T.D. 1/99

Decision released on May 17, 1999

THE CANADIAN HUMAN RIGHTS ACT

R.S.C., 1985, C. H-6 (as amended)

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

JOHN MILLS

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

VIA RAIL CANADA INC.

Respondent

DECISION OF TRIBUNAL

Tribunal: Eve Roberts, Q.C.

Appearances: Patricia Lawrence, Counsel for the Commission

Tom Barron, CAW/Canada, representing the Complainant,

John Mills

Dominique Monet, Counsel for Via Rail Canada Inc.

Dates & Location of Hearing: September 28 to October 1, 1998 and October 26 to 30, 1998, in Sydney, Nova Scotia

November 24 to 27, 1998, December 14 to 18, 1998 and January 6 to 8, 1999, in Halifax, Nova Scotia

THE COMPLAINTS

Via Rail refused to let John Mills continue working after he suffered several episodes of back problems, despite the fact that he said he was well enough to work. He laid a complaint on the basis that he was discriminated against because of a physical disability contrary to s. 7 of the *Canadian Human Rights Act* (the *Act*) and he filed a grievance. The grievance was resolved by a consent award. A term of the grievance award was that he return to work on condition that his attendance level be equal to the average of certain others. He failed to achieve the attendance level because of illness unrelated to his back problems, and Via terminated his employment. He laid a second complaint, again alleging discrimination on the ground of physical disability.

A Canadian Human Rights Tribunal heard the first complaint. The Federal Court decided the tribunal had erred in its decision and ordered the matter reheard. The second complaint has not been previously heard. It was agreed by all parties that the evidence could be applied to either or both of the complaints.

Medical and Employment History

John Mills trained as a cook in the Navy. Canadian National Railway (now Via Rail) hired him in that capacity in 1970. Via trained him for many on-board jobs; cook, chef, service attendant, bar tender, etc., but he considered his occupation to be that of a chef.

He usually did not have sufficient seniority to work as a chef; he often held a position on the "spareboard", (a listing of employees used to fill in when those with regularly assigned positions were absent), working in any one of the positions for which he was trained. He testified that he sometimes preferred the spareboard as he could work schedules which allowed him to spend longer stretches of time in Louisbourg, Nova Scotia, his home.

He was working a regularly assigned position as a chef from Moncton in 1990 when Via closed its Moncton operations. He qualified for "employment security" under the terms of an agreement between the Union and the Company. In order to maintain his employment security, he had to be available for work at the company's call. Under employment security he was paid at a chef's rate whether he worked or not, as long as he did not refuse to work.

In the fall of 1990, the Company required him to work from the Halifax spareboard in a variety of capacities on runs to Montreal. He applied to be moved to Halifax as he was a Moncton employee. At first Via refused, but later agreed he was entitled to be moved. However, there were disagreements between Mr. Mills and Via over the sale of his home in Louisbourg and he is still residing there.

Before 1990, Mr. Mills suffered a few minor episodes of back pain during his employment with Via; all were of short duration and none were particularly noted by Via. Two of these episodes were caused by accidents, unrelated to any chronic condition. In March 1990, he suffered a back injury while working as a service attendant and was off work intermittently until October 1990. Dr. Holmes was examined by his family doctor in Louisbourg, Dr. Wawrzyszyn, by Dr. Nurse, who was Via's doctor, and, at the request of Dr. Nurse, by Dr. Holmes, an Orthopedic Surgeon who was in private practice in Sydney, N.S. The only problem Dr. Holmes noted was that Mr. Mills told him that he had difficulty pulling down and making beds, which was one of the duties of a service attendant. Dr. Holmes found nothing very startling on his physical examination except for a possible slight weakness in one vertebra. He stated that Mr. Mills should have physiotherapy and then be retried at his job. Dr. Holmes went on to say that if Mr. Mills could not handle the job, attention would have to be given to finding him something he could do.

Dr. Nurse, after finding nothing remarkable in his physical examination, said Mr. Mills should refrain from heavy lifting, stretching and pulling for a few weeks.

He returned to work on the spareboard in October 1990, usually working as a service attendant, until April 1991, when he injured his back lighting a gas oven on a day when he was working as a chef. He was off work and having physiotherapy until October 1991.

In September 1991 his family doctor, Dr. Wawrzyszyn, in a response to a request from Dr. Nurse, reported that Mr. Mills was having physiotherapy which should lead to improvement. He

went on to say that the long term prognosis was guarded, that Mr. Mills might suffer repeated flare-ups and that he had been advised to consider a change of occupation.

On October 19, 1991, Dr. Wawrzyszyn cleared Mr. Mills to return to work. However, Via's doctor, Dr. Nurse, wanted him to see Dr. Holmes again.

Dr. Holmes reported on October 22, 1991. He had reviewed what Mr. Mills told him and had physically examined him. He answered three questions that Dr. Nurse had put to him; - to determine Mr. Mills' physical disability, to decide whether his disability was related to work injury, and to determine whether he could return to work. Dr. Holmes stated that Mr. Mills' impairment was at about 15%, he found that the impairment did not seem to be legitimately related to work, and found that "his capacity for returning to this present employment has got to be very limited. The type of occupation which he describes involves virtually all of the activities which provoke the back to more pain...".

On the basis of this report, Dr. Nurse (who did not examine Mr. Mills in October 1991), wrote Mr. Dionne, Via claims manager, and said he thought Dr. Holmes' recommendation should be accepted and Mr. Mills declared unfit for his present job. He told Mr. Dionne that he had refused to let Mr. Mills return to work and suggested that Mr. Mills be offered a disability pension or some other form of employment.

Mr. Mills then applied for Workers' Compensation, which was opposed by Via and was initially refused. After a review of medical reports, Workers' Compensation concluded that "you have had a series of minor back sprains.there is no justification for a permanent medical impairment assessment". Mr. Mills also applied for Sun Life benefits (Via had a benefit package available for its employees). Via takes the position that Mills cannot argue both sides of the coin: either he was well enough to work and should not have been entitled to benefits, or he wasn't capable of working. Dr. Wawrzyszyn, the family doctor who had said Mr. Mills could go back to work in October 1991, completed forms for benefits stating that Mr. Mills was temporarily disabled. Dr. Wawrzyszyn said that he did so because he thought Mr. Mills' referral to Dr. Holmes might take some time and Mr. Mills would have no income otherwise. I find this explanation reasonable and at all points I believed Mr. Mills' testimony when he said that throughout he wished only to return to work. Eventually, Mr. Mills won his appeal and was granted Workers' Compensation.

In November 1991, Via offered Mr. Mills a disability pension, which he refused. Via then sent him to Moncton for five weeks' training as a telephone sales agent (TSA), at Via's expense. On completion of the training, Via offered him several one-day vacancies as a TSA. However, because of the cost of travel from Louisbourg (the train service between Moncton and Sydney closed in 1990), Mr. Mills refused to work on the ground that the cost of travel and accommodation was greater than the one-day's pay. Via also offered Mr. Mills limited time work in Moncton by letter from Preston Beaumont of Via to Gary Miller, of Mr. Mills' union, but as the offer was restricted, did not include a transfer of seniority and, as no agreement had been reached on relocation, Mills declined. The union countered with another offer and Via made no further response.

In July 1992, Mills applied for a job as a baggage handler. He testified he thought that if he could do the work of a baggage handler, Via might let him return to his work as a chef.

Via consequently referred him to Dr. Brown, another orthopedic surgeon, in July 1992, for an assessment. Dr. Brown apparently did not understand that the request was to assess Mr. Mills as a baggage handler and he recommended that Via return Mr. Mills to work as a chef. He noted that Mr. Mills should be allowed to try this work despite the fact that he might be off work from time to time with back problems. The misunderstanding on the part of Dr. Brown was resolved by having another Via doctor, Dr. Pigeon, do a paper review of Mr. Mills' medical history. Dr. Pigeon made the final decision and considered him unfit for on-board services.

As a result of being found unfit, Mr. Mills laid a grievance and the first complaint with the Canadian Human Rights Commission. The grievance went before a labour arbitrator. He did not hold a formal hearing, but apparently suggested a settlement to Via and the Union. Mr. Mills would return to work as a chef only, he would be paid no lost wages, and he had to have an absenteeism rate in each quarter no worse than the average of chefs on his run for the next two years.

Mr. Mills testified that although he was not a party to the grievance, the arbitrator asked him if he agreed to the terms, which he did. He testified that he understood that the arbitration award did not settle his Human Rights complaint. He also testified that he thought the attendance condition in the award applied only to back problems. The award was made in July 1993 and Mills returned to work as a chef.

Mr. DeWolfe, a manager with Via, testified that on the day Mills returned to work under the award, Via thought he was fit to work.

In the next year and a quarter, Mr. Mills was off work on several occasions. He cut his leg outside of working hours, (although he wanted to continue working, Via would not let him, until it healed), he suffered a cut finger, a burned finger and he was off work for several months because of depression.

When he first was absent in a quarter more than the average, Via sent him a warning letter. On October 7, 1994, Via terminated him for failing to meet the arbitration award's attendance requirement. Mr. Mills then laid the second Human Rights complaint, claiming that Via had discriminated against him on the ground of a physical disability in terminating him.

The first complaint was heard by a tribunal; its decision was reviewed by the Federal Court[(1)] which ordered a new hearing. The second complaint has not been previously heard. Both complaints allege discrimination contrary to s. 7 of the *Act*.

In preparation for the first hearing yet another orthopedic surgeon, Dr. Kevin Orrell, examined Mr. Mills, at the request of the Commission. The Commission sent Dr. Orrell a copy of the chef's job description and asked certain questions pertaining to Mr. Mills' ability to do both the chef's job and occasional passenger railcar duties. It asked whether Mr. Mills was a risk to himself or others on the job, and whether he anticipated any deterioration in Mr. Mills' back condition. Dr.

Orrell prepared a report and testified that Mr. Mills suffered from mechanical low back pain. He was of the opinion that Mr. Mills was fit to return to work in October 1991, and that the preferred treatment for mechanical low back pain is to keep moving and indeed working. He opined that Mr. Mills might suffer from back spasms from time to time that would necessitate further time off work, but that save from heavy lifting, he would not injure himself by working, and that his condition should improve with age.

Indeed all of the doctors who testified about Mr. Mills' back, Dr. Wawrzyszyn, Dr. Nurse, Dr. Holmes, Dr. Brown and Dr. Orrell, agreed in general with Dr. Orrell's diagnosis and agreed that the best treatment for Mr. Mills was to keep moving and active.

I have placed considerable weight on the testimony of Dr. Orrell. I did this partly because of the depth of his expertise and the clarity of his explanations, and partly because, in the sense that his opinion was one on which neither Mr. Mills nor Via had acted, his testimony was the most objective despite the fact that he was hired as an expert by the Commission. Dr. Wawrzyszyn was Mr. Mills' own family doctor, Dr. Nurse was Via's doctor, Dr. Holmes and Dr. Brown saw him on behalf of Via, and Dr. Brown misunderstood what he was asked to do. Dr. Orrell, on the other hand, who is an experienced witness and gives expert evidence in many trials, saw him for the sole purpose of providing expert testimony to the Tribunal. In addition, unlike Dr. Holmes and Dr. Brown, Dr. Orrell was given a copy of the chef's job description and was asked relevant questions about Mr. Mills' ability.

There was considerable evidence regarding the duties and requirements of the position of chef and other on-board positions. A view of the rail cars was taken by the Tribunal in Halifax. The collective agreement between Mr. Mills' union and Via spelled out the duties of several positions, including that of a chef. Any pulling, lifting and stretching required by on-board positions were described by Mr. Mills and by another chef called as a witness, with little discrepancy.

Dr. Nurse said when he restricted an employee from heavy lifting, as he did Mr. Mills, he used the occupational health standard of 30 kilograms or 66 pounds. Mr. DeWolfe described Via's heavy lifting requirement as 40 pounds. Mr. Mills said the heaviest thing that had to be lifted was 50 pounds of potatoes, and that could be broken down into smaller lots. Both Mr. Mills and the chef called as a witness described any regular company required medicals as non-existent or perfunctory and said that medicals did not include a physical examination nor were employees' physical capabilities tested. Dr. Nurse said there were medical job descriptions specific to job titles; he had either seen or been told of them some years previously, but had not had them in his possession.

Mr. Mills asked to be reinstated in his job. There was no evidence that anyone would be unexpectedly dispossessed of a job if Mr. Mills was returned to his seniority. There was evidence that he had enough seniority to be either a regularly assigned chef or to be on the chef's spareboard in Halifax.

Mr. Mills asked for lost wages for the time between Dr. Holmes' report and the arbitrator's award and for the time between his termination and the present. Mr. DeWolfe testified that Via

voluntarily paid Mills from the time of the Tribunal order in the first hearing of the first complaint to the date of the decision of the Federal Court which set it aside. Mr. Mills acknowledged that he would have to repay amounts paid to him by Worker's Compensation and Sun Life if he were awarded lost wages.

Mr. Mills testified that he had applied for jobs in and around the Louisbourg area without success. Via argued that he had applied for only a few jobs and that therefore his attempts to mitigate were not sufficient. Mr. Mills also testified that he owned and ran a seasonal business of a "chip wagon" in Louisbourg. He ran it while he was employed with Via by hiring others, and by doing work on his days off. Via argued that his income from the chip wagon should mitigate his damages.

Mr. Mills testified that he had lost pension benefits during the times he was not working as he had not been able to contribute to his Via Pension, his Canada Pension Plan and to a US railroad pension, nor had Via made employer contributions. He also testified he had had to pay directly for medical and drugs costs that would have been paid for by Sun Life benefits had he been working.

Mr. Mills asked for damages for hurt feelings and described how Via's treatment of him had hurt his mental health and had affected his life and that of his wife and children.

ANALYSIS

The First Complaint

1. Res Judicata

As early as the Case Planning Conference, Via's counsel stated that he would be making a preliminary argument on the grounds that the arbitrator's award had dealt with the first complaint and therefore the matter was res judicata.

The hearing proceeded and the evidence was introduced. All parties agreed that the issue of res judicata would be left to final argument. The issue was argued by all parties before their arguments on the remaining issues.

Rocois Construction Inc. v. *Quebec Ready Mix Inc., et al*[(2)] sets out that there are three criteria required to constitute res judicata; identity of parties, identity of object and identity of cause. All three must be present.

The parties to the arbitration were Via Rail and Mr. Mills' union, the Canadian Brotherhood of Railway, Transport and General Workers. The parties to the complaint were Via Rail, Mr. Mills and the Canadian Human Rights Commission, representing the public interest. Thus there is no identity of parties.

The arbitrator who made the award in 1993 was sitting pursuant to the *Canada Labour Code*. His jurisdiction came from the Collective Agreement and his role was to decide whether the Collective Agreement had been followed. A Canadian Human Rights Tribunal has authority under the *Canadian Human Rights Act* to conduct an inquiry into an alleged discriminatory practice and if such a practice is found, to prescribe remedial action. The *Canadian Human Rights Act* was not referred to in the Collective Agreement.

One of the terms of the Collective Agreement dealt with accommodation of sick or injured employees. There was no evidence that the arbitrator based his award on the requirement of accommodation in the Collective Agreement or that the Collective Agreement requirement of accommodation was to the point of undue hardship as required under human rights law. Therefore, there was no identity of cause.

The preliminary objection on the ground of res judicata is therefore dismissed.

1. Is there a prima facie case of discrimination in the first complaint?

I find that John Mills was disabled within the meaning of the *Act*. All the medical witnesses

agreed that he suffered from mechanical low back pain; - they differed on whether his disability was sufficient for Via to refuse him to go back to work after it received Dr. Holmes' report in October 1991. Via obviously thought it was, and even though Mr. Mills thought it wasn't, it is the effects of discrimination that the *Act* attempts to prevent. One of the intentions of the *Act* is to prevent persons from being discriminated against on the basis of a perception; - for example that women can't do certain work, that whites are more capable than blacks, etc. Thus, even if Via just perceived Mr. Mills to be disabled, a violation of the *Act* is possible. *Foucault* v. *CNR*[(3)]

As Via acted on the basis of either a disability or its perception of a disability in a way that affected Mr. Mills to his detriment in his employment, I find a prima facie case of discrimination has been made out.

1. Was the discrimination direct?

According to extensive case law, I must determine whether the discrimination was direct or indirect. In fact, it was because of the first tribunal hearing the first complaint neglected this step that the Federal Court returned the matter for a re-hearing.

Direct discrimination is usually found in a case where the discrimination is clear on its face. Indirect discrimination occurs when a policy or action which appears to be neutral on its face has an adverse impact on one or more persons. While the difference may be obvious in some cases, that is not necessarily so in all cases. For example, in the recent case of *Toronto-Dominion Bank* v. *Canadian Human Rights Commission* and *Canadian Civil Liberties Association*,[(4)] a case dealing with whether a bank could drug test new and returning employees, all three members of the Federal Court of Appeal differed. One found no discrimination, one found direct discrimination and one found indirect discrimination.

I find that the discrimination against Mr. Mills is direct; he was kept from work because the employer thought he was unfit physically to do his job. There was no rule or practice neutral on its fact that impacted adversely on Mr. Mills. If there was a rule or practice, it was that an employee must be fit to do his or her job. In terms of physical disability, this is not neutral on its face, as it goes to the very question of ability or disability. (see *MacNeill* v. *A.G. Canada*)[(5)]

Section 15(a) of the *Act* as it was when the complaint was laid allows a defence of a bona fide occupational requirement ("BFOR") to a case of direct discrimination. (The *Act* was recently amended to incorporate accommodation into the BFOR analysis, however, for the purposes of this complaint, previously decided case law dictates that accommodation plays no role in proving a BFOR). Via says it meets the BFOR based solely on Mr. Mills' physical condition in October 1991. As no standards of fitness for on-board services were put in evidence, the BFOR can only be that an employee must be declared fit by the doctor or doctors chosen by Via.

I disagree that the BFOR was met. Case laws tells us that a BFOR must be imposed honestly, in good faith and in the belief that the limitation is imposed in the interests of the adequate performance of the work, a subjective test. In addition, it must be related in an objective sense to the performance of the employment concerned and be reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.[(6)]

Dr. Holmes and Dr. Nurse examined Mr. Mills in 1990 and found nothing significantly wrong with his back. The second report of Dr. Holmes in 1991 said that Mr. Mills' capacity for returning to on-board services was limited. Dr. Holmes was not asked if Mr. Mills could meet the job descriptions in the Collective Agreement, or if he met any objective standards or

requirements of the jobs, such as capacity to lift a certain weight or meet any safety requirement. All employees were required to assist in emergency evacuations but there was no evidence of what was required by any particular job. Via seems not to have considered Dr. Wawrzyszyn's contrary opinion of October 1991. It id not request further medical examination. It had no physical standards for on-board jobs against which it could compare Mr. Mills' ability except for the weight lifting standard and Via's own evidence was contradictory on this point. Further, there was no testing to see what precisely Mr. Mills could lift. Dr. Brown thought Mr. Mills should be returned to his position as a chef, and the final decision was made by Dr. Pigeon, who had never examined Mr. Mills.

My conclusion is bolstered by the fact that with no intervening treatment or physical examination or testing, Via decided on the day of the arbitration that Mr. Mills was fit to return as a chef. My conclusion is even further bolstered by the fact that Mr. Mills did return to work for more than a year as a chef without further back injury.

I find that Via has failed the test that the BFOR was imposed honestly and in good faith. I do not mean to imply that Via acted maliciously when I say it acted in bad faith. I mean that Via acted recklessly in that it did not take the proper steps to ensure that its perception of Mr. Mills' ability was accurate.

Further, I find that Via has failed the test that the BFOR was related in an objective sense to the performance of the employment. There were no objective standards of fitness against which Mr. Mills' ability was compared. There were no standards at Via about how long an employee could be absent before the efficient and economical work performance of on-board services suffered. The evidence all seemed to point that with the spareboard, Via could tolerate certain absences.

If I have erred, and the discrimination should be categorized as indirect, Via has open to it the spareboard of having accommodated Mr. Mills to the point of undue hardship. I find it has not so accommodated him. While some attempts at accommodation were made, such as giving Mills training as a TSA, there was no evidence Via had done so to the point of undue hardship, or even of what the cost of various accommodations might be. For example, Via was obligated to move Mills to Halifax when it required him to work there in 1991 and had not done so. It could therefore, presumably have moved him to Moncton so he could work as a TSA at a cost similar to that which it was already obligated to spend. There was no evidence as to the cost of transferring Mr. Mills' seniority to the agreement that covered employees working as TSA's. Further, it was Via that ended negotiations with the union over the transfer of Mr. Mills' seniority rights.

Via's whole set-up of a "spareboard" for on-board services was a way of dealing with vacancies when regularly assigned employees could not work due to vacation, sick leave, etc. There was no evidence from Via that it could not bear the cost of keeping Mr. Mills as a regularly assigned

chef, if his seniority so qualified him, or on the spareboard, despite certain absences. In fact, the evidence suggested that there were always employees on the spareboard who could be called upon to work at any time.

Via argued that it had accommodated Mills in various other ways such as workers' compensation, employment insurance, disability benefits and the arbitration award. However, I find that "accommodation" does not include steps Via was already obligated to take by law, such as providing workers' compensation or participating in a grievance procedure, particularly where Via originally contested Mr. Mills' right to workers' compensation and originally challenged the arbitrator's jurisdiction.

In my view accommodation is something that is usually tailored to the circumstances of an individual and will assist a particular employee. It could include assigning a part of an employee's work to another. Via argued that a chef had certain job requirements and the cook or another on-board employee could not be expected to do them. I disagree because the evidence of the other chef called as a witness was that the chef and the cook divided the work 50 - 50. The chef was the supervisor of the cook and the work could be apportioned to accommodate the skills and abilities of each of them. Dividing the work in a different way can be accommodation as long as it doesn't cause undue hardship to the employer.

Via argued that it could not have one employee doing the work of another, and argued that if a chef took the time to divide up heavy loads, he might then be running late. However, argument is not evidence and there was not sufficient evidence that that was so or that Via would suffer undue hardship as a result.

Thus, as there was not sufficient evidence of accommodation to the point of undue hardship, the defence fails.

Second Complaint

The second complaint arose from Via's final termination of John Mills. Via argued that his work was terminated because of absenteeism in excess of the arbitrator's condition, not because of his disability. Mr. Mills and the Commission argued that the Award should be interpreted in such a way that the condition applied only to absenteeism due to his back and that the award itself was discriminatory.

They also argue that the second complaint flows directly from the first; that had Via not discriminated against Mills in the first complaint, there would have been no Award and no condition. I agree. I also agree that the Award was discriminatory because it could penalize Mr.

Mills for being disabled.

It is clear that Via terminated Mr. Mills for not meeting the arbitrator's Award and that it knew his absenteeism was for medical reasons. It therefore perceived he was physically unfit and, applying the same reasoning as in the first complaint, there is a prima facie case of discrimination established and Via discriminated against him directly.

Again, the defence of BFOR is open to Via. However, there was no evidence that Via had a policy or standard on medical absenteeism that was objectively related to work performance. In fact, in order to arrive at the average agreed to at the arbitration, Via must have been prepared to accept above average medical absenteeism, for there was no evidence that all employees absent above the average would be terminated. In fact, there was evidence that several employees who had long-term disabilities were still on the company's records.

Further, Via based its decision on misconceptions and was again reckless in its actions. In a letter regarding Mr. Mills' termination from Preston Beaumont, a Via employee, to Gary Murray, a union representative, dated October 21, 1994, Beaumont said "Mr. Mills has a dismal work history and although this most recent and ongoing illness appears not to be directly related to his degenerative back disorder, it may be a recurrence of a previous depressive illness".

There was no evidence that Mr. Mills had a "degenerative back disorder". In fact, the medical evidence was that he had mechanical low back pain and that mechanical low back pain usually improves with age. There was no evidence that Mr. Mills' depression was a recurrence. It seems that Beaumont was speculating when he used the phrase "it <u>may</u> be a recurrence", and speculation is not a proper basis for action.

I do not think Mr. Mills' termination was indirect discrimination because there was no neutral rule dealing with medical absenteeism, or indeed innocent absenteeism, that applied to all employees and affected Mr. Mills adversely. If I am wrong, and the discrimination was indirect, it is clear that Via made no attempt to accommodate his disability, other than to give him a second chance at meeting the absenteeism condition in the award when he first failed to meet it. There was no evidence of any undue hardship.

Thus, I find that Via simply fired Mills on the basis that he had not met the Award's condition, and there was no evidence that the arbitration Award met the BFOR standards or that Via accommodated Mr. Mills.

<u>DAMAGES</u>

Having found that Via discriminated against John Mills contrary to the *Canadian Human Rights Act* in both of the complaints, pursuant to s. 53(2) of the *Act* as it was when the complaints were laid, it is hereby ordered that:

1. Via shall place John Mills on the chef's spareboard in Halifax forthwith with his full seniority and he shall be able to bid on regular assignments as his seniority allows at the next opportunity.

2. Via shall pay to Mr. Mills his lost wages, including those for statutory holidays and vacation pay from the date of Dr. Holmes' October 1991 report to the date he returned to work pursuant to the arbitrator's award and his lost wages from the date he was terminated in 1994 to the day he is returned to the spareboard. From this shall be deducted the amount of wages he has earned as an employee for anyone other than Via during these times, and the amount Via paid him between the date of the decision in the first tribunal hearing and the date of the decision of the Federal Court. It is recognized that from these amounts Mr. Mills will have to repay certain amounts to Workers' Compensation, Employment Insurance and to Sun Life.

3. Interest shall be paid at the Canada Savings Bond rate from time to time on the amount of lost wages from the date of Dr. Holmes' report to the date of the arbitrator's Award. I have not awarded interest on the remaining amount as I agree with Via that Mr. Mills did not make sufficient attempts to find employment once he was terminated. As Mr. Mills was in the chip wagon business before October 1991, and as I accept his evidence that the business was merely seasonal, I find that the business income does not affect his right to damages.

4. Via shall pay to John Mills an amount equal to the difference between the amount he pays in income tax in the year in which he receives his lost wages and interest and the amount he would have paid in income tax on those wages and interest had he received them in the years for which they are calculated.

5. If any of the Via Pension Plan, Canada Pension Plan, and the US Pension Plan to which Mr. Mills or Via on his behalf has contributed, allow Mr. Mills to be reinstated for the time he did not contribute between October, 1991 and the present, then Via shall pay the applicable employer contributions and Mr. Mills the applicable employee contributions for that pension. If any of these plans do not allow Mr. Mills to be reinstated for the said periods and Revenue Canada so allows, Via and Mr. Mills shall pay into a locked-in RRSP for Mr. Mills the employer and employee contributions. If neither of the above options is possible, when Mr. Mills does draw each of these pensions, Via shall cause to be calculated and paid to him the difference between the pension he receives in each case and the pension he would have received had he contributed to the pension throughout, and pay him the difference monthly, or weekly, or as the case may be. If Mr. Mills dies before drawing a pension leaving a survivor entitled to pension benefits, the survivor benefit shall be calculated in the same way.

6. Via shall pay to Mr. Mills amounts Mr. Mills has spent on drugs and medical and dental care, for which he can provide receipts, that would have been paid for by Sun Life between October 1991 and his return to work.

7. Via shall pay Mr. Mills $3,000.00 for hurt feelings.

8. Via shall pay Mr. Mills for wages lost because of attendance at the hearing in 1998 and 1999. Mr. Mills is not entitled to travel costs to attend the portions of the hearing in Sydney as they were held in Sydney at his request, but I award him expenses for his trips to Halifax, including travel, accommodations and meals.

9. I do not make any order on the issue of the move of Mr. Mills to Halifax as I find the issue arises from the Collective Agreement and not from the complaint.

10. The Tribunal retains jurisdiction in this complaint and directs the parties to attempt to determine the actual monetary amounts awarded above. If the parties

are unable to come to an agreement on the amount of damages within 40 days of the filing of this Decision, each party shall have 10 days following the 40 days to file written submissions of their respective positions with the Tribunal registry and with each other. Each party will then have a further 10 days to respond to the submissions of the other parties. Following final submissions, the Tribunal will make a decision on the issues.

Dated at St. John's, Newfoundland this day of May, 1999.

_____ Eve Roberts, Q.C.

1. See *VIA Rail Canada Inc. v. CHRC,* 1998 1 F.C. 376 (T.D.)

2. 1990 2 S.C.R. 440

3. (1981) 2 C.H.R.R. D/475

4. (1998) 32 C.H.R.R. D/261

5. 1994 3 F.C. 261 (C.A.) at p. 286)

6. *Ontario Human Rights Commission* v. *Etobicoke* 1982 1. S.C.R. 202 at 208