

CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE
LA PERSONNE

WAYNE DOUGLAS

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

SLH TRANSPORT INC.

Respondent

DECISION

MEMBER: Edward P. Lustig 2010 CHRT 1
2010/01/27

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I. THE COMPLAINT

[1] This is a decision regarding a complaint made by Wayne Douglas, as Complainant, against SLH Transport Inc. ("SLH"), as Respondent, dated July 11, 2007. The Complaint alleges that SLH discriminated against him by terminating his employment as a consequence of a physical disability, contrary to section 7 of the *Canadian Human Rights Act*.

[2] The inquiry by this Tribunal into the Complaint was requested by the Canadian Human Rights Commission (the "Commission") as being warranted pursuant to s. 44 (3) (a) of the *Canadian Human Rights Act* (the "Act") by letter dated August 26, 2008.

[3] The Commission did not appear at the Hearing.

II. SECTION 7 OF THE ACT

[4] The Complaint cites subsection (a) of the above noted section of the *Act* as the discriminatory practice that the Respondent engaged in on the basis of Mr. Douglas' disability. This section reads as follows:

7. It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual,

on a prohibited ground of discrimination.

The prohibited ground of discrimination cited in the Complaint is disability pursuant to s. 3 (1) of the *Act*.

III. FACTS

[5] Wayne Douglas is 37 years old. He started to work with SLH on September 21, 1998 as a part-time truck driver. Approximately six months later he was made a full-time employee of SLH. He has a grade ten education. His employment with SLH was terminated on May 11, 2007 while he was on a long term disability leave waiting for surgery to be performed on his right knee.

[6] Throughout his career as a truck driver with SLH, Mr. Douglas always worked on a "peddle" run night shift from SLH's terminal in Bedford north of Halifax along the south shore of Nova Scotia west from Bedford. This run consists of a drive of approximately seven hundred kilometers in total, stopping at twelve Sears catalogue stores or depots from Bedford west to Yarmouth and back again delivering Sears catalogue goods ranging from lighter items such as clothing, jewellery and bedding to heavier "big ticket" items such as snow blowers, stoves, washers, lawn tractors and large quantities of insulation shrink wrapped and loaded onto pallets. The truck consists of a two seat non-sleeper cab, the back of which is hitched to the front of a trailer that is approximately fifty feet long.

[7] A "peddle" run has a team of two - the principal driver and an assistant who can also drive. The driver and the assistant unload the goods at each of the stores or depots and take back returned goods. Some of the stores or depots have loading docks where the trailer can be lined up at the grade of the dock. Others do not have loading docks and a ramp from the trailer is required to unload and load the goods. Since a lot of the goods

are heavy, the trucks come equipped with two wheel hand dollies and sometimes, depending on the load, an hydraulic pallet jack for goods loaded on pallets.

[8] There are ordinarily four "peddle" run night shifts and one "peddle" run day shift operating out of the Bedford terminal. The loading and unloading of the trailers at the terminal is done by dock workers. A driver goes into the terminal about half an hour before his run starts to fill out paper work and "pre-trip" the truck, by checking such things as fluids, lights, belts, hoses, tires and brakes. He then hooks the truck to the trailer and proceeds to begin to drive his run. When he returns to the terminal at the end of his run he pulls in his truck to the dock, unhooks the trailer and then drives the truck to the fuel pump, fills it with fuel and parks it.

[9] The SLH terminal at Bedford is one of two terminals it has in the Maritimes - the other one is located in Moncton, New Brunswick. The Bedford terminal has about forty employees including six mechanics, three full-time dock workers, an operational manager, a regional manager, an accounting clerk, a payroll manager, a sales person, a driver/trainer, two and one half dispatchers, five teams of "peddle" drivers consisting of two drivers on each team, two part-time drivers and six day-time and night-time line haul drivers.

[10] The head office for SLH is in Kingston, Ontario. SLH has about one thousand employees across Canada. In 2006, SLH had its second best year from a profit point of view. In 2007, SLH had its best year. In 2008 it had almost as good a year as in 2007, however, after summer, business fell off dramatically. In 2007 there were approximately thirty more employees than there are today in the Bedford and Moncton terminals as the recent recession has hurt SLH's business. Since the Fall of 2008 business has declined and there is no longer any shortage of truck drivers. In 2009 the volume of business is off by thirty percent to the date of the hearing.

[11] Mr. Douglas was paid on the basis of fifteen hours of paid time allocated for his "peddle" run (the "south shore" run). If a "peddle" run driver is able to drive this run in less than fifteen hours he still receives the same pay. Most of the time the driver is able to complete this run in approximately ten to twelve hours with about two to three hours of the time spent in loading and unloading and most of the rest of the time driving. A driver is never paid for any days except for the days that he actually works and only for the time allotted for his run plus any overtime to do it. Most of the time Mr. Douglas drove three nights a week but, each year, as Christmas approached it got busier and he would drive four nights a week and even five nights a week.

[12] The trailers are virtually always loaded almost full to the back (door) with sufficient head room for safety and with a small space at the right corner of the back of the trailer to allow entry room for the driver and his assistant to unload the trailer. A significant percentage (fifty to seventy five percent) of the goods delivered and picked up on a "peddle" run weigh well in excess of one hundred pounds and involve heavy lifting of "big ticket" items. The dollies and pallet jack stored in the trailer are of assistance, but heavy lifting and manoeuvring involving lifting, pushing and pulling of goods in excess of one hundred pounds is a core aspect of the "peddle" run job taking about sixty percent of the loading and unloading time for the "peddle" run driver and his assistant.

[13] Mr. Douglas is currently employed with Hudson's Bay Company ("HBC") as a truck driver. He started his job at the beginning of April, 2009. The work with HBC is purely "pin" work involving driving a similar truck to the one that he drove at SLH. He now drives five nights a week from the HBC terminal in Dartmouth Nova Scotia either to Moncton, New Brunswick or to Lincoln, New Brunswick and back. On a "pin" run at HBC there is only one driver and no assistant. He still has to hitch up the trailer and put the legs up and down and check under the hood and under the truck as part of the pre-trip examination, however, his job now at HBC involves pure "pin" or "pin to pin" work with no loading, unloading or lifting required by the driver.

[14] SLH's core business since its inception in 1989 has been "peddle" runs to Sears stores. SLH now also does "non-peddle" full truck load commercial hauling ("TL"). In TL, SLH hauls for one customer to different stops. This is mainly done in day time short run hauling. In this work SLH truck drivers do not normally do pure "pin" work or "pin to pin" work. In TL there is virtually always loading and unloading with heavy lifting approximately ten to twenty percent of the time (as opposed to "peddle" runs where there is heavy lifting about sixty per cent of the time). On rare occasions, SLH might have a "pin to pin" assignment without any heavy loading and unloading on a short TL daytime line haul but this would not be very frequent and would not involve enough work to create one full time job, particularly in the current poor economic climate. It is unlikely that currently SLH could set up a truck driving job where there would be no heavy lifting since there is not enough volume to generate a full time job for anybody in that category without reducing the number of hours for the rest of the truck drivers to unacceptable levels.

[15] The Government of Nova Scotia has recently introduced a new pilot project known as the long combination vehicle ("LCV") program that is presently being tested as an environmental initiative to reduce green house gases by running four piece tractor trailers. There is a cab, a fifty three foot trailer, and a converter to join the first fifty three foot trailer to the last or second fifty three foot trailer. SLH has been approved to be involved in the pilot project but has not yet been finally approved to actually run it. The vehicles for this program can only be run on divided highways. The run that SLH is hoping to use, if it gets finally approved for this program, is the so called "mail" route (not a real "mail" delivery) that it currently has from Bedford (Halifax) to Moncton. It is mainly a "pin" run involving catalogue merchandise but it is not a pure "pin" run and still involves some loading, unloading and lifting of heavy goods. There have been three SLH employees that have been trained at a training facility in Calgary to do LCV driving.

[16] Mr. Douglas testified before the Tribunal in support of his complaint. He acknowledged that SLH was a good employer. SLH has a work place health and safety program, a driving information and training program including the handling of dangerous goods, a drug and alcohol abuse prevention policy and an employee assistance program ("EAP"). SLH has no specific policy on discrimination in the work place per se that gives employees information with respect to human rights legislation and practices.

[17] In the Fall of 2006 Mr. Douglas testified that he experienced pain and discomfort in his right knee. He felt a loss of stability and diminished control of his steps going up and

down ramps while moving goods in and out of trailers during work shifts. His knee felt like it was giving out on him. He also felt discomfort while sitting and driving. He did not report any problem with his right knee to his employer prior to November 17, 2006 when he advised his boss, Mr. Clyde Smith, SLH's Regional Manager for the Maritimes, that he was going to be off work for a couple of weeks because of his knee problem. He told Mr. Smith that the injury was not work related. According to Mr. Douglas, he had been limping for some time before November 17, 2006 and some of his co-workers would have observed this condition. According to Mr. Smith, however, his right knee condition was not known by SLH management prior to November 17, 2006.

[18] On November 20th, 2006 Mr. Douglas went to see Dr. Leckey who sent him for x-rays and referred him to Dr. Stalker, a sports doctor at Dalhousie University to review the x-rays. He obtained a doctor's note from Dr. Leckey dated November 27, 2006 saying that he was going to be off work indefinitely due to his right knee problem. He gave the doctor's note to Mr. Smith on November 27th. Mr. Smith told him to look after his knee and fill out all of the proper paper work required and keep him informed of his progress. On December 18th, 2006 he saw Dr. Stalker who felt that he would probably need knee surgery. Dr. Stalker referred him to Dr. Gross, an orthopedic surgeon. On January 11th, 2007 Mr. Douglas saw Dr. Gross who told him that he needed to have surgery for a medial meniscus tear and cyst on his right knee. Dr. Gross indicated that the surgery would be done within about six months. Mr. Douglas advised Mr. Smith of this after he saw Dr. Gross.

[19] Mr. Douglas had a history of absences for medical reasons prior to his absence related to his right knee. He was off work for acute mental stress from June 21st until September 1st, 2001. He was also off work from March 11, 2002 until August 19th, 2003 as a result of surgery on his left knee. On both of these occasions that he was off work he received both short term disability ("STD") and long term disability ("LTD") benefits through Sun Life Financial ("Sun Life") under the benefit program at SLH. He filled out all of the necessary forms in order to qualify for these benefits with the help of his life partner Lisa Gillis including providing all medical information required. In both cases his job was held open for him and his benefits continued to be paid. Upon his return from both of these prior disabilities SLH returned him to his job as a "peddle" run truck driver without any restriction on his duties.

[20] With the assistance of Lisa Gillis, Mr. Douglas filled out the necessary forms and was approved for STD benefits until March 23, 2007 for his right knee condition after an assessment was carried out. He indicated on the forms that his injury was not work related. As STD benefits are available for approximately seventeen weeks, he completed, again with the assistance of Lisa Gillis, the necessary forms for transitioning from STD benefits to LTD benefits. Mr. Douglas was approved by Sun Life for LTD benefits to March 23, 2009 and SLH was informed of this.

[21] Mr. Douglas filled out the forms for Sun Life with respect to his right knee condition the same way as he had filled out the forms with respect to his left knee condition several years earlier. There was no request from SLH to Mr. Douglas between the end of November of 2006 and the beginning of April of 2007 for information concerning his health other than a letter from Sue Reid, SLH's Payroll and Benefits Administrator in

February, 2007 reminding him to fill out the transition forms for Sun Life to qualify for LTD benefits after March 23rd and Mr. Smith's requests in November, 2006 and January, 2007 to keep him posted. During the time that Mr. Douglas was employed by SLH and off work on LTD, SLH continued to pay his share of the Sun Life benefit coverage premiums together with its own share since he was not being paid a salary, but SLH expected him to pay his share of his benefit coverage costs back. He was often late in his benefit coverage repayments to SLH.

[22] In January of 2007 Mr. Smith was visited by Ed Dugas, a Federal government employee who was responsible for *Canada Labour Code* compliance matters in the area. During his visit Mr. Smith discussed Mr. Douglas' situation with Mr. Dugas. Mr. Smith wanted to know what his obligation was under the *Canada Labour Code* to hold Mr. Douglas' position open in the eventuality of a long term medical leave. Mr. Dugas told Mr. Smith that under the Canada Labour Code he needed only to keep the position open for twelve weeks from the first day of the medical leave. He also told him that there would be no severance required to be paid to Mr. Douglas if terminated. Mr. Dugas told Mr. Smith that he should contact Mr. Douglas for an update on his condition and when he might return to work.

[23] In late April of 2007, Mr. Douglas went to the Bedford terminal to repay SLH some health benefit coverage premiums. While he was there Mr. Bill Oakley, SLH's Operations Manager, asked him to sign a form prepared by Mr. Smith containing a number of questions related to his health situation. Mr. Douglas did not think that the form was of any great significance. He had not seen the form before, although according to Mr. Smith and Ms. Reid, it had been mailed to him previously by registered mail but was not picked up. He asked Mr. Oakley whether he needed to have a physician or anyone else help him answer the questions. Mr. Oakley did not indicate to him that he needed anyone else to assist him with the questions.

[24] Mr. Douglas filled out the form while he was at the terminal that day. One of the questions asked him if his surgery had not been performed, whether he had a surgery date? He answered that the date was six months to a year from the date of filling out the form but in answer to a subsequent question he answered that he had no date for surgery. He was also asked what would a reasonable estimate of an expected date of return to work be? Mr. Douglas' answer to this question was also between six months and a year. The form was prepared to follow up on the advice that Mr. Dugas had given to Mr. Smith in January. Mr. Smith had never prepared a form like this for any other employee who was off work on a medical leave. Very recently, according to Mr. Smith, forms such as this have been utilized for employees on medical leave.

[25] According to Mr. Smith, when he reviewed Mr. Douglas' responses to the form he became convinced that Mr. Douglas' absence would be in excess of a year to a year and a half like his previous absence for surgery to his left knee. He felt that Mr. Douglas' responses were unsatisfactory since he still had no date for surgery and since the time frames given in answer to both of the questions referred to above were the same with no time contemplated for recovery from surgery, that had taken six months in the case of Mr. Douglas' left knee surgery.

[26] Mr. Smith's evidence was that he needed a full-time replacement to meet business demand at that time as SLH was entering into a busy part of the year - Spring and early Summer when big ticket items needed to be shipped. SLH had already lost several key "peddle" run drivers in 2006 and part-time employees, were totally utilized. Mr. Smith felt that Mr. Douglas' absence was creating a burden especially when he also had to work in vacation and Christmas time off for other employees and juggle assignments to make things work. He had to have part-time people cover for shifts and move driver assistants over to do primary driving on "peddle" runs. At that time in 2007, drivers were in heavy demand and could not easily be hired on a part-time basis. The company had lost a number of drivers to the boom economy in Western Canada. Mr. Smith therefore felt he had to act from a business/operational point of view.

[27] On May 11, 2007 a termination letter was sent by Mr. Smith to Mr. Douglas. The letter provided as follows:

"Thank you for providing the update to your current absence as recently requested. It is truly regrettable that what was supposed to be a fairly short absence when first reported in November of 2006, has now turned into one that could last an additional 6 months to a year from the present date. The long term absence of a full time employee does cause SLH Transport operational difficulties and a reduced level of service to the customer. That is something we are not prepared to endure an additional time on your behalf. SLH Transport has again gone well beyond the 12 week maximum that we are required to keep your job open, as dictated by Canada Labor Code regulations for medical leave. Yet, we still have no return to work date in the foreseeable future. We will therefore be severing your ties to SLH Transport effective May 14, 2007 and filling the vacated full time position to more efficiently utilize our staff and better service our customer".

[28] Mr. Douglas was devastated and humiliated by this letter. He felt he had done a good job for over eight years at SLH. He had just purchased a new house and was anxious about how he was going to be able to keep up the payments for the house. He became fearful, anxious, despondent, moody and depressed as a result of the letter of termination. He felt it was unfair to be terminated while waiting for a surgery date that he had no control over and that this was not consistent with what had been done for other truck drivers currently off on medical leave.

[29] Mr. Smith's evidence was that his decision to terminate Mr. Douglas was strictly a business decision based on his operational needs as referred to above. He had no personal animus towards Mr. Douglas. His view was that Mr. Douglas was adequate as a truck driver but was a marginal employee lacking in the necessary skill, mental capacity and leadership qualities to do more complex jobs like dispatching.

[30] He had concerns about the fact that Mr. Douglas had been off on medical leave for almost two years of the eight years that he actually was employed by the company and had, in Mr. Smith's view, failed to keep the company up to date with his health situation or prognosis while off for both of the knee conditions. Mr. Smith felt that Mr. Douglas was not a team player or motivated to do any extra work beyond the minimum number of shifts offered to him. As a result, his earnings were among the lowest of any of the SLH truck drivers according to Mr. Smith.

[31] Mr. Smith says that he did not terminate Mr. Douglas based upon any rumour or innuendo but he did admit to hearing stories about Mr. Douglas riding his dirt bike or ATV and going fishing while he was off on medical leave for his right knee - something that Mr. Douglas denied. He was also somewhat skeptical about Mr. Douglas' efforts to obtain an early surgery date and return to work any earlier than eighteen months to two years from when he went on leave. In this regard, Mr. Smith contrasted his own experience in proactively being able to obtain a surgery date and return to work from rotator cuff surgery within several months to Mr. Douglas' inability to get an earlier surgery date and return. Mr. Smith indicated that if he had been told in April of 2007 that Mr. Douglas' absence would be in the range of four to six months and if Mr. Douglas had kept him informed and worked with him, Mr., Smith would have held his job open for that length of time, but due to operational needs he would not do so without any more definitive information than he had received from Mr. Douglas by the date of termination.

[32] Prior to sending him the form of April and then terminating Mr. Douglas, Mr. Smith did not contact Mr. Douglas to see how he was or check on his progress or attempt to find him light duties or modified work pending surgery. Nor did Mr. Douglas contact Mr. Smith directly with an update or to ask him to find him modified work. Mr. Smith admitted in his evidence that when he terminated Mr. Douglas he did not know or try to determine whether Mr. Douglas would be able to return to work as a truck driver at SLH with the capability of lifting heavy items as required in all normal truck driving assignments with the firm whether "peddle" work or non "peddle" work or to do any other work for SLH. At no time did he attempt to accommodate Mr. Douglas or consider light duties or other work for him.

[33] When he terminated Mr. Douglas, Mr. Smith had no further interest in having him work for SLH and was focused instead on hiring a replacement. After Mr. Douglas was terminated SLH took no steps to reinstate him and find him a job despite contacts from Sun Life conveying Mr. Douglas' desire to return to work. SLH made no inquiries into whether, following surgery, he was qualified to do truck driving or any other work with the firm. There was no evidence given at the hearing to indicate that Mr. Douglas made any direct contact with SLH to be rehired in any capacity after he was terminated but he did advise Sun Life of his desire to return to work at SLH. Sun Life, through Carmen LeFort, a Health Management Consultant, did make inquiries of Sue Reid on behalf of Mr. Douglas in this regard, to no avail.

[34] When Mr. Douglas was off work and on LTD for his previous two ailments, SLH held his job open and allowed him to come back and resume his truck driving duties which included heavy lifting. SLH did not request that he fill out a form indicating his date of surgery or date of return and did not express concern about needing a full time replacement. Other truck drivers at SLH were also treated in the same way as this over the years and returned to their full time truck driving jobs after LTD albeit without any restriction on lifting heavy goods. Aaron Douglas, the complainant's brother, had both knee surgery and hernia surgery and returned to his job after being off for medical leave and in receipt of LTD benefits for several months. He was accommodated with light duties on account of his hernia condition pre-surgery for a short period of time.

[35] At least four other SLH truck drivers who had been off between one to almost four years on LTD and Worker's Compensation medical leave were not terminated or requested to give surgery dates and return dates. Their benefits continued to be paid by SLH. No issue respecting the need to terminate these employees or to find replacements for them was raised by SLH. There was no evidence of any other SLH employee who had actually been fired while off on LTD and waiting for surgery or fired for any other reason. There was evidence that no one had lost their jobs at SLH because of recent difficult economic conditions but vacancies were not being filled.

[36] During the time that Mr. Douglas worked in 2006 prior to his being off work in November of that year, he earned a gross salary of approximately \$3,000.00 a month. He was paid on a bi-weekly basis with deductions taken off his pay for income tax, his contribution to his RRSP of approximately 4% which was matched by the company and deductions for the Sun Life Benefit package. The Sun Life benefit package covered medical, dental and life insurance benefits. This package was paid for 65% by the company and 35% by Mr. Douglas. The amount of Mr. Douglas' contribution on a bi-weekly basis for this benefit package was approximately \$77.00. The LTD benefit coverage was paid for entirely by Mr. Douglas as part of the \$77.00 bi-weekly payment.

[37] The net bi-weekly amount that Mr. Douglas received in this period immediately prior to going off with a disability came to about \$800.00 every two weeks. After Mr. Douglas went off and was being paid under the LTD following his termination, he no longer received any payments from the company for coverage with Sun Life for medical, dental, life insurance and for the company's contribution to his Registered Retirement Savings Plan. He had to rely on Ms. Gillis' health benefits from her employment during this time that were not entirely sufficient to pay all health expenses such as physiotherapy costs, part of which Sun Life voluntarily paid until his discharge from physiotherapy in September of 2008. He did receive, on a monthly basis LTD benefits of \$1,830.00 so that his bi-weekly net amount was approximately the same when he was on LTD as when he was working. This is partly because the monthly amount for LTD was not taxable. As well, he did not have any deductions for either a pension contribution or other benefit coverage costs.

[38] During all periods when Mr. Douglas was receiving LTD benefits there would also have been no payments for the disability coverage since he was receiving disability benefits. In essence, therefore, Mr. Douglas' net income was approximately the same after his termination until the disability payments ended on March 23, 2009 as it would have been had he been working. During this period of time, if he was still employed by SLH, had he not been off on a disability but was not working for some other reason (i.e. because he didn't want to take shifts or because the company had no work for him), he would not have been paid by the company other than for his benefits since he was only paid if he actually worked. On the other hand, if he was working during this time at SLH, the disability benefits would have ceased and he would have been paid his normal compensation together with the company's share of the costs of benefits.

[39] Prior to the termination, Ms. Gillis had regularly been in contact with Dr. Gross' office to see if a surgery date was available for Mr. Douglas. Since the letter of

termination cited his inability to get a date for surgery within a reasonable period of time as a reason for termination, with Ms Gillis' assistance, Mr. Douglas wrote to Dr. Gross' office soon after he was terminated indicating that he was fired because of his inability to get an appointment for surgery and asked to know if Dr. Gross had a date for surgery for him. The letter asked Dr. Gross to advise whether a date had been set and to indicate whether Mr. Douglas was definitely waiting for surgery. In response Dr. Gross wrote him back on May 17, 2007 to advise him that he could not give him a surgery date since the allocation of dates was on a priority basis and it would take some time before it was booked. Dr. Gross expressed his frustration and sympathy about this situation.

[40] Subsequently, Mr. Douglas went to see Dr. Leckey to find out if she could refer him to someone who could do the surgery more quickly. She contacted Dr. Yepes, a surgeon in Cape Breton. It was a four hour drive to Dr. Yepes' office in Sydney that Mr. Douglas made with his brother Aaron to see him in October of 2007. Dr. Yepes told him that he needed surgery and would contact him when he had a date for surgery in New Waterford. Ms. Gillis continued to contact Dr. Yepes' office regularly to try to get a surgery date for Mr. Douglas.

[41] On January 17, 2008 Mr. Douglas had his surgery as a result of a cancellation that occurred in Dr. Yepes's surgery schedule. Following surgery he saw Dr. Yepes for post operative consultations approximately six weeks after the surgery and then went to physiotherapy at Beaverbank Orthopaedic and Sport Physiotherapy ("Beaverbank") three times a week.

[42] Mr. Douglas started to get physiotherapy at Beaverbank in March of 2008. Physiotherapy was performed by Chris Bergman, a physiotherapist and principal of Beaverbank three times a week until September of 2008 when Ms. Bergman discharged Mr. Douglas as his progress had, by then, according to her "plateaued". Mr. Douglas was given exercises to perform both at the clinic and at home. Initially he had significant pain and discomfort regularly around his right knee when he began the exercises but as time passed and he continued with physiotherapy and the exercises at home, his condition improved in about June of 2008. Generally his strength improved, however, when there was weight bearing on his right knee, Mr. Douglas had greater difficulty than with non-weight bearing exercises since some of the cushioning had been taken out of the knee by the surgery.

[43] On September 23, 2008 Ms. Bergman performed a functional assessment of Mr. Douglas. This is also known as a physical abilities assessment. The test was administered at the request of Carmen LeFort, to determine the rehabilitation potential of Mr. Douglas. As a result of the testing of Mr. Douglas, Ms. Bergman, determined that in September of 2008 he could not do either heavy or very heavy lifting but could do medium lifting, carrying, pushing or pulling. This would mean that he could occasionally lift items that were twenty one to fifty lbs., frequently lift items that were eleven to twenty five lbs. and constantly lift items that were one to five lbs. Ms. Bergman's opinion was that, as a result of the condition of his right knee, he could not lift items such as fridges, stoves, washers, dryers and lawn tractors that were normally included in the "peddle" runs that he had worked at SLH, even with the equipment provided by SLH on "peddle" runs.

[44] At the request of the complainant's counsel, Ms. Bergman also prepared a letter on March 23, 2009 based on the functional assessment results of September, 2008 to determine whether Mr. Douglas could have, as at September, 2008, returned to work with or without accommodation on a modified or full-time basis in the various categories of "peddle" work truck driving, "pin" work truck driving, without heavy lifting or "administrative" non-truck driving work. She found that he could not have returned to "peddle" or non "peddle pin" work with heavy lifting but could have returned to non "peddle pin" work truck driving without heavy lifting and could have returned to work in an administrative job from a physical point of view.

[45] Ruth Duggan is an occupational therapist who is self employed at Cornerstone Occupational Therapy Consultants ("Cornerstone"). She along with Chris Bergman gave expert evidence at the hearing. Ms. Duggan does job demands analysis, forensic rehabilitation and has done functional capacity evaluation to determine whether injured employees can be matched to or accommodated in various work settings within the industrial sector. Without actually ever meeting or examining Mr. Douglas, she was asked by SLH to review his medical file and to take the medical information and functional information from the file in order to determine what his abilities were. She was then to look at the jobs that were available at SLH and analyze those jobs to see if there were any jobs that would match Mr. Douglas' ability and capability and if there were any reasonable accommodations that could be made. She wrote her report on May 7, 2009. Before writing her report, she met with Mr. Smith and interviewed him about different jobs that were available at SLH. She also visited the terminal for about a half a day at Bedford to observe the operation. She watched employees doing their jobs and interviewed a number of them about their various tasks. She conducted a number of inquiries including weighing items and observing situations in order to do her research.

[46] Ms. Duggan assumed that the physical abilities assessment or functional capacity assessment that was done by Ms. Bergman in September of 2008 was correct. She assumed that Mr. Douglas' capabilities were to do work at a medium physical demand level such as lifting, carrying, moving, pushing or pulling items up to about fifty pounds on an occasional basis and up to about twenty five pounds on a more frequent basis over the course of a day. She also reviewed a transferrable skills analysis report that had been prepared by Banyan Work Health Solutions ("Banyan") in May of 2008 as requested by Sun Life that identified a few different jobs that Mr. Douglas could probably do.

[47] While truck driving was something that was identified by Banyan as a match, Ms. Duggan was of the view that since truck driving meant different things depending on what was required of the individual, it was necessary to determine what that term meant in relation to the jobs available at SLH. She looked at the different truck driving jobs at SLH including the "peddle" run which she found fell into a heavy difficult demand situation from a physical requirement point of view requiring frequent lifting of items over fifty pounds even with two people on the job. She found that that would be a heavy physical demand that Mr. Douglas was not capable of handling.

[48] Ms. Duggan also looked at the "non-peddle" work which could occasionally be "pin" work without lifting but would still require medium physical demand to lift the legs on

the tractor to the trailer. That would be a medium task that Mr. Douglas was capable of doing. However, the "pin" work only represented a minority of "non-peddle" work on a normal day and it varied from day to day. The majority of "non-peddle" work on a normal day involved loading, unloading and lifting by only one employee of heavy items to a certain extent. Accordingly, her understanding was that "non-peddle" work involved some heavy lifting at SLH and that Mr. Douglas would not be capable of doing that work since he was not capable of performing beyond a medium difficult demand. As such, Ms. Duggan was of the opinion that Mr. Douglas could not do truck driving at SLH since it always involved some heavy lifting beyond his capability.

[49] Ms. Duggan then looked at other jobs that were available at SLH, including the job of dispatcher since the Banyan report had identified this as being a potential job match. She found that the dispatch job required more than just typical dispatching duties but also had a supervisory role attached to it that put it in a different category in terms of cognitive skills required, as well as organizational, communication and leadership skills. She found that this job included possible confrontational situations with employees and customers, as well as disciplinary situations. She felt that while Mr. Douglas might have the physical capability to do this job there was no evidence to support the conclusion that he could do the job from a thinking perspective or from a supervisory/management perspective. She admitted, however, that there had been no testing done of Mr. Douglas' mental capabilities or other capabilities for this job.

[50] Ms. Duggan also looked at the potential for Mr. Douglas to work as a mechanic at SLH, however, to be a mechanic one needed to have certain training, including a four year training course. She concluded that this was not an appropriate job match for Mr. Douglas. She also looked at other administrative duties including clerical jobs at SLH but found that there was no suitable match for these jobs since Mr. Douglas had no experience, qualifications or training for any of them.

[51] On May 28, 2009, at the request of Ms. Raymond, Ms. Bergman reviewed the report of Ms. Duggan. She agreed with Ms. Duggan that neither the "peddle" run nor a "non-peddle" run involving manual heavy lifting, loading and unloading would be a match for Mr. Douglas' lifting capabilities. Ms. Bergman indicated that she felt that Mr. Douglas could do the job of dispatcher from a physical point of view but noted that the Duggan report indicated that he did not have the needed numerical and clerical skills to perform that job. Ms. Bergman felt that he should be tested objectively with respect to those requirements. She agreed with Ms. Duggan that Mr. Douglas was not appropriately trained to perform the duties of a mechanic.

[52] In a subsequent letter dated June 3, 2009, again in response to a request by Ms. Raymond, Ms. Bergman indicated that if the truck driving assignment was pure "pin" work, like the complainant's current job at HBC, he would be able to perform this work without accommodation.

[53] Karen MacDonald, an Abilities Case Manager at Sun Life asked Sue Reid of SLH in March of 2007 if SLH could accommodate Mr. Douglas with light duty work but Sue Reid told her that they would only need truck drivers and warehouse people which did not fit Mr. Douglas' condition at that time. In June of 2007 SLH told Carmen LeFort that

Mr. Douglas would not be hired back by SLH in any case. Carmen LeFort met with Mr. Douglas in May of 2008 to explore other work opportunities. She referred him to Banyan to assist him to find a new job and be trained, but after an initial contact when Banyan prepared its report on his functional abilities and transferrable skills analysis, the firm did not follow up with Mr. Douglas. SLH never expressed any interest in allowing Mr. Douglas to return to work after the letter of termination and despite contact by Sun Life as to whether job opportunities for Mr. Douglas' return existed.

[54] SLH never attempted to assess Mr. Douglas' capabilities at any time after he left work on account of his right knee disability or post-surgery for purposes of re-employment nor did it make any effort to accommodate him in the work place through changes to truck driving or through retraining or through re-deploying him in other areas of its operation or through any modified work. Carmen LeFort told Sue Reid on May 6, 2008 that Mr. Douglas was participating in rehabilitation and was motivated to return to work and that she would continue to update Sue Reid. SLH responded that there was no job available for him.

[55] Carmen LeFort who testified at the hearing was of the view that Mr. Douglas was always motivated to return to work at SLH. He obtained his own surgery date. He went to Cape Breton for the surgery. He and Lisa Gillis always kept in touch with Sun Life. Mr. Douglas always communicated to Sun Life his desire to return to SLH as he had done when he had his left knee surgery.

[56] Mr. Douglas started to search for work outside of SLH after Ms. Bergman advised him in September of 2008 that his progress had "plateaued" and discharged him from physiotherapy. At about this time, Sun Life paid Mr. Douglas a lump sum of about \$8,000.00 for the remaining unpaid LTD benefits up to March 23, 2009 and closed its file. With the help of Ms. Gillis he sent out applications with his resume to various employers for truck driving jobs. He eventually found his current job at HBC as a truck driver on a pure "pin" run starting on April 1, 2009.

[57] Mr. Douglas admitted that his current job was "perfect" since it involves no lifting, loading or unloading and the pay is about the same as he was receiving at SLH. He admits that he can no longer do "peddle" work because of the strain it would cause to his right knee. He also acknowledges that there is no pure "pin" work at SLH since all runs there involve some heavy lifting, loading and unloading. Nevertheless, he expresses the desire to be rehired at SLH either to do truck driving with the necessary changes and accommodations to suit his capabilities or to do dispatching. He feels that he could be trained to do dispatching even though he has no experience in that job.

[58] Mr. Douglas believes that he has been discriminated against by SLH because of his physical disability. He feels that it was not his fault but rather the health system's lengthy surgery scheduling problems that cost him his job. There was evidence that even as late as April of 2009 Dr. Gross would not have had a surgery date for him, had he waited for Dr. Gross to do the surgery.

[59] After Mr. Douglas was terminated, two new "peddle" run truck drivers were hired. As well, two existing employees were moved into the dispatch operation. One became a

full-time dispatcher in June of 2007 having been a part-time dispatcher. As well, a truck driver was hired to do part-time dispatching in March of 2009. There was a competition for a part-time position including a general and math skills aptitude test. The successful candidate has a University degree and scored the highest on the test.

[60] Mr. Smith did not feel that Mr. Douglas had the qualifications to be a dispatcher. He felt that he did not have the leadership qualities to give direction to other employees as a manager, or the level of intelligence to deal with the various computer and math skills required to work out loading requirements and other related matters. He also did not feel that Mr. Douglas had the skills to deal with customers and employees under pressure situations which arose in dispatching.

[61] SLH does not have any positions for truck drivers presently because of the downturn in the economy. According to Mr. Smith, uncontradicted evidence, no new drivers have been hired recently and, as a result of two departures, the truck driving ranks have been reduced instead of filling the vacancies.

[62] Mr. Smith gave evidence that there was no equipment that could be safely used to accommodate Mr. Douglas in a truck driving position at SLH without heavy lifting to compensate for his physical restrictions. The equipment that SLH uses is the best that the industry has to offer in this regard and the various types of electric pallet jacks or forklifts on the market would be too heavy to store on a truck and could crash through loading ramps. They were therefore not a feasible means to accommodate a person such as Mr. Douglas in a truck driving capacity at SLH.

[63] Mr. Smith admitted that had it not been for Mr. Douglas' right knee problems and his inability to come back to work within about six months while he was waiting for surgery, he would not have been terminated.

IV. ISSUES

[64] There are two issues that need to be determined in this case:

- (1) Has the Complainant demonstrated a *prima facie* case of discrimination on the basis of a disability?
- (2) Has the Respondent provided a reasonable explanation that is not a pretext for discrimination?

V. ANALYSIS/CONCLUSIONS

[65] A *prima facie* case is "one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the Complainant's favour in the absence of an answer from the Respondent". That answer or explanation must be believed and not shown to be a pretext *CHRC v. Canada 2005 FCA 154, para. 26*. Once a Complainant establishes a *prima facie* case of discrimination, he is entitled to relief in the absence of justification by the Respondent. *Ontario Human Rights Commission and O'Malley v. Simpson Sears [1985] 2 S.C.R. 36*; *Lincoln v. Bay Ferries Ltd. 2004 FCA 204, at para. 18*.

[66] Once a *prima facie* case of discrimination is established, the burden of proof shifts to the Respondent to demonstrate that the alleged discrimination either did not occur as

alleged or that the conduct was somehow non-discriminatory or justified. It is not necessary that discriminatory considerations be the sole reason for the actions in issue for a complaint to succeed. It is sufficient that the discrimination be but one basis for the employer's actions or decisions. *Holden v. Canadian National Railway Co.* (1990) 14 C.H.R.R. D/12 (F.C.A.).

[67] The Complainant's job as a truck driver was terminated by the Respondent while he was in the sixth month of a bonafide medical leave waiting to have surgery on his right knee. The reasons given by the Respondent for the termination were that the Complainant's absence from work was causing it to have operational difficulties in running its business and as a result of the Complainant not being at work and not being able to provide a definitive date for surgery or for his return to work, it had to terminate his employment and hire a full-time replacement. The Complainant did everything he could to try to get a surgery date. He had no control over the scheduling of his surgery. Other than paying for the cost of its share of his benefits, there were no employment or wage costs being incurred by the Respondent while the Complainant was on medical leave prior to his termination.

[68] Accordingly, the Complainant has demonstrated a prima facie case of discrimination on the basis of a disability.

[69] The Respondent as its justification and explanation advanced the argument that it had relied on the information it received with respect to the *Canada Labour Code* in not terminating the Complainant until after twelve weeks had elapsed from the beginning of his medical leave. In that connection, s. 239 (1) of the *Canada Labour Code* provides as follows:

"PROHIBITION

239.(1) SUBJECT TO SUBSECTION (1.1), NO EMPLOYER SHALL DISMISS, SUSPEND, LAY OFF, DEMOTE OR DISCIPLINE AN EMPLOYEE BECAUSE OF ABSENCE DUE TO ILLNESS OR INJURY IF

(A) THE EMPLOYEE HAS COMPLETED THREE CONSECUTIVE MONTHS OF CONTINUOUS EMPLOYMENT BY THE EMPLOYER PRIOR TO THE ABSENCE;

(B) THE PERIOD OF ABSENCE DOES NOT EXCEED TWELVE WEEKS; AND

(C) THE EMPLOYEE, IF REQUESTED IN WRITING BY THE EMPLOYER WITHIN FIFTEEN DAYS AFTER HIS RETURN TO WORK, PROVIDES THE EMPLOYER WITH A CERTIFICATE OF A QUALIFIED MEDICAL PRACTITIONER CERTIFYING THAT THE EMPLOYEE WAS INCAPABLE OF WORKING DUE TO ILLNESS OR INJURY FOR A SPECIFIED PERIOD OF TIME, AND THAT THAT PERIOD OF TIME COINCIDES WITH THE ABSENCE OF THE EMPLOYEE FROM WORK. "

[70] The *Code* operates to protect employees. The above quoted section of the *Code* is a prohibition against an employer terminating an employee on medical leave prior to twelve weeks if he has three years of continuous service with the employer in cases such as this one involving a medical leave for a non-work related injury. The section is not

paradoxically a licence to allow an employer to violate s. 7 of the *Canadian Human Rights Act* in circumstances such as those that exist in this case. To find otherwise would be to render the *Act* subordinate to the *Code*, in spite of the fact that both of these pieces of legislation are designed to protect employees. Even if s. 239 (1) of the *Code* and s. 7 of the *Act* are to be viewed in conflict with each other, the *Act* has primacy as a quasi-constitutional piece of legislation. *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150, *Canada (Attorney General) v. Uzoaba*, [1995] 2 F.C. 569, *Canada v. Vaid* 2005 SCC 30, at para. 81.

[71] As such the Respondent has not provided a reasonable explanation or justification for its discrimination in terminating the Complainant's employment in this case.

[72] Subsections (1) (a) and (2) of the *Act* provides for exceptions from what would otherwise be discriminatory practices as follows:

"15. (1) It is not a discriminatory practice if

(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement;

Accommodation of needs

(2) For any practice mentioned in paragraph (1) (a) to be considered to be based on a bona fide occupational requirement and for any practice mentioned in paragraph (1) (g) to be considered to have a bona fide justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost."

[73] The evidence was uncontradicted that at the time that the termination occurred several other truck drivers also on leave for medical reasons for periods considerably longer than the Complainant's leave were not terminated by the Respondent or questioned about when they might return to work, nor did the need to terminate them and hire full-time replacements come up. All of the evidence produced at the hearing respecting the Complainant's capability to do his former job post surgery or to be accommodated in some other position was ex post facto the termination and produced for the purposes of the hearing. At the time of termination, the Respondent did not, in any way, consider whether the Complainant could return to work after his surgery as he had done several years earlier following surgery to his left knee and as other employees were permitted to do without being terminated and replaced. Nor did the Respondent at the time of termination give any consideration at all to providing the Complainant with modified work or accommodating him in any way in the work place through changes to his job or other work opportunities.

[74] As such, the provisions of s. 15 (1) (a) of the *Act* do not come into play in this case so as to except the conduct of the Respondent as a discriminatory practice.

VI. DECISION

[75] For the reasons set out above, I have determined that the Complaint has been substantiated.

VII. REMEDIES

[76] The Complainant has requested that I exercise my discretion to make an order including various of the terms under s. 53 (2) and (3) of the *Act* as set out below:

53. (2) *If at the conclusion of an inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:*

at the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;

at the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice; and

at the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.

(3) *In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.*

[77] On the facts of this case, it is not appropriate for me to exercise my discretion, pursuant to s. 53 (2) (b) to order the Respondent to rehire the Complainant. To do so would prompt him to leave his current job at HBC which he has described as being “perfect” and require the respondent to integrate him into a work place where there does not appear, on the evidence, to be any truck driving job that he can physically do or any other job that he is presently qualified to do or that is currently available to him. I am unwilling to risk the possibility that he may not be able to do any of the jobs at the Respondent after he has left his “perfect” job at HBC. The intention of the remedies under the *Act* is to make the Complainant whole for the rights that have been violated by the discrimination that has occurred. The effect of including in an order the term requested would be inimical to this purpose. *Milano v. Triple K. Transport 2003 CHRT 30, at para. 63; OHRC V. Naraine 2001 CanLII 21234, paras. 68-74.*

[78] On the facts of this case it is not appropriate for me to exercise my discretion, pursuant to s. 53 (2) (c) to order the Respondent to compensate the Complainant for any lost wages since the Complainant did not incur any lost wages. The Complainant would not have been paid by the Respondent if he was not terminated unless he was actually working. While he was off on medical leave, the Complainant received essentially the same net amount of compensation through disability benefits as he would have had he continued in his prior job as a truck driver with the Respondent. His disability benefits concluded within a week of his finding new employment which provided him with the

same or better compensation than he had received while working for the Respondent. In other words, had the Complainant not been discriminated against by being terminated while on medical leave he would either have (i) continued to be on medical leave receiving only the disability benefits that he received in the same fashion as had occurred when he was off several years earlier with his left knee disability; or (ii) he would have been returned to work at some point earlier than the end of March of 2009 and then would have been compensated by the Respondent but would not have received disability benefits which were essentially the same as the compensation he would have received from the Respondent.

[79] On the facts of this case it is appropriate for me to exercise my discretion, pursuant to s. 53 (2) (e) to order the Respondent to pay the Complainant for pain and suffering experienced as a result of the discriminatory practice. There was earlier in this Decision a review of the facts surrounding the aftermath of the Respondent's termination of the Complainant's employment after almost nine years of employment as he waited to obtain a surgery date for surgery to his knee. The sudden termination of his employment was a cruel blow to a person already suffering from the pain and difficulties of his injury and who had a history of anxiety problems. It caused him, for a considerable amount of time after the termination, to suffer anguish, depression and despair. He felt he had no job or employment future at a time he was not well and had debts on his newly purchased home to deal with. Accordingly, I hereby order the Respondent to pay the Complainant the sum of Fifteen Thousand (\$15,000.00) Dollars pursuant to s. 53 (2) (e) of the *Act*.

[80] On the facts of this case it is appropriate for me to exercise my discretion pursuant to s. 53 (3) to order the Respondent to pay the Complainant for having willfully terminated the Complainant while he was on medical leave contrary to s. 7 of the *Act*. Again, the facts already reviewed in this Decision indicate that while the Respondent claimed that it had no animus towards the Complainant its actions create another impression. The Complainant was clearly attempting to obtain a surgery date - something the Respondent was aware of. It is common knowledge that currently in Canada lengthy waiting times exist for non-critical surgeries. There was no evidence of any record of poor performance or misconduct by the Complainant in the past. The Respondent was not paying the Complainant wages while he was on medical leave so there was no real monetary loss for the Respondent in retaining the Complainant at least until it could determine whether the Complainant could return to work after surgery. The Respondent did not terminate other truck drivers for being on medical leave for periods significantly greater than the Complainant nor did it make any requests of them for information concerning their surgery schedule. Accordingly, I hereby order the Respondent to pay the Complainant the sum of Ten Thousand (\$10,000.00) Dollars pursuant to s. 53 (3) of the *Act*.

Edward P. Lustig

OTTAWA, Ontario
January 27, 2010

PARTIES OF RECORD

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DATE AND PLACE OF HEARING:	June 15 to 19, 2009 and June 22, 2009 Halifax, Nova Scotia
DECISION OF THE TRIBUNAL DATED:	January 27, 2010
APPEARANCES:	
Kathryn A. Raymond	For the Complainant
(No one appearing)	For the Canadian Human Rights Commission
Michael J. O'Hara	For the Respondent