

**CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES  
DROITS DE LA PERSONNE**

**B. RICK MOORE**

**Complainant**

**- and -**

**CANADIAN HUMAN RIGHTS COMMISSION**

**Commission**

**- and -**

**CANADA POST CORPORATION**

**- and -**

**CANADIAN UNION OF POSTAL WORKERS**

**Respondents**

**REASONS FOR DECISION**

MEMBER: J. Grant Sinclair 2007 CHRT 31  
2007/07/25

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## **I. INTRODUCTION**

[1] The complainant in this case is Brian Rick Moore. He works for Canada Post Corporation (CPC) in the Vancouver Mail Processing Plant (VMPP).

[2] Mr. Moore filed a complaint dated July 12, 2001 with the Canadian Human Rights Commission against CPC. He alleges that CPC contravened ss. 7 and 10 of the *Canadian Human Rights Act*. The prohibited ground of discrimination is disability.

[3] On the motion of CPC, the Canadian Union of Postal Workers (CUPW) was added as a respondent to his complaint.

[4] There are two elements to his complaint. First, Mr. Moore alleges that CPC discriminated against him by permanently assigning him to the Manual section and reclassifying him from a PO5 to a PO4, at a lower wage rate, because of his disability; and

[5] Second, Mr. Moore claims that in 1999, CPC adopted a policy that adversely differentiated between permanently, partially disabled (PPD) employees and other employees by limiting the shift bid choices of PPD employees. This resulted in Mr. Moore having to work the "graveyard" shift (12 a.m.-8 a.m.) in 2001 and 2002, which caused him physical and emotional difficulties.

[6] Mr. Moore claims damages for lost wages and other benefits resulting from being reassigned and reclassified and for the difficulties he experienced because he had to work the graveyard shift. And for both elements, he claims damages for the loss of the right to be free from discrimination.

## **II. DECISION**

[7] For the reasons that follow, the Tribunal has concluded that Mr. Moore has not substantiated the first element of his claim. As to the second element, the Tribunal concludes that CPC did engage in a discriminatory practise. But Mr. Moore has not demonstrated that, but for the discriminatory practise, he had the seniority to successfully bid on the day shift or afternoon shift. Accordingly, the Tribunal has not made any award of compensation.

## **III. FACTS**

(i) 1981-1994

[8] Mr. Moore was first hired by CPC in May 1981 as a mail handler. This job consisted of sorting parcels and mail bags into containers, dispatching mail and transporting mail containers to loading areas.

[9] In April 1989, Mr. Moore injured his back lifting a heavy mail bag. He was off work for about 3 weeks and when he returned to work, he was on modified duties.

[10] Mr. Moore's return to work was based on an Occupational Fitness Assessment (OFA) completed by his doctor, Dr. Taylor, dated November 7, 1989. In the OFA, Dr. Taylor indicated that Mr. Moore was able to perform his usual duties but may require adjustment of his workload from time to time because of his back problem. On November 11, 1989, he returned to full duties.

[11] In May 1990, CPC reclassified all the Mail Handler PO2 positions to Dispatcher, PO5.

[12] In September 1992, Mr. Moore again injured his back while at home. He was off work until November 1992, returning to modified duties outside of his PO5 duties.

[13] Dr. Taylor completed another OFA for Mr. Moore on June 30, 1993. In this assessment, he indicated that Mr. Moore was restricted to standing for not more than 15 minutes, he should avoid any bending or twisting and was restricted to lifting not more than 25 pounds. Dr. Taylor also indicated that Mr. Moore was fit to return to work full time but on modified duties within these restrictions.

[14] In August 1993, seeking to better understand Mr. Moore's fitness for work, CPC's medical consultant, Dr. Haakonson, requested additional medical information from Dr. Taylor.

[15] Dr. Taylor provided this information on August 14, 1993. His assessment was that Mr. Moore had a history of lower back problems and was prone to injury. He also outlined what he considered to be Mr. Moore's work limitations.

[16] This information was given to Dr. Haakonson. He reviewed Dr. Taylor's medical assessment and concluded that Mr. Moore should be designated as permanently, partially disabled with the following work limitations:

- Standing - not more than 30 minutes at one time,
- Bending and twisting - must avoid repetitive forward bending,
- Lifting from the waist - not more than 55 pounds,
- Lifting waists to head - not more than 55 pounds,
- Carrying - not more than 55 pounds.

He advised the Director, Plant Operations on August 26, 1993, of Mr. Moore's restrictions and recommended that Mr. Moore be assigned to permanent work within these restrictions. He also wrote to Mr. Moore telling him of the designation and limitations and also that the specified limitations would be used to determine his position.

#### **A. Temporary Modified Duties / PPD Restrictions**

[17] There are two categories of injured workers at CPC. The employee who is injured but is expected to recover within a short period of time and who will be assigned temporary modified duties. And the PPD employee who has been assessed as having a permanent partial disability and who is assigned to work within specified PPD restrictions.

[18] The procedure for employees who require temporary modified duties is that they would provide a note from their doctor. If the medical note is sufficient, they are assigned the appropriate modified duties by their supervisor. If CPC requires more information,

the supervisor would request that the employee obtain a more detailed medical note, usually an OFA which would indicate the nature of their injury, and give an estimate of how long modified duties are required.

[19] Most temporary modified duties are for two to three months, but could be extended for up to six months. In such case, a further medical assessment would be required.

[20] If the need for modified duties continues beyond six months, the matter is discussed with CPC's Occupational Health Services (OHS). Additional medical information (AMI) would be requested and reviewed by the CPC's medical consultant. The extension may be granted or the employee may be designated as PPD if so warranted by the medical information.

[21] If an employee is classified as PPD, CPC's medical consultant will provide to the Director, Plant Operations, a field summary setting out the PPD restrictions. He will pass this on to inform the employee's manager or supervisor so that the PPD employee will be assigned work appropriate to the restrictions.

[22] The PPD restrictions are ongoing in the absence of any new medical information. If a PPD employee brings in new medical information, this would be given to the CPC medical consultant who would decide whether the PPD restrictions should be modified or removed. If so, a new field summary would be issued.

[23] In October 1993, Mr. Moore met with his supervisor and manager to discuss his assignment as a PO5 within his PPD restrictions. He was assigned to operating motorized equipment (forklift) which was one of the PO5 duties of the rotation of duties. Mr. Moore was to operate the forklift to the exclusion of all of the other PO5 rotation of duties.

[24] Mr. Moore worked on the forklift from October 1993 until December 1994. Apparently, this caused considerable resentment among Mr. Moore's co-workers who felt that he was getting special treatment. They believed that if he was fit enough to work on the Despatch dock, he should work more of the PO5 rotation. Some of his co-workers took this up with Mr. Moore's manager and requested that Mr. Moore be assigned elsewhere.

[25] In December 1994, Mr. Moore's supervisor asked him to step down from the forklift duties because of these complaints. He voluntarily agreed to do so to reduce the tensions and he was assigned to Letter Carrier Pre-sort (LCP) which is in the Manual section.

**(i) 1995-1998**

[26] Mr. Moore worked in LCP for about six weeks, but he felt that he was not getting the opportunity to work on the motorized equipment in LCP. So he asked to return to the Despatch dock.

[27] His supervisor agreed and Mr. Moore returned to the PO5 rotation in early 1995 on modified duties. The PO5 rotation of duties on the Despatch dock were as follows:

Fork: loading & unloading annex trailers.

Fork: unloading trucks and transporting mail between the receiving & dispatch dock

Fork: transporting & organizing the containers of mail on the dispatch-dock

Fork: loading and unloading Airmail trailers to and from the airport

Fork: loading 5 ton trucks and organizing monotainers and mail on 1st floor.

Mono Dumper: dumping monotainers of City mail down the chute

Forward Mono Dumper: dumping monotainers of forward mail on belt

Support pallet lifter: transporting mail from the dispatch-dock mainly to and from 1<sup>st</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> floor via elevator.

and pallet lifter: transporting fwd mail on the 3<sup>rd</sup> floor, and between the 3<sup>rd</sup> and 2<sup>nd</sup> floor via elevator.

or pallet lifter: transporting monotainers of mail on the 4<sup>th</sup> floor.

Carrier Presort: manually breaking down and sorting mail bags and bundles of mail from monos

cleanup: mostly sorting and breaking down heavy domestic, USA and International mail coming from the airport

Positions: these relief positions are used to cover any absentee due to a regular day off, sick leave or vacation etc.

The rotation list was prepared at least six weeks in advance and each employee would rotate through the list

[28] Mr. Moore testified that the only job that he could not do was the dock cleanup. He said he was able to do the other jobs on the PO5 rotation, sometimes with self-accommodation, when necessary.

[29] It was common practice on the Despatch dock to trade jobs. Usually, Mr. Moore was able to trade the dock cleanup job for another job with a co-worker. If he was unable to trade the dock cleanup which happened occasionally, Mr. Moore would advise his supervisor and he would be relieved from this duty.

[30] Mr. Moore worked the PO5 rotation from early 1994 to early June 1998. On June 14, 1998, he went on sick leave because of back pain. He went to see Dr. Taylor on June 24, 1998 who completed another OFA. Dr. Taylor indicated restrictions on walking, lifting, carrying etc, which essentially were the same as Mr. Moore's restrictions from August 1993. Dr. Taylor said that Mr. Moore could return to work on June 29, and that he could resume his PO5 duties in two to three months.

[31] Mr. Moore did return to work on June 29, but was assigned to the Manual section, S/L Prime, one of the most sedentary jobs in the VMPP. He was there for about two weeks and then went on vacation for five weeks, returning to work on August 17, 1998 to his regular PO5 duties.

[32] However, on September 24, 1998, he went on sick leave again because of back pain. He returned on September 29 and worked for about one hour on the Despatch dock but could not continue because of his back pain. He was assigned again to, S/L Prime.

[33] At the request of CPC, Mr. Moore obtained another OFA from Dr. Taylor on October 6, 1998. In this OFA, Dr. Taylor indicated that Mr. Moore was not to operate the forklift, as bouncing would aggravate his back. Dr. Taylor indicated that Mr. Moore could return to the PO5 rotation within his limitations in 15- 28 days.

#### **(ii) Occupational Health Services Memoranda**

[34] Following Dr. Taylor's June 24, 1998 OFA, there were a series of memorandums from Sharon Harlos, the OHS nurse to various Superintendents between June 1998 and November 1998. In her June 30, 1998 memo, Ms. Harlos inquired whether Mr. Moore had returned to work and she was advised that Mr. Moore had returned to work on June 29, 1998 and was assigned to S/L Prime.

[35] On July 22, 1998, the OHS nurse asked for an update on Mr. Moore's status and was told that he was on annual leave for another month.

[36] In a September 25, 1998 memorandum to Ms. Harlos, Andrew Langdon, Area Superintendent, said that Mr. Moore had been off from June 14-25, was on modified duties in S/L Prime until July 13 when he went on annual leave. He returned on August 17, 1998 to his PO5 duties.

[37] Mr. Langdon noted that Mr. Moore booked off sick on September 24 because of his bad back and was still off on September 25. Mr. Langdon went on to say that Mr. Moore indicated to him that if he were to return, he would require modified duties indefinitely. Mr. Langdon suggested to OHS that Mr. Moore be asked to complete an OFA if he is not able to return. And perhaps, given Mr. Moore's condition, CPC should explore the possibility of a permanent reassignment for him.

[38] Mr. Langdon also had a discussion with Mr. Moore sometime in early October 1998 about assigning him permanently to Manual because of his limitations. Mr. Moore recalled this discussion. He said that Mr. Langdon asked him if he was interested in being reassigned to Manual and becoming a PO4. Mr. Moore told him that he was not interested, but if he changed his mind, he would let him know.

[39] On November 2, 1998 Ms. Harlos wrote to Martin Osborne, Area Superintendent, asking whether Mr. Moore was working up to his PPD restrictions. If he was not back to his previous restrictions, he needed to be reassessed. Mr. Osborne's reply was that Mr. Moore was not back on PO5 duties.

[40] This exchange led to Mr. Moore's OFA in November 9, 1998, in which Dr. Taylor reaffirmed his previous recommended restrictions and added that Mr. Moore was to avoid operating the forklift and pallet lifter. If this was so, Mr. Moore would be restricted from doing more than half of the PO5 duties.

[41] Mr. Moore testified that by the end of 1999, he still did not feel that he was capable of going back to his PO5 duties. He continued to see Dr. Taylor for his back problems in 2002, 2003, 2004 and 2005. He also said that because his back was so sore, Dr. Taylor sent him to a physiotherapist who treated him over the period from December 2000 to 2003. During that period he experienced back pain although he was doing one of the most sedentary jobs at the VMPP.

#### **B. Prelude to Mr. Moore's Permanent Assignment to S/L Prime and PO4**

[42] In 1998, Neil McClure was A/Manager, Production Control & Reporting. His job was to ensure that the VMPP operated to meet its delivery commitments to its customers. His many responsibilities included work schedules, annual leave, vacation, equal opportunity, scheduling, health and safety and consultations with CUPW with respect to these matters.

[43] At that time, there were problems with CPC meeting its customer commitments. CPC had to bring in casual workers and pay overtime to process the mail. In his wanderings around the plant, Mr. McClure noticed that at one point, there were only four or five persons working in City Parcels on the day shift, but the work schedule showed 25 positions.

[44] When Mr. McClure asked why there were so few people working there, he was told that employees had bid into City Parcels but were not able to do the work. So they had to be accommodated elsewhere, and most of them had been assigned to S/L Prime. Mr. McClure was concerned about this because CPC was spending a lot of extra money on overtime and casual hours to meet customer commitments.

##### **(i) The 1999 Shift Bid**

[45] The collective agreement between CPC and CUPW provided that CUPW could request that an annual shift bid be held for certain groups of employees in the VMPP. The bidding process took place between September and November for shift assignments which commenced on the second Sunday of the following calendar year.

[46] The collective agreement also provided for consultation between CPC and CUPW relating to changes in the system of work and other matters. In August 1998, CUPW requested a shift bid and advised CPC that it was available for consultation relating to CPC's staffing proposals.

[47] Mr. McClure first raised his concerns about the imbalance, particularly on the day shift at the first consultation with CUPW on October 2, 1998. He pointed out that, there were 118 PPD employees at the VMPP. Of these employees, approximately 43% worked on the day shift. (4 p.m.-12 a.m.).

[48] Mr. McClure suggested two options that CPC was considering. One would allow employees to bid only into sections where they could be accommodated. The other would allocate employees on modified duties evenly, over all three shifts.

[49] The reason for this imbalance was because of the shift bid procedures that were in place. Employees would bid into a work center that involved heavy work. They did so knowing that they could not do the work and would have to be accommodated elsewhere, for example, in Manual where the work is easier.

[50] But they would have enough seniority in that work center to successfully bid for their preferred shift, usually #2 shift or #3 shift. When accommodated they would bring their bids with them to their accommodated position.

[51] The effect was two-fold. It resulted in too many employees in one work center and insufficient number in another. Secondly, it created animosity among able-bodied employees who worked in the work center where the accommodated employees were assigned, who had more seniority.

[52] At the next consultation on October 21, 1998, CUPW agreed that PPD employees could not bid into a section where they could not be accommodated. But CUPW wanted to review the situation for each PPD employee. CPC agreed to give CUPW a list of PPD employees showing where they had bid and where they were accommodated.

[53] The question of PPD employees and shift bids was again discussed at the October 28, 1998 consultation. CPC indicated that there were about 120 PPD employees. Approximately 50% had bid into positions where they could not be accommodated and had asked to be assigned to other areas.

[54] On December 1, 1998, CPC provided CUPW with a list of employees who could not be accommodated in the section/work center in which they had bid. The list included Mr. Moore and showed his current bid result to be Despatch dock, #3 shift and his accommodation S/L Prime, #3 shift.

[55] At the next consultation on December 7, 1998, CUPW asked and CPC agreed that the current staffing of PPD employees would remain the same for 1999 because employees had not been given sufficient notice of CPC's proposal to change the shift bid procedures. But for the 2000 shift bid. PPD employees could only bid into areas in which they could be accommodated.

#### **(ii) CPC/CUPW 1999 Memorandum of Agreement**

[56] Following the 1998 consultations, CPC and CUPW entered into a Memorandum of Agreement (MOA) dated January 8, 1999. The MOA set out procedures for accommodating PPD employees after s. 54.02 of the collective agreement was applied.

[57] Under the MOA, CPC and CUPW were to consult on the appropriate placement of PPD employees into positions where they could be accommodated. PPD employees would be carried over complement and considered part of the work schedule for which

they were assigned and would be assigned to any vacancy in the work schedule where they were being carried over complement.

[58] Upon assignment, PPD employees would be "red circled" within their work schedule. This meant that, if PPD employees were accommodated and assigned to a position with a lower rate of pay, they would continue at their former pay rate until the rate for their accommodated position reached that level. This was to ensure that PPD employees would not suffer any wage loss because of the accommodation.

[59] As to future shift bids, PPD employees would bid their seniority only into the work schedule where they were being accommodated. PPD employees could apply to have their situation reassessed if their physical limitations changed.

[60] The accommodation of disabled or injured employees was an ongoing issue between CPC and CUPW. It was solely CPC's decision as to where a PPD employee would be accommodated. CUPW could not veto the decision. It could only grieve it if it disagreed.

[61] CUPW wanted a process which would allow it to consult and give its input into accommodation decisions to PPD employees. The MOA allowed input of CUPW in the accommodation process.

### **(iii) The 2000 Shift Bid**

[62] On September 29, 1999, CPC wrote to CUPW about its 2000 shift bid proposal. PPD employees who were assigned to a specific area in last year's bid would remain in that section unless their PPD status changed. And their seniority would decide the shift they would work. All other PPD employees would bid only in an area where they could be accommodated and seniority would govern.

[63] There were a number of consultations in the Fall 1999, leading up to the last consultation on November 2, 1999. At that time, CPC had provided CUPW with an up-to-date list of PPD employees and their PPD restrictions in relation to the annual bid. There were 50 PPD employees, and for each one, the list showed how they were to be dealt with. Mr. Moore was listed as being accommodated in S/L Prime and shown as red circled.

[64] CPC was to notify these employees by letter which would identify their PPD status, limitations and which areas they would be allowed to bid for a position.

[65] The new shift bid for 2000 procedure was announced to the employees both by CUPW and by CPC. In its November 3, 1999 Bulletin, CUPW announced that CPC and CUPW had spent considerable time at consultations, reviewing how to accommodate disabled employees. PPD employees would be contacted by the CUPW to confirm their placement and/or bidding restrictions based on their limitations.

[66] For CPC, Mr. McClure sent a letter dated November 12, 1999 to all VMPP employees outlining the changes for the 2000 shift bid. He also sent a letter to individual PPD employees as to their situation.

[67] Mr. McClure sent Mr. Moore a letter dated November 15, 1999, in which he advised Mr. Moore that he had been permanently assigned to the Manual section since he was being accommodated in that area. His shift bid choices were Manual Prime #1, #2 or #3 shifts. He was also advised that his PO5 wage rate was red circled until the PO5 rate reached the PO4 rate.

[68] As to why Mr. Moore was permanently reassigned, Mr. McClure said that CPC considered that his PPD limitations prevented him from doing any PO5 duties on the



Despatch dock. And that Mr. Moore had been working in S/L Prime since September 1998.

[69] It is clear that CUPW was not involved in the decision to accommodate Mr. Moore in S/L Prime in September 1998. It is also clear, that although CUPW had input into the accommodation for PPD employees through the consultation, CUPW did not make the decision with CPC to permanently assign Mr. Moore to Manual and reclassify him from PO5 to PO4.

### **C. Mr. Moore's Grievances**

[70] After receiving Mr. McClure's November 15, 1999 letter, Mr. Moore contacted CUPW and completed an internal grievance form in which he claimed that his rights under the collective agreement had been violated. The reason he gave was that CPC had reclassified him from PO5 to PO4 without his consent by assigning him permanently to the Manual section because he was PPD. He concluded by stating that "at this time, I do not feel confident at returning to my previous modified duties on the RT&D (Despatch dock), but would like the right to exercise my options in the future".

[71] CUPW filed a formal grievance dated January 5, 2000. In the grievance, CUPW set out that in its November 15, 1999 letter, CPC improperly reclassified Mr. Moore from PO5 to PO4 and improperly changed his status. The remedy sought by CUPW was that Mr. Moore retain his PO5 status and be paid as a PO5.

[72] In his February 1, 2000 letter to Mr. Moore, Mr. McClure officially confirmed his permanent reassignment to Manual S/L Prime and that his wage rate would be red circled until the catch up to the PO4 rate.

[73] CUPW filed a second grievance on behalf of Mr. Moore dated May 19, 2000. In this grievance, CUPW alleged that CPC improperly reduced Mr. Moore's rate of pay from PO5 to PO4. CPC was to compensate Mr. Moore for all lost wages and benefits and maintain Mr. Moore's rate of pay at the current level.

[74] Both grievances were withdrawn by settlement agreements between CUPW and CPC. The January 5, 2000 grievance on June 13, 2003; the May 19, 2000 on February 6, 2001.

[75] In his internal grievance form and in both CUPW grievances, Mr. Moore's accommodation to S/L Prime was never challenged. Mr. Moore appeared to be content to work as a PO4 and receive the PO5 wage rate. It was only when his wage rate was red circled did he become concerned. But his concern and that of CUPW related to the change in his rate of pay, not the accommodation to S/L Prime.

[76] Ken Mooney was the CUPW grievance officer at the time and was responsible for grievances and arbitrations. He testified that CUPW withdrew the grievances because it had concluded that the grievances would not be upheld at arbitration.

[77] There was arbitral jurisprudence that if an employee cannot perform the duties of a higher classification, the employer should not have to pay the wages of the higher classification. Mr. Mooney said that he had specifically discussed these arbitration decisions with Mr. Moore. When CUPW withdrew Mr. Moore's grievances in 2001 and 2003, a number of years had passed since Mr. Moore had done PO5 duties. And Mr. Moore had not provided any current medical evidence showing that he could return to work as a PO5.

### **D. The 2000 and 2001 Shift Bids - Mr. Moore to the Graveyard Shift**

[78] Mr. Moore's 2000 bid form restricted his shift bid to Manual Prime #1, #2 or #3 shifts. He had consistently worked the #3 shift as a PO5 and from the time he was accommodated in S/L Prime in September 1998.

[79] For the 2000 shift bid, there were 292 positions available for bid in the Manual section distributed over the four work centers/schedules: Manual Prime (S/L and O/S); FSM, LCP and City Finals. Of these, Mr. Moore was restricted in bidding for 158 positions or 54% of the total. Other employees in the Manual section were able to bid on all of the positions. In spite of the limitations, Mr. Moore successfully bid for his preferred #3 shift, afternoons.

[80] In 2001, CPC separated Manual into S/L and O/s into two schedules (except on the #2 shift where they remained combined). Mr. Moore's shift bid was restricted to S/L Prime, #1 and #3 shifts and Manual Prime #2 shift.

[81] For the 2001 shift bid, there were 301 positions in the Manual section, but the number of positions available to Mr. Moore was 119 or 40% of the total. This was because S/L and O/S were now two schedules.

[82] Mr. Moore did not have the seniority for the #2 or #3 shifts and the result was that he was "bumped" from #3 shift to #1 (graveyard) shift for 2001.

[83] For Mr. Moore, his 2002 shift bid results were the same. In 2002, there were 278 positions in Manual. Mr. Moore was restricted to bidding for 84 or 30%. Again he ended up on the graveyard shift for that year.

[84] In 2003, CPC restructured the VMPP. A number of sections were consolidated with the S/L Prime so that the number of positions that Mr. Moore could bid on was increased. This allowed Mr. Moore to get the shift of his choice. So in January 2003, Mr. Moore returned to S/L Prime #3 shift, where he remains today.

#### **E. Has Mr. Moore Established a *Prima Facie* Case of Discrimination?**

[85] In a human rights case before this Tribunal, the complainant must first establish a *prima facie* case of discrimination. A *prima facie* case is one which covers the allegations made and which, if believed, i.e. credible, is complete and sufficient for a decision in the favour of the complainant, in the absence of a reasonable answer from the respondent. The respondent's answer should not figure in the determination of whether the complainant has made a *prima facie* case of discrimination. (See *Ontario (Human Rights Commission and O'Malley v. Simpson Sears Ltd.*, [1985] 2 S.C.R. 536; and *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 2004; *Dhanjal v. Air Canada*, (1997) 139 F.T.R. 37 at para. 6)

[86] In his complaint, Mr. Moore alleges that CPC discriminated against him by failing to accommodate his disability. I cannot emphasize enough that "failure to accommodate" is neither a prohibited ground of discrimination nor a discriminatory practise under the *CHRA*. There is no free-standing right to accommodation under the *CHRA*.

[87] The duty to accommodate only arises in the context of s. 15(2) of the *CHRA* and only when a respondent raises a *bona fide* justification by way of defense to an allegation of discrimination. For Mr. Moore to show a *prima facie* case, he must rely on something other than the failure of CPC to accommodate him.

[88] Mr. Moore's allegations of discrimination against CPC are:

- (1) CPC discriminated against him because of his disability by permanently reassigning him to the Manual section and by reclassifying him from PO5 to PO4;
- (2) CPC differentiated adversely in relation to him by restricting his shift bid choices because of his disability.

To establish a *prima facie* case, Mr. Moore must show that his reassignment and reclassification contravened either s. 7(a) or s. 7(b) of the *CHRA*.

**F. *Prima Facie* Case - S. 7(a) of the *CHRA***

[89] In terms of s. 7(a), it is clear that CPC did not refuse to employ Mr. Moore. It could be argued however, that CPC refused to continue to employ Mr. Moore as a PO5 by reclassifying him to PO4.

[90] But CPC maintained Mr. Moore's PO5 rate of pay as a PO5 from September 1998 to January 2000, even though he was doing PO4 work. Mr. Moore did not ask at any time during this period to return to his duties.

[91] It was only after November 15, 1999, when Mr. Moore was advised by Mr. McClure that he would be permanently assigned to Manual and red circled, that he raised an objection through his grievances.

[92] In so doing, Mr. Moore never disputed the accommodation. By his own admission in his 1999 internal grievance form, Mr. Moore was not confident that he could return to his duties on the Despatch dock. At this point in time, CPC did not refuse to continue to employ Mr. Moore as a PO5. He could not do PO5 work then.

[93] At the hearing before the Tribunal, Mr. Moore testified that his back had improved sufficiently to allow him to return to his PO5 duties in January 2000. Coincidentally, this is the same time he was officially reassigned and reclassified. But Mr. Moore never asked to return to PO5 duties. He did not speak to his supervisor or anyone else at CPC that he was ready to do so. Nor did he offer any medical evidence that he could do so.

[94] Mr. Moore's explanation was that he believed his reclassification to PO4 removed the possibility of being able to resume his PO5 duties. But Mr. Moore could have taken steps to return to his PO5 duties if he felt capable. The collective agreement contains detailed provisions for transferring jobs and in fact, imposes an obligation upon an employee who wishes to do so to file a written application with their immediate supervisor indicating his/her desire to transfer.

[95] It was also Mr. Moore's evidence that he continued to see Dr. Taylor regarding his back problems in 2002, 2003, 2004 and 2005. And on Dr. Taylor's recommendation, Mr. Moore went to physiotherapy between 2000 and 2003 because of his back was so sore. At no time in those years did Mr. Moore ask Dr. Taylor for medical assessment that would allow him to return to PO5 duties.

**IV. CONCLUSION**

[96] I find that when CPC reclassified Mr. Moore to a PO4 and reassigned him to Manual in January 2000, Mr. Moore was not capable of PO5 duties at that time. Nor does the evidence demonstrate that he could do PO5 work at any time thereafter.

[97] I accept the proposition that has been enunciated in the arbitral decisions if an employee is not capable of performing the essential functions of his/her job, an employer is justified in reclassifying the employee to a lower rated position. (see *Ontario English Catholic Teachers Association v. OPEIU*, b1 LAC (4<sup>th</sup>) 109; *Chamberlin v. 599273 Ontario Ltd.*, 11 C.H.R.R. D/110)

[98] CPC did not refuse to continue to employ Mr. Moore by reclassifying him to PO4. Mr. Moore has failed to establish a *prima facie* case under s. 7(a) of the *CHRA*. This aspect of Mr. Moore's complaint has not been substantiated.

**A. *Prima Facie* Case - S. 7(b) of the *CHRA***

[99] Did the reclassification and reassignment of Mr. Moore give rise to a *prima facie* case under s. 7(b) of the *CHRA*? I think not. It is not adverse differentiation to lower the wages of a disabled employee to correspond to the value of the work performed.

[100] Further, as compared to those able-bodied PO4 employees who are doing PO4 work, Mr. Moore was paid the same. As for those employees receiving PO5 pay, their situation was not comparable to Mr. Moore. They were doing PO5 work and Mr. Moore was not.

[101] For these reasons, Mr. Moore has not shown a *prima facie* case of discrimination under s. 7(b) of the *CHRA* because of his reclassification.

**B. *Prima Facie* Case? - Restricting Mr. Moore's Bidding Rights, s. 7(b) of the *CHRA***

[102] Mr. Moore as a PPD employee was restricted to bidding only on some, not all of the positions in the Manual section. Able-bodied employees in the Manual section were not so restricted. Mr. Moore was so limited because of his disability. This is enough to establish a *prima facie* case on this aspect of his complaint.

[103] The obligation is then on CPC to show that this restriction amounted to a *bona fide* justification and Mr. Moore was accommodated to the point of undue hardship as mandated in s. 15(2) of the *CHRA*.

[104] CPC's proffered justification was that it was experiencing serious problems in meeting its customer commitments. This was because PPD employees would bid into work centers where they could not do the work and required accommodation in another work center. This led to an imbalance in some sections in the VMPP and not enough employees in other sections. Thus, CPC adopted the policy that an employee could only bid into the work section or schedule where they could be accommodated.

[105] But CPC had the obligation to show that Mr. Moore was not capable of doing the work in any of the Manual work centers except S/L Prime. There is no specific evidence that when Mr. Moore's shift bid was restricted, CPC made an assessment of Mr. Moore's ability to work in any of the Manual work centers other than S/L Prime.

[106] Rather, it appears that the decision was made on impressionistic evidence, namely, that Mr. Moore had been accommodated in S/L Prime for a number of years. This is not a sufficient answer to meet Mr. Moore's *prima facie* case. This being the case, I conclude that CPC has engaged in a discriminatory practise.

**V. REMEDY**

[107] Mr. Moore asked for \$2,500 as compensation for the loss of the right to be free from discrimination for the restrictions on his right to bid during the 2001 and 2002 shift bids; \$2500 for the reckless way in which CPC reassigned and reclassified him and restricted his bidding rights; and \$1,500 for the physical and emotional difficulties he experienced as a result of being bumped to the "graveyard shift" in 2001 and 2002.

[108] The Tribunal has no jurisdiction under the *CHRA* to award compensation for the loss of the right to be free from discrimination. As to his claim for reckless conduct by CPC, I find that CPC took the decision to reclassify and reassign Mr. Moore as part of the overall business strategy to deal with its failing obligation to meet customer commitments. Consequential to this was the CPC's policy to assign employees where they could be accommodated. I do not find that, in doing so, CPC acted in reckless manner.

[109] As to Mr. Moore's claim for physical and emotional difficulties, the Tribunal can recognize this through an award for pain and suffering. Mr. Moore's evidence is that

working the graveyard shift made it very hard for him to sleep when he was off work. He says that he could only sleep three to four hours. Dr. Taylor recorded in his April 27, 2001 notes, "insomnia, working graveyard shift permanently, whereas not sleeping well and gets palpitations". He prescribed Mr. Moore medication to aid his sleeping.

[110] Mr. Moore also testified that graveyard shift affected his home life. It made him moody and confrontational in family affairs. This caused a lot of people to get uptight when they were around him at home. He said he felt like he was in a daze for most of the time except maybe on the weekend when he could catch up with his sleep.

[111] I accept that Mr. Moore experienced some physical and emotional difficulties as a result of working the graveyard shift. But to receive any compensation Mr. Moore must show there was a serious possibility that, but for the discrimination, he would have obtained the #3 shift (his first choice) or the #2 shift (his second choice). (*Sangha v. McKenzie Valley Land and Water Board*, 2006 CHRT 9 at para. 216; *Brooks v. Canada*, 2006 F.C. 1244, paras 40-45).

[112] Mr. Moore did not present any evidence that his seniority would have carried him beyond the #1 shift. For this reason an award for pain and suffering is not appropriate.

**A. Mr. Moore's S. 10 Complaint**

[113] In his complaint, Mr. Moore also alleged a contravention of s. 10 of the *CHRA*. But he did not point to any evidence to support this allegation or make any final submissions on this question. I assume he has abandoned this allegation. If not, it has not been substantiated.

**B. Liability of CUPW**

[114] As to any liability of CUPW on the question of reassigning and reclassifying Mr. Moore and limiting his shift bid, it is true that CUPW participated in the consultations that led to the MOA. But it was CPC that had the final decision as to Mr. Moore's fate. CUPW's role was to consult to ensure if possible that PPD employees were properly accommodated. CUPW did not make the final decision.

[115] I conclude that CUPW has no liability arising out of Mr. Moore's complaint.

"Signed by"

J. Grant Sinclair

OTTAWA, Ontario  
July 25, 2007

PARTIES OF RECORD

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STYLE OF CAUSE:	B. Rick Moore v. Canada Post Corporation and Canadian Union of Postal Workers
DATE AND PLACE OF HEARING:	August 8 to 11, 2006 October 30 to November 2, 2006  Vancouver, British Columbia
DECISION OF THE TRIBUNAL DATED:	July 25, 2007
APPEARANCES:	
B. Rick Moore Assisted by Kathy Roczowskyj	For himself
No one appearing	For the Canadian Human Rights Commission
Zygmunt Machelak Assisted by Bob Jasamanidse	For the Respondent, Canada Post Corporation
Gina Tessaro Assisted by Robert Mulvin	For the Respondent, Canadian Union of Postal Workers