

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

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Date: November 7, 2017
File No.: T1873/10312

Between:

Kouroush Alizadeh-Ebadi

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Manitoba Telecom Services Inc.

Respondent

Decision

Member: Edward P. Lustig

Table of Contents

I.	Background.....	1
II.	Facts	7
	Event 1: Remarks made by David Atwell.....	9
	Event 2: Denial of a second computer	15
	Event 3: Denial of training requests	17
	Event 4: Use of the “nicknames” “Crash” or “Kourash”	17
	Event 5: Comments about Mr. Alizadeh-Ebadi’s trips to Turkey and his work ethic	19
	Event 6: Relegation to Service Desk.....	21
	Event 7: Hostile Work Environment/TEAM meeting	22
	Event 8: Denial of Promotion to Senior Client Support Specialist (Site Prime) position.....	24
	Event 9: Failure to provide accommodation for a disability through a gradual return to work program 2007-2009	30
	Event 10: Treatment on return to work in 2009.....	32
	Event 11: MTS internal investigation and report	37
III.	Legal Framework-Liability	41
IV.	Issues.....	46
V.	Analysis-Liability.....	47
A.	Issue 1	47
B.	Issues 2 and 3.....	51
	Event 1: Remarks made by David Atwell.....	51
	Event 2: Denial of a Second Computer.....	52
	Event 3: Denial of training requests	53
	Event 4: Use of the “nicknames” “Crash” or “Kourash” either section	53
	Event 5: Comments about Mr. Alizadeh-Ebadi’s trips to Turkey and his work ethic	54
	Event 6: Relegation to Service Desk	55
	Event 7: Hostile work environment/TEAM meeting	55

Event 8: Denial of Promotion to Senior Client Support Specialist (Site Prime) position	56
Event 10: Treatment on return to work in 2009.....	57
Event 11: MTS Internal Investigation and Report	57
VI. Decision	59
VII. Legal Framework-Remedies.....	59
VIII. Analysis-Remedies	61
C. Issue 4	61
IX. Orders	65

I. Background

[1] Mr. Kouroush Alizadeh-Ebadi filed a complaint with the Canadian Human Rights Commission (the Commission) dated May 30, 2010 against Manitoba Telecom Services Inc. (MTS), alleging that it had discriminated against him while he was employed by MTS between mid-2001 and April 2009 on the prohibited grounds of race, national or ethnic origin and religion under section 3(1) of the *Canadian Human Rights Act (CHRA)* by engaging in the discriminatory practices of adverse differentiation and harassment that he described in his complaint, contrary to sections 7(b) and 14(1)(c) of the *CHRA*.

[2] Sections 3(1), 7(b), 14(1)(c), 41(1)(e), 49(1) and (2), 50(1), 53 and 65(1) and (2) of the *CHRA* are relevant to this case and provide as follows:

Prohibited grounds of discrimination

3 (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

Employment

7 It is a discriminatory practice, directly or indirectly,
(b) in the course of employment, to differentiate adversely in relation to an employee,
on a prohibited ground of discrimination.

Harassment

14 (1) It is a discriminatory practice,
(c) in matters related to employment,
to harass an individual on a prohibited ground of discrimination.

Commission to deal with complaint

41 (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that
(e) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.

Request for inquiry

49 (1) At any stage after the filing of a complaint, the Commission may request the Chairperson of the Tribunal to institute an inquiry into the complaint if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted.

Chairperson to institute inquiry

(2) On receipt of a request, the Chairperson shall institute an inquiry by assigning a member of the Tribunal to inquire into the complaint, but the Chairperson may assign a panel of three members if he or she considers that the complexity of the complaint requires the inquiry to be conducted by three members.

Conduct of inquiry

50 (1) After due notice to the Commission, the complainant, the person against whom the complaint was made and, at the discretion of the member or panel conducting the inquiry, any other interested party, the member or panel shall inquire into the complaint and shall give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations.

Complaint dismissed

53 (1) At the conclusion of an inquiry, the member or panel conducting the inquiry shall dismiss the complaint if the member or panel finds that the complaint is not substantiated.

Complaint substantiated

(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

(a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including

(i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or

(ii) making an application for approval and implementing a plan under section 17;

(b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;

(c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;

(d) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and

(e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.

Special compensation

(3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

Interest

(4) Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.

Acts of employees, etc.

65 (1) Subject to subsection (2), any act or omission committed by an officer, a director, an employee or an agent of any person, association or organization in the course of the employment of the officer, director, employee or agent shall, for the purposes of this Act, be deemed to be an act or omission committed by that person, association or organization.

Exculpation

(2) An act or omission shall not, by virtue of subsection (1), be deemed to be an act or omission committed by a person, association or organization if it is established that the person, association or organization did not consent to the commission of the act or omission and exercised all due diligence to prevent the act or omission from being committed and, subsequently, to mitigate or avoid the effect thereof.

[3] By its letter dated October 5, 2012, the Commission requested the Canadian Human Rights Tribunal (the Tribunal) to institute an inquiry into the complaint under s. 49 of the *CHRA*.

[4] The hearing of the case was originally scheduled to start in Winnipeg on the morning of June 18, 2014. The day before the hearing was to start, Mr. Alizadeh-Ebadi

filed an amended Statement of Particulars to add new language to paragraph 17 of his Statement of Particulars that had been filed on June 12, 2013. The new language specifically referred to the prohibited ground of disability, which was not previously cited by Mr. Alizadeh-Ebadi in his complaint. It covered a new allegation not included in his complaint alleging adverse differentiation on the basis of “race and prior history of disability”, through the failure by MTS to accommodate Mr. Alizadeh-Ebadi with a gradual return to work program, as a result of injuries sustained in a car accident that was not his fault outside of the workplace in 2007, that resulted in him being away from work until 2009.

[5] This proposed amendment was objected to by MTS, on a preliminary basis, at the outset of the hearing on June 18, 2014. MTS submitted that this allegation and the ground of disability was not mentioned in Mr. Alizadeh-Ebadi’s complaint and, as such, was not investigated by the Commission and therefore was not part of what was referred by it to the Tribunal for an inquiry. MTS submitted that it was therefore not properly before the Tribunal for adjudication as part of the inquiry into the complaint requested by the Commission.

[6] A recess took place to allow the parties to discuss this matter further with each other. After resuming the hearing later that morning Mr. Alizadeh-Ebadi, on consent of MTS, requested an adjournment of the case to allow him to return to the Commission for the purpose of requesting the Commission to consider a further complaint respecting the new allegation referred to in the proposed amendment to paragraph 17, including the prohibited ground of disability. I granted Mr. Alizadeh-Ebadi’s request for an adjournment *sine die*.

[7] A letter was sent to the Tribunal by counsel for Mr. Alizadeh-Ebadi dated November 7, 2014 respecting the status of the case. In the letter counsel stated that Mr. Alizadeh-Ebadi “...has filed an additional complaint with the Canadian Human Rights Commission (“CHRC”) relating, *inter alia*, to allegations that MTS discriminated against him on the basis of a disability...” The letter referred to the fact that the Commission was reviewing the matter in relation to the possible application of section 41(1)(e) of the *CHRA* and that an

investigation by the Commission of the additional complaint would only occur if the section 41 issue was resolved.

[8] Subsequently, the Commission decided not to deal with the additional complaint of Mr. Alizadeh-Ebadi, on the basis that it was out of time under section 41(1)(e) of the *CHRA*. As such, the additional complaint was not investigated or referred to the Tribunal for an inquiry. There was no judicial review of the Commission's decision to not deal with the additional complaint. Following the Commission's decision, Mr. Alizadeh-Ebadi filed a re-amended Statement of Particulars removing from paragraph 17, as amended, the language referring to the new allegation and the prohibited grounds of both race and disability related thereto. The three versions of Paragraph 17, in Mr. Alizadeh-Ebadi's original Statement of Particulars, in his proposed Amended Statement of Particulars, and in his Re-amended Statement of Particulars read as follows:

1. Original Statement of Particulars

Between 2007 and early 2009, the Complainant was on an extended sick leave arising out of a serious motor vehicle accident that was not his fault. While he was away, his then TEAM leader, Brenda Coutts, removed his computer without saving the contents of the computer on a compact disk. When the Complainant expressed his dissatisfaction with this upon his return to work, Ms. Coutts told him "shit happens - suck it up". When he took issue with this response, Ms. Coutts replied that he was "bordering on insubordination." She later apologized for her comments.

2. Proposed Amended Statement of Particulars

Between 2007 and early 2009, the Complainant was on an extended sick leave arising out of a serious motor vehicle accident that was not his fault. MTS required that the Complainant only return to work after he had fully recovered from the accident. MTS would not permit a gradual return to work or any other meaningful accommodation. This treatment by his supervisors, including Wayne Horseman and Brenda Coutts, was different than the treatment provided to other employees returning to work from a leave of absence which the Complainant attributes to his race and prior history of disability. While he was away, his then TEAM leader, Brenda Coutts, removed his computer without saving the contents of the computer on a compact disk. When the Complainant expressed his dissatisfaction with this upon his return to work, Ms. Coutts told him "shit happens - suck it up". When he took issue with this response, Ms. Coutts replied that he was "bordering on insubordination." She later apologized for her comments.

3. Re-amended Statement of Particulars

Between April 26, 2007 and February 2009, the Complainant was on an extended sick leave arising out of a serious motor vehicle accident that was not his fault. From June 2007 to February 2009 this absence was without pay from MTS. The Complainant received income replacement indemnity benefits from Manitoba Public Insurance Corporation (“MPI”) from May 3, 2007 until April 11, 2008, Throughout the Complainant’s absence from MTS, the Return to Work Coordinator, Des Hathaway, and MTS exchanged communication with respect to the Complainant’s return to the workplace. While he was away, his then TEAM leader, Brenda Coutts, removed his computer without saving the contents of the computer on a compact disk. When the Complainant expressed his dissatisfaction with this upon his return to work, Ms. Coutts told him “shit happens - suck it up”. When he took issue with this response, Ms. Coutts replied that he was “bordering on insubordination.” She later apologized for her comments.

Further, it should be noted that Part B of Mr. Alizadeh-Ebadi’s original Statement of Particulars was never amended and has always read as follows, without any reference to the prohibited ground of disability:

B. Complainant’s Position on Legal Issues

1. Did MTS fail to provide a harassment free work environment?

The Complainant’s position is that MTS failed to provide a harassment free work environment.

2. Did the Complainant receive adverse differential treatment which adversely impacted his career at MTS?

The Complainant asserts that he was treated in a differential manner on the basis of his race, national/ethnic origin and religion and that his career was therefore adversely impacted.

[9] The hearing was resumed and held in Winnipeg during the weeks of August 2nd and November 7th, 2016; and during the week of February 13th, 2017, and on May 19th, 2017. The evidence phase of the hearing was completed on February 17th, 2017. On May 19th, 2017 the parties made oral arguments, having agreed to exchange with each other and file with the Tribunal their written arguments on May 15th.

II. Facts

[10] Mr. Alizadeh-Ebadi self identifies as an ethnic Azerbaijani (Azeri) Turk. He was born in the City of Urmia in the Province of West Azerbaijan, in Iran. His religious background is Islam. While in Iran he and his family were persecuted by the Farsi majority on account of his Turkish ethnicity. He moved from Iran to Turkey when he was 19 years old. In 1989 he moved to Canada and became a Canadian citizen in 1992.

[11] Mr. Alizadeh-Ebadi was hired by MTS in March of 2000 as a co-op student from the University of Manitoba. He was initially hired to a term position and thereafter became a full time employee of MTS, working in its Corporate Information Systems department (CIS) later renamed the Information Technology Service Management department (ITSM). From March 2000 to December 2000 Mr. Alizadeh-Ebadi worked as a Local Area Network (LAN) Administrator. From December 2000 to April 2001 he was a Technical Support Representative. From April 2001 to July 2009 he was an Information Services Specialist, later renamed a Client Support Specialist (CSS) “tier 2”. At all material times, he was the only Muslim in the ITSM department but there were employees of various races, ethnicities and religions there then. At all material times Mr. Alizadeh-Ebadi was a member of the Telecommunications Employees’ Association of Manitoba (TEAM).

[12] In the “tier 2” CSS role Mr. Alizadeh-Ebadi provided support to MTS employees experiencing more complex problems with their computers than could be handled at the Service Desk by the front line “tier 1” CSSs.

[13] Mr. Alizadeh-Ebadi had a car accident outside of work in November of 2001 that was 100% not his fault. As a result of the injuries he sustained he was off work until January of 2002 and was then on a graduated return to work program, for the most part working half days, until May of 2003 when he returned to regular work hours.

[14] Mr. Alizadeh-Ebadi had another car accident outside of work that was also 100% not his fault in April of 2007. As a result of the injuries he sustained in this accident he was off work until he returned to work on February 23, 2009. Mr. Alizadeh-Ebadi was not on a graduated return to work program following this accident. From June 2007 to February

2009, this absence was without pay from MTS but Mr. Alizadeh-Ebadi did receive income replacement benefits through the Manitoba Personal Injury Protection Plan.

[15] After he returned to work he became ill on March 23, 2009 and, as a result, was off work on a leave of absence for illness until he resigned from MTS as at July 25, 2009.

[16] MTS was acquired by BCE Inc. in March of 2017 before the last week of the hearing and is now known as Bell MTS. It is the primary telecommunications company in Manitoba and employs several thousand employees in Manitoba.

[17] There is a series of events (the Events) during Mr. Alizadeh-Ebadi's career at MTS from about 2001 until 2009 that evidence was presented about at the hearing that Mr. Alizadeh-Ebadi feels establishes that MTS engaged in the discriminatory practices against him on the prohibited grounds, as alleged in his complaint. In his view, these Events ultimately caused him to suffer anxiety, nervousness and depression that resulted in him resigning from MTS, as of July 25, 2009.

[18] Fourteen witnesses, who were all employees or former employees of MTS at some time during Mr. Alizadeh-Ebadi's career with MTS, testified at the hearing about these Events. The witnesses were as follows: For Mr. Alizadeh-Ebadi, in addition to himself, Neil Wyrchowny, Ernest Desmarais, Qwin DeBrant and Ryan Bird testified at the hearing. For the Respondent, David Atwell, Stephen Grant, Glen Fryatt, Ryan Workman, Brenda Coutts, Brian Elliott, Rejean David, Caroline Taylor and Don Rooney testified.

[19] Each of the Events are described by the following descriptive captions below, and will be elaborated on in further detail herein:

1. Remarks made by David Atwell
2. Denial of a second computer
3. Denial of training requests
4. Use of the "nicknames" "Crash" or "Kourash"
5. Comments about Mr. Alizadeh-Ebadi's trips to Turkey and his work ethic
6. Relegation to service desk

7. Hostile work environment/TEAM meeting
8. Denial of Promotion to Senior Client Support Specialist position
9. Failure to provide accommodation for a disability through a gradual return to work program 2007-2009
10. Treatment on return to work in 2009
11. MTS Internal Investigation and Report

Event 1: Remarks made by David Atwell

[20] David Atwell was a Supervisor in ISTM in the Hardware and Software Distribution division during part of Mr. Alizadeh-Ebadi's career at MTS. He didn't actually directly supervise Mr. Alizadeh-Ebadi, as he directly supervised employees who worked in the Hardware and Software Distribution division that provided hardware support to employees of MTS. Mr. Alizadeh-Ebadi worked in the Workstation (Desktop) LAN Support division that, as stated, provided software support to computer users and was directly supervised by Neil Wyrchowny until 2003 and thereafter by Brenda Coutts (and by Brian Elliott in Brenda Coutts' absence) as his supervisors or "Team Leads".

[21] The two divisions, while separate, fell under one Director. During the early part of the period of the complaint until about 2003 the Director was Ken Barchuck. He was followed by Rob Pettit until about 2005 who was then followed by Wayne Horseman. The two divisions had various interactions with each other in serving the information system technology needs of MTS employees. David Atwell thus interacted in the workplace with Mr. Alizadeh-Ebadi and they communicated with each other, from time to time, for both work related reasons and for casual reasons, such as breaks in the cafeteria for coffee and meals. MTS had several workplace locations in Winnipeg and both Mr. Alizadeh-Ebadi and David Atwell moved between some of these workplaces during the term of this complaint.

[22] I accept the evidence at the hearing from Mr. Alizadeh-Ebadi and other witnesses that David Atwell made disparaging and offensive remarks to or about Mr. Alizadeh-Ebadi,

including remarks following the tragic events of the 9/11 terrorist attack, that suggested that Mr. Alizadeh-Ebadi was a member of Al-Qaeda and a terrorist.

[23] The exact words that were used, the frequency that the remarks were made, the duration that the remarks continued for and whether management of MTS was aware of them, were the subject of varying accounts given by different witnesses. A number of the witnesses testified that, as a great deal of time had elapsed since the events took place, it was difficult for them to remember some things with complete clarity or certainty.

[24] I find, on the evidence, that around the time of 9/11 and for a period thereafter, David Atwell made remarks in the workplace to or about Mr. Alizadeh-Ebadi along the lines of “Kouroush when are you going to show us your Al -Qaeda membership card?” (on several occasions); and “we better check Kouroush’s lunch to see if there is a bomb in there”; and “don’t get Kouroush angry or he will fly a jet into a building”; and that Kouroush was a “sleeper cell”; and that it would be best if “we bombed the Middle East back into the Stone Age”. In addition to David Atwell making these remarks directly to Mr. Alizadeh-Ebadi, some of these remarks were also made in front of other employees and were known by a number of employees to have been made by David Atwell.

[25] David Atwell claimed at the hearing that he didn’t remember making the remarks to Mr. Alizadeh-Ebadi described in paragraph 24 above, as a result of certain memory deficiencies. He admitted that if other witnesses who gave evidence at the hearing, such as Neil Wyrchowny, said that he had made some of those remarks (like the Al-Qaeda remarks in particular) that he probably did make those remarks. He also admitted that it was possible that he made some of the other remarks referred to in paragraph 24 above. He admitted that it was wrong for him to have made those remarks; that he understands that the remarks were hurtful to Mr. Alizadeh-Ebadi; and that he is sorry for having made the remarks and for hurting Mr. Alizadeh-Ebadi. He apologised to Mr. Alizadeh-Ebadi at the hearing as follows:

“Mr. Ebadi, I know the things I said back then were hurtful and wrong. And I would like to apologize to you and I would like to sincerely ask for your forgiveness if you can find it. If you can’t, I completely understand that, but I would like to apologize to you personally for that time in my life and yours.”

After making the above apology at the hearing in examination in chief, he later also stated as follows in response to questions in his cross examination:

“I admitted yesterday that the comments I made were inappropriate, were wrong, were hurtful. I stand by that apology and I hope that Kouroush can accept my apology. I hope that he can find it in his heart to forgive me at some point in his life, but again, I understand if he can't. I'm not disputing that that was wrong.”

[26] MTS stated in its submissions that “MTS does not dispute that in the days following 9/11 and for a time thereafter that ended no later than 2003 (the “Impugned Period”), Mr. Atwell made inappropriate comments to Mr. Alizadeh-Ebadi based on his ethnicity. MTS does not dispute that such comments amount to harassment under the Act.” Further it also stated that “...the reason that we have admitted harassment is because there are five or six comments about an Al-Qaeda card and I believe one about a bomb being brought to work by Mr. Alizadeh-Ebadi in the wake of 9/11, a very sensitive time. Those five or six comments at that time, constitutes harassment, we admit that. How far past that event, that is for the Tribunal to determine. We are not admitting anything further.”

[27] I accept the evidence given at the hearing that for a period of time David Atwell also regularly made derogatory and belittling comments, some of which were racist, about other people in the workplace. These comments included doing work “on Indian time”, suggesting laziness in relation to an employee who was First Nations and comments to a Mennonite employee suggesting hypocrisy in the Mennonite teachings and practices in relation to liquor consumption.

[28] There is no need to go into the further detail about the derogatory comments made by David Atwell about other people, as this case relates to Mr. Alizadeh-Ebadi, however, the facts are noted here for contextual purposes. David Atwell and many of the other witnesses at the hearing testified about his past inappropriate behaviour at MTS invoking descriptions of David Atwell as an “equal opportunity jerk” and a “junior high bully” who would then regularly making ethnic remarks and other negative comments in the workplace that he considered to be “jokes” as part of a “locker room” atmosphere that existed then at MTS.

[29] There was evidence from David Atwell and other witnesses that at that time he was loud, abusive and vulgar; that he would pick a target like Mr. Alizadeh-Ebadi and, if he got a rise, he would go after that person; and that he regularly made “jokes” about other people’s ethnic backgrounds and race anywhere from 4 to 12 times a day. David Atwell stated in his evidence that he was then “blissfully unaware of what he was doing and how it was affecting his co-workers.”

[30] In his evidence, David Atwell explained that he came from a military background. He was a member of the Canadian Army Reserves for 31 years. He retired as a Lieutenant Colonel in 2013. He was in command of the Fort Garry Horse Regiment in Winnipeg at the time of the 9/11 terrorist attack and trained and supervised many of the soldiers from Winnipeg who served in Afghanistan. He explained that his behaviour at MTS at the time of 9/11 and for a period thereafter, until he started to change with the help of mentoring by Wayne Horseman, was in part based upon this regimented military background and in part based upon personal problems he was having away from work and at home.

[31] I find, on the evidence, including Mr. Alizadeh-Ebadi’s evidence, that the remarks by David Atwell referenced in paragraph 24 above were made because of Mr. Alizadeh-Ebadi’s race, national or ethnic origin or religion and that they were serious, persistent and deeply hurtful to Mr. Alizadeh-Ebadi who complained about them to David Atwell and others.

[32] Neil Wyrchowny, who witnessed the “Al Qaeda membership card” remarks, told Mr. Atwell, at the time, that those remarks were completely inappropriate and that he shouldn’t be making remarks like that. Mr. Atwell laughed off Neil Wyrchowny’s admonition about his remarks and continued his negative behaviour for some time thereafter, despite knowing that Mr. Alizadeh-Ebadi objected to the remarks.

[33] Neil Wyrchowny did not report the “Al Qaeda” remarks to his supervisor Ken Barchuck or anyone else above him in management at MTS at the time because he felt that it would not make any difference if he did, given his view of management’s indifferent attitudes about such things then.

[34] There was no evidence that any written complaint was made to MTS management concerning David Atwell's disparaging comments and behaviour towards Mr. Alizadeh-Ebadi prior to the internal complaint in 2009 that resulted in the Taylor internal MTS investigation discussed later in this decision, even though a number of Mr. Alizadeh-Ebadi's colleagues knew about the comments and knew that the comments were not appreciated by Mr. Alizadeh-Ebadi. There was evidence that management did discipline other employees, including Neil Wyrchowny, on occasions when they actually received written complaints about other employees' inappropriate behaviour that was contrary to MTS's Respectful Workplace Policy in effect at the time.

[35] There was, however, evidence that management of MTS knew or ought to have known about David Atwell's behaviour towards Mr. Alizadeh-Ebadi at the time the remarks were being made. In fact, David Atwell conceded in his cross examination that management "should have been aware". Stephen Grant, a credible witness called by MTS, testified that David Atwell's inappropriate actions "more than likely would have been known to management". Moreover, there was evidence that after Rob Pettit was replaced by Wayne Horseman in around 2005, Mr. Horseman mentored David Atwell in helping him to change his behaviour, suggesting that he knew that David Atwell's behaviour in the workplace needed to change. I accept the evidence from MTS' own witnesses that MTS knew or should have known about David Atwell's harassing behaviour towards Mr. Alizadeh-Ebadi at the time as well as his intolerant attitude toward him because of his race, national or ethnic origin or religion, long before the internal investigation in 2009 by MTS.

[36] I find on the evidence that it is probable that the frequency and persistence of hurtful comments and behaviour towards Mr. Alizadeh-Ebadi by David Atwell based on his race, national or ethnic origin or religion was not limited to one or two or three specific instances such as the Al-Qaeda/terrorist card comments. It was more frequent and persistent than that, particularly given David Atwell's own evidence about the frequency of his ethnic comments generally in paragraph 29 above, as well as Mr. Alizadeh-Ebadi and other witnesses' evidence about the frequency of comments to Mr. Alizadeh-Ebadi specifically.

[37] While the open, direct, explicit racist or ethnic remarks by David Atwell about Mr. Alizadeh-Ebadi being a member of Al Qaeda etc., as referred to in paragraph 24 above, appear to have stopped by sometime in 2003, I believe that David Atwell probably continued his bad behaviour to Mr. Alizadeh-Ebadi for some time after because at that time David Atwell was intolerant of his race, national or ethnic origin or religion.

[38] I believe that David Atwell, by his own admissions about his behaviour generally at that time regarding making ethnic “jokes” frequently in the workplace and based upon his apology at the hearing, was then a racist and did not change or discontinue his offensive remarks and behaviour to Mr. Alizadeh-Ebadi and others until some time later.

[39] Exactly when that change started to take place was not absolutely clear from the evidence. Mr. Alizadeh-Ebadi testified that the negative behaviour by David Atwell to him continued for a very long time after the events of 9/11 although he gave few specifics besides the racist comments referred to in paragraph 24 above and the Events involving David Atwell related to the denial of a second computer and the training on the Win2K project and the use of the name “Crash” or “Kourash” described later in this decision. There is no record of any racist comments by David Atwell either in the minutes of the TEAM union meeting in 2005, discussed later in this decision or in Mr. Alizadeh-Ebadi’s comments about the workplace in his performance reviews (PP&Rs) that took place in 2004, 2005 or 2006.

[40] There was a change in circumstances organizationally around 2003 that limited the verbal interactions between the David Atwell and Mr. Alizadeh-Ebadi. Rob Pettit retired sometime in the first half of 2005 and was replaced by Wayne Horseman who began to mentor David Atwell to help him change his behaviour. One of Mr. Alizadeh-Ebadi’s witnesses testified that the harassing behaviour by David Atwell to Mr. Alizadeh-Ebadi continued until 2010 but that does not seem to be possible. A number of witnesses for both sides place the date of the change in David Atwell’s behaviour some time in around 2004. My sense is that as of that date, or sometime shortly thereafter, David Atwell stopped harassing Mr. Alizadeh-Ebadi.

[41] A number of witnesses who testified about how deplorable David Atwell's behaviour was during the earlier part of the term of this complaint also testified that David Atwell was now a changed person and doesn't behave the way he used to and hasn't for some time. This was also David Atwell's evidence about himself. It is to be hoped that his apology and his regret for his past behaviour towards Mr. Alizadeh-Ebadi as expressed at paragraph 25 above is genuine as is his claim that he is a changed person but still in the process of continuing to try to be a better person.

[42] There was no evidence that any other person at MTS made disparaging racial, ethnic or religious remarks to or about Mr. Alizadeh-Ebadi during his employment. Unfortunately, Mr. Alizadeh-Ebadi was hurt by the intolerant remarks he suffered at the hands of David Atwell, based upon Mr. Alizadeh-Ebadi's race, national or ethnic origin or religion. I accept the evidence of David Atwell and Stephen Grant, who were both MTS's own witnesses, concerning MTS' knowledge of David Atwell's behaviour at paragraph 35 above. That evidence relates to a period of time when no action was taken by MTS to stop David Atwell's behaviour to Mr. Alizadeh-Ebadi--well before the internal investigation of David Atwell's comments and behaviour by MTS in 2009.

Event 2: Denial of a second computer

[43] Soon after Mr. Alizadeh-Ebadi became a permanent employee in June of 2001 he requested a second computer to do various tasks including testing new software systems and doing research for MTS and for educational purposes to assist him in maintaining his important Microsoft Certified Systems Engineer Certificate (MCSE). The above noted testing and research tasks were more efficiently done on a separate computer from the computer he was using to do his essential work of responding to work orders ("tickets") to try to solve MTS employee computer problems. Many of the other CSS's had second computers for these purposes.

[44] A request for a second computer was made on Mr. Alizadeh-Ebadi's behalf by Neil Wyrchowny to David Atwell, who controlled the issuance of hardware including second computers. The request was in accordance with the proper protocol for such requests as

testified to by David Atwell --i.e. a request by the Team Lead. The request was for a used or recycled computer that was available, not for a new computer. MTS sold or disposed of its recycled computers but there were many at any time that were kept in storage pending sale or other disposal.

[45] David Atwell refused the request from Neil Wyrchowny and subsequent requests made by Mr. Alizadeh-Ebadi for a second computer. Various reasons were given for the refusal of the request to have a second computer, including directions from management to not provide second computers unless a solid business case was made and also to set an example.

[46] David Atwell testified that the business case was not provided in enough detail, although the evidence was that Neil Wyrchowny requested it for Mr. Alizadeh-Ebadi in an email to David Atwell for what appears to be a legitimate business reasons--maintaining his valuable MCSE certification.

[47] There were as many as 200-300 recycled computers in storage available at the time of the request. The evidence was that unlike Mr. Alizadeh-Ebadi, many of his co-workers simply took second computers from storage and used them without asking David Atwell and without encountering any problem. One witness testified the David Atwell had actually told him to "just...take one." Neil Wyrchowny couldn't remember anyone else actually being refused a second computer when requested by a supervisor.

[48] In my view, based on the evidence, the reasons for the refusal by David Atwell to issue the second computer at that time, are not convincing. I find that David Atwell's refusal, when many others in Mr. Alizadeh-Ebadi's position had recycled second computers for the same reasons he was requesting one, was at least, in part, a result of David Atwell's intolerant thinking at the time about Mr. Alizadeh-Ebadi as a person because of his race, national or ethnic origin or religion, as borne out in the evidence about David Atwell's behaviour towards Mr. Alizadeh-Ebadi at the time as described in Event I above.

Event 3: Denial of training requests

[49] This Event was considerably narrowed at the hearing to relate to David Atwell's refusal of a request on behalf of Mr. Alizadeh-Ebadi by his supervisor Neil Wyrchowny to be put Mr. Alizadeh-Ebadi on the "Win2K" project related Microsoft's then new software operating system.

[50] David Atwell agreed in evidence that he could have put Mr. Alizadeh-Ebadi on this project. This may have resulted in Mr. Alizadeh-Ebadi being entitled to a second computer. On the evidence, in my opinion, there does not appear to be any factually based rationale for the refusal of this request made on behalf of Mr. Alizadeh-Ebadi by his supervisor at the time, Neil Wyrchowny.

[51] In my opinion, David Atwell's refusal of this request is closely tied to his refusal of the request for a second computer explained above. This refusal by David Atwell, in my opinion, was based, in part, on David Atwell's intolerant attitude and behaviour at the time towards Mr. Alizadeh-Ebadi's because of his race, national or ethnic origin or religion. It was consistent with the inappropriate behaviour that David Atwell admitted to in his apology to Mr. Alizadeh-Ebadi referred to in paragraph 25 above.

Event 4: Use of the "nicknames" "Crash" or "Kourash"

[52] In June of 2001, before Mr. Alizadeh-Ebadi's first car accident, an email complimentary of his work was sent by one of his co-workers referring to his name as "Kurash". This may have been either a mistake or a play on his ethnic name but Mr. Alizadeh-Ebadi let his co-workers know that he didn't appreciate the name and it stopped for awhile.

[53] After his first car accident, when he was on graduated return to work, the name "Krash", or "Crash" or "Kourash" began to be used by various persons including David Atwell and others.

[54] The use of the “nicknames” was not appreciated by Mr. Alizadeh-Ebadi and he complained to his co-workers that he did not like their use of these names but they continued to be used intermittently during his career at MTS.

[55] The last use of the “nickname” was in the subject line of an email Glen Fryatt forwarded to him through Brenda Coutts on his return to work in 2009, concerning the loss of his administrative access identification explained later.

[56] Mr. Alizadeh-Ebadi testified that he felt that that use of the names made him a “laughing stock” and brought back bad memories of very serious and painful injuries he suffered in car accidents that were not his fault.

[57] Several witnesses at the hearing including Brenda Coutts, Glen Fryatt and David Atwell testified that in retrospect they understood that, as opposed to other “nicknames” used in the workplace that may have been lighthearted or even complimentary, these nicknames were not complimentary. They testified that in retrospect they could understand why Mr. Alizadeh-Ebadi would not want to be called those names as they were insensitive and inappropriate given his serious car accidents and injuries.

[58] Glen Fryatt testified that he apologized to Mr. Alizadeh-Ebadi in the hallway outside of the hearing for using the “nicknames”. Brenda Coutts testified that referring the Glen Fryatt email to Mr. Alizadeh-Ebadi with the subject line reference of “Kurash” was worthy of an apology. David Atwell testified that he “tried to stop” but it is not clear when this occurred.

[59] At all material times during the period of this complaint, MTS had a Respectful Workplace Policy in place. The “nicknames” might have offended the policy but there was no formal complaint made by Mr. Alizadeh-Ebadi or anyone else about them under this policy until the internal MTS complaint was made in 2009 prompting the Taylor investigation discussed later in this decision.

[60] I accept the evidence of the witnesses at the hearing that the use of the “nicknames” stemmed from Mr. Alizadeh-Ebadi’s driving and his car accidents and were not related to his race, ethnicity or religion. I also accept the fact that, as they related to his

car accidents from which he suffered serious injuries, that they were hurtful and unacceptable to Mr. Alizadeh-Ebadi to hear.

Event 5: Comments about Mr. Alizadeh-Ebadi's trips to Turkey and his work ethic

[61] In his complaint and Re-amended Statement of Particulars, the Complainant alleges that Brian Elliott made a number of negative and disparaging comments in the workplace about Mr. Alizadeh-Ebadi "faking" illness and taking trips to Turkey during his sick leave absences and about having a poor work ethic.

[62] The time period referred to in the complaint that these comments were made by Brian Elliott was after his first car accident and also specifically in the Fall of 2005. It was alleged by Mr. Alizadeh-Ebadi in his complaint that at that time another employee overheard Brian Elliott say that Mr. Alizadeh-Ebadi was "faking it and probably taking a trip to Turkey" when he was on sick leave.

[63] At the hearing there was evidence by several witnesses that Brenda Coutts also made disparaging and negative comments in the workplace suggesting that Mr. Alizadeh-Ebadi was faking injuries and taking trips to Turkey when he was on sick leave and questioning his work ethic and commitment to his job. Brian Elliott and Brenda Coutts both denied making these comments in their evidence.

[64] Brian Elliott admitted in evidence that he wasn't a "fan of Kouroush's work ethic" in the early years, even though he didn't supervise him and couldn't explain his rationale or impression for forming that opinion based on anything concrete.

[65] Several of Mr. Alizadeh-Ebadi's peers testified that there was a lot of gossip and chatter among his co-workers about a perception that Mr. Alizadeh-Ebadi was faking illness and taking trips to Turkey while he was on sick leave. There was evidence that, as a result of this perception, some of his peers resented Mr. Alizadeh-Ebadi because his sick leave absences resulted in them having to do more work and be under greater pressure to make up for his absence from work.

[66] There was no evidence presented that Mr. Alizadeh-Ebadi's absences from work for illness were in any way unjustified from a medical stand point or that his injuries from the car accidents were not real or that any trips he took to Turkey, including to visit his mother who was ill, were in any way illegitimate. Further, there was no evidence from his supervisors Neil Wyrchowny or Brenda Coutts that Mr. Alizadeh-Ebadi was a poor performer or had a poor work ethic. His performance reviews by Brenda Coutts were generally positive.

[67] There was conflicting evidence about this Event. On balance, I find Brian Elliott and Brenda Coutts' denials about having made these comments to be credible and more consistent and convincing than the accounts of this Event by others. Brian Elliott and Brenda Coutts did not appear to waiver in their evidence in this regard and in my opinion were credible in their denials.

[68] On the other hand, there was vagueness and inconsistency with respect to the evidence of others about who made the comments and when and where they were made. For example, Ryan Workman who Mr. Alizadeh-Ebadi claimed to have overheard the 2005 comments by Brian Elliott, could not recall in his evidence that this actually occurred. Neil Wyrchowny gave very vague evidence where he suggested that he only recently remembered such comments having been made by Brian Elliott but couldn't remember where or when. Neil Wyrchowny had told a Commission investigator years earlier that he didn't recall these comments.

[69] In any event, I can find no evidence that even if these comments were made that they would have been made in relation to Mr. Alizadeh-Ebadi's race, ethnicity or religion. There was no evidence presented that either of Brian Elliott or Brenda Coutts made racist, ethnic or anti-Muslim comments to or about Mr. Alizadeh-Ebadi. Nor am I able to infer that they were influenced by the racist comments made by David Atwell referred to in paragraph 24 above so as to discriminate against Mr. Alizadeh-Ebadi on the basis of his race, national or ethnic origin or religion.

Event 6: Relegation to Service Desk

[70] As noted above, there were two “tiers” of CSSs. Tier 1 CSSs worked at the “Service Desk” and attempted to solve problems encountered by computer users at the “front line” so to speak. If the problem couldn’t be solved by the Service Desk it would be sent to the Tier 2 CSSs who would receive a “ticket” (i.e. work order) to attempt to solve the problem. As such, by and large, the more complex work was done by the Tier 2 CSSs and the perception was that the Service Desk was a “step down” for Tier 2 CSSs.

[71] The Complainant raised this matter in his complaint, referring to a period in 2005 where he alleged that Brenda Coutts, Brian Elliott and Rob Pettit were attempting to “shove” him into the Service Desk position but that it didn’t happen as a result of efforts by his co-workers to prevent it. There was no mention of this matter in his Re-amended Statement of Particulars.

[72] At the hearing there was evidence that Mr. Alizadeh-Ebadi was one of several of the Tier 2 CSSs who took a turn at the service desk for several months.

[73] The suggested corporate purpose at the time of this initiative was to cross train CSSs to improve their experience and knowledge in order to better serve the users. However, it was also the evidence of some witnesses that the people chosen first by MTS to do their stint on the service desk were those perceived to be on management’s “shit list” and that this was punishment for poor performance and troublemaking.

[74] Brenda Coutts, who made the selection of who served on the service desk from her group, testified that Mr. Alizadeh-Ebadi was not in conflict with her at that time but he was one of the employees who did a turn for several months there.

[75] Although the matter was not grieved, it was clear that there were concerns and opposition expressed by a number of the employees affected by the service desk initiative. MTS terminated the initiative around 2005 in part, as a result of these concerns and opposition.

[76] It is to be noted that that both Mr. Alizadeh-Ebadi and another witness who did a turn on the service desk expressed the opinion that their experience on the service desk

was actually helpful. Further, the group that did their turns included employees who had no distinguishing protected characteristics.

[77] The evidence was that it was a group, not Mr. Alizadeh-Ebadi alone, who were chosen for this initiative. I am not able to find on the evidence that Mr. Alizadeh-Ebadi was sent to the service desk because of his race, national or ethnic origin or religion.

Event 7: Hostile Work Environment/TEAM meeting

[78] This is not an Event, as such, but rather relates to Mr. Alizadeh-Ebadi and other witnesses' perceptions about conditions in their department during the Rob Pettit period that some described as "toxic". It was not included as an item in either the complaint or in the Re-amended Statement of Particulars.

[79] On September 14, 2004 a meeting was held by Mr. Alizadeh-Ebadi and a number of his co-workers who were also members of TEAM. The Minutes of the meeting were part of the evidence at the hearing. A number of the employees who attended the meeting, including Mr. Alizadeh-Ebadi, Neil Wyrchowny, Stephen Grant, Ryan Workman, Qwin DeBrant, and Ernest Desmarais were witnesses at the hearing. According to the Minutes, the following items were raised with the TEAM Executive reps who also attended the meeting:

1. Job titles changes-combining pay scales
2. Acting assignments-selection and length
3. Selection and compensation for CSSs who were appointed as site primes for particular work location
4. Bullying-actively encouraged by Rob Pettit - "dog house" system of discipline for taking any contrary stand and then becoming a target-"favored" employees given job opportunities and opportunities to advance
5. Training-lack of relevant training and training given to "favored" people
6. Compensation differences
7. Innovation thinking not accepted

8. Unrealistic expectations for job performance
9. Different rules for BT&IT
10. Process driven not Client Driven-- Rob Pettit has an unchanging closed door policy
11. Lack of confidence in ITSM management team
12. Staffing issues-vacancies not filled or filled with "Acting" jobs resulting in "unbearable" stress levels

[80] Items 1 and 6 above were the only two items that were covered under the heading "Priorities" in the Minutes of the meeting.

[81] Mr. Alizadeh-Ebadi's comments at the meeting were covered in the Minutes as follows: "New jobs (promotions-advancements) usually created as acting positions"

[82] None of the matters that were discussed at the meeting were grieved under the collective agreement with MTS. Brenda Coutts gave evidence that she became aware of the meeting and the Minutes after it was held and that management were probably aware of the items but that no follow up was taken by MTS to address any of the items other than to terminate the service desk rotation initiative.

[83] Ryan Workman testified that Brian Elliott told him not to grieve the service desk issue and "not to rock the boat". Ryan Workman testified that after Rob Pettit retired the work atmosphere improved.

[84] There was evidence given Ryan Workman, who was a very credible witness, that at the time of the meeting, the conduct of some of the so called "Bad Dog Box" group that included him, Mr. Alizadeh-Ebadi and several others, may have been somewhat less than exemplary for doing things like taking longer lunches and other breaks than permitted.

[85] The Minutes and the evidence about the meeting clearly indicate that Mr. Alizadeh-Ebadi and his co-workers at the time were unhappy and frustrated about some of the conditions that existed arising out of actions or inactions by management of MTS-- in particular by the leadership of Rob Pettit.

[86] Mr. Alizadeh-Ebadi and some of his co-workers who gave evidence at the hearing felt that they were on a “shit list” of management and were not treated well or fairly as a result, leading to their perception that the atmosphere there then was “toxic”.

[87] None of the items described in paragraph 79 above, however, were particular to Mr. Alizadeh-Ebadi as opposed to the group of concerned employees, most of whom had no distinguishing protected characteristics. Nor were the matters specifically related to grounds specified in the complaint. As such, I do not feel that this Event establishes behaviour by MTS against Mr. Alizadeh-Ebadi based upon his race, national or ethnic origin or religion.

Event 8: Denial of Promotion to Senior Client Support Specialist (Site Prime) position

[88] In the various MTS locations or sites in Winnipeg that CSSs worked there were CSSs identified as “Site Primes” who, as the term implies, were ranked above the other CSSs. There was a pay differential for taking on this added responsibility and it was seen as a promotion. Prior to 2006, the positions were all established in an acting capacity. As such, the acting Site Primes had been appointed on the recommendations of Brian Elliott and Brenda Coutts, as the two Team Leads that supervised the acting Site Primes, not through a job competition process. Mr. Alizadeh-Ebadi served for two months in an acting Site Prime position to fill a temporary absence on one occasion but for the most part the incumbents were in the acting positions for much lengthier periods of time.

[89] In 2006 MTS decided to fill these positions on a permanent basis and opened a competition for the jobs of which there were six positions to be filled.

[90] Article 8 of the Collective Agreement between Team and MTS governs the posting and filling of vacant positions in the bargaining unit.

[91] MTS has a process that is to apply in job competitions. Pursuant to that process MTS:

- a. posts the job vacancy in accordance with the Collective Agreement;

- b. receives and assesses all applicants for the vacancy against the criteria identified in the particular posting;
- c. pre-screens out those applicants whose applications indicate they do not possess the criteria set out in the job posting or whose attendance levels or work performance is unacceptable;
- d. interviews those applicants whose applications indicate they meet the criteria in the job posting and have acceptable attendance levels and work performance;
- e. awards the position.

[92] In 2006 Mr. Alizadeh-Ebadi, among others, applied to fill approximately six vacant Site Prime positions. To fill the vacancies MTS executed the process outlined in paragraph 91.

[93] Mr. Alizadeh-Ebadi met the criteria set out in the job posting and had acceptable attendance levels and work performance. As such, along with eight other applicants he was interviewed by a three person panel consisting of Brian Elliott, Brenda Coutts and Cathy Hanischuk-Morris, a Human Resources recruiting specialist whose duties included recruiting both internal and external applicants for vacancies. The panel interviewed applicants who were not pre-screened out of the process.

[94] Normally, MTS would use a three person panel consisting of the supervisor for the job vacancy, a “neutral” person from another department who was not involved with the job and an HR specialist to guide the process. Since the applicants for these particular six jobs were going to be supervised separately by both Brenda Coutts and Brian Elliott (three each), as the two Team Leads for these positions, it was decided by MTS that it would be more efficient to have both Team Leads on the panel and not use a neutral person from another department on the panel.

[95] Most, if not all, of the incumbent acting Site Primes, all of whom had been recommended for the existing acting positions by either Brenda Coutts or Brian Elliott, applied for the permanent positions and were granted interviews.

[96] The process involved the following:

- a. The qualifications for the job description were prepared by Brian Elliott and Brenda Coutts based on an existing precedent for the Site Prime position;
- b. In advance of the interviews, the interview questions were drafted, as was an interview key which indicated what constituted a good answer. There were two types of questions: technical and core competency. Brenda Coutts and Brian Elliott drafted the technical questions and answer and Cathy Hanischuk-Morris drafted the core competency question;
- c. In advance of the interview, a scoring system based on 100 points was created, 5 points were allocated to the presentation of the interview, the remaining 95 points were allocated to responses to interview questions. Of those remaining points, approximately 60 percent were allocated to technical questions and 40 percent to core competency questions. Each question was allocated a maximum point value that varied from question to question. Brian Elliott and Brenda Coutts determined the point values for the technical questions. Cathy Hanischuk-Morris determined the point values for the core competency questions. In order to obtain the position the applicant would have to pass a pre-determined scoring threshold;
- d. In advance of the interviews, Cathy Hanischuk-Morris instructed the panel that the same question had to be asked of each applicant in the same order by the same person and there was to be no prompting or other assistance given;
- e. Cathy Hanischuk-Morris explained how the interview process would be conducted to each applicant immediately before the applicant started;
- f. Each applicant's interview would be scored immediately after it ended and before the next applicant would be interviewed. All three members of the panel had equal input on the scoring of each individual question and the panel would come to a consensus on a score for each question. During the process the panel compared notes on how the applicant's answers compared to the answer key. A final score for the interview was arrived at by adding up all the individual scores;

- g. Once all of the applicants were interviewed and scored, the panel met again to consider if the scoring adjustments were necessary. The purpose of this meeting was to ensure consistency in scoring throughout all of the interviews such that the applicants were not penalized for their scoring depending on when they were interviewed relative to other applicants;
- h. Ultimately a final ranking of candidates was arrived at on the interview scores. Since there were six available Site Prime positions, the top six ranked applicants would be offered the positions, provided they passed the scoring threshold.

[97] Mr. Alizadeh-Ebadi was not offered a position. The positions were offered and accepted by the six acting Site Prime applicants. Rejean David was ranked 7th in the competition, Mr. Alizadeh-Ebadi was ranked 8th and Qwin DeBrant was ranked 9th. A number of months after the competition, a Site Prime vacancy opened up and MTS appointed Rejean David to fill the vacancy without a competition.

[98] The results of the job competition were not grieved and the documentation relating to the job competition, including documents showing what the actual interview scores were or how they were calculated was no longer available for the purposes of this inquiry.

[99] Evidence at the hearing about this Event was given by Mr. Alizadeh-Ebadi, Brenda Coutts, Brian Elliott and Don Rooney who was the MTS Director of Labour Relations, Safety and Environment at all material times and still holds that position.

[100] Mr. Alizadeh-Ebadi's evidence was that the competition was predetermined by Brenda Coutts and Brian Elliott to assist and advance their favourites--the incumbents whom they had appointed to the acting positions and were thereby placed in an advantageous position in the competition. Further, he felt that the decision was impacted by previous negative jokes and comments made about him by David Atwell and Brenda Coutts including those in reference to his trips to Turkey and his absences for work on sick leave and his work ethic.

[101] Mr. Alizadeh-Ebadi also questioned the process of not having a truly neutral third panel member involved rather than either Brenda Coutts or Brian Elliott who he claimed

didn't like him. Finally, he questioned the results in terms of his greater seniority over some of the successful applicants and in terms of his superior technical knowledge, education, and competence in comparison to some of the other successful applicants in his opinion.

[102] Brenda Coutts' evidence was that the process described in paragraph 96 above was strictly followed in this case and that despite there being no "neutral" person it was carried out exactly the same way as in previous competitions that she was involved in.

[103] Brenda Coutts' evidence was that while the incumbents likely had an advantage because of their experience in acting in the Site Prime positions for extended periods of time, the results of the competition were based entirely on the interview scores and not predetermined or based on any favouritism toward incumbents or upon the race, religion or ethnicity of any applicant. She testified that half the six successful applicants were visible minorities (two were Filipino and one was Aboriginal) and that two thirds of the applicants who were unsuccessful were Caucasian males.

[104] Specifically, Brenda Coutts testified that while Mr. Alizadeh-Ebadi's score met or exceeded the minimum threshold qualifying him to hold the position, his score was 8th out of the 9 applicants who were interviewed. She testified that while he scored well on the technical questions he did not score as well on the on the core competency questions.

[105] Brian Elliott's evidence corroborated Brenda Coutts' evidence. He also testified that the panel composition was dictated by HR. Further, he testified while that Cathy Hanischuk-Morris only scored the core competency questions as she was not familiar with the technical questions. Mr. Alizadeh-Ebadi performance was stronger on the technical questions than on the core competency questions. He testified that while Mr. Alizadeh-Ebadi was better than Rejean David on the technical side, Mr. David scored higher than Mr. Alizadeh-Ebadi in the interview. He testified that seniority played no role in the interview process and that he did not bring any biases about Mr. Alizadeh-Ebadi into the interview process.

[106] Don Rooney did not participate in the 2006 Site Prime job competition but he gave evidence about the process in general terms from an HR perspective. He confirmed that

the process for the 2006 competition was completely in conformity with the process for all other MTS competitions during the period from 1989 to 2015 across three bargaining units at MTS.

[107] Don Rooney testified that this was not the first time there was more than one hiring manager on a job completion. It happens in all three bargaining units at MTS where there are multiple vacancies that span across two managers. He was not aware that it had happened in a TEAM bargaining unit prior to 2006 but it has happened since. When there are two hiring managers with respect to a job competition the composition of the interview panel is each hiring manager and the HR person. This is dictated by the HR representative. It saves MTS resources to conduct job competitions in this manner rather than having more than one set of job competitions conducted for the same positions.

[108] I found the evidence of Brenda Coutts, Brian Elliott and Don Rooney to be very clear and consistent about this Event. I found all of these witnesses to be credible in their evidence about the Event. Their evidence was not contradicted, in my opinion, by anything presented by Mr. Alizadeh-Ebadi and did not leave me with any impression that the manner by which the process and interviews were handled was unfair or biased against Mr. Alizadeh-Ebadi in any way.

[109] I found Mr. Alizadeh-Ebadi's evidence to be self-serving and impressionistic about this Event. He didn't convince me that any of the applicants, including Rejean David, who were offered positions as a result of their performance on the interview were equally qualified or less qualified than he was but lacked the distinguishing feature which is the gravamen of his complaint.

[110] Mr. Alizadeh-Ebadi also testified at the hearing about his view that he was treated unfairly in not being assigned to acting Prime Site roles by Brenda Coutts other than the one time mentioned above. He testified that he felt that this was proof of a bias by Brenda Coutts against him as she made the appointments for the group of CSSs he was a part of who reported to her. He had cited "acting positions" as a problem during the TEAM meeting described in Event 7 above, although the Minutes on this are not specific. He said he felt that these acting opportunities that turned out to be long term improved the

actors' chances for training and moving up in the organization. In any case, it doesn't appear that he raised this issue with Brenda Coutts in any of his performance reports or with Neil Wyrchowny who he was very close with and who was the originator of the acting Site Prime positions. He was not able to identify an acting opportunity that went to anyone equally qualified or less qualified than him but lacking the distinguishing feature which is the gravamen of his complaint.

[111] Brenda Coutts testified that she was unaware of his concern in this regard and that after his acting turn she wrote very favourably to Wayne Horseman about that assignment and alluded to his good work in his next performance evaluation. She also testified that following his unsuccessful application for the permanent Site Prime positions he wrote an email about his disappointment and she spoke with him and counselled him to improve his skills that were lacking and to keep trying. Wayne Horseman also counselled him in the same way. Brenda Coutts testified that her choices of acting Site Primes were limited but were not based on race, ethnicity or religion. I believe she was credible in her evidence and accept that evidence for this Event.

Event 9: Failure to provide accommodation for a disability through a gradual return to work program 2007-2009

[112] As noted in paragraphs 4 to 8 inclusive above, this Event and the prohibited ground of disability was not included in Mr. Alizadeh-Ebadi's complaint or his Re-amended Statement of Particulars. The Commission decided not to deal with an additional complaint to cover this Event, filed by Mr. Alizadeh-Ebadi after the adjournment of this hearing on June 18, 2014. The additional complaint was therefore neither investigated or referred by the Commission to the Tribunal for an inquiry. The Commission's decision was not judicially reviewed. After the Commission's decision, Mr. Alizadeh-Ebadi removed language relating to this Event including both the prohibited grounds of race and disability from his proposed amended Statement of Particulars in a new re-amended Statement of Particulars. The Event is included herein as an Event, despite the foregoing, because after the evidence phase of the hearing had concluded, counsel for Mr. Alizadeh-Ebadi

included it in his written arguments filed and exchanged with MTS on May 15, 2017 and also in his oral arguments that were made on May 19, 2017.

[113] MTS provided a gradual return to work program for Mr. Alizadeh-Ebadi after his first car accident in 2001, as described in paragraph 13 above. MTS did not provide a gradual return to work program for Mr. Alizadeh-Ebadi after his second car accident, as described in paragraph 14 above.

[114] Des Hathaway was assigned by MTS in May 11, 2007 to Mr. Alizadeh-Ebadi as a Return to Work Coordinator from an outside independent firm. He was not called as witness at the hearing, although various correspondence and a summary of notes he kept during the period from 2007 to 2009 were attached to the Agreed Statement of Facts of the parties that was entered as an Exhibit at the hearing. These notes were not referred to at the hearing in any significant way.

[115] From the evidence at the hearing, it appears that on the direction of Wayne Horseman, Mr. Alizadeh-Ebadi was not provided a graduated return to work program until he was deemed to be 100% fit to return to work. However, there was scant evidence at the hearing of what actually transpired with respect to graduated return to work opportunities for Mr. Alizadeh-Ebadi at the time and his capacity and willingness to return on a graduated basis. Wayne Horseman was not called as a witness at the hearing nor were any medical practitioners, nor, as stated was Des Hathaway.

[116] Don Rooney, who was not involved in this Event, testified, in part, as follows:

“No. I think in this case -- I mean I don't know -- I wasn't involved in this case back then, I wasn't involved in the decision-making process. From what I see, Mr. Horseman, who is no longer with the company, was allowed to say, 'I'm putting my foot down. We're not accommodating.' If that decision was brought up to Bill Kominsky for example, who I would think was looking after the accommodation piece at that time, he would have brought it to me and we absolutely would have said, 'Wayne Horseman, you're wrong. I know you have budgets to meet, but this is bigger than your departmental budget. You must accommodate him.'”

[117] Don Rooney also testified that MTS' practice during 2007 to 2009 was to accommodate employees who required a graduated return to work program from a disability.

Event 10: Treatment on return to work in 2009

[118] This Event captures number of incidents that occurred after Mr. Alizadeh-Ebadi's return to work on February 23, 2009 that he feels demonstrates that MTS was insensitive and unwelcoming to him as an employee who was returning to work after almost two years off because of serious injuries sustained in a car accident that was not his fault. He feels that this treatment is further evidence of discrimination.

(a) no Administrative Level Access provided

[119] On his first day back at work on February 23, 2009 Mr. Alizadeh-Ebadi discovered that he did not have full Administrative Level Access to all of the MTS systems. Such access was necessary in order for him to do his job. Mr. Alizadeh-Ebadi had to spend some time and effort to get this fixed. Brenda Coutts sent Mr. Alizadeh-Ebadi an email early that afternoon to confirm that Glen Fryatt had reset the access for him. The subject of her email was "Krash's Admin ID". Mr. Alizadeh-Ebadi felt that this reference was insensitive to him after suffering serious injuries and showed that MTS was not serious about his return to work.

(b) initial refusal of holidays for Turkish holiday of Nevruz

[120] As well, on his first day back to work on February 23, 2009 Mr. Alizadeh-Ebadi had a meeting with his supervisor Brenda Coutts who was not well that day but came in to work to meet with Mr. Alizadeh-Ebadi. A memo summarizing that meeting was prepared by Brenda Coutts and emailed to Mr. Alizadeh-Ebadi that day. The email included references suggesting that Mr. Alizadeh-Ebadi ask for assistance, if needed, with respect to lifting things; about the expectation that Mr. Alizadeh-Ebadi not request time off for the next two weeks during his retraining as such requests would not be approved; and that

Brenda Coutts would be away on holidays until March 16, 2009. Mr. Alizadeh-Ebadi was also informed by Brenda Coutts that he needed to take his 5 days of accumulated holidays before the end of April that year or they would be lost.

[121] On or about March 10, 2009 Mr. Alizadeh-Ebadi advised Brian Elliott, who was acting as his supervisor while Brenda Coutts was still on holidays, that he wished to book vacation on March 12 and 13, 2009 to observe the traditional Turkish cultural holiday of Nevruz, celebrating the New Year. Nevruz is the spring equinox that actually falls on or about March 21 but it is celebrated on four Wednesdays before the actual date none of which would have fallen on March 12 or 13 in 2009. There was some conflicting evidence between Mr. Alizadeh-Ebadi and Brenda Coutts about whether he had initially requested the days off for Nevruz or for a personal matter.

[122] Brian Elliott initially refused the request on the basis of his mistaken understanding that it was contrary to Brenda Coutts' directive about not requesting time off and also because it was too late in order to adequately deal with employee scheduling. A heated exchange of emails between Mr. Alizadeh-Ebadi and Brian Elliott ensued. Eventually, after elevating the refusal of the request, Wayne Horseman granted Mr. Alizadeh-Ebadi the holidays. After Brenda Coutts returned from her holiday she admonished Mr. Alizadeh-Ebadi in an email about the tone of his emails to Brian Elliott and Wayne Horseman.

[123] Mr. Alizadeh-Ebadi felt that the initial refusal was unreasonable and unfair and would not have happened but for his ethnicity. He felt it made him feel stressed and anxious about his return to the workplace.

(c) inadequate retraining

[124] As noted in paragraph 120 above, there was an expectation that there would be a period of retraining for Mr. Alizadeh-Ebadi when he returned to the workplace on February 23, 2009 after being away from work for so long.

[125] There was no formal retraining program put in place, rather Brenda Coutts expected that for the first two weeks, Mr. Alizadeh-Ebadi would "self-train" by asking his

Site Prime, Rejean David, questions and by taking “easy” tickets. While Brenda Coutts advised a number of CSS’ to be aware of Mr. Alizadeh-Ebadi’s return to work and to assist him she didn’t actually sit down with Rejean David and give him direction on her expectations.

[126] What occurred, from Mr. Alizadeh-Ebadi perspective, was that he was not given meaningful retraining despite needing help in technical matters as the world of technology changed so rapidly in the period of time that he was away from the workplace. He testified that Rejean David was not really available to him when he needed help and that, while he got some help from some of his colleagues, it was insufficient and showed MTS’ lack of interest in him. As a result he looked incompetent to his colleagues and the user community and he felt depressed.

[127] Rejean David, who was a very credible witness, testified that he did not receive any specific instructions from Brenda Coutts about a retraining program for Mr. Alizadeh-Ebadi. He testified that he was often too busy to answer questions but he also testified that he felt that when Mr. Alizadeh-Ebadi returned to work he seemed very withdrawn and unhappy. He also testified that the retraining given to Mr. Alizadeh-Ebadi was essentially the same that he had observed with other people coming back to work. He had a cubicle right beside Mr. Alizadeh-Ebadi and he testified that whenever he asked Mr. Alizadeh-Ebadi how things were going Mr. Alizadeh-Ebadi simply said he was “OK”.

[128] Brenda Coutts’ testimony with respect to this incident included the following:

- i. she made arrangements for Mr. Alizadeh-Ebadi that were consistent with how Mr. Alizadeh-Ebadi, on a previous return to work from a disability and others returning from medical leave or being introduced or re-introduced into the workplace are treated; and
- ii. she was unaware of a need to provide Mr. Alizadeh-Ebadi with any additional support or training as Mr. Alizadeh-Ebadi had never informed her of such a need and had left a message with Des Hathaway on March 3, 2009 that “MTS was being lenient and that he had no complaints” and had emailed Brian Elliott indicating that he had caught up quickly; and
- iii. she had directed Rejean David to assist and mentor Mr. Alizadeh-Ebadi and had approached other peers of Mr. Alizadeh-Ebadi to assist and support him on his return to work; and

- iv. she was told after she returned from her holidays by Rejean David and others that Mr. Alizadeh-Ebadi's transition was not as smooth as she had been led to believe but the information she received was that he wasn't engaging and seemed detached.

(d) loss of computer hard drive information

[129] When Mr. Alizadeh-Ebadi was away his computer was given to another employee. Typically, when an employee is absent for a prolonged period of time his or her computer is assigned to another employee but the contents of the hard drive are supposed to be stored on a compact disc so that when the employee returns he can access the data again. Normally the data goes back to the manager of the employee who returns it to the employee on his return. Some employees don't use the hard drive but store their data on a server but that was not the case for Mr. Alizadeh-Ebadi.

[130] Mr. Alizadeh-Ebadi's computer was reassigned in compliance with normal procedure but the contents of his hard drive were not stored on a compact disc, contrary to company policy. This deprived Mr. Alizadeh-Ebadi of important information both for professional and personal reasons and he was frustrated and upset by this.

[131] Brenda Coutts had given James Dondo another CSS the task of saving Mr. Alizadeh-Ebadi's hard drive information but, unknown to Ms. Coutts, Mr. Dondo failed to carry out this task. She did not follow up with him to retrieve Mr. Alizadeh-Ebadi's stored data on a disc until the request by Mr. Alizadeh-Ebadi on his return to work. After checking into this Ms. Coutts realized that the data had not been saved by Mr. Dondo on a disc as he was instructed to do.

[132] When Mr. Alizadeh-Ebadi raised this problem with Brenda Coutts, on the first day of her return to work from her holidays on March 16, 2009, a heated exchange of emails ensued. Initially after Mr. Alizadeh-Ebadi asked about it, Ms. Coutts responded that Mr. Dondo had not archived the data as he was supposed to. Mr. Alizadeh-Ebadi then sarcastically responded "Way to go ISTM" to which Brenda Coutts then responded "Suck it up...shit happens". Mr. Alizadeh-Ebadi then responded "...act like a lady if you don't

wanna act like a manager...” to which Brenda Coutts responded by warning Mr. Alizadeh-Ebadi “Careful you are bordering on insubordination. There is nothing I can do”.

[133] Subsequently, on the same day Brenda Coutts and Mr. Alizadeh-Ebadi had a meeting where she apologised to him for her comments and Mr. Alizadeh-Ebadi claims he also apologised to her which Brenda Coutts denies. After the meeting, Brenda Coutts sent him an email summarizing the meeting which included her apology and acknowledgment to him that her comments were unprofessional and that she understood his frustration. She did not mention any apology from him to her. Further, the email went on to admonish him for his emails to her and his requests for vacation time while she was away. This made Mr. Alizadeh-Ebadi feel unwelcome again and that he was being discriminated against.

[134] Later that day after receiving Brenda Coutts’ email, Mr. Alizadeh-Ebadi left work complaining of chest pains and attended St. Boniface General Hospital. He was discharged from the hospital on that day.

[135] Between February 23, 2009 and March 23, 2009, Mr. Alizadeh-Ebadi was at work for 14 days between absences for illness and holidays. Of these dates Brenda Coutts was at work for 5 of those days. Des Hathaway reported on March 3, 2009 that Mr. Alizadeh-Ebadi had expressed to him that his return to work after the initial week with accommodated duties had gone “ok”. Mr. Hathaway reported on March 5, 2009 that when he spoke to Mr. Alizadeh-Ebadi that day about an illness that he was away from work for on March 3rd and 4th he received information that the problem was apparently resolving itself.

[136] On March 23rd Mr. Alizadeh-Ebadi departed from work during the day leaving Brenda Coutts a note simply saying that he was ill and was going to his doctor. On that date a letter was issued by Dr. Groohi of the Red River Medical Clinic in Winnipeg saying that Mr. Alizadeh-Ebadi would need to be off work from March, 24 to April, 24, 2009 “due to his illness”. March 23rd was Mr. Alizadeh-Ebadi’s last day on the job. Des Hathaway spoke to Mr. Alizadeh-Ebadi on March 25th and reported that his illness then was not related to his previous illnesses.

[137] By April of 2009 Mr. Alizadeh-Ebadi had moved to Vancouver and was being treated there by Dr. Samborski. Initially, through contacts that Des Hathaway made with Mr. Alizadeh-Ebadi and with Dr. Samborski on April 16, 2009, he thought that Mr. Alizadeh-Ebadi would be able to return to work on about April 24, 2009, and efforts were underway for his return to work. However, on April 26, 2009 Dr. Samborski issued a note saying that Mr. Alizadeh-Ebadi would be off work “due to illness” until July 25th.

[138] On May 15, 2009 Des Hathaway wrote to Dr. Samborski asking for information to help MTS make arrangements for Mr. Alizadeh-Ebadi to return to work with accommodation if necessary. Des Hathaway noted that it appeared that Mr. Alizadeh-Ebadi’s absence then was not related to physical problems but rather due to stress from work conditions. He forwarded a Return to Work program form for Dr. Samborski to complete.

[139] Dr. Samborski completed and signed the form on May 22, 2009. In his comments he indicated that Mr. Alizadeh-Ebadi was being treated for a non-physical ailment and while he hoped that Mr. Alizadeh-Ebadi could return to work at some time in the next 4-6 weeks but that he would not be able to return to his old job and was not “planning on a return to MTS”.

[140] I accept Mr. Alizadeh-Ebadi’s evidence that the actions of Brenda Coutts and others at MTS in the incidents described in this Event frustrated and upset him and made him feel unwelcome on his return to work. Mistakes were made and inappropriate and heated emails were exchanged. I cannot, however, infer or find, from the evidence before me, that any of these incidents were related to Mr. Alizadeh-Ebadi’s race, national or ethnic origin or religion. In reviewing the evidence, I also do not believe that anyone at MTS other than David Atwell exhibited racist behaviour towards Mr. Alizadeh-Ebadi during his employment with MTS.

Event 11: MTS internal investigation and report

[141] On March 25, 2009 Team wrote a letter on behalf of Mr. Alizadeh-Ebadi to Sandy Adelman, MTS’ Employment Equity Specialist, advising her among other things, that Mr.

Alizadeh-Ebadi believes he was subjected to racial harassment, bullying and discrimination for many years. The letter included references to the David Atwell comments; the “Crash nickname”; the “unwelcome” reception upon his return in 2009; the initial refusal of holidays for Nevruz; the lack of advancement opportunities; the refusal of the second computer--all resulting in him being on sick leave at that time for anxiety and depression. There was no mention in the letter of Event 9 described herein.

[142] The letter was considered an Internal Complaint under MTS’ Harassment and Respectful Workplace Policy that was in place during the entire period of this complaint. It was referred to Caroline Taylor, who was then MTS’ Senior Specialist, HR Policy and Governance, based in Toronto, for an investigation.

[143] On April 7, 2009 Ms. Taylor conducted a phone interview with Mr. Alizadeh-Ebadi to try to formulate a list of items that he felt she should investigate. She prepared notes from the call that she sent to him for his review and comments. Thereafter, she prepared a document listing the subjects of his complaints and describing them on the basis of her call with him. She then sent him the documents and requested his comments. She spoke with him again by phone and exchanged emails with him between April 7 and April 16. He suggested a number of revisions to the document which she incorporated into the final version of the document.

[144] The final version of the document included the following subjects with descriptions of each of the subjects. “Denial of Request for Second P.C for research purposes”; “Disrespectful Comments in 2001/2002”; “Lack of Technical Training in 2002”; “Lack of Advancement in 2006”; “Lack of Retraining following extended absence after the second car accident--February 2009”; “Request for Turkish Cultural Holidays Declined in March 2009”; and “Disrespectful Comment relating to Removal of P.C. Contents During Extended Absence--March 2009”. There was no mention in the document of Event 9 (ie lack of accommodation for disability) described herein.

[145] Ms. Taylor then had phone interviews with Wayne Horseman, David Atwell, Brenda Coutts, Brian Elliott, Qwin DeBrant between April 20th and May 19th, 2009 respecting the

Internal Complaint and made notes of her interviews. She did not interview any former employees such as Neil Wyrchowny or Ernest Desmarais.

[146] On May 20, 2009 Ms. Taylor delivered a report of her findings with respect to the Internal Complaint. The Summary and Recommendations read as follows:

“Summary of Findings:

While some discriminatory comments appear to have been made over five years ago, a review of the complaint itself and the Emails provided by Kouroush do not provide evidence of current discrimination on the basis of race or national or ethnic origin. Interviews with those alleged to have discriminated against Kouroush in many cases provide alternative explanations for decisions made.

It appears that Kouroush’s expectations for resources, training, advancement and time off with little notice are unrealistic and have not been met for reasons unrelated to race or national origin.

Kouroush’s tone in Emails to management that he himself provided is disrespectful and antagonistic and has provoked on at least one occasion an unprofessional response from management but this is not seen as discrimination.

The above findings were reviewed with Mark Eklove, Legal Counsel and Daniele Malcolm, Director, HR Policy & Governance on May 20th, 2009 and the following recommendations have been developed:

Recommendations:

1. Management to be reminded to communicate professionally with Kouroush at all times.
2. Kouroush to be coached to be respectful and courteous in all dealings with management.
3. Kouroush to be coached on possible strategies for meeting his career goals as part of the PP &R process.”

[147] Caroline Taylor’s report included the following about the David Atwell disparaging comments:

“Item 2: Disrespectful Comments

A. Al Qaeda Membership card comment in 2001

Kouroush alleges that Team Leader Dave Atwell asked him two or three times when he was going to reveal his Al Qaeda membership card following 9/11. Dave denies doing so, however Qwin De Brant confirms that he overheard Dave make two or three Al Qaeda references to Kouroush between 2001 and 2004. Qwin has heard no other disrespectful comments from Dave to or about Kouroush. Qwin stated that Dave has made derogatory comments about others as well in the past but that he has not done so in a very long time.

These comments were made over five years ago with no prior complaint having been lodged and Kouroush's confirmation that he did not ask Dave to stop these comments.

B "Crash" Nickname in 2002

Kouroush states that Dave began calling him "Crash" in front of others after his car accident in 2002. Dave admits to doing this and indicated he picked up the nickname from Kouroush's peers. The nickname Crash did not relate to race or national origin but rather to driving record."

[148] Following her release of the report Ms. Taylor emailed Mr. Alizadeh-Ebadi a copy of the report and had a discussion with him about it on May 27, 2009.

[149] Mr. Alizadeh-Ebadi's reaction to the report is captured in an email that he sent to MTS on July 9, 2009, resigning from his employment effective July 25, 2009.

"Hi Don,

Considering the fact that I was discriminated against for so long and, following the biased internal investigation that blamed me for faults, I am left with no choice but to resign.

The anger and frustration that I have after a "protective" investigation result, is causing me anxiety and nervousness, I do not want to end up in hospital again.

Even imagining or a thought of returning to that environment makes me ill and I am willing to throw my years of hard work in order to gain my mental and physical wellbeing.

This is to inform you and MTS that following my sick leave (that ends on July 25th) I will not return to work, so therefore this should be considered as my notice.

Thanks,

Kouroush"

[150] Brenda Coutts filled out an exit report on Mr. Alizadeh-Ebadi in which she noted her views at that time that Mr. Alizadeh-Ebadi had high absenteeism was difficult to train and was not performing at the level as other members of the team. While Mr. Alizadeh-Ebadi did have high absenteeism there is no evidence that any absences were unjustified. Further, while it seemed that at the end of his work he was withdrawn there was no evidence to corroborate Brenda Coutts' opinion at that time that he was difficult to train or not performing satisfactorily under the circumstances.

[151] MTS no longer uses in house personnel to conduct investigations of Internal Complaints but hires independent third parties to carry them out.

III. Legal Framework-Liability

[152] The complainant has the initial burden of proving a *prima facie* case of discrimination. A *prima facie* case is one that covers the allegations made and which, if the allegations are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent. The *prima facie* case is decided on the basis of the complainant's evidence alone-the respondent's answer is not a factor in the assessment.

Ontario (Human Rights Commission) and O'Malley v. Simpson Sears Ltd., [1985] 2 S.C.R. 536 ("O'Malley").

[153] The applicable standard of proof is the civil standard of the balance of probabilities.

Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center), 2015 SCC 39, [2015] 2 S.C.R. 789.

[154] Complainants are not required to prove that respondents intended to discriminate in order to establish a *prima facie* case. Indeed, it is often said that discrimination is not a practice that would ordinarily be displayed openly and direct evidence is often not available to a complainant in cases of discrimination. As a result, one must examine all of the circumstances to determine if there exists what has been described by the Tribunal as the "subtle scent of discrimination". Such a determination may involve drawing an inference

from circumstantial evidence. An inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses.

Basi v. Canadian National Railway Co. (1988), 9 CHRR D/5029 (“*Bas*”).

[155] A *prima facie* case cannot be supported by mere sincere allegations or allegations that are supported by evidence that lacks specifics. The allegations have to be “complete and sufficient”. Evidence that is vague, impressionistic and consisting primarily of personal opinions is insufficient to establish a *prima facie* case.

Khiamal v. Greyhound Canada Transportation Corporation, 2007 CHRT 34; *Hill v. Air Canada*, 2003, CHRT 9 (“*Hill*”); *Morin v. Canada (Attorney General)*, 2005 CHRT 41 (“*Morin*”).

[156] In order to establish a *prima facie* case of discrimination under section 7(b) of the *CHRA*, the Complainant must establish that the Respondent adversely differentiated in its treatment of the Complainant compared to others and that there was a connection between the adverse differential treatment and a prohibited ground of discrimination under section 3 of the *CHRA*. Differential adverse treatment requires a distinction between the Complainant and another employee(s) which is harmful or hurtful towards the Complainant.

Opheim v. Gaigan Gill & Gillco Inc., 2016 CHRT 12; *Chaudhary v. Smoother Movers*, 2013 CHRT 15.

[157] In job competition cases under section 7(b) of the *CHRA*, where the Complainant is not hired and someone else is, the Tribunal has established a three part test as a useful guide. In such cases, the Complainant must show that he was qualified for the job at issue; he was not given the job at issue; and someone no better qualified, but lacking the distinguishing feature which is the gravamen of the human rights complaint, was given the job. This test, however, is not to be applied in a rigid or arbitrary fashion, rather the circumstances in each case need to be weighed. Ultimately, the question will be whether the Complainant has satisfied the *O'Malley* test, that is: if believed, is the evidence before

the Tribunal complete and sufficient to justify a verdict in favour of the Complainant, in the absence of an answer from the Respondent.

Premakumar v. Air Canada, 2002 CanLII 23561 (CHRT)

[158] Once the complainant has met his burden of proving a *prima facie* case of discrimination, the burden shifts to the respondent to prove, on the balance of probabilities, that there is a reasonable explanation for what appears to be discriminatory behaviour. The answer or explanation must be believed and not shown to be a pretext. It is not necessary that discriminatory consideration be the sole reason for the decision or conduct at issue in order for a complaint to succeed. It is sufficient if discrimination was a factor, even if other factors were also at play.

Basi, supra.

[159] The Tribunal's authority to institute an inquiry into a complaint is derived from the Commission's decision to request the Tribunal to institute an inquiry pursuant to section 49 of the *CHRA*. If the Commission decides not to deal with a complaint pursuant to section 41(1)(e) of the *CHRA*, an investigation into the complaint will not occur and no request by the Commission to the Tribunal to institute an inquiry into the complaint pursuant to section 49 will take place. As such, there is no authority for the Tribunal to institute an inquiry into a complaint that the Commission has decided not to deal with.

[160] Section 50(1) of the *CHRA* provides that parties to an inquiry before the Tribunal shall have the full and ample opportunity to appear at the inquiry, present evidence and make representations. That a party to a hearing is entitled to know the allegations against him and be able to have a fair opportunity to respond is a matter of procedural fairness in accordance with the principles of natural justice embodied in this section of the *CHRA*.

[161] The duty of procedural fairness provides that parties affected by a decision should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decision. The Courts and the Tribunal have recognized this duty in many decisions.

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817; *Prasad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 569; *Culic v. Canada Post Corporation*, 2007 CHRT 1; *Durrer v Canadian Imperial Bank of Commerce*, 2007, CHRT 6; *Fahmy v. Greater Toronto Airports Authority*, 2008 CHRT 12; *Whyte v. Canadian National Railway*, 2009 CHRT 33.

[162] While proposed amendments to complaints and pleadings that are disputed can be decided by the Tribunal on motions brought by the party seeking the amendment, the Tribunal has held in such cases that amendments sought on motions of this kind will be decided based on both jurisdictional and fairness considerations, namely 1) whether or not there is a logical nexus between the amendment sought and the original complaint, so that the proposed amendment does not create a new complaint that has not been dealt with by the Commission, investigated and properly referred to the Tribunal to institute an inquiry; and 2) whether there will be unacceptable prejudice to the respondent to the motion if the amendment is granted, depriving him of a fair hearing. However, these cases always arise within the context of a motion for an amendment by a complainant actually being brought before the Tribunal before the end of the evidence phase of the hearing when the respondent still may have a fair opportunity to respond.

Attaran v. IRCC, 2017 CHRT 21; *Tran v. Canada Revenue Agency*, 2010 CHRT 31; *Cook v. Onion Lake First Nation*, 2002 CanLII 61849 (CHTR); *Gaucher v. Canadian Armed Forces*, 2005 CHRT 1; *Canada v. Pitawanakwat* (1991) 43 F.T.R.47.

[163] Section 14(1)(c) of the *CHRA* makes it a discriminatory practice to harass an individual on a prohibited ground of discrimination in matters of employment. While the *CHRA* does not define the term “harassment” the Tribunal and the Courts have provided guidance with respect to the application of this term that are relevant to this case, including the following:

- i. the conduct has to be unwelcome by the victim and related to a prohibited ground of discrimination that detrimentally affects the work environment or leads to adverse job related consequences for the victim;
Morin, supra.
- ii. the gravamen of harassment lies in the creation of a hostile work environment which violates the personal dignity of the complainant;

Dawson v. Canada Post Corporation, 2008 CHRT 41 (“*Dawson*”).

- iii. in certain circumstances a single incident may be enough to create a hostile work environment and in others some element of repetition or persistence is required. Accordingly, the nature of the conduct should be calculated according to the inversely proportional rule: the more serious the conduct and its consequences are, the less repetition is necessary; conversely, the less severe the conduct, the more persistence will have to be demonstrated;
Dawson, supra.
- iv. harassment does not include expressions that are rude and offensive but not connected to a particular characteristic. Conduct can be offensive and based on personal circumstances, but not repetitive enough or serious enough to constitute harassment under the *CHRA*;
Morin, supra.
- v. in determining whether the conduct is unwelcome, an objective standard must be applied based on what a reasonable person would perceive from the perspective of the victim;
Hill, supra.
- vi. in assessing the “reasonableness” of the conduct at issue, the touchstone is the usual limits of social interaction in the circumstances. The following more specific factors are relevant in the determination: the nature of the conduct; the workplace environment; the pattern of prior conduct between the parties; whether the alleged harasser is in a position of authority over the complainant; and whether an objection has been made.
Hill, supra.
- vii. by virtue of section 65 of the *CHRA* any act or omission committed by an employee of an association or organization, in the course of employment of said employee, shall, for the purposes of the *CHRA*, be deemed to be an act or omission committed by that association or organization. This remains the case unless the

association or organization did not consent to the commission of the act or omission and exercised all due diligence to prevent the act or omission from being committed and subsequently, to mitigate or avoid the effect thereof;

- viii. employers have an obligation to their employees to create and maintain a discrimination-free work environment and their duty of diligence exists once it becomes aware of an act that, by reason of its intrinsically offensive, humiliating or degrading character, would likely degenerate into harassment if it were subsequently repeated.

Dawson, supra.

- ix. the existence of an anti-harassment policy itself is not enough to release the employer from all due diligence. There is a positive duty upon an employer to take prompt and effectual action when it knows or should know of the conduct in the workplace amounting to racial harassment and to avoid liability, the employer is obliged to take reasonable steps to alleviate, as best it can, the distress arising within the workplace and to reassure those concerned that it is committed to the maintenance of a workplace free of racial harassment.

Hinds v. Canada 1988 CarswellNat 993.

IV. Issues

[164] The issues in this case are as follows:

1. i) Should the Tribunal decide allegations of discrimination with respect to Event 9 described above, based upon the prohibited grounds of race and/or disability?; and
ii) Should the Tribunal decide any allegations of discrimination with respect to any of the other Events described above, based upon the prohibited ground of disability?
2. Has Mr. Alizadeh-Ebadi discharged his onus of proving a *prima facie* case of discrimination with respect to any of the Events described above that the Tribunal is deciding?

3. If Mr. Alizadeh-Ebadi has discharged his onus of proving a *prima facie* case of discrimination with respect to any of the Events described above that the Tribunal is deciding, has MTS discharged its onus by proving a reasonable explanation that is not a pretext?
4. What, if any, remedies should be ordered in this case?

V. Analysis-Liability

A. Issue 1

[165] In spite of the facts set out in paragraphs 4 to 8 inclusive above and referenced again in paragraph 112 above, counsel for Mr. Alizadeh-Ebadi submitted written arguments to support allegations of discrimination by MTS against Mr. Alizadeh-Ebadi, with respect to Event 9 described above, not only based on the prohibited grounds of race, national or ethnic origin and religion but also based on the prohibited ground of disability. As well, counsel for Mr. Alizadeh-Ebadi submitted written arguments in support of allegations of discrimination by MTS against Mr. Alizadeh-Ebadi with respect to other Events described above, based on prohibited grounds that included the prohibited ground of disability. At no time prior to submitting these arguments was there any motion brought before the Tribunal to amend Mr. Alizadeh-Ebadi's complaint or the pleadings, neither of which referenced Event 9 or cited disability as a prohibited ground with respect to any Event.

[166] As noted in paragraph 9 above, the written arguments of both parties were exchanged by agreement between counsel for the parties several days before oral arguments were heard. Counsel for MTS did not include in their written arguments any reference to Event 9 or any reference to the prohibited ground of disability in relation to any other Event described above. MTS' written submissions referred to the Events (other than Event 9 which was not mentioned) as "incidents" and analysed them each in relation to the prohibited grounds listed in the complaint, namely-- race, national or ethnic origin and religion but not to disability which was not mentioned in Mr. Alizadeh-Ebadi's complaint or pleadings.

[167] In his oral arguments on May 19, 2017, counsel for Mr. Alizadeh-Ebadi acknowledged that counsel for MTS had not referred to Event 9 described above or to the prohibited ground of disability in their written arguments with respect to any of the Events. Counsel for Mr. Alizadeh-Ebadi also acknowledged in his oral arguments that MTS had a “get out of jail card” for Event 9 described above, as a result of the Commission’s decision not to deal with Mr. Alizadeh-Ebadi’s additional complaint.

[168] However, counsel for Mr. Alizadeh-Ebadi submitted in his oral arguments that the Tribunal should, in deciding this case, consider “prior history of disability” as a prohibited ground for the alleged discrimination by MTS in relation to some of the other Events described in the complaint, even though disability is not mentioned in the complaint or pleadings as a prohibited ground. “Prior history of disability” was part of the language removed by Mr. Alizadeh-Ebadi from his amended Statement of Particulars (together with race) in relation to Event 9 described above, after the Commission refused to deal with it as an additional complaint. That ground, according to counsel for Mr. Alizadeh-Ebadi in his oral arguments, arises out of the fact that while Mr. Alizadeh-Ebadi was accommodated by MTS by providing him with a graduated return to work program for about one and a half years after his first car accident in 2001, Brenda Coutts and Brian Elliott and other managers at MTS allegedly did not believe that Mr. Alizadeh-Ebadi was disabled at that time and made comments in the workplace that he was “faking” and was probably taking trips to Turkey during his prior disability and therefore that he had a poor work ethic.

[169] In his oral arguments, counsel for Mr. Alizadeh-Ebadi submitted that this alleged conduct on the part of Brenda Coutts and Brian Elliott and other MTS managers of not believing that Mr. Alizadeh-Ebadi’s the prior disability was true and of making related unsubstantiated comments about his work ethic and trips to Turkey, was a factor in a number of the alleged discriminatory actions by MTS against Mr. Alizadeh-Ebadi, including the use of the name “Krash” and of Mr. Alizadeh-Ebadi not being promoted in 2006. Put another way, even though disability as a prohibited ground is not mentioned in the complaint or pleadings, nevertheless, according to counsel for Mr. Alizadeh-Ebadi in his oral arguments, Mr. Alizadeh-Ebadi’s disability resulting from the first car accident (for

which he was accommodated) was a factor in a number of the allegedly discriminatory Events by MTS that followed that accident because Mr. Alizadeh-Ebadi's prior disability was not believed by managers of MTS. The Tribunal, according to the oral submissions of counsel for Mr. Alizadeh-Ebadi, should now take this into consideration in deciding this case.

[170] Counsel for Mr. Alizadeh-Ebadi cited the case of *Egan v. Canada Revenue Agency* (2012) CHRT a ruling that I made in a case that I am still seized of. In that case I allowed an amendment to a complaint because I found that there was a logical nexus between the amendment and the original complaint and that there would be no prejudice to the respondent as it would have ample time to respond. My ruling in that 2012 case, unlike this case, was decided by me on a preliminary motion brought by the complainant long before the hearing started. In fact, the hearing in that case has only very recently started.

[171] As noted in paragraph 166 above, counsel for MTS did not refer to Event 9 described above and the prohibited ground of disability with respect to any of the Events in their written arguments exchanged with counsel for Mr. Alizadeh-Ebadi a few days before the last day of the hearing when oral arguments were scheduled to take place. Counsel for MTS in their oral arguments disagrees with counsel for Mr. Alizadeh-Ebadi with respect to Issue 1 on the basis that, 1) Event 9 and the prohibited ground of disability with respect to any of the Events is not properly before the Tribunal to decide, as it wasn't part of the complaint dealt with by the Commission and was therefore neither investigated or referred to the Tribunal; and 2) at this late stage when the evidence in the hearing has been completed, it would be unfair for the Tribunal to decide that either Event 9 or the prohibited ground of disability with respect to any Event is properly before the Tribunal to decide.

[172] I accept the arguments of MTS with respect to Issue 1 for the following reasons.

[173] Failure to accommodate any disability was not alleged by Mr. Alizadeh-Ebadi in his complaint or his pleadings and no reference to the prohibited ground of disability appears in any of these documents.

[174] The Commission refused to deal with Mr. Alizadeh-Ebadi's additional complaint alleging failure to accommodate Mr. Alizadeh-Ebadi for a disability by providing him with a

graduated return to work program after the 2007 accident. That additional complaint was made on the basis of the prohibited grounds of race and prior history of disability after a proposed amendment to add this allegation to his Statement of Particulars was objected to by MTS.

[175] It must be assumed that in requesting the adjournment of this hearing in June of 2014 and filing the additional complaint thereafter, Mr. Alizadeh-Ebadi had concluded that Event 9 described above and the grounds of race and prior history of disability in relation to it were not included in the original complaint. There was no judicial review taken of the decision of the Commission nor was there a motion made to the Tribunal to amend the complaint or the pleadings. After the Commission's decision not to deal with the additional complaint and before the hearing resumed in June of 2016, Mr. Alizadeh-Ebadi removed the words "race and prior history of disability" from the proposed amendment to the Statement of Particulars together with any allegation of failure to accommodate a disability with respect to the 2007 car accident.

[176] As such, with respect to the first part of Issue 1, in my opinion, based on the facts in this case and on paragraph 159 above, Event 9 described above, is not properly before the Tribunal for determination and the Tribunal should not decide allegations of discrimination with respect to Event 9 on the basis of race and/or disability.

[177] Counsel for Mr. Alizadeh-Ebadi argues that the Tribunal should decide that MTS discriminated against Mr. Alizadeh-Ebadi in a number of the other Events described above, based, in part, on the prohibited ground of disability related to the alleged disbelief by certain managers of Mr. Alizadeh-Ebadi's prior history of disability following his first car accident for which Mr. Alizadeh-Ebadi was accommodated by providing him with a graduated return to work program. The Tribunal is being asked to make this determination at the argument phase of this hearing after the evidence phase has long ago been concluded, without any motion having been made to the Tribunal to amend the complaint or the pleadings. As previously noted, there is no reference in the complaint or the pleadings to the prohibited ground of disability or to an allegation of failure to accommodate any particular disability.

[178] In my opinion, at the close of the evidence phase of the hearing, MTS had every reason to believe that allegations based upon the prohibited ground of disability were not part of this inquiry, given the facts set out in paragraphs 4 to 8 inclusive above and also the references to those facts in paragraph 112. MTS presented its case on that basis and it would be unfair and contrary to the principles of natural justice to now change the scope of the inquiry in this case because of arguments made by counsel for Mr. Alizadeh-Ebadi that the prohibited ground of disability is part of this inquiry.

[179] As such, with respect to the second part of Issue 1, in my opinion, based on the facts in this case and on paragraphs 160, 161 and 162 above, it would be unfair to decide any allegations of discrimination with respect to any of the other Events described above on the basis of the prohibited ground of disability.

B. Issues 2 and 3

Event 1: Remarks made by David Atwell

[180] Based on the evidence in this case, including my findings in paragraphs 22, 24, 27, 31, 35, 36, 37 and 40 above, in my opinion, Mr. Alizadeh-Ebadi has discharged his onus of proving a *prima facie* case of discrimination against MTS pursuant to section 14(1)(c) of the *CHRA*, on the prohibited grounds of race, national or ethnic origin or religion with respect to Event 1 described above.

[181] As noted in paragraphs 25 and 26 above, David Atwell apologised for his behaviour to Mr. Alizadeh-Ebadi and MTS admitted that Mr. Atwell's conduct in making certain derogatory comments to Mr. Alizadeh-Ebadi in the workplace over a period of time amounted to harassment under the *CHRA*.

[182] MTS's explanations for this conduct are essentially that (i) there was a limited number of comments and a limited time during which they were made and therefore the harassment was not of a serious or persistent nature; and (ii) that Mr. Alizadeh-Ebadi is too sensitive about the comments and exaggerated them in his evidence and (iii) the

Event was not reported to management until the Taylor internal Report and therefore MTS is exculpated under section 65(2) of the *CHRA*.

[183] In my opinion, the evidence and my findings including those in paragraphs 31, 35, 36 and 40 above counters the explanations of MTS referred to above. Regarding section 65(2) of the *CHRA*, on the basis of my findings at paragraph 35 above, according to MTS' own witnesses there was or should have been knowledge by MTS' management of Mr. Atwell's harassing behaviour towards Mr. Alizadeh-Ebadi long before Caroline Taylor's report.

[184] As such, MTS should have acted positively to deal with the harassment when the disparaging remarks by David Atwell occurred. It failed in its duty to take prompt and effectual action in line with the legal principles set out in paragraph 163 (viii) and (ix) above.

Event 2: Denial of a Second Computer

[185] Based on the evidence in this case, including my finding in paragraph 48 above, in my opinion, Mr. Alizadeh-Ebadi has discharged his onus of proving a *prima facie* case of discrimination against MTS pursuant to section 7(b) of the *CHRA*, on the prohibited grounds of race, national or ethnic origin or religion with respect to Event 2 described above.

[186] In my opinion, David Atwell, at the time of this Event, was intolerant of Mr. Alizadeh-Ebadi because of his race, national or ethnic origin or religion and adversely differentiated against him in refusing his legitimate request through his supervisor Neil Wyrchowny for the same privilege to have a second computer necessary to him as most of his peers had. The reasons for the refusal advanced by David Atwell in his evidence are not believable or reasonable in my view as a second computer was a necessary tool for Mr. Alizadeh-Ebadi to do his work and the request made for one from his supervisor Neil Wyrchowny was legitimate from a business case point of view.

[187] MTS's explanations of this conduct are that i) Mr. Alizadeh-Ebadi was not treated differently than others; and ii) the refusal was not based on a prohibited ground specified in

the complaint. I do not accept these explanations based on the evidence. Clearly, on the evidence, there was adversely differential treatment of Mr. Alizadeh-Ebadi compared to his peers in refusing a second computer where virtually none of them had been refused. Further, David Atwell, at that time, was intolerant of Mr. Alizadeh-Ebadi's race, ethnicity or religion as per my findings in Event 1 and his attitude towards Mr. Alizadeh-Ebadi, in my opinion, was a pervasive factor in all of his dealings with him.

[188] In my view the legal principles as set out in paragraph 154 above are supportive of my reasoning with respect to Event 2 on the basis of an inference that I have made that the "subtle scent of discrimination" is present in this Event in the actions of David Atwell.

Event 3: Denial of training requests

[189] Based on the evidence in this case, including my finding in paragraph 51 above, in my opinion, Mr. Alizadeh-Ebadi has discharged his onus of proving a *prima facie* case of discrimination against MTS pursuant to section 7(b) of the *CHRA*, on the prohibited grounds of race, national or ethnic origin or religion with respect to Event 3 described above.

[190] Exactly the same reasoning set out in paragraphs 186, 187 and 188 above with respect to Event 2 is applicable to Event 3 in the sense that, in my opinion, David Atwell at the time of this Event was intolerant towards Mr. Alizadeh-Ebadi on the basis of his race, national or ethnic origin or religion. As a result, he adversely differentiated on the basis of those prohibited grounds in refusing the Win2K project training request made on behalf of Mr. Alizadeh-Ebadi while not refusing this training to other peers of Mr. Alizadeh-Ebadi who did not have his personal characteristics. Once again, I am able to draw the inference from the evidence with respect to this Event that the "subtle scent of discrimination" is present in the actions of David Atwell.

Event 4: Use of the "nicknames" "Crash" or "Kourash" either section

[191] Based on the evidence in this case, including my findings in paragraph 60 above, in my opinion, Mr. Alizadeh-Ebadi has not discharged his onus of proving a *prima facie* case

of discrimination against MTS pursuant to either section 14(1)(c) or section 7(b) of the *CHRA*, on the prohibited grounds of race, national or ethnic origin or religion with respect to Event 4 described above.

[192] These “nicknames” were not pleasant for Mr. Alizadeh-Ebadi to hear or read in view of the injuries he sustained in his car accidents. The use of these plays on his name showed insensitivity and disrespect for a person who had been through painful injuries as a result of accidents that were not his fault. Mr. Alizadeh-Ebadi made it known to his colleagues that he didn’t appreciate the use of these names and yet they persisted until the end of his career with MTS. However, the arguments advanced by Mr. Alizadeh-Ebadi in respect of this Event specifically relate to the prohibited ground of disability that, for the reasons detailed above in Part V. Analysis Issue 1, is not before the Tribunal for determination in this case.

Event 5: Comments about Mr. Alizadeh-Ebadi’s trips to Turkey and his work ethic

[193] Based on the evidence in this case, including my findings in paragraphs 67, 68 and 69 above, in my opinion, Mr. Alizadeh-Ebadi has not discharged his onus of proving a *prima facie* case of discrimination against MTS pursuant to either section 14(1)(c) or section 7(b) of the *CHRA*, on the prohibited grounds of race, national or ethnic origin or religion with respect to Event 5 described above.

[194] In my opinion, Mr. Alizadeh-Ebadi’s supervisor Brenda Coutts as well as Brian Elliott, who supervised him in Ms. Coutt’s absence, were not tainted by their association with David Atwell so as to make discriminatory comments about Mr. Alizadeh-Ebadi. They may or may not have been good managers but, as noted above, I accept their evidence and denials, that they did not make these comments. I found their evidence to be credible and consistent on this Event. I found that the evidence of Mr. Alizadeh-Ebadi and other witnesses who suggested that they did make these comments was vague, inconsistent and impressionistic.

[195] Finally, Mr. Alizadeh-Ebadi's arguments with respect to this Event related these comments to the prohibited ground of disability that, for the reasons detailed above in Part V. Analysis Issue 1, is not before the Tribunal for determination in this case.

Event 6: Relegation to Service Desk

[196] Based on the evidence in this case, including my finding in paragraph 77 above, in my opinion, Mr. Alizadeh-Ebadi has not discharged his onus of proving a *prima facie* case of discrimination against MTS pursuant to section 7(b) of the *CHRA* on the prohibited grounds of race, national or ethnic origin or religion with respect to Event 6 described above.

[197] The evidence with respect to this Event is clear, in my opinion, that the actions taken by MTS were not directed at Mr. Alizadeh-Ebadi alone but were directed to a group of employees including Mr. Alizadeh-Ebadi and some of his peers. It may have been a poor decision by MTS to try out this program and may also have been, in part, directed to a group of employees, some of whom were not held in high esteem for their performance by management. However, in my opinion, it was not directed at Mr. Alizadeh-Ebadi alone and not based upon the prohibited grounds of race, national or ethnic origin or religion. Many of the group of peers affected by the program had no distinguishing protected characteristics.

Event 7: Hostile work environment/TEAM meeting

[198] Based on the evidence in this case, including my finding in paragraph 87 above, in my opinion, Mr. Alizadeh-Ebadi has not discharged his onus of proving a *prima facie* case of discrimination against MTS pursuant to either section 14(1) (c) or section 7(b) of the *CHRA*, on the prohibited grounds of race, national or ethnic origin or religion with respect to Event 7 described above.

[199] The meeting that was the subject of the Event, indicates that a number of unionized workers with their representatives met to discuss a number of issues that may have indicated a bad work atmosphere at the time in the ITSM Department because of various

actions or inactions by management of MTS. Management actions complained of at the meeting did not include discrimination under the *CHRA*. The “Bad Dog Box” group that was referred to in the Minutes of the meeting was not applicable to Mr. Alizadeh-Ebadi alone but a group of his peers including him. Many of whom had no distinguishing protected characteristics.

[200] In my opinion, similar to my reasoning in paragraph 197 above concerning Event 6, this Event does not constitute discrimination as it was not directed to Mr. Alizadeh-Ebadi alone or related to the prohibited grounds of race, national or ethnic origin or religion.

Event 8: Denial of Promotion to Senior Client Support Specialist (Site Prime) position

[201] Based on the evidence in this case, including my findings in paragraphs 108, 109 and 111 above, in my opinion, Mr. Alizadeh-Ebadi has not discharged his onus of proving a *prima facie* case of discrimination against MTS pursuant to section 7(b) of the *CHRA* on the prohibited grounds of race, national or ethnic origin, or religion with respect to Event 7 described above.

[202] The evidence in this Event was very clear to me that a decision was made by the three person panel based on a fair assessment of all applicants’ performances in response to a set of test questions that were fairly and consistently administered and scored. Nothing about the competition leaves me with the impression that it was biased against Mr. Alizadeh-Ebadi in any way. I can find no “subtle scent” of discrimination against Mr. Alizadeh-Ebadi by MTS with respect of this Event.

[203] Moreover, as noted in paragraphs 108, 109 and 111 above, in my opinion, the evidence of Brenda Coutts, Brian Elliott and Don Rooney was very credible while the evidence of Mr. Alizadeh-Ebadi was very vague and impressionistic about this Event nor did it establish in any way that the three part test guide referred to in paragraph 157 above had been satisfied with respect to the job competition for the Site Prime positions or any other acting opportunities that were not awarded to him.

Event 10: Treatment on return to work in 2009

[204] Based on the evidence in this case, including my findings in paragraph 140 above, in my opinion, Mr. Alizadeh-Ebadi has not discharged his onus of proving a *prima facie* case of discrimination against MTS pursuant to either section 14(1)(c) or section 7(b) of the *CHRA* on the prohibited grounds of race, national or ethnic origin, or religion with respect to Event 10 described above.

[205] The evidence with respect to this Event indicates to me that Mr. Alizadeh-Ebadi's supervisors and some of his peers were not as sympathetic or helpful to him as they should have been given his circumstances at that time. Undoubtedly, this made him feel unwanted, frustrated and depressed. I also believe, based on the evidence, that Mr. Alizadeh-Ebadi was not a particularly happy or motivated employee at that time and acted accordingly for reasons pertaining to his recent injuries, time off work and his unwelcome reception in the workplace. The combination of these factors, in my opinion, led to some of the unfortunate and inappropriate actions and behaviour between management and Mr. Alizadeh-Ebadi, much of which demonstrated poor management on the part of MTS and Brenda Coutts in particular.

[206] Although no medical witnesses were called at the hearing, it is likely, based on the report from his intake and discharge at the St. Boniface General Hospital on March 16, 2009, that the incidents that day concerning his loss of computer information and the heated exchanges on that subject with Brenda Coutts, caused him to leave work and go to the hospital complaining of chest pains and stress. I do not, however, detect the "subtle scent of discrimination" against Mr. Alizadeh-Ebadi in the incidents described in this Event. As noted at paragraph 140 above, I am unable to infer or find that any of these incidents were related in any way to Mr. Alizadeh-Ebadi's race, national or ethnic origin or religion.

Event 11: MTS Internal Investigation and Report

[207] Obviously, for the reasons set out paragraphs 180 to 188 above, I do not agree with the findings with respect to Items 1 and 2 in the Investigation and Internal Report (which are Events 2 and 1 above) or with the recommendations related thereto. In my opinion, as

noted above, MTS failed in its obligation to create and maintain an harassment free environment by failing to take prompt and effectual actions against David Atwell at the time of the harassment and the unfair actions against Mr. Alizadeh-Ebadi by Mr. Atwell with respect to these Items, when it knew or ought to have known about them. Both the findings and the recommendations of Caroline Taylor related to these Items are, in my opinion, erroneous and ineffective in concluding that, as the harassment by David Atwell had occurred in the past and without any official internal complaint having been filed there was nothing more to be done about it. As such, remedial orders with respect to these Items are being issued below.

[208] Moreover, I feel that the Internal Investigation and Report was undertaken in a somewhat superficial manner and without proper objectivity. In that regard, in my opinion, the investigation should have included former key employees such as Neil Wyrchowny and Ernest Desmarais who would not be influenced by an existing employment relationship with MTS, rather than relying only on current internal employees of MTS (some of whom, including David Atwell, appear to have given Caroline Taylor a somewhat different version of the evidence than I heard). Further, having an investigator who also works for the company and having her report reviewed by internal company lawyers before its release, is also problematic in terms of ensuring objectivity and fairness in this type of exercise. I assume that MTS, by changing its practices in this regard, as noted in paragraph 151 above, agrees with this latter point.

[209] Notwithstanding paragraphs 206 and 207 above, based upon the evidence before me, in my opinion, the undertaking of the Internal Investigation and Report and its findings and recommendations by Caroline Taylor, do not themselves represent adverse differential treatment or harassment towards Mr. Alizadeh-Ebadi by Ms. Taylor or MTS under the *CHRA*, on the basis of the prohibited grounds of race, national or ethnic origin or religion. As noted above, I disagree with certain aspects of the manner by which the Internal Investigation and Report was undertaken and with some of the findings and recommendations. I also understand that the results of the Internal Investigation and Report upset and disappointed Mr. Alizadeh-Ebadi. However, I am unable to conclude on the evidence before me that Caroline Taylor or MTS acted in a discriminatory manner

towards Mr. Alizadeh-Ebadi in undertaking the Internal Investigation and Report or producing its findings and recommendations.

VI. Decision

[210] For the foregoing reasons, I find that the complaint is substantiated with respect to:

- (a) Event 1 described above, pursuant to section 14(1)(c) of the *CHRA*, on the prohibited grounds of race, national or ethnic origin or religion;
- (b) Event 2 described above, pursuant to section 7(b) of the *CHRA*, on the prohibited grounds of race, national or ethnic origin or religion;
- (c) Event 3 described above, pursuant to section 7(b) of the *CHRA*, on the prohibited grounds of race, national or ethnic origin or religion.

[211] For the foregoing reasons, I find that the complaint is not substantiated with respect to Events 4 to 8 inclusive described above and 10 and 11 described above, and I hereby dismiss same. Event 9, described above, is not properly before me as previously explained and the complaint in respect of it is therefore also dismissed.

VII. Legal Framework-Remedies

[212] Section 53(2) of the *CHRA*, as set out in paragraph 2 above, provides that if at the conclusion of the inquiry the member finds that the complaint is substantiated, subject to section 54, the member may make an order against the person found to have engaged in the discriminatory practices and include in the order terms that the member considers appropriate as set out in clauses (a) to (e) inclusive.

[213] When evidence establishes pain and suffering, an attempt to compensate for it must be made. Awarding the maximum amount allowed under section 53(2)(e) of the *CHRA* is reserved for the most egregious discriminatory practices.

Grant v. Manitoba Telecom Services Inc. 2012 CHRT 10 (“*Grant*”).

[214] Section 53(3) of the *CHRA* is a provision intended to provide a deterrent and to discourage those who deliberately discriminate. A finding of willfulness requires that the discriminatory act and the infringement of the person's rights under the Act is intentional. A finding of recklessness generally denotes acts that disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly. The award of the maximum under the section should be reserved for the very worst cases.

Grant, supra.

[215] The Tribunal has the discretion pursuant to section 53(2)(b) of the *CHRA* to order reinstatement of an employee who has lost his job as a consequence of discrimination against him by his employer. In order for the Tribunal to exercise this discretion, it must be satisfied that there is at least a serious possibility, if not probability that the Complainant would be in that position but for the discrimination and whether reinstatement is appropriate in the circumstances, as well as analyzing the link between the discriminatory practice and the loss claimed.

Grant, supra.

[216] While the Tribunal has wide discretion to order remedies under section 53(2) of the *CHRA* if a complaint is substantiated in order to put the complainant in the position he would have been had the discrimination not occurred, the use of the words "as a result of" means there must be a causal connection between the remedy awarded and the discrimination. Therefore, careful consideration of all surrounding facts, on a case by case basis, must be considered by the Tribunal to determine whether a sufficient causal connection exists to justify the remedy.

Canada (Canadian Human Rights Commission) v. Canada (Attorney General), [2001] F.C.J. No. 1922. ("*Carter*").

[217] The onus is on the Complainant to prove entitlement to the remedies claimed. He must prove that had the discrimination not occurred, he would have obtained the payments and benefits he is seeking in remedies (or in the case of seeking reimbursement, would not have been out those expenses). To discharge this onus the

Complainant must prove on a balance of probabilities that there is a serious possibility that the conduct which violated the *CHRA* caused the damage for which the Complainant claims compensation.

Culic v. Canada Post Corporation, 2007 CHRT 1.

[218] The Tribunal is to be guided by common sense which requires that limits be placed upon liability for the consequences flowing from an act, absent bad faith. Common sense tells us that consequences which appear down the chain of causality but are too remote are to be excluded.

Carter, supra.

VIII. Analysis-Remedies

C. Issue 4

[219] In the argument phase of the hearing in this matter, Mr. Alizadeh-Ebadi argued that all of the Events described above had been proved and that his complaint should be substantiated. Mr. Alizadeh-Ebadi also provided his submissions on remedies at the same time, obviously not knowing then what my decision would be on liability in the case. He advanced the position that, given the facts of this case, I should make an order under section 53(2) and (3) of the *CHRA* against MTS including the following terms:

- a. General damages for his pain and suffering resulting from the discriminatory practices, for the maximum amount of \$20,000.00, pursuant to section 53(2)(e) of the *CHRA*.
- b. Special compensation for having willfully or recklessly engaged in discriminatory practices, for the maximum amount of \$20,000.00, pursuant to section 53(3) of the *CHRA*;
- c. Reinstatement of Mr. Alizadeh-Ebadi to a similar position to the one he had before he resigned, pursuant to section 53(2)(b) of the *CHRA*;
- d. Pursuant to section 53(2)(b)(c) and (d) of the *CHRA*–

- i. an award for lost wages from February 23, 2009 until June 30, 2015 (the latter date agreed to by the parties in their Agreed Statement of Facts), in the amount of \$161,180.00 for the difference in total wages (including Variable Pay Plan, Employee Share Ownership Plan, Dental charges and bonus amounts under the Collective Agreement) between what Mr. Alizadeh-Ebadi would have earned at MTS if he was employed by MTS during the period and the income he actually did earn during the period;
- ii. as well as an award for an amount for lost pension to be quantified later;
- iii. as well as an award for relocation expenses to relocate he and his family to British Columbia in the amount of \$12,419.30 (comprised of \$4000.00 moving expenses and \$8,419.30 for a mortgage payout penalty on his home in Winnipeg).

Mr. Alizadeh-Ebadi argues that all of the foregoing losses and expenses would not have occurred or been incurred had he remained an employee of MTS which would have been the case, but for the discrimination by MTS that caused him to have to resign from his job.

- e. An award of interest on all heads of damages at the Bank of Canada Rate from the date of loss to June 30, 2015 or as otherwise determined by the Tribunal, pursuant to section 53(4) of the *CHRA*.
- f. Pursuant to section 53(2)(a) of the *CHRA* order MTS to provide its front-line managers with sensitivity training and training about discrimination and its obligations under the *CHRA*. As well, order MTS to work with the Commission to ensure that it has appropriate policies in place, especially those related to harassment, discrimination and respectful workplace.

Mr. Alizadeh-Ebadi argues that these orders are required because it is not clear that MTS has learned from this experience and that it needs to change its ways with respect to how it deals with discrimination in the workplace going forward.

[220] Mr. Alizadeh-Ebadi argues that this case is about an accumulation of all of the discriminatory Events described above, culminating with Events 10 and 11 that finally

caused him to resign from MTS to protect himself and his well-being. He argues that he had to leave work and go to the hospital with chest pains and stress following his unwelcome return to work by his colleagues in February of 2009, after an absence of two years as a result of injuries sustained in an accident that was not his fault. He says he then had flashbacks of all of the previous Events described above that he felt were all discriminatory. When he finally complained internally about these Events under MTS' Respectful Workplace Policy, he was rebuffed by MTS in what he felt was a "whitewashed" Internal report. He says he realized then that he could not return to work at MTS because of this accumulation of discriminatory behaviour by MTS over the years that was not being addressed and was making him feel depressed, anxious and unwell while working at MTS. So after he had left MTS and moved to British Columbia, despite Des Hathaway's attempts during this time to try to accommodate him back into the workforce, he resigned. He argues that, but for the Events described above that he believes were all discriminatory, he would not have resigned from MTS. Hence, Mr. Alizadeh-Ebadi argues that the remedies described in paragraph 219 above should be ordered against MTS on the basis that the discriminatory Events at MTS were hurtful, harmful and deliberate and caused him to resign from his job at MTS.

[221] MTS argues that only in Event 1 has discriminatory behaviour been established and only for a relatively short period a long time ago. MTS argues that it is not liable for Event 1 because it didn't consent to it pursuant to section 65(2) of the *CHRA*, as it received no complaint about it. It further argues that in each of the other Events discrimination has not been established on the basis of the prohibited grounds of race, national or ethnic origin or religion or that if it has been established, MTS has provided a reasonable explanation for the behaviour that is not a pretext. Hence it argues that no remedies should be ordered.

[222] I have found that the complaint is substantiated with respect to Events 1, 2 and 3 described above, as set out in paragraph 210 above, but that the rest of the complaint, with respect to Events 4 to 11 inclusive as described above is dismissed, as set out in paragraph 211 above.

[223] In essence, I have found that the discrimination by MTS against Mr. Alizadeh-Ebadi in this case relates specifically to the behaviour of David Atwell during the earlier part of Mr. Alizadeh-Ebadi's employment, because he was then intolerant of Mr. Alizadeh-Ebadi's race, ethnic or national origin or religion and engaged in the discriminatory practices referred to in Events 1, 2 and 3 as described above; that Mr. Alizadeh-Ebadi was very upset and distressed because of these Events and let others know about his feelings; that MTS knew or should have known about these discriminatory practices by David Atwell and should have then acted appropriately to ensure that they did not continue; and that MTS failed in its duty to do so.

[224] As such, I find that an order ought to be made against MTS in respect of the discrimination I have found with respect to Events 1, 2 and 3 described above because they were willfully discriminatory and caused Mr. Alizadeh-Ebadi serious pain and suffering. I think the conduct of David Atwell in these Events was deliberate and very hurtful and harmful to Mr. Alizadeh-Ebadi. MTS should have stopped it many years ago as it knew or ought to have known what was going on. Accordingly, I find that the amount of \$20,000.00 for each of the two heads of damages in section 53(2)(e) and section 53(3) of the *CHRA* is justified and appropriate in this case and should be ordered to be paid by MTS to Mr. Alizadeh-Ebadi for these Events of discrimination, together with interest as prescribed in section 53(4) of the *CHRA* on the each of the two \$20,000.00 amounts calculated and payable from January 1, 2002 until June 30, 2015.

[225] In essence, I have found that Events 4 to 8 inclusive and Events 10 and 11 were upsetting and distressful to Mr. Alizadeh-Ebadi, for various reasons that are quite understandable. In some cases they involved poor management by MTS and in some other cases they involved poor behaviour by employees of MTS towards Mr. Alizadeh-Ebadi. However, in my opinion, they did not involve discriminatory behaviour against Mr. Alizadeh-Ebadi by anyone at MTS on the prohibited grounds of race, national or ethnic origin or religion. As such, I am unable to find that there is a causal relationship between these Events and Mr. Alizadeh-Ebadi's resignation based on discrimination that would justify me to order the remedies under the *CHRA* that Mr. Alizadeh-Ebadi seeks in paragraph 219 (c) (d) and (e) above with respect to these Events. Nor is there, in my

opinion, a reasonable or logical causal relationship between Events 1, 2 and 3, described above and Mr. Alizadeh-Ebadi's resignation, given the lapse in time between those Events and the resignation, that would justify these remedies for those Events. In other words, while I feel that Mr. Alizadeh-Ebadi was justified in not wanting to continue to work at MTS for his own health and well-being because of his feelings about the atmosphere for him at MTS in 2009, I do not feel that the atmosphere there then was based upon discrimination by MTS against Mr. Alizadeh-Ebadi. As such, I will not make the orders that Mr. Alizadeh-Ebadi seeks in paragraph 219 (c) (d) and (e) above.

[226] I am, however, concerned that David Atwell may still need some assistance in recognizing how to be respectful to other people in the workplace, despite the evidence I heard that he had changed his ways some time ago. I am also concerned that MTS does not yet fully understand that it must be more proactive in responding to circumstance like Mr. Alizadeh-Ebadi faced with respect to Events 1, 2 and 3 above and may need to change its policies to achieve better results in that regard. As such, I am ordering MTS, to consult with the Commission to address these two areas.

IX. Orders

[227] For the foregoing reasons, I hereby order MTS

- i. to pay Mr. Alizadeh-Ebadi the amount of \$20,000.00 for pain and suffering, pursuant to section 53(2)(e) of the *CHRA*, together with interest thereon calculated from January 1, 2002 to June 30, 2015, pursuant to section 53(4) of the *CHRA*; and
- ii. to pay Mr. Alizadeh-Ebadi the amount of \$20,000.00 for special compensation, pursuant to section 53(3) of the *CHRA*, together with interest thereon calculated from January 1, 2002 to June 30, 2015, pursuant to section 53(4) of the *CHRA*; and
- iii. to consult with the Commission in order to enroll David Atwell in an appropriate educational and training course(s) dealing with respectful behaviour in the workplace and discrimination and to also consult with the Commission in order to have its various policies relating to harassment, respectful behaviour in the

workplace and discrimination reviewed by the Commission and amended accordingly where necessary.

Signed by

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
November 7, 2017

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1873/10312

Style of Cause: Kouroush Alizadeh-Ebadi v. Manitoba Telecom Services Inc.

Decision of the Tribunal Dated: November 7, 2017

Date and Place of Hearing: June 18, 2014;
August 2 to 5, 2016;
November 7 to 10, 2016;
February 13 to 17, 2017; and
May 19, 2017
Winnipeg, Manitoba

Appearances:

Kris M. Saxberg and Tomas Masi, for the Complainant
No one appearing, for the Canadian Human Rights Commission
Paul A. McDonald, for the Respondent