CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

ROBERT COULTER

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

PUROLATOR COURIER LIMITED

Respondent

REASONS FOR DECISION

2004 CHRT 37

MEMBER: Michel Doucet

2004/12/07

[TRANSLATION]

I. INTRODUCTION

[1] Robert Coulter ("the Complainant") alleged discrimination on the basis of a disability, in that the Respondent, Purolator Courier Ltd. ("Purolator"), refused to accommodate and continue to employ him contrary to section 7 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the "Act").

A. THE FACTS

B. Background on the illness and employment with Purolator

[2] The Complainant is married and has one son, 11 years old. He is the carrier of a disease called myotonic dystrophy. The first symptoms of his disease appeared at age 27 or 28, when he noticed a loss of muscle strength in his hands and difficulty relaxing the muscles after contraction.

[3] In 1990, Dr. Pierre-Paul Noiseux, a neurologist, diagnosed the Complainant with Steinert's myotonic dystrophy, a degenerative change in the motor functions normally appearing in adolescence. Specifically, Steinert's myotonic dystrophy is a disease of the striated muscles that prevents quick and effective contraction and relaxation of all muscles. This disease can sometimes affect the heart muscles. It is a hereditary, congenital disease, meaning that the person is born with it. In society, this disease affects approximately three people in 10,000.

[4] Steinert's myotonic myopathy or dystrophy can remain stable for a long period, or the affected person's condition may deteriorate gradually over the years until he/she can no longer work.

[5] The effect of this disease is seen in the slowness of movements affecting speech, diction, the opening and closing of the eyes and muscle relaxation. With speech, there is dysphonia, which is a variation in language performance caused by an impairment of the muscles that control speech, the muscles involved in breathing, and those of the larynx and pharynx. Thus, the pitch of the voice can change and even become virtually inaudible. A person with dysphonia can be hard to understand.

[6] Among the people afflicted, there are degrees of variation or degrees of severity. The disease can appear at various stages of life. Some individuals may be carriers of the disease at birth and become symptomatic in childhood, while others may not become symptomatic until adulthood. The disease does not affect all individuals with the same severity. There can be slight manifestations of the disease in the 0-to-18 age group, moderate manifestation from 18 to 40 years of age and more serious manifestations in the 40-and-above age group.

[7] According to Dr. Noiseux, the Complainant is moderately affected, meaning that he has difficulty walking - he walks slowly - and he has foot drop on both sides. He has reduced muscle strength during contraction, and relaxation is quite slow. He has also had an operation for cataracts on his eyes.

[8] After diagnosing the Complainant with myopathy, Dr. Noiseux did not see him again until 1997. He said that he has seen him occasionally since 1997, about once a year, but not for treatment because there is no treatment for this disease. Between 1990 and 1997, he observed some deterioration primarily in the pupils and eyes. From 1997 to 2003, he determined that the Complainant was losing about 3% to 4% of his physical ability per year.

[9] In 1991, the Respondent hired the Complainant as a courier (delivery driver). He said that he had told his new employer that he had Steinert's myotonic dystrophy. When he was hired, his supervisor was George Foster. He was the person who conducted his road test and interview. The Complainant was employed with Purolator for 7½ years.

[10] According to the description by Guy Wilson, Purolator's Human Resources District Manager for Quebec, Purolator is a transportation service company that picks up and delivers parcels, in other words, envelopes and small packages. In Quebec, it has three sorting centres and about 20 depots or sub-depots.

[11] According to the Collective Agreement between Purolator and the Teamsters, there are three functional group categories at the depots. A functional group encompasses classifications having relatively similar activities. Within the functional group, there is the "linehaul driver" classification, which includes all drivers of heavy vehicles, which are vehicles with a net mass of five tonnes or more.

[12] Then there are the "couriers," which include "conventional couriers," "utility couriers," "conventional foot couriers" and "utility foot couriers." Quebec does not have the last two classifications. The difference between conventional couriers and utility couriers is that the latter are used as replacements or during peak periods. They do not have dedicated routes, and their schedules may vary

from day to day depending on the company's requirements. They are guaranteed 25 hours of work per week that can be increased with extra hours.

[13] Until 1998, "conventional" and "utility couriers" had to hold a class "5" driver's licence. In February 1998, Purolator raised its driver's licence requirements for these positions to class "3". However, it continued to recognize the qualification of couriers with class "5" before the requirements changed. Also at that time, Purolator adopted a policy whereby employees who had not driven a Purolator vehicle for a year had to re-qualify in order to drive Purolator vehicles. Re-qualification involved taking the written examination and road test again. Examinations were administered by a Purolator driver/instructor or unit manager. According to Mr. Wilson, these measures were adopted to comply with the spirit of the *Act Respecting Owners and Operators of Heavy Vehicles*, S.Q. 1998, c. 40, which the provincial government had just passed.

[14] When he was first hired, the Complainant worked "on call." In 1993, he obtained a permanent position with 32.5 hours a week, but he added that the weeks when he worked only 32.5 hours were rare because he was always willing to do overtime and often worked 45 hours a week. His regular shift would start at 1:00 p.m. and end at 7:30 p.m. During a normal day, he would make deliveries from 1:00 p.m. to 3:00 p.m., and the rest of the day would be devoted to pick-ups. In 1998, he was paid $17.26 an hour.

[15] When performing their duties, couriers must comply with certain standards, such as making a delivery in 6 minutes and a pick-up in 7 minutes. The work also required physical exertion. They are required to handle parcels up to 70 lbs. They must also be able to go up and down ramps and stairs and squat to gather parcels. In his testimony, the Complainant pointed out that, in a normal day, he would have to squat and stand up again between 60 and 80 times to lift packages and parcels.

[16] The Complainant was working out of the Ville Saint-Pierre depot. This depot serves the greater part of downtown Montreal, namely Ste-Catherine, Sherbrooke, De Maisonneuve, René-Lévesque and McGill College streets. This part of downtown Montreal is very busy with many pedestrians. The route includes Old Montreal, with its narrow streets, pedestrians and carriages.

[17] There were two or three places along this route where, to make deliveries or pick up parcels, the courier would have to back the truck up to a loading dock. At other locations, the courier would have to carry parcels on foot. There are very few elevators in the buildings in Old Montreal. Therefore, parcels have to be carried up the stairs. This route is very different and more demanding from a driving perspective than a route in an industrial area where virtually every building has a loading dock.

[18] To do his work, the Complainant drove a "Curb Master" truck about 14 ft. long and between 3,100 and 3,500 lbs. The driver's licence required for this type of truck, at the time the Complainant was hired, was a class 5 licence, in other words a regular driver's licence.

[19] The Complainant testified that during his employment, he had two road tests in addition to the one in 1998, which is of particular relevance in this case. Both were conducted under the supervision of Ferrier Caron, a Purolator driver/instructor whose responsibilities included conducting examinations of new drivers and coordinating the driver training. One of the tests was held in 1997 and the other in the fall of 1998, a few months before the one that would be conducted by George Foster. The Complainant indicated that, in both cases, Mr. Caron did not make any negative comments on his driving of the vehicle.

[20] The Complainant also testified that, after the 1998 road test, he received a "Certificate of Automobile Driving Excellence" [translation]. This certificate states that "Purolator is pleased to award Robert Coulter for two year(s) a certificate of automobile driving excellence in recognition of his accident-free, safe and courteous driving, his responsibility towards others, and the care he takes while driving motor vehicles on public highways and roads" [translation]. The certificate is signed by "Mark Tilden" and "Daniel Quévillon," the operations manager, in Ville Saint-Pierre.

C. The incidents leading to the December 15, 1998 meeting

[21] In his testimony, Guy Wilson stated that, at the beginning of December 1998, Ferrier Caron informed him that he had noticed the Complainant having difficulty driving his vehicle. Mr. Wilson said that he then contacted the operations manager in Ville Saint-Pierre, Daniel Quévillon, to inform him of the situation and suggest a route audit of the Complainant. Mr. Quévillon assigned the task to Mr. Foster. Mr. Caron and Mr. Quévillon were not called upon to testify at the hearing.

[22] On December 7, 1998, George Foster conducted a route audit of the Complainant to evaluate his truck driving. According to George Foster, the goal of such an audit is to establish criteria for the number of stops that may be made within a given period of time on a given route. There are usually two route audits per year for each route. He added that the purpose of these audits is more to evaluate employee productivity than their ability to drive a truck. This testimony is not consistent with the one from Mr. Wilson, who said that the evaluation was requested because of concerns raised by Mr. Caron.

[23] According to the testimony from Paul Océan, the depot's chief union steward, Mr. Foster had told him that he had conducted this route audit because he

had noticed the Complainant taking longer than scheduled to complete his route. Therefore, his testimony appears to confirm Mr. Foster's account.

[24] On December 7, 1998, Mr. Foster accompanied the Complainant on his route. From 1:00 p.m. to 3:00 p.m., the Complainant made his deliveries. He stated that he made about 15 deliveries and finished them around 3:00 p.m. He then proceeded with his usual letter and parcel pick-ups. He acknowledged that, at one particular customer location on Ste-Catherine Street, he received assistance loading boxes into the truck, but stated that he had not asked for this assistance. He added that that particular customer always gave him a hand loading boxes into the truck even though he never asked for help.

[25] The Complainant stated that, during that day, George Foster made no negative comments about his vehicle driving or about safety. They returned to the depot around 7:45 p.m. He added that there had been no accidents or incidents that day.

[26] On the "Driving Certification Form" [translation] that George Foster filled out during the evaluation, he noted two locations during the deliveries where there had been incidents. The first occurred at 2:18 p.m. and reads as follows, "Hit entrance. Hit Dock Hard"; the second occurred at 2:38 p.m. and states "Hit Dock Hard." The evaluation started at 1:00 p.m. and ended at 8:15 p.m.

[27] After this route evaluation, Mr. Foster also prepared a written report on December 15, 1998 because, according to him, "there was a problem with the security of the truck which Mr. Coulter was driving."

[28] In this written report, he noted that the Complainant had had difficulty controlling the steering wheel on several occasions, which, according to him, was due to the fact that he was holding the steering wheel with the palm of his hand instead of his fingers. He then noted the 2:18 p.m. incident at 1250 René-Lévesque, where the Complainant hit a cement post. He added, "On a couple of occasions, pedestrians crossing the street inadvertently, caused him to veer but in a dangerous fashion due to his inability to react quickly." He then added another incident, which he had not entered on his "Driving Certification Form" [translation], that occurred at 1 Place du Canada and, finally, he mentioned the 2:38 p.m. incident at 1800 McGill College. The Complainant hit the loading dock in both cases and, according to Mr. Foster, the impact was so hard that it hurt his back. In neither case was an accident report filled out, as stipulated in Article 25.03 of the Collective Agreement.

[29] Mr. Foster also added that, during the parcel pick-up portion, he was walking at a normal pace and had to keep waiting for the Complainant: "He appears to

have great difficulty walking quickly." As to his ability to carry parcels, this too seemed inadequate in Mr. Foster's estimation. One of the procedures the Complainant used that was not compliant with Purolator's procedure, according to Mr. Foster, was the one the Complainant used to carry parcels from the loading dock to the truck. Instead of carrying a parcel in his arms and going down the stairs, the Complainant would place the parcel on the dock, go down the stairs and then retrieve the parcel from the dock. This was an unproductive method according to Mr. Foster. He noted that, on several occasions, the Complainant dropped parcels and on other occasions asked the customer to help him lift parcels. Regarding this latter case, he said he did not remember where or how often the Complainant had asked for help.

[30] In his conclusion he stated, "While these problems do effect the productivity of the company, the principal reason for these events is that Robert suffers from a degenerative disease called `Steinert's Myotonic Dystrophy' [translation]. I feel that there is both a security and an image problem so evident that I do not feel that Robert is capable of performing the duties of a courier as is required by the company." (My emphasis.) No solid evidence was submitted to the Tribunal regarding the road safety problem that the Complainant presented, other than the minor incidents that Mr. Foster indicated in his written report. No evidence of vehicle damage, if any, or of the extent of the back injuries Mr. Foster sustained. No evidence of customer complaints about the Complainant's work. Everything is based on Mr. Foster's perceptions. When asked whether other route audits of the Complainant had been conducted, Mr. Foster answered that he did not remember. However, since he testified that two route audits per year were done, it is very likely that the Complainant had been through this procedure before. The Complainant testified that Ferrier Caron had conducted such an audit just two months earlier.

[31] Louise Fillion, the Senior Human Resources Advisor, and Marie-Claude Pilon, the Human Resources Advisor at the Ville Saint-Pierre depot at the time, testified having discussed the Complainant's route audit. Ms. Pilon described the problems that the Complainant had experienced on the road. Ms. Fillion said that she had advised her to meet the employee with Mr. Foster and advise him of the observations and to suspend him from the route with pay until he could be assessed by a physician.

[32] On December 14, one week after the route audit, the Complainant, who had continued to perform his normal duties during that time, received a call from his employer to come in in the morning to make deliveries because they were short on drivers. This was a rather surprising request, given the safety problem that the Complainant supposedly presented.

[33] Around 11:30 a.m., after he had finished his deliveries, he was asked to return to the depot. When he arrived, he was told that the supervisor wanted to see him in the conference room. George Foster; Marie-Claude Pilon; Richard Marques, a Ville Saint-Pierre supervisor; and Paul Océan, the Ville Saint-Pierre depot chief union steward, were present. In his testimony, George Foster said that he had no recollection of that meeting, whereas all those testifying who had attended the meeting confirmed that he was there.

[34] During that meeting, Mr. Foster informed the Complainant that his truck driving was unsatisfactory and that his method of carrying parcels was incorrect. He criticized him for hitting two posts and for "rolling" [translation] parcels instead of lifting and carrying them. He then informed him that he would not be returning to his route to do the pick-ups and that a decision about him would be made the following day. He assigned him to inventorying parts in the garage. He was informed that he was to appear for work the next morning at around 8:00 a.m. to continue with the inventory.

D. The December 15, 1998 meeting

[35] On December 15, 1998, another meeting was held to discuss the Complainant's case. In addition to the Complainant, George Foster (he again said he had no recollection of this meeting), Louise Fillion, Richard Marques and Paul Océan were present. According to the Complainant's testimony, George Foster spoke first. Mr. Foster said that the Complainant was a hazard on the road, that he could not hold the steering wheel correctly and that he should not even have a driver's licence.

[36] According to the notes that Marie-Claude Pilon took during this meeting, Mr. Foster had added, "I saw you drop boxes that were not even five pounds. What does the customer think, that you're drunk?" The Complainant was informed that he was relieved from his courier duties with pay until he could receive a neurological assessment.

[37] The Complainant stated that he had been surprised and insulted by Mr. Foster's remarks, particularly since he had had a road test two months earlier and had received no negative comments about his truck driving.

[38] The Complainant said that, during the December 15th meeting, he had indicated that he was prepared to do anything to keep working. He stated having asked whether he could do other duties, such as continuing with the inventory they had asked him to do. Mr. Foster had said no and had added that he had been hired to drive trucks and that since he could not perform his duties, he would have to go home. The Complainant had asked whether he could do "foot courier" duties

and Mr. Foster answered that he could not because of the physical requirements of that position.

[39] Paul Océan, who had also attended the December 15th meeting, added that Mr. Foster had informed the Complainant that the decision he had made was not easy but that he had to terminate his employment because he was no longer qualified for it. Mr. Océan had then asked what would happen with the Complainant. Mr. Foster had answered that there was nothing available for him, and Marie-Claude Pilon had added that the Complainant was going to go on "insurance" [translation] and that after that they would see. Again according to Mr. Océan, the Complainant continued to plead that he was capable of doing his work, and it was then that Mr. Foster had said, "Look we don't want you here, you have a disability."

[40] After the meeting, Mr. Océan informed the Complainant that the union was going to file a grievance challenging Purolator's decision. On December 22, 1998, the union filed a grievance demanding that the employer reinstate the Complainant in his courier position and pay him the wages that he alleged having lost.

[41] After the December 15, 1998 meeting, the Complainant went home. Purolator continued to pay his wages based on 32.5 hours per week.

[42] On December 24, 1998, the Complainant received a letter from Purolator summoning him to an appointment on January 19, 1999 for a medical assessment with Dr. Suzanne Rousseau, a neurologist.

E. The period between January and December 1999

[43] After the December 15, 1998 meeting, the Complainant contacted his neurologist, Dr. Pierre-Paul Noiseux. The neurologist wrote a letter dated January 5, 1999 saying that the Complainant was capable of performing his courier duties, but with the observation that, because of his myopathy, his performance would be slower than that of someone not having this disease.

[44] The Complainant stated that he had submitted a copy of this letter to Marie-Claude Pilon the following day, namely January 6, 1999. According to the Complainant, Ms. Pilon told him that the letter was not enough, that he would have to have a neurological assessment with a Purolator-designated neurologist.

[45] On January 19, 1999, the Complainant arrived for his appointment with Dr. Suzanne Rousseau at "Les neurologues de Maisonneuve" private clinic. It is

interesting that, in her letter of December 22, 1998 addressed to Dr. Rousseau, Marie-Claude Pilon stated that, since 1993, the Complainant had been involved in 19 road accidents, but immediately added that "each of the road accidents was minor, a fender bender while turning, another while backing up ....none of the damage was very costly, but on the whole, it demonstrates Mr. Coulter's lack of `coordination'" [translation]. (My emphasis.) She also indicated that "[t]he manager [Mr. Foster] drew our attention to the fact that Mr. Coulter drove with his wrists [in his report, Mr. Foster wrote that the Complainant drove with the `palm' of his hands] and not with his hands, that he drives bent over almost at 90°, that he would get into the truck head first [I have trouble understanding what these two observations have to do with safety while driving a vehicle]" [translation]. Finally, she requested that Dr. Rousseau assess the Complainant's ability to perform his work: "Is he able to drive a truck safely? Is his hand grip strong enough to hold the steering wheel properly? Has there been any deterioration in his condition since your last examination in July 1997?" [translation]

[46] As Ms. Pilon's letter indicates, Dr. Rousseau had already conducted a neurological examination of the Complainant on July 23, 1997 to determine his neurological condition. Following that examination, she expressed the opinion that the Complainant's muscle weakness, while allowing him to engage in most normal daily activities, was nevertheless "enough to put him in a risk position that I consider excessive in the job he holds. In fact, even though he is probably capable of driving a personal vehicle, his job requires him to drive a heavier vehicle for an eight-hour work period every day, thereby increasing the risk of an accident" [translation]. (My emphasis.)

[47] She then added that the disease progresses slowly and that deterioration and "a heightened risk" [translation] could be expected. Therefore, in 1997 the Respondent was aware of the Complainant's health condition. In cross-examination, Ms. Fillion said that she was unaware of the 1997 assessment until she read about it in Dr Rousseau's report. However, Marie-Claude Pilon was aware of it because she mentioned it in her letter of December 22, 1998.

[48] In her 1997 report, Dr. Rousseau stated, "I therefore believe that the applicant is at risk of an accident because of his myotonic dystrophy. However, in fairness, I suggest that it would probably be preferable to have his actual driving abilities evaluated, for example at the Constance-Lethbridge Centre or the Lucie-Bruneau Rehabilitation Centre (in ergotherapy)" [translation]. (My emphasis.) The Respondent did not follow-up on this recommendation until two years later, specifically May 31, 1999. Between 1997 and 1998, there was no follow-up to this report. The issue of the Complainant's truck-driving safety apparently did not worry Purolator at that time.

[49] After her second examination, Dr. Rousseau sent a report to Purolator on January 26, 1999. In the cover letter, she stressed, as she had in 1997, that the Complainant should undergo an evaluation of his driving abilities with a qualified ergotherapist.

[50] In her 1999 report, she said she had essentially the same opinion as the one she had expressed in the July 1997 report. She added "that the current muscle weakness that is obvious upon objective examination, while allowing him to engage in most normal daily activities, is enough to put him in a risk position that I consider excessive in the job he holds" [translation]. It is interesting that this finding is not necessarily due, according to her report, to the fact that the Complainant was required to drive a heavy truck, but instead to the fact that he had to do so "for an eight-hour shift every day" [translation], which, according to her, "unquestionably increases the risk of an accident" [translation].

[51] She then added that she had not observed any obvious or overall deterioration in his muscle strength since his previous assessment. However, she did explain that, since this is a disease that progresses slowly, "deterioration and therefore a heightened risk could be expected" [translation].

[52] In response to specific questions put to her, Dr. Rousseau concluded that the Complainant was fit for remunerative work, but believed that he was at risk driving a truck safely and holding a full-time driving position. According to her observations, the Complainant is capable of holding a steering wheel with his hands, but the myotonic condition limits his ability to let go of the steering wheel when required to perform repetitive actions. In her view, the Complainant could be "relocated" [translation] to a more suitable work, preferably office work.

[53] Ms. Fillion acknowledged in cross-examination that "relocating" the Complainant was never considered at that time. Purolator preferred instead to follow one of Dr. Rousseau's other recommendations, namely "to conduct an evaluation of actual driving ability through a simulation exercise and an ergotherapy assessment," a recommendation that had been made previously in 1997.

[54] Dr. Noiseux, the expert witness for the Commission and the Complainant, also conducted, at the Commission's request, a neurological assessment of the Complainant on July 28, 2003. He observed that, because of the dysfunction of the striated muscles, the Complainant had slowed muscle function during both contraction and relaxation and that this affected his mouth, tongue, eyes, hands, arms, feet, pelvis, quadriceps and all muscles involved in walking. As a result, with a sustained speed of contraction and slowed relaxation speed and with myotonia in the muscles, the doctor concluded that the Complainant's functioning was slowed.

[55] As to strength, he said that the Complainant could not lift weights exceeding 40 lbs. He explained that it was frequency that was important in this case. The Complainant could lift an object weighing that much, but that if it was too often, he would probably be unable to do so.

[56] He stated that, when squatting, the Complainant could not stand back up again without holding onto furniture or a support pole. In the cerebellum, his movements were slow, but not distorted. He exhibited a bit of "steppage gait" [translation].

[57] In his assessment report, Dr. Noiseux concluded that the Complainant's muscle functioning was slowed throughout his whole body. He was unable to make quick movements because the muscles did not relax fast enough. In his view, the Complainant's medical condition did not prevent him from driving a delivery truck even though his muscle movements were slower than those of someone who does not have this disease. Therefore, according to his assessment, he was fit for his normal duties.

[58] According to Dr. Noiseux, making quick movements was not possible since the muscles did not relax fast enough. He added that there was a manipulation paresis (a weakness). The only muscle not currently affected was the heart. He acknowledged that, because of the Complainant's medical condition, turning a steering wheel quickly using contraction and relaxation movements would be difficult. He agreed that, when turning, the Complainant would be slower with a larger turning radius. He also conceded that the total lack of the Achilles reflex prevented the cautionary or contraction and relaxation preparation movements required for acceleration and deceleration when driving a vehicle. The monosynaptic reflex, an involuntary reflex or automatism, is not there, but Dr. Noiseux immediately added that this does not prevent the Complainant from voluntarily ordering his foot to accelerate or decelerate, but again with some degree of slowness.

[59] He also added that the Complainant's only restrictions were to not lift weights greater than 40 lbs., run, engage in sports and strenuous physical activity or go up stairs quickly.

[60] Other than these restrictions, the Complainant is, in his view, capable of performing all courier duties, albeit slowly. He conceded that his conclusion was based on the job description that the Complainant had provided him, not on an official job description from the Respondent. He said that he had taken into account that the Complainant had performed his work with no problems from 1991 to 1998. In his view, "this patient should have been relocated...to perform some other work that is consistent with his condition" [translation], a

recommendation similar to the one Dr. Rousseau had made in her 1997 and 1999 reports.

[61] Dr. Noiseux said he saw no contradiction between the statement that the Complainant was fit for his duties and the comment that "he should have been relocated" [translation]. When the Complainant had been removed from duty, the Respondent, according to Dr. Noiseux, should have found him some work that was consistent with his condition, in other words work that could be performed with a degree of slowness, such as office work.

[62] Dr. Noiseux also read Dr. Rousseau's two reports in order to prepare his assessment report. He stated that he did not share Dr. Rousseau's findings regarding the risk the Complainant presented in his truck-driving duties. According to him, this conclusion does not flow logically from the premises in the reports. As regards Dr. Noiseux's and Dr. Rousseau's assessments, since Dr. Noiseux was called to testify and was cross-examined and seemed to me to be a credible witness, where there are contradictions in the reports, I tend to favour Dr. Noiseux's findings.

[63] Following Dr. Rousseau's report, the Complainant had another meeting with Louise Fillion and Marie-Claude Pilon, on January 29, 1999. They informed him of the findings in Dr. Rousseau's report and suggested that he submits an application under Purolator's "long-term medical insurance" [translation] plan. Ms. Fillion testified that she had told the Complainant that he had to have the forms filled out soon and attach a copy of a medical report because, from then on Purolator would no longer be paying him. Ms. Fillion also said that she had then informed the Complainant that arrangements would be made for an ergotherapist to conduct an assessment.

[64] The medical insurance form was duly filled out and sent to the insurer, who refused the Complainant's application. The reason for the refusal was that Dr. Drainville, the Complainant's family doctor, indicated in his report that he had not placed the Complainant on sick leave. The Complainant did not appeal the decision. Ms. Fillion testified that, following the insurance company's refusal, she forwarded them a copy of Dr. Rousseau's report, but the decision remained unchanged.

[65] When asked why she had not considered assigning the Complainant to another position when she received Dr. Rousseau's report, Ms. Fillion responded that it was not the Respondent's policy to assign an employee on medical insurance to another position, particularly since, at the time, the Complainant was asking to be reinstated in his courier position.

[66] On February 15, 1999, the Complainant received his "Record of Employment" [translation]. According to this record, Purolator terminated his employment because, in the box indicating the "reason for this record of employment" [translation], the code "M" was entered, meaning "termination" [translation]. According to Marie-Claude Pilon, the use of the code "M" was an error. According to her, on February 16, 1999, instructions were given to "deactivate" [translation] the Complainant because he was no longer being paid. However, she added that he was still considered an employee. On June 21, 1999, after his assessment at the Lucie Bruneau Centre, which we will return to further on, the Complainant received an amended record of employment indicating that the reason was now code "D", meaning "illness or injury" [translation]. I do not doubt Ms. Pilon's testimony, but I do wonder about the time that passed between the error and when it was corrected.

[67] The Complainant stated that, on February 25, 1999, after the first "Record of Employment" [translation] was issued, he filed another grievance. In this grievance, he challenged his termination. Surprisingly, when Purolator received this grievance, it did not correct what it had considered to be an error on the February 15, 1999 record of employment.

[68] After his assessment with Dr. Rousseau, the Complainant was referred to an ergotherapist, France Duhamel, of the Lucie Bruneau Centre. According to Louise Fillion, there were to be two parts to the assessment. The first was a driving evaluation in a car and afterwards, if necessary, a second evaluation would be conducted in a truck. The Lucie Bruneau Centre had suggested this procedure. If there were any problems in the car, there would be no need to proceed with the second evaluation.

[69] The Complainant's car-driving evaluation by the ergotherapist was held on May 31, 1999. The Complainant claimed to be surprised that the evaluation was done with a car having a 5-speed standard transmission and no power steering, whereas for the Respondent, he was required to drive trucks. The evaluation took two and a half hours and followed the Complainant's route.

[70] The ergotherapist's report was submitted on June 7, 1999. The only comments from the Complainant's driving evaluation that could be considered negative are those regarding the turns that were executed slower than normal, according to the evaluator. The evaluator observed a tendency to turn on a slightly wider turning radius and that hairpin turns were a bit more difficult. She also noticed that the manoeuvres for backing up while turning had to be executed at a slower speed because of motor impairment, but that the Complainant backed up satisfactorily using the mirrors. There was no mention of any manoeuvres that could endanger the safety of the Complainant or pedestrians.

[71] From her evaluation, she concluded that the Complainant was able to drive a motor vehicle safely. She suggested that he modify certain manoeuvres to compensate for his motor impairment, for example turning a little more slowly. She also added that the Complainant had functional limitations and suggested adding a ball (or other type of handle) to the steering wheel to make turning easier, due to the number of hours of driving per day.

[72] According to Dr. Noiseux, adding a ball to the steering wheel would be pointless. He pointed out that the Complainant had to perform his driving tasks with both hands, and adding a ball would not make any difference He also said that the Complainant does not have a problem with his grip on the steering wheel. He does not have a muscle contraction problem; his problem is with relaxation.

[73] When asked whether the Complainant could perform all aspects of Purolator's courier duties, Ms. Duhamel answered, "With respect to driving a vehicle, Mr. Coulter is able to carry out all aspects of this part of the job. As for delivering parcels, it is possible that he has some difficulties, but it would be better for him to be examined by an ergotherapist in an occupational fitness assessment" [translation]. This recommendation received no follow-up.

[74] Finally, she stated that, for now and according to the road tests, the Complainant did not present any imminent danger. Despite the use of a car, this conclusion is very different from George Foster's. Mr. Foster had stated that, if it were up to him, the Complainant would not have a driver's licence.

[75] According to Ms. Fillion, Purolator had problems with the "ball" recommendation because installing one would result in a restriction on his driver's licence. In addition, Purolator was still not sure of the Complainant's truck-driving ability. It had therefore been decided to conduct a second road test with a truck. On August 5, 1999, two months after Ms. Duhamel's report was submitted, Ms. Fillion had a conversation about this with Isabelle Fontaine of SécuriMed. However, it was not until October 14, 1999 that SécuriMed sent the Respondent a cost estimate for a road test with a truck. In the end, the truck test did not happen.

[76] According to Purolator's witnesses, there were two reasons why this test never took place. First, apparently it was difficult to find an instructor who was able to conduct this test with a truck. However, no evidence was submitted regarding steps taken in this direction other than the cost estimate submitted by SécuriMed in October 1999. The second reason involves the SAAQ's decision on October 1, 1999 to issue restrictions on the Complainant's driver's licence preventing him from driving a truck.

[77] Around September 1999, the Complainant decided to apply for his class 1 driver's licence so he could, according to him, find another driving job. On October 1, 1999, the Société de l'assurance automobile du Québec notified him in a letter that it would not issue him a class 1 driver's licence because of his disability. However, the Complainant still had the privilege of driving vehicles corresponding to classes 5 and 6A licences, but with some restrictions including a vehicle weight restriction. In accordance with these new restrictions, the Complainant could not drive vehicles over 2,500 kilograms, which eliminated many employment opportunities for him, including with Purolator, whose trucks exceed this weight.

[78] The Complainant stated that he could have appealed the SAAQ's decision, but that he chose not to do so because of Article 11.04(b) of the Collective Agreement. He believed that he could benefit from this article and be moved to another classification. A grievance was filed on December 8, 1999, asking the employer to apply Article 11.04(b).

[79] Jimmy Mansell testified that, after this grievance was filed, he had discussions with Louise Fillion to determine the possibility of moving the Complainant within the company. Note that Article 11.04(b) does not provide for the creation of a new position but rather for moving an employee within the company in accordance with the procedure set out in Article 15.02 of the Collective Agreement. According to Mr. Wilson, this provision did not apply in the Complainant's case because his driver's licence had not been revoked, just "reclassified" [translation].

[80] A meeting involving the Complainant, Mr. Mansell, Mr. Wilson and Ms. Fillion was held on December 22, 1999. During this meeting, the parties discussed the possibility of "relocating" [translation] the Complainant. According to Mr. Wilson, the "marker" [translation] position seemed to be the only operations position suitable for the Complainant because it was one of the few positions not requiring an employee to use much physical effort. Mr. Wilson stated that he was sure the Complainant would be able to perform most of the "marker" [translation] duties and that it was possible that a suitable environment would be found for his situation.

[81] A marker is a person responsible for identifying the destination on parcels to facilitate sorting and directing. The wage is comparable to that of a courier.

[82] Purolator representatives gave the Complainant a book to study the codes for becoming a marker because the Complainant would have to qualify for this position. If he was successful, the employer would then have to perform checks to find a position in accordance with the provisions of the Collective Agreement. According to Mr. Wilson, Purolator had shown the union that it was open to

considering opportunities that may not comply with those provisions. To accomplish that, however, a letter of understanding with the union had to be signed.

[83] The Complainant decided not to apply for the "marker" [translation] position because Mr. Mansell had told him that even if he qualified, he could not be moved to that position since he did not have enough seniority. Mr. Mansell explained that the Complainant could have been moved to a "marker" [translation] position, but that he would not have enough hours to support himself because of his low seniority. However, the Complainant acknowledged that the Respondent had told him during the December 22nd meeting, "If you pass the marker position, we'll see if we can find you a job somewhere."

[84] Purolator and the union never reached a point in their discussion where they contemplated a special agreement for deviating from the Collective Agreement in order to move the Complainant to a "marker" [translation] position.

[85] A second meeting was held on January 7, 2000. Attending this meeting were the Complainant, Jimmy Mansell, Guy Wilson and Louise Fillion. During the meeting, they first discussed the possibility of relocating the Complainant to operations, but according to Ms. Fillion's testimony, the Complainant's medical condition meant that the only operations opportunity was the "marker" [translation] position. Therefore, it was decided to focus on clerical positions.

[86] The Complainant expressed his desire to write the proficiency tests for a support officer position in the RRP (document control centre) and an operator position at the call centre. The Complainant passed the proficiency tests for both positions. These positions were in a different bargaining unit than the one for couriers, namely the Energy and Paperworkers' Union of Canada. In the end, the Complainant chose the call center operator position because the pay was better. The advancement opportunities in this position were also more attractive according to the Complainant.

F. His position at the call centre

[87] The Complainant started working at the call centre on January 25, 2000. His wage was $13.24 an hour.

[88] The Complainant, even though already a Purolator employee, was considered a new employee for the purposes of this position because he had come from a different certification unit. Therefore, he was on probation for 60 days.

[89] Josée Nadon said that she had met with the Complainant on February 8, 2000, to explain, among other things, the regular employee evaluations. As to these evaluations, every month the employees had to take general knowledge tests. Monthly monitoring of employee communications with customers was also conducted and evaluated by supervisors. These evaluations were used to prepare quality reports for each employee.

[90] On his first quality report in February 2000, the Complainant received a mark of 84%. According to Josée Nadon, the Complainant's greatest difficulties during the evaluation were that he spoke too fast, that he failed to confirm some information and that he used the French familiar form of address with customers. In March 2000, the mark on his quality report increased to 94%; in April his mark was 91%. The same comments were made regarding his speech rate, his use of the familiar form of address and the fact that he sometimes failed to confirm information.

[91] The May 2000 quality report was not submitted as evidence and no reason was given for its absence.

[92] According to Ms. Nadon, the average for the Complainant's four call evaluations was 89%. She added that she saw no progress in his results, except between February and March. However, not having the May results, I find it difficult to draw this conclusion.

[93] On the general knowledge tests, his marks were 85% for February 2000, 60% for March 2000 and 85% for April 2000. Note that, for April, only the mark was submitted as evidence because the test documents could not be located. On the May 2000 general knowledge test, the Complainant received a mark of 100%. His four-month average for the exams was 83%.

[94] According to Ms. Nadon, the employer required its employees to achieve 95% on both evaluations. She added that the Complainant's performance evaluations were not very good. She said that she had met with the Complainant on April 26, 2000 and explained to him what the employer expected of him, the objectives he had to achieve and that he had a month to improve. She added that she told him he was on probation and that if he did not meet these expectations, Purolator would terminate his employment.

[95] Ms. Nadon said that, since the Complainant's performance did not improve, she discussed his case with Ms. Fillion, who discussed it with Mr. Wilson. The decision was then made to terminate the Complainant's employment. According to their evaluations, the Complainant did not have the skills required for the call centre operator position.

[96] On June 9, 2000, Josée Nadon met with the Complainant and told him that he was terminated because of the quality of his work.

[97] The Complainant stated that his termination from the call centre was a surprise to him because he was in no way expecting it. He said he was shocked and discouraged by his employer's decision. Since he was on probation and was not permanent, he could not file a grievance. The Respondent never considered relocating him to another position. As Ms. Fillion pointed out, "When someone on probation ... is terminated, relocating him/her to another position is not considered. If he/she doesn't have the skills for a specific duty or position, he/she doesn't have the skills for another one" [translation].

[98] After his termination, the Complainant said that he met with people at Emploi-Québec. Through them, he was accepted into a computer technical support officer course for September 2000 at John Abbott College in Sainte-Anne-de-Bellevue. Emploi-Québec paid for the course.

[99] On September 12, 2000, the Complainant filed a complaint with the Canadian Human Rights Commission. It was also around this time that the Complainant applied for Quebec Pension Plan disability benefits, which he would receive from October 2000 until his return to the labour market after finishing his course at John Abbott College. He said that he had applied for this because of his precarious financial situation. The amounts he received for his studies were not enough to support him and his family.

[100] In mid-September 2000, he started his course at John Abbott College. He successfully passed his final exams. He then took three months of training. He found a job with a company called Gexel Telecom, a call centre providing technical support for high-speed users. In February 2002, he found a new job with another call centre, Sodema Télé-Performance, where his work involved providing customers with technical support. He is still working for this company.

II. ISSUES

The questions I was called upon to decide can be summarized as follows:

(a) Was the Complainant discriminated against by the Respondent, Purolator Courier Ltd., on the basis of a disability?

(b) If the Tribunal answers in the affirmative, did the Respondent contravene section 7 of the *Canadian Human Rights Act* by refusing to accommodate and continue to employ the Complainant?

(c) If the Tribunal answers in the affirmative to the second question, to what remedies is the Complainant entitled?

III. RELEVANT PROVISIONS FROM THE *CANADIAN HUMAN RIGHTS ACT*

The relevant provisions from the *Canadian Human Rights Act* are as follows:

3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

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

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

b) in the course of employment to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

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

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

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

IV. ANALYSIS AND DECISION

[101] In the Supreme Court's decisions in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 [also referred to as "Meiorin"] and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 [also referred to as "Grismer"], the classic distinction between direct and indirect discrimination has been replaced by a unified approach to the adjudication of human rights complaints. Under this unified approach, the initial onus is on a complainant to establish a *prima facie* case of discrimination. A *prima facie* case is one which covers the allegations made and which, if believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent.

[102] Once a *prima facie* case of discrimination has been established, the onus shifts to the respondent to prove, on a balance of probabilities, that the discriminatory standard or policy is a *bona fide* occupational requirement. In order to establish this, the respondent must prove that:

i) it adopted the standard for a purpose or goal that is rationally connected to the function being performed.

ii) it adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose, with no intention of discriminating against the claimant.

iii) the impugned standard is reasonably necessary for the employer to accomplish its purpose, i.e. safe and efficient job performance. The employer must establish that it cannot accommodate the claimant and others adversely affected by the standard without experiencing undue hardship.

[103] The *Meiorin* and *Grismer* cases address parameters for determining whether a defence based on undue hardship has been established. In *Meiorin*, the Supreme Court observed that the use of the word "undue" implies that some hardship is acceptable. It is only "undue" hardship that satisfies this test. An uncompromisingly stringent standard may be ideal from the employer's perspective. Yet, if it is to be justified under human rights legislation, the standard must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship.

[104] The Supreme Court further observed that, in order to prove that a standard is reasonably necessary, a respondent always bears the burden of demonstrating that the standard incorporates every possible accommodation to the point of undue hardship. [See *Grismer, supra*, para. 32.] It is incumbent on the respondent to show that it has considered and reasonably rejected all viable forms of accommodation. The onus is on the respondent to prove that incorporating aspects of individual accommodation within the standard was impossible short of undue hardship. [See *Grismer, supra*, para. 42.]

[105] In the present case, there is no doubt that the Complainant has a physical disability, Steinert's Myotonic Dystrophy, and I do not believe that I need to elaborate further on that. The Respondent had been aware of this physical disability since the Complainant was first hired.

[106] Once the existence of this disability is established, it is incumbent upon the Commission and the Complainant to establish a *prima facie* case of discrimination. Once this is established, the burden shifts to the Respondent to justify its decision based on a *bona fide* occupational requirement.

[107] To determine whether a *prima facie* case has been established, we must return to the evidence surrounding the December 15, 1998 meeting. In the conclusion of the written report he prepared after his road test, George Foster wrote, "While these problems do effect the productivity of the company, the principal reason for these events is that Robert suffers from a degenerative disease called `Steinert's Myotonic Dystrophy' [translation]. I feel that there is both a security and an image problem so evident that I do not feel that Robert is capable of performing the duties of a courier as is required by the company" (My emphasis). It is clear upon reading this excerpt that the reason why Purolator removed the Complainant from his position was his disability. If that were not enough to convince us, we need only refer to the notes taken by Marie-Claude Pilon during the December 15, 1999 meeting, in which she wrote that Mr. Foster had said, "I saw you drop boxes that were not even five pounds. What does the customer think, that you're drunk?"

[108] I am of the view that this evidence alone is sufficient to justify a verdict in the Complainant's favour, in the absence of an answer from the Respondent. Therefore, I find that a *prima facie* case of discrimination has been established and that it is now up to Purolator to justify its decision based on a *bona fide* occupational requirement.

[109] On this point, if we rely on Mr. Wilson's testimony, the goal of Purolator's standard is road safety for its employees, the public and goods. According to him, this concern for road safety arises from the *Act Respecting Owners and Operators of Heavy Vehicles*, approved on June 20, 1998 by the Quebec government. It is

obviously impossible to establish an absolute road safety goal because there is no such thing as a perfect driver. As the Supreme Court observed in *Grismer*, "driving ability varies even among drivers with excellent vision, hearing and reflexes" [translation] [*Grismer*, *supra*, para. 26.]. Therefore, there is a road safety goal that I would describe as "reasonable." Moreover, given the nature of Purolator's services, we can also identify another standard, the goal of which is the effective performance of courier duties.

[110] After determining the nature of Purolator's goals, we must now ask whether it has established, on a balance of probabilities, that these road safety and effectiveness goals are rationally connected with the functions it performs. In other words, whether the goal sought (safety and effectiveness) is rationally connected to the performance of the work in question (delivering parcels). I am of the view that a rational connection has been established. There is an unquestionable connection between road safety and effectiveness and parcel delivery by a private courier service. In fact, companies using vehicles in their business must be conscious of the safety of its employees, the general public and the goods it conveys. Also, to keep its market position, it must ensure that its services are as efficient as possible.

[111] The third issue is whether Purolator's standard is reasonably necessary to the accomplishment of the legitimate goal. To satisfy this requirement, it must demonstrate that, to meet its goals, it is impossible to accommodate individuals like the Complainant without experiencing undue hardship.

[112] In *Meiorin*, the Supreme Court suggests an approach for taking into account various ways of accommodating an individual's abilitities. Beyond personal evaluations for determining whether the individual has the skills and abilities required for the job, the Respondent should consider different ways of performing the work while still achieving the legitimate work-related purpose. Purolator never carried out this evaluation.

[113] As to the danger the Complainant presented while driving a vehicle, the evidence submitted at the hearing seems inconclusive to me. In the "Driving Certification Form" [translation] that George Foster filled out during the route evaluation, he noted only two incidents, and no reports were prepared for either of them.

[114] In her letter of December 22, 1998, addressed to Dr. Rousseau, Marie-Claude Pilon said that, since 1993, the Complainant had been involved in 19 road accidents, but immediately added that "each of the road accidents was minor, a fender bender while turning, another while backing up....none of the damage was very costly" [translation].

[115] In 1997, Dr. Rousseau examined the Complainant for the first time, and she observed that he was "at risk of an accident because of myotonic dystrophy" [translation]. She had suggested that it would probably be preferable to have his actual driving abilities evaluated by an ergotherapist. The issue of the Complainant's truck-driving safety apparently did not worry Purolator at that time since it did not follow up on this recommendation from Dr. Rousseau and did not remove the Complainant from the route.

[116] In her second report in 1999, Dr. Rousseau reproduced her 1997 recommendation and suggested that the Complainant undergo an evaluation of his driving abilities with a qualified ergotherapist. She noted what she described as "numerous" [translation] accidents involving the applicant and added that, "on the whole, these accidents demonstrate the applicant's functional difficulties" [translation]. I have a hard time understanding on what Dr. Rousseau based her conclusions. Since she was not called upon to testify, I have no evidence before me for evaluating the reasons that led her to make this judgement. I have to agree on this point with the opinion from Dr. Noiseux, the Commission's and the Complainant's expert witness, and I find that this conclusion does not flow logically from the premises in Dr. Rousseau's reports.

[117] I also find interesting a further conclusion in Dr. Rousseau's report, where she states "that the current muscle weakness that is obvious upon objective examination, while allowing the applicant to engage in most normal daily activities, is enough to put him in a position of excess risk in the job he holds" [translation]. This finding is not necessarily due, according to her report, to the fact that the Complainant was required to drive a heavy truck, but instead to the fact that he had to do so "for an eight-hour shift every day" [translation], which, according to her, "unquestionably increases the risk of an accident" [translation].

[118] Another interesting observation was her adding that she had not observed any obvious or overall deterioration in the Complainant's muscle strength since her previous assessment. In that case, why did Purolator decide to take action then, whereas, in 1997 when the Complainant's condition was more or less the same, Purolator did not consider the situation to be serious enough to take any action? The only difference, according to Mr. Wilson, was the 1998 passing of the Quebec legislation, but the evidence on this issue is too patchy to make a *bona fide* occupational requirement from it in this case.

[119] Nor is there evidence of any attempt on Purolator's part to determine whether it could not accommodate the Complainant in his courier duties or some other duties without experiencing undue hardship.

[120] In her submissions, counsel for Purolator referred to the decision in *Brimacombe v. Northland Road Services Ltd*, British Columbia Human Rights

Council, issued on June 17, 1998, to justify Purolator's request to remove the Complainant from the route while waiting for his medical examination. However, in *Brimacombe*, once the requested medical certificate was supplied, Northland, the employer, accommodated Brimacombe's disability by assigning him to another position. [See para. 84]. In the case before us, Purolator did not proceed that way, but instead stopped paying the Complainant's wages and suggested that he apply for disability insurance.

[121] As to the Complainant's effectiveness problems, Purolator did not submit to the Tribunal any evidence of customer complaints regarding the Complainant's work. Only George Foster complained about the "image" [translation] the Complainant was projecting, his overly slow way of walking, and the way he conveyed parcels. Here, too, there was no attempt at accommodation, yet Mr. Foster found a way to criticize the Complainant's method of conveying parcels from the loading dock to the truck, which enabled him to "accommodate" his disability.

[122] Has it been demonstrated that it was completely impossible for a person with the disability in question to meet the reasonable objectives of road safety and effectiveness? Has it been demonstrated that any accommodation would impose undue hardship? The answer is obviously no. Purolator's evidence is far from sufficient.

[123] Therefore, I find that Purolator failed to demonstrate satisfactorily that, between December 15, 1998 and January 25, 2000, the Complainant, due to his disability, was unable to meet the road safety and effectiveness objectives without imposing undue hardship and that it therefore had the duty to accommodate the Complainant in the performance of his duties. Sending the Complainant home without pay as of the end of January and suggesting that he apply for disability insurance is definitely not an acceptable form of accommodation.

[124] More than just meagre effort is required from the employer to meet its duty to accommodate. Accommodation is not limited to simply determining whether a complainant is capable of performing his/her current work. The employer is responsible for initiating the accommodation process. [See *Conte v. Rogers Cablesystems Ltd.*, T.D. 4/99, decision rendered on November 10, 1999.]

[125] Counsel for Purolator pointed out several times in her final submissions what she described as the strategy that the union and the Complainant had used during that time, which involved demanding that the Complainant be reinstated in his courier position. I attach little importance to this argument. The Complainant, faced with the difficult situation created by Purolator's decision to remove him from duty, had no choice but to try to protect his rights under the Collective Agreement. Faced with this decision, there was nothing preventing Purolator from

immediately initiating the process for accommodating the Complainant like Mr. Océan and the Complainant had asked for at the December 15th meeting. Recall that, at that time, Mr. Foster's response had been that nothing was available for him and that Marie-Claude Pilon had added that the Complainant was going to go on "insurance" [translation] and that afterwards they would see.

[126] But what about the period between January 2000 and June 2000, during which the Complainant was working at Purolator's call centre? I agree that the duty to accommodate requires that the employer consider alternatives including reorganizing essential duties, moving the employee to another position and even creating a position geared to the employee's condition. Obviously, the concept of "undue hardship" applies to this duty.

[127] The evidence shows that, as of December 1999, Purolator finally made a reasonable effort to accommodate the Complainant. Mr. Wilson testified that he had evaluated the operations positions available and that he had concluded that the most appropriate position for the Complainant was the "marker" [translation] position, since the physical effort required was not as great. He also indicated that Purolator was prepared to consider a special arrangement with the union to find such a position for the Complainant. However, on the advice of his union representative Mr. Mansell, the Complainant decided to turn down this opportunity.

[128] In his final argument, counsel for the Commission raised the point that Purolator had not considered the possibility of accommodating the Complainant in another position such as a sorter or caretaker. I believe that the evidence submitted by Mr. Wilson demonstrates that Purolator considered these possibilities but rejected them because it believed that they would require too much physical effort from the Complainant. Other possibilities were in clerical services and customer service. In the end, the Complainant accepted a call centre position.

[129] However, counsel for the Commission asked us to consider the conditions the Complainant was placed in, in this new position, particularly the fact that he was put on probation for six months. Recall that the duty to accommodate does not require one party to depart significantly from the provisions of the Collective Agreement [*Brimacombe* - para. 75]. In this context, the Complainant had been informed of the conditions that the new position presented, and he accepted them.

[130] Does the duty to accommodate require that the employment relationship be maintained at all costs? The duty to accommodate must be approached with some common sense. When the Complainant accepted a position that completely suited his abilities, he no longer required special accommodation for his limitations. The evidence does not show that the Complainant had any limitations in his operator

position. His problems in this position were essentially performance-related. From then on, he was subject to the same rules and performance evaluation as all the other employees.

[131] I believe that we must be careful not to acknowledge a duty to accommodate that gives a disabled employee the privilege of maintaining an employment relationship for as long as he/she stays with the company. The duty to accommodate must be to allow disabled employees to keep their jobs as long as they are able to perform their duties.

[132] The notion that the duty to accommodate gives employees like the Complainant the right to maintain the employment relationship is contrary to the very existence of the defence of "a *bona fide* occupational requirement." In addition, as Professor Laflamme pointed out in her article "L'obligation d'accommodement confère-t-elle aux personnes handicapées un droit à l'emploi?" (2002) 62 Rev. of B. 125, at page 156, "it could adversely affect true, sustainable integration of the disabled into the labour market" [translation].

[133] Therefore, I find that the Complainant was discriminated against on the basis of a disability, in that Purolator refused to accommodate and continue to employ him contrary to section 7 of the *Canadian Human Rights Act* during the period from December 15, 1998 to January 25, 2000 and that, because of this contravention, he is entitled to the following remedies.

V. REMEDIES

[134] According to paragraph 53(2)(*c*) of the *Act*, at the conclusion of the inquiry the member or panel finding the complaint to be substantiated may make an order to compensate the victim for wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice.

[135] In the Complainant's case, I believe that he is entitled to compensation for the wages he lost between December 15, 1998 and January 25, 2000. According to the evidence submitted at the hearing, the Complainant's last pay day at Purolator was February 5, 1999, and his first day of work at the call centre was January 25, 2000. I understand that, as of October 1999, the Complainant had a restriction on his licence preventing him from driving a truck. However, I find that Purolator still had a duty to accommodate him at that time.

[136] Therefore, I order Purolator to pay to the Complainant the income he lost in wages between February 5, 1999 and January 25, 2000. This amount will be

calculated based on the hourly wage rate provided for in the Collective Agreement in force at the time for a courier with the Complainant's seniority. To reflect the overtime that the Complainant could have worked during that period, I order the wages to be calculated on the basis of 37.5 hours of work per week.

[137] By virtue of the power vested in me by subsection 53(2) e) of the *Act*, I also order the Respondent to pay to the Complainant $5,000 for the pain and suffering caused by its action.

[138] As the Complainant stated during the hearing, he will have to use money from this amount to pay back the income he received from the employment insurance program during that period.

[139] As to the claim for future lost wages, I believe that an order for this is not justified.

[140] I accept the claim for the penalty amount that the Complainant had to pay on February 18, 1999 under his car rental contract, which he had to terminate early. I order the Respondent to reimburse the Complainant the sum of $24,449.82.

[141] Due to lack of evidence, I do not accept the Complainant's claims for medical insurance, mediator fees, the loan he allegedly had to obtain from his father and losses to his pension fund.

[142] By virtue of the powers vested in me by subsection 53(3) of the Act, I order Purolator to pay to the Complainant $7,500 in compensation for the reckless nature of its action. I believe that George Foster's attitude alone, during the December 15, 1998 meeting, warrants this order. I would also add the slowness with which those responsible at Purolator handled this matter, at least until December 1999, and their attitude of believing that it was enough simply to refer the Complainant to disability insurance to fulfill their obligations.

[143] In accordance with subsection 53(4) of the *Act* and Rule 9(12) of the Tribunal's Interim Rules of Procedure, I award the Complainant interest on the aforementioned amounts, at simple interest, calculated on a yearly basis using the current Canada Savings Bond rate. The interest begins accruing on September 12, 2000, the date the Complainant filed a complaint with the Commission.

[144] Purolator is responsible for calculating the amounts as soon as possible and informing the Complainant and the Commission in writing of the details.

[145] I also order Purolator, in consultation with the Commission, to take steps to prevent similar practices in the future.

[146] Finally, I agree to maintain my jurisdiction regarding the fiscal implications of my order relating to the income losses and the implementation of the remedies I ordered above.

Signed by
Michel Doucet

OTTAWA, Ontario
December 7, 2004

PARTIES OF RECORD

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APPEARANCES:	
Robert Coulter	On his own behalf
Giacomo Vigna	For the Canadian Human Rights Commission
Louise Béchamp	For Purolator Courier Limited