HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Yong Xiang Li

Applicant

-and-

University Health Network

Respondent

-and-

Canadian Union of Public Employees, Local 5001

Intervenor

DECISION

Adjudicator:	Brian Eyolfson
Date:	October 17, 2014
File Number:	2012-10600-I
Citation:	2014 HRTO 1550
Indexed as:	**Li v. University Health Network**

APPEARANCES

Yong Xiang Li, Applicant	)	Self-represented
University Health Network, Respondent	)	Jacqueline Silvera, Representative
Canadian Union of Public Employees, Local 5001, Intervenor	)	Devon Paul, Counsel

INTRODUCTION

[1] This Application was filed under section 34 of Part IV of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"), on December 29, 2011, and alleges discrimination in employment on the basis of disability.

[2] The applicant was employed with the respondent, University Health Network ("UHN"), for approximately seven years, as a steamfitter in the "Facilities" department at Toronto General Hospital ("TGH"). At the time of the alleged discrimination, the applicant was a member of the Canadian Union of Public Employees, Local 5001 (the "union").

The applicant's allegations

[3] In his Application, the applicant explains that he called in sick, due to back pain, from August 29 to September 22, 2010. When he returned to work, the respondent did not give him a "modified job", and he did his full duties every day. He states that the heavy work made his back pain get worse, and he called in sick again.

[4] The applicant alleges that, while he was off sick the second time, the respondent hired an investigator to conduct a surveillance of him, between November 15 and 22, 2010. The respondent used evidence from the investigator's report to terminate his employment, but refused to show him the evidence when he was issued a termination letter.

[5] The applicant's termination letter, dated January 24, 2011, states, in part, that strong evidence substantiates the fact that, during the applicant's absence, he engaged in activities that were in clear conflict with the restrictions and functional abilities information that were provided to the respondent by the applicant and his medical practitioner.

[6] The applicant alleges that, when the respondent terminated his employment, he was still under a "modified duty situation." He also alleges that the respondent

terminated his employment because it thought that it gave him a modified job, and he still called in sick. He alleges, however, that the respondent did not give him even one day of a real modified job.

The respondent's response to the allegations

[7] In its Response filed May 30, 2013, the respondent submits that the applicant was off work due to medical reasons between August 26 and September 24, 2010. The respondent refutes the applicant's assertion that it did not provide him with real modified work to accommodate his restrictions. The respondent submits that the applicant returned to work on September 24, 2010, with the restrictions of "no repetitive bending or twisting" and "no walking or standing greater than 30 minutes" (a "Modified Work Plan" dated September 24, 2010, and attached to the respondent's Response, also refers to the restriction of "no sitting… greater than 30 minutes").

[8] On or about October 26, 2010, the respondent received an Attending Physician Statement ("APS") regarding the applicant. The APS indicated that the applicant required the same restrictions as before. As a result, the modified duties and accommodation continued. The applicant was also off work from November 15 to December 20, 2010. During this time, the same restrictions remained in place.

[9] The respondent submits that, at all material times, the applicant was accommodated according to the restrictions confirmed by his physician, and, at no time, did the applicant or his physician indicate that there was any change or modification to the restrictions.

[10] The respondent submits that the applicant returned to work on November 22, 2010, but left the same day due to medical reasons. The following day, the respondent attempted to follow up with the applicant to discuss the reason for his absence and explore if any supports were required, but the respondent was unable to reach the applicant. The applicant remained on sick leave and was scheduled to return to work on December 20, 2010. The applicant took vacation and returned on January 7, 2011.

[11] The respondent submits that the applicant was not forthcoming with information related to his absence based on illness. As a consequence, a third party investigator was retained to conduct surveillance, which occurred on November 24 and 25, and December 10, 2010. The surveillance revealed the applicant shopping, walking more than 30 minutes, repeatedly bending to pick up items, driving, remaining seated for lengthy periods beyond the 30 minute restriction, and climbing stairs. The respondent submits that the applicant demonstrated that he was capable of performing activities that included "repetitive bending or twisting", and "walking or standing greater than 30 minutes".

[12] The respondent submits that, on January 6, 2011, its Occupational Health Disability Case Manager contacted the applicant as an APS had not been received, and to confirm that the applicant's absence from work was due to medical reasons, and his return to work date. On January 7, 2011, the applicant returned to work, and continued with the same modified duties, and accommodation with the same restrictions, as implemented since September 24, 2010.

[13] On January 24, 2011, the applicant, a union representative, and the respondent's Human Resources Manager, Department Manager, and Department Director, met to discuss the applicant's restrictions. The applicant indicated that the same medical restrictions were in effect as prescribed by his physician. The respondent submits that, at no time during the meeting, did the applicant indicate he had new or different medical restrictions which would have required his absence or a change in his accommodation at work. The respondent submits that the applicant's employment was terminated for engaging in activities that were in clear conflict with his medical restrictions while collecting paid sick leave from the respondent.

[14] The respondent submits that the applicant's employment was terminated for cause, based on his actions which were contrary to policy. The respondent refers to breach of trust and time theft, in claiming sick time and alleging he could not attend work, or perform those tasks for which he was being appropriately accommodated by the respondent. The respondent submits that the termination was appropriate due to the

above violations, and for failing to notify the respondent prior to, and during, unapproved absences.

Procedural Background

[15] The applicant indicated in his Application that the facts of the Application were also part of a grievance proceeding that was ongoing. On February 2, 2012, the Tribunal issued a Notice of Intent to Defer the Application, pending completion of the grievance proceeding.

[16] By Interim Decision dated April 3, 2012, 2012 HRTO 684, the Tribunal declined to exercise its discretion to defer the Application, noting that the union advised that the applicant's grievance had been settled on the basis that the applicant's employment be reinstated, amongst other terms. The union advised that the applicant objected to the settlement and did not return to work. He was subsequently dismissed from his employment on January 6, 2012, and did not ask the union to file a grievance in relation to this second dismissal. The union stated that, as far as it was aware, there was no other proceeding in progress to which the Application should be deferred.

[17] In its Interim Decision, the Tribunal also granted the union's Request to Intervene, and directed the respondent to file a Response to the Application within 35 days.

[18] As the Tribunal did not receive a Response from the respondent by June 12, 2012, the Tribunal issued an Interim Decision on that date, 2012 HRTO 1146, directing the respondent to file a Response to the Application within 10 days. On June 22, 2012, the respondent sought and was granted an extension until July 3, 2012 to file a Response.

[19] In its Response to the Application, filed July 13, 2012, the respondent requested that the Application be dismissed, pursuant to s. 45.1 of the *Code*, on the basis that the grievance proceeding had appropriately dealt with the substance of the Application.

[20] Following a pre-hearing conference call addressing the respondent's s. 45.1 dismissal request, the Tribunal issued an Interim Decision on December 4, 2012, 2012 HRTO 2260, dismissing the respondent's dismissal request. The respondent was directed to file a full Response to the Application within 14 days.

[21] On December 18, 2012, and January 9, 2013, the respondent sought and was granted extensions until January 10 and February 4, 2013, respectively, to file a full Response. As the Tribunal had not received a Response from the respondent as of March 1, 2013, the Tribunal issued an Interim Decision on that date, 2013 HRTO 359, directing the respondent to file a full Response within 14 days.

[22] On May 14, 2013, the respondent sought and was granted a further extension to file a Response until May 30, 2013. A full Response was ultimately filed on May 30, 2013.

[23] At the hearing, the parties confirmed that the second termination of the applicant's employment on January 6, 2012, is not part of this Application.

EVIDENCE

[24] The applicant gave evidence at the hearing, and called the following witnesses: Premie Destacamento, a supervisor of the applicant at TGH; Rong Cui, a co-worker of the applicant at TGH; and, Eddie Domingues, President, CUPE, Local 5001.

[25] The respondent called the following witnesses: Sergije Hadzivukovic, Manager, Occupational Health, UHN; Tom Girard, Disability Case Coordinator, Occupational Health, UHN; and, Chris Green, a private investigator who conducted a surveillance of the applicant in November and December of 2010.

[26] The parties provided the Tribunal with a number of documents at the hearing, and the respondent also provided video evidence from the surveillance of the applicant.

ANALYSIS AND DECISION

Relevant *Code* provisions

[27] Sections 5(1), 9 and 17 of the *Code* state as follows:

> 5 (1). Every person has a right to equal treatment with respect to employment without discrimination because of… disability.
>
> 9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.
>
> 17(1). A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability.
>
> (2). No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.
>
> (3). In determining for the purposes of subsection (2) whether there would be undue hardship, a tribunal or court shall consider any standards prescribed by the regulations.

[28] In addition, "disability" is defined in s. 10(1)(a) of the *Code*, in part, as follows:

> 10. (1)(a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device…

Assessment of credibility

[29] To the extent that any issues addressed in this Decision turn on my assessment of the credibility of the parties, I am guided by the principles set out by the British Columbia Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, at paras. 356-357:

> …Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility.
>
> The credibility of interested witnesses, particularly in cases of conflict of evidence cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions (…) Again, a witness may testify to what he sincerely believes to be true, but he may be quite honestly mistaken.

[30] I am also guided by factors considered by the Tribunal in *Cugliari v. Clubine and Brunet*, 2006 HRTO 7, at para. 26: the motives of the witnesses, the relationship of the witnesses to the parties, the internal consistency of their evidence, inconsistencies and contradictions in relation to other witnesses' evidence, and observations as to the manner in which the witnesses gave their evidence

Does the applicant have a disability within the meaning of the *Code*?

[31] The applicant states in his Application that he called in sick, in August 2010, because of back pain. He also states that a CT scan report showed that he had two bones pressing on nerves. He testified at the hearing that these allegations are correct. He also testified that he had back pain, and that he went to see his family doctor because he could not do his job. He testified that he still, sometimes but not always, wears a "back support" when doing his job, but that he no longer has a physical job, and he no longer has the same medical restrictions.

[32] There does not appear to be any dispute that, during the time period relevant to the allegations in the Application, the applicant had confirmed medical restrictions of no repetitive bending or twisting, and no sitting, standing or walking for longer than 30 minutes, in relation to a medical condition concerning his back. The respondent indicated in its Response, and Mr. Girard agreed in his evidence, that these restrictions were communicated by the applicant's attending physician. The applicant also testified that his family doctor signed all of the APS statements that were provided to the respondent. The respondent also does not appear to dispute that the applicant has a disability within the meaning of the *Code*.

[33] The Tribunal has previously held that lower back pain resulting in physical limitations in the ability to do aspects of one's job constitutes a disability within the meaning of the *Code*. See *Llano v. Fairweather*, 2011 HRTO 556. In the circumstances of the present case, I am also satisfied that the applicant's medical condition concerning his back constitutes a disability within the meaning of the *Code*, during the time period relevant to the allegations in the Application.

Was the applicant subjected to discrimination on the basis of disability in the workplace prior to the termination of his employment?

[34] In his Application, the applicant alleges that he was denied necessary accommodation, or modified work, in the workplace. He also alleges that he continued to do the full duties of his position, and that the regular, heavy work made his back pain get worse and he called in sick again.

[35] The respondent, on the other hand, submits that, at all material times, the applicant was accommodated according to the restrictions as confirmed by his attending physician.

Evidence

[36] At the hearing, the applicant confirmed that the allegations in his Application that he was not given a "real modified job" when he returned to work after being off sick, and

that he did his "full duty job" every day, were correct. He testified that his Manager, Mark Lagerquist, did not give him even a single day of a modified job. He testified that everybody signed a "contract", but that the contract was not implemented.

[37] The applicant referred to four Modified Work Plans ("MWPs"), dated September 24, October 27, and December 22, 2010, and January 7, 2011. He testified that the Human Resources ("HR") department did not "follow up", and that, during the four months that the MWPs pertained to, he did not receive one day of a modified job. He testified that he does not believe that the HR department even knew where he was working, and that they just focussed on the paperwork.

[38] The applicant testified that his steamfitter position was a "full duty position", referring to a job description revised February 2, 2010. I note that from a second job description revised August 2, 2010, it appears that the applicant's position title changed from steamfitter to "plumber/steamfitter", and the applicant testified that he had concerns about that, as well as being asked to report directly to a lead hand instead of a supervisor.

[39] In cross-examination, the applicant confirmed that he never received modified work, nor did he receive any accommodation, despite he and others meeting with the Occupational Health ("OH") department and signing the MWPs. He testified that it was paperwork that nobody followed up on, or reviewed, and that he spoke to Mr. Lagerquist a couple of times and reminded him that he did not get a modified job. He testified that he did not tell his union, or the OH department, because the union is weak and does not have any say with the respondent, and only the Manager can make a decision. He testified that he asked Mr. Lagerquist to give him a modified job, but Mr. Lagerquist gave him a three-day suspension on September 29, 2010. He reiterated twice in cross-examination that he spoke to his Manager about not receiving modified work.

[40] The applicant also testified that he did not tell anybody at the MWP meetings that he was not getting accommodation. When asked why he signed the MWPs, the applicant testified that he did not want Mr. Lagerquist to get mad at him. He explained

that Mr. Lagerquist gave him a three-day suspension, and was the only person who could make a decision about his accommodation, and that is why he kept quiet. He also testified that nobody asked him about it, and that he signed the MWPs, but that does not change the fact that the respondent did not give him a modified job. He explained further that he did not tell anybody at the MWP meetings that he was not being accommodated, and that he waited to be asked because he did not want Mr. Lagerquist to get mad and give him a suspension.

[41] The applicant was also specifically asked about the January 7, 2011 MWP which indicates, at the top of the document, that only the applicant and Mr. Girard were present at the meeting, and only has their two signatures, at the bottom. He testified that he did not tell Mr. Girard that he was not being accommodated, and just because there are only two signatures does not mean that there were only two people at the meeting. He also testified that Mr. Lagerquist may have been at the meeting, and he did not want to get into trouble.

[42] The applicant testified that the only reason he was not at work when he was off sick in the months prior to the termination of his employment was because he was not given a modified job and his body could not do the work. When asked what modifications he needed, the applicant testified that he does not know what the exact meaning of a "modified duty job" is, and the respondent's policy on modified work does not give any detail, but the steamfitter job is a "full-duty" job, and not a modified job. He reiterated that nobody gave him a modified job. He confirmed that his doctor signed all of the APSs he provided to the respondent.

[43] Premie Destacamento testified that he was the applicant's direct supervisor. He went on vacation in 2010, and when he returned the applicant's employment had been terminated. Although Mr. Destacamento did not testify as to when he went on vacation, his signed witness statement indicates that he was off as of November 15, 2010, and that he has no idea what happened after that. Mr. Destacamento ceased working for the respondent in December 2011.

[44] Mr. Destacamento testified that he was aware of the applicant being sick on and off because of his back in 2010, but he was not aware of any modified job that the applicant did. He testified that the applicant was always working full-time, and he referred to helping the applicant with a heavy job because of his condition, but he did not indicate when that was.

[45] Mr. Destacamento testified that he could not recall any conversation or any meeting he attended, while the applicant's supervisor, concerning the applicant's medical condition.

[46] Mr. Destacamento testified that the respondent tried to make the applicant work under a lead hand who was under a different supervisor, sometimes before he left, and that he heard about the applicant getting suspended, but he was not really sure what it was about.

[47] In cross-examination, Mr. Destacamento was asked about disciplining the applicant. He testified that he only disciplined the applicant because of his absenteeism. He explained that he talked to him and warned him about his attendance (I note that the applicant provided the Tribunal with a copy of a letter dated June 30, 2009, signed by Mr. Destacamento, wherein Mr. Destacamento suspends the applicant for one day for using profanity in the workplace). Mr. Destacamento explained that someone said that the applicant was also working "outside" of the respondent, and there was a pattern of the applicant always being sick on Wednesdays. He testified that there were questions about why the applicant was not at work, and the applicant was saying that it was because of a back issue, but there were questions about that.

[48] Mr. Destacamento was shown the October 27, 2010 MWP which states that he was in attendance at the October 27, 2010 MWP meeting, and appears to have his signature. He agreed that he signed the document, and wrote "supervisor" next to his signature, but testified that he could not really recall this issue. He explained that he never got involved in the applicant being involved in any modification, and could not recall. He also explained that Mr. Lagerquist took the applicant out of his supervision.

The applicant then worked under another supervisor, who was a plumber, and under that supervisor's lead hand. He testified that Mr. Lagerquist wanted the applicant to report to the lead hand.

[49] Mr. Destacamento recalled that the applicant was calling in sick when he was working under him in the summer. He testified that, after the applicant began reporting to someone else, he would not have had any direct knowledge about the applicant's medical condition.

[50] Mr. Rong Cui confirmed the contents of his witness statement which essentially sates that, during September 2010 to January 2011, as the applicant's co-worker at TGH, he did not notice that any modified jobs had been arranged for the applicant.

[51] In cross-examination, Mr. Cui testified that he worked for the respondent as a plumber from 2006 to 2012 when he quit. He testified that some individuals with modified jobs stay in the office and do paperwork, but the applicant did not. He testified that the applicant did the same duties as before as he normally did.

[52] Mr. Cui testified that he did not know what type of restrictions the applicant had, but he was aware the applicant had problems with his lower back and had lower back pain. He testified that he did not know what a modified work program looks like.

[53] Sergije Hadzivukovic, who is the Manager of the respondent's Disability Case Coordinators, gave general evidence about the respondent's modified work process.

[54] Mr. Hadzivukovic testified that the respondent's modified work process has been developed to accommodate the medical needs of employees when necessary. There are several steps to the process, including collecting medical information, reviewing it, coordinating MWPs based on the restrictions and limitations resulting from the medical situation, and monitoring MWPs. The respondent has a standardized process for collecting medical information, though APSs, to give treating doctors an opportunity to make recommendations on restrictions and limitations that need to be accommodated in the workplace. If the information supplied lacks clarity, the respondent can either

connect with the doctor, with consent, and ask for clarification of the restrictions, or the respondent can initiate further assessments. Mr. Hadzivukovic testified that the idea of the process is to have a full understanding of the safe abilities and restrictions and limitations of an employee, so that the MWPs developed are safe, suitable and minimize the possibility of any re-injury.

[55] Mr. Hadzivukovic confirmed that the applicant's four MWPs, are standard MWP forms. He testified that employees participate in the development of the MWPs. He explained there is a joint meeting with the employee, and the employee's manager, and the union is invited. The employee's restrictions and limitations are reviewed and included in the plan, and there is a discussion about duties and responsibilities assigned to the employee during a MWP that have to suit the restrictions and limitations. Mr. Hadzivukovic testified that, therefore, the first opportunity for an employee to raise concerns about the suitability of assignments is when the MWP is started.

[56] Mr. Hadzivukovic testified that, as part of the monitoring of the MWP, usually there are regular follow-up meetings scheduled, and, depending on the medical situation, follow-up meetings can occur every two or three weeks. Also, in addition to developing and signing a MWP when the content is agreed upon, there is usually some discussion between the Disability Case Coordinator, the employee and the employee's manager, about the employee letting the respondent know if any difficulties are experienced, and a follow-up meeting will occur sooner than scheduled.

[57] Mr. Hadzivukovic testified, again, that the purpose of the discussion and planning is to minimize re-injury, and also to ensure that the duties and assignments given are suitable and appropriate, considering the medical situation of the employee. He explained that the initial MWP and follow-up meetings are seen as an opportunity for all parties involved to express any concerns, as it is not in the interest of anyone to expose any employee to any re-injury. He testified that the respondent can make some corrections during follow-up meetings in order to maintain the safety component of the MWP.

[58] Mr. Hadzivukovic testified that the respondent always tries to accommodate employees within their own departments, and duties are adjusted to suit their needs. Occasionally, because of the medical condition or the specifics of work in an employee's department, the respondent needs to look for work outside of the department to ensure safety.

[59] In cross-examination, Mr. Hadzivukovic confirmed that he was not familiar with the applicant's case, and testified that he did not know if there were any issues regarding the applicant's MWP.

[60] When asked if the manager of the department in which an employee works would be the person who has the final say concerning a MWP, Mr. Hadzivukovic testified that the manager or supervisor of the department participates in the development of the MWP, and the decision making on whether suitable work is available for the employee in the department. He also explained that some information in the plan is not coming from the manager, but from the doctor, such as the restrictions and limitations with respect to duties and responsibilities and hours of work, which becomes part of the plan that is jointly discussed at the meetings with the manager and employee.

[61] Tom Girard testified that he is an occupational health nurse and Disability Case Coordinator with the respondent, and has been in that role for approximately 10 years.

[62] Mr. Girard confirmed that his signature is on all four of the applicant's MWPs, and that the applicant participated in the process on all four occasions. Mr. Girard testified that the applicant never raised concerns with him about modified work. He explained that he asks people before they sign a MWP whether they are satisfied with the MWP, and, if they do not agree, they do not sign it. He testified that he does not recall the applicant refusing to sign, and that the applicant never asked for any revision around the MWP. He explained that employees can refuse to sign a MWP and, if they do, the MWP meeting is over and arrangements are made for further discussions.

[63] Mr. Girard also testified that he never asked the applicant to provide him with any additional information, and he could not recall what took place at the January 7, 2011 MWP meeting. He confirmed that the information regarding the applicant's restrictions came from the applicant's doctor.

[64] In cross-examination, Mr. Girard testified he advises attendees at a MWP meeting what the employee's restrictions are and a discussion ensues regarding how the employee will be accommodated under those restrictions. He testified that, in all cases, the manager or supervisor of the applicant's home department assured him that the applicant would be accommodated within his restrictions within the workplace, but he could not answer whether the applicant's supervisor notified him as to how the applicant's job was arranged, or if anyone notified the applicant as to what his modified duties were. He also could not answer if, at the MWP meetings, he ever asked the applicant what his modified duties were in detail.

[65] When asked how he followed up, or made sure or verified, that the applicant's MWP was carried out, Mr. Girard testified that, during all the MWP meetings, he always advised people that if there were any problems, or they were not satisfied, to please contact him immediately. He also testified that he was only aware of the applicant's classification, and not exactly where he worked at TGH.

[66] Eddie Domingues testified that he has some experience with MWPs. He testified that, on occasion, some employees have not signed MWPs. He explained that, if an employee does not sign a MWP, usually there is a follow-up meeting to see if there is an alternative MWP.

Findings

[67] There does not appear to be any dispute that the applicant's doctor confirmed that the applicant had medical restrictions requiring accommodation by the respondent in the workplace.

[68] The applicant's most recent job description appears to include the physical demands of sitting and trunk-twisting for an hour or less, and standing, crouching, kneeling, crawling, stooping, bending and working in a difficult position for more than 3 hours.

[69] The applicant's MWPs dated September 24, October 27 and December 22, 2010, all indicate that the applicant had restrictions of no repetitive bending or twisting, and no sitting, standing or walking greater than 30 minutes. The MWP dated January 7, 2011, indicated that the applicant had the restrictions of no bending, no sitting continuously for more than 30 minutes, and that the applicant is unable to walk for more than 30 minutes without rest. With respect to the applicant's duties, all of the MWPs indicate that the applicant was to be accommodated within his department.

[70] Section 17 of the *Code* requires a respondent employer to accommodate an applicant's disability, as it relates to performing essential employment duties, to the point of undue hardship. The Supreme Court of Canada has indicated that the duty to accommodate has both procedural and substantive components. See *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [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. The procedural component requires that the respondent employer take steps to understand the employee's disability-related needs and undertake an individualized investigation of potential accommodation measures to address those needs. The substantive component of the analysis considers the reasonableness of the accommodation offered or the respondent's reasons for not providing accommodation.

[71] In *Baber v. York Region District School Board*, 2011 HRTO 213, the Tribunal described an employer's duty to accommodate as follows, at para. 94:

> Once the duty to accommodate has been triggered, the respondent employer has both procedural and substantive obligations. Procedurally, the employer has an obligation to take the necessary steps to determine what kinds of modifications or accommodations might be required in order to allow the employee to participate fully in the workplace. The substantive duty requires the

> employer to make the modifications or provide the accommodation necessary in order to allow the employee to participate fully in the workplace, such as by modifying duties or hours of the workplace itself, as the case may be, up to the point of undue hardship.

[72] The duty to accommodate requires an individualized assessment of *Code*-related needs, including the possibility that there may be different ways to perform the job: See *Simpson v. Commissionaires (Great Lakes)*, 2009 HRTO 1362, at paras. 36-40.

[73] The Supreme Court of Canada has also explained that "[t]he search for accommodation is a multi-party inquiry" and that there is "a duty on the complainant to assist in securing an appropriate accommodation." See *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, at para. 43. The Supreme Court also explained that this does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While a complainant may be in a position to make suggestions, the employer is in the best position to determine how a complainant can be accommodated without undue interference in the operation of the employer's business. See *Renaud*, at para. 44.

[74] In addition, while the legal burden to establish discrimination on a balance of probabilities rests with the applicant throughout, the Supreme Court of Canada has also indicated that it is the respondent who bears the onus of demonstrating what considerations, assessments, and steps were undertaken to accommodate the employee to the point of undue hardship. See *Meiorin*.

[75] In the present case, I have concerns with some aspects of the applicant's evidence relating to his allegation that the respondent did not provide him with modified work. The applicant raised for the first time when he was cross-examined at the hearing that he spoke to his Manager, Mr. Lagerquist, about not being provided with modified work. He also testified that when he asked Mr. Lagerquist to give him a modified job, Mr. Lagerquist gave him a three-day suspension on September 29, 2010. He testified further that he did not tell anybody else involved in the MWP process that he was not being accommodated because Mr. Lagerquist was the only person who could make a

decision about his accommodation, and he did not want Mr. Lagerquist to get mad at him and give him another suspension.

[76] A letter addressed to the applicant dated September 29, 2010, and signed by Mr. Lagerquist, indicates that the applicant was given a three-day suspension for repeatedly refusing instructions to communicate directly with a lead hand. The letter indicates that the applicant's work relationship with the lead hand was reviewed on four occasions: August 5 and September 23, 27, and 29, 2010.

[77] At the hearing, the applicant confirmed that Mr. Lagerquist asked him to communicate with a lead hand on four occasions and he refused. He testified that his job description stated that he was to report directly to a maintenance supervisor, and he told Mr. Lagerquist that he would report to the lead hand if Mr. Lagerquist changed his job description. He confirmed that this is why he received a three-day suspension on September 29, 2010. He also testified that he filed a grievance in relation to this suspension, and he filed a grievance in relation to an earlier one-day suspension issued on June 30, 2009.

[78] In the circumstances, I find the applicant's suggestion in his evidence that he received a three-day suspension from Mr. Lagerquist for asking for a modified job to be rather far-fetched and lacking in credibility. The applicant clearly confirmed that he received the suspension for repeatedly refusing to report to a lead hand when instructed to do so. For this reason, I also have some difficulty with the applicant's explanation in his evidence that he did not tell anybody else involved in the MWP process that he was not being accommodated because he did not want Mr. Lagerquist to get mad at him and give him another suspension.

[79] I appreciate that, if the applicant was not being appropriately accommodated, he may have been reluctant to raise this in front of Mr. Lagerquist and the various other individuals who attended the MWP meetings. On the other hand, the applicant does not appear to be someone who is reluctant to assert his rights or position, having regard to his repeated refusal to report to a lead hand as instructed, his grievances in relation to

two workplace suspensions and the termination of his employment, and his conduct in pursuing and representing himself at the hearing of this Application before the Tribunal.

[80] I note that the applicant was also asked about the January 7, 2011 MWP meeting at which it appears that only the applicant and Mr. Girard were in attendance. The applicant confirmed that he did not tell Mr. Girard that he was not being accommodated. He explained that just because there are only two signatures on the January 7, 2011 MWP does not mean that there were only two people at the meeting, and that Mr. Lagerquist may have been at the meeting, and he did not want to get into trouble. There is no indication from the document, however, that anyone other than the applicant and Mr. Girard were at the meeting. Their names are the only two names listed as in attendance at the meeting, and their signatures are the only two signatures on the document. In the circumstances, it is not clear to me why the applicant did not raise with Mr. Girard that he was not being accommodated at the January 7, 2011 meeting, if he was not being accommodated. It is also not clear to me why the applicant did not raise the issue of accommodation with anyone else, other than Mr. Lagerquist who he testified he did raise the issue with, if he was not being appropriately accommodated. In any event, the applicant clearly communicated his disability-related needs when he provided the respondent with APSs setting out his restrictions, thereby triggering the respondent's duty to accommodate.

[81] Mr. Destacamento testified that he was the applicant's direct supervisor and he was aware of the applicant being sick on and off because of his back in 2010, but he was not aware of any modified job that the applicant did. He also explained that Mr. Lagerquist took the applicant out of his supervision, and the applicant then worked under another supervisor, who was a plumber, and under that supervisor's lead hand, and Mr. Lagerquist wanted the applicant to report to the lead hand. Mr. Destacamento testified that the applicant was calling in sick when he was working under him in the summer, but, after the applicant began reporting to someone else, he would not have had any direct knowledge about the applicant's medical condition.

[82] It appears from the documentary evidence that the applicant was instructed to report to a lead hand under a different supervisor than Mr. Destacamento as early as August 5, 2010. It also appears from Mr. Destacamento's evidence that the applicant would no longer have been supervised by him after this point in time. As it appears that Mr. Destacamento testified that he was not aware of any modified job the applicant did while the applicant was under his supervision, I find that Mr. Destacamento's evidence in this regard does not assist the applicant's position that he was not provided with modified work, as that allegation relates to a time period commencing in late September 2010. I note, however, that the documentary evidence indicates that Mr. Destacamento attended the applicant's October 27, 2010 MWP meeting, although Mr. Destacamento essentially did not recall this. That evidence is also addressed below.

[83] Mr. Cui confirmed that, during September 2010 to January 2011, as the applicant's co-worker at TGH, he did not notice that any modified jobs had been arranged for the applicant, and testified that the applicant did the same duties as before as he normally did. He also testified, however, that he did not know what type of restrictions the applicant had, or what a modified work program looked like.

[84] It is not clear to me how closely Mr. Cui worked with the applicant during the relevant time period, and it does not appear, in any event, that Mr. Cui would have known whether the applicant was working within his medical restrictions. While I have no reason to doubt Mr. Cui's evidence that, from his perspective, the applicant continued to do the same duties that he normally did, I find Mr. Cui's evidence to be of little, if any, assistance in determining whether the applicant was accommodated in the workplace.

[85] As indicated above, I have some concerns with the applicant's evidence that he spoke to Mr. Lagerquist about not being provided with modified work, particularly as the applicant asserted this for the first time while being cross-examined at the hearing. I also have some concerns about the applicant's credibility, in light of my findings above that his suggestion that Mr. Lagerquist suspended him for asking for a modified job

lacks credibility, and that it is not clear why he did not raise with anyone else that he was not being accommodated, if that was the case.

[86] On the other hand, the applicant was clear in his evidence that he spoke to Mr. Lagerquist about not receiving modified work, and that he asked Mr. Lagerquist that he be provided with a modified job. While the respondent indicated at the outset of the hearing that Mr. Lagerquist would be called as a witness to testify that modified work was provided to the applicant at all material times, on the second day of the hearing, well after the applicant completed giving his own evidence, the respondent indicated that Mr. Lagerquist would not be attending the hearing. No explanation was provided. In all of the circumstances, I accept the uncontradicted evidence of the applicant and find that he spoke to Mr. Lagerquist about not receiving modified work, and that he asked to be provided with a modified job. While this finding is not determinative of the issue of whether the applicant was provided with accommodation, in my view, it lends some support to the applicant's allegation that he was not provided with appropriate accommodation, in light of his disability-related needs.

[87] The applicant was also clearly adamant in his evidence that he was not provided with accommodation, or a modified job, and that he continued to do the full duties of his regular position. I note, however, that the applicant's evidence was somewhat lacking. For example, the applicant did not indicate if the respondent told him anything about his actual job duties during the time that he was to be accommodated in the workplace. He also did not indicate what aspects of his job, if any, were problematic in light of his medical restrictions.

[88] While the applicant's evidence was somewhat lacking, I find that the respondent's evidence concerning whether the applicant was accommodated in light of his medical restrictions was even more lacking. For example, the respondent called Mr. Hadzivukovic to give evidence, in general, about the respondent's modified work process, however, Mr. Hadzivukovic confirmed that he was not familiar with the applicant's particular case.

[89] The respondent also called Mr. Girard who confirmed that his signature is on all four of the applicant's MWPs, and that the applicant participated in the process on all four occasions, and never raised concerns with him about modified work.

[90] In cross-examination, Mr. Girard testified that he advises attendees at a MWP meeting what the employee's restrictions are, and a discussion ensues regarding how the employee will be accommodated under those restrictions. His evidence in this regard was consistent with the evidence of Mr. Hadzivukovic as to what generally happens at MWP meetings coordinated by the respondent. For example, Mr. Hadzivukovic testified that there is a discussion about duties and responsibilities assigned to the employee, which have to suit the employee's restrictions and limitations. He also referred to ensuring that the duties and assignments given are suitable and appropriate, considering the medical situation of the employee.

[91] With respect to the applicant's duties and responsibilities, Mr. Girard testified that, in all cases, the manager or supervisor of the applicant's home department assured him that the applicant would be accommodated within his restrictions within the workplace. However, Mr. Girard could not answer whether the applicant's supervisor notified him as to how the applicant's job was arranged, or if anyone notified the applicant as to what his modified duties were. He also could not answer if, at the MWP meetings, he ever asked the applicant what his modified duties were in detail.

[92] When asked how he followed up, or made sure or verified, that the applicant's MWP was carried out, Mr. Girard testified that, during all the MWP meetings, he always advised people that if there were any problems, or they were not satisfied, to please contact him immediately. He also testified that he was only aware of the applicant's classification, and not exactly where he worked at TGH.

[93] While it appears from the evidence that the parties met on four occasions and signed MWPs, the MWPs simply list the applicant's restrictions and, with respect to duties, only state that the applicant would be accommodated within his department. There is no mention of the applicant's actual job duties, or if any actual modifications to

his job duties were required. It is not clear to me if the applicant was expected to carry out his regular job duties, while abiding by his restrictions, or if this was even possible. I note that the applicant essentially testified that he could not do his regular job because of his medical condition.

[94] While the respondent submits that modified work was provided to the applicant at all material times, there is simply no evidence before me that the applicant's job duties were modified in any way. There is also no evidence before me as to what the respondent communicated to the applicant, if anything, with respect to the job duties he was to perform, or how he was to perform his job duties, during the time that he was to be accommodated.

[95] Mr. Girard testified, in general, that he advises attendees at MWP meetings what an employee's restrictions are, and a discussion ensues regarding how the employee will be accommodated under those restrictions. With respect to the applicant's MWP meetings, Mr. Girard testified that the applicant's "manager or supervisor" assured him that the applicant would be accommodated within his restrictions within the workplace, but he could not answer whether the applicant's supervisor notified him as to how the applicant's job was arranged. He also did not indicate which manager and/or supervisor actually assured him that the applicant would be accommodated.

[96] It appears from the MWP documents that the applicant's Manager, Mr. Lagerquist, was in attendance at the first three MWP meetings, however, as indicated above, he was not called to testify. It also appears that the applicant's supervisor at the time attended the December 22, 2010 MWP meeting, but he was also not called to testify, nor was the lead hand who the applicant was instructed to report to at the time.

[97] It appears that Mr. Destacamento attended the applicant's October 27, 2010 MWP, as a "supervisor", however, it also appears that Mr. Destacamento was not the applicant's supervisor at the time. He also testified that he could not really recall this "issue", and explained that he never got involved in the applicant being involved in any

modification. It is not clear why Mr. Destacamento would be in attendance at the applicant's MWP meeting if he was not his supervisor at the time.

[98] Having considered all of the evidence, I prefer the largely uncontradicted evidence of the applicant that he was not provided with modified work. I am not satisfied that the respondent provided the applicant with appropriate accommodation in light of his disability-related needs, and I find that it did not.

[99] Clearly, the respondent did engage in the procedural component of the duty to accommodate by conducing MWP meetings, identifying the applicant's medical restrictions, and indicating that he would be accommodated in his department. However, other than indicating that the applicant would be accommodated within his department, it is by no means clear, based on the evidence before me, how the applicant was to actually be accommodated in his department, and if the respondent actually determined this. Again, Mr. Girard's evidence was simply that the applicant's manager or supervisor assured him that the applicant would be accommodated. In the circumstances, I find that the respondent's approach to the procedural component of the duty to accommodate was inadequate. I find, therefore, that the respondent breached the procedural duty to accommodate the applicant.

[100] Whether or not the respondent breached the procedural component of the duty to accommodate, I find that the respondent breached the substantive component of the duty to accommodate. Other than the bald statements in the MWPs that the applicant would be accommodated within his department, there is no evidence before me that any accommodation was actually provided to the applicant within his department.

Was the applicant subjected to discrimination on the basis of disability when his employment was terminated?

[101] The applicant alleges that he was subjected to discrimination when his employment was terminated.

[102] The respondent submits that the applicant's employment was terminated for cause, referring to breach of trust and time theft, in claiming sick time and alleging he could not attend work, or perform those tasks for which he was being appropriately accommodated by the respondent. The respondent submits that the termination was appropriate due to these violations, and for failing to notify the respondent prior to, and during, unapproved absences.

Evidence

[103] The applicant testified that the respondent never showed him the evidence it relied on to terminate his employment. He testified that he did not break any of the limitations or restrictions that his doctor provided, and that he did not engage in any activities that conflicted with his restrictions.

[104] The applicant testified that he was not being accommodated, and he saw his doctor because he could not do his job. He also testified, as set out above, that the only reason he was not at work when he was off sick in the months prior to the termination of his employment was because he was not given a modified job and his body could not do the work.

[105] When asked if he was given an opportunity to explain what he was doing when he was away from work at the January 24, 2011 meeting when his employment was terminated, the applicant essentially testified that he asked about the purpose of the investigation and was not given the evidence. When asked if he was asked at the meeting if he engaged in any activities that disagreed with his back pain, he testified that his steamfitter job was a full-duty job, and not a modified job.

[106] Chris Green testified that he is a private investigator with Investigative Research Group, which was retained by the respondent. He conducted a video surveillance of the applicant.

[107] Mr. Green explained that he conducts surveillances from his car, and that he starts as close to 6:00 a.m. as possible. He stays a minimum of 100 metres away from

any house he is watching. He uses a high-definition video camera. If a subject goes inside a grocery store, he uses a different video camera, concealed as a key chain.

[108] Mr. Green conducted a surveillance of the applicant on November 24 and 25, and December 10, 2010.

[109] Mr. Green testified that on November 24, 2010, he commenced the surveillance at 5:59 a.m. and ceased at 5:50 p.m. He testified that he observed the applicant engaging in the following activities: driving a vehicle; turning his head from side to side as he drove; walking; conversing with his spouse; tilting his head up and down; using a cell phone; standing; bending forward at the waist, and carrying a plastic grocery basket in his right hand; carrying grocery bags in each hand, depositing them into a vehicle, and bending forward at the waist while doing that; and, ascending stairs, and carrying groceries all in his left hand while ascending stairs.

[110] Mr. Green testified that, on November 24, 2010, at 3:45 p.m., he observed the applicant sitting in his van for 90 minutes, but it was interrupted by the applicant getting out to smoke. He testified that the applicant was seated for more than 30 minutes. He also testified that he did not see the applicant walking for more than 30 minutes at a time, but he did observe the applicant walk a distance of at least 800 metres.

[111] Mr. Green testified that on November 25, 2010, he commenced the surveillance at 6:02 a.m. and concluded at 8:57 p.m. He testified that he observed the applicant engaging in the following activities: operating a vehicle; turning his head from side to side; tilting his head up and down; using a cell phone; bending forward at the waist while leaning into the tailgate area of a vehicle; and, closing a rear tailgate with his right hand.

[112] Mr. Green testified that on December 10, 2010, he commenced the surveillance at 6:18 a.m. and ceased at 4:55 p.m. He observed the applicant engaging in the following activities: walking; carrying various items, including a tool box; bending forward at the waist; opening and closing the rear tailgate of his van with his right hand; leaning into a motor vehicle while putting all his body weight on his right leg; shaking out

a vehicle floor mat, and holding the floor mat with his left hand while brushing off the mat with his right hand; smoking cigarettes; ascending stairs; and, entering and operating a motor vehicle.

[113] Mr. Green confirmed that, over the three days, he observed the applicant engaging in activities with bending, twisting, and sitting for more than 30 minutes. He also observed him walking distances, but could not confirm that he walked for more than 30 minutes. He testified that the applicant got into his car and sat for more than 30 minutes.

[114] Mr. Green testified that video recordings of the surveillance were provided to the respondent.

Video evidence

[115] The respondent played portions of the video recordings at the hearing, and Mr. Green commented on portions of the recordings. The respondent also provided a copy of approximately 200 minutes of the video evidence to the Tribunal, depicting the instances referred to by Mr. Green, below, as well as some other instances described below.

[116] With respect to the recording for November 24, 2010, Mr. Green drew the Tribunal's attention to the following instances: at 11:56 a.m., the applicant entered a grocery store, and bent forward at the waist; at 11:59 a.m. and 12:04 p.m., he bent into a freezer bunker; at 3:18 p.m. he left a gas station in his vehicle and went to a mall at 3:40 p.m., where he sat in his car, got out and smoked, and then sat in his car for approximately 90 minutes.

[117] In cross-examination, the applicant suggested to Mr. Green that, at 2:01:52, on November 24, 2010, the applicant was sitting in his vehicle but could be seen reclining in his seat and laying down. Mr. Green did not disagree. The applicant also suggested to Mr. Green that, although Mr. Green indicated the applicant sat in his car for 90

minutes on November 24, 2010, the applicant could be seen laying down at 3:56:17 p.m. Mr. Green confirmed that the applicant both sat and laid down.

[118] Having carefully reviewed the video evidence, it appears that the applicant commenced driving at 1:57 p.m. on November 24, 2010. At 2:00 p.m. he is parked in a parking lot, and at 2:02 p.m. he appears to recline in his car seat and lay down in his vehicle for approximately 54 minutes.

[119] The applicant can also be seen leaving a gas station in his vehicle at 3:18 p.m. on November 24, 2010. At 3:19 p.m. he appears to be driving and there is a break in the recording until 3:40 p.m. when he appears to be still driving. At 3:45 p.m. the applicant appears to be parked in a parking lot, however, between 3:45 p.m. and 3:50 p.m., the applicant cannot be seen on the recording. At 3:56 p.m. the applicant can be clearly seen reclining in his seat He appears to lay down for approximately 73 minutes. Assuming the applicant continued to drive between 3:19 and 3:40 p.m., and remained seated upright in his vehicle between 3:45 and 3:50 p.m., since the time he left the gas station at 3:18 p.m., until he reclines in his seat while parked at 3:56 p.m., he would have been sitting upright in his seat for approximately 38 minutes. However, Mr. Green testified that when the applicant arrived at the mall at approximately 3:40 p.m., he got out of his car and smoked. As only the rear and passenger side of the applicant's vehicle, and not the applicant, can be seen on the recording between 3:40 and 3:45 p.m., it is not clear if the applicant actually sat continuously from 3:18 to 3:56 p.m., or if he got out of his vehicle and smoked between 3:40 and 3:45 p.m.

[120] Earlier on November 24, 2010, the applicant can be seen getting into his vehicle and driving at 11:17 a.m., parking at 11:25 a.m., and reclining in his seat at 11:38 a.m. As such, he appears to be sitting upright for a total of 21 minutes while driving and then parked, prior to reclining in his seat.

[121] With respect to the recording for November 25, 2010, Mr. Green drew the Tribunal's attention to the following instance: at 3:43 p.m., the applicant left his house and went to a bank at 4:25, driving seated for almost 45 minutes.

[122] It appears from the video recording that the applicant left in his vehicle at 3:43 p.m., and parks and steps out of his vehicle at 4:25 p.m. He appears, therefore, to have driven for 42 minutes.

[123] Mr. Green drew the Tribunal's attention to the following instances on the December 10, 2010 recording: at 4:08 p.m., the applicant adjusted his shoe, bent forward at the waist, and carried items from a vehicle into a garage. He also commenced driving at 4:14 p.m. and was still driving 30 minutes later, at 4:44 p.m., when Mr. Green could no longer follow him.

Termination of employment letter

[124] The applicant's termination of employment letter, dated January 24, 2011, states, in part, as follows:

> …
>
> Your termination is for breach of trust and theft to time; specifically, your claiming paid sick time for the period of November 15, 2010, to November 19, 2010, and November 23, 2010, to December 17, 2010, while claiming alleged issues with your back that would not allow you to attend work during the above noted periods, including engaging in any form of workplace accommodation that UHN was willing to provide.
>
> Strong evidence substantiates the fact that during your absence, you engaged in activities that were in clear conflict with the restrictions and functional abilities information that was provided by you and your medical practitioner to UHN.
>
> During an investigative meeting held with you, where you were asked a series of questions pertaining to the issue noted above, it was found that you were not forthcoming nor truthful with your responses, and as such, you failed to provide an explanation for your actions that was considered to be acceptable by UHN management.
>
> As a result, it is considered that the employment relationship has been irreparably severed, thus the termination of your employment.

> It should also be noted that should your employment not have been terminated today, UHN was to have invoked a five-day suspension on you, with regard to an incident that had recently been investigated, pertaining to your misuse of sick time to attend a medical appointment, as well as for a two-day unauthorized absence related to that same matter.
>
> …

Findings

[125] As set out above, there does not appear to be any dispute that the applicant's doctor confirmed that the applicant had medical restrictions requiring accommodation by the respondent in the workplace. I have also found, as set out above, that the respondent breached its duty to accommodate the applicant in the workplace, and that there was no evidence before me that any accommodation was actually provided to the applicant within his department.

[126] The applicant testified that he saw his doctor because he could not do his job, and that the only reason he was not at work when he was off sick in the months prior to the termination of his employment was because he was not given a modified job and his body could not do the work. While no one involved in the decision to terminate the applicant's employment was called as witness for the respondent, it appears that the respondent was of the view that the applicant had absences from work in November and December of 2010 that were not legitimate. I note, however, that while the applicant appears to have provided the respondent with APSs setting out his medical restrictions on four occasions, there is no evidence before me that the respondent ever sought any medical information or clarification from the applicant regarding the reason for his absences from work during the relevant time period. Rather, the respondent provided the Tribunal with evidence from the video surveillance of the applicant.

[127] I note that Mr. Hadzivukovic testified that if the medical information the respondent receives concerning an employee's medical restrictions and limitations lacks clarity, the respondent can either connect with the doctor, with consent, and ask for clarification of the restrictions, or the respondent can initiate further assessments. It appears from the evidence, however, that the respondent did not seek any clarification

of the applicant's medical restrictions, aside from having the applicant have his doctor complete APSs at regular intervals.

[128] I also note that the respondent submits that the applicant returned to work on November 22, 2010, but left the same day due to medical reasons. The following day, the respondent attempted to follow up with the applicant to discuss the reason for his absence and explore if any supports were required, but the respondent was unable to reach the applicant. The respondent submits that, as the applicant was not forthcoming with information related to his absence based on illness, an investigator was retained to conduct surveillance. It appears that the surveillance commenced early on the morning of November 24, 2010. Again, while there is no actual evidence before me that the respondent ever sought any medical evidence or clarification from the applicant regarding the reason for his absence from work, based on the respondent's own submissions, it does not appear that the respondent made much effort to obtain any information from the applicant regarding his absence, before resorting to surveillance.

[129] The applicant's medical restrictions were no repetitive bending or twisting, and no sitting, standing or walking greater than 30 minutes. While the applicant can be seen bending and twisting a few times on the video recordings, there is certainly nothing on the recordings that could, in my view, be characterized as *repetitive* bending or twisting. There is also no indication that the applicant walked or stood for greater than 30 minutes. With respect to sitting, it appears that the applicant sat in his vehicle and drove for approximately 42 minutes, on one occasion, which is 12 minutes longer than recommended for sitting. He also may have, on another occasion, with a combination of both driving and being parked, sat in his vehicle for 38 minutes; however, based on the evidence of Mr. Green, he may not have sat for greater than 30 minutes on that occasion as he may have got out of his vehicle to smoke.

[130] In my view, the applicant cannot be seen to be engaging in any activities on the video recordings that are outside of his restrictions in any significant way. Rather, it appears that on one occasion, and perhaps two occasions, the applicant sat in his vehicle for a few minutes longer than was recommended. Based on the evidence, to the

extent that the applicant engaged in activities that were outside of his medical restrictions, it appears that he only did so in a minor way on one occasion, and perhaps two occasions.

[131] I note that the respondent submits in its Response that its Occupational Health Disability Case Manager contacted the applicant on January 6, 2011, in part to confirm that the applicant's absence form work was due to medical reasons. There is no evidence before me, however, that this actually occurred.

[132] The respondent also submits that, at no time during the meeting with him on January 24, 2011, did he indicate he had new or different medical restrictions which would have required his absence or a change in his accommodation at work.

[133] While the applicant was asked at the hearing about being asked at the January 24, 2011 meeting what he was doing while away from work, and if he engaged in any activities that contradicted his back pain, he was not asked to confirm at the hearing if he was asked at the January 24, 2011 meeting about the reasons for his absence from work. When asked in general why he was not at work, the applicant testified that the only reason he was not at work was because he was not given a modified job and his body could not do the job.

[134] The respondent, on the other hand, provided no actual evidence of what was actually said at the January 24, 2011 meeting. At the outset of the hearing, the respondent indicated that a Human Resources Manager would be called to testify about the applicant's dishonesty in the meeting on January 24, 2011. On the second day of hearing, however, the respondent indicated that the Human Resources Manager would not be attending the hearing. No explanation was provided.

[135] I have considered all of the evidence, including the applicant's evidence that the only reason he was not at work when he was off sick in the months prior to the termination of his employment was basically because he could not do his job due to medical reasons. In my view, the applicant's evidence was essentially uncontradicted, and I find that he was absent from work for reasons related to a disability within the

meaning of the *Code*. I also find that the applicant's disability-related absence was clearly a factor in the respondent's decision to terminate his employment, and that the respondent has not established a reasonable non-discriminatory explanation for the termination of the applicant's employment. In my view, the video evidence provided simply does not provide a reasonable non-discriminatory basis for terminating the applicant's employment, and there is no actual evidence before me that the respondent sought any clarification as to why the applicant was absent from work, prior to terminating his employment.

[136] In all of the circumstances, I find that the applicant was subjected to discrimination on the basis of disability within the meaning of the *Code* when his employment was terminated by the respondent.

[137] I note that the respondent submitted in its Response that the termination of the applicant's employment was also appropriate due to the applicant failing to notify the respondent prior to, and during, unapproved absences. The termination letter, however, only states that the applicant would have been suspended in relation to an unauthorized absence, had his employment not been terminated.

REMEDY

[138] The Tribunal's remedial powers are set out in s. 45.2(1) of the *Code*, which provides, among other things, the power to order monetary compensation and restitution for loss arising out of the infringement, including compensation and restitution for injury to dignity, feelings and self-respect. The Tribunal may also direct any party to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with the *Code*.

[139] In his Application, the applicant seeks monetary compensation, including lost wages for eight months, and compensation for damages to his reputation and "mental" loss. He also seeks an apology from the respondent, in a newspaper.

Lost income

[140] The applicant testified that, after his employment was terminated, he commenced employment on September 26, 2011, first in British Columbia, and then in Alberta. He essentially testified that he waited until his back was better before commencing employment, and that he no longer does a physical job.

[141] In cross-examination, the applicant confirmed that he "stayed at home" for more than half a year until he felt comfortable to work again, and then he found another job. The respondent essentially submitted that, with respect to the applicant's claim for lost wages, there is no evidence of mitigation.

[142] It appears from the applicant's own evidence that he did not make efforts to find alternate employment for more than half a year, and, when he did so, he found another job. While the applicant testified that he still had medical restrictions at the time his employment was terminated, there is no evidence that his medical restrictions would have precluded the applicant from attempting to seek alternate employment after his employment with the respondent was terminated. In the absence of any evidence whatsoever that the applicant attempted to mitigate his losses by seeking alternate employment for several months after his employment was terminated, I do not find that it is appropriate to award compensation for lost income. See *Duliunas v. York-Med Systems*, 2010 HRTO 1404, at paras. 92-97.

Injury to dignity, feelings and self-respect

[143] Prior to section 45.2(1) of the *Code* coming into force, the Tribunal had identified the relevant criteria to be used in assessing the appropriate award of damages to compensate for the infringement of rights enumerated in the *Code* which have an intrinsic value and for mental anguish. See *Sanford v. Koop*, 2005 HRTO 53. Although the remedial provisions of the *Code* no longer refer to "mental anguish", the Tribunal has found the criteria developed in previous cases helpful in determining the appropriate damages for injury to dignity, feelings and self-respect. See *S.H. v. M(…) Painting*, 2009 HRTO 595, and *Hughes v. 1308581 Ontario*, 2009 HRTO 341. The

Divisional Court, in *ADGA Group Consultants Inc. v. Lane*, (2008) 295 D.L.R. (4th) 425, held that the following are among the factors that Tribunals should consider when awarding general damages: humiliation; hurt feelings; the loss of self-respect, dignity and confidence by the complainant; the experience of victimization; the vulnerability of the complainant; and the seriousness of the offensive treatment.

[144] In addressing relevant factors in determining damages for injury to dignity, feelings and self-respect, in particular cases, the Tribunal provided the following comments in *Arunachalam v. Best Buy Canada*, 2010 HRTO 1880, at paras. 52-54:

> (…) The Tribunal's jurisprudence over the two years since the new damages provision took effect has primarily applied two criteria in making the global evaluation of the appropriate damages for injury to dignity, feelings and self-respect: the objective seriousness of the conduct and the effect on the particular applicant who experienced discrimination: see, in particular, *Seguin v. Great Blue Heron Charity Casino*, 2009 HRTO 940 (CanLII), 2009 HRTO 940 at para. 16 (CanLII).
>
> The first criterion recognizes that injury to dignity, feelings, and self respect is generally more serious depending, objectively, upon what occurred. For example, dismissal from employment for discriminatory reasons usually affects dignity more than a comment made on one occasion. Losing long-term employment because of discrimination is typically more harmful than losing a new job. The more prolonged, hurtful, and serious harassing comments are, the greater the injury to dignity, feelings and self-respect.
>
> The second criterion recognizes the applicant's particular experience in response to the discrimination. Damages will be generally at the high end of the relevant range when the applicant has experienced particular emotional difficulties as a result of the event, and when his or her particular circumstances make the effects particularly serious. Some of the relevant considerations in relation to this factor are discussed in *Sanford v. Koop*, 2005 HRTO 53 (CanLII), 2005 HRTO 53 (CanLII) at paras. 34-38.

[145] In *O'Brien v. Organic Bakery Works Inc.*, 2012 HRTO 457, at paras. 46-47, the adjudicator reviewed the Tribunal's awards for disability-related discrimination involving a termination of employment, and agreed with the applicant that the range of awards was generally $10,000 to $20,000. The Tribunal noted, however, that where $15,000 to

$20,000 has been awarded, the cases have involved either multiple breaches, conduct occurring over a longer period of time, or evidence of significant psychological or emotional consequences.

[146] In the present case, the applicant referred in his Application to his reputation being damaged, and the pressures of unemployment generally. He also submitted that it was difficult to find another job when he had to explain that his employment was terminated. On the other hand, as set out above, based on the applicant's evidence at the hearing, it appears that he did not make efforts to find alternate employment for more than half a year, and, when he did so, he found another job.

[147] At the hearing, the applicant also testified that he was very humiliated. He submitted that he felt very disgraceful or shameful when his employment was terminated, and that the respondent treated him like a thief. He referred to the impact of the termination of his employment on his responsibilities to his family. He submitted that the respondent should treat everybody with respect.

[148] I accept that the applicant felt disgraced as a result of the termination of his employment, but he gave little evidence as to the impact the termination of his employment had on him. Again, he also basically testified that he stayed home until he felt better. In my view, an award at the lower end of the range would be appropriate in the present case for the impact of the discriminatory termination of the applicant's employment. I have also found that the respondent subjected the applicant to discrimination when it failed to appropriately accommodate him in the workplace.

[149] Having regard to all of the circumstances, I find an award of $15,000 to be appropriate compensation for the impact of both the discriminatory termination of the applicant's employment, and the failure to accommodate him in the workplace, on his dignity, feelings and self-respect.

Apology

[150] While the applicant seeks a public apology in his Application, he did not repeat his request for any apology at the hearing. In any event, the Tribunal has generally declined to order parties to provide an apology on the basis that such orders are viewed as inappropriate, or an ineffective remedy, and raise potential freedom of expression concerns. See *Abdallah v. Thames Valley District School Board*, 2008 HRTO 230, at para. 110, and *Turnbull v. Famous Players*, (2001) 40 C.H.R.R. 333 at para. 264. In the present case, I decline to order the respondent to provide an apology.

Future compliance

[151] In its Response, the respondent indicates that it has an internal human rights policy and complaint process to deal with discrimination and harassment. The respondent also attached copies of both a temporary modified work plan policy and a sick leave reporting policy to its Response.

[152] It is also clear that the respondent is a large organization with an Occupational Health and Safety department and Disability Case Coordinators. While I have found that the applicant was not ultimately provided with accommodation in his department, a Disability Case Coordinator did meet with him on at least four occasions in relation to his medical restrictions. I note that the applicant does not seek any remedy with respect to future compliance, and, in the particular circumstances of this case, I decline to order any particular remedies addressing future compliance. I leave it to the respondent to ensure future compliance with the *Code* in terms of ensuring that medical restrictions are appropriately accommodated in its Facilities department.

ORDER

[153] The Tribunal orders as follows:

> 1. Within 30 days of the date of this Decision, the respondent shall pay the applicant $15,000.00 for injury to dignity, feelings and self-respect;

2. Pre-judgment interest is payable on the above amount from January 24, 2011, to the date of this Decision, in accordance with the *Courts of Justice Act*. Post-judgment interest is payable on any amount not paid within 30 days of the date of this Decision, in accordance with the *Courts of Justice Act*.

Dated at Toronto, this 17th day of October, 2014.

"signed by"

_____

Brian Eyolfson
Vice-chair