



# HUMAN RIGHTS TRIBUNAL OF ONTARIO

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**B E T W E E N:**

**Ian MacLeod by his litigation guardian Shaune MacLeod**

**Applicant**

**-and-**

**The Corporation of the County of Lambton**

**Respondent**

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## DECISION

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**Adjudicator:** Ken Bhattacharjee  
**Date:** September 10, 2014  
**File Number:** 2009-03842-I  
**Citation:** 2014 HRTO 1330  
**Indexed as:** **MacLeod v. Lambton (County)**

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**APPEARANCES**

Ian MacLeod by his litigation guardian Shaune MacLeod, Applicant	) ) ) )	Stuart Mackay and Sean Flaherty, Counsel
The Corporation of the County of Lambton, Respondent	) ) ) )	H. P. Rolph, Stephane Thiffeault, and David Cribbs, Counsel

## INTRODUCTION

[1] In 2005, Ian MacLeod (the “applicant”), who has bipolar disorder, was hired by the Corporation of the County of Lambton (the “respondent”) to be the Manager of its Emergency Medical Services (“EMS”) department. He did not disclose his mental illness to the respondent.

[2] Between 2005 and 2007, the applicant received regular performance reviews, which raised some concerns, but indicated that he was meeting expectations overall.

[3] From late 2007 to the summer of 2008, the applicant’s medical caregivers took him off certain medications and began a trial of a new medication, which allowed the symptoms of his bipolar disorder to become more prominent.

[4] In summer of 2008, when the applicant was absent from work for reasons related to his bipolar disorder, several EMS staff reported to the respondent’s Human Resources (“HR”) department and his Manager that he was verbally abusive and not following rules and policies in his management of the EMS department. The applicant then disclosed to the respondent that he had bipolar disorder. When he attempted to return to work in the fall, the respondent refused to allow him to resume his duties, and assigned him to work in a different building on special projects. The applicant’s depression worsened, and he remained on sick leave.

[5] In the summer of 2009, when the applicant attempted to return to work for a second time, the respondent still refused to allow him to resume his duties, and directed him to work in a different building on special projects, and answer questions about issues that had arisen with respect to his behaviour and management of the EMS department. The applicant then became severely depressed again, and he remained on sick leave.

[6] In the fall of 2009, the process before this Tribunal began. The applicant filed an Application under s. 34 of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended

(the “Code”), which alleged that the respondent discriminated against him with respect to employment because of his disability. Beginning in January 2010, the applicant put the respondent on notice several times through this process that his position was that any improper conduct that he had exhibited in the workplace was or could be related to his bipolar disorder.

[7] In the spring of 2011, the applicant had recovered sufficiently from his depression to return to work on special projects, and answer questions about the issues that had arisen with respect to his behaviour and management of the EMS department. In September 2011, the hearing before this Tribunal began. On October 31, 2011, the respondent notified the applicant in writing that it had concluded its investigation, and decided that he would not be returned to his EMS Manager position because of concerns about his behaviour and management of the department. The respondent did not consider whether the applicant’s behaviour and performance issues were related to his bipolar disorder.

[8] During the hearing, the applicant presented uncontradicted expert opinion evidence that much of his behaviour and performance issues were related to his bipolar disorder.

[9] The purpose of this Decision is to decide whether the respondent’s 2008, 2009 and 2011 refusals to allow applicant to resume his duties as EMS Manager, and its 2011 decision that he would never be returned to his EMS Manager position, constituted discrimination because of disability.

[10] After hearing the parties’ evidence and submissions, I have decided to uphold the Application in part. I have dismissed the applicant’s allegations that the respondent’s 2008, 2009 and 2011 refusals to allow him to resume his duties as EMS Manager were discriminatory. I have found that the respondent had reasonable concerns about the applicant’s conduct and its impact on the staff and operation of the EMS department, and that it was therefore prudent and non-discriminatory not to allow him to resume his duties without interviewing him and completing its investigation.

[11] However, I have upheld the applicant's allegation that the respondent's 2011 decision that he would never be returned to his EMS Manager position was discriminatory. I have found that much of the applicant's impugned conduct was related to his bipolar disorder, but during its investigation and in its decision, the respondent took no steps whatsoever to consider whether his conduct was disability-related, and whether his disability could be accommodated in his EMS Manager position. I have also found that although some of the applicant's previous disability-related conduct was harmful, returning him to his EMS Manager position with accommodation would not have resulted in undue hardship to the respondent.

[12] As a remedy, I have ordered that the applicant be reinstated into his position as EMS Manager, but with terms and conditions in recognition of the harm that his previous disability-related conduct caused and the challenges in accommodating his disability. I have also ordered the respondent to pay the applicant monetary compensation for his loss of income and injury to dignity, feelings and self-respect.

[13] The detailed reasons for my decision are below.

## **BACKGROUND**

[14] The Application was filed on behalf of the applicant by his wife, Shaune MacLeod, who is acting as his litigation guardian because of capacity issues related to his disability, including the fact that he continued to exhibit bipolar disorder-related symptoms, particularly depression, and underwent electroconvulsive therapy ("ECT"), which resulted in memory loss, during the process before this Tribunal.

[15] The hearing began in September 2011 after the respondent had refused to allow the applicant to resume his duties as EMS Manager in 2008, 2009, and 2011, but before the respondent made its decision on October 31, 2011 not to return the applicant to his EMS Manager position. The hearing began, in fact, during the tail end of the interim period when the applicant had returned to work and was participating in the investigation of the allegations made against him. As a result, the Application was

amended twice during the hearing process. The hearing took place over multiple days and was completed in the summer of 2013.

[16] During the hearing, I heard the oral testimony of 17 witnesses, including the applicant, his wife, his managers, supervisors and employees who worked under him, and two psychiatrists. The applicant's testimony had limitations because of his complete inability to recall certain incidents. His psychiatrist testified that he suffered from extreme memory loss as result of the ECT. The respondent did not argue, and I do not believe, that the applicant feigned memory loss to avoid answering questions about difficult matters.

[17] I also admitted into evidence a large number of documents tendered by the parties, including a job description, performance reviews, emails, policies, invoices, and medical documents pertaining to the applicant's bipolar disorder.

[18] The respondent presented copious amounts of witness testimony and documents with respect to the allegations made against the applicant, which took up a significant number of hearing days. Ultimately, however, the respondent's witnesses admitted, mainly in cross-examination, that they were either satisfied with the applicant's responses to, or there was no basis for, a number of the concerns raised. I have taken note of the applicant's position that the respondent took a "throw enough mud against the wall and some of it will stick" approach, but for sake of conciseness, I have focused below mainly on the concerns raised in the respondent's October 31, 2011 letter which decided that the applicant would not be returned to his EMS Manager position.

[19] Neither party sought an order pursuant to Rule 3.11 of the Tribunal's Rules of Procedure to protect the confidentiality of personal and sensitive information, but I have endeavoured, where possible, to exclude such information where it is not relevant to the issues to be decided in this Decision.

## EVIDENCE

[20] The applicant is a 54-year-old man. He was diagnosed with depression when he was a teenager, and has had ongoing symptoms since then. In 1981, he completed a college paramedic program, and then spent the next 19 years working as a paramedic and a supervisor with ambulance services in southwestern Ontario. He did not disclose his mental illness to his employers.

[21] In 2000, Thames EMS hired the applicant to be an Operations Supervisor. He did not disclose his mental illness to anyone at Thames EMS. In 2003, the President, Randall Denning, fired the applicant for insubordination. Following his firing, the applicant made a suicide attempt, and was admitted to the psychiatric department of a hospital. For the first time, he was diagnosed with bipolar disorder.

[22] In 2004, the applicant left a suicide note, which also contained threats about what he might do to Mr. Denning and two other Thames EMS employees who were involved in firing him. His wife found the note and called the police. Mr. Denning testified that he had heard second-hand that the applicant had made threats against him, but he also stated that the applicant was a good employee, and that he would not have fired him if he had known at that time that the applicant had bipolar disorder.

[23] The applicant presented a significant amount of evidence explaining what bipolar disorder is, which was not contested by the respondent and was admitted into evidence. According to the testimony and reports of the applicant's current psychiatrist, Dr. Richard Owen, and an article, "Bipolar Disorder (DSM-IV-TR #296.0-296.89)", which he identified and stated that he attached to one of his reports for information purposes, bipolar disorder is a mental illness, which is characterized by cycles of manic and depressive episodes with intervals of a normal state of well-being. The applicant was subsequently given a more specific diagnosis of bipolar disorder II, which involves hypomania and depression. Hypomania is less severe than acute mania or delirious mania.

[24] In a hypomanic episode, there is heightened mood, which is euphoric or irritable. Common symptoms include increased energy, less need for sleep, racing thoughts, rapid leaps from one idea to another, impulsive decisions, spending sprees, hypersexual activity, and a failure to recognize that one's judgment is impaired. Where there is euphoria, the person is often jolly and cheerful, and sometimes selfish and pompous. Where there is irritability, the person is often dissatisfied with others, intolerant of views different than his or her own, and may become enraged by trifling slights.

[25] In a depressive episode, there is a depressed mood and often irritability. Other common symptoms include a lack of energy, sluggish and slow thoughts, an inability to concentrate and remember things, a loss of interest in life, a change in sleep and appetite patterns, and feelings of apathy, pessimism, despair, and guilt.

[26] The applicant made a few visits to a psychiatrist to treat his bipolar disorder, and then followed up with his family doctor. He was prescribed a mood stabilizer and an antidepressant. Later, a second antidepressant was added to his prescription.

[27] In June 2005, the respondent hired the applicant to be the Manager of its EMS department. He reported to Cindy Thayer, who was the General Manager, Community Services. He did not disclose his mental illness to Ms. Thayer or anyone else employed by the respondent. He testified that he was afraid of being stigmatized. The applicant's wife, who is a nurse with experience in the mental health field, testified that she supported the applicant's non-disclosure because of the stigma of being identified with a mental illness. She stated that even in the health care field, she sometimes hears professionals making jokes about the behaviour of people with mental illnesses.

[28] As the Manager of EMS department, the applicant was responsible for the respondent's land ambulance services. His main duties were to provide overall planning and direction for the department, and to ensure that statutory provisions were fulfilled, programs were efficiently administered, professional standards were

maintained, budgetary requirements were met, staff were properly supervised, and the ambulance service needs of county residents were met.

[29] The EMS department had a multimillion dollar budget, and more than 100 paid staff. Frontline paramedics did not report directly to the applicant; rather, they reported to various supervisors. The applicant's direct reports included several Operations Supervisors, a Quality Assurance Supervisor, and a Program Support Clerk.

[30] In his testimony, the applicant was unable to recall the condition of his mental health in 2005 and 2006, but he stated that he was on medication and there may have been some issues. The applicant's wife testified that the applicant always had mood disturbances, but that they were fairly well controlled through medication in 2005 and 2006. She stated that she began to have some concerns in the fall of 2006 because she observed the applicant exhibiting more cyclic behaviour.

[31] Between June 2005 and June 2007, the applicant's Manager, Ms. Thayer, conducted three formal reviews of his work performance. The first performance review, which is dated February 2006, found that the applicant was meeting expectations in 27 out of 28 categories, and not meeting expectations in one category (applied job knowledge and skills). The comments section made positive comments about his performance, and specified a couple of areas for improvement. Ms. Thayer recommended that the applicant be appointed to permanent staff, and that his probationary period not be extended.

[32] The second performance review, which is dated July 2006, found that the applicant was exceeding expectations in four out of 28 categories, meeting expectations in 22 categories, and not meeting expectations in two categories (public relations and able to express himself in writing). The comments section made positive comments about his performance, and specified a couple of areas for improvement.

[33] The third performance review, which is dated June 2007, found that the applicant was exceeding expectations in one out of 28 categories, meeting expectations in 24

categories, and not meeting expectations in three categories (conduct, leadership, and worked with others as team member). The comments section specified three areas for improvement, including behaviour and attitude during an occupational health and safety review that reflected poorly on the EMS. This was the last formal performance review that Ms. Thayer conducted.

[34] In the fall of 2007, the applicant had blood tests, which indicated that his liver was not breaking down his mood stabilizer. His doctor then took him off the mood stabilizer because he was becoming resistant to it, and it had the potential to damage his liver.

[35] The applicant's wife testified that the fall of 2007 was very difficult for her because the applicant became more irritable and depressed. She stated that his mental health continued to deteriorate, and when they were away on vacation in January 2008, he talked about committing suicide. She stated that after they came back, she contacted the applicant's family doctor about his state of mind. The applicant saw his family doctor, who conducted a Mood Disorder Questionnaire, which confirmed his previous diagnosis of bipolar disorder.

[36] The applicant's wife testified that the applicant's mental health deteriorated even further in March 2008. During spring break, the applicant drove up and down a highway with a truckload of clothes while he was speaking to his wife on the phone telling her that he did not know what to do. Following this incident, the applicant's family doctor referred him to a psychiatrist.

[37] On April 14, 2008, the applicant saw the psychiatrist for a consultation. The psychiatrist also spoke with the applicant's wife. The psychiatrist confirmed the diagnosis of bipolar disorder. He noted that the applicant denied a history of hypomanic symptoms, but that his wife reported symptoms suggestive of hypomania, including excessive spending of money, risk taking behaviour, decreased need for sleep, and increased sexual desire. As treatment, he recommended that the applicant be tapered

off his antidepressants, and then put on a trial of a different mood stabilizer than the previous one he had been on.

[38] Between the fall of 2007 and the spring of 2008, the applicant purchased a number of items for the EMS department, which later became an issue. Specifically, he purchased a closed-circuit video camera, water- and fog-proof binoculars, and a portable two-way radio for an Emergency Support Unit (“ESU”) vehicle project. He also purchased a semi-studio video camera for training purposes. The total cost of all these purchases was almost \$12,000.

[39] When the applicant was in the process of purchasing the closed-circuit video camera, the vendor sent him an email, which stated that the camera that he was proposing to buy was good, but there were better, more expensive video cameras that he could purchase. In his response email, the applicant stated:

“I am open to what you tell me to buy.... What ever you think we need to get is what we will get.

How’s that for an answer!!!”

The vendor then replaced the originally proposed camera with a more advanced camera, which was twice as expensive.

[40] The applicant also had the software for the closed-circuit video camera loaded on to his computer by the store rather than the respondent’s Information Technology (“IT”) department, the camera loaded into his personal vehicle rather than delivered directly to the office, and the binoculars delivered to his home rather than the office, which was all contrary to the respondent’s policies and procedures on purchasing.

[41] The applicant began tapering off his antidepressants in late May 2008, and started on a new mood stabilizer in late July 2008. Dr. Owen, the applicant’s current psychiatrist, stated in a report, which was admitted into evidence, that in a person with bipolar disorder, cessation of antidepressants can lead to withdrawal effects, such as irritability, and allow the underlying bipolar symptoms to become more prominent. He

also testified that a trial on a new mood stabilizer lasts three months during which time it may become effective at some point or never be effective.

[42] The applicant testified that he became moody and irritable during this time period. The applicant's wife testified that this was the most difficult period that she had ever experienced with the applicant. She stated that he was angry, irritable and paranoid. She also stated that he would buy something ridiculous one moment, and then be depressed the next moment, and that his mood swings made her feel like she had to walk on egg shells when he was around. She further stated that the family's funds were low because he spent money on his ham radio hobby, gardening equipment, and things for the house without consulting with her.

[43] In late May 2008, the applicant had an email exchange with a female paramedic on his work account, which later became an issue. The exchange began with the paramedic complaining about some supervisors. In his response, the applicant agreed with her complaint, and thanked her for "growing some balls." He then appeared to make a pass at her. In her initial response, she did not address his overture. However, he then responded by pressing the issue, and she responded by encouraging him to tell her what was on his mind, and suggesting that she may respond positively. The applicant then asked for her home email address, which she provided, to continue the conversation.

[44] In early June 2008, the applicant spoke with and offered the position of part-time Supervisor to three individuals. He did not conduct formal interviews, use an interview tool with written questions and answers, or involve a manager one level above him, which was all contrary to the respondent's policies and procedures on hiring, and became an issue later on. He wrote an email to a consultant in the respondent's HR department, which explained what he had done, asked whether he had to complete formal interview tools after the fact, and stated that it would save him some time if he did not have to. He did not receive a response, and a few days later, he sent two of the individuals written offers of employment.

[45] On August 8, 2008, the applicant's wife told the applicant that she wanted to end their marriage. She testified that she told him this because she could not take his behaviour anymore, and he did not understand that he needed help to deal with his illness.

[46] The applicant went to work, but was in distress. He spoke with the EMS department's Program Support Clerk, Sandra Johnson, and told her about his situation at home, and the fact that he had bipolar disorder. Ms. Johnson noticed that the applicant was in distress. She told him that he should contact the respondent's Employee Assistance Program ("EAP") and went to get him an EAP brochure, but when she came back the applicant was gone. The applicant had spoken with his wife on the phone, and went back home. Later that day, the applicant's wife successfully convinced him to check into the psychiatric department of a hospital.

[47] Ms. Thayer testified that up until August 8, 2008, her main concerns with the applicant's work performance were that at times, he did not follow the respondent's policies and procedures, particularly with respect to purchasing goods and loading software on to his computer. In chief, she testified that it was not typical for a senior manager to be assessed as not meeting expectations in a category in a performance review, and that his other scores were average. In cross-examination, however, she admitted that she stopped working closely with the applicant after one year because she was satisfied with his performance, and that although she had concerns in a few areas, she was satisfied with his overall performance.

[48] The applicant was hospitalized for five days. As part of his treatment, he was taken off the mood stabilizer, and started on a different mood stabilizer and a different antidepressant than the ones he had been on before. After he checked out of the hospital, he informed Ms. Johnson that he would be returning to work on August 22, 2008. During the applicant's absence from work, Ms. Johnson and other senior staff had raised concerns about his behaviour in the workplace with the HR department, who notified his Manager, Ms. Thayer, about the concerns. Ms. Johnson testified that the

main reason that she reported the applicant's behaviour was because she was concerned about his well-being.

[49] On August 15, 2008, Ms. Thayer sent the applicant an email, which notified him that he was not to return to work before he had spoken with her. She then interviewed several EMS staff, who alleged that the applicant had mood swings, was verbally abusive, did not follow policies and procedures, and/or was autocratic.

[50] On August 20, 2008, the applicant met with Ms. Thayer. Ms. Thayer informed him generally about the allegations that had been made against him, and told him that he would remain on a paid leave while she continued her investigation. Later, the applicant spoke to the Corporate Manager of HR, Chris Doyle, by telephone, and informed him that he had bipolar disorder. In response, Mr. Doyle encouraged the applicant to tell Ms. Thayer the same thing.

[51] During the following work week, Ms. Thayer interviewed several more EMS staff, who also alleged that the applicant had mood swings, was verbally abusive, did not follow policies and procedures, and/or was autocratic.

[52] Four of the EMS staff whom Ms. Thayer interviewed testified before this Tribunal. Their allegations about the applicant may be summarized as follows:

- **Unpredictable mood swings.** One staff person stated that the applicant did not treat her well for the most part, but there were days when he was "very nice" to her. She stated she never knew what kind of day it was going to be. Another staff person stated that the applicant would tell him one day that he was doing a great job, and the next day tell him that he was not performing his job, even though he was doing the exact same task. A further staff person stated that the applicant had bad days, but he also had good days. He also stated that the applicant was "intimidating", but he could also be "very charming".
- **Verbally abusive towards staff.** One staff person stated the applicant questioned how she could do a certain task when she was too stupid to breathe on her own. She stated that on another occasion, when they had a disagreement about expenses, he called her a "stupid cunt" under his breath. Another staff person stated that when the applicant

asked him why another staff person had dropped from full-time to part-time status, and he responded that he had not heard that, the applicant called him a “fucking liar”. Another staff person stated that the applicant referred to an assignment, and then said to him: “Any idiot can do this, why can’t you?” A further staff person stated that when he mistakenly parked in the applicant’s parking spot, the applicant said to him: “Don’t park your fucking car there again.”

- **Verbally abusive towards external individuals.** One staff person stated that during a meeting with an outside consultant, who was assisting the EMS department with asset tracking, the applicant swore several times, and told the consultant that what she was saying was “bullshit”. Another staff person stated that during a management-union meeting, the applicant referred to a member of the union committee as “fucking stupid”, and requested that it be written down that the member was “s-t-u-p-i-d”. He stated that on another occasion, when an employee from the Ministry of Health was meeting with the applicant to review the policies and procedures in the EMS department, he heard the applicant say to her: “Show me where it fucking says I have to do that.”
- **Failure to follow policies and procedures.** One staff person stated that the applicant would brag about how much equipment he could get, and say that the rules did not apply to him. She also stated that he hired three part-time Supervisors without following the respondent’s policies and procedures, which required that an official interview tool be used. She stated that after they were hired, he asked her to print out blank interview tools, and also asked her how he could make them look correct. Another staff person stated that during a bidding process, he saw the applicant show one vendor’s bid to another, which was contrary to the respondent’s policies and procedures on bidding. Another staff person stated that when the applicant told him to allow a media crew to ride in the back of an ambulance, and he objected because it raised privacy and liability issues, the applicant said to him: “I don’t care about your issues, make it fucking happen.”
- **Autocratic.** One staff person stated that the applicant constantly referred to the EMS department as his “kingdom”, and that one of his frequent phrases was, “It is my way or the highway.” Another staff person stated that after he contacted the respondent’s purchasing coordinator to double check some calculations that the applicant had made, the applicant called him and said that someone in his department was questioning his calculations, and when he found out who it was, that person was “done”. Two other staff also stated that the applicant told staff that no one was to go above him.

[53] In cross-examination, the four staff stated that although a few of the above incidents occurred in 2005 and 2006, the majority of them occurred in 2007 and 2008, and that the applicant's behaviour was particularly bad in 2008. The staff person who testified that the applicant called her a "stupid cunt" stated that the incident occurred shortly before the applicant went off on a sick leave on August 8, 2008.

[54] Between August 21 and 26, 2008, the applicant had an email exchange on his work email with the fire chief of a local municipality. The applicant sent the fire chief an email, which stated that Ms. Thayer wanted him out because of allegations made against him by some of his senior staff. In response, the fire chief proposed that they find out who the staff were, and then the "bitch slapping" could begin. He also stated that he could "wind up shit" on his end to make life uncomfortable for those staff. In response, the applicant stated, "Let's wait and see what happens to me," but he also disclosed the name of one staff person, who he said had "stuck a knife in my back cause I have been riding his poor performance issues." The fire chief also made negative remarks about Ms. Thayer during the exchange.

[55] On August 27, 2008, the applicant sent an email to Ms. Thayer and Mr. Doyle, which informed Ms. Thayer that he had bipolar disorder. He also stated that his control over his disorder had changed in the last eight months because of a change in medication, and that may be the cause of concern. He further stated that he was having performance issues with two of his senior staff, which she was aware of.

[56] On August 29, 2008, the applicant's brother-in-law, who is a lawyer by profession, also sent Ms. Thayer an email, which drew her attention to this Tribunal's decision in *Lane v. ADGA Group Consultants Inc.*, 2007 HRTO 34 ("*Lane*"), upheld on judicial review by the Divisional Court, *ADGA Group Consultants Inc. v. Lane* (2008), 91 O.R. (3d) 649 (Div. Ct.) ("*ADGA*"), which found that an employer had discriminated against an employee with bipolar disorder by firing him, rather than accommodating him, after he disclosed his disability. Among other issues, the decision addressed odd and inappropriate behaviour that the employee had exhibited in the workplace which was related to his bipolar disorder.

[57] On September 3, 2008, Mr. Doyle informed the applicant that he was to meet with him and Ms. Thayer on September 5, 2008, and that the meeting was serious. The applicant then proceeded to send emails from his work account to senior staff in various EMS, fire service, and Ministry of Health offices around southwestern Ontario, which stated that the respondent was going to fire him

[58] On September 4, 2008, the applicant sent the respondent a doctor's note, which stated that he was unable to work because of illness.

[59] On September 5, 2008, the applicant met with Ms. Thayer and Mr. Doyle. Ms. Thayer informed him that he would be assigned special projects and not be returning to his EMS Manager position while the investigation continued. She also asked him to provide the password for his email account, which he did. Mr. Doyle asked the applicant to return all of the respondent's property in his possession except for his Blackberry. The applicant remained on a sick leave and did not return to work on special projects.

[60] Following the meeting, the applicant sent Ms. Thayer an email, which mentioned that he was a presenter at an EMS conference at the end of September. Ms. Thayer sent the applicant an email in response, which instructed him not to attend the conference because he was on a sick leave. The applicant ignored her instruction and attended the conference, which she found out about soon afterwards.

[61] Ms. Thayer also reviewed the applicant's email account, and found the email exchange between him and the local fire chief, and the emails that he had sent to senior staff in various EMS, fire service, and Ministry of Health offices around southwestern Ontario.

[62] On October 21, 2008, the applicant met with Ms. Thayer and Mr. Doyle again to discuss his return to work. Ms. Thayer told the applicant that because of issues around his management, the complaints of staff mistreatment, his disregard of her instruction not to attend the EMS conference, and the contents of his emails to various professional

acquaintances, she was not prepared to return him to his EMS Manager position at that time. Rather, she told him, he would be reassigned to work on special projects out of a different office building, where he would report directly to her, and he would be required to attend workshops and courses on respect in the workplace, management, and leadership.

[63] Following the meeting, the applicant's depression worsened, and he remained on sick leave.

[64] Ms. Thayer testified that she was not prepared to return the applicant to his EMS Manager position at that time because she did not believe that he was capable of managing the department, she did not believe that he could work with staff there, and she was concerned about the threats of vengeance that had been made against staff in the email exchange between him and the local fire chief.

[65] In cross-examination, when it was put to Ms. Thayer that she had done nothing to accommodate the applicant's disability, she stated that she had, in fact, accommodated his disability by not firing him. She stated that if the applicant had not informed her that he had bipolar disorder, she would have fired him for misconduct and insubordination. She stated that not firing him was a "big" accommodation.

[66] During his absence from work, the applicant received, for the first time in his life, comprehensive and ongoing treatment of his bipolar disorder. He was treated by a mental health team consisting of a psychiatrist, psychologists, and a social worker.

[67] The applicant met with the psychiatrist, Dr. Owen, on a regular basis. Dr. Owen's role on the team was to assess the state of the applicant's mental health, and prescribe and monitor his use of medication.

[68] Under the guidance of two psychologists, the applicant also participated in Cognitive Behaviour Therapy ("CBT") and Dialectical Behaviour Therapy ("DBT"). CBT teaches a person to recognize unhealthy thought patterns and accompanying

behaviour, and how to change the patterns and behaviour. DBT teaches a person to identify and deal with triggers that lead to stress and unhealthy behaviour.

[69] The applicant testified that the CBT and DBT were only partially effective. He stated that they have helped him recognize when he is “sliding” or not well, and that if someone is telling him that there is an issue with his behaviour, there is an issue. He also stated that he is “terribly embarrassed” about what he has done in the past. Dr. Owen testified that the CBT and DBT were eventually stopped because they were not helping the applicant get back to work, and he was very depressed.

[70] The applicant also had ECT treatments, which consisted of streaming electrical currents into his brain while he was under anesthesia to induce a seizure. ECT is used to treat major depression and treatment-resistant depression. The applicant testified that he did not feel any changes in his mood, but his wife and other people told him that there had been some changes. Dr. Owen testified that, in his opinion, the ECT was very successful in treating the applicant’s depression. He stated that the applicant became symptom-free after a series of ECT treatments, but he also experienced memory loss.

[71] The applicant testified that he is seeing a neuropsychologist about the short- and long-term memory loss caused by the ECT. He stated that there are still some huge holes in memory from his past, including what happened at work between 2005 and 2008. The applicant’s wife testified that following the ECT, the applicant was unable to remember the recent death and funeral of his mother. Dr. Owen testified that memory loss is a typical side effect of ECT, and that the applicant suffered from extreme memory loss. However, he also stated that most patients who receive ECT, and have memory loss, will eventually regain it.

[72] In 2009, while the applicant was still off work, the respondent began implementing an asset management plan required by the Province. As part of the plan, purchased assets had to be tracked. During the tracking process in the EMS department, staff were unable to locate a number of items that had been purchased by

the applicant, including two GPS units, and the closed-circuit video camera, the water- and fog-proof binoculars, and the portable two-way radio for the ESU vehicle project.

[73] On July 15, 2009, the applicant's psychiatrist, Dr. Owen, cleared him to return to work because he had been free of symptoms of depression for three months. The applicant and the respondent mutually agreed that the applicant would return to work on September 8, 2009. However, when the respondent informed the applicant in writing on August 21, 2009, that he would be required to report to a different building, to work on special projects for approximately eight weeks, to undergo management and leadership training, and to address a number of issues that had arisen, including the missing items that he had purchased, he became severely depressed, and was unable to return to work.

[74] On November 13, 2009, the applicant filed an Application with this Tribunal under s. 34 of the *Code*, which alleged that the respondent had discriminated against him with respect to employment because of his disability. On December 22, 2009, the respondent filed a Response, which identified a number of concerns about the applicant's behaviour and management of the EMS department, and denied the allegation of discrimination. In January 2010, the applicant filed a Reply, which denied that he had behaved improperly in the workplace or had performance issues, but that if he had, the behaviour and performance issues were a consequence of, and directly related to, his disability.

[75] In the fall of 2010, the respondent's external counsel and the applicant's counsel exchanged letters with respect to the respondent's concerns about the applicant's behaviour and management of the EMS department, including his treatment of subordinates. In his letter, the applicant's counsel specifically stated that Dr. Owen had confirmed that the complaints made against the applicant could be about behaviour that was a manifestation of his bipolar disorder.

[76] In the spring of 2011, Dr. Owen, again cleared him to return to work because he had been free of symptoms of depression for three months. This time the applicant

actually returned. In his absence, Ms. Thayer had left her position with the respondent. On May 9, 2011, he reported to a different building where met with his new Manager, Andrew Taylor, who was the General Manager of the respondent's Public Health Services Division. The applicant was directed to have no contact with EMS staff. He was assigned a cubicle, and provided orientation. Over the following weeks and months, he was given management and leadership training, and assigned to complete special projects. He continued to be paid his Manager salary.

[77] On June 17 and 20, and August 10, 2011, Mr. Taylor and Mr. Doyle met with the applicant and asked him questions about a number of issues relating to his behaviour and management of the EMS department during his tenure of employment, but mainly in 2007 and 2008. Some of those issues were brought to Ms. Thayer and Mr. Doyle's attention in August and September 2008. Other issues were brought to Mr. Taylor's and Mr. Doyle's attention as a result of the asset tracking that had occurred in 2009, and a review of the applicant's email account that had occurred in 2011 related to the litigation before this Tribunal.

[78] During the investigation, the applicant was asked if he knew where the two GPS units and the portable two-way radio for the ESU vehicle project that he had purchased were because EMS staff were not able to locate them during the asset tracking process. In response, the applicant stated that they were in his gear bag at home, and had been there since he went off sick in August 2008. The applicant then returned these items to the respondent.

[79] In the spring and summer of 2011, the applicant and the respondent were also complying with this Tribunal's Rules on disclosure of documents and witnesses in advance of a hearing of the merits of the Application beginning on September 27, 2011. As part of his disclosure, the applicant put the respondent on notice that Dr. Owen would be testifying that his impugned conduct in the workplace was driven by his bipolar illness. There were also references in the applicant's medical brief to having had memory issues as a result of the ECT.

[80] The applicant's wife testified that after the applicant returned to work in May 2011, she observed that he was having a tough time. She stated that he expressed feelings of being demoralized, segregated, and demeaned because he was isolated from the EMS department, told not to have contact with anyone from the department, and he was under investigation by Mr. Taylor and Mr. Doyle.

[81] Dr. Owen testified that when the applicant initially returned to work in May 2011, he was doing well, but that the frustration of not being returned to his original Manager position and the stress of the ongoing investigation caused him to become depressed again. He stated that the applicant's depression became worse and worse and by mid-August 2011, when the applicant was exhibiting a number of concerning symptoms, including vague suicidal ideation, he recommended that the applicant go off on a sick leave, but the applicant refused.

[82] The hearing before this Tribunal began on September 27, 2011, which was before Mr. Taylor and Mr. Doyle had completed their investigation of the applicant's behaviour and work performance. The respondent was represented by external counsel and in-house counsel. In his opening statement, the applicant's counsel stated that the applicant's actions that the respondent was investigating were related to his bipolar disorder.

[83] I directed the respondent to call its evidence first. The respondent called Mr. Doyle as its first witness. He testified and was cross-examined on September 27, 28 and 29, 2011. In chief, he testified that in the late summer and fall of 2008, he, Ms. Thayer and in-house counsel were the decision-makers with respect to the applicant's situation. In cross-examination, the applicant's counsel asked Mr. Doyle whether he took into consideration whether the applicant's conduct that was being investigated was caused by his bipolar disorder, and whether he was aware that the applicant had ECT, which can affect a person's memory. I have set out his answers further down below.

[84] At the end of the hearing day on September 29, 2011, continuation dates were tentatively set for December 2011. On October 31, 2011, which was between the two

sets of hearing dates, Mr. Taylor gave the applicant a letter at work, which stated that he had completed his investigation, and decided not to return the applicant to his position of Manager of the EMS department because he did not have sufficient confidence in his ability to manage the unit appropriately and autonomously. He then set out his specific reasons in two categories: inappropriate spending and unprofessional behaviour. He also stated that the relationships between the applicant and a number of senior EMS staff were severely damaged and compromised. He concluded by stating that he would continue to assign the applicant special projects to work on, and that they could have a discussion about non-management positions that may be available for him within the organization. There was no mention of the applicant's bipolar disorder in the letter.

[85] On November 1, 2011, the applicant went on a sick leave again because he was severely depressed. Dr. Owen testified that, in his opinion, because the applicant did not have any other significant stressors in his life at that time, the respondent's decision to never return him to his EMS Manager position was the cause of the severe depression that rendered him unable to work. He described the October 31, 2011 letter as the "straw that broke the camel's back."

[86] When the hearing before this Tribunal resumed in December 2011, Mr. Taylor testified over several days. The applicant testified during hearing days in 2012.

[87] Both parties presented evidence with respect to each of the specific reasons that Mr. Taylor listed in his October 31, 2011 letter for not returning the applicant to the EMS Manager position. I will start by setting out the evidence with respect to the four specific reasons in the category of "inappropriate spending".

**1. Purchase of a "Security Camera" (the closed-circuit video camera for the ESU vehicle project).**

[88] Mr. Taylor testified that the applicant purchased a camera that is expensive, and he is responsible for the fact that it is now missing because he did not follow the

respondent's purchasing policies and procedures when he had the vendor load the software for the camera loaded on to his computer, and then load the camera into his personal vehicle. In his testimony, Howard Lucas, who is the respondent's Manager of Procurements, described the applicant's actions as "highly unusual". He stated that the respondent's policies and procedures on purchasing require that the respondent's IT department install software on to computers, and that vendors deliver purchased goods directly to the respondent's receiver.

[89] The applicant testified that Ms. Thayer approved his purchase of the camera, and he has no recollection of having the vendor load software on to his computer or load the camera into his personal vehicle. He stated that it is either in the EMS department's storage room, or someone took it out of the storage room. He stated that most staff have a key to open the storage room.

## **2. Purchase of a "Video Camera" (the semi-studio video camera for training purposes).**

[90] Mr. Taylor testified that the applicant purchased an expensive, semi-studio camera, which has never been used by staff in the EMS department because they needed a simple camera. John Cann, who is an Operations Supervisor, testified that he had asked the applicant to purchase a video camera so that he could record training sessions, and then use the recordings for training new staff. He stated that he was expecting a cheap, simple camera, but instead, the applicant purchased the type of camera that is used in a television studio. He described the purchase as "overkill", and stated that the camera has only been used once.

[91] The applicant testified that Ms. Thayer approved his purchase of the camera, and that she and other staff agreed that it was appropriate to purchase a semi-studio camera.

[92] Ms. Thayer testified that she had to supervise four senior managers, including the applicant, and that when they made purchase requests, her general approach was

to trust that they were legitimate expenses, and sign off on them. She also stated that she would not see the final invoices for the purchases.

### **3. Purchase of “Marine Binoculars” (the water- and fog-proof binoculars for the ESU vehicle project).**

[93] Mr. Taylor testified that the binoculars are missing, and during the investigation, the applicant was unable to provide a rationale for purchasing them. Jeff Brooks, who was a Quality Assurance Manager and became the acting Manager of the EMS department in the applicant’s absence, testified that binoculars can be used during hazardous materials emergencies to read the placard numbers on tank cars or observe the scene, but that the department already had spotting scopes with a greater range than binoculars for that purpose. He also stated that the EMS department does not participate in marine operations.

[94] The applicant testified that Ms. Thayer approved his purchase of the binoculars, and that they were to be used, along with the spotting scopes, on the ESU vehicle to see things more clearly. He also stated that they are not, in fact, “marine” binoculars, and that the respondent is implying that he bought them to use on his private boat, which is untrue.

### **4. Purchase of a “Motorola MXT-52500 Radio” (the portable two-way radio for the ESU vehicle project).**

[95] Mr. Taylor testified that the applicant purchased a radio that was expensive and not useable by the EMS department, and then kept in his gear bag for three years while he was off sick. Mr. Doyle testified that such a radio could be used on the “trunking” system used by the Ministry of Health and the Ontario Provincial Police (“OPP”), but only if it was supplied by Bell Mobility, which it was not. He also stated that he was perturbed that the applicant had not returned the radio after he had asked him on September 5, 2008 to return all of the respondent’s property in his possession except for his Blackberry.

[96] The applicant testified that the radio was vital for the ESU vehicle. He tendered into evidence a written explanation that he had provided to Mr. Taylor, which stated that the radio could be programmed to work on a much broader section of the communications spectrum than other radios, including “trunked” radio systems used by the OPP, and municipal and county fire and police services. He also stated that he did not return the radio in 2008 because he was still an employee and it was still in his “purview”. He further stated that the radio was no different than his helmet and gloves which were also in his bag, but, in cross-examination, he retracted this statement.

[97] Next, I will set out the evidence with respect to the seven specific reasons that Mr. Taylor listed in his October 31, 2011 letter in the category of “unprofessional behaviour” for not returning the applicant to the EMS Manager position.

**5. Engaging in an inappropriate email exchange with a frontline paramedic (the applicant’s email exchange with a female paramedic in late May 2008).**

[98] Mr. Taylor testified that by using the phrase “growing some balls” and flirting with a female subordinate over the respondent’s email system, the applicant exposed the respondent to a potential sexual harassment complaint. Mr. Doyle testified that the applicant’s emails were inappropriate because he was in a boss-subordinate relationship with the paramedic, and appeared to be pursuing some sort of relationship with her.

[99] In his testimony, the applicant stated that the paramedic is his friend, and denied that he was flirting with her. He stated that the email exchange was about a truck that she was trying to sell. In cross-examination, however, when pressed on this issue, he stated that he was changing medications at that time, and that is what might have been influencing him to have such an exchange.

**6. Inappropriately berating supervisorial level staff in an email exchange with a frontline paramedic (the same email exchange with a female paramedic in late May 2008).**

[100] Mr. Taylor and Mr. Doyle both testified that by explicitly agreeing with the paramedic's criticisms of supervisors, the applicant was undermining the supervisors' authority over frontline paramedics.

[101] In his testimony, the applicant stated that he had an open door policy and was telling the paramedic to grow some balls and talk to her supervisor. In cross-examination, however, he admitted someone could interpret his emails as short-circuiting the chain of command.

**7. Failure to follow corporate purchasing policy requirements by pursuing equipment and asset purchases, and by inappropriately providing one vendor's quote to another.**

[102] The first part of this reason is covered under the reasons for "inappropriate spending" above. With respect to the second part of this reason, Mr. Taylor testified that there was an allegation that the applicant had provided one vendor's quote to another. He stated that his concern was not whether or not the applicant had done what was alleged, but that when he asked the applicant about this matter, the applicant could not recall having done so, but stated that he does not see anything wrong with such a practice.

[103] Mr. Brooks, who had made the allegation, testified that during a bidding process, he saw the applicant show one vendor's bid to another vendor who was in his office. In cross-examination, however, he admitted that what he specifically saw was the applicant showing a letter from the first vendor to the second vendor, and he did not see an actual quote. He stated that he assumed that the letter had the quote in it. He also stated that during another bidding process to replace the EMS department's defibrillators, he overheard the applicant speaking on his cell phone and telling one vendor what the numbers were from the other vendor that it had to be beat. This allegation was not mentioned in Mr. Brook's will-say statement which was disclosed

prior to the hearing. In his will-say statement, he stated that when the EMS department went to market for defibrillators, the applicant met with one vendor and provided it with the other vendor's quote. When he was asked about this, he stated that he drew this conclusion because the second vendor called him and complained that he saw the applicant eating breakfast with the first vendor at a conference.

[104] In his testimony, the applicant denied that he ever provided one vendor's quote to another. In cross-examination, he also stated that one vendor can find out another vendor's quote on its own because such information is widely shared. He also stated that it is not uncommon to meet with vendors, including have breakfast or lunch with them.

**8. Disrespectfully instigating and engaging in email exchanges with external community partners, and promoting derogatory comments about Ms. Thayer (the applicant's emails in early September 2008 to senior staff in various EMS, fire service, and Ministry of Health offices around southwestern Ontario, and his email exchange in late August 2008 with a local fire chief).**

[105] Ms. Thayer testified that the applicant's emails to various professional acquaintances were problematic because they portrayed the respondent as a lousy employer, and stated that the respondent was going to fire him, which was untrue. Mr. Taylor testified that, although the applicant acknowledged during the investigation that his email exchange with the local fire chief was wrong, he remained concerned about the contents of the emails, particularly the derogatory comments about Ms. Thayer. In cross-examination, Mr. Taylor admitted that it was the fire chief, not the applicant, who made threats of reprisal against senior EMS staff and derogatory comments about Ms. Thayer.

[106] The applicant testified that he sent emails to various professional acquaintances because he believed, based on his conversation with Mr. Doyle on September 3, 2008, that Ms. Thayer was going to fire him on September 5, 2008, and he wanted to quell any rumours. In cross-examination, he admitted that during his email exchange with the local fire chief that he named one of the senior staff who he believed had made

allegations against him, but he stated that at that time, he was ill, and was paranoid that the staff person and others were trying to push him out of his job.

**9. Failure to follow the respondent's hiring policies and procedures (speaking with and offering the position of part-time Supervisor to three individuals in early June 2008), and misleading the investigation panel during questioning on this subject.**

[107] Mr. Taylor testified that although the applicant eventually admitted that he could see the concern about his failure to follow the respondent's hiring policies and procedures, when he was initially asked about the hiring during the investigation, he responded that Mr. Brooks had hired them. Mr. Taylor stated that when he showed the applicant documentary evidence that he, in fact, had done the hiring, the applicant looked shocked, told him to talk to Ms. Johnson, and stated that he could not remember the hiring. Mr. Taylor stated that the applicant tried to mislead him and Mr. Doyle during the investigation, rather than admitting that it happened and assuring them that it would not happen again.

[108] The applicant testified that when he was initially asked about this hiring during the investigation, he did not recall it. He stated that he felt terrible about what he was alleged to have done, and told Mr. Taylor and Mr. Doyle that he must have been authorized to have done it. He also stated that he does not recall anyone raising a concern about what he had done at the time of the hiring. In cross-examination, he admitted that he is friends with some of the individuals whom he hired.

**10. Use of inappropriate language with Mr. Taylor, employees, and business agents.**

[109] Mr. Taylor testified that staff had complained that the applicant swore and used foul language in his interactions with them, and that the applicant even swore and used foul language with him between May and October 2011. He also stated that the applicant admitted that he should not have sworn and used foul language when he was interacting with the outside consultant, who was assisting the EMS department with asset tracking.

[110] In his testimony, the applicant admitted that he swore in the workplace, but he stated that everyone swore in the EMS department. In cross-examination, when asked whether he had called his staff “stupid”, “cunt”, and “idiot”, he stated he does not recall making such comments. He also stated his staff may be exaggerating or lying, but that his illness makes him suspicious. Furthermore, when further pressed on this matter, particularly the allegation that he called an employee a “stupid cunt”, he responded, “Welcome to the world of being bipolar,” and apologized for any such statements he had made to his staff.

[111] In cross-examination, Ms. Johnson admitted that there was a lot of swearing in the EMS department, and the use of the word “fuck” was common place.

**11. Displaying aggressive, intimidating, and insolent behaviour towards Mr. Taylor after he returned to work in May 2011.**

[112] Mr. Taylor testified that after the applicant returned to work in May 2011, he questioned why he was in a different building, said that he was not going to sit around for months on end, and demanded to be returned to his Manager position in the EMS department. He stated that the applicant also often mentioned his lawyer, and demanded that the investigation begin immediately. He described the applicant’s behaviour as “aggressive”, “rude”, and “odd”. He stated that the applicant was loud and would come right up to him, which made him feel like the applicant was trying to intimidate him. He stated that he was aware that the applicant had bipolar disorder, so he tried not to be aggressive in return.

[113] The applicant testified that after he returned to work in May 2011, the relationship between him and Mr. Taylor quickly became adversarial. He stated that he did not understand why he was not allowed to return to his Manager position in the EMS department, and why there had to be an investigation because his lawyer had already answered the respondent’s questions. He stated that he felt like the investigation was a witch hunt. He stated that Mr. Taylor would stand up behind his desk and point fingers at him. He stated that he given work to do, but some of it was menial, such as data

entry. He stated that other staff would walk by him without talking to him. He stated that he felt intimidated, bullied and humiliated by Mr. Taylor's behavior.

[114] Finally, I will set out the evidence with respect to the final, uncategorized reason that Mr. Taylor listed in his October 31, 2011 letter for not returning the applicant to the EMS Manager position.

**12. Relationships between the applicant and a number of senior EMS staff were severely damaged and compromised. During meetings with Mr. Taylor, the applicant made many spiteful comments towards them.**

[115] Mr. Taylor testified that when he informed EMS staff in May 2011 that the applicant was returning to the EMS department, but would be in a different building, some staff had no reaction, but other staff expressed great concern.

[116] Mr. Taylor also testified that after the applicant returned to work in May 2011, he made a number of negative comments about the two senior staff whom he had identified as having performance issues in his August 27, 2008 email to Ms. Thayer. Mr. Taylor stated that the applicant told him that he had recently heard that one of them was running the place, and the other was just hiding in his office. Mr. Taylor stated that the applicant also claimed that he had documented the performance issues of these two staff, but when Mr. Taylor checked the performance reviews that the applicant had conducted on them, they were both positive.

[117] The most recent performance review for each staff person was identified and admitted into evidence. The performance review for one of them, which is dated August 9, 2007, found that the person was either meeting or exceeding expectations in all 28 categories. The comments section made several positive comments about the person's performance, and specified one area for improvement: "Keep me informed of our activities." The performance review for the other person, which is dated July 14, 2008, found that, overall, the person exceeded job requirements. The comments sections made several positive comments about the person's performance, and specified one area for improvement: "Time management on assignments – organization."

[118] In cross-examination, the applicant admitted that he had told Mr. Taylor that he had heard that one of the staff was now running the place, and the other was now just hiding in his office. When asked whether he believed that these two particular staff had been out to get him in August 2008, he stated they both had poor performance reviews which were sitting on his desk on his last day of work in August 2008. He also stated that he had spoken to Ms. Thayer about their performance issues. However, when the most recent performance reviews for these two staff were put in front of him, he agreed that the reviews were largely positive, and only identified minor deficiencies in their work performance.

[119] In her testimony, Ms. Thayer agreed that the applicant had spoken to her about performance issues with respect to the two individuals in question.

[120] In his testimony, the applicant also made a number of unflattering comments about Mr. Taylor and Ms. Thayer. He stated that Mr. Taylor was over his head in the General Manager position, considered himself high up in the food chain, and “strutted around” like he felt he was really important. He also described Ms. Thayer as the “queen duck”.

[121] Mr. Doyle and Mr. Taylor both testified about their overall assessment of the applicant’s behaviour and performance issues following the investigation. Mr. Doyle testified that he provided advice to Mr. Taylor about whether or not the applicant should be returned to his EMS Manager position, but Mr. Taylor was responsible for making the final decision. Mr. Doyle stated that one of his main concerns about the applicant’s answers during the investigation was that he often responded that he could not remember what happened, or “I don’t know.” Mr. Doyle also stated that there was evidence that the applicant had engaged in “willful” misconduct, and he was not confident that the applicant would not engage in “willful” misconduct again in the future.

[122] Mr. Taylor testified that the applicant did not take any responsibility for his misconduct, could not see that he had done things which were wrong, and was

paranoid. He also stated that he did not believe that the applicant could contain his use of foul language.

[123] The applicant called Dr. Owen as an expert witness. The respondent agreed that Dr. Owen is an expert in psychiatry. The applicant had provided Dr. Owen with background information, some of Ms. Thayer's notes, and the will-say statements that the respondent had disclosed in advance of the hearing, and asked him to provide an opinion about whether the applicant's behaviour and performance issues mentioned in the notes and the will-says could be related to his bipolar disorder. Dr. Owen prepared two reports addressing this issue. He identified both these reports at the hearing, and they were admitted into evidence. He also testified about this issue at the hearing.

[124] In his first report dated February 25, 2011, Dr. Owen answered a series of questions, including the following:

1. Please briefly describe Mr. MacLeod's condition and the effects it has upon Mr. MacLeod?

Mr. MacLeod suffers from Bipolar Disorder Type II. This can lead to mood swings and irritability. Since knowing him he has been in the depressed phase of that illness. He has suffered with low mood, anergia [lack of energy], avolition [lack of drive or motivation], poor concentration and suicidal ideation.

2. As referenced above [In or about November 2007, Mr. MacLeod was removed from the medication that he was taking at the time to treat his psychological condition for fear it was causing liver damage. From that point onward to the summer of 2008, a number of alternative medications were experimented with to treat Mr. MacLeod's condition. In the summer of 2008, Mr. MacLeod was removed from all medications by his treating physician.], a number of medications were experimented with for approximately 8-9 months before his present regime. Could medication changes, as directed above, have had an impact on Mr. MacLeod's condition and affect his mood and performance in his employment?

(...) Assuming you mean "therapeutic trials" of medication these are often indicated for deterioration of mental illness and in changing medications side effects etc. can affect a person physically and mentally.

3. Could a removal from all medication in the summer of 2008 have had an impact upon Mr. MacLeod's condition and affect his mood and performance in his employment?

Medication cessation can lead to both withdrawal effects such as irritability, shakiness, weakness etc. and also allow the underlying medical condition to become more prominent.

4. I have attached notes regarding complaints that were apparently made about Mr. MacLeod. Is this behaviour described therein consistent with Mr. MacLeod's condition?

These behaviours seem out of character for Mr. MacLeod and it would be my feeling that this was illness driven. Also it was pointed out that he also had days when he was extremely pleasant and affable.

(...)

[Emphasis added]

[125] In his second report dated September 7, 2011, Dr. Owen provided a more detailed opinion on this issue, which I will quote in its entirety:

Mr. MacLeod has been a patient of mine since September 15, 2008. In this time, he has always been punctual to appointments and compliant with taking his medicine. He has also engaged in psychotherapy within our department and shown similar respect to other healthcare professionals. At interview he is polite and respectful, calm in manner and vocally grateful for the care he receives. To this end, he has been this way, consistently, for numerous appointments for numerous years. Throughout all of my professional contact this has remained constant. Mr. MacLeod's depression has been severe, warranting in-patient admission and he has been faced with great stress, both as an out-patient and in-patient.

Despite that stress it would appear that his "character" has remained as stated above with no obvious change to that described in the "will say" statements. I would therefore state that the behaviours described are inconsistent with my observations of his "character" certainly if his "character" was as described he would be unemployable and [I] doubt [he would] receive reference letters.

As a preamble to Bipolar Disorder it should be understood that two mood states are possible. In my time of caring for Mr. MacLeod I have been dealing with the depressed phase of that illness, with him suffering from low mood, poor appetite, lack of energy, lack of motivation, anhedonia

[inability to feel pleasure], poor concentration and sadly suicidal ideation. During the opposite of depression I will describe typical behaviours to be expected during mania or hypomania.

Heightened mood or “irritability”. Sometimes full of jollity, they can appear selfish and pompous prone to making jokes, wisecracks and insinuations. Self esteem and self confidence are inflated.

They may boast about past achievements and discuss ever grander plans for the future. When irritable patients become demanding, inconsiderate and intemperate. Dissatisfied and intolerant of others when questioned patients may become enraged.

Lability of mood may be evidence ranging from laughter to tears. Increased energy lead to them to try to be overinvolved. They can be extremely distractible and can often not follow others conversations. Distractibility leads to tasks not being completed. Not realizing there is a problem they can enter into agreements that are against the rules and ultimately make poor choices. Increased and frivolous spending can occur, spending sprees being typical. When mistakes happen the patient can take offense, turn indigent and self righteous and quick with excuses.

An episode of mania/hypomania depression can be triggered by a stressful event. That event does not need to be perceived as detrimental. Positive stress can trigger an episode such as moving to a new house, birth of a child, a marriage or starting a new job. I will now highlight from the will says provided symptoms I feel reflect those described in the preamble.

**Irritability:**

“Various outbursts”

“Which would cause fights”

“Show me where I have to fucking do this”

“Foul-mouth, nasty and derogatory towards me”

**Suggest a change of mood state:**

“Mr. MacLeod could be at times respectful and charming”

“Vulgar, offensive, hostile and demeaning, rude and condescending”

“One day, he was telling me that I was doing a fine job. The next day he’d criticize me often times saying I was ‘dropping the ball’”

**Patients often embarrassed by their actions when well:**

“Embarrassment”

**Suggest frivolous spending:**

“His favourite place to shop for goodies was Tiger Direct”  
 “Equipment had been loaded into Mr. MacLeod’s personal vehicle”  
 “Simply showed up with two new jackets (each costing roughly \$600.00) and ordered me to pay it through our budget”  
 “Purchasing a GPS unit for his personal vehicle, a digital camera, marine binoculars and an electric clipboard”  
 “He often showed up with stuff he had purchased”  
 “2006, 2007 and 2008, the applicant authorized a number of purchases without adhering [to] the Respondent’s procedures for making such purchases”

**Poor concentration, inappropriate:**

“Too much work”  
 “Swore”  
 “No leadership or management skills” (why was he hired?)  
 “Some of his decisions were perplexing”  
 “Know that at least 2 of those hires were acquaintances” (friends)

**Inflated Self-esteem:**

“Calling friends of his asking if they’d be interested in additional hours”  
 “Hey want a job”  
 “Buddies”  
 “Case someone asked”  
 “Did not follow rules or policies if they did not list his own agenda”  
 “Operated as a one-man show”  
 “No one was to go around or above him”  
 “Did not give a fuck what the price is, that he can make the numbers say what (I) want”  
 “He could do whatever he wanted”  
 “Mr. MacLeod having breakfast with the competitor at a conference in Vancouver”  
 ““His way or the highway”” he made known to everyone”  
 “Only concerned about his own ego”  
 “I had apparently not left him a parking spot”  
 “Glory seeker”  
 “Never please him or perform to his expectation”

**Lability of mood:**

“He was shaking and in clear distress”  
 “He clearly looked upset”

**Illness affects close relationships also:**

“His spouse kicked him out”

**Obviously needed support or help:**

“To call our EAP services to talk to someone”

**Inappropriate:**

“Fucking stupid”

“Instructing to write S-T-U-P-I-D”

**Poor decision making:**

“Allow a new crew from A-Channel to ride along in an ambulance with paramedics. He also ordered our paramedics to allow a friend of his who was visiting to ride along”

“2006, 2007 and 2008, the applicant authorized a number of purchases without adhering [to] the Respondent’s procedures for making such purchases”

**Impaired judgment:**

“He had not followed the established process”

“If we had any issues or concerns, that we raise them with him only”

“Ordering of oxygen tanks, amendments to the EMS policy manuals, his recruitment of part-time supervisors, the whereabouts of certain assets of his management of the acquisition of an ESU”

**Illness not confined only to the work place:**

“He advised me of his personal situation at home (his wife apparently asked for a divorce in front of his children)”

Whilst not an exhaustive list from the willsays but it does seem conclusive. Mr. MacLeod was first diagnosed with Bipolar Disorder in 2003, confirmed by several other psychiatrists in London. From the history it would appear that a calm and capable man is hired for his qualities, the stress of a new job triggers a hypomanic episode causing such behaviour. Then the Mood Disorder switches to Depression caused by another stress warranting hospital admission and ECT.

[126] In his testimony, Dr. Owen repeated the above opinion that the applicant’s behaviour and performance issues were related to his bipolar disorder. In cross-examination, the respondent did not ask questions challenging Dr. Owen’s opinion on

this matter. Furthermore, the respondent called a different psychiatrist, Dr. Frank Cashman, as an expert witness, but Dr. Cashman did not contradict Dr. Owen's opinion on this matter.

[127] The applicant testified that during the investigation, he asked Mr. Taylor and Mr. Doyle to contact his doctor, but he does not remember when he asked them. He also stated that during the second day of the investigation, when he was being asked about the missing closed-circuit video camera, he told them that he was pretty sick at that time, and Mr. Taylor responded that he was not, in fact, sick at that time.

[128] Mr. Taylor testified that he was aware that the applicant had bipolar disorder, and had taken that into consideration during his investigation by slowing down and taking breaks when the applicant needed them. He also stated that he took the applicant's bipolar disorder into consideration in his decision by continuing to employ him even though he would not be returned to his EMS Manager position. He also stated that if the applicant did not have bipolar disorder, he would have fired him. He further testified that when he questioned the applicant during the investigation, the applicant never told him that there was the relationship between his conduct in the workplace and his bipolar disorder, or that he had ECT which resulted in memory loss.

[129] In cross-examination, Mr. Doyle admitted that he did not know very much about bipolar disorder, but stated that he did some internet research, which indicated that it involves mood swings. He also admitted that neither he nor anyone else with the respondent contacted an expert on bipolar disorder or the applicant's doctor to find out more about his disorder. He also admitted that he never took into consideration whether the applicant's conduct that was being investigated was caused by his bipolar disorder, did not tell Mr. Taylor in 2011 that they needed to consider whether the applicant's conduct was disability-related, and that neither he nor Mr. Taylor took into consideration the possibility that the applicant's impugned conduct was disability-related when they questioned him. He also admitted that he was not aware that the applicant had ECT, which can affect a person's memory. He further admitted that if information about the applicant's bipolar disorder and ECT had been before him during investigation

in June and August 2011, his assessment of the applicant's answers might have been different.

[130] In cross-examination, Mr. Taylor stated that when the applicant returned to work in May 2011, the only information that HR and in-house counsel gave him was that the applicant had bipolar disorder, had been cleared to return to work, and needed accommodation in the form of a graduated return to work. He also stated that he was not given any information indicating that the applicant's conduct in the workplace may have been related to his bipolar disorder, and admitted that he had not taken into consideration the possibility of such a correlation when he conducted his investigation and decided that the applicant would not be returned to his EMS Manager position. He also admitted that he did not know that the applicant had received ECT, which can have an effect on memory. He further admitted that having information about the relationship between the applicant's conduct in the workplace and his bipolar disorder, and the effect of ECT on his memory, would have been relevant in his investigation and decision.

[131] In cross-examination, when Mr. Taylor was asked whether he would return the applicant to his EMS Manager position if he received medical evidence that the applicant was receiving treatment and his bipolar-related behaviour would not reoccur, he stated that it would be very difficult because of the aggressive behaviour and inappropriate language that the applicant had displayed, and the number of staff that he would have to oversee. He stated that he would still be concerned about liability issues, and would have to consult with HR and legal counsel. However, when pressed on this matter, he stated that if he received a consult about the treatment the applicant was receiving for his bipolar disorder, he would consider putting him back in the EMS Manager position.

[132] Three of the EMS staff who testified before the Tribunal were asked how they would feel about the applicant returning as EMS Manager. One of the staff is Mr. Brooks, who is currently the acting EMS Manager. All three expressed great concern about, or were outright opposed to, the applicant returning because of his past

behaviour. One of them also expressed a fear that he would be targeted by the applicant because he participated in the respondent's investigation, and testified in the hearing before this Tribunal.

[133] In cross-examination, however, two of the staff admitted that they did not know that the applicant had bipolar disorder, and the other stated that he had heard through the grapevine that the applicant had a mental disorder, but he did not know that it was bipolar disorder. One of the staff then acknowledged that if he was in the applicant's position, he would also want to the opportunity to return to his position. He stated that would be "fair". Another staff also then stated that if the applicant's behaviour was under control like it was when he first started as EMS Manager in 2005, he could work with the applicant again.

[134] The third staff person, Mr. Brooks, appeared to remain opposed to the applicant returning to his position. However, when asked what would happen if the applicant returned to the EMS Manager position, Mr. Brooks admitted that he would then be removed from the acting EMS Manager position, and have to return to his home position.

[135] Between the end of Mr. Taylor's testimony and the end of the hearing in July 2013, the respondent did not present any evidence showing that Mr. Taylor had reconsidered his decision not to return the applicant to the EMS Manager position.

[136] In his February 25, 2011 report, Dr. Owen stated that there is no medical reason to prevent the applicant from returning to the EMS Manager position. To accommodate the applicant's disability-related needs, Dr. Owen stated that there should be a gradual increase in hours up to full-time, and the applicant may need training for any changes in procedure that took place in his absence.

[137] In his testimony, Dr. Owen stated that, in his opinion, given that the applicant has been functional in employment before, he should be able to return to the EMS Manager position when his mental health is stable. He stated that the applicant is currently

depressed because he had stopped ECT because he did not want to have memory loss during the hearing process before this Tribunal. He stated that once this proceeding is completed, the applicant will have more ECT, and if it is successful in stabilizing his mental health, the applicant would be medically cleared to return to the EMS Manager position. He also stated that after the applicant returns to work, “maintenance” ECT can be continued on a monthly basis.

[138] Dr. Owen also testified that, in his opinion, the applicant will have ongoing psychiatric problems, but given that he has gone through DBT to deal with stress better, and the respondent is now aware of his bipolar condition, if staff notice that he is acting inappropriately, his supervisor can direct him to make an appointment with his psychiatrist to deal with it. He stated that the applicant’s behavior would then be stopped before it became excessive.

[139] Dr. Owen also testified that because of the progress of the applicant’s bipolar disorder, his episodes of illness are now depressive. He stated that he has not observed the applicant experiencing a hypomanic episode since he started treating him in September 2008. As a result, he stated, in his opinion, it is very unlikely that the applicant will exhibit hypomanic symptoms, such as excessive spending, like he did in the past.

[140] Dr. Owen further testified that, in his opinion, the applicant’s mental health condition is not incompatible with performing the EMS Manager job, even though the job is stressful. He stated that he has recommended that patients with post-traumatic stress disorder or schizophrenia not return to certain types of jobs, but it is not the same with bipolar disorder because the patient can be well between episodes of illness.

[141] In cross-examination, Dr. Owen stated that if the applicant is subjected to “big” stress, he would likely have a serious depressive episode, but “small” or everyday stress would not lead to such an episode, though it could result in minor depressive episodes.

[142] In cross-examination, when it was put to Dr. Owen that the respondent had the opinion of another psychiatrist, Dr. Cashman, who stated that the applicant's return to the EMS Manager position would not be successful unless he was symptom-free for 12 months, Dr. Owen disagreed. He stated that, in his opinion, the applicant can return to his position on a graduated basis immediately after he has recovered from his current depressive episode.

[143] The respondent called Dr. Cashman as an expert witness. The applicant agreed that Dr. Cashman is an expert in psychiatry. Dr. Cashman did not examine the applicant. The respondent provided him background information, the applicant's recent medical records, and the will-say statements that the applicant had disclosed during the process before this Tribunal, and asked him to address what he would want to observe in terms of the applicant's behaviour and level of symptoms in order to give the medical opinion that he was fit to discharge his duties as EMS Manager. Dr. Cashman prepared a report addressing this issue. He identified this report at the hearing, and it was admitted into evidence. He also testified about this issue at the hearing.

[144] In his report dated April 10, 2013, Dr. Cashman noted that the applicant had been diagnosed with Bipolar Affective Disorder Type II, and described it as follows:

BAD, Type II, is a mood disturbance with serious episodes of depression and less serious episodes of hypomania. It is a recurrent condition whose course is often best predicted by the individual's past mood. If there are recurrent episodes of depression and hypomania it is likely that these will continue. An important issue in treatment and prognosis is a period of health after the last depressive or hypomanic episode. [Emphasis added]

[145] Dr. Cashman then answered a series of questions, which I will quote in their entirety:

**What would I want to observe in Mr. MacLeod's behaviour and level of symptoms in order to give the Psychiatric opinion that Mr. MacLeod was able to discharge his duties as a manager of Lambton's EMS Department?**

I note that Mr. MacLeod has suffered from a serious and persistent mental

disorder. The diagnosis has been Bipolar Affective Disorder, Type II. This can be a chronic condition with some but brief periods of remission. That seems to be the case for Mr. MacLeod. I have reviewed Dr. Owen's description of Mr. MacLeod's depression (with a remission of at the most three months) and agree with him that Mr. MacLeod is at this time unable to work. I understand that Mr. MacLeod will undergo another course of ECT which might help his mood but at the same time is often associated with a relapse after a few months. The clinical history you have provided suggested that no intervention, Psychological or Psychopharmacological, has allowed Mr. MacLeod to be symptom free (euthymic) or to lead a sufficient remission that allows Mr. MacLeod to function.

In order for Mr. MacLeod to perform the functions outlined in his work as a Manager of Lambton's EMS Department I would expect a period of continuous euthymia (normal mood), or markedly improved mood (with few biological symptoms of impairment) for at least one year. The prognosis of a Bipolar Affective Disorder Type II is difficult to be certain about but with Mr. MacLeod's history of a severe and persistent mental disorder I do not know how a clinician can be certain about his ability to function without observing Mr. MacLeod as well for at least a year.

In a note Dr. Maxwell remarked that stress precipitates Mr. MacLeod's depression. In the year after his remission he should not be in a stressful job. This suggests that his working as a Manager of EMS services would be contraindicated especially in an individual as vulnerable as Mr. MacLeod.

**How long would I wish to observe such behaviour and the level of his symptoms?**

Given the severity and length of his illness, and given the high responsibility and demands of the job Mr. MacLeod is returning to I would suggest that he should be regularly observed and his mental status should be documented monthly for at least a year after he achieves remission (euthymia or significant improvement).

**What are the reasons that I would want to observe those behaviours and symptoms that would allow Mr. MacLeod to function as Manager of the EMS department?**

My understanding is that the job as manager of EMS is a stressful and responsible one. Mr. MacLeod's history suggests that he is vulnerable to stress which in my opinion is one reason that he is precluded from functioning as Manager of EMS services until he is well for a year. I note that given the history of a severe and persistent mental disorder, and given the vulnerable nature of the clients and staff he would work with, Mr.

MacLeod might advertently present a risk to others if severely depressed or hypomanic.

For these reasons I would look for a history of at least [a] year of complete or significant remission before advising Mr. MacLeod to return to his work as Manager of EMS Services.

[Emphasis added]

[146] In his testimony, Dr. Cashman repeated his opinion he would want to see a period of remission of one year before the applicant was cleared to perform the functions of the EMS Manager position. He stated, by way of further explanation, that there is a high recurrence rate of 50% or more in patients with serious depression, including those who have received ECT. He also stated that during the one-year remission period, the applicant's mood should be stable, he should not be changing medications, his daily living activities should be normal, and he should be functioning in a work environment where he is not required to supervise a large number of people.

[147] Dr. Cashman also testified that, in his opinion, the role of EMS Manager, who is responsible for dealing with serious illnesses and accidents, and supervising approximately 100 people, cannot be performed by someone who has a serious cognitive impairment resulting from serious depression or hypomania. He stated, by way of explanation, that a person in such a role who is cognitively impaired may present a risk to others because of hostile behavior or an inability to make a proper decision.

[148] Dr. Cashman further testified, by way of clarification, that, in his opinion, if the applicant is in remission, he should first be returned to a low-stress job, and if the remission continues for one year, he could then be returned to his EMS Manager position.

[149] In cross-examination, Dr. Cashman admitted that he had not received or read the applicant's job description when he opined in his April 10, 2013 report that the applicant might advertently present a risk to others if severely depressed or hypomanic. He also admitted that that the "others" whom he was referring to were frontline paramedics. When asked whether he was aware of the line of command in the EMS department, he

stated that he had recently seen a job description and assumed that the EMS Manager interacted directly with frontline paramedics.

[150] The parties jointly tendered an Agreed Statement of Facts with respect to the Current Job Duties of the EMS Manager, which was entered into evidence. The general job duties are similar to those in the 2005 job description:

The EMS Manager is responsible for the operation of the EMS Department in accordance with relevant legislation and County policies. He is expected to provide overall planning and direction for the department and to ensure that its programs are efficiently administered and professional standards are observed and budgetary requirements are met. He is expected to review departmental operations annually and report the achieved results to the General Manager to whom he reports. He is expected to manage the collective agreement that applies to the paramedics and deal with any collective bargaining or grievances that arise.

[151] With respect to supervision of staff, the EMS Manager's direct reports are one Manager of Quality Assurance, nine Operations Supervisors, and two Program Support Staff. The EMS department's 138 frontline paramedics do not report directly to the EMS Manager.

[152] With respect to managing the County's response to an emergency or a municipality's request for assistance during an emergency, the EMS Manager is a member of the County Control Group and required to report to the Emergency Operations Centre.

[153] With respect to on-site duties, the EMS Manager may be required to do the following:

In the event of an emergency requiring EMS personnel, the EMS manager may attend near the scene to provide direction if it is required in the circumstances. The responsibilities are similar to those when acting as the emergency site manager, but are focused specifically on EMS Operations and are responsible to liaise with the emergency site coordinator and the other lead representatives of all emergency services.

## ANALYSIS

### Applicable Law and Issues

[154] The Application relates to ss. 5, 9 and 17 of the *Code*, which provide:

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.

[155] The applicant has the onus of proving on a balance of probabilities that a violation of the *Code* has occurred. A balance of probabilities means that it is more likely than not a violation has occurred. Clear, convincing and cogent evidence is required in order to satisfy the balance of probabilities test. See *F.H. v. McDougall*, 2008 SCC 53 at para. 46.

[156] In order to establish a case of discrimination, the applicant must prove that (1) he had, or was perceived to have, a disability, (2) he received adverse treatment, and (3) his disability was a factor in the adverse treatment. See *Shaw v. Phipps*, 2010 ONSC 3884 at para. 47, upheld 2012 ONCA 155, and *Communications, Energy & Paperworkers' Union of Canada (CEP), Local 789 v. Domtar Inc.*, 2009 BCCA 52 at para. 36.

[157] In the case at hand, there was no dispute that the applicant had a disability within the meaning of the *Code*. The main dispute was whether the applicant received adverse treatment, and, if so, whether his disability was a factor in the adverse treatment.

[158] With respect to the second and third parts of the discrimination test, s. 17 of the *Code* requires that an employer accommodate an employee's disability-related needs, as they relate to performing the essential duties of the job, up to the point of undue hardship.

[159] It is well-established that the accommodation process is a shared responsibility. See *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 at para. 43. In order to trigger the duty to accommodate, the employee is not required to inform the employer of all the details of his disability, but he should inform the employer that he has disability-related needs, and endeavour to provide as much information as possible to facilitate the search for accommodation. See *Simpson v. Commissionaires (Great Lakes)*, 2009 HRTO 1362 at para. 35.

[160] Once the duty to accommodate has been triggered, the employer must meet both its procedural and substantive obligations. The procedural duty to accommodate involves obtaining all relevant information about the employee's disability, at least where it is readily available. The term "undue hardship" requires that the employer seriously consider how the employee could be accommodated. A failure to give any thought or consideration to the issue of accommodation, including what, if any, steps could be taken constitutes a failure to satisfy the procedural duty to accommodate. In assessing whether the employer has met the duty, its efforts will be assessed at the time of the alleged discrimination. The employer may not use after-acquired evidence to support its view that the employee could not be accommodated. See *ADGA*, above, at paras. 106-107.

[161] The substantive duty to accommodate requires the employer to show that it could not have accommodated the employee's disability-related needs short of undue

hardship. “Accommodation” refers to what is required in the circumstances to avoid discrimination. The factors causing “undue hardship” will depend on the particular circumstances of every case. The use of the term undue infers that some hardship is acceptable; it is only *undue* hardship that satisfies the test. Undue hardship cannot be established by relying on impressionistic or anecdotal evidence, or after-the-fact justifications. See *ADGA*, above, at paras. 113 and 117-118. The employer has to present cogent evidence to support its position that it cannot accommodate the employee’s disability-related needs because of undue hardship. See *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3, at paras. 78-79.

[162] However, this does not mean that there is a reverse onus. The ultimate issue is whether the applicant has proven, on a balance of probabilities, that discrimination because of disability has occurred. Although an evidentiary burden to rebut discrimination may shift to the respondent, the onus of proving discrimination remains on the applicant throughout. See *Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593 at paras. 112 and 119.

[163] In assessing credibility and reliability, I have applied the traditional test set out by the British Columbia Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354:

(...) 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.

[164] I am also mindful of the Ontario Court of Appeal's comments on credibility and reliability in *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (C.A.) at p. 205:

Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is honest witness, may, however, still be unreliable.

[165] In this case, the two main issues to be decided are the following:

- 1) Did the respondent discriminate against the applicant with respect to employment because of his disability when it refused to allow him to resume his duties as EMS Manager in the summer/fall of 2008, the summer of 2009, and the spring of 2011?
- 2) Did the respondent discriminate against the applicant with respect to employment because of his disability when it decided in the fall of 2011 that he would never be returned to his EMS Manager position?

**Did the respondent discriminate against the applicant with respect to employment because of his disability when it refused to allow him to resume his duties as EMS Manager in the summer/fall of 2008, the summer of 2009, and the spring of 2011?**

[166] In my view, the respondent did not discriminate against the applicant with respect to employment because of his disability when it refused to allow him to resume his duties as EMS Manager in the summer/fall of 2008, the summer of 2009, and the spring of 2011.

[167] The following facts are undisputed. In August 2008, when the applicant was off work on a sick leave, his Manager, Ms. Thayer, heard complaints from several staff in the EMS department that he was verbally abusive and mismanaging the department. The applicant then disclosed to Ms. Thayer that he had bipolar disorder. In September

2008, when the applicant was still off, Ms. Thayer found the email exchange between him and the local fire chief which contained threats of reprisal against the staff who had complained to her. Although it was the fire chief, rather than the applicant, who made the threats, and the applicant discouraged the fire chief from doing anything immediately, he did not discourage the fire chief from ever doing anything, and also disclosed the name of one staff person, who he said had “stuck a knife” in his back. Around the same time, Ms. Thayer also found out that the applicant had been blatantly insubordinate by ignoring her instruction not to attend a conference when he was on a sick leave.

[168] I find that the respondent treated the applicant adversely by refusing to allow him to resume his duties as EMS Manager. However, I also find that the respondent had reasonable concerns about the applicant’s conduct and its impact on the staff and operation of the EMS department. In particular, the respondent had legal obligations under the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, as amended, and the *Code* to provide a safe and harassment-free workplace for its employees. I therefore find that it was prudent and non-discriminatory not to allow the applicant to resume his duties without interviewing him and completing the investigation.

[169] As part of its investigation, the respondent certainly had a duty to consider whether the applicant’s behaviour was disability-related, and if it was, to consider whether his disability could be accommodated in his EMS Manager position, but I accept the respondent’s position that allowing the applicant to resume his EMS Manager duties, which included supervision of staff, before interviewing him and completing its investigation, would have raised safety risks amounting to undue hardship.

[170] Moreover, I find that by not firing the applicant, the respondent was, in fact, accommodating his disability. Ms. Thayer provided uncontradicted testimony, which I accept, that she would have fired the applicant for misconduct and insubordination if he had not disclosed that he had bipolar disorder. I also find that assigning the applicant to work on special projects at his EMS Manager rate of pay while he was being

interviewed and the investigation was ongoing was a reasonable accommodation of his disability.

[171] The fact that the respondent's refusal to allow the applicant to resume his duties as EMS Manager pending the completion of its investigation worsened his depression is unfortunate and regrettable, but it is not evidence of discrimination.

**Did the respondent discriminate against the applicant with respect to employment because of his disability when it decided in the fall of 2011 that he would never be returned to his EMS Manager position?**

[172] In my view, the respondent discriminated against the applicant with respect to employment because of his disability when it decided in the fall of 2011 that he would never be returned to his EMS Manager position.

[173] I will start by setting out my factual findings with respect to each of the specific reasons that Mr. Taylor listed in his October 31, 2011 letter for not returning the applicant to the EMS Manager position.

**1. Purchase of a "Security Camera" (the closed-circuit video camera for the ESU vehicle project).**

[174] I find that there was a rationale for purchasing such a camera, but its cost was extravagant. When the vendor sent the applicant an email, which stated that the camera that he was proposing to buy was good, but there were better, more expensive video cameras that he could purchase, the applicant sent an odd, hyper email in response, which essentially stated that he would purchase whatever camera the vendor proposed. The applicant then purchased a camera which was twice as expensive as the originally proposed camera. I therefore accept Mr. Taylor's conclusion that there was "inappropriate spending" involved in the purchase of this camera.

[175] I also find that the applicant breached the respondent's policies and procedures on purchasing by having the software for the camera loaded on to his computer by the vendor rather than the respondent's IT department, and the camera loaded into his

personal vehicle rather than delivered directly to the respondent's receiver. The respondent's evidence on this matter was not contradicted by the applicant.

[176] I also find that, although there may be several possible reasons why the camera is now missing, it was not unreasonable for Mr. Taylor to hold the applicant responsible for the missing camera given that he did not follow the respondent's purchasing policies and procedures when he bought and picked up the camera.

### **2. Purchase of a "Video Camera" (the semi-studio video camera for training purposes).**

[177] I find that there was a rationale for purchasing such a camera, but its cost was extravagant. I accept Mr. Cann's testimony, which was logical and not contradicted by the applicant, that he had asked for, and expected to receive, a cheap, simple camera for training purposes, and that the applicant's purchase of a semi-studio camera was "overkill". I therefore also accept Mr. Taylor's conclusion that there was "inappropriate spending" involved in the purchase of this camera.

### **3. Purchase of "Marine Binoculars" (the water- and fog-proof binoculars for the ESU vehicle project).**

[178] I find that there was a rationale for purchasing a magnifying device, but the purchase and cost of water- and fog-proof binoculars was extravagant. I accept Mr. Brooks' testimony, which was logical and not contradicted by the applicant, that the EMS department already had spotting scopes with a greater range than binoculars for magnification purposes during a hazardous materials emergency, and that the EMS department does not participate in marine operations. I therefore also accept Mr. Taylor's conclusion that there was "inappropriate spending" involved in the purchase of the binoculars.

[179] I also find that, although there may be several possible reasons why the binoculars are now missing, it was not unreasonable for Mr. Taylor to hold the applicant responsible for the missing binoculars given that he did not follow the respondent's

purchasing policies and procedures when he had them delivered to his home rather than the office.

#### **4. Purchase of a “Motorola MXT-52500 Radio” (the portable two-way radio for the ESU vehicle project).**

[180] I find that there was no rationale for purchasing this very expensive and multifaceted two-way radio, and that it was an extravagant purchase. I do not have any expertise in two-way radios, but I am more inclined to believe Mr. Doyle’s testimony over the applicant’s testimony with respect to its utility for the EMS department because, for no good reason, the applicant kept the radio at his home for approximately three years.

[181] Specifically, on September 5, 2008, Mr. Doyle asked the applicant to return all of the respondent’s property in his possession, except for his Blackberry. Although the applicant was then on a sick leave until May 2011, there was no reason why he could not have returned the radio during his two periods of remission in 2009 and 2011, and when he returned to work in May 2011. He ended up returning the radio several months after his return, and even then, it was only because he came under pressure during the investigation to return it. In my view, the applicant did not want to return the radio because he knew that Mr. Doyle and Mr. Taylor would examine it, and discover that it was an extravagant purchase which could not be justified. I therefore accept Mr. Taylor’s conclusion that there was “inappropriate spending” involved in the purchase of this radio.

#### **5. Engaging in an inappropriate email exchange with a frontline paramedic (the applicant’s email exchange with a female paramedic in late May 2008).**

[182] I find that the applicant used the phrase “growing some balls” and flirted with a female subordinate over the respondent’s email system. The applicant’s claim that the email exchange was about a truck that she was trying to sell does not make sense, and is not credible. I agree with Mr. Taylor and Mr. Doyle that that the applicant’s emails

were inappropriate because he was in a boss-subordinate relationship with the paramedic, and he exposed the respondent to a potential sexual harassment complaint.

**6. Inappropriately berating supervisorial level staff in an email exchange with a frontline paramedic (the same email exchange with a female paramedic in late May 2008).**

[183] I find that the paramedic complained about some supervisors, and the applicant responded by agreeing with her complaint. I disagree with Mr. Taylor that the applicant was “berating” the supervisors. The applicant’s statement about the supervisors does not even come close to being “berating”. However, I agree with Mr. Taylor and Mr. Doyle that the applicant was undermining the supervisors’ authority over frontline paramedics by encouraging the paramedic not to follow the chain of command. I also disagree with the applicant that he was telling the paramedic to talk to her supervisor. In his email, he thanked the paramedic for “growing some balls” by complaining to him. There is no indication whatsoever that he was telling her to talk to her supervisor.

**7. Failure to follow corporate purchasing policy requirements by pursuing equipment and asset purchases, and by inappropriately providing one vendor’s quote to another.**

[184] The first part of this reason is covered under the reasons for “inappropriate spending” above. The source of the allegation that the applicant provided one vendor’s quote to another was Mr. Brooks, who is currently the acting EMS Manager. He will be removed from this position and returned to his home position if the applicant is reinstated into the EMS Manager position. For that reason, I have assessed his testimony with caution.

[185] I did not find Mr. Brooks’ testimony about this matter to be credible. In chief, he testified that during a bidding process, he saw the applicant show one vendor’s bid to another vendor who was in his office, which left me with the impression that he saw the actual quote. In cross-examination, however, he admitted that what he specifically saw was the applicant showing a letter from the first vendor to the second vendor, and he did not see an actual quote. In view of Mr. Brooks’ shifting testimony

about this incident, and the lack of any direct evidence of wrongdoing, I do not accept that he saw the applicant show one vendor's bid to another.

[186] Mr. Brooks also testified that during another bidding process to replace the EMS department's defibrillators, he overheard the applicant speaking on his cell phone and telling one vendor what the quote was from the other vendor that it had to beat. This allegation was not mentioned in Mr. Brooks' will-say statement which was disclosed prior to the hearing. In view of this, and my overall concern about the credibility of Mr. Brooks' testimony about this matter, I do not accept that Mr. Brooks overheard the applicant providing one vendor's quote to another.

[187] Mr. Brooks further testified that when the EMS department went to market for defibrillators, the applicant met with one vendor and provided it with the other vendor's quote. When he was asked to provide further details, he stated that he drew this conclusion because the second vendor called him and complained that he saw the applicant eating breakfast with the first vendor at a conference. In view of the fact that Mr. Brooks was relying on hearsay, and even the person speaking to him did not actually say that he saw the applicant provide its quote to the first vendor, I do not find credible whatsoever his conclusion that the applicant provided one vendor's quote to another.

[188] At the hearing, Mr. Taylor appeared to have retreated from his finding that the applicant had provided one vendor's quote to another. Instead, he stated, his concern was that the applicant stated that he does not see anything wrong with such a practice. In view of Mr. Taylor's shifting position on this matter and the applicant's denial that he ever provided one vendor's quote to another, which clearly indicates that he knows that it is wrong to do so, I do not find it credible that the applicant would say that he does not see anything wrong with such a practice. The applicant testified that one vendor can find out another vendor's quote on its own because such information is widely shared, which, in my view, is more likely what he actually said.

**8. Disrespectfully instigating and engaging in email exchanges with external community partners, and promoting derogatory comments about Ms. Thayer (the applicant's emails in early September 2008 to senior staff in various EMS, fire service, and Ministry of Health offices around southwestern Ontario, and his email exchange in late August 2008 with a local fire chief).**

[189] I agree with Ms. Thayer that the applicant's emails to various professional acquaintances were problematic because they falsely claimed that the respondent was going to fire him. I also agree with Mr. Taylor that the applicant's email exchange with a local fire chief was inappropriate. Although it was the fire chief, rather than the applicant, who made the threats of reprisal against the EMS staff who had complained, and the applicant discouraged the fire chief from doing anything immediately, he did not discourage the fire chief from ever doing anything, and also disclosed the name of one staff person, who he said had "stuck a knife" in his back. Furthermore, although it was the fire chief again, rather than the applicant, who made the negative comments about Ms. Thayer, he did not discourage the fire chief from making such comments.

**9. Failure to follow the respondent's hiring policies and procedures (speaking with and offering the position of part-time Supervisor to three individuals in early June 2008), and misleading the investigation panel during questioning on this subject.**

[190] I find that the applicant failed to follow the respondent's hiring policies and procedures when he offered the position of part-time Supervisor to three individuals, some of whom were his friends, without conducting formal interviews, using an interview tool with written questions and answers, or involving a manager one level above him. Although the applicant wrote an email to a consultant in the respondent's HR department, which explained what he had done, and he did not receive a response to it, that does not change the fact that he failed to follow the respondent's policies and procedures.

[191] However, I do not accept Mr. Taylor's testimony that the applicant misled the investigation panel during questioning on this subject. Dr. Owen provided uncontradicted testimony that the applicant suffered from extreme memory loss following ECT treatment, and I therefore find it credible that the applicant did not

remember doing this hiring when he was asked about it, and assumed that someone else must have done it. For reasons that remain unclear, the respondent's external and in-house counsel, who were aware that the applicant had undergone ECT, which resulted in memory loss, never shared this information with Mr. Taylor. While I understand why Mr. Taylor interpreted the applicant's answers and behaviour as an attempt to mislead him, he was quite simply wrong because he did not have information before him about the applicant's ECT treatment and its effect on his memory.

#### **10. Use of inappropriate language with Mr. Taylor, employees, and business agents.**

[192] I find that the applicant used inappropriate language with, and was verbally abusive towards, several EMS staff and business agents. Four staff provided uncontradicted testimony about this matter, which I found credible. Therefore, I accept that the applicant told one staff person she was too stupid to breathe on her own on one occasion, and called her a "stupid cunt" on another occasion. I also accept that he called another staff person a "fucking liar". I also accept that he said to another staff person, "Any idiot can do this, why can't you?" I also accept that he said to another staff person, "Don't park your fucking car there again." Similarly, I accept that the applicant made similar comments to two business agents and a union representative. I also accept Mr. Taylor's uncontradicted testimony that the applicant swore and used foul language with him.

#### **11. Displaying aggressive, intimidating, and insolent behaviour towards Mr. Taylor after he returned to work in May 2011.**

[193] I find, based on the context (Mr. Taylor was supervising the applicant's non-management, special project work, and also investigating the applicant's past behaviour and work performance), and the testimony of Mr. Taylor and the applicant, that they inevitably developed an adversarial relationship after the applicant returned to work in May 2011. The applicant is much larger than Mr. Taylor, and I accept Mr. Taylor's testimony that he found the applicant's behaviour, which included swearing, using foul

language, and being loud and coming right up to him, to be aggressive, intimidating, and rude.

**12. Relationships between the applicant and a number of senior EMS staff were severely damaged and compromised. During meetings with Mr. Taylor, the applicant made many spiteful comments towards them.**

[194] I find, based on the nature of the verbal abuse that the applicant directed towards a number of senior EMS staff and the testimony of three EMS staff that they had great concern about, or were outright opposed to, the applicant returning to his EMS Manager position, that the relationships between the applicant and those staff were severely damaged and compromised. It is also undisputed that the applicant made a number of negative comments about certain EMS staff to Mr. Taylor. I have also noted, with some concern, that the applicant made a number of odd, unflattering comments about Mr. Taylor and Ms. Thayer during his testimony before this Tribunal.

[195] I now turn to consider whether the applicant's impugned behaviour and performance issues in the workplace were related to his bipolar disorder. I find that the applicant's impugned conduct was largely disability-related for the following reasons.

[196] First, between June 2005 and June 2007, Ms. Thayer conducted three formal reviews of his work performance, which identified some performance issues, but which largely indicated that the applicant was meeting performance expectations. In cross-examination, Ms. Thayer admitted she was satisfied with his overall performance during this time period. The applicant's wife also testified that the applicant's mood disturbances were fairly well controlled through medication during this time period.

[197] Second, with the exception of a few of the verbally abusive comments, all of the applicant's impugned conduct occurred between late 2007 and the summer of 2008 when the applicant's medical caregivers had taken him off certain medications and began a trial of a new medication, which, according to Dr. Owen, would have allowed the applicant's underlying bipolar symptoms to become more prominent. The applicant's wife provided compelling testimony about the decline in the applicant's

mental health during this time period, and the chaos it caused in their home life. There is also documentary evidence that she reported to the applicant's psychiatrist that he was exhibiting symptoms of hypomania, including excessive spending of money, risk taking behaviour, decreased need for sleep, and increased sexual desire. The situation became so out of control that in August 2008, the applicant's wife told him that she wanted to end their marriage. Furthermore, EMS staff testified that the applicant's behaviour was particularly bad in 2008.

[198] Third, Dr. Owen provided an uncontradicted opinion that the applicant's impugned conduct between late 2007 and the summer of 2008 was related to his bipolar disorder and was out of character. Dr. Owen identified a number of bipolar disorder-related symptoms that the applicant exhibited during this time period, including irritability, mood swings, frivolous spending, inappropriate behaviour, inflated self-esteem, poor decision-making, and impaired judgment.

[199] Accordingly, I find that the applicant's purchase of a closed-circuit video camera, a semi-studio video camera, water- and fog-proof binoculars, and a portable two-way radio, which were either overly expensive or not needed at all, constituted frivolous spending, which was a symptom of his bipolar disorder. I find it telling that the applicant's wife reported to his psychiatrist during the same time period that he was excessively spending their family's money.

[200] I also find that the applicant's failure to follow corporate purchasing policies by having the software for the closed-circuit video camera loaded on to his computer, the camera into his personal vehicle, and the water- and fog-proof binoculars delivered to his home, constituted poor decision-making and impaired judgment, and was a symptom of his bipolar disorder. I find it telling that the applicant's wife testified that during the same time period he was spending money on his hobby and things for the house without consulting with her.

[201] I also find that the applicant's inappropriate email exchange with a female paramedic, in which he appeared to make a pass at her, constituted inappropriate

behaviour, inflated self-esteem, poor decision-making, and impaired judgment, and was a symptom of his bipolar disorder. The applicant engaged in this email exchange during a time period when he was taken off, or in the process of being taken off, medications, which would have allowed his underlying bipolar symptoms to become more prominent. I find it telling that the applicant's wife reported to his psychiatrist around the same time period that he had increased sexual desire.

[202] I also find that the applicant's emails to senior staff in various EMS, fire service, and Ministry of Health offices around southwestern Ontario, and his email exchange with a local fire chief, constituted poor decision-making, and impaired judgment, and was a symptom of his bipolar disorder. He was ill and under enormous stress when he sent these emails. Specifically, he was released from hospital, was in the process of changing medications again, and Ms. Thayer then prohibited him from returning to work because of alleged misconduct.

[203] I also find that the applicant's failure to follow the respondent's hiring policies and procedures when he offered the position of part-time Supervisor to three individuals constituted inflated self-esteem, poor decision-making, and impaired judgment, and was a symptom of his bipolar disorder. This incident occurred shortly after the applicant began tapering off his antidepressants, which would have allowed his underlying bipolar symptoms to become more prominent.

[204] I also find that the applicant's use of inappropriate language with, and verbally abusive behaviour towards, several EMS staff and business agents constituted irritability and inappropriate behaviour, and was a symptom of his bipolar disorder. I find it telling that the most egregious comment, calling a female staff person a "stupid cunt", occurred a few weeks after the applicant began tapering off his antidepressants, which would have allowed his underlying bipolar symptoms to become more prominent, and shortly before the applicant's wife told him that she wanted to end their marriage and he was hospitalized.

[205] I also find that the applicant's use of inappropriate language with, and aggressive, intimidating and rude behaviour towards, Mr. Taylor constituted inappropriate behaviour, and was a symptom of his bipolar disorder. The applicant was under great stress during this time period. He was working in a different building than EMS staff, he was prohibited from communicating with them, he was being assigned non-management special project work, and he was being investigated. Dr. Owen's opinion, which I accept, was that the stress caused the applicant to become depressed again. As mentioned above, when a person with bipolar disorder is in a depressive episode, there is often irritability.

[206] I now turn to consider whether the respondent treated the applicant adversely when it decided that he would never be returned to his EMS Manager position. In its closing submissions, the respondent suggested that it did not treat the applicant adversely because it did not fire him, and offered him the opportunity to continue working on special projects, and to have a discussion about non-management positions that may be available for him. I disagree. In my view, it is self-evident that the respondent treated the applicant adversely by permanently removing him from the managerial position that he had held since 2005, and informing him that he would not be considered for any other management positions. That said, the respondent's submission is relevant with respect to the issue of damages.

[207] I turn next to consider whether the applicant provided the respondent with sufficient information to trigger the respondent's duty to accommodate his disability. In its submissions, the respondent stated that its duty to accommodate was limited because the only accommodation that the applicant requested when he returned to work in May 2011 was a graduated return, and he did not request any further accommodation over the next several months. I disagree. The applicant provided the respondent with the following information about his disability, which was relevant to accommodation process:

- 1) On August 27, 2008, he sent an email to Ms. Thayer and Mr. Doyle, which informed Ms. Thayer that he had bipolar disorder, his control

over his disorder had changed in the last eight months because of a change in medication, and that may be the cause of concern.

- 2) On August 29, 2008, the applicant's brother-in-law sent Ms. Thayer an email, which drew her attention to this Tribunal's decision in *Lane*, above. This employment decision specifically addresses odd and inappropriate behaviour related to bipolar disorder.
- 3) In January 2010, during the exchange of pleadings before this Tribunal, the applicant delivered a Reply to the respondent, which denied that he had behaved improperly in the workplace or had performance issues, but that if he had, the behaviour and performance issues were a consequence of, and directly related to, his disability.
- 4) In the fall of 2010, the applicant's counsel sent the respondent's external counsel a letter, which specifically stated that Dr. Owen had confirmed that the complaints made against the applicant could be about behaviour that was a manifestation of his bipolar disorder.
- 5) In the spring and summer of 2011, during the disclosure process before this Tribunal, the applicant put the respondent on notice that Dr. Owen, would be testifying that his impugned conduct in the workplace was driven by his bipolar illness. There were also references in the applicant's medical brief to having had memory issues as a result of the ECT.
- 6) During the first three days of the hearing before this Tribunal on September 27, 28 and 29, 2011, the applicant's counsel asked Mr. Doyle in cross-examination whether he took into consideration whether the applicant's conduct that was being investigated was caused by his bipolar disorder, and whether he was aware that the applicant had ECT, which can affect a person's memory.

[208] There was conflicting testimony about whether the applicant told Mr. Doyle and Mr. Taylor between May and October 2011 that his conduct was disability-related, but, in my view, whether or not he did is neither here nor there because he had clearly provided the respondent with significant amounts of information to that effect before Mr. Taylor made his decision in October 2011 to never return the applicant to his EMS Manager position. I therefore find that the applicant provided the respondent with sufficient information to trigger the respondent's duty to consider whether his impugned conduct was disability-related, and whether it could accommodate his disability.

[209] I turn next to consider whether the respondent met its procedural and substantive obligations to accommodate the applicant's disability when it decided that he would never be returned to his EMS Manager position. I find that it did not.

[210] With respect to the respondent's procedural obligation to accommodate the applicant's disability, Mr. Doyle, who participated in the investigation and was advising Mr. Taylor, admitted that he did not know very much about bipolar disorder, that neither he nor anyone else with the respondent contacted an expert on bipolar disorder or the applicant's doctor to find out more about his disorder, and that he never took into consideration whether the applicant's conduct that was being investigated was caused by his bipolar disorder. Mr. Taylor, who was the decision-maker, testified that HR and in-house counsel did not give him any information indicating that the applicant's conduct in the workplace may have been related to his bipolar disorder, and admitted that he had not taken into consideration the possibility of such a correlation when he conducted his investigation and decided that the applicant would not be returned to his EMS Manager position. He also admitted that he did not know that the applicant had received ECT, which can have an effect on memory. He further admitted that having information about the relationship between the applicant's conduct in the workplace and his bipolar disorder, and the effect of ECT on his memory, would have been relevant in his investigation and decision.

[211] I therefore find that the respondent failed to meet its procedural obligation to accommodate the applicant's disability. By the end of the hearing, it was still unexplained why the respondent's counsel and/or its HR department had failed to provide relevant information about the applicant's disability to Mr. Taylor. I will assume that this failure was inadvertent rather than intentional.

[212] With respect to the respondent's substantive obligation to accommodate the applicant's disability, it is difficult to see how the respondent could meet this obligation when it failed to meet its procedural obligation. There is clear, convincing and cogent evidence, which I have accepted, that much of the applicant's impugned conduct was related to his bipolar disorder. However, Mr. Doyle concluded that the applicant had

engaged in “willful” misconduct, and he was not confident that the applicant would not engage in “willful” misconduct again in the future. Mr. Doyle failed to take into account that bipolar-related behaviour is not “willful”, and that his behaviour may be controllable with appropriate medical treatment.

[213] Similarly, Mr. Taylor concluded that the applicant did not take any responsibility for his misconduct, could not see that he had done things which were wrong, was paranoid, and was unable contain his use of foul language, but the reliability of his conclusion was tainted by the fact that he never took into consideration that much of the applicant’s conduct was disability-related, and that his behaviour may be controllable with appropriate medical treatment. Ultimately, however, Mr. Taylor did state that that if he received a consult about the treatment the applicant was receiving for his bipolar disorder, he would consider putting him back in the EMS Manager position.

[214] Furthermore, the applicant presented evidence, which I accept, that he was functional in the workplace in 2005 and 2006; that since he left the workplace in August 2008, he has received, for the first time in his life, comprehensive and ongoing treatment of his bipolar disorder; that he has received behavioural therapy that has helped him recognize when he is “sliding” or not well, and that he has to listen to others; that the symptoms related to his bipolar disorder are controllable through medication and therapy; and that now that the respondent is aware of his bipolar condition, if staff notice that he is acting inappropriately, his supervisor can direct him to make an appointment with his psychiatrist to deal with it.

[215] In its closing submissions, when addressing the issue of “undue hardship”, the respondent placed emphasis on Mr. Taylor’s conclusion that the relationships between the applicant and a number of senior EMS staff were severely damaged and compromised, and the fact that the applicant has continued to make negative comments about some of those staff and others, including Mr. Taylor. In short, the respondent argued, the applicant is not willing to start afresh.

[216] I accept that the applicant's disability-related behaviour was harmful, particularly with respect to his relationships with EMS staff whom he verbally abused, but I do not accept that those relationships are permanently damaged and compromised and cannot be repaired. Three of the EMS staff who testified expressed great concern about, or were outright opposed to, the applicant returning because of his past behaviour, but they were not aware that the applicant had bipolar disorder when they expressed that opinion, and in cross-examination, two of them indicated that they were open to the applicant returning to his EMS Manager position if the symptoms of his bipolar disorder were under control. I have not given any weight to the third staff person, Mr. Brooks, remaining opposed to the applicant returning to his position because Mr. Brooks will be removed from the acting EMS Manager position, and have to return to his home position, if the applicant returns. I believe that a properly implemented workplace restoration process, which is run by experts in mental health and reconciliation, can repair the damaged and compromised relationships.

[217] I have some concerns that the applicant has continued to make negative comments about some of those staff and others, including Mr. Taylor, but, in my view, these comments are most likely related to the applicant's bipolar disorder, and can be addressed by placing conditions on his reinstatement to the EMS Manager position.

[218] I therefore find that the respondent did not meet its substantive obligation to accommodate the applicant's disability because there is insufficient evidence showing that returning the applicant to the EMS Manager position would have resulted in undue hardship to the respondent.

[219] In its closing submissions, the respondent argued that it merely had an obligation to offer the applicant reasonable accommodation, which it did by continuing to employ him in a non-management capacity, but the applicant was not entitled to a perfect solution, which was returning him to his EMS Manager position. I disagree. There were two stages where the respondent had an obligation to accommodate the applicant's disability. First, the respondent had an obligation to consider whether the applicant's behaviour was disability-related, and if it was, whether it could accommodate his

disability by returning him to his original position. Second, if the respondent determined that the applicant's behaviour was disability-related, but it would cause it undue hardship to return him to his original position, it had an obligation to consider whether it could accommodate his disability by returning him to a different position. The respondent is essentially arguing that it had no obligation to accommodate the applicant's disability during the first stage, which is incorrect.

[220] That said, I find that the respondent did partially accommodate the applicant's disability when Mr. Taylor decided to continue employing the applicant in a non-management position rather than terminating his employment. I accept his testimony that if the applicant did not have bipolar disorder, he would have fired him. This is relevant with respect to damages.

[221] In conclusion, I find that the respondent discriminated against the applicant with respect to employment because of his disability when it decided in the fall of 2011 that he would never be returned to his EMS manager position.

## **REMEDY**

### **Applicable Law and Issues**

[222] The Tribunal's remedial powers are set out in s. 45.2 of the *Code*, which provides:

(1) On an application under section 34, the Tribunal may make one or more of the following orders if the Tribunal determines that a party to the application has infringed a right under Part I of another party to the application:

1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.
2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the

infringement, including restitution for injury to dignity, feelings and self-respect.

3. An order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act.
- (2) For greater certainty, an order under paragraph 3 of subsection (1),
- (a) may direct a person to do anything with respect to future practices; and
  - (b) may be made even if no order under that paragraph was requested.

[223] Accordingly, the issues that I am required to determine are whether the applicant is entitled to monetary compensation and non-monetary restitution, and whether the Tribunal should order the respondent to do anything further to promote compliance with the *Code*.

### **Non-Monetary Restitution (Reinstatement)**

[224] The applicant is seeking an award reinstating him into the position of EMS Manager. The respondent opposes the applicant's request for the reasons set out in the above section. I have already rejected the validity of those reasons.

[225] It is well established that the object of the *Code* is remedial. Where the Tribunal finds that a respondent has discriminated against an applicant, it has a broad authority to fashion a remedy that not only provides monetary compensation, but may also include non-monetary restitution that will put the applicant back in the position that she would have been in, but for the discrimination. See, for example, *TA v. 60 Montclair*, 2009 HRTO 369 at para. 20.

[226] The Tribunal set out its approach to a request for reinstatement in *Krieger v. Toronto Police Services Board*, 2010 HRTO 1361 at para. 182:

While reinstatement orders are rarely requested or ordered in human rights cases, they are “normally” ordered in arbitral cases where a

violation of a grievor's rights has been found, unless there are "concerns that the employment relationship is no longer viable" *Alberta Union of Public Employees v. Lethbridge Community College*, [2004] S.C.R. 727, 2004 SCC 28 (CanLII), at para. 56. The goal of human rights legislation, which is remedial in nature, is to put the applicant in the position that he or she would have been in had the discrimination not taken place. See *Impact Interiors Inc. v. Ontario (Human Rights Commission)* (1998), 35 C.H.R.R. D/477 (Ont. C.A.). Where viable, reinstatement is sometimes the only remedy that can give effect to this principle.

[227] I find, based on the evidence before me, that the most appropriate way to put the applicant back in the position that he would have been in, but for the discrimination, is to order the respondent to reinstate the applicant to the position of EMS Manager. In my view, if the respondent had undertaken its duty to accommodate the applicant's disability up to the point of undue hardship, it would have reinstated the applicant to the EMS Manager position in or around October 2011.

[228] The main area of dispute between the parties is when the applicant will be ready to resume his duties as EMS Manager. The applicant's psychiatrist, Dr. Owen, opined that the applicant should be able to resume his duties on a graduated basis when his mental health is stable, which he expects to be after the applicant has received further ECT. Dr. Owen disagreed with the respondent's counsel's suggestion that the applicant should be symptom-free for 12 months before he resumes his duties.

[229] The respondent's retained psychiatrist, Dr. Cashman, opined that because of the high recurrence rate in patients with serious depression, including those who have received ECT, the applicant should have euthymia (normal mood) or markedly improved mood (with few biological symptoms of impairment) for at least one year before he resumes his duties as EMS Manager. He explained that, given that the EMS Manager is responsible for dealing with serious illnesses and accidents, and supervising approximately 100 people, the applicant might inadvertently present a risk to others if severely depressed or hypomanic. He also opined that the applicant should first be returned to a low-stress job, and if the remission continues for one year, he could then be returned to his EMS Manager position.

[230] I find that both Dr. Owen's and Dr. Cashman's opinions have reliable components, which are helpful in deciding when the applicant will be ready to resume his duties as EMS Manager. At the end of the day, they both believe that the applicant can return to the EMS Manager position after he is in remission; where they differ is that Dr. Owen believes that the applicant can resume his duties immediately on a graduated basis, while Dr. Cashman believes that the applicant should first be returned to a low-stress job, and if the remission continues for one year, he should then resume his EMS Manager duties. However, Dr. Cashman did not address, and I do not see, why the applicant could not resume low stress EMS Manager duties, rather than a different job, after he is in remission.

[231] I also have some concerns with both Dr. Owen's and Dr. Cashman's opinions. My main concerns with Dr. Owen's opinion are that he did not squarely address the recurrence rate in patients with serious depression, which, according to Dr. Cashman is high, and, unlike Dr. Cashman, he did not directly address how the applicant's behaviour may be harmful to others in the workplace if he becomes unwell. He also did not address the fact that, although the applicant has expressed some remorse for his previous behaviour and the impact that it had on EMS staff, he has continued to make negative comments about certain staff, and his own Manager, Mr. Taylor.

[232] I accept Dr. Owen's opinion that the applicant became depressed after he returned to work in May 2011, and was depressed during the hearing before this Tribunal because he had stopped ECT because he did not want to have memory loss. Furthermore, I accept that when a person with bipolar disorder is in a depressive episode, there is often irritability. All of this is a probable explanation for the applicant's negative comments about certain staff and Mr. Taylor. However, I cannot see how reinstatement is going to be successful if the feelings underlying the applicant's comments are not resolved. I also cannot see how ECT and medication alone will resolve the applicant's negative feelings towards them.

[233] My main concerns with Dr. Cashman's opinion is that he is not the applicant's treating psychiatrist, and did not appear to be fully informed about the EMS Manager's

job duties, which led, in both instances, to some unfounded assumptions. For example, when he expressed his concern about the applicant advertently presenting a risk to others if he became hypomanic, he seemed to be unaware of Dr. Owen's prognosis that the applicant was unlikely to exhibit hypomanic symptoms in the future because of the progress of his bipolar disorder, which has only been depressive in recent years. Dr. Cashman also appeared to assume that in the EMS Manager role the applicant would be responsible for frontline supervision work at emergency scenes, including supervising approximately 100 paramedics. The evidence before me indicates that the applicant's duties in the EMS Manager role would be predominantly high-level management, his direct reports would be Operations Supervisors rather than frontline paramedics, and although he may occasionally be on scene during emergencies, his role would be to manage the overall situation, and not direct the frontline treatment of members of the public by paramedics.

[234] In the circumstances, I am ordering the reinstatement of the applicant into the position of EMS Manager under the following terms and conditions:

- 1) As a condition precedent to resuming his EMS Manager duties, the applicant shall provide the respondent with a medical certificate from Dr. Owen or another treating psychiatrist that certifies that he is sufficiently well (normal mood or markedly improved mood) to resume the duties of EMS Manager.
- 2) As a condition precedent to resuming his EMS Manager duties, the applicant shall provide the respondent with a medical certificate from Dr. Owen or another treating psychiatrist or psychologist that certifies that he has participated in therapy, which has resolved his negative feelings about EMS staff who complained about his behaviour, and Mr. Taylor, who investigated his behaviour.
- 3) Within 30 days of the date of this Decision, the respondent shall retain a consultant with expertise in bipolar disorder and discrimination to provide training to Mr. Taylor, senior EMS staff, in-house legal counsel, and HR staff on bipolar disorder-related behaviour, and how to accommodate bipolar disorder in compliance with the *Code*. The consultant shall be provided with a copy of this Decision.
- 4) Within 14 days of the parties meeting the terms and conditions in 1) - 3) above, the parties shall draft and sign a protocol for identifying and

dealing with any bipolar disorder-related behaviour by the applicant that adversely affects the workplace, and how the applicant's disability will be accommodated in compliance with the *Code*. The protocol shall clearly set out the obligations of both parties.

- 5) Within 14 days of the parties meeting the terms and conditions in 4) above, the respondent shall retain an expert in workplace restoration, who has knowledge of mental disabilities, and implement a process to repair the damaged and compromised relationships between the applicant and the EMS staff whom he verbally abused, and the applicant and Mr. Taylor.
- 6) Within seven days of the parties meeting the terms and conditions in 5) above, the applicant shall resume his EMS Manager duties on a graduated basis over a one year period beginning with low stress duties and adding more stressful duties gradually over the one year.

## Monetary Compensation

### *Lost Income*

[235] The applicant is also seeking an award of compensation for lost income from October 31, 2011, to the present.

[236] The purpose of compensation for loss of income is to restore the applicant as far as is reasonably possible to the position that the applicant would have been in had the discriminatory acts not occurred. See *Impact Interiors Inc.*, above, and *Piazza v. Airport Taxi Cab (Malton) Assn.* (1989), 10 C.H.R.R. D/6347 (Ont. C.A.)

[237] I find that the applicant's request for an award of compensation for lost income should be granted because it will restore him as far as is reasonably possible to the position that he would have been in had the respondent not discriminated against him. In my view, if the respondent had undertaken its legal duty to accommodate the applicant's disability up to the point of undue hardship, it would have reinstated the applicant to the EMS Manager position in or around October 2011.

[238] I will leave it up to the parties to calculate the exact amount of lost income, and determine how it should be paid, given the potential for claw back by the respondent's disability insurance carrier.

[239] The Tribunal also has the jurisdiction to order the respondent to pay interest in accordance with the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "CJA"). See *Quereshi v. Ontario (Human Rights Commission)*, 2006 CanLII 63686 (ON SC) at para. 55, and *Impact Interiors Inc.*, above, at para. 1.

[240] Pursuant to s. 128 of the CJA, pre-judgment interest runs from the date the cause of action arose (October 31, 2011) to the date of this Decision. Pursuant to s. 129 of the CJA, post-judgment interest runs from the date of this Decision.

#### *Injury to Dignity, Feelings and Self-Respect*

[241] The applicant is also seeking an award of \$75,000 compensation for injury to dignity, feelings and self-respect. The respondent's position is that if such an award is made, the appropriate range is \$10,000 to \$20,000.

[242] An award of monetary compensation for injury to dignity, feelings and self-respect includes recognition of the inherent value of the right to be free from discrimination and the experience of victimization. The Divisional Court has recognized that the Tribunal must ensure that the quantum of damages for this loss is not set too low, since doing so would trivialize the social importance of the *Code* by effectively creating a "licence fee" to discriminate. See *ADGA*, above, at para. 152.

[243] The Divisional Court has also recognized that humiliation; hurt feelings; the loss of self-respect, dignity and confidence by the applicant; the experience of victimization; the vulnerability of the applicant; and the seriousness of the offensive treatment are among the factors to be considered in setting the amount of damages. See *ADGA*, above, at para. 153.

[244] In *Arunachalam v. Best Buy Canada*, 2010 HRTO 1880, the Tribunal reviewed recent awards under this heading of damages, and stated 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 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) at paras. 34-38.

[245] I find that, objectively, the respondent's discriminatory conduct was a serious violation of the *Code*. The respondent decided to never return the applicant to the EMS Manager position that he had held since 2005 because he had exhibited disability-related behaviour.

[246] I also find that the applicant was vulnerable and suffered immensely because of the respondent's decision. I accept Dr. Owen's opinion that because the applicant did not have any other significant stressors in his life at that time, the respondent's decision to never return him to the EMS Manager position was the cause of a severe depression that rendered him unable to work.

[247] The two Tribunal decisions that are most analogous and relevant with respect to the appropriate quantum to be awarded for injury to dignity, feelings and self-respect are *Lane*, above, and *Krieger*, above.

[248] In *Lane*, the Tribunal found that the employer had discriminated against a new employee with bipolar disorder by firing him, rather than accommodating him, after he disclosed his disability and exhibited odd and inappropriate disability-related behaviour. The Tribunal found that the respondent had failed to meet its procedural and substantive obligations to accommodate the applicant's disability. The Tribunal also found that the termination caused the employee to progress into a full-blown manic state, which resulted in his hospitalization. The Tribunal made an award of \$45,000 for what were then referred to as "general and mental distress damages".

[249] In *Krieger*, the Tribunal found that the employer, a police services board, had discriminated against a probationary police officer with post-traumatic stress disorder by firing him rather than accommodating his disability after he exhibited violent and inappropriate disability-related behaviour. The Tribunal found that the respondent had failed to meet its procedural and substantive obligations to accommodate the officer's disability. The Tribunal also found that the termination prolonged the officer's suffering and greatly added to his distress. The Tribunal made an award of \$35,000 for injury to dignity, feelings and self-respect

[250] In my view, the facts in the case at hand, though egregious, are less egregious than in *Lane* and *Krieger* because the respondent did not terminate the applicant's employment, and he was able to continue receiving disability benefits. I find, overall, after considering the seriousness of the violation of the *Code*, the applicant's individual circumstances (particularly the fact that the respondent's decision was the cause of a severe depression that rendered him unable to work), and this Tribunal's case law, that \$25,000 is an appropriate award of compensation for injury to dignity, feelings and self-respect.

[251] Pursuant to s. 128 of the *CJA*, pre-judgment interest runs from the date the cause of action arose (October 31, 2011) to the date of this Decision. Pursuant to s. 129 of the *CJA*, post-judgment interest runs from the date of this Decision.

## ORDER

[252] Accordingly, the Tribunal orders as follows:

- 1) The respondent shall reinstate the applicant into the position of EMS Manager subject to the terms and conditions listed above.
- 2) The respondent shall pay the applicant lost income from October 31, 2011 to the present. Pre-judgment and post-judgment interest are payable in accordance with the *CJA*.
- 3) The respondent shall pay the applicant \$25,000 as monetary compensation for injury to dignity, feelings and self-respect. Pre-judgment and post-judgment interest are payable in accordance with the *CJA*.

[253] I shall remain seized to deal with issues arising out of implementation of these orders for a period of two years.

Dated at Toronto, this 10<sup>th</sup> day of September, 2014.

*“Signed by”*

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Ken Bhattacharjee  
Vice-chair