CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

JIM ST. JOHN

Complainant

- and -
CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -
CANADA POST CORPORATION

Respondent

REASONS FOR DECISION

MEMBER: Karen A. Jensen 2007 CHRT 19
2007/05/15

I. INTRODUCTION

[1] On June 20, 2003, Mr. Jim St. John filed a complaint against Canada Post Corporation (Canada Post or CPC) alleging that CPC had discriminated against him in employment on the basis of his disability by treating him in an adverse differential manner, contrary to section 7 of the *Canadian Human Rights Act*. Specifically, Mr. St. John complained that Canada Post sent him home from work early on May 27, 2003, claiming that there was no work for him to do within his restrictions. Canada Post then made use of Mr. St. John's sick leave credits to compensate him for the lost wages he incurred.

[2] Mr. St. John further alleged that in May 2003, Canada Post was engaging in a discriminatory policy or practice, as those terms are used in s. 10 of the *Act*, when it sent him and three other disabled employees home early from the Edmonton Mail Processing Plant (EMPP) and paid them from their sick leave credits on May 27, 2003. On that day, Canada Post was experiencing a period of low mail volume. Mr. St. John complained that this was the second time he had been sent home from work as a result of low mail volume. The first time was in 2001.

[3] The Canadian Human Rights Commission fully participated in the hearing into this matter. The Commission called a number of witnesses including the Complainant, Mr. St. John, and several union representatives. The Respondent, Canada Post, called one witness: Ms. Darlene Swabb, the manager of the section of the EMPP in which Mr. St. John worked in May 2003.

[4] During the hearing of this matter, the parties reached a settlement with respect to the section 7 portion of the complaint. The parties, however, indicated that they wished to have the section 10 complaint heard and determined by this Tribunal. The issue in this decision, therefore, is quite simply: in May of 2003, was Canada Post pursuing a policy or practice that deprived or tended to deprive Mr. St. John and other employees with disabilities of employment opportunities on the basis of a prohibited ground of discrimination?

II. FACTS

[5] Mr. Jim St. John is a full-time postal clerk (PO-3) at the Canada Post Mail Processing Plant in Edmonton ("the EMPP"). He works the day shift at the EMPP. Although there was some confusion with respect to the exact times of the shift, it would appear that in 2003, the day shift at the EMPP was from 7 a.m. to 3 p.m. Mr. St. John is a member of a bargaining unit represented by the Canadian Union of Postal Workers (CUPW).

[6] Mr. St. John is disabled; he suffers from bipolar mood disorder and has lower back and knee problems. Mr. St. John has been designated by CPC as having permanent partial disabilities ("PPD's").

[7] As a result of his PPD status, from 1995 onward Mr. St. John has been accommodated in the Forward Letters section of the Communication Value Stream ("Communications") in the EMPP. Forward Letters is where all of legal-sized and normal-sized envelopes are

sorted and prepared for dispatch to Canada and elsewhere in the world. The Communication Value Stream is a department within Canada Post.

[8] To accommodate Mr. St. John, Canada Post did not require him to work in sections other than his own, permitted him to work day shift only, and did not require him to perform any tasks that involved bending, twisting or turning with weight. These modifications were subsequently changed to permit Mr. St. John to work in other sections of the EMPP provided his other restrictions were respected.

[9] On May 27, 2003, the EMPP was experiencing a period of low mail volume. As a result, there was no work for Mr. St. John and other employees in his section to perform; there was however, work to be done in other parts of the plant. A search was undertaken to find work in the EMPP that was within Mr. St. John's restrictions. None was found.

[10] Therefore, at approximately 1:15 p.m., Mr. St. John and four other individuals, all of whom were disabled, were sent home from work. Canada Post management informed the employees that they were being sent home because although there was work to be done in the plant, there was no work that they were capable of doing, given their restrictions. In order to protect the employees from a loss of earnings as a result of being sent home, their sick leave credits were utilized.

[11] On June 13, 2003, the union grieved the matter. The grievance was later settled. The employees' sick leave credits were reimbursed.

[12] Mr. St. John filed the present human rights complaint on June 20, 2003, because he believed that there were outstanding issues that had not been dealt with through the grievance procedure. Specifically, he believed that Canada Post had not changed its practice of sending disabled employees home when there was no work within their restrictions during periods of low mail volume at the EMPP. It is Mr. St. John's view that this practice is discriminatory and he is requesting that the Tribunal issue an order requiring Canada Post to change the practice.

A. Low Mail Volume at the EMPP

[13] Ms. Darlene Swabb, the manager of the Communications Value Stream at the time of the events in this complaint, stated that there are times, primarily in the summer months, when the mail volume in some parts of the EMPP will drop.

[14] Ms. Swabb stated that when the mail volume is low at the EMPP, Canada Post offers incentives to all employees to reduce the staff compliment that day. Above compliment vacation leave or leave without pay are offered. Once it is determined how many employees are willing to take leave and how many employees wish to remain, Canada Post reassesses the work situation and determines how to re-deploy personnel throughout the plant so that productive work can be found for all the remaining employees.

[15] It is at that point that Canada Post may decide to "loan" or re-assign employees from one part of the plant where there is no work to another part of the plant and even to the mail depots in the Edmonton area if there is more work to be done there.

[16] Article 14.19 of the Collective Agreement between the CUPW and Canada Post permits Canada Post to re-assign workers to duties in other parts of the plant when work is not available in their area. Ms. Swabb testified that the re-assignment or loaning of employees to other sections is a way of ensuring that Canada Post employees are engaged in productive work even when mail volume is low.

[17] Ms. Swabb stated that if mail volumes become low half way through a shift, Canada Post will sometimes transport the workers to another facility. But within an hour or two

of the end of the employees' shift it is usually not worth it to transport them to another facility given the cost of transportation and the time involved in explaining the safety procedures and duties. Ms. Swabb stated that it is a judgment call as to whether it makes sense to send workers to another facility to work.

[18] Canada Post's ability to loan employees from one part of the plant to another is subject to a general prohibition against "backfilling". Backfilling occurs when an employee is moved out of his or her assigned duties and is replaced by another employee. For example, if employee A, who has been assigned to sort letter mail, is moved to another section to operate a coding machine, and employee B is assigned to employee A's sortation duties, then backfilling has occurred. Loaning or reassigning employees pursuant to Article 14.19 is different from backfilling in that another worker is not assigned to do the work that was being done by the reassigned employee. Indeed, there is no reason to do so because employees are only loaned to other sections when there is no work to be done in their own section, that is, the service requirements in that section have been met.

[19] Ms. Swabb testified that the Corporation is not permitted to backfill because it violates the seniority provisions of the collective agreement. Employees use their seniority rights to bid on a particular section and schedule. Ms. Swabb stated that the arbitral jurisprudence has established that an employee's bid cannot be modified on the unilateral initiative of Canada Post to backfill a position.

B. CPC's Practice Regarding the Reassignment of Work to Disabled Employees during Periods of Low Mail Volume

[20] In re-assigning work to employees during low mail volume periods, Canada Post must observe the restrictions that have been set out in regard to disabled employees. Disabled employees cannot be asked to do work that is not within their restrictions. Therefore, Canada Post has developed a practice regarding the accommodation of disabled employees when mail volume is low.

[21] Ms. Swabb testified about the practice that was followed in the EMPP in May of 2003. She stated that although it is not written down anywhere, she did have occasion to document the practice in an electronic mail exchange that she had with Mr. John Cherry, a human resource officer with Canada Post. In that e-mail, dated June 29, 2005, Ms. Swabb indicated that the process that was followed in May of 2003 was a combination of current contractual obligations, operational requirements and her understanding of the requirements of the duty to accommodate. In the e-mail, she stated:

All employees who fall under the "Duty to Accommodate" umbrella are discussed with the Local Union. The operation is tasked to ensure that the employees are productive during the course of their day. The following are the steps in which we follow during low mail volume periods:

a) Work Section A is low or has no mail volume to process.
b) Supervisor reviews other sections to see if there is a requirement for more employees to complete the work in that particular section.
c) Employees are loaned to other sections as long as there is extra work to complete and the work requirements are within the employee's physical restrictions.
d) We cannot move employees from section B to section C and "backfill" their job in section B with another employee as this process does not follow contractual obligations.

e) If other sections have work and fit the employee's physical restrictions, but do not require extra staff to complete the work by shift end, then above complement vacation leave and leave without pay is offered to employees throughout the facility, including Section A, in an attempt to provide work the employees from Section A.

f) When employees accept the extra vacation leave or leave without pay, employees are then loaned into the sections, within their restrictions, where there is work.

g) I never encountered a scenario where there is no work in the plant for employees that do not have physical restrictions. The plant provides both light, medium, and heavy physical duties.

h) If the available work is outside the physical restrictions of the modified or PPD employee, then the duty to accommodate is no longer available and the employee is sent home to utilize their sick leave benefits. This is no different as when the employee gets initially injured and no work is available at that time, as a result, they stay at home on sick leave or disability insurance until the Corporation has work for accommodation.

[*sic* throughout]

[22] The e-mail correspondence also noted that the union is notified before a modified/PPD employee is sent home when no work is available within his or her restrictions. The union then, at times, will review the plant status and provide options if any are available.

[23] Ms. Swabb also stated that Medisys, the occupational health and safety consultant for Canada Post, prepares a report outlining the restrictions for each employee who is on modified duties or has been determined to have permanent partial disabilities. A copy of this report is in the employee's personal file and all supervisors have access to this file.

[24] At the hearing, Ms. Swabb confirmed that the practice as outlined above is the one that was followed in May of 2003. Ms. Swabb testified, however, that Canada Post's official policy regarding the accommodation of permanently partially disabled employees, which is found in the Corporate Manual System, prevails over point "d" in the above-cited e-mail correspondence. She testified that the Policy indicates that the rules and provisions of the collective agreement may be disregarded in order to find suitable accommodation for the employee when the Corporation is otherwise unable to accommodate a disabled employee. This means that backfilling is, in fact, permitted if necessary in order to find work for a disabled employee to do during times of low mail volume.

[25] Therefore, Ms. Swabb clearly indicated that the practice that was followed in May 2003, was not in accordance with the official accommodation policy. Ms. Swabb stated that in order to remedy this situation, Canada Post's current practice is to backfill a position if necessary in order to accommodate a disabled employee.

[26] However, in May 2003, Mr. Ken Sagan, who was Mr. St. John's supervisor at the time, followed the practice which did not allow for backfilling. As a result, Mr. Sagan did not identify certain job duties that Mr. St. John was capable of performing on May 27, 2003. Had Mr. Sagan understood that he was permitted to backfill positions if necessary to make work available for Mr. St. John and the other disabled employees, he would have been able to assign Mr. St. John to duties in the mechanized section of the Communication Value Stream at the EMPP. There was work available in the mechanized section that was within Mr. St. John's restrictions which was being performed by non-disabled employees. This work could have been reassigned to Mr. St. John and the other

employees reassigned to work elsewhere in the plant. Mr. St. John then would not have been sent home and his sick leave credits would not have been utilized.

C. The No Lay-Off Rule

[27] Ms. Swabb stated that low mail volume is fairly common at the EMPP. In contrast, it is rare that the EMPP will run out of work altogether for the employees to do. When there is no work at all for employees to perform at the EMPP or in the depots, or it is not cost effective to transport the employees to a facility where there is work, the rule is that Canada Post is not permitted to lay employees off; it must pay them even if there is no work for them to perform.

[28] The witnesses in this case disagreed as to whether it was Article 53 or 14.02 of the collective agreement, or a combination of both that prevented Canada Post from laying off employees when there was no work in the plant for them to perform. Interestingly, there would appear to be no provision in the collective agreement that explicitly sets out Canada Post's commitment that it will not lay employees off when there is no work for them to do.

[29] Article 53.01 of the collective agreement between CUPW and Canada Post provides that there shall be no lay-off of any regular employee, provided the employee agrees to be displaced to another position in accordance with the procedure set out in Article 53. Several witnesses testified that this provision of the collective agreement does not apply to temporary no-work situations; rather, it applies when there is a permanent lack of work and one or more positions must be eliminated.

[30] Article 14.02 of the collective agreement provides that the normal work week for full-time employees is forty hours, eight hours per day, five days per week. This article does not, however, guarantee that an employee will work the full forty hours, or that he or she will be paid forty hours a week, for fifty-two weeks a year. Mr. Darren Steinhoff, union representative for the Prairie Region of CUPW, testified that if, for example, an employee took leave without pay, he or she would not be entitled to insist, pursuant to Article 14.02, that Canada Post must pay his or her regular wages.

[31] Although there was disagreement as to the source of the no lay-off rule in the collective agreement, all of the witnesses, whether testifying on behalf of the Commission or the Respondent, stated that when there is no work to be done whatsoever in the EMPP or in the depots in the Edmonton area, the rule is clear that Canada Post is not permitted to lay employees off. They must be paid their regular wages until more mail appears, other work is found for them to do, or their shifts end.

[32] The evidence presented was also clear that in no-work situations, employees, whether disabled or not, are not required to take sick leave, vacation leave or leave without pay. They are all paid their regular wages.

[33] Mr. Gord Fisher, the Regional Grievance officer for the Prairie Region of CUPW, testifying on behalf of the Commission, also stated that in return for Canada Post's commitment to pay employees even when there is no work for them to do, employees must remain on the premises if required to do so by Canada Post. Mr. Fisher testified that when he is asked by employees why they can't go home when there is no work to do, he responds by saying that they are being paid for eight hours of work. Therefore, they are required to be at the workplace and remain ready to work if the work becomes available.

D. The Practice Regarding Use of Leave Provisions in the Collective Agreement

[34] Ms. Swabb testified that apart from low mail volume situations such as the one that prevailed on May 27, 2003, employees who are sick or otherwise incapacitated are always given the option of using leave without pay, sick leave credits or vacation time or any other applicable form of leave available under the collective agreement.

[35] Paragraph (h) of the practice outlined above does not provide for such a choice to be offered to employees who are being sent home during times of low mail volume. It simply states that employees who are sent home will utilize their sick leave credits or will apply for disability insurance.

[36] Ms. Swabb stated that she did not know whether Mr. St. John had been given a choice of leave options before he was sent home, but she thought maybe not. She stated, however, that if Mr. St. John had asked to access his vacation leave or leave without pay, she would have permitted this, just as she does with other employees who are unable to work.

III. ANALYSIS

[37] Section 10(a) of the *Act* makes it a discriminatory practice to establish or pursue a policy or practice that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

[38] Section 10(b) is different from s. 10(a) in that it makes it a discriminatory practice to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

[39] There is no evidence that Canada Post struck an agreement with the union or anyone else regarding the practice of sending home employees who had PPD's when there was no work for them to do within their restrictions. Therefore, it is section 10(a) of the *Act* that applies in this case.

[40] In human rights cases before this Tribunal, the complainant has the initial burden of establishing a *prima facie* case of discrimination. The Supreme Court of Canada decision in *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at para. 28 ("*O'Malley*") provides the basic guidance for what is required to make out a *prima facie* case. The Court stated that a *prima facie* case is one that covers the allegations made and which, if the allegations are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent (*Dhanjal v. Air Canada*, (1997), 139 F/T.R. 37 at para. 6).

[41] The onus then shifts to the respondent to provide a reasonable explanation that demonstrates either that the alleged discrimination did not occur as alleged or that the conduct was somehow non-discriminatory (*Morris v. Canada (Canadian Armed Forces)* 2005 FCA 154 at para. 26). If a reasonable explanation is provided by the respondent, it is up to the complainant to demonstrate that the explanation is merely a pretext for discrimination (*Basi v. Canadian National Railway Company (No.1)* (1988), 9 C.H.R.R. D/5029 at para. 38474 (C.H.R.T.)).

[42] Conduct may be found to be non-discriminatory if, in accordance with s. 15(1)(*a*) of the *Act*, it is established that it is based on a *bona fide* occupational requirement. Section 15(2) of the *Act* stipulates that for the practice to be considered a *bona fide* occupational requirement, it must be established that accommodation of the individual would impose undue hardship considering health, safety and cost.

A. What was the practice that allegedly violated s. 10(a) of the *Act*?

[43] The evidence established that when mail volume was low in the EMPP in May of 2003, Canada Post followed the practice described by Ms. Swabb in her e-mail correspondence with Mr. John Cherry. If there was no work for employees within a particular section of the plant, an investigation was undertaken to determine if employees were needed in other sections of the plant to complete the work there. This investigation also involved an examination of whether there was work to be done that was within the disabled employees' restrictions. If extra employees were needed in other sections, then the employees would be loaned to those sections. Provided the work was within the disabled employees' restrictions, they were also loaned to other sections. If other sections had work that fit the disabled employee's restrictions, but extra staff was not required to do the work, then above-compliment vacation leave or leave without pay was offered to all employees in the plant in order to make the work available.

[44] However, Canada Post would not backfill positions in order to make work available for disabled employees at the EMPP. That is, Canada Post would not re-assign employees in a section that had work to other duties within the plant in order to make their work available to disabled employees.

[45] If, after an otherwise full investigation of all of the options for re-assignment of disabled employees, it was determined that there was no productive work within the disabled employee's restrictions, he or she was sent home on sick leave.

B. The Allegations

[46] The Commission and the Complainant allege that the practice as set out above denies or tends to deny Mr. St. John and other disabled employees the following "employment opportunities":

a) the opportunity to perform work duties that were within their restrictions and to be paid regular wages for that work;
b) access to the no lay-off rule which provides that even when there is no work to be done, employees will be paid their regular wages; and,
c) the choice of the leave provisions they wished to utilize upon being sent home.

[47] Before dealing with each of the above-noted allegations, I note that the issue of what is meant by the term "employment opportunity" was not argued by the parties. In *Mossop v. Canada (Attorney General)* [1991] 1 F.C. 18, aff'd on other grounds: [1993] 1 S.C.R. 554, Mr. Justice Marceau of the Federal Court of Appeal stated, in *obiter*, that the Tribunal should not neglect the analysis of whether the particular employment benefit which has allegedly been denied constitutes "an employment opportunity" within the meaning of s. 10(a) of the *Act*. None of the parties addressed the question of whether the above-noted allegations involved an "employment opportunity" within the meaning of s. 10(a).

[48] In my view, a legitimate question could be raised about the ambit of this aspect of s. 10 (see: *Mossop, supra; Hay v. Cameco* [1991] C.H.R.D. No. 5 No. T.D. 5/91; *Cramm v. Canadian National Railway* (1998), T.D. 5/98 at paras. 30-35, aff'd on other grounds: (2000), 192 F.T.R. 83 (T.D.); *Stevenson v. Canada (Canadian Human Rights* Commission), [1984] 2 F.C. 691 at p. 721-722). However, given that this issue was not canvassed by the parties, it would not be appropriate for me to analyze the question of whether the above-noted allegations were "employment opportunities" within the meaning of s. 10(a). The Tribunal cannot deal with matters that were never placed before

it, and that were not debated by the parties (see *Bergeron v. Télébec Ltée*., 2005 FC 879 at para. 63; *Beauregard v. Canada Post*, 2005 FC 1384 at paras. 26-27). Therefore, for the purposes of this decision, I will proceed on the assumption that the opportunities that were allegedly denied the Complainant were "employment opportunities" within the meaning of s. 10(a).

(i) The Opportunity to Perform Work and to Be Paid Regular Wages

[49] The evidence established that on May 27, 2003, there was productive work that Mr. St. John was capable of performing that had been assigned to non-disabled employees. Mr. St. John was forbidden from performing this work due to Canada Post's blanket prohibition against backfilling. The no backfilling rule prevented Canada Post from identifying and assigning work to Mr. St. John. Therefore, Mr. St. John was denied the opportunity to complete his shift and to be paid his regular wages. The Respondent's denial of this opportunity was based on the fact that Mr. St. John is disabled.

[50] I find, therefore, that the Commission and Mr. St. John have established a *prima facie* case that when Canada Post sent Mr. St. John and four other disabled workers home early from their shift on May 27, 2003, in accordance with the practice of refusing to backfill positions, Canada Post was engaging in a practice that denied disabled employees an employment opportunity.

The Respondent's Explanation

[51] Canada Post did not offer any reasonable explanation for its *prima facie* discriminatory practice. Moreover, Canada Post did not attempt to justify its practice as a *bona fide* occupational requirement under s. 15(1)(*a*). On the contrary, counsel for Canada Post conceded that, to the extent that the practice in May of 2003 contained a blanket prohibition on backfilling, it failed to allow for the accommodation of disabled workers to the point of undue hardship. In view of the fact that Canada Post's practice in May 2003 precluded any investigation whatsoever of backfilling a position in the appropriate circumstances, it effectively blocked a viable option for accommodating Mr. St. John's disabilities. To that extent, counsel for Canada Post stated in closing argument, the practice at the time was discriminatory.

[52] Given the Respondent's failure to present a reasonable explanation, or establish a justificatory defence under the *Canadian Human Rights Act*, I find that the Commission and Mr. St. John have established that the practice of refusing to consider backfilling in order to find appropriate work for disabled employees denied Mr. St. John an employment opportunity on the basis of a prohibited ground of discrimination.

(ii) Denial of Access to the No Lay-off Rule

[53] Mr. St. John and the Commission argued that the practice of sending disabled workers home when there was no available work within their restrictions was discriminatory not just because it did not allow for the reassignment of disabled workers to work duties within their restrictions, but also because it resulted in the denial of access by disabled employees to Canada Post's no lay-off rule.

[54] Thus, the Commission took the position that the simple removal of the blanket prohibition against backfilling would not remedy the impugned practice. Rather, the practice of sending disabled workers home when there is no work available within their restrictions must be stopped altogether. In accordance with the no lay-off rule, disabled employees must be permitted to remain at work and collect regular wages when they cannot be accommodated.

[55] As noted above, the no lay-off rule applies when there is no work available anywhere in the plant or the mail depots, or where there is work in the depots but it would not be cost effective to send plant workers to another facility. In those cases, Canada Post pays employees their regular wages even though they are not performing productive work.

[56] In the view of the Commission and Mr. St. John, disabled workers for whom no work can be found should be entitled, like able-bodied employees for whom there is no work in the plant, to the benefit of the no lay-off rule. In essence, the argument is that disabled workers who cannot be accommodated are in a comparable position to that of all workers when there is no work at all to be done in the plant. Yet, because of the practice of sending disabled workers home when there is no available work within their restrictions, disabled workers like Mr. St. John are deprived of the benefit of the no lay-off rule. This, it is alleged constitutes a *prima facie* case of discrimination.

[57] Canada Post argued that disabled workers who are sent home after an exhaustive search for alternative work within their restrictions are not "laid-off" and hence, are not denied the benefit of the no lay-off rule. Rather, in situations like the one on May 27, 2003, when mail volume is reduced, there is still work to be done in the plant. The goal then is to find productive work for all employees remaining in the plant. If disabled employees are sent home it is not because there is no work for them; it is because they are not able to do the work that is there to be done. Provided the practice requires that every reasonable effort be made to find alternative work for disabled employees before they are sent home, Canada Post argued, there is no *prima facie* discrimination.

[58] For the following reasons, I agree with the Respondent that the Complainant and the Commission have not established a *prima facie* case of discrimination regarding this allegation.

[59] The evidence in this case was clear that the rule regarding no lay-offs applies only in cases where there was no work whatsoever to be done in the plant or it was not cost efficient to transport the employees to another facility to do the available work. The evidence indicates that when there is no work to be done at Canada Post, able-bodied and disabled workers alike are paid their wages for the entire shift. Neither group is forced to take vacation time, sick leave, leave without pay or any other kind of leave or benefit to protect their income. Thus, in no-work situations all employees, whether disabled or not, are treated alike.

[60] However, in situations of low mail volume, a different set of rules applies. Article 14.19 applies. Employees are loaned out to other sections in accordance with their capabilities. The goal of loaning employees in situations of low mail volume is to ensure that all employees who have chosen to remain at work are performing productive work. In doing so, Canada Post must observe the restrictions that have been assigned to disabled employees. They cannot be asked to do work that is not within their restrictions. This is when the practice, as outlined above, comes into play.

[61] If, after a thorough search of the facility and the depots, it is determined that there is no work that the disabled employees are capable of doing, they are sent home. The work is there, but it is not within the disabled employees' restrictions. They are not deprived of the benefit of the no lay-off rule because that rule does not apply in situations where there is work to be done in other areas of the plant or the depots. When there is work to be done, no one is given the benefit of the no lay-off rule (including the Complainant); when

there is no work to be done in the EMPP or the depots, everybody is given the benefit of the no lay-off rule (including the Complainant). Therefore, in low mail volume situations disabled employees are not deprived of access to the no lay-off rule on the basis of their disabilities, but rather on the basis of the fact that the EMPP is not in a "no work" situation.

[62] The Commission and the Complainant argued however, that the no lay-off rule should apply to disabled workers in low mail volume situations since their disabilities have effectively put them in a no-work situation. It is only because they are disabled that the employees are unable to perform the existing work. Therefore, the refusal to apply the no lay-off rule to disabled employees in low mail volume situations is discriminatory since it deprives them of a mechanism that is available under the collective agreement to ensure that when there is no work, employees will be paid nonetheless.

[63] When this argument is examined more closely, however, it becomes clear that it is not so much the denial of access to the no lay-off rule that is at the root of the complaint. Rather, the real source of the complaint is the Complainant's unequal earning power in a low mail volume situation. The argument then is that the inequality of earning power between disabled employees and non-disabled employees in a low mail volume situation is, in itself, discriminatory.

[64] With respect, this argument is not based on an accurate interpretation of the rights and obligations under the *Canadian Human Rights Act*. Section 10(a), which makes it discriminatory practice to pursue a practice that denies employment opportunities on the basis of a prohibited ground of discrimination, must be interpreted in the light of the general purpose of the *Act*. Section 2 states that the purpose of the *Act* is to give effect to the principle that all individuals should have an equal opportunity to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society.

[65] The *Act* therefore, does not aim to create equality of results, or economic equality, nor does it grant individuals the right to receive wages. Rather, it ensures an equal opportunity for all individuals to participate on an equal footing with other workers in the workplace.

[66] There is, therefore, no general obligation on employers to compensate disabled employees who are not providing services (*Canada (Human Rights Commission) v. Canada (Human Rights Tribunal) ("Dumont-Ferlatte")* (1997), 33 C.H.R.R. D/100 (F.C.T.D.); *Cramm v. Canadian National Railway* (1998), T.D. 5/98, aff'd (2000), 192 F.T.R. 83 (T.D.), *Orillia Nurses' Association v. Orillia Soldiers Memorial Hospital (1999)*, 42 O.R. (3d) 692 (C.A.) at para 27). In *Cramm*, the Review Panel observed that if this were not the case, employees who are away from work because of illness or injury would be entitled to be fully indemnified by their employers for the period they were away, however, long that might be, in order to ensure that they were treated no differently than other employees. The Review Panel stated that this would clearly be an untenable result.

[67] Thus, assuming that Canada Post has been diligent in looking for available work, the inequality in earning power that might arise between disabled employees and non-disabled employees in low mail volume situations is not discriminatory. Disabled employees have been given an "equal opportunity" commensurate with their abilities to fulfill their workplace "duties and obligations". If the inequality of earning power

experienced in a low mail volume situations is not in itself discriminatory, then Canada Post's refusal to top up disabled employees' wages by means of the no lay-off rule in order to eliminate the inequality of earning power cannot be discriminatory.

[68] For all of these reasons, I find that Mr. St. John and the Commission have failed to establish a *prima facie* case that the practice of denying disabled employees the benefit of the no lay-off rule when an exhaustive search reveals that there is no work that they can perform is discriminatory.

(iii) Choice of Leave Provisions

[69] The Commission and Mr. St. John alleged that the impugned practice denies disabled employees the same choice that is provided to other employees who are unable to work due to incapacity, that is, the choice of which leave provision in the collective agreement they wish to access.

[70] On behalf of the Commission, Mr. Darren Steinhoff testified that employees who are incapable of working are normally given a choice as to whether they wish to take paid sick leave, sick leave without pay, leave without pay or vacation leave. Mr. St. John testified that he was not given this choice when he was sent home on May 27, 2003.

[71] The practice, as it was articulated in the electronic mail exchange that Ms. Swabb had with Mr. Cherry, stated:

If the available work is outside the physical restrictions of the modified or PPD employee, then the duty to accommodate is no longer available and **the employee is sent home to utilize their sick leave benefits**. This is no different as when the employee gets initially injured and no work is available at that time, as a result, they stay at home on sick leave or disability insurance until the Corporation has work for accommodation. (emphasis added)

[72] The practice as set out above, does not contemplate offering employees different leave choices.

[73] Mr. St. John testified that on May 27, 2003, he was asked to fill out an application for sick leave, but he refused. Despite his refusal, Canada Post accessed his sick leave account and deducted the appropriate number of credits directly from his account.

[74] Mr. St. John further testified that before he was told that he was going to be sent home, all employees in the plant were given the option of taking leave without pay or vacation leave as part of the general practice when mail volume was low. Mr. St. John stated that whenever such options were presented he refused them because he is a single father and needs the income more than the time off. He also stated that he would not take vacation leave because he uses this leave as a way to manage his stress levels so that his bipolar mood disorder does not flare up.

[75] Mr. St. John argued, however, that when Canada Post told him that he was going to be sent home, he should have been provided with another opportunity to decide which kind of leave he wished to use, since at that point he knew that the option of receiving regular wages was off the table.

[76] Mr. St. John testified that maintaining control over his sick leave credits and deciding when he will use them is particularly important to him. The nature of his disability is such that he requires hospitalization from time to time for periods of up to a month at a time. Therefore, he needs to save his sick leave credits so that he has enough to cover these periods of hospitalization. He worries that when Canada Post dips into his

credits in order to cover periods when there is no work that he can perform at the EMPP, he may not have enough to cover his hospital stays.

[77] The practice in May of 2003 of automatically deducting sick leave credits when an employee was sent home denied Mr. St. John the choice of leave options that was provided to other employees who were unable to work for any reason. This practice had an adverse effect on Mr. St. John's ability to deal with his disability. Therefore, I find that Mr. St. John and the Commission have established a *prima facie* case that the practice with regard to the choice of leave options deprived or tended to deprive Mr. St. John of an employment opportunity.

The Respondent's Explanation

[78] Again, to his credit, counsel for Canada Post conceded that there was no reasonable explanation for failing to offer the choice of leave options to disabled workers who are sent home. He stated that these workers should probably be offered the same choice that is offered to all employees who, because of incapacity are unable to perform productive work.

[79] Ms. Swabb testified that the practice in May 2003 was based on the assumption that if the employees were unable to work, they should be placed on sick leave. She stated that this was because it was thought that use of sick leave credits was the most expedient way of providing income protection for employees like Mr. St. John.

[80] Ms. Swabb stated that Canada Post did not consider whether use of the employees' sick leave credits on their behalf might have a negative impact on their ability to manage their disabilities, as in the case of Mr. St. John.

[81] In view of the fact that Canada Post has not provided a reasonable explanation or justification for refusing to offer a choice of leave to employees who are sent home, I find that the Complainant and the Commission have succeeded in establishing that, to the extent that it does not allow for a choice of leave options, the practice deprived Mr. St. John of an employment opportunity on the basis of his disability.

IV. REMEDY

[82] As a result of the settlement of the section 7 component of the complaint, Mr. St. John withdrew his request for individual remedies under sections 53(2)(*e*) and 53(3). The Commission requested, however, that the Tribunal issue an order pursuant to s. 53(2)(*a*) that Canada Post cease the practice of sending disabled workers home as it was described by Ms. Swabb in the hearing and documented in the electronic mail message from her to Mr. Cherry.

[83] For the reasons provided above, I find that the order requested by the Commission is not appropriate. I have found that the practice was discriminatory only to the extent that it contained a blanket prohibition on backfilling and did not offer employees who were sent home a choice of leave options.

[84] Therefore, in my view the following order is most appropriate in the circumstances:

(i) Canada Post is ordered to cease the application of the blanket prohibition against backfilling that formed part of the practice in May 2003;

(ii) Canada Post is further ordered to offer the same leave options to employees for whom alternative work cannot be found as is offered to other employees who are sent home for reason of incapacity.

"*Signed by*"

Karen A. Jensen

OTTAWA, Ontario
May 15, 2007

PARTIES OF RECORD

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APPEARANCES:	
Jim St. John	For himself
Ceilidh Snider	For the Canadian Human Rights Commission
Zygmunt Machelak	For the Respondent