Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Tim Day

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canada Post Corporation

Respondent

Decision

Member: Karen A. Jensen
Date: October 19, 2007
Citation: 2007 CHRT 43

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I. Introduction

[1] Tim Day is a registered electronics engineer. He has been working for Canada Post Corporation for nineteen years. In 1994, he became ill and was diagnosed with depression, anxiety disorder and an obsessive compulsive personality disorder. He returned to work in 1995. Since then, Mr. Day's employment relationship with Canada Post has been difficult. He thinks that Canada Post has never accepted his psychiatric disability and has treated him differently from other employees because he is disabled.

[2] Mr. Day has raised ten allegations of discrimination during the time period from April 2001 to August 2006. The allegations relate to Mr. Day's psychological fitness to work, Canada Post's requirement that he work the night shift, the termination of his employment, and a number of other allegations involving negative differential treatment and harassment on the basis of his disability.

[3] Mr. Day invokes sections 7 and 14 of the *Canadian Human Rights Act.* Section 7 provides that it is a discriminatory practice to refuse to continue to employ an individual, or to differentiate adversely in relation to an employee on the basis of a prohibited ground of discrimination. Section 14 stipulates that it is a discriminatory practice to harass an individual on the basis of a prohibited ground of discrimination.

[4] Of the ten allegations of discrimination made by Mr. Day, one is substantiated. Canada Post treated Mr. Day differently from non-disabled employees when it placed him on sick leave and removed him from the workplace in November of 2001. Although the evidence supported Canada Post's decision to remove him from the workplace, the Corporation failed to treat Mr. Day with dignity and respect throughout the accommodation process. Mr. Day's other allegations were not substantiated.

[5] After a brief overview of the facts that gave rise to the complaint, I will set out Mr. Day's allegations and then address them in turn. Finally, I will provide my reasons for the remedy that I have ordered.

II. What Are the Facts That Give Rise to the Complaint?

[6] Mr. Day was hired as a mechanic by Canada Post in April of 1986 in the Technical Services department at the Glanford Mail Processing Plant (GMPP) in Victoria. In 1992, he was promoted to an EL5, a technical specialist position in Technical Services. EL5's perform the most difficult repair and maintenance work on the machines at Canada Post. They are also required to supervise up to twenty employees.

[7] In the fall of 1995, Mr. Day experienced a major depressive episode. He was off work for ten months. He returned to work on a gradual basis, but his reintegration did not go entirely smoothly. He had problems with Canada Post management over a number of issues in the workplace.

[8] One issue involved the requirement to wear steel toed boots. The repair and maintenance of machinery can be dangerous work. For that reason, Canada Post requires its Technical Service employees to wear steel toed boots on a continuous basis. Mr. Day cannot do so because of a foot condition. Although Canada Post accommodated his foot condition, Mr. Day thought that the way Canada Post handled the process was discriminatory.

[9] Another dispute between Mr. Day and Canada Post involved the requirement to work shifts at Canada Post. When he was promoted to the EL5 position in 1992, Mr. Day worked the afternoon shift only, from 3 p.m. until 11 p.m.

[10] In 1997, Canada Post implemented a rotating shift system; from then on all EL5's, with the exception of the EL5 who held the "electronics specialist" position, were required to rotate through the following three shifts on a twelve week basis:

(1) the day shift, known as Shift 1 which was, at the time of the complaint from 7 a.m. until 3 p.m.;

(2) the afternoon shift, known as Shift 2, which was from 3 p.m. until 11 p.m.; and

(3) the night shift, known as Shift 3, which was from 11 p.m. until 7 a.m.

[11] Mr. Day had difficulty with the night shift at Canada Post. From 1996 until the fall of 2001, Mr. Day and his doctors were of the view that working nights aggravated his symptoms of depression. During that period, Canada Post relieved Mr. Day of the obligation to work the night shift whenever he produced a note from his doctor indicating that he could not work nights. He did so on every occasion that he was scheduled to work nights during that period, although he attempted to work a few shifts on two occasions.

[12] In the fall of 2001, Mr. Day was scheduled to work night shift again. As before, he produced a note from his doctor indicating that he was unable to work night shift. This time, however, Canada Post questioned whether Mr. Day needed to be relieved from the night shift on an ongoing basis. Canada Post temporarily accommodated Mr. Day on the afternoon shift and passed the note on to Medisys, the medical consulting firm that handled Canada Post's occupational health and safety issues, for further investigation.

[13] Medisys requested additional medical information. Mr. Day was sent for an Independent Medical Examination (an IME) with Dr. Miller, a psychiatrist in Victoria. On October 11, 2001, Dr. Miller reported that Mr. Day was suffering from major recurrent depression with incomplete remission. He recommended a change in Mr. Day's medication and cognitive behavioural therapy. Dr. Miller stated that shift work was likely to worsen Mr. Day's mental state. He was also concerned that there were issues of workplace safety if Mr. Day's workplace disputes were allowed to drag on unresolved.

[14] On November 16, 2001, Canada Post thought that Mr. Day's psychological health had deteriorated to the point that he posed a threat to workplace safety. He was sent home at the end of his shift with a letter stating that he was not fit for work and would be placed on sick leave.

[15] Mr. Day returned to the workplace on November 21, 2001, with a medical note attesting to his fitness to work. Canada Post did not accept the note and Mr. Day was escorted from the workplace. His supervisor, Mr. Bob Ormerod, informed him he needed confirmation from his

doctor that he was complying with Dr. Miller's treatment recommendations and that he was fit to return to work.

[16] On December 3, 2001, Mr. Day's doctor confirmed that Mr. Day was following the treatment recommended by Dr. Miller and that he was progressing well on it. He stated, however, that Mr. Day should work day shift only.

[17] Dr. Hamm, the Medisys doctor, disagreed with Mr. Day's doctor that permanent accommodation on day shift was needed. Dr. Hamm thought that Mr. Day was likely to continue to improve on the new drug regime. His symptoms of depression would then go into remission and he would be able to work all three shifts, including the night shift. He provided his opinion to Canada Post in a document known as a Field Report dated December 4, 2001.

[18] Mr. Day returned to work on December 11, 2001. He was not scheduled to go on night shift until April of 2002. Before that date however, several events occurred which caused Mr. Day concern.

[19] On January 16, 2002, Canada Post served Mr. Day with a 24 Hour Notice of Interview to discuss his failure to satisfactorily administer the preventative maintenance system. Preventative maintenance is done on the machinery at Canada Post to ensure that it is in good working order. Mr. Day was required to provide information regarding the completion of these duties. He refused to do so, and was disciplined as a result.

[20] Also in January of 2002, Mr. Day requested permission from Canada Post to switch his twelve week block of afternoon shifts with a fellow EL-5 who was due to go on days. Canada Post denied his request.

[21] Sometime around April 10, 2001, Mr. Day provided a note to Canada Post from his doctor indicating that, for medical reasons, he was advised not to work nights. Mr. Ormerod, the Superintendent of Engineering and Technical Services in Victoria, informed him that a doctor's

note would not suffice to excuse him from working the night shift. He also stated that the medical information to date indicated that he was capable of working nights and was expected to do so.

[22] Mr. Day worked part of the night shift on several occasions. Then on April 25, 2002, he left before his shift was over and called in sick the next day. He was suspended for three days without pay for his refusal to work the night shift.

[23] On May 27, 2002, Canada Post terminated Mr. Day's employment. The reason cited for the termination was his failure to report for work or to provide an acceptable reason for not doing so.

[24] Mr. Day grieved his discharge. A settlement agreement was reached pursuant to which Mr. Day returned to work on a gradual basis on May 16, 2003. He worked day shift only.

[25] In 2004, Canada Post determined that Technical Services was overstaffed by two positions. On September 23, 2004, Canada Post informed the union that two EL5 positions would be declared surplus. This would result in the elimination of Mr. Day's position.

[26] Mr. Day became consumed with a desire to prove that his position had been eliminated because he was disabled. His symptoms of depression and anxiety increased. He went on sick leave again on October 27, 2004.

[27] On November 1, 2004, Mr. Day's position and that of another EL5 were declared surplus. Mr. Day was informed that he had been transferred to a PO4 position, which is a mail sorter position in the Glanford Mail Processing Plant in Victoria. Mr. Day has never worked in this position since being on sick leave from October 27, 2004.

[28] In March of 2005 while on sick leave, Mr. Day applied for a vacant MAM11 position in the Technical Services Department in Victoria. This is a mechanics' position. Mr. Sarbjit

Sangha, Manager of Technical Services for Vancouver and Victoria, subsequently informed Mr. Day and his union that the MAM11 position had been deleted. Therefore, Mr. Day was not eligible for the MAM11 position.

[29] In May of 2006, Mr. Day bid on a letter carrier position in Victoria. Although he was successful in obtaining the route that he requested, he lost it in a subsequent route re-organization. Ultimately, he was assigned to a relief mail carrier position, a position with which he was not happy.

[30] Mr. Day has been seeing a psychiatrist, Dr. David Swan, in Victoria since September of 2002. Dr. Swan testified that after trying a number of medications, he decided that Mr. Day's depressive disorder would not respond completely to medication; he continues to have symptoms that will not remit completely. However, Dr. Swan testified that Mr. Day has been fit to return to work on day shift since November of 2004.

[31] Mr. Day's obsessive compulsive personality disorder manifests itself in high expectations of himself and others. When his or someone else's performance falls short of these expectations, it can generate feelings of frustration, anxiety and depression. He tends to dwell on issues that bother him. The disorder does not, however, affect Mr. Day's ability to act responsibly in the workplace. It does not affect his ability to perform the functions of his job.

III. What Are the Issues In the Present Case?

[32] The following questions must be answered in the present case:

(1) Did Canada Post discriminate against Mr. Day with respect to the requirement to wear steel toed boots in April of 2001?

(2) Did Canada Post discriminate against Mr. Day when it placed him on sick leave and removed him from the workplace in November of 2001?

(3) Did Canada Post discriminate against Mr. Day with regard to the preventative maintenance reports in January of 2002?

(4) Was the denial of Mr. Day's request to exchange shifts with a co-worker in January of 2002 discriminatory?

(5) Was the requirement that Mr. Day work the night shift in April 2002 discriminatory?

(6) Was the termination of Mr. Day's employment with Canada Post in May of 2002 discriminatory?

(7) Did Canada Post discriminate against Mr. Day in November of 2004 when it eliminated his EL5 position?

(8) Was the deletion of the MAM11 position in March of 2005 discriminatory?

(9) Was the assignment of Mr. Day to the relief letter carrier position in 2006 discriminatory?

(10) Was Mr. Day harassed on the basis of his disability?

A. What are the Applicable Legal Tests in this Case?

[33] When discrimination is alleged, the complainant must first establish a *prima facie* case of discrimination (*Ontario Human Rights Commission et al v. The Borough of Etobicoke*, [1982] 1 S.C.R. 202). A *prima facie* case is made out when the complainant presents evidence that covers the allegations made and which, if believed, is complete and sufficient for a decision in favour of the complainant, in the absence of an answer from the respondent (*Ontario Human Rights Commission and O'Malley v. Simpson Sears Ltd*. [1985] 2 S.C.R. 536).

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

[35] Conduct may be found to be non-discriminatory if the employer establishes that it is based on a *bona fide* occupational requirement (a "BFOR"). A BFOR is a rule or practice established in the honest belief that it is necessary to accomplish a valid workplace goal. A requirement will qualify as a BFOR only if the employer establishes that accommodation of the individual's needs would impose undue hardship considering health, safety and cost (ss. 15(1(a) and 15(2) of the *Act*).

[36] In determining whether a BFOR has been established within the meaning of the *CHRA*, the Tribunal bears in mind the principles set out by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3 ("*Meiorin*") and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 ("*Grismer*")).

B. Analysis of the Issues

(i) Was the Way that Canada Post Handled the Requirement to Wear Steel-Toed Boots Discriminatory?

The *Prima Facie* Case

[37] In 1993, Mr. Day provided a medical note indicating that he had a foot condition that prevented him from wearing steel toed boots on a continuous basis. His practice was to wear running shoes and change to steel toed boots only in areas where there was a risk of injury.

[38] In January of 2001, Mr. Steve Clark, the Coordinator of Technical Services issued a memorandum to all Technical Service employees indicating that they were required to wear steel toed boots at all times in the Technical Services Department.

[39] Following the release of the memo, Mr. Day was asked to update his medical note. Canada Post issued him a 24 Hour Notice of Interview to discuss his inability to wear steel toed boots. After it was determined there were no alternatives to steel toed boots that Mr. Day could

wear on a continuous basis, he was permitted to continue his practice of wearing running shoes in the plant.

[40] Mr. Day took no issue with the ultimate resolution of the problem. Rather, he complained that the process of having to provide updated medical information, to attend an interview with Canada Post and to look for other boots constituted negative differential treatment on the basis of disability. He felt that Canada Post used the excuse of the steel toed boot requirement to single him out for negative treatment because he was disabled.

[41] Mr. Iroume, a co-worker of Mr. Day, testified that there were other employees who wore running shoes from time to time in the plant. They were not required to attend an interview about this.

[42] Mr. Day has established a *prima facie* case that the issuance of a 24 Hour Notice of Interview for his inability to wear steel toed boots constituted adverse differential treatment on the basis of disability. Mr. Day was led to believe that he might be disciplined for being unable to wear steel toed boots. He was also required to look for steel toed boots that he could wear on a regular and continuous basis when there were apparently other employees who did not always wear steel toed boots.

The Respondent's Explanation

[43] I am satisfied that Canada Post's actions with regard to the steel toed boot requirement were based solely on a legitimate safety concern. The repair and maintenance of the large machinery at Canada Post puts workers at risk of injury. Steel toed boots provide protection against injury. Mr. Clark was under orders from the National Health and Safety Committee to vigorously enforce the requirement. He needed to determine if, eight years after the most recent medical information, Mr. Day's foot condition was still a problem. Mr. Clark also needed to determine if there was any other protective footwear that Mr. Day could wear on a more continuous basis.

[44] The fact that the clarification of Mr. Day's accommodation needs was done by way of the 24 Hour Notice process does not, in my view, render it adverse differential treatment. Mr. Clark explained that at Canada Post, 24 Hour Notices and Interviews do not constitute disciplinary action. Rather, they provide an opportunity for Canada Post to discuss concerns with an employee and for the employee, and his or her union representative, to respond to these concerns. If a satisfactory resolution to the problem is arrived at during the interview, disciplinary action does not follow and the notice is not placed in the employee's personal file. A satisfactory resolution of Canada Post's concerns was achieved in Mr. Day's case. He was fully accommodated.

[45] While it may be true, as Mr. Iroume testified, that the Technical Service employees do not always wear their steel toed boots, Mr. Day and Mr. Clark gave evidence that Mr. Day was the only Technical Service employee who had a regular and consistent practice of wearing running shoes and changing to boots only in certain areas of the plant.

[46] I accept Mr. Clark's explanation that it was Mr. Day's regular practice of wearing running shoes that prompted him to question whether anything could be done to increase the amount of time that he spent wearing protective footwear. He did not target Mr. Day for negative treatment based on his disability; he had a genuine health and safety concern that he needed to raise with Mr. Day.

[47] Canada Post has, therefore, provided a satisfactory explanation with regard to Mr. Day's first allegation.

(ii) Did Canada Post discriminate against Mr. Day when it placed him on sick leave and removed him from the workplace in November of 2001?

The *Prima Facie* Case

[48] On November 16, 2001, Mr. Day was due to attend an interview regarding work performance concerns that Canada Post had raised in a 24 Hour Notice of Interview. Instead, the

interview was cancelled before it began. Mr. Day was sent home at the end of his shift with a letter saying that he was being placed on sick leave.

[49] Mr. Day testified that he was shocked at being placed on sick leave. He did not feel ill. He thought it was part of Canada Post's plan to get rid of him because he was disabled.

[50] On November 21, 2001, Mr. Day returned to work with a note from his doctor indicating that he was "well and able to work". He worked the shift, but at the end of it he was approached by Mr. Ormerod who called his name out from across the plant floor. When Mr. Ormerod reached Mr. Day, he told Mr. Day that he should not be at work, that his doctor's note was insufficient, and that he was to leave immediately. Mr. Ormerod then escorted him from the building. Mr. Day testified that he was very embarrassed by this incident.

[51] Mr. Day testified that one of the most upsetting parts of this series of incidents for him was the fact that he did not understand the reason that he was being sent home. The letter he was given on November 16, 2001 indicated that Canada Post had a "bona fide concern" with respect to his fitness for duty based on observations and the professional opinion of Dr. Hamm.

[52] The letter from Canada Post given to Mr. Day on November 21, 2001, the day that he was escorted from the workplace, indicated that he would not be permitted to return to work until he provided medical proof that he was following the course of treatment recommended by Dr. Miller in the IME Report.

[53] However, neither Mr. Day nor his doctor received Dr. Miller's IME Report until November 23, 2001, and it was not until his union representatives met with Canada Post on November 28, 2001 that Mr. Day became aware that Canada Post thought he posed a safety risk at work.

[54] Mr. Day testified that he had never been violent towards himself or others in the workplace. He stated that if he was a risk at all it would be with respect to his own safety. He

stated that although he was upset about the interview on November 16, 2001, his behaviour was slow rather than agitated because he had taken anti-anxiety medication to calm himself. He thought that Canada Post was not justified in placing him on sick leave or removing him from the workplace in November of 2001.

[55] I find that Mr. Day has established a *prima facie* case under s. 7(b) of the *Act* that he was treated adversely in the course of employment on the basis of his disability. Mr. Day was deemed by Canada Post to be a safety risk and unfit to work when his own physician was of the view that he was, in fact, able to work. He was denied the right to return to work even though he had presented proof of his fitness. He was subjected to a humiliating removal from the workplace in front of his peers. Neither he nor his physician was provided with the information they needed to address the concerns that gave rise to Canada Post's removal from the workplace.

The Respondent's Explanation

[56] Canada Post argued that the evidence at the time indicated that Mr. Day posed a serious risk to his own safety and to the safety of others in the workplace. It would have constituted undue hardship to have permitted him to remain in the workplace or to have informed him of the full extent of the reasons for his removal. Therefore, placing Mr. Day on sick leave and refusing to permit him to return to work in November 2001 constituted a BFOR, according to Canada Post.

[57] According to sections 15(1)(a) and 15(2) of the *Act*, the Complainant's removal from the workplace cannot be considered to be based on a BFOR unless the Respondent can establish that accommodation of his needs would impose undue hardship, having regard to health, safety and cost.

[58] Risk is a factor to be considered in determining whether undue hardship would result from the accommodation (*British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* (*"Grismer"*), [1999] 3 S.C.R. 868, at para. 30). Where

safety is at issue, both the magnitude of the risk and the identity of those who bear it are relevant considerations (*Central Alberta Dairy Pool v. Alberta (Human Rights Comm.)* (1990), 12 C.H.R.R. D/417at para 62).

[59] I find that the evidence in the present case established that on November 16, 2001, both the severity and magnitude of the risk to Mr. Day's safety and/or the safety of others in the workplace was such that Canada Post had no other option than to send Mr. Day home.

[60] Dr. Miller's report indicated that Mr. Day's psychological health was very unstable at that time. He was concerned that Mr. Day might become violent if his workplace grievances could not be resolved.

[61] One day prior to sending him home on sick leave Canada Post had issued Mr. Day with a 24 Hour Notice of Interview detailing a list of concerns about Mr. Day's work performance. Ms. Jenica Epp, the Medisys nurse, testified that Mr. Day came to see her before his interview on November 16, 2001. She testified that he was tense, anxious-looking and distraught. She stated that he had a pronounced eye and facial tick. She was uncomfortable and frightened in his presence.

[62] Mr. Clark also testified that in the weeks prior to November 16, 2001, he noticed that Mr. Day was more agitated and tense than usual. Mr. Clark stated that he was concerned about Mr. Day's psychological stability at that time.

[63] I accept that Canada Post has an obligation to assure the safety and well-being of all the employees on its premises. Therefore, employees who pose a safety risk to themselves or others are removed from the workplace and are not permitted to return until they have established, by way of acceptable medical evidence, that they no longer pose such a threat. Accommodating Mr. Day in the workplace would have constituted undue hardship in that it would have exposed others and/or Mr. Day to the serious potential of significant harm.

[64] Before permitting Mr. Day to return to work, Canada Post needed assurances from Mr. Day's physician that he was receiving the treatment recommended by Dr. Miller and that he was no longer a safety risk. Neither of the notes provided by Mr. Day provided that assurance. Again, given the magnitude and severity of the risk to worker safety in this case, I find that it would have created undue hardship to have permitted Mr. Day to return to work on November 21, 2001.

[65] However, the inquiry as to whether the duty to accommodate has been met does not end there. There is both a procedural and a substantive component involved in the duty (*Meiorin,* at para 66). The Supreme Court has directed that the procedure adopted to assess the issue of accommodation should be considered separately from the substantive component when determining whether or not the duty has been discharged.

[66] A failure to meet one of the two components does not necessarily result in a violation of the *Act*. Both the procedure of the inquiry and the substantive results of those inquiries should be considered when determining whether an employer has met its obligations under the *Act* (*Meiorin,* at para 66; *Datt v. McDonald's Restaurants of Canada Ltd.* 2007 BCHRT 324; *Gordy v. Painter's Lodge (No. 2)*, 2004 BCHRT 225)

[67] In *Irvine v. Canadian Armed Forces ("CAF")*, 2005 FCA 432, the Federal Court of Appeal indicated that the procedural component of the duty to accommodate requires a fair assessment of the available medical evidence in relation to the complainant's fitness for duty.

[68] Fairness in the accommodation process is not, in my view, 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. It requires that the inherent worth and dignity of the individual be respected throughout the process to the point of undue hardship (*Meiorin,* at para 62).

[69] The question in the present case then is whether Mr. Day was treated fairly in the application of the standard identified above, that is removal from the workplace when there is a risk of violent or dangerous behaviour. For the following reasons I find that he was not.

1. Neither Mr. Day, nor his physician was provided, on a timely basis, with a copy of the IME Report which formed the basis of the decision to send Mr. Day home.

[70] Mr. Day was seen by the IME psychiatrist, Dr. Miller, on October 11, 2001. On several occasions in early November, Mr. Day requested the IME Report from both Canada Post and Medisys. His requests went unheeded; the report was not sent to Mr. Day's doctor until November 20, 2001.

[71] Mr. Ormerod explained that the IME report was sent to Mr. Day's doctor on November 20, 2001. As a result of a problem with the doctor's fax machine, the report did not reach Mr. Day's doctor until November 23, 2001. However, no explanation was provided as to why the Report was not sent to Mr. Day's physician prior to November 20, 2001.

[72] As a result of the failure to provide the IME Report on a timely basis, Mr. Day had no idea until November 23, 2001, when his doctor received the Report, that Dr. Miller thought he was not receiving proper treatment for his depression and that there was a concern about his safety at work. He felt completely blind-sided by the notice that he was unfit for work.

[73] As a further result of Canada Post's failure to provide Mr. Day with the information he needed on a timely basis, he suffered the embarrassment of being escorted from the building on November 21, 2001, because his doctor's note did not respond to Canada Post's concerns. Again, Mr. Day had no idea what Canada Post was looking for because his doctor had not yet received the IME report.

[74] It cannot be said with any certainty if the delivery of the IME Report to Mr. Day's doctor on a timely basis might have produced a different result in this case. However, based on Mr. Day's statement that he began the treatment recommended by Dr. Miller immediately upon

receiving the report, and his doctor's statements that he responded well to the medication, it is entirely conceivable that the whole series of events in November might have been avoided had the report been provided right after it was received by Medisys.

2. Mr. Day's doctor was not informed that Mr. Day was being placed on sick leave on November 16, 2001

[75] Mr. Ormerod and Mr. Clark, who were Mr. Day's supervisors, testified that Mr. Day was not informed about the Corporation's concerns with respect to his safety, nor did they involve him in the decision to send him home on November 16, 2001 because they were worried that this would further upset him. Mr. Clark stated that he said nothing to Mr. Day because "no one likes to hear that he is considered to be a safety risk". I accept that on November 16, 2001 Canada Post was facing a critical situation, and that a difficult judgment call had to be made about what information to provide to Mr. Day. Therefore, the decision not to inform Mr. Day of the full extent of the reasons for his removal may have been justified.

[76] However, Canada Post did not provide a satisfactory explanation as to why Mr. Day's doctor was not informed that there were serious concerns about his mental health and that he was thought to pose a safety risk to himself or others on November 16, 2001. Mr. Ormerod stated that information regarding an employee's mental health and safety should not be provided directly to the employee by his or her employer, but by a medical person.

[77] Why then were Canada Post's serious concerns regarding Mr. Day's mental health not immediately communicated to Mr. Day's physician?

[78] Dr. Hamm stated that he did not inform Mr. Day's doctor about what had happened on November 16, 2001, because he did not think that the situation was an emergency. He simply thought that Mr. Day needed to be at home where he could compose himself. In my view, however, if the situation was urgent enough to send Mr. Day home without notice to him about the full extent of the reasons, then it was urgent enough to alert Mr. Day's doctor. After all, Mr. Day's own health was potentially at risk. Dr. Miller's report was vague with respect to

Mr. Day's potential for violence. It certainly could be interpreted to mean that he might direct the violence toward himself. The failure to inform Mr. Day's doctor that he was being sent home because he posed a safety risk shows, in my view, a rather callous disregard for Mr. Day's well-being.

[79] I find, therefore, that Canada Post did not treat Mr. Day fairly in November of 2001; he was treated as a "safety risk" rather than as a human being whose needs for information and support should be respected. Although accommodating Mr. Day in the workplace was not possible given the safety risk that he posed, Canada Post did not provide a satisfactory explanation as why it did not provide Mr. Day and his physician with timely disclosure of the IME and the Field Report. Similarly, it was not established that informing Mr. Day's physician of Canada Post's concerns with respect to his safety would have caused undue hardship.

[80] As a result, Canada Post did fulfill the procedural component of the duty to accommodate. Although a failure to fulfill the procedural component of the duty to accommodate will not necessarily result in a violation of the *Act*, I think that in this case the impact of the failure, both in terms of the outcome of the events in November 2001 and its impact on Mr. Day's dignity and self-worth, warrant such a finding. Canada Post failed to establish, pursuant to ss. 15(1)(a) and 15(2) of the *Act,* that it accommodated Mr. Day's needs to the point of undue hardship. Mr. Day's allegation with regard to the November events is therefore substantiated.

(iii) Was the requirement that EL5's hand in preventative maintenance slips each Friday of the week discriminatory?

The *Prima Facie* Case

[81] As an EL5, Mr. Day was required to assign and supervise preventative maintenance ("pm") duties on the day shift. The work was assigned on Mondays. It was expected to be completed by the end of the week unless the work was extensive or the plant was busy. Reports regarding the status of the work ("pm slips") were entered into a computerized system that

monitored the preventative maintenance work done on machines all across Canada. The EL5's collected the pm slips for the employees that they supervised on the day shift and handed them in along with their own.

[82] From 1999 to 2001, the EL5's could submit the pm slips to management for input into the computer system on the following Monday, after the work was assigned. That policy changed some time in 2001. By the time Mr. Day reached the day shift in January of 2002, the expectation was that EL-5's would submit the pm slips on the Friday of the same week that the work was assigned.

[83] Mr. Day disagreed with the change in policy. He also disagreed with the manner in which the change was implemented. He thought that it was part of Canada Post's campaign to treat him differently because he was disabled.

[84] Mr. Day did not hand in the pm slips for his subordinates on Friday, January 11, 2002 as required. He handed in only his own. Canada Post subsequently issued Mr. Day with a 24 Hour Notice of Interview to discuss his failure to satisfactorily administer the pm system.

[85] At the interview, it was pointed out to Mr. Day that he was not being singled out; all of the EL5's were required to hand in their own and those of their subordinates on Friday. Mr. Day continued to hand in only his own pm slips. As a result, he was suspended for three days without pay.

[86] Mr. Iroume testified on behalf of Mr. Day. He stated that when he came onto days in April of 2002, he too failed to hand in all of the pm slips on Friday. He was also given a 24 Hour Notice of Interview and told to hand the pm slips in on time. Mr. Iroume testified that following the interview, he conformed to Canada Post's requirements. He stated, however, that Canada Post issued him with a 24 Hour Notice and then interviewed him solely to make Canada Post's actions with respect to Mr. Day seem legitimate.

[87] Mr. Iroume's evidence on this point was not credible. He admitted that prior to the interview he was not complying with the requirement; he was only handing in about 15% of the pm slips for his shift. After the interview, when he was given a direct order by Canada Post to get the pm slips in, that figure moved to 60 to 70%. Mr. Day, however, did not comply with Canada Post's directive. Accordingly, he was disciplined.

[88] There was no credible evidence to support the contention that Mr. Day was treated differently from other employees on the basis of his disability with regard to the preventative maintenance system. Therefore, Mr. Day has failed to establish a *prima facie* case on this ground.

(iv) Was the Denial of a Shift Change between Mr. Iroume and Mr. Day discriminatory?

The *Prima Facie* Case

[89] In January of 2002, Mr. Day attempted to switch his twelve week block of afternoon shifts with Mr. Guido Iroume, a fellow EL-5 who was due to go on days. Mr. Iroume preferred afternoons and Mr. Day preferred day shift for family and health related reasons. The request was denied.

[90] Mr. Day testified that switching an entire twelve week shift block was a common practice at Canada Post. Mr. Iroume testified that while shift exchanges were common, the frequency of the practice diminished after the release of an arbitral decision by Arbitrator Blasina in April of 2002. In that decision, Arbitrator Blasina held that the Corporation was required to rotate the EL5's through all three shifts.

[91] Mr. Day argued that Canada Post's denial of the shift exchange request constituted adverse differential treatment on the basis of his disability. However, neither Mr. Day nor Mr. Iroume provided examples of people who had exchanged an entire shift. Moreover, Mr. Iroume's testimony strongly suggested that if there was such a practice, it changed after

April 2002. At that point neither Mr. Day nor his colleagues were permitted to switch an entire shift block. There was no evidence to suggest that the denial of the shift exchange was based on Mr. Day's disability.

[92] Counsel for Mr. Day argued that the denial of the request for a shift exchange constituted adverse effect discrimination since Mr. Day was unable, by reason of his disability to work the afternoon shift.

[93] Mr. Day however, testified that he did not have any trouble working the afternoon shift. He stated that at that point in time, he was looking to be relieved from the requirement to work night shift, **not** the afternoon shift. Therefore, I find that Mr. Day did not establish a *prima facie* case that the denial of his request for a shift change, or the requirement that he work the afternoon shift in January of 2002 constituted adverse differential treatment on the basis of disability.

(v) Was the requirement that Mr. Day work the night shift discriminatory?

The *Prima Facie* case

[94] From 1997 until April of 2002, Mr. Day was relieved of the requirement to work night shift at Canada Post whenever he presented a doctor's note indicating that his disability prevented him from doing so. In April of 2002, however, Canada Post insisted that he work the night shift because, in the Corporation's view, the most recent medical evidence indicated that his disability did not prevent him from doing so.

[95] Mr. Day disagreed that he was capable of working the night shift. He thought that the medical evidence clearly established that working the night shift made him sick. Therefore, he did not work the night shift as he was required to do in April and May of 2002. Canada Post issued him with a three day suspension as a result.

[96] Mr. Day complained that Canada Post's requirement that he work night shift and the discipline that it issued to him for his inability to do so constituted adverse differential treatment on the basis of his disability contrary to s. 7(b) of the *Act*.

[97] Based on the following evidence, I find that Mr. Day has established a *prima facie* case of adverse differential treatment with regard to this allegation.

[98] There was medical support for Mr. Day's assertion that night shift aggravated his symptoms of depression and anxiety. In the IME Report of October 11, 2001, Dr. Miller indicated that shift work was likely to worsen rather than improve Mr. Day's mental state. He stated that Mr. Day's depression was not in complete remission and had not been adequately treated.

[99] In a Field Report dated October 30, 2001, Dr. Hamm of Medisys agreed that night shift duties should be avoided. He also stated that Mr. Day should follow Dr. Miller's treatment recommendations.

[100] In December 3, 2001, Mr. Day's doctor indicated that although Mr. Day was responding well to the new drug treatment and was capable of returning to work, he should work day shift only. In apparent contradiction to his previous Field Report of October 30, 2001, Dr. Hamm disagreed. He stated that he did not support permanent accommodation on day shift.

[101] In January of 2002, Mr. Day began seeing a new family doctor by the name of Dr. Cook because his previous doctor had left the country. Dr. Cook provided Mr. Day with a note dated April 10, 2002, which stated "this patient is advised not to work nights for medical reasons". Mr. Day and Ms. Andrew, the grievance officer for CUPW, testified that the note was faxed to Canada Post on April 15, 2002, from the union office.

[102] Mr. Ormerod denied having received this note. However, Mr. Clark's evidence on this issue was more convincing. He stated that either he or Mr. Ormerod had received the note and that if he had received the note he would have passed it on to Mr. Ormerod.

[103] Moreover, on April 15, 2002, Mr. Ormerod wrote to Mr. Day saying that his doctor's note dated April 15, 2002 would not be sufficient to avoid night shift. It is unlikely that Mr. Ormerod would have made such a statement had he not received the note. Therefore, I find that Mr. Ormerod received a note from Mr. Day's doctor indicating that, for medical reasons, he was advised not to work the night shift.

[104] Mr. Day presented medical evidence to Canada Post indicating that he was unable to work the night shift in April of 2002 as a result of his disability. Canada Post refused to accept the note from his doctor and instead continued to insist that he work night shift. The evidence led by Mr. Day suggests that he was punished because he could not work the night shift. On that basis, I find that Mr. Day has made out a *prima facie* case of adverse differential treatment on the basis of disability.

The Respondent's Explanation

[105] After a careful review of the evidence in this case, I have concluded that Canada Post did not discriminate against Mr. Day in imposing a three day suspension for his refusal to work the night shift. The Corporation had sound medical evidence indicating that Mr. Day could, in fact, work the night shift. However, giving Mr. Day the benefit of any doubt that might remain in that regard, I find that Canada Post offered him a number of reasonable offers of accommodation. Mr. Day chose not to accept these offers. If Canada Post had a duty to accommodate Mr. Day (and I am not convinced that it did), it discharged that duty.

(i) Mr. Day did not require accommodation

[106] Although the medical evidence up to December of 2001, suggested that Mr. Day was not able to work night shift, there was consistent medical evidence from Dr. Hamm and Mr. Day's new physician, Dr. Cook, that Mr. Day's inability to work nights was likely due to the fact that, up to that point, he had not been properly treated for his depression. In April of 2002, however, the evidence indicated that Mr. Day had responded well to the drug treatment program recommended by Dr. Miller and that he was able to work nights. I will now review that evidence.

[107] In his IME Report of October 2001, Dr. Miller stated that the herbal remedies that Mr. Day had been taking on the recommendation of his previous doctor, Dr. Rozwadowski, were ineffective. He prescribed not only a change in pharmacological treatment, but also cognitive behavioural therapy to deal with his ongoing work issues.

[108] Dr. Hamm was qualified as an expert in Occupational Medicine at the hearing. He testified that he had extensive experience working with patients with depression. Provided they were properly treated and their symptoms were in remission, these patients did not have any difficulty with shift work, including the night shift, in Dr. Hamm's experience.

[109] As a result of a provision in the contract between Medisys and Canada Post, Dr. Hamm was not permitted to meet with Mr. Day. However, he conducted a thorough review of Mr. Day's file and was in contact with Mr. Day's physicians.

[110] In December of 2001, Dr. Hamm consulted with Mr. Day's doctor at the time and was told that Mr. Day was doing well on the medication that Dr. Miller had recommended; his condition had improved and he was back to work.

[111] On that basis, Dr. Hamm formed the opinion in December of 2001 that, given the improvement in Mr. Day's mental health, he should be able to work the night shift by April of

2002. It was for that reason that Dr. Hamm told Canada Post that he did not support permanent accommodation on day shift in the Field Report dated December 4, 2001.

[112] In a letter to the union dated April 18, 2002, Dr. Hamm explained the apparent discrepancy between his recommendation to avoid night shift in the October 2001 Field Report, and his recommendation to continue with his usual duties including night shift in his December 2001 Field Report. In the letter, Dr. Hamm stated that he had supported **temporary** accommodation on day shift in October 2001 to give Mr. Day time to adjust to his new medication and for his symptoms to remit. However, it was not his intention at that time to recommend permanent accommodation on day shift to Canada Post. After speaking with Mr. Day's doctor in December of 2001, Dr. Hamm was of the view that Mr. Day was progressing nicely and should be able to work the night shift as many of his other patients with depression had succeeded in doing.

[113] Dr. Cook, whom Mr. Day began seeing in January of 2002, provided important testimony at the hearing regarding Mr. Day's ability to work night shift during the period from January 2002 to May 29, 2002. Dr. Cook testified that he was, and had always been of the view that Mr. Day was medically capable of working the night shift on the condition that his health was monitored while he was doing so. He thought that Mr. Day's problems were not medical in nature; rather they related to his ongoing disputes with Canada Post. Dr. Cook was of the view that Mr. Day needed the help of a mediator or a counselor with a specialization in workplace disputes, rather than a physician or a psychiatrist.

[114] Dr. Cook testified that, from his first visit with Mr. Day in January of 2002, it was clear to him that Mr. Day wanted nothing more from him than medical support for the position that he could not work the night shift. Dr. Cook was uncomfortable with this. Like Dr. Hamm, he testified that he had many patients who had depression who could work the night shift provided they were being properly treated and followed by a physician.

[115] In a letter dated March 18, 2002, Mr. Day told Canada Post that Dr. Cook had advised him not to work night shift due to his medical condition. Dr. Cook, however, testified that he would not have said this because he did not believe that to be the case. When Mr. Day first asked him to provide a note in March of 2002 indicating that he could not work night shift, he refused to do so because he thought it was a workplace dispute rather than a medical issue.

[116] Nonetheless, on April 10, 2002, Dr. Cook did provide Mr. Day with a note stating that he was advised not to work nights for medical reasons. Dr. Cook testified that he did not know why he had provided the note to Mr. Day. He agreed with counsel for the Respondent in cross-examination that he did so to get Mr. Day "off his back". Dr. Cook's testimony strongly suggested that the note was not an authentic expression of his medical views, but rather was a response to intense pressure to support Mr. Day's request to be excused from working the night shift.

[117] Mr. Day's testimony leant further support to Dr. Cook's statement that Mr. Day was interested only in obtaining support for his belief that he should not work night shift. He testified that he had always had trouble with Dr. Cook because the doctor did not seem to understand his situation. Mr. Day stated that he had a history of being supported by his physicians and Dr. Cook did not follow that pattern. It was evident from Mr. Day's testimony that he had difficulty with the fact that Dr. Cook would not provide his unqualified support to avoidance of night shift.

[118] As a result, in May of 2002, Mr. Day changed physicians from Dr. Cook to Dr. Cooper. Dr. Cooper testified that Mr. Day should not have been required to work night shift in April of 2002. In Dr. Cooper's view, the night shift exacerbated Mr. Day's symptoms of depression. Dr. Cooper, however, was not Mr. Day's physician during the relevant time period of this allegation. He acknowledged that Dr. Cook would have been in a better position to judge Mr. Day's mental health at the time.

[119] What explanation did Canada Post provide for the fact that Mr. Day's note of April 10, 2002 was not accepted as proof that he could not work the night shift? Mr. Ormerod testified that Canada Post had decided that medical notes on prescription pads would no longer suffice to excuse Mr. Day from night shift. More information was needed to determine why the treatment recommended by Dr. Miller was not working. This was explained to Mr. Day and the union in a meeting on April 22, 2001.

[120] Mr. Ormerod stated that Mr. Day had also been informed, as early as February 28, 2002, that Canada Post expected that the drug treatment program that he was following would lead to his ability to work the night shift. He had had ample time, therefore, to seek medical advice to the contrary, if that was appropriate. He had not provided this medical information. A prescription pad note would not suffice as proof of his inability to work the night shift because it did not provide enough information.

[121] In my view, this was a reasonable position for Canada Post to take. It did not render Canada Post's assessment of Mr. Day's fitness unfair. Mr. Day knew the Corporation's position with respect to his fitness to work the night shift. He also knew that, since the fall of 2001, Canada Post had ceased to accept medical notes on prescription pads to excuse him from night shift. The fact that he was unable to provide more medical information from his doctor about his inability to work night shift reflects, in my view, the fact that his doctor at the time thought that he **could** work night shift, notwithstanding the note that he provided to the contrary.

[122] I agree with counsel for the Respondent that, had the April 10 note from Dr. Cook been provided to Medisys, the likely result would have been that Dr. Hamm would have contacted Dr. Cook and learned that the latter felt pressured by Mr. Day to provide the note. In fact, Dr. Hamm did contact Dr. Cook on April 25, 2002, and discussed Mr. Day's ability to work the night shift. Dr. Hamm testified that Dr. Cook told him that Mr. Day was medically fit to work the night shift. Dr. Hamm communicated this information to Canada Post.

[123] Consequently, on April 25, 2002 Mr. Day was given a three day suspension without pay for being absent without leave. Given the medical evidence that Canada Post had regarding Mr. Day's ability to work the night shift at the time, I find that the discipline was not discriminatory. The Respondent has provided a satisfactory explanation to the *prima facie* case raised by Mr. Day. There was sound medical evidence establishing that Mr. Day was able to work the night shift in April of 2002. The three day suspension was based solely on Mr. Day's refusal to work the night shift, not on his disability.

(ii) If Mr. Day did require accommodation, Canada Post provided reasonable offers of accommodation

[124] If there was any doubt, however, as to whether Mr. Day was able to work the night shift, I am satisfied that Canada Post provided Mr. Day with reasonable offers of accommodation.

[125] The Supreme Court has stated that accommodation is a multi-party responsibility. The complainant must do his or her part to facilitate the accommodation process. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfill the duty to accommodate, the complainant has a duty to accept the proposal (*Central Okanagan School District No. 23 v. Renaud* [1992] 2 S.C.R. 970 at paras. 43-44).

[126] On April 22, 2002, Mr. Ormerod offered Mr. Day three options. The first was that he would be permitted to take leave without pay or annual leave for the duration of his night shift, but he would not be permitted to work part shifts and take the remainder in leave. The other two options were that Mr. Day could work the regular night shift, or he could work a modified shift from 6 pm to 2 am on the condition that he obtained an appointment with a psychiatrist by 3 pm on April 26, 2002.

[127] Mr. Day did not accept any of the options offered by Canada Post. He stated that the 6 pm to 2 am shift was not a reasonable proposal because it was conditional upon obtaining an appointment with a specialist by April 26, 2002. Mr. Day stated that this was impossible, given the shortage of mental health specialists in Victoria. In the spirit of cooperation, Mr. Day could

well have made the effort to obtain an appointment and then indicated to Canada Post if he could not make the deadline. Mr. Ormerod testified that any such effort to obtain an appointment in April would have been acceptable to him. Instead, Mr. Day did not attempt to obtain an appointment with a psychiatrist until the middle of May which was well past the deadline.

[128] Mr. Day argued that a suggestion made by his doctor on April 25, 2002 to attend a sleep lab in Vancouver constituted an effort to cooperate with Canada Post's accommodation efforts. Canada Post's refusal of the suggestion demonstrated a failure to accommodate him to the point of undue hardship, according to Mr. Day.

[129] Dr. Hamm testified that he investigated the sleep lab suggestion and ultimately rejected it because none of the many physicians that Mr. Day had seen had ever diagnosed him with a primary sleep disorder. Rather, his sleep difficulty was a symptom of his unremitted depression. Therefore, Dr. Hamm decided that there was no justification for expending the time and resources to pursue the question of whether Mr. Day had a sleep disorder. Based on the evidence, I agree that this was not a reasonable option.

[130] Mr. Day stated that he was advised by Dr. Cook not to work the 6 pm to 2 am shift because it would put his health at risk. However, Dr. Cook did not corroborate this statement. Dr. Cook stated that he was not aware that the Post Office offered Mr. Day a modified shift. If he had been asked about it, he would have advised him to try it. Mr. Day tried the modified shift once and rejected it.

[131] The situation is similar to the facts in *Jeffrey v. Dofasco Inc.* (No. 4) 2004 HRTO 5; aff'd: 2007 CanLII 41275 (ON S.C.D.C). In that case, the Ontario Human Rights Tribunal found that the complainant, who was suffering from myofacial pain and some symptoms of fibromyalgia, could have attempted a job as a switchboard operator. The Tribunal found that while she may have experienced some pain in attempting the switchboard position, she would have been in no danger or harm's way by doing the job. Her chronic pain was not so disabling as to prevent her from trying the job. She failed to try the job not because she was unable to do so but because she

chose not to try it. The Tribunal found that there was no medical reason why she could not have tried the switchboard job.

[132] I think that the situation in *Jeffrey* is analagous to the present case. There was no medical reason as to why Mr. Day could not have tried the 6 pm to 2 am shift beyond the one occasion on which he worked it. Indeed, Mr. Day testified that when he worked the afternoon shift from 3 pm to 11 pm, he was often called upon to work overtime until 1 or 2 am. He stated, however, that he was able to cope with the afternoon shift. Therefore, I find that the 6 pm to 2 am shift was a reasonable offer of accommodation. Granted it was conditional upon obtaining an appointment with a psychiatrist, but there was no reason why Mr. Day could not have made efforts to do so before mid-May.

[133] Finally, the 6 pm to 2 am shift was not the only option that Canada Post offered to Mr. Day. If he did not feel that he could work the 6 pm to 2 am shift, he could have opted for leave without pay or annual leave for the duration of the twelve week shift. This would have provided him with ample time to obtain medical information from a specialist before he was due to go on night shift again. I find that this too was a reasonable proposal for accommodation. Mr. Day did not accept either of these options. It was clear from his testimony that he would accept no other proposal than that he be excused from working the night shift on a permanent basis.

[134] Counsel for Mr. Day suggested that Mr. Day's obsessive compulsive personality disorder may have been a factor in his inability to cooperate with Canada Post's efforts to accommodate him. On that basis it was argued that Canada Post should have accommodated this condition by granting Mr. Day his preferred option – the day shift. However, Canada Post had no knowledge that Mr. Day had obsessive compulsive personality disorder. Dr. Hamm testified that he did not provide this information to Canada Post because he was of the view, based on his clinical experience, that Mr. Day's disorder did not present any work restrictions. Mr. Day's own psychiatrist testified that Mr. Day's judgment and ability to act responsibly in the workplace were not affected by the disorder.

[135] I find therefore, that there was no merit in the argument that Mr. Day's obsessive compulsive personality disorder prevented him from being able to see Canada Post's offers of accommodation as reasonable proposals. Rather, Mr. Day's testimony demonstrated that his refusal to accept the offers was based on his belief that he had a legal right to be relieved of the obligation to work night shift on a permanent basis. The law is clear, however, that an employee is not entitled to hold out for the perfect solution (*Renaud*, at p. 995). Mr. Day had an obligation to accept one of the reasonable proposals offered by Canada Post even if it was not exactly what he wanted. He did not do so. Therefore, I find that if there was any doubt as to whether Mr. Day was able to work the night shift, Canada Post fulfilled its obligation to accommodate Mr. Day.

(vi) Was the Termination of Mr. Day's Employment with Canada Post discriminatory?

The *Prima Facie* Case

[136] Mr. Day did not report for work on the night shift after his three day suspension was over; instead, he called in sick on May 1, 2002. He saw Dr. Cook on May 2, 2002 who said that, rather than writing a note, he would telephone Dr. Hamm.

[137] Mr. Day was served with a 24 Hour Notice of Interview for his failure to report for work on May 1, 2002. The interview was scheduled to take place on May 2, 2002. Mr. Day testified that he did not attend work or the interview because he was sick. He informed Canada Post of this on May 2, 2002.

[138] On May 14, 2002, Mr. Day wrote to Rob Taylor, the Manager of Mail Operations, that he had been to see his doctor, he was having adjustments made to his medications and, he was waiting for a referral to a psychiatrist. Mr. Day also stated that his doctor was filling out forms for disability insurance and that he would be forwarding those documents to Mr. Taylor presently.

[139] On May 22, 2002, Mr. Day received a letter from Mr. Ormerod indicating that since he had failed to report for work, or to provide an acceptable reason for his failure to report, he was recommending Mr. Day's release from Canada Post.

[140] On May 27, 2002, Mr. Taylor discharged Mr. Day from his employment with Canada Post based on his failure to report for work or to provide an acceptable explanation for his failure to do so.

[141] Section 7(a) of the *Act* stipulates that it is a discriminatory practice to refuse to continue to employ an individual on the basis of a prohibited ground of discrimination. Mr. Day informed Canada Post that he was unable to work because of his disability. Knowing this, Canada Post discharged Mr. Day from his employment. On that basis, I find that Mr. Day has established a *prima facie* case that Canada Post refused to continue to employ him on the basis of his disability.

The Respondent's Explanation

[142] Canada Post argued that Mr. Day's disability had nothing to do with the imposition of the discharge. Rather, Canada Post dismissed Mr. Day on the basis of his failure to report for work on his scheduled shift and to provide medical documentation to substantiate his illness.

[143] The evidence in this case supports Canada Post's explanation. Mr. Day did not attend work as he was scheduled to do on May 1, 2002. He saw Dr. Cook on May 2, 2002 and asked for a note to support his absence from work. Dr. Cook refused to provide that note.

[144] Rather, Dr. Cook spoke directly with Dr. Hamm by phone on May 7, 2002. Dr. Hamm's note to file about that conversation indicates that Dr. Cook informed him that he had increased Mr. Day's medication. It states that Dr. Cook was wondering whether he should be on long term disability leave. Dr. Hamm concluded his note by stating: "I gather he will be supporting Mr. Day being off work due to his psychiatric diagnosis."

[145] Dr. Cook testified that he did not, in fact, support Mr. Day's absence from work. For that reason, he did not provide a note or medical information to that effect. He stated unequivocally, both in examination in chief and in cross-examination, that he did not think that Mr. Day had a psychiatric problem that required him to be off work; he thought that Mr. Day needed the help of a counselor or mediator to deal with his workplace issues. He never recommended to Mr. Day that he should be off work and he did not support his request for long term disability leave.

[146] Dr. Cook testified that during the telephone conversation with Dr. Hamm on May 7, 2002, he and Dr. Hamm discussed ideas to help Mr. Day with his ongoing work problems. Dr. Cook stated that one of the ideas that he discussed with Dr. Hamm was putting Mr. Day on long term disability leave. Dr. Cook testified that he did not think that being off work was a good idea. However, he considered it because he felt some sympathy for Mr. Day, and this was what Mr. Day seemed to want. Dr. Cook also testified that he had increased Mr. Day's medication as a way of providing support to Mr. Day. He did not think, however, that Mr. Day's medical condition had changed from the time he first saw him in January of 2002, until May 29, 2002, the date of his last visit. For that reason he refused to provide the medical documentation that Mr. Day wanted to support his absence from work.

[147] Accordingly, I find that Canada Post has refuted Mr. Day's *prima facie* case. There was no medical evidence provided to substantiate Mr. Day's statement that he was unable to work on May 1, 2002 by reason of his medical condition. The discharge, therefore, was not based on Mr. Day's disability, but on his refusal to report for work or to provide an acceptable explanation for his absence.

[148] Mr. Day grieved his discharge in May of 2002. Pursuant to a settlement agreement regarding that grievance, he returned to work in May of 2003.

(vii) Was the surplusing of Mr. Day's EL5 position discriminatory?

The *Prima Facie* Case

[149] In the fall of 2004, Canada Post informed Mr. Day that two out of four EL5 positions in Technical Services at the Glanford plant were being eliminated pursuant to Article 53 of the collective agreement. A staffing review had revealed that there was insufficient work at the Glanford plant to warrant the number of Technical Service staff that were employed there. Article 53 of the Collective Agreement between CUPW and Canada Post provides a process whereby positions for which there is insufficient work may be declared surplus and eliminated. Mr. Day and Eric Walry had the lowest seniority among the four EL5's. Therefore, pursuant to Article 53, their positions were to be eliminated.

[150] Eric Walry was reassigned to an EL5 in Ontario. Mr. Day, however, was unwilling to move from Victoria. Therefore, according to the collective agreement, his only option was a PO4 position at the Glanford plant. Even though he retained his EL5 salary, he found this reassignment demeaning and upsetting since, as a mail sorter, he would not have the opportunity to use his technical skills. He alleged that the elimination of his EL5 position in 2004 was orchestrated by Canada Post as a means of removing him because he was disabled.

[151] Mr. Day based his allegations on a letter dated February 3, 2003 from Steve Clark to Joanne Purser, the Manager of Mail Operations at the time. In that letter, Mr. Clark expressed concern that the surplusing action was being considered as a way to remove Tim Day, "a troublesome employee" who was disabled from the department. Mr. Clark made a case for not eliminating the EL5 positions (including that of Mr. Day) because it could be perceived as bad faith on the part of Canada Post with respect to Mr. Day.

[152] I find that Mr. Day has established a *prima facie* case of differential treatment based on disability. Mr. Clark's letter suggests that the elimination of Mr. Day's position was done to remove him from Technical Services because his disability was "troublesome" to Canada Post.

Hence, there is evidence that he was being targeted for differential treatment on the basis of his disability.

The Respondent's Explanation

[153] The Respondent established, to my satisfaction, that Mr. Clark's concerns were not borne out in the surplusing process. The elimination of Mr. Day's position had nothing to do with his disability. I draw this conclusion on the basis of the following factual determinations.

[154] In 2002 and early 2003, Canada Post management in the Vancouver and Victoria region received notice from Ottawa that the Victoria plant was overstaffed. A study had been done that indicated that Victoria Technical Services had four to six positions more than it should have. Management in Victoria was tasked with coming up with a strategy for resolving the overstaffing issue.

[155] Ms. Purser, the Manager of Mail Operations in Victoria, consulted with a number of people in the Glanford Plant to determine the best course of action. Among the people with whom Ms. Purser consulted were Mr. Ormerod and Mr. Clark.

[156] Mr. Ormerod candidly admitted that he favoured the deletion of EL5 positions because he saw it as a way of getting rid of a difficult employee – Tim Day. However, when this was pointed out to him, he tried to put it aside and look squarely at what made sense for the plant, instead of letting his feelings about Mr. Day influence his thinking. He stated that no other plant had 4 EL5's; Victoria was overstaffed on the EL5 side. There was new equipment that was easier to maintain, and so it made sense to recommend that two EL5 positions be surplused.

[157] Steve Clark disagreed with Mr. Ormerod. He recommended that two MAM 11 postions be eliminated. Ms. Purser agreed with Mr. Clark. She recommended to Tom Dixon, the Director of Vancouver and Northern British Columbia (which included Victoria), that two MAM11 positions be surplused.

[158] Mr. Dixon received a letter from Technical Services workers in Victoria objecting to the surplusing action. Therefore, he decided to put the action on hold until a more thorough review of the staffing issue could be undertaken because he wanted to be sure that the right decision was being made.

[159] Tom Dixon requested that a staffing review or audit of the Victoria Mail Processing Plant be undertaken by National Headquarters. In July 2004, two people from Canada Post Headquarters were brought in to conduct this audit. The auditors reported that, in their opinion, the Victoria Plant had two positions in Technical Services in the Glanford Mail Processing Plant that were not needed.

[160] When he received the results of the audit, Mr. Dixon consulted with Mr. Sarbjit Sangha, Manager of Technical Services for Vancouver and Victoria. Mr. Sangha stated that Vancouver, which was a much bigger plant with more mail volume and more machinery, had only two EL5's whereas Victoria had four. He thought that this did not make sense. He provided his opinion to the auditors based on his review of the final draft of the audit report.

[161] Mr. Sangha stated unequivocally that Tim Day was not a factor in his opinion regarding the need to eliminate two EL5 positions in Victoria. He stated that he did not know who Mr. Day was when he provided his opinion. There was no evidence that he saw the letter from Mr. Clark to Ms. Purser. His testimony was not shaken on cross-examination.

[162] Upon receiving the audit and Mr. Sangha's recommendations, Mr. Dixon decided to eliminate two EL5 positions. He stated that the decision had nothing to do with Mr. Day; it was a response to the results of the audit and Mr. Sangha's advice indicating that there were two EL5 positions too many in Victoria. He did not recall ever having seen the letter from Mr. Clark to Ms. Purser regarding Mr. Day.

[163] Mr. Dixon did not consult with Mr. Ormerod about the decision to eliminate the EL5 positions. Mr. Ormerod left Technical Services in 2003. His views with respect to the staffing issue were not sought after he provided his opinion to Ms. Purser in 2002.

[164] Canada Post's witnesses who testified about this issue were credible and consistent. I accept the explanation that the decision to eliminate the EL5 positions was not done to move Mr. Day out of Technical Services because of his disability. Canada Post has defeated the *prima facie* case of discrimination with respect to this allegation by showing that the decision had nothing to do with Mr. Day's disability.

(viii) Was the deletion of the MAM11 position discriminatory?

The *Prima Facie* Case

[165] Mr. Day testified that after he was assigned to the PO4 position, he applied for a mechanic's position - the MAM11 B-2 position. He knew that this position would be vacant since the incumbent was retiring.

[166] On April 4, 2005, Ms. Andrew, the union representative, requested that Mr. Day be given the vacant MAM11 B-2 position. She stated that Mr. Day was on sick leave. When he was ready to return his doctor wanted him in a "less stressful" than the EL5 position. The MAM11 position fit that description.

[167] Ms. Andrew testified that it was standard practice that before a position was eliminated, Canada Post consulted with the union. This was not done. Instead, on the same day as the request for the position was made, the union received notice that the MAM11 position had been eliminated.

[168] Mr. Day argued that the MAM 11 position was deleted after his request was made in order to frustrate his attempt to return to the Tech Services Branch. This was based on the fact

that he was disabled, and Technical Services refused to accept his need for accommodation of his disability.

[169] The evidence presented by Mr. Day supported the contention that Mr. Sangha deleted the MAM11 position **after** Mr. Day applied for it. Mr. Sangha knew, from Ms. Andrew's letter that Mr. Day was off sick and was requesting the position as a way of coping with the stress of reintegration into the workplace. The way that the process was handled suggested that Mr. Day's disability was a factor in the decision to delete the MAM11 position. Mr. Day has therefore succeeded in establishing a *prima facie* case of discrimination on the basis of his disability.

The Respondent's Explanation

[170] Mr. Sangha stated that he made a decision sometime in the fall of 2004 or early winter of 2005 that he would eliminate the MAM11 position when the incumbent retired in March of 2005. This was well before Mr. Day applied for the position. However, he forgot to inform the union of his decision in writing at the time. He stated that he felt bad when he received Ms. Andrew's letter in April of 2005 because it was then that he realized that he had neglected to inform the union of his decision earlier on.

[171] He explained that National Headquarters in Ottawa had decided to replace an old machine in Victoria with a machine that required much less maintenance. As a result, the staff complement of fourteen employees in Technical Services in Victoria exceeded the available work. The union was informed that the number of mechanics on staff at the Victoria Mail Processing Plant would be reduced because there was no longer enough work for fourteen employees. For that reason, he decided to eliminate the MAM11 position.

[172] Mr. Sangha was a credible witness. He was forthright in his admission of the mistake he made in failing to inform the union about his decision to eliminate the MAM11 position. His testimony was unshaken on cross-examination. Although he did not provide written

confirmation of his decision to eliminate the position prior to Mr. Day's request, I was nonetheless convinced by his testimony that there was no connection between Mr. Day's disability and the decision to eliminate the MAM11 position.

[173] I find therefore, that Canada Post has established that Mr. Day's disability was **not** a factor in the elimination of the MAM11 position.

[174] Mr. Day argued, in the alternative, that even if his disability was not a factor in the elimination of the position, Canada Post's refusal to keep it open for him constituted adverse differential treatment. It deprived him of an opportunity to assume a position that would have accommodated his disability.

[175] Assuming that Mr. Day established a *prima facie* case that the elimination of the position had an adverse differential effect on him, I am of the view that the obligation under s. 15(2) of the *Act* does not extend to the maintenance or creation of a position for which there is no productive work. Rather, the obligation is to provide accommodation to enable employees to perform productive work. The evidence disclosed that there was not enough work to justify the maintenance of the MAM11 position. Canada Post was not required to maintain the position in order to accommodate Mr. Day.

(ix) Was the assignment of Mr. Day to the relief letter carrier position discriminatory?

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[176] In May 2006, Mr. Day bid for a letter carrier position in Victoria. He was successful in obtaining both the position and the route he wanted. After his successful bid, there was a reorganization of the letter carrier routes. The new routes were to be determined by bid. Mr. Day alleged that the person in charge of the bidding process neglected to call him or the union while he was on disability leave so that he could bid on a new route. As a result, he was assigned a relief letter carrier position. This position is the least preferable because it involves moving around from route to route.

[177] Based on Mr. Day's testimony I am prepared to assume that the alleged failure to advise Mr. Day of the bid on the reorganized route while he was on sick leave constituted adverse differential treatment on the basis of disability.

The Respondent's Explanation

[178] Mr. Clark's understanding was that Mr. Day had been informed, or should have been informed by the union about the bid on the reorganized routes. The arrangement at the time was that all communication intended for Mr. Day would go through the union. Mr. Clark stated that Barry Barter, who was handling the route reorganization at the time, told him that he informed the union about the bid. Mr. Clark did not know whether the union communicated that information to Mr. Day.

[179] Mr. Patterson, the Secretary-Treasurer of the Victoria local of the CUPW at the time, was the only union official that testified on this matter. He could not confirm or deny that the union had been informed about the bidding for the reorganized routes.

[180] I accept Mr. Clark's evidence that the union was informed about the reorganized bid. Whether the union informed Mr. Day or not about the bid is unclear. However, I accept that Canada Post did its part to provide the information so that Mr. Day could place his bid.

[181] Therefore, I find that Canada Post has provided a reasonable explanation that refutes Mr. Day's allegation that his assignment to the relief route was discriminatory.

(x) Was Mr. Day harassed on the basis of his disability?

[182] Mr. Day argued that all of Canada Post's actions in the present case constituted harassment on the basis of his disability. Section 14 (1)(c) provides that it is a discriminatory practice to harass an individual on a prohibited ground of discrimination.

[183] "Harassment" in the context of complaints based on disability has been defined as conduct manifested through repeated words, actions or gestures, that is vexatious, demeaning or insulting and is directed at another person on the basis of his or her disability (*Bergeron v. Télébec Ltée.,* 2004 CHRT 16, at para. 260; aff'd : 2005 CF 879). The severity of the impugned conduct must be assessed from the perspective of the reasonable victim (*Dhanjal v. Air Canada* (1996), 28 C.H.R.R. 367 at paras 216 – 217 (CHRT), aff'd: [1997] F.C.J. No. 1599).

[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.

[185] The jurisprudence also indicates that harassment generally requires an element of persistence or repetition, although in certain circumstances a single incident may be enough to create a hostile work environment. 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 (*Canada (Canadian Human Rights Commission) v. Canada (Canadian Armed Forces) (re Franke)* [1999] 3 F.C. 653 (T.D.) at paras 43 and 45).

[186] In the present case, the impugned conduct does not have the character of demeaning or humiliating conduct that is extraneous or irrelevant to the legitimate operations of Canada Post. Rather, Canada Post's actions were undertaken in the course of managing the mail operations at the Glanford plant. Moreover, with the exception of the removal of Mr. Day from the workplace in November of 2001, I have found that Mr. Day's disability was not a factor in the actions taken by Canada Post.

[187] I do not think that a reasonable disabled employee would find Mr. Day's removal from the workplace in November of 2001, in and of itself, to have constituted harassment. It was disrespectful and insensitive of Mr. Day's needs as a disabled person; however, it was not

repeated, humiliating conduct that was extraneous or irrelevant to Canada Post's legitimate operations.

[188] For these reasons, I find that there is no merit to Mr. Day's allegation that Canada Post harassed him on the basis of his disability.

IV. What Is The Appropriate Remedy?

[189] Section 53(2) of the *Act* authorizes the Tribunal to make an order against the person found to have engaged in the discriminatory practice. I find that Canada Post engaged in a discriminatory practice when it placed Mr. Day on sick leave and removed him from the workplace in November of 2001.

A. Compensation for Pain and Suffering

[190] Mr. Day has claimed compensation for the pain and suffering that he experienced as a result of Canada Post's discriminatory conduct. The Tribunal may order compensation in an amount not exceeding $20,000 for any pain and suffering the victim experienced as a result of the discriminatory practice (s. 53(2)(e)).

[191] Mr. Day testified that not knowing the basis for the decision to place him on sick leave caused him a great deal of anguish and stress. He was humiliated when he was escorted out of the Plant on November 21, 2001. These hurt feelings were caused by Canada Post's discriminatory conduct in failing to treat Mr. Day fairly in the accommodation process in November of 2001.

[192] I find therefore, that an award of compensation for pain and suffering in the amount of $6,000 is appropriate in the circumstances of this case. Pursuant to s. 53(2)(e), I order Canada Post to pay this amount to Mr. Day.

B. Compensation for Willful and Reckless Conduct

[193] Mr. Day claimed compensation pursuant to s. 53(3) of the *Act*. That provision of the *Act* authorizes the Tribunal to order compensation in an amount not exceeding $20,000 when it finds that the Respondent engaged in the discriminatory conduct willfully or recklessly.

[194] I find that when it placed him on sick leave and removed him from the plant in November of 2001, Canada Post willfully or recklessly engaged in discriminatory conduct. Canada Post and Medisys knew or ought to have known that the information in Dr. Miller's report was extremely important and should have been immediately communicated to Mr. Day's doctor. They knew or ought to have known that Mr. Day was seeking that information. Finally, if Canada Post and/or Medisys were of the view that Mr. Day was so ill that he was a safety risk, that information should have been communicated to Mr. Day's physician. The failure to do so demonstrates a wanton disregard of Mr. Day's needs as a disabled person. In the circumstances, I find that an order for compensation under s. 53(3) of the *Act* in the amount of $5,000 is appropriate.

C. Interest

[195] Interest is payable in respect of all awards made in this decision pursuant to section 53(4) of the *Act*. The interest shall be simple interest calculated on a yearly basis, at a rate equivalent to the bank rate (monthly series) set by the Bank of Canada, per Rule 9(12) of the *Tribunal's Rules of Procedure*. The interest shall run from the date of the complaint. In no case, however, should the total amount payable under s. 53(2)(e), including interest, exceed $20,000. Similarly, the total amount payable under s. 53(3), including interest, should not exceed $20,000.

D. Legal Expenses

[196] In a recent decision, the Chairperson of this Tribunal held that the weight of judicial authority supports the Tribunal's power to award reasonable legal costs under s. 53(2) of the *Act*

(*Mowat v. Canadian Armed Forces* 2006 CHRT 49 at para. 27). I agree that the Tribunal has the authority under the *Act* to award reasonable legal expenses.

[197] I therefore order that Canada Post compensate Mr. Day for the reasonable costs of retaining counsel both prior to and during the hearing.

[198] The parties are encouraged to come to an agreement on the quantum of reasonable costs in this matter. I shall retain jurisdiction over this aspect of the award in the event that the parties are unable to reach such an agreement. The parties are to notify the Tribunal within 60 days of the receipt of this decision if an agreement has not been reached.

Signed by

Karen A. Jensen
Tribunal Member

Ottawa, Ontario
October 19, 2007

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1121/0306

Style of Cause: Tim Day v. Canada Post Corporation

Decision of the Tribunal Dated: October 19, 2007

Date and Place of Hearing: November 6 to 9, 2006
November 15 to 17, 2006
February 5 to 9, 2007
March 19 to 23, 2007
March 27 to 29, 2007

Victoria, British Columbia

Appearances:

Jo-Anne Kahan, for the Complainant

No one appearing, for the Canadian Human Rights Commission

Norm Trerise and Matthew Prescott, for the Respondent