Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Stephen Closs

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Fulton Forwarders Incorporated and Stephen Fulton

Respondents

Decision

Member: Susheel Gupta
Date: November 30, 2012
Citation: 2013 CHRT 30

I. Complaint

[1] On June 8, 2011, pursuant to subsection 49(1) of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 [the *Act*], the Canadian Human Rights Commission (the Commission) requested that the Chairperson of the Canadian Human Rights Tribunal (the Tribunal) institute an inquiry into the complaints of Stephen Closs (the Complainant) against Fulton Forwarders Inc. (FFI) and Stephen Fulton (Mr. Fulton). The Complainant claims FFI engaged in discriminatory practices, contrary to paragraphs 7(a) and 7(b) of the *Act*, on the grounds of disability and family status. The Complainant also claims that FFI and/or Mr. Fulton engaged in a discriminatory practice, contrary to paragraph 14(1)(c) of the *Act*, on the same grounds.

II. Complainant's Evidence

[2] As part of the inquiry into these complaints, a hearing was held on February 2, 2012 in Cambridge, Ontario. At the outset of the hearing, the parties presented the Tribunal with an Agreed Statement of Facts. Together with these agreed facts, the Complainant testified as to his version of the events that gave rise to these complaints as follows.

[3] The Complainant was employed as a truck driver by FFI. Located in Cambridge, Ontario, FFI is a trucking transport business that delivers goods within Ontario and also between Ontario and Quebec. In 2008, the Complainant worked under the supervision of Terence Fulton, President of FFI, as a replacement driver, filling in for drivers who were sick or on vacation. In February 2009, Stephen Fulton, the Operations Manager for FFI, hired the Complainant as a part-time driver. According to the Complainant, at the beginning of his part-time employment with FFI, he worked primarily day shifts. In addition to his day shifts, the Complainant was sometimes asked to work night shifts. Over time, the Complainant claims that the request to work night shifts grew to a point where he was working up to four night shifts a week, on top of his day work. During this time, the Complainant described his work load as "running hard" for FFI, working sixty to seventy hours a week, with little time to sleep between his shifts. From February 9, 2009 until his last shift with FFI on May 14, 2010, the Complainant was under the direct supervision of Stephen Fulton and reported to him directly.

[4] The Complainant advised FFI that he had a "disease" which impacted his eyesight. The Complainant testified that he told both Terrence and Stephen Fulton, at the outset of his employment relationship with each of them, that he suffers from Jessner's, a form of lupus. According to the Complainant, his lupus affects his nervous system and causes him some fatigue. The Complainant added that some of the medication he takes to address his condition affects his eyesight. This requires him to get eye exams every six months. On occasion, the Complainant would have to miss work for medical appointments or because of the side effects of the medications he was prescribed. The Complainant testified that, at first, FFI was accommodating and understanding concerning any time off he needed to attend to his medical condition. As a result of his condition, the Complainant claims to have also requested that he be able to bring his friend, Tim Caskenette, along with him on his runs in order to help him stay awake. The Complainant claims that FFI was aware that Tim Caskenette was riding with him for this reason. In fact, the Complainant stated that he has no complaint about FFI's accommodation in this regard.

[5] Under the heading "Closs's Medical Condition", at paragraph 12 of the Agreed Statement of Facts, it states that the Complainant advised Mr. Fulton that he could no longer drive at night and that FFI agreed to this request. During his testimony, the Complainant explained that he did not request that FFI no longer schedule him for night driving. Rather, as he felt he was getting "burnt out" by his day/night work schedule, he requested that he be allowed to go home and sleep between shifts or that his hours be scaled back. The Complainant claims to have even suggested to Mr. Fulton that he hire another driver to reduce his workload.

[6] In April 2009, the Complainant and his spouse found out they were pregnant. On or about April 13, 2009, the Complainant's spouse went to the hospital for an ultrasound. The ultrasound indicated there were complications with the pregnancy, and the Complainant's spouse set up an appointment with her personal physician for later in the day to discuss the nature of the complications. The Complainant was on duty at the time he found out about the complications with the pregnancy and the scheduled appointment. He phoned Mr. Fulton to advise him of the situation and his desire to be with his wife for the appointment. According to the Complainant's

testimony, arrangements were made by Mr. Fulton to expedite the loading/unloading of his truck, which allowed him to finish his runs early, and leave work to attend the appointment.

[7] At the appointment, the Complainant and his wife learned that their pregnancy had been lost and that his wife would need to go to the hospital to receive treatment. As the Complainant was scheduled to work another shift that evening, he phoned Mr. Fulton to discuss the situation and requested the night off to go to the hospital with his wife. According to the Complainant, he was denied the night off and was threatened with termination should he not work his shift. The Complainant claims Mr. Fulton told him words to the effect of "You have a job to do – so do it". The Complainant decided he would stay at the hospital until the miscarriage occurred, and told Mr. Fulton that he would call him again at that point.

[8] At around 12:00am, on April 14, 2009, the Complainant and his spouse suffered the miscarriage. Shortly thereafter, the Complainant again phoned Mr. Fulton to discuss the situation and claims to have requested a few days off to grieve the loss of the pregnancy with his wife. Once he advised Mr. Fulton of the miscarriage, the Complainant claims that Mr. Fulton told him words to the effect of "The first thing that's good for you is getting your ass back in that truck and driving down the highway because you're going to get your mind off it". While the Complainant understood the comment to be related to Mr. Fulton's own experience with having suffered a miscarriage and his way of coping with it, the Complainant did not feel as though working would be best for him. Subsequently, the Complainant claims he was denied any time off and was threatened with termination should he not work. According to the Complainant, the words of Mr. Fulton were to the effect that "I'm going to have to fire you and get a real truck driver because you can't do your job right". Therefore, the Complainant went to work.

[9] In September 2009, the Complainant and his spouse once again learned they were pregnant, this time with twins. On or about December 17, 2009, the Complainant's spouse was hospitalized due to complications with this second pregnancy. The Complainant was on duty at the time he found out about his spouse's hospitalization. The Complainant phoned Mr. Fulton to advise him of the situation and his desire to be with his wife. According to the Complainant, he

was denied permission to leave his shift to be with his wife at the hospital. The Complainant testified that Mr. Fulton told him words to the effect that "it's a miscarriage, she'll get over it, just do your job". During his shift, on or about Friday, December 18, 2009, the Complainant's spouse suffered a second miscarriage. Subsequently, the Complainant again claims to have requested some time off to grieve the loss of the pregnancy with his wife. The Complainant claims he was again advised by Mr. Fulton that if he did not come to work his employment would be terminated. Therefore, the Complainant worked his next shift on Monday, December 21, 2009.

[10] On or about Friday, April 9, 2010, the Complainant sustained a leg injury. The Complainant testified that he slipped on mud in FFI's yard while getting out of his truck. The Complainant testified that he attempted to reach Mr. Fulton on April 10 and 11 to discuss the injury, leaving him messages. On April 11, 2010, Mr. Fulton phoned the Complainant and they discussed the leg injury over the phone. During this conversation, the Complainant advised Mr. Fulton that he could not work because he was having difficulty walking and that he needed to consult with his doctor concerning the injury. Also during their conversation, the Complainant testified that Mr. Fulton asked that he not file a Workplace Safety and Insurance Board (WSIB) claim in respect of the injury, and assured the Complainant that FFI would compensate him during his time off. Subsequent to this conversation, the Complainant testified that he obtained a note from his doctor, which he gave to Mr. Fulton, indicating that he required a week off to allow his leg injury to heal.

[11] During his week off, the Complainant again consulted with his doctor regarding his injury and it was recommended that the Complainant take an additional week off from work to allow his injury to heal. Another note was prepared, dated April 20, 2010, indicating that the Complainant was to be off work from the 12th to the 26th of April. The Complainant phoned Mr. Fulton to indicate that he required another week off from work and could only return to work on April 26, 2010. In response, the Complainant testified that Mr. Fulton requested that he attend at FFI's yard on April 23, 2010 to clean out his truck to allow another driver to drive it during the Complainant's absence.

[12] On or about April 23, 2010, the Complainant went to FFI's yard to meet with Mr. Fulton and to clean out his truck. At that time, the Complainant provided Mr. Fulton with the doctor's note, dated April 20, 2010. The Complainant claims to have questioned Mr. Fulton as to why, given he was returning to work on the 26th, he had to clean out his truck. The Complainant testified that Mr. Fulton advised him that a new driver was hired to cover his shift and that there was no longer work available for the Complainant. A Record of Employment (ROE), dated April 23, 2010, was issued to the Complainant under code D "illness or injury". Under "expected date of recall", the ROE indicates "unknown". According to the Complainant, at this point, the conversation became heated and during this exchange he claims that Mr. Fulton advised him to "ride out" employment insurance benefits in order to address his "disease".

[13] At this time, it was the Complainant's understanding that his employment with FFI was no longer available to him; however, he does recall Mr. Fulton offering him replacement duties should they become available. On this basis, and as he feared refusing a shift could jeopardize his claim for employment insurance benefits, the Complainant worked one more shift with FFI on May 14, 2010, replacing a driver who was sick. Subsequently, the Complainant testified that due to the fact that he had launched the present complaints, he was advised to no longer return to work for FFI because doing so could jeopardize his legal proceedings/complaints against FFI.

[14] Mr. Tim Caskenette also testified as part of the Complainant's evidence at the hearing of this matter. As indicated above, and confirmed by Mr. Caskenette, he accompanied the Complainant during truck drives to help him stay awake. Apart from not being able to recall the physical exchange of the medical note and the ROE on April 23, 2010, Mr. Caskenette's testimony was consistent with his witness statement, which he testified was prepared by him independently based on his own memory of the events in question in this complaint. Overall, Mr. Caskenette's evidence was supportive of the Complainant's version of the events giving rise to this complaint.

III. Has The Complainant Established a *Prima Facie* Case of Discrimination?

[15] The complainant in proceedings before the Tribunal must establish a *prima facie* case of discrimination. A *prima facie* case 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…" (*Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 SCR 536 at para. 28 [*O'Malley*]). In this case, the Complainant has alleged a contravention of paragraphs 7(a), 7(b) and 14(1)(c) of the *Act*.

A. Complainant's allegations under paragraph 7(a) of the Act

[16] With regard to his termination, the Complainant alleges that his knee injury and his ongoing treatment for lupus were factors in FFI's decision to terminate his employment. Given Mr. Fulton's comments regarding the Complainant's spouse, the Complainant also claims that his family status was a factor in the decision to terminate his employment. As a result, the Complainant submits that he was discriminated against on the basis of his disability and family status in his employment contrary to paragraph 7(a) of the *Act*.

[17] Paragraph 7(a) of the *Act* provides that it is a discriminatory practice, directly or indirectly, to refuse to employ or continue to employ any individual on a prohibited ground of discrimination. In complaints under paragraph 7(a), the complainant must establish a link between a prohibited ground of discrimination and the employer's decision to refuse to employ or continue to employ (see *Roopnarine v. Bank of Montreal*, 2010 CHRT 5 at para. 49). That said, discrimination does not need to be the only reason for the decision. It is sufficient that discrimination be one factor in the decision (see *Holden v. Canadian National Railway Co.*, [1990] F.C.J. No. 419 (F.C.A.) (Q.L.); and, *Khiamal v. Canada (Canadian Human Rights Commission)*, 2009 FC 495 at para. 61).

[18] In this case, the Complainant suffered a knee injury, a physical impairment which resulted in a functional limitation on his ability to drive a truck. As such, I find the Complainant's knee injury was a physical disability under the *Act* (see the definition of "disability" at section 25 of the *Act*; and, *Desormeaux v. Ottawa (City)*, 2005 FCA 311 at para.

15 [*Desormeaux*]). Having received from the Complainant a doctor's note indicating that he could return to work on April 26, 2010, FFI presented the Complainant with an ROE, dated April 23, 2010, indicating code D "illness or injury". The ROE is an indication that the Complainant was no longer working with FFI as of April 23, 2010. Furthermore, FFI hired a another driver to perform the Complainant's work and indicated to the Complainant that, although he could return to the workplace once his knee healed, only replacement duties (filling in for drivers who are sick or on vacation) would be made available to him. This is in contrast to the sixty to seventy hour work weeks the Complainant indicated he had been working on a regular basis. While the Complainant may not have been terminated, he was no longer offered continued employment in the same capacity as he had been prior to the injury. This is similar to the situation in *Tanzos v. AZ Bus Tours Inc.*, 2007 CHRT 33, aff'd 2009 FC 1134, where the Tribunal found that an employer's refusal to return an employee to full-time duties, and only offering her part-time duties following her doctor's recommendation that she no longer work in the evening, constituted a *prima facie* case of discrimination under paragraph 7(a) of the *Act*. Given the Complainant's evidence, I find that he has established a link between his knee injury and FFI's decision to issue the ROE and no longer continue to employ the Complainant in the same capacity as he had been employed before.

[19] While the issuance of the ROE arose from the Complainant's leg injury, the Complainant testified that other discriminatory factors may have factored into FFI's decision. The Complainant testified that, at the time of the issuance of the ROE on April 23, 2010, Mr. Fulton advised him to "ride out" employment insurance benefits in order to address his "disease". The Complainant indicated that he informed FFI at the outset of his employment, through both Terence and Stephen Fulton, that his "disease" was Jessner's, a form of lupus. According to the Complainant, at times his lupus limited his ability to drive a truck. To address those limitations, he requested some time off on occasion and that Mr. Caskenette ride with him. Given this evidence, I am satisfied that the Complainant's lupus is also a physical disability under the *Act* (see the definition of "disability" at section 25 of the *Act*; and, *Desormeaux* at para. 15). While FFI argued that the Complainant never provided medical documentation to it or to the Tribunal to establish that he has lupus, aside from making this statement, FFI did not challenge the

Complainant's assertion that he suffers from lupus before this Tribunal. Nor was any reason advanced as to why the Complainant's assertion that he has lupus is not credible. Therefore, given the Complainant's testimony regarding Mr. Fulton's comments at the time of the issuance of the ROE, I also find there to be some evidence of a link between the Complainant's lupus and FFI's decision to no longer continue to employ him.

[20] Therefore, the Complainant has established a *prima facie* case of discrimination, on the ground of disability, both his leg injury and his lupus, under paragraph 7(a) of the *Act*.

[21] With regard to Mr. Fulton's alleged comments regarding the Complainant's spouse, the evidence presented by the Complainant indicated that the comments were made in the context of the Complainant's request for leave following each of the miscarriages. Sufficient evidence was not led to establish that those events and related comments somehow factored into FFI's decision to issue the ROE in April 2010. As a result, I fail to see a link between Mr. Fulton's alleged comments regarding the Complainant's spouse and FFI's actions in April 2010.

B. Complainant's allegations under paragraph 7(b) of the Act

[22] The Complainant also claims to have been denied accommodation by FFI at the time of his wife's two miscarriages. As a result, the Complainant submits that he was discriminated against on the basis of family status contrary to paragraph 7(b) of the *Act*.

[23] Paragraph 7(b) of the *Act* provides that it is a discriminatory practice, directly or indirectly, to differentiate adversely in relation to an employee in the course of employment on a prohibited ground of discrimination. To "differentiate" is to create a distinction or to treat someone differently (see *Tahmourpour v. Canada (Royal Canadian Mounted Police)*, 2009 FC 1009 at para. 44 [*Tahmourpour*]; varied on other grounds in *Tahmourpour v. Canada (Royal Canadian Mounted Police)*, 2010 FCA 192 [*Tahmourpour (FCA)*]; and, *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445 at para. 254). However, not every distinction is discriminatory, as the *Act* qualifies the differential treatment with the term

"adversely". According to the Federal Court, "adverse" is an adjective that in its ordinary meaning means harmful, hurtful or hostile (see *Tahmourpour* at para. 44; see also *Tahmourpour (FCA)* at para. 12). Finally, the adverse differential treatment must be based on a prohibited ground of discrimination. In this case, the Complainant argues that he was adversely treated by FFI on the basis of his family status.

[24] In determining the scope of the protection against discrimination on the ground of family status, the Supreme Court of Canada has supported an approach that focuses on the harm suffered by the individual, regardless of whether that individual fits neatly into an identifiable category of persons similarly affected (see *B. v. Ontario (Human Rights Commission)*, 2002 SCC 66 at para. 46 [*B*]). In this regard, an approach to determining discrimination based on the harm suffered by the individual is reflected in the purpose of the *Act* at section 2:

> *all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices.*.
>
> *(Emphasis added)*

In the employment context, the Tribunal has stated that section 2 of the Act is a clear recognition, within the context of "family status", of an individual's right and duty to strike a balance between work and family obligations, coupled with a clear duty on the part of an employer to facilitate and accommodate that balance (see *Brown v. Canada (Department of National Revenue)*, 1993 CanLII 683 (CHRT) at p. 20 [*Brown*]). On this basis, the Tribunal has recognized that the scope of "family status" can also include an individual's duties and obligations within the family (see *Brown*; *Hoyt v. Canadian National Railway*, 2006 CHRT 33 [*Hoyt*]; *Johnstone v. Canada Border Service Agency*, 2010 CHRT 20 [*Johnstone*]; and, *Seeley v. Canadian National Railway*, 2010 CHRT 23 [*Seeley*]).

[25] The British Columbia Court of Appeal has suggested that only a "serious interference" between work and family obligations will result in a *prima facie* case of family status discrimination in the employment context (see *Health Sciences Assoc. of B.C. v. Campbell River and North Island Transition Society*, 2004 BCCA 260). However, the Tribunal and the Federal Court have rejected this approach as conflating the threshold issue of *prima facie* discrimination with the second-stage *bona fide* occupational requirement analysis; and, as creating a hierarchy of grounds of discrimination, where the ground of family status is singled out for a different and more onerous *prima facie* standard (see *Hoyt*; *Johnstone*; *Seeley*; and, *Johnstone v. Canada (Attorney General)*, 2007 FC 36).

[26] FFI argues that the requirements to establish a *prima facie* case of discrimination based on family status are as follows:

> *the evidence must demonstrate that family status includes the status of being a Parent and includes the duties and obligations as a member of society and further that the Complainant was a parent incurring those duties and obligations. As a consequence of those duties and obligations, combined with an employer rule, the Complainant was unable to participate equally and fully in employment with her employer*
>
> *(Johnstone at para. 55)*

Based on these requirements, FFI argues that the Complainant does not qualify as being a parent; that there is no employer rule inhibiting the Complainant from participating equally and fully in his employment; and, that the request to extend the definition of family status to cover the circumstances of this case stretches the definition beyond that of any prior jurisprudence and beyond a reasonable interpretation.

[27] While the requirements outlined in *Johnstone* are instructive, they cannot automatically be applied in a rigid or arbitrary fashion in every case. Rather, the circumstances of each case must be considered to determine if the Complainant has established a *prima facie* case pursuant to the test established in *O'Malley*. I would add that the *Act* does not define the term "family status" as some provincial legislatures have chosen to do under their respective human rights schemes (see for example the definition of "family status" at subsection 10(1) of the *Human Rights Code* of Ontario; and, paragraph 44(1)(f) of the *Alberta Human Rights Act*). Therefore, Parliament has left it to the Tribunal to ascertain the meaning of the term "family status". I have also not been referred to any jurisprudence that restricts the definition of "family status" under the *Act* to being a parent or being in a parent-child relationship. As was stated above, in determining the scope of the protection against discrimination on the ground of family status, the focus is on the harm suffered by the individual, regardless of whether that individual fits neatly into an identifiable category of persons similarly affected (see *B* at para. 46). =

[28] In the circumstances of this case, the Complainant testified as to the pain he felt for not being there to support his wife during and after the miscarriages. He also testified as to the grief he experienced as a result of the lost pregnancies and the continuing effect that those losses have had on him. With specific regard to the second miscarriage, the Complainant testified that it still hurts him today that he was not there to be with his wife during and after the miscarriages. He explained that the experience with the miscarriages has made him fearful of getting pregnant again and that he avoids interacting with other people who may be pregnant. He claims he has become depressed by not having time to mourn the loss of the pregnancies and that this in turn has affected his home life. The Complainant claims he is now seeking counseling to address these issues.

[29] In their closing submissions, the Respondents stated that the Complainant's testimony clearly demonstrated an individual with deep feelings regarding the miscarriages suffered by his spouse. I agree, but I believe it is more appropriate, given these circumstances, to characterize the loss of the pregnancies as suffered by the Complainant and his spouse together, as a family. The relationship between spouses is protected by the ground of family status (see meaning of "family status" in *Schaap v. Canadian Armed Forces*, 1988 CanLII 125 (CHRT) at p. 27, rev'd on other grounds [1989] 3 F.C. 172 (C.A.); and, in Justice Walter Surma Tarnopolsky & William F. Pentney, *Discrimination and the Law*, Vol. 2 (Toronto: Carswell, 2004) at p. 9-3).

[30] In the situation where his wife had complications related to her pregnancies and had to go to the hospital, the Complainant felt he had an obligation within his family to be there with her to provide comfort and support. When the pregnancies were lost, the Complainant also felt he had an obligation within his family to take time off to grieve the losses with his wife. The Complainant claims to have asked FFI for time off to address these family obligations, but was denied such leave.

[31] In denying his request for time off, the Complainant claims that FFI created a hurtful distinction between the Complainant's family obligations and work obligations. As described above, this distinction, which resulted in the Complainant not being able to attend to his family obligations, caused the Complainant some pain. According to the Complainant, there was no attempt to facilitate a balance between his family and work obligations. Rather, based on the Complainant's evidence, FFI was only concerned with ensuring that the Complainant got his job done, without consideration of his family obligations. On this basis, I am satisfied that the Complainant has established a *prima facie* case of discrimination, on the ground of family status, pursuant to paragraph 7(b) of the *Act*.

C. Complainant's allegations under paragraph 14(1)(c) of the Act

[32] Paragraph 14(1)(c) of the *Act* provides that it is a discriminatory practice, in matters related to employment, to harass an individual on a prohibited ground of discrimination.

Throughout his employment with FFI, the Complainant claims to have been harassed by Stephen Fulton, contrary to paragraph 14(1)(c) of the *Act*. Specifically, the Complainant claims that Mr. Fulton made continuous use of profane language in addressing and directing him; that the Respondent refused to accommodate his reasonable requests without consideration or explanation; and, that the Respondent routinely threatened to terminate his employment in the event "he chose to exercise his statutory rights" or when the Complainant raised concerns about compliance with hours of work regulation. The Complainant adds that the Respondent routinely dismissed the severity of the miscarriages or their aggregate impact on him. In this regard, in addition to the comments the Respondent made at the time of the miscarriages, the Complainant testified that the Respondent also made a comment to the effect that "maybe if you got rid of your wife, you could actually work harder and wouldn't have to worry about going home to spend time with your wife". In the context of discussing his lupus, the Complainant also claims that Mr. Fulton suggested that he ask his doctor about medicinal marijuana.

[33] Within the meaning of section 14 of the *Act*, harassment has been defined as unwelcomed conduct, directed at another person on the basis of a prohibited ground of discrimination. By its definition, harassment generally requires an element of persistence or repetition; however, the more serious the conduct and its consequences, the less repetition may be necessary. The severity of the impugned conduct is assessed from the perspective of the reasonable person in the circumstances (see *Janzen v. Platy enterprises ltd.*, [1989] 1 SCR 1252; and, *Canada (Human Rights Commission) v. Canada (Armed Forces)*, [1999] 3 FC 653).

[34] With regard to the allegations of the use of profane language and the threats related to statutory rights/hours of work, the Complainant did not establish that these acts were related to a prohibited ground of discrimination. I would add that the Complainant's allegations relating to his family obligations were addressed above under paragraph 7(b); and, aside from FFI's reasons for issuing the ROE, the Complainant testified that he did not have a complaint regarding FFI's actions with regard to his lupus.

[35] In discussing the comment made by Mr. Fulton with regard to medicinal marijuana, the Complainant testified that he was not sure whether the comment was an actual suggestion or was just a joke. Either way, the Complainant's testimony did not establish that the marijuana comments persisted beyond the one incident or that the severity of the one comment was such that it constituted harassment.

[36] I also find that there is insufficient evidence to establish harassment on the basis of the Complainant's allegation that Mr. Fulton routinely dismissed the severity of the miscarriages or their aggregate impact on him. The Complainant testified about the comments the Respondent made at the time of the miscarriages, however, there was little evidence regarding any persistency in these comments outside of when the Complainant made requests for time off. While the Complainant, in his testimony, claims that the Respondent made an additional comment to the effect that the Complainant should get rid of his wife, the Complainant did not elaborate as to when this comment was made, the context in which it was made, or whether this persisted beyond the one incident.

[37] Persistency aside, I also find that the severity of the comments does not meet the threshold to establish harassment. Mr. Fulton's alleged comments are focused on the Complainant fulfilling his employment obligations. While such a focus may have been insensitive to the Complainant's circumstances and family obligations, the Complainant did not indicate that the comments themselves seriously affected him. Rather, my understanding of the Complainant's testimony was that it was the denial of the time off itself that caused the Complainant pain in dealing with the miscarriages. I would add that the Complainant acknowledged that Mr. Fulton's comments regarding the miscarriages were influenced by his own experience with having suffered a miscarriage. Mr. Fulton's way of dealing with the grief was to get his mind off of it by working. While this strategy may not have been acceptable to the Complainant and the communication of such a perspective may have been done in an insensitive manner, I find this adds context to the comments made by Mr. Fulton and contributes to my

finding that the severity of the comments does not meet the threshold for establishing harassment.

[38] Given the reasons above, I do not find the Complainant to have established a *prima facie* case under paragraph 14(1)(c) of the *Act*.

IV. Respondent's Evidence

[39] For the reasons detailed above, I have found that the Complainant has established a *prima facie* case of discrimination under paragraphs 7(a) and 7(b) of the *Act* on the grounds of disability and family status. Once a complainant has established a *prima facie* case of discrimination, the respondent must demonstrate that the *prima facie* discrimination did not occur as alleged or that the practice is justifiable under the *Act*.

[40] At the hearing of this matter, Stephen Fulton testified on behalf of FFI.

A. Response to the Complainant's prima facie allegations under paragraph 7(a) of the Act

[41] Mr. Fulton testified that the Complainant was informed, prior to injuring his knee, that another driver would share his duties with him. According to Mr. Fulton, the decision to hire another driver was in response to the Complainant's notification that he could no longer drive at night safely. According to Mr. Fulton, the Complainant was also advised in April 2010 of the loss of much of FFI's day work and the lack of work which could accommodate the no night driving requirement of the Complainant.

[42] According to Mr. Fulton's testimony, following his knee injury, the Complainant phoned Mr. Fulton to inform him that he had slipped in the yard. Mr. Fulton says that the Complainant initially informed him that it would be six months to heal the injury. Mr. Fulton claims he offered to submit a WSIB claim, however, the Complainant said not to worry as he would say he hurt himself at home. During their phone conversion, Mr. Fulton claims to have also discussed

the option of claiming employment insurance benefits to cover the Complainant's absence from work.

[43] The genesis of the April 23, 2010 meeting at the yard was a request by the Complainant to remove his personal belongings from his truck, now being driven by another driver. When the Complainant arrived at the yard on April 23, 2010, Mr. Fulton claims he was limping and appeared to be in a lot of pain. While Mr. Fulton was provided with a note dated April 20, 2010 advising that the Complainant was unable to work for the period of April 12 to April 26, 2010, he requested a further and better medical note beyond the brief note provided. According to Mr. Fulton, the Complainant refused to provide a further note citing the cost of having to do so.

[44] Overall, Mr. Fulton testified that his reasons for issuing the ROE were because the Complainant advised that his "disease" would no longer allow him to drive at night and that FFI's daytime work was drying up. Mr. Fulton stated that he explained to the Complainant that "you got to deal with your disease" and that FFI does not have short-term disability leave benefits, whereas Employment Insurance can provide him with that type of benefit. In their closing submissions, at paragraph 31, FFI added:

> Given the lack of work and Closs having failed to provide medical clearance for [a] return to work and his ongoing advice as to a host of medical related issues and the lack of disability leave benefits Fulton advised Closs he could obtain Employment Insurance and this would permit him time to deal [with] his medical appointments and his reported disease.

[45] FFI maintains that they did not terminate the Complainant. Rather, they note that an ROE is not a dismissal notice and that, following the issuance of the ROE, there was an offer of continued shifts in May 2010. Following his shift on May 14, 2010, the Complainant did not report for further shifts.

[46] While the Complainant may not have been terminated at the time of the issuance of the ROE, FFI did not dispute that from that point forward it was no longer continuing to employ the Complainant in the same capacity as he was before. Whereas the Complainant was hired as a

part-time driver, and would sometimes work up to seventy hours in a week; following the issuance of the ROE, he was only offered work as a replacement driver when other drivers were sick or otherwise absent from work.

[47] It is curious that despite requesting further medical documentation regarding the Complainant's leg injury, and the effects that the injury may have on the Complainant's ability to drive a truck, FFI was still willing to have the Complainant drive a truck for them should it need a replacement driver. On this basis, without providing further medical documentation that his leg injury was healed, the Complainant was asked to work other shifts for FFI in May 2010. Therefore, I do not accept that the Complainant's refusal to provide further medical documentation regarding his ability to return to work factored into FFI's decision to issue the ROE. Nor do I accept that the ROE was issued to allow the Complainant to claim employment insurance benefits when FFI did not offer short-term disability benefits. This is not credible given that the ROE is dated April 23, 2010, and the Complainant was off work starting April 12, 2010; and, furthermore, the ROE is inconsistent with the Complainant having presented Mr. Fulton with a doctor's note indicating he could return to work.

[48] While the circumstances giving rise to the issuance of the ROE were in relation to the Complainant's request for time off following his leg injury, by Mr. Fulton's own admission, FFI's decision to issue the ROE was primarily motivated by the Complainant's "disease" and its inability to accommodate the Complainant's alleged request to no longer drive at night. This is reinforced by the Respondents' closing submissions which indicate that "Given...his ongoing advice as to a host of medical related issues...Employment Insurance...would permit him time to deal [with] his medical appointments and his reported disease". In his testimony, Mr. Fulton also admitted that he had some concern about potential abuse of time off by the Complainant, but did not pursue those concerns with the Complainant. From these statements, it appears as though FFI either did not believe that the Complainant's request for time off in April 2010 was related to his leg injury or they were just unwilling to entertain any further requests for time off from the Complainant. This is reinforced by the fact that, despite getting a doctor's note indicating he could return to work, FFI issued the ROE.

[49] Despite Mr. Fulton's reasons for issuing the ROE, FFI argues that the Complainant never provided medical documentation to it or to the Tribunal to establish that he has lupus. As stated above, aside from making this statement, FFI did not challenge the Complainant's assertion that he suffers from lupus before this Tribunal. I would add that, notwithstanding the lack of medical documentation, FFI accepted that the Complainant could no longer drive at night and, that given this restriction and the loss of daytime work, it could not accommodate the Complainant. Even if it is true that the Complainant requested to no longer drive at night because of his medical condition, which the Complainant denies, once the accommodation request was made FFI had a duty to obtain all relevant information about the Complainant's disability and seriously consider how the Complainant could be accommodated (see *Adga Group Consultants Inc. v. Lane*, 91 OR (3d) 649 (Ont. Sup. Ct.) at para. 160; and, *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3 at paras. 64-66 [*Meiorin*]). Given that FFI never requested medical documentation regarding the Complainant's lupus, I cannot accept that it seriously considered whether it could accommodate his alleged request to no longer drive at night. Nor was sufficient evidence led to establish that accommodating the Complainant's alleged request to no longer drive at night would have caused FFI undue hardship. In fact, FFI never led a defence under paragraph 15(1)(a) and subsection 15(2) of the *Act* in attempting to justify their actions.

[50] Given the above, I find FFI's decision to issue the ROE to be discriminatory. Instead of seriously considering whether it could accommodate the Complainant's request for time off following his leg injury, FFI replaced the Complainant with another driver because they either did not believe, or were unwilling to entertain, his request for time off. While I recognize Mr. Fulton's testimony that FFI is a small business and that the trucking industry may present some unique challenges in attempting to accommodate employees; however, those factors must be considered alongside "...the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship" (*Meiorin* at para. 62). As indicated above, the evidence in this case does not support FFI's decision to issue the ROE and no longer continue to employ the Complainant as a part-time driver.

[51] As a result, I find that FFI has not provided a satisfactory explanation or justification for their prima facie discriminatory conduct in refusing to continue to employ the Complainant on the basis of his disability, both his leg injury and his lupus, contrary to paragraph 7(a) of the Act.

B. Response to the Complainant's prima facie allegations under paragraph 7(b) of the Act

[52] According to Mr. Fulton's testimony, when the Complainant notified him of his wife's hospitalization on April 13, 2009, it was the first he heard of the Complainant's pregnancy. At that time, the Complainant was on route with a delivery and arrangements were made to expedite the Complainant back to the home terminal. Following the Complainant's miscarriage, the Complainant and Mr. Fulton discussed the Complainant's return to work over the phone. In an attempt to be sensitive to the situation, Mr. Fulton testified about speaking with the Complainant about keeping busy, time healing and about his personal experiences with a miscarriage. Mr. Fulton denied any disregard for the situation or the feelings of the Complainant. According to Mr. Fulton, the Complainant did not request time off following the miscarriages, but decided he would continue working a reduced schedule, in order to continue receiving an income, at times when his wife was resting and other family members were available to assist her.

[53] The Complainant's Trip Sheets for April14-17, 2009 were provided to the Tribunal as part of Mr. Fulton's testimony. The Trip Sheets, which are filled out by the driver of the truck, detail the trip information, including start and end date, pick-up and delivery location, and the mileage of the trip, for a given day. Mr. Fulton recalled that on April 14, 2009, the Complaint went to work early in the morning because he had been at the hospital with his wife the previous evening. According to Mr. Fulton, arrangements were made to have the Complainant perform one delivery and then return directly to FFI's yard. The Complainant then worked a shift on April 15, 2009, ending his shift the next day on April 16, 2009 in Bowmanville, Ontario. According to Mr. Fulton, the Complainant began his shift late on April 15, 2009 due to the fact that he was with his wife until other family members were available to be with her. On April 16, 2009, beginning in Bowmanville, the Complainant went to pick-up a load in Etobicoke. According to Mr. Fulton, as the Complainant's wife was not feeling well, arrangements were

made to expedite the loading of the Complainant's truck in Etobicoke to allow for a quick return to FFI's yard. Mr. Fulton adds that the Complainant did not work the evening of April 16, 2009. On April 17, 2009, it was Mr. Fulton's understanding that the Complainant worked while his wife was sleeping.

[54] According to Mr. Fulton, following the first miscarriage, the Complainant did not complain about his conduct or about having to work. Mr. Fulton recalls the Complainant expressing that he was having trouble getting over the loss of the pregnancy, but that he reassured the Complainant that time heals and to keep going.

[55] Regarding the second miscarriage, Mr. Fulton testified that it was not possible to relieve the Complainant of his duties on December 17-18, 2009. The Tribunal was provided with the Complainant's Daily Log for December 18, 2009 and his Trip Sheets for December 17-18, 2009. On December 17, 2009, the Complainant made a delivery to Belleville, Ontario, and then went overnight from Bellville to Scarborough, Ontario, to pick up another load on the morning of December 18, 2009. From Scarborough, he delivered the load in Toronto, and then returned to FFI's yard in Cambridge. According to Mr. Fulton, during this time, another driver was involved in an accident. When the Complainant informed him of his wife's hospitalization and his request to be with her, he also requested that the driver involved in the accident come to relieve him. Given the accident and the other driver having worked in excess of his hours for the day, Mr. Fulton did not think it was safe for the other driver to relieve the Complainant. Also, given that the Complainant was on his way home with a load anyways, Mr. Fulton did not think the Complainant would be home any sooner whether he was relieved of his duties or completed his deliveries. Mr. Fulton added that arrangements were again made to expedite the loading of the Complainant's truck in Toronto to allow him to return home more quickly.

[56] As December 18, 2009, was a Friday, the Complainant did not work on the weekend of December 19-20, 2009. Mr. Fulton recalls making contact with the Complainant over that weekend to discuss how he was doing and whether he was ready to return to work. According to Mr. Fulton, the Complainant was concerned about having money for Christmas. Therefore,

Mr. Fulton offered him a shift for December 21, 2009. Mr. Fulton claims that the Complainant indicated to him that, as he had other family members available to be with his wife, he would work the shift on December 21, 2009. The Complainant's Daily Log and Trip Sheet for Monday, December 21, 2009 indicate that he worked from 5:30am until 7:00pm that day. The Complainant did not work an evening shift that night.

[57] Following the December 21st shift, Mr. Fulton does not recall any discussions with the Complainant regarding his return to work or any request for time off. The Complainant next worked on December 28, 2009.

[58] Overall, the FFI maintains that the Complainant was not treated in an adverse differential manner on the basis of his family status. FFI submits that it attempted to address the medical emergencies relating to the pregnancies and miscarriages by expediting a return to home base and providing work as requested by the Complainant. In this regard, the FFI claims that its actions were reasonable in response to the situation.

[59] Again, without advancing a defence under paragraph 15(1)(a) and subsection 15(2) of the *Act*, FFI claims that it accommodated the Complainant in the circumstances prior to and subsequent to the miscarriages. Prior to both miscarriages, in the situations where his wife had complications related to the pregnancies and had to go to the hospital, FFI made arrangements to expedite the Complainant's return to the yard so he could leave work early to be with his wife. However, the crux of the complaint is that the Complainant was denied permission to leave his shift until after he completed his deliveries. While arrangements were made by FFI, sufficient evidence was not led to establish that those arrangements met FFI's duty to accommodate. Subsection 15(2) of the *Act* states that:

> *For any practice...to be considered to be based on a bona fide occupational requirement...it must be established that accommodation of the needs of an individual...would pose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.*

Generally, undue hardship is reached when an employer shows that it could not have done anything else reasonable or practical to avoid the negative impact on the individual (see *Meiorin*, at paras. 38, 64-65; and, *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15 at para. 130). In this case, sufficient evidence was not led to establish that FFI considered any other accommodation measures beyond expediting the Complainant's return to the yard or that it would have caused FFI undue hardship to allow the Complainant to leave his shift prior to finishing his runs. While Mr. Fulton explained that it was not possible to allow the Complainant to leave his shift prior to the second miscarriage, again, sufficient evidence was not led that FFI considered other accommodation measures beyond those that the Complainant proposed (ie. that a particular driver come to relieve him) or what undue hardship FFI would have sustained if the Complainant did not complete his deliveries.

[60] Following the miscarriages, the Complainant also claims to have been denied time off. On the other hand, FFI says that the Complainant did not request time off, but, rather, wished to continue working a modified schedule, to keep earning an income, at times when his wife had other people with her to provide support. Given the contradictory evidence of the parties on these facts, this aspect of the complaint requires the Tribunal to make a credibility assessment. The Daily Log and Trip Sheets provided by FFI are not very helpful in this regard. While they establish that the Complainant was working on the days in question, which was not in dispute, they do not shed any additional light on Mr. Fulton's assertion that the Complainant did not request time off following the miscarriages.

[61] In weighing the totality of the evidence presented on this aspect of the complaint, I do not find FFI's version of the events to be credible. I find it more probable than not that the Complainant requested time off following the miscarriages. In particular, some inconsistencies with FFI's version of events were identified. Following the first miscarriage, Mr. Fulton admitted to having researched whether FFI had an obligation to provide leave, whether paid or unpaid, following a miscarriage. If the Complainant had not requested time off, whether paid or unpaid, and actually wished to continue working, why would Mr. Fulton have looked into FFI's obligations in this regard? Furthermore, regarding the second miscarriage, Mr. Fulton was asked "Do you not consider it reasonable for him [the Complainant] to ask you for time off?". In

response, Mr. Fulton stated "I gave him time off [...] During Christmas he worked one day". In its closing submissions, at paragraph 22, FFI added:

> *It was not in dispute that Closs did not work between December 22, 2009 and December 29, 2009. Fulton confirmed that work continued in their trucking business over this period except statutory holidays and subject to workload demands in the usual course. It was the position of Closs that this period in some way did not count towards a leave without providing an explanation for this position.*

While it maintains that the Complainant did not request time off, FFI here describes the period of December 22-29, 2009 as them providing him with leave. Finally, in response to the question "He [the Complainant] was a pain to you wasn't he?", Mr. Fulton responded "Not when he was working".

[62] This last comment is consistent with the Complainant's contention that, in the circumstances of his family's miscarriages and related requests for time off, FFI's primary concern was ensuring that he continued to work and completed his runs. The Complainant's testimony was straightforward and consistent with this allegation. Through his demeanor and answers, I had no reason to question the Complainant's capacity to remember the events surrounding the miscarriages or the credibility of his statement that he did in fact request time off following the miscarriages.

[63] Having accepted that it is more probable than not that the Complainant requested time off following the miscarriages, FFI had a duty to consider whether it could accommodate the Complainant's request. Among the possible accommodation measures available, Mr. Fulton testified that replacement drivers may have been available to cover the Complainant's shifts. However, that measure does not seem to have been explored. That is not to say that FFI had to provide the Complainant with leave, or that it did not have valid reasons to deny the leave; however, as mentioned above, those factors must be considered alongside "...the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship" (*Meiorin* at para. 62). While Mr. Fulton may have been of the view that the

Complainant should work through the grief of the miscarriages, based on his own personal experience with having suffered a miscarriage, that is not a strategy that the Complainant shared or that could necessarily be applied to the Complainant. In this regard, "[t]he importance of the individualized nature of the accommodation process cannot be minimized. The scope of the duty to accommodate varies according to the characteristics of each enterprise, the specific needs of each employee and the specific circumstances in which the decision is to be made" (*McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4 at para. 22). In this case, considering that FFI denies that the Complainant requested time off, which I do not find credible, there is no evidence to suggest that FFI seriously considered the Complainant's needs in requesting time off following the miscarriages or that FFI seriously considered whether it could accommodate those needs.

[64] As a result, I find that FFI has not provided a satisfactory explanation or justification for its *prima facie* discriminatory conduct in relation to the Complainant's family status, contrary to paragraph 7(b) of the *Act*.

V. Conclusion

[65] Given the evidence and reasoning above, I find the complaints under paragraphs 7(a) and 7(b) of the *Act* to be substantiated.

VI. Order

[66] Pursuant to subsection 53(2) of the *Act*, if at the conclusion of the inquiry the Tribunal finds that the complaint is substantiated, the Tribunal can make an order against the person found to have engaged in the discriminatory practice. In this regard, the Complainant seeks an order with the following remedies: lost wages, interest on the lost wages; compensation for pain and suffering; compensation for having engaged in the discriminatory practice willfully or recklessly; and, such other remedy as Tribunal may determine is just.

[67] The aim in making an order under subsection 53(2) is not to punish the person found to have engaged in the discriminatory practice, but to eliminate - as much as possible - the discriminatory effects of the practice (see *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 at para. 13). To accomplish this, the Tribunal's remedial discretion must be exercised on a principled basis, considering the link between the discriminatory practice and the loss claimed (see *Chopra v. Canada (Attorney General)*, 2007 FCA 268 at para. 37). In other words, the Tribunal's remedial discretion must be exercised reasonably, in consideration of the particular circumstances of the case and the evidence presented (*Hughes v. Elections Canada*, 2010 CHRT 4 at para. 50).

A. Lost wages

[68] The Complainant seeks lost wages for the period of April 9, 2010 to December 15, 2011. According to the Complainant, his projected annual earnings for the years 2010 and 2011 would have been $63,000 per year or $1,220 per week. Therefore, over a period of 83 weeks, he would have earned $101,260. However, he mitigated those lost wages by earning $25,729 through employment insurance and other employment. Therefore, the Complainant claims he is owed $75,531 in lost wages.

[69] FFI disputes the lost wages claim. According to them, the calculation is not applicable because their drivers are paid by the kilometer. FFI adds that the Complainant's evidence regarding his efforts to mitigate is questionable. He initially stated that he was off work until his employment insurance benefits ran out. The Complainant then obtained employment and has had employment since in or about December 2010. Therefore, FFI argues that the Complainant appears able to obtain and maintain employment when he chooses to do so.

[70] The ROE dated April 23, 2010 issued by FFI to the Complainant indicates that the last day for which the Complainant was paid was April 9, 2010. The evidence indicates that the Complainant worked one more shift for FFI on May, 14, 2010. Subsequently, the Complainant received employment insurance benefits until, according to the Complainant, approximately the

end of November 2010. The Tribunal was provided with the Complainant's T4E, Statement of Employment Insurance and Other Benefits, for the year 2010. This document indicates that the Complainant received $12,755 in employment insurance benefits for 2010.

[71] The Complainant began employment with Challenger Motor Freight Inc. in December 2010. The Tribunal was provided with the Complainant's T4, Statement of Remuneration Paid, issued by Challenger for the year 2010, indicating he earned $5,550.27. The document does not indicate a start or end date for the Complainant's employment with Challenger. According to the Complainant, as he was not receiving sufficient hours with Challenger - only 5-6 hours a day, two to three days a week - he quit Challenger, and on the same day went to work for Wag-mar Transport Inc. The Tribunal was provided with an ROE, issued by Wag-mar on May 18, 2011. This document indicates that the Complainant started work with Wag-mar on February 11, 2011 and his last day for which he was paid was May 15, 2011. The ROE also indicates that the reason for issuing the ROE is code M "dismissal". The ROE does not indicate the Complainant's income during his employment with Wag-mar, only his "total insurable earnings". No evidence was provided regarding the Complainant's employment situation following his dismissal from Wag-mar.

[72] Given that the Complainant was unemployed between April 2010 and December 2010 as a result of FFI's decision to issue the ROE, I accept that he suffered a wage loss for this period. While FFI questions the Complainant's efforts to mitigate his wage loss during this period, they did not advance sufficient evidence to support their claim. Furthermore, I accept the Complainant's testimony that in working for Challenger, his hours were significantly reduced from what he used to work with FFI. Despite partially mitigating his wage loss by working for Challenger, the Complaint continued to suffer a wage loss during this period.

[73] However, despite procuring employment with Wag-mar, on a more full-time basis than with Challenger, the Complainant claims he continued to suffer a wage loss until December 2011. Sufficient evidence was not provided by the Complainant to explain why he continued to suffer a wage loss once he began employment with Wag-mar or subsequently.

Specifically, I note that the Complainant's calculation of his "projected annual earnings for the years 2010 and 2011" does not explain why his employment with Wag-mar ended and, as mentioned above, what the Complainant's employment situation was for the period between May to December 2011. Furthermore, while the Complainant claimed in his testimony that his legal action against FFI has made it difficult for him to find and maintain employment, sufficient evidence was not advanced to substantiate this claim.

[74] Given the evidence and reasoning above, and pursuant to paragraph 53(2)(c) of the *Act*, I order FFI to compensate the Complainant for his lost wages for the period of Monday, April 12, 2010 until February 10, 2011. This amounts to 43 weeks and four days of wages.

[75] In determining the amount to be awarded to the Complainant under this remedy, the calculation of the Complainant's wages shall follow the same method used by the parties previously, as indicated at paragraph 29 of the Agreed Statement of Facts, to calculate the amount of each week's worth of wages:

> **CLC Proceeding**
>
> *29. No adjudication on the merits occurred and there was no determination as to unjust dismissal. No human rights claims were raised nor adjudicated. A without prejudice settlement was reached wherein FFI paid Closs two weeks wages.*
>
> (*emphasis added*)

[76] To avoid double compensation, the wages the Complainant received for his shift on May 14, 2010 shall be deducted from the award. Furthermore, the amount of $12,755 shall be deducted from the award to reflect the amount of employment insurance benefits the Complainant received during the relevant period. The amount of $5,550.27 shall also be deducted from the award to reflect the Complainant's earnings from Challenger in 2010. Finally, the earnings the Complainant received from Challenger in 2011 shall also be deducted from the award.

[77] In accordance with subsection 53(4) of the *Act*, the Complainant also sought interest on any compensation for lost wages. As such, and pursuant to Rule 9(12) of the Tribunal's *Rules of Procedure*, I grant interest on the lost wages award, from April 23, 2010, the date on which the ROE was issued to the Complainant, until the date of the payment of the award. The interest shall be simple interest, calculated on a yearly basis, at the Bank Rate (monthly series) established by the Bank of Canada.

[78] I shall retain jurisdiction with regard to the lost wages award in the event any further clarification is required and until such time as the parties confirm that the terms of this aspect of the order have been implemented.

B. Compensation for pain and suffering

[79] The Complainant seeks $20,000 as compensation for the pain and suffering that he experienced as a result of the discriminatory practices. According to the Complainant, the way FFI treated him during the loss of the pregnancies and the resulting pain that it caused him warrants an award of compensation for pain and suffering. The Complainant also submits that he has suffered symptoms associated with mental distress and anxiety, which commenced after his employment with FFI and have progressively worsened since the termination of his employment. The Complainant claims he has been prescribed medication for the treatment of these symptoms.

[80] According to FFI, the amount claimed by the Complainant is excessive given that there is evidence that indicates that the Complainant suffered from a pre-existing condition and that there were external factors affecting his mental well being.

[81] Pursuant to paragraph 53(2)(e) of the *Act*, $20,000 is the maximum amount of compensation that the Tribunal can award for pain and suffering. Therefore, the Tribunal only awards the maximum amount in the most egregious of circumstances: where the extent and

duration of the complainant's suffering as a result of the discriminatory practice warrants the full amount.

[82] The Tribunal was provided with the Complainant's "Patient Medical History", a printout from Shoppers Drug Mart, indicating the Complainant's prescription history. Among other medications, the Complainant was prescribed trimipramine, which the Complainant described as an anti-depressant, and ratio-fluoxetine, which the Complainant stated he took to address panic attacks. These prescriptions were both serviced on January 27, 2009, prior to the Complainant having been hired by Mr. Fulton. The Complainant also testified to having experienced anxiety and panic attacks prior to his employment with FFI, as a result of having witnessed an automobile accident at a previous job. Therefore, I do not accept the Complainant's statement that his mental distress and anxiety only commenced after his employment with FFI. Nor was the Tribunal provided evidence to support the claim that these symptoms worsened following the issuance of the ROE.

[83] That said, I accept the Complainant's testimony that the issuance of the ROE caused him some emotional upset, which resulted in a heated exchange with Mr. Fulton and the filing of this complaint.

[84] With regard to the miscarriages, as mentioned previously and as stated by FFI, the Complainant's testimony clearly demonstrated an individual with deep feelings regarding the miscarriages suffered by his family. However, in awarding a remedy under paragraph 53(2)(e), the Tribunal is not trying to rectify the pain and suffering the Complainant experienced as a result of the miscarriages. Rather, it is attempting to redress the effects of the discriminatory practices. In denying the Complainant time off to address his family obligations, without seriously considering his needs, FFI exacerbated the grief suffered by the Complainant as a result of the miscarriages. The Complainant testified that not being there to support his wife during the miscarriages and not being given time to grieve has had some long term effects on him, including depression. While the Complainant may have suffered from depression previously, again, I accept that the situation may have exacerbated his condition. Furthermore, the

Complainant testified that he is now seeking counseling to address these issues, as his suffering is now affecting his relationship with his wife and others. That said, and without disregarding the effects of FFI's conduct, I believe the Complainant's evidence demonstrates that the bulk of his pain and suffering surrounding the miscarriages was as a result of losing the pregnancies themselves.

[85] Given the above, and pursuant to paragraph 53(2)(e) of the *Act*, I feel it is appropriate to order FFI to compensate the Complainant in the amount of $5,000.00 for the pain and suffering he experienced as a result of the discriminatory practices.

C. Compensation for having engaged in the discriminatory practice wilfully or recklessly

The Complainant seeks $20,000 as compensation for FFI having engaged in the discriminatory practice wilfully or recklessly. According to FFI, there is no evidence to support wilful or reckless conduct which would give rise to damages under this head.

[86] In order to be wilful or reckless, "…some measure of intent or behaviour so devoid of caution or without regard to the consequences of that behaviour" must be found (*Canada (Attorney General) v. Collins*, 2011 FC 1168, at para. 33). Under subsection 53(3) of the *Act*, $20,000 is the maximum amount of compensation that the Tribunal can award for having engaged in the discriminatory practice wilfully or recklessly. Therefore, the award of the maximum amount should be reserved for the most severe or egregious cases.

[87] While I do not believe that the evidence demonstrates that FFI intentionally sought to discriminate against the Complainant, I do believe that FFI demonstrated a reckless disregard for the consequences of its behaviour. In the situation of the miscarriages, the Complainant made FFI aware of his needs and asked for accommodation, but FFI chose to focus on its own needs, without giving adequate consideration to the Complainant's family obligations. In the situation resulting in the issuance of the ROE, again, the Complainant made FFI aware of his needs and his request for accommodation. FFI's reasons for ignoring that request were dispassionate towards the Complainant's needs and, in replacing the Complainant with another driver, demonstrated a reckless disregard for the accommodation process.

[88] Given the above, and pursuant to subsection 53(4) of the *Act*, I feel it is appropriate to order FFI to compensate the Complainant in the amount of $5,000.00 for having engaged in the discriminatory practices recklessly.

Signed by

Susheel Gupta
Acting Chairperson

OTTAWA, Ontario
November 30, 2012

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1693/4811 & T1694/4911

Style of Cause: Stephen Closs v. Fulton Forwarders Incorporated and Stephen Fulton

Ruling/Decision of The Tribunal Dated: November 30, 2012

Appearances:

Mr. Craig Lewis, for the Complainant

No one appearing, for the Canadian Human Rights Commission

Carol VandenHoek, for the Respondent