CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5003–04–05

Heard in Edmonton, February 14, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of Conductor Dave Danchilla ("the Grievor") of Moose Jaw, SK for the following:

1. The Company's alleged failure to accommodate him.
2. Mr. Danchilla's subsequent harassment complaint and allegation that the Company failed to take remedial action which he alleges led to his constructive dismissal; and
3. The Company's alleged continued failure to accommodate Mr. Danchilla ultimately resulting in the eventual closure of his employment record.

Three separate grievances were filed in relation to each of the above grievances and while related, each should be considered separate and evaluated on its own merits.

JOINT STATEMENT OF ISSUE:

Mr. Danchilla ceased active service July 1, 2017, due to a medical condition which was verified in August of 2017.

In April of 2018 Mr. Danchilla was deemed fit for Non–Safety Sensitive sedentary duties due to his medical restrictions and following this, he was accommodated from June 6 – 26 2018. On June 27, 2018, Mr. Danchilla became unfit for all duties and the accommodation ceased.

A harassment complaint was filed by Mr. Danchilla and a report with CPKC Employee Relations' conclusion was released. The Union alleges several of Mr. Danchilla's complaints were never addressed and a culmination of the treatment of Mr. Danchilla, and the lack remedial action, led to Mr. Danchilla's constructive dismissal.

On September 16, 2022, Mr. Danchilla received a letter regarding the Company's intent to close his employment record as he has been absent from work since June 2018 which stated:

"Our records indicate that you have been absent from work as a result of a reported medical condition since July 1, 2017. Medical information provided to CP since June 27, 2018, has confirmed that you remain unfit for all work. In accordance with your latest Fitness to Work Assessment, dated September 3, 2021, your restrictions are considered permanent and there is no reasonable expectation for return to work.

Based on the above information CP has determined that you are unable to perform any position with CP for the foreseeable future."

On October 12, 2022, Mr. Danchilla's Employment File was closed via letter which provided the following:

"In the letter sent to you dated September 16, 2022, you were advised of the Company's intent to close your employment record. You were invited to provide any new information that may cause us to reconsider our decision by October 5, 2022. An updated Functional Abilities Form (FAF) dated September 30, 2022 followed by a further updated FAF dated October 5, 2022 were provided to CP in response to the September 16, 2022 letter. Following review, both FAFs confirm there has been no change to your restrictions, nor is there any expectation that you will be able to return to work in the foreseeable future.

Please be advised that your employment record is closed effective October 12, 2022."

UNION POSITION

The Union contends that the Company failed to fulfill its' duty to accommodate Mr. Danchilla's condition contrary to the terms Article 36 of the Collective Agreement, the Company's Workplace Accommodation Policy, Return to Work Policy and the *Canadian Human Rights Act*. The Union further contends that the Company failed to demonstrate that to do so would constitute undue hardship, which resulted in discriminatory treatment in addition to undue hardship for the Grievor. Additionally, the Union submits the Company wrongfully refused scheduling flexibility to accommodate verified medical appointments as required for Mr. Danchilla's recovery.

The Union submits the Company failed to recognize Mr. Danchilla's ongoing medical condition as requiring accommodation, which resulted in a discriminatory treatment in addition to undue hardship.

The Union submits the Company's actions, following Mr. Danchilla's November 4, 2016 arbitration award (CROA 4505) and subsequent award on compensation, have been prejudicial, predatory and discriminatory as a result.

The Union contends that the Company's failure to take remedial action in response to the verified harassment complaints are in violation of Company Policies, The Canadian Human Rights Act, Canada Labour Code, and the terms of the Collective Agreement.

With regard to the closure of his employment file, Mr. Danchilla filled out the required paperwork on October 5, 2022, prior to the deadline provided by the Company. The FAF form submitted to the Company indicated that Mr. Danchilla was unfit for work at the time however it further indicated that he is expected to make a full recovery. The Company has failed to show what reasonable actions it has undertaken to accommodate Mr. Danchilla to the point of undue hardship.

The Company continued to fail in its duty to accommodate Mr. Danchilla and has otherwise not been reasonable in the handling of this employee. The Company continually failed to demonstrate any undue hardship by not properly accommodating him. The Company has failed to comply with its own policy 1501 Workplace Accommodation, and previous incarnations of this policy.

The Company's unreasonable handling of Mr. Danchilla and his medical conditions caused by the Company that were substantiated through the Company's internal investigation

process and their inactivity in the handling of the ongoing grievance constitutes a further violation of HR Policy 1300.

The Company's actions are in violation of the Canadian Human Rights Act, Canada Labour Code, Duty to Accommodate, existing jurisprudence, the legal obligation to accommodate an employee, and Articles 36 & 39 of the Collective Agreement. The employer has a legal obligation to accommodate disabled workers to the point of undue hardship. In that respect, the onus falls upon the Company to demonstrate that the burden has been met.

The Company responded to the Union's Step 2 File Closure grievance until after the case had been scheduled at CROA. The Union's position remains that the grievance was not responded to in violation of Article 40.03 and Letter Re: Management of Grievances & the Scheduling of Cases at CROA.

The Union requests

- an order the Company has violated the Collective Agreement, policies, and legislation as described.
- a order that the Company has not, to this point, demonstrated that they cannot accommodate the grievor's disability to the point of undue hardship.
- that Mr. Danchilla be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings with interest.
- monetary damages resulting from the violations in an amount to be determined.

In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

COMPANY POSITION

The Company disagrees and denies the Union's request.

The Company maintains it actively participated in the return to work process throughout the entire period in question and in doing so complied with Article 36 of the Collective Agreement, the Company's Workplace Accommodation Policy, Return to Work Policy and the *Canadian Human Rights Act*. and fulfilled its duty to accommodate. As outlined in the Company's grievance response, the Union's "constructive dismissal" grievance is untimely and therefore should be denied. Notwithstanding the above the Company maintains that the Grievor's complaint of harassment was investigated and appropriately handled in that the Company has taken appropriate remedial actions to ensure the matters raised by the Grievor were addressed.

As such, the Company maintains that there has been no violation of Policy HR 1300, the *Canada Labour Code*, or the *Canadian Human Rights Act*.

The Company maintains that it has not been unreasonable and disagrees that file closure constitutes frustration of other grievances. Pursuant to the Closure of Employment Record letter dated September 16, 2022, Mr. Danchilla was absent from the workplace as a result of a medical condition beginning July 1, 2018 and never returned. All medical information provided to the Company confirmed that Mr. Danchilla remained unfit for all work. Further, his Fitness to Work Assessment (FTWA) dated September 3, 2021, indicated these restrictions were considered permanent and there was no reasonable expectation he would return to work.

Accommodation is a tripartite obligation. The Company maintains that it has complied with its duty to accommodate, given the grievor's refusal to accept all reasonable accommodations

offered by the Company. Evidence shows the Union was in communication with the employee and the Company throughout the process.

As noted above, the Company received an updated Functional Abilities Form (FAF) dated September 30, 2022 followed by a further updated FAF dated October 5, 2022. A review of both FAF's confirmed there was no change in Mr. Danchilla's restrictions nor any expectation that he would be able to return to work in the foreseeable future. For these reasons, the Company maintains that it had reached the point of undue hardship and that the employment contract was frustrated. Mr. Danchilla's employment file was therefore closed.

As previously stated, the Company maintains that there has been no violation of Article 36 of the Collective Agreement, Policy 1300, the Company's Workplace Accommodation Policy, the Return to Work Policy and the *Canadian Human Rights Act*. and in doing so fulfilled its duty to accommodate.

In regard to the request for damages, the Company maintains that the Union has provided no support for their claim. Damages are reserved for conduct which is found to be harsh, vindictive, reprehensible, malicious as well as extreme in nature. The Company maintains that no such conduct has occurred in this case and therefore the Union's claims are without merit.

In regards to the Union's contentions concerning grievances responses, the Consolidated Collective Agreement Article 40.04 is clear in that the remedy for failing to respond is escalation to the next step. The Company's position remained unchanged throughout the grievance procedure and the Union has failed to demonstrate any prejudice as a result.

For the above reasons, the Company requests that the Arbitrator be drawn to the same conclusion and dismiss the Union's grievances in their entirety.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) D. Fulton	**(SGD.) F. Billings**
General Chairperson CTY–W	Assistant Director, LR

There appeared on behalf of the Company:

F. Billings	– Assistant Director, Labour Relations, Calgary
D. Zurbuchen	– Manager Labour Relations, Calgary
A. Harrison	– Manager, Labour Relations, Calgary
M. Jegou	– Manager, Disability Management, Calgary (via Zoom)
B. Dawes	– Specialist, Disability Management, Calgary (via Zoom)

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
D. Fulton	– General Chairperson, CTY W, Calgary
J. Hnatiuk	– Vice General Chairperson, CTY-W, Vancouver
L. Inverarity	– Local Chairperson, Moose Jaw
D. Danchilla	– Grievor, Moose Jaw

AWARD OF THE ARBITRATOR

Background

[1] The Grievor was a Conductor, hired by the Company in 1988. He was based in Moose Jaw, Saskatchewan.

[2] The Grievor suffered a number of injuries/illnesses during the course of his employment (not work–related), beginning with a shoulder injury in 1998. The Grievor was off work in 2012 due to injury; his file was closed in 2015; he was reinstated by arbitral award and again suffered an off–work injury to his knee shortly after he returned to work in July 2017, after that reinstatement was actioned. He worked two hours a day briefly in June 2018.

[3] The Grievor has not performed any work for the Company since June 27, 2018.

[4] Since being off work, the Grievor also had difficulties with his hand (he was awaiting surgery for contractures as of late 2021) and mental health issues for which he first sought treatment in summer of 2019.

[5] On October 12, 2022, the Company closed the Grievor's file as it considered he was unable to return to work in the foreseeable future.

[6] This Award addresses three Grievances which are inter–related:

a. Failure to Remediate Harassment/Constructive Dismissal;
b. Discrimination from Failure to Accommodate the Grievor to Undue Hardship; and
c. Improper File Closure.

[7] While each Grievance was assigned a CROA number, the parties argued all three Grievances together, filing one Brief and one Reply for all three cases. The parties also agreed that all three Grievances were appropriately addressed in one Award, given that the timeline was largely shared as between the three issues.

[8] As has been noted by this Office, duty to accommodate cases are about evidence[1]. While the Grievor attended these hearings to observe, like most CROA cases, the evidence in

[1] **CROA 4648**, para. 30.

this case was documentary, entered without objection, and included email exchanges, Functional Abilities Forms ("FAF's"), and the Company's internal OHS department's file[2].

[9] Each of the parties provided the Arbitrator with two very large Exhibit books of documents which contained this evidence and their authorities. A thorough and comprehensive review of the entirety of these documents – and the parties' extensive submissions – was undertaken. When summary statements are made, they are made in the context of this underlying review. Certain "themes" that became apparent upon this review, which will also be noted.

[10] The Union also provided extensive evidence[3] before the Grievor was returned to work in May of 2017. As **CROA 4505–S** appropriately addressed those issues, that evidence will not be summarized in this Award.

[11] Given this expedited process and the time limitations for issuing decisions, it is impossible to set out all of this evidence in detail. However, a timeline of events is necessary to address the Union's allegations. Every interaction will not necessarily be summarized in this timeline, but all have been carefully and comprehensively reviewed in reaching the conclusions in this Award.

[12] The issues to be determined have been set out in some detail by the parties in the JSI. There is overlap between the harassment and accommodation claims. It is the position of the Union that the Company not only failed to establish undue hardship in its accommodation of the Grievor, but that the manner in which it handled the request for "flexible scheduling" for his initial two hour a day gradual return to work ("RTW") in June of 2018[4] resulted in harassment and a failure to accommodate the Grievor. This lack of flexibility for the Grievor's involvement in scheduling was identified in both the Union's Brief and its Reply as the "central issue" for the allegation the Grievor was not appropriately accommodated.

[2] This is a department of the Company which is distinct from the Disability Management office, also mentioned in this Award.
[3] The first 23 Exhibits
[4] And his treatment since returning to work in May 2017.

Analysis and Decision

The Law Relating to Accommodation

[13] Prior to summarizing the evidence, it is appropriate to first set out the broader principles relating to the duty to accommodate. The evidence can then be situated within this framework.

[14] The principles of duty to accommodate have been sent out in **CROA 4503** and the framework was set out by this Arbitrator in **AH834**[5]. The question of undue hardship is contextual. As was noted in **CROA 4503**, the Supreme Court of Canada has noted that the employer's duty to accommodate ends when the employee is no longer able to fulfill the basic obligations of the employment relationship, for the foreseeable future.

[15] As previously noted by this Arbitrator, the obligations under an accommodation process do not only land on an employer. The accommodation process is a *tri–partite* process, meaning there are duties and obligations which are placed on the union, the employer and the employee.

[16] For its part, the employee must first and foremost provide evidence of a disability to be accommodated and that an adverse impact has been suffered. This establishes *prima facie* discrimination and the need for accommodation. Without that evidence, no duty to accommodation is triggered.

[17] An employee has two other obligations. First, an employee must cooperate in the accommodation process, which includes providing ongoing medical information to the employer. It is not unreasonable or unusual for an employer to request an employee provide updated medical information periodically, even when an individual has been off–work completely, as medical illnesses and injuries can change, and the accommodation process must adapt to those changes. If an employee attempts to dictate the "terms" under which he or she will agree to participate in an accommodation process, or who he will – or will not speak to, they risk a finding they have not been cooperating in that process.

[5] See also this Arbitrator's analysis of the principles in **CROA 4861.**

[18] Second, an employee must also accept a reasonable accommodation, even if it is not a "perfect" accommodation, or even if it is not his or her "preferred" accommodation. This is because it is well–settled that an employee is not entitled to either "perfect" or "preferred' accommodation: An employee is entitled to a "reasonable" accommodation. What is a reasonable accommodation is a question of fact.

[19] For its part, an employer also has two duties. One is described in the jurisprudence as procedural and one is substantive[6]. Under the procedural component, there are two sub–requirements: the employer must take steps to understand the disability needs of the employee; and must also "undertake an individualized investigation of potential accommodation measures to address those needs". The substantive component of the employer's obligation refers to the reasonableness of the accommodation offered; or the reasons for not providing that accommodation.

[20] For its part, a Union may be required to address issues which could arise if an accommodation may act impact those other employees and of course assist its member when required in understanding his or her obligations under the process. A Union must also cooperate in the search for an accommodated position, as that search may lead outside the bargaining unit. A Union also argues on behalf of its member, which this Union vigorously did, in this case.

[21] When an employer fails to live up to its obligations, there would be a finding there has been a failure to accommodate, and discrimination has therefore occurred. If an employee fails in either of their two obligations, the employer's obligations to accommodate that employee are at an end as – without the employee's cooperation – the point of undue hardship is reached.

[22] There is another well–established principle in labour relations that is brought into focus in these Grievances: An employer's "management rights" generally allow it to direct its workforce[7]– which includes setting a work schedule for its employees.

[6] See **AH834** at paras. 9–10 for a summary of these principles.
[7] Assuming those rights have not been limited in the collective agreement.

[23] When carrying out an accommodation, this means that an employer is entitled to determine how an accommodation is to be carried out in the workplace and on what schedule, *unless* a specific schedule is medically required: *C.A.W.–Canada, Local 1941 v. Siemens VDO Automotive Inc.*[8] An accommodated employee is not entitled to their "preferred" schedule, just because they are being accommodated. A particular schedule must be a medical requirement of the disabilities suffered. It is only those requirements that are subject to accommodation.

[24] The burden to establish a particular request is a required, is on the employee. If an employee maintains that a certain schedule was set as a reprisal, they would also have the burden of establishing that fact. If an employee disagrees with the assessment of the Company regarding whether their schedule is or is not a medical requirement, then like in all such instances of disagreement during the currency of the contract, they can file a grievance they have not been appropriately accommodated.

[25] These Grievances raise issues with whether *both* the Grievor and the Company have met their respective obligations.

[26] Before turning to the allegations in those Grievances, it must also be emphasized that the Company has on ongoing obligation to protect *all* of its employees from harassment, and not just the Grievor. All employees have an obligation to treat each other with respect and dignity.

[27] Prior to addressing the individual Grievances, some mention must be made of an earlier grievance, to place these Grievances into a historical context.

The Earlier Grievance: CROA 4505

[28] In August of 2015, the Company had previously closed the Grievor's file due to inability to return to work due to injury. The Union grieved that decision, claiming failure of the Company to accommodate the Grievor. That grievance was decided in November 2016, in **CROA 4505**. The Grievance was allowed and the Grievor was reinstated. That

[8] 2006 CarswellOnt 8754; at para. 23.

arbitrator determined the Company had not met its duty to accommodate the Grievor, as its efforts had not at that point reached the point of undue hardship.

[29] That arbitrator noted that an employee has important obligations in providing updated medical information to the employer to facilitate the accommodation process, and that Mr. Danchilla "did not assist his situation at times by being slow to provide updated medical information". The Arbitrator reserved on issues of remedy. On July 17, 2020, the arbitrator resolved the remaining issues of remedy in **CROA 4505–S.** Compensation was ordered to be paid for a one year period, reduced by 40% for Mr. Danchilla's failure to mitigate. Similar comments were made regarding the Grievor's lack of cooperation.

[30] While evidence from 2012 to 2015 was filed into *this* arbitration process, I am satisfied the arbitrator in **CROA 4505** dealt with those issues and that evidence need not be summarized here. However, this earlier Grievance has significance, as it is the position of the Union that certain of the incidents investigated were taken after the Grievor was reinstated due to that Award, as a result of an alleged reprisal for the filing of that grievance and resentment with his reinstatement.

[31] Against these general comments, I will address the specifics of the evidence which underlies these Grievances.

Evidence Recital and Assessment

*T*he Grievor's Return to Work in 2017, Second Injury, and First Request for FAF

[32] The Grievor returned to work in May 2017 after his reinstatement by **CROA 4505**.

[33] On July 1, 2017, the Grievor was booked off–duty due to a further injury to his knee, suffered while walking his dog.

[34] On that same day, two comments were made by Company personnel internally regarding the Grievor's injury: The first was by Mr. Leedahl, Assistant Superintendent, Moose Jaw to Mr. Jaggernauth, Superintendent for Saskatchewan South, stating "That didn't take long. Said he hurt his knee tripping over his dog"; to which Mr. Jaggernauth replied "I said the same thing, but I think the dog tripped over him", to which Mr. Leedahl replied "What a loser".

[35] There is no doubt these comments were unprofessional, inappropriate and were substantiated in the Investigation as discriminatory to the Grievor. To have a supervisor call an employee a “loser” is a serious issue. The Grievor was not aware of these comments, at this point, as they were internal. Therefore, those comments do not provide any context or explanation for the Grievor’s attitude towards the Company when he was next contacted in the summer of 2017, to substantiate his knee injury.

[36] On July 17, 2017, Gabrielle Belanger (“GB”), Supervisor, Support Services contacted the Grievor to remind him that Manulife (the Company’s disability insurer) had a 30 day submission deadline, and that the FAF was required as soon as possible, as there was a 72 hour requirement (from the time of going off work due to injury) and the Grievor had an appointment with his doctor on July 17, 2017.

[37] The Grievor responded within the next hour that the FAF form would be completed “as soon as my doctor completed them”. He also stated “I would like to know who is copied into the emails you’ve been sending me. *In the future have Paula be the contact person*”.[9]

[38] This was the first of many times the Grievor attempted to dictate the ‘terms’ under which he would communicate with the Company and participate in the accommodation process, and in particular who he would speak to. GB responded that ‘Paula’ did not handle RTW and that her email to the Grievor was a courtesy to ensure he met deadlines. She also noted that copies on the email was the Grievor’s union representative, the RTW specialist, Jennifer Lehfellner and Greg Jaggernauth who she recently copied to ensure the Grievor was properly informed. The Grievor did not take any issue with Mr. Jaggernauth being informed or included on the email.

[39] Two weeks later, as CP had still not received any FAF relating to the Grievor’s injury, Ms. Lehfellner (“JL”) contacted the Grievor by phone. This was her first contact with the Grievor. She wrote a lengthy and detailed email to GB after that discussion. I have been given no reason to doubt the veracity of this email or its summary of these discussions. They are consistent with the record of other discussions in the OHS file when the Grievor is contacted for information.

[9] Emphasis added.

[40] JL noted she spoke with the Grievor, that he was “very angry” with her request for a FAF; that his doctor said he was going to fire him as a patient; that he “went on” about his being fired by ‘Lisa’ [*earlier grievance*]; that she continually tried to bring him back on task regarding providing an FAF for his current injury; that the Grievor told her she “didn’t have anything to offer him anyway”; and that JL told him the Company did not know that as they had not yet received an FAF. JL stated the Grievor was short with her; raised his voice with her; and that she finally told him she would not continue the call with him if he was not willing to listen. She explained all she needed to know was his current situation; not his past. The Grievor said to her “you’re just trying to get me fired”; at which point JL stated there were policies and procedures to be followed, including receiving an FAF for an injury. The Grievor again challenged JL with “what do you have for me then?”. Again, JL noted she did not know as she hadn’t yet received an FAF. The Grievor told her it was knee injury and probably a MCL tear and that she should ‘get her facts straight’ before she calls. Apparently, the Grievor expected JL to ‘take his word’ for it. JL again reiterated she had no medical information to know that facts and required an FAF. At the end of the call JL noted she would send out a letter to request the FAF and the Grievor told her to “save your writing and call the dr.”.

[41] JL noted in this email that this was a ‘difficult conversation’, and this Arbitrator agrees with that assessment. The Grievor was argumentative, aggressive and resistant to the reasonable and necessary request being made for medical information to substantiate his new knee injury.

[42] The Grievor’s negative attitude and failure to understand the importance of providing timely medical information is the same as that commented upon in the remedy grievance, **CROA 4505–S**, which was issued several years later, in 2020.

[43] Not getting anywhere with the Grievor, GB contacted the Union (Mr. Hariniuk) in early August of 2017, noting it had been a month since the Grievor’s injury and no FAF had been received, which information was due 72 hours after going off work. She indicated that the doctor’s office had been spoken to in the past, and that the Grievor had a history of not providing all of the pages to the doctor’s office (which history was also recognized by the arbitrator several years later, in **CROA 4505–S**). She also pointed out it was the

employee's responsibility to provide this information and she asked that the Grievor's FAF be submitted by August 4, 2017. As this date is more than a *month* after the Grievor went off work – and given the difficulty with the Grievor as already noted – I do not find that request to be unreasonable or in any way harassing. Neither is the deadline unreasonable.

[44] Mr. Hariniuk responded promptly to Ms. Belanger. He noted it was understood how important the documents were (although the Grievor seemed not to understand this from his conversation with JL), and that their completion was out of the Grievor's control, and that he had himself contacted the doctor's office and inquired about the delay. It was suggested that someone from CP contact the doctor. While I accept that completion of medial information was out of the Grievor's control, the manner in which he responded to JL was well within his control and he is accountable for his own behaviour. The Union is attempting to "smooth over" the issues already being caused by the Grievor, fresh into this new accommodation process.

[45] On August 3, 2017, JL sent an email to GB attaching JL's notes of her earlier conversation, (which were forwarded to the Union), of what she had "endured", which is an accurate descriptor for what occurred and is in no way harassing. The difficulties in the past regarding the Grievor providing forms to his doctor, which "Sam" had previously spoken with the doctor's receptionist about, were also mentioned. It was suggested that going to a walk–in clinic to have the forms completed was as an alternative (which I accept was the Company attempting to help to problem–solve this issue); and that the Company was following the policy, but the doctor and Grievor were not. A further email was sent where JL wonders if the Grievor was taking treatment and that if so, perhaps medical information could be obtained from that treatment provider. Again, the Company is discussing options to obtain the needed medical information to assess the Grievor's needs. This was reasonable and not harassing.

[46] A further email is sent to the "BenTeam" from JL. She noted "this one is difficult…". I find that comment to be factual and not in any way negative or harassing. JL's one and only contact with the Grievor ***was*** difficult and could itself be considered as harassing and inappropriate behaviour towards her *by the Grievor*.

[47] The next email is curious, given the threads to this date. On August 3, 2017, Mr. Hariniuk contacted GB, with copies to several individuals, including the Grievor's supervisors Mr. Jaggernauth and Mr. Leedah and JL, stating that it was of the "utmost importance to deal in facts"; and referring to GB's email as making "unfounded damaging comments". This appears to be a reference the fact that in the past the Grievor did not provide all the pages to his doctor. However, that comments was not unfounded, as it was stated to be based on conversations the Company had with the Grievor's doctor previously. Further, the Grievor's failure to cooperate in providing medical information was subsequently noted as an issue by the CROA arbitrator in **CROA 4505,** which substantiated that the Grievor does have that issue**.**

[48] The email also noted that JL's email had disclosed information regarding the Grievor's injury, which was given in confidence; that that these situations highlighted issues of "fairness and impartiality the company is exhibiting towards my member and I would like this behaviour to cease and desist immediately so that the Grievor could manage his disability "in privacy and dignity". This is a curious demand for the Union to make, since the Grievor himself had not offered any dignity or respect to JL in their earlier conversation. It is not clear what "disclosure" the Grievor is referring to at this point as being inappropriate. The Grievor – and the Union – appear to believe that respect and dignity should be shown to the Grievor, but that the same standard is not necessarily to be applied to the Grievor's own behaviour towards Company staff.

[49] Late in the day on August 3, 2017, the first FAF was received and reviewed by occupational health and safety (OHS) at the Company. It was noted the Grievor was awaiting an MRI for his knee for a possible tear; that modified work was not recommended and that the Grievor was "unfit for all work". That FAF noted that "physio was occurring", but not how often. The estimated date for return to work was listed as "unknown".

[50] Late in the afternoon on August 3, 2017, an email was sent from the internal OHS department to several individuals, including GB, Mr. Jaggernauth, Mr. Leedahl and JL regarding a 'fitness to work' assessment for the Grievor. It was noted he was "unfit for any work including non–safety sensitive duties; and that a reassessment would occur in 4–6 weeks.

[51] On August 4, 2017 at 8:45 a.m. in the morning, JL wrote an email to GB and "BenTeam" with the statement "apparently he is unfit to work", which demonstrated that she *had* seen the email from OHS who had assessed his FAF as demonstrating unfitness to work. While the frustration experienced by JL in her discussion with the Grievor can be readily understood given his poor behaviour toward her, this was an inappropriate and unnecessary comment. It demonstrated she doubted the Grievor's disability and his sincerity is also doubted by JL later.[10] These comments were part of the substantiated instances of harassment found by the Company's internal investigation, which results were given to the Grievor in October of 2019. That said, JL was not in a position to act in a manner of reprisal regarding the Grievor's later accommodation, as her role – which I accept – was only to determine what accommodations were required. Decisions relating to operationalizing any accommodation were made by other Company personnel.

[52] Regarding the comments made by BenTeam, I am not convinced that "BenTeam" saw the FAF before writing the email on the morning of August 4, 2017, which referred to no information having been received and the possibility of suspension of the Grievor. I am satisfied "BenTeam" had not yet viewed the email from OHS and was under the false impression that information had not yet been received.

Events Leading to the Two Hour Accommodation; 2018

[53] On May 24, 2018, JL sent an email to Tracey Fetting at CP, copied to GB regarding the Grievor's non–compliance and that Benteam has indicated he is on LTD, which seems extreme given his injury. She raised the issue of whether file–closure was a potential.

[54] JL refers to herself at one point as a "therapist" and so has some training to understand injuries. In that context, I do not find her reference here to be in any way discriminatory or harassing or to demonstrate bias at that point. She was making an observation which was based on her own experience.

[10] Union's Tab 38, which appears to be a copy of an internal messaging system conversation between Tracey Fetting and JL.

[55] On May 25, 2018, Corey Wolak responded to JL and indicated it “looks good” and states she should include an offer for the Grievor to meet with Mr. Wolak the next day. JL responded “I really want to have my s**t together for this one”.

[56] While the Union has suggested this is also a harassing comment and resulted in discrimination and demonstrated a bias against the Grievor, I cannot agree. By that point, JL was aware of the Grievor’s previous confrontational and dismissive attitude directed towards her, when she had requested medical information regarding his injury. It would not be unusual in that context for JL to seek guidance from superiors, or to express the view that since the Grievor could be very difficult, she wanted to ensure she had completed her part appropriately. This concern was not unwarranted.

[57] On May 28, 2018 the Grievor’s doctor provided an updated FAF to Tracey Fetting, in the OHS department at CP. It stated the Grievor had a diagnosed disability relating to his knee; was attending physio “every 2 weeks”; was to start with two hour days during daylight (no evenings) and “may be the judge of own condition and abilities during work hours”.

[58] There is no mention of any need for flexibility in scheduling these two hours in terms of what hours/days were worked, beyond the stipulation that it be “daylight” hours; and that the Grievor have flexibility *within* the shift to sit or stand, as required. The FAF also pointed out that the Grievor was attending physio “every 2 weeks”, which direction becomes important as this file progressed.

[59] On May 29, 2018, Ms. Fetting contacted the Grievor’s doctor seeking clarity on the timeline for the graduated RTW and the statement regarding the Grievor “being the judge of his own condition”. There is nothing unusual, biased or harassing about this contact. The questions are reasonable, normal and expected to be asked when a grievor is in a work hardening program. The Grievor’s doctor responded that the Grievor could perform sedentary, non–safety duties that allows the Grievor to “sit or stand as deemed by David”. He also gave information on what positions should be avoided, and that the RTW should “start off” with two hours during daytime hours, that would be expected to increase to four hours after two weeks, and continue increasing in this fashion, but that the Grievor would

need to be reassessed before that point, as he was working “zero hours” at that point. No flexible for scheduling is noted to be required by the Grievor’s medical needs.

[60] On May 29, 2018 at 9:32, Ms. Fetting contacted several individuals with information to operationalize the Grievor’s return to work plan. She indicated that she would like to offer the accommodation to start at 0600–0800 “with the same days off”; and followed this with a question mark, which I am satisfied was to seek the understanding of whether this would work for the operational needs of the Company. Mr. Wolak responded that the time period should be “1600 to 1800 Wednesday to Sunday with Monday and Tuesday off”. Forty–five minutes later, the details of the RTW plan for the Grievor were circulated. The reassessment date was to be June 28, 2018, consistent with the discussion that Ms. Fetting had with the Grievor’s doctor, for an anticipated progression after two weeks (hopefully increasing to four hours). An updated FAF was to be provided by June 28, 2018, and the Grievor was to be supervised by John Randall. Mr. Leedahl and Mr. Wolak were two of the individuals copied on this RTW plan, but Mr. Jaggernauth was not.

[61] The Grievor was not pleased to have days off on not on the weekend, or set earlier in the workday. On May 31, 2018, JL made a memo to file after a conversation with the Grievor. She noted that he ‘wanted to let me know that he ‘got his back up’ the other day and he didn’t want this to get out of hand; that he heard there was a disagreement with his union rep and the General Manager and ‘didn’t want it to get any further’; and that he ‘just had a couple of questions why the days off changed’. There is no record of the conversation the Grievor is referring to in this email, in the spring of 2018, where he “got his back up” with JL.

[62] JL indicated she told the Grievor that his inquiry would be a question for Mr. Wolak; and that he could be added to their call. Mr. Wolak was in fact waiting to be added to his call, anticipating that request. However, the Grievor declined that, as he did not want to have a ‘big meeting’. The Grievor stated to JL that he understood she had a job to do and that ‘I found him an accommodation’. JL explained that the ‘end decision is up to the workplace on the hours and days off and I’m just the facilitator’; and that the Grievor stated he ‘didn’t want to be put in a position to be set up for dismissal’. She explained her job was to find him an accommodation. JL noted she called Mr. Wolak to tell him how the call transpired.

[63] As the Company did not consider there was any medical requirement for the flexibility the Grievor was seeking, it proceeded with its RTW schedule. An RTW plan was signed by the Grievor on June 7, 2018, and he began to work that schedule.

[64] On the day the Grievor attended for his first day of modified duties, there had been a miscommunication and the Grievor was sent home as there were no duties for him to do. While the Grievor considered this part of a pattern of harassment, I cannot agree. Miscommunications can happened when employees are firs set up for accommodated duties, so this was not an unusual or completely unexpected occurrence. I am satisfied this is what occurred, in this case.

[65] On June 13, 2018, the Grievor's doctor completed another FAF. Like all but the first FAF's submitted, it indicated he was attending physio every 2 weeks, and that if he was taking Tramadol (which had been prescribed), he should not be performing any safety sensitive duties.

[66] The doctor also stated:

> *As per our communication (faxed reply on May 31), 2 hours a day for now will continue in that duration until reassessment.* ***Please allow flexibility in scheduling by involving David in determining when those 2 hours can be worked.***

[67] The doctor did not set out any details of what type of "flexibility" was medically required due to the Grievor's disability – as he had done in the past ("daylight hours only"). Neither did the doctor did not suggest that the Grievor required this flexibility to attend physiotherapy, which would be a difficulty direction to support when physio was noted in that same FAF to occur only every two weeks. It was not the *doctor's* evidence this flexibility in scheduling was required for attending medical appointments and most specifically physiotherapy appointments. That was the Grievor's evidence only.

[68] Upon considering all of the evidence, I am satisfied the Grievor was not happy his days off did not align with the weekend, and also were not scheduled for earlier in the day, and that when the Company took the position his desired scheduling was a "want" and not a medical "need", he went to his doctor and had him add a general line to his FAF for his "involvement" in scheduling decisions.

[69] On June 13, 2018, the Company reviewed the FAF and considered that the restrictions remained the same as those given in the FAF sent earlier that month. It did not consider "flexibility" for scheduling as a medical requirement. On June 20, 2018, the Grievor contacted Lisa Trueman at CP indicating another FAF had been sent the previous week and he wanted to discuss and asking her to call. That same day, Ms. Trueman emailed the Grievor to say it was received and was updated, but that the "restrictions remained the same as the last fitness to work assessment on June 4, 2018" and to follow up with JL in his return to work planning. On June 20, 2018, Lisa Trueman also emailed J. Schumacher and JL that while there was an FAF which contained a statement regarding being flexible with scheduling the work, it was noted there was no medical rationale apparent. On June 21, 2018, Ms. Trueman emailed the Grievor that JL would be following up with him to 'discuss your RTW plan, restrictions and limitations".

[70] The Grievor was of the opinion this "flexibility in scheduling" and his involvement in that scheduling *was* a medical requirement. The Grievor took the position the Company was failing to accommodate him by not following what he considered to be his doctor's medical advice.

[71] Meanwhile, on June 14, 2018, JL copied images from the Grievor's Facebook page dated October 9, 2017 showing him in a stadium, presumably attending some type of sporting event. It was not clear in the evidence why this information was gathered by JL at this point in time, but there is also no evidence it was ever used for any purpose. Facebook is a public forum and at this point in time, the Grievor was noted to have significant issues ambulating or maintaining one position, due to issues with his knee.

[72] On June 22, 2018, there was a meeting between Robert Dales, JL and the Grievor, which lasted 54 minutes. The Grievor's continued accommodation was discussed, including the need for him to schedule medical appointments outside of his two hour work day or notifying a manager if that could not be done, as the Grievor had already called in sick to attend a medical appointment.

[73] The Grievor indicated he got "too tired" to come to work at 4 p.m. if he has physio at 1 p.m., as physio "beats him up". He referred to the "flexible hours" statement on his FAF.

[74] The Company repeated its position that the Grievor's request for "flexible scheduling" was not a medical need; and that the Company would continue to accommodate him based on their business needs, when the ATM/TM was at their desk to supervise. The Company also advised they would be communicating with the Grievor's doctor regarding his restrictions and limitations. The Grievor was not pleased with the Company doing so. At one point, he was asked by Robert Dales to lower his voice. The Grievor was asked if he had any other travel coming up, but the Grievor did not answer that question. The Grievor also stated in this meeting that while he has a lot of issues going on, he was able to "work out every day" and "do different things".

[75] After hearing this in the meeting, the Company sent a letter to the Grievor's doctor, noting that the Grievor said he went to the gym every day and that he has traveled out of town, and asking if therefore the work hours could be increased to four hours a day, as had earlier been discussed, for work hardening. Since more than two weeks had gone by in the accommodation, this update was not unreasonable as it was the anticipated time for reassessment, nor did it demonstrate harassment. I am further satisfied the assumption that the Grievor went to the gym came was not some sort of nefarious harassment or discrimination, but arose from the Grievor's own comment during the meeting on June 22, 2018 that he "worked out every day". It was a reasonable assumption for the Company to make, based on that comment, that he 'worked out' *in a gym,* and that if he could do that, his work hardening program could perhaps be increased.

[76] The Grievor worked in his accommodated position until June 26, 2018. On June 27, 2018, a new FAF was received (one was due on June 28, 2018 as earlier noted). That FAF noted the Grievor's return to work for two hours had worsened his symptoms and he was totally unfit for any form of work. There was no mention in that FAF of any mental health symptoms. The symptoms which are mentioned to have worsened as a result of his accommodation were all physical, and included knee pain, and joint and back pain.

[77] The Grievor never returned to work again.

[78] The first diagnosis the Company received that the Grievor suffered from mental health issues was received after he was noted to be unfit for work due to his physical issues.

Time Period Post Accommodation

[79] On August 1, 2018, the Grievor again took significant offence to the Company's attempt to communicate with his doctor, in the manner noted above. This was a reference to the letter sent seeking an increase to the work hardening program, and a re–assessment, as the Grievor had been "working out" and "traveling" . He sent an email to Deanne Cote, stating the letter sent to his doctor would not be completed "due to the false statements in the letter made by Jennifer Lehfellner….my Doctor will complete letters that are factual and helpful to my recovery". He also requested not to have interactions with JL.

[80] As it was time for a reassessment for work hardening by the Grievor's doctor's own timetable, it was not unreasonable or in any way harassing for the Company to ask the doctor to undertake that reassessment. As earlier noted, the Company had a reasonable basis for believing the Grievor may be able to increase his work hours as part of work hardening.

[81] Once again, the Grievor appears to believe any contact is harassing, and is of the mistaken belief that he can dictate how communication around his accommodation can proceed, and how demonstration of his fitness is to occur. Further, there is the mistaken belief that he can label reasonable requests as harassment and take a position they need not be addressed.

[82] On August 1 and 2, 2018, Dave Moore, Manager, Disability Management contacted the Grievor to address his concerns to Ms. Cote He confirmed that conversation in an email dated August 2, 2018. In that email he noted that he had agreed to review the Grievor's concerns and get back to him the next day, which he was doing via the email. As he had determined the physician to whom the letter was directed was no longer the Grievor's physician, he requested the Grievor provide an updated FAF from his new physician within the 8 week reassessment period indicated on the previous FAF of June 26, 2018. Mr. Moore noted the Grievor had agreed to this. He also referred to the fact that the Grievor indicated he may require an extension of time to find a new doctor. Mr. Moore also gave the Grievor a link with doctors accepting new patients.

[83] Mr. Moore noted the Grievor felt his agreement to the RTW Plan "was no longer valid". Mr. Moore indicated it was important for the Company to receive a new FAF as the

Company had received information his functional abilities had changed as the tasks in the plan appear no longer suitable, and he noted the Grievor understood that. Mr. Moore also provided another copy of the FAF form.

[84] There is no evidence the Grievor wrote to Mr. Moore to disagree with this summary of his conversation and the plan to provide a further FAF. I am satisfied that Mr. Moore believed he had addressed any concerns the Grievor had regarding communication with his doctor, and had a plan forward to move on from the issue.

[85] I can see nothing untoward or harassing about Mr. Moore's contact. It addressed the Grievor's concerns to Ms. Cote and set out a plan. The Grievor obviously did not agree. On August 28, 2018, the Grievor *again* wrote to Ms. Cote, indicating his frustration that is first email as "handed off to Dave Moore". He noted that the last letter from JL was "completely false…to the point of my doctor dismissing it". He also stated:

> That JL was 'threatening my employment every step of the way and is still working my file? I have a non compliance letter going out from Jennifer? However I will Not be dealing with Jennifer Lefellner. Nor will I respond to her. I also asked in writing that Jennifer Lefellner not to look after my file do [sic] to the harassment and discrimination I'm endoring [sic] from her conduct. ….Dave did nothing to help or fix this problem. Only to keep this harassment and discrimination [sic] rolling.

[86] The Grievor appears to be fixated on this issue, even though he and Mr. Moore discussed this issue and had created a plan to move forward past it, which was to provide an updated FAF from a new doctor, and the Grievor was also given an extension of time to do so.

[87] There is nothing unusual or harassing about requesting this further FAF, as it was anticipated by the Grievor's doctor that he would need to be reassessed before his hours were increased. It would have ben a simple matter for the Grievor to correct any mistake of facts the Company made with his doctor through an appointment with him, prior to the doctor providing the updated assessment. This would be the appropriate course of action, rather than taking the position the letter should <u>not</u> be considered or answered at all, and that the Company was harassing him by even suggesting such a thing, which was not the case. Once again, the Grievor is under a mistaken impression that he is entitled to dictate how he will participate in the accommodation process, and ignore processes put in place

to receive further medical information. That is a course of action fraught with considerable risk.

[88] Ms. Cote provided a detailed response to the Grievor on September 5, 2018. She indicated that JL would not be removed from the file; and that an updated FAF was required by August 24, 2018. She further noted Mr. Moore had been thorough in investigating his complaints against JL, and that what had been requested (an updated FAF) was ‘standard practice’. The reassessment date was scheduled for August 15, 2018. It was not received. A letter was sent to the Grievor on September 28, 2018 requesting further information by October 19, 2018, which was later changed to November 9, 2018.

[89] An FAF is in the evidence which is dated September 10, 2018, although it is unclear when this was received by the Company, who was still looking for information as of September 28, October and November. That FAF indicated the Grievor had a right knee meniscal tear, and joint and back pain, with physio every 2 weeks, that he was “unable to work at this time” and that his expected RTW was “unknown” but he would be reassessed in 8 weeks. No mental health issues are noted in this FAF; the Grievor’s inability to work arises from only physical symptoms.

[90] Meanwhile, the two Grievances which alleged harassment and failure to accommodate were being processed.

[91] On November 18, 2018, an email was sent to the Grievor that OHS had been trying to contact him on October 22, 29 and November 15, 2018 regarding his requested medical information, and that he would be considered to be in non–compliance if no response was received that day. On November 19, 2018, there were emails and discussions. The Grievor indicated he thought his doctor had sent an FAF November 9, 2018 and had not missed any calls from OHS and had not heard from them in months. OHS was looking for a “Standard Generic Initial Letter” from his physician rather than an FAF, and a deadline was set for this to be provided by December 19, 2018. The letter was not provided and OHS did not contact the Grievor again, on instructions from the field.

[92] In late December of 2018, the Grievor filed a complaint of harassment with the Company. The Company launched an internal Investigation.

[93] In April of 2019, OHS received a consent form which would normally prompt a call to an employee to discuss and were given approval to do so. An attempt was made to contact the Grievor on April 4, 2019, but the Grievor was not cooperative and did not want to continue the discussion and asked her not to call him.

[94] The results of the Company's harassment investigation were provided to the Grievor in October of 2019. The only evidence entered into this Arbitration process regarding that investigation was the statement taken from the Grievor as part of that process, a letter dated October 30, 2019 to the Grievor from Cody Gagne, Manager of Employee Relations which summarized the 13 different allegations and the result of the investigation (three were "substantiated" and one was "partially substantiated", however it is unclear what this latter phrase means, as no further details were in evidence); and letters from the Company telling the Grievor the matters had been remediated and to re–engage him in the accommodation process (as detailed below).

2020 Forward

[95] The Union launched an appeal of the Investigation findings on January 24, 2020.

[96] On February 6, 2020 there was a further letter from Mr. Gagne, sent via registered mail, stating he was writing to "re–engage you in the workplace accommodation process" and requesting he contact an OHS nurse (Ms. Wurah) by mid–February to initiate "a re–assessment of your fitness to return to work". On February 10, 2020, the Company was notified that the Grievor "does not want the product and refused the delivery".

[97] On March 2020, Mr. Moore sent a further letter to the Grievor, this time via courier and email. That letter was sent in follow–up to Mr. Gagne's February 6, 2020 letter, noted what had been required and requested the Grievor contact the OHS nurse, Ms. Wurah to initiate that assessment, by March 9, 2020, and that no further extensions would be granted. The Grievor also refused delivery of this letter.

[98] I do not consider either contact – or its deadline – to be harassing but rather to be properly taken in furtherance of the Company's obligations to accommodate the Grievor. The

deadline was necessary given the Grievor's continuing lack of engagement with the Company.

[99] While the Grievor had refused delivery of this second letter, as it was also sent via email, the Grievor did become aware of it. In his email response, the Grievor stated that:

> You and your office are part of the Harassment I endured in the past. I feel this is more of the same from you and your office. I still have a Human Rights charges pending and legal council who are dealing with CP Rail admitted Harassment. Moving forward have the VP of OHS or the VP of HR to contact me"

[100] It is not clear how the Grievor considered that a request to re–engage in an accommodation process was 'more of the same' harassment of him. It is not harassment to attempt to re–engage a Grievor in an accommodation process and to seek updates.

[101] On March 2, 2020, Ms. Wurah at OHS also received an "angry" call from the Grievor, stating he did not understand 'why we are requesting anything from him as we have not addressed his harassment complaint'. It was noted she tried to explain, but that the Grievor kept cutting her off and did not let her explain the purpose of the letter, and that she explained to him if he did not cooperate, the call would need to be ended. In that call, the Grievor was given an extension of time to file, and mentioned he was "not in the country".

[102] In his email and his call to OHS, the Grievor improperly *connects* the accommodation process to the harassment process; and holds the first process hostage to the second process. It is not clear why the Grievor felt that filing a human rights complaint would excuse him from re–engaging in the accommodation process. It does not. Whether or not the Grievor remained dissatisfied or disenchanted with the harassment investigation process, the accommodation process was required to continue. His obligations to cooperate in the accommodation process and provide periodic updates to the Company regarding his injuries were not at an end because he felt he had an outstanding harassment issue. It is significant that the Grievor makes no efforts to find out if there have been any personnel changes, and who he would be reporting to, if he had returned to an accommodated position in Moose Jaw. *Those* are the details that he should have

been interested in, had he truly been concerned with accommodation in the face of previous harassment. That would have been a reasonable inquiry to make.

[103] The Grievor also dictated that the Company should have either the VP of HR or the VP of OHS to contact him “moving forward”. This is a further example of the Grievor dictating the terms on which he was willing to communicate with the Company in the accommodation process.

[104] To the Company’s credit, it *did* have a Vice–President contact the Grievor, on April 28, 2020, in response to his ‘demand’, even though it had no obligation to do so. That VP was Chad Rolstad, VP HR & Chief Cultural Officer. In his letter, Mr. Rolstad explained that it was ‘standard practice’ to re–engage a Grievor in the accommodation process, and to seek information from that Grievor, and that the letter sent February 6, 2020 was that attempt; and the letter sent March 2, 2020 was a reminder.

[105] This Arbitrator agrees with that assessment and recognizes this as ‘standard practice’ and an attempt by the Company to satisfy its obligations to the Grievor. There was no ‘harassment’ in this contact.

[106] On April 28, 2020 – a significant time later – the Grievor responded via email to Mr. Rolstad, stating that Mr. Rolstad was ‘misinformed’, as his complaint was never investigated properly under Policy 1300. He then pointed out those aspects which were substantiated or partially substantiated. The Grievor ended his email by noting he had a human rights complaint filed and that there were other allegations not investigated, and urged the VP to “re–read and review my full complaint”.

[107] Despite being contacted by a VP level employee – as requested – the Grievor did not make any attempt to re–engage in the accommodation process, as requested. Instead, he continued to hold his participation in the accommodation process hostage to a satisfactory resolve to his perceived harassment issues.

[108] In June of 2020, Mr. Rolstad responded and stated the Company was satisfied with the investigation and that appropriate remedial action was taken to address the matters that were substantiated. Mr. Rolstad also referred to a recent complaint made by the Grievor of harassment against the Disability Management team, noting that the reach out by that

team was “standard practice” to re–engage the Grievor in the accommodation process. The Grievor was encouraged to engage with Disability Management.

[109] **CROA 4505–S** was decided on July 17, 2020.

[110] In August of 2021, the Company contacted the Grievor with a modified accommodation offer, as they were under the impression from a factual mistake on social media that the Grievor was working as a “campaign manager” for a candidate, and they were also aware the Grievor continued to sit on the Development Appeal Board in Moose Jaw. The Grievor responded that this was allegation of being a campaign manager was false and this unfounded allegation was causing him a high level of anxiety.

[111] However, in the letter the Grievor ultimately provided from the candidate to the Company in support, the candidate *himself* noted that social medial ***had*** incorrectly named the Grievor as his campaign manager; and the Company staff were not the only one who thought the Grievor held that position. This was therefore not an unfounded allegation by the Company and it *was* reasonable for the Company to believe the Grievor was performing this work, which would have been inconsistent with his significant restrictions.

[112] It was not harassing for the Company to follow this up. While the next step of the Company should have been to put that information to the Grievor’s doctor and have that individual update the Grievor’s FAF (instead of offer an accommodation without that information), given the significant difficulties the Company had communicating with the Grievor since the summer of 2018 – even at the Vice–President level, I am not satisfied the Company’s error in this regard resulted from any nefarious or inappropriate motivation; I am satisfied it resulted from the difficulty Company personnel were experiencing communicating with the Grievor and getting him to re–engage in the accommodation process.

[113] In September of 2021, the Union launched a Grievance for constructive dismissal.

[114] While the Grievor provided two letters from a psychologist (in May of 2020 and in September of 2021) that indicated the Grievor began treatment for mental health issues in June of 2019 (one year after he was found to be totally unfit due to physical issues), that psychologist specifically stated in her letter that she did not provide formal diagnoses,

but only treatment for symptoms. It was therefore left to the Grievor's doctor to make a diagnosis of mental health issues, which did not appear until September of 2021.

[115] In November of 2021, a further FAF was filed. The doctor noted the Grievor was totally unfit for any work. It was noted the Grievor had R. knee meniscus tear, anxiety; general arthritis and contractures and tendinitis. It was noted that he was not fit to work, with the explanation being that he had "significant restrictions as a result of his arthritic problems and (R) knee meniscus problems" (which were by now four years old) and that he was awaiting surgery for contractures in his (R) hand. While certain words in this FAF related to his cognitive issues are illegible, nothing turns on this, as it is noted the Grievor has "anxiety related to stress".

[116] This is the first FAF to note this mental health condition, which was diagnosed by Dr. Hugo in September of 2021.

[117] A year later, in September of 2022, the Grievor was contacted about the Company's intent to close his file. That letter advised the Grievor to provide any further medical information to indicate his restrictions had changed. On September 30, 2022, Dr. Hugo provided a note that the Grievor's mental health issues – which he stated were related to his toxic work environment – were "*not considered permanent and his ability to return to work may be reconsidered if the work environment would become less challenging for him and more accommodating*". An FAF was also filed, that only related to the mental health issues. The FAF stated that the Grievor "*would be able to return to work if his work environment changes and becomes less toxic for him. This is a result of findings of harassment at work*". On this FAF, the doctor also noted that the Grievor was "totally unfit for any work" and that complete recovery was *not* expected.

[118] Curiously, there is no mention in that FAF of the Grievor's extensive physical disabilities, which had prevented him from working since June of 2018 and throughout the intervening period. Those physical disabilities were extensively noted in the FAF from November 9, 2021 as totally disabling, including arthritis, tendinitis and "knee meniscus problems". It was those physical disabilities which had also "worsened" with the Grievor's attempts at two hours of work a day, in June of 2018.

[119] The Company closed the Grievor's file in October of 2022.

Themes in the Evidence

[120] It was noted by that arbitrator in **CROA 4505–S** that "Mr. Danchilla did not always assist in providing CP with the medical information it required. That makes it difficult to fault CP's efforts during the initial accommodation period (at para. 37); and [t]he arbitrator understands CP's position that delays seem to occur with Mr. Danchilla. For example, he delayed in providing CP with medical information to assist it with accommodation. He also delayed in attempting to mitigate his damages" (at para. 40).

[121] These comments are repeated at this juncture, as it is a common theme in the evidence that the Grievor continued to 'stand in his own way' by his own argumentative behaviour and false assumptions, even after his file was re–opened. Upon a review of the totality of the evidence, two strong themes become apparent.

[122] While there *were* inappropriate and discriminatory comments made internally about the Grievor (three in total; by 3 different employees) in mid-2017 – which were substantiated in the Company's internal harassment investigation – the Grievor is not himself blameless in his interactions with his colleagues; nor does he come to this process with "clean hands" regarding his own treatment of Company employees. The Grievor has a tendency to take a confrontational and argumentative stance with Disability Management and Company OHS staff when those personnel are making reasonable and standard requests of an individual off work due to disability. The Grievor labels that contact as "harassing" to him. I accept these requests over which the Grievor took offence were in fact 'standard practice' and not unusual, and that various staff members – up to the Vice–President of Human Resources – tried to help the Grievor understand this.

[123] The fact that the Grievor had issues previously with the Company and was ordered to be re–instated does not justify these argumentative and inappropriate actions towards both Disability Management staff and internal OHS staff, during the five year period at issue in this Grievance. These inappropriate interactions by the Grievor began as soon as he was contacted in the summer of 2017, to substantiate his new knee injury.

[124] I further accept that outlining what could occur if the Grievor remained non–compliant with his obligations to provide medical information was also not "threatening" or "harassing" behaviour towards the Grievor, regardless of how he perceived those comments. There

are serious consequences for an individual who does not cooperate in the accommodation process.

[125] Further, while the Grievor was quick to label as “harassing” any requests he felt were unreasonable; or any behaviour he felt was inappropriate, or if he felt he was not treated without “dignity and respect” or should not be contacted, he did not apply that same standard of dignity and respect to himself when dealing with Company staff. This tendency begins very early in the accommodation process, once he re–injured his knee. That injury took place on July 1, 2017. He was slow to substantiate that injury with *any* medical information at all. That this was a pattern of conduct for this Grievor was noted in **CROA 4505–S** several years later, regarding the time period before 2017, and I am satisfied this attitude continued into 2017. The Grievor was reasonably contacted by JL from the Disability Management office, seeking this information, in mid July of 2017. In this conversation, the Grievor was rude and argumentative, talked over her and refused to listen to her explanations, and resisted providing medical information to *even* substantiate he *had* suffered an injury. The Grievor expressed frustration with the request for an FAF as in his view it was either excessive or he was still unable to work so the attitude was ‘why was the Company bothering him? or ‘you don’t have anything for me anyways’.

[126] JL considered him as ‘difficult’ case thereafter. This was a reasonable and correct assessment to have made given this conduct. I have no doubt that she was intent on making sure she had all her “ducks in a row” when she dealt with the Grievor, and I do not find the internal comment she made regarding what she felt was a need to make sure she was correct (“I need to have my s*** together for this one”) to have been adversarial, harassing, discriminatory, or to demonstrate bias, considering how she had *already* been treated by the Grievor. She ran certain of her proposed letters through her superiors, to ensure she was acting correctly, which was reasonable in the circumstances.

[127] The Grievor had the same attitude with other OHS staff. He refused to listen to explanations of the process; he labelled as “harassing” when that staff contacted him; or sought information from him; and he generally felt he knew better than the Company how

his accommodation process should proceed and on what timetable. An example is his conversation with Ms. Wurah in March of 2020.

[128] I do not find it was harassing for the Company to direct who the Grievor should have contact with, given his difficulty in acting in a respectful manner.

[129] The second theme is the Grievor has a tendency to try to seize control of the accommodation process, and dictate and direct unreasonably and improperly how that process should proceed and who he should talk to and deal with at the Company. The Grievor even went so far as to refuse to accept registered mail from the Company twice, when they repeatedly sought his re–engagement in the accommodation process after the harassment investigation had been concluded, in early 2020. At that point, the Grievor also directed that he would only speak to someone at a Vice–President level.

[130] It is confounding how the Grievor felt he was in a position to make such demands. To his credit, Mr. Rolstad, who was Vice–President of Human Resources, acceded to this request and contacted the Grievor. He again explained it was standard practice the Griever be contacted to re–engage in the accommodation process. When the Grievor finally responded to this reach out by Mr. Rolstad, his position was that Mr. Rolstad was "misinformed", and should go back and read his harassment complaint 'to the letter' as it had not been satisfactorily resolved. He chose to dictate to the Company that he would not re–engage in the accommodation process, given the outstanding human rights complaint he had filed, and this harassment Grievance. He effectively "leveraged" his cooperation in that process to his harassment complaints. As mentioned to the Union at the hearing, the Grievor would not be the first employee to be dis–satisfied with the results of a harassment investigation.

[131] An employee who refuses to engage in an accommodation process in this manner does so at their considerable peril.

Grievance: Failure to Accommodate

[132] The Union argued in both its Brief and Reply, that the "central issue" in its arguments for failure to accommodate stem from the Company's refusal to allow the Grievor to

determine his own scheduling for his accommodated work. It is the Union's position the Grievor's doctor asking the Company to involve the Grievor in scheduling his hours was a medical requirement. The Union took the position the Company failed to follow the Grievor's doctor's recommendations, which resulted in a failure of the employer's duty to accommodate the Grievor to the point of undue hardship. For its part, the Company maintained the Grievor's request was a preference and not a medical requirement and that it was not therefore required to accommodate that preference.

[133] In June of 2018, the Grievor returned to work under an accommodated timetable from his doctor, at two hours a day. This was a drastically reduced work schedule compared to the norm, being ¼ of the time usually worked. This was a "work–hardening" type of accommodation which was expected to increase as time passed, with the first reassessment to be two weeks after the start of the program. It was supported by an FAF and conversations with the Grievor's doctor that had occurred in late May. The Company's clarification of the Grievor's medical requirements was consistent with accommodating that program.

[134] There is no mention in the initial FAF or even in the clarification from the Grievor's doctor, about any other need for flexibility of the Grievor in scheduling beyond the two hour limit and the need for "daylight hours". There *was* a medical requirement that the Grievor have the flexibility to take "micro breaks" *within* his two hour work day, which allowed him to change positions, and this was accommodated during the short period of time the Grievor ultimately worked.

[135] The Company set the Grievor's accommodation schedule as 16:00 to 18:00, Wednesdays to Sundays, with Monday and Tuesday off, for reasons which I am satisfied related to supervision. I am further satisfied this was an operational decision and did not arise from the Disability Management office. The evidence demonstrates the Grievor was not happy to have his days off 'changed' and inquired of the Company why this was done. He expressed his frustration with this state of affairs. In the Grievance documentation, the Union indicated this flexibility was required *for days he had physio*, due to the fact that physio 'beat him'. *In the Grievor's view*, as he was just doing administrative work, it could

be done anytime. He took that issue up with the Company, which noted there was no medical requirement for the schedule the Grievor preferred.

[136] The Grievor unreasonably viewed the Company's actions as a form of reprisal, which allegation has not been established on a balance of probabilities. I consider this is another situation where the Grievor wanted to dictate the terms under which he would cooperate with the accommodation process, which was a pattern of behaviour.

[137] When the Company refused his preference, the Grievor then attended on his doctor to obtain an FAF that requested he have the flexibility he wanted, in setting his own schedule.

[138] Just because a statement flows from a doctor's pen as a request, does not clothe it with a distinction of being a "medical" requirement that must be accommodated. The Grievor was under the mistaken impression that it did, and that all he needed to do was to have his doctor state his preference for it to be binding on the Company. It was the Grievor's – and not the doctor's – evidence that he wanted this "flexibility" to attend medical appointments and particularly his physio appointments. Given my questions to the Union at the hearing, it will likely not come as a great surprise that I have significant difficulty with this argument for sever reasons.

[139] First, the doctor's requirement is not framed as a direction with any specifics of what type of "flexibility" would be required (such as "daylight hours" only). It is framed as a request rather than a direction.

[140] But more significantly, I have difficulty understanding how Grievor needed to be involved in setting a flexible work schedule when physiotherapy was only required "every 2 weeks". That the Grievor's doctor did not state this "flexibility" requirement was to attend physiotherapy is consistent with the fact that this would be a difficult requirement to medically substantiate given that these appointments were so infrequent. The Grievor was only attending work two hours a day. Even if physiotherapy were a "multi times a week requirement", there was no explanation offered for why the Grievor could not have scheduled his physiotherapy appointments so as not to interfere with the small amount of time he was expected to work – either for his days off – which were during business hours during the week – *or* earlier in his two hour workday, well before his 4:00 p.m. start time,

if physiotherapy tired him, as he suggested in the evidence. There was no evidence why the physiotherapy appointments could not be scheduled at 8:00 a.m., for example, to allow him to rest after that appointment, before he started work at 4:00 p.m. His only example given to the Company was that physio at "1 p.m." tired him out for working at "4 p.m.".

[141] The Grievor's credibility is significantly shaken by his assertion that he needed "flexibility in his scheduling – and in particular his choice of days off – to attend physiotherapy in the face of this clear evidence that those appointments were only every two weeks.

[142] Neither was any evidence provided of an unusual need to attend medical appointments by 2018, or why those appointments could not be undertaken on the Grievor's days off, or even during work days, given that his work began at 4 p.m., which is late in the business day.

[143] When the question of infrequent physio was put to the Union at the hearing, its response was that the Investigator has determined that the Grievor's allegation of harassment regarding this issue was "partially substantiated". While a summary of the Investigator's findings was provided to the Grievor and is in evidence, I cannot agree there is sufficient evidence in that summary that was determinative of this issue, given the lack of detail and the reference to this allegation being "*partially* substantiated", or which parts were substantiated and which were not if it was "partial". The evidence is lacking. It is unnecessary to speculate, as I do not consider that the assessment of an Investigator who does not have legal training in determining duty to accommodate issues, nor all the contextual factors necessary to make that determination, would be binding on this Arbitrator whose role it is under the grievance procedure to assess the evidence; apply the legal framework; and decide exactly that issue.

[144] This is distinguishable from the situation in **CROA 4861,** where a pregnant Grievor was willing to try a particular role during her pregnancy; and found she was physically unable to continue to perform those particular duties due to exhaustion, so re–attended on her doctor, reported that exhaustion and obtained *specific* updated restrictions for work she

was – and was not – physically able to perform. This is not that. *Evraz Inc. v. NA Canada*[11] is also distinguishable. In that case, an electrician was laid off first in order, because he was unable to work 12 hours shifts due to a medical accommodation. There was no issue raised in that case that the schedule was a medical requirement.

[145] Given the evidence, including the lack of any reference to flexibility in scheduling in the initial FAF which formed the basis for the RTW; the Grievor's noted frustration with having his days off 'changed' which was communicated to the Company and the quick timing of the new FAF with a vague and non–specific request for his "involvement" in scheduling, I am satisfied that on a balance of probabilities, the need for "flexibility" reflected the Grievor's own *preference* for having the weekends off or his work day set earlier in the day – communicated through his doctor – rather than any medical requirement to accommodate his disability, whether for attendance at physiotherapy or otherwise. The Grievor has not met his burden to establish this need for "flexibility" in scheduling through his involvement in that decision was a medical requirement.

[146] It was a part of the Company's obligations to assess the Grievor's medical needs and to determine a reasonable accommodation. I am satisfied it did so appropriately when it determined that it was the Grievor's "preference" and not a "medical need" that he be "involved" in scheduling decisions.

The Result of the Grievor's Assumptions

[147] The Grievor made several assumptions about the Company's denial of his request for "flexible hours", which were incorrect, including a presumption that the Company had once again failed to accommodate him; was once again harassing him; and – most significantly – that he was *not* required to re–engage in the accommodation process until that harassment was addressed. I am satisfied his erroneous beliefs and perceptions that he was being "harassed" due to failure to accommodate his involvement in scheduling resulted in his mental health deterioration for which he began receiving treatment in 2019, which connection was made by the Grievor. It would have also

[11] 2010 CanLII 96500 (ABGAA)

influenced the information he relayed to his physician's regarding the state of his work environment being "toxic" as a result of that harassment, which I have not found to be the case. While it may be self–evident, the Grievor's doctor would only have been privy to the Grievor's perceptions of what harassment he considered he had been experiencing.

[148] This leads to a discussion of a further element of the accommodation grievance, which is whether the Company's obligations were at an end when the Grievor refused to re–engage in the accommodation process. As noted by the Supreme Court in *Hydro–Quebec v. SCFP–FTQ, infra,* "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".[12]

[149] For the reasons which follow, I am satisfied the Company's obligation to accommodate the Grievor was at an end on two distinct bases.

[150] The first basis relates to the Grievor's failure to re–engage in the accommodation process after the harassment Investigation was concluded in late 2019.

[151] The Company took considerable efforts to re–engage the Grievor in the accommodation process, including succumbing to his dictate that he only be contacted by someone at the Vice–President level, and sending letters (the first of which he refused) and reminders. In doing so, the Company went 'above and beyond' what was required, to try to convince the Grievor to cooperate, including contact at the Vice–President level, which the Grievor had no basis to demand. The Grievor was not satisfied with Mr. Rolstad's explanations. The Grievor told Mr. Rolstad that he 'still' had a human rights complaint or harassment complaint, and that Mr. Rolstad was 'misinformed' if he thought it was addressed.

[152] The Grievor effectively and inappropriately held the accommodation process hostage to a satisfactory harassment resolve and suggested Mr. Rolstad go and review that complaint again. He assumed he could maintain that the toxicity continued; that he was being harassed with almost every contact; and therefore, he did not have to cooperate. The Grievor chose to in effect "hold hostage" any further accommodation process to his demand the Company 'properly' address his harassment claims when the Company

[12] 2008 2 SCR 561, at para. 19.

sought – repeatedly– to re–engage him in the accommodation process. The Grievor also fixated on the doctor's letter and would not let that issue go, even when Mr. Moore felt he had a plan going forward that the Grievor agreed with. He did not even check on which individuals he would even need to work with in an accommodated role, which may not have even included those he previously worked with as significant time had gone by.

[153] An employee who refuses to engage in an accommodation process – and in particular– to inappropriately tie one process to another – does so at his or her own considerable risk. As was pointed out by this Arbitrator to the Union at the hearing, the Grievor would not be the first employee who has alleged harassment, who holds the view the investigation either was not properly carried out, or came to the wrong conclusions, or who believed his employer was not appropriately accommodating him when a preferred accommodation was not provided.

[154] As already noted, the Supreme Court has directed that an employee must fulfill the basic requirements of employment or risk file closure. Those basic requirements for a disabled employee include an obligation to cooperate in the accommodation process. In this case, the Grievor refused to do so. Upon review of all of the evidence carefully, the Grievor's attitude and resistance to cooperation has brought the Company's obligations to accommodate the Grievor to an end. Without the Grievor's cooperation, the Company has reached the point of undue hardship.

[155] Even if the Grievor's lack of cooperation did not result in this point being reached, his chronic absenteeism has also resulted in the point of undue hardship being reached and is the second basis that supports the Company's decision.

[156] The Company has established the requirements set out in *Hydro–Quebec v. SCFP–FTQ:*

> However, the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration.
>
> and
>
> However, in a case involving chronic absenteeism, if the employer shows that, despite measures taken to accommodate the employee, the employee will be unable to

> resume his or her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship[13].

[157] I cannot agree there is a reasonable basis to believe the Grievor's performance could improve in future regarding his attendance at work, such that reasonable accommodation to the point of undue hardship could be pursued. While this ground is more fully covered in the "File Closure" section, the Grievor has not established that there has been a change in his long–standing, significant and pervasive physical restrictions, which have prevented the performance of productive work for more than four years. Silence regarding any physical issue in the final FAF provided by the Grievor does not satisfy the Grievor's obligation to establish his physical issues have resolved, especially given the significant and long–standing history of the serious physical limitations he has suffered over multiple years, including arthritis, tendonitis, knee problems and joint and back pain. Given that the Grievor had provided multiple FAF's listing these restrictions, the Grievor was required to demonstrate there was some prospect of improvement of those conditions in the foreseeable future, which he did not do.

Grievance: Harassment/Constructive Dismissal

[158] Given my findings on accommodation, it is not necessary to determine if the Grievor was harassed to the point of being constructively dismissed. However, in case I am in found to be error, I will also address this issue.

[159] It was argued by the Union that the Company had not explored certain matters in the Investigatory process, as it was required to do; and that there was a sustained pattern of harassment which violated the Grievor's rights under both the collective agreement and human rights legislation. It also argued the Grievor had the same rights during this harassment investigation as it would have for a disciplinary investigation under the collective agreement, and that these rights were denied, as he was not present when statements were taken. The Union argued the Company had not offered any remediation for the substantiated allegations; that the Grievor had not received any apologies from the employees who committed harassment against him; that the Company did not

[13] At para. 17.

"meaningfully address the substantiated harassment"; that the Company did not treat the Grievor with "civility, decency, respect and dignity" but he was belittled and harassed by both management and staff; that this caused the Grievor to lose trust and for irreconcilable differences to occur, which resulted in the Grievor's constructive dismissal. It argued it was the Grievor's mental health decline as a result of the Company's actions which rendered the Grievor unable to work.

[160] For its part, the Company argued it appropriately investigated the Grievor's complaints of harassment and appropriately remediated those complaints. It urged it had not violated Policy 1300. It argued there was no obligation to tell the Grievor the details of what was done in remediation of his harassment complaints. It urged it appropriately investigated those complaints and advised the Grievor of both the results of that investigation and that it had taken remedial measures. It noted in its Reply Brief that the appropriate training and coaching regarding respectful behaviour, discrimination and harassment in the workplace was completed with all managers and supervisors at the Moose Jaw Terminal on February 19 and 20, 2020. There was also training regarding accommodation in the workplace. The Company noted that the Union *was* aware that this remedial measure that was taken, as it was invited to the training in Moose Jaw. It argued these actions appropriately addressed the Grievor's complaints. It also pointed out that Policy 1300 directed the Grievor to report any retaliation should that occur, which was his protection when he returned to work. It further argued it could not give the Grievor assurances he would never come into contact with any of the individuals again in the workplace, however it did point out that by November of 2021 personnel had changed in the Moose Jaw Terminal, office, had the Grievor made any inquiries. It argued this was not an appropriate case to attract damages.

[161] For the following reasons, I cannot agree with the Union that the Grievor was constructively dismissed, or that the Grievor's mental health decline was due to the Company's conduct against him or that damages are appropriate in this case.

[162] As a preliminary point, I cannot agree with the Union's position that the Grievor had the same rights in a harassment investigation that exist under the collective agreement for an Investigation under Policy 1300. The two processes do not just arise under different

instruments, they are for different purposes. A disciplinary investigation occurs under the collective agreement, while a harassment investigation occurs under the Company's Discrimination and Harassment Policy (HR #1300), which is a unilateral policy of the Company. A disciplinary Investigation ensures the Grievor has the right to know and understand any evidence that could be used against him. A harassment investigation is taken at the *instigation* of an employee. There is not the same concern with ensuring the Grievor understands any allegations, or has the ability to review all of the evidence that could be used against him; as the allegations are not being made against the Grievor, but *by* the Grievor. The processes cannot be equated, nor would they attract the same rights and protections.

[163] Regarding remediation, it was up to the Company to determine – and not the Grievor to dictate – how to appropriately protect its employees from any harassment in the workplace. In this case, the Grievor was not performing any work for the Company in 2019 at the time the Investigation was undertaken. There was no requirement or need to protect him from any individuals who would do him harm, or to change his workplace, other than to provide the necessary training to managers and supervisors in Moose Jaw with the appropriate training in harassment and accommodation, which was accomplished in February of 2020. Neither did the Grievor *even ask* if the same personnel were in the Moose Jaw office when he was approached to re–engage in the accommodation process, to determine if the same individuals would even be present should he return to work, which would have been a legitimate concern.

[164] The Union has not provided any jurisprudence to support its position that the Grievor was entitled to his desired details after the harassment investigation was concluded, including an apology from the employees involved. Further, the jurisprudence on which the Union relied for constructive dismissal related to non–unionized employees.

[165] Neither am I satisfied there was any ongoing pattern of harassment from the Company against which the Grievor had to be protected in his dealings with Disability Management or OHS. It was not harassing – but was standard practice – for the Company to communicate with the Grievor's doctor to determine when the Grievor's work hours could be reasonably increased in the work hardening program due to the passage of time. This

was also reasonable because the Grievor himself mentioned he “worked out” each day so it was also not unusual or unexpected for the Company to consider that he ‘went to the gym’. He also stated he was “out of town” so capable of travel.

[166] Neither do I find it harassing that the Grievor did not have any work on the first day he reported for this modified duty. It is not unusual that miscommunications can occur when modifications are taking place. That only occurred for one day. The Grievor jumped to the conclusion that this was continued harassment, which conclusion was unfounded.

[167] It was also not a “lie” or “completely unfounded” for the Company to believe that the Grievor was acting as campaign manager. As the candidate noted *in the letter the Grievor himself had provided,* social media ***had*** incorrectly named the Grievor as the campaign manager and the candidate had been contacted about that issue and had since corrected that misinformation, so the Company’s belief had a legitimate basis. How the Grievor could cast blame on the Company – for the same conclusion that the candidate indicated had been taken by others – is confusing.

[168] I accept that the Company should not have offered an accommodation directly to the Grievor based on information it had that the Grievor was stated to be the Campaign Manager for a political candidate, or from the fact that he was continuing to sit on the Development Appeal Board. The proper step would have been to seek a further FAF (which did occur shortly after). However, in accommodation cases, context is important and that context can work for and against a Grievor. In the circumstances of the Grievor’s significant resistance to providing medical information, I consider this offer to be an effort to avoid discussions with a very difficult Grievor, as opposed to a pattern of harassment. I do not accept that in seeking that information, the Company’s action was unreasonable or it was participating in any level of harassing conduct.

[169] I cannot agree with the Union that the events subsequent to 2018 – and into 2019, 2020, 2021 and 2022 continued any pattern or harassment for this Grievor or that a toxic work environment continued for him after the Company’s remediation of the substantiated concerns of the inappropriate comments. Upon a close review of all of the material, I am satisfied that the Grievor himself acted in a manner which was aggressive, unprofessional and unreasonable towards the Company’s staff on several occasions; that he did not

show Company personnel respect and talked over individuals who were trying to help him understand what was standard practice; that he was unreasonably angry with JL on her first phone call regarding his new knee injury; and on a subsequent call (as demonstrated by his own admission on a later call); that he talked over JL when she rightly tried to explain to him the disability management process; that he wrongly and unreasonably maintained these individuals were "harassing" him when they were following standard practice by reasonably seeking updated medical information, or trying to re–engage him in the accommodation process; that he blamed the Company for him "losing" his doctor with their repeated requirements for medical assessments, when I am not convinced this loss was entirely the Company's fault; and that he raised his voice and was unprofessional in his communication, to the point that both JL and Ms. Wurah both noted they would need to end the call and Mr. Dales had to tell him to lower his voice.

[170] In these circumstances, I am prepared to determine that the *Grievor* harassed multiple employees of the *Company* who were only trying to perform their roles, and that the Company – and the Union – made multiple efforts to try to help the Grievor understand the accommodation process. I have not been convinced there was a continuing pattern of harassment shown to the Grievor by any Company officials after the original issues had been remediated. There was no continuing toxic work environment except what the Grievor was he himself creating.

[171] I further do not accept it was the Company's conduct which caused the Grievor to suffer mental health issues which rendered him unable to work, as argued by the Union, or which lead to irreconcilable differences. The Grievor had been rendered physically unfit for any productive work in late June 2018, after a short attempt at work hardening had worsened his *physical* symptoms, as noted in the FAF received in late June 2018. No FAF was every provided that showed those physical ailments had resolved and the Grievor could return to work. It would be the Grievor's burden – which was not met – to establish those physical issues had resolved to the point he was capable of performing productive work for the Company. As late as November 2021, those physical symptoms persisted.

[172] There was no diagnosis of any mental health issues at the point in time when he left work due to his physical issues. It was a further year later that the Grievor sought treatment for mental health issues. I am satisfied that the Grievor's physical disabilities had already rendered him unfit for any work at the time he developed mental health issues, regardless of their cause.

[173] It is only when a determination was made to close his file that an FAF was provided which was for the first time silent on what had been severe and pervasive physical injuries which had prevented the Grievor from performing productive work *for years,* and which noted the Grievor's mental health issues could "change"*.*

[174] Even if that were not the case, I cannot agree with the Union that it was the Company's actions which led to the Grievor's mental decline. That occurred when the Grievor *mistakenly* believed that the Company had failed to accommodate him for flexibility in scheduling and that this was harassing to him, which I have found was a mistaken perception on his part. Up to that point, the Grievor had been performing accommodated work.

[175] I also cannot agree the Grievor was not treated with civility, decency, respect or was belittled or humiliated. There *were* three inappropriate comments made at a point in time in 2017. The Company investigated and remediated the issues that were substantiated. The Grievor was off work at that time. As earlier noted, the Grievor was treating others with a lack of civility, decency and respect, and belittling and disregarding their important role in seeking his accommodation.

[176] The Company did provide the Union with certain information regarding remediation. From this Arbitrator's experience, sensitivity training is a common remediation in cases of harassment complaints which occur from one–time comments. The Union *was* made aware that one of the remediations was to be sensitivity training for the Moose Jaw Terminal, as it was invited to participate.

[177] Neither do I find the Union has met its burden to establish – on a balance of probabilities – that the change to the Grievor's days was a form of reprisal or harassment. There is no evidence which would support that claim. The Company was entitled to schedule its employees in its workplace and did so for the Grievor. In fact, given the Grievor's stated

difficulties regarding physiotherapy, having days off which were in the middle of the business week would have *supported* him in seeking that treatment.

[178] Allegations of harassment are serious and significant– not just for the employee making them, but also for the employees against whom they are made. The bulk of these serious allegations made by the Grievor were not substantiated. While I am satisfied that the Company's own internal investigations *did* find that 3 out of 13 allegations of harassment were substantiated – which comments are in the evidence recital – I am also satisfied the Grievor was advised of what the results of that investigation were for every allegation made; that as the Grievor was off work no immediate personnel changes would have been required, and that the Company was entitled to remedy that harassment, without providing the details to the Grievor. As there were many allegations that were not substantiated, those results may not have been to the Grievor's satisfaction. However, that does not mean the Grievor was further harassed by the Company due to his disagreement with that result.

[179] Three inappropriate comments were made and sensitivity training was offered. Given the Grievor's inappropriate and harassing conduct of Company staff, I am not satisfied this is an appropriate case for damages to issue.

Grievance: File Closure

[180] As noted in *Hydro–Quebec v. SCFP–FTQ*, "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".

[181] It has been found on two different bases that the Grievor has failed to cooperate in the accommodation process. With the breach of his own obligations and his refusal to participate in the accommodation process, I am satisfied the Grievor is unable to meet the "basic obligations associated with the employment relationship for the foreseeable future". I am satisfied the accommodation process was brought to an end, as without the Grievor's cooperation, the Company has reached the point of undue hardship and the file was appropriately closed.

[182] However, even if I were incorrect in this finding, I would have determined that that the Grievor's file was appropriately closed, based on his prolonged absenteeism and lack of a reasonable basis to conclude he could return to productive work in the foreseeable future.

[183] As noted in **CROA 3346**, although the obligations under the duty to accommodate are continuing, where there is excessive innocent absenteeism due to a disability, with an unlikelihood of regular attendance in the foreseeable future, administrative dismissal by the Company can be upheld. As was also noted in that case, advance notice of its intention is required, so the Grievor has an opportunity to provide any further information that may be relevant. That warning – and chance – was given in this case.

[184] The Union has argued that it was not appropriate to close the Grievor's file, given that medical information was provided in October of 2022 that the Grievor's absence from the workplace was not permanent, and he could return to work if his working environment "changed".

[185] There are three answers to the Union's argument:

[186] First, the stipulations that are noted in the Grievor's final FAF that recovery could occur if 'changes' were made to his "toxic" work environment" (which has been found to no longer exist) – is so broad and vague as to be rendered meaningless. While there *had* been inappropriate comments made in mid–2017, there was no ongoing or insidious pattern of misconduct or harassment. This comment is based on the Grievor telling his doctor of a workplace rife with harassment, when that workplace did not exist. Further, it is curious that the Grievor failed to make any inquiries over the intervening years to re–engage in the accommodation process to inquire whether such changes could be implemented, if it were the case that he was able to return to work given "changes" to his work environment. That would have been valuable information for the Grievor to know. If the Grievor was able to return to work with certain changes, then having "checked out" of the accommodation process years earlier, it would be his obligation to have raised that issue at the earliest opportunity.

[187] It is also curious that the possibility of returning to an accommodation process with "changes" was not even mentioned *until* the Company stated it was going to close his file.

[188] Second, even if it could be said that there was a reasonable possibility of a significant and dramatic turn around in the Grievor's mental health under what are unclear, broad and vague "changes", the fact remains that all of the FAF's – for multiple years – have consistently held that the Grievor was incapable of performing any work *due* to *his physical limitations*. The FAF's have been carefully and closely reviewed as part of this arbitration process. These physical restrictions are clearly still noted on the November 2021 FAF, which is the last FAF received prior to the decision to close the Grievor's file, and on each prior FAF after June 27, 2018. In fact, that final FAF mentions a *further* physical disability related to the Grievor's right hand. Those physical issues prevented the Grievor's return to work and made him "unfit" for *any* work, *including any sedentary duties.*

[189] Third, the Grievor's symptoms *worsened* when a two hour schedule was worked for a two week period, in June of 2018 and he was rendered totally unfit. As in **CROA 3346**, the Union tendered no evidence that there would be any modified duties the Grievor would be fit to perform. After being pervasive and preventing the Grievor from performing productive work *for four years*, the Grievor has not established that there has been a change in those physical restrictions, such that it is reasonable to expect him to have the capacity to return to productive work. Silence regarding any physical issues in the final FAF provided by the Grievor does not equal resolution of these physical restrictions, given the significant and long–standing history of the serious physical limitations he has suffered. It was the Grievor's burden to establish a change to his health and he failed to do so.

[190] The Grievor cannot have it both ways: Either he is prevented from performing any work due to his physical issues – as he has maintained for years – or he is not. That situation dos not suddenly change because the Company is now closing his file and this may impact his pension (which impact was noted by the Union at the beginning of this hearing). I am satisfied this case meets the criteria set out in **CROA 3346** and that noted in *Hydro–Quebec v. SCFP–FTQ*: it has been established that "reasonable accommodation to the

point of undue hardship is still not possible" and there is "no reasonable basis to believe that he would be able to return to meaningful service in the future"[14].

[191] In this case, there is no reasonable probability established on the evidence that the Grievor's restrictions had a reasonable basis of changing in the future, rendering him reasonably capable of returning to productive work.

[192] Despite the able argument of the Union on the Grievor's behalf, I am satisfied the Company has taken all reasonable steps to try to accommodate the Grievor; that there is no prospect for his return.

[193] It was therefore reasonable for the Company to close its file.

Conclusion

[194] The Grievances are dismissed:

a. The Company has fulfilled its duty to accommodate the Grievor, as the point of undue hardship has been reached;
b. Even if not, the Grievor has not been constructively dismissed due to harassment; and
c. The Company's decision to close the Grievor's file was warranted.

I reserve jurisdiction to correct any errors and address any omissions to give this Award its intended effect.

May 9, 2024

CHERYL YINGST BARTEL
ARBITRATOR

[14] **CROA 3346**