CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4573

Heard in Montreal, July 13, 2017

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Grievance regarding the Company's failure to accommodate Conductor L. McFarland's family status.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Ms. McFarland had previously applied for, and was granted a compassionate leave of absence (3 months), by the Company in order to fulfill her child care responsibilities. Although it was understood subsequent requests were forthcoming in order to deal with her ongoing status, the Company informed Ms. McFarland on December 19, 2014 that no further leaves would be granted regardless of her situation.

The Union contends that the Company improperly and arbitrarily discontinued Ms. McFarland's family status accommodation, and has failed to provide any insight or reasoning whether the accommodation (unpaid leave), caused an undue hardship.

The Union further contends that the Company has failed to recognise Ms. McFarland's family status as requiring accommodation, which has resulted in discriminatory treatment in addition to undue hardship. As a result, the Union submits the Company has acted contrary to the terms of the Collective Agreement, the Company's Workplace Accommodation Policy, and the Canadian Human Rights Act. The Union further contends that the Company has failed to demonstrate that to do so would constitute undue hardship.

The Union seeks a determination that the Company has violated the above-cited Collective Agreement, policies and legislation, including the Grievor's human rights (family status). The Union further seeks an order that the Company cease and desist from these violations and that it be directed to comply with the above-cited Collective Agreement, policies and legislation. The Union seeks a determination that the Company has not met its burden of accommodating the Grievor's status to the point of undue hardship.

For these violations, and in accordance with the Union's letter of December 30, 2016, the Union seeks an order that the Grievor be made whole, including but not limited to:

- An order that the Grievor be reinstated immediately;
- An order for payment of any and all lost wages, with interest, including: Lost wages from March 30, 2015 through June 9, 2015;

- Lost wages from a shortfall due to a lower wage rate after leaving CP in June 2015 to the date of reinstatement;
- Payment for any lost benefits including expenses incurred, payable forthwith, all plus interest, to be accrued to the date of payment;
- Damages for pain and suffering in an amount to be determined;
- Any other remedy the Arbitrator deems just.

The Company disagrees and denies the Union's request.

FOR THE UNION:
(SGD.) D. Fulton
GENERAL CHAIRMAN

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

C. Clark	– Assistant Director, Labour Relations, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
D. Edward	– Senior Vice General Chairman, Calgary
R. Finnson	– Vice General Chairman, Wynyard
S. Hicks	– Local Chairperson, Calgary
L. McFarland	– Grievor, Calgary

AWARD OF THE ARBITRATOR

On January 9, 2015, the Union filed a Step Two Grievance, as per Article 71 of the Collective Agreement, in which it alleges that the Company is discriminating against Ms. McFarland based on her family status in denying her an unpaid leave.

On May 9, 2015, the Union filed a Step Three Grievance, stating that the Company was still discriminating against Ms. McFarland based on her family status and demanding that the Company accommodate Ms. McFarland, as per its duty under the *Human Rights* legislation, and make her whole for any losses incurred by the Grievor due to the Company's failure to accommodate her.

On December 30, 2016, the Union wrote a letter to the Company specifying the particulars of the make whole remedy of the Step Three Grievance, including a request for general damages and reinstatement of the Grievor (including all lost wages and benefits). In the alternative, the letter serves as a Step One appeal pursuant to Article 71 of the Collective Agreement, in which the Union seeks: reinstatement, payment of all lost wages (including: lost wages from March 30, 2015, through June 9, 2015; lost wages from a lower wage rate after leaving CP in June 2015 to the date of reinstatement), payment of lost benefits, damages for pain and suffering in an amount to be determined and any other remedy that the Arbitrator deems just.

The Facts

To paint an accurate picture of the present case, a detailed account of the events that unfolded throughout 2014 and 2015 is required.

Ms. Lauree McFarland was hired by the Company in January 2007 as a Conductor and qualified in September 2012 for a position of Locomotive Engineer.

Ms. McFarland is married to Peter Ranieri. They have two children: a son, born in 2004 and a daughter, born in 2008. The former, by the time he was six or seven years of age, was diagnosed with significant anxiety coupled with a tendency towards violent behavior and difficulties with focus and self-regulating behavior.

Ms. McFarland and her husband lobbied for their son to remain in a public school and not a specialized institution. However, that implied that they had to make professional arrangements to take care of their son's special needs. Therefore, one parent must be available anytime in case their son has an episode, which can happen multiple times a week. Only the parents are able to calm the child.

During all the time relevant to this dispute, Mr. Ranieri was employed at Fluor Canada as a Senior Design Engineer. The nature of his work, contrary to the Grievor's, made it possible for him to leave work and go to his son's school in a relatively short period of time. Because of this, the Grievor's husband had been the dedicated caregiver for their son during the Grievor's first seven years of employment at CP.

However, in the spring of 2014, Mr. Ranieri was informed by his employer that he would be required to travel to South Korea for a period of four to six months. The parents worried about their son's wellbeing, as Ms. McFarland's schedule did not allow the kind of flexibility that was needed to tend to her son's needs. The family explored different childcare solutions, since the Grievor would effectively be a single parent during that time and would be required to be at work for times exceeding the normal school day.

The family's physician, Dr. Kroetsch, was consulted and expressed concern over leaving Ms. McFarland's son without reliable parental support in case of an episode.

Finding no suitable childcare option that could accommodate the Grievor's work schedule and her son's special needs, the couple concluded that it was best that Ms. McFarland stay home to tend to her son and avoid that he be stressed by childcare.

In a letter, dated July 28, 2014, Ms. McFarland wrote to the Company's Labour Relations Department to request an unpaid personal leave of absence for childcare duties during her partner's four to six months absence, starting August 11, 2014. She made the request as per the Memorandum of Settlement, December 2, 2007 Appendices, Appendix 11 (Family Care).

Ms. McFarland later provided the Company with a letter from Fluor Canada, dated August 11, 2014, which stated that Mr. Ranieri was on a work assignment in South Korea from August to December 2014 and that he may be required to return overseas for additional trips from January through April 2015.

The Grievor also provided a letter from her family physician, dated August 12, 2014, in which Dr. Kroetsch stated:

> Unfortunately, due to the nature of [Ms. McFarland's son] condition, it is possible she may be called away at a moment's notice. As such, it is not feasible that she return to work even for a duration of modified hours during this time period.

By August 15, 2014, the Company had not approved the Grievor's leave. On that day, the Union's Vice President, Mr. Doug Finnson, spoke to the Director of Labour Relations, Mr. Dave Guerin, to discuss the Grievor's leave of absence. On August 16, 2014, Mr. Finnson sent an email to Mr. Guerin reiterating the Union's request. Later in the

afternoon, Mr. Guerin responded via email, stating that the Company could not grant the request for the full period due to operational reasons and added that it could only be granted from September 22 to December 8, 2014. Mr. Guerin also stated that local management was willing to work with the local Union representative to see if any yard assignment schedule could be accommodated for her until September 22, 2014.

Local management initially suggested that the Grievor take a day job in the yard, which would allow her to leave as soon as her replacement arrived. However, due to her son's immediate needs in case of an episode, Ms. McFarland indicated that this was not a possibility and that a leave of absence was required.

On August 27, 2014, the parties signed an agreement granting a compassionate leave of absence to the Grievor from September 1 to November 30, 2014, as per Article 64 of the Collective Agreement. The signed agreement was sent by Mr. Finnson through email and reminded Mr. Guerin that the two men should take time to discuss the extension of the leave prior to its end date in November 2014.

On November 6, 2014, Ms. McFarland wrote to Labour Relations at CP to request an extension of her leave of absence as her husband's overseas assignment had been prolonged. The Grievor mentions having continued her research into possible alternative daycare options, but that her family physician had deemed it best that a parent be home to tend to her son's needs.

On November 17, 2014, Mr. Finnson wrote another email to Mr. Guerin requesting a four months extension to the Grievor's current leave, corresponding to the return of Mr. Ranieri from his Korean assignment. The next day, Mr. Guerin responded to Mr. Finnson, inquiring as to the Grievor's husband date of return and the period of time during which he would stay.

On November 23, 2014, Mr. Dave Fulton answered that Mr. Ranieri would return for the holidays from December 20, 2014, to January 12, 2015 and that he would permanently come back at the end of April 2015. Mr. Fulton also mentioned that Ms. McFarland would return to work during her husband's presence in the country during the holidays. On November 25, 2014, Mr. Guerin replied that he thought the Grievor's husband would be returning in February and that the proposed extension would put the compassionate leave at a period of eight and a half months, well beyond the provision of the Collective Agreement. On the same day, Mr. Fulton reiterated to Mr. Guerin that Ms. McFarland was willing to work while Mr. Ranieri was in the country.

On November 27, 2014, Mr. Fulton provided Mr. Guerin a letter from Mr. Ranieri's employer, which indicates the prolongment of his overseas assignment. Mr. Fulton repeated the Grievor's commitment to protect her work during her husband's return to the country.

The letter from Fluor Canada, dated November 27, 2014, indicates that:

> Mr. Ranieri will be on a work assignment in South Korea from August 2014 to April 30, 2015, and may be required to return to South Korea for additional trips as required during 2015.

As Mr. Guerin was absent during that time, he was replaced by Mr. Mike Moran, who accepted to further prolong the Grievor's leave for an additional 20 days. On December 5, 2014, the parties, including the Grievor, signed an agreement to extend the leave to December 20, 2014.

During that time, Ms. McFarland developed an anxious condition resulting from the strain caused by her family and work obligations, compounded by the Company's opposition to accommodating her family duties in her husband's absence. For the Grievor, this feeling of hostility was reminiscent of the belittling, threatening and discriminatory behavior she experienced from three Company Officers in January 2013 and for which she wrote a letter of complaint to the Company. She received a letter of apology from one of the Officers. In June 2014, she filed a Step One Grievance concerning the violation of Unfit Clause by Assistant Superintendent Corey Wolack and a violation of the Company's Discrimination and Harassment Policy.

On December 15, 2014, Ms. McFarland saw her family physician for her condition. Mr. Kroetsch determined she was not fit to work and completed a Company form to this effect.

The following day, the Grievor learned from her husband that his holiday stay would be shortened to five days and that he would return to South Korea on December

26, 2014. Ms. McFarland advised her Union on December 17, 2014, which, in turn, forwarded the information to the Company.

On December 19, 2014, Mr. Guerin responded in the following way:

> Dave,
>
> In looking at this again, this case has now gone from an original request of four to six months to a request to expand this leave to just under nine months. The compassionate leave provision does not contemplate this length of time nor does it address a situation where the accommodation is also being made for the other spouse to go work overseas for an extended period of time. As you are also aware, an extension for compassionate leave was recently signed on December 5, 2014 to push this to four months duration, one month over the max compassionate leave timelines.
>
> No further leave will be granted under the circumstances of this case.

Ms. McFarland was informed of the Company's refusal on the same day. Upon learning of the Employer's demand that she returns to work, the Grievor felt like her life was falling apart and was distraught by the Company's refusal to grant her an extension for her leave of absence. This prompted her to file a complaint with the *Human Rights Commission* on December 20, 2014.

Also on December 20, 2014, the Grievor tried to contact Jacqueline Edwards by phone at the Company's OHS department. Since there was no answer, the Grievor left a voice message advising Ms. Edwards that she was off sick and that the department should have received medical documents from her physician to that effect.

In the interim, Assistant Superintendent Jason Inglis called the Grievor on her cellphone on December 22, 2014, and left her a message asking that she calls him back.

When the Grievor later listened to the message, she informed her Union Chair, Mr. Sean Hicks, of the situation and told him she was afraid of reprisal for filing a human rights complaint. Mr. Hicks offered to call Mr. Inglis on her behalf, which he did on December 23, 2014. Despite making several calls, Mr. Hicks was unable to join Mr. Inglis and while he left voice messages asking the latter to call him back, Mr. Inglis never did so.

On December 24, 2014, Mr. Fulton emailed Mr. Guerin to request that the Company accommodate the Grievor's parental needs when she would be medically fit to return to work. Mr. Guerin responded on the same day, stating that the accommodation would have to be done locally. On December 30, 2014, Mr. Finnson responded to Mr. Guerin and told him that he did not understand the need to start the accommodation process all over again and that it would only incur unnecessary delays.

Company records show that from December 7, 2014 to January 7, 2015, the Grievor was recorded as being on a leave of absence. On January 7, 2015, the Grievor's status changed from being on a leave of absence to being pulled out of service.

On January 11, 2015, Mr. Hicks wrote the following email to the Grievor:

> After our phone conversation on Thursday. Here is the information that you are requesting. I had called assistant superintendent of Calgary Jason Inglis on December 23, 2014 to discuss your temporary accommodations and had left him a couple of messages also with other things to discuss as well. Last Wednesday I actually had a live

> conversation with Jason and ask him what we were going to do about your accommodations. Jason had told me he was not willing to accommodate you and felt that you had went AWOL. I told him that was not the case that you have booked off sick and this is why I contacted him. So that being said Jason had told me that the company had no plans of accommodating you at the moment and also said you would be in for a statement and would also be sending you a registered letter with your statement package and a memo of closing in your file. This conversation took place Wednesday January 7th 2015. If there is any other information you need feel free to contact me at anytime.

On the same day, Ms. McFarland received a letter from Mr. Inglis, summoning her to attend an investigation concerning "[her] leave of absence from December 21, 2014 to current".

On January 12, 2015, Mr. Inglis had written a memorandum concerning the situation, which reads as follow:

> This memorandum is in regards to Lauree McFarland absent from the workplace without authorization. In August, Ms. McFarland was granted a compassionate leave of absence for a three (3) month period from September 1st 2014, until November 30th 2014. Then on December 5th, I granted Ms. McFarland an additional 3 week extension, returning December 20th 2014. On December 20th, I tried calling Ms. McFarland to make sure she was booking back on from her extended leave of absence, however there was no answer and no return phone call. I have since tried to contact Ms. McFarland on 4 separate occasions to which none have been answered. Date and times were as follows:
> 1. Dec 21, 2014 at 09:34 (office)
> 2. Dec 22, 2014 at 11:12 (Cell)
> 3. Dec 29, 2014 at 16:09 (office)
> 4. Jan 7, 2015 at 13:51 (cell)
>
> At no time has Ms. McFarland made any attempts to return my calls or contact me in any way. I have since removed Ms. McFarland from company service pending an investigation.

In early January 2015, the Grievor contacted OHS and spoke with Ms. Edwards, who told her that she had been out of the office and had not received her voice message. Ms. Edwards further instructed the Grievor to have a Company's Functional Abilities Form completed by her physician to receive insurance claims, which the Grievor did on January 15, 2015. During that visit to her doctor, she was referred to a psychologist to assist her in treating her anxiety issue. Ms. McFarland indicates that Ms. Edwards' answering machine did not mention that she was out of the office.

On January 16, 2015, Dr. Kroetsch wrote a note stating that:

> Ms. McFarland is currently under my care. I strongly advise her against attending a meeting regarding an investigation or hearing. She is not fit to accurately or fairly represent herself in this manner at this time.

On April 20, 2015, Ms. McFarland was initially cleared to work. However, due to the Company's request for additional information from her physician, she was not finally cleared by OHS until April 27, 2015.

Despite being cleared to work, Ms. McFarland had to first attend an investigation on April 29, 2015. The investigation was cut short due to harassing behavior from one of the Company's officers, Trainmaster Paul Sadler, who, at one point, stood over the Grievor and demanded she return her statement package. When Ms. McFarland refused, Mr. Sadler became animated in a threatening way and left the room. On May 28, 2015, the Grievor filed a Step One Grievance for CP's violation of their Discrimination and Harassment Policy and Collective Agreement by Mr. Sadler.

By way of letter dated May 2, 2015, the Grievor was informed that she had to attend another investigation on May 7, 2015 in connection with "[Her] work history from September 1st, 2014 to the present date, specifically the events leading up to [her] being held out of service on January 7th, 2015". In the meantime, Ms. McFarland was withheld from service without income.

The May 7, 2015, investigation lasted some six hours between 11:23 a.m. to 5:35 p.m. In addition to the aforementioned facts, Ms. McFarland indicated during the investigation that she did not know the full extent of the negotiations that were ongoing between her Union and the Company. For instance, she did not know what was communicated between the parties that would allow the Company to believe that she would be working during her husband's three weeks break during the holidays. The Grievor added that as she was off status in the CMC and that she thought she did not have to call CP to advise them she would not return to work on the 20th of December. Ms. McFarland said that she did not return Mr. Inglis' call of December 22, 2014, as her doctor had told her to deal only with OHS and not frontline managers in regards with her condition. She added that she was unaware that the Company had no idea of her whereabouts between December 20, 2014, and January 7, 2015, that she thought OHS would have communicated with them.

On May 26, 2015, the Company assessed a 30 days' suspension to the Grievor for having failed to properly advise any CP Officer that she had been off sick since December 21, 2014 until January 7, 2015, despite having received calls from Mr. Inglis

and having been aware that she had been called. The suspension was recorded as having started on May 7, 2015, the day of the investigation.

The suspension was grieved and settled on a without prejudice basis.

Upon requalifying as an Engineer/Conductor on June 8, 2015, the Grievor went back to work. However, upon her return, Ms. McFarland's anxious condition returned. The Grievor believed that her Employer would not accommodate her in the future if her husband was to be called away for work again. She feared further questioning, reprisal and harassment due to her past experience with the Company.

On June 9, 2015, the Grievor handed Mr. Inglis a resignation form and a letter which read:

> Dear Mr. Inglis:
> Please accept this letter as formal notification that I am leaving my position with Canadian Pacific Railway effective immediately.
> Thank you for the opportunities you have provided me during my time with the company.

In a letter dated July 11, 2017, the Grievor's physician wrote a letter in which he stated, in part:

> As has been previously documented in detail by Ms. McFarland in her employee statements, her employment with CP was not always easy. While she enjoyed the work immensely, work policies and interpersonal relationships took their toll on her personal well-being. The period of time following her leave was especially difficult.
>
> While she no doubts misses the opportunity to continue to work for the railway industry, I would agree with Ms. McFarland that, with respect to her health and overall well-being, she is better off pursuing other areas of employment.

From December 24, 2014, to March 30, 2015, the Grievor received compensation for her lost wages through the insurance company Manulife.

Analysis & Decision

The Union asserts that the Company failed to accommodate Ms. McFarland's family status and harassed her during the application process for her unpaid leave of absence. As a result, the Grievor felt that she had no choice but to resign, thus making her resignation void.

The Company argues that it did try to accommodate the Grievor by offering her a yard position but that, by refusing the suggestion, she discharged the Company from its duty to accommodate. Moreover, the Company has granted the Grievor her full three months' leave and even agreed to a three weeks extension beyond the delay provided for in the Collective Agreement. Additionally, since Ms. McFarland was either on an unpaid leave of absence or received benefits, she cannot be said to have suffered any wage losses.

In *Attorney General of Canada* and *Fiona Ann Johnstone*, the Federal Court of Appeal recognized that child care was part of family status and, thus, protected under the *Human Rights Act*:

> [74] In Conclusion, the ground of family status in the Canadian Human Rights Act includes parental obligations which engage the parent's legal responsibility for the child, such as childcare obligations, as opposed to personal choices. Defining the scope of the prohibited ground in terms of the parent's legal responsibility (i) ensures that the protection offered by the legislation addresses immutable (or constructively immutable) characteristics of the family relationship

> captured under the concept of family status, (ii) allows the right to be defined in terms of clearly understandable legal concepts, and (iii) places the ground of family status in the same category as other enumerated prohibited grounds of discrimination such as sex, colour, disability, etc.[1]

In the same decision, at paragraphs 94 to 97, the Court laid out a series of four factors that must be proven in order to establish discrimination. In *Tonka Misetich* and *Value Village Stores Inc.*, the adjudicator summarized these four factors as follow:

> a. The child must be under the parent's care and supervision;
> b. The childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to personal choice;
> c. The individual has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible; and
> d. The impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfilment of the childcare obligation.[2]

The adjudicator, upon a review of the jurisprudence of different tribunals on the matter, concludes that different courts have established somewhat different tests to establish discrimination for parental status. These various tests all aim to differentiate the notions of distinction from discrimination, namely, that not every negative impact or conflict with a family obligation is discriminatory. Hence, in order to establish said discrimination:

> The negative impact must result in real disadvantage to the parent/child relationship and the responsibilities that flow from that relationship, and/or to the employee's work. For example, a workplace rule may be discriminatory if it puts the employee in the position of having to choose between working and caregiving or if it negatively impacts the parent/child relationship and the responsibilities that flow from that relationship in a significant way.[3]

[1], 2014 FCA 110
[2] 2016 HRTO 1229, par. 36
[3] Ibid, par. 54

Once the applicant makes a case for *prima facie* discrimination, the onus shifts to the employer. As stated by the Supreme Court:

> [14] […]. The employer must demonstrate that it cannot accommodate the complainant without suffering undue hardship.
>
> [15] The factors that will support a finding of undue hardship are not entrenched and must be applied with common sense and flexibility (*Meiorin*, at para. 63; *Commission scolaire régionale de Chambly* v. *Bergevin*, [1994] 2 S.C.R. 525, at p. 546; and *Central Alberta Dairy Pool* v. *Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, at pp. 520‑21). For example, the cost of the possible accommodation method, employee morale and mobility, the interchangeability of facilities, and the prospect of interference with other employees' rights or of disruption of the collective agreement may be taken into consideration. Since the right to accommodation is not absolute, consideration of all relevant factors can lead to the conclusion that the impact of the application of a prejudicial standard is legitimate.[4]

In the present case, based on the evidence that was adduced before this Tribunal, I find that the Employer has erred in refusing twice to extend the Grievor's unpaid leave of absence: once on December 19, 2014, by Mr. Guerin and another time on January 7, 2015, without justification, from Mr. Inglis. Even though Ms. McFarland was booked off sick during January, the duration of her sickness leave was unknown and her husband was still away in South Korea. It was then pertinent for the Grievor to know she could be potentially accommodated if she was to be cleared for work before Mr. Ranieri's return.

I am satisfied that Ms. McFarland's situation met the four factors laid out in *Johnstone*: her son was clearly under her supervision, her obligations towards her son were not the result of personal choice, but rather stemmed from her son's special needs, she had made reasonable efforts to find alternative solutions and the Employer's

[4] *McGill University Health Centre (Montreal General Hospital)* v. *Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4

schedules and work conditions were clearly interfering with her obligations towards her son while her husband was gone away on temporary basis for professional reasons. Even in a yard position, Ms. McFarland could not have been in a position to quickly tend to her son in case of an episode. It must also be underlined that for the past seven years, it had been Mr. Ranieri who was the dedicated caregiver for the family's son and it was the former's employer that accommodated that role. The evidence discloses that the frequency of the episodes requires that a parent must be available to quickly go and calm the child.

As such, the Company had to treat her request for an extension in view of the *Human Rights Act*, and not solely the Collective Agreement. Indeed, the time limit set forth by the parties is not an accommodation rule, nor was it negotiated with the intent of limiting the Employer's duty to accommodate and, lastly, that any leave of absence exceeding that time limit can be qualified as undue hardship.[5]

The Company could not simply assert that operational requirements made it impossible to extend the Grievor's unpaid leave of absence, it had to prove it to the point of undue hardship. The Company has only presented these claims without presenting any evidence on the matter. Therefore, it has not demonstrated that the extension of the Grievor's unpaid leave of absence constituted undue hardship.

[5] *Syndicat de professionnelles et professionnels du gouvernement du Québec* c. *Lavoie*, D.T.E. 2003T-799 (QCSC), par. 43

Remains is the question of whether or not the Grievor's resignation can be qualified as constructed dismissal by the Employer's acts.

On that subject, learned authors Brown and Beatty explain that it is solely an employee's right to resign. Thus, in certain circumstances, employees can challenge an employer's assertion that they quit their job in a voluntarily manner. In such cases, arbitrators must determine the true intention of the grievor[6].

This is accomplished through an objective and subjective test, as stated by Arbitrator Finkelman in the seminal case on the matter:

> The act of quitting a job has in it a subjective as well as an objective element. An employee who wishes to leave the employ of the Company must first resolve to do so and he must then do something to carry his resolution into effect. That something may consist of notice, as specifically provided for in the Collective Agreement or it may consist of conduct, such as taking another job, inconsistent with his remaining in the employ of the Company.[7]

When considering whether an employee's resignation was deliberate or not, arbitrators can consider a wide variety of factors:

> […] If, on the facts of a case, the employee's statement was made on the spur of the moment, or out of anger and frustration, for example, it will typically be found to lack the subjective element that is necessary to establish a quit. 'Resignations' made under duress and undue pressure, emotional turmoil and stress, or provocation, or by persons whose mental and medical condition deprived them of the capacity to make such decisions rationally, are treated the same way. […]
>
> Whether an announcement of quitting will be found to be real depends, of course, on the facts of each case. Arbitrators take into account a wide range of factors, including the context in which the statement was made; the amount of time the employee had to reflect on his or her

[6] Brown & Beatty, section 7:7100 Resignation
[7] *Anchor Cap & Closure Corp. of Canada, ltd.* (1949), 1 L.A.C. 222, p. 223

> decision; whether the employee had the benefit of his or her union's advice; and what the employee did immediately thereafter. Putting a resignation in writing is usually taken to be objective evidence that the employee did intend to quit, but there can be circumstances, such as when the document is prepared by the employer, when it is not.[8]

The fundamentals of the applicable test for determining constructive dismissal have been laid out by the Supreme Court in *Farber* c. *Royal Trust Co. (1996)*[9]*.* Adjudicator Emrich, in *Palmer* v. *Canadian National Railway*, detailed the test in the following manner:

> [11] Thus Farber stands for the proposition that it is not a necessary element of constructive dismissal to find intention on the part of the employer to dismiss or intention to force the employee to resign. The focus is upon whether a reasonable employee in similar circumstances would perceive the changes to be so substantial to essential terms that the employer has repudiated the contract. The employer's resiliation gives rise to the employee's option to be released from further obligation to perform. In such circumstances, the employee's choice to leave cannot be construed as indicative of intention to resign. Thus cases which suggest that finding employer intention to terminate is a necessary element should not be considered authoritative.[10]

In *Canadian National Railway* and *Drew*, at paragraphs 186 and 187, the Arbitrator stated that a toxic work environment could result in constructive dismissal under two different approaches. The first one deems that there is an implied fundamental term in the contract that employees will be treated with civility, decency, respect and dignity and that, when that fundamental term is breached, an employee can claim constructive dismissal. The second approach is to determine if the conduct of the employer is so intolerable that a reasonable person would not be expected to persevere in the employment. In *Drew*, the grievor had been subjected to verbal abuse, was regularly belittled, had her job threatened and was subjected to yelling and swearing. The Arbitrator

[8] Brown & Beatty, precited, note 1
[9] [1997] 1 S.C.R. 846 (S.C.C.)
[10] [2001] C.L.A.D. No. 85

concluded that such conditions amounted to constructive dismissal under both approaches[11].

In the present case, after a very careful review of the evidence, I cannot come to the conclusion that Ms. McFarland has been constructively dismissed or that she otherwise did not intend to resign on June 9, 2015. Both subjective and objective elements were present in her decision.

Indeed, while the Employer was wrong in failing to accommodate the Grievor by extending her unpaid leave of absence and while its treatment of Ms. McFarland's case was far from impressive, it did not constitute constructive dismissal. These shortcomings, while reprehensible, fall within the Company's management rights, including the one to make mistakes. It is only when faced with an unreasonable exercise of such rights that management prerogatives will be considered to be abusive[12]. In the present instance, the Grievor's work conditions were not substantially or fundamentally altered so that a reasonable person, in similar circumstances, would come to the conclusion that the Employer had repudiated her contract: Ms. McFarland had been cleared to work, the question of another leave of absence was off the table and she was grieving or had grieved all of the Company's actions that she found violated her rights.

[11] 2009 CarswellNat 6808, par. 188
[12] *Centre hospitalier régional de Trois-Rivières (Pavillon Saint-Joseph)* and *Syndicat professionnel des infirmières et infirmiers de Trois-Rivières*, [2006] R.J.D.T. 337

While I sympathise with Ms. McFarland and understand that she felt she has been unfairly treated, the Company's actions do not amount to a substantial change in her work conditions.

Overall, the evidence adduced before me, beyond the Company's poor treatment of the request for accommodation and further investigation following the Grievor's return to work, indicate that lack or poor communication between all parties involved caused some misunderstandings and, in the end, made the whole experience more stressful and difficult for Ms. McFarland.

As such, I find that Ms. McFarland resigned intentionally on June 9, 2015, by way of a written letter a month after the May 7th investigation. For reasons best know to herself, the Grievor thought her resignation from CP would be her best option at the time.

However, I cannot ignore that the Company's lackluster treatment of the Grievor's situation has been a great source of distress for her. The Company's undue refusals to extend her unpaid leave, the summoning for an investigation while the Grievor was booked off sick and had asked for an accommodation (which Mr. Inglis was well aware of as of January 7, 2015), the enlargement of the scope of the May 7th investigation (from, originally, the Grievor's "absence between December 21, 2014, and current", to her "work history from September 1, 2014, to current") and the ensuing 30 days' suspension following the May 7th investigation all contributed to the Grievor's anxious condition. As

such, the Company's overzealous and rigid approach to Ms. McFarland's situation and the resulting impact on her health deserve to be compensated.

On the appropriate amount to compensate mental distress, I find it appropriate to cite Arbitrator McFetridge in **SHP 713**:

> 79. The amount of damages awarded depends on the seriousness and severity of the injury suffered. Expert evidence, including medical reports, would be a useful aide in the assessment of damages. However, expert evidence is not a requirement and damages can be determined through other means, including the credible testimony of the claimant. An award of $5000 is substantially less than the amount awarded by the Courts in a number of recent cases where there was little or no medical evidence to support a finding of mental distress. (see *Chappell* v. *Canadian Pacific Railway Company*, 2010 ABQB 441 (CanLII), 2010 ABQB 441 - $20,000; *Simmons* v. *Webb* 2008 CanLII 67908 (ON SC), (2008), 54 B.L.R. (4th) 197 (Ont. S.C.) - $20,000 ; Coopola v. *Capital Pontiac, Buick, Cadillac, GMC*, 2011 SKQB 318 (CanLII), 2011, SKQB 318 - $25,000)[13]

In the present case, it is clear that the Grievor's anxious condition, which made her unable to work for four months, was due and aggravated, in part, by the flurry of unnecessary administrative measures stemming from the Company's initial failure to properly accommodate Ms. McFarland's family status. The Grievor was directed by her physician to consult a psychologist in January 2015 following the pending issues with her Employer. As stated by her physician in his July 2017 letter, the period subsequent to her leave of absence was especially difficult for Ms. McFarland.

[13] The award if dated February 24, 2014. See also **CROA 3465**, where Arbitrator Picher cites a decision from arbitrator Shime's finding that $25,000 was an appropriate amount for harassment and violations of the implicit terms of the collective agreement.

Thus, for all of the above-mentioned reasons, the grievance is allowed, in part. While Ms. McFarland will not be reinstated, I nevertheless direct that the Company compensate the Grievor with the lump sum of $15,000.00 for her pain and sufferings.

July 27, 2017

MAUREEN FLYNN
ARBITRATOR