Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Pierre Croteau

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian National Railway Company

Respondent

Decision

File No.: T1623/16910
Member: Matthew D. Garfield
Date: May 12, 2014
Citation: 2014 CHRT 16

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I. Introduction

[1] The Complainant, Pierre Croteau started working for Canadian National Railway Company ("CN") in 1992. He progressed his way to the position of train conductor without incident. Unfortunately, as will be discussed in these Reasons for Decision, things changed for the worse in the Fall of 2003. Due to injuries initially and the onslaught of a mental disability, Mr. Croteau has not worked in his pre-injury/illness conductor's job since 2004. Indeed, he has been on unpaid leave since May of 2008.

[2] The relationship between employer and employee quickly deteriorated beginning in 2003-04. The Complainant filed an internal harassment complaint against two supervisors, along with grievances, a complaint to the Privacy Commissioner of Canada, and "duty of fair representation" Canada Labour Code complaints against his union. Mr. Croteau also filed a complaint ("Complaint") with the Canadian Human Rights Commission ("Commission") alleging discrimination and harassment contrary to sections 7 and 14 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, as amended ("*CHRA*") based on the prohibited ground of disability.[1]

II. Background

[3] The Commission referred the Complaint to the Tribunal on December 15, 2010. Some time prior to the commencement of the hearing on January 9, 2012, a motion to limit the scope of the inquiry was filed by CN. Other than on this motion and a subsequent motion for non-suit, the Commission did not participate in the hearing. With regard to the motion to limit the scope of the inquiry, I heard the motion and dismissed it without prejudice to the Respondent's renewing

[1] His Complaint also included the ground of sex (perceived sexual orientation). This ground was investigated by the Commission, but not referred to the Tribunal.

it at the conclusion of the Complainant's case. Mediation also took place before and during the hearing.

[4] This Complaint involved 11 allegations of harassments from 2003-07 and a continuing allegation of failure to accommodate from 2004 to the end of the hearing in 2013. The hearing lasted 36 days, including a motion for non-suit at the conclusion of the Complainant's case. There were many breaks during the hearing to accommodate the panic attacks experienced by the Complainant. This was manageable and the Complainant was able to return. There is a mountain of *viva voce* and documentary evidence (10 binders of exhibits) in which to analyze and consider too. And of course, there are final submissions and books of authorities filed as well.

[5] From the parties' and the witnesses' points of view, memories fade and giving testimony becomes more difficult – some events going back to 2003. From the Tribunal's perspective, it made it more challenging to adjudicate.

III. Use of Initials

[6] Because of the allegations made against certain individuals and/or findings I have made, I have chosen to use initials or letters to identify them rather than their full name, in order to protect privacy interests.

IV. The Complaint

[7] Mr. Croteau claims that his rights under sections 7 and 14 of the *CHRA* were violated by CN based on the ground of disability. Section 7 reads:

> 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,
> based on a prohibited ground of discrimination.

Subsection 14(1) reads:

> It is a discriminatory practice,
> … …
> (c) in matters related to employment,
> to harass an individual on a prohibited ground of discrimination.

[8] The scope of the Complaint, as defined by the Statement of Particulars and further stipulations by the Complainant, through his counsel's final submissions, is as follows:

> The essential substance of Mr. Croteau's case includes allegations of a continuous pattern of harassment and behaviour by the Respondent that started in 2003 and continues to the present. It is Mr. Croteau's contention that he was singled out and harassed, his character falsely impugned and his and his family's privacy invaded in violation of his privacy rights by CN because of the fact that he needed medical leave for a personal medical issue in 2003 and also due to two workplace injuries in 2004. The first injury affected his shoulder and the second his knee. Mr. Croteau further contends that the cumulative effect of the actions of CN caused him to develop anxiety disorder, post traumatic stress disorder, and adjustment disorder for which it has failed to meaningfully comply with its duty to accommodate, which has exacerbated and prolonged his conditions.

V. Context to this Case: The Railway Business

[9] I wish at the beginning of my Reasons to comment on the unique context of the Respondent's business – freight rail. This is a dangerous business when things go wrong. CN's witnesses and the exhibits filed speak to the one issue that looms above all others at CN – SAFETY, of its employees and the public. Derrick Colasimone, the current General Manager, Michigan Division, which includes Sarnia and Windsor, who is very experienced in the railway business, including having been a conductor and locomotive engineer, was eloquent in expressing the nature of the railway business, the importance of safety and the inherent dangers of operating a railway business. This is a highly safety-conscious, regulated industry, for obvious reasons. As he put it: "Safety enables performance" is our motto. If you run a safe railway, everything else is gravy…It's a very unforgiving industry. You don't get hurt 'a bit'." As well, the freight railways often transport dangerous goods. Every rule in the Railway Rules

Book is there for a reason, many of which were promulgated on spilled blood (lessons learned from fatal accidents).

[10] I heard evidence about the extensive regulation of the railway industry and oversight by Transport Canada. And of course, there are tremendous internal rules and monitoring by CN, including regular efficiency testing. Conductors (who are responsible for the overall operation of the train) and engineers (who are responsible for the operation of the locomotive) are deemed safety-critical positions ("SC"), requiring the highest fitness for duty requirements and review. There are other SC positions such as trainmasters, yardmasters, etc. Below those positions in terms of safety designation are safety-sensitive ("SS") jobs (e.g., rover). And below those are positions that are non-SC/SS and which have no safety designation, such as clerical positions.

[11] I also heard evidence about the rules concerning the reporting of injuries and accidents by train crew. More than one CN witness testified about the fact that "no injury is too small" to be reported (which is mandatory, not optional) and investigated. As Mr. Colasimone pointed out, any safety rule violation has the potential to be a fatality. He used the example of "detraining". The train crew member could fall under the train.

[12] I say the foregoing because, as will be seen in these Reasons for Decision, and contrary to the Complainant's submission, "the safety issue" was no "red herring, smoke screen or justification to explain harassment and inability to accommodate" the Complainant on the part of CN. While there is not one *CHRA* for one workplace and another for the rail industry, context is important. As well, "safety" is specifically identified as a factor to consider in assessing whether proposed accommodation would impose "undue hardship" within the meaning of section 15(2) of the *CHRA*. It was quite clear to me after this long hearing that "safety" is an overarching and defining consideration to CN, the railway industry in general and to the government who regulates it.

VI. Motion for Non-Suit

A. The Election Issue

[13] At the conclusion of the Complainant's case, counsel for the Respondent indicated he intended to bring a motion for non-suit. I received written submissions about the issue of whether CN would be put to an election not to call evidence if the motion was heard. I ruled that it would not be required to make an election.

[14] Regarding the issue of the election in a non-suit motion, I have a few comments which I first made in my Reasons for Decision in *Fahmy v. GTAA*, 2008 CHRT 12. First, the Tribunal has the jurisdiction to decide whether an election is required and to hear a motion for non-suit: *Filgueira v. Garfield Container Transport Inc.*, 2006 FC 785. Hughes J. pointed out at para. 22 that the matter of requiring an election is one of procedure, not of law or natural justice: "Tribunals should be allowed reasonable latitude when it comes to procedure…" Second, there are thoughtful decisions at the Tribunal-level both requiring and not requiring an election to be made prior to hearing a motion for non-suit. In both decisions, the respective members agreed that the question should be decided in the circumstances of each case: *Chopra v. Canada (Department of National Health and Welfare)*, [1999] C.H.R.D. No. 5 and *Filgueira*, 2005 CHRT 30.[2] In the civil context, most jurisdictions in Canada do not require an election.[3] While there are sound legal and policy reasons for both determinations, I am more persuaded by the arguments in favour of not requiring an election, for the reasons stated in *Fahmy*.

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[2] There have been Tribunal decisions on this issue post-*Fahmy*: *Wiseman v. Canada (Attorney General)*, 2009 CHRT 19 (no election required) and *Khalifa v. Indian Oil and Gas Canada*, 2009 CHRT 27 (election required).

[3] See J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada*, 2nd ed. Toronto: Butterworths, 1999, at pp. 139-41 for a discussion about the requirement (and lack thereof) of an election in non-suit motions across Canada and in England.

B. The Law With Respect to Non-Suit Motions

[15] While a defendant's resources and the public purse should not be burdened to pay for frivolous or vexatious claims, courts have set a high bar for non-suit motions to succeed. This is done through various means: the *prima facie* test requiring a presumption that a plaintiff's evidence be believed; forcing an election to be made by a defendant (in those jurisdictions that require it); and the awarding of costs against an unsuccessful moving party. The courts have clearly determined that it should not be too easy for a defendant to knock out a lawsuit on a motion for non-suit. Perhaps there is a fear of delay to the process if unsuccessful non-suit motions became the norm. On the other hand, as Adjudicator Wildsmith stated in *Gerin v. IMP Group Ltd.*, [1994] N.S.H.R.B.I.D. No. 4, at para. 21: "…I note that the motion for non-suit is a potential safeguard against abuse."

i. The *Prima Facie* Case in Non-Suit Motions

[16] The test for the moving party is as set out by Hughes J. in *Filgueira*, at paras. 24-25:

> A motion for non-suit requires that the Court or Tribunal consider the evidence from the point of view that, if believed, does it establish at least a *prima facie* case. As stated by McIntyre J. of the Supreme Court of Canada in "*O'Malley" (Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536) at paragraph 28:
>
> > "The complainant in proceedings before human rights tribunals must show a prima facie case of discrimination. A prima facie case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer."
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> The Nova Scotia Court of Appeal in *J.W. Cowie Engineering Ltd. V. Allen* (1982), 26 C.P.C. 241 especially at paragraphs 12 to 17 reviewed the nature and level of evidence sufficient to satisfy the "*prima facie*" test. Jones JA for the majority at paragraph 14 gave a succinct statement of the law:
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> > "It is clear that the mere fact there is some evidence, however weak, does not prevent a trial Judge from granting the motion."

[17] An unsuccessful motion for non-suit does not mean that the plaintiff will win the day at the conclusion of the hearing proper. It simply means this high bar for a preliminary dismissal has not been reached.

[18] It is important to note the different analytical approaches used in the non-suit and "on the merits" determination. As Member Groarke noted in another decision in *Filgueira v. Garfield Container Transport Inc.*, 2005 CHRT 32, at para. 12, in a motion for non-suit there is a different kind of analysis undertaken than that carried out "on the merits" at the end of a hearing. The courts have been quite clear that a trial judge or adjudicator should not do the regular weighing and assessing of evidence, including credibility, that is done in the normal course at the conclusion of a trial or hearing. The trier at the non-suit is measuring the case from a *prima facie* perspective – very superficially, "at first glance or sight" as the Latin term *prima facie* literally means. No in-depth perusing of the evidence or assessment of the credibility of the witnesses is done. Indeed, the bar is cast so high that it is only if the complainant's case is totally unbelievable or far-fetched that it should be disbelieved.[4]

[19] The role of the trial judge in a motion for non-suit was canvassed by the Ontario Court of Appeal in *FL Receivables Trust 2002-A (Administrator of) v. Cobrand Foods Ltd.* (2007), 85 O.R.(3d) 561. The Court held that the trial judge applied the wrong test in granting the non-suit motion "…by going beyond his limited mandate…" on the non-suit motion. Laskin J.A. wrote at paras. 35-36:

> On a non-suit motion, the trial judge undertakes a limited inquiry. Two relevant principles that guide this inquiry are these. First, if a plaintiff puts forward some evidence on all elements of its claim, the judge must dismiss the motion. Second, in assessing whether a plaintiff has made out a *prima facie* case, the judge must assume the evidence to be true and must assign "the most favourable meaning" to evidence capable of giving rise to competing inferences…

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[4] See Adjudicator Ratushny's comment about "far-fetched" testimony in *Abary v. North York Branson Hospital* (1988), 9 C.H.R.R. D/775 (Ont. Bd. Inq.), at para. 38202.

> In other words, on a non-suit motion the trial judge should not determine whether the competing inferences available to the defendant on the evidence rebut the plaintiff's *prima facie* case. The trial judge should make that determination at the end of the trial, not on the non-suit motion. See John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths Canada, 1999) at 139.

I assume that the Court is not suggesting the "assumption of truth" of the evidence includes evidence that is unbelievable in the extreme, or simply preposterous.

[20] I also wish to point out that there is some confusion in the case law about whether the test requires that the evidence *would* or *could* trigger liability. Courts and tribunals have taken both approaches and some avoid the issue altogether. In *Filgueira*, *supra*, Hughes J. quotes with approval at para. 6 the following passage in Sopinka, Lederman and Bryant: "The judge must conclude whether a reasonable trier of fact *could* find in the plaintiff's favour if it believed the evidence given in the trial up to that point." [My italics.] It appears clear that the Supreme Court of Canada has adopted the "*could*" approach, at least in the civil and criminal context, which I have followed here.[5] I see no reason to deviate from it in proceedings before the Tribunal.

C. Reasons for Ruling on the Motion for Non-Suit

[21] On July 19-20, 2012, I heard argument on the motion for non-suit. On October 9, 2012, I advised the parties of the following ruling:

> The motion for non-suit is granted in part; specifically, with respect to allegations #9 (notebook during rules refresher class) and #10 (non-disclosure of surveillance tapes). The motion was disposed of in accordance with the "limited inquiry" paradigm of a non-suit motion: i.e., the trier must assign the most favourable meaning to the Complainant's evidence and not apply the usual assessing and weighing of evidence and credibility that a trier does in the normal course after the close of a hearing. CN may, but is not required to, adduce evidence with respect to the remaining harassment and "failure to accommodate" allegations…

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[5] See Sopinka, Lederman and Bryant, *supra*, at pp. 138-39.

[22] One will see from my ruling above that I essentially gave no reasons. This addresses the commentary in the various cases dealing with elections and non-suits concerning whether reasons should be given, and when and to what extent, where an election is not required. Adjudicator Slotnick in *Potocnik v. Thunder Bay (City)*, [1996] O.H.R.B.I.D. No. 16, at para. 16 cites with approval the approach taken in *Tomen v. O.T.F. (No. 3)*, (1989) 11 C.H.R.R. D/223 not to give reasons. At para. 10, Adjudicator Slotnick states:

> …where an adjudicator does not require an election and ends up rejecting the motion to dismiss the complaint, the proper procedure is to give no reasons. Otherwise, the party that is about to present its evidence would have the advantage of the adjudicator's thoughts on the evidence of the other party.

In *Filgueira*, *supra*, Member Groarke refers to a respondent "taking the temperature" of the Tribunal. I agree that a respondent should not get an advantage from bringing an unsuccessful non-suit motion by getting to "test the waters" of a tribunal. The adjudicator should not give reasons, other than to say whether a *prima facie* test has been made out. That is the approach I have taken in this case.

i. Particular Allegations and Facts in this Non-Suit Motion

[23] I now turn to apply the law on non-suits to the allegations and facts in issue here. CN argues that there is no evidence which, if believed, is capable of supporting a finding of liability against it on either sections 7 or 14 of the *CHRA* based on the prohibited ground of disability. The allegations are based on the Complainant's "subjective beliefs" alone. The Complainant, of course, argues the opposite.

[24] I have carefully examined the evidence, both *viva voce* and documentary, presented by the Complainant and his witnesses. As I indicated in my ruling, I was satisfied evidence existed which, if believed, could trigger liability on nine of the eleven allegations of harassment and the

failure to accommodate allegation.[6] For two of the eleven harassment allegations, I found otherwise and dismissed them.

[25] I have done this analysis on the motion for non-suit following these legal parametres: giving the most favourable interpretation to the Complainant's evidence and that of his witnesses; and not taking into account questions of credibility. I will focus on the two allegations that I non-suited.

[26] **"I am gay" notation in Rules exercise book:** Mr. Croteau alleges that Don Schenk, a supervisor, wrote the phrase "I am gay" in the Complainant's exercise book during a Rules Refresher class on May 31, 2007. There is no dispute that the words were in the book. Terrence Gallagher, Senior Human Resources Manager, investigated and acknowledged the incident to the Complainant in his letter of June 12, 2007. He wrote that the books are normally "re-used from class to class" and inspected before redistribution. "In this case, unfortunately, the writing in the booklet went unnoticed. And we are unable to determine who had written the comment in the booklet," he penned. "I was glad to get it [the letter]," said Mr. Croteau during his testimony. Mr. Gallagher also called him. CN would take steps to make sure that such an incident would never happen again.

[27] Mr. Croteau believes unequivocally that Mr. Schenk wrote the words. Mr. Croteau testified that there were six other employees in the class, but didn't know them. He had reviewed the book (60-80 pages) prior to the class and didn't see those words in it. During the break, he went to the washroom. When he returned, only Mr. Schenk was present. He then noticed the words in question. He concedes that he does not know if anyone else had come into the room when he was absent. He became visibly upset and was having a panic attack.

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[6] I note that "failure to accommodate" is not a "discriminatory practice" under the *CHRA*. The *prima facie* case under subsection 7(b) would be adverse differential treatment.

Mr. Schenk noticed and asked him what was wrong. The Complainant refused to give him the book to inspect and repeated: "I am not gay and I am not quitting."

[28] At the hearing, he testified that even though he was experiencing a "severe" panic attack (at a 9.5-10 level according to Mr. Croteau) during the incident, he nevertheless had a clear recollection of the event and was sure Mr. Schenk had written it. He even suggested a connection between the incident and his perceived "cut in pay" (i.e., that he should be paid a full day's wages even if he worked for less than that). The Complainant acknowledged later that Mr Schenk was not responsible for "pay issues" nor involved in his return-to-work ("RTW") regime, other than teaching this Rules class.

[29] Mr. Croteau also testified that because his brother passed away from AIDS 12 years before the incident, that Sarnia is a small town and everyone was aware of the cause of his brother's death, that he drove a red VW Beetle car which he described as "not a manly car", that he was "off and on" work due to his personal medical issue, he thought that people "assumed he was gay." He conceded that no one at CN ever made a comment, disparaging or otherwise, about these topics, other than the book incident in May 2007.

[30] CN's counsel argues that this harassment allegation is "preposterous" and "bizarre", based solely on the Complainant's subjective belief. In the alternative, even if I were to find that Mr. Schenk had written those words, Mr. Schenk is not a named respondent and CN can avail itself of the section 65 (vicarious liability) provision of the *CHRA*.

[31] Complainant counsel responds that CN has not met the high threshhold for successfully non-suiting this allegation and is conflating the test for non-suit with the usual post-hearing test of evaluating evidence and credibility. The Complainant has met the low hurdle of establishing a *prima facie* basis for this allegation.

[32] With respect to the above evidence and argument, I find that the Complainant has not established a *prima facie* basis for this allegation. The allegation is based solely on the

Complainant's perception and belief, without any evidence even tending to suggest that Mr. Schenk wrote those words.

[33] In the alternative, had I not dismissed this allegation at the non-suit stage, I would have done so on a balance of probabilities at the conclusion of the hearing. There was no adversarial relationship or history between the Complainant and Mr. Schenk. He had no motive to do this. Based on the evidence, Mr. Schenk was surprised at Mr. Croteau's discombobulation and inquired what was wrong and wanted to see the book. Mr. Schenk's Memo to File, written a few days after the incident, showed that he was both surprised and concerned with what had happened and the impact on Mr. Croteau. After the class, he even asked the Complainant if he wanted him (Mr. Schenk) to call him a taxi to go home. I also note that it would have been very risky for him to have written those words, given that Mr. Croteau or the other employees could have walked in at any time during the break.

[34] In addition, there can be no *CHRA* liability here because even if Mr. Schenk did write those words in the book, the evidence establishes that CN pursuant to subsection 65(2) of the *CHRA*: did not "consent" to the act; "exercised all due diligence to prevent the act"; and subsequently exercised all due diligence "to mitigate or avoid the effect thereof." CN has extensive anti-discrimination/harassment policies. Furthermore, it would go through the Rules books before they were re-used in another class. Finally, CN looked into the matter when it became aware of what had happened. Indeed, Mr. Croteau testified that he appreciated Mr. Gallagher's investigation (unsolicited by Mr. Croteau) and response (phone call and letter).

[35] **Non-disclosure of surveillance tapes:** Mr. Croteau alleges that CN failed to provide him with full disclosure with regard to the private investigation surveillance tapes that he had requested. The evidence during the Complainant's case was that CN showed him the March 2004 surveillance tapes during the investigation meeting with Trainmaster Kevin Mau on May 11, 2004. CN offered to provide him with a copy of the tapes, but Mr. Croteau would have to pay a "copy fee" to the third party production company. CN was not profitting from copies being made. Mr. Croteau stated that CN was offering to sell the tapes to "third parties" at a

profit. The evidence in the Complainant's case also showed that his wife, who also testified, was told that she could receive a copy of the tapes for a fee. Mr. Croteau testified that he was not willing to pay for the tapes, given his financial situation and "out of principle". He thought he should have gotten copies for free. He also testified that the "surveillance issues" were part of the "workplace issues" required to be resolved for his healing in order to RTW. This implies that the copy-fee requirement prevented him from getting the tapes and resolving the "surveillance issues" which in turn prevented him from re-integrating into the workplace. I do not accept this.

[36] Reviewing the evidence in the Complainant's case on this allegation under the limited non-suit inquiry and assigning it the most favourable interpretation short of preposterousness or absurdity, I cannot let this allegation continue beyond the non-suit motion stage. I find no nexus or link between the evidence of this allegation to a violation of harassment under section 14 of the *CHRA*.

VII. Reasons for Decision on the Merits: Introduction

[37] Having dismissed the motion for non-suit on nine of the eleven harassment allegations and the adverse, differential treatment (failure to accommodate) allegation, I asked counsel for the Respondent if he wished to call evidence. Understandably, Mr. McFadden answered "yes" and I proceeded to hear CN's witnesses and the brief Reply evidence of the Complainant. What follows are my Reasons for dismissing the Complaint on the merits after a full hearing, putting the witnesses and their testimony, the documentary evidence, etc. under the scrutiny that a trier normally does upon completion of the hearing – *i.e.*, weighing and assessing evidence, including questions of credibility.

VIII. The Law

[38] The initial onus of establishing a *prima facie* case of discrimination under the *CHRA* rests with a complainant or the Commission: *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Limited*, [1985] 2 S.C.R. 536, at para. 28. Once that is established, the burden then shifts to the respondent to establish a justification or explanation for the discriminatory

practice or action: *Canada (A.G.) v. Lambie*, [1996] F.C.J. No. 1695, at para. 16. The respondent's explanation should not figure in the determination of whether the complainant has made out a *prima facie* case of discrimination: *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 2004, at para. 22.

[39] Also relevant to the instant case is the legal principle that: "It is not necessary that discriminatory considerations be the sole reason for the actions in issue in order that the complaint may succeed. It is sufficient that the discrimination be one of the factors for the employer's decision": *Morris v. Canada (Armed Forces)* (2001), 42 C.H.R.R. D/443 (C.H.R.T.), at para. 69.

[40] The case law recognizes the difficulty of proving allegations of discrimination by direct evidence. Discrimination is frequently practised in a very subtle and subterranean manner. Overt discrimination is rare: *Basi v. Canadian National Railway Company (No.1)* (1988), 9 C.H.R.R. D/5029 (C.H.R.T.), at para. 5038. Rather, it is the Tribunal's task to consider all of the circumstances to determine if there is what is described in the *Basi* case as the "subtle scent of discrimination."

[41] The standard of proof in discrimination cases is the ordinary civil standard of the balance of probabilities. According to this standard, discrimination may be inferred where the evidence offered in support of the discrimination renders such an inference more probable than the other possible inferences or hypotheses: *Premakumar v. Air Canada (No. 2)* (2002), 42 C.H.R.R. D/63 (C.H.R.T.), at para. 81.

A. Harassment

[42] Part of this Complaint involves harassment allegations. Section 14 of the *CHRA* provides that it is a discriminatory practice to "harass an individual on a prohibited ground of

discrimination." Although "harassment" is not defined in the *CHRA*, the case law of the courts and human rights tribunals have developed an accepted definition of any words or conduct that is unwelcome or ought to be known to be unwelcome (from an objective standard)[7] based on a prohibited ground. While the case law generally requires repetitious or persistent acts, courts and tribunals have also considered a single, serious event as sufficient to constitute "harassment".[8] If the test were merely from the subjective, personal belief of complainants, it would be very difficult for respondents to mount a successful defence.

[43] Developing a working legal definition of "harassment" outside of the sexual harassment sphere is challenging, since the latter iteration of the test developed first. The vast majority of the case law deals with sexual or racial harassment. That said, there is of course a commonality. It is important to recognize when dealing with allegations of "disability harassment" that it denotes more than just being uncomfortable or offended in the sometimes difficult, sensitive discussions between management and employees. For example, an employer has the right to manage its employees and issues relevant to the operation of its business, such as making, monitoring and enforcing rules in the workplace. The key is to examine whether the conduct has violated the dignity of the employee (e.g., as a result of belittling or degrading treatment by the employer linked to the ground of disability) from an objective perspective such that it has created a hostile or poisoned work environment.[9] In *Day v. Canada Post Corporation*, 2007 CHRT 43, Member Jensen wrote at para. 184:

> The jurisprudence on harassment is premised on the idea that the conduct in issue is, by its nature, extraneous or irrelevant to the legitimate operations and business goals of the employer. Derogatory comments or constant and unnecessary questioning about a disability which are humiliating and demeaning are examples of conduct that is extraneous to the legitimate operation of a workplace.

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[7] *Stadnyk v. Canada (Employment and Immigration Commission)*, 2000 CanLII 15796 (FCA), at para. 11.
[8] The more serious the conduct and its consequences are, the less repetition is necessary; conversely, the less severe the conduct, the more persistence will have to be demonstrated: the "inverse proportionality test": *Canada (Canadian Human Rights Commission) v. Canada (Canadian Armed Forces)* ("*Franke*"), [1999] 3 F.C. 653 (T.D.), at paras. 43 and 45.
[9] See *Hill v. Air Canada*, 2003 CHRT 9.

B. Duty to Accommodate

[44] I have considered the following general legal principles and case law (this is not an exhaustive list):

(1) The duty to accommodate is a multi-party obligation and exercise involving: the employer; the employee; and if applicable, the bargaining agent. I have written in this and other Decisions that the process should resemble a dialogue, not a monologue: *Jeffrey v. Dofasco Inc.*, 2004 HRTO 5, aff'd (2007), 230 OAC 96 (Div. Ct.). The employee may make suggestions as to his/her *preferences*, but must accept a reasonable solution (short of perfection) proposed by the employer addressing his/her *needs*. The outer limits are that of undue hardship, considering health, safety and cost, [10] or synonymously referred to as "reasonable accommodation": *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970. The duty to accommodate is neither absolute nor unlimited: *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, at para. 38;

(2) *Renaud* also states that complainants have a duty to facilitate the accommodation process. In *Hutchinson v. Canada (Minister of the Environment)*, 2003 FCA 133, the Federal Court of Appeal held that where the employer proposes a reasonable accommodation, the complainant cannot insist on his or her preferred alternative accommodation, *even if the alternative would not create undue hardship*;

(3) The goal is to address or accommodate the employee's needs in order that s/he is able to do the essential duties of his/her job. To that end, employers should be "innovative yet practical" and creative when considering how best this may be

[10] See *Adamson v. Air Canada*, 2014 FC 83 (on appeal) where Annis J. held that the undue hardship factors of health, safety and cost are not an exhaustive list.

accomplished in each case: *British Columbia (Public Service Employee Relations Comm.) v. BCGSEU*, [1999] 3 S.C.R. 3 (*"Meiorin")*, at para. 64;

(4) An employer does not have a "make-work" obligation of unproductive work of no value and doesn't have to change the working conditions in a fundamental way. However, it "does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.": *Hydro-Quebec v. Syndicat des employe-e-s de Techniques Professionnelles et al.*, 2008 SCC 43, at paras 16-18;

(5) "Fairness in the accommodation process is not…limited to a fair assessment of the complainant's fitness for duty. Rather, the notion of fairness extends to all facets of the accommodation process…to the point of undue hardship." See *Day v. Canada Post Corporation*, 2007 CHRT 43, at para. 68; *Meiorin*, *supra*.

C. The *Cruden* Case

[45] This case is key to the matter before me. In *Attorney General of Canada v. Cruden et al.*, 2013 FC 520 (appeal recently argued), Mr. Justice Zinn reversed a Decision of the Tribunal: *Cruden v. Canadian International Development Agency and Health Canada*, 2011 CHRT 13. Ms. Cruden had filed a complaint against the parties because she was refused a posting to Afghanistan partly due to a medical assessment that determined that, because of her Type I diabetes, she was medically unfit for that posting.

[46] Although the Tribunal had found that CIDA would have been caused "undue hardship" to accommodate Ms. Cruden's needs in Afghanistan, it nevertheless upheld her complaints against CIDA and Health Canada "based on its finding that there were "procedural shortcomings" in the accommodation process." In other words, in the Tribunal's view, there is a separate procedural component in the duty to accommodate requirement in the *CHRA* that can be independently breached and attract remedies, "even when their employer cannot accommodate the disability

without undue hardship." Zinn J. disagreed with the above interpretation of the *CHRA* and set aside the Tribunal's Decision.

[47] As CN's counsel, Mr. McFadden, correctly points out, there is a divergence in approaches to this issue among the courts (Zinn J.'s Decision in the above case and the Ontario Divisional Court in *ADGA Group Consultants Inc. v. Lane et al.*, 91 O.R. (3d) 649, by human rights tribunals (he cited several Decisions of the Human Rights Tribunal of Ontario, including *Lane* and one from this Tribunal pre-*Cruden* - *Day v. Canada Post Corp.*, 2007 CHRT 43); and by labour arbitrators. One approach is to award compensation for "pain and suffering" or general damages for procedural breaches in the duty to accommodate even when substantively-speaking, the respondent was unable to accommodate the needs of the complainant to the point of undue hardship. The other approach, as determined by Zinn J. in *Cruden*, is to end the inquiry once a determination has been made that the respondent was not able to substantively accommodate the complainant without incurring undue hardship.

[48] This is a very important judgment, now on appeal to the Federal Court of Appeal, and having ramifications well beyond the matter before me. It is the present, *binding* statement of the law and I shall follow and apply it to the instant case.

[49] Mr. Bolter, the Complainant's counsel, submits that *Cruden* stands for, among other things, the proposition that there is no separate procedural right once the Tribunal has found the respondent has met the undue hardship test. However, "procedure" is still important for a couple reasons. In para. 69, Zinn J. stated:

> In paragraph 66 of *Meiorin* [a key Supreme Court of Canada Judgment dealing with the *bona fide* occupational requirement ("BFOR")/duty to accommodate defence]…the Supreme Court is merely stating that a court or tribunal can look at the procedure employed in the accommodation process *as a practical tool* for deciding whether an employer has established – on an evidentiary basis – undue hardship: [he then quotes the passage from the Supreme Court's Judgment]. [My emphasis.]

He then goes on to write at para. 70:

> That is not to say that the procedure used by the employer when considering accommodation cannot have significance in any given case; indeed, in practical terms, if an employer has not engaged in any accommodation analysis or attempts at accommodation at the time a request by an employee is made, *it is likely to be very difficult to satisfy a tribunal on an evidentiary level that it could not have accommodated that employee short of undue hardship*...That is the very real and practical effect of the evidentiary burden to establish a BFOR resting with the employer. [My emphasis.]

In other words, and as CN's counsel submits, an employer may do nothing and have "guessed right". That is no doubt a dangerous legal strategy, but it is open to an employer to do, according to *Cruden*.

[50] The important carve-out or exception to the above regarding a separate procedural duty to accommodate was stated by Zinn J. at para. 79:

> …there is no independent and separate discriminatory practice as set out in the *CHRA* that rests only on the accommodation process or the manner in which a policy or guideline is applied in the accommodation process, *unless of course the process itself or the application of the policy or guideline is conducted in a substantively discriminatory manner*. [My emphasis.]

An example of the above exception might be if a company said, "For physical disability accommodation requests, we will consider them immediately, but for mental disability accommodation ones, we require a criminal record check before we implement any mental disability RTW."

[51] Applying *Cruden* to my Decision, I shall consider the accommodation process used by CN as a practical tool on an evidentiary level to determine whether it has satisfied the Respondent's BFOR/duty to accommodate defence. As well, I will determine whether Zinn J.'s carve-out/exception in para. 79 applies to the case before me.

IX. Findings of Credibility

[52] As an adjudicator, I am mindful that the hearing room is an artificial environment where witnesses react in individual and different ways to the stresses of giving testimony, etc. Accordingly, their demeanour is used as only one *indicium* of credibility. More important is the content of their testimony and what they did, said and wrote (as documentary evidence is important too) in the past events that form the basis of the subject-matter of the Complaint before me, and how their evidence fares in the context of the totality of the evidence presented. I also wish to add that finding a witness credible or not does not mean that everything the witness says or writes is accepted or rejected. I have tried to make sense of all the evidence and make findings of fact about what actually occurred.

[53] In regard to the above, I have done my best to determine whether the truth of the Complainant's (and CN's) story is in "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions." (*Farnya v. Chorny*, [1952] 2 D.L.R. 354 at 357 (B.C.C.A.)).

[54] As in many cases, credibility played an important part here. In my Reasons, I comment on the credibility of various witnesses. Here specifically, I wish to comment mainly (but not exclusively) on the credibility of the most important witness in the hearing: the Complainant. It is the Complainant who has launched this proceeding (along with other internal/external processes) based on a multitude of events over the course of ten years. He bears the initial *prima facie* burden to establish his allegations.

A. The Complainant

[55] The Complainant's credibility was in question throughout the hearing, both in terms of what he said on the stand and what he wrote in emails and letters, and as juxtaposed against other witnesses' evidence. I find that in many instances he was not credible and his evidence not reliable. He was on the stand for several days. The content of many of his answers was unbelievable. The Complainant was frequently evasive in his response to questions posed by

CN's counsel. Mr. Croteau did not answer many questions the first time around; some required repeated re-asking, particularly in cross-examination. Often, he only provided a clear response when I re-phrased counsel's question. This was commented on by Mr. McFadden during the hearing. Sometimes he would contradict himself within the span of minutes, and certainly from the examination-in-chief to the cross-examination. Language was not an issue as Mr. Croteau is fluent in English, both verbal and written. I do not believe that his anxiety related disorders were the problem either. He appeared to understand the questions. When at times he was experiencing panic attacks, either he or I would initiate a break in the proceeding. He was always able to resume.

[56] With regards to my comments above, I wish to stress that I do not believe that Mr. Croteau was intentionally deceiving the Tribunal. For the most part, I have concluded that he truly believes what he has testified to. From his perspective and according to his beliefs, CN harassed him, CN failed to accommodate his disability and return him to work, and he, on the other hand, had fully and with good intentions participated in the RTW process.

[57] I will outline now some of the more stark examples of the evidence affecting his credibility and the reliability of his evidence. It is important to understand that, as Mr. McFadden put it, "the centre piece of unreality" begins with the short conversation of November 19, 2003 between Mr. Croteau and KS, the Risk Management Officer ("RMO"): "Everything after that that happened to him was because [KS] was angry with him for not revealing his personal medical issue in that 2-3 minute conversation." This is the genesis of his "work related issues" and affects his entire case based on his subjective perception of KS (and Superintendent TC) and CN in general. At times, Mr. Croteau seemed paranoid and presented an almost conspiracy-like description of CN – named and unnamed personnel – trying to "ruin" his life. This included the union who initially supported him and on whom he relied to communicate with CN, including acting as a conduit of information and documentation. At one point in his testimony, he indicated that his once-ally, the union, was colluding with CN against him.

[58] The most stark examples of his paranoia or fear of KS were revealed when he dropped these bombshells during his testimony:

(1) Since 2004 and to this day, he has daily thoughts (5-6 times per day) that KS "might kidnap or hurt" his two sons. This is so even though KS, according to her evidence, left Sarnia for Oakville in April 2004 and later the employ of CN in 2007; that he had no contact with her at CN since May 2004; that he has not seen her since his Canadian Railway Office of Arbitration ("CROA") arbitration hearing in July 2008; that she has never threatened to hurt him or his family;

(2) He had fears of travelling to Toronto to this day, as he was afraid of KS possibly going to his home in Sarnia in his absence pretending to be an insurance salesperson in order to harm his family. He pointed out that his wife does not know what she looks like;

(3) To this day, his anxiety symptoms are triggered whenever he encounters someone with the same names as KS, or a woman with blonde hair. I note that he did not attend the hearing when KS testified;

(4) He often thinks of KS when approaching or leaving his home.

[59] I say the above not to denigrate or make light of Mr. Croteau's feelings. He has a profound fear of KS to this day and by extension, a fear of CN in general. This will be canvassed later when discussing whether Mr. Croteau could ever realistically RTW at CN. Dr AB indicated that the above fears could be seen as symptoms of Post Traumatic Stress Disorder ("PTSD"), but that they were not indicative of a Delusional Disorder.

[60] In his testimony, he stated that at his investigation meeting with Kevin Mau and his Union representatives on May 11, 2004, KS (who was not in attendance at the meeting) pushed him in the corridor and not lightly. KS testified that that never happened. Mr. Mau did not testify, and the Complainant did not call the union rep in attendance, Mr. Scarrow, to testify.

The evidence I heard was that Mr. Scarrow is a senior union executive with great experience and no "shrinking violet". Had KS shoved the Complainant as described, Mr. Scarrow or others there would have interceded. There was no documentation of this alleged incident by the union. It commented on less serious matters, but not this. I do not believe that KS shoved Mr. Croteau.

B. Leslie Croteau and Cheryl Hames

[61] Leslie Croteau is the wife of the Complainant. I found her to be a credible witness. She admitted that her knowledge of most of the events at CN is based on what her husband had told her. However, she did attend the March 1, 2005 meeting with Human Resources Manager Terrence Gallagher, her husband and the union. She also had a phone conversation with KS on April 23, 2004. The phone conversation will be dealt with later in these Reasons.

[62] Ms. Croteau also gave evidence about how the events had changed her husband, as a person, husband and father. She also discussed the impact of finding out about the March-April 2004 surveillance of her husband, which included surveillance of her and their two children.

[63] Cheryl Hames is the sister-in-law of the Complainant. She testified about a brief conversation she had also with KS on April 23, 2004. I find her to be a credible witness as well.

C. CN's Witnesses

[64] CN proffered seven witnesses:

(1) KS – formerly employed with CN in different positions, but as a RMO during the 2003-04 incidents in question;

(2) Vanessa Paquet – currently employed with CN, she was a RTW Co-ordinator and RMO during 2004-08;

(3) Terrence Gallagher – currently employed with CN and Human Resources Manager dealing with Mr. Croteau's internal harassment complaint and RTW matters;

(4) Derrick Colasimone – currently holds the senior position of General Manager of CN's Michigan Division (which includes Sarnia);

(5) Suzanne Fusco –currently an Employee Relations Officer for CN and worked in Human Resources in 2004-08;

(6) Kathy Smolynec – the Senior Manager in Occupational Health Services ("OHS") department; and

(7) Laura Waller – RTW Co-ordinator.

[65] I find that CN's witnesses were credible and that their evidence was generally reliable. They answered the questions succinctly and their *viva voce* testimony was generally consistent with the documentary evidence entered, and with the preponderance of the evidence in the case. Some of their witnesses were quite candid, in particular Messrs. Gallagher and Colasimone. I will discuss their evidence under the various subsequent headings in these Reasons.

X. Dr. AB and His Proffered Expert Evidence

[66] The Complainant has seen Dr. AB, an experienced psychologist for approximately 150 hours worth of sessions since August 2004. Beyond a doubt, of the all the health care professionals who have seen Mr. Croteau, Dr. AB has had the most lengthy, extensive relationship with the Complainant.

[67] The Complainant sought to have Dr. AB qualified to give expert opinion evidence about the following: "anxiety disorder; PTSD; adjustment disorder; panic attacks and the impact of those on individuals and specifically Mr. Croteau; causation of these disorders; ability of people with PTSD to RTW generally and specifically Mr. Croteau; what things need to be put in place for a RTW for the Complainant; [and to] comment on Dr. Chad's IMEs."

[68] CN's counsel opposed the request to have Dr. AB qualified as an expert. He did not oppose his giving testimony as the Complainant's treating psychologist, although he submits that the Tribunal should be "reluctant to rely on anything he said. CN's reasons for its position are:

> i. Dr. [AB]'s diagnosis of Mr. Croteau is by his own admission at odds with the requirements of the DSM-IV [11] and with the prevailing opinion in the psychiatric/psychological [sic] professional (at least with respect to Post-Traumatic Stress Disorder);
>
> ii. his professional relationship with Mr. Croteau has crossed the line into an unrestricted advocacy on behalf of Mr. Croteau, and he does not have the objectivity that adjudicators require of medical professionals; and
>
> iii. Dr. [AB] in his evidence refused to change his view or opinion even when he became aware that the facts upon which he originally formed the opinion were different from what he understood.

[69] Based on the second and third submission above, I decline to qualify Dr. AB to give expert opinion evidence on the matters requested. However, his evidence as Mr. Croteau's treating psychologist will be considered and given appropriate weight.

[70] In coming to this conclusion, I have reviewed the leading Supreme Court of Canada Judgment dealing with the nature and admissibility of expert evidence – *R. v. Mohan*, [1994] 2 S.C.R. 9 – and its four criteria. Interestingly, the criteria do not include a stand-alone requirement of independence and impartiality. However, Canadian courts have inferred the same: see for example *R. v. Abbey*, 2009 ONCA 624, at para. 87, footnote 8, leave to appeal denied [2010], S.C.C.A. No. 125; and *Es-Sayyid v. Canada (Public Safety and Emergency Preparedness)*, 2012 FCA 59, at para. 43, leave to appeal denied [2012] S.C.C.A. No. 116.

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[11] The *Diagnostic and Statistical Manual of Mental Disorders, 4th edition*, published by the American Psychiatric Association is the standard classification of mental disorders used by mental health professionals in the United States and Canada. The DSM-V was published in May/June 2013.

[71] There is no question, in my view, that Dr. AB is a knowledgeable, articulate psychologist. Notwithstanding the absence of academic writings and presentations at conferences which usually find their way into an expert's *curriculum vitae*, this did not concern me in terms of his ability to provide expert opinion evidence on the matters sought. He has significant experience in these matters. He has been in private practice since 2000 and also worked in a hospital. He indicated that he has done over 1,000 assessments, primarily in the context of motor vehicle accidents, with at least one-third of them dealing with RTW issues. Much of his work comes from insurers and the Workplace Safety and Insurance Board. He said that he doesn't usually see his clients post-IME.

[72] My concerns are with items 2 and 3 of CN counsel's submissions. I do find that Dr. AB has "crossed the line" into the realm of an advocate, and falling short of the degree of objectivity required of an expert. Perhaps this was unavoidable or even desirable from a clinical standpoint. In cross-examination, Dr. AB agreed that to build the relationship with a patient and Mr. Croteau specifically, it is important that he believes that you believe what he says. Dr. AB has played a significant role in Mr. Croteau's pathway to healing, as Mr. Croteau attested to.

[73] Mr. Croteau has testified that he hopes one day to be "friends" with Dr. AB, when he won't need his professional assistance. Notably, at the December 3, 2008 meeting to discuss new allegations of harassment with Ms. Fusco, Mr. Schenk, Mr. Croteau and Dr. AB, the latter was introduced as Mr. Croteau's "friend" who was there to assist him. This was notwithstanding that Dr. AB had, since 2004, been treating Mr. Croteau and whose fees were paid initially by the insurer and then by CN. Not only did Mr. Croteau introduce him as his "friend", not once indicating he was his psychologist, but Dr. AB did not correct him and failed to disclose his professional capacity and role.

[74] There were times in Dr. AB's testimony that he came across more as an advocate than an expert. For example, during his cross-examination about Mr. Croteau's perception of CN and the workplace conflict, when invited to admit that sometimes both parties are blameworthy, he replied in the affirmative. However, when it was then put to him: "Is it possible that he

[Mr. Croteau] is mistaken, that he was partially or wholly to blame?" the witness replied, "Yes, it's possible theoretically, but not likely, from having known him for over 100 hours, as a bystander who wasn't there, it didn't sound like he played a large role in the incidents…and should [not] be blamed for it."

[75] I also agree with CN's counsel that there were several examples where Dr. AB refused to change his evidence involving his opinion of the Complainant's conduct even when confronted with powerful evidence to the contrary. Mr. McFadden argues that "no contrary facts matter" to Dr. AB when it comes to Mr. Croteau, thus showing the lack of objectivity and neutrality required of an expert giving evidence before a court or tribunal. Counsel raised the issue with Dr. AB about his client's less-than-honest withholding of key information to him in April 2008. Following Dr. Chad's third IME and recommendations, CN proposed a Transition Work Plan ("TWP") involving shadowing the night rover. Mr. Croteau objected indicating *inter alia* that he was concerned that he would be shadowing a different rover each shift and that they would be privy to confidential information about his medical condition. Ms. Paquet wrote back to Mr. Croteau on April 25, 2008 indicating that would not be so. But Mr. Croteau failed to disclose this key information to Dr. AB when they met. He had Dr. AB write a letter to CN reiterating his original concerns on April 30, 2008.

[76] With regards to the above issue, during cross-examination, Mr. McFadden put it to Dr. AB that the Complainant had been "dishonest" with him. Dr. AB replied, "I can't account for why he said that to me." Counsel then asked if he was not concerned that he was "being used as a dupe" by Mr. Croteau. The witness paused and finally answered: "Yes, there is obviously a contradiction here and I can't account for it." Counsel then said that he was "being used" to which the witness replied that he was not concerned that he was being used "in an improper fashion because I've known him for over eight years. I assume there is some explanation." Mr. McFadden then suggested to the witness that it wouldn't be "highly ethical conduct" for Mr. Croteau to use Dr. AB "to propagate an untruth" on CN. Dr. AB responded: "If he did do that, yes, that would concern me." He then appeared evasive and nervous and talked about this issue in an abstract, almost philosophical way in the context of being in a "professional

relationship" and not having any reason to doubt that person. He said that he would "give people the benefit of the doubt. There must be an explanation here...I don't know what happened here, but I assume there's some sort of explanation."

[77] As well, there is the perception of a lack of objectivity and a tone of advocacy in Dr. AB's summary of his work with the Complainant dated November 4, 2011. On page 4, he uses phrases such as "when the plug was pulled on the [RTW] program", and "when CN closed the door with respect to the [RTW] plan." In another instance, on page 2, he described Mr. Croteau as being engaged in "A fight to obtain justice" with regards to CN "over the last seven years". On page 5, he concludes that his client would have succeeded "if he had only been given a proper chance to succeed." Dr. AB made other references in his testimony and letter to "appropriate supports" and "with proper support". The totality of these comments would leave one with the impression that Dr. AB is advocating on behalf of Mr. Croteau and attributing fault or blame to CN.

[78] I also note that there is the perception of a pecuniary interest: i.e., the Complainant is claiming compensation in this hearing for past unpaid and future sessions with Dr. AB. The Complainant indicated that Dr. AB was only seeking payment for past sessions if the Complainant receives compensation for them as a result of an Order in this proceeding.

[79] Based on the foregoing, I conclude that Dr. AB does not meet the requirements of an expert witness. As such, I did not consider his evidence as expert opinion evidence. However, his evidence as Mr. Croteau's treating psychologist, including Dr. AB's diagnosis and treatment of Mr. Croteau, the psychologist's interaction with CN in meetings, telephone conversations, correspondence, etc. with respect to Mr. Croteau will be given due consideration and weight.

XI. The Harassment Allegations

[80] I will deal now with the nine remaining harassment allegations of the Complainant and the issues that flow from them, under section 14 of the *CHRA*. As indicated by Mr. Bolter in argument and as demonstrated by the Complainant's testimony and documents, and

understandably so, Mr. Croteau sometimes used the term "harassment" (in the generic, plain meaning, layperson's use of the word) to include not just "harassment" as we would define it in *CHRA* proceedings, but also as denoting a failure to accommodate his disability needs to the point of undue hardship in his RTW at CN. These nine harassment allegations were the ones specifically advanced at the hearing by the Complainant and argued by his counsel (and defended and argued by CN).

A. Allegation #1: November 19, 2003 Conversation Between KS and the Complainant

[81] The Complainant alleges that on or about November 19, 2003, he went to KS's office to get a Short Term Disability ("STD") form for his personal medical issue. He claims that she insisted on knowing what the personal medical issue was and was rude and persistent and got increasingly angry when he would not tell her. He also claims that she slammed her drawer. Her office door was apparently open during this exchange which lasted approximately 5-10 minutes. He ended up leaving as KS was not the person who had the non-Workplace Safety and Insurance Board ("WSIB"), non-work related leave forms and his reason-for-leave was not work related. He never disclosed his personal medical issue to her.

[82] KS testified and denied the allegation. She was surprised and clearly upset when many months later she was presented with his internal harassment complaint regarding this event. She said that she had no previous conflict with Mr. Croteau and had previously been involved with an accommodation for him as a result of a taxi accident injury. The conversation was brief, a few minutes. Her door was open, so if there had been such an altercation, others would have heard.

[83] KS joined CN in 1985. She occupied various field positions, including trainmaster, conductor and engineer, before she joined management. KS made it clear that, as an experienced manager and RMO at the time, she was trained not to inquire into employee's personal medical issues, that there was a "brick wall" between Medisys/OHS and "field people" like her when it came to employee's personal medical information. She averred that she has a "recollection" of the meeting, some nine years later: "Maybe five minutes in my office. He came in and indicated

he needed paper work for an absence. I needed to confirm if it was work related or not because the process [and the form] would be completely different." If it was work related KS would deal with it; otherwise (for personal injury/illness) the employee would deal with Debbie Robinson.

[84] In her Statement given to CN's Human Resources department looking into the internal harassment complaint, she wrote:

> I remember Pierre coming to my office about a personal condition. I also remember asking him if it was work related and he had stated that it wasn't so I sent him to Debbie for the info on the new forms…The only conversation with Pierre about his injury was whether it was work related or not. Our follow-up is very different depending on whether we are dealing with a personal injury or a work-related injury.
>
> … …
>
> One of the first things I learned as a RMO was that if an employee had a personal condition that I was not entitled to know anything about it. I would never ask him those personal questions knowing that it was not my business to know…I think his visit lasted less than a minute.

[85] KS testified that she would "never" ask an employee the nature of his/her illness: "We knew it was not our business and not allowed to ask." She stated that she had dealt with 500 employees in similar situations looking for forms and would ask if the matter was work related or not: "I never crossed that line, wouldn't, it wouldn't benefit me, there would be no reason to ask for it." She said that none of the 500 said employees had ever alleged that she made such inappropriate inquiries, other than Mr. Croteau.

[86] This is a classic "he said-she said" situation. There was no other evidence presented about this event. However, Mr. Croteau's wife and sister-in-law testified about phone conversations they had on April 23, 2004 with KS where she was inquiring the whereabouts of Mr. Croteau. Ms. Croteau testified that KS was not only rude and aggressive, but revealed personal medical information and wanted to know "what's wrong with him now". I find that Ms. Croteau and Ms. Hames were credible witnesses. It is *possible* that on November 19, 2003

KS was being nosey, curious to know the personal medical reason for the form-request and asked Mr. Croteau to disclose it. However, based on my credibility and reliability concerns regarding the Complainant, and having heard KS's testimony, on a balance of probabilities I find that it is more likely that she was aggressive, assertive, impatient or even rude during that in-office conversation with Mr. Croteau, including when ascertaining whether the illness was work related or not, but did not ask him to disclose the personal medical issue. This clearly does not trigger liability under section 14 of the *CHRA*. I also wish to add that throughout the hearing Mr. Croteau commented about people's manners, so-and-so "was rude", etc. Manners and proper etiquette are important to Mr. Croteau, and understandably so. This may have informed his perception of the incident.

[87] In the alternative, even if she did ask the nature of his illness (other than whether it was work related or not), such an inquiry would not constitute harassment based on disability under the *CHRA* for the following reasons: such an inquiry, which information was not provided by Mr. Croteau, would be more of an attempted breach of privacy. This would not qualify as "unwelcome conduct" of such a singular, significant nature or repetitious, persistent nature based on the prohibited ground of disability or created a poisoned work environment, on the objective-based standard.

[88] This is a significant allegation as it is the genesis, according to the Complainant, for what followed, both in terms of harassment and the failure to properly accommodate him based on his disability. As Complainant counsel, Mr. Bolter stated: It was the turning point in his relationship with [KS]" and I would add, with CN too. While the later disclosure of the video surveillance exacerbated the situation, this meeting set off the deterioration of his work-life.

[89] Mr. McFadden described the Complainant's allegation about the November 19, 2003 incident as "the centre piece of unreality. He actually believes this and everything after November 2003 that happened to him…was because [KS] was angry at him for not revealing his personal medical issue in this 2-3 minute conversation around November 19, 2003." Counsel also submits: "It has an echo effect: in every case, he comes back to this conversation. It

established an animus or vendetta by [KS] against him that infects the rest of CN. And it carries through to 2007 when she was long gone."

[90] It is clear from Mr. Croteau's testimony that the genesis of his Complaint is this November 19, 2003 conversation in KS's office. Indeed, he claimed events thereafter, including with other CN managers, were linked to, or influenced by, KS: a conspiracy-like attempt or vendetta to harass and terminate his employment from CN. At one point in his evidence, he stated that four employees had told him that KS was out to get him fired. When asked to name them in the hearing, he replied that he only knew the name of one of the four employees. However, he would not name that one employee for fear of retribution against that employee by CN. For fairness and natural justice reasons, I place no weight on this evidence.

B. Allegation #2: Mau investigation meeting on December 15, 2003

[91] Trainmaster Kevin Mau convened an investigation meeting on December 15, 2003 regarding Mr. Croteau's failure to "protect his assignments" in relation to two missed calls. This was in violation of CN terminal policy. This was almost one month after the November 19th incident in KS's office. A union representative was present for part of the meeting. The Complainant alleges that KS was responsible for Mr. Mau's calling him in for an investigation. This was not the first investigation meeting that the Complainant had attended. He acknowledged the policy (can't miss more than 1/28 shifts) and practice at CN. Mr. Croteau also testified that CN was "very intense" about such attendance matters at this time with all their employees. He has no evidence that Mr. Mau either knew about his personal medical issue or the November 19th conversation in KS's office or even that the two of them had spoken about it or about Mr. Croteau. In particular, Mr. Croteau viewed as "harassment" the fact that Mr. Mau told him that he *could* be fired for lack of attendance.

[92] Other than Mr. Croteau's personal belief, there is no evidence to suggest that this investigation meeting was linked to his conversation with KS on November 19, 2003, which I have found did not breach the *CHRA*. The December 15, 2003 investigation was per a standard, non-discriminatory CN policy. As for Mr. Mau's comment that he *could* be fired for lack of

attendance, I find that this comment was essentially made in line with best practices which require managers to keep their employees informed of the consequences of breaches of (non-discriminatory) policies, in this case dealing with attendance. There was no animus or threat, express or implied, here. I note that Mr. Mau did not testify. I had indicated during case management part-way through the hearing that I did not need Mr. McFadden to call either Mr. Mau or TC to the stand, but that he was free to do so if he wished. He chose not to call them. Mr. Bolter also could have chosen to call them as witnesses, but did not do so.

C. Allegation #3: January 8, 2004 shoulder injury re-enactment

[93] On January 8, 2004, Mr. Croteau sustained a shoulder injury while pulling a hand- brake. He alleges that KS improperly required him to participate in an immediate re-enactment of the injury and "interrogated" him. Mr. Croteau acknowledged in testimony that CN's policy was to do a re-enactment, however slight the injury or accident, as quickly as possible after the incident. This was part of CN's safety-first ethos.

[94] Mr. Croteau testified the total time involved in the re-enactment process was at least several hours. He did acknowledge that the actual re-enactment itself lasted only five minutes. What was peculiar to him was that this was the first time, to his knowledge, that KS was involved in the re-enactment process. Mr. Croteau also objected to the fact that his wife was left waiting in the car. He also testified that KS said that he hadn't pulled the brake properly and that Mr. Brownlee had said, "Don't go there [K]." He averred that he began to feel "targeted" by CN at this point and called his union.

[95] I find no *CHRA* harassment violation here. KS was following standard CN policy when an injury was reported. Her involvement in re-enactments was an important part of her job as a RMO. It had no connection to her November 19, 2003 conversation with Mr. Croteau (which I already have found to be non-discriminatory). The re-enactment took a mere five minutes. As for the wait-time, Mr. Croteau had gone home and realized that he hadn't handed in his injury/accident occurrence report so had to return to the terminal. KS, Ms. Paquet, Mr. Colasimone and Ms. Fusco also testified about the policy and practice: that CN wants to do

re-enactments in *every case if possible* and as soon as possible after the event. No injury is too minor for a re-enactment to be done, and on the same train and equipment if possible. As well, Paul Sutor who attended had not complained about the re-enactment.

[96] Regarding, Mr. Brownlee's comment: "Don't go there [K]", without more, I cannot determine if there was any negative, discriminatory taint to it. Furthermore, there was no discipline imposed in relation to Mr. Croteau's operation of the hand-brake, and no Q and A investigation ordered. Had KS wanted to target or get Mr. Croteau, this would have been an opportunity for her to do so. Rather, she was simply doing her job: to find out why an injury happened and to try to prevent future ones.

D. Allegation #4: March 10, 2004 knee injury

[97] Mr. Croteau injured his knee while de-training on March 10, 2004. Notably, this was his second injury in two months. The Complainant testified that KS questioned him about the injury and criticized his accident/injury record: which was 12 injuries in 10 years. KS testified that it was 11 injuries from October 1993-January 2004: "an exceptionally high number. That's why he was on the list to talk to [TC]." At the end of his meeting with KS, the evidence shows that she offered the Complainant a drive to the hospital which he declined, and she reminded him to return the medical forms filled out by his doctor. Mr. Croteau testified that as he was "stressed out" from KS, he did not directly return the forms to her as directed but, rather, he asked the Union to do so on his behalf.

[98] I stress that no re-enactment was done immediately after the accident as he said that he was in pain and wanted to go to the hospital. And he did. The doctor provided him with a note indicating a 3-day restriction period. However, Mr. Croteau alleges that it was harassment for KS to have kept him there and questioned him in an accusatory manner about his latest injury and tell him that he had a bad injury record. He also stated that she screamed at him as he ran down the stairs: "like a screech, she was completely unhinged."

[99] Having heard the testimony of the Complainant and KS and having reviewed the documentary evidence, I do not find that CN and its employee KS harassed him. First, KS had questioned the *bona fides* of his injury based on how he said and wrote that it happened: i.e., he twisted his knee *while* de-training vs. *after* de-training. I am not suggesting that Mr. Croteau was less than honest about this. And there is a semantical aspect to this issue. However, I find that KS was not unreasonable in questioning him and even having doubts about the veracity of his reporting given the apparent contradictions in his versions. If this had been his first injury in ten years, I might have viewed it differently, but this was his 12th injury in 10 years, and his 2nd in 2 months. Furthermore, it was her job as RMO to question such matters. I heard evidence in the hearing that it was not uncommon for employees to try to avoid responsibility for injuries. I am not suggesting Mr. Croteau did this, simply that, given the circumstances, it was not unreasonable for KS to question him and certainly not harassment based on the prohibited ground of disability under the *CHRA*.

[100] I am not willing, based on my general credibility/reliability concerns about the Complainant, and having heard KS's evidence, to find that KS "screeched" at him. She may have lost her patience with him, but that *per se* does not constitute harassment under the *CHRA.*

[101] Regarding her questioning of his work injury record, again I find no violation of the *CHRA*. The documentary evidence outlines each and every injury that the Complainant sustained: 12 in 10 years. Much time was spent at the hearing going through each injury-incident. I agree that a few of the twelve injuries may be characterized as minor ones and not due to his negligence or failure to follow the rules, but not all twelve, and over a period of ten years.

[102] Mr. Bolter asks me to make an adverse inference that CN failed to produce the comparative computer records showing injuries for certain employees over a given period. Various CN witnesses testified that such information was available. However, CN did not provide a reason for not producing it. While I find it odd that it was not produced, I decline to draw an adverse inference. (I note that Mr. Bolter could have made a request for an Order of

production.) I heard from several CN witnesses regarding their opinion on an injury record of 12 in 10 years. Mr. Gallagher was especially colourful in his description, calling it "abysmal." He averred that "one injury per year or more is a very, very poor record. Very few employees have a record like that." The hearsay statement of TC was that he had never been injured in his thirty years at CN. Ms. Paquet stated that the Complainant's record was "high and consistent; a lot of injuries and at least every year or other year….He has a lot of unsafe behaviour." And these comments are coming from experienced CN managers, most of whom had extensive "running trades" experience as conductors or engineers, and all of whom had to maintain their train crew training and qualifications.

[103] Of the CN witnesses, Mr. Colasimone has the most train crew experience, in operations and management and occupies a senior management operations position at CN. I place great weight on his evidence. He too was quite clear about his views on such an injury record. When asked, "How common is it for employees in the running trades to suffer *no* injuries," he replied, "Very common, better than half." Then he was asked, "If you saw an employee with a record like this, 12 in 10?" He answered, "I would be very concerned. That employee would become a 'focused employee'" and he would speak with him/her and draw the "stick man" injury diagram.[12] However, that did not occur with Mr. Croteau. Other than KS raising his record with him on March 10, 2004 and requiring him to speak with TC which he did, nothing further occurred: he was certainly not made a "focused employee". When asked how Mr. Croteau could have "lasted" with a record like that over ten years, Mr. Colasimone answered, "Different management styles. Obviously he slipped through the cracks. I personally can't imagine it happening." He also agreed that it was an "abysmal safety record" and the Complainant would have been a "focused employee" under his watch. Of this I have no doubt. As well, it does not appear that he was "on the radar" – a subject of discussion on the weekly national safety call

[12] The witness testified that when CN had concerns for the safety of a given employee, s/he would become a "focused employee". CN would monitor that employee, meet with him/her regularly, and provide any assistance/further training needed. Said employee would be discussed on the weekly national safety conference call with management (often with the Senior Vice-President on the call) including those from operations and the RMO to ensure that the employee returns to a safety-acceptable level.

with management including Mr. Creel, the number two senior executive directly below the CEO of the company.

[104] Notwithstanding that it appears the Complainant "slipped through the cracks" (other than KS having him speak with TC about his safety record in 2004), I find that Mr. Croteau had real safety issues and a poor safety record as a conductor at CN. I recognize that this is at odds with the Complainant's perception of himself as "one of the safest employees" at CN.

E. Allegation #5: The Video Surveillance of Mr. Croteau and his family

[105] This may be the most significant allegation in terms of the impact it had on Mr. Croteau and his mental health condition. If he didn't have severe anxiety related disorders before becoming aware of the surveillance in the Q and A investigation meeting with Mr. Mau on May 11, 2004, he most certainly developed them at that point, and his symptoms became worse as time went on.

[106] Following his knee injury on March 10, 2004, the Complainant provided his union with a medical note initially indicating that he could RTW on modified duties and shortly thereafter, provided another note with conflicting medical restrictions, indicating that he could not RTW at all until March 29, 2004. These notes were not provided directly to CN but instead provided to his union. During the 20-day absence, Mr. Croteau did not communicate directly with CN management but instead contacted his union. The evidence shows that KS questioned the legitimacy of Mr. Croteau's sick leave, and that CN retained an outside private investigation firm to conduct video surveillance of him during his absence. There were two periods of surveillance, one in March 2004 and the other one month later.

[107] The surveillance captured, among other things, Mr. Croteau playing soccer with his children in a park, Mr. Croteau playing basketball with some adult friends and footage of his house from the street and various shots of either Mr. Croteau or his wife driving their cars. All of the surveillance was shot during daylight hours and in public spaces.

[108] The Complainant testified that he believed KS and Mr. Schenk had authorized the surveillance and that it had been undertaken out of suspicion that he was gay because he had this personal medical issue and because of general common knowledge in Sarnia that his brother had passed away due to AIDS. The evidence indicates that while KS recommended surveillance, it was authorized likely by Tony Marquis, the General Manager. While not involved in the decision to surveil Mr. Croteau, Mr. Colasimone, who currently holds the position that Mr. Marquis held in 2004, testified that he had authorized surveillance of employees in the past and been involved in a couple dozen of them. Often it would be done if the company was suspicious about the activities, injuries or absences from work of an employee. Sometimes, "doctor shopping" would raise suspicions. Mr. Gallagher and Ms. Fusco also testified about the reasons or situations which might trigger CN having an employee surveilled. The evidence was clear that CN did not lightly order surveillance of employees, which is an expensive exercise. But clearly, given the sequence of events in March and April 2004 involving Mr. Croteau, including his 20-day Absent Without Leave ("AWOL") period, back briefly and then off again, and conflicting medical notes and inability to reach him, cumulatively raised the suspicion of KS and senior management. Ultimately, he was not disciplined for the 20-day AWOL period. I accept that he had asked the union to advise CN because he didn't want to deal directly with KS. The union was acting as his agent or representative or "buffer" between him and KS.

[109] Although ultimately CN did not use the surveillance tapes to discipline Mr. Croteau, his activities on the tapes playing soccer and basketball would have been a reasonable basis for an employer's suspicions to be raised and to question the validity of an employee's absences from work. I take "judicial notice" that playing soccer and basketball are activities that involve pivoting and twisting in different directions, something which might be inconsistent with a claim of being unable to work due to a knee injury.

[110] I also wish to address the issue of Mr. Croteau making himself unreachable by phone. KS testified that she tried *58 times* to reach the Complainant by phone. Her list of the dates and times of the calls was entered into evidence. Mr. Croteau says she is lying; she never made those calls. He had a home number and two cell numbers. When she called his two cell numbers, the

phones appeared to be turned off because there was only a standard message that the person is not available, but no voice mail attached to them. I find two things strange. First, that KS would have the time, for she testified that she was quite busy during this period, to place 58 calls to Mr. Croteau. Second, that well before call #58, she wouldn't embark on another method to contact him – e.g., by registered mail. Finally, it is odd that Mr. Croteau would not have voice-mail attached to his phone to ensure that he did receive important messages from his employer. That said, although KS was perhaps overzealous, having listened carefully to her testimony and reviewed the exhibit listing the details of her calls, I do find that she placed those 58 calls to Mr. Croteau, but to no avail.

[111] I find no *CHRA* violation in the ordering of the surveillance, nor in the methods of the third party private investigator. Clearly KS and her superiors were suspicious of the *bona fides* of Mr. Croteau's absences and injury. They had reasonable grounds for their suspicions, based on the sequence of events including the changing content of doctors' notes, the difficulty in reaching him, etc. There is no harassment based on the prohibited ground of disability here. Clearly, Mr. Croteau and his family were upset. His wife testified too about this. And I don't doubt them. I can appreciate that it would be very upsetting to learn that one was followed and filmed by a private investigator. And I also appreciate that Mr. Croteau feels that there was no objective, justifiable reason for such surveillance. But I find otherwise. It is not a violation of the *CHRA* for an employer or insurer or WSIB to order surveillance of an individual who claims to be injured or disabled, so long as there are reasonable grounds for it and the decision to conduct surveillance is not based on discriminatory considerations.

[112] As for the report of the Office of the Privacy Commissioner of Canada ("PCC") into the complaint filed by Mr. Croteau against CN for the surveillance, it had concluded that CN had ordered the surveillance prematurely, without first taking less restrictive methods. The PCC did not find that CN had harassed Mr. Croteau or had no lawful basis to surveil him and his family. And in any event, the PCC's determination under the *Personal Information Protection and Electronic Documents Act,* S.C. 2000, c. 5 does not determine the result of my inquiry into a violation of the *CHRA*.

[113] Mr. Croteau objected to the private investigator's methods, including filming his wife and children in his absence. The investigator did not testify. I do not know why he chose to do that. However, I viewed the surveillance tapes. All were taken from public venues. I speculate that collateral surveillance was taken as the investigator was ascertaining whether Ms. Croteau would be meeting her husband. But clearly Mr. Croteau was the subject of the surveillance, the family's and others' inclusion merely collateral. I reviewed the written reports of the investigator in this vein. This was a licensed private investigation firm – a third party hired by CN. There is no evidence to suggest that CN told the private investigation firm to surveil Ms. Croteau or her children or in general how to conduct the surveillance exercise. Again, I emphasize my appreciation of the impact this had on Mr. Croteau (and on his wife) when he learned of the surveillance on May 11, 2004. The effects were immediate and palpable, including moving one son to the other son's bedroom. As well, it offended his self-image as a safe, hardworking, honest employee and that others at CN had *suspicions* about him and may have thought otherwise of him.

F. Allegation #6: May 11, 2004 investigation meeting with Kevin Mau

[114] This was the occasion where Mr. Croteau first learned of his surveillance. Mr. Croteau was called into a Q and A investigation meeting, as required by CN policy and the collective agreement, regarding his 20-day failure to report AWOL period from March 10-30, 2004. Mr. Croteau alleges that holding an investigation meeting was a form of harassment. He also challenges the inordinate length of the meeting. He also alleges and testified that Mr. Mau commented that he had "cute kids" and felt that comment was of a threatening, "creepy" nature, though not of a sexually inappropriate nature. As well, he alleges that KS "shoved" him in the hallway, though she was not in attendance at the investigation meeting.

[115] Mr. Croteau was shown the surveillance video footage during the meeting. Mr. Mau did confront him about being seen playing soccer and basketball while he was off due to a knee injury. The Complainant acknowledged that Mr. Mau said "there was nothing in the footage that CN could use."

[116] Mr. Mau did not testify. However, having reviewed the investigation report and considering Mr. Croteau's testimony and written internal complaint dealing with this issue, I am of the view that the purpose of the meeting, as required by the collective agreement before any discipline can be meted out, was to address CN's reasonable suspicions around his 20-day AWOL period, including questions as to why Mr. Croteau was unreachable during this time, why he went to different doctors and what he was doing while off during that time. I do not detect a scent of harassment to this investigation meeting. He was not being targeted because he was injured, ill or disabled. I agree with Mr. McFadden that the non-harassment message CN was imparting to him (and any other employee) was: "if you go AWOL and can't be reached and it looks like you're doctor-shopping, you may be placed under surveillance" and called into a Q and A investigation meeting.

[117] It is true that the meeting was inordinately long – under five hours, taking into account the three breaks of twenty minutes. And it exceeded the form's space for a maximum 98-questions and required a second sheet, with a total of 125 questions being asked. Having reviewed the investigation transcript, though I would have expected questions about how the actual knee injury occurred and more than one question about the soccer/basketball playing, it is clear from the questions that CN had doubts about the veracity of his 20-day absence from work and his lack of communication and reach-ability during that period (i.e., KS had attempted to reach him by phone 58 times). I note that in cross-examination, at first the Complainant denied that he had ever been asked by Mr. Mau about playing in the park with his kids. However, when shown the document, he recanted. It is also clear that Mr. Mau was probing to see if he was running a business (perhaps as a pilot) while AWOL. CN unquestionably was suspicious about the *bona fides* of his injury and/or absences. As indicated earlier, regardless of the outcome and conclusion, CN had reasonable, non-harassment grounds to conduct this Q and A investigation meeting.

[118] It is true that Mr. Gallagher testified that he thought it was "really dumb" and "absolutely useless" to show the surveillance tape: "Why show the tape if you got nothing…" However, when reviewing his evidence in its entirety, certain things are clear. First, Mr. Gallagher only

saw “approximately ten minutes” of the tapes of the soccer playing. It was his first week in the region and didn’t know the people involved. He stated: “Robert Bruder asked me to see it and my opinion of it to justify an investigation of fraud, fraudulent misrepresentation of his illness.” He watched it on a Friday and was told Mr. Croteau was returning to work on Monday. It is clear to me that he thought it was “really dumb” to show him the surveillance a few days before he was returning to work. In his re-examination, he stated: “I wouldn’t have thought it dumb and useless if Mr. Croteau was coming back in a month or there was no known [return] date.” He was not saying that putting him under surveillance was “really dumb” or for some illegitimate purpose.

[119] Regarding the allegation of “you have cute kids,” Mr. Mau did not testify. However, while I believe that subjectively speaking, Mr. Croteau may have felt threatened by this “creepy” remark, objectively speaking it would appear to me to be nothing more than a compliment, a way of breaking the tension in a stressful Q and A meeting environment. I note that Mr. Croteau testified that he never had any personal conflict with Mr. Mau. There was no animus there. As for the allegation regarding KS shoving him in the hallway, I have already made a finding about it in the “credibility” section of this Decision.

G. Allegation #7: Tuition reimbursement denial

[120] Mr. Croteau alleges that his supervisor had approved his application for education tuition reimbursement, then was told by TC that CN would not approve it. Mr. Croteau alleges that this constitutes harassment based on the ground of disability because he was targeted or singled out because of his legitimate absences from work.

[121] On March 30, 2004, TC told the Complainant that CN felt he had been AWOL, that KS had been trying to contact him and that he was not communicating with the company.

[122] On July 2, 2004, TC had told Mr. Croteau over the phone that, “I talked it over with our HR people and we’re not really prepared to offer some assistance for education.” When asked

why not, he replied: "Well it depends on the individual. It depends on whether they are promotable. It depends on what they're taking. I had them review it and they declined."

[123] In the July 5, 2004 meeting in TC's office that was secretly taped by Mr. Croteau, TC told the Complainant that he has "got to display the proper management techniques, come to work, be productive, not hurt yourself, and that's all part of being a manager." The Complainant responded: "Absolutely. And if you talk to anyone around here, I'm probably one of the safest people around here. I listen to the Rules. I follow my instructions to a 't'…"

[124] Further on, TC said that he had been working at CN for thirty years and never injured himself. He then commented on the Ontario WSIB being more lenient – "It's almost communism" – than workers' compensation boards in the Western provinces (CN admonished TC for making that comment). TC then commented: "I haven't even seen the tapes cause I heard you're playing ball or soccer with your kids or something…And you're off on compensation…That's just a minor example. You're originally slated to modified duties and all of a sudden, bang, it changes to totally unfit for duties, and we can't contact you for a month."

[125] Mr. Colasimone was asked about CN's educational assistance program and its decision to approve, and then not approve said tuition reimbursement. The witness averred that he couldn't understand why it wouldn't have been honoured when the form had been signed and approved:

> No comment, without more information. Something is missing. We pride ourselves on doing what we say we will do. There is more to the story. It would have to go to at least an Assistant Superintendent level and confer with the GM; that's a lot of money…Criteria had to be met and it definitely has to benefit the company.

I note that it appears that it was never approved at the Assistant Superintendent level, only by his supervisor, and for one course only.

[126] Having reviewed the *viva* voce and documentary evidence and considered legal argument, I do not find the above allegation to be made out. The reasons as stated above do not

constitute harassment based on disability. I accept that, due to the events that had transpired, CN management (at the Assistant Superintendent level or higher) did not believe Mr. Croteau was displaying "promotable" behaviour or was of management calibre, at that time. That is not to say that CN would not have come to a different conclusion in the future. For example, while communicating through the Union is not improper, from CN's perspective it was probably not "good management practice". In other words, an employee that wants to become management, but is afraid to deal directly with management is not "good management material". Mr. Bolter argues that TC made "erroneous assumptions" and the "employer reneged on the agreement for the wrong reasons" constituting harassment. That may well be true vis-à-vis the first two parts of his submission, but not the third: I find no harassing behaviour based on disability here. If anything, it *may* be a breach of contract or tort, but that is beyond my mandate and I make no such finding.

[127] I appreciate that it was upsetting to Mr. Croteau that CN approved, then disallowed his tuition assistance application. There is no question that Mr. Croteau was ambitious and viewed himself very differently as an employee than did CN. For example, he told TC that he was one of the safest employees around. At one point in his testimony, he voiced that he had aspirations one day to reach the pinnacle of CN's management – that of the CEO, like his role model, then CEO (and now CEO of rival Canadian Pacific Railway) Hunter Harrison.

H. Allegation #8: TC improperly relied on hearsay and misinformation

[128] This allegation is related to the preceding one. Mr. Croteau alleges that in "reneging" on General Supervisor Paul Sutor's approval, TC had improperly relied on hearsay and misinformation from CN's Human Resources and Labour Relations people.

[129] It is true that TC had received some hearsay and inaccurate information. For example, when he said that Mr. Croteau was on compensation during the time he was seen playing soccer and basketball, that was technically untrue. However, the Complainant had, by that time, *applied* for WSIB payments. But beyond this point is the one that a manager is entitled to seek information from human resources or labour relations within an organization. And s/he may

receive some erroneous information and apply it, but absent a *CHRA* –tainted intention or adverse impact to discriminate or harass, the *CHRA* is not engaged. There is no evidence, other than Mr. Croteau's belief, that CN (be it via KS, TC or others) denied this one-course tuition subsidy because it was punishing him or targeting him because of his disability. The reasons supporting this conclusion were explained in the preceding section dealing with allegation #7.

I. Allegation #9: Mr. Croteau being disciplined in 2006 for the March 2004 absences

[130] In January 2006 CN issued a 14-day deferred suspension (which was never applied and removed from his record) for his failure to contact CN during the 20-day AWOL period in March 2004. Kevin Mau had brought him in for a Q and A investigation meeting on May 11, 2004. Mr. Croteau alleges that the discipline itself and the timing of it constitute harassment.

[131] From my review of the evidence, there is only Mr. Croteau's personal belief that the discipline was meted out and was delayed to harass him and is related to his conflict with KS on November 19, 2003. KS had left Sarnia for a promotion at the Oakville terminal in April 2004.

[132] Regarding the discipline penalty itself, Mr. Bolter had agreed that technically his client was AWOL during this 20-day period. The penalty was deferred, meaning that it would be applied if there were a recurrence. It was never applied. It was subsequently wiped clean from his personnel record. Even if CN was wrong in meting out that deferred penalty, I see no *CHRA* harassment violation here, no proven pejorative link to the prohibited ground of disability.

[133] As for the timing of it, in cross-examination Mr. Croteau reluctantly agreed that CN had waited as he was away from work from May 14, 2004-February 26, 2007 on STD, then Long Term Disability ("LTD") benefits. And he agreed that the Union might have requested CN to wait too. I add that he was not prejudiced by this delay in the deferred suspension.

[134] Mr. Croteau grieved this matter with CROA. An arbitrator dismissed the grievance.

[135] In conclusion, having considered the evidence of the harassment allegations individually and then in the aggregate, and applying the principles enunciated in the case law, I find no violation of Mr. Croteau's rights under section 14 of the *CHRA*.

XII. Failure to Accommodate Allegation

[136] Having reviewed the voluminous amount of evidence, I find that the Complainant has made out a *prima facie* case of adverse differential treatment contrary to subsection 7(b) of the *CHRA*. This requires an explanation and justification from CN. The Respondent led evidence to establish a BFOR under section 15(1)(a) of the *CHRA* and as part of that defence, that it provided reasonable accommodation or in the words of the statute - accommodation to the point of undue hardship - under section 15(2). Hence, the focus of the section 7 allegation turned on CN's ability to show that it had provided reasonable accommodation of Mr. Croteau's disability needs.

A. Mr. Croteau's Diagnosis/Medical Condition and Restrictions

[137] The Complainant's diagnosis/medical condition is integral to understanding how things unraveled as they did in this ten year period from injury/illness/disability to the end of the hearing. His medical condition has informed his responses to people and events at CN, preventing a successful RTW. It is difficult to determine the degree to which Mr. Croteau's thoughts, responses and conduct are attributable to his mental health condition throughout this period. However, what is certain is that his medical condition, the resulting impacts and often destructive consequences are real and not imagined.

[138] What was Mr. Croteau diagnosed with and has it changed throughout this 10-year period from 2003-13? His team of health professionals consisted of his family physician, Dr. Gannon and his psychologist, Dr. AB. As well, Dr. Larry Chad, a psychiatrist and Deputy Chief of Psychiatry at Toronto East General Hospital, conducted three Independent Medical Examinations ("IME") and played an integral role. Others involved on CN's end from a medical perspective were Dr. Leger, its Chief Medical Officer; and nurses at CN's OHS department (formerly called Medisys, a private company contracted by CN). There were other CN

employees involved with RTW matters, but outside the confidentiality "wall" erected to protect the employee's confidential medical information, such as the Risk Management Officer, the Manager of Human Resources, the RTW Co-ordinator, and various operational managers/supervisors.

[139] Upon examining the medical documentation from Drs. Chad, Gannon and AB and references to it from CN's OHS documentation, I will refer to his diagnosis and condition as "anxiety related disorders". These will include the symptoms described such as the panic attacks, heart palpitations, nausea, vomiting, and PTSD symptoms.

[140] Also of importance are the restrictions used by CN in Mr. Croteau's back to work TWPs. The four restrictions were based on the medical information received from Drs. Gannon, Chad and AB. They remain unchanged as of the end of the hearing, as confirmed by the Complainant through his counsel. They are:

(1) Cannot occupy a safety sensitive/critical position or perform such duties;

(2) Cannot operate moving railway equipment;

(3) Cannot assume responsibility for the safety of others; and

(4) Cannot work alone.

[141] While it is difficult to pinpoint the exact time that he developed these conditions, the genesis of the underlying workplace conflict, at least in terms of the harassment allegations, appears to be the November 19, 2003 brief meeting in KS's office. What also seems to be accepted is that the anxiety related disorders became significantly worse or amplified with the revealing of the surveillance tapes to Mr. Croteau at the investigation meeting on May 11, 2004. I cannot overstate the significance of this event on Mr. Croteau's psyche. Had this event not occurred, it is likely that the escalation of events in the years afterward would not have occurred and there would have been a different and more positive outcome in Mr. Croteau's life, both at work and at home. I agree with Dr. AB's evidence that Mr. Croteau's mistrust of CN grew to the

point where his anxiety related disorders became chronic and "generalized" beyond the "work related issues" so often quoted in the reports and documentation of Drs. Chad, Gannon and AB.

[142] In the case of anxiety-related disorders, as with many health conditions, doctors and other health care providers rely on what the patient tells them and how they "present". And of course in the mental health field, there are tests that can be administered. Bearing this is mind, it is worth considering whether Drs. Chad, Gannon and AB would have come to a different conclusion regarding diagnosis, prognosis and treatment for Mr. Croteau's RTW at CN, including whether he could ever RTW successfully at CN, if they had been aware of certain key facts.

[143] With regards to the above and by way of example, Mr. Croteau indicated a continuous fear/paranoia about KS potentially kidnapping his two sons and has asked me to award him compensation for special damages to allow him to sell his house and move because, among other things, he is afraid to let CN know where he lives. He clearly expressed a "fear of CN and KS knowing where I live." When asked if he wishes to move because the home is associated with this bad period in his life or because CN will cause him harm, he replied: "Both." Dr. AB testified that he was unaware of this, and that such fears never came up in any of their 150 sessions. There was no mention of this in Dr. Chad's three IMEs.

[144] I also suspect that had Dr. Chad – the only psychiatrist to have seen the Complainant – been made aware of these matters, they would have figured prominently in his IMEs, and that his diagnosis and/or recommendations might have been different with regards to Mr. Croteau's RTW prospects as a conductor at CN.

[145] I note that CN was entitled to rely on the medical opinions of Drs. Chad and Gannon and on the psychological opinion of Dr. AB. From the *CHRA* one may infer a duty upon the employer to seek relevant information about the employee and his/her accommodation needs, and the employee has a corresponding duty to facilitate the gathering of this *complete and accurate* information.

[146] Furthermore, at this point going forward, as Mr. Croteau is still an employee of CN while on unpaid leave and CN still has an obligation to accommodate his disability "needs", the above is relevant to the issue of whether Mr. Croteau's "needs" could be accommodated to the point of undue hardship with the goal of his being able to perform the essential duties of the job for which he was hired – train conductor.

[147] I also wish to note that in none of the medical documentation, nor in Dr. AB's testimony nor in any of the submissions from Complainant counsel was there any suggestion that Mr. Croteau lacked capacity to understand what he was saying or doing, including during the hearing. Complainant counsel stated that he believed that his client had the capacity to retain and instruct him throughout the process. While Mr. Croteau experienced many panic attacks during the hearing, for which we often took breaks, he was able to participate throughout the process, including several days of his own testimony. This is not meant to minimize the real symptoms he was experiencing during his panic attacks.

B. Accommodation History and Findings

[148] In fairness to the Complainant, while he alleges a general and continual failure to accommodate his disability needs to the end of the hearing, he does acknowledge that CN did accommodate his needs at some points in this period between 2007-13. However, his counsel was not able to enumerate those specific acts of proper accommodation.

[149] On January 8, 2004, Mr. Croteau injured his shoulder while using the handbrake. Two months later, on March 10, 2004, he injured himself again, this time hurting his knee while he was de-training. He went to the hospital and the first doctor he saw gave him a note that he was to be off for four days, and able to RTW with modifications as required. I note that KS was trying to reach him because she had modified duties available for him. In essence, CN was at this point ready to accommodate his "needs". As indicated earlier, Mr. Croteau went off work injured for twenty days, from March 10-31. He had asked his Union to communicate with CN regarding his absence and provide the required paper work. There was miscommunication to say the least as KS was trying to reach him (58 phone calls made by her). CN considered him

AWOL. He returned from April 1-18, 2004, and then was off again for a personal medical issue (unrelated to the shoulder or knee injury) on April 19. He returned on April 21 and was off again on May 14, 2004.

[150] On April 23, 2004, KS had a "rude" conversation with the Complainant's wife (who called KS a "bitch") and a later one with the Complainant's sister-in-law. In both, KS was looking for Mr. Croteau. By this point, on her recommendation and approved by senior management, surveillance of Mr. Croteau was ordered twice – the first in March and the second in April, unbeknownst to Mr. Croteau until May 11, 2004. At this point, CN was suspicious of Mr. Croteau's injuries and absences from work.

[151] From May 14, 2004-February 26, 2007, the Complainant was not working at CN. He subsequently exhausted his STD, then LTD benefits. He was being held out to be totally unable to work. He also received EI benefits. From 2004-07, there was a window of three weeks that Mr. Croteau was not receiving disability benefits and was able to be accommodated. Aside from that brief window of time, CN was not legally obligated under the *CHRA* to accommodate the Complainant's disability during this three-year-period. During this time, CN having received Dr. Chad's first IME with the diagnosis and expert opinion that the issue was "work related…without any restrictions due to psychiatric factors", indicated that it would remove the "work related issues" – KS and TC – from the equation in terms of potentially have any dealings with the Complainant.

Dr. Chad and the First IME Report dated June 10, 2004

[152] Dr. Chad wrote that "Mr. Croteau reported that prior to April/May of 2003, he was well both physically and emotionally." He had "no prior significant past depressions, mood swings or anxiety attacks, no prior psychiatric contact, had never been suicidal and had never been psychiatrically hospitalized." He also penned: "Mr. Croteau reported that his boss [KS] did not get on his case until November of 2003."

[153] Dr. Chad indicated that Mr. Croteau said that he has one to two anxiety attacks a day and can't concentrate: "I can't even unload a dishwasher without messing it up." This was problematic given the dangerous work involved as a train conductor. He then wrote: "Mr. Croteau feels that he is essentially anxious as a result of work related stress and his fear of being fired." At page 7, the doctor stated: "Mr. Croteau was asked whether he thought he was able to work for another boss at this time and responded "absolutely". He indicated that he thinks he can work if his work issues are settled." The concept of "work issues being settled or resolved" will become a key part of the diagnosis and RTW attempts. Dr. Chad indicated that the Complainant remarked that since December 2003 "his boss [KS] started getting on his case for his attendance and having accidents." Dr. Chad also wrote that Mr. Croteau said that "he has a lawyer regarding his harassment suit and intimidation suit with Human Rights."

[154] Dr. Chad indicated that the Complainant presented as "reasonably clear" and "coherent". "Overall, he did not appear to be significantly depressed or anxious…There was no indication of any psychotic thinking." From a diagnostic standpoint according to the DSM-IV, Dr. Chad said Axis I "Adjustment Disorder with mixed anxiety and depressed mood and Occupational Problem" applies. He wrote at pp. 13-14:

> The history suggests that Mr. Croteau developed an Adjustment Disorder with mixed anxiety and depressed mood in relation to his general work related stress and the problems with his boss, and the pain with his [personal medical issue]. He does not meet the diagnostic criteria for a Major Depressive Episode at this time. Similarly, he does not meet the diagnostic criteria for an Anxiety Disorder at this time. In that work related issues are significant precipitating factors to him getting depressed, anxious and stopping and continuing to remain off work, he also has an Occupational Problem.
>
> … …
>
> While Mr. Croteau may continue to have some intermittent mild mixed symptoms of anxiety and depression, these are not generally of a nature or severity that are consistent with him being totally disabled from working at this time, if work related issues were sorted out.

[155] Again, at p. 14, Dr. Chad writes:

> Mr. Croteau's current psychiatric symptoms are not at a severe enough level that should be preventing him from returning back to work on a full-time basis as soon as work related issues are sorted out. In the absence of sorting out work related issues, he would be probably too anxious to perform in a safe effective manner as a result of his anxiety and decreased concentration.

[156] Finally, he concludes:

> If work related issues were sorted out, Mr. Croteau should be able to work on a regular full-time basis at this time *without any restrictions due to psychiatric factors.* He is in agreement with this…The prognosis for continued improvement is good provided that his work related issues are sorted out. [My emphasis.]

[157] It is important to note that, as of June 10, 2004, psychiatrist Dr. Chad is telling CN that Mr. Croteau could RTW full-time as a train conductor "without any restrictions due to psychiatric factors" so long as "work related issues were sorted out". At that point, "work related issues" are the conflict between the Complainant and KS and TC.

[158] On August 25, 2004, Mr. Croteau had his first session with Dr. AB. On November 5, 2004, Dr. AB wrote: "It appears that Mr. Croteau's return to work is on hold, due to more legal type issues, and not so much related to psychology."

The Second IME Report dated January 4, 2005

[159] Seven months later, Dr. Chad sees the Complainant again for a second IME. At this point, Mr. Croteau was still off work and in receipt of benefits. He had filed his internal harassment complaint and was pursuing a complaint with the PCC regarding the surveillance issue. Dr. Chad reported that the Complainant said he was having problems sleeping at night and experiencing panic attacks and poor concentration.

[160] At pp. 8-9, Dr. Chad states: "Mr. Croteau was asked why he has not returned back to work as yet and responded that this is as a result of work issues not having been sorted out. Mr. Croteau indicated that if CN were to allow him back now, he would not want to go back until the work issues were sorted out. If the two bosses [KS and TC] with whom he has complaints were not there, he would go back at this time…"I'm not going to set myself up for revenge.""

[161] Dr. Chad makes the following diagnosis at pp. 13-14:

> He appears to have gotten stressed out and to have developed an Adjustment Disorder with mixed anxiety and depressed mood…He does not meet the full diagnostic criteria for an Anxiety Disorder. He does not meet the diagnostic criteria for a Post-Traumatic Stress Disorder…In that work related issues are the major precipitating and perpetuating factors to him getting stressed out, anxious and stopping and continuing to remain off work, he also has an Occupational Problem.
>
> … …
>
> While Mr. Croteau may continue to suffer from some intermittent mild mixed symptoms of anxiety and depression, these are not generally of a nature or severity that are consistent with him being unable to work at this time…He should be able to meet with his employer at this time and deal with work related issues.
>
> … …
>
> If Mr. Croteau were to return back to work at this time, without work related issues having been sorted out, he may have some difficulties performing at his regular tasks as a result of anxiety, some concentration difficulties and some difficulties with his attention span. Not dealing with work related issues, will only perpetuate his mixed symptoms of anxiety and depression and prolong his absence from work…
>
> … …
>
> If work related issues are dealt with, there need not be any specific restrictions regarding Mr. Croteau returning back to work on a regular full time basis…Mr. Croteau does not require any psychotropic medications at this time. A referral to a psychiatrist at this time is not necessary…*The main intervention that*

> *is necessary at this time is to sort out his work related issues. This appears to be more of a work related issue than a psychiatric disability issue.* [My emphasis.]

[162] In January 2005, with CN having received Dr. Chad's second IME, RMO Bob Leonard wrote the Complainant indicating that he would like to meet to discuss Mr. Croteau's RTW. This was met with fierce, over-the-top opposition from both the Complainant and the Union who was acting on behalf of the Complainant. They did not even want to meet to *discuss* the RTW. Mr. Croteau stated that he thought CN was trying to force him back to work as a conductor too soon. I do not accept this. The evidence is clear that what was being proposed was simply a *pre-RTW* meeting. I agree with Mr. McFadden's submission that this constituted an unjustifiable refusal to participate in the "accommodation dialogue" and could have resulted in serious consequences to Mr. Croteau, including arguably dismissal.

[163] On March 1, 2005, a key meeting took place to discuss the Complainant's internal harassment complaint against KS and TC. The Memo to File indicates that the Union wanted to discuss RTW, but Mr. Gallagher responded that the meeting was called to deal with Mr. Croteau's internal harassment complaint. Note that at this point in time, the Complainant was also aware of CN's surveillance of him via a private investigation firm and was clearly exhibiting signs of anxiety related disorders. The meeting was with Mr. Gallagher, the Complainant and his wife, and three senior Union members. During this meeting Mr. Croteau presented his "wish list" to resolve the internal harassment complaint. "I was going by what the Union wanted," said Mr. Croteau on the witness stand. Mr. McFadden suggested that he was trying "to hide behind the Union" and blame it. The Complainant disagreed. Mr. Gallagher came right out and said it was not a "flexible" list and urged them to do some "horse-trading, and negotiate." After reviewing the testimonies of the Complainant and Mr. Gallagher and the list as found in the Memo to File entered as an exhibit, I find that Mr. Croteau wanted *inter alia*:

(1) KS and TC punished, disciplined, and perhaps even fired;

(2) An apology from CN and from both KS and TC to Mr. Croteau and his family;

(3) Compensation for lost earnings/benefits.

[164] In the Memo to File, Mr. Gallagher wrote: "I sought clarification of the remedy [s]ought by Mr. Croteau. Following a rather lengthy caucus Mr. Croteau brought forth the following reply: "As a remedy must be a deterrent 1 Dollar may be too much and 1 Million dollars may not be enough, we will not know until the process is over."" The Complainant testified about its meaning: "If Mr. Gallagher did a proper human rights investigation, at the end of the day, I wasn't looking for money. The Union told me this." Mr. McFadden responded by asking the Complainant how he expected CN to respond to such a proposal? He answered, "That's a good question. My intention was to wake up the HR department." CN's counsel asked: "Your purpose was to design a settlement that was somewhat ridiculous so they won't talk to you anymore?" The Complainant disagreed. When I interjected and suggested that it might look like a roadblock or obstacle to CN, the Complainant replied: "You may be right. The Union dropped me shortly after…I can appreciate that CN might see it as this guy doesn't want to settle, return to work." I too can see how Mr. Gallagher and CN came to this conclusion – that in order to heal and RTW, the above "wish list" needed to be agreed to by CN.

[165] What is remarkable about the above is that just a couple weeks earlier, Mr. Croteau and the Union were refusing to even meet to discuss a RTW. Yet Mr. Croteau stated at the March 1, 2005 meeting that if CN agreed to the "wish list", he would RTW *as a conductor immediately and without restrictions*. Mr. McFadden cross examined him on this issue and asked: "The memo says if the conditions are met, you would be back to work in March 2005 in your full, unrestricted duties as a conductor, yet you said today that you couldn't, you were in bad shape then?" Mr. Croteau answered, "I see your point." This makes me question his credibility and *bona fides* about returning to work during this period. It also lends credence to CN's argument that Mr. Croteau always had an "Alternative Plan" – pursue his internal harassment complaint, "wait for the PCC report", "go to CROA [grievance]", and wait until his disability benefits run out– but not to RTW. I note too at page 2 of his prospective "judicial review" of the CROA arbitration dismissal (sent to the Federal Court, the Canadian Judicial Council, the PCC, etc. but never actually filed as a judicial review application), Mr. Croteau wrote: "For the past three years I have been cooperating with my union's decisions in regards to their plan of action for having

me remain off work due to my illness in which I was receiving long term disability while awaiting the outcome of the Privacy Commission's investigation."

[166] The Complainant attacked Mr. Gallagher's harassment investigation, both in terms of the conclusion and its process. Based on my review of the evidence, I find that Mr. Gallagher's (and that of Ms. Fusco who worked on it before going on leave) investigation was fair and reasonable, both in its process and conclusion. The investigation process consisted of the following: CN's Human Resources department received the written complaint which was longer and more detailed than most and reviewed it; they contacted the alleged perpetrators for their written response; Ms. Fusco made a chart comparing who had said what on different topics; a meeting was held on March 1, 2005 with the Complainant, his wife and Union representatives; Mr. Gallagher made it clear that he would accept further submissions from the Union following the meeting which it never sent; Mr. Gallagher also invited the Union to send any further evidence in support of the complaint, which it did (tapes of conversations between Mr. Croteau and TC); Mr. Gallagher invited a senior colleague unfamiliar with the complaint to listen to the tapes and provide his opinion.

[167] Mr. Croteau was given a fair chance to present his harassment case to Mr. Gallagher. The latter came to a different conclusion from Mr. Croteau. Mr. Gallagher concluded that there was no merit to the harassment allegations against KS and TC. At most, KS may have been "assertive" and "aggressive" toward Mr. Croteau, but that did not constitute harassment. I appreciate that Mr. Croteau did not agree with Mr. Gallagher's conclusion, but at some point, there must be finality to the process.

[168] During this period as noted, Mr. Croteau was on leave receiving disability benefits and therefore not able to work. However, CN did do things to assist in his eventual RTW during this time. First, CN had dealt with the "work related issues" as identified by Dr. Chad: i.e., KS and TC. KS was promoted to a job in Oakville in the summer of 2004 and Mr. Mau filled in the spot of TC if any interaction with the Complainant by TC was needed. Second, CN was making efforts to find the Complainant work. CN proposed an accommodated position, that of

Fire/Safety Watch in Sarnia on March 15, 2005. Mr. Croteau wanted to show the offer to Dr. Gannon to see if it was within his restrictions. Two weeks later, on March 28, 2005, Great-West Life accepted his LTD application. Mr. Croteau did not respond to this proposed TWP for nine months. By December 2005, CN had indicated that the position itself no longer existed.

[169] On November 30, 2005, Dr. AB stated that he agreed that "a graduated return to work, in a non-safety sensitive position, while monitoring his symptomatology, is warranted…" On December, 14, 2005, noting the "serious panic attack" that Mr. Croteau recently had in attempting to RTW, he recommended that his client remain off work for a couple of months.

C. April 2007-May 2008 Accommodation Period

[170] For almost three years (2004-07), Mr. Croteau was on leave, receiving disability benefits. The first significant meeting after his benefits ran out took place on April 4, 2007 at Mac Yard in Concord, north of Toronto. In attendance were Mr. Croteau, Mr. King, the Union representative, Mr. Gallagher, OHS Nurses Jackie Andersen and Marge McCauley (by phone). Mr. Croteau, as he often did, secretly taped the meeting. The tape was played in the hearing. The purpose of the meeting was to discuss the Complainant's RTW. From the start, it was quite apparent that Mr. Croteau wanted to re-hash his previous harassment allegations that had been dismissed by Mr. Gallagher when his investigation closed in April 2005. By April 2007, the first of those allegations (the November 19, 2003 conversation in KS's office) was 3 ½ years old. To give credit to Mr. King, he told the Complainant to literally (and figuratively) "close his [complaint] binders" on this issue and to focus on the RTW. Mr. Croteau said, "I just want to deal with this one set of lies." At this point, Mr. Croteau had been on leave for three years, receiving a fraction of his pre-disability income. One can see his obsession, persistence, stubbornness – however one may describe it– in not letting go of this issue. In his testimony, Dr. AB described Mr. Croteau as someone who "won't give up, not in a negative sense…He's like a dog you give a bone to, doesn't let it go…He's extremely principled. When he gets something in his mind, he goes for it." At this point, CN reasonably interpreted Dr. Chad's first and second IME as indicating the non-"psychiatric factors" at play were the "work related issues" of KS and TC. However, looking back now and hindsight being 20/20, it is apparent that the "work related issues" had expanded

beyond the prevention of any interaction of KS and TC with Mr. Croteau to include the surveillance, the harassment investigation process and its conclusion/findings.

[171] At this April 4, 2007 meeting, several topics were discussed:

(1) Mr. Gallagher reassured Mr. Croteau that the deferred discipline penalty in 2006 had been expunged from his record and he sent a letter immediately after the meeting to that effect. Mr. Croteau acknowledged that "it was a good start";

(2) Mr. Croteau wanted to be paid the "belt pack rate" for a full day's work when he returned to work, even if he worked for less than the standard eight hour shift. Mr. Gallagher said he would look into this. He did and emailed Denis Fournier at CN Payroll department. Mr. Croteau said that he was "promised" that he would be paid at this rate. My review of the evidence suggests otherwise. One can hear Mr. King on the tape saying that they would like CN to consider doing so and Mr. Gallagher agreed to look into it;

(3) The issue of RTW and location was discussed. On the tape, Mr. Croteau said: "I will return to work at Sarnia." Listening to the tape and reviewing the other evidence (*viva voce* and documentary), I find that CN reasonably thought that Mr. Croteau was only interested in RTW at the Sarnia terminal, and nowhere else.

[172] There is no question that this was an emotional meeting. Mr. Croteau was "bawling" and crying in the meeting. According to the Complainant's testimony, shortly after this meeting, the Union (who he said thought Mr. Gallagher's investigation report was "correct") "dropped him" and the relationship between the Union and Mr. Croteau became negative and adversarial, leading to the Complainant's launching a section 37 Duty of Fair Representation complaint with the Canada Industrial Relations Board ("CIRB").

D. The Five RTW Attempts

[173] CN's plan, in cooperation with the Complainant and Union, was to ease the Complainant back into the workplace, with the eventual goal of returning him to his pre-injury/disability job of conductor. This was in keeping with the diagnosis and restrictions as set out by Dr. Chad and Dr. Gannon. There was no set time etched in stone, but clearly progress was to be made to that eventual goal of returning to the conductor's position.

[174] CN agreed to pay for the Complainant to see Dr. AB in a "desensitization" program. Initially, it was difficult for Mr. Croteau to even physically enter CN's terminal in Sarnia. CN ended up paying for Dr. AB's counseling for approximately one year, longer than originally anticipated and approved. The program was to start with Mr. Croteau working with Dr. AB on the basics of going "on the property" and then "de-briefing". Dr. AB would be paid to attend on-site with the Complainant. Hopefully, the Complainant would improve to the point of being able to start a TWP. As Mr. Croteau could do more, more tasks would be assigned. Assessment would be ongoing, with the confidentiality "wall" remaining between OHS and RTW and operations.

i. Attempt #1: Job-shadowing Rover Joe Russell

[175] In August 2007, CN proposed that the Complainant job-shadow rover Joe Russell on the night shift. A TWP was created with the erstwhile four conditions/restrictions. On August 15, 2007, there was a conference call between Ms. Paquet, the Complainant and Dr. AB to discuss the TWP.

[176] The rover position is safety-sensitive and curtailed by Mr. Croteau's restrictions. However, Mr. Croteau would be only "shadowing" the rover. This accommodated/RTW plan lasted for only one shift. CN's Chief Medical Officer, Dr. Leger, who by statute and the Canadian Railway Medical Rules Handbook ("Medical Rules Handbook"), has final say on TWPs essentially vetoed this TWP. He felt that because "shadowing" implies the employee can

assume the job, he had concerns about the safety-sensitive components of the job vis-à-vis Mr. Croteau.

ii. Attempt #2: Administrative/Clerical Work with Tino and Robinson

[177] On August 22, 2007, Ms. Paquet had a telephone conversation with Dr. AB who agreed to a clerical position for the Complainant and told Ms. Paquet that "he expects the employee to return to his conductor job." On September 17, 2007, OHS received a medical update indicating that the Complainant would be better suited to clerical work given his condition and restrictions. A meeting took place among Mr. Gallagher, Ms. Paquet, Will Nolan and the Complainant. An 8-week TWP was developed that would involve doing administrative/clerical work under the supervision of supervisor Brian Tino and later Debbie Robinson, who "cut and paste" and "scrounged up" work for Mr. Croteau to do. It was clearly a make-work project. (I note that Sarnia no longer has such positions.) However, as Ms. Paquet logically pointed out in her testimony, there is still some "value" to CN to have an accommodated employee back on-site, that there is a therapeutic aspect to having the employee back in the workplace. This accommodated work lasted for approximately one month.

iii. Attempt #3: Shadowing Rover LG

[178] Consistent with the medical reports and updates, it was decided that it would be useful to achieving the eventual and ultimate goal of RTW as a conductor to have the Complainant "in the field" rather than in an office doing make-work "paper-work". A TWP was created that would have Mr. Croteau job-shadow morning/day rover LG, who occupied the position herself as an accommodative measure. Again, the goal was to "shadow" first, then actually do the rover tasks and eventually RTW as a conductor.

[179] Mr. Croteau commenced this job-shadowing on October 17, 2007. It lasted less than two months due to a serious "personality conflict" between the Complainant and LG. The Complainant said that LG called him a "mental freak" and he accused her of doing personal

errands on company time. LG accused him of always "bad-mouthing" the company and other things. It is clear that it was not working out and the two of them needed to be separated.

[180] On November 1, 2007, OHS received a medical update that the Complainant would be required to decrease his work hours back to six hours per day over a 3-4 week period. As with all other medical recommendations, CN complied.

iv. Attempt #4: Radio Inventory Clerk

[181] The next TWP was for the position of radio inventory clerk, gathering and re-numbering radios in the basement. This took place from December 13, 2007-April 12, 2008 – four months. It is clear from Mr. Croteau's testimony and the documentary evidence that he was bored in this job and wanted more responsibility. As well, he testified that sometimes he had no more than ½-1 hour's worth of productive work in a day. He testified that often he would read technical journals. This was clearly a make-work project, of little value to CN, other than as Ms. Paquet said earlier, getting him back into the cycle of working on site and with other CN employees. As she correctly pointed out, often there's a barrier just getting the employee physically back to the job site. Other employers might not have seen it as a useful exercise. To CN's credit, it did.

[182] By December of 2007, CN was getting concerned that Mr. Croteau's progress had hit a plateau and that he was no closer to returning to work as a conductor then as he was in April 2007. Brian Tino, who on "good terms" with Mr. Croteau and who supervised him during his clerical and radio inventory TWPs, sent an email on December 14, 2007 to Ms. Andersen at OHS and copied to several CN people involved in Mr. Croteau's RTW program. He asks Ms. Anderson to "arrange to review all medical reports on Mr. Croteau to determine his future status." He is concerned about the apparent lack of progress and "little improvement": "…[W]e have progressed to 6 hours and seem to be stuck there." He says that they need to assess the situation to see if he will "ever reach" his pre-injury/disability duties as a conductor "in Sarnia." There is clearly an understandable frustration at the lack of progress and where to go from there. But he is taking the correct path: reassess Mr. Croteau's status, taking into account the medical condition and restrictions. CN then decides to get IME #3. As Ms. Smolynec testified, ordering

costly IMEs is not common for RTW cases at CN; having three is highly unusual. But to CN's credit, it went ahead and had Dr. Chad perform his third IME. I note that the Complainant resisted having a third IME done, insisting that he was "improving all the time."

[183] CN also received a completed CN form - Medical Report on Mental Health - from Dr. Gannon dated January 17, 2008. Surprisingly, Dr. Gannon wrote: "Patient is improving – prognosis is good."

[184] In a letter incorrectly dated November 29, 2008 but which Dr. AB believes was written by him sometime after November, 29, 2007 (not 2008) but before April 20, 2008, he stated:

> As you know, Mr. Croteau continues to have panic attacks at work.
>
> … …
>
> In discussing these attacks with Mr. Croteau, we have ascertained a certain pattern to them, that they seem to be precipitated by certain events or activities related to "politics in the workplace," e.g., hearing other workers complain of job conditions, dealing with supervisors, reading upsetting notices on the bulletin board, etc.

Dr. AB was recommending that Mr. Croteau be placed outside of the "office environment" and in the yard with the trains as that "might be beneficial, in that being out in the yard he would be removed from the things which have been triggering his panic."

The Third IME Report dated February 3, 2008

[185] By January 2008, after five months of RTW attempts, CN was seeing no real improvement in terms of Mr. Croteau progressing to the ultimate goal of returning to his pre-disability job of train conductor. It looked as if Mr. Croteau had hit an improvement-plateau; hence, the decision to get a third IME.

[186] At p. 5, Dr. Chad writes:

> Mr. Croteau reported that his goal is to return back to his conductor's job…Mr. Croteau reported that essentially, if he got an apology and some compensation for the money he lost, he would feel better…He explained that he won't quit, because "I didn't do anything wrong."…Mr. Croteau reported that all of his bosses have changed…He explained, however, that he wants more responsibility.[13]

[187] At p. 7, Dr. Chad states: "Mr. Croteau reported that he wants to return back to his conductor role. "Be the CEO actually". He explained that he would like to move up in the ranks at CN…Mr. Croteau reported that he continues to have six panic attacks a day when he is working."

[188] Dr. Chad made a change of diagnosis in his third IME. He felt that under the DSM-IV Mr. Croteau most fit in the category of Adjustment Disorder with Anxiety with a Differential Diagnosis of Panic Disorder and Occupational Problem. In Axis IV, Mr. Croteau was identified to have "Major recent stressors [that] include his work-related issues and some financial constraints."

[189] Dr. Chad continued at p. 12:

> The history suggests that Mr. Croteau got increasingly stressed out in 03/04 in relation to his perceived harassment at work…As he continues to have some panic attacks, the differential diagnosis would include a Panic Disorder. There, however, appears to have been some significant improvement regarding his panic attacks since he returned back to work in September of 2007…It is my impression, that if he were gradually given more responsibilities, this would decrease his anxiety level and would speed up his recovery time regarding his panic attacks…*His anxiety appears to be largely in relation to work-related issues, and these will need to be sorted out in the work context.* [My emphasis.]

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[13] As mentioned earlier, in 2004 KS was in a different position in Hamilton/Oakville and CN had Mr. Mau act in TC's place so that the latter would have no interaction with Mr. Croteau.

[190] At page 13, Dr. Chad concludes:

> It is my impression, that Mr. Croteau should be able to gradually increase his responsibility level at work. He should be fit to occupy a safety sensitive critical position, with increasing responsibility. It might be helpful for him to initially, at least, get involved in such a position in a shadowing role and then initially, at least, be more closely supervised…It is my impression, that restricting his responsibilities has been inadvertently contributing to his anxiety level at work and to his panic attacks. It is my impression that a gradual increase in his responsibilities would be paralleled by a decrease in his anxiety level.

[191] What I gather from the three IMEs is that Mr. Croteau, according to Dr. Chad, suffered from an Adjustment Disorder with Anxiety and Occupational Problem that by the time of the third IME included the Differential Diagnosis of Panic Disorder. What is also quite noticeable is the prolific use of the phrase "work-related issues" throughout the three IMEs. At first, they seemed to be identified by Dr. Chad as interaction with KS and TC only, based on what Mr Croteau had told him. However, once those two managers were no longer in the picture, the "work-related issues" continued and even expanded with the introduction of the revealing of surveillance of Mr. Croteau and the conclusion of the Gallagher investigation with a result not to the liking of the Complainant. I will come back to the key matter of "work-related issues" later in these Reasons.

v. Attempt #5: Rover-shadow Position

[192] As indicated above, in Dr. Chad's third IME dated February 3, 2008, he recommended *inter alia* that the Complainant be given increased responsibilities as a way of improving his progress toward the eventual goal of a RTW as a conductor. He suggested it be outside of the office, non-clerical, i.e., job shadowing, subject of course to CN CMO's review and approval. Dr. Chad maintained the four restrictions. This was also consistent with Dr. AB's letter written sometime after November 29, 2007. In response to his IME, as it had done in the past, CN followed the recommendation and created a TWP for shadowing the night Rover. Remember that the Medical Rules Handbook requires that safety-critical employees (e.g., conductors) be "symptom-free" for six months before returning to their job.

[193] Dr. Leger approved the rover-shadow position. The plan was for night rover Charlie Knight to train Mr. Croteau as he shadowed Mr. Knight. When Mr. Croteau was ready to assume the rover position, Mr. Knight would move into the afternoon shift, as afternoon Joe Russell was returning to his regular position. Mr. Croteau made it clear in his complaint to the PCC and in his testimony that he thought CN was placing him in the night shift slot due to his upcoming CROA arbitration, so that he could not prepare for it presumably. As Mr. McFadden argued, Mr. Croteau was telling Dr. Chad in the third IME that he wanted more responsibility and wanted to eventually RTW as a conductor. Counsel rhetorically asked: "What did that mean? Do more radio inventory work?" Here CN was acceding to his wishes and Dr. Chad's recommendation.

[194] On April 7, 2008, Ms. Paquet sent a letter to Mr. Croteau regarding shadowing the midnight rover. It said if he had "any questions or concerns" to contact her. He responded on April 9th with his concerns: (1) he didn't want to job-shadow a different person each night; and (2) those persons would know his confidential medical information. He stated that he could not move to a night position on such short notice, so his start-date was delayed. Ms. Paquet wrote back on April 25, 2008 that he would not be working with a different person every night, but in fact the same person; that Mr. Tino would stay as his contact person; and that only his restrictions would be conveyed and only when necessary. She also addressed what she considered a "threat" in his letter. As well, she said that his CROA arbitration should have no impact on his RTW program.

[195] Unbeknownst to Ms. Paquet, on April 16, 2008, Mr. Croteau had submitted a letter from Dr. Gannon restricting him from the night shift. It naturally went to OHS. It then notified her of this new restriction (It had never been raised previously in Dr. Chad's IME, or by Drs. Gannon or AB). Of note during Dr. AB's cross-examination, he stated that from his reading of Dr. Gannon's letter, Dr. Gannon wasn't just saying "no night shift" but he also meant place Mr. Croteau on the morning/day shift. I do not agree with Dr. AB's interpretation of Dr. Gannon's letter.

[196] The Complainant argues that he could not work the night shift because he had become used to working earlier shifts in previous accommodated positions, he was experiencing profound insomnia and that he couldn't speak to his wife on the night shift (22:00-06:00 hrs.). CN argues that he suddenly raised this objection and got Dr. Gannon to sign a letter to that effect because he wanted the time during the day to prepare for his upcoming CROA hearing. Mr. Croteau testified that the paper-work and preparation were already complete. His wife testified that they were quite busy during this period – "a lot was happening." I have some sympathy for Mr. Croteau's position regarding his reasons for objecting to the night shift. In any event, as in the past, as "coincidental" or "suspicious" as this sudden shift restriction appeared to be, CN acceded to the medically-backed request. Mr. Croteau ended up only working one week on the night shift.

[197] CN made arrangements then with rover Knight to have Mr. Croteau shadow him on the afternoon shift, and when Mr. Croteau was ready to move into the rover position, Mr. Knight would then move back into the night shift so that Mr. Croteau could have the afternoon shift (14:00-22:00 hrs.). A job offer went out to Mr. Croteau to work the afternoon shift. On April 30, 2008, OHS received another medical update – this time from Dr. AB – indicating that the Complainant could not work afternoons and instead suggesting that he work with a Yardmaster (a Safety Critical position that can be called upon to work any shift). Normally CN would rely on notes from physicians. This is the first time that it had relied solely on psychologist Dr. AB's recommendation alone when it came to the imposition of, or change to, work restrictions. In any event, CN agreed and by this time, Mr. Croteau had only worked two afternoon rover-shadow shifts.

[198] It was clear to CN at this point that Mr. Croteau's preference and only medical clearance was for the morning/day rover-shadowing position. It is clear from the evidence that CN was not prepared to agree to this as LG was being accommodated in the rover position. Because of the interpersonal conflict between the two earlier, bringing them back together was not a viable option. I agree. Furthermore, CN could not displace one accommodated employee for another. That said, Ms. Paquet suggested that Ms. Reaume, the Union representative, might speak with

LG to see if she would be agreeable to a move to another slot. The Union never got back to Ms. Paquet.

E. May 6, 2008: Mr. Croteau Placed "Out of Service" – leave without pay

[199] At this point, CN was running out of options for Mr. Croteau. Mr. Gallagher stated in an email on April 30, 2008 that he wanted a conference call set up as soon as possible to discuss the next steps. It never took place. No explanation has been provided by CN. Instead, on May 6, 2008, Ms. Paquet had sent a letter to Mr. Croteau and telephoned him, advising the Complainant that, as there was no available, productive work for him within the four restrictions, he was being put "out of service" or on unpaid leave of absence. CN would continue to look for work for him that met his restrictions. This was a devastating moment for Mr. Croteau, as he testified; an emotion-laden situation for sure. Ms. Paquet testified that on the call, but not in the letter, she had asked Mr. Croteau if he would be willing to relocate outside of Sarnia, but that he did not reply. She also suggested that he speak with Ms. Reaume, his Union representative, to see if arrangements could be made with LG to move her from the morning/day shift.

[200] Mr. Croteau was cross-examined on the issue of whether he responded to Ms. Paquet's question about being willing to relocate outside of Sarnia:

> A. It sounds familiar.
> Q. She will testify that you didn't respond until the January hearing.
> A. I said, "That would be no problem" I'm sure. I would have said, "Do something."
> Q. Her evidence will be that you didn't say anything.
> A. Why wouldn't I have answered?
> Q. In the January hearing, Member Garfield asked if you ever told CN that, you said "I don't think I told them, but would never have said 'no'." Now you're saying you did?
> A. …It's familiar, it's not in stone.

Mr. Croteau's answers above are convoluted, vague and contradictory. I appreciate that he was quite upset during that phone call. I prefer Ms. Paquet's evidence on this point. On a balance of probabilities, I find that Mr. Croteau did not respond to this question during the call, nor afterward until the hearing in 2012.

F. Post-May 6, 2008 Events

[201] On July 14, 2008, Arbitrator Picher dismissed the CROA harassment grievance due to delay (doctrine of laches). Incidentally, it was during this arbitration hearing that Mr. Croteau saw KS for the first time since 2004.

[202] On August 13, 2008, Ms. Reaume asked Ms. Paquet for a new TWP, indicating that all shift restrictions were now removed. CN responded that it would require updated medical restrictions from Mr. Croteau's physician. This was provided by Dr. Gannon two weeks later: no shift restrictions, but still a safety-critical work restriction. (I note that while seeking accommodative work, at the same time Mr. Croteau was also seeking LTD benefits, meaning that he was essentially unable to work. I also note at this time that he and his family were experiencing serious financial problems.)

[203] Dr. AB wrote a subsequent letter to CN dated August 27, 2008 indicating that "Mr. Croteau's psychological difficulties prevent him from returning to his previous employment as a conductor at CN, but that he is now able to return to work on modified duties." In his final letter placed into evidence dated April 20, 2009, Dr. AB wrote to CN "to clarify my position with respect to his work capabilities." He reiterated that the Complainant's "only work place restriction is not to work in a safety sensitive position." Though not labelling it as a "restriction per se", he recommended a day shift for Mr. Croteau.

[204] On September 22, 2008, Mr. Croteau filed a section 37 Canada Labour Code complaint against his Union for unfair representation. He testified that at this point he felt his Union had been colluding and "in cahoots" with CN against his interests. The CIRB dismissed his application on May 12, 2009. Of interest at page 5, the Board wrote: "The Board is not a

grievance arbitrator and does not determine whether CN abided by its human rights obligations. But the Board does note, and Mr. Croteau did not contest, that there have been a significant number of attempts to find Mr. Croteau work that fit within his changing limitations." I agree.

Meeting with the Complainant, Ms. Fusco and Others on December 3, 2008

[205] On October 14, 2008, Mr. Croteau made further allegations that he had been harassed at CN post-July 14, 2008. Ms. Fusco contacted him and sent him an agenda for a meeting at Mac Yard in Concord scheduled for December 3, 2008 to discuss these new allegations.

[206] The meeting lasted approximately 18 minutes. It was attended by Ms. Fusco, Mr. Schenk, Mr. Croteau and Dr. AB (who as mentioned earlier was introduced as a "friend" and not by his professional role). Mr. Croteau made it clear from the start that he wanted to re-hash the harassment allegations going back to 2003. Ms. Fusco indicated that these had been thoroughly investigated by Mr. Gallagher and that the matter had been closed in April 2005 – over 3 ½ years ago. Mr. Croteau responded: "If [CN] cannot accept that there has been harassment prior to July 2008, then we have nothing to talk about." He was visibly upset and called CN "liars". However, he and Dr. AB confirmed that there were no new harassment allegations. Ms. Fusco then "shifted the tone of the meeting and confirmed with Pierre that he was currently off sick and that he had restrictions." The meeting ended shortly thereafter.

[207] On December 16, 2008, Ms. Fusco sent him a follow-up letter to the December 3, 2008 meeting "…wherein you requested that I review your restrictions to determine whether or not there was suitable work for you *in Sarnia*." [Emphasis added.] He replied by letter with some concerns and clarifications on January 5, 2009. As will be discussed later, while CN continued in its efforts to look for suitable, available work for Mr. Croteau, there was no further communication from CN on this subject until the Tribunal hearing in 2012. No updates from CN, nothing.

[208] Since being put on leave without pay in May 2008, Mr. Croteau has been working part-time at Princess Auto in Sarnia. He testified that he experienced a significant panic attack when one of the managers got fired. To his credit, in 2009 he went back to school at Lambton College. He also applied for various jobs, including with the Canadian Coast Guard. I find that he has made reasonable, laudable efforts to mitigate his wage loss.

G. May 2008-June 2013 Accommodation Efforts including the Job Search Radius

[209] As Mr. McFadden correctly acknowledged, as Mr. Croteau remains employed with CN, it has an ongoing obligation to accommodate his disability to the point of undue hardship or, in other words, provide reasonable accommodation.

[210] As will be discussed later, it is CN's position that until Mr. Croteau's testimony in January of 2012, it did not know, or could not be reasonably deemed to have known, that Mr. Croteau was willing to relocate outside of Sarnia. I agree. It is clear from the April 4, 2007 meeting (and the December 3, 2008 meeting too for that matter) that he was only willing to stay in Sarnia. Based on the evidence before me, I find that Ms. Fusco confirmed his restrictions at the December 3, 2008 meeting and that she would speak with Ms. Paquet to "see if there were any positions available for him in a non-safety critical capacity at Sarnia." At no point, did he correct her and suggest that CN look beyond Sarnia. She sent him a confirmatory and a "follow-up" letter, both dated December 16, 2008: "We will continue to review the positions at Sarnia against any new medical information that is provided to us." In his reply of January 5, 2009, he corrected her on a couple of points, but not on the important issue of the job search radius being limited to Sarnia.

[211] In Ms. Reaume's email to CN dated August 13, 2008 exploring a possible RTW for Mr. Croteau, she too focused on jobs in Sarnia. It is manifest in the evidence that the Union too was of the belief that Mr. Croteau was only interested in accommodated work in the location of Sarnia.

[212] When did it become clear that Mr. Croteau was willing to relocate outside of Sarnia? The answer is: at the hearing in January 2012. While testifying, he averred that he would have worked outside of Sarnia and that he felt that CN should have realized that. At one point, he insisted that he had told CN that. Then he recanted and stated that CN should have inferred his willingness to leave Sarnia from his letters such as the comment in one of them that he wanted to come back to CN.

[213] I noted this development at the hearing and directed that Mr. Croteau advise CN of the appropriate search parametres. As a result, Ms. Cialone wrote a letter to Mr. Croteau dated May 22, 2012 indicating that she understood that Mr. Croteau was now interested in an accommodated position even outside of Sarnia. She suggested that "a nearby large center such as Toronto [Mac Yard is CN's biggest terminal] would yield the best opportunities…If no such positions are available, CN could extend its search to other regions. Please indicate whether or not you would be willing to relocate to the Toronto area…" Mr. Croteau replied through his counsel in a letter dated June 5, 2012. Mr. Bolter stated that his client takes the position that he was never unwilling to consider work in other locations. He said that Mr. Croteau's preference was Sarnia, "or as close to Sarnia as possible", but that he would be wiling to relocate to Toronto for a "reasonably stable" position. In the next paragraph he then referred to a position "in Toronto or elsewhere." At this point, it was clear that Mr. Croteau was willing to relocate to the Toronto area. How far "or elsewhere" extended to in his mind I did not know for certain until the last day of the evidentiary part of the hearing – June 12, 2013. In reply evidence, Mr. Croteau was clear and unambiguous for the first time on this topic: he would be willing to relocate anywhere, from "coast to coast to coast" in Canada.

[214] What is interesting is that, notwithstanding the ambiguity about the search radius extending beyond Sarnia, and the miscommunication between the Complainant and CN on this point, CN had in fact been searching for suitable, available work for Mr. Croteau beyond Sarnia while he has been on unpaid leave.

[215] Laura Waller, a RTW Co-ordinator at CN who recently took over the files of colleague Tania Cialone (who went on maternity leave), testified at the hearing. Also entered into evidence were emails from both Ms. Waller and Ms. Cialone dealing with RTW efforts made while Mr. Croteau was on unpaid leave. Ms. Waller testified about the monthly national "complex cases" conference calls at CN aimed at finding accommodated positions for injured/disabled employees. Represented on the calls are OHS, Human Resources, Labour Relations and Ms. Waller's RTW group. They go over the files of the relevant employees to try to match them with available accommodated jobs. OHS does not share the diagnosis or other confidential medical information with the other participants. Ms. Waller stated that said employees usually remain on the list for a few years so the group becomes familiar with their circumstances and restrictions. No Minutes of the meetings, spread sheet or written confirmation of the content of said calls was entered into evidence. CN's counsel said that such documentary evidence contained privileged information as that department had been merged with the legal department at CN. Mr. Bolter did not challenge that these monthly complex conference calls took place; rather, that we don't know if Mr. Croteau's name came up on every call and that the meetings didn't "address his unique needs and issues." While I find it odd that there was no written information of said "complex calls" produced at the hearing, I accept the testimony of Ms. Waller. She was credible.

[216] Ms. Waller said that she has been looking for a clerical job for one employee with similar restrictions to Mr. Croteau's to no avail since 2008 in the Greater Toronto Area. Some of her searches also occurred in 2009 and 2010 for clerical/sedentary work. She remarked:

> [At Mac Yard for accommodation] it's very difficult right now because there aren't that many open positions that are not safety critical/safety sensitive…There hasn't been any other jobs posted, so unfortunately there's not a lot of movement on the accommodation list…It's been over a year or more [since the last clerical job accommodation at Mac Yard]…The only bulletin that came out was the CAW [Canadian Auto Workers union] bulletin [for the crew-dispatcher positions].

[217] Mr. McFadden asked her about the number of available clerical jobs (non-"SC/SS") from May 6, 2008 to present. She answered: "In Sarnia, none. At Mac Yard, there were clerical jobs

within crew dispatch [not SC/SS] that were filled by the CAW [members]. Not one was filled for accommodation at Mac Yard; Ontario, none." She indicated that there are no cross-bargaining unit placements for clerical jobs at CN. And there are very few clerical jobs to begin with. She stated that, with Mr. Croteau's restrictions (e.g., no SC/SS duties), "It rules out quite a few jobs, such as those in transportation, engineering department, and some mechanical. It just leaves clerical type work."

[218] Ms. Waller also testified in detail about the efforts they made for Mr. Croteau and the possible, available accommodated positions fitting the four restrictions and why they didn't result in a match:

(1) Track inspection system: involved work done on the computer, not a physical job, more clerical, a little bit of travelling; but CN didn't need anyone; it was never filled. She thought it was a funding issue;

(2) Janitorial work: not available because CN contracts out such work in Eastern Canada. To CN's credit, her manager contacted the Vice-President, Eastern Canada to see if something could be done. They got a response that CN is not in the janitorial business there. She wasn't aware of any opportunities outside of Eastern Canada;

(3) Rover position in Sarnia: no available afternoon rover from 2009-11 and no rover position now for the evening (night) shift;

(4) Job vacancies in Sarnia between January 2008-November 2010: She wasn't aware of any such positions. This list was from Ms. Cialone and indicated that they were not applicable because either they were of a SC/SS nature, or they required a Red Seal journeyman trade certification;

(5) Crew dispatcher jobs: CAW had the right to bid first; if not filled, CN could look outside to another bargaining unit. All the jobs were filled by the CAW [Mr. Croteau was not a member of the CAW];

(6) Windsor Fire/Safety Watch: She wanted it for another worker to be accommodated and it was not suitable for Mr. Croteau because of his restrictions. This job only existed in Windsor. If Mr. Croteau had taken that job, Ms. Cialone would have had to find another job for the displaced employee. As Mr. McFadden rightly pointed out, the *CHRA* does not require accommodation of one disabled employee by displacing another from his/her job.

Ms. Waller noted that it's always "harder" to find accommodated work in smaller terminals: fewer office jobs; fewer jobs in general there.

[219] Ms. Waller acknowledged that the documents in Ms. Cialone's file start in 2011 and go to November 2012; there is nothing in the file pre-2011, specifically from 2008-11. (Though I note that there is entered into evidence an email from Ms. Cialone dated November 24, 2008 referable to Mr. Croteau's file.) When asked if she found this surprising, she answered: "Not necessarily…no action may have been required; nothing happened. I guess we can improve the process to put 'No action taken because outside restrictions'." She clearly rejected the suggestion that Ms. Cialone was being "passive" or not being "creative" in her efforts on behalf of Mr. Croteau: "No, Tania was pretty active looking…We do take an active approach." She also noted that Mr. Croteau's four restrictions had not changed and had been deemed permanent by OHS. This is reflected in the May 22, 2012 letter from Ms. Cialone to the Complainant. The witness acknowledged that she doesn't know what CN did for him from May 2008-2011 as she wasn't on this file.

[220] In answer to a question about the job search radius, according to Mr. Bolter's June 5, 2012 letter, Ms. Waller said it appeared that Mr. Croteau's preference is still Sarnia, but that he would consider relocating to Toronto:

> It's not clear if he means 'outside Ontario'. I would probably want to clarify that…I've extended the search to all of Ontario, but not beyond. I'm not quite sure if he wants to go out of province. It's not clear [on June 12, 2013 Mr. Croteau finally clarified that: "coast to coast to coast"]…I haven't looked out West for him.

[221] Mr. McFadden then had her confirm that her knowledge of Ms. Cialone's efforts to find suitable, productive work for Mr. Croteau is based on the documents before the Tribunal, but that in 2011, she had tried to RTW others so she was familiar with what was available then job-wise. Ms. Waller answered in the affirmative and also asserted that she had similar knowledge of what had been available from May 2008 to 2011. She confirmed that the only suitable positions available from 2008-11 were the crew dispatch jobs and they were all filled by the CAW. I note that Ms. Cialone sent out an email to CN managers across Ontario on May 13, 2011 inquiring about available clerical work for Mr. Croteau: "CN is looking very actively for an accommodation for an employee who has been off for many years."

[222] I accept Ms. Waller's evidence and the documentary evidence filed by CN regarding efforts it made to find available, suitable work within Mr. Croteau's restrictions from May 2008 to the end of the hearing in June 2013. Mr. Croteau did not make it clear until the hearing that he would consider work outside Sarnia. Furthermore, during the hearing the clarity progressed from his January 2012 testimony, to the June 5, 2012 letter of his counsel, to the Complainant's reply evidence of "coast to coast to coast" on June 12, 2013. Notwithstanding the gradual evolution, CN was steps or miles ahead of Mr. Croteau in terms of its own accommodated job search radius. CN met its statutory duty to accommodate here.

[223] I do not accept that either Mr. Croteau told CN (prior to the hearing in 2012) that he would relocate outside of Sarnia or that CN should be deemed to have known this. It was clear from Mr. Croteau's actions and words from 2007 to 2012 that he wanted to RTW in Sarnia and

only Sarnia. Furthermore, I note that Mr. Croteau submitted lengthy written documents to CN and to various tribunals and agencies in the form of letters, his internal harassment complaint, his CROA arbitration grievance, his section 37 complaint against the Union, etc. And his written works went from the grand to the minutiae. He has no problems expressing himself using the written word. Had he wanted to work outside of Sarnia, on this major issue of great importance to him, Mr. Croteau would have said so. It only required one sentence of unequivocal expression to CN. But as mentioned earlier, while this is relevant as far as a question of credibility, in terms of the ultimate result, it would have made no difference. Why? Because CN, on its own initiative, searched beyond Sarnia and nothing suitable was available.

[224] As for CN's accommodation efforts from 2007-May 6, 2008, I also find that it has established its statutory defence of a BFOR with accommodation to the point of undue hardship. The RTW efforts involved five attempts at accommodation, not counting the failed March 2005 Fire/Safety one. CN acted in good faith. It wanted to return Mr. Croteau to the job that he had been hired and trained for, and actually did for years, that of conductor. CN always followed the medical recommendations and tried to work with the Complainant and his Union representatives in a constructive manner.

H. Why Were Mr. Croteau's RTW Attempts Unsuccessful? Why Did CN's BFOR/Accommodation Defence Succeed?

[225] This first question is not a simple one. We are dealing with a human being, not a machine. He clearly had (and has) severe anxiety-related disorders. Of that I have no doubt. But I believe the RTW efforts were unsuccessful for the following reasons:

(1) Mr. Croteau did not fully participate in the accommodation process:

[226] Mr. Croteau did not fully cooperate in the process at all times and fell short *at times* of his legal obligation to participate in the accommodation dialogue. For example, at the hearing he listed jobs that he felt CN should have considered accommodating him in. But these jobs were outside his qualifications and/or restrictions, such as an electrician position that requires Red

Seal certification after several years of study and apprenticeship. He wanted to shadow the Yardmaster. But this is a SC job. Why would CN have him shadow a SC position that he was never hired to do? In January 2005, he (and the Union) wouldn't even meet to discuss his RTW. On March 1, 2005 he attended the meeting with the Union and Mr. Gallagher where he made the cryptic "$1 may be too much and $1 Million may not be enough" comment and submitted a list of demands which rightly gave CN the impression that this was not an employee who truly wanted to RTW, unless it was on his terms only. If CN agreed to his terms, he apparently would have returned to work that very month.

[227] As well, he altered a CN document and had his supervisor sign it. Mr. Gallagher testified that this could have resulted in his receiving half the demerit points needed to result in dismissal. Mr. McFadden submitted that it could have led to serious discipline, including dismissal from employment at CN. I agree with Mr. McFadden that, had CN really intended to "get" Mr. Croteau as he feared, the Complainant had provided the company with plenty of ammunition and opportunity. Also, Mr. Croteau was not forthright in the April 30, 2008 meeting with Dr. AB and having him write to CN to include a shift restriction from the shadow-rover TWP based on information on two points that the Complainant knew just five days earlier from Ms. Paquet's letter to be false.

[228] It is true that he did not refuse to do accommodated assignments, but when he was doing them, it seemed like he was going through the motions only. It may be due *partly* to the make-work nature of some of the RTW jobs. This is one of the conclusions I draw from the evidence in this 36-day hearing.

(2) His Fear/Paranoia/Mistrust originally focussed on KS, but then extended to CN:

[229] I use the above terms, not in the medical, clinical sense (e.g., paranoia), but in their every day plain, dictionary meaning sense. It was clear to me throughout the hearing that Mr. Croteau had (and still has) a profound fear of KS. The kidnapping fear was an obvious example. I do not say this to demean or belittle Mr. Croteau. I do not believe that he is making this up. The

problem is that, even though KS and TC left the picture very quickly at CN's insistence and had no further interaction with Mr. Croteau, their impact (mainly KS's) lingers on: Indeed, her image haunts him still. This fear/paranoia about KS eventually extended to a profound mistrust of all things "CN". The "work related issues" often repeated in Dr. Chad's IMEs and the reports and letters from Drs. Gannon and AB had extended beyond KS and TC. This was highlighted when the Complainant testified that he wanted compensation to cover his moving expenses because he did not want CN to know where he lives. The mistrust extended to the Union too and his belief that it was in collusion with CN against his interests. In the hearing, he would not accept benign explanations and motives for CN's actions; for example, about CN's having paid for Dr. AB's sessions with him and well beyond the initial time (and cost) allotment it had set.

(3) Mr. Croteau wanted Agreement or there was to be no resolution of "work related issues":

[230] There was a circular reasoning at play here: a Merry-go-round or *Groundhog Day*-ish aspect to this case. I believe Mr. Croteau when he testified and wrote that he needed to heal in order to RTW. But the question is: What did he require in order to heal so that he could RTW? I do not accept that it was simply a matter of a better process: e.g., more meetings with Ms. Paquet, a better harassment investigation by Mr. Gallagher (and not necessarily a different conclusion/findings). No, what he was seeking in addition to these things was AGREEMENT – that KS and TC were "guilty" of harassing him, that CN was "guilty" for putting him (and collaterally his family) under surveillance, that he receive an apology and compensation and discipline of KS and TC, etc. The list of demands at the March 1, 2005 meeting I believe were sincerely held conditions precedent in Mr. Croteau's mind for his healing and RTW at CN. Anything less would not do.

[231] There was an interesting exchange in cross-examination between Mr. McFadden and Dr. AB. Counsel put it to the witness that it was clear from the evidence that Mr. Croteau wanted an apology, and that the removal of KS and TC by CN, such that they had no more involvement with the Complainant, was not sufficient. But what if they didn't do anything wrong, asked Mr. McFadden. How could CN resolve Mr. Croteau's "work related issues" then?

Dr. AB responded: “I’m also a couple’s therapist. With open communication, legitimately trying to understand each other sometimes does work. Is an apology necessary? Maybe if they all sat down in a room…” With no disrespect intended to Dr. AB and his skills as a psychologist and couple’s therapist, while this may be a therapeutic prescription that sometimes works, it would not succeed here. More conversations, TWPs, letters, “sit-down” meetings or the re-opening of the harassment investigation would not have made a difference unless CN ultimately AGREED with Mr. Croteau with regard to the perceived wrongs allegedly visited upon him by KS, TC, CN, the Union, etc. Without this, there would be no healing, and without the healing which Mr. Croteau testified about several times, there would be no successful RTW.

[232] Mr. Croteau’s RTW progress had hit a plateau. Sure it was better than in August 2004 when he couldn’t even go onsite without a major panic attack. But in terms of actually progressing to the point of reasonably being able to RTW as a conductor, his recovery was nowhere close to that goal, notwithstanding the medical evidence to the contrary. I say this because Drs. Chad, Gannon and AB were not fully informed by Mr. Croteau of his true feelings and fears about KS and CN in general. Dr. AB wasn’t even aware of Mr. Croteau’s “kidnapping” fear regarding KS, for example.

(4) There was no available, suitable work for Mr. Croteau:

[233] Finally, there was no available, suitable work that fit within Mr. Croteau’s four restrictions, as well as his geographic one. As discussed earlier, CN was even ahead of Mr. Croteau in terms of extending its job search radius beyond Sarnia. As Ms. Waller’s testimony (and to a lesser extent Mr. Colasimone’s) and the documentary evidence showed, at CN there was (as of the last day of the hearing) nothing available in terms of a clerical job.

[234] Based on the foregoing, I find that CN has successfully established its BFOR/accommodation defence under sections 15(1)(a) and 15(2) of the *CHRA*.

I. Procedural Accommodation/Best Practices Issues

[235] As indicated earlier, Zinn J. in *Cruden* held that there is no separate procedural duty in the accommodation process which can be breached and attract remedies on its own where there has been a substantive finding of undue hardship. Accommodation must be reasonable (to the point of undue hardship); it need not be perfect: *Renaud*.

[236] From this long hearing, while I find that CN has mounted a successful BFOR/accommodation defence, there are some aspects of its process that, while not imposing *CHRA* liability (as they certainly do not meet the exception carved out by Zinn J. in para. 79 of *Cruden*), nevertheless fell short of "best practices" and upon which I wish to remark.

(1) Better communication with accommodated employees/changes to TWPs:

[237] I accept the evidence of Mr. Croteau that there were times when CN made changes to his TWP on short notice and without his input. Suffice to say that best efforts should be made to eliminate such occurrences in general, and specifically in relation to employees with Mr. Croteau's diagnosis of anxiety-related disorders. I also include in this category the delay in advising Mr. Croteau, following the April 4, 2007 meeting, as to whether he would be paid at the "belt pack rate". This caused undue stress about a fundamental aspect of the employer-employee relationship - pay - and to an employee who was under serious financial pressures. The above examples were not causes of the unsuccessful RTW attempts.

(2) Communication with "out of service" injured/disabled employees:

[238] The evidence before me was that there was no direct communication between CN and Mr. Croteau regarding efforts made to find him accommodated work after the December 3, 2008 meeting with Ms. Fusco and Mr. Schenk and the follow-up letter. Surprisingly, there was not even an official status update from June 5, 2012 (when Mr. Bolter wrote his responding letter to CN about his client's willingness to relocate in the Toronto region "or elsewhere") to the end of the hearing in June 2013, other than the evidence of Ms. Waller. I agree with Mr. Bolter that this

leads an employee to think that nothing is being done. No evidence was led about CN's policy and general practices about communication with "out of service" employees.

(3) Updated/Current Medical information:

[239] The most current medical information on file from a physician regarding Mr. Croteau is from Dr. Gannon. He wrote a letter and a prescription note both dated August 28, 2008. The prescription note reads: "His patient may return to work without shift time restrictions." He also completed a CN "Medical Report on Mental Health (Safety Critical Position)" for Mr. Croteau dated October 2, 2008. Dr. Chad's last IME Report is dated February 3, 2008. Dr. AB's last letter to CN is dated April 20, 2009. Dr. AB testified that he hasn't assessed Mr. Croteau for fitness to RTW for some time. He states that he "suffers from chronic severe anxiety related disorders." His condition progressed to being chronic.

[240] During the hearing, Mr. McFadden indicated initially that his client might have another (fourth) IME done. Later, at the hearing on April 16 and June 13, 2013, counsel said that CN likely would not, but instead look to the Complainant's family physician regarding Mr. Croteau's RTW restrictions, etc. I note that CN had not done any of these things, as of the last day of the hearing. I don't know if CN has done any of them since then.

[241] I appreciate that, based on Mr. Bolter's June 5, 2012 letter and his submission on behalf of his client during the hearing that the four restrictions remain, CN may not think it necessary to seek updated medical information from a physician, especially given that there is no available work based on these restrictions. As well, Ms. Waller testified that OHS informed them that Mr. Croteau's four restrictions were deemed permanent, as reflected in Ms. Cialone's letter to Mr. Croteau dated May 22, 2012. I also accept that, based on the many panic attacks during the hearing, CN takes the position that Mr. Croteau has not been symptom-free for six months for SC work, as required by the Railway industry Medical Rules Handbook, and that the underlying conditions that prompted the SC/SS restriction for example, have not changed significantly, if at all.

[242] With regards to the preceding paragraph, generally speaking, "best practices" would suggest getting updated medical information to confirm work restrictions. They originate from the physician data in the first place. However, in the instant case, had CN taken the *procedural* accommodation step of obtaining further, updated medical information from Mr. Croteau's physician from 2009 onward, I find on a balance of probabilities that *substantively* it would have made no difference in terms of the outcome for the ultimate goal: Mr. Croteau's RTW at CN. I say this for the reasons outlined in the preceding section **"**Why Were Mr. Croteau's RTW Attempts Unsuccessful? Why Did CN's BFOR/Accommodation Defence Succeed?"

XIII. Conclusion

[243] Based on the foregoing, the Complaint has not been substantiated and is accordingly dismissed. This has been a long hearing with much evidence, covering a decade's worth of events. I know that Mr. Croteau will be disappointed. I have listened very carefully to him (and to CN) in the presentation of their respective cases. During his testimony, Mr. Croteau said: "I'm hoping this Tribunal will bring me closure." With a great deal of compassion and empathy, I hope that Mr. Croteau will be able to achieve closure and heal with the love and support of his family, his internal strength and determination, and Dr. AB's help. He's an intelligent, thoughtful person with many years ahead of him.

Signed by

Matthew D. Garfield
Tribunal Member

Ottawa, Ontario
May 12, 2014

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1623/16910

Style of Cause: Pierre Croteau v. Canadian National Railway Company

Decision of the Tribunal Dated: May 12, 2014

Date and Place of Hearing: January 9 to 13, 2012
February 21 to 24, 2012
February 27 to 29, 2012
May 23 to 25, 2012
May 28 to June 1, 2012
November 13 to 16, 2012

Sarnia, Ontario

July 19 to 20, 2012
April 3 to 5, 2013
April 15, 16 and 18, 2013
June 12 to 14, 2013

London, Ontario

June 25, 2013

Via teleconference

Appearances:

Andrew C. Bolter, for the Complainant

No one appearing, for the Canadian Human Rights Commission

Michael G. McFadden, for the Respondent