

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 4702

Heard in Montreal, October 9, 2019

Concerning

VIA RAIL CANADA INC.

And

UNIFOR COUNCIL 4000

DISPUTE:

Whether or not VIA has undertaken efforts to reasonably accommodate Mr. Mallet to the point of undue hardship pursuant to the provisions of the Collective Agreement and other applicable legislation.

1. Whether Mr. Mallet was the victim of sexual harassment pursuant to the collective agreement and other applicable legislation.
2. Whether VIA Rail conducted a fair and impartial investigation into the allegations of harassment and fulfilled its obligation to maintain a workplace environment free of harassment.

Whether Mr. Mallet had a right to reasonable accommodation and if so, whether he was accommodated to the point of undue hardship

THE UNION'S LEAVE to SUBMIT EXPARTE STATEMENT OF ISSUE:

Mr. Mallet participated in a hearing before the Canada Industrial Relations Board (CIRB) where the CIRB issued a decision in *Firmin Mallet, Canadian Brotherhood of Railway, Transport and General Workers and VIA Rail Canada Inc., 2014 CIRB 730*, ordering that his grievance be submitted to arbitration as follows: "The Union will forward Mr. Mallet's reasonable accommodation grievance to arbitration; any time limits in the collective agreement are hereby waived;"

During April of 2017 the respective solicitors for (a) Mr. Mallet (Mr. Brad Proctor), (b) VIA Rail Canada Inc. (Mr. William Hlibchuk attempted unsuccessfully to negotiate a "Joint Statement of Issue" within the meaning of the May 20, 20-4 Memorandum of Agreement Establishing the CROA&DR (the "CROA" Rules).

Accordingly, pursuant to the CROA Rules, Mr. Mallet seeks to submit an *ex parte* statement of issue to be arbitrated before CROA. In accordance with the CROA Rules and principles of procedural fairness and natural justice, Mr. Mallet seeks:

- An oral hearing before CROA;
- The submission of a comprehensive written statement of his position with supporting (a) evidence, (b) argument, and (c) authority in support thereof; and

- The ability to testify, call witnesses and cross examine adverse witnesses in support of his written statement of position;
- The ability to introduce expert evidence of a medical nature in support of his position.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

- Mr. Mallet, who resides in Dartmouth, Nova Scotia, commenced employment with VIA on or about 1998 as a Station Attendant in Halifax, Nova Scotia.
- Mr. Mallet is an openly homosexual man. Mr. Mallet believes that his sexual orientation was known to his VIA Co-workers, VIA supervisors and VIA.
- In 2007 Mr. Mallet began working with a co-worker, Mr. Jeff Cox. In 2009, Mr. Cox was promoted to Mr. Mallet's supervisor. During the time period 2007 to 2009, Mr. Mallet was exposed to an escalating campaign of harassment by Mr. Cox based on Mr. Mallet's sexual orientation.
- Mr. Mallet went off work on sick leave effective February 9, 2019 and presently remains a VIA employee absent on sick leave (without pay). Mr. Mallet's treating medical advisors, including Dr. Gregus, were of the opinion that Mr. Mallet's medical condition was caused, at least in part, by his employment and particularly the conduct of his supervisor, Mr. Cox. Mr. Mallet was gainfully employed and earning a livelihood with VIA prior to the treatment by Mr. Cox commenced.
- On or about January 21, 2010, Mr. Mallet filed a complaint against Mr. Cox pursuant to VIA's internal harassment policy. After an investigation by VIA, which Mr. Mallet contends was flawed and not conducted in a fair and impartial manner, VIA concluded, among other things, that Mr. Cox's conduct towards Mr. Mallet did not violate VIA's policy.
- During Mr. Mallet's sick leave he has provided VIA with various medical reports recommending, among other things, that VIA resolve the workplace issues between Mr. Mallet and his supervisor. Mr. Mallet's medical file contains recommendations from various medical practitioners including but not limited to Dr. Gregus (general physician), Dr. Waletynowicz (psychiatrist), Dr. Sperry (psychologist), Dr. MacDonald (psychiatrist) advising, among other things, that VIA needed to resolve Mr. Mallet's workplace issues and treatment by his supervisor, Mr. Cox. Mr. Mallet states that VIA failed to reasonably accommodate Mr. Mallet in his workplace in numerous ways including failing to adequately (a) inquire into and/or investigate, and (b) provide a reasonable accommodation. J
- Mr. Mallet's supervisor, Jeff Cox, remains the supervisor in charge of the Halifax, Nova Scotia station.
- As opposed to investigating the recommendations of Mr. Mallet's treating medical practitioners to resolve the situation with his supervisor, the Union and VIA attempted to return Mr. Mallet to work in a different city and province, being the Moncton, New Brunswick station. This return to work was unsuccessful and not compatible with the recommendations of Mr. Mallet's treating medical practitioners. There is a pending grievance in relation to this failed attempt to return Mr. Mallet to work.
- VIA has not resolved the issues between Mr. Mallet and his supervisor and Mr. Mallet remains off work on sick leave (without pay). This failure to accommodate Mr. Mallet has caused, or alternatively< materially contributed, to Mr. Mallet's present condition and losses.
- In an April 29, 2016, decision of the Nova Scotia Worker' Compensation Appeals Tribunal ("WCAT"), WCAT found that Mr. Mallet was, in fact, subjected to "work-related harassment" in the VIA workplace causing disablement.
- VIA, the Union and Mr. Mallet participated in a hearing before the *Canada Industrial Relations Board* ("CIRB") where the CIRB issued a decision in ***Firmin Mallet, Canadian***

Brotherhood of Railway, Transport and General Workers and VIA Rail Canada Inc, 2014 CIRB 730, ordering:

- The Union will forward Mr. Mallet's reasonable accommodation grievance to arbitration; any time limits in the collective agreement are hereby waived;"
- The grievance that Mr. Mallet sought to file in 2012 which has been ordered to be submitted to arbitration by the CIRB is:
 - *I would request that the Union file a grievance with VIA alleging a violation of the collective agreement wherein the Company refuses to make and have a reasonable accommodation for me, Firmin Mallet in a workplace that is free from harassment and that this violation of the refusal to accommodate has caused me the loss of wages and benefits and the right to work with VIA. I allege that the Company's actions are unjust, contrary to the collective agreement and the Human Rights act, Section 7. I request that the employer compensate me for all lost wages and benefits from the day the request to activate the proposed agreement on independent mediation."*
 - *As a result, Mr. Mallet seeks to be made whole through the following remedies:*
 - a) Reinstatement to his workplace in an environment free of harassment;
 - b) Any and all lost wages and benefits between the time Mr. Mallet left the workplace and reinstatement;
 - c) Damages arising out of any causal relationship and/or material contribution of Mr. Mallet's workplace to his current medical condition and loss of earnings and benefits.
 - d) General and special damages;
 - e) Punitive and aggravated damages; and
 - f) any and other remedy the Arbitration Board deems just and appropriate.
- Mr. Mallet reserves his right to supplement this ExParte Statement of Issue in his written statement, evidence and argument before CROA.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

- Mr. Mallet, who resides in Dartmouth, Nova Scotia, commenced employment with VIA Rail Canada Inc. ("**VIA Rail**") in 1998 as a Station Attendant in Halifax, Nova Scotia.
- Mr. Mallet is an openly gay man.
- In 2007 Mr. Mallet began working with a co-worker, Mr. Jeff Cox. In 2009, Mr. Cox was promoted to an in-charge position of the station (a Unionised position), with Mr. Mallet reporting to him.
- There is no record of any complaints between Mr. Mallet or Mr. Cox for the period of 2007 - 2009.
- On or about January 21, 2010, Mr. Mallet filed a complaint of harassment and discrimination pursuant to VIA Rail's internal harassment policy against Mr. Cox. No sexual element was raised in this complaint.
- A thorough investigation was conducted by VIA Rail into this complaint and concluded that there was no harassment. Nevertheless, in the course of the investigation VIA Rail facilitated a mediation session with Mr. Cox and Mr. Mallet. A proposed letter of understanding was drafted based on this proposed mediation session dated February 5, 2010. Mr. Mallet refused to sign this letter.

- Mr. Mallet went on sick leave effective February 9, 2010, and has not returned to work since that time, though he remains an employee of VIA Rail. Mr. Mallet's disability benefits ceased on or around November 2013.
- On May 12, 2011, Mr. Mallet filed a sexual harassment complaint under VIA Rail's internal harassment policy against Mr. Cox alleging inappropriate conduct related to his sexual orientation beginning in 2007.
- VIA Rail investigated the harassment claim and interviewed Mr. Mallet, Mr. Cox and their colleagues in relation to the allegations.
- In a letter dated September 6, 2011 VIA Rail concluded that based on the investigation it could not substantiate the allegations of harassment made by Mr. Mallet. However, in this same letter VIA Rail offered the service of a third party mediator in order to resolve any conflict and facilitate Mr. Mallet's return to work.
- On or around March 2011, Mr. Mallet was offered a return to work in the position of Stock Attendant in which he would not be reporting to Mr. Cox. This was refused by Mr. Mallet.
- On or around February 2, 2012, Mr. Mallet filed a sexual assault complaint with the police against Mr. Cox. Subsequent to this Mr. Cox then refused to participate in the proposed mediation. VIA Rail informed Mr. Mallet that the mediation could not be pursued due to Mr. Cox's refusal in a letter dated May 22, 2012.
- No appeal was filed by Mr. Mallet of either harassment investigation finding as was his right pursuant to VIA Rail's internal harassment policy.
- On or around March 30, 2012, Mr. Mallet requested that the Union pursue the grievance arbitration process and the mediation process (offered in the letter of September 6, 2011). The text of the grievance put forth by Mr. Mallet read as follows:

“I would request that the Union file a grievance with VIA alleging a violation of the collective agreement wherein the Company refuses to make and have reasonable accommodation for me, Firmin Mallet in a workplace that is free from harassment and that this violation of the refusal to accommodate has caused me the loss of wages and benefits and the right to work with VIA. I allege that the Company's actions are unjust, contrary to the collective agreement and the human rights act, section 7. I request that the employer compensate me for all lost wages and benefits from the day the request to activate the proposed agreement on independent mediation.”
- The Union decided not to file a grievance with respect to Mr. Mallet's complaint.
- On June 11, 2012, Mr. Mallet filed a complaint against the Union with the Canada Industrial Relations Board (“**CIRB**”) pursuant to section 97(1) of the Canada Labour Code (the “**Code**”) claiming that the Union had failed in their duty of fair representation (section 37 of the Code) in relation to the adjudication of his complaint against Mr. Cox.

- The CIRB held a hearing into the complaint and issued a decision in **Firmin Mallet, Canadian Brotherhood of Railway, Transport and General Workers and VIA Rail Canada Inc., 2014 CIRB 730**). The CIRB ordered, amongst others, the following:

“The Union will forward Mr. Mallet’s reasonable accommodation grievance to arbitration; any time limits in the collective agreement are hereby waived;”

- Mr. Mallet filed a human rights complaint with the Canadian Human Rights Commission (“**CHRC**”) on or around April 12, 2012.
- Mr. Mallet’s human rights complaint was not pursued by the CHRC and his file was closed on or around August 1, 2012.
- Mr. Mallet was considered by his medical doctors to be disabled during the course of his absence from work. Although VIA Rail attempted to accommodate Mr. Mallet by creating a position for him in the ticket sales office, Mr. Mallet was not cognitively or physically able to function in that job role. He resumed his absence for medical reasons following an unsuccessful trial in that position on or about spring 2014.
- At that time Mr. Mallet was declared totally unfit for work and his situation has not changed to VIA Rail’s knowledge.

VIA Rail’s Position

VIA Rail submits that it conducted a thorough, fair, and impartial investigation of the harassment complaints filed by Mr. Mallet and validly concluded that no harassment occurred. Despite this finding, VIA Rail exercised all due diligence to prevent any harassment or reprisal by:

- offering Mr. Mallet a transfer of into a position in which he would no longer report to Mr. Cox. Mr. Mallet refused this offer of transfer.
- offering to provide independent third-party mediation. This recourse was not pursued due criminal complaints against Mr. Cox by Mr. Mallet.
- providing a number of training sessions to their employees over on topics including bullying, respect and professionalism in the workplace.

Although the causality of Mr. Mallet’s long term disability that he developed between 2010 and the present day is unclear, VIA Rail did attempt to accommodate him by creating a position for him, which he was unable to fulfil. Given his complete unfitness for work, any other accommodations would be considered undue hardship.

FOR THE UNION:
(SGD.)
GENERAL CHAIRPERSON

FOR THE COMPANY:
(SGD.) D. Crossan for D. VanCauwenbergh
Director, Labour Relations

There appeared on behalf of the Company:

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|-------------|--|
| W. Hlibchuk | – Counsel, Norton Rose, Montreal |
| K. Houlihan | – Counsel, Norton Rose, Montreal |
| K. Chapados | – Specialist Advisor, Employee Relations, Montreal |
| S. Williams | – General Manager, Commercial Eastern Canada |
| R. Coles | – Human Resources Business Partner, Montreal |

C. A. Faucher – Student, Montreal
E. Houlihan – Specialist, Director Employee Relations, Montreal

And on behalf of the Union:

B. D. J. Proctor – Counsel, McInnes Cooper, Halifax
F. J. Mallet – Grievor, Halifax

AWARD OF THE ARBITRATOR

In a decision dated June 16, 2014, the Canada Industrial Relations Board, acting on a complaint by the grievor under Section 37 of the *Canada Labour Code* – the duty of fair representation provision – concluded that the Union violated the Code in that (essentially) it carried out a perfunctory examination of the grievor’s request to file an accommodation grievance. By way of remedy the Board directed (*inter alia*) that “the Union will forward [the grievor’s] reasonable accommodation grievance to arbitration”, any time limits in the collective agreement being waived. Subsequently the parties agreed to the submission of the matter to arbitration before the Canadian Railway Office of Arbitration and Dispute Resolution, in accordance with its rules. This is the office that would normally hear arbitrations under the collective agreement.

It is clear from both the decision of the Canada Industrial Relations Board and from the parties’ submissions at the hearing of this Office, that the grievor alleges that he has been harassed at work, contrary to the *Human Rights Code* and the Company’s harassment policy, and that he has been subject of improper discrimination. It is alleged that the matter was not properly investigated, that insufficient efforts were made to accommodate the grievor at work, and that VIA’s failure to attempt to accommodate the grievor’s return to work in the 2011 and 2012 time period caused his disability and all

losses and damages flowing therefrom. The remedies sought include reinstatement and compensation for loss of wages and benefits as well as damages under various headings. With respect to reinstatement, it appears that the grievor remains in the employ of the Company. His status is said to be that of an employee "on sick leave without pay".

At the outset of the hearing, counsel agreed that the first matter to be determined should be that of harassment, and that the second should be whether or not the Company investigated the harassment allegations in an appropriate way. Questions relating to the duty to accommodate would follow, as would the question of causation. I shall therefore deal first with the questions relating to harassment and its investigation. Some discussion of the duty to accommodate will be convenient at this stage as well.

The grievor was hired by VIA in 1998, and worked in various positions, but at the material times as a Station Attendant. In 2007, he first worked with a colleague, "J", in the Linen Room, and it was from that point that sexual harassment is said to have begun. The grievor, who is openly homosexual, stated that "J" spoke of virtually nothing but sex. The grievor appears to have protested to "J" but does not appear to have taken any other action at that time. "J" denied the grievor's accusations as to the extent of sexual talk, and stated that such as there was, was in good fun, and that the grievor participated in it. Some time later (although not as a response to the grievor's allegations) "J" was transferred upstairs to the ticketing office. Shortly thereafter, the grievor was also transferred there. In 2009, "J" was made the grievor's lead supervisor (a position within

the bargaining unit). In November 2009, the grievor sought the help of a Union officer. He explained that he felt he was being targeted, bullied and harassed by "J", who he felt was stringently enforcing the work rules against him while being less severe with other VIA employees. There is some indication that the grievor had attendance problems, being frequently late in reporting for work and in returning from lunch breaks. However this may be, there is no suggestion that the grievor was ever disciplined in that respect and I consider it not material to the substantial issues in this case.

The Union officer quite properly advised the grievor to file a complaint under the Company's harassment policy, and he did so on January 21, 2010. As a result of the complaint the Company proposed a "letter of understanding" between the grievor and "J". The grievor rejected this letter which, in his view, directed blame away from "J" and on to the grievor in respect of his attendance issues. Whether or not this was so, the letter appears to have been an attempt to make the problem go away, and in my view was not an appropriate or sufficient action under the Company's harassment policy.

At about this time the grievor was diagnosed by his doctor as suffering from anxiety and placed off work. While off work, on November 24, 2010, he filed a further and more detailed complaint of sexual harassment against "J". Following this complaint, the Company appointed an independent investigator, being a Manager from the Company's Moncton terminal. While being "independent" in the sense of having no axe to grind as between the various employees, he was of course an officer of the Company. He does

not appear to have had any qualifications or experience in disability or accommodation matters.

The investigator concluded that “it was not possible to establish the grievor’s allegation” although a mediation was offered between the grievor and “J”, in which “J” was unwilling to participate. As for the establishment of the grievor’s allegation there can be no doubt, from all the material before me, that he was the victim of harassment, although “J” and other employees may not have recognized it as such. There is indeed a form of material corroboration in that “J”, while on vacation, acquired a tee-shirt and a coffee mug emblazoned with gross obscenities of a homosexual nature. “J” apparently considered these amusing and displayed them to the grievor on his return. It does not appear that the Company took any action with respect to this display of obscenities in the workplace.

The fact that “J” was unwilling to participate in mediation did not relieve the Company of its obligation to participate in efforts to accommodate the grievor. Instead, the Company wrote the grievor on May 22, 2012, stating in part:

Given the nature of the legal proceedings in this matter, your file has now been referred to legal services in Montreal who will be handling your file.

In effect, the Company gave up any attempt at accommodating the grievor.

On the two preliminary questions dealt with at the hearing of this matter, my conclusions are:

- 1) The grievor has been the victim of harassment at work.
- 2) The Company's investigations of the harassment allegation were not carried out in an appropriate fashion in the circumstance of this case.

Although some mention has been made of accommodation efforts in the foregoing, questions remain relating to the duty to accommodate, and to the matter of causation, as the parties agreed. Accordingly, the matter will be set down for continuation of hearings.

November 25, 2019



J. F. W. WEATHERILL
ARBITRATOR