information than Mr. Gordon in advance of the hearing. Mr. Gordon was not interviewed as a witness by the Commission when it conducted its investigation because he had health issues. The Commission's process unfolded without the Commission taking notes about his interview. Apart from being interviewed during UPS's investigation, Mr. Gordon did not make prior statements over which his testimony could be challenged. Mr. Gordon was not added as a Respondent to this proceeding until an earlier ruling by another member of this Tribunal in March 2019. Mr. Gordon failed to provide many material details in his original SOP, as he is obliged to do. This led to a motion by Ms. Peters for further and better particulars and disclosure from Mr. Gordon. The Tribunal issued an informal and unreported ruling on May 25, 2020 requiring Mr. Gordon to file an Amended SOP to provide more information. Mr. Gordon filed an Amended SOP but did not correct many deficiencies. His amended disclosure included blanket denials and "no comment" as a response. In those respects, Mr. Gordon effectively refused to comment.

[294] It would not be procedurally fair for the Tribunal to decide to disregard the Complainant's testimony based on inconsistencies respecting nonessential details in prior statements when Mr. Gordon was not required to make statements to the Commission and made only limited disclosure at the Tribunal stage although he was directed to do so. The Tribunal has instead focused on the testimony of the witnesses at the hearing and looked for material inconsistencies there.

[295] For these reasons, the allegation respecting assault will not be determined based on comparing details in prior statements. It is being determined based on the evidence at the hearing, taken as a whole.

(ix) Ms. Jeffers' Provision of Information About UPS to Ms. Peters

[296] There is another matter relevant to the assessment of the credibility of Ms. Jeffers' testimony. Several years after the alleged events, UPS's parent company in the United States was ordered to pay very large compensatory awards for substantiated sexual harassment claims. Ms. Jeffers sent information to Ms. Peters about these successful claims. The Tribunal observed that Ms. Jeffers testified at the hearing as Ms. Peters' friend, in a manner fully supportive of Ms. Peters. It was apparent that she was biased in favour of Ms. Peters. She was also frustrated by Ms. Peters' failure to go to the police. She contacted a police detachment in a non-identifiable way soon after the alleged assault to obtain general information for Ms. Peters about reporting assault to the police. However, Ms. Jeffers also respected that the decision to report the matter to the police was Ms. Peters' decision to make. By her actions, she let matters be and offered moral support.

[297] The Tribunal has taken this apparent bias into account. However, the Tribunal is not prepared to conclude that Ms. Jeffers perjured herself before this Tribunal when she testified to being on the phone with Ms. Peters during the alleged assault. Ms. Jeffers sent Ms. Peters what was probably surprising information about UPS in the United States, as a friend, most likely to encourage her to keep going with her complaint. It does not follow from this action that Ms. Jeffers made up testimony to help her friend. These are two different matters.

(x) Analysis Respecting the Medical Evidence

[298] In a note in Ms. Peters' medical file dated January 7, 2015, Dr. MacDonald wrote:

> 'feels like she is losing her mind'
>
> living with sister, sleeping on her couch, now separated since April 2014
>
> 3 children…finds supervisor coming on to her and makes her uncomfortable.

This note provides documentary corroboration that on January 7, 2015, Ms. Peters reported experiencing sexual harassment at work to her physician.

[299] Extracts from a medical note of January 23, 2015 read:

> still with ongoing problems with supervisor ‘hinting at affair’
>
> called labour board-has appt next week to discuss
>
> supervisor has been ‘looking over her shoulder’
>
> feels that union not doing anything ++
>
> tried to kiss her when she was sitting in her car.

This note provides documentary corroboration that Ms. Peters reported to her physician, by January 23, 2015, that Mr. Gordon had attempted to kiss her in her car.

[300] When Ms. Peters next saw her physician on February 3, 2015, he put her off work on medical leave. Extracts from his file note state:

> met with labour board; condition being evaluated
>
> claims that manager continues to ‘come on to her’
>
> feels that they will likely fire him
>
> work not aware of investigation [presumably by Labour Board, as no human rights complaint had been filed]
>
> work ‘treating her differently’
>
> his manager states ‘he has no proof’
>
> did not go to police
>
> apparently manager has had previous complaints
>
> he had been trying to kiss her.

[301] Dr. MacDonald’s notes are Ms. Peters’ subjective reports to her physician. There is no reason to conclude that the notes were written in error, although they may not reflect the exact words that Ms. Peters used. They confirm that Ms. Peters believed that Mr. Gordon

was coming on to her in January 2015. If the content is true, these notes corroborate that sometime, likely between January 7 and January 23, 2015, Mr. Gordon attempted to kiss Ms. Peters. It is clear that Ms. Peters saw her doctor and told her doctor that the attempt was made. To this extent, Dr. MacDonald's note corroborates that the assault occurred.

(xi) Conclusion Respecting Alleged Assault

[302] In summary, the Tribunal has considered the points made by Mr. Gordon that make it less likely that Ms. Peters was assaulted and UPS's submissions about inconsistencies and contradictions in the evidence. These are outweighed by the believability of Ms. Peters' testimony, its corroboration by Ms. Jeffers and by Dr. MacDonald's medical file, and the Tribunal's findings of other instances of sexual harassment of Ms. Peters by Mr. Gordon. The Tribunal finds on a balance of probabilities that it is more likely than not that Mr. Gordon assaulted Ms. Peters in the UPS parking lot.

(xii) Timing of Assault

[303] As explained, Ms. Peters did not recall when the assault occurred. The evidence respecting timing was considered, given the importance of the allegation.

[304] This includes that, as noted previously, on January 15, 2015, Ms. Peters, her union steward and Mr. Ghanem attended a meeting. There is no suggestion that the assault in the parking lot was mentioned at that meeting. The alleged harassment was noted by Dr. MacDonald in Ms. Peters' medical file on January 7, 2015, but not the assault. The Tribunal believes that, if the assault had occurred between January 7 and 15, 2015, as a major incident, it most likely would have been brought up at that meeting.

[305] Ms. Peters does not suggest that she raised the assault at that meeting. The evidence suggests that Ms. Peters felt that her credibility was challenged at that meeting. One could reasonably expect that Ms. Peters would have used the alleged assault as a means of being persuasive at that meeting, had it occurred. The Tribunal concludes that it is more likely that the assault occurred between January 16 and January 22, 2015, most likely in the January 18–21, 2015 period.

X. Summary of Findings Respecting Sexual Harassment by Mr. Gordon

[306] Mr. Gordon engaged in sexual harassment of Ms. Peters through ongoing and repeated inappropriate communications with her both within UPS's Toronto Hub workplace and through communications outside of work. The latter is illustrated by the recording of his voicemail messages to her on December 1 and 2, 2014.

[307] These communications began with Mr. Gordon seeking Ms. Peters out when she worked in the car wash, as corroborated by Ms. Lawes-Newell, to both speak with her and to lay claim to her in sexualized comments to other employees. This was sufficiently frequent and embarrassing to cause Ms. Peters to hide from Mr. Gordon in the trucks in the car wash. However, Ms. Peters was able to de-escalate Mr. Gordon's repeated attempts to speak with her by hiding. She appears to have "managed" Mr. Gordon's behaviour in this manner and by declining his offers of travel assistance and assistance with reconnection with the church. However, at that time Ms. Peters worked in a different department than Mr. Gordon. He was not her supervisor. That mitigated his opportunity to pursue and exercise authority over Ms. Peters in the workplace.

[308] The verbal sexual harassment and "seeking behaviour" by Mr. Gordon stopped briefly when Mr. Gordon became Ms. Peters' supervisor as of November 4, 2014. Mr. Gordon appears to have made a show of being professional towards his "friend" Ms. Peters, assuring her there would be no favouritism. She agreed with that. At the same time, unbeknownst to her, he interpreted the events as Ms. Peters selecting him as her preferred supervisor, although none of the evidence showed that it was reasonable for him to reach this conclusion. Ms. Thompson, who recommended that Ms. Peters be assigned to work under his supervision, did not indicate that to Mr. Gordon.

[309] Ms. Peters and Mr. Gordon had dinner on November 14, 2014, ostensibly so that Mr. Gordon could give Ms. Peters advice about work. Mr. Gordon's position that the two would adhere to high professional standards quickly descended to his expression of interest in pursing a sexual relationship.

[310] Ms. Peters ultimately made it obvious through either her statements or her reactions that she did not want a relationship with Mr. Gordon and that his actions were unwelcome.

This is confirmed by Mr. Gordon's conduct towards her following the dinner, including his anger when she did not respond to his offer of a date. The recordings of December 1 and 2 2014 confirm that Mr. Gordon became very angry with Ms. Peters when she refused or failed to see him outside of work at his beckoning.

[311] By mid-December 2014, Mr. Gordon began what became inappropriate supervision of Ms. Peters on the box line. Regardless of its initial merits, Mr. Gordon's supervision deteriorated into comments and actions consisting of excessive monitoring, "training," hyper-vigilance and anticipated criticism of her performance. He stood too close to her at times on the box line and touched her buttocks on one occasion. The Tribunal concludes this was deliberate and was followed by an inappropriate comment about her buttocks.

[312] Mr. Gordon's sexual harassment of Ms. Peters culminated in the latter part of January when Mr. Gordon followed Ms. Peters to her car in an area of the UPS parking lot where she was alone, and he was alone. He forcibly tried to kiss her, leading to a brief physical struggle between the two before Ms. Peters was able to drive away.

[313] For these reasons, the Tribunal finds Mr. Gordon liable for sexually harassing Ms. Peters contrary to section 14 of the Act.

XI. The Relationship Between the Obligation to Report & Section 65

[314] Having found that Mr. Gordon engaged in sexual harassment, the next question is whether that finding will apply to UPS. There are, in theory, two sources of potential liability for UPS: liability arising from failure to respond to reported harassment, in accordance with the Federal Court's decision in *Franke*, and liability by reason of section 65(1) of the Act.

[315] In response to the potential application of section 65(1), UPS raised a defence pursuant to section 65(2), which is explained below, but also argued that the complaint should be dismissed against it because Ms. Peters failed to report the harassment, as required by *Franke.* This approach raised an issue about the relationship between the obligation to report, section 65(1) and a section 65(2) defence.

A. Overview of the Reporting Requirement in *Franke*

[316] By way of re-introduction, the Federal Court in *Franke,* at paras 43–46, added an element to the legal test to establish a claim of sexual harassment against an employer respondent that had been set out by the Supreme Court of Canada in *Janzen*. That addition was the requirement that the employee alleging harassment give notice to the employer.

[317] Reporting and thereby giving notice to the employer was initially stated in *Franke* at para 43 to be an obligation of a complainant "whenever possible." The obligation, as first stated, appears intended to apply in all harassment cases whenever possible. However, the court clarified that the requirement applies where "the employer has a personnel department along with a comprehensive and effective sexual harassment policy, including appropriate redress mechanisms, which are already in place" (at para 45).

[318] *Franke* emphasized that the policy and redress mechanisms of the employer must be effective for the reporting requirement to apply. The common law obligation upon a complainant to report does not, therefore, apply to all sexual harassment cases. It applies only when the requirements identified in *Franke* are met.

[319] The Tribunal understands that these requirements extend beyond simply having a policy. To begin with, any policy must be effective, comprehensive and be applied properly, or at least reasonably, by those involved. The effectiveness of a policy is dependent upon the effectiveness of its application. In the view of the Tribunal, to determine whether *Franke* applies, it is not sufficient to merely confirm that an employer has, for example, policies and an HR department and to presume that they are effective. They may not be. There is also the matter of whether appropriate redress mechanisms are available.

[320] *Franke* based its reasoning for the requirement to report upon the principle of fairness. *Franke* noted that employers are obligated to prevent, address and mitigate the effects of sexual harassment in the workplace. *Franke* found that the employer should be notified of the harassment by the employee where the employer has invested in a personnel department, or has trained personnel, and has developed effective, comprehensive tools and resources to prevent, address and mitigate the effects of sexual harassment. The court effectively said that, from a fairness perspective, if an employer has done what is required

to meet its obligations under the Act to address sexual harassment, it ought to be given the opportunity to do so. The court also referenced at para 46 the desirable goal of having employers act quickly to end ongoing harassment in the workplace.

[321] Where the obligation to report in *Franke* does apply, therefore, the legal test to establish sexual harassment includes a reporting obligation. Accordingly, one implication of the application of *Franke* to a human rights case is this: when a person employed to act on behalf of a respondent employer commits sexual harassment in the workplace and the complainant fails to report the sexual harassment, a complaint may be dismissed against the respondent employer. By including a reporting obligation in the legal test, *Franke* appears to have concluded that this outcome is in the interest of fairness.

[322] Given the potential impact of *Franke*, fairness also applies when the converse is true: where the employer does not have comprehensive and effective policies, including appropriate redress mechanisms, to address sexual harassment, it would not be reasonable to dismiss a complaint of sexual harassment against an employer because a complainant failed to report the sexual harassment. In these circumstances, reporting the harassment would be unlikely to lead to correction and mitigation. This corollary conclusion is likewise consistent with the principle of fairness that underscores the rationale for the reporting obligation in *Franke*. Much depends, therefore, on the content and effectiveness of the employer's policies when *Franke* is said to apply. Whether there was a comprehensive and effective sexual harassment policy already in place, including appropriate redress mechanisms, is, in any event, an issue to be determined in this case.

B. Potential Limits on the Reporting Obligation in *Franke*

[323] The issue of whether the employee was required to give the employer notice of harassment was not one of the issues directly under review by the Federal Court in *Franke*. The obligation to report is not mentioned in what the Federal Court identified as the relevant passage of the majority decision in the Tribunal's decision below. The court in *Franke* at para 49 held: "In my opinion, the Tribunal applied the proper test: it looked at the comments to determine whether they were unwelcome at the time they were made and whether, being

sexual in nature, they were serious enough to constitute sexual harassment" (emphasis added). The court reviewed the components of the test for sexual harassment in *Janzen* and concluded that the Tribunal had applied the proper legal test in deciding, based on the legal test in *Janzen,* whether sexual harassment occurred.

[324] Employer counsel raised the argument that notice of harassment should be given. However, it was not one of the main issues that the Federal Court was asked to decide through judicial review. The court added the requirement that the employee was required to provide notice to the employer of the harassment. Arguably, the addition of the obligation to report was commentary. However, the reporting obligation has subsequently been treated as part of the legal test for sexual harassment in other cases.

[325] The obligation to report does not arise in many cases before the Tribunal. However, the obligation to report in *Franke* can lead to the dismissal of complaints before this Tribunal and to an employer avoiding liability. In *R. L. v. Canadian National Railway*, 2021 CHRT 33 (Can LII), several employees were accused of harassment. The employer was found to be not liable for the harassment of one of its employees because the harassment by that employee was not reported.

[326] In summary, the obligation to report will arise in different circumstances. As explained above, the obligation was not intended by the court in *Franke* to apply in all cases. Its application should not be presumed.

[327] Further, because a duty to report harassment was not squarely in issue on judicial review, in some respects, the implications of the reporting obligation were not fully fleshed out in the reasons in *Franke*. This is another reason to apply this aspect of the case carefully. There had been no finding of sexual harassment by the Tribunal in *Franke* and, therefore, no finding of liability. The Federal Court was not required to decide whether to dismiss the complaint on the basis that the complainant had not reported the harassment. The court was not required to assess the effectiveness of the employer's policies. It did not expressly state that a lack of notice by the complainant would negate any finding of liability upon an employer for harassment by another of its employees, although, as noted above, that is

clearly implied. As explained below, the court also did not address section 65(1) of the Act which concerns liability.

[328] Dismissal of a complaint against a respondent employer can be a harsh outcome where the harassing employee lacks the financial ability to pay any compensation or is not named as a party. It may negate the means to address a complainant's statutory entitlement to any damages that are awarded. Dismissal also negates the jurisdiction of the Tribunal to order that any deficiencies in the respondent employer's policies and programs be corrected or to order other remedies in the public interest.

[329] *Franke* was also decided in 1999. Since then, our understanding of the harm to victims of serious sexual harassment, such as sexual assault and rape, has grown. Difficulty in reporting serious sexual harassment is sometimes driven by the deleterious effects of the sexual harassment itself or the victim's particular vulnerability. Where serious sexual harassment or rape has occurred, it may be unreasonable or unfair for the Tribunal to find an employer not liable for sexual harassment by its employee because the employee complainant did not report it to the employer at the time. There is an argument to be made that the obligation to report the incident shortly after it occurs, in such circumstances, should not form the basis for an otherwise valid complaint to be dismissed against the respondent employer. If there are other relevant factors that persuasively mitigate or negate the complainant's reporting obligation, fairness would require that those factors be considered, as well.

[330] The Tribunal solely intends here to identify that there may be potential exceptions to the reporting obligation in *Franke.* By illustrating this example, the Tribunal has not intended to further pursue what constitutes "serious sexual harassment." This is not a case of serious sexual assault or rape. Further, to be clear, dismissal of a complaint that goes unreported by the complainant may be a fair and appropriate result in many cases. The point here is that taking a generalized approach to the issue of notice could place greater importance on the procedural requirement that an employer receive notice than on the substance of the harassing co-worker's actions and the resulting harm and injury to the complainant. There could be circumstances where applying the reporting obligation in *Franke* to dismiss a complaint would effectively re-victimize the complainant. That no such result was intended

was noted in *Franke*, which is often cited for its warning that "the trier of fact should be sensitive… and consider the context in which the impugned conduct took place, when determining how the reasonable person would react in similar circumstances" (para 37).

[331] The Tribunal concludes that, where it has determined that a reporting obligation exists, and the employer seeks to have a complaint dismissed or to avoid liability because it was not reported, the Tribunal should include in its considerations any evidence of mitigating circumstances or context that would reasonably make it difficult for the complainant to come forward to the employer on a timely basis after an incident.

C. Explanation of Section 65(2) Statutory Defence

[332] As explained above, UPS first relies upon what will be termed here a "section 65(2) defence." The relevant provisions engaged in the application of a section 65(2) defence are as follows:

65. (1) Subject to subsection (2), any act or omission committed by an officer, a director, an employee or an agent of any person, association or organization in the course of the employment of the officer, director, employee or agent shall, for the purposes of this Act, be deemed to be an act or omission committed by that person, association or organization.	65 (1) Sous réserve du paragraphe (2), les actes ou omissions commis par un employé, un mandataire, un administrateur ou un dirigeant dans le cadre de son emploi sont réputés, pour l'application de la présente loi, avoir été commis par la personne, l'organisme ou l'association qui l'emploie.
Exculpation	Réserve
(2) An act or omission shall not, by virtue of subsection (1), be deemed to be an act or omission committed by a person, association or organization if it is established that the person, association or organization did not consent to the commission of the act or omission and exercised all due diligence to prevent the act or omission from being committed and, subsequently, to mitigate or avoid the effect thereof.	(2) La personne, l'organisme ou l'association visé au paragraphe (1) peut se soustraire à son application s'il établit que l'acte ou l'omission a eu lieu sans son consentement, qu'il avait pris toutes les mesures nécessaires pour l'empêcher et que, par la suite, il a tenté d'en atténuer ou d'en annuler les effets.

[333] As explained above, Section 65(1) applies to the acts or omissions of employees in the course of their employment with the respondent employer. By reason of section 65(1), acts of the employee in breach of the Act become the acts of the employer. Essentially, section 65(1) is a statutorily created version of strict, vicarious liability. As explained below, it applies to all cases before the Tribunal.

[334] The concept of vicarious liability is this: in the context of certain relationships, the law requires that someone who engages others accept responsibility for the others' wrongdoing, even if they do not have knowledge at the time that the wrongdoing is occurring. While section 65(1) does not specifically use the words "vicarious liability", in practical terms it makes employers responsible for the wrongful acts of their employees whether they have knowledge of and agree with the employee's actions or give permission for what they do, or not.

[335] In this case, Mr. Gordon was acting in the course of his employment at the times material to the complaint. He has been found by the Tribunal to have engaged in sexual harassment in relation to a subordinate employee, Ms. Peters. UPS is deemed to have committed the same acts as Mr. Gordon by virtue of section 65(1).

[336] This result is not subject to the discretion of the Tribunal. The language of "shall" in section 65(1) is mandatory, not discretionary. Otherwise, it would be unnecessary for the drafters of the Act to have included section 65(2). The Tribunal is required to find that UPS has committed sexual harassment through Mr. Gordon's actions and is, therefore, liable for those actions, pursuant to section 65(1), unless UPS meets the conditions to acquire a statutory right to avoid liability in section 65(2).

[337] Specifically, the respondent employer must satisfy the conditions stated in section 65(2) to be "exculpated" and thereby be exempted from the statutory vicarious liability in section 65(1). To avoid liability, section 65(2) requires that the employer respondent establish three things:

> 1) that the employer did not consent to the harassment;
>
> 2) that the employer exercised all due diligence to prevent the harassment from being committed in the first place; and,

> 3) that the employer exercised due diligence subsequent to the harassment to mitigate or avoid the effect of the harassment.

D. Overview of UPS's Section 65(2) Defence

[338] In its final submissions, UPS asserts that:

> …[I]f the corporate respondent can show that it did not consent to the harassment and that it exercised "all due diligence" to prevent the harassment from being committed and, subsequently, to mitigate or avoid its effects, the corporate respondent is exempt from liability….
>
> In practice this means that an employer will not be held liable for the improper conduct of its employees if it institutes and consistently enforces its policies and if it responds appropriately to any complaints of discrimination or harassment by its employees.

[339] UPS asserts that it meets the criteria in section 65(2) in these ways:

> 1) UPS submits that it did not consent to the harassment, assuming it occurred, because it did not know it was taking place;
>
> 2) UPS submits that it acted with due diligence to prevent Mr. Gordon from harassing Ms. Peters by having effective policies and training in place respecting sexual harassment; and,
>
> 3) UPS submits that it exercised due diligence to mitigate or avoid the effect of the sexual harassment upon Ms. Peters through its investigation of the alleged harassment and the corrective actions it subsequently took.

[340] As part of its section 65(2) defence, UPS asserts that it had an effective regime in place to deal with sexual harassment and, accordingly, Ms. Peters had an obligation to notify it of any harassment. This was to give the company an opportunity to address any harassment. UPS argues that it would have done so appropriately had Ms. Peters reported the harassment. From this, UPS also alleges that, because it did not receive notice from Ms. Peters, it did not consent to the sexual harassment. UPS states that sexual harassment is prohibited in its workplaces. UPS is asking that the complaint against it be dismissed pursuant to section 65(2) because Ms. Peters failed to report the harassment to UPS.

[341] UPS's position assumes that the alleged existence of an effective regime respecting sexual harassment creates a reporting obligation upon Ms. Peters in section 65(2). UPS's submission also requires the issue respecting its consent to the harassment and Ms. Peters' alleged reporting obligation to intersect or overlap.

E. The Relationship Between the Obligation to Report & Statutory Liability

(i) Context

[342] UPS is mingling its section 65(2) defence with the reporting obligation identified in *Franke*. Accordingly, the Tribunal considered the extent to which section 65 is different from, intersects with, overlaps or supersedes the reporting obligation in *Franke*.

[343] For its part, the Federal Court in *Franke* was not tasked with consideration of vicarious liability by reason of section 65(1) of the Act or under the common law. As identified above, in *Franke*, there had been no finding of sexual harassment by the Tribunal to trigger the application of section 65(1) and require that the employer be found liable. There was no consideration of section 65(2). In short, *Franke* does not consider section 65. The court in *Franke* reviewed a decision of the Tribunal to dismiss the complaint because sexual harassment was not established on the evidence.

[344] The obligation upon a complainant to report was added to the legal test for sexual harassment in *Franke* and has since become part of the common law. In all other respects, the legal test for harassment in *Janzen* concerns an assessment of the acts and omissions of the alleged harasser.

[345] The obligation to report in *Franke* does not change the facts about whether an alleged harasser committed harassment by their actions. It is here that there is a significant difference between section 65 and *Franke*. If the individual respondent is found to have engaged in harassment by reason of their acts or omissions, section 65(1) of the Act holds the respondent employer liable for those acts and omissions. For ease of reference, section 65(1) is repeated here:

> 65. (1) Subject to subsection (2), any act or omission committed by an officer, a director, an employee or an agent of any person, association or organization in the course of the employment of the officer, director, employee or agent shall, for the purposes of this Act, be deemed to be an act or omission committed by that person, association or organization.

[346] There is nothing in section 65(1) that could be said to incorporate an obligation upon a complainant to report before a respondent employer can be found liable. There is no wording in section 65(1) that would reasonably support such an interpretation.

[347] As indicated, section 65(1) applies to all complaints before the Tribunal involving a respondent employer. Because of section 65(1), the acts of Mr. Gordon are deemed to be the acts of UPS.

[348] The Tribunal concludes that the statutory liability created by section 65(1) supersedes any reporting obligation upon the complainant at common law by reason of the reporting obligation first identified in *Franke*. To put it another way, a failure to report does not negate the application of section 65(1).

[349] Section 65(1) is expressly subject to subsection (2). The issue is whether a respondent employer is able to avail itself of a section 65(2) defence. Here, because UPS is relying on section 65(2) and asserting that Ms. Peters had an obligation to report the harassment, its position raises the issue of whether there is an obligation to report in section 65(2).

(ii) Is There an Obligation to Report in Section 65(2)?

[350] Section 65(2) does not expressly incorporate an obligation upon a complainant to have reported the sexual harassment to the employer. It states nothing about reporting. It concerns only the conditions that a respondent employer must satisfy to avoid liability. However, the Tribunal reviewed each of the three conditions in section 65(2) to consider whether an obligation to report could be implicitly required by a condition or be of direct relevance to the analysis of any of the conditions.

[351] The first statutory condition in section 65(2) is that an employer establish that they did not consent to the harassment. UPS submits that UPS did not consent to the harassment because it was not reported by Ms. Peters and it had no knowledge harassment was taking place. UPS equates a lack of knowledge about the harassment, due to the complainant's failure to report, to a lack of consent. Whether this is persuasive and the issue of any interplay between consent in section 65(2) and the obligation to report in the common law is a sufficiently detailed issue that it is addressed in a separate section below.

[352] As will be explained, the Tribunal agrees that the issue of reporting the harassment may be arguably relevant to the issue of consent. For example, if harassment is reported and an employer does nothing about it, the employer may not be able to establish that it did not consent. But being of arguable relevance does not mean that an obligation upon a complainant to report can be implied in this part of section 65(2). For the reasons provided below, the Tribunal is not persuaded by UPS's legal argument that the requirement of "did not consent" in section 65(2) is necessarily or always conjoined with an obligation to report upon a complainant. The condition upon an employer to have not consented in section 65(2) is not solely dependent upon a complainant having reported the harassment. The Tribunal does not conclude that the obligation to report is implied in relation to the issue of consent in all cases. The condition respecting consent by the employer is independent from the issue of whether the complainant had an obligation to report the harassment and, if so, whether the complainant met that obligation.

[353] As explained, the second condition in section 65(2) is that the employer must prove that it "exercised all due diligence to prevent the act or omission from being committed." Due diligence in the context of prevention may include that a respondent employer has a program in place, including effective policies with methods of redress and training, to prevent sexual harassment, just as the Federal Court in *Franke*, at para 45, required that the employers' policies, including mechanisms for redress of the harassment, be comprehensive and effective. [The issue of what constitutes due diligence respecting prevention in the context of section 65(2) is also addressed below.] Accordingly, there is apparent overlap between the condition of all due diligence respecting prevention in section 65(2) and the requirements in *Franke* that must exist for the obligation to report to arise.

[354] Nonetheless, the second condition in section 65(2) only applies to and creates required action by the respondent employer. There is no language within the second condition that could be said to implicitly include action by a complainant by creating a separate or corresponding obligation. The requirement to prevent harassment in section 65(2) does not extend beyond the employer. Further, the obligation to prevent harassment applies to the respondent employer in all cases. The issue is to what extent. The Tribunal concludes that, when section 65(2) is relied upon, the reporting obligation upon a complainant does not arise in the context of prevention in section 65(2) as it did in *Franke*.

[355] This brings us to another difference between section 65(2) and the reporting obligation in *Franke*. To avoid liability, the employer must still satisfy the third condition in section 65(2): that the employer exercised all due diligence subsequent to the harassment to mitigate or avoid the effect of the harassment. Once again, the third condition rests upon the actions of the respondent employer. The language of the third condition in section 65(2) does not include an obligation to report. Its language does not reasonably permit an interpretation that would implicitly create the addition of an obligation upon a complainant.

[356] Section 65(2) is also optional; it is only applicable where a respondent employer seeks to rely upon it. However, once relied upon, the conditions of due diligence respecting prevention and mitigation in section 65(2) become requirements that are applicable only to the employer, for purposes of that section. The two conditions upon an employer based on “all due diligence” are not subject to or otherwise tied to an obligation of a complainant to report. The Tribunal concludes that an obligation to report cannot reasonably be said to be implicitly required by the two conditions in section 65(2) because they expressly pertain to a respondent employer’s due diligence to prevent harassment and, subsequently, to mitigate or avoid the effect of the harassment.

[357] The Tribunal concludes that an obligation to report upon a complainant is not implied in section 65(2). However, that does not mean that the obligation to report is irrelevant to the analysis of a sexual harassment complaint.

(iii) Is the Obligation to Report Relevant to Section 65(2)?

[358] In the view of the Tribunal, it is at the stage of the analysis where the first two conditions in section 65(2) have been met but the third condition has not been met that the obligation of a complainant to report becomes relevant: where the employer has not consented to the harassment and exercised due diligence to prevent sexual harassment but did not exercise due diligence to mitigate or avoid the effects of the harassment after it occurred. It is at that point that the obligation upon a complainant to report sexual harassment becomes directly relevant to the analysis of the complaint. If a respondent employer does not have knowledge that sexual harassment is perceived in the workplace because the complainant failed to report it, the complainant cannot fairly complain that the employer failed to exercise due diligence to investigate and mitigate the effect of the harassment upon them. A failure to report sexual harassment provides an evidentiary defence to a respondent employer who did not consent to the harassment and exercised due diligence to prevent it but cannot otherwise avoid liability pursuant to section 65(2) because they cannot establish that they meet the third condition. This is where an obligation upon a complainant to report is most relevant.

[359] The Tribunal concludes that section 65(2) requires a different approach to the obligation to report than *Franke*, where the obligation to report arises within the legal test for sexual harassment. In the view of the Tribunal, the legal test for sexual harassment should focus upon whether sexual harassment occurred, as it did in *Janzen*. Given the import of section 65(2, in proceedings under the Act it seems unreasonable to place an obligation to report, which rests upon a complainant, within the legal test a complainant must meet to establish that sexual harassment occurred. Doing so places an obligation on the complainant to prove that they reported sexual harassment ahead of a determination that the employer did not consent and that it exercised due diligence to prevent the harassment from occurring. It places an obligation to report ahead of an assessment of the viability, fairness and necessity of such a requirement. Doing so appears to interfere with the sequence of findings respecting the determination of liability of a respondent employer required by section 65. The obligation to report should be considered, if it is relevant, after the first two conditions in section 65(2) are met by the respondent employer and there has

been a finding that the respondent employer has failed to meet the third condition, namely, there is a finding that the employer has failed to exercise due diligence subsequent to the harassment to mitigate or avoid the effect of the harassment.

(iv) The Sequence of Issues to Be Determined in Sexual Harassment Cases

[360] For the reasons explained above, the Tribunal concludes that the sequence of issues to be determined pursuant to the Act inclusive of section 65 should be the following:

1) First, it must be determined whether the acts and omissions in issue constitute sexual harassment by the alleged harasser as defined in *Janzen*, inclusive of the content in *Franke* that pertains to the determination of whether the complainant was sexually harassed. If so, the respondent employer must be found liable pursuant to section 65(1) unless it can avail itself of a section 65(2) defence.

2) Second, the respondent employer must prove that it meets all three conditions listed in section 65(2) to successfully rely on a section 65(2) defence: 1) that it did not consent to the harassment; 2) that it exercised all due diligence to prevent the harassment from being committed in the first place; and, 3) that it exercised due diligence subsequent to the harassment to mitigate or avoid the effect of the harassment.

3) If the respondent employer proves that it meets the first two conditions but did not exercise due diligence to mitigate and avoid the effect of the harassment, whether the complainant notified the employer of the harassment, or the employer otherwise knew or should have known of the harassment, will be relevant and important considerations in determining whether the respondent employer can, nonetheless, avoid liability pursuant to section 65(2) by establishing that it exercised all due diligence in the circumstances.

[361] Whether the respondent employer did not or could not have known that there was a perception that sexual harassment was taking place in the workplace is of direct relevance to the assessment of the nature and extent of their obligation to exercise due diligence in relation to mitigation efforts.

XII. Whether UPS is Liable for the Sexual Harassment

A. Did Not Consent to the Commission of the Act

(i) Knowledge Versus Consent

[362] UPS asserts that it did not have any knowledge that Mr. Gordon was sexually harassing Ms. Peters. It blames this lack of knowledge on Ms. Peters' failure to report it. UPS argues, therefore, that it could not have consented to the harassment. UPS submits that the Tribunal should find that UPS did not consent to the harassment and conclude that UPS is not liable pursuant to section 65(2).

[363] As pointed out above, section 65(1) of the Act does not require that UPS have knowledge of the wrongdoing at the time for UPS to be liable. UPS would be found liable because of section 65(1).

[364] Section 65(2) does not use the word knowledge, nor does it state that the employer must have expressly consented to be found liable. No reasonable employer would voice agreement with sexual harassment. It is highly unlikely that an employer would proactively, explicitly consent to one of its employees sexually harassing another. If a finding of liability was dependent upon a finding that an employer explicitly or overtly consented to the act or omission in question, few, if any, employers would ever be held liable pursuant to section 65(2).

[365] Not only does section 65(2) refrain from use of the wording "expressly consent", it does not state that the employer must have consented to be found liable. If it did state that, employers could remain silent about the topic of sexual harassment and avoid liability on the basis that they did not actively consent.

[366] The legal test in section 65(2) requires that the employer establish that it "did not consent to the commission of the act or omission." This presents a more difficult requirement, namely, that the employer establish a negative: that it did not consent to the harassment; in other words, that it had not consented to the harassment. This requires an

analysis of the status of matters relevant to the issue of consent within a reasonable period before and up to the time the harassment occurred.

[367] Further, an employer's lack of knowledge of the harassment alone is not the equivalent of "not consenting." Knowledge and consent are not identical concepts and are not interchangeable. One either has knowledge, or one does not. On the other hand, consent may be express or implied.

[368] An employer can inadvertently or implicitly fail to "not consent." This can happen when the employer is not proactive. Sexual harassment often initially occurs without the employer's knowledge. Reporting it always occurs after the fact. "Not consenting", therefore, likely requires appropriate communication in advance of the conduct complained of that the employer is "not consenting." Further, to avoid the complication of implied consent, the fact that the employer is "not consenting" should be express and effectively communicated.

[369] To illustrate, an employer that has no policies about harassment could appear in the circumstances of a case to not have turned its mind to the need to make it clear that sexual harassment is prohibited in the workplace or may not have considered the issue at all. The employer may or may not have intended to implicitly consent to the sexual harassment, but it likely cannot prove or will have difficulty proving that it "had not consented" or "did not consent" to the occurrence which is what section 65(2) requires the employer to demonstrate. Proof of the fact the employer did not consent appears to require evidence of some action or expression by the employer, as opposed to inaction. In this example, the employer would not have communicated to the employees or the individual harasser that sexual harassment was not acceptable in the workplace. The absence of an express communication against harassment leaves this employer open to the potential risk that it will be found to have a workplace that was not informed or concerned about sexual harassment. Where it is not made clear that sexual harassment is not tolerated, the employer may be unable to prove an absence of consent or a prohibition, which appears to be what section 65(2) requires by stating that the employer must prove that it had <u>not</u> consented.

[370] There are many problematic behaviours that can occur in a workplace that an employer has no obligation to "not consent to" in advance, such as conduct that would

amount to just cause for termination of employment. There are many behaviours that an employer has no legal obligation to try to prevent. Health and safety incidents would be an exception. However, the issue in section 65(2) is not whether an employer must have "not consented" to sexual harassment for the employer to be able to take action and manage its workplace. The issue is whether the employer should escape liability arising from the problematic behaviour of sexual harassment pursuant to section 65(1). In this context, it is not unreasonable to expect the employer to have been proactive in some way to be eligible to be exempted from liability, including an expectation there be effective communication that the employer does not consent to sexual harassment and, therefore, did not consent to the harassment. This is consistent with the other conditions in section 65(2) that require not merely proactivity but due diligence by the employer.

[371] A failure to "not consent" can also occur by an employer's failure to act when the employer knows that harassment is occurring and allows it to continue, without doing anything about it. Condoning harassment is another way of consenting or failing to not consent to sexual harassment through inaction.

[372] Depending on the seriousness of the conduct in question, some sexualized behaviour must be repeated to meet the legal definition of sexual harassment in the Act. It could also be the case that an employer had no written policies when the harassment began but can establish that they did not consent to ongoing harassment. Where the employer engages with the alleged harasser directly after an initial occurrence involving a minor incident and clearly identifies the kind of conduct or similar conduct that is problematic and communicates that it is not permitted in the workplace, and/or requires the employee to take sexual harassment training, the employer may well be able to demonstrate that it did not consent to the harassment if it continues. However, if the initial occurrence is serious enough to meet the legal test for sexual harassment and there was no prior communication that the employer did not consent, the employer may not be able to avoid liability by operation of section 65(1). Each case needs to be assessed on its facts.

[373] The point is that "not having knowledge" and "did not consent" are not the same thing. The latter is a broader, more nuanced issue. "Not consenting" is not purely a matter of a lack of knowledge that harassment is occurring.

[374] For these reasons, assuming that UPS can establish as a fact that it had no knowledge of the harassment, the Tribunal is, in any event, not persuaded by UPS's legal argument that it did not consent to the harassment for purposes of section 65(2) because it did not have knowledge of the harassment.

(ii) A Policy Prohibiting Sexual Harassment

[375] UPS further submits that it had an effective policy in place prohibiting sexual harassment and, therefore, can demonstrate that it had not consented to the harassment. UPS submits that the evidence at the hearing demonstrates that all employee witnesses understood that sexual harassment was strictly prohibited in the workplace. The Tribunal leaves aside for now the issue of whether UPS had an effective policy in the context of the requirement in section 65(2) that an employer exercise due diligence to prevent harassment. That issue is addressed below.

[376] It is agreed that workplace policies can be an effective means of communicating that an employer does not consent to sexual harassment. However, the requirement that the employer "not have consented" applies to the harassment by the harasser in section 65(1), not the workplace in general. The employer's non-consent to the behaviour or conduct must be communicated to the relevant individual. Communications that may exist within the workplace, but which were not communicated to the alleged harasser, may fail to demonstrate that the employer had not consented to the actions or omissions of the harasser.

[377] Further, the prohibition of sexual harassment in a workplace policy needs to be effectively communicated to the harasser. This includes not only the means of communication but the substantive content of the communication. An employer that can establish that there was effective communication to the harasser of what sexual harassment is and that sexual harassment is prohibited will have demonstrated that it did not consent to the harassment.

(iii) Findings Respecting "Did Not Consent"

[378] In this case, UPS provided a "Sexual Harassment" policy, dated 2003, that stated that the practice of discrimination in any form, including sexual harassment, was prohibited. This appears to have evolved into a "Professional Conduct and Anti-Harassment" policy by 2006. The Tribunal was provided with the 2003 policy and the 2006 policy that had been signed by Mr. Ghanem. It appears that much, but not all, of the 2003 policy was repeated in the 2006 policy. UPS also provided the Professional Conduct and Anti-Harassment policy (the "anti-harassment policy") signed by Mr. Gordon in 2006 and Ms. Peters in 2011 and 2014. The existence of the policy is some evidence that UPS did not consent to sexual harassment in the workplace. It is also some evidence that UPS engaged in due diligence to prevent harassment. As noted, that issue is dealt with at a later stage of these reasons.

[379] Both policies have a definition of sexual harassment taken from the *Canada Labour Code*. The 2003 "Sexual Harassment" policy states that harassment on the basis of sex is prohibited under the *Canada Labour Code*. That policy also mentions that sexual harassment is a discriminatory practice pursuant to the Act. The anti-harassment policy from 2006 onwards does not mention the Act. It states that discrimination and harassment is prohibited in the UPS community. It does not expressly state that harassment based on sex is a violation of the *Canada Labour Code*. Again, the accuracy, comprehensiveness and potential effectiveness of what is written in the policy as a due diligence measure is not being addressed at this stage. With respect to the issue of consent, the issue is whether the policy effectively communicated what sexual harassment is and the fact that it is prohibited in the workplace to Mr. Gordon.

[380] The anti-harassment policy makes it clear that harassment in the workplace is prohibited. With respect to discrimination and harassment, the policy identifies "derogatory or other inappropriate remarks, slurs, threats or jokes" and "inappropriate visual and non-verbal objects or conduct." The policy says that forms of harassment include but are not limited to:

> a) Verbal: repeated sexual innuendos, racial or sexual epithets, derogatory slurs or remarks, off-colour jokes, propositions, threats, or suggestive or insulting sounds;

> b) Visual/Non-verbal: derogatory posters, cartoons or drawings, suggestive objects or pictures, graphic commentaries, leering or obscene gestures;
>
> c) Physical: unwanted physical contact including horseplay, touching, interference with an individual's normal work movement, or assault; and
>
> d) Other: making or threatening reprisals as a result of a negative response to harassment.

[381] The policy includes sexual harassment as one example of harassment. It is here that there is mention of "unwelcome sexual advances." It states that sexual harassment is defined under the *Canada Labour Code* as "any conduct, comment, gesture or contact of a sexual nature that:

> a) is likely to cause offence or humiliation to any employee; or
>
> b) might, on reasonable grounds, be perceived by the employee as placing a condition of a sexual nature on employment or on any opportunity for training or promotion."

[382] Mr. Gordon knew that sexual harassment was prohibited in the workplace. However, it is not clear what role, if any, this policy played in his knowledge that sexual harassment was prohibited in the workplace or in his understanding of what constitutes sexual harassment. The anti-harassment policy was communicated to Mr. Gordon when he was hired in 2006. By "communicated", the Tribunal means that there was evidence he read the sexual harassment policy as part of a review of a package of policies during his orientation. He testified that he had about 20–30 minutes to review and sign all documents in the package. There was no training. He was not questioned during his testimony about his knowledge of the contents of the policy. There was no evidence respecting his recollection of the contents of the policy at the time of the alleged events. It cannot be assumed that he remembered specific content from the policy years later in 2013-2015. While Mr. Gordon knew that sexual harassment was prohibited in the workplace, this may well have been the result of his general knowledge. Further, the Tribunal is not prepared to find that the information in the policy that defined behaviours as sexual harassment was recalled by Mr. Gordon at the time relevant to this complaint.

[383] Mr. Gordon testified that full-time supervisors were retrained annually but not the part-time supervisors. Part-time supervisors were given policies to sign each year but no explanation or demonstration of them. As a part-time supervisor, he would also sometimes be given policies to read verbatim to the other employees at short, 5-minute briefing meetings called “Pre-work Communication Meetings” or “PCMs.” This included reading an anti-harassment policy to the employees who were present.

[384] The issue is whether Mr. Gordon knew what sexual harassment was and, therefore, understood what was prohibited by his employer. In other words, did Mr. Gordon understand what his employer was not consenting to in the workplace? The Tribunal is not persuaded on the evidence that there was effective communication to Mr. Gordon about what sexual harassment is prior to the alleged events. As well, Mr. Gordon had no workplace experience with application of the policy as a part-time supervisor. As noted, Mr. Gordon testified that “if what he did was sexual harassment, he did not know what sexual harassment was.” The Tribunal also considered whether Mr. Gordon knew what sexual harassment was but engaged in sexual harassment anyway. This was a concern given the Tribunal’s assessment that Mr. Gordon was not always a credible witness. The Tribunal believes that Mr. Gordon knew or should have known that the two incidents involving physical contact with Ms. Peters were sexual harassment based on his general knowledge.

[385] With respect to his other sexually harassing conduct, Mr. Gordon should have known or eventually figured out from Ms. Peters’ responses that his conduct was unwelcome. However, he lacked social awareness and sensitivity to societal norms. This observation is based upon parts of his testimony and the evidence of some of his co-workers. Mr. Gordon was not prepared to accept that his conduct was unwelcome.

[386] Had he acknowledged that his conduct was unwelcome, it is unlikely that Mr. Gordon would have realized that his conduct was sexual harassment. The Tribunal believes Mr. Gordon’s testimony that he must not know what sexual harassment is. Mr. Gordon appeared unaware that it was not for him to define or decide whether what he did amounted to sexual harassment. The Tribunal believes that if Mr. Gordon was shown examples of objectively blatant and derogatory sexual harassment by others, he would recognize behaviour that no one would want to experience as sexual harassment. However, he could

not recognize that his own behaviour constituted sexual harassment. He did not understand that the issue did not involve a subjective assessment by him. He did not understand that, if Ms. Peters found his conduct unwelcome and sexual in nature, and if he continued despite her indications, he could be in serious trouble at work. Instead, he appears to have believed that he could rely on his own assessment of his actions and his interpretation of their relationship as determinative of the matter.

[387] Leaving aside, for the moment, the instances of his assault and unwanted touching of Ms. Peters in January 2015, which he knew or should have known was sexual touching and assault, it appears that Mr. Gordon considered his behaviour in seeking out Ms. Peters at work and his communications about Ms. Peters in the workplace to be positive and friendly. Mr. Gordon did not engage in derogatory comments or remarks, offensive jokes, propositions (a word which could be interpreted as direct and derogatory propositions to have sex), threats, sexual epithets or suggestive or insulting sounds, leering or obscene gestures in the workplace. Mr. Gordon called Ms. Peters things like “his baby” and “beautiful” and said he wanted to “hug her and squeeze her.” He actions indicate that he assumed that she would appreciate his comments. He appeared oblivious to the fact that he caused her offence, embarrassment and humiliation when he made these comments in the workplace to people with whom she worked and to her repeatedly. Mr. Gordon clearly did not know that sexual harassment can encompass non-derogatory, even apparently complimentary, comments, when they are unwelcome and sexually possessive of the employee.

[388] It is not clear on the evidence whether Mr. Gordon’s understanding of what constitutes sexual harassment was formed by his review of UPS’s anti-harassment policy. However, if it was, the policy did not adequately define sexual harassment outside a context where there is no derogatory connotation. Sexual harassment includes any repeated, unwelcome, sexual behaviour. The policy does not convey, and Mr. Gordon did not understand, that being spoken of in a sexually possessive manner by a co-worker at work, when the targeted employee does not want to have such a relationship, can be a deeply upsetting and humiliating experience, depending on the circumstances. It clearly was for Ms. Peters in these circumstances.

[389] At first glance, UPS did not consent to the harassment because UPS had a sexual harassment policy in the workplace that prohibited sexual harassment. Employee witnesses confirmed that they knew that sexual harassment was strictly forbidden in the workplace, including Mr. Gordon. However, UPS did not effectively communicate what sexual harassment was to Mr. Gordon, and this is highly relevant. The evidence of what Mr. Gordon did at the time demonstrates a lack of any depth of understanding of sexual harassment. This was not dispelled during his testimony. Mr. Gordon's testimony that, "if what he did was sexual harassment, he did not know what sexual harassment was", confirms the Tribunal's overall assessment of the evidence in this regard.

[390] To be clear, Mr. Gordon's understanding of the policy is a relevant consideration but is not determinative as a standard. Had UPS effectively and substantively communicated a policy that prohibited and explained sexual harassment within the workplace including to Mr. Gordon, and if Mr. Gordon were unable by reason of disability or functional limitation to reasonably comprehend and distinguish between what is prohibited and what is not, it would not be fair to hold UPS responsible. However, no one suggested that there was any functional limitation in issue here.

[391] In this case, there is insufficient evidence for the Tribunal to conclude that the policies were substantively communicated and explained to Mr. Gordon in an effective manner. UPS failed to establish that it provided a sufficient explanation of the behaviour to which it did not consent to Mr. Gordon.

[392] Mr. Gordon testified that, once he received the human rights complaint in March 2015, he was extremely careful not to have personal communications with other employees. The Tribunal believes Mr. Gordon's evidence in this regard. There was other evidence that Mr. Gordon was careful in relation to his behaviour when he understood concepts. Mr. Gordon previously came to understand that he could not exhibit favouritism to a friend as a supervisor, which would be relevant if this were a case involving alleged sexual conditions upon employment. He understood this point sufficiently well that he communicated this rule to Ms. Peters when she came under his supervision, although he had previously begun to sexually harass her and continued to do so.

[393] Mr. Gordon did not have a sufficient understanding of how his conduct towards Ms. Peters would be judged. He did not understand that alleging friendship or a relationship outside of work with Ms. Peters would not be a defence to his conduct if it were unwelcome and it continued. He did not appear to understand that communication that behaviour was unwelcome could occur even without an express confrontation with Ms. Peters.

[394] While UPS prohibited sexual harassment in its workplace by having an anti-harassment policy, its effort in this regard was not effectively communicated to Mr. Gordon, the harasser. Without deliberately intending to do so, UPS failed to "not consent to the harassment" by the harasser, Mr. Gordon, and thereby failed to satisfy the first condition to avoid liability in section 65(2).

B. Notice of the Harassment

[395] It has been explained why an employer's lack of knowledge that there is a perception of sexual harassment in the workplace does not equate to an employer demonstrating that it had not consented to the harassment for the purposes of section 65(2). The Tribunal has further concluded that UPS did not meet the requirement in section 65(2) that it did not consent to the harassment by Mr. Gordon. However, several arguments were advanced by UPS that are based upon the foundation that UPS did not receive notice that there was an issue of sexual harassment in the workplace from Ms. Peters. Further, the Tribunal has found that the state of the employer's knowledge can be relevant to the alleged failure on its part to exercise all due diligence to mitigate or avoid the effects of the harassment. In this regard, the issue of whether the harassment was reported is relevant to whether the employer knew or should have known that harassment was perceived in the workplace. Accordingly, whether UPS had knowledge that there was a potential issue respecting sexual harassment in its workplace requires a factual finding.

[396] UPS's argument about notice, based on the obligation to report harassment in the common law, requires the Tribunal to address a significant amount of conflicting evidence and to make several assessments of credibility respecting whether Ms. Peters reported that she was being sexually harassed at a meeting in January 2015 or otherwise. It also requires

consideration of all the evidence respecting the accessibility and availability of HR-related resources in the workplace relevant to sexual harassment, Ms. Peters' alleged efforts to report, and the role played by managers and the union steward in this case, among other issues. While the Tribunal will return to address the most relevant and significant aspects of these matters, it is not necessary to decide whether Ms. Peters gave notice to UPS at the January 2015 meeting, which is denied by UPS, or via other means. This is because, contrary UPS's submissions, there is no dispute that UPS had notice of her allegations. UPS received a detailed description of the allegations, not just notice that sexual harassment was alleged.

[397] As indicated, on or before March 23, 2015, UPS received a copy of Ms. Peters' provincial complaint. As indicated, both UPS and Mr. Gordon were named as respondents. As well, Mr. Ghanem, the full-time supervisor, and Mr. Brent Dambrosio, Manager of Charge Operations, were named as respondents. UPS, therefore, had knowledge that Ms. Peters was making a sexual harassment complaint against Mr. Gordon, other involved managers in its employ and against UPS. UPS had this knowledge by March 23, 2015, as it had received the complaint by that date. These facts are not in dispute.

[398] UPS did not suggest that the provincial complaint and the complaint that was subsequently filed with the Canadian Human Rights Commission in July 2015 (the "written complaint") differed in any material respect. While the provincial complaint was not filed by the parties as an exhibit at the hearing, the Tribunal would reasonably assume that, if there were any material differences between the two that prejudiced UPS's ability to respond at the time or to conduct effective investigation(s), UPS would have brought that to the Tribunal's attention. Instead, UPS submitted at the hearing that it had all the information it needed from Ms. Peters in her written complaint. UPS took this position in response to criticism from the Commission and Ms. Peters over its failure to interview Ms. Peters for information respecting her written complaint.

[399] When UPS received Ms. Peters' provincial complaint, UPS obtained knowledge of the material aspects of her complaint. The Tribunal finds that UPS had notice, and sufficient notice, of the material aspects of Ms. Peters' human rights complaint as of March 23, 2015.

[400] UPS did not argue that it did not have to investigate because Ms. Peters had filed a complaint with the Human Rights Tribunal of Ontario. The fact that notice arrived via the offices of a third party, the Human Rights Tribunal of Ontario, does not change the fact that UPS received notice; neither does the fact that the information was received in the context of a legal proceeding before another tribunal. In any event, UPS did not dispute its obligation to investigate. UPS implied in its submissions that it was not able to interview Ms. Peters because she was adverse in interest. That is addressed below.

[401] To be clear, the commencement of a legal proceeding does not negate the employer's duty to investigate and mitigate the harmful effects of any sexual harassment that occurred, or which could be ongoing in its workplace. The employer has an immediate obligation to investigate and, if there has been harassment, to remediate the situation. UPS was under such a duty and had an opportunity to investigate and make mitigation efforts when it received notice in March 2015. If warranted upon investigation, UPS had an obligation to help Ms. Peters, to ensure that there would be no repeat of sexual harassment within the workplace and to confirm that no other employees were impacted. How UPS received the information about the allegations is not relevant to its obligations once the information was received.

[402] UPS's submission that Ms. Peters did not provide notice focused on events in the workplace before she went on medical leave. UPS's submissions imply that Ms. Peters' failure to give UPS notice before she left on her medical leave is tantamount to her not giving UPS notice. Such a position suggests that Ms. Peters had to still be actively employed at work to give notice. The provincial complaint was filed shortly after she began medical leave. Ms. Peters was still an employee of UPS. She is not estopped from giving notice because she is on medical leave. In fact, she was placed on medical leave by her physician until "the work-related issues" were addressed.

[403] UPS did not squarely address the issue of whether notice had to be given to it by Ms. Peters before she filed her federal complaint. The Tribunal observes that, in any event, on these facts, Ms. Peters did provide notice to UPS before she filed her federal complaint. UPS received her provincial complaint.

[404] The Tribunal notes that:

1) as is explained below, UPS recognized that the complaint would be re-routed to the correct tribunal;

2) UPS eventually conducted an investigation based on the information in Ms. Peters' complaint as it was obligated to do; and,

3) UPS did so despite not receiving notice of the allegations outside an existing legal proceeding.

Ms. Peters refiled her complaint with the Commission and UPS investigated the complaint in September 2015.

[405] The Tribunal concludes that UPS received notice of the sexual harassment allegations. Any arguments advanced by UPS that are based upon the foundation that UPS did not receive notice that there was an issue of sexual harassment in the workplace and did not have knowledge of this must fail as there is no factual foundation for the arguments.

[406] Before leaving the issue of notice, the fact that Ms. Peters was placed on medical leave by her physician until "the work-related issues" were addressed warrants mention in this context. The note from the physician of February 3, 2015 was sufficient notice to UPS that there were issues in the workplace impacting Ms. Peters' health. The physician's note does not equate to a notice of the harassment but comes very close to it. In any event, UPS should have made inquiries to try to find out what those work-related issues were. UPS did not explain why it took no action at any time in response to the note.

C. What Does "Due Diligence" in Section 65(2) Require of an Employer?

[407] While not strictly necessary to decide, given the determination on the issue of consent, the Tribunal will determine whether UPS has established that it met the two conditions in section 65(2) that require a respondent employer to exercise due diligence. This case could have been determined by any one of the conditions in section 65(2); the Tribunal could have begun with any of the conditions in section 65(2). All are of equal legal importance and deserving of a ruling in this case. It is also appropriate for the Tribunal to

address all three conditions in section 65(2) in the event that the Tribunal's determination below that all the conditions must be met is over-ruled.

(i) The Standard of Conduct Required

[408] It is first necessary to consider the standard of conduct imposed by section 65(2) and what is intended by the requirement that the employer exercise "all due diligence" in its efforts to prevent and mitigate the effects of sexual harassment.

[409] UPS submitted that the obligation to exercise "all due diligence" in section 65(2) is not a requirement based on perfection. UPS submits that "due diligence" requires that its efforts be reasonable. In this regard it relies upon *Cassidy,* where the Tribunal wrote at para 158:

> …In my view, the modifier "all" before "due diligence" does not require a standard of "perfection" in the exercise of its due diligence. Rather, the modifier requires that the corporate respondent exercised "reasonable" due diligence all of the time.

It was implicit in UPS submissions that the Tribunal was urged to take the same approach here as the Tribunal did in *Cassidy.*

[410] *Cassidy* quoted a 1988 decision of the Tribunal in *Hinds v. Canada (Employment and Immigration Comm.)* 1988 CAN LII 109 (CHRT), (1988), 10 CHRR 5683 ["*Hinds*"] at 41611 where the Tribunal applied section 48(6) of the Act, which is section 65(2) as it then read:

> Although the CHRA does not impose a duty on an employer to maintain a pristine working environment, there is a duty upon an employer to take prompt and effectual action when it knows or should know of co-employees' conduct in the workplace amounting to racial harassment…. To avoid liability, the employer is obliged to take reasonable steps to alleviate, as best it can, the distress arising within the work environment and to reassure those concerned that it is committed to the maintenance of a workplace free of racial harassment. A response that is both timely and corrective is called for and its degree must turn upon the circumstances of the harassment in each case.

[411] In addition to *Hinds, Cassidy* also adopted the approach taken by the Human Rights Tribunal of Ontario in two cases: *Sutton v Jarvis Ryan Associates et al*., 2010 HRTO 2421 (Can LII), which, in turn, relied upon the decision of *Laskowska v. Marineland of Canada Inc.,* 2005 HRTO 30 (CanLII) ["*Lawkowska*"].

[412] The Ontario *Lawkowska* decision has found its way into the jurisprudence of the Tribunal and is the leading case on the standard of conduct expected of employers. UPS urged the Tribunal to take the same approach, placing significant emphasis upon specific comments in *Laskowska*. UPS quoted the relevant portion of *Laskowska* in its submissions as follows, which includes UPS's placement of emphasis in support of its argument:

> The Tribunal's jurisprudence has established that the employer's duty to investigate is held to a standard of reasonableness, not correctness or perfection. In *Laskowska*, the Tribunal set out the relevant criteria for an employer to consider in its duty to investigate as:
>
> > (1) Awareness of issues of discrimination/harassment, Policy Complaint Mechanism and Training: Was there an awareness of issues of discrimination and harassment in the workplace **at the time of the incident?** Was there a suitable anti-discrimination/harassment policy? Was there a proper complaint mechanism in place? Was adequate training given to management and employees;
> >
> > (2) Post-Complaint: Seriousness, promptness, Taking care of its Employee, Investigation, and Action: Once an internal complaint was made, did the employer treat it seriously? Did it deal with the matter promptly and sensitively? Did it reasonably investigate and act; and
> >
> > (3) Resolution of the Complaint (including providing the Complainant with a Healthy Work Environment) and Communication: Did the employer provide a reasonable resolution in the circumstances? If the complainant chose to return to work, could the employer provide him/her with a healthy, discrimination-free work environment? Did it communicate its findings and actions to the complainant?
>
> The Tribunal in *Laskowska* also stated the following at para.60:
>
> > While the above three elements are of a general nature, their application must retain some flexibility to take into account the

> unique facts of each case. The standard is one of reasonableness, not correctness or perfection. There may have been several options – all reasonable – open to the employer. The employer need not satisfy each element in every case in order to be judged to have acted reasonably, although that would be the exception, not the norm. One must look at each element individually and then in the aggregate before passing judgment on whether the employer acted reasonably.

In short, *Laskowska* identified three criteria respecting the standard of conduct required of an employer but decided that an employer would not necessarily have to meet all three criteria.

[413] UPS emphasized the common thread in these cases that an employer need not do everything to be found to have acted reasonably. UPS also highlighted the last paragraph in *Laskowska* where the Tribunal said that an employer did not need to meet all three criteria and could still be found to have acted reasonably.

[414] The Tribunal agrees that an employer should be held to a standard of reasonableness, not perfection. The Tribunal acknowledges that the standard of reasonableness creates some degree of latitude in considering how respondents prevent and respond to complaints.

[415] Some cases have pointed to the size and resources of the organization. The size and resources of UPS are not significant factors here.

(ii) Is the Exception in *Laskowska* Available Under Section 65(2)?

[416] The Tribunal has difficulty accepting the exception within the quote above from *Laskowska*: “The employer need not satisfy each element in every case in order to be judged to have acted reasonably, although that would be the exception, not the norm.” This exception appears to allow too significant a latitude to employers given the relevance and importance of each of the elements. It is settled law that it is not reasonable for an employer to fail to address prevention, to fail to investigate a complaint or to fail to address the harasser or to make reasonable efforts to provide the complainant with a healthy work environment. As well, this conclusion in *Laskowska* raises the following question: in what

exceptional circumstance would it be acceptable for an employer to fail to satisfy one of the elements but still be found to meet a standard of reasonable due diligence in the context of human rights? The answer is not immediately obvious.

[417] In any event, in this case, UPS's submissions require that the concept of "exceptions" to reasonable standards in *Laskowska* be analyzed in the context of the due diligence requirements in section 65(2) of the Act.

[418] The Tribunal considered the degree of overlap or differences between the standards in *Laskowska* and in section 65(2). The first element in *Laskowska*, "awareness of issues of discrimination/harassment, policy complaint mechanism and training," essentially is a reference to aspects of "prevention" in the context of section 65(2). The second element, "taking care of its employee, investigation, and action," can be summarized as "mitigating or avoiding the effects of harassment" in section 65(2). The third element, "resolution of the complaint (including providing the complainant with a healthy work environment) and communication," further states components of "mitigating or avoiding the effects of harassment" in section 65(2). The three elements in *Laskowska* may be restated more simply as 1) prevention, 2) addressing the complaint, and 3) mitigating or avoiding the effects of the harassment. These, in turn, are aligned with section 65(2)'s due diligence requirements respecting prevention and mitigating or avoiding the effects of harassment, the latter of which includes an investigation.

[419] UPS defended several criticisms of its handling of similar "elements" as those addressed in *Laskowska* on the basis that it acted reasonably overall. UPS placed significant reliance upon the idea that the employer need not be perfect and do everything.

[420] As a reminder*, Laskowska* was not decided based on an analysis of the vicarious liability provision in the Ontario *Human Rights Act* (the "Ontario Act"), unlike the case here where section 65(2) of the Act is engaged. *Laskowska* was decided based on section 5 of the Ontario Act. It requires "any person" to ensure that there is no harassment in the workplace. *Laskowska* considered common law principles respecting corporate due diligence and borrowed from those concepts in reaching its conclusions respecting the "reasonableness" expected of employers in relation to their obligation to ensure that there

was no harassment in the workplace. *Laskowska* concluded: “One must look at each element individually and then in the aggregate before passing judgement on whether the employer acted reasonably” (see para 60).

[421] There is nothing incorrect about the approach in *Laskowska*. However, the Tribunal considered whether it should similarly look at each element in section 65(2) individually and then in the aggregate before deciding whether UPS acted reasonably. In this regard, it will be apparent from the reasons above that the Tribunal has been reading the three conditions in section 65(2) as requirements. The Tribunal, therefore, considered whether all three of the requirements stated in section 65(2) had to be met for that statutory defence to apply and be available to UPS.

[422] Section 65(2) requires the employer respondent to establish that it “…did not consent to the commission of the act or omission and exercised all due diligence to prevent the act or omission from being committed and, subsequently, to mitigate or avoid the effect thereof.” In the Tribunal’s view, the use of the word “and” in section 65(2) is conjunctive. It unifies the three requirements into an overall set of requirements that must be met. There is no basis to consider that any one condition was intended by Parliament to be optional.

[423] The Tribunal concluded that the three stated requirements in section 65(2) must be met by UPS. If one statutory pre-condition is not proven, the employer’s section 65(2) defence must fail. However, in relation to each requirement of due diligence, the test is “reasonableness”, not perfection, in assessing due diligence.

D. Prevention

(i) The Parties’ Positions and the Content of UPS’s Policy

[424] As noted, UPS took the position that its policies strictly prohibited sexual harassment; no employees were exempt from their obligations. UPS submitted that all employees, including Ms. Peters, Mr. Gordon and Mr. Ghanem, as well as other employee witnesses “affirmed their knowledge of the policies and that the harassment alleged was absolutely prohibited by UPS.”

[425] It is apparent that UPS believes that it met its obligation to take reasonable due diligence to prevent and respond to sexual harassment through its policy. UPS's reliance upon its anti-harassment policy is founded upon the assumption that its policy is eminently suitable for its purpose.

[426] The Commission submits that UPS's policy is wholly inadequate. The Commission says that the policy has not changed from 2006 until the hearing. It points out that, depending on font size, the policy is either one page long or slightly over one page.

[427] The Commission submitted a template of the anti-harassment policy that is available on its website into evidence and a detailed guide for developing anti-harassment policies, also found on its website. The latter includes a checklist of the content that the Commission believes should be contained in the policies of medium to large organizations. The Commission points out that its template policy includes:

> sections setting out who is responsible for: ensuring the policy is applied in a timely and consistent manner; determining whether a complaint is substantiated; determining what corrective action to take; and reviewing the policy annually or as required. It also includes a section that stipulates the specific roles of supervisors, including that they are responsible for "setting an example about appropriate workplace behaviour". It also sets out in detail the specific procedures for addressing harassment complaints, including: how and to whom complaints are to be reported; who will communicate the allegations to the alleged harasser; the fact that the parties will be offered mediation; and how the investigation will be conducted. It also explains what remedies may be available for the complainant, what corrective actions may be taken with respect to the harasser, and what measures will be taken to protect privacy and confidentiality.

[428] The Commission submits UPS's anti-harassment policy does not include most of these elements. The Commission highlights that this includes that the policy does not provide the procedure for addressing harassment complaints or identify the specific responsibilities of supervisors and managerial personnel and does not mention remedies that may be available to complainants. The Commission asserts that the policy is insufficient to establish due diligence by UPS for purposes of section 65(2) of the Act.

[429] UPS submits that its workplace harassment policy was "intentionally kept simple and straightforward, given the diverse array of people that it employs and significant turnover."

UPS maintains that the policy provides an effective guide to employees who may experience workplace harassment.

(ii) Analysis and Findings Respecting Policy

[430] In short, this policy is insufficient. The Tribunal identified problems with the manner in which the policy defines sexual harassment above. The information identified by the Commission as omitted from the policy is needed for employees to understand process, everyone's role and responsibilities, possible outcomes, how privacy will be addressed and to have some assurance that the policy will be applied accurately and consistently. The omissions can be included and described in plain language that is straightforward and easy for employees to follow.

[431] Mr. Greenaway, a UPS manager, indicated that some of this information could be found in other UPS documents. Any such documents are arguably relevant and, therefore, UPS was under a legal obligation to disclose them. UPS was required to provide this type of documentation to the Commission. No other documents were produced or entered into evidence to be considered by the Tribunal. If Mr. Greenaway was correct, some effort should have been made by UPS to correct this omission and ensure that UPS met its ongoing disclosure obligations as recognized by its counsel in advance of the hearing.

[432] The Tribunal concludes that UPS has failed to meet its obligation of due diligence to prevent harassment as required by section 65(2) by having a reasonable and potentially effective policy.

(iii) The Parties' Positions and Evidence About Training

[433] As part of its prevention efforts, UPS states that it provided training on its policies and actively enforced them. UPS produced documents that purported to record the extent of training its employees received about sexual harassment and harassment. UPS asserted that "…the company was entitled to believe its employees were compliant with their statutory duties in the absence of allegations to the contrary."

[434] UPS submits that Ms. Peters "is looking to UPS Canada for monetary compensation arising from Gordon's alleged misconduct, despite abdicating her responsibility to follow UPS Canada's policies and procedures in order to obtain the help that she allegedly needed."

[435] The Commission submits that UPS's training about sexual harassment and the content related to sexual harassment in its training materials was either non-existent or inadequate. The Commission filed detailed submissions respecting the evidence of employee witnesses about the extent of their training about sexual harassment.

[436] The Commission points out that only full-time managers and supervisors, such as Mr. Greenaway and Mr. Ghanem, received training on the topic of workplace harassment. Hourly employees and part-time supervisors, such as Ms. Peters, Mr. Gordon and other witnesses were not provided with harassment training other than any brief messages they received during PCMs and the requirement that they read the policy during their orientation session and, presumably, if they were asked to resign the policy.

[437] As noted, there are nearly 3000 UPS employees in Toronto, Ontario. The majority are hourly employees.

[438] Ms. Peters testified that she did not receive any training on harassment or regarding UPS's anti-harassment or another UPS policy, the "Professional Working Relationship" policy. Mr. Gordon stated that during his nearly 11 years as a part-time supervisor at UPS he did not receive any training on sexual harassment, harassment, or the anti-harassment and the "Professional Working Relationship" policies. He did not receive any training about his responsibilities as a supervisor in responding to complaints of harassment.

[439] As explained above, during orientation, new employees were given policies to read and sign that included the anti-harassment policy upon which UPS relies. Both Ms. Peters and Mr. Gordon testified to this effect. As noted, Mr. Gordon indicated that, at most, 30 minutes was allotted for him to go through the package of about 21 policies and sign them. On the other hand, Mr. Greenaway testified that instructors take about 1-1.5 hours to go through this material. However, he acknowledged during cross-examination that the exercise could take 20–30 minutes depending on class size and the number of questions

asked. There was no clear evidence that any “instructors” had additional materials, such as specific scenarios or content about sexual harassment, beyond the package of policies to review with employees.

[440] PCMs involved a manager or supervisor taking 5 minutes to read material on certain topics to their staff. As noted, Mr. Gordon testified that he had a PCM on harassment about every year. The material provided consists of a few short paragraphs and bullet points with general statements that discrimination and harassment are prohibited.

[441] Regarding what was read at the PCM, the Commission submitted the following:

> There is no substantive information about what constitutes harassment, the procedures in place for addressing it, and the concrete steps that will be taken by supervisors or managers when it is reported. Mr. Gordon confirmed that…he was expected to simply read the script word for word; and that is what he would do. He said it wasn’t meant to be a discussion and there wasn’t really time for questions and answers during the PCM.

[442] There was evidence that if employees had a PCM statement about harassment read to them, UPS recorded that those employees had harassment training. There was also evidence of errors in the system UPS used to record harassment training. For example, UPS’s tracking system had Ms. Peters attending harassment training from March 2015 until September 2017 when she was not at work. Mr. Gordon was recorded as having taken training about harassment through a “Transcript Report” from 2018 produced by UPS for the hearing. Mr. Gordon denied having ever taken training of this type. In response to suggestions that he had, Mr. Gordon said he did not receive training unless reading and signing a policy can be considered training. When Mr. Greenaway was asked why the entries in question appeared beside Mr. Gordon’s name, he responded: “Because signing of policies and documents we consider training as well.”

[443] The lack of any specific training respecting sexual harassment was confirmed by the testimony of Ms. Evans, who could not recall any training even when she was promoted to supervisor. Mr. Klimov, Ms. Bridgeman and Ms. Blackburn, likewise, could not recall any training on sexual harassment. Ms. Burke and Ms. Thompson, the union steward, said they did not receive any training.

[444] The Commission also provided an analysis of all sets of training materials that UPS produced for the hearing from 2010 to the present. (UPS did not indicate that there were additional training materials or previous versions of materials that it was unable to produce). The Commission looked for content about sexual harassment or about the Act in the training materials. The materials provided were for full-time management, "specialists" or the District Incident Response Team. As noted above, this training was not provided to part-time supervisors and hourly employees.

[445] Some contained no relevant content. One mentioned sexual harassment as a form of workplace violence but included no substantive content about sexual harassment. Some of the more recent training material contained some information about sexual harassment but was delivered after the incidents in this case occurred. For example, a "Focus on Compliance" training document from March 2015 had good examples of what harassment involves. However, the Commission pointed out that this training could be improved by:

> 1) including a sexual harassment scenario…;
>
> 2) incorporating content about the [Act];
>
> 3) providing guidance on what managers and supervisors should do when harassment is reported to them; and
>
> 4) ensuring that the training is provided to not only full-time managers but also part-time supervisors and other employees.

[446] It was suggested by Mr. Greenaway that part-time supervisors and hourly employees would have received this Focus on Compliance training through a PCM. However, these meetings were very brief.

[447] The Commission highlighted a PCM script provided to managers to read to other managerial employees from February 2015 which stated, "that in 2014, the number one concern of employees calling into the helpline was 'professionalism' and that another area of concern in the region was 'harassment.'"

[448] UPS's new management orientation training, which is a four-day training period for employees when they first become full-time supervisors, makes no mention of human rights

or workplace harassment. Based on these documents, it appears likely that sexual harassment is not addressed in the training given to new full-time supervisors.

[449] UPS's response to the Commission's concerns was as follows:

> While the…Commission… certainly took issue with the thoroughness of UPS Canada's training regime, the fact remains that policies existed which prohibited the conduct at issue and all employees, including Peters, Messrs. Gordon and Ghanem, as well as various employee witnesses called by the parties, all affirmed their knowledge of the policies and that the harassment alleged was absolutely prohibited by UPS Canada.

(iv) Analysis and Findings Respecting Training

[450] UPS acknowledged that the Commission "took issue with the thoroughness" of its training regime. However, UPS's point is that all its employees had knowledge of its anti-harassment policy and knew that sexual harassment was absolutely prohibited in the workplace.

[451] UPS emphasizes the fact that its employees knew that sexual harassment was prohibited. However, this was based on a policy prohibiting sexual harassment having been included in the orientation materials at the time of hiring, which in many cases was years before the events in this complaint. Given the evidence of all the witnesses, it appears most probable that the review process took a half hour or less. It is reasonable to conclude based on the evidence that employees recalled only the mere fact that sexual harassment was prohibited in the workplace, or other generalities such as an employee could go to management or HR to report it. UPS did not demonstrate on the evidence that its employees had sufficient knowledge of the subject matter the policy purported to address.

[452] The Tribunal finds that the evidence does not support UPS's contention that all its employees had actual knowledge of the content of the anti-harassment policy. The evidence of Mr. Gordon and Ms. Peters and others is consistent with a level of knowledge about sexual harassment that was wholly inadequate.

[453] UPS did not address the efforts it made to exercise due diligence to prevent the sexual harassment from occurring in any detail. UPS's submissions suggest that UPS

believes that issues respecting the thoroughness of its training identified by the Commission can be overlooked because its employees knew that sexual harassment was prohibited.

[454] Prevention of sexual harassment involves not only the existence of, but also the effectiveness of policies and training. Training about what the policy statement means is just as, if not more important than, the existence of a policy statement. Policies and training are co-dependent. A policy without effective communication and training is likely ineffective, if not meaningless.

[455] Further, and this is highly significant, employees are less likely to report harassment if an employer has not invested time or effort in any training because they would reasonably be less confident that the employer would act appropriately upon receipt of a complaint.

[456] UPS also contradicts the very concept of due diligence upon an employer in section 65(2) when it asserts that it was "entitled to believe its employees were compliant with their statutory duties in the absence of allegations to the contrary" (emphasis added). That could only possibly be the case if, among other things, UPS had provided effective training to its employees.

[457] In a workplace with approximately 3000 employees, most of whom are not receiving training about harassment, it cannot be assumed that employees are compliant with their human rights obligations. Further, as noted, it was suggested that UPS employs about 15,000 across Canada. Mr. Greenaway testified that UPS's approach to training was consistent across Canada. If there is no effective, ongoing training, there is a significant probability that some of the employees will not understand the substantive and procedural components relevant to sexual harassment issues. Nor should it be assumed that the absence of any allegations means that employees know that they should report allegations of sexual harassment in the workplace, why they should do so, how to do so and that they should believe that any complaint will be thoroughly investigated and with sensitivity. The absence of reports does not automatically confirm the absence of sexual harassment issues in the workplace.

[458] Section 65(2) clearly states that an employer's obligation is to take all due diligence to prevent the harassment to avoid liability for sexual harassment in the workplace. The

wording leaves no room for an interpretation that an employer is “entitled” to assume that prevention efforts are satisfied by the existence of a policy and that effective training is optional because of a lack of complaints.

[459] As well, UPS’s argument assumes a factual absence of any allegations within the workplace. That is not the case. UPS disclosed and provided documentary evidence respecting its handling of sexual harassment cases throughout Canada. There were more than enough reported cases that UPS should have realized that it could not assume that its employees were compliant with its policies. UPS’s argument ignores, as well, the PCM script from February 2015 which stated, “that in 2014, the number one concern of employees calling into the helpline was ‘professionalism’ and that another area of concern in the region was ‘harassment.’” It is not the case that there was an absence of any allegations.

[460] In this case, there was clearly no adequate training in the workplace about sexual harassment. This case truly illustrates the need to provide training to explain the policy and the importance of reminding employees about the policy in a meaningful way. This is all the more true in this case where the policy is quite general, open to interpretation and does not address the steps that will be taken to investigate the allegations or the possible steps that may be taken to mitigate or avoid the effect of the harassment upon the complainant. Employees left in an informational void are likely to draw incorrect conclusions and make assumptions. Some of them did so in this case. Employees may also doubt whether the policy will be enforced if they are not provided with assurances of action and context. Training provides an opportunity for those assurances and context.

[461] Assumptions and misunderstandings about the nature and extent of sexual harassment are evident in Mr. Gordon’s testimony, as explained above. As well, Ms. Peters and Ms. Lawes-Newell struggled with how to label and deal with Mr. Gordon’s unwelcome sexualized behaviour. Even the union steward, Ms. Thompson, testified that she lacked an understanding of how she could have helped in 2015. She said that she had no prior experience dealing with sexual harassment complaints and had never received any training on harassment over her 12 years with UPS.

[462] The omissions and deficiencies in training were serious and pervasive over a number of years. They contributed to Ms. Peters experiencing harassment over an unnecessarily prolonged period, delay in Mr. Gordon's behaviour being reported, Mr. Ghanem's dismissiveness and management's failure to recognize its need to act or investigate once it ought to have done so. All of this reflects a lack of adequate knowledge about sexual harassment among the involved employees. The lack of training about what sexual harassment is specifically contributed to Mr. Gordon's failure to identify or to potentially be able to identify what was wrong with his own behaviour and to recognize that his assumptions about the relationship he had with Ms. Peters were just that: assumptions and irrelevant. Other involved employees did not appear to know how to appropriately respond to the situation, including the complexities of Ms. Peters' reaction, such as Ms. Thompson. The Tribunal cannot conclude on these facts that UPS exercised due diligence to prevent Mr. Gordon's harassment from occurring based on its training efforts. UPS has failed to establish that it exercised due diligence to prevent harassment through its training efforts for the purposes of section 65(2).

E. Investigation & Mitigation Efforts

(i) Introduction

[463] UPS asserts that it exercised due diligence to mitigate or avoid the effect of the sexual harassment upon Ms. Peters through its investigation of the alleged harassment and through the corrective actions it subsequently took. UPS therefore claims that it satisfied the third condition in section 65(2). UPS placed significant emphasis on this component of section 65(2).

[464] The Tribunal begins with the actions taken by UPS after learning about Ms. Peters' complaint.

(ii) The Evidence Respecting UPS's First Steps and First Investigation

[465] As soon as Ms. Peters' provincial complaint was received by UPS on March 23, 2015, UPS's Labour and Employment Legal Manager (the "Legal Manager") provided all

named respondents, which included Mr. Gordon, with the complaint. In an email of March 23, 2015, the Legal Manager advised the named respondents that arrangements were being made for the individual respondents to have separate legal counsel. The Legal Manager wrote:

> I cannot act for personal respondents. As such, we have retained external counsel… to represent everyone in this matter. [External counsel] is preparing "joint retainer letters" which outline the scope of her retainer and representation of all respondents. I'll circulate a copy of those letters when they are ready and circulate for everyone to review. I'll also organize a call to discuss – sometime during the week of April 6th.

[466] The Legal Manager also told the named respondents that the Human Rights Tribunal of Ontario was not the appropriate forum for the complaint and that the complaint should have been filed with the Canadian Human Rights Commission. The March 23, 2015 email states:

> [External counsel] will prepare a response on everyone's behalf requesting that this complaint [be dismissed] on a preliminary basis for this reason. <u>What will likely occur then is that Ms. Peters will file a new complaint with the CHRC.</u>
>
> At this point although a detailed response on the merits of this complaint is not required I would like to start to gather some information on this file. (Emphasis added)

UPS's Legal Manager expected that Ms. Peters would eventually file her complaint with the Commission.

[467] A list of the information and documentation requested by the Legal Manager follows. The email also confirms that a legal hold will be implemented to preserve evidence including all emails in the individual respondents' accounts.

[468] Mr. Jerome Greenaway, the Area Manager at the time for UPS's Toronto Hub, received the email of March 23, 2015 from the Legal Manager. He testified that he followed up on several of the requests for information and documents in that email.

[469] Ultimately, Mr. Greenaway conducted both a first and a second investigation into Ms. Peters' complaint. However, Mr. Greenaway testified that when he received the

complaint, he did not open an investigation into the complaint because it was already in the hands of "legal." He clarified that at UPS, "We wait for legal." Mr. Greenaway further testified that "they would not start an investigation right away because the complaint was with a third party." By third party, Mr. Greenaway apparently meant the Human Rights Tribunal of Ontario and then the Canadian Human Rights Commission. He also offered that he was unaware of the stage of the complaint (the Tribunal understood this to refer to the stage of the Commission's process).

[470] Mr. Greenaway testified that he started to investigate the complaint in September 2015, after he was directed to do so at the end of August 2015 by "legal." Mr. Greenaway completed the investigation by September 15, 2015. Mr. Greenaway prepared an Investigation Summary based on his investigation which is dated September 16, 2015.

[471] On cross-examination, Mr. Greenaway was asked how many sexual harassment investigations he had been involved in. He did not provide a number. He responded, "Not a whole lot." He testified that other full-time managers usually conducted sexual harassment investigations. He explained that he was personally involved in the investigation into Ms. Peters' complaint because this complaint came through "legal."

[472] Mr. Greenaway testified that UPS had a written guide explaining how to conduct investigations, the "UPS Guidelines for Investigation of Workplace Issues", that was given to management. He testified that this document provided managers with instruction about how to conduct a proper and thorough investigation.

[473] Mr. Greenaway testified that his investigation consisted of his interview of nine employees and the preparation of the Investigation Summary. He decided whom to interview based on Ms. Peters' "statement" and added two other employees. By "statement", the Tribunal understood he meant Ms. Peters' written complaint to the Commission. He interviewed, amongst others, Mr. Gordon, Mr. Ghanem, Mr. Dambrosio, and Ms. Thompson.

[474] UPS submitted in its final written submissions that it did not interview Ms. Peters because she had left UPS. UPS further stated that Ms. Peters had left Canada for the United

States when it conducted its interviews. UPS asserted that she had particularized her allegations in her human rights complaint form and that it could rely upon that.

[475] Mr. Greenaway testified that he made no attempt to reach out to Ms. Peters. He did not send her a list of questions. He did not ask for clarification of any details in her complaint or request the names of any additional witnesses. He said that the complaint she had provided to the Commission was detailed enough. He also testified that he put every allegation she made to everyone he interviewed.

[476] In addition to his testimony that he did not interview Ms. Peters because the complaint was “with legal”, he also offered that Ms. Peters was not interviewed when he did conduct interviews because she was on leave. Mr. Greenaway did not testify that he did not interview Ms. Peters because she had abandoned her employment or that she had placed herself in an adverse position with her legal proceeding. Mr. Greenaway maintained that he conducted himself on the basis that the matter was with legal and that he proceeded with the investigation when he was advised to do so.

[477] It is not clear on the evidence whether Mr. Greenaway’s omission to contact with Ms. Peters was based on his own assumptions, his interpretation of UPS policies and practices or on specific instruction from UPS that she should not be contacted. However, it is clear that the Legal Manager did not advise Mr. Greenaway to take steps to attempt to interview or obtain additional information from Ms. Peters right away when the complaint was received. The Tribunal believes that, had Mr. Greenaway received specific instruction to attempt to interview Ms. Peters, he would have done so.

[478] The Tribunal found Mr. Greenaway to be a credible witness.

[479] The Commission pointed out that the “UPS Guidelines for Investigation of Workplace Issues” made it clear that the complainant was to be interviewed and asked for the names of relevant witnesses, which did not happen in this case. The Commission cited other significant examples of Mr. Greenaway not following the guidelines for investigation.

[480] As indicated, Ms. Peters and the Commission were critical of the omission of Ms. Peters from Mr. Greenaway’s investigation. UPS implied that it was not necessary to

ask Ms. Peters for additional information because the written complaint had been prepared with legal assistance. The Tribunal understands that, early in the complaint process, Ms. Peters had the assistance of a paralegal.

(iii) UPS's Finding From the First Investigation

[481] Following Mr. Greenaway's first investigation into the complaint, on October 13, 2015, Mr. Gordon was not found guilty of sexual harassment. Mr. Greenaway wrote a Letter of Understanding to Mr. Gordon, informing Mr. Gordon that he had been found to have engaged in "significant misconduct" and "unprofessional behaviour" by "having dinner with Tesha Peters that was not work related, and therefore violated the policy regarding 'Professional Working Relationships.'" Mr. Gordon was informed that any further misconduct of this nature would result in the termination of his employment.

[482] The Letter of Understanding included a statement about UPS's exposure to unnecessary liability in the context of the human rights complaint due to Mr. Gordon's conduct in having a non-work-related dinner with Ms. Peters:

> Your actions… amount to serious breaches of company policy and serious violations of the UPS Code of Conduct. In light of this recent Human Rights complaint, your actions have placed this company at great risk, exposed UPS Canada to unnecessary legal liability and has potentially compromised our ability to represent our position legally.

(iv) Absence of Steps to Mitigate the Impact of Any Harassment Upon Ms. Peters in Relation to First Investigation

[483] Ms. Peters was not contacted by UPS.

[484] Ms. Peters was not advised that her complaint was investigated. She was not offered any reassurance that her complaint would be investigated. Ms. Peters later learned about the investigation through the Commission's disclosure process.

[485] Ms. Peters was not advised of the outcome of the investigation.

[486] There is no evidence that UPS required Mr. Gordon to undergo any training to ensure that he understood UPS's policies. Mr. Greenaway appears to have read the relevant policies to Mr. Gordon.

[487] Ms. Peters was spared the experience of finding out that her complaint was not upheld by UPS. However, she continued to be of the belief that UPS had done nothing to investigate her complaint at a time she was on medical leave because of workplace-related issues.

[488] There is no evidence that UPS turned its mind to taking any steps to mitigate the impact upon Ms. Peters as a result of Mr. Gordon's misconduct in accordance with its finding or otherwise in relation to the matters she raised in her complaint or in response to the physician's note.

[489] As indicated, at the hearing, it was agreed that Ms. Peters remained an employee of UPS while she was on medical leave. There is no evidence of any effort made by UPS to allow her to return to work in a safe and harassment-free workplace or to reassure her that this would happen. There is no evidence that UPS had any communication with her about her employment status or potential return to work at any time prior to the hearing.

(v) Applying the Investigation and Mitigation Effort Requirement in Section 65(2) to the First Investigation

(a) Approach

[490] In relation to "mitigating or avoiding the effects of harassment", *Laskowska* asked: Did the employer treat the complaint seriously? Did it deal with the matter promptly and sensitively? Did it reasonably investigate the complaint? The Tribunal agrees that responding to the complaint by treating the complaint seriously and the parties with sensitivity, investigating effectively and promptly, taking steps to mitigate the effects of sexual harassment, if it has occurred, and to avoid further harm are all relevant components in determining whether an employer exercised due diligence to mitigate any harassment pursuant to section 65(2).

(b) Factual Findings Respecting First Investigation

[491] The Tribunal has made the following factual findings:

1. Upon receipt of the sexual harassment complaint in March 2015:

    a. UPS's response was to secure legal counsel for those opposed in interest to Ms. Peters, and it paid for that counsel;

    b. UPS collected documentary and electronic evidence in the possession of witnesses who would be potentially aligned with the interests of UPS, if UPS were to deny the validity of the complaint;

    c. UPS made no request to Ms. Peters asking her to preserve evidence and did not notify her that she should do so to protect and facilitate an investigation by UPS;

    d. while UPS requested certain information, UPS's efforts to preserve evidence did not directly extend to the five witnesses named in the complaint by Ms. Peters or to any witnesses that could have been suggested by named respondents; UPS decided that those named in the complaint were not required to provide particulars respecting the merits of the complaint when it was received;

    e. Ms. Peters was not asked for any additional particulars of her complaint; and,

    f. UPS knew that it was likely that the provincial complaint would be filed with the Commission; there is no indication on the evidence that UPS believed that Ms. Peters' complaint might be dropped; to the opposite effect, UPS expected the complaint to be pursued within the applicable federal jurisdiction.

2. Further,

a. UPS had the medical note from Ms. Peters' physician of February 2015 that notified UPS that Ms. Peters would be off work indefinitely until the issues in the workplace were resolved; UPS did not make an inquiry and investigate or take any other action to address this information; and,

b. although UPS received a copy of Ms. Peters' provincial complaint a few weeks later in March 2015, there is no evidence that UPS considered whether Ms. Peters was on medical leave because of the harassment she alleged by Mr. Gordon; it continued to make no effort to identify or clarify what the workplace issues were that caused her to remain off work, it made no effort to resolve those issues with Ms. Peters.

3. Five and a half months later, in September 2015:

a. UPS began an investigation into the harassment complaint;

b. UPS selected a senior manager who did not have much experience investigating sexual harassment complaints, namely the Area Manager, Mr. Greenaway, to conduct the investigation; it does not appear he was given assistance beyond a policy guide;

c. UPS had made no effort in the months since March 2015 to communicate with or contact Ms. Peters while she was on medical leave following its communication to her on March 6, 2015 respecting bereavement leave pay; UPS did not request an update respecting her medical state or her intentions; nor did UPS ever make any effort to have Ms. Peters return to the workplace;

d. UPS did not advise Ms. Peters that it was conducting an investigation into her claim of sexual harassment;

e. Ms. Peters was not asked for an interview or provided written questions to address for the investigation; there is no evidence of any contact with her or

her paralegal to ascertain what might be possible in terms of her participation; and

f. UPS did not inform Ms. Peters of its completion of or the outcome of the investigation

g. UPS did not ensure that Mr. Gordon received training about its relevant policies.

(c) The Timeliness of the First Investigation

[492] Timeliness is a key aspect of due diligence. Simply put, for mitigation efforts to constitute due diligence, they must be timely. Timeliness is not a standard of perfection. However, any investigation should be conducted within a reasonable time and, preferably, as soon as it is possible to do so.

[493] In UPS's final submissions, it stated:

> … Had UPS known about Peters' allegations against Gordon at the material time, it would have immediately commenced an internal investigation in accordance with its policies and procedures.
>
> However, Peters' failure to file any internal complaint prior to the commencement of legal proceedings meant that UPS Canada lacked any knowledge of her allegations, and was therefore prejudiced and deprived of the opportunity to conduct an investigation at the relevant time.

[494] The relevant time to commence an investigation is when the employer respondent learns that allegations of sexual harassment have emerged in the workplace. UPS learned of the allegations on March 23, 2015. As has been found, its obligation to investigate, or at least to try to investigate, was triggered then. There is no evidence that it attempted to investigate at that time. There is also no evidence of anything that prevented UPS from making the attempt. As addressed below, UPS made no effort to access Ms. Peters. In other words, UPS says that it would have immediately commenced an investigation as required by its policies and procedures had Ms. Peters reported the alleged harassment. However,

UPS did have notice of Ms. Peters' allegations as of March 23, 2015. UPS did not immediately commence an investigation.

[495] It is not apparent on the evidence what the reason was for the delay in commencing the investigation. It appears likely that some of the delay is because UPS chose to wait until the complaint was filed with the federal Commission, although it expected this would happen. This is not a justifiable reason to wait.

[496] UPS recognized that it had an obligation to investigate. This is demonstrated by its actions because it eventually did conduct an investigation. However, it did not investigate when it learned of the existence of sexual harassment allegations in its workplace and, therefore, failed to investigate in a timely manner.

[497] UPS did take immediate steps to protect its legal interests and the legal interests of the accused individual respondent by involving its Legal Manager. However, its actions did not extend to include a process that would enable UPS to decide what happened in relation to Ms. Peters' allegations. To illustrate, UPS should have taken timely steps to secure the most accurate accounts from witnesses, by requesting statements or conducting interviews when the memory of witnesses were relatively fresh.

[498] UPS allowed this lapse in action respecting the complaint itself to continue for five and a half months. Without making any finding in this regard, the appearance this inaction creates should be noted. Inaction is consistent with the assumption that the complaint of sexual harassment would be found to be meritless if the investigation proceeded.

[499] The Tribunal must reach the conclusion on the evidence that UPS did not exercise reasonable due diligence in initiating an investigation. This finding is a key determination in this case. As UPS failed to conduct a timely investigation, UPS cannot avail itself of a section 65(2) defence on these facts.

[500] Before leaving this issue, the Tribunal returns to UPS's motion about spoliation and its submission that it was prejudiced in its investigation of the complaint because of the loss of evidence that was destroyed or unavailable due to the passage of time. UPS did not conduct a timely investigation. UPS did not investigate the complaint in a manner that would

enable it to reach an accurate result in relation to Ms. Peters' allegations, by trying to interview Ms. Peters to help identify the existence of corroborating evidence, for example. It is UPS's position that it had sufficient information to investigate the complaint based on the complaint it received in mid-March 2015. UPS provided no evidence of prejudice. The Tribunal is not prepared to find that UPS was prejudiced in its investigation in these circumstances.

(d) The Fairness of the First Investigation

[501] When UPS finally did investigate the complaint, UPS proceeded in a manner that was unfair to Ms. Peters. Ms. Peters was denied any information or notice that the investigation was taking place. She had no opportunity to provide any additional information or comment. Typically, a complainant employee in an internal investigation would be interviewed. They would often be reinterviewed after information was collected from other witnesses. They would be given an opportunity to address any material points or issues that have been identified in the investigation.

[502] It is not an answer to speculate that, if UPS had attempted to have Ms. Peters cooperate, she would have refused. There is no evidence of this. No inquiry was made.

[503] Not making an effort to include the complainant in the investigation or even letting the complainant know it is occurring does not meet the standard of exercising due diligence in the context of section 65(2).

(e) The Reasonableness of the First Investigation

[504] UPS submits that its investigation was reasonable despite its failure to interview Ms. Peters because Ms. Peters was in the United States and unavailable. Had UPS proceeded with an investigation following notice of the complaint in March 2015, that would not have been the case. Ms. Peters did not move to the United States until the summer. Further, there is no evidence that UPS attempted to find her.

[505] UPS also submits that Ms. Peters was unavailable because she was on medical leave for work-related issues. UPS could have asked Ms. Peters to explain what the issues were at work that her physician indicated were making her unwell as soon as her health permitted her to do so or asked her to check with her physician to find out whether she was well enough to explain in an email what her concerns were. UPS also provided no evidence or justification respecting its apparent failure to consider that the absence may have been due to the alleged harassment, given their temporal proximity.

[506] As indicated, UPS further submitted that it had sufficient information for its investigation because Ms. Peters' information was all in her complaint. Not all her information was on her complaint form as evidenced by her SOP and her evidence, including the voicemail recordings. The fact that UPS had to conduct a second investigation after it received further information through the Commission's process is clear evidence that it did not have all the information simply because it had Ms. Peters' complaint form. UPS also contradicted its own argument in this respect when it complained that it did not have access to the voice mail recordings and to other evidence that it says was destroyed when it conducted its first investigation.

[507] UPS's investigation was not reasonable in the circumstances.

(f) Investigating When Parties are Adverse in Interest

[508] In UPS's final written submissions, UPS argues that Ms. Peters had retained counsel and was in an adversarial position to UPS. Because of this, UPS asserts that it was not reasonable for it to interview Ms. Peters. However, Mr. Greenaway did not accept this argument when it was put to him on direct examination. No evidence was provided to support this argument.

[509] Ms. Peters was adverse in interest to UPS because she believed that UPS would not take appropriate action and would not believe that she was sexually harassed. As matters turned out, her concern was well-founded.

[510] Ms. Peters retained a paralegal to assist her in preparing her complaint, not legal counsel. In any event, being adverse in interest is not a persuasive reason to not request

information from Ms. Peters about her complaint. Ms. Peters was still an UPS employee and had an obligation to respond to her employer. That status did not change when Ms. Peters filed her provincial complaint. It did not change when she filed this complaint. UPS and Ms. Peters had an obligation to cooperate with one another to permit investigation and to resolve the complaint, if possible.

[511] UPS assumed that Ms. Peters was adverse in interest, yet it did not make the same assumption about Mr. Gordon, who was potentially the harasser. UPS requested information from Mr. Gordon about the complaint. UPS met with him. It should have been apparent that Mr. Gordon might become adverse in interest to UPS, yet UPS's investigation did not appear impacted or impeded by this prospect.

[512] To be clear, an employer should not assume that a complainant or an accused harasser is adverse in interest. Being adverse in interest or potentially so is not a valid reason for an employer to fail or refuse to request additional information from an existing employee about an ongoing issue impacting the workplace and co-worker relationships.

[513] UPS is not relieved of its obligation to make best efforts to conduct a fair and reasonable investigation because the complainant or alleged harasser are or potentially may be adverse in interest.

(g) Investigation Cannot be Biased

[514] UPS had several concerns about Ms. Peters' attendance at work, her rate of absenteeism and about her failure to report absences in accordance with its policies. Complaints about Ms. Peters' absenteeism and other performance issues are found throughout UPS's submissions. Witnesses were questioned about these issues at the hearing. It was implied by UPS that Ms. Peters was not a credible or reliable witness because of her alleged absenteeism and failure to always report in a timely manner.

[515] However, absenteeism and sexual harassment are not necessarily related. Whether Ms. Peters had an absenteeism issue, a performance issue or a compliance issue is completely irrelevant to whether Mr. Gordon engaged in a protracted pattern of verbal sexual harassment towards Ms. Peters or engaged in physical sexual harassment. For this

reason, the Tribunal's reasons respecting Ms. Peters' complaint of sexual harassment do not address any of the performance-related issues raised by UPS concerning Ms. Peters. This evidence is irrelevant to this issue.

[516] On occasion it appeared that UPS used absenteeism to extrapolate that Ms. Peters would file a false complaint of sexual harassment or that she would file a complaint because her absenteeism rate was unacceptable. UPS seemed supportive of Mr. Gordon's view and the opinion of Ms. Thompson that Ms. Peters made up a story about being harassed to avoid discipline for her absenteeism issues. There is no evidence of this, or of any alleged statement by Ms. Peters to this effect, only conjecture.

[517] UPS appears to have had a biased, negative attitude towards Ms. Peters' complaint because of its concerns about her absenteeism. For an investigation to be fair and reasonable, it cannot be biased.

(vi) Evidence & Analysis Respecting the Second Investigation

[518] In its submissions, UPS blamed Ms. Peters for the limited results of its September 2015 investigation and, implicitly, its conclusion that Mr. Gordon had not engaged in sexual harassment. Its reason was that Ms. Peters had not provided UPS with the recordings of Mr. Gordon's voicemail messages.

[519] UPS had a copy of Ms. Peters' complaint which referenced harassing communications. UPS did not ask for any records of harassing communications.

[520] When the recordings were listened to by UPS during the Commission's investigation, UPS decided to hold a second investigation. This appears to have consisted of Mr. Greenaway interviewing Mr. Gordon again. UPS took the position that this was also an investigation of Ms. Peters' sexual harassment allegations. However, the focus appeared to be on whether Ms. Gordon had been forthright during his first interview, not whether he had engaged in sexual harassment. To illustrate, UPS's access to the recordings did not lead UPS to conclude that the voicemail recordings were evidence of sexual harassment. There is no evidence that UPS returned to Ms. Peters' complaint in light of the voicemail recordings and reconsidered the content, approach and conclusions in its first investigation. There is

no evidence that it sought further information from Ms. Peters about the voicemail recordings.

[521] UPS took the position that the sexual harassment allegations were not substantiated during its second investigation. Mr. Gordon's employment with UPS, which was terminated by UPS after the second investigation, was not terminated because he engaged in sexual harassment. UPS says in its final submissions that his employment was terminated because "he failed to be sufficiently forthright during the initial investigation conducted by UPS Canada regarding the extent of his non-work-related communications with Peters when he was questioned in September 2015." In short, UPS took the position that the sexual harassment allegations were not substantiated during its investigations and this proceeding.

[522] The Tribunal has concluded that the voice recordings were evidence of sexual harassment. UPS's second investigation and its first investigation had to be fundamentally flawed for UPS to conclude that there was no evidence of sexual harassment. UPS unreasonably disregarded clear evidence of harassment when it implicitly concluded that these messages were innocuous "non-work-related communications with Peters" as opposed to inappropriate external communications. Mr. Gordon abused his position of authority by even making those repeated calls. Further, UPS found Mr. Gordon's explanation for the contents of the recordings to be believable. At the same time, UPS concluded that Mr. Gordon had demonstrated such a sufficient lack of integrity in explaining his prior communications with Ms. Peters that his termination was warranted.

[523] As noted, UPS made submissions about how its ability to investigate was harmed by Ms. Peters' alleged failure to report or to preserve evidence. However, when UPS had evidence of sexual harassment by Mr. Gordon, namely the voice mail recordings, UPS did not conclude that Mr. Gordon's behaviour was sexual harassment.

[524] As well, Mr. Greenaway's notes of his interviews were in evidence. Some of the information he collected corroborated that Ms. Peters had believed that she was being sexually harassed. For example, he noted that Ms. Thompson indicated that Ms. Peters had told her that she was being sexually harassed when she started in the Charge Department. It appears that Mr. Greenaway asked Ms. Thompson if Ms. Peters wanted her to do

anything about it and that Ms. Thompson said no. There is no indication that Mr. Greenaway explored this further. It appears that Mr. Greenaway overlooked the information that Ms. Peters had told her union steward that she was being sexually harassed by Mr. Gordon.

[525] The idea that UPS's investigations, which Ms. Peters had no knowledge of, reached a flawed result because of Ms. Peters' lack of cooperation or availability, is not supported by the evidence.

(vii) Summary of Findings Respecting UPS's Investigations

[526] It was appropriate for UPS to conduct an investigation as it was under a legal obligation to do so in order to avoid liability for Mr. Gordon's actions pursuant to section 65(2). However, both investigations, considered separately and taken together, were excessively delayed and were otherwise procedurally flawed. The first investigation was not held for five and a half months, which is not timely or reasonable. The conclusions reached through the investigations were unreasonable because of procedural and evidentiary errors.

[527] These include but are not limited to a failure to recognize that the voicemail recordings were evidence of sexual harassment. No attempt was made by UPS to obtain additional information from Ms. Peters. None of the reasons provided by UPS to justify its failure to interview Ms. Peters or to try to obtain additional information from her are persuasive. UPS appears to have been biased against Ms. Peters because of her absenteeism issues. UPS obviously did not ask Mr. Gordon all the right questions during the first investigation because it failed to gather all available material information from Ms. Peters or make a reasonable attempt to do so. It did not interview all relevant witnesses or gather all relevant information. For example, UPS did not interview Ms. Lawes-Newell. Ms. Thompson's information appears to have been ignored by Mr. Greenaway. The situation called for an investigator knowledgeable about what sexual harassment is and with pre-existing knowledge of what questions to ask and, in general, how to conduct this kind of investigation. UPS did not take the investigation process seriously enough in this case and, thereby, reached the wrong result when it failed to find that Mr. Gordon had sexually harassed Ms. Peters.

[528] To be clear, UPS is not being held to a standard of correctness respecting the result of its investigation here; rather, the Tribunal finds that the conclusions UPS reached were unreasonable because of what UPS disregarded and failed to do. Its conclusion was based on legal errors respecting what constitutes sexual harassment, the evidence was not considered in context in the two investigations, and the evidence considered was otherwise incomplete. This is why the outcome of the investigation was inherently flawed and could not lead to accurate results or outcome. Had UPS taken proper steps, correctly informed itself, conducted timely, thorough and comprehensive interviews, including of Ms. Peters and Mr. Gordon, it most likely would have reached a different conclusion. In failing to conduct a proper investigation, UPS inevitably could not reach an informed and well-considered conclusion.

[529] UPS is not required to conduct a perfect investigation to meet its obligation to take due diligence to address the complaint. However, UPS's investigation was unreasonable and not fair. It did not constitute an exercise of due diligence by UPS to mitigate or avoid the effects of the harassment as required by section 65(2). UPS is not entitled to rely upon section 65(2) to avoid liability for Mr. Gordon's actions as a result.

(viii) Mitigating or Avoiding the Effects of the Harassment Beyond the Investigation

[530] A timely investigation leading to direct results protects all involved employees from the harmful effects of an investigation and the related confrontation and conflict in the workplace. Timeliness can go along way towards helping an employee who has been harassed by protecting them from the deleterious effects of the harassment, including by minimizing their exposure to emotional upset. Timely investigation is consistent with an employer's obligation to ensure that the workplace is free of sexual harassment so that others are not impacted. Of similar importance is the opportunity an investigation provides to an employer to devise solutions, or to address employees who refuse to be reasonable or who engage in misconduct. Equally, it is critical to relieve an employee who has been wrongly accused of harassment.

[531] For instance, meeting with an employee who alleges harassment in the context of an investigation and learning about the impacts of their experiences provides opportunities for an employer to understand the situation and respond appropriately. It is difficult to mitigate the effects of harassment on an employee if an employer does not know what those impacts are. The same would apply to a respondent who has been unfairly accused of harassment. UPS had no information about the impacts Ms. Peters experienced because UPS made no inquiry in this regard.

[532] Ms. Peters spent a long period on medical leave, going through the complaint process with the Commission, after she had provided UPS with a note from her physician that stated that she should not work until the issues at work were resolved. Ms. Peters was left on her own by UPS, without support, in a state of anxiety, as confirmed by her physician, experiencing repetitive negative thoughts and emotions, reliving unresolved issues from her experience with Mr. Gordon.

[533] UPS lost an opportunity to exercise due diligence to mitigate any harassment pursuant to section 65(2) because it did not initially respond to the complaint by conducting an effective and prompt investigation. It did not take the complaint seriously. It did not treat the parties with sensitivity. This includes that UPS left Mr. Gordon up in the air for five months. However, he, at least, was given legal support. UPS arrived at a flawed result when it did investigate five months later because its investigation was flawed. Even then, UPS did not take steps to mitigate the effects of sexual harassment that did, in fact, occur.

[534] UPS made no effort to have Ms. Peters return to the workplace. It made no effort to assure her that she would not have contact or unmonitored contact with Mr. Gordon if she did return during or after the investigation. There is no evidence that UPS had considered or was willing to make plans to provide her with a discrimination-free work environment. UPS failed to provide a reasonable resolution to Ms. Peters.

(ix) Conclusion Respecting UPS's Duty to Mitigate or Avoid the Effects of the Sexual Harassment

[535] UPS did not conduct its investigation in a manner consistent with its main purpose, which is to mitigate or avoid the effects of harassment upon the employees involved. UPS failed to take any concrete steps to avoid or mitigate the effect of the sexual harassment upon Ms. Peters. As a result, UPS failed to exercise a reasonable degree of due diligence to mitigate or avoid the effects of the sexual harassment that occurred in this case as required in section 65(2).

F. Was the Harassment Reported Before March 2015?

(i) Recap & The Issue of What Constitutes Reporting

[536] Before concluding the issues related to section 65(2), the Tribunal returns to the potential obligation upon a complainant to report harassment. The Tribunal has determined that the obligation to report harassment to an employer only becomes relevant for purposes of section 65(2) when the employer has failed to exercise due diligence to mitigate and avoid the effect of the sexual harassment and the employer seeks to blame this upon the failure of the complainant to report the harassment. UPS alleged that Ms. Peters' failure to report impacted its ability to investigate. The argument that UPS was prejudiced in its ability to investigate has not been accepted by the Tribunal. The Tribunal has concluded that UPS did not exercise all due diligence to investigate the complaint for various reasons and that UPS failed to mitigate the harassment in other ways.

[537] UPS did not argue that it should be excused from its failure to mitigate the effect of the harassment specifically upon Ms. Peters because Ms. Peters did not report the harassment to it, nor could it have done so persuasively. Ms. Peters was not under an obligation to report the harassment to UPS on the facts of this case because UPS did not, in any way, exercise due diligence to mitigate or avoid the effects of the harassment upon Ms. Peters personally.

[538] The Tribunal has concluded that UPS had notice of Ms. Peters' allegations in March 2015. The issue of whether Ms. Peters reported the harassment at an earlier time is not determinative and, therefore, does not need to be decided. UPS did not commence an investigation until September 2015, in any event. However, the Tribunal will provide reasons in this respect to address Ms. Peters' submission that she gave notice to UPS of the harassment at the meeting of January 15, 2015 and UPS's submissions that she did not. UPS placed significant reliance on its position that Ms. Peters did not report that she was being sexually harassed by Mr. Gordon to Mr. Ghanem at the meeting. In this regard, UPS relies heavily upon the undisputed fact that Ms. Peters likely did not use the word "sexual" in stating that she was being harassed. UPS submits that Ms. Peters was obligated to specify that the harassment was sexual. UPS raises the issue of what constitutes a reasonable and sufficient effort by a complainant to report sexual harassment. The Tribunal concluded that a finding in this regard was in the interest of the completeness of the key liability issues raised by the parties.

[539] In this regard, UPS also submits that, in addition to the January 15, 2015 meeting, Ms. Peters did not otherwise access available options to seek redress such as contacting HR, the UPS Helpline and/or a filing a grievance. UPS argues that Ms. Peters had access to various means to report the sexual harassment. In this regard, UPS did not admit that Ms. Peters' attempt to report the sexual harassment to Mr. Ghanem failed. However, UPS implies that Ms. Peters should have used more than one means of reporting the harassment through its efforts to highlight that she had other options.

(ii) UPS' Position Respecting the January 15, 2015 Meeting

[540] UPS submits that:

> On one occasion, at the tail end of a disciplinary meeting with her manager and union steward which was being held to address her chronic absenteeism issues, Peters claimed that she was being "harassed" by her supervisor, Mr. Gordon. On her own evidence, Peters refused to provide Ghanem with any particulars and, in fact, immediately withdrew her allegation after making it.

[541] In addition to Mr. Ghanem's testimony, UPS relies upon the evidence of the union steward, Ms. Thompson, who attended the disciplinary meeting on January 15, 2015. UPS called Ms. Thompson as a witness.

[542] UPS does not dispute that Ms. Peters stated that she was being harassed at the meeting. UPS submits that it was the recollection of both Mr. Ghanem and Ms. Thompson that, after Ms. Peters said she was being harassed, she was questioned about her comment and described that Mr. Gordon was "breathing down her neck," told her that she "had to work fast", and that "she did not like that he removed her from another place on the line." UPS says that Mr. Ghanem informed Ms. Peters that performance management was not the same as harassment, but that if she felt that Mr. Gordon was going beyond job training, she should escalate the matter to HR because UPS had "zero tolerance for such harassment." UPS submits that both Ms. Thompson and Ms. Peters agreed in their testimony that no details of sexual harassment were provided. UPS submits that Ms. Peters also admits that her allegation was withdrawn.

[543] UPS also says that it was Ms. Thompson's evidence that Ms. Peters told her later that she did not want to report Mr. Gordon's harassment because she did not want him to lose his job. UPS submits that this is an admission by Ms. Peters that "if she had properly reported Mr. Gordon's misconduct, as she was required to do, the likely outcome would have been the termination of Gordon's employment if the allegations were true."

[544] It is UPS's position that Mr. Ghanem reasonably interpreted what Ms. Peters said at the January 15, 2015 meeting as Ms. Peters complaining about the fact that Mr. Gordon was engaging in "performance management" of Ms. Peters. UPS also implies that Ms. Peters was not motivated to report the harassment because she did not want to cause Mr. Gordon to lose his job. Along with its submission that Ms. Peters did not provide particulars and withdrew her allegation of harassment at the January 15, 2015 meeting, UPS suggests that Ms. Peters did not pursue the issue of harassment further beyond that meeting.

[545] UPS further submits that Ms. Peters should have reported the harassment because the employee witnesses' evidence corroborates that UPS had a variety of mechanisms

available to report harassment and that these witnesses affirmed that UPS would have treated sexual harassment seriously.

(iii) Background to Credibility Assessments

[546] There was much contradictory and unclear evidence about what was and was not said at the meeting of January 15, 2015. In part, this was because there were a number of allegedly inconsistent prior "statements." For the most part, these were notes taken during interviews and were not checked for accuracy by the relevant witness at the time. They were not true witness statements. Ms. Thompson initially had no recollection that she was ever even interviewed by the Commission and did not recognize the notes as her statement. The Tribunal placed more weight on the testimony at the hearing and documents that existed at the time of the harassment.

[547] The witnesses' testimony at the hearing also differed about what was said at the meeting. As noted previously, Ms. Peters' testimony about what happened at the meeting was credible, even if her recall of details was not always reliable. It became clear that there were issues with the reliability and credibility of the testimony provided to the Tribunal by Ms. Thompson and Mr. Ghanem about what happened. The Tribunal notes that Ms. Thompson's defensiveness and lack of accountability for her role in what occurred lead the Tribunal to not afford aspects of her testimony as much weight as it otherwise would. She also demonstrated bias against Ms. Peters. The evidence provided and the reasons for these assessments are explained below.

(iv) Ms. Peters' Testimony

[548] As explained, Ms. Peters testified that she reported to Mr. Ghanem that she was being "harassed" at the meeting that had been called to discuss her absenteeism. At the time she was seeing her physician for help with health issues caused by the harassment. She had seen her doctor as recently as January 7, 2015. The medical notes include the following notations: "'feels like she is losing her mind'", "depressed", "missing work", "feels overwhelmed", "having to 'force herself to get up and go to work'", "finds supervisor 'coming

onto her' and makes her uncomfortable", "tearful in office, emotionally flat with limited range", "work – does not want time off", "? has STD." Dr. MacDonald did not put her off work at that time.

[549] UPS appears to imply that "harassment" was something raised in passing by Ms. Peters at the end of the meeting and then withdrawn. Ms. Thompson testified that she believed that the harassment issue was raised by Ms. Peters in response to being disciplined for her absences and because of the problem with her receipt of inaccurate pay from UPS.

[550] The Tribunal concludes, based on all the evidence, that Ms. Peters likely attempted to explain what was behind her absences to Mr. Ghanem when she told him that she was being harassed at the meeting. In any event, as highlighted below, the harassment allegation did not arise for the first time at the meeting, as UPS and Ms. Thompson suggested.

[551] As indicated previously, Ms. Peters testified that, before the January 2015 meeting, she had talked to Ms. Thompson about being sexually harassed by Mr. Gordon. Ms. Peters had used the words "sexually harassed." Ms. Thompson, in fact, ultimately corroborated that Ms. Peters used these words. This includes that Ms. Thompson confirmed that Ms. Peters reported that Mr. Gordon made the type of statements about her described earlier. However, Ms. Thompson minimized this entirely in her testimony

[552] Ms. Peters did not testify that she used the word "sexual" to Mr. Ghanem. She also stated that she did not provide any particulars of the harassment to Mr. Ghanem. Ms. Peters also said nothing that would lead Mr. Ghanem to assume that, by harassment, she meant to rule out sexual harassment or to rule out that she was being given a hard time because she was female. The Tribunal accepts Ms. Peters' testimony that she told Mr. Ghanem that Mr. Gordon was harassing her "both inside and outside of work." Ms. Peters also did not suggest in any way that she pushed Mr. Ghanem to investigate the alleged harassment as a formal complaint, beyond alleging that she was being harassed at the meeting.

[553] Ms. Peters made no effort to embellish her testimony at the hearing. This is one of the reasons that the Tribunal prefers her testimony.

(v) The Alleged Problem with Reporting

[554] The primary issue is whether Ms. Peters was required to state that it was sexual harassment to trigger any obligation upon Mr. Ghanem to react as if the harassment could be sexual harassment. UPS submits that Ms. Peters needed to identify to Mr. Ghanem that the harassment was sexual harassment to differentiate her experience from the common workplace experience of an employee being performance managed by their supervisor. UPS says that Ms. Peters failed to do so.

(vi) Ms. Thompson's Testimony About the January Meeting

[555] Contrary to what UPS submitted, Ms. Thompson did not testify that only "harassment" was mentioned at the January 15, 2015 meeting. Her testimony was that she could not recall if the term "sexual harassment" was used by Ms. Peters to Mr. Ghanem.

[556] Also, contrary to UPS's submission, Ms. Thompson did not testify that it was her recollection that, after Ms. Peters said she was being harassed, she was questioned about this comment by Mr. Ghanem in the manner suggested. She did not testify that Ms. Peters described that Mr. Gordon was "breathing down her neck", told her that she "had to work fast", and that "she did not like that he removed her from another place on the line." She, therefore, did not corroborate Mr. Ghanem's testimony in this regard. This included that she said that she could not recall whether Ms. Peters was asked about what she meant by Mr. Ghanem.

[557] Ms. Thompson testified that she knew what Ms. Peters meant (in other words, Ms. Peters meant sexual harassment) because of their previous discussions and that she was not sure that Mr. Ghanem knew it was sexual harassment. If Ms. Peters had made the statements described by Mr. Ghanem, it is unlikely that Ms. Thompson would repeatedly testify, as she did, that Mr. Ghanem seemed to her to have made an assumption that the harassment related to performance management. If those statements had been made by Ms. Peters, there would have been no reason for Ms. Thompson to assume how Mr. Ghanem interpreted "harassment." Mr. Ghanem would have been informed by reason of receipt of particulars from Ms. Peters. Ms. Thompson's testimony was clearly intended to

convey that Mr. Ghanem made a mistake because Ms. Peters only used the word "harassment".

[558] Ms. Thompson also testified that the harassment issue only really became an issue for Ms. Peters in response to Ms. Peters' other problems at UPS. Ms. Thompson testified that Ms. Peters "did not make a big issue about it" until management called her out on her attendance. She also thought that "the escalation started from Brent [Dambrosio] putting his foot down and saying he was not going to pay her." It appeared that Ms. Thompson made this point to indicate that Ms. Peters was using the harassment allegation to cause trouble. If so, this was purely speculative opinion on her part. There is no persuasive evidence that Ms. Peters was not upset by Mr. Gordon's behaviour all along. The only person who suggested that Ms. Peters was not upset after discussing it with Ms. Peters was Ms. Thompson. It is most likely that Ms. Peters was upset but did not know how to handle it. In any event, Ms. Thompson effectively suggested that the issue of harassment did not arise until the January 15, 2015 meeting.

[559] In addition, Ms. Thompson initially avoided admitting her prior involvement and the fact that Ms. Peters brought her sexual harassment allegations to her. She was asked on direct examination whether Ms. Peters complained about Mr. Gordon sexually harassing her or sexually assaulting her before January 15, 2015. Ms. Thompson denied that this occurred. She then subsequently confirmed her knowledge of what was going on during her testimony. She testified several times that, when Ms. Peters said she was being harassed at the meeting, she had known what Ms. Peters meant; she said she already knew about what Ms. Peters had said about sexual harassment by Mr. Gordon.

[560] The Tribunal concludes that it was not reasonable for Ms. Thompson to imply that the issue of harassment was not raised by Ms. Peters until the January 15, 2015 meeting. Further, Ms. Thompson was not initially forthcoming in her evidence about the extent and nature of her involvement.

[561] Ms. Thompson also initially said that she knew nothing about sexual assault at the meeting of January 15, 2015. She then testified that she knew about Mr. Gordon touching Ms. Peters while she was working, before the meeting.

[562] As an aside, the Tribunal has previously determined that the more serious incidents of physical sexual harassment had not yet occurred by the time of the January meeting. Ms. Thompson's recollection of timing varied during her testimony. She eventually said that "everything came out" after the January 15, 2015 meeting. Ms. Thompson's initial testimony about timing does not alter the Tribunal's assessment of the evidence about when the touching incident likely occurred. The Tribunal is not persuaded, based on all the evidence, that Ms. Thompson knew about the touching incident before the meeting.

[563] The point is that, when she testified, Ms. Thompson believed that she knew about the touching incident at the January meeting. She believed that she knew at the time that Ms. Peters had told her that Mr. Gordon touched her buttocks while she was working on the box line. It did not appear to occur to Ms. Thompson that she should have reported the touching incident to the union and management when she learned of it. She should certainly have brought it up at the meeting if she knew about the incident. However, it was Ms. Thompson's evidence that she did not share any of the information she obtained about Mr. Gordon's sexual harassment of Ms. Peters with anyone.

[564] The Tribunal finds that Ms. Peters shared her concerns with Ms. Thompson about Mr. Gordon's inappropriate communications to her, and about her, in the workplace before the meeting of January 15, 2015. The evidence is that Ms. Thompson took no action to inform Ms. Peters about how sexual harassment claims should be addressed and to support her in reporting her concerns. There is no evidence that she took any action to find out.

[565] Ms. Thompson also described a different response from Mr. Ghanem than what he stated occurred when he testified. She testified that, when Ms. Peters said that she felt that she was being harassed by Mr. Gordon, Mr. Ghanem was "not happy" with that word. Ms. Thompson said that Mr. Ghanem responded, "that's a strong word." In fact, she repeated that Mr. Ghanem was not happy with the use of that word during her testimony.

[566] It appears from the various accounts of those in attendance that, after Ms. Peters said she was being harassed, Ms. Thompson said nothing that was helpful to Ms. Peters, even though Ms. Peters had previously reported to her that she was being sexually harassed by Mr. Gordon. She said nothing to Mr. Ghanem along the lines of "she means

that Mr. Gordon is saying sexually inappropriate things, harassing her and is now being very hard on her at work" or some similar contribution or participation in their discussion.

[567] Ms. Thompson testified that, after Ms. Peters said that she was being harassed, she "went out with her." By that she meant that the two left the meeting to speak privately. She provided no information to explain why the two left the meeting right after Ms. Peters used the word "harassment."

[568] Ms. Thompson testified that she asked Ms. Peters if she "was going to say anything about it." She said that Ms. Peters said no and that they went back into the meeting.

[569] The Tribunal infers that Ms. Thompson took Ms. Peters outside the meeting, not the other way around. Ms. Thompson offered no explanation about why she would have asked Ms. Peters if she was going to say anything about the sexual harassment. Ms. Peters had already said that she was being harassed. If Ms. Thompson believed that Ms. Peters did not want the harassment reported going into the meeting in January, she should have realized that her impression was incorrect or no longer correct because Ms. Peters had just raised it with Mr. Ghanem in front of her.

[570] It appears most likely from Ms. Thompson's testimony that she was highly uncomfortable at the thought of there being a sexual harassment complaint at UPS. It seems that she was concerned about what that might mean for her as the union steward and for Mr. Gordon personally. There was evidence that Ms. Thompson and Mr. Gordon were friends at work, that they "horsed around together" at work, and had occasionally met outside of work as friends.

[571] If Ms. Thompson asked Ms. Peters if she was going to say anything about "it", the Tribunal concludes that this question was not asked in a manner intended to encourage Ms. Peters to say anything or to offer further details. It is more likely that Ms. Thompson was questioning Ms. Peters' decision to raise the sexual harassment issue with UPS.

[572] In her testimony on direct examination, Ms. Thompson was asked if Ms. Peters said why she did not want to file a complaint (which is not what Ms. Thompson stated earlier in her testimony) when the two met outside. First Ms. Thompson testified that she did not

recall. She then said that maybe the reason was that “we have to be careful because this could hurt his family.” Ms. Thompson added that Ms. Peters “kept saying that she didn’t want to say anything.”

[573] Based on all the evidence, the Tribunal concludes that Ms. Peters attempted to report that she was being harassed by Mr. Gordon to Mr. Ghanem. Ms. Thompson did not want this to happen. Ms. Thompson took Ms. Peters outside. It appears probable that Ms. Thompson talked to Ms. Peters about the need to be cautious and about the implications for Mr. Gordon and his family. It is most likely that Ms. Thompson tried to pressure Ms. Peters to not say anything; enough so that Ms. Peters assured her more than once that she was not going to say anything, even though she had already told Mr. Ghanem that she felt that she was being harassed. Ms. Thompson then testified to the Tribunal that Ms. Peters did not want to say anything.

[574] It seems to the Tribunal that Ms. Thompson’s interpretation of what occurred at the meeting is incorrect and reflects a degree of bias against Ms. Peters. As noted above, there was ample opportunity for Ms. Thompson to assist Ms. Peters at the meeting by ensuring that there was no misunderstanding about the nature of the harassment being alleged by Ms. Peters. If Ms. Thompson was correct that Mr. Ghanem misunderstood the nature of the harassment involved, she could have corrected that misunderstanding. This did not happen.

[575] To the contrary, Ms. Thompson testified that, during the meeting, she said something like “you don’t want to go there with her” to Mr. Ghanem. She confirmed Ms. Peters’ testimony that Mr. Gordon said something to the effect that she had better have evidence. She also testified that that she mentioned it to Mr. Ghanem, but he “didn’t want to hear it.” Mr. Greenaway’s notes of his interview with Ms. Thompson confirm this.

[576] Ms. Peters testified that she was asked to leave the meeting and to wait outside while Mr. Ghanem and Ms. Thompson had a private discussion. There was conflicting evidence about whether this occurred.

[577] Mr. Ghanem disputed that Ms. Peters was absent for any part of the meeting. At first, Ms. Thompson seemed to think that she did not meet privately with Mr. Ghanem. She then admitted that she often stayed to speak with the supervisor at such meetings to plead for

the employee and could have done so. Finally, Mr. Greenaway's notes of his interview with Ms. Thompson were presented to her. Presented with his notes, she confirmed that she recalled that she did stay behind. On its own, this would not be a cause of concern about the reliability of Ms. Thompson's evidence, given the passage of time. However, given all the evidence presented, it appears that Ms. Thompson once again significantly changed her initial evidence to avoid the impression that she and Mr. Mr. Ghanem had a private discussion at the January 15, 2015 meeting.

[578] As Mr. Ghanem disputed that this meeting took place, he gave no evidence to account for the period in the meeting during which Ms. Peters was not present. Ms. Thompson suggested that Ms. Peters would have left the meeting entirely and that she would only have supported Ms. Peters in relation to her absenteeism during that portion of the meeting.

[579] The Tribunal prefers Ms. Peters' testimony that she waited outside. When Ms. Peters rejoined Mr. Ghanem and Ms. Thompson at the January meeting, there is no evidence that anything was said to Ms. Peters by way of additional follow up to her comment about harassment. If Ms. Thompson and Mr. Ghanem spoke about Mr. Gordon's harassment of Ms. Peters privately, it made no difference to Mr. Ghanem's response or to Ms. Thompson's reaction. Both did nothing. The meeting ended.

[580] As explained, there is no reliable testimony available to the Tribunal about what was said between the two during this private communication. It seems improbable that Ms. Thompson knew that Ms. Peters was being sexually harassed and yet did not say anything to Mr. Ghanem about the subject. However, the Tribunal is not able to make a factual finding about what was or was not said between Ms. Thompson and Mr. Ghanem at their private meeting on January 15, 2015 because of insufficient evidence. As noted, however, Ms. Thompson testified in an unspecific manner, without reference to time or place, that she "mentioned it to [Mr. Ghanem] and got the impression that he didn't want to hear it." There is a significant likelihood, if not a probability, given all the evidence, that Ms. Thompson conveyed to Mr. Ghanem during that conversation that Mr. Gordon's alleged harassment was sexual in nature.

(vii) Ms. Thompson's Testimony About What Happened After the Meeting

[581] Ms. Thompson continued to fail to advocate for Ms. Peters after the meeting. She testified that she subsequently listened to the voicemail messages from Mr. Gordon. She, therefore, knew that Mr. Gordon was harassing Ms. Peters outside of work. She agreed that his messages were inappropriate. Ms. Thompson did not advise Ms. Peters that she should provide the messages to UPS or explain to her that the messages were corroboratory evidence and could be used to convince Mr. Ghanem. She did not do anything about the messages herself.

[582] Instead, during her testimony, Ms. Thompson expressed annoyance that Ms. Peters had asked her to listen to the voicemail messages and, therefore, had involved her. She testified that she did not understand why Ms. Peters had her listen to them, although she was the union steward. She complained that Ms. Peters did not give the messages to management without involving her.

[583] As noted, Ms. Thompson subsequently learned about the incident when Mr. Gordon touched Ms. Peters while she was working on the box line. She also testified that she came to know that Ms. Peters alleged that Mr. Gordon had sexually assaulted her in the parking lot. These incidents did not lead Ms. Thompson to conclude that she should bring these matters to someone's attention to be properly investigated. She testified that she did not believe that Mr. Gordon assaulted Ms. Peters in the parking lot for reasons that closely matched Mr. Gordon's version of events.

(viii) Water-cooler Talk

[584] Ms. Thompson was dismissive of comments that she overheard from male employees who thought that Mr. Gordon made a point of always talking to female employees. She called it "water cooler talk" and implied that male employees always had this problem when there were women present and still do. She also testified that she heard something about Mr. Gordon being brought up to HR for sexual harassment. She said that nothing was proven and that "it was just something I heard", but that there were two males

who raised an issue. She testified that she could not say their names without permission. Her assertion was not challenged.

(ix) Ms. Thompson's Communications with Mr. Gordon

[585] Ms. Thompson's testimony about the nature of her discussions with Mr. Gordon during this time evolved considerably. Ms. Thompson began by testifying during her direct examination that Ms. Peters complained to her about Mr. Gordon's supervision. She says she spoke to Mr. Gordon and that he explained that Ms. Peters was not doing what she was supposed to be doing and that is why he was "coming down on her." Ms. Thompson also testified that Mr. Gordon came to her to discuss Ms. Peters' work ethic. In this way, Ms. Thompson appeared to corroborate Mr. Gordon's evidence that he was supervising Ms. Peters because of performance issues and that this was all that they had discussed.

[586] Ms. Thompson was later asked whether she ever talked to Mr. Gordon about Ms. Peters' allegations. She testified that she asked Mr. Gordon whether he was supervising Ms. Peters closely because of "what had happened in the past" and that he told her that this was not true.

[587] Under cross-examination, Ms. Thompson repeated that, after the January 15, 2015 meeting, she told Mr. Gordon that Ms. Peters said that she was being harassed by him because of what had happened in the past. She then confirmed that "what happened in the past" meant sexual harassment.

[588] Ms. Thompson was not immediately forthcoming about the fact that Ms. Peters reported to her that Mr. Gordon was supervising her inappropriately in follow-up to his sexual harassment of her. Ms. Thompson's initial testimony created the impression that her discussions with Mr. Gordon about his supervision of Ms. Peters had nothing to do with sexual harassment, only legitimate concerns about her work ethic. Ms. Thompson was not forthcoming with the evidence that she went to Mr. Gordon and in effect asked him if he was being extra hard on Ms. Peters because of the sexual harassment allegations.

[589] Mr. Gordon denied he was sexually harassing Ms. Peters when she asked. Ms. Thompson accepted Mr. Gordon's statement at face value. Ms. Thompson appears

very biased in favour of Mr. Gordon because she appears to have been fully prepared to accept his version of events, but not Ms. Peters' version, without investigation of those statements.

[590] Ms. Thompson testified that it did not occur to her to ask to have someone else supervise Ms. Peters once she knew about the sexual harassment allegations. This would have been both an appropriate preventative and mitigative measure.

[591] As a reminder, Mr. Gordon testified that he had no idea that Ms. Peters thought he was sexually harassing her until he received her provincial complaint. This contradicts Ms. Thompson's testimony that she raised this issue with him before the provincial complaint would have been received.

(x) The Lack of Grievance

[592] The Tribunal notes that it was Ms. Thompson's evidence that "she did not think of" reporting the harassment. She testified that, at the time, she did not know that she could file a grievance on behalf of Ms. Peters because of the harassment. She blamed this on a lack of training by UPS. She said that she realizes now that, if she learns of sexual harassment in the workplace, she should say something. She testified that she learned this, not from training, but "just through life" and that she was "more free to speak up about it."

[593] The Tribunal does not accept Ms. Thompson's testimony that it did not occur to her that she should do something about the harassment when she was a union steward. The Tribunal concludes that Ms. Thompson did not want to do anything about the harassment. She was very resentful about the fact that she even knew about it, so much so, that when she was contacted by the Commission to be interviewed, she declined to be involved. The person to whom she reported within the union contacted her as a result. She said that she explained to him that she did not want to be involved. It appears that she was directed to allow herself to be interviewed.

[594] Ms. Thompson was asked on redirect examination whether, had Ms. Peters asked her to file a grievance or to go to HR with her, she would have done so. Ms. Thompson

responded with enthusiasm that she would have done so. The Tribunal does not believe this testimony.

[595] It was not suggested by Ms. Peters or the Commission that reporting the harassment to Ms. Thompson as a co-worker and union representative equated to or could replace the alleged obligation of Ms. Peters to report the harassment to UPS. Accordingly, no finding is being made respecting this issue.

(xi) Additional Context to the Lack of Any Grievance

[596] The issue of sexual harassment was not the only occasion that Ms. Thompson did not actively or effectively support Ms. Peters in the workplace. Another example provided additional context for the Tribunal's assessment of Ms. Thompson's credibility. As mentioned, when Ms. Peters changed jobs in 2014, she was not paid at the correct rate. This problem was not resolved until after the human rights complaint was filed with the Commission, several years later. Mr. Dambrosio eventually was disciplined by UPS for making this decision. The *Canada Labour Code* requires that employees receive the pay that they are owed for the hours they have worked. For unionized employees this is specified in the collective agreement. It is not plausible that the applicable collective agreement would expressly allow an employer to impose a condition of 100% attendance upon an employee's right to receive the correct pay. There is no suggestion that there was another justifiable reason for Ms. Thompson to accept that Ms. Peters should not be paid at the accurate rate for the hours that she worked.

[597] According to Ms. Peters, on January 23, 2015, which was shortly after the meeting of January 15, 2015, Ms. Thompson told her that management would not pay her the back pay she was owed unless she came to work for three months straight without a day off for sick leave. Ms. Thompson appeared to go along with UPS's decision.

[598] Ms. Peters reported that Ms. Thompson informed her that she could not take the stress and that Ms. Peters could fight the grievance herself. To be clear, there was a grievance filed over Ms. Peters' pay issue. There is no evidence that Ms. Thompson did anything further to help Ms. Peters. Instead, at the hearing Ms. Thompson accused

Ms. Peters of “using her” for her complaint in having her listen to Mr. Gordon’s voicemail messages.

[599] In relation to both the sexual harassment and UPS’s failure to provide accurate pay to Ms. Peters, Ms. Thompson had discussions with management that did not include Ms. Peters. She was not helpful to Ms. Peters thereafter. In the circumstances, it is understandable why no grievance was ever filed about sexual harassment. Ms. Peters’ union representative did not support her.

(xii) Mr. Ghanem’s Testimony

[600] In any event, whether Ms. Thompson expressly reported the sexual nature of the harassment to Mr. Ghanem is not entirely determinative of the issue of whether Ms. Peters reported Mr. Gordon’s sexual harassment. On the facts of this case, Mr. Ghanem should have known based on Ms. Peters reporting harassment by Mr. Gordon that he needed to make appropriate enquiries. For the reasons explained below, he failed to do so. It should have occurred to him that discrimination could be a factor in any harassment and, in any event, any harassment requires action. The issue is more appropriately framed as whether, in reporting that she was being harassed, Ms. Peters provided sufficient information to Mr. Ghanem to trigger a legal obligation upon Mr. Ghanem and, thereby UPS. The Tribunal finds that Ms. Peters did provide sufficient information, coupled with what Mr. Ghanem already knew and what else she said at the meeting.

[601] As noted, the Tribunal accepts Ms. Peters’ testimony that, after she stated that Mr. Gordon had been harassing her, she clarified, in response to a question from Mr. Ghanem, that it was occurring “in and outside of work.”

[602] UPS had a formal Professional Relationships Policy that it used ultimately to discipline Mr. Gordon for having dinner with Ms. Peters in November 2014. The policy states that supervisors and managers are to avoid relationships with subordinate employees outside of work and that, “[S]hould concerns arise, UPS must deal with all conduct and relationships prejudicial or reasonably likely to be prejudicial to the interests of its employees, customers and business.” When Ms. Peters indicated that the harassment was

occurring inside and outside of work, that should have raised Mr. Ghanem's curiosity, or interest, if not concern, about what she meant. Ms. Peters had just raised concern about her supervisor's conduct towards her outside of work and the policy indicated that Mr. Ghanem had a responsibility to deal with that.

[603] Mr. Ghanem maintained throughout his testimony that he believed that Ms. Peters was only talking about performance management when she stated that Mr. Gordon was harassing her. That should not and likely would not have been happening outside of work hours.

[604] Furthermore, it was clear from Mr. Ghanem's testimony that he made an incorrect assumption about what "harassment" could mean. It was his opinion that employees use the word "harassment" all the time, incorrectly. Specifically, they allege harassment when their supervisor or manager is only trying to manage their performance. Mr. Ghanem testified that if he had to conduct an investigation every time one of his employees used the word "harassment", all he would do is conduct harassment investigations.

[605] This is incorrect. All Mr. Ghanem would have to do is ensure that he correctly understood what each employee meant by harassment, and, if he was too busy, pass the information to HR for investigation.

[606] UPS pointed to Mr. Ghanem's testimony that he advised Ms. Peters that performance management was not the same thing as harassment. This testimony is not credible. The Tribunal does not believe that Mr. Ghanem received particulars from Ms. Peters or expressly advised Ms. Peters what he was thinking, namely that there was an alternative explanation, at the meeting. If he had, that should have led to correction by Ms. Peters and further discussion. There is no evidence of this. As well, Ms. Thompson was consistent throughout her testimony about her belief that Mr. Ghanem made an assumption that the issue was really supervision. This was based on her observations and her own assumptions and beliefs. She did not testify that Mr. Ghanem said anything like "performance management is not the same thing as harassment." The Tribunal finds that Mr. Ghanem's testimony inaccurately asserts that he made this comment.

[607] Mr. Ghanem's testimony gave the impression that he was not receptive to having a meaningful discussion about what Ms. Peters meant. This and other comments that he made demonstrate that Mr. Ghanem's mind was very closed to the possibility that what Ms. Peters said about Mr. Gordon harassing her was true. The Tribunal concludes that Mr. Ghanem's approach, tone and manner lacked the sensitivity required to enable Ms. Peters to feel comfortable that she could safely talk to Mr. Ghanem and that he might believe her.

[608] Mr. Ghanem was given enough information at the January 15, 2015 meeting to be reasonably expected to realize that he should change gears from his disciplinary mindset and ask some questions to confirm that he was right in his assumption about what was meant by "harassment." It also should have occurred to him that harassment might explain why Ms. Peters was missing work and had brought it up at the meeting. A reasonable person would wonder whether the two problems were connected.

[609] Furthermore, some of the evidence about what was said at the meeting suggests Mr. Ghanem did have an inkling that the harassment was sexual in nature or at least was potentially significant harassment. The Tribunal refers here to the evidence that Mr. Ghanem stated words to Ms. Peters and Ms. Thompson to the effect of "she had better have proof." This is inconsistent with Mr. Ghanem's testimony that he believed that the harassment Ms. Peters alleged was merely performance management. Mr. Ghanem would not likely respond to Ms. Peters that she needed proof if he had missed the point that she was reporting a significant form of harassment that could warrant inquiry.

[610] Given the inherent power imbalance between Mr. Ghanem, as a member of management, and Ms. Peters, as a part-time employee, Ms. Peters was not realistically in a position to contest Mr. Ghanem's belief that her report that she was being harassed was not enough and his implication that she would not have evidence to prove it. It was reasonable for Ms. Peters to conclude that UPS management would not do anything about the harassment in the face of Mr. Ghanem's response. It also appears likely that Mr. Ghanem told her, in effect, to take her problem to HR but that she needed evidence. Mr. Ghanem is unlikely to have made a supportive statement in this regard.

[611] There was also insufficient factual context to support Mr. Ghanem's assumption that Mr. Gordon's behaviour was performance management. Mr. Ghanem was the full-time supervisor and Mr. Gordon was the part-time supervisor. Mr. Gordon was not involved in dealing with Ms. Peters' absences from work. Mr. Ghanem was.

[612] There was no evidence that Mr. Ghanem and Mr. Gordon had previously discussed or agreed that both needed to performance manage Ms. Peters or that she needed further training. If other performance management was occurring, it is responsible to expect that this would have been discussed by the supervisors. Further, Mr. Ghanem had just begun to performance manage Ms. Peters about her absences at the January 15, 2015 meeting. It is reasonable to expect that he would have been curious and made an inquiry of Mr. Gordon to find out what else was going on that required close management of Ms. Peters. There is no evidence that he did.

[613] In short, there was no evidence that the two supervisors had shared information about Ms. Peters that would lead Mr. Ghanem to conclude that Mr. Gordon was engaged in performance management of Ms. Peters. Ms. Peters clearly alluded to something beyond Mr. Gordon's usual supervision. It should have occurred to Mr. Ghanem that something was off or might be.

[614] There is no evidence that this changed. Mr. Ghanem eventually received Ms. Peters' doctor's note of February 3, 2015. It should have occurred to him that, possibly, she was off work due to stress because of the perceived harassment she had mentioned two weeks earlier. There is no evidence that Mr. Ghanem did anything in response to this note, only his evidence that he put the notes from physicians in a desk drawer and left them there.

[615] The circumstances point to the potential that something beyond performance management could be occurring between Ms. Peters and Mr. Gordon. Mr. Ghanem had sufficient information and context to investigate whether there may be a need for investigation. He should have made appropriate inquiries or reported to HR that Ms. Peters perceived that she was being harassed so that HR could undertake this inquiry. By appropriate inquiries, the Tribunal means to include that, if Mr. Ghanem was going to have

this discussion with Ms. Peters, he needed to do so with an open mind, and in a thorough and sensitive manner. Instead, he dissuaded her by telling her that she needed proof.

(xiii) Did Ms. Peters Report the Harassment to UPS Before March 2015?

[616] The Tribunal concludes that, for an employee who had not received training about sexual harassment or reporting harassment, Ms. Peters made a reasonable effort to report that Mr. Gordon was sexually harassing her on January 15, 2015. She may not have used the word “sexual”, but she made it clear that it included conduct outside of the workplace by Mr. Gordon. That should have led to inquiry about what happened inside and outside of work with requests for specific examples of some or even all incidents.

[617] Even if she had not said that, Ms. Peters reported that she was being harassed by Mr. Gordon, her supervisor. The Tribunal concludes that this was a sufficient effort to report the sexual harassment in the circumstances. Those circumstances include that most employees at UPS, including Ms. Peters, Mr. Gordon and Ms. Thompson, had no training about what sexual harassment was and what made it distinctly sexual harassment, as opposed to other types of harassment.

[618] Further, Ms. Peters did not have enough legal knowledge to realize that it would be helpful to her case to specifically identify that it was sexual harassment. Ms. Peters should not be held to a standard that requires that she, alone, correctly and expressly identify the nature of the harassment to her employer, while UPS does not have any obligation to do so or to clarify this issue.

[619] Without diminishing the above conclusions of the Tribunal, which are intended to stand alone without additional findings, the Tribunal has also considered the probable impact of the fact that Ms. Thompson did not want Ms. Peters to be explicit at the meeting of January 15, 2015. Ms. Thompson did not advise Ms. Peters that she should explain further or do so herself, although she knew what Ms. Peters meant. Ms. Thompson also told Mr. Ghanem that “he did not want her to go there.” This no doubt signalled to Ms. Peters that she should not say anything further to Mr. Ghanem because she was going to create a significant problem. Her comment may also have dissuaded Mr. Ghanem from asking more

because the comment implied that Ms. Thompson knew more and was looking out for Mr. Ghanem's interests.

[620] The Tribunal concludes that neither Mr. Ghanem nor Ms. Thompson wanted to hear that UPS had a sexual harassment allegation that would have to be addressed, with the implications that represented for all. Ms. Peters was attempting to report that she was being sexually harassed to two people who did not want to receive that message. Her report that she was being harassed by Mr. Gordon, her supervisor, constitutes a sufficient attempt to report the sexual harassment in the circumstances.

(xiv) Was Ms. Peters Required to Specify that the Harassment was Sexual?

[621] Before leaving this issue, the Tribunal returns to UPS's position that Ms. Peters was legally obligated to expressly state that she was experiencing sexual harassment, as opposed to harassment. The obligation to identify that harassment is sexual or is based on any other discriminatory ground does not rest solely upon the complainant but is shared between the complainant and the employer. An employer has an obligation to prevent discrimination-based harassment, and all other harassment. The obligation to prevent discriminatory practices includes the obligation to make reasonable efforts to identify them. In all the circumstances, the information Ms. Peters provided was sufficient to trigger an obligation upon UPS to engage in a sufficiently thorough and sensitive investigation, at least with Ms. Peters, to ensure there was no discriminatory aspect to the harassment pursuant to the Act. Had Ms. Peters and Mr. Ghanem had a more sensitive, open and thorough discussion, Mr. Ghanem would have quickly ascertained that there was a sexual aspect to Mr. Gordon's harassment. Further, because Ms. Thompson stated, "you don't want to go there," which implies that she knew that Mr. Ghanem might find out something "bad", the initial investigation should have included Ms. Thompson.

[622] UPS's position that Ms. Peters was legally obligated to identify sexual harassment also overlooks content in the Act. Harassment is a form of discriminatory practice when it is based upon any one or more prohibited grounds of discrimination. [Section 14(1) of the Act states that it is a discriminatory practice in matters related to employment to harass an

individual on a prohibited ground of discrimination.] An employee can be harassed in other ways than sexual harassment and the harasser may be in breach of the Act. For example, an employee may perceive that they are harassed because they have a disability or because of their race, national or ethnic origin, colour, religion, age, marital or family status, to name common prohibited grounds, quite apart from harassment because of sex, sexual orientation, or gender identity or expression. Quite often these protected characteristics are a factor in harassment.

[623] When an employee reports harassment, whether a protected characteristic forms any part of the reason for the perceived harassment is a highly relevant question. Had Mr. Ghanem had adequate training about human rights, and the content and application of the Act, he may have appreciated that he had an obligation to obtain enough information to rule out the possibility, if not the probability, that the harassment was a form of discrimination based on any of the characteristic protected by the Act.

[624] The Tribunal does not believe Mr. Ghanem's testimony that, when an employee said they were being harassed, he would always inquire to assess what type of harassment was being alleged to determine whether investigation was required. The Tribunal has found that Mr. Ghanem did not make appropriate inquiries of Ms. Peters in this regard. The evidence is clear that Mr. Ghanem did not want to know whether Ms. Peters was being harassed at all in this case. There is no persuasive reason on the evidence why the Tribunal should conclude that Mr. Ghanem was properly informed about the Act and approached these issues with an open mind.

[625] Further, employers are not entitled to require that an employee correctly select the applicable, accurate ground of discrimination before they have any obligation under the Act to react. To illustrate, an employer cannot avoid its obligations under the Act because an employee reports being harassed based on marital status when they should have said family status. The issue is whether the employer had sufficient information to trigger an obligation under the Act.

(xv) Whether Ms. Peters Withdrew or Did Not Wish to Pursue a Complaint

[626] As noted, UPS threw doubt on Ms. Peters' motivation to report the harassment, alleging that she did not want to cause Mr. Gordon to lose his job. UPS submits that it was Ms. Thompson's evidence that she later asked Ms. Peters why she did not report the sexual harassment, and that Ms. Peters indicated that she did not want Mr. Gordon to lose his job. This was not the evidence at the hearing. Ms. Thompson did not testify that she later asked Ms. Peters this question, nor did she testify that Ms. Peters made that statement to her. Ms. Thompson said that Ms. Peters did not seem concerned that Mr. Gordon might lose his job.

[627] The evidence relied upon by UPS that Ms. Peters said this was not testimony by Ms. Thompson, but rather content in "Interview Notes" taken by the Commission's officer who investigated the complaint for screening purposes. The officer interviewed Ms. Thompson by telephone. As noted, when Ms. Thompson testified, she did not initially recognize the notes or even recall being interviewed. There is no evidence that the accuracy of the content was confirmed with Ms. Thompson at the time. If the comment was made by Ms. Peters to Ms. Thompson, and relayed by Ms. Thompson during her interview, there was no evidence about when the comment was made by Ms. Peters. There is no evidence that Ms. Peters felt that way at the January 15, 2015 meeting or by the end of January after any of the more recent and serious incidents of physical harassment. In any event, it was clear to the Tribunal that it was Ms. Thompson who did not want the harassment "officially" reported or pursued, not Ms. Peters.

[628] UPS also submits that Ms. Peters "withdrew" her allegation at the January 15, 2015 meeting and states that Ms. Peters refused to give Mr. Ghanem any more particulars. First, the Tribunal has found that Mr. Ghanem did not make an appropriate effort to obtain particulars. With respect to the issue of the alleged withdrawal of her complaint, Mr. Ghanem had a disciplinary mindset at the meeting. Mr. Ghanem appears to have demonstrated visible initial opposition, a dismissive attitude, and even an element of direct affront to the suggestion that Mr. Gordon may have harassed Ms. Peters.

[629] Ms. Peters accurately observed a lack of sensitivity and support at that meeting. When she used the word harassment, she was taken out of the meeting by Ms. Thompson and talked to about the impact her allegation would have upon Mr. Gordon's family. Ms. Thompson testified that Ms. Peters reassured Ms. Thompson privately that she was not going to do anything about it. UPS did not directly rely upon this evidence to argue that Ms. Peters withdrew her complaint because it did not acknowledge that Ms. Thompson and Ms. Peters left the meeting. However, if Ms. Peters said this to Ms. Thompson, the Tribunal finds that it is because she was pressured in that moment and that it does not change Mr. Ghanem's responsibility to respond appropriately. Ms. Peters had already stated to Mr. Ghanem that she was being harassed. The comment she allegedly made to Ms. Thompson was not made to him.

[630] It was understandable that Ms. Peters would give up the idea of pushing the issue of harassment further at the meeting given what Ms. Thompson said in front of Mr. Ghanem and what she did not say. It was reasonable for Ms. Peters to not press the harassment issue at the meeting for other reasons, as well.

[631] If Ms. Peters had pushed the idea harder, it is likely she would have been seen as argumentative and possibly insubordinate. Mr. Ghanem assumed that Mr. Gordon was a good employee who would only act with good intentions and that Ms. Peters was not. Ms. Thompson testified about her own belief that Ms. Peters' harassment allegations did not seem true to her. Ms. Thompson thought that they only became a real issue in response to the absenteeism issues and Mr. Dambrosio's decision to withhold Ms. Peters' pay. Ms. Peters was in a difficult meeting with two people who wanted her to drop the subject of harassment.

[632] It is also relevant that Mr. Ghanem was having the meeting with Ms. Peters in contemplation of discipline, probably to assess the extent of disciplinary action. Ms. Peters would reasonably not wish to aggravate Mr. Ghanem. In fact, she received a written warning referencing the matters discussed at the meeting several days later. It is not surprising that, when Ms. Peters met resistance in Mr. Ghanem, she conveyed a reluctance to discuss the matter further with him.

[633] It would have been very difficult to complain about the most embarrassing aspects of Mr. Gordon's behaviour in the face of Mr. Ghanem's positive beliefs about Mr. Gordon and his visible, negative beliefs about her. Ms. Peters did not "withdraw" her allegation in a manner that ended UPS's obligations under the Act; she simply withdrew from Mr. Ghanem. Notably, the lack of support from her union steward about having been harassed at that meeting also diminished the importance of her experience and contributed to her withdrawal from Mr. Ghanem.

[634] The Tribunal finds that there is insufficient evidence to support UPS's submission that Ms. Peters did not more openly report the sexual nature of the harassment to UPS because she did not wish to pursue a complaint against Mr. Gordon. It may have been the case that Ms. Peters was hesitant to do so, for a number of reasons, but there is no reliable evidence that Ms. Peters decided to forego making a complaint to protect Mr. Gordon. In fact, the evidence demonstrates the opposite.

[635] Shortly thereafter, Ms. Peters experienced two incidents of physical sexual harassment by Mr. Gordon. Her physician put her off work until the "work-related issues" were resolved. That she provided a doctor's note with this information to UPS contradicts UPS's submission that Ms. Peters did not wish to have her issues with Mr. Gordon resolved. It also appears from the medical notes made by Dr. MacDonald that Ms. Peters was in the process of making inquiries with a Labour Board at the time.

[636] The Tribunal is not persuaded that Ms. Peters decided that she did not wish to pursue a complaint against Mr. Gordon. Ms. Peters filed her provincial complaint of harassment in early March 2015 that named Mr. Gordon as one of the respondents soon after she began her medical leave. Simply put, there is no persuasive evidence that Ms. Peters withdrew the allegation of harassment first made to Mr. Ghanem at the meeting of January 15, 2015 or intended to do so such that UPS had no further legal obligation to her.

[637] Rather, Ms. Peters' testimony indicates her belief that UPS would not take action against Mr. Gordon based on harassment. This was not an unreasonable belief. Her complaint of harassment at the January 15, 2015 meeting was brushed off by Mr. Ghanem. Her physician's note of February 3, 2015 putting her off work for reasons that included

workplace issues elicited no response from UPS. Ms. Peters' belief that UPS would not take appropriate action in response to her complaint was reasonable.

(xvi) The Helpline and Using Other Options to Report

[638] Having found that, in all the circumstances, Ms. Peters provided sufficient notice to UPS in reporting to Mr. Ghanem that she was being harassed at the January 15, 2015 meeting, it is not necessary to resolve the factual dispute concerning whether Ms. Peters reported the harassment in other ways, such as using the Helpline. She says that she tried to contact HR, for example, and UPS says she did not. The reasons why Ms. Peters did not have a grievance filed on her behalf is explained above.

[639] Ms. Thompson, for her part, had no respect for UPS's resources for employees experiencing harassment. She also testified that at the time of these events, UPS did not take sexual harassment seriously.

[640] The Tribunal has concluded that the evidence overall suggests that UPS reacted in this case as if it did not want to realize that it had a sexual harassment complaint. UPS did not act quickly to get to the bottom of what had been going on between Ms. Peters and Mr. Gordon. UPS avoided the conclusion that the complaint was valid, when it clearly was. It is, therefore, not necessary to review the evidence about the other options to report.

[641] The Tribunal offers the observation that it may be more challenging for employees who work late night shifts to access company resources. The evidence in this case suggested that this was a factor.

[642] The Tribunal also wishes to address UPS' implied suggestion that Ms. Peters was obliged to keep trying to report the harassment or to report it through more than one means. Barring exceptional circumstances, an employee is not under an obligation to make multiple efforts to report harassment to their employer, having already made a reasonable effort to do so. In any event, Ms. Peters did report the harassment through more than one avenue. She reported the harassment to her union by informing Ms. Thompson, the union steward, that she was being harassed, including telling her about the two incidents of physical sexual

harassment. The fact that no grievance was filed on her behalf and that Ms. Thompson did not advise Ms. Peters that she could or should file a grievance is not Ms. Peters' fault.

XIII. Summary of Findings Respecting the Section 65(2) Defence

[643] UPS has not established that it did not consent to the sexual harassment. UPS did not exercise due diligence to prevent the sexual harassment from occurring. This includes a failure by UPS to have a reasonable policy that demonstrates through its content how it is applied and related training to explain, in a contextualized manner, the nature of sexual harassment and to effectively teach its supervisors and employees about this subject matter. UPS failed to investigate appropriately and to otherwise mitigate or avoid the effect of the sexual harassment upon Ms. Peters, despite having detailed notice of the allegations in March 2015. UPS, therefore, cannot complain that Ms. Peters did not report the sexual harassment earlier and is not excused from its failure to mitigate or avoid the effects of the sexual harassment. UPS also failed to follow-up on the information it did receive earlier at the January 15, 2015 meeting and from Ms. Peters' physician in early February 2015. This information should have led UPS to make inquiry and investigate.

[644] UPS does not meet any of the conditions necessary to rely upon section 65(2) and avoid strict liability for Mr. Gordon's actions. UPS is liable for Mr. Gordon's actions.

XIV. Discrimination Based on Disability

A. Overview

[645] As previously explained, Ms. Peters' complaint includes an allegation that she was discriminated against based on disability pursuant to section 7 of the Act.

[646] Section 7 reads as follows:

7. It is a discriminatory practice, directly or indirectly, (a) to refuse to employ or continue to employ any individual, or	7. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :

(b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.	a) de refuser d'employer ou de continuer d'employer un individu; b) de le défavoriser en cours d'emploi.

[647] She alleges that UPS ignored medical notes provided to validate that her absences from work were for medical reasons at the time. She further alleges that UPS disciplined her for those absences and took no steps to return her to work during her extended leave beginning in February 2015. She says that her disability was a significant factor in these decisions.

[648] Ms. Peters makes the related submission that UPS's inaction respecting her sexual harassment allegations was compounded by UPS's belief that Ms. Peters was a problem employee with a chronic absenteeism issue. In this regard, Ms. Peters relies upon section 3.1 of the Act respecting multiple grounds of discrimination. That section provides that a discriminatory practice includes a practice based on the effect of a combination of prohibited grounds of discrimination. In this case, the alleged combination of prohibited grounds is disability and sex.

[649] As noted, Ms. Peters also relies on section 14(1) of the Act. Section 14(1) deems it a discriminatory practice for anyone to harass an individual because of a protected characteristic, such as disability or sex, in matters related to employment.

B. The Legal Test for Discrimination Based on Disability and the Standard of Proof

[650] The burden is upon Ms. Peters to establish a *prima facie* case of discrimination based on disability pursuant to section 7 of the Act. Ms. Peters must demonstrate that:

1) she has a disability;

2) UPS adversely differentiated against her; and,

3) her disability was a factor in the adverse differential treatment she experienced.

[651] If Ms. Peters provides proof of a *prima facie* case, considering all the evidence presented about the above issues, the onus shifts to UPS to establish a defence (in addition to the opportunity to dispute whether Ms. Peters has established a *prima facie* case). In this case, UPS disputes that Ms. Peters has established a *prima facie* case. UPS says that there is an alternate explanation for what occurred that refutes that there was any discrimination at all. In this regard, UPS submits that Ms. Peters was properly disciplined for conduct involving chronic absenteeism and for her failure to call into work to report her absence on a timely basis. UPS also claims to have complied with its duties of accommodation.

[652] The civil standard of a "balance of probabilities" continues to be the applicable standard of proof when the allegations involve disability-based discrimination.

C. UPS's Liability Arguments

[653] UPS makes two related arguments to submit that, if there was discrimination, it should not be liable. As it argued in relation to the sexual harassment allegations, UPS submits that Ms. Peters had a duty to articulate to it that she was a victim of disability-related discrimination and failed to do so. Further, UPS suggests that it should not be liable for the improper conduct of its employees pursuant to section 65(2) because it has policies, enforces them consistently and responds appropriately to any complaints of discrimination.

D. Chronology of Events Alleged by Ms. Peters

[654] In mid-January 2014, Ms. Peters' brother passed away unexpectedly. In May 2014, her cousin passed away suddenly. In July 2014, Ms. Peters' father was diagnosed with terminal cancer. Dr. MacDonald put Ms. Peters off work due to stress from July 1, 2014, to July 14, 2014, and provided her with a medical note to this effect.

[655] Ms. Peters testified that she left this medical note with the security office at UPS and was of the understanding that it would be passed on to UPS's HR. She left for the United States to be with her father.

[656] While returning from visiting her ill father on July 14, 2014, Ms. Peters was in a car accident. She received medical attention for her injuries in the United States.

[657] Ms. Peters returned to Canada and was seen by her family physician on July 16, 2014. Dr. MacDonald recommended that Ms. Peters be on short-term disability leave. Ms. Peters testified that she contacted UPS HR and forwarded her doctor's notes.

[658] When she returned home on July 17, 2015, Ms. Peters found what is known at UPS as a "72-hour notice letter" dated July 3, 2014. This is a standard letter that UPS issues to absent employees who do not call into work. The letter advised Ms. Peters that she was required to contact her manager within 72 hours to explain her absence from work or she would be considered to have voluntarily resigned, effective immediately.

[659] Ms. Peters testified about being confused because she had provided her doctor's note to UPS ore she left for the United States. She interpreted the letter as informing her that she had been terminated by UPS since she could not be at work because of her need to take medical leave.

[660] Ms. Peters also discovered a letter dated June 26, 2014. The letter was highly complimentary of Ms. Peters' performance, including that she performed "above and beyond" expectations. The letter stated:

> You have proven yourself not only as an employee who can be called the best in the industry, but as an individual whose example inspires the best from others in your work group. You show pride in your daily work to your peers and management team. The ownership you take in your responsibilities is evident in the results of your work. You should be as proud of your accomplishments as we are to have you as part of our determined team.

[661] Because of this letter, Ms. Peters believes that UPS had no concerns about her performance. Ms. Peters disputes UPS's position that she was a problematic employee.

[662] Ms. Peters testified that she reached out to her union representative for advice about the 72-hour notice letter but did not receive a response until September 2014.

[663] With respect to UPS's allegations about chronic absenteeism, Ms. Peters testified that she understood that she could miss days of work if she reported her absence to UPS.

She also says that she called in to UPS to advise she would not be coming in to work on numerous dates for which UPS claims it has no record of her having done so.

[664] As explained previously, in November 2014 the decision was made to have Ms. Peters report to the box line area and be supervised by Mr. Gordon, rather than return to the car wash where she had worked previously.

[665] Ms. Peters submits that she had a disability at all material times relevant to her complaint. She alleges that the sexual harassment and oppressive supervision she experienced by Mr. Gordon led to a decline in her mental health that was recorded by her physician. Health records from the period after she returned to work in November 2014 confirm that Ms. Peters became depressed, withdrawn, and anxious, with her medical issues culminating in adjustment disorder. In fact, her medical records show her reporting issues to her physician impacting her health related to Mr. Gordon's behaviour dating back to April 2014.

[666] Ms. Peters says that she missed work on January 5 and 6, 2015 and gave Mr. Ghanem, her manager, a doctor's note to support her absence. She claims that Mr. Ghanem was upset, raised his voice and questioned the validity of the physician's note. She claims that he bluntly conveyed that it was unacceptable for her to be missing so much time from work. Ms. Peters says that Mr. Ghanem did not have a discussion with her about why she was absent from work so often. He did not inquire about any problems she might be experiencing, nor about her experience in her new role reporting to Mr. Gordon.

[667] As explained previously, Mr. Ghanem called Ms. Peters to attend a meeting to discuss her attendance issues on January 15, 2015. On January 19, 2015, she received a letter of reprimand for missing work without notice on January 14, 2015.

[668] As has been determined, the sexual harassment continued and worsened in January of that year. As indicated, Dr. MacDonald testified that he decided that Ms. Peters could not cope with the harassment. He saw her on January 7 and 23, 2015, and again on February 3, 2015, when he put her off work until the end of February 2015. His medical notes of February 27, 2015, when he next saw her, record that Ms. Peters advised him that she gave UPS his letter putting her off work on February 3, 2015, but subsequently received a

registered letter from UPS and was “apparently fired.” Ms. Peters says that she provided Dr. MacDonald’s note to UPS on February 3, 2015, and received a receipt from HR.

[669] Ms. Peters received another 72-hour notice letter from UPS on February 10, 2015. She did not receive any communication from UPS subsequently to advise her that the letter was sent in error.

[670] As explained above, the note of February 3, 2015 from Dr. MacDonald advised that she should remain off work due to the issues he was following. He later extended her leave at the end of February. Ms. Peters asserts that UPS did not, at any time, request any updated medical information or try to have her return to work. She also highlights that, in its SOP, UPS stated that Ms. Peters had abandoned her employment or that the employment relationship was frustrated. This position was asserted again in UPS’s final written submissions. However, during the hearing, UPS’s witnesses acknowledged that Ms. Peters has been on leave and is still an employee because she has not been terminated.

E. Chronology of Events Alleged by UPS

[671] In its SOP, UPS submits that Ms. Peters’ performance while working at the car wash was unsatisfactory. It says that she was disciplined for breaching the Attendance and Punctuality Policy.

[672] UPS provided a 29-page Part-time Employee Policy Sign-Off with various policies which included the Attendance and Punctuality Policy that Ms. Peters signed on March 25, 2011. The policy states that a satisfactory attendance record is a condition of employment. The policy acknowledges that there may be times when an employee must be absent because of an illness or emergency. The policy requires that employees notify UPS at least one hour before the start of their shift if they are going to be absent from their shift. UPS underscores that Ms. Peters understood this rule but did not comply with it.

[673] With respect to the 72-hour notice letter UPS sent to Ms. Peters on July 3, 2014, UPS denies that any grievance was filed on Ms. Peters’ behalf. UPS says that Ms. Peters returned to work at UPS because, in November 2014, Ms. Thompson convinced Mr. Dambrosio, the manager to whom Mr. Ghanem reported, to allow Ms. Peters back to

work. This was on the basis she was a single mother and had “experienced considerable hardship during the year.” [Ms. Thompson testified that a grievance was filed on Ms. Peters’ behalf on the basis that she did not receive the 72-hour notice letter of July 3, 2014.]

[674] In his testimony, Mr. Dambrosio vaguely acknowledged that Ms. Peters had asserted that she had provided medical documentation to support her leave of absence in July 2014. He testified that he recalled there was some “disputed information” about the 72-hour notice letter that Ms. Peters had received from UPS in July.

[675] Mr. Dambrosio also acknowledged that he sent the highly complimentary letter of June 26, 2014 to Ms. Peters that praised her performance. He testified that the letter was sent to multiple employees. However, he agreed under cross-examination that Ms. Peters had no idea that other employees had been given this letter.

[676] UPS submits that, soon after Ms. Peters returned to work in November 2014, she continued to fail to call in to cancel her shifts on a timely basis and was absent too often. UPS says that, as a result, Ms. Peters required performance management and was properly disciplined.

[677] UPS submits that its concerns about Ms. Peters’ absenteeism were reasonable, in part, because she provided suspicious and sometimes contradictory reasons for her absences. In this regard, UPS submitted documents into evidence that showed that on January 5, 6 and 7, 2015, Ms. Peters sent texts to Mr. Ghanem stating she would not be in to work her shift with less than an hours’ notice. These three texts did not state that Ms. Peters had a medical issue. UPS says that Ms. Peters subsequently provided a medical note for these absences. It submits that the medical note contradicts the contents of her texts.

[678] UPS relied upon these and other alleged performance issues to submit that Ms. Peters required ongoing, active management by UPS. In this regard, UPS submits that Mr. Gordon was the person responsible for managing her “day-to-day” performance.

[679] UPS submits that its evidence that Ms. Peters had a low rate of attendance is demonstrated by:

> …the relatively low amount of income that she earned from UPS Canada over the years, as reflected in her annual T4 statements:
>
> (a) 2011 $6286.20
> (b) 2012 $9705.3
> (c) 2013 $5939.5
> (d) 2014 $2466.01
> (e) 2015 $2321.69

[680] UPS explains that, as a part-time employee, Ms. Peters did not have set hours. When she worked on the box line, the hours she was to work fluctuated depending on the season and the volume of packages to be sorted. For example, there was evidence that the period before the Christmas holidays would be busy. It submitted that her expected weekly hours would have been in the range of 15–25 hours per week. UPS asserts that Ms. Peters' attendance record was "abysmal." UPS claims that Ms. Peters only worked an average of 15.5 hours a week between November 2014 and January 2015.

[681] UPS suggests that Ms. Peters' testimony that she called in to report her absences is inaccurate. UPS claims that Ms. Peters' assertion about the inaccuracy of UPS's records respecting call-ins was self-serving in nature.

[682] UPS submits that the testimony of both Ms. Thompson and Ms. Peters' co-worker, Ms. Lawes-Newell, confirmed that Ms. Peters was "a chronically absent employee who consistently refused to follow UPS Canada's attendance policies…." UPS says that Ms. Thompson agreed that, while working in the car wash, Ms. Peters' conduct was a problem and assured Mr. Dambrosio in November 2014 that Ms. Peters would comply with the company's policies respecting attendance if she were permitted to return. As well, UPS highlights Ms. Lawes-Newell's opinion during her testimony that Ms. Peters "came to work when she wanted to."

[683] Mr. Ghanem testified that Ms. Peters had missed 8 days in January 2015. As discussed above, Mr. Ghanem called Ms. Peters to the meeting to discuss her excessive absenteeism on January 15, 2015. He subsequently sent her a letter of reprimand for failing to report to work at her start time on January 14, 2015.

[684] Mr. Ghanem testified that Ms. Peters received more lenient treatment than other employees while he was her manager for compassionate reasons because of her family status. UPS submits that, "[N]ormally her breaches of reporting requirements would have attracted escalating progressive discipline."

[685] Mr. Ghanem also testified that, if an employee was frequently absent, he would have a discussion with the employee about why he or she was absent from work so often.

[686] UPS asserts that Ms. Peters did not appear for work on February 3, 2015 and did not call in. UPS says that on February 4, 2015, Ms. Peters faxed a doctor's note to HR indicating that "she would be off work until the end of February 2015."

[687] HR did not send that note to the department in which Ms. Peters worked until February 9 or 10, 2015. UPS claims that, by the time the doctor's note was received, a 72-hour notice letter dated February 10, 2015 had "already been automatically generated and sent to Peters." UPS submits that this event was "inadvertent." In response to Ms. Peters' position that this letter was disciplinary, UPS points out that UPS "took no further action with respect to the 72-hour notice letter of February 10, 2015."

F. UPS's Position Respecting *Prima Facie* Case

[688] As noted, the first requirement in the test for discrimination is that Ms. Peters prove that she had a disability. UPS submits that, "[a]t no time in the course of the evidence presented in this hearing by either Peters or her family physician, was any assertion made of an underlying disability that somehow prevented Peters from complying with UPS Canada's attendance policy which required her to call in and report her absences on a timely basis."

[689] UPS also highlights that the short-term disability claim that Ms. Peters filed after she went on medical leave in February was denied. That decision was not appealed by Ms. Peters and became a final decision. In its final submissions, UPS states that Ms. Peters' absence was "not substantiated as being a valid absence." UPS submits that, as a result, Ms. Peters "cannot now assert that she was medically unable to continue work at UPS Canada…as a result of her alleged mental health condition."

[690] As noted above, although it disputes that there was a disability, UPS briefly asserts in its final submissions that it complied with its duties of accommodation.

[691] With respect to the second component of the test for discrimination, UPS submits that Ms. Peters has not proven that she experienced an adverse impact at work, that she was differentially treated or that she was disciplined because of the amount of her approved absenteeism. UPS does not dispute that Ms. Peters experienced adverse impacts for unapproved absences and for calling in late. However, it submits that this was because she was a problematic employee who needed performance management and was appropriately disciplined.

[692] Further, UPS disputes Ms. Peters' submission that the 72-hour letters she received were disciplinary in nature or caused any differential treatment of her as an employee. UPS claims that these letters could not have had an adverse impact upon her. UPS states that the purpose and significance of 72-hour letters is misunderstood; these letters are not disciplinary and are not termination letters. UPS says that they are an attendance management tool when an employee is absent "for reasons not fully understood by the company." UPS explains that the point of the letters is to solicit explanations from employees for their absence "in an effort to prevent deemed terminations." UPS says that this would occur after three days of unapproved absence pursuant to the applicable collective agreement. UPS suggests that Ms. Thompson was in favour of the use of these letters.

[693] UPS appears to imply that the 72-hour notice letter sent to Ms. Peters in February 2015 ought not to count as an adverse impact. As noted, UPS witnesses acknowledged at the hearing that this 72-hour notice letter was sent to Ms. Peters in error, after she had provided a physician's note about her absence. Because UPS highlighted that it took no further action after sending that letter in error, UPS appears to suggest that Ms. Peters did not suffer an adverse impact by reason of the issuance of the letter.

[694] Ms. Peters also complains about UPS's inaction, after having sent the letter. In response, UPS denies in its SOP that it failed to do anything to follow up with Ms. Peters respecting the February 10, 2015 letter. UPS submits that, on February 9, 2015, HR sent Ms. Peters short-term disability ("STD") forms for her to fill out to submit to the disability

insurer. UPS submits that this documentary evidence (the fact that STD forms were sent) demonstrates that Ms. Peters' medical documents validating her absence from work were, in fact, accepted by UPS. UPS asserts that it did not take any adverse steps against Ms. Peters because of her medical issues.

[695] UPS did not directly address the third issue of whether Ms. Peters' disability was a factor in the adverse effects and discipline she experienced, perhaps because it did not agree that she had a disability or, at least, a relevant disability. The latter belief appears to be because of its position that her disability would need to impede her ability to call in. UPS seems to argue that the adverse impacts Ms. Peters did experience are not relevant because they were warranted, given her conduct, and had no connection with an alleged disability.

[696] UPS states that since Ms. Peters did not try to return to UPS in March 2015, it correctly assumed that the employment relationship was frustrated or abandoned. In other words, UPS denies terminating Ms. Peters' employment because of her chronic absenteeism or late call-ins.

[697] Based on these arguments, UPS submits that Ms. Peters has failed to establish that she has a disability and that she suffered an adverse impact related to her disability. UPS submits, therefore, that Ms. Peters has failed to establish a *prima facie* case of discrimination based on disability.

G. The Analysis

(i) Contextual Findings Respecting Alleged Performance Management Issues

[698] As determined above, there was little evidence of performance management by Mr. Gordon, only his overbearing actions on the box line, purportedly to show her how to move boxes, that have been found to constitute sexual harassment. Mr. Ghanem did engage in performance management of Ms. Peters respecting her absences and call-ins. He met with her twice in January 2015 to discuss her absenteeism and issued a letter of

reprimand. His notes of discussions with her began January 15, 2015. As noted, as well, several 72-hour notice letters were issued over the course of Ms. Peters' employment.

[699] As explained, there is insufficient evidence to support UPS's suggestion that there were significant problems with Ms. Peters' performance beyond the issue of her absences or failures to call in. The Tribunal adds that three notes were recorded about her performance while she worked in the car wash, one in December 2012 and two on the same day in December 2013, that appear to involve minor issues that did not relate to absenteeism or a failure to call-in. These did not repeat and did not result in discipline. There is no evidence there were other, more recent performance issues over the weeks leading up to her final medical leave. Accordingly, on the evidence, the alleged performance management issues are restricted to Ms. Peters' excessive absences, failure to call in on a timely basis, and her failure to show up for her shift on January 14, 2015.

[700] In general, the evidence suggests that Ms. Peters' medical notes were not believed by UPS's managers. This attitude was present in Mr. Ghanem's testimony when he gave conflicting testimony about whether he could challenge medical information from Ms. Peters' physician. Mr. Ghanem clearly did not believe that Ms. Peters' physician provided valid information in the January 2015 medical note, yet he backtracked from his own ability to make that assessment when pressed. With respect to absences while Ms. Peters worked in the car wash, Mr. Dambrosio complained that Ms. Peters brought in medical notes from walk-in clinics. The Tribunal notes that the letterhead that Dr. MacDonald used on occasion indicated that he was working in a walk-in clinic.

[701] There is significant evidence of suspicion and assumptions being made by UPS managers. There is no evidence that anyone at UPS sought clarification of the reasons for or further medical information about Ms. Peters' absences.

(ii) Key Assessments of Credibility

[702] The Tribunal's assessment of Mr. Ghanem and Mr. Dambrosio also provides important context. Mr. Ghanem did not present as a credible witness. His testimony was contradictory in several key respects. He did not acknowledge errors on his part.

[703] His decision to reject, out of hand, the medical note of January 7, 2015 seems unreasonable. Under cross-examination, he denied possessing the expertise to second-guess Dr. MacDonald.

[704] He testified that he would talk to employees with absenteeism issues to find out the underlying cause. This evidence is questionable because it appears self-serving. The evidence does not show that he had such a conversation with Ms. Peters.

[705] He was quick to jump to the conclusion that Ms. Peters could not mean that she was being sexually harassed by Mr. Gordon. He was quick to assume that whatever it was Mr. Gordon was doing, it was not harassment, only performance management and that the problem was Ms. Peters. Mr. Ghanem showed no sign of willingness to take any responsibility for any insensitivity, dismissiveness or pre-judgement towards Ms. Peters or for not making an effort to get to the bottom of what had happened.

[706] Likewise, Mr. Dambrosio was not a reasonable, credible witness. This was apparent in his handling of Ms. Peters' July 2014 medical leave in November 2014. This was potentially a serious situation for UPS: An employee, claiming to have notified their employer that they would be off work for medical reasons, with a father who was terminally ill, had been deemed terminated by UPS in a 72-hour notice letter and left without pay or benefits, including the loss of any access to short-term disability, after three days of absence. Their physician then extended their medical leave.

[707] According to Ms. Peters' testimony, she tried to give UPS notice of her absence before she left by leaving her medical note with the security office. The Tribunal trusts her version of the events. [It appeared assumed by UPS that Ms. Peters did not leave a physician's note with the security office. There was no evidence of any follow-up by UPS at any time with the security office to attempt to verify or disprove whether that office received a note from Ms. Peters and, if it did, whether it passed the note on to Mr. Ghanem or HR.]

[708] Ms. Peters' medical leave was extended by her physician because of her car accident. Ms. Peters testified that HR received her medical information after her leave was extended. There is no evidence that anyone at UPS investigated the situation at the time. There is no evidence that anyone in HR contacted her to clarify what was going on. Further,

Ms. Peters may have qualified for short-term disability at some point that summer because her medical issues continued for weeks. It was not suggested that she was sent any STD forms to apply for disability insurance.

[709] Mr. Dambrosio said that no grievance was filed. Ms. Thompson indicated that there was. Even if Mr. Dambrosio's testimony is accurate, there is no dispute that the union raised the issue of Ms. Peters' situation with UPS. If no grievance was filed, that does not mean that there was no reason for anyone at UPS to look into what happened.

[710] As noted, Mr. Dambrosio testified that he could remember that Ms. Peters had asserted that she had provided medical documentation to support her leave of absence in July 2014. He recalled there was some "disputed information" about the 72-hour notice letter that Ms. Peters had received from UPS in July.

[711] Mr. Dambrosio did not appear to appreciate that there was any potential problem with UPS's handling of Ms. Peters' July 2014 medical leave. He did not recognize any need to investigate whether there was any truth to the information the union provided about Ms. Peters' loss of her job or her medical issues. Mr. Dambrosio's testimony gave the impression that he did not have to do anything because Ms. Peters was at fault for having abandoned her job and that he was doing her a significant favour by letting her return.

[712] Mr. Dambrosio was also not initially prepared to acknowledge the good aspects of Ms. Peters' performance. Mr. Dambrosio said that he sent the complimentary letter of June 26, 2014 to other employees. Nonetheless, he still chose to send the letter to Ms. Peters. It is very unlikely that a manager would send a letter with the content described above to an employee considered to be as problematic, at the time, as UPS alleged at the hearing.

[713] Mr. Dambrosio also was behind the decision to not pay Ms. Peters her full wage when she worked in the box line position. He appears to have convinced Ms. Thompson to not fight his position that Ms. Peters had to work an extended period without any absences before she would receive the pay she was owed.

[714] Mr. Dambrosio failed to convince the Tribunal of his credibility as a witness or that he acted reasonably in this regard.

[715] The credibility assessment of Mr. Dambrosio and Mr. Ghanem are of particular importance in relation to UPS's allegation that Ms. Peters had been disciplined for absenteeism. This includes the assertion that Ms. Peters had been disciplined for absenteeism while she worked in the car wash. No documentary evidence, such as letters of reprimand, was presented from UPS's personnel file respecting Ms. Peters for the period she worked in the car wash. Mr. Ghanem only became Ms. Peters' manager in November 2014. As noted, there is no evidence that he became involved in managing her absenteeism as if it were a serious problem until she presented him with a doctor's note on January 7, 2015 and he allegedly became upset. There is also his evidence about his leniency towards Ms. Peters for compassionate reasons and UPS's acknowledgment that, "[N]ormally her breaches of reporting requirements would have attracted escalating progressive discipline." The Tribunal concludes that Ms. Peters did not have a storied history of being performance managed or disciplined.

(iii) The Weight to be Given to UPS's Attendance and Punctuality Policy

[716] UPS relied heavily upon the existence of its written policy requiring good attendance and the timely reporting of absences. As noted, this policy made it clear that unplanned or excessive absenteeism caused serious disruption to workflow and placed an undue burden on other employees. The policy expressly states that a satisfactory attendance record is a condition of employment.

[717] The weight to be placed upon any written policy should be commensurate with the extent to which it is applied and enforced in the workplace. The Tribunal places more weight upon Ms. Peters testimony that she believed that she could cancel a shift if she called in and gave notice. As UPS points out, her testimony in this regard does contradict the policy. However, UPS's actions also contradict the policy. The attendance records produced by UPS show that Ms. Peters called in to advise she would not be attending her scheduled shift from the time she was hired in 2011 to the end of her active employment with UPS. The frequency of occurrence changed at times, but she called in to cancel shifts regularly. The fact UPS allowed this to continue is consistent with Ms. Peters' evidence that she could call in and cancel her shift. She may have been spoken to about needing to attend work more

regularly. However, UPS produced no disciplinary records beyond the January 2015 letter of reprimand and a few 72-hour notice letters that were sent after UPS believed that she had not called in or attended work for several days without explaining herself. If attending work was a real condition of employment, as stated in the policy, it seems that UPS condoned the practice of Ms. Peters calling in to cancel her shift. The Tribunal is not persuaded by UPS's submission that Ms. Peters' evidence does not accord with normal employment relationship expectations because of UPS's inaction and lack of discipline in response.

[718] The Tribunal reached a similar conclusion regarding the usual workplace expectation that employees will call in to advise their employer if they cannot attend work. The Tribunal was provided with records that showed the use of work codes used for payroll for each potential shift to be worked by Ms. Peters. The options of codes included the ability to record "called in" and "no call." There are recorded instances of "no call" throughout Ms. Peters' employment. While failing to report to work or to call in is normally grounds for discipline, UPS presented no documentary evidence that she was disciplined for being a no-show or for calling in with less than one hours' notice before the letter of reprimand in January 2015.

[719] Conversely, although UPS disputed that the 72-hour notice letters were disciplinary, Ms. Peters received several of such letters over the years. The Tribunal believes that they were potentially disciplinary in nature. Those incidents could have been treated as warranting further discipline, as they continued to occur. However, Ms. Peters was not disciplined or given written notice that she could be terminated for this conduct. This lack of action contradicts the idea that good attendance and calling in on a timely basis are non-negotiable requirements in UPS's workplace.

[720] As noted, UPS also did not provide any documentation to confirm its oral evidence that Ms. Peters had been selected for performance management. There was also no documentary evidence that Ms. Peters was subject to any program or official plan to manage her chronic absenteeism.

[721] Ms. Peters says she did give notice when she was not coming in to work and that UPS's records that indicate "no call" are incorrect. Some evidence does suggest that UPS's

records respecting attendance were not always reliable. For example, Ms. Peters was listed as attending training over a period when she was not at work. Mr. Ghanem put medical notes that he received from employees in a drawer, including Ms. Peters' notes, without paying any further attention to them. Whether Ms. Peters did or did not give timely notice on all occasions is not ascertainable based on the available evidence. In any event, it is not of direct relevance. What is relevant are the inconsistencies between the policy and UPS's actions. UPS did not present documented evidence of performance management or discipline respecting Ms. Peters' chronic absenteeism. Accordingly, not much weight is placed on UPS's policy, and it is not determinative of the issues respecting Ms. Peters' absenteeism and failure to call in on time in this case.

(iv) Did Ms. Peters Have a Disability?

[722] As indicated, UPS disputes that Ms. Peters had a disability. UPS submits that Ms. Peters' STD claim was not approved by the insurer because the need for her medical leave was not "substantiated." UPS implies that Ms. Peters' absence was not a valid absence and refers to her "alleged mental health condition" instead of her "disability" despite the medical records in evidence and Dr. MacDonald's testimony. It seems that UPS is relying on the insurer's finding that Ms. Peters' medical leave was not medically justified with respect to the issue of whether Ms. Peters had a disability.

[723] A review of the documentation from the short-term disability provider shows that UPS's position, that the STD insurer found that Ms. Peters' medical leave was not "substantiated", is not entirely factually accurate. The STD insurer asked Ms. Peters questions about the cause of her mental health disability. Ms. Peters reported to the insurer that she was being harassed at work and that this is what caused her health issues. The insurer took the position that Ms. Peters' medical condition was a result of stresses caused at the workplace. The insurer asserted that it did not provide insurance coverage in these circumstances. The insurer's communication of its decision to Ms. Peters also included the finding that her claim was not substantiated. However, a review of the insurer's file materials show that the primary reason her benefits were denied was the STD insurer's finding that she had a work-related injury that was allegedly not covered by the insurance policy.

[724] The STD insurer's finding that Ms. Peters' medical condition was not validated does not itself appear justified based on the file materials provided. Ms. Peters provided medical information from Dr. MacDonald to support a claim. No other medical evidence was obtained by the insurer to contradict that evidence.

[725] Further, it seems most likely that at least part of the reason that the STD insurer concluded that Ms. Peters' medical condition was not substantiated is because of what UPS communicated to the insurer. UPS was asked several times by the insurer whether Ms. Peters believed that she had been harassed at work. UPS had her provincial complaint when those inquiries were received. UPS, therefore, had the details of her allegations, which undisputedly alleged sexual harassment. UPS should have simply answered "yes." However, UPS portrayed Ms. Peters to the insurer as a problematic employee. It seems likely that UPS's communications about the cause of Ms. Peters' mental health issues led to a perception by the insurer that Ms. Peters' explanation was not genuine. As a result, Ms. Peters' claim that her disability was caused by workplace harassment appears to have not been believed, even though the insurer declined coverage on this basis. Further, the validity of her mental health-related disability itself appears to have been questioned, resulting in the denial of her disability payments.

[726] The Tribunal is not bound to accept any finding by the STD insurer that the need for Ms. Peters' medical leave was not medically supported and will not do so in this case. The Tribunal gives little weight to this finding given its concerns about the accuracy of the insurer's decision.

[727] Further, UPS's position appears to be that Ms. Peters' STD claim would have had to have been approved by the insurer in 2015 before UPS was under an obligation to consider her medical absence to be validated. As well, UPS seems to take the position that the STD insurer had to approve Ms. Peters' medical leave before UPS was required to conclude that she had a disability.

[728] UPS was under a legal obligation to make its own determination respecting whether its employee is on a valid medical leave or is disabled for purposes of the Act. This is an

entirely separate matter from the issue of whether a disability insurer is obligated to make disability payments under the terms of an insurance policy.

[729] The medical confirmation received by UPS from Dr. MacDonald in February 2015 established that Ms. Peters had a medical problem that required a month-long absence from work. This is enough to raise the probability that Ms. Peters had a medical condition that met the definition of disability under the Act. At the very least, if UPS needed more information to determine whether Ms. Peters had a disability or if UPS disputed that Ms. Peters had a disability, it was under an obligation to make appropriate inquiries and to seek additional medical information.

[730] UPS was also under an obligation to make reasonable decisions based on informed, medical expertise. Yet Mr. Ghanem appears to have been at liberty to decide whether to accept the medical note Ms. Peters provided from her physician in January 2015. He appears to have completely disregarded it.

[731] It is acknowledged that some of the text messages Ms. Peters sent prior to the medical note appeared contradictory. The first text on January 5, 2015 seems contradictory because Ms. Peters references being at a police station. However, there may have been underlying medical issues that were the root cause of the reasons she offered. In any event, the texts were vague in that they did not clearly confirm the reasons for her absence. On January 6, 2015 she texted Mr. Ghanem, “I’m unable to come in tonight…There’s so much going on right now I’m unable to work.” On January 7, 2015, Ms. Peters sent a text that stated “So sorry again unable to make it in.” However, her medical chart confirms that she had a medical appointment with Dr. MacDonald that day and reported symptoms related to the harassment. When Ms. Peters provided a note from her doctor advising that she had missed the three days because of illness, Mr. Ghanem should have made inquiries about those alleged inconsistencies, not disregarded the medical note.

[732] From the evidence and the arguments raised by UPS, it appears that UPS disputed the validity of Ms. Peters’ medical leaves and did not take any action to ascertain whether there was a disability issue, even though it had notice on January 15, 2015 that Ms. Peters had spoken of being harassed at work. This continued in the face of UPS’s receipt of

Dr. MacDonald's medical notes in February. UPS seems to have only perceived an attendance issue.

[733] Conversely, UPS argued that it should be understood to have accepted Ms. Peters' medical leave in February because Ms. Peters was eventually sent STD forms by HR. UPS did not explain how it could conclude that Ms. Peters' medical leave was valid in 2015 but not acknowledge at the hearing that she had a disability.

[734] UPS also submits that Ms. Peters had to have an underlying disability that somehow prevented her from complying with UPS's attendance policy, which required her to call in and report her absences on a timely basis. That is not the issue. Ms. Peters did not allege in her complaint that she had a disability that prevented her from calling in absences on a timely basis. Ms. Peters alleges that UPS failed to meet its obligations to her as an employee with a disability. This includes while she was on a physician-approved medical leave because of a disability. In this regard, Ms. Peters alleges that UPS failed to follow up respecting her health status, to accommodate her, to return to work or to otherwise take any interest in her once she went on medical leave in 2015.

[735] As noted above, UPS suggested that it complied with its duties of accommodation. It did not specify what accommodations it allegedly made. However, the duty to accommodate only arises if the complainant has a disability. UPS denies that there is evidence that Ms. Peters had a relevant disability. The remainder of UPS's arguments indicated that it did not have a duty to accommodate because of Ms. Peters' lack of disability. The argument by UPS that it complied with its duty to accommodate is not persuasive.

[736] At this stage of the legal test, Ms. Peters is required to prove that she had a disability at the relevant time. The Tribunal finds that she did. The medical evidence is clear that she had a disability related to mental health. It is also clear that UPS knew or ought to have known that Ms. Peters had a disability. UPS had an obligation to accommodate her. There is no evidence that it did.

(v) Did Ms. Peters Experience Adverse Treatment?

[737] UPS says that it did not do anything that constitutes an adverse impact upon Ms. Peters concerning her approved absences. This submission is not persuasive for several reasons.

[738] One would not expect Ms. Peters to suffer an adverse impact over an approved absence. The issue is whether she suffered an adverse impact concerning unapproved absences and whether her disability was a factor in what occurred.

[739] UPS's position requires that it have separated approved and unapproved absences and, thereafter, have treated them differently. UPS has not provided persuasive evidence that it tracked and separated approved and unapproved absences. There is no evidence that UPS had a reliable and consistent system for deciding which absences were approved or not. Mr. Ghanem's personal assessment of Dr. MacDonald's medical note in 2015 indicates otherwise. Similarly, Mr. Ghanem's testimony that he would put medical notes received in a drawer and that these notes were not tracked electronically indicates the absence of a recording system. As a result, the Tribunal deduces that there was no system to track and record approved and unapproved absences accurately. There was no system in place to separate the two.

[740] Given UPS's position that it differentiated between Ms. Peters' approved and unapproved absences, one would expect UPS to have policies relevant to chronic absenteeism that distinguish between health-related absences and absences that reflect performance issues. The package of policies provided to new employees, including Ms. Peters when she resumed work in November 2014, did not include the relevant policies one would expect if an employer had an established program to address chronic absenteeism among its employees. There is no policy in the new employee package that tells an employee what they should do if they need to take a medical leave or that explains when they are obligated to provide a medical note for absences. There was only a policy related to work injuries and accommodation. There is also no evidence that UPS consistently advises employees whether their absences are approved or not.

[741] In any event, there is no evidence that UPS categorized each of Ms. Peters' absences as approved or unapproved or communicated that to her. Further, UPS did not identify or lead clear evidence at the hearing about which absences it said were approved or not approved. The Tribunal cannot agree, given these facts and the lack of information provided, that UPS had a reliable and consistent system for deciding which absences were approved or not and that this exercise was done in Ms. Peters' case.

[742] UPS claims that Ms. Peters suffered no differential treatment regarding her approved absences; however, it does not appear that any of Ms. Peters' absences from July 2014 onward were actually or ultimately approved by UPS. As such, it does not seem likely that there were approved absences for which Ms. Peters suffered no differential treatment.

[743] UPS decided that Ms. Peters employment was "unilaterally" deemed to have been terminated by her in July 2014. Clearly, that absence was not approved. There is no documented evidence about Ms. Peters taking approved absences from November 14, 2014 to December 31, 2014. There is a reference to what appears to be a one-day unapproved absence in December. It is not clear whether Ms. Peters was approved or unapproved for her absences on January 5, 6 and 7, 2015. It is not apparent how or whether Mr. Ghanem responded to her texts. If Ms. Peters was approved when she sent the texts, she appeared to have been retroactively unapproved because Mr. Ghanem clearly doubted the validity of the medical note she provided on January 7, 2015 for those days. Ms. Peters also had an unapproved absence on January 14, 2015 for which she received a letter of reprimand. Her next absence was on February 3, 2015 when Dr. MacDonald put her off work. UPS sent her a 72-hour notice letter on February 10, 2015, treating her absence in early February, at the time, as an unapproved absence.

[744] As noted, there is no clear evidence to delineate what absences, if any, were approved. UPS's assertion that Ms. Peters did not suffer any adverse effects regarding approved absences is irrelevant and, in any event, lacks the requisite factual foundation.

[745] There is ample evidence that Ms. Peters suffered adverse effects for allegedly unapproved absences. The Tribunal concludes that Ms. Peters experienced adverse effects and differential treatment in relation to those absences that were not only medically

supported or approved but that ultimately stemmed from the sexual harassment and/or her disability. This differential treatment included but was not limited to being considered a problematic employee because of her absenteeism.

[746] In this regard, the 72-hour letters Ms. Peters received were clearly part of a disciplinary strategy by UPS respecting employees who did not appear for work without notice. The letters state:

> Your failure to notify your management team of your absence places undue strain on your fellow workers, the management team and the internal operation of the Scarborough centre. This behaviour is unacceptable and will not be tolerated.
>
> This letter is to notify you that you have 72 hours upon receipt of this letter to contact your supervisor regarding your employment at UPS Canada. However, should you fail to make contact; we will consider this your voluntary resignation from UPS Canada, effective immediately.

[747] The letter states that the absence is unacceptable and will not be tolerated. It does not inform employees that their employment will be deemed terminated by virtue of the collective agreement. The letter does not allow for exception or the possibility that there could be a good reason for an employee to not be able to respond within 72 hours. For example, an employee admitted to hospital may not be able to respond in 72 hours. The Tribunal concludes that the 72-hour notice letters were unilateral and had disciplinary characteristics.

[748] Further, the 72-hour notice letter sent to Ms. Peters in February 2015 appears intended by UPS to end the employment relationship in lieu of UPS taking formal disciplinary action. The Tribunal places little to no weight on UPS's evidence at the hearing that the 72-hour letter, sent February 10, 2015, was sent in error. If that were so, that would have been explained to Ms. Peters at the time. UPS's argument in this regard implies that Ms. Peters' absence was approved when it was not. The February 2015 letter may have been sent in error, but it was not inadvertent, and it was not corrected.

[749] Subsequently, UPS did not contact Ms. Peters for medical information or for further information about her intentions. UPS conducted itself as if it hoped it would not hear from Ms. Peters again. This constitutes differential, adverse treatment of Ms. Peters.

[750] As noted, UPS implies that, since the February 2015 72-hour notice letter was sent in error, it should not be considered to have had an adverse effect upon Ms. Peters. The evidence is that it clearly had an adverse effect upon her, given its arrival when she was off work due to her disability, and can reasonably be expected to have been upsetting to her.

[751] UPS also took contradictory positions in this proceeding, respecting the import of the 72-hour notice letter. When it suggested that Ms. Peters had abandoned her position when she left in February 2015, UPS appears to have been poised to rely upon the 72-hour letter that advised her that she would be considered to have abandoned her position. UPS maintained this position in its final submissions even though UPS witnesses acknowledged that she was still an employee of UPS at the hearing and/or had not been terminated. UPS's positions respecting this aspect of the case were inconsistent, contradictory and, therefore, not persuasive. Ms. Peters receipt of a 72-hour notice letter and the experience of being treated as if she had abandoned her position, which continued to the hearing, constitutes adverse treatment.

[752] It should be clear that Ms. Peters experienced other adverse differential treatment which includes her receipt of a letter of reprimand in January 2015. The issue of whether she experienced adverse treatment by reason of not being accommodated is addressed below.

[753] The Tribunal finds that Ms. Peters suffered adverse and differential treatment in the workplace in relation to her unapproved absences.

(vi) If So, Was Disability a Factor in the Adverse Treatment Experienced?

[754] UPS disputes that Ms. Peters had a relevant disability. UPS does not specifically and directly address whether Ms. Peters' disability was a factor in the adverse impacts she experienced related to her absences from work. UPS simply alleges that Ms. Peters was a problem employee because of excessive absenteeism.

[755] As often happens, the reasons for Ms. Peters' absences changed over the course of her employment. Ms. Peters had a history that included declining shifts for reasons unrelated to disability. At different periods, Ms. Peters had medical issues that constituted a disability for purposes of the Act and did not work scheduled shifts at UPS as a result. She had personal and family health issues that impacted her health and attendance. The medical evidence is also clear that Mr. Gordon's harassment had a significant, deleterious effect upon her mental health.

[756] It is likely that most instances of absence in late 2014 and 2015 were due to the impact of the harassment and related to her mental health disability. The medical evidence demonstrates a direct correlation between the harassment and continuation, or exacerbation of the symptoms and functional limitations Ms. Peters experienced related to her disability. The instances of physical sexual harassment, in addition to the verbal harassment, ultimately necessitated the long-term medical leave in February 2015. It, therefore, seems likely that most of Ms. Peters' absences in late 2014 and 2015 were related, at least in part, to disability.

[757] Most, if not all, the absences in 2015 leading up to her medical leave in February and the medical leave itself were treated by UPS as unacceptable chronic absenteeism and were characterized and acted upon by UPS as performance or disciplinary issues. It is clear that Ms. Peters' disability became a factor in the adverse treatment she experienced as a result of those absences.

(vii) Did UPS Accommodate Ms. Peters?

[758] UPS alleges that accommodation was attempted. However, the only action UPS ever identified was that it sent Ms. Peters disability forms, which was stated in its SOP. UPS was obligated to send these forms because STD was a benefit to which she was entitled. That is not equivalent to UPS's obligation to accommodate Ms. Peters.

[759] UPS was under an obligation to accommodate Ms. Peters respecting both absences due to disability (concerning which it offered no evidence) and respecting her return to work (which it did not attempt). At the hearing, the evidence demonstrated that:

1) UPS made no effort to follow up with Ms. Peters about her medical leave;

2) UPS did not seek additional medical information beyond what she provided;

3) UPS did not make inquiries about any accommodation she might have required; and

4) UPS did not make any inquiries or efforts to have her return to work with or without accommodation.

[760] The Tribunal finds that UPS made no effort to accommodate Ms. Peters and thereby breached the Act. Ms. Peters had no means to ever return to work without UPS's active cooperation. UPS's inaction, therefore, was akin to a decision by UPS to end the employment relationship without communicating that decision to her. In this regard, as well, Ms. Peters suffered adverse and differential treatment in the course of her employment as a result of her disability.

(viii) Conclusion Respecting *Prima Facie* Case

[761] The Tribunal concludes that Ms. Peters had a disability respecting her mental health. She suffered differential and adverse treatment in employment consisting of UPS's performance management and discipline of her absenteeism, which was related to her disability, and the issuance of a 72-hour notice letter that appeared to, unfairly and unreasonably, end her employment relationship in February 2015 as well as in relation to UPS's subsequent conduct towards her, including its failure to accommodate Ms. Peters' disability. Her disability was clearly a factor in the adverse impacts she experienced. The Tribunal finds that, considering all the evidence, Ms. Peters has established a *prima facie* case of discrimination.

(ix) Summary of Findings Respecting Discrimination Based on Disability by UPS

[762] Since Ms. Peters has met her burden of establishing a *prima facie* case of discrimination and UPS has failed to provide a defence that would be a justification for this

discrimination, the Tribunal finds that UPS engaged in a discriminatory practice based on disability in relation to Ms. Peters as defined by section 7 of the Act.

[763] Having established that UPS discriminated against Ms. Peters pursuant to section 7, is not necessary for the Tribunal to make a finding concerning whether UPS engaged in harassment based on disability contrary to section 14 of the Act as the same acts and omissions of UPS are engaged.

(x) Finding Respecting Section 3.1 of the Act

[764] It seems most likely that UPS's inaction respecting Ms. Peters' sexual harassment allegations was compounded by UPS's belief that Ms. Peters was a problem employee with a chronic absenteeism issue. The evidence is clear that UPS did not separate the issue of disability and chronic absenteeism from the issue of whether Ms. Peters was sexually harassed in its assessment and consideration of the issues in its workplace. The Tribunal finds, therefore, that the discriminatory practices of UPS include practices based on the effect of the combination of discrimination based on disability and sexual harassment contrary to section 3.1 of the Act.

XV. Whether UPS Is Liable for the Discrimination Based on Disability?

[765] UPS raises a section 65(2) defence to the finding of this Tribunal that its employees discriminated against Ms. Peters based on disability. UPS also claims that Ms. Peters had a legal obligation to report to UPS that she believed she was being discriminated against based on disability.

[766] UPS asserts that it did not have any knowledge that Ms. Peters was being discriminated against. It blames this lack of knowledge on Ms. Peters' failure to report that she was being discriminated against.

[767] The obligation to report sexual harassment arose specifically in the context of the *Franke* decision respecting sexual harassment for the reasons identified by the court, as canvassed above. UPS did not provide case law or explain the basis for its argument that

employees have an obligation to identify that they are being discriminated against in the context of other grounds of discrimination.

[768] UPS argues that, as it had no knowledge of any discrimination, it could not have consented to the discrimination and that the Tribunal should find that UPS did not consent to the discrimination. If anything, UPS's argument illustrates the importance of the distinction between knowledge and not having consented in the context of section 65(2) of this Act. If an employer could avoid liability for human rights violations by subsequently blaming its employees because management at a more senior level did not have knowledge of what lower management employees were doing, there would be little to no legal recourse for complainants under the Act against respondent employers.

[769] As pointed out above, UPS is liable by reason of section 65(1). Section 65(1) of the Act does not require that UPS have knowledge of the wrongdoing at the time for UPS to be liable. In any event, UPS did have knowledge of the wrongdoing because those managers who were involved knew what they were doing or not doing. UPS is taken to have knowledge at law of the acts and omissions of its managers. This includes that those managers were provided with medical confirmation at various points. They should have realized that Ms. Peters had a disability. The need for Ms. Peters to take an extended medical leave was confirmed on February 3, 2015 with management, as was the need for Ms. Peters to be on short term disability in July 2014 and after she left on medical leave in February 2015.

[770] For UPS to avail itself of section 65(2), it would have to produce persuasive evidence that it did not consent to the discrimination. The involved managers and supervisors acted on its behalf.

[771] UPS also provided no evidence or argument to support the inference in its submissions that it had also exercised all due diligence to both prevent and mitigate the effects and impact of any discrimination that occurred in the workplace as required by section 65(2).

[772] UPS fails in respect of its arguments to avoid liability for disability-based discrimination. The reasons and conclusions of this Tribunal respecting the interpretation of section 65(2) and due diligence in sexual harassment cases are applicable, in the view of

the Tribunal, to allegations of discrimination based on disability, subject to any changes required by any difference in context. UPS has not established a valid section 65(2) defence.

[773] However, this finding is subject to a cautionary note. The reasons and conclusions above respecting section 65(2) in the context of sexual harassment include what was intended to be the purposive placement of the obligation to report sexual harassment within the analysis of that section. The Tribunal does not mean to suggest that there is an obligation upon complainants to report that they are experiencing discrimination based on disability to a respondent employer before they can have a valid complaint; nor is it intended to create a new defence in this case based on an obligation to report that can be raised by a respondent employer when the due diligence conditions in section 65(2) have been met. Employees are not required to expressly report their belief that they are being discriminated against to their employer before they can bring a successful complaint.

XVI. Overall Conclusion Respecting Liability

[774] For all the reasons stated above, the Tribunal finds that Mr. Gordon sexually harassed Ms. Peters contrary to section 14(2) of the Act. As well, UPS discriminated against Ms. Peters based on disability contrary to section 7 and 3.1 of the Act. UPS is liable for the acts and omissions of its employees pursuant to section 65(1) of the Act.

XVII. Bifurcation

[775] As indicated in the “Overview,” the Tribunal determined it was appropriate to bifurcate the issues respecting liability and remedy. A separate decision will be issued regarding the remaining issues to be decided that are relevant to remedies.

[776] The “Remedy Decision” will include the Tribunal’s ruling in response to Ms. Peters’ motion where the issue is whether the Tribunal has the jurisdiction to award up to $20,000 for each discriminatory practice found to have been committed in relation to a complaint pursuant to section 53(2)(e) and section 53(3) of the Act.

Signed by

Kathryn A. Raymond, Q.C.
Tribunal Member

Ottawa, Ontario
August 15, 2022

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2201/2317

Style of Cause: Tesha Peters v. United Parcel Service Canada Ltd. and Linden Gordon

Decision of the Tribunal Dated: August 15, 2022

Date and Place of Hearing: September 8-11, September 14-15, November 2-5, 12-13, 2020, January 26-27, February 17-18, 2021

By videoconference

Appearances:

Laura Lepine, David Baker and Claire Budziak, for the Complainant

Sasha Hart and Ikram Warsame, for the Canadian Human Rights Commission

Seann McAleese, for United Parcel Service Canada Ltd.

Linden Gordon, for the individual Respondent