

CITATION: Nason v Thunder Bay Orthopaedic Inc., 2015 ONSC 8097
COURT FILE NO.: CV-13-280
DATE: 2015-12-30

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

Darren Nason

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) *Mr. D. Matson for the Plaintiff*

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Plaintiff)

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- and -

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Thunder Bay Orthopaedic Inc.

) *Mr. J. Lester for the defendant*

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Defendant)

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) **HEARD:** May 26, 27, 28, 2015 in Thunder

) Bay and written submissions

Mr. Justice J.S. Fregeau

Judgment

INTRODUCTION

[1] The plaintiff claims the sum of \$391,720.21 from the defendant comprised of the following amounts;

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1. **\$112,387.20** representing lost wages for the period August 18, 2010 to January 22, 2013, a period when the plaintiff alleges the defendant failed to accommodate his disability and **\$35,000.00** damages for a breach of the defendant's human rights including injury to the plaintiff's dignity and sense of self-worth for the period June 14, 2010 to January 22, 2013, all pursuant to the Ontario *Human Rights Code*, R.S.O. c. H.19 (the "Code");
 2. **\$84,333.01** or 20 months' salary representing pay in lieu of notice for wrongful dismissal;
 3. **\$35,000.00** damages as compensation for a breach of the defendant's human rights related to the termination of his employment on January 22, 2013;
 4. **\$75,000.00** for aggravated damages and **\$50,000.00** for punitive damages related to the wrongful dismissal; and,
 5. Prejudgment interest and postjudgment interest.

SUMMARY OF THE EVIDENCE

Darren Nason

[2] The plaintiff is 45 years old and has a grade 12 education. He began employment with Thunder Bay Orthopaedic Inc. ("TBO") on May 10, 1993. On September 28, 2002, Mr. Nason became a Registered Orthotic Technician ("ROT").

[3] TBO is a small corporation, employing fewer than 10 employees, including two or three orthotic technicians at any time. TBO manufactures custom orthotic braces and also fabricates various types of orthotic devices and braces. Gary McWhirter is the President of TBO and one of two shareholders.

[4] As an ROT, Mr. Nason's duties included assisting in the casting and fitting of custom and off-the-shelf braces, preparing and modifying plaster casts of patients' limbs, manufacturing new

braces and cutting and grinding plastic. These duties required Mr. Nason to use (and therefore grip) various hand and power tools, some of which caused significant vibration.

[5] In 2006, Mr. Nason began experiencing pain and numbness in his hands, wrists, elbows and neck. Mr. Nason's family doctor initially referred him to physiotherapy. Mr. M. Belcamino, Mr. Nason's physiotherapist, noted multiple impairments at that time, consistent with "possibly early signs of vibration induced Raynaud's Syndrome." In 2009, Mr. Nason's family doctor prescribed bilateral wrist splints for him, noting they were for carpal tunnel syndrome.

[6] By early June 2010, Mr. Nason's symptoms were severe enough to cause him to attend the emergency department of the Thunder Bay Regional Health Sciences Centre. The ER doctor concluded that Mr. Nason had carpal tunnel syndrome that was related to his job at TBO. Mr. Nason relayed this information to Mr. McWhirter. Mr. Nason did not miss any work at TBO at this time. He testified that he was not experiencing any symptoms during the day and that he did not have any difficulty performing his job duties.

[7] Mr. Nason saw his family doctor on June 14, 2010. At this time, he was diagnosed with carpal and cubital tunnel syndrome in his left arm with cervical and peripheral nerve pressure. Dr. Wilberforce completed a Health Professional's Report in order to initiate a potential Workplace Safety and Insurance Board ("WSIB") claim. In this report, Dr. Wilberforce noted that Mr. Nason was suffering from repetitive strain injury to his left forearm, hand and fingers. When reporting on Mr. Nason's task limitations, Dr. Wilberforce noted "currently no limitations imposed, but may need to if situation worsens."

[8] On June 21, 2010, Mr. Nason completed a WSIB Worker's Report. In this report, Mr. Nason noted the Area of Injury as neck, left shoulder, arm and forearm, right arm and forearm, and left and right wrists, hands and fingers. Mr. Nason also indicated in this report that he believed the work that caused his condition was forming and grinding casts and braces.

[9] Mr. Nason testified that he thereafter attended physiotherapy but "continued doing (my) job." He testified that TBO pulled him off cast modifications and prohibited him from using the

company computer on his lunch break without consulting him and despite the fact that he was not, according to him, having any difficulty doing cast modifications.

[10] On July 5, 2010, Mr. Nason received a letter from WSIB. WSIB confirmed that Dr. Wilberforce's diagnosis of left hand double crush syndrome was compatible with repetitive use injury. Mr. Nason was told that his claim had been allowed for his left hand and arm only. Mr. Nason continued to work at TBO and did not draw WSIB benefits at this time. He testified that he did not request any accommodation and that his condition did not affect his pace of work. He also testified that TBO did not say anything to him about his ability to perform his job during the summer of 2010.

[11] By letter dated July 14, 2010, TBO submitted further information to WSIB as to their understanding of Mr. Nason's activities outside of the workplace which may have contributed to his condition. TBO copied this letter to various parties, including Mr. Nason, Mr. Nason's family doctor, his physiotherapist and their lawyer. Mr. Nason testified that he felt that TBO was saying that he was a liar. He was distraught that the letter had been copied to his doctor and physiotherapist.

[12] Mr. Nason went on vacation for a couple of weeks beginning August 6, 2010. Mr. Nason testified that he was not having any difficulty at work at this point. According to him, he was not having any issue with his hands, numbness or pain and had no difficulty gripping or using tools. Mr. Nason testified that his productivity and pace of work had not been affected by his medical condition. Mr. Nason's evidence was that the symptoms only bothered him at night. He testified that medical professionals had not placed any limitations on him.

[13] On August 17, 2010, TBO wrote to WSIB stating that TBO "can no longer accommodate" Mr. Nason. When Mr. Nason returned to work on August 18, 2010, he found his personal belongings boxed up and at his workstation. Mr. Nason and his wife (also a TBO employee) were called into the office by Mr. McWhirter and his co-owner. According to Mr. Nason, TBO advised him that WSIB had accepted his claim and that he was now WSIB's responsibility, or words to that effect. Mr. Nason was told by TBO that he was being placed on

leave. Mr. Nason testified that he did not need any accommodation at that point nor did TBO ask about any potential accommodation. Mr. Nason thereafter contacted WSIB to initiate loss of earning benefits.

[14] On August 27, 2010, Mr. Nason attended the WSIB Hand Speciality Clinic in Toronto at which time Dr. Binhammer confirmed Mr. Nason's diagnosis as bilateral carpal tunnel syndrome. The Toronto Western Hospital WSIB Hand Specialty Program prepared a Return to Work Initial Consultation Report after Mr. Nason's meeting with Dr. Binhammer. The author of this report was Mr. Darin Ramcharitar, Return to Work Coordinator.

[15] In this report, Mr. Ramcharitar noted that Mr. Nason reported to him that the essential physical demands of his work included frequent bilateral resistive gripping when using manual and power hand tools to fabricate braces and casts. Mr. Nason also apparently advised Mr. Ramcharitar that he was working on modified duties between June and August 2010 and that he had been managing with the modified duties. Mr. Nason also reported to Mr. Ramcharitar that he continued to have numbness in his finger tips with shooting pain into the wrists and elbows of both arms.

[16] A WSIB Return to Work Specialist Intervention Memo to File prepared by Ms. K. Lauzon subsequent to a meeting on October 5, 2010 was filed in evidence. The meeting included Mr. Nason, a worker representative, TBO and Ms. Lauzon. Under Functional Abilities, Ms. Lauzon noted, "no repetitive or resistive gripping and handling activities." Ms. Lauzon also noted that Mr. Nason had "functional limitations as a result of his...bilateral wrist condition" and that he required accommodation to his pre-injury occupation. Despite the contents of this report, Mr. Nason maintained that he was experiencing symptoms only at night and not during the day.

[17] Mr. Nason underwent surgery for left carpal tunnel syndrome on April 11, 2011. Mr. Nason testified that he regained the use of his left hand three to four days after surgery and that he had "no restrictions" in the ability to use his left hand after three or four days. Mr. Nason testified that TBO did not contact him after this surgery and that he did not contact them.

[18] Mr. Nason underwent surgery for left cubital tunnel syndrome on August 17, 2011. Mr. Nason testified that his recovery time from this surgery was one week and that he would have been able to perform his duties at TBO one week after this surgery.

[19] Mr. Nason underwent surgery on his neck on February 7, 2012. Mr. Nason testified that his recovery time from the neck surgery was three months during which time he wore a neck collar and could not bend his neck.

[20] Mr. Nason underwent surgery for right carpal tunnel syndrome on March 2, 2012. Mr. Nason testified that he was fully recovered from this surgery, with no restrictions, after three to four days.

[21] Mr. Nason wrote to TBO on April 26, 2012. In this letter, Mr. Nason requested a meeting with TBO to “discuss (TBO’s) intentions with my employment at TBO.” Mr. Nason testified that he wrote the letter because he wanted his job at TBO back. According to Mr. Nason, he never received a response to this letter.

[22] Mr. Nason followed up his April 26, 2012 letter with a similar letter to TBO on June 11, 2012. Mr. Nason testified that he did not receive a response to this letter.

[23] According to Mr. Nason, he was fully recovered and would have been able to return to work at TBO, without restrictions or accommodation, in the late summer or fall of 2012. According to Mr. Nason, prior to surgery he experienced symptoms only at night and not during the day. He testified that he underwent the numerous surgeries because he was off work. He understood that the surgeries would relieve his symptoms and make him more comfortable at night, enabling him to sleep better and achieve a better quality of life.

[24] In a letter to Mr. Nason dated November 29, 2012 and copied to TBO, WSIB advised Mr. Nason and TBO that pursuant to their review of medical reports Mr. Nason’s restrictions included “no vibration, no prolonged positioning of the wrists or elbows and no repetitive wrist or elbow activities.”

[25] On January 9, 2013, Mr. Nason wrote to TBO. In this letter, Mr. Nason stated that it was apparent to him that TBO was not interested in acknowledging their obligation to accommodate him. He further stated that “since you have indicated to WSIB that it is your intent to sever my employment, we do need to discuss my severance package.”

[26] Mr. Nason testified that he received a reply from TBO dated January 22, 2013 (Exhibit #2, Tab 83). This letter, entitled “Termination of Employment” advised Mr. Nason that he had been terminated effective April 19, 2013. Mr. Nason testified that as of January 2013 he had limitations regarding gripping and squeezing. He maintained that these limitations could have been accommodated by scheduling his work duties appropriately.

[27] On February 8, 2013, Mr. Nason received an email from TBO (Exhibit #2, Tab 86). In this email, TBO asked Mr. Nason to “disregard our letter of January 22, 2013” until further discussions took place “at which time the letter may be formally rescinded.” Mr. Nason testified that he never agreed to a rescission of TBO’s January 22, 2013 termination of his employment. According to Mr. Nason, TBO has maintained him on the company benefit plan despite his request in April 2013 that he be removed and placed onto his wife’s TBO benefit coverage.

[28] Mr. Nason testified that he “felt like (his) life ended” upon receiving the termination letter. He said that he loved his job and loved working with his employers. He was very proud of having achieved the ROT designation and felt like it all had been taken away from him.

[29] Mr. Nason testified that WSIB also sent him to CAMH for a psychiatric assessment on November 18, 2011. The Psychiatric Assessment Report, dated December 7, 2011, was filed in evidence. This report indicates that Mr. Nason was diagnosed with “Major Depressive Disorder, Single Episode, Mild.” A further CAMH Assessment Report, dated December 8, 2011, noted that Mr. Nason’s workplace injury is a major contributor to the Major Depressive Disorder and that the loss of his job was a co-existing contributor.

[30] As a result of the CAMH reports, WSIB referred Mr. Nason to Dr. Prenger, a local psychologist. Three Psychological Service Reports of Dr. Prenger (April 26 and June 28, 2012

and February 26, 2013) were entered into evidence as business records, being part of the WSIB file. They were filed to corroborate Mr. Nason's evidence as to his state of mind.

[31] In the April 26, 2012 report, Dr. Prenger noted that Mr. Nason's symptoms included "generalized anxiety and depressed mood associated with loss of functioning (injury) and apprehension about the future, particularly as related to his recovery." It was also noted that Mr. Nason had shown "good gains through the treatment process" but that there had been one weekend where his mood "declined to the point of suicide ideation." Mr. Nason agreed with the contents of this report.

[32] In the June 28, 2012 report Dr. Prenger noted that Mr. Nason continued to report a mild degree of depressive symptoms. Mr. Nason testified that he felt this was a result of the uncertainty of his future employment.

[33] In the February 26, 2013 report, Dr. Prenger noted that Mr. Nason was consistently maintaining previous gains he had made regarding mood and anxiety symptoms with the exception of some recent periods of time "related to issues with his former employer." Mr. Nason testified that these recent issues related to his January 2013 termination.

[34] On February 26, 2013, Mr. Nason and TBO met, together with their respective lawyers. At this meeting, TBO confirmed that it was rescinding the January 22, 2013 termination of Mr. Nason. Mr. Nason was advised that his position as an orthotic technician remained open to him, pending "further medical assessments and the outcome of these assessments." Mr. Nason testified that he "could never work for (TBO) again...just for what they've done to me, my termination and the way I was treated throughout the whole process."

[35] Mr. Nason testified that he attempted to find alternative employment after being terminated by TBO. According to Mr. Nason, no firms in northwestern Ontario provide the same services as TBO. Other orthotic firms in Winnipeg and Edmonton contacted him about possible employment, but he did not consider relocating because both his parents and his mother in law lived locally and were elderly.

[36] Mr. Nason has received WSIB Loss of Earning Benefits and Retirement Pension Benefits since August 18, 2010. He received a WSIB Non-Economic Loss Award of \$7,010.24 in February 2013. On March 1, 2013, Mr. Nason began receiving CPP Disability Benefits. On September 11, 2014, Mr. Nason began receiving LTD benefits from Sun Life Financial. WSIB and LTD benefits received by Mr. Nason are not taxable. The exact amount of benefits Mr. Nason receives is set out in Exhibit #1, Agreed Statement of Facts.

[37] On cross examination, Mr. Nason acknowledged that he accepted the recommendations of his ER and family doctor in June 2010 in regard to initiating a WSIB claim. Mr. Nason also agreed that he had submitted a claim to Canada Life on August 19, 2010, the day after he was placed on leave by TBO. It was not made clear in evidence but I am prepared to infer that this was a short term disability claim. In this document, statements and representations made by Mr. Nason included the following:

1. Pain began April 14, 2010;
2. Was on light duty at work (could not perform regular job duties) from June 10, 2010;
3. Employer informed me that they could no longer accommodate me on light duty and that I was off to rehabilitate till I am 100 percent.

[38] Mr. Nason testified that the only accommodation he ever requested of TBO was to have his work bench raised at some point. When asked whether he needed any other accommodation he replied that he was “doing my job.” He agreed that TBO eliminated cast modifications from his job duties in June 2010 but insisted that he was otherwise doing his job. Mr. Nason agreed that he was having trouble gripping things at work from time to time. Mr. Nason acknowledged that TBO provided him with paid time off to attend both physiotherapy and doctors’ appointments during the summer of 2010. Mr. Nason agreed that he was permitted to interrupt his daily routine to do stretching exercises for his hands and wrists. He also agreed that he was required to work at a “slightly slower pace.” Mr. Nason agreed that as a result of him being

taken off cast modification work in June 2010, both Mr. McWhirter and the co-owner, Brian Berezowski were required to do more of this work.

[39] The contents of a June 23, 2010 WSIB memo to file were put to Mr. Nason. This memo detailed a conversation between Mr. Nason and Ms. Chantel Liberty, a WSIB Claims Specialist. Mr. Nason acknowledged that on June 23, 2010 he told Ms. Liberty that “in the past 6 months (his) symptoms had gradually increased to the point where he was losing grip strength and always had tingling in his hands...Darren attributes this increase in symptoms to staff shortage.” When it was put to Mr. Nason that Ms. Liberty also noted in this memo that he had told her he was continually dropping things at work, Mr. Nason agreed that “I drop things. Continuously? No.”

[40] Mr. Nason was cross examined on the issue of his physical restrictions prior to his surgeries. He was referred to a letter from him to WSIB dated February 6, 2011, explaining “why I am unable to be retrained at this time.” Mr. Nason acknowledged telling WSIB the following in February 2011:

“If I need something done around the house I have to wait for someone to do it for me...Holding a fork and knife, washcloth, telephone...anything for that matter puts my hands into spasms and shaking even when I’m doing absolutely nothing with my hands, arms and elbows are in constant pain, numbness and spasms. My wife cuts any meat for me now because it hurts...how am I supposed to know what I want until I get my final restrictions after surgeries...I AM IN SEVERE PAIN AND CANNOT DO RETRAINING AT THIS TIME again as per my doctor’s reports” (emphasis in original).

[41] Mr. Nason agreed that he did in fact have restrictions prior to his surgeries but maintained that they were “nothing that couldn’t be accommodated.”

[42] Mr. Nason was referred to his April 26, 2012 letter to TBO. Mr. Nason and TBO had not spoken since a meeting with WSIB in October 2010. In this letter, Mr. Nason indicated that he wanted “to start planning for (his) future. I am requesting a meeting with you to discuss your

intentions with my employment at TBO.” Mr. Nason denied that he was referring to any form of severance in this letter. Mr. Nason maintained that he was indicating to TBO that he wanted to discuss his return to work.

[43] Mr. Nason was next referred to his June 11, 2012 letter to TBO in which he requested a meeting with TBO “to discuss your intentions with my employment...” Mr. Nason again insisted that in this letter he was requesting a return to work and not inquiring as to a possible severance package.

[44] Mr. Nason was cross examined on the contents of his January 9, 2013 letter to TBO. In this letter, Mr. Nason stated that “it is ...apparent that you are not interested in acknowledging this obligation and we have come to an impasse on my employment.” When asked what he had meant, Mr. Nason responded that “they didn’t want to bring me back and I wanted to go back to work for them.” He insisted that he was physically able to return to work at this time. In this letter, Mr. Nason once again asked to “discuss (his) severance package.”

[45] Mr. Nason also acknowledged a telephone conversation he had with WSIB on March 8, 2012. He agreed that he had asked WSIB about TBO’s obligation to provide him with severance pay.

[46] Mr. Nason acknowledged that he met with a WSIB Work Transition Specialist on January 15, 2013. Mr. Nason agreed that the purpose of the meeting was to discuss a possible work transition training program sponsored by WSIB. Mr. Nason agreed that WSIB placed the following “precautions” on him at that time:

Precautions: No repetitive or resistive gripping or handling, avoid pressure on elbows, no repetitive/prolonged movement, no vibration...the worker reported that he finds neck flexion very difficult.

[47] Mr. Nason indicated that the neck flexion issue was all that was actually reported by him. When asked to comment on an entry in the report which stated that his “Maximum Medical Recovery Date Reached/Expected” was December 3, 2012, Mr. Nason testified that he

interpreted this to mean that this was the date of his full recovery post surgeries. The WSIB definition of this term is “a plateau in recovery that has been reached and is not likely that there will be any further significant improvement in the work related injury or disease.” Mr. Nason was only prepared to acknowledge that the December 3, 2012 Maximum Medical recovery date in this memo was the subjective opinion of the Work Transition Specialist.

[48] Mr. Nason was referred to a February 1, 2013 letter to him from WSIB in regard to WSIB’s Non Economic Loss Decision on his file. He agreed that WSIB had deemed him to have a “permanent impairment as a result of (his) bilateral wrists and elbows impairment.” He also acknowledged that he was, as of the date of this letter, aware that WSIB had determined his Maximum Medical recovery date was December 3, 2012.

[49] Mr. Nason testified that he considered himself a disabled employee on January 22, 2013, the date of the TBO termination letter. He indicated that his disabilities included his hands and neck, “...all things that could have been accommodated in the workplace.” He agreed that he had not discussed possible accommodation directly with TBO in January 2013.

[50] Mr. Nason was referred to an email to him from TBO dated February 8, 2013, wherein TBO acknowledged trying to arrange a meeting with him to discuss his potential return to work with TBO. Mr. Nason was asked about a line in this email in which TBO asked him to “please disregard our letter of January 22, 2013” (the termination letter). Mr. Nason responded that once he had received the letter purporting to terminate him he could never go back to work for TBO.

[51] Mr. Nason confirmed that his claim against the defendant included a claim for damages for depression and anxiety caused by TBO’s failure to accommodate him. He agreed that he had previously suffered from “mild depression” in 2006. It was his evidence that his depression “started slightly in August 2010” when TBO put him on leave. Mr. Nason acknowledged that the poor treatment he allegedly received from WSIB throughout the course of the claims process contributed to or increased his depression and anxiety.

[52] Mr. Nason agreed that in a meeting on February 26, 2013, TBO offered him full re-employment pending medical clearance. He also agreed that he did not provide TBO with a list of his workplace restrictions after this meeting nor did he ever undergo a medical assessment for the purpose of determining if he could return to TBO.

[53] Mr. Nason acknowledged that he had successfully applied for disability benefits from the Canada Pension Plan in 2013. On or about March 1, 2013, Mr. Nason began receiving CPP Disability benefits in the amount of \$1,016.46 per month. Mr. Nason also acknowledged that he applied to Sun Life Financial for Long Term Disability (“LTD”) benefits in November 2010. Sun Life provides benefits to TBO employees. Mr. Nason was approved for LTD benefits but denied that he was totally disabled at the time. Mr. Nason continues to receive LTD benefits from Sun Life. These benefits are offset and reduced by the amount of WSIB benefits received. Mr. Nason’s LTD benefit amount has changed over the years as a result. He continues to receive LTD benefits from Sun Life.

[54] Mr. Nason testified that he remains on the TBO benefit plan as a single employee, that the premiums are paid for by both him and TBO and that he still utilizes available benefits. He testified that he has never told Sun Life that he was terminated by TBO on January 22, 2013.

Michael Belcamino

[55] Mr. Belcamino has practised as a physiotherapist for over 20 years. He has extensive experience working with patients with carpal tunnel syndrome and repetitive strain injuries. Mr. Nason has been a patient of Mr. Belcamino for a number of years.

[56] Mr. Belcamino was referred to a WSIB Health Professional’s Progress Report he prepared regarding Mr. Nason dated June 22, 2011. Mr. Belcamino noted Mr. Nason’s limitations included the use of the upper extremities, vibration, gripping, squeezing and carrying. In another progress report dated September 7, 2011, Mr. Belcamino noted Mr. Nason’s limitations as gripping and any tasks for which he was required to use his hands.

[57] The next report Mr. Belcamino was referred to was dated April 18, 2012. Limitations noted in regard to Mr. Nason at this time were gripping (fine grip), grasping (gross motor skill), vibration and squeezing. In a July 24, 2012 progress report, Mr. Belcamino indicated that “multiple impairments, vibration induced signs/symptoms” were complicating factors that may influence Mr. Nason’s recovery and return to work. When asked to indicate Mr. Nason’s “status and task limitations”, Mr. Belcamino noted “permanent restrictions.”

[58] Mr. Belcamino explained that by the date of this report he had observed a “cumulative effect...he was showing signs coming from his neck, coming from his elbow, coming from his wrists...multiple nerve root pathology.” When asked to explain what he meant by permanent restrictions, Mr. Belcamino stated that the passage of almost two years together with numerous surgeries with no actual or anticipated improvement led him to conclude that there was a poor likelihood of Mr. Nason returning to his previous employment without restrictions. In this report, Mr. Belcamino also noted that he did not anticipate any clinical improvement for Mr. Nason.

[59] Mr. Belcamino was referred to a WSIB Health Professional’s Progress Report dated October 25, 2012 that he had completed in regard to Mr. Nason. Mr. Belcamino noted at that time that Mr. Nason’s bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome and impingement of the nerve roots in the neck as “complicating factors influencing Mr. Nason’s recovery and return to work.” He also noted that he anticipated improvement in six to seven weeks. In this same report, Mr. Belcamino listed Mr. Nason’s limitations as bending, lifting, use of upper extremities, sustained neck flexion, vibration exposure and manual dexterity.

[60] In a progress report dated November 28, 2012, Mr. Belcamino noted Mr. Nason’s limitations as “use of upper extremities, vibration.” He explained this as limiting Mr. Nason’s exposure to vibration and the use of his hands. Mr. Belcamino went on to explain that it was beyond the capacity of these WSIB forms and the examinations he did on Mr. Nason to comment on Mr. Nason’s ability to return to his employment in some capacity. Mr. Belcamino explained that a complete functional ability assessment would be required to make this determination.

[61] On cross examination, Mr. Belcamino estimated that he would have seen Mr. Nason three to four times per week in the summer of 2010 while Mr. Nason was working at TBO. In a progress report dated June 14, 2010, immediately after Mr. Nason attended hospital due to the severity of his symptoms, Mr. Belcamino noted a significant reduction in Mr. Nason's left grip strength and a 50 to 60% decrease in wrist extension.

[62] Mr. Belcamino was referred to his September 7, 2011 progress report. In this report, Mr. Belcamino agreed that he concluded that Mr. Nason was unable to resume either regular or modified duties as of the date of the report. Limitations noted in this report included gripping and manual tasks, the latter explained to be "anything that he would have to manipulate his hands to do."

[63] In cross examination, Mr. Belcamino was asked to explain the significance of having noted "permanent restrictions" in his July 24, 2012 progress report. Mr. Belcamino explained that this means that "it's highly unlikely that this individual would be able to go back to doing the tasks at work the same way he did prior to all...of these problems...modifications at work are not temporary...whatever modifications...arrived at would have to be there as long as he was doing that job" requiring significant change to his job.

Robert Bellin

[64] Mr. Bellin worked as an orthotic technician at TBO with Mr. Nason from June 2009 to October 2010. Mr. Bellin and Mr. Nason generally worked in the same work space. Mr. Bellin testified that he did not notice Mr. Nason having any difficulties fulfilling his job duties or in holding onto items. He also testified that he did not hear Mr. Nason complain about his ability to do his job. Mr. Bellin testified that he did not observe Mr. Nason having any difficulty with the sewing machine or with the grinder.

Diane Nason

[65] Ms. Nason has been married to Mr. Nason for over 20 years. She has worked at TBO for 27 years, currently as a secretary, previously as the office manager. Ms. Nason recalled the

August 18, 2010 meeting between her husband, Mr. McWhirter and Mr. Berezowski. Her recollection was consistent with that of Mr. Nason. She confirmed that no harsh language was used. Mr. Nason was simply informed that he was WSIB's responsibility and that TBO could no longer have him there.

[66] Ms. Nason testified that Mr. Nason found it very difficult to have been put on leave in August 2010. According to Ms. Nason, the January 22, 2013 letter from TBO to Mr. Nason caused Mr. Nason to go "into a total depression." She testified that "there was hope after 2010. After 2013 there wasn't." According to Ms. Nason, Mr. Nason repeatedly expressed a desire to return to work at TBO after August of 2010 but not after the January 22, 2013 letter.

[67] Ms. Nason testified that she asked the TBO bookkeeper, on or about April 19, 2013, if Mr. Nason's status on the company benefit plan could be changed so that he would thereafter be covered under her plan. She was told that TBO would not do so.

[68] On cross examination, Ms. Nason acknowledged that Mr. Nason had a history of depression or anxiety prior to August 2010. On re-examination, Ms. Nason testified that Mr. Nason's earlier depression resulted from having a difficult relationship with a previous owner of TBO. According to Ms. Nason, his condition improved after the current owners assumed control of TBO to the point that he was, or was going to be weaned off medication after 2006.

Gary McWhirter.

[69] Mr. McWhirter has worked at TBO for 33 years. He became a certified orthotist in 1985 and a co-owner in 2005. He is very familiar with all aspects of the operations of TBO on a day to day basis, including the role and expectations of an orthotic technician. TBO is a small operation which generally has about three technicians working on fabrication and manufacturing in the shop area. Mr. McWhirter testified that he and his co-owner trained Mr. Nason as an orthotic technician, including training in cast modification. When Mr. Nason became a registered orthotic technician, he continued to do cast modifications, something that he was "very good at" according to Mr. McWhirter.

[70] Mr. McWhirter testified that a technician's duties included pouring casts, stripping casts, modifying casts, cutting casts with a cast cutter and roughing out braces. They primarily work alone under general supervision.

[71] Mr. McWhirter acknowledged having seen Dr. Wilberforce's June 14, 2010 WSIB report which noted her diagnosis of Mr. Nason's condition as being double crush syndrome. He testified that he was aware that Mr. Nason had been having some wrist issues for a few years. Mr. McWhirter testified that he was concerned when he learned of the true extent of Mr. Nason's condition because Darren was "a friend and a valued employee. He was a big part of our ability to produce and dispense braces...I was concerned about his health." According to Mr. McWhirter, TBO was under the impression at this time that Mr. Nason's condition was short term and they were hoping for a quick recovery allowing Mr. Nason to return to work as soon as possible.

[72] To the best of Mr. McWhirter's recollection, TBO employed two full time (Mr. Nason and Mr. Bellin) and two part time technicians in June 2010. Mr. McWhirter testified that upon learning of the true nature of Mr. Nason's condition, he and his co-owner sat down with Mr. Nason to discuss his limitations. According to Mr. McWhirter, TBO agreed to allow Mr. Nason to work at a pace that was compatible with his condition, resulting in him accomplishing less in a given period of time than previously. He was also allowed frequent rest breaks, taken as and when he felt them to be necessary. He was also allowed breaks to do any required stretching exercises. Mr. McWhirter testified that Mr. Nason was told not to use the computer over his lunch period, eliminating strain from keyboarding and allowing rest.

[73] Most significantly, according to Mr. McWhirter, TBO removed cast modifications from Mr. Nason's job scope. Based on his experience, Mr. McWhirter knew that this job was physically demanding on a person's hands and wrists. According to Mr. McWhirter, TBO also accommodated Mr. Nason by allowing him to attend physiotherapy and medical appointments during working hours. Mr. McWhirter estimated that this resulted in 18 periods of time (1.25 to 1.5 hours each) away from work out of 24 work days between June 10, 2010 and August 18, 2010, only two of which were over a lunch period.

[74] Asked specifically to comment on Mr. Nason's pace of work between June and August 2010, Mr. McWhirter testified that "everything was proceeding at a much slower pace so productivity was decreased." Once heavy duties and cast modifications were taken away from Mr. Nason, he spent more time on "catch up" tasks, such as cleaning and restocking supplies. Mr. McWhirter testified that none of the technicians were asked to work overtime or over lunch breaks to counter Mr. Nason's decreased productivity. Instead, he and Mr. Berezowski worked late into the evenings and on weekends to pick up the slack. According to Mr. McWhirter they were able to keep up with productivity and their billings, but the impact on he and his co-owner was significant. They skipped coffee and lunch breaks and worked until 8:30 or 9:00 pm weekdays as well as working weekends.

[75] Mr. McWhirter disagreed with the evidence of Mr. Bellin as to Mr. Nason's ability to do his job during the summer of 2010, suggesting that while Mr. Bellin may have seen Mr. Nason working, he had no real appreciation for his productivity. Mr. McWhirter estimated that Mr. Nason's productivity was down "by at least 50%...probably higher" between June 10, 2010 and August 17, 2010. This required Mr. McWhirter and Mr. Berezowski to each work an additional 12 to 13 hours per week. They chose not to hire a new technician because neither of them would have had the time to train an inexperienced person. The core aspects of Mr. Nason's job duties that he was unable to perform during this period of time included cast modifications and prolonged use of the Troutman grinder, according to Mr. McWhirter. Mr. McWhirter denied that Mr. Nason had ever asked to have his workbench raised.

[76] Mr. McWhirter disputed Mr. Nason's evidence that he was somehow "forced" onto WSIB loss of earnings benefits in August 2010. When he returned from vacation on August 18, 2010, TBO, based on their previous discussions with WSIB, advised Mr. Nason that WSIB had requested that he attend their offices to discuss the issue of these benefits. Mr. McWhirter testified that he had contacted Ms. L. Wojechowski, a WSIB caseworker, by telephone on August 10, 2010, to inquire about how loss of earning benefits are initiated. Mr. McWhirter was told that the employer had to write WSIB and inform them that the employee could no longer be accommodated. This was done by TBO in a letter to WSIB dated August 17, 2010.

[77] When asked why TBO had decided that Mr. Nason should be put on WSIB benefits, Mr. McWhirter testified that Mr. Nason's productivity was "so minimal that it made no sense for us to continue to employ him." He further said that it was "quite evident that things were getting worse." Mr. McWhirter candidly testified that he and his co-owner "were concerned for (Mr. Nason) and...we were concerned for ourselves. We knew this couldn't continue indefinitely. So we were hoping for a fast return to work. It was in our best interest. It was in Darren's best interest."

[78] TBO and Mr. Nason did not meet directly between the fall of 2010 and the spring of 2012. Their first contact with him was the letter Mr. Nason sent to them on April 26, 2012, referred to in Mr. Nason's testimony. Mr. McWhirter testified that he interpreted this letter to mean that Mr. Nason was planning to return to work with TBO. Mr. Berezowski called Mr. Nason and unsuccessful attempts were made to set up a meeting. Mr. McWhirter acknowledged the contents of a letter from WSIB to him dated May 4, 2012 in which WSIB confirmed a recent telephone conversation with TBO. Mr. McWhirter agreed that he had asked WSIB about TBO's obligation as an employer to provide employment to Mr. Nason. Mr. McWhirter testified that he had made these inquiries to determine TBO's legal obligation and insisted it was not an indication that TBO would not return Mr. Nason to work. Mr. McWhirter testified that, at this point in time, his understanding of Mr. Nason's restrictions was no vibration, no repetitive movement, no long-term positioning of the elbows and no heavy lifting.

[79] Mr. McWhirter also recalled TBO receiving Mr. Nason's June 11, 2012 letter in which he requested a meeting to "discuss (TBO's) intentions with my employment at TBO." According to Mr. McWhirter, TBO responded to Mr. Nason by phone but they were unable to agree on the logistics of a meeting.

[80] Mr. McWhireter was referred to Mr. Nason's January 9, 2013 letter to TBO discussed by Mr. Nason in his testimony. Mr. McWhirter denied that he ever told WSIB that TBO no longer had a position for Mr. Nason, as Mr. Nason alleged in this letter. Mr. McWhirter testified that TBO was still "exploring" return to work options for Mr. Nason at this time, subject to some form of WSIB or medical clearance to ensure that a return to work did not "contribute to further

injury.” When asked what he understood Mr. Nason to be requesting when he stated that “we do need to discuss my severance package”, Mr. McWhirter testified that he read this as Mr. Nason requesting a meeting to “discuss the terms of him leaving the employment of TBO.” Mr. McWhirter was unable to say whether or not Mr. Nason was physically able to return to work at the time of this letter, not having seen him in over two years. According to Mr. McWhirter, TBO had only Mr. Nason’s unsubstantiated statement that he was physically able to return to his position at TBO. TBO was not prepared to initiate a return to work on that basis.

[81] TBO replied to Mr. Nason’s January 9, 2013 letter by letter dated January 14, 2013. According to Mr. McWhirter, TBO wanted to reassure Mr. Nason that TBO had not told WSIB that they were thinking of terminating him. TBO further advised Mr. Nason that they would “re-evaluate” the possibility of him returning to work at TBO when his doctor and WSIB approved and it was no longer a risk to his health. To this point in time, TBO had not received any form of clearance indicating that Mr. Nason was medically able to return to work.

[82] Mr. McWhirter then testified as to TBO’s January 22, 2013 “Termination of Employment” letter to Mr. Nason. According to Mr. McWhirter, TBO had given further consideration to Mr. Nason’s January 9, 2013 letter which Mr. McWhirter interpreted to have “requested termination.” Mr. McWhirter testified that TBO’s “position on the issue had changed.” According to Mr. McWhirter, he and his partner had now decided to “allow the severance to proceed” and allow Mr. Nason to move on with his life if that is what he wanted. Mr. McWhirter testified that he had no recollection of Mr. Nason actually requesting to be returned to work with appropriate accommodations, nor did he recall TBO being provided with a list of suggested accommodations for Mr. Nason.

[83] Mr. McWhirter testified that Mr. Nason called TBO on January 24, 2013. According to Mr. McWhirter, Mr. Nason again requested a meeting to discuss a possible return to work. Again, for logistical reasons the parties were unable to schedule a meeting.

[84] Mr. McWhirter recalled receiving a copy of a February 1, 2013 letter from WSIB to Mr. Nason. In this letter, WSIB informed Mr. Nason that he had, according to WSIB criteria, a

“permanent whole person impairment” of 11% as a result of his bilateral wrist and elbow impairment. It also confirmed that Mr. Nason’s maximum medical recovery date was December 3, 2012. Mr. McWhirter testified that this was the first indication that TBO had that Mr. Nason was not going to fully recover and that he had a permanent impairment.

[85] Mr. McWhirter was asked to explain a February 8, 2013 email to Mr. Nason. In this email, TBO told Mr. Nason that they would be happy to have him back if he was able to return to work. TBO asked Mr. Nason to “please disregard our letter of January 22, 2013 until they could meet, “at which time the letter may be formally rescinded.” Mr. McWhirter explained that “things were rather confused around this time...we were still endeavoring to determine whether Darren did or did not want to return to work.” He further testified that TBO was unclear at this time as to whether Mr. Nason was asking to return to work or be severed.

[86] Mr. McWhirter testified that TBO then received a telephone call on February 12, 2013 from an authorized representative calling on behalf of Mr. Nason. This was another attempt to schedule a meeting between TBO and Mr. Nason. Among other things discussed during this call, Mr. McWhirter recalled Mr. Nason’s representative bringing up the issue of a severance package for Mr. Nason. Mr. McWhirter testified that a meeting eventually did occur on February 26, 2013. The parties were both present with advisors. According to Mr. McWhirter, Mr. Nason expressed a desire to return to work at TBO. Mr. McWhirter testified that TBO explained to Mr. Nason that they required medical evidence that he was healthy enough to return to work and that his return to work at TBO would not aggravate his condition. Apparently Mr. Nason undertook to provide this information. Mr. McWhirter testified that without this information TBO felt that they would have been putting Mr. Nason at risk.

[87] Mr. McWhirter confirmed that Sun Life provides TBO with their employee benefit plan. It is employee/employer funded on a 50/50 basis with the employees’ share of the premiums deducted from their paycheques. Mr. Nason’s premiums are paid directly to TBO by the Nasons because Mr. Nason is not receiving a paycheque. Mr. McWhirter confirmed that Mr. Nason is currently in receipt of LTD benefits from Sun Life and remains listed as a TBO employee by Sun Life on the plan. Mr. McWhirter acknowledged that Ms. Nason had recently requested that Mr.

Nason be placed under her benefit plan. It was Mr. McWhirter's evidence that the necessary forms had never been completed and returned to TBO by the Nasons.

[88] On cross examination, Mr. McWhirter testified that Mr. Nason gained the skills necessary to do cast modifications well before 2010. Strictly speaking, registered orthotic technicians are not qualified to do cast modifications. However, according to Mr. McWhirter, it is common in the industry for the technicians to do this work, with instruction and under the supervision of the orthotist. Mr. McWhirter acknowledged that he had seen Dr. Wilberforce's June 14, 2010 Health Professional's Report which stated "currently no restrictions, but may need to be if situation worsens." He testified that TBO decided to be "proactive" and remove Mr. Nason from cast modifications anyway. Despite Mr. Nason's willingness to continue to do this work, Mr. McWhirter testified that he and his partner, knowing of Mr. Nason's diagnosis, decided that this work was too onerous for him.

[89] Mr. McWhirter agreed that TBO wrote to WSIB on August 17, 2010, the day before Mr. Nason was to return to work from vacation. In this letter, TBO advised WSIB that they could no longer accommodate Mr. Nason. They requested that loss of earnings payments be initiated August 18, 2010. Mr. McWhirter agreed that TBO had done so without talking to Mr. Nason about it. Mr. McWhirter agreed that TBO did not give Mr. Nason the option of continuing to work at TBO at that time. He testified that he and Mr. Berezowski were seeing Mr. Nason on a daily basis during the summer of 2010 and that Mr. Nason's condition was "worsening dramatically." According to Mr. McWhirter, when Mr. Nason left on vacation on August 6, 2010, "his tasks were very limited...he couldn't produce at a viable level" and he was working at an ever increasingly slower pace.

[90] In response to counsel's suggestion that TBO's accommodation of Mr. Nason was in fact working in early August 2010, Mr. McWhirter testified that he and Mr. Berezowski were working at a "rate that could not be sustained" and were being "severely impacted by the extra workload." In responding to questions about TBO's August 18, 2010 meeting with Mr. and Ms. Nason, Mr. McWhirter denied that Mr. Nason had been told to look for alternate work or that he was WSIB's responsibility now.

[91] Mr. McWhirter agreed that TBO had no direct contact with Mr. Nason between an October 2010 meeting and April 2012. According to Mr. McWhirter, TBO received copies of all of Mr. Belcamino's physiotherapy reports and was therefore generally aware of Mr. Nason's progress and condition. He agreed that TBO did not contact Mr. Nason over this period of time, testifying that the personal relationship had broken down and they were respecting Mr. Nason's privacy.

[92] Mr. McWhirter testified that he interpreted Mr. Nason's April 26, 2012 letter to TBO as a request for a meeting to discuss his return to work. He agreed that he called WSIB on or about May 4, 2012 because of Mr. Nason's letter. He agreed that he had done so to discuss TBO's obligations in regard to Mr. Nason returning to work. At that time, TBO realized that they were not obligated to return Mr. Nason to work. Mr. McWhirter interpreted Mr. Nason's June 11, 2012 letter in the same way.

[93] Mr. McWhirter was cross examined on TBO's January 22, 2013 "Termination of Employment" letter to Mr. Nason. Mr. McWhirter testified that TBO had come to the conclusion that Mr. Nason was in fact requesting termination in his January 9, 2013 letter to them. According to Mr. McWhirter, TBO had previous employees who had requested termination in order to pursue other occupations. Mr. McWhirter testified that TBO was simply granting Mr. Nason's request to be terminated.

[94] When asked to point out where in the January 9, 2013 letter Mr. Nason requested to be terminated by TBO Mr. McWhirter was unable to do so. Mr. McWhirter was unable to point to any letter in which Mr. Nason expressly requested termination. Mr. McWhirter testified that TBO's January 22, 2013 letter was actually a response to the overall "situation."

[95] Mr. McWhirter testified that in January 2013, TBO had no current objective information as to Mr. Nason's restrictions. He agreed that TBO did not ask Mr. Nason about his restrictions, saying that it would not have mattered because they would have needed independent information.

[96] Mr. McWhirter agreed with counsel's suggestion that Mr. Nason did not expressly accept TBO's rescission of his termination. It was his evidence that Mr. Nason had impliedly done so by continuing to pay his portion of the premiums for the company benefit plan and by continuing to receive benefits from the plan. Mr. McWhirter denied that Ms. Nason requested that Mr. Nason be removed from the company benefit plan in April 2013.

[97] Mr. McWhirter agreed that TBO was not experiencing financial undue hardship as a result of accommodating Mr. Nason during the summer of 2010. When asked if bringing Mr. Nason back to work in 2013 would have caused TBO financial undue hardship at that time, Mr. McWhirter testified that it would not have if Mr. Nason would have been able to return to his full duties. If Mr. Nason would have returned to work on modified duties, Mr. McWhirter felt that there would have been financial hardship.

[98] Mr. McWhirter testified that a new part-time employee would not have alleviated the extra burden on him and Mr. Berezowski in August 2010. He reiterated that this would have in fact made the situation worse because either he or Mr. Berezowski would have had to take yet more time to train a new and unskilled employee.

[99] On re-examination, Mr. McWhirter testified that, as a result of being in regular communication with WSIB and receiving copies of Mr. Nason's physiotherapy progress reports, TBO understood the extent of Mr. Nason's condition and restrictions. He listed the modifications to his work duties as no gripping, no exposure to vibration, no heavy lifting, no long term positioning of the elbows or wrists.

Douglas Robinson

[100] Mr. Robinson is a financial advisor and is TBO's benefits program broker with Sun Life. He testified that Mr. Nason first applied for LTD benefits in November 2010. Mr. Robinson assisted Mr. Nason with this application. He testified that he did not "force" Mr. Nason to apply for LTD benefits. Mr. Robinson testified that Mr. Nason was approved for LTD benefits and continues to receive them.

[101] Mr. Robinson testified that Mr. Nason has never provided him with any information about a change in his employment status at TBO.

The Position of the Plaintiff

[102] The plaintiff submits that the defendant discriminated against him because of his disability with respect to his employment at TBO. The plaintiff submits that this court has jurisdiction to award the plaintiff damages for this infringement of his human rights if the primary cause of action is wrongful dismissal, as in this case.

[103] The plaintiff is asking this court to order TBO pay him monetary compensation for their infringement of his human rights as follows:

1. \$112,387.20 representing lost wages for the period August 18, 2010 to January 22, 2013;
2. \$ 35,000.00 for injury to the plaintiff's dignity and self-worth and for the breach of his human rights over the period June 14, 2010 to January 22, 2013; and,
3. \$ 35,000.00 for injury to the plaintiff's feelings, dignity and self-worth as a result of allegedly being terminated on January 22, 2013 because of his disability.

[104] In addition to damages claimed under the *Code*, the plaintiff is seeking damages of \$84,333.00, being 20 months' salary in lieu of notice for wrongful dismissal. The plaintiff is also requesting \$75,000.00 in aggravated damages for the alleged bad faith manner of dismissal and \$50,000.00 punitive damages to punish and deter employers from acting as TBO allegedly did in terminating Mr. Nason on January 22, 2013.

[105] The plaintiff submits that the defendant breached his human rights:

- a) When TBO failed to investigate his need for workplace accommodation once they became aware of his disability in June 2010;
- b) When TBO put him on leave on August 18, 2010; and,

- c) When TBO failed to investigate his disability related needs between August 18, 2010 and January 22, 2013.

[106] The parties agree that Mr. Nason was diagnosed with bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome and bilateral double crush syndrome on June 14, 2010. The plaintiff submits that the evidence, including that of Mr. Nason, establishes that the plaintiff suffered symptoms only at night and not during the day while at work at TBO. Although Mr. Nason was approved for WSIB benefits in July 2010 as a result of his condition being work related, he continued to work at TBO until August 6, 2010 when he left on vacation.

[107] The plaintiff submits that Mr. Nason was fulfilling all work related tasks between June 14, 2010 and August 6, 2010. The plaintiff submits that Mr. Nason's evidence on this point is corroborated by Mr. Bellin, a co-worker. The plaintiff submits that there is no medical evidence before this court that suggests that Mr. Nason had workplace restrictions or limitations during the summer of 2010. The plaintiff submits that TBO did not discuss Mr. Nason's abilities, restrictions or accommodations with Mr. Nason during this time. The plaintiff submits that TBO made unilateral assessments as to Mr. Nason's limitations based on their understanding of his condition.

[108] The plaintiff submits that TBO then put Mr. Nason on leave when he returned from vacation on August 18, 2010 without having any medical evidence as to his limitations, without consultation with Mr. Nason and without making any inquiries as to Mr. Nason's disability related needs. While there was limited contact between TBO and Mr. Nason in August, September and October 2010, the plaintiff submits that TBO made no effort whatsoever to contact Mr. Nason between October 2010 and the spring of 2012. The plaintiff submits that Mr. Nason's two letters to TBO in April and June of 2012, inquiring about a return to work, were ignored by TBO.

[109] Mr. Nason underwent five surgeries between April 2011 and August 2012, all related to his disability. The plaintiff submits that Mr. Nason underwent these surgeries only because he was off work and only in an attempt to alleviate his night time symptoms. The plaintiff submits

that Mr. Nason was fully recovered from each surgery and able to return to work within days or weeks after each surgery. The plaintiff submits that TBO never attempted to contact Mr. Nason after any of his surgeries to inquire about his condition or restrictions.

[110] The plaintiff submits that TBO then proceeded to terminate Mr. Nason's employment on January 22, 2013 without being in possession of any objective medical information that confirmed Mr. Nason's condition at that time or what restrictions and/or accommodations might be required to allow Mr. Nason to return to his previous employment position with TBO.

[111] The plaintiff submits that these facts substantiate their submission that TBO failed in its duty to accommodate Mr. Nason between June 14, 2010 and January 22, 2013. It is submitted that TBO's knowledge of Mr. Nason's disability as of June 2010 triggered their duty as an employer to accommodate him, pursuant to the *Code*. The plaintiff submits that this duty required TBO to make appropriate inquiries about their employee's condition, abilities and restrictions and to then accommodate these restrictions to allow Mr. Nason to perform his employment duties.

[112] The plaintiff submits that TBO did not discuss any of these matters directly with Mr. Nason nor did they request this information from third parties. The plaintiff submits that TBO's unilateral decision to put Mr. Nason on leave on August 18, 2010 without having made any of the required inquiries is a clear breach of his human rights and of TBO's duty to accommodate.

[113] The plaintiff submits that TBO thereafter committed a continuing breach of his human rights between August 2010 and January 2013 by failing to make any inquiries directly of Mr. Nason as to his ongoing condition, restrictions or limitations. The plaintiff submits that Mr. Nason, on two separate occasions in the spring of 2012, wrote to TBO in an attempt to arrange a meeting to discuss his return to work. The plaintiff submits that both were ignored by TBO.

[114] The plaintiff submits that TBO was legally required to accommodate Mr. Nason's employment with them, or his return to their employment, up to the point of undue hardship.

The plaintiff submits that TBO bears the onus of establishing undue hardship and has not done so in regard to Mr. Nason's condition in August of 2010 and January 2013.

[115] The plaintiff submits that monetary compensation for human rights infringements can include damages for lost wages and CPP contributions as well as compensation for injury to dignity, feelings and self-respect. The plaintiff submits that he is entitled to damages for lost wages between August 18, 2010 and January 22, 2013 in the amount of \$112,387.00. It is submitted that this damage award should not be reduced to reflect WSIB benefits received during this period because he will be required to repay WSIB if awarded damages for lost wages.

[116] The plaintiff submits that a further "general damage" award of \$35,000.00 for the ongoing breach of his human rights between June 14, 2010 and January 22, 2013 is appropriate. During this period of time, the plaintiff submits the defendant failed in their obligation to investigate his disability related needs. On August 18, 2010 he was placed on leave without medical evidence as to his ability to work subject to accommodation. They thereafter failed to investigate or inquire about his disability related needs between August 18, 2010 and January 22, 2013, including ignoring two letters from the plaintiff in which he alleges he expressed a desire to return to work.

[117] The plaintiff submits that a further "general damage" award of \$35,000.00 should be ordered because of the defendant's summary termination of Mr. Nason without ascertaining or attempting to ascertain Mr. Nason's functional abilities as of January 2013 or TBO's capacity to accommodate him. This damage award is submitted to be appropriate to compensate Mr. Nason for injury to his dignity and self-worth resulting from this termination.

[118] The plaintiff submits that he was terminated without cause by TBO effective January 22, 2013. It is submitted that TBO's purported period of "working notice" to April 26, 2013 is meaningless because Mr. Nason was not receiving income from TBO between January 22, 2013 and April 26, 2013. The plaintiff submits that an employer cannot rescind the termination of an employee without the employee's consent. The plaintiff submits that Mr. Nason did not, expressly or impliedly, consent to TBO's rescission of his termination. It is submitted that

termination ends the employment contract and an employer cannot thereafter unilaterally revive it. The plaintiff submits that he is entitled to 20 months' pay in lieu of notice. The plaintiff submits that Mr. Nason had been employed by TBO for 19 years. His position as an orthotic technician was unique with no other similar positions available in the Thunder Bay area.

[119] In addressing the issue of mitigation, the plaintiff submits that TBO's offer to re-employ Mr. Nason is irrelevant. Firstly, it is submitted that an employee is not obligated to accept an offer of re-employment from a former employer that has discriminated against him and refused to accommodate him. Secondly, it is submitted that TBO's purported offer of re-employment was conditional on Mr. Nason undergoing a functional abilities assessment.

[120] The plaintiff submits that the manner of termination should attract aggravated and punitive damages in the amounts of \$75,000.00 and \$50,000.00 respectively.

The Position of the Defendant

[121] The defendant submits that the plaintiff has never pleaded a continuing breach of TBO's duty to accommodate Mr. Nason between August 18, 2010 and January 22, 2013 despite amending the Statement of Claim three times. The defendant submits that the Amended Statement of Claim alleges an infringement of the plaintiff's human rights only on August 18, 2010 and on January 22, 2013. The defendant submits that the plaintiff has advanced the ongoing breach claim only in its closing submissions. To give effect to this aspect of the claim would be procedurally unfair, according to the defendant.

[122] The defendant submits that all or some of the plaintiff's claim for damages under the *Code* are outside the applicable limitation period and therefore statute-barred. The *Code* requires that a claim for an alleged infringement of a person's human rights be brought within one year after a single incident of an alleged infringement or, if there were a series of incidents, within one year after the last incident. The defendant submits that this claim was issued on August 3, 2013 and that any alleged infringement of the plaintiff's human rights pre-dating August 3, 2012 is statute-barred. In the alternative, the defendant submits that the two year general limitation

period under the *Limitations Act*, 2002 S.O. 24 applies to bar any aspect of the claim pre-dating August 3, 2011.

[123] The defendant submits that the plaintiff bears the onus of establishing a *prima facie* case of discrimination under the *Code* before an alleged failure to accommodate can be considered. The defendant submits that the plaintiff has not made out a *prima facie* case of discrimination. The defendant concedes the plaintiff suffers from a disability but submits that he has not suffered an adverse impact due to his disability. The defendant submits that the plaintiff was placed on leave on August 18, 2010 and WSIB Loss of Earning benefits initiated to provide the plaintiff with an income while he was recovering from his disability in the hope that he would be able to return to work when recovered. The plaintiff continues to receive the WSIB benefits. The defendant submits that the plaintiff has not suffered any adverse impact and has not made out a *prima facie* case of discrimination.

[124] If the defendant has made out a *prima facie* case of discrimination, the defendant submits that it has been established that TBO fulfilled its duty to accommodate the plaintiff's needs to the point of undue hardship over the summer of 2010. The defendant submits that TBO immediately modified Mr. Nason's duties upon learning of his condition in June 2010. TBO was aware of how physically onerous performing cast modifications was. TBO therefore no longer required Mr. Nason to do this task. The defendant submits that Mr. Nason was allowed to work at a slower pace, was allowed frequent rest breaks to do stretching exercises and was given extensive paid time off to attend any physiotherapy or medical appointments. TBO also prohibited Mr. Nason from using the company computer over lunch break, knowing that the use of a keyboard could aggravate his condition.

[125] The defendant submits that Mr. Nason's condition progressively worsened, despite these accommodations. The defendant submits that Mr. Nason's productivity was down at least 50% by August 2010. Mr. McWhirter and Mr. Berezowski were required to work late on evenings and on weekends to maintain overall productivity. The evidence of Mr. McWhirter was that he and Mr. Berezowski were each working an additional 12 to 13 hours per week to counter the decrease in Mr. Nason's productivity. The defendant submits that in August 2010, TBO was

aware that Mr. Nason's condition was worsening and that the situation was unsustainable. At this time they chose to place Mr. Nason on leave to allow him to recover from his injuries while drawing WSIB benefits.

[126] The defendant submits that the concept of accommodation to the point of undue hardship must be analyzed contextually. The defendant submits that TBO is a small, privately held company with only two or three technicians working at any one time. The loss of 50% productivity in one of these employees is suggested to have placed an undue hardship on the daily operations of TBO. The defendant submits that paying an employee to do minimal tasks, representing a fraction of the essential duties of his employment position, while at the same time requiring others to step in and fulfill these duties, is an undue hardship on a small business.

[127] If it is established that Mr. Nason's human rights were infringed as a result of TBO failing to accommodate his disability, the defendant submits that any monetary compensation he may be entitled to as a result should not be equivalent to income allegedly lost between August 18, 2010 and January 22, 2013. The defendant submits that Mr. Nason's receipt of WSIB Loss of Earning benefits is in lieu of any cause of action he may have against TBO. The defendant submits that the plaintiff is barred from advancing a claim against TBO for lost income during any period of time he received WSIB Loss of Earning benefits.

[128] In the alternative, because WSIB benefits received by Mr. Nason are not repayable if he receives compensation for lost wages, the defendant submits that the plaintiff's loss of income claim against TBO should be reduced by the amount of WSIB benefits received during the same period of time. The defendant submits that this results in only a nominal claim for lost income for the period August 18, 2010 to January 22, 2013.

[129] The defendant submits that the plaintiff's claim that he was wrongfully dismissed by TBO on January 22, 2013, must fail because it has not been established that he was in fact dismissed. The defendant provides four grounds for this submission.

[130] First, the defendant submits that Mr. Nason is still an employee of TBO. The defendant submits that Mr. Nason has never advised Sun Life, the company benefit provider, that he is no longer an employee of TBO. The defendant submits that Mr. Nason continues to pay his personal share of the premiums for this coverage. He has also applied for and received LTD benefits through Sun Life. Mr. Nason also continues to claim dental benefits on this plan. The defendant submits that Mr. Nason has held himself out to third parties as an employee of TBO after the date of his alleged termination.

[131] Second, the defendant submits that Mr. Nason's contract of employment with TBO has been frustrated, barring a claim for wrongful dismissal. The defendant submits that Mr. Nason's disability made his return to work in January 2013 impossible. The defendant points to the evidence of Mr. Belcamino and the position taken by WSIB in support of their suggestion that Mr. Nason was suffering from permanent restrictions which precluded him from returning to work for TBO. The defendant also submits that Mr. Nason successfully applied for both CPP disability benefits and LTD disability benefits. The defendant submits that the only logical inference to be drawn from this evidence is that Mr. Nason was disabled and unable to return to his former position with TBO. As a result, the plaintiff's condition frustrated the employment contract and TBO was not obliged to provide reasonable notice of termination or pay in lieu thereof.

[132] Third, the defendant submits that Mr. Nason requested termination and that TBO simply complied with this request. The defendant submits that the evidence establishes that on several occasions prior to January 22, 2013, Mr. Nason made inquiries, both directly and indirectly, about a "severance package" he may be entitled to from TBO. It is suggested that his representative made similar inquiries after January 22, 2013. The defendant submits that Mr. Nason's inquiries were reasonably interpreted by TBO as an indication that Mr. Nason wanted to end his employment with TBO and move on. The defendant submits that TBO complied with Mr. Nason's request such that the January 22, 2013 termination was consensual.

[133] Finally, the defendant submits that TBO withdrew or rescinded Mr. Nason's termination before it took effect. The plaintiff submits that the termination letter expressly stated that the

termination was not effective until April 19, 2013. On February 8, 2013, TBO, having reconsidered its position, emailed the plaintiff asking him to disregard the January 22, 2013 termination letter. This was followed by a meeting between the parties at which time TBO advised Mr. Nason that he had not been terminated and that his job was open to him pending medical clearance. The defendant submits that TBO's purported termination of Mr. Nason never took effect and was rescinded prior to the effective date of termination. In these circumstances, according to the defendant, there has been no dismissal.

[134] In the event this court finds that Mr. Nason was wrongfully dismissed by TBO on January 22, 2013, the defendant submits that the 20 months' pay in lieu of notice requested by the plaintiff is excessive. The defendant submits that the appropriate range of pay in lieu of notice for an employee of the plaintiff's age, years of service and skill set is 11 to 14 months.

[135] The defendant submits that the plaintiff failed to make reasonable efforts to mitigate his damages by refusing to accept TBO's offer of re-employment on February 26, 2013 and in not making efforts to find alternate employment. The defendant submits that TBO advised Mr. Nason in an email on February 8, 2013 that they would like to meet with him to discuss his potential return to work and that they would be happy to have him back if he was "willing and able." At a meeting on February 26, 2013, TBO offered Mr. Nason his job, subject to medical clearance. The defendant submits that all the plaintiff had to do was provide confirmation from a medical professional that he was able to return to work at TBO. The defendant submits that a reasonable person would have accepted this offer of re-employment if truly ready and able to return to work.

[136] The defendant submits that any damages awarded to the plaintiff for pay in lieu of notice should be reduced by the amount of WSIB Loss of Earnings and pension benefits received during the same period. The defendant submits that there is no evidence before this court to allow me to conclude that Mr. Nason's WSIB benefits are repayable if he receives damages for wrongful dismissal.

[137] The defendant submits that there is nothing in the defendant's alleged conduct in the manner of dismissal that warrants an award of aggravated damages. The defendant submits that there is no evidence of any significant animosity between the parties in January 2013. The defendant submits that TBO sent the January 22, 2013 termination letter because they had a reasonable belief that this was what Mr. Nason wanted. TBO thereafter sent the February 8, 2013 email and met with Mr. Nason on February 26, 2013 to discuss re-employment. The defendant submits that there is no evidence of insensitivity or bad faith on the part of TBO in their dealings with Mr. Nason such that aggravated damages should be ordered.

[138] The defendant submits that there is no basis whatsoever to award punitive damages to the plaintiff.

The Issues to be Determined

1. For the period June 14, 2010 to January 22, 2013, did the defendant discriminate against the plaintiff because of the plaintiff's disability. Did the defendant fail to accommodate the plaintiff's disability-related needs to the point of undue hardship;
2. Was the plaintiff's employment with the defendant terminated without cause on January 22, 2013;
3. If the plaintiff was wrongfully dismissed by the defendant, what is the appropriate notice period and what are his damages;
4. Is the plaintiff entitled to damages pursuant to the *Code* as a result of his termination on January 22, 2013.

DISCUSSION

For the period June 14, 2010 to January 22, 2013, did the defendant discriminate against the plaintiff because of the plaintiff's disability. Did the defendant fail to accommodate the plaintiff's disability-related needs to the point of undue hardship?

[139] The relevant sections of the Ontario *Human Rights Code* are:

Employment

5.(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

Disability

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.

Accommodation

17. (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.

Civil Remedy

46.1(1) If, in a civil proceeding in a court, the court finds that a party to the proceeding has infringed a right under Part 1 of another party to the proceeding, the court may make either of the following orders, or both:

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.

[140] The plaintiff bears the initial onus of establishing a *prima facie* case of discrimination under the *Code*. If the plaintiff does so, the inquiry shifts to whether or not the defendant has fulfilled its duty to accommodate to the point of undue hardship. If the defendant is unable to establish that it has accommodated the plaintiff's disability related needs to the point of undue hardship, discrimination will be found to have occurred. *Simcoe Condominium Corporation No. 89 v. Dominelli*, 2015 ONSC 3661 at para. 40.

[141] The duty to accommodate has both procedural and substantive obligations. The procedural component requires that the employer take steps to understand the employee's disability-related needs and undertake an individualized investigation of potential accommodation measures to address those needs. The substantive component of the analysis considers the reasonableness of the accommodation offered or the employer's reasons for not providing accommodation. The employer bears the onus of demonstrating what considerations, assessments and steps were undertaken to accommodate the employee to the point of undue hardship. The purpose of the duty to accommodate in an employment context is to ensure that an employee with a disability has the opportunity to continue to perform the essential duties of his or her employment if his or her needs can be accommodated without causing undue hardship to the employer. *Ellis v. General Motors of Canada Ltd.*, 2011 HRTO 1453, paragraphs 6 and 28.

[142] The standard of "undue hardship" infers that some hardship is acceptable. Among the relevant factors that may be considered when assessing an employer's duty to accommodate an employee to the point of undue hardship are the financial cost of the possible method of accommodation, the relative interchangeability of the workforce and facilities and the prospect of interference with the rights of other employees. The analysis of whether an employer has accommodated an employee up to the point of undue hardship must be done using common sense and flexibility in the context of the factual situation presented in each case. *British*

Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U. [1999] 3 S.C.R. 3 at paragraphs 62 and 63.

[143] The test for undue hardship is not total unfitness for work in the foreseeable future. If the characteristics of a disability are such that the proper operation of the business is hampered excessively or if an employee with such a disability remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate him or her, the employer will have satisfied the test. The duty to accommodate is compatible with general labour law rules, including both the rule that employers must respect employees' fundamental rights and the rule that employees must do their work. The employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future. *Hydro-Quebec and Syndicat des employe-e-s techniques Professionnelles et de bureau d'Hydro-Quebec*, 2008 SCC 43 at paragraphs 18 and 19.

[144] The Ontario Human Rights tribunal commented on the respective obligations and boundaries of employees and employers in the accommodation process. In accommodating the needs of an employee, the employee must cooperate in the facilitation of such accommodation by providing the required information to the employer on which the latter can attempt to create a solution and participate meaningfully in the accommodation dialogue. Assuming the employee actually wants to return to work and that the employer wants to assist the employee back to work, the employee must communicate the ability, not just the desire, to return to work. The needs are what is required to be accommodated – what issues relating to the employee's disabilities need to be dealt with to allow that person to successfully perform the essential duties of the job. *Jeffrey v. Dofasco Inc.* [2004] O.H.R.T.D. No. 5 at paragraphs 183 and 184.

[145] In addressing their substantive duty to accommodate, an employer does not have to create a new position for the employee, fundamentally change working conditions, assign the essential duties of an employee to others or change the essential duties and requirements of a position so that an employee can meet them. *Perron v. Revera Long Term Care Inc.* 2014 HRTO 766 at paragraphs 15 and 16.

[146] On June 14, 2010, Mr. Nason was diagnosed with bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome and bilateral double crush syndrome. It has been established that he was suffering from a disability within the meaning of section 10. (1) of the *Code*. TBO was aware of Mr. Nason's condition from the time of his diagnosis. Mr. Nason remained actively employed by TBO until August 18, 2010 at which time he was removed from his employment position because of his disability. Mr. Nason remained off work until January 22, 2013, when his employment with TBO ended.

[147] The plaintiff has failed to establish a *prima facie* case of discrimination for the period June 14, 2010 to August 18, 2010. During this period of time, Mr. Nason was employed on a full time basis and received his normal salary. Mr. Nason's disability-related needs were accommodated by TBO from the time of his diagnosis until he was put on leave on August 18, 2010. During this period of time, Mr. Nason did not suffer any adverse impact in regard to his employment at TBO. He has therefore failed to establish a *prima facie* case of discrimination for this period of time.

[148] The plaintiff has established a *prima facie* case of discrimination because of his disability with respect to his employment at TBO for the period August 18, 2010 to January 22, 2013. On August 18, 2010, he was placed on leave because of his disability. His salary was terminated and he began to draw WSIB benefits. His status remained unchanged until he received the termination letter on January 22, 2013. As the plaintiff has established a *prima facie* case of discrimination for this period of time, the first issue to address is whether or not the defendant fulfilled the procedural and substantive components of their duty to accommodate Mr. Nason's disability-related needs to the point of undue hardship when he was placed on leave on August 18, 2010.

[149] I reject the defendant's submission that the plaintiff has failed to properly plead a continuing failure to accommodate between August 18, 2010 and January 22, 2013. This specific allegation is found in paragraph 45 of the Amended Statement of Claim. I also reject the defendant's submission that the plaintiff's claims are outside the one year limitation period set out in the *Code*. The theory of the plaintiff's case is that TBO infringed his human rights as a

result of a series of related actions between June 14, 2010 and January 22, 2013. The limitation period set out in section 34(1) of the *Code* begins to run one year from the last in a series of incidents. The Statement of Claim was issued on August 3, 2013, within the limitation period.

Disability and Accommodation Prior to August 18, 2010

[150] The analysis of the defendant's duty to accommodate over the relevant time period requires findings of fact and an assessment of the credibility of Mr. Nason and Mr. McWhirter. At issue is the true extent of Mr. Nason's disability, his ability to perform the essential duties of his job and the extent of accommodation that he required, and which was provided, over the summer of 2010. While he continued to work full time for TBO until August 18, 2010 and suffered no discrimination over this period of time, what occurred between June and August 18, 2010 is relevant to what occurred on August 18, 2010 and thereafter.

[151] Mr. Nason was adamant that his symptoms only bothered him at night and that he was able to "do my job", as he put it. He was resentful that TBO took him off cast modifications and eliminated his use of the company computer over his lunch hour. Mr. Nason insisted that he could have continued to do cast modifications without difficulty and that his overall pace of work was not affected during the summer of 2010. In contrast to this evidence, on cross examination Mr. Nason acknowledged that he had been having trouble gripping tools at work and was required to work at a "slightly slower pace". He also conceded that he was required to attend numerous physiotherapy appointments and that he interrupted his work routine to do stretching exercises for his hands and wrists.

[152] Mr. Nason completed a WSIB Worker's Report of Injury on June 24, 2010. When asked to describe his injury and the work he believed may have caused it, he wrote "pain and numbness in the wrist, hand and fingers of both and pain in the neck, shoulder and arm on the left side. Modify, close up, vacuum form grind casts and braces etc." In a June 23, 2010 WSIB memo to file, the worker recorded Mr. Nason having told her that "in the past 6 months (his) symptoms has gradually increased to the point where he was losing grip strength and always had tingling in his hands...he continually drops things...he is no longer doing any rasping as he finds

that the most taxing.” Mr. Belcamino’s June 28, 2010 report noted a significant grip strength differential between Mr. Nason’s right and left hands.

[153] In his August 27, 2010 report, Dr. Binhammer of the WSIB Hand Speciality Program wrote that Mr. Nason reported that “his numbness and tingling gets worse at night...he can also get symptoms while on the phone or gripping a steering wheel.” Mr. Ramcharitar, a WSIB Return to Work Coordinator, summarized his August 27, 2010 discussion with Mr. Nason in a report dated August 27, 2010. Mr. Nason apparently told Mr. Ramcharitar that he was on “modified duties” between June 14, 2010 and August 6, 2010, and that he “was managing” with modified duties. Mr. Nason also reported that “he continues to have numbness in the finger tips with shooting pain into the wrists and elbows” and that “orthotic technician duties would be problematic for him at this time.”

[154] In my opinion, this evidence refutes the plaintiff’s submission that there is no medical evidence from the time period June 14, 2010 to August 18, 2010 that suggests that Mr. Nason was experiencing symptoms during the day. Mr. Nason’s description of his condition as told to third parties is at odds with what he told this court.

[155] Mr. McWhirter’s evidence as to the extent of Mr. Nason’s disability and its impact on his ability to perform his job was quite different. TBO felt it necessary to remove heavy duties and cast modifications from Mr. Nason’s job scope. He needed rest breaks, breaks for stretching and time off for physiotherapy appointments. Productivity declined dramatically. Mr. McWhirter disagreed with Mr. Bellin’s evidence that nothing really changed with Mr. Nason over the summer of 2010.

[156] Having heard the evidence of Mr. Nason and Mr. McWhirter and having read the reports of third parties, I find that Mr. Nason has significantly minimized the extent of his disability and the impact it had on his ability to do his job over the summer of 2010. Generally speaking, I was less than impressed with Mr. Nason as a witness. He displayed significant animosity and belligerence toward his former employers. I found his credibility questionable. Having heard Mr. McWhirter testify and having observed him as a witness, I was left with the impression that

TBO generally acted in good faith in their dealings with Mr. Nason. I found Mr. McWhirter to be generally credible. Having said that, it was obvious that TBO struggled when trying to navigate through the various employment issues confronting them in regard to Mr. Nason. Where Mr. McWhirter's evidence differs from that of Mr. Nason, I prefer and accept the evidence of Mr. McWhirter. I place little weight on the evidence of Mr. Bellin. While he may have worked in close proximity to Mr. Nason, he would have had little appreciation for Mr. Nason's true productivity.

[157] My findings on TBO's accommodation of Mr. Nason over the summer of 2010 and on whether that accommodation had reached the point of undue hardship by August 18, 2010 will therefore be based primarily on the evidence of Mr. McWhirter and that of objective third parties.

[158] Mr. McWhirter was told by Ms. Nason that Mr. Nason had gone to the hospital on June 10, 2010 because of his condition. Mr. McWhirter was aware that Mr. Nason had been having issues with his wrists for several years. Mr. McWhirter testified that he read Dr. Wilberforce's initial report and diagnosis. Mr. McWhirter testified that he received copies of both WSIB reports and Mr. Belcamino's physiotherapy progress reports. Mr. McWhirter was very familiar with the duties of an orthotic technician. Mr. McWhirter testified that he and his co-owner sat down with Mr. Nason to discuss his condition and limitations in June 2010 and continued to monitor the situation over the summer of 2010. I accept this evidence.

[159] Pursuant to TBO's knowledge of Mr. Nason's condition and their knowledge of the physical requirements of a technician's job, modifications were put in place for Mr. Nason. It was agreed that he would be allowed to work at a pace compatible with his condition. Mr. Nason was allowed rest breaks at his discretion and breaks to perform stretching exercises. He was told not to use the computer at lunch and to rest his hands and wrists instead. He was allowed extensive paid time off as requested to attend physiotherapy and medical appointments. Most significantly, he was no longer required to do cast modifications, a job that Mr. McWhirter knew was physically demanding. Mr. Nason's evidence that he was not consulted and that all changes were made unilaterally is not credible.

[160] In my opinion, the steps taken by TBO satisfy the substantive component of their duty to accommodate Mr. Nason's disability. Mr. McWhirter testified that despite these accommodations, the overall situation got worse. He testified that Mr. Nason's condition continued to deteriorate and his productivity declined to the point where it was 50% or less of what it should have been. I accept this evidence.

[161] Mr. McWhirter testified that TBO employed only two technicians at this time, one of whom was Mr. Nason. As Mr. Nason's productivity decreased, Mr. McWhirter and Mr. Berezowski were required to work evenings and weekends, each working an additional 12 to 13 hours per week, to maintain productivity and to keep pace with orders. This represents approximately 2/3 of a full time position. Mr. McWhirter testified that he and his co-owner came to realize that this was simply not sustainable. He testified that it made no sense to keep Mr. Nason on the payroll. TBO felt it was in the best interests of TBO and of Mr. Nason that he be put on leave, allowed to draw the WSIB benefits for which he was qualified and given time away from the workplace to recover from his injuries. I find this to be logical and reasonable.

[162] A determination of whether an employer has accommodated a disabled employee to the point of undue hardship must take account of the specific fact situation and apply common sense. An employer is not required to create a new position for the employee. An employer is not required to make fundamental changes to the employee's job scope or working conditions. Hardship becomes undue when an employee is no longer able to fulfill the basic obligations of his employment position, despite accommodations.

[163] I am persuaded that TBO fulfilled the procedural and substantive components of their duty to accommodate Mr. Nason. TBO is a small business in which all aspects of the operation are familiar to the owners. To a large extent, they work in close proximity to or alongside their employees. They know what is going on in their shop on a day to day basis. TBO understood Mr. Nason's disability and they acted proactively to accommodate that disability by significantly altering his employment duties over the summer of 2010. Despite such accommodations, his condition worsened and his ability to fulfill his employment obligations decreased beyond the point of viability. Keeping him on as an active employee beyond this point would have required

further fundamental changes to his job duties as well as hiring another technician to do what Mr. Nason could no longer do.

[164] I find that as of early August 2010, TBO had fulfilled their duty to accommodate Mr. Nason to the point of undue hardship. Having done so, their decision to put him on unpaid leave on August 18, 2010 was not an infringement of Mr. Nason's right to equal treatment with respect to employment. This aspect of the plaintiff's claim is dismissed.

August 18, 2010 to January 22, 2013

[165] The plaintiff's position is that TBO continued to discriminate against Mr. Nason on an ongoing basis between the date that he was put on leave and the January 2013 dismissal. The essence of this claim is that TBO failed to inquire as to Mr. Nason's various treatments and progress over this period of time and therefore failed in the procedural aspect of their duty to accommodate him. The plaintiff seeks damages equivalent to his lost wages over this period of time.

[166] Mr. Nason attended several medical appointments in Toronto immediately after he was put on leave in August 2010. The results of these were shared with TBO as they became available. A multi-party meeting was held on October 5, 2010. Mr. Nason's status was fully discussed at that time. Presumably, Mr. Nason's proposed treatment plan was disclosed to TBO at that time. If it was not, it should have been.

[167] Mr. Nason underwent surgery to address his condition on five occasions between April 2011 and August 2012. Mr. Nason testified that the only reason he underwent these five surgeries was because he was off work and he hoped that the surgeries would alleviate his night-time symptoms. I found this testimony to be incredible. Mr. Nason was implying that the surgery was not really necessary. This evidence is directly contradicted by Mr. Nason's February 6, 2011 representations to WSIB (see paragraph 40 herein).

[168] Mr. Nason testified that he was ready and able to return to work shortly after each surgery. I do not accept Mr. Nason's evidence on this point. At no point over the course of the

surgeries did he directly provide any medical information to TBO that he was sufficiently recovered to return to work. My perception was that Mr. Nason was again minimizing the severity of his condition in an attempt to establish that he was, at all times, able to return to work at TBO with minimal accommodation.

[169] Mr. Nason's surgeries were each followed by appointments with Mr. Belcamino who provided progress reports to WSIB. Mr. McWhirter testified that he received copies of these reports. He also testified that he was generally aware of Mr. Nason's various surgeries. In Mr. Belcamino's June 23, 2011 report, he noted Mr. Nason's restrictions as including vibration, gripping and squeezing. His July 28, 2011 report noted Mr. Nason's limitations as gripping and manual tasks. Mr. Belcamino's September 9, 2011 report noted Mr. Nason's limitations as bending, twisting, gripping and manual tasks. Of note, in this report Mr. Belcamino states that Mr. Nason cannot resume either regular or modified duties. Mr. Belcamino's April 18, 2012 report notes Mr. Nason's limitations as gripping, grasping, vibration and squeezing.

[170] In a July 24, 2012 report, Mr. Belcamino noted multiple impairments and stated that Mr. Nason had permanent restrictions. Mr. Belcamino testified that the passage of two years with multiple surgeries and little or no improvement led him to conclude that Mr. Nason could not return to his previous employment without permanent restrictions. The July report was followed by a September 12, 2012 report in which Mr. Belcamino indicated that Mr. Nason was unable to lift, push, pull or use upper extremities at that time. Limitations were noted as gripping and manual dexterity. In his evidence, Mr. Belcamino fairly pointed out that these various restrictions and limitations did not preclude all such activity.

[171] Mr. McWhirter testified that TBO was generally aware of Mr. Nason's condition and lack of progress. He agreed that TBO did not contact Mr. Nason. The evidence also established that Mr. Nason did not contact TBO directly to advise of his medical condition and progress. He did write to TBO in April and June of 2012 to initiate return to work discussions. Mr. McWhirter agreed that this was the case and testified that TBO responded by telephone in unsuccessful attempts to schedule a meeting. I accept Mr. McWhirter's evidence that TBO did so.

[172] The next contact between the parties was the exchange of letters and some telephone calls in January 2013. At no point in time, up to and including January 2013, did Mr. Nason provide any information to TBO, medical or otherwise, that he was physically *able* to return to work, what restrictions he may have had and what accommodation he felt would be necessary. To this point in time, TBO did not actively solicit this information from Mr. Nason or third parties. Mr. Nason had by now come to the conclusion that TBO did not want him back. He repeatedly inquired about a severance payment from TBO. TBO came to the conclusion that Mr. Nason did not want to return to work at TBO. TBO's January 22, 2013 termination letter resulted from this breakdown in communication.

[173] I am not persuaded that TBO discriminated against Mr. Nason or infringed his human rights between August 18, 2010 and January 22, 2013. The defendant submits that TBO failed in the procedural aspect of their duty to accommodate. However, the accommodation process is not a one way street. A disabled employee who wants to return to work must cooperate in the facilitation of accommodation by providing the information necessary to allow the employer to attempt to create solutions. A disabled employee must communicate the *physical ability*, not just the desire, to return to work.

[174] Mr. Nason did not do so. I accept that he wanted to return to work. This was communicated to TBO. What he failed to provide to his employer was any form of confirmation that he was physically able to do so. I find this particularly puzzling in light of the seriousness of Mr. Nason's condition, the number of surgeries he underwent and the pessimistic tone of post-operative physiotherapy reports, the latter noting permanent restrictions and impairments. I have expressly commented only on Mr. Belcamino's progress reports. There are numerous other reports in the record, from Mr. Nason's family doctor and from WSIB, that paint a similarly pessimistic picture of Mr. Nason's condition and prognosis. In all of the circumstances, I find that it was reasonable for TBO to require independent confirmation of Mr. Nason's physical condition and restrictions before allowing him to return to work.

[175] While giving evidence at trial, Mr. Nason described himself as a disabled employee able to return to work if accommodated. In light of Mr. Nason's serious disability in 2010 and his

series of surgeries between April 2011 and August 2012 without any appreciable progress, it was incumbent on him, as a disabled employee who truly wanted to return to work, to provide authoritative confirmation that he was physically able to do so. How can an employer assess their ability to accommodate a disabled employee in their particular workplace without knowing the level of disability and what accommodations are necessary?

[176] TBO could not meaningfully comply with their obligation to accommodate Mr. Nason without a reasonable level of cooperation and communication from him. In my opinion, TBO did not discriminate against Mr. Nason between August 18, 2010 and January 22, 2013. This aspect of the plaintiff's claim is dismissed.

Was the plaintiff's employment with the defendant terminated without cause on January 22, 2013?

[177] Mr. Nason wrote to TBO on January 9, 2013, informing the defendant that WSIB had told him that TBO no longer had a position for him. Having apparently received this information, Mr. Nason requested a discussion about his "severance package." TBO responded on January 14, 2013, advising Mr. Nason that he has not been terminated, laid off or severed. TBO advised Mr. Nason that, based on their understanding of his current condition and restrictions, there was no modified work currently available to him. He was further told that TBO would re-evaluate their position when his doctors and WSIB had cleared him for a return to work at TBO.

[178] Mr. McWhirter testified that he and his co-owner subsequently thought the matter over and came to the conclusion that Mr. Nason was in fact asking to be terminated. TBO then wrote Mr. Nason the January 22, 2013 "Termination of Employment" letter. Mr. Nason was given a 12 week notice period "in respect of ongoing benefits paid by your employer." The notice of termination was expressly effective April 19, 2013.

[179] I reject the defendant's submission that Mr. Nason remains an employee because he remains on the company benefit plan and pays his portion of the premiums. I accept the

evidence of Ms. Nason that she requested, on her husband's behalf, to have him moved onto a family plan based on her employment with TBO and that TBO refused to do so. In my opinion, this was a disingenuous tactical attempt by TBO to establish that Mr. Nason remained an employee and that he had not been terminated.

[180] I also reject the defendant's submission that Mr. Nason's contract of employment with TBO was frustrated as of the date TBO purported to terminate Mr. Nason. The issue of whether the termination of the employment contract of a disabled employee is a wrongful dismissal or the frustration of the employment contract depends on the facts of the case. Where an employee is permanently unable to work because of a disabling condition, the doctrine of frustration of contract applies because the permanent disability renders performance of the employment contract impossible, such that the obligations of the parties are discharged without penalty. Frustration of contract is established if at the time of termination there is no reasonable likelihood of the employee being able to return to work within a reasonable time. (*Fraser v. UBS*, 2011 ONSC 5448, paragraphs 15 and 32) The onus is on the employer to prove that the contract was frustrated. (*Naccarato v. Costco*, 2010 ONSC 2651 at para. 13)

[181] TBO has failed to establish that there was no reasonable likelihood of Mr. Nason being able to return to work within a reasonable time of January 22, 2013. The evidence does establish that Mr. Belcamino was of the opinion that Mr. Nason had permanent restrictions. The evidence also establishes that WSIB felt that Mr. Nason's recovery had plateaued and that he had reached his maximum medical recovery. WSIB also concluded that Mr. Nason was partially permanently impaired as of the end of 2012. However, whether Mr. Nason could have returned to work, or attempted to return to work, with accommodations, had not been sufficiently explored as of January 2013 such that one could conclude that there was no reasonable likelihood of it happening in the future.

[182] TBO's statements in their January 14, 2013 letter to Mr. Nason undermine their position on this issue. In this letter they advised Mr. Nason that nothing is currently available but they will "re-evaluate" his desire to return to work if and when medically cleared. This was followed by TBO's February 8, 2013 email to Mr. Nason. In this email, TBO indicated a willingness to

meet with Mr. Nason and discuss his potential return to work, saying they would be “happy to have him back” if he was willing and able to return. The parties then met on February 26, 2013, with counsel. At this time, TBO once again told Mr. Nason that his position remained available to him, with his return to work subject to medical assessment. On these facts, TBO has not established frustration of Mr. Nason’s employment contract with TBO.

[183] I also reject the defendant’s submission that Mr. Nason requested termination and that they were simply granting his request by terminating him on January 22, 2013. Mr. McWhirter acknowledged that Mr. Nason never expressly requested that he be terminated. Mr. McWhirter testified that TBO was responding to the overall “situation” when they sent the January 22, 2013 termination letter. Again, in their January 14, 2013 letter to Mr. Nason, TBO confirmed to Mr. Nason that he remains an employee of TBO and that they had no intention of changing that situation. TBO cannot credibly suggest, one week later and with no further communication from Mr. Nason, that they were changing their position and granting his unspoken request to be terminated.

[184] Finally, I reject the defendant’s submission that TBO rescinded or withdrew their termination of Mr. Nason’s employment prior to its effective date. The January 22, 2013 termination letter stated that Mr. Nason’s termination was effective April 19, 2013. As Mr. Nason was not working and not being paid, the only advantage of this to Mr. Nason was to maintain his coverage on the Sun Life benefit package available to TBO employees. In their February 8, 2013 email, TBO asked Mr. Nason to “disregard” the January 22, 2013 termination letter until the parties could meet, “at which time the letter may be formally rescinded.” This was then done at the February 26, 2013 meeting. Mr. Nason testified that he did not accept TBO’s purported withdrawal of his termination. Mr. McWhirter agreed that this was so.

[185] The issue is whether an employer can unilaterally withdraw an unconditional termination of an employee’s employment contract prior to the effective date of termination. In my opinion, an employer cannot do so. In support of their position to the contrary, the defendant referred me to *Roche v. Sameday Worldwide, a division of Day and Ross Inc.*, [2014] N.J. No. 57 (NFLD SC). In *Roche*, a long-term employee was told to return to work after the termination of

her LTD benefits. The employer was under the mistaken belief that the employee had been medically cleared to return to work. Upon learning that this was not the case, the employer revoked the termination. At the same time, when the employee first learned of her “dismissal”, she wrote to the employer pointing out the error and expressly asking the employer to reconsider her termination. The Newfoundland Supreme Court held that the employee had not been dismissed because the termination was immediately revoked and the revocation was “acknowledged” by the employee.

[186] In my opinion, *Roche* is distinguishable from the fact situation before me. I find the notice period prior to the April 19, 2013 “effective date” of Mr. Nason’s termination to be of no significance because he was not an active employee. The termination was therefore effective when sent on January 22, 2013. Unlike the employee in *Roche*, Mr. Nason never expressly or impliedly consented to TBO’s attempt to withdraw their termination of his employment. TBO and Mr. Nason have not agreed to cancel the termination or to continue the employment relationship. TBO’s unilateral continuation of Mr. Nason’s benefits cannot alter the contractual relationship.

[187] I find that TBO terminated Mr. Nason’s employment without cause on January 22, 2013. At this point, the contract of employment was at an end. TBO’s attempt to unilaterally withdraw that termination and restore the employment relationship is of no effect.

What period of notice was the plaintiff entitled to and what are his damages?

[188] Having found that Mr. Nason did not request termination, that the employment contract was not frustrated and that TBO could not withdraw their termination of Mr. Nason, it follows that the plaintiff was terminated by TBO without cause on January 22, 2013. I must now determine the notice period/damages the plaintiff is entitled to, whether the plaintiff is entitled to *Code* damages because of this termination, whether he has made reasonable efforts to mitigate his damages and whether his damages should be reduced to account for the WSIB Loss of Earnings and pension benefits received during the notice period. The plaintiff also seeks aggravated and punitive damages in relation to the termination.

[189] The plaintiff was 43 years old at the time of termination. In January 2013, he had been an employee of TBO for 19 years in total with 17 years of active service. The plaintiff is a technician who has developed a certain skillset. The evidence establishes that there are no similar employment positions available in the immediate Thunder Bay area. The plaintiff had not found other work by the date of trial. Based on these facts, the plaintiff submits that Mr. Nason is entitled to 19 months' pay in lieu of notice; the defendant suggests 13 months is appropriate.

[190] In my opinion, the plaintiff is entitled to 15 months' pay in lieu of notice. Mr. Nason is a relatively young man whose skill set was obviously a valuable asset to TBO. He was earning a modest wage at TBO. Mr. Nason's age, skills and experience should enable him to find comparable employment in the Thunder Bay area. There is conflicting evidence as to whether the plaintiff received automatic annual pay raises while with TBO and whether or not this would have continued after 2010. I am not persuaded on a balance of probabilities that his pay would have automatically increased annually after 2010. Mr. Nason's average bi-weekly pay in 2010 was \$1,754.65 gross, equivalent to \$3,799.00 per month gross. Mr. Nason is therefore entitled to damages for wrongful dismissal in the amount of \$56,985.00 representing 15 months' pay in lieu of notice.

Is the plaintiff entitled to damages pursuant to the Human Rights Code as a result of his termination on January 22, 2013?

[191] The plaintiff and defendant agree that Mr. Nason was an employee with a disability in January 2013. The significant body of evidence before me leads me to the conclusion that his ongoing physical disability was a factor in TBO's decision to terminate him at that point. I have found that Mr. Nason did not ask to be terminated. However, he certainly made TBO aware that an end to his employment with them was "in play" by January 2013. In my opinion, TBO's decision to terminate him when they did was opportunistic. As Mr. McWhirter conceded, TBO was reacting to the overall "situation" by terminating Mr. Nason when they did. They had been dealing with a disabled employee for two and one-half years. The personal relationships had

deteriorated significantly by that point. TBO saw an opportunity to terminate a disabled employee and they attempted to exploit that opportunity.

[192] A decision to terminate an employee based in whole or in part on the fact that the employee has a disability is discriminatory and contrary to the *Code*. See *Wilson v. Solis Mexican Foods Inc.*, 2013 ONSC 5799 at para. 56. It was obvious that TBO's termination had a negative impact on the plaintiff. However, I note that Mr. Nason had been under the care of a psychologist since April 28, 2012. His depression appears to me to have been caused primarily by his disability and his being on leave as a result of that disability, rather than the fact of his January 2013 termination. In my opinion TBO's efforts to ameliorate the situation very shortly after January 22, 2013, while ineffective on a contractual basis, are relevant to the quantum of *Code* damages the plaintiff is entitled to. I feel that an appropriate award under s. 46.1(1) of the *Code* is \$10,000.00. This takes into account the importance of the right infringed, the impact on the plaintiff and the particular circumstances of this unusual case.

[193] I find that there is no merit to the submission that the plaintiff is entitled to aggravated or punitive damages as a result of the manner of dismissal. The manner of dismissal was not unduly insensitive nor was it in bad faith. I accept the evidence of Mr. McWhirter when he testified that things "were confusing" in January 2013. In light of the content of Mr. Nason's letters to TBO in which he inquired about a severance package I find that TBO did not act in bad faith in terminating him on January 22, 2013.

[194] There is no merit to the submission that the defendant failed to make reasonable efforts to mitigate his damages. I do not think it is reasonable to suggest that the plaintiff should have pursued alternate employment in Winnipeg, Manitoba, a city more than five times the size of Thunder Bay and 500 miles away. I also find, in the circumstances of this case, that it would have been unreasonable to require Mr. Nason to have accepted the defendant's conditional offer of re-employment in order to mitigate his damages. At that point in time, feelings were hardened, the parties were polarized and the employment and personal relationship had been irrevocably damaged. In all the circumstances of this case, the damages awarded should not be reduced on account of mitigation.

[195] The final issue to be addressed is whether or not the damage award for wrongful dismissal should be reduced to reflect the WSIB Loss of Earning and pension benefits received by Mr. Nason over the 15 month notice period. The plaintiff submits that these benefits should not be deducted because Mr. Nason will be required to repay WSIB from the damage award. The only evidence relied on in support of this submission is a letter from WSIB to Mr. Nason dated March 8, 2012. WSIB informed Mr. Nason that “Termination pay is considered earnings...if you receive termination pay while receiving WSIB benefits, this would be considered earnings and your WSIB benefits would be reduced by the amount of termination pay received.” No viva voce evidence was led on this issue and no law has been provided to me by the plaintiff in support of his position.

[196] The defendant submits that any damage award for pay in lieu of notice should be reduced by Loss of Earnings and pension benefits received from WSIB. In support of this proposition, the defendant cites *Antonacci v. Great Atlantic & Pacific Co. of Canada*, [2000] O.J. No. 40 (ON CA) in which, at paragraph 17, the Ontario Court of Appeal stated that “all Workers’ Compensation benefits received during the 24 month notice period are deductible from the damage award” for wrongful dismissal. The defendant also relied on the more recent decision of *Jensen v. Schaeffler Canada Inc.*, 2011 ONSC 1342, a decision of this court. In *Jensen*, Haines J. reviewed and followed the reasoning of the Alberta Court of Appeal in *Salmi v. Greyfriar Developments Ltd.* [1985] A.J. No. 1089 in concluding that “the benefits paid by WSIB on account of lost earnings during the notice period must be credited against the loss.”

[197] I accept the position of the defendant on this issue. I find that all WSIB benefits received by Mr. Nason during the 15 month notice period are deductible from the \$56,985.00 damage award. I decline to “gross up” the non-taxable WSIB benefits for the purpose of this calculation, as suggested by the defendant.

[198] The parties are in agreement that the defendant received WSIB Loss of earnings and pension benefits in 2013 in the amount of \$1,300.00 bi-weekly or \$2,814.50 monthly and in 2014 in the amount of \$1,312.00 bi-weekly or \$2,840.00 monthly. WSIB benefits received during the 15 month notice period beginning January 22, 2013 are therefore \$30,960.00

(February to December 2013 inclusive) and \$11,360.00 (January to April 2014 inclusive) for a total of \$42,320.00 over the 15 month notice period. The net damages to be paid to the defendant by the plaintiff for wrong dismissal are therefore \$14,665.00.

CONCLUSION AND COSTS

[199] For the reasons given, damages are awarded to the plaintiff in accordance with paragraphs 192 and 198 of these reasons plus prejudgment and postjudgment interest.

[200] Success has been divided, however the defendant has been more successful than the plaintiff. If the parties cannot agree on costs, they shall file brief written submissions not exceeding five pages exclusive of their respective Bills of Costs and copies of any offers to settle. The plaintiff shall file his costs submissions within 15 days of the release of these reasons; the defendant shall file their costs submissions within 15 days thereafter.

The Hon. Mr. Justice J.S. Fregeau

Released: December 30, 2015

CITATION: Nason v. Thunder Bay Orthopaedics Inc., 2015 ONSC 8097
COURT FILE NO.: CV-13-280
DATE: 2015-12-30

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Darren Nason

Plaintiff

and –

Thunder Bay Orthopaedics Inc.

Defendant

JUDGMENT

Fregeau J.

Released: December 30, 2015