

2009 CarswellNat 2256, [2009] L.V.I. 3853-2



2009 CarswellNat 2256

Drew v. Canadian National Railway

In the Matter of an Adjudication under Division XIV, Part III of the Canada Labour Code

Paula Drew and Canadian National Railway Company

Canada Arbitration Board

Laura Trachuk Adjud.

Heard: December 11, 2007 - November 18, 2008

Judgment: June 10, 2009

Docket: None given.

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Counsel: **Kevin Fox**, Paula Drew, for Complainant

Richard J. Charney, Anne-Marie Naccarato, Terrence Gallagher, for Company

Subject: Labour and Employment; Public

Labour and employment law --- Employment law — Termination and dismissal — Termination of employment by employer — Constructive dismissal — Miscellaneous.

Labour and employment law --- Employment law — Termination and dismissal — Remedies — Damages — Reduction for failure to mitigate.

Labour and employment law --- Employment law — Termination and dismissal — Practice and procedure — Limitation periods.

Cases considered by *Laura Trachuk Adjud.*:

Banca Nazionale del Lavoro of Canada Ltd. v. Lee-Shanok (1988), 87 N.R. 178, 88 C.L.L.C. 14,033, 89 C.L.L.C. 14,026, 22 C.C.E.L. 59, 1988 CarswellNat 254 (Fed. C.A.) — considered

Cardwell v. Young Manufacturer Inc. (1988), 20 C.C.E.L. 272, 1988 CarswellOnt 894 (Ont. Dist. Ct.) — considered

Colistro v. BMO Bank of Montreal (August 16, 2006), Doc. YM2707-7015 (Can. Adjud. app. under Can. Lab. Code) — considered

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Cox v. Robertson (1999), 1999 CarswellBC 2490, 69 B.C.L.R. (3d) 65, 1999 BCCA 640, 131 B.C.A.C. 257, 214 W.A.C. 257, 181 D.L.R. (4th) 214 (B.C. C.A.) — considered

Evans v. Teamsters, Local 31 (2008), 65 C.C.E.L. (3d) 1, 2008 C.L.L.C. 210-019, 374 N.R. 1, D.T.E. 2008T-400, 292 D.L.R. (4th) 577, 253 B.C.A.C. 1, 425 W.A.C. 1, 2008 CarswellYukon 22, 2008 CarswellYukon 23, 2008 SCC 20, [2008] 1 S.C.R. 661 (S.C.C.) — considered

Farber c. Royal Trust Co. (1996), 1996 CarswellQue 1158, 1996 CarswellQue 1159, 145 D.L.R. (4th) 1, 97 C.L.L.C. 210-006, [1997] 1 S.C.R. 846, (sub nom. *Farber v. Cie Trust Royal*) 210 N.R. 161, 27 C.C.E.L. (2d) 163 (S.C.C.) — considered

Farquhar v. Butler Brothers Supplies Ltd. (1988), [1988] 3 W.W.R. 347, 1988 CarswellBC 46, 23 B.C.L.R. (2d) 89 (B.C. C.A.) — considered

Faryna v. Chorny (1951), 1951 CarswellBC 133, 4 W.W.R. (N.S.) 171, [1952] 2 D.L.R. 354, [1952] 4 W.W.R. 171 (B.C. C.A.) — considered

Lloyd v. Imperial Parking Ltd. (1996), 25 C.C.E.L. (2d) 97, 46 Alta. L.R. (3d) 220, 192 A.R. 190, [1997] 3 W.W.R. 697, 1996 CarswellAlta 1036 (Alta. Q.B.) — considered

Manitoba Assn. of Native Fire Fighters Inc. v. Perswain (2003), 2003 CarswellNat 850, 2003 FCT 364, 25 C.C.E.L. (3d) 110, 2003 CFPI 364, 2003 CarswellNat 2064 (Fed. T.D.) — considered

McBride v. SNC-Lavalin Inc. (2002), 2002 NBQB 6, 2002 CarswellNB 49 (N.B. Q.B.) — considered

Mifsud v. MacMillan Bathurst Inc. (1989), 28 C.C.E.L. 228, 63 D.L.R. (4th) 714, 35 O.A.C. 356, 70 O.R. (2d) 701, 1989 CarswellOnt 770 (Ont. C.A.) — considered

Morgan v. Chukal Enterprises Ltd. (2000), 2000 C.L.L.C. 210-036, 2000 BCSC 1163, 2000 CarswellBC 1578, [2000] B.T.C. 558 (B.C. S.C.) — considered

Morland v. Kenmara Inc. (2006), 2006 CarswellOnt 989, 48 C.C.E.L. (3d) 308 (Ont. S.C.J.) — considered

Naothamegwanning First Nation v. Gauthier (2000), 1 C.C.E.L. (3d) 252, 2000 CarswellNat 280 (Can. Adjud. app. under Can. Lab. Code) — considered

Paitich v. Clarke Institute of Psychiatry (1988), 19 C.C.E.L. 105, 1988 CarswellOnt 888 (Ont. H.C.) — considered

Robinson v. Royal Canadian Mint (1992), 1992 CarswellOnt 1937 (Ont. Gen. Div.) — considered

Rowe v. General Electric Canada Inc. (1994), 1994 CarswellOnt 1006, 8 C.C.E.L. (2d) 95 (Ont. Gen. Div.) — considered

Scarfe v. Saskatchewan Indian Cultural Centre (November 28, 1996), Ball Arb. (Can. Adjud. app. under Can. Lab. Code) — considered

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Shah v. Xerox Canada Ltd. (1998), 99 C.L.L.C. 210-003, 1998 CarswellOnt 4130, 49 C.C.E.L. (2d) 30 (Ont. Gen. Div.) — considered

Shah v. Xerox Canada Ltd. (2000), 49 C.C.E.L. (2d) 166, 2000 CarswellOnt 831, 131 O.A.C. 44, 2000 C.L.L.C. 210-022 (Ont. C.A.) — considered

Sheppard v. Sobeys Inc. (1997), 1997 CarswellNfld 327, 149 Nfld. & P.E.I.R. 328, 467 A.P.R. 328 (Nfld. C.A.) — considered

Stamos v. Annuity Research & Marketing Service Ltd. (2002), [2002] O.T.C. 356, 2002 CarswellOnt 1600, 2002 C.L.L.C. 210-036, 18 C.C.E.L. (3d) 117 (Ont. S.C.J.) — considered

Starr v. Sandy Bay First Nation (2006), 2006 CarswellNat 6532 (Can. Arb. Bd.) — considered

Whiting v. Winnipeg River Brokenhead Community Futures Development Corp. (1998), 159 D.L.R. (4th) 18, 1998 CarswellMan 190, 126 Man. R. (2d) 176, 167 W.A.C. 176, [1998] 9 W.W.R. 584 (Man. C.A.) — considered

Wilding v. Qwest Foods Ltd. (1994), 4 C.C.E.L. (2d) 141, 93 B.C.L.R. (2d) 295, 45 B.C.A.C. 125, 72 W.A.C. 125, 1994 CarswellBC 295 (B.C. C.A.) — considered

Statutes considered:

Canada Labour Code, R.S.C. 1985, c. L-2

s. 240 — referred to

s. 240(2) — referred to

s. 242 — referred to

Laura Trachuk Adjud.:

1 This award arises from the adjudication of a complaint filed under Division XIV, Part III section 240 of the *Canada Labour Code*. I was appointed to adjudicate the complaint pursuant to section 242. Paula Drew (referred to as "Ms. Drew or the "complainant") alleges that the Canadian National Railway Company (referred to as the "company", "CN" or the "respondent") has constructively dismissed her. She does not seek reinstatement to her former employment but does seek damages. The company denies that it constructively dismissed Ms. Drew and also claims that her complaint was out of time. In the alternative, the company contends that, even if it is found to have constructively dismissed Ms. Drew, she has failed to mitigate her damages by accepting an offer of employment made to her in June 2006. There is no other dispute about my jurisdiction to hear this matter.

2 A preliminary award dated January 17, 2007 and an interim award dated April 15, 2008 were issued previously with respect to this complaint.

Summary

3 It is useful to set out a summary of this award at the outset given its length and the number of issues that had to be determined. Ms. Drew has made a number of allegations against CN including a history of discriminatory

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treatment and verbal abuse by her supervisors. Many of the allegations about previous discriminatory treatment proved to be unfounded after all of the evidence was presented and the complainant ultimately chose not to rely upon them. However, she has met the onus of proving on the balance of probabilities that she was verbally harassed by her supervisors. The verbal abuse was significant enough to create an intolerable working environment and resulted in her constructive dismissal.

4 Ms. Drew's problems really began in September 2003 when she was transferred to the position of Trainmaster at the MacMillan Yard (the "Mac Yard"). The Mac Yard is a very stressful working environment. It is the regional hub of the railway and there is enormous pressure on the people that work there. In Ms. Drew's case, the pressure on her to perform crossed the line into abuse. The Superintendent of Mac Yard, John Orr, and the Manager of the Greater Toronto Area, Kirk Carroll, regularly yelled and swore at her. While profanity was common at Mac Yard and used by Ms. Drew herself, Mr Orr and Mr Carroll actually called Ms. Drew names such as "fucking bitch". They both denied that they yelled and swore at Ms. Drew but after considering all of the evidence I have found that such actions did occur. I also find that the abusive treatment affected Ms. Drew's perception of other interactions with them as well as her perception of certain things that happened to her in the past. The affect on her has been similar to the way a person might rewrite the history of a relationship after a messy divorce.

5 The abuse Ms. Drew suffered while working at the Mac Yard contributed to a depression which caused her to break down on November 24, 2004. She went off work on that date and received short and then long term disability payments for almost two years. She ultimately went into therapy which led to her recovery. The company asserts that if Ms. Drew was constructively dismissed it occurred on her last day of work. It claims that the complaint is untimely because it was not filed until March 14, 2005. I find that the constructive dismissal took place subsequent to November 24, 2004 and that the complaint was therefore timely.

6 In May 2006, Ms. Drew was examined by a doctor at the request of the insurer and was found to have recovered sufficiently to return to work. The company offered her a position with its GO operation. Ms. Drew refused the position and the company alleges that she thereby failed to mitigate any damages to which she would be entitled. I find that it was reasonable for Ms. Drew to refuse the position at GO and that she has not failed to mitigate any damages to which she would be entitled.

Facts

7 Ms. Drew commenced employment with the company in 1987 at the age of 24. She worked for CN in a variety of positions until she went off work in November 2004.

8 From 1987 until 2001, Ms. Drew worked in a number of positions in the United Transportation Union (UTU) bargaining unit. She testified that she was sometimes subjected to rough treatment by her, mostly male, co-workers. That treatment included name calling and comments which reflected their view about the appropriateness of women working in a rail yard. However, Ms. Drew testified that she learned to ignore or stand up to the comments and her co-workers usually backed off. She did not have many personal problems with her co-workers in those years.

9 The company was privatized in 1995. That caused a significant cultural change at the railroad as well as fundamental changes in operations. CN subsequently dramatically improved its standing as a North American railway. Mac Yard is the most significant and profitable "hump yard" in the company. It is the fifth largest hump yard in the world and processes over one million rail cars per year. A hump yard receives and "builds" trains (i.e. adds and removes cars). The Trainmasters are the front line supervisors responsible for the operation. It is a stressful job in a stressful environment.

Trainmaster at Malport

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10 Ms. Drew testified that she trained as a Trainmaster at Malport Terminal beginning in 1998. It appears that she may have been mistaken about the date and actually started a year later. She testified that she worked at Malport as a Trainmaster for a year and a half. She claimed that it was a management position but that she was not "staffed in" as management and continued to be paid as conductor under the collective agreement. She contended that she raised the matter with a number of supervisors including Richard Chorkawy but received no response. Mr. Chorkawy testified but did not recall her raising that issue. Ms. Drew testified that at some point she was advised by a co-worker, Tim Allen, that he was taking over her job. She then called Mr. Chorkawy and asked why she was being replaced by a co-worker who had been employed by the company for fewer years than she had. She said that she asked Mr. Chorkawy if it was because she was a woman and he replied, "If we don't have to deal with women we'd rather not." Mr. Chorkowy denied that he made that statement.

11 Ms. Drew testified that she called Mr. Chorkowy's superior Brian Bowness and he arranged a meeting. Mr. Chorkoway attended as well. Mr. Bowness explained at the meeting that he wanted more people trained in the Trainmaster role and that he chose Mr. Allen because he had a Yardmaster background. Ms. Drew said she asked why he was being staffed in and paid as a manager when she had not been. Mr. Chorkoway told her that she would probably continue to act as Trainmaster on a relief basis and that he wanted to send her on a Supervisor Operations course. However, he subsequently advised her that it was not necessary for her to take the course as she had a business background.

12 Mr. Bowness could not recall Ms. Drew ever complaining to him about her salary or being staffed in at Malport. However, he did recall that he attended a meeting with her and Mr. Chorkowy. He said that it was not held to discuss Mr. Chorkowy's alleged remark or Ms. Drew being replaced by someone staffed in as management. He said that it was more of the "flavour" of a quarterly review. They were discussing Ms. Drew's performance as manager to let her know where she stood. He acknowledged that the catalyst could have been the assignment of Tim Allen to the Relief Trainmaster position. He denied that Ms. Drew had ever complained to him about Mr. Chorkowy's comment about working with women. Mr. Chorkowy testified that he did not recall such a meeting.

13 Mr. Bowness was uncertain as to whether or not Mr. Allen was staffed in as Trainmaster immediately but at some point he agreed he was staffed in as a Trainmaster at Mac Yard. He thought that had happened within a few months of starting in the Relief Trainmaster role.

14 It appears that it was the practice to pay Relief Trainmasters under the UTU collective agreement because the position is temporary. However, when that was put to Ms. Drew in cross-examination she said that no one had ever told her that.

Assistant Manager at Conport

15 In 2001, Ms. Drew applied for a position as Operations Officer at the Brampton Intermodal Terminal (BIT). She did not get the job she applied for but another position was created for her there. It was a Management Level 10 position.

16 Ms. Drew testified that on November 27, 2002 she was advised by her superior at BIT that she was being promoted to the position of Assistant Terminal Manager at the Conport Yard. Suzanne Fusco, the Human Resources Manager for the Great Lakes Region, denied that Ms. Drew's position at Conport was a promotion. She said that Ms. Drew was still a Level 10 Operations Officer. Ms. Drew submitted a job description for Assistant Terminal Manager at Conport. Ms. Fusco testified that Ms. Drew had prepared the job description herself as part of a salary review request. However, she acknowledged in cross-examination that she did not know who had drafted the document. Mr. Carroll said that he did not recognize it as a company document. Mr. Drew also provided a business card which indicated that her title was "Manager Conport". There were also a number of e-mails sent by her in which she gave her title as Assistant Manager Conport. Bob Pelland, the Manager of Conport at the time, did not testify.

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17 Ms. Fusco relied upon a computer generated document which purported to be Ms. Drew's work history at CN. It showed that she remained at management level 10 until she went to Mac Yard. It does not include a promotion to a position called "assistant manager". Ms. Drew had not seen the document prior to its production in this litigation.

Transfer to MacMillan Yard

18 Ms. Drew testified that in September 2003, Kirk Carroll advised her that her position at Conport was being abolished as the yard was too "top heavy". He said that she was being assigned as a Transportation Supervisor at Malport. (She was ultimately assigned as a Trainmaster at Mac Yard.) Ms. Drew said that she subsequently learned that even though she had been told that her position was being abolished, she was replaced by another employee, Todd Bouma. Mr. Bouma had reported to Ms. Drew at BIT and she had identified him as a potential management employee. She testified that when she asked Mr. Carroll about Mr. Bouma taking her job he said that he needed her as a Trainmaster and that he did not think that Conport would last long. Mr. Bouma was also moved to Mac Yard after six months and was not replaced at Conport.

19 Ms. Drew provided an e-mail that she had sent to Mr. Carroll on August 27, 2003 advising him that it was going to be difficult for her to find someone to look after her children on the night shift on such short notice. She suggested some scheduling options. She also raised the concern that she was told she was being moved because Conport was too top heavy but that she was being replaced by Todd Bouma as "assistant manager".

20 Mr. Carroll agreed that Ms. Drew was moved because they had too many managers at Conport and needed Trainmasters at Mac Yard. He also agreed that Ms. Drew expressed reluctance but said that she understood the necessity.

21 Ms. Drew testified that on the last Saturday she worked at Conport, a man came in asking for the Terminal Manager. Ms. Drew introduced herself and said that she was the acting Terminal Manager. The unidentified man responded by saying that "no goddamn woman can run no goddamn railroad". Ms. Drew invited him to leave her office and he responded by saying that "By Monday you are a front line supervisor". Ms. Drew described the man as having a southern accent. Mr. Carroll testified that there are three men in senior management at CN with southern accents but he did not think any of them could have been the person Ms. Drew spoke to. Ms. Drew testified that she called Mr. Carroll about the incident. He said he was not sure what was going on but that on Monday she should report to MacMillan Yard to get her Trainmaster schedule. Mr. Carroll said that he had no recollection of such a telephone call.

22 Mr. Carroll testified that Ms. Drew's move to the Mac Yard was seen as a developmental opportunity for her and a promotion as she was moved to a higher pay level (Management level 8). Mr. Orr also testified that it was a promotion.

23 Ms. Drew started work at MacMillan Yard in September 2003. She reported directly to the Assistant Superintendents, including Colin Tucker. The Assistant Superintendents reported to Mr. Orr, the Superintendent of Mac Yard. Mr. Orr reported to Mr. Carroll the Manager of Greater Toronto Area. Both Mr. Orr and Mr. Carroll had offices at Mac Yard. Ms. Drew worked 12 hour shifts, one month nights and one month days.

Accommodation

24 Ms. Drew testified about the atmosphere at MacMillan Yard. She described it as extremely hectic. It became even more difficult as winter arrived due to problems caused by the snow. In February 2004, the situation became even more stressful because the Canadian Auto Workers bargaining unit went on strike for 30 days. By the end of

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the strike, Ms. Drew was experiencing heart palpitations and ended up going on short term disability benefits for a few months.

25 Ms. Drew returned to work in September 2004 with certain restrictions. She testified that she was not supposed to climb on and off the equipment, had to work days and was supposed to gradually increase her hours. She also testified that she was not supposed to perform work that was too stressful until further cardiac tests were performed. She asserted that she should not be assigned to do investigations as they were highly stressful. It does not appear however, that Ms. Drew's doctor provided such detailed restrictions to the employer. The document provided to CN only stated that she was restricted from safety sensitive/safety critical work. The e-mail sent to Mr. Orr from Human Resources on September 8, 2004 outlining Ms. Drew's restrictions said "...Paula is considered fit to return to work, starting with graduated hours and is presently restricted from safety sensitive/safety critical work."

26 Ms. Drew testified that she was back up to 10 hour days within three to five weeks of returning to work. An e-mail was submitted into evidence which was generated by Mr. Orr's secretary, Mardy Lee Speers. It indicates that Ms. Drew did not work a full week until October 18, 2004. It appears that she worked full weeks after that although she continued on modified duties.

27 Ms. Drew testified that she was asked to take an investigation after she had been back at work for a few weeks. She said that she told Mr. Orr that she was not supposed to do stressful work like that. He told her to just take on attendance investigations and that, "I need you to do your fucking job". Mr. Orr denied that he said that Ms. Drew agreed to do the investigations and eventually was assigned to one which was attended by Glen Gower, the UTU Unit Chair. Ms. Drew found Mr. Gower very difficult to deal with. She testified that she got very upset and her heart started to race. She therefore asked another Trainmaster, Todd Bouma, to take over the investigation. She testified that Mr. Orr mocked her for doing that He called her a "fucking wuss" and accused her of not doing her job. Mr. Orr denied that he said that.

28 Mr. Orr denied that he was ever advised by Ms. Drew or anyone else that she should not do investigations. However, he recalled in cross-examination that he and Ms. Drew agreed that she would only do basic investigations. He said that he had agreed that if Ms. Drew had difficulty with Mr. Gower in an investigation they would get her out. He said that he was glad that she stopped the investigation after Mr. Gower showed up.

29 Mr. Orr denied that Ms. Drew was required to work 12 hour days within her first few weeks back. He testified about the modified duties to which she was assigned. He said that she gave rules instruction to transportation employees who needed to recertify, updated the Mac Yard manual and was involved in the interviewing process for UTU bargaining unit members who were being considered for training as Trainmasters.

PMP Rating

30 Ms. Drew was concerned about the performance evaluation rating she received in 2004. She expected it to be 3.0 which corresponds with "meeting expectations". However, she received 2.85 which was below "meeting expectations". Mr. Orr testified that she received the lower score because part of the rating was the group performance and that the group was not meeting its safety or budget numbers from January to March, 2004 when Ms. Drew was working. The group rating had improved but he could not credit Ms. Drew with that because she had been absent. He also said he could not take into account the period of time when she was working on modified duties. Mr. Orr denied that he had given Ms. Drew the impression that she would receive a more favourable evaluation.

Strike pay

31 The CAW bargaining unit was on strike from February 20 to March 20, 2004. The managers, including the Trainmasters, had to do their own jobs as well as the work normally performed by the bargaining unit employees.

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Ms. Drew testified that they worked very long hours and got very little sleep. She started to experience heart palpitations.

32 All but one of the other Trainmasters received extra pay or holidays for the work they did during the strike. However, Ms. Drew did not receive either.

33 Ms. Drew testified that she worked extra shifts in January due to the weather and then worked six extra shifts during February and March 2004 during the strike. Mr. Colin Tucker, one of the Assistant Superintendents to whom Ms. Drew directly reported, testified that she worked the extra shifts. No one ever asked Ms. Drew to submit the hours she worked during the strike.

34 When Ms. Drew was ready to return to work in August 2004 she sent Mr. Orr the following e-mail:

A couple of things John, giving up my week of vacation was fair and I expect you to be fair as well. I know that all my peers were given two or more extra weeks vacation for their support during the strike. I too gave extra days and time, maybe not every weekend due to kids and being a single parent, but most every week I gave one or more of my scheduled days off and every second weekend. I feel I should be included and given extra vacation as well. What do you think?

35 She also met with Mr. Orr and Ms. Fusco and asked why she had not received a thank you letter, extra pay or vacation like her colleagues. Mr. Orr advised her he had used a formula to determine who was entitled to extra pay and that she did not qualify. She asked what the formula was and Ms. Fusco advised her that she would let her know. However, the formula was not provided to her until November 8, 2004. The e-mail which Ms. Drew ultimately received on November 8, 2004, indicated that she was entitled to one lieu day under the formula because Mr. Orr had submitted that she had worked two extra shifts.

36 Ms. Drew testified that she complained to Ms. Fusco about the failure to pay her in recognition of the extra shifts she had worked. Ms. Fusco told her that she had to deal directly with Mr. Orr.

37 Mr. Orr testified that Ms. Drew came to him before the strike and said that she was a working mother and could not work extra shifts but that she would come in if he really needed her. He said that she only worked two extra shifts in the last week of the strike when people were getting really tired. He acknowledged that they did not do a very good job of keeping track of when people worked during the strike. To the extent that hours were kept, they were kept by Ms. Speers. She did not testify. Mr. Orr said that he did not consult any of the employees about the hours they worked before he submitted them for the purposes of the formula. In cross-examination he said that they may have used a document that Ms. Speers prepared. Mr. Orr conceded that even if Ms. Drew had only worked the two 12 hour shifts that he agreed she worked, she would have been entitled to one lieu day on the basis of the formula. Although Mr. Orr testified that if anyone kept track of hours it was Ms. Speers, an e-mail was submitted which appeared to be from Mr. Orr to Ms. Speers dated March 24, 2004 in which he specifies how many days off the Assistant Superintendents and Trainmasters had off during the strike. He indicates that Ms. Drew only worked two extra 12 hour shifts.

38 Mr. Carroll testified that the managers who had worked during the strike were asked to submit their hours.

Vacation

39 In January 2004, Ms. Drew had booked off a week in August to go to Mexico. However, in August she was off on short term disability. She spoke to her doctor and he said that she could go. She also spoke to the insurance company that was managing her short term disability benefits. They did not express any concerns. However, Ms. Drew was advised by Mr. Orr when she returned from Mexico that he was taking away a week of her vacation as

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she should not have gone on vacation while on short term disability benefits.

40 Ms. Fusco testified that anyone on short term disability needs to be available for modified duties which was why Mr. Orr took issue with Ms. Drew taking the vacation. She acknowledged that neither the insurance company nor the company which managed the claims took any issue with Ms. Drew taking the vacation. Ms. Fusco testified that Ms. Drew agreed that she would lose one week's vacation

41 Mr. Orr testified that he was concerned by Ms. Drew's trip to Mexico because she had said that she could not come in to perform modified duties. He claimed that Ms. Drew had advised him that she could not drive and did not want to be so far away from her heart specialist. He felt that something in her condition must therefore have materially changed if she could travel to Mexico. He maintained that she had an obligation to tell him if that were the case.

Solutions Centre

42 Ms. Drew testified that she applied for other positions at CN in order to get away from Mr. Orr and Mr. Carroll. She applied for a position at Intermodal as well as the new "Solutions Centre". She testified that she met with two people from the new Solutions Centre but they told her that Mr. Orr would not release her from transportation at that time.

43 Ms. Drew advised Mr. Orr that she might be interested in going to the Solutions Centre in an e-mail on August 26, 2004. She asked him if he would support her if she chose to pursue that. He responded on September 6, 2004 that "first and foremost I am interested in your return to active duty as a Trainmaster".

44 Mr. Orr agreed that Ms. Drew raised the possibility of joining the Solutions Group that was being formed. He said that his response was that she needed to get fully back to work and then they could consider it. He said that he would not pass on someone who was not capable of doing the job physically. He said that she had been at Mac Yard for a year and had been off six months. He had given her an 11 per cent raise and wanted her to come back and start contributing. He said that no one from the Solutions Group said that they were interested in Ms. Drew or that she had applied.

Yelling and Swearing

45 Swearing is common at the MacMillan Yard. However, Ms. Drew alleges that the yelling and profane language directed at her by Mr. Orr and Mr. Carroll crossed the line into abuse.

46 Ms. Drew interacted with Mr. Orr regularly. She described their relationship as toxic and horrible. She claimed that he yelled constantly, particularly as the winter progressed and the CAW strike began. He routinely threatened her job which caused her great stress. For example, he frequently asked what was the matter with her and if she liked her job. She conceded that he was probably stressed too.

47 Ms. Drew testified that during the strike she started to have heart palpitations. She said she went to Mr. Orr while wearing the heart monitor and asked for a couple of days off. He told her to get her ass back to work. She testified that the situation was just as bad when she returned from her sick leave in September 2004. She claimed that Mr. Orr said he did not think there was anything wrong with her and the restrictions should be lifted. She responded that it was not like a broken arm or something that one could see. She felt that her restrictions were adding to his stress. She also testified that she complained to him about the way he treated her. She testified that she would sometimes say to him "if you want to talk to me in a nicer manner you can call me back" and hang up. At other times she would say to him "...if you want to talk to me civilly".

48 Ms. Drew acknowledged that Mr. Orr complimented her from time to time. The company provided a number

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of e-mails in which he said complimentary things to her.

49 Ms. Drew testified that she also dealt with Mr. Carroll regularly. They were involved in a conference call twice each shift with the heads of all of the departments. She also regularly saw him in the yard. Ms. Drew testified that Mr. Carroll always "talked down" to her. She felt that he did not like her. She said that he yelled and swore a lot because whenever she had to deal with him it was a derailment. She said that was a big issue and he was a hot head. She testified that he called her a "stupid bitch" on many occasions.

50 Ms. Drew specifically recalled one incident in which Mr. Carroll called her and another employee into the tower and said "Get your heads out of your fucking asses and do your goddamn job". After another incident he told her and another employee to "haul their asses in here" and refused to listen to the mechanical explanation for what had occurred. During the strike he saw Ms. Drew at work on a Saturday and said "What the fuck are you doing here, you don't work Saturdays." When she responded that she did work Saturdays, he said "you don't have a husband so you need your peers to work for you". She replied that that was not fair and that she did put in time although maybe not as much as some of her co-workers with no wives or kids. Ms. Drew said that she spoke to Ms. Fusco the Human Resources Manager for the Great Lakes Region, about the incident but she did not put in a written complaint because Mr. Carroll spoke like that all the time and she tried to let it roll off her back. She acknowledged that everyone was stressed at the time due to the strike.

51 Ms. Drew testified that she talked to Ms. Fusco, on a number of occasions about Mr. Orr and Mr. Carroll. She claimed that she asked Ms. Fusco how she should deal with the way they were speaking to her. Ms. Fusco responded that the best way was for Ms. Drew to deal with them directly. When Ms. Drew said she had already done that Ms. Fusco allegedly replied that she did not want to rock the boat. On another occasion she told Ms. Fusco that she knew it was "rough and tough" but there was no need for Mr. Orr to swear at and belittle people. Ms. Fusco denied that Ms. Drew ever complained to her about the way she was being treated by Mr. Orr and Mr. Carroll.

52 Ms. Drew provided a copy of an e-mail that she said she sent to Ms. Fusco complaining about the treatment she had been receiving. The copy provided had been sent by Ms. Drew to her e-mail at home. She said she had done that so she would have a copy. The email is dated October 12, 2004. Ms. Drew testified that she sent it to Ms. Fusco and that she put a copy under her door. Ms. Fusco denied that she received the e-mail and testified that she did not have an office at that time as it was being renovated. She said that she was located in a temporary cubicle in the main office. Ms. Drew had just returned from short term disability and may not have known that Ms. Fusco was not working in her office.

53 Ms. Drew reported to the Assistant Superintendents including Colin Tucker. Mr. Tucker reported to Mr. Orr. Mr. Tucker's testimony supported Ms. Drew's allegation that Mr. Orr and Mr. Carroll yelled and swore at her.

54 Mr. Tucker is still employed at CN. At the time he testified he had been off work on parental leave and short and long term disability. He has known Ms. Drew since they met at work in 1990. They sometimes carpooled together and occasionally socialized outside of work.

55 Mr. Tucker testified that between 2002 and 2004 he regularly observed Mr. Carroll interacting with Ms. Drew. He frequently heard Mr. Carroll yelling and swearing at her. He did it in front of her peers and subordinates. Mr. Tucker said he could not recall dates as it happened so regularly. He testified that Mr. Carroll made comments such as "Get your head out of your ass." He remembered that one of the occasions that comment was made was at the entrance to the Hump building. Mr. Tucker said that on another occasion he was standing with a colleague about 50 feet from Mr. Carroll's office and could hear him yelling into his phone "You stupid fucking bitch — you'll do as you're told". Mr. Tucker understood that Mr. Carroll was talking to Ms. Drew as she was the only woman working that day. Mr. Tucker therefore went back to his work station and called Ms. Drew. He asked her if Mr. Carroll was talking to her and she said yes. Mr. Tucker asked her what was going on she said that she was supposed to give him

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a report and it was not what he wanted. Mr. Tucker asked her if she was all right and she responded that it was just another day at Mac Yard. He said there were a number of similar instances. He heard Mr. Carroll call Ms. Drew a "stupid bitch" on a number of occasions. He also called her a "fucking idiot".

56 Mr. Tucker also testified about Mr. Carroll's comment to Ms. Drew during the strike. He and Ms. Drew were working on a Saturday. Mr. Carroll drove up and said to Ms. Drew "What the fuck are you doing here — you don't work Saturdays" He said that her co-workers had to work the weekends for her. Mr. Tucker testified that Ms. Drew did work Saturdays especially during the strike.

57 Mr. Tucker described another incident in which he had asked Ms. Drew to come up to the office because they needed to talk to the Yardmasters. Mr. Carroll came out of his office and said "What the fuck are you doing here?" She said she was doing her job and Mr. Carroll said her job was "out there" not in here. Mr. Tucker recalled that the abuse often took place on conference calls as well.

58 Mr. Tucker said that Ms. Drew's response to the abuse was to just stand there and take it. She would drop her eyes and try to get away. She did not respond by swearing or yelling back at Mr. Carroll. Mr. Tucker testified that the relationship between Ms. Drew and Mr. Carroll was "tense, brutal, you could cut it with a knife". Mr. Tucker confirmed that Ms. Drew swore at work but did not engage in directed swearing at people.

59 Mr. Tucker also had regular opportunities to observe Mr. Orr interacting with Ms. Drew. He testified that he heard Mr. Orr yelling and swearing at her whenever their shifts coincided. Mr. Tucker said that Mr. Orr called Ms. Drew a "stupid bitch" and a "fucking idiot" and said that she was "so fucking stupid it was embarrassing". Mr. Tucker recalled one occasion when he objected and Mr. Orr replied, "If you think I'm bad you should get a load of Creel". Mr. Creel was the Vice-President of Eastern Division.

60 Mr. Tucker said that Mr. Orr yelled and swore at Ms. Drew in the office, in the conference room and in front of subordinates. One time he observed him doing it in the parking lot Mr. Tucker had asked Ms. Drew to come over and as she was pulling up, Mr. Orr was coming back from lunch. Mr. Orr asked Mr. Tucker how it was going and Mr. Tucker responded that he and Ms. Drew were just getting some things straightened out. Mr. Orr turned to her and said "Do you always need someone to hold your hand- can't you do your fucking job?" Mr. Orr denied that he said that.

61 Mr. Tucker explained that sometimes Trainmasters have to come up to the office to talk to Yardmasters as they cannot always get them on the phone. Mr. Tucker, Mr. Orr and Mr. Carroll were trying to have the Trainmasters stay in the yard as much as possible. Nevertheless, sometimes they had to come up. If Ms. Drew came up Mr. Orr would tell her to get back to her "fucking" track. Mr. Orr denied that he said that.

62 Mr. Tucker testified that Ms. Drew never seemed to be able to do anything right for Mr. Orr. Sometimes she had to come up to the office to make coaching entries (PMRCs) in the computer. The Trainmasters were required to record 15 to 20 of them a month. All of the names and coaching for the new hires had to be entered. There were only two computers in the yard and it could not be done from home. Nevertheless, Mr. Orr regularly appeared and berated Ms. Drew. When she explained what she was doing he would tell her to do it later and get back in the "fucking" field. Mr. Orr denied that he did that Mr. Tucker testified that one time Mr. Orr said "if you can't stay the fuck out of here you may as well look for another job." Ms. Drew just left. On another occasion when she was checking who was on a particular crew he said "You should have fucking known that by now. If you can't figure it out maybe we'll find someone else to do your job".

63 In cross-examination Mr. Tucker remembered another incident in which Mr. Orr said "what the fuck are you doing ordering a fucking train." Mr. Tucker also testified that any suggestions that Ms. Drew made in a meeting would be knocked down by Mr. Orr but would be accepted if made by someone else. Mr. Tucker therefore found

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that it was better to have staff meetings when she was not at work. Mr. Orr testified that he did not have staff meetings. Mr. Tucker said that Ms. Drew never responded by swearing back at Mr. Orr.

64 Mr. Carroll denied that he had frequent contact with Ms. Drew although he acknowledged that he would be on the conference calls with her and would see her in the yard. He denied that he ever swore at her although "strong language was used in the environment". Mr. Carroll testified that his relationship with Ms. Drew was not different from his relationship with anyone else. He said it was an intense and fast paced operating environment but that they had a great team. He explained that Mac Yard was going through a transition at the time. He said that the measure of effectiveness in a Hump Yard is how many rails cars are processed in a 24 hour period and that they took Mac Yard from processing 1200 cars in a 24 hour period to more than 3,000 per day. He said that did not come without a lot of hard work, intensity and attention to detail. He explained that the way Mac Yard performs dictates how the company performs throughout Canada and the U.S. He denied that he had any agenda against Ms. Drew and said that his only agenda was to pick a strong team. He considered Ms. Drew to be part of that team and he respected her.

65 Mr. Carroll testified that he raised his voice at times but that it was always calculated for effect. He agreed that he had raised his voice at Ms. Drew but said that he did not consider it yelling because that suggests someone who has lost control and he was always in control. He agreed that swearing was common in the yard and that he did swear but that he never engaged in "directed swearing". He denied that he called her a "stupid fucking bitch" or a "fucking idiot". He acknowledged that he told Ms. Drew and another employee to "Get their heads out of her asses" on a conference call. He denied that he made the comment to Ms. Drew during the strike about her not working Saturdays. He said that he had the conversation about staying in the yard and out of the Hump building with two other Trainmasters but not with Ms. Drew. He denied that he told Ms. Drew that if she could not do her job someone else would but said that he had had two conversations with other people in which he had said that if they did not have the right people they should find the right people.

66 Mr. Orr testified that although he did swear at work he did not engage in "directed swearing" against Ms. Drew. He said that he never called her names or belittled her. Mr. Orr testified that he thought that he and Ms. Drew had a good relationship and that she did a good job. He said she brought him a gift after she returned from a vacation one Christmas and he once brought her a birthday cake. Mr. Orr denied that he ever threatened Ms. Drew's job. He also denied yelling at her although he said that he could be "intense". In cross-examination he acknowledged that he did raise his voice at work sometimes. He claimed at one point that he could lose his temper as he was human and at another point that he never got angry. He denied that he shot down her ideas in meetings and said that he was not a big "meetings person".

67 Mr. Orr denied every alleged instance of swearing directed at Ms. Drew. He also denied making the comment about Mr. Creel. He testified that he admired Mr. Tucker's skills and that he chose to keep him when they reduced the complement of assistant superintendents from four to two. Mr. Orr claimed, however, that he started to have concerns about Mr. Tucker's "responsiveness and leadership". Documents were submitted which indicated that in the fall of 2005, Mr. Orr and Doug Ryhorcuk, the new Superintendent of MacYard, were concerned that Mr. Tucker was not remaining available on his days off which they apparently expected of people in his position. Mr. Orr also met with Mr. Tucker about his failure to complete his "Safety Efficiency Tests". Mr. Tucker went on disability in March 2006. The contract with the UTU required members in management positions to choose whether to return to their bargaining unit positions by the end of 2006 or give up the right to do so. Some members of management, including Mr. Tucker, chose to go back to the bargaining unit. Mr. Orr testified that Mr. Tucker and Ms. Drew had a good working relationship and had a friendship outside of work as well.

68 Mr. Tucker was asked about his relationship with the managers. He said that he did not have any issues with Mr. Ryorchuk who replaced Mr. Orr when Mr. Orr was promoted to General Manager. He said that he and Mr. Orr "butt heads and have debates on things". He acknowledged that he received some formal criticism from both of them. He did not agree with all of the criticisms but he denied feeling resentful about them. He acknowledged that he did not like Mr. Orr but that Mr. Carroll and Mr. Ryorchuk were "O.K."

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Salary

69 When Ms. Drew started work at Mac Yard she was receiving the lowest salary of all of the Trainmasters. She testified that she had more experience than some of the other Trainmasters who were being paid more. Ms. Fusco testified that Ms. Drew's starting salary as a Trainmaster was based on the position she had left at Conport. However, all of the Trainmasters were paid within the band for level 8 management employees.

70 Ms. Drew complained about her salary to Mr. Orr and he advised that it had to be raised incrementally. He promised her a 5 percent raise which she received retroactive to the date she started in the position. He also promised her a three month salary review but was advised by Human Resources that he could not review her salary for six months. Ms. Drew received the annual three per cent increase in April, 2004 and another two or three per cent in May. Mr. Orr said he had to justify the extra raise but he did so as he thought she did a very good job in her first six months as Trainmaster. By May 2004, Ms. Drew was earning more than one of the other Trainmasters.

November 24, 2004

71 Ms. Drew described the situation leading up to her last day at work. She testified that she was suffering physical problems due to the stress. She said that she was becoming increasingly depressed and had started yelling at her children.

72 Ms. Drew testified that on November 24, 2004, she arrived at work about 5:30 a.m. and was approached by the night Trainmaster who told her that Mr. Orr was on a rampage and that she should find out what had happened before she called him. Ms. Drew was supposed to have an attendance investigation meeting at 6:00 a.m. with an employee named Mike Foster. However, Mr. Foster had been sent to Oshawa by the night General Supervisor of Transportation so she would be unable to meet with him. The e-mail sent to her said there was no one else available for the Oshawa job and that Mr. Foster would therefore miss his formal investigation. Apparently, Mr. Foster would also be receiving a premium for the shift although that was not mentioned in the e-mail. Ms. Drew testified that Mr. Orr called her while she was trying to find out what had happened. He was angry and yelling that no one had the right to send their employees to Oshawa to work. He yelled "You better get your fucking shit together and do your fucking job. You know better than this." He said "This fucking investigation should have been done ages ago" and he hung up on her.

73 Ms. Drew testified that that was her breaking point and that she fell apart. She started crying and shaking. Eventually she called Ms. Fusco but her voice mail message advised that she was away. Callers were advised that they could call Human Resources in Montreal and were provided with a phone number. Ms. Drew left a message for Ms. Fusco saying that she had to have this addressed and that she could not go on any longer. She also called Terrence Gallagher, the Senior Human Resources Manager for the Eastern Region and left the same message. She then called the number provided on Ms. Fusco's voice message. She spoke to Michel Lamarche who was the Human Resources Manager for Sales and Marketing. She gave him some history and said she could not take it any more and that she needed some resolution. Mr. Lamarche sent an e-mail about the conversation to Mr. Gallagher on November 25. His e-mail is reproduced below. (English is not Mr. Lamarche's first language.)

Here are my notes of the conversation with Paula Drew yesterday on 24 November.

- When I answer the phone, she started by saying that Sue's voice mail was saying to call me and she started to cry.
- She said that she could not take it anymore

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- She cannot take it from being yield at like that, this is not Human.
- This behaviour is totally unacceptable and noone should tolerate that.
- I asked her who was that person and she said it was John Orr Supt.
- she said she had enough of being "belittle".
- she said that she had previously been called stupid bitch and fucking wasz?
- she said she was back from a heart attack and was not suppose to be full time but she is.
- They have her doing investigations
- She said everyday someone is being yield at and nobody is doing anything as everyone is scare to lose their job.
- at every conf. call on GTA, he yields at someone over the phone in front of everyone.
- she said that one day he called and she answered "CN Paula Drew". To this he said not to call herself CN and start to yield at her. He added I will fire your ass.
- I asked her what was the "culminating incident" that made her like that today. She said that following an email that she sent him advising him that the employee she was supposed to investigate did not show up. After finding out where he was, she was told that an Asst. Supt had assigned him as a Yardmaster as he was short of personnel. John Orr would have called her and started to yield at her saying it was not acceptable and that the person that did that should have not done so as the plan was to investigate him. He then told her to get into the AMS system, to send letter to people off sick, etc. He added that he was sick and tire of her and hang up on her.
- She said that this behaviour is acceptable here as everybody is scared of losing his job and nobody will react And if you do react you will pay for it.

During the entire conversation which last appr. 10 to 15 minutes she was crying all the time and was saying that she is not taking this anymore.

She said she was leaving as she could not stay longer, that she would go to Medecis (or had called or gone to Medicis). She said she had told a trainmaster and an Asst Supt that she was leaving home sick.

I told her to call Terry and to leave him a message that she wanted to talk to him about the situation as soon as he will be back from Homepayne.

I called her back at home (appr 15 minutes later (I think it was around 10:10 am) and left a message on his vms asking to call me back but she did not to date. I wanted to tell her to go to the EFAP if she needed to. I called back late in the afternoon that same day and there was no answer. I did not leave another message. [He then provided her home phone number].

74 Ms. Drew called Mr. Tucker after speaking to Mr. Lamarche. She advised him that she was leaving and went to a walk-in clinic. She testified that she had no recollection about how she got there. The doctor at the clinic gave

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her Lorazepam and told her to take it right there and to see her own doctor the next day. He gave her a letter to stay off work for three days.

75 Mr. Tucker testified that he was at his work station around 9:00 a.m. on November 24, 2004 when he received a telephone call from Ms. Drew. He said that she was hysterically upset and said that she was going home. She said "I can't deal with him, everything I try to do is wrong." She was speaking very quickly and Mr. Tucker tried to get her to slow down. He got the impression that she was driving and told her to pull over. She said that she could not do anything right and that whenever she asked "him" for help he said she was an idiot Mr. Tucker said she should not be driving but she said she would be all right and he asked her to call him when she got home. She was sobbing and speaking erratically. Ms. Drew did not say who she was referring to but Mr. Tucker thought something had happened with Mr. Orr or Mr. Carroll.

76 Mr. Tucker then went to Mr. Orr's office and told him that he had received a call from Ms. Drew who was very upset and was going home. He told Mr. Orr what she had said. They then walked over to Mr. Carroll's office and Mr. Tucker told him what had happened. Mr. Carroll said that he had overheard Mr. Orr's phone call with Ms. Drew and that nothing seemed inappropriate from his end of the call. Mr. Tucker replied that she was upset and was leaving and that they were short a Trainmaster. Mr. Tucker testified that Mr. Orr said to Mr. Carroll "That stupid bitch is going to do as she's told or she's out of a job." Mr. Tucker said he replied "Let's fix the issue of what's wrong" and that Mr. Orr replied that it was not his job to fix it. He said that it was Ms. Drew's job and she "fucking better get it done". Mr. Orr then said that he would call Ms. Drew and make sure that everything was all right. Mr. Tucker asked Mr. Orr to let him know if he reached her. Mr. Orr subsequently called Ms. Drew and left a voice mail. He also sent her an e-mail.

77 Mr. Carroll testified that Mr. Tucker came down to Mr. Orr's office on the morning of November 24, 2004. Mr. Carroll said that he could see Mr. Tucker because his door and Mr. Orr's door were both open. He claimed that he heard Mr. Orr's side of a conversation with Ms. Drew and that he was not using the speaker phone. Mr. Carroll said that Mr. Orr was expressing his disappointment that the interview with Mike Foster had not taken place. He said that Mr. Orr was speaking in a raised voice but was not yelling. He testified that Mr. Orr did not use any directed swearing but could not recollect if he had used "strong language" although he thought it was likely. Mr. Carroll said that Mr. Tucker then left Mr. Orr's office. Mr. Carroll testified that Mr. Orr came to his office and expressed frustration that Mr. Foster had been sent on another assignment which would pay a premium rather than coming in for an attendance management interview. Mr. Carroll had no recollection of Mr. Orr saying "that stupid bitch is going to do as she's told or she will be out of a job". Mr. Carroll said it was not unusual for Mr. Orr to discuss a phone call with him if he were highly agitated. He said that Mr. Orr did not get highly agitated over insignificant issues so he must have considered it significant. Mr. Carroll testified that he told Mr. Orr to follow up with Ms. Drew.

78 Mr. Carroll testified that Mr. Tucker subsequently returned and said that Ms. Drew was upset and had left the property.

79 Mr. Orr testified that he learned about Mr. Foster's absence on the conference call the morning of November 24. He then sent Ms. Drew a few e-mails. He claimed that Mr. Tucker came to his office and confirmed that Mr. Foster had been booked off on company business to attend an interview at Mac Yard but had been sent to Oshawa. Mr. Orr testified that he called Ms. Drew while Mr. Tucker was standing at the door of his office and that he used the speaker phone. He said that he expressed disappointment that Mr. Foster was in Oshawa and that he was concerned that he had been scheduled for his interview more than once. He said that he did not want to wait another week to schedule him on a day off and wanted it done as soon as possible. Mr. Orr testified that he also restated his expectations about Ms. Drew's "ownership" of the attendance management process and gave her constructive feedback on how she should have handled this issue. He said that Ms. Drew claimed that it was out of her control and that she did not know that they were taking Mr. Foster. She said "obviously there is a disconnect here" and she committed to clearing it up. Mr. Orr insisted that he did not yell or swear at Ms. Drew but that he was "firm". He denied that he hung up on her. He agreed that he said no one had the right to send Mr. Foster to Oshawa. Mr. Orr

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testified that Ms. Drew was not upset during the phone call.

80 Mr. Orr testified that Mr. Tucker returned to his office later and told him that Ms. Drew went home and was crying. Mr. Orr agreed that he may have said that it was because of the Mike Foster issue. Mr. Carroll called them into his office and asked them what was going on. Mr. Orr said that he asked Mr. Tucker to evaluate the conversation and that Mr. Tucker said that he would not have taken exception.

81 Mr. Tucker testified that the next day Mr. Orr asked him to provide an e-mail describing what had happened. The e-mail Mr. Tucker sent on November 25 in response to Mr. Orr's request says nothing about Mr. Tucker listening to a conversation between Mr. Orr and Ms. Drew. It only describes the phone call Mr. Tucker received from Ms. Drew. Mr. Orr said he subsequently asked Mr. Tucker to include the conversation he insists that he overheard but he never did.

82 No one ever really explained what Ms. Drew had done wrong with respect to the attendance management interview with Mr. Foster. She had scheduled the interview and booked him off so he could be there. During the night he was assigned by a supervisor to go to Oshawa where he was needed. Ms. Drew did not learn that he had been assigned to Oshawa until she came in on the morning of November 24. Mr. Orr's explanation was that "She had a responsibility to communicate with people so this didn't happen again". He never actually explained what she should have done. It appeared that the real issue was that senior management in the Eastern Zone were calling people from the Toronto zone to Oshawa.

Investigation and Constructive Dismissal Complaint

83 Ms. Drew testified that neither Ms. Fusco nor Mr. Gallagher called her back on November 24. She said that the only response she had from Ms. Fusco was an inquiry about providing further medical documentation. There was other, mostly e-mail, correspondence between Ms. Drew and Ms. Fusco with respect to benefits over the next few months.

84 Mr. Gallagher testified that a complaint by Ms. Drew against Mr. Orr and Mr. Carroll would be within his jurisdiction. He said that he received Mr. Lamarche's e-mail on November 25 and called Ms. Drew that day. He testified that he left a message but Ms. Drew did not call him back or send him an e-mail. He said that he left her another voice mail a few days later. Ms. Drew did not reply to that message either. He explained that he did not call her again because he did not want to be perceived as "badgering" her. He claimed that prior to receiving Mr. Lamarche's e-mail he had not been aware of any problems with Ms. Drew.

85 Mr. Gallagher interviewed Mr. Orr and Mr. Carroll about the situation with Ms. Drew in December 2004. He produced a report of those interviews but not his original notes. He did not interview Mr. Tucker or anyone else. Mr. Orr testified that he asked Mr. Gallagher to interview him because he disagreed with the contents of Mr. Lamarche's email and wanted to set the record straight.

86 After interviewing Mr. Carroll and Mr. Orr, Mr. Gallagher arrived at a "conditional" summary in which he decided there had been "no transgression". Mr. Orr denied that he had yelled at Ms. Drew or called her derogatory names. He claimed that he was giving her work in keeping with her accommodation requirements. He said that the conversation between them on November 24 was about "her need to be more accountable in managing the attendance issues." The report of Mr. Gallagher's interview with Mr. Orr does not disclose any claim that Mr. Tucker was in the room when the conversation with Ms. Drew took place.

87 Mr. Orr was asked to speculate "as to why he thought Paula would bring forward allegations relating to his behaviour". He said she might have been frustrated by the work hardening program. Mr. Gallagher also notes that Mr. Orr said that Ms. Drew had her heart set on a position within IMX "usually days and in an office environment".

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Mr. Orr denied saying that and Mr. Gallagher testified that the notes were incorrect and that Mr. Orr had not said that

88 Mr. Orr testified that he told Mr. Gallagher that he thought something must have happened to Ms. Drew or perhaps, with her medication because her allegations were so out of character for her and for their relationship. He said that she might have been frustrated by not being able to do her old job. Mr. Orr also testified that Ms. Drew had never complained about working shifts.

89 Mr. Gallagher's interview summary with Mr. Carroll indicates that Mr. Carroll told him that he overheard Mr. Orr's conversation with Ms. Drew. He also said that Mr. Tucker was in the room when Mr. Orr spoke to Ms. Drew. Mr. Carroll reportedly said that the conversation was about missed calls and that Mr. Orr did not yell, curse or make derogatory comments to Ms. Drew. He said that they had had a positive relationship in the past.

90 Mr. Carroll was asked by Mr. Gallagher whether there were any "issues which could promote the "behaviour/allegations" made by Paula Drew. He is noted to have replied that Ms. Drew was concerned about her strike pay and that she thought her PMP assessment was too low. Mr. Carroll is also noted to have said that Mr. Orr did not treat Ms. Drew differently from her peers but that he was "managing her attendance aggressively". He attributed this to the view that she was not managing her health issues as best she could since she declined the offer of meeting with a "3rd party specialist" that Mr. Orr had offered to arrange for her.

91 Mr. Gallagher's report or "memo to file" as he titled it, contained the following:

Summary (conditional)

To date we have not had the opportunity to interview Paula Drew, hence we cannot yet close this file with a formal recommendation. However, based upon the information we have at hand, we can conclude that to all intents and purposes Paula has been treated fairly, equitably, and professionally. There are likely ancillary issues, which are driving Paula Drew to seek attention, and likely movement from the rigours of Operations. Of particular note is a statement from Mr. Orr expressing his sentiments that a) he hopes she becomes well, B) that regardless his dealings with her would not change, as he was a professional and he believed that Paula provided value as an employee. This comment alone supports my preliminary contention that there has been no transgression.

92 Mr. Gallagher acknowledged that his comments about "ancillary issues and the rigours of operations" were an assumption and that neither Mr. Carroll nor Mr. Orr had mentioned that He also agreed that the comment should not have been included in his report.

93 On January 5, 2005, Ms. Drew received a letter from Mr. Gallagher advising her that her short term disability would be coming to an end on January 14, 2005. It did not say anything about an investigation. The company took the position that she was not entitled to a new period of short term disability (STD) benefits because she had been on a work hardening program. However, the same letter advised that employees are entitled to a new period of STD if they were back at work for four weeks without an absence and that Ms. Drew's work hardening was from September 10 to October 22, 2004 but she did not go off work until November 24, 2004.

94 On January 31, 2005, Ms. Drew received a letter from Mr. Gallagher claiming that he had made repeated attempts to reach her. He asked to meet with her to discuss her allegations of harassment at work and requested that she call him to arrange a time. However, Mr. Gallagher was unable to recall any calls he had made to Ms. Drew other than the two in November.

95 Ms. Drew testified that she was surprised that Mr. Gallagher was only contacting her at the end of January to

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discuss allegations she had made two months earlier. Nevertheless, she was hopeful that the letter meant that her concerns would be addressed. However, she did not arrange to meet with him when she received the letter because she was "stressed out and on drugs". She said she was advised by her doctor to let her lawyer handle it. Ms. Drew therefore had her lawyer at that time, Heidi Rubin, send a detailed reply. That reply took the form of a letter to Mr. Orr on February 4, 2005. It indicated that Ms. Drew was initiating a formal complaint against CN for its "longstanding improper treatment of her, including subjecting her to a destructive work environment, the imposition of unreasonable work expectations, harsh verbal abuse and general harassment over the past several years". The letter went on to detail many of the allegations that were included as part of this complaint. It asked for Ms. Drew to be transferred to a different department and compensated for the work she did during the strike.

96 Mr. Orr said that he went to Mr. Gallagher for guidance when he received the letter from Ms. Rubin. Mr. Gallagher told him that his department would handle it

97 In a letter dated February 14, 2005 William McMurray, counsel for CN at the time, responded that the company denied the allegations and could not move Ms. Drew to a different department. It advised that Ms. Drew had hampered the investigation and must contact Mr. Gallagher to set up a meeting. Ms. Drew was distressed by this response. She noted that she had spoken to Ms. Fusco on several occasions and she had never mentioned any investigation. Ms. Drew concluded that her concerns were not being taken seriously.

98 Ms. Drew then received a letter dated February 18, 2005, from Doug Ryhorchuk, the Terminal Superintendent who had replaced Mr. Orr, saying her absences had not been substantiated and that her absence from work since February 15, 2005 was not authorized. However, Ms. Drew had sent all of her documentation to Great West Life as required. She then received a letter from Mr. Ryhorchuk dated February 25, 2005 advising her that she must return to work no later than March 3, 2005 and that if she failed to do so the company would assume that she had resigned. Ms. Drew replied by e-mail that she had provided the medical documentation and had responded to his previous letter. She also noted that the insurer was actually waiting for a document from the company. She asked him not to send her any more threatening letters but to send any further correspondence to her lawyer.

99 On March 2, 2005, Ms. Rubin sent a letter to CN's counsel. The letter indicated that Ms. Drew had been advised by her doctor not to return to work until the end of May and that medical documentation had already been provided to the company and to the insurer. The letter also stated that Ms. Drew was not resigning her position.

100 Ms. Drew retained Mr. Pox's firm to represent her shortly thereafter. She filed this complaint on March 11, 2005. She also filed a human rights complaint. Ms. Drew testified that she filed this complaint because she did not think she had a job as of March 3 since she had not complied with the company's direction to return on that date. Ms. Drew later took the position that she was constructively dismissed.

101 The company has asserted at all times that it did not dismiss Ms. Drew.

Human Rights Complaint

102 Ms. Drew filed a human rights complaint alleging that she had been discriminated against on the basis of gender and family status. An investigation took place that appears to have consisted of an Investigator talking to a few people on the telephone. The Investigator recommended that the Commission dismiss the complaint against CN, Mr. Carroll and Mr. Orr. She found that the evidence showed that Mr. Carroll was abusive towards employees regardless of gender and therefore it did not support the claim of discrimination. She found that the evidence gathered did not indicate that Mr. Carroll made sarcastic comments to Ms. Drew because of her family status. She summarized that Mr. Orr's treatment of Ms. Drew on November 4, 2004 could be classified as personal harassment but was not differential treatment as other employees were also treated poorly. Neither Mr. Carroll nor Mr. Orr were provided with an opportunity to comment on the report.

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103 The Commission accepted the Investigator's recommendation and dismissed the complaint. It does not appear that CN did any investigation of its own with respect to the human rights complaint or report or that any action was taken against Mr. Carroll and Mr. Orr. Mr. Gallagher testified that he did not recommend discipline as the Human Rights Commission had determined that there was no issue.

Medical Evidence

104 Ms. Drew described her condition during 2005. She said that she was depressed and suffering from anxiety. She was unable to deal with the day to day needs of her children or her home. She wanted to sleep all the time and could not function properly. She could not focus so it was too dangerous for her to drive. She isolated herself in the house and stayed mainly in her room. She said that it felt like the end of the world and that she could not see the light at the end of the tunnel.

105 From November 2004 to February 2005, Ms. Drew saw her doctor weekly or bi-weekly. She was prescribed anti-depression medication as well as beta blockers to regulate her heartbeat Great West Life referred her to Dr. Sam Ozersky for an independent psychological evaluation on March 31, 2005. Dr. Ozersky did not testify but his medical reports were submitted. In his first report he indicates that Ms. Drew's "presenting problems" were "depression and "workplace harassment and abuse". He reports that she advised him, among other things, that she was "consistently being abused verbally, yelled at, screamed at, and sworn at by the supervisor". He was of the view that the heart problems she started having in March 2004 sounded very much like panic attacks and that by the time he saw her in March 2005 she reported having panic attacks since November 2004 for which she was being medicated. At the time Ms. Drew saw Dr. Ozersky she was on three separate medications.

106 Dr. Ozersky found that Ms. Drew had symptoms indicative of a "major depressive episode" with panic attacks and was unfit to work. He did not find any "thought disorder or perceptual disturbance". He noted that the "clear precipitant in her mind is what she perceives to be an atmosphere of toxic workplace harassment and abuse". He recommended adjustment to her medications and 15 sessions of Cognitive Behaviour Therapy.

107 Pursuant to the report and recommendation of Dr. Ozersky, Great West Life referred Ms. Drew to a psychologist, Dr. Dana Anderson.

108 Dr. Anderson has a Ph.D in psychology and has a clinical practice. She received a referral letter from Great West Life to provide cognitive therapy for Ms. Drew in May 2005. Cognitive behavioural therapy involves strategies to reframe a person's thoughts to reduce emotional arousal and to engage in adaptive behaviours. Dr. Anderson treated Ms. Drew over 23 one hour sessions which took place from May 2005 to June 2006. They had a final follow up session in September 2006.

109 Dr. Anderson received medical documentation about Ms. Drew's heart as well as Dr. Ozersky's report Dr. Ozersky had already diagnosed Ms. Drew and Ms. Anderson agreed with the diagnosis. She testified that Ms. Drew was suffering from a mood disorder, specifically anxiety and a major depressive disorder. Neither Dr. Ozersky nor Dr. Anderson saw any evidence of a personality disorder which would include mental health issues affecting perception. Dr. Anderson testified that Ms. Drew did not have distorted perceptions. She did not exaggerate her symptoms. Both Dr. Anderson and Dr. Ozersky diagnosed Ms. Drew's problems as falling within the DSM IV Axis 1.

110 Dr. Anderson testified that the environmental issues impacting on Ms. Drew included the situation at work and the litigation that she was involved in. She explained that it took Ms. Drew some time to be able to order her thoughts about Mr. Orr and Mr. Carroll. She testified that Ms. Drew considered herself to have been abused by them. Dr. Anderson described how the depression affected Ms. Drew when she first started seeing her. The workplace issues were pushing the positive things out of her life. She was unable to do chores, drive or function

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with her family, friends or boyfriend. She was agitated and angry. However, Dr. Anderson testified that Ms. Drew was motivated and cooperative with her therapy and she began to improve. Dr. Anderson had no hesitation in stating that Ms. Drew would not have recovered from the major depression if she had continued working at CN. She testified that Ms. Drew needed to be removed from the environment completely to get at the underlying issues.

111 The focus of Dr. Anderson's sessions with Ms. Drew was the circumstances at work in 2004 and the ongoing legal dispute. She concluded that the workplace environment was a major contributing factor to Ms. Drew's mental disorder because that is what they worked on and Ms. Drew got better. Dr. Anderson testified that she did not think that the death of Ms. Drew's parents in 2003 was major contributing factor to her depression because they did not deal with bereavement issues at all in therapy. She said that if they had not focused on the real factor underlying Ms. Drew' depression they would not have seen the improvement that they did. She also did not think childhood issues or family conflicts were significant contributing factors to the depression. Ms. Drew had apparently looked at those issues in psychotherapy at some prior point and had not found it to be particularly useful.

112 Dr. Anderson was clear that Ms. Drew did not suffer from any paranoid ideation or even suspiciousness. She testified that she had also seen documents such as the report from the Human Rights Commission that she felt supported Ms. Drew's perception of the situation at work.

113 Dr. Ozersky examined Ms. Drew again in May, 2006 and found that her major depressive disorder was in remission. He stated that she had made a "conscious and informed decision not to go back to CN in particular or any other railway". However, he also stated "There are no specific medical restrictions that would impact on her ability to function in pre-disability job duties, her new job or in any other productive work. I believe that her reluctance to return to CN is based on her assessment that she would be constructively dismissed, rather than based on any impairment or disability." He stated further, "Obviously she does not want to return to CN, given that she fears they will find a way of dismissing her. In addition, after launching legal proceedings against CN, she believes the atmosphere would just be too toxic. The major factors motivating her not to return to work at CN are related to the workplace problems she has there and her personal preference."

114 Dr. Anderson agreed with Dr. Ozerski's determination that Ms. Drew's depression was in remission by May 2006. However, she did not agree that she could return to work at the company. Dr. Anderson sent a letter to Great West Life expressing her disagreement with that recommendation. She believed that returning to the environment where the symptoms had developed would result in a revival of those symptoms. In her letter to Great West Life, Dr. Anderson stated "However, I do not agree that she should return to her previous employer in the proposed position and the reasons are more complex than her desire not to return. The two issues factoring into my conclusion are a) workplace conflict and the contribution of that conflict to her disability and b) the contribution of shift work to disability." Dr. Anderson went on to explain that Dr. Ozersky had originally found that Ms. Drew's improvement would much depend on the "progress of the settlement of her legal case with CN or some other type of resolution" and that the legal proceedings had not been resolved. She said that she could not recommend that Ms. Drew return to CN as long as the litigation was ongoing. She also said that she could not recommend that Ms. Drew return to CN given the atmosphere mere and the likelihood that she would be subjected to further abuse. She stated that a reoccurrence of Ms. Drew's symptoms was likely to occur if she returned. Dr. Anderson also advised that Ms. Drew should not work rotating shifts due to her history of sleep, heart and mental health problems. Regardless of Dr. Anderson's letter, Ms. Drew's benefits ceased on June 30, 2006.

115 Dr. Anderson testified that if Ms. Drew had returned to work in 2006 there would have been undue stress due to the outstanding legal issues against the employer. She noted that there was still a lot of conflict and that the letter directing Ms. Drew to return to work came from John Orr.

116 In a report prepared for the litigation, Dr. Anderson stated that Ms. Drew's improvement in 2006 was the result of medication, therapy and "modification of the environmental stressors. She concluded that the "the symptoms of the disorder would resurface upon return to work at CN."

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117 Dr. Anderson's testimony was unshaken by cross-examination. She did agree that Ms. Drew's prior depression and a family history of mental health issues were factors in her depression. However, she was steadfast in her view that the depression in 2005 was precipitated by the workplace issues. She believed that Ms. Drew probably entered a major depressive episode at the time she went off work on November 24, 2004 and that it was caused by an accumulation of events and constant conflict in the workplace.

118 Dr. Joel Sadavoy testified for the company. He is a psychiatrist with a clinical practice as well as an academic role. He never met Ms. Drew but prepared a report on the basis of Dr. Ozersky's and Dr. Anderson's reports. He also reviewed Dr. Anderson's clinical notes as well as some of the exhibits before he testified.

119 Dr. Sadavoy was skeptical of Dr. Anderson's conclusion that Ms. Drew's depression was caused by the work environment. He focused instead on the family history set out in Dr. Ozersky's report. He noted that Ms. Drew reported to Dr. Ozersky that her problems began in August 2003 when both her parents died within a month. While Dr. Sadavoy acknowledged that Ms. Drew's depression might have been precipitated by her workplace he claimed that it was equally likely that it was caused by the deaths of her parents. He based that conclusion on his view that grief, particularly in cases of unexpected death, can trigger depression. He testified that that was particularly true if the individual was already vulnerable and had a history of conflict with her parents. He explained that grief reaction can be delayed and that is what he believed occurred in Ms. Drew's case. He considered that theory to be bolstered by the fact that Ms. Drew had heart palpitations six months after her parents' deaths. Dr. Sadavoy went on to speculate that Ms. Drew's childhood may have left her with low self-esteem and an inability to withstand criticism.

120 Dr. Sadavoy also testified that one cannot make a determination about whether a person has a personality disorder without reviewing her history in detail and in particular her relationships and emotional responses. He did not feel that Dr. Anderson had delved into Ms. Drew's history sufficiently. He understood Dr. Ozersky to be commenting not on his own view but on what Ms. Drew considered her problems to be. Dr. Sadavoy testified further that depression can have a marked effect on how one sees the world. He also testified that depressive thoughts can become suspicious or paranoid.

121 Dr. Sadavoy also pointed to a history of mental illness in Ms. Drew's family and hinted that some kind of personality disorder should not have been ruled out. However, he cautioned that one should be careful about diagnosing someone with a personality disorder in the middle of a depressive episode as a person can seem very disordered. He suggested as well that since Ms. Drew had a prior period of depression and has a family history of depression, the depression she suffered in 2004 might have been "spontaneous". Dr. Sadavoy also posited that the anxiety symptoms could be related to the emergence of a mild cardiac problem.

122 Dr. Sadavoy was of the view that, even if Ms. Drew was subject to the verbal abuse she alleged, it would probably not have caused a major depressive episode. He testified that it would probably only have affected her profoundly if she was already depressed. He noted that Ms. Drew had not reacted to the work environment previously so something must have changed. He acknowledged that he did not know anything about her previous reporting structure. Dr. Sadavoy was of the view that Ms. Drew's work environment was not necessarily a negative one as there were three positive e-mails in the exhibits.

123 In the end, Dr. Sadavoy acknowledged that he could not know what caused Ms. Drew to decompensate but posited that all of the factors, including her parents' deaths and family history of mental illness, probably played a part.

124 Dr. Sadavoy testified that Ms. Drew may not have recovered from her depression as a result of the cognitive behavioural therapy which focused on her work environment but because of the medication that she was taking.

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125 Dr. Sadavoy also testified that Ms. Drew could return to CN if certain protections were in place and she wanted to do so. When asked in cross-examination about the accommodations that should be in place, he said that not talking to the abusive people would be one. He agreed later that Ms. Drew was vulnerable to a relapse and that if the work environment were toxic that could be a cause. In his report he recommended that she return with new reporting relationships.

126 Dr. Anderson was provided with Dr. Sadavoy's report and disagreed with his conclusion that the work environment was not a major contributing factor to the depression. She reiterated that Ms. Drew was removed from that environment and got better. Dr. Anderson also disagreed with Dr. Sadavoy's suggestion that it was equally possible that Ms. Drew's depression came from elsewhere and that the emotional disturbance affected her perception of workplace stress. She pointed out again that if the depression was caused by something other than the work environment and the legal dispute then it would not have improved when they targeted those issues. Dr. Anderson disputed Dr. Sadavoy's conclusion that Ms. Drew was highly sensitive to feeling attacked or criticized because she had not experienced those reactions in her sessions with Ms. Drew. She testified that she was able to challenge Ms. Drew without any adverse consequences. She also denied that Ms. Drew had diminished self esteem. She said that the erosion of Ms. Drew's self confidence was transient and situational. She testified that Ms. Drew did not have difficulty dealing with conflict. She noted that she had worked out custody issues and was raising teenagers. She also disagreed with Dr. Sadavoy's claim that Ms. Drew was unable to problem solve and said that she had good problem solving ideas. She was able to analyze her situation and had held a job for years.

Employment Offer

127 As a result of Dr. Ozersky's second report, the company advised Ms. Drew that she was fit to return to her pre-disability employment and that her benefits would cease on June 30, 2006. On June 2, 2006 she received a letter directing her to report for a position as a Trainmaster at GO Operations on June 7, 2006. The letter indicated she was to report to the office of John Kelly, Senior Manager GO Operations but it was signed by Mr. Orr as General Manager, Toronto Division.

128 Ms. Drew's counsel advised CN that she would not be taking the position as she had been constructively dismissed and litigation had commenced. The company's counsel subsequently contacted Ms. Drew's counsel and advised that Ms. Drew could either return to her position of Trainmaster at MacMillan Yard or take the GO position. He advised that she would not be working for Mr. Carroll or Mr. Orr. On June 26, 2006 Ms. Drew's counsel responded that she would not be returning to CN due to the poisoned work environment. On July 5, 2006 the company's counsel wrote to Ms. Drew's counsel urging her to accept the position at GO and explaining again that it was at a different location. He also advised that if she did not accept the position the company would conclude that she abandoned her job. On August 9, 2006 Mr. McMurray sent a letter to Mr. Fox confirming that CN considered Ms. Drew to have abandoned her employment.

129 CN is responsible for the crewing and operations at GO along a particular rail corridor. Mr. Gallagher testified that if Ms. Drew had accepted the GO job she would have worked in Mimico and not at Mac Yard. She would have reported to John Kelly. Mr. Kelly would have reported to Mr. Orr. Mr. Gallagher advised that if Ms. Drew had accepted the position at GO she would not have had to interact with Mr. Orr or Mr. Carroll although he did not know the circumstances in which Mr. Orr would have to become involved in GO operations. Mr. Gallagher also testified that the position at GO would have been less stressful than the job at Mac Yard. Furthermore, there was no overnight shift. He advised that neither Ms. Drew nor anyone on her behalf ever inquired about the position at GO.

130 Mr. Orr testified that he sent the letter to Ms. Drew about the position on the instructions of Human Resources. He testified that the position was a Trainmaster and that Ms. Drew's salary, benefits and bonus would have been the same. GO was not a 24 hour operation and if Ms. Drew had accepted the position she would have had little contact with him.

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131 Ms. Drew agreed that she was much improved by June 2006. She testified, however, that the GO position was not acceptable because nothing had been resolved at that time. She felt that she was being put back in the same situation. She said that she was reporting to a different manager but she would still have to deal with Mr. Orr as he was the head of the Greater Toronto Area. She did not want to put herself in that position as she had come such a long way. Ms. Drew testified that she did not understand why she was being asked to report to GO when she had filed a wrongful dismissal-complaint which had not been resolved.

132 Dr. Anderson advised Ms. Drew that she should not accept the position to which she was being directed. She told her it would be like giving a carton of cigarettes to a cancer patient and sending them home. She said that nothing had been resolved and that her symptoms would just reoccur.

133 The company terminated Ms. Drew's employment on August 9, 2006 when she failed to accept the GO position. It claimed that she had abandoned her employment.

Relevant Statutory Provisions

134

240(1) Subject to subsections (2) and 242(3.1) any person

(a) who has completed twelve consecutive months of continuous employment by an employer, and

(b) who is not a member of a group of employees subject to a collective agreement,

May make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust

(2) Subject to subsection (3), a complaint under subsection (1) shall be made within ninety days from the date on which the person making the complaint was dismissed.

(3) The Minister may extend the period of time referred to in subsection (2) where the Minister is satisfied that a complaint was made in that period to a government official who had no authority to deal with the complaint but that the person making the complaint believed the official had the authority.

Complainant's Submissions

135 The complainant claims that she was constructively dismissed. She asserts that employees are entitled to be treated with decency, civility and respect and that name calling, threats of termination, yelling and swearing violate that entitlement and amount to constructive dismissal. Ms. Drew maintains that the company repudiated her contract by yelling at her, threatening her job, belittling her and subjecting her to profanity laden verbal assaults.

136 The complainant submits that the jurisprudence approaches constructive dismissal cases based on abusive behaviour in two ways. One group of cases assumes that there is a fundamental contractual term that an employee is to be treated with civility, respect and decency. The other group of cases is premised on the view that abusive behaviour creates an intolerable environment in which an employee cannot be expected to work and which amounts to a constructive dismissal. She maintains that under either approach, the abuse she was subjected to by Mr. Orr and Mr. Carroll met the requirements for a determination of wrongful dismissal. She contends that the actions of the supervisors are the actions of the company.

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137 The complainant argues that her version of events should be accepted over that of the company's witnesses. She submits that the company has not presented any other reasonable explanation for what occurred. She insists that it would not be reasonable to find that she had a plan to leave the company and therefore made up the allegations about Mr. Orr and Mr. Carroll since those allegations will ensure that she will never work for any railroad again. She also says that it makes no sense that she would try to leave that way. She notes that she never approached anyone about a termination package or anything like that beforehand. There was no indication that she had any plan to leave and seek compensation. The complainant contends that she had a great career and 18 years on the job. She had no other income and was earning a very good salary. She had worked hard for many years and had sought and accepted a variety of positions at CN. She had learned to ignore the comments of her male colleagues. Nevertheless, she felt she had to leave work on November 24, 2004 because she could no longer face the abuse.

138 The complainant also maintains that her version of events should be preferred to that of CN's witnesses because it was supported by Mr. Tucker's evidence. He testified about the abuse she suffered at the hands of Mr. Orr and Mr. Carroll. She asserts that he had nothing to gain and had everything to lose by testifying against Mr. Orr and Mr. Carroll since he is still an employee of CN. She claims that there can be no valid business reason for subjecting an employee to such tirades. The complainant's theory is that Mr. Carroll and Mr. Orr had become desensitized to the general swearing in the yard and crossed the line into "directed swearing" such as calling her a "fucking bitch" or "stupid bitch".

139 Ms. Drew also argues that her description of the events on November 24, 2004 should be accepted. She claims that Mr. Orr was angry that the investigation had not taken place and called her to blow off steam. She notes that he sent two e-mails within nine minutes and that Mr. Carroll testified that he was agitated. The complainant submits that Mr. Tucker's evidence with respect to November 24 also undermines Mr. Orr's and Mr. Carroll's version of events because he denies that he was present when Mr. Orr spoke to her. Furthermore, the document Mr. Tucker produced for Mr. Orr when Mr. Orr asked him to document what happened only mentions the conversation she had with Mr. Tucker and does not say Mr. Tucker was present when she spoke to Mr. Orr.

140 The complainant claims that Human Resources took no real steps to deal with her complaint after she left on November 24, 2004. She asserts that the company did not even investigate after it received the report of the Human Rights Commission which found that Mr. Carroll had been abusive towards employees.

141 Ms. Drew is now relying on the other allegations she made, such as her claim that she was demoted from the position as Relief Trainmaster at Malport and the failure to give her a bonus, as background to understanding the issues that gave rise to the constructive dismissal. She is not relying upon them as part of her claim that she was constructively dismissed. She maintains that it was reasonable for her to make the allegations given what she knew at the time. For example, Ms. Drew argues that it was not disputed that she had worked as a Relief Trainmaster for one and half years at Malport and was not staffed in. However, her replacement was staffed in after four months. The company's view that it was a temporary position used to train as many people as possible was never explained to her and it was reasonable for her to perceive that she was treated differently

142 Furthermore, Ms. Drew submits that her testimony that she raised the issue with Mr. Bowness and Mr. Chorkoway should be accepted because the evidence demonstrates that she always raises issues when she has concerns about them. She argues further that her evidence that Mr. Chorkoway said they would rather not work with a woman should be accepted because it is not credible that two busy managers coincidentally dropped in for a twenty minute status meeting at that time she claims she made the complaint

143 Ms. Drew also asserts that it was reasonable for her to believe that she was an assistant manager at Conport as she had a job description and a business card that said so. It was therefore not unreasonable for her to believe that her move to the position as Trainmaster was a demotion. Nor was it unreasonable for her to believe that she was

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being replaced by Todd Bouma because he did do her job after she left. No one told her that Mr. Bouma had been picked for training even when she asked about him replacing her.

144 Ms. Drew argues that her evidence about the strike pay should be accepted because even on the employer's own evidence she worked at least two extra shifts during the strike and should have received something for that. However, Mr. Orr's response to her inquiry had been dismissive and he either did not want her to receive the extra shift or did not care to ensure that he was correct. Ms. Drew submits that that illustrated how Mr. Orr felt about her. She notes that it took seven weeks for someone to explain the formula to her although she asked about it several times.

145 The complainant argues that her claim that she complained to Ms. Fusco prior to November 24, 2004 should be accepted because the evidence demonstrates that she always raised issues. She testified that Ms. Fusco told her to deal with Mr. Orr directly and that Ms. Fusco agreed that is usually the advice she gives. Ms. Drew maintains that her evidence that she tried to submit a written complaint should also be accepted. She notes that Ms. Fusco testified that she had worked in a cubicle during a period of construction. The complainant argues that she would not claim that Ms. Fusco worked in an office if she had known she worked in a cubicle.

146 The complainant asserts that Human Resources failed to respond to the situation because Mr. Gallagher did not interview Mr. Tucker after November 24 even though Mr. Carroll had claimed that he was a witness to Mr. Orr's conversation with Ms. Drew. She also contends that Mr. Gallagher made no real attempt to get in touch with her until the end of January, 2005. She notes that he had written to her about short term disability but not about any investigation. Mr. Gallagher claimed to have called her repeatedly but had really only called her twice. Ms. Drew contends that Mr. Gallagher wanted to find some motivation for her to have made up her allegations when he interviewed Mr. Carroll and Mr. Orr. She maintains that that is why he never interviewed Mr. Tucker or tried to contact her until the end of January. She notes that he took no action even after he received the Human Rights Commission's report. He accepted that Mr. Orr could not have done the things Ms. Drew accused him of because he said he liked her and she added value. He also concluded that she was seeking attention although there was no evidence of that.

147 The complainant argues that she was not required to mitigate her losses by accepting the position with GO Operations in June 2006. She asserts that she was not required to accept the position because her relationship with the company was acrimonious and she was engaged in litigation. She contends that the basic relationship of trust, faith and sincerity was gone. She also submits that accepting the position would have been humiliating. No steps had been taken with respect to her complaint by Human Resources and she had no faith in them. Ms. Drew says that she had made allegations against Mr. Orr and he now held the senior position in the GTA which would put her in a vulnerable position. Furthermore, the offer was made almost two years after she had stopped working. She submits that the offer was a litigation tactic to limit the company's damages.

148 The complainant argues that the verbal abuse she was subjected to amounted to constructive dismissal so it is irrelevant whether it led to her depression. However, she submits that her depression is relevant to the issue of whether she should have accepted the position she was offered in 2006. It was Dr. Anderson's opinion that her symptoms would reappear if she returned. She maintains that Dr. Anderson's opinion should be preferred to that of Dr. Ozersky or Dr. Sadavoy. Furthermore, she maintains that neither Dr. Anderson nor Dr. Ozersky, the only doctors who examined her, saw any reason to doubt her perceptions including those that the conflict had not been resolved and would follow her if she returned to CN. The complainant argues that Dr. Sadavoy's refusal to acknowledge the potential effects of name calling and belittling comments undermined his credibility.

149 The complainant refers to the following authorities: *Berg v. Cowie*, [1919] S.J. No. 97; *Lloyd v. Imperial Parking Ltd.*, [1996] A.J. No. 1087 (Alta. Q.B.); *Shah v. Xerox Canada Ltd.*, [1998] O.J. No. 4349 (Ont. Gen. Div.); *Shah v. Xerox Canada Ltd.*, [2000] O.J. No. 849 (Ont. C.A.); *Whiting v. Winnipeg River Brokenhead Community Futures Development Corp.*, [1998] M.J. No. 199 (Man. C.A.); *Stamos v. Annuity Research & Marketing Service Ltd.*, [2002] O.J. No. 1865 (Ont. S.C.J.); *Sheppard v. Sobey's Inc.*, [1997] N.J. No. 78 (Nfld. C.A.); *Paitich v. Clarke*

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Institute of Psychiatry, [1988] O.J. No. 198 (Ont. H.C.); *Robinson v. Royal Canadian Mint*, [1992] O.J. No. 2270 (Ont. Gen. Div.); *Thornton v. Toronto Dominion Bank*, [2008] C.L.A.D. No. 216; *Saunders v. Chateau Des Charmes Wines Ltd.*, [2002] O.J. No. 3990; *Morgan v. Chukal Enterprises Ltd.*, [2000] B.C.J. No. 1563 (B.C. S.C.); *Morland v. Kenmara Inc.*, [2006] O.J. No. 657 (Ont. S.C.J.); *Hirst and Canadian Imperial Bank of Commerce*, [1995] C.L.A.D. no. 623; *Marion v. Ken Snider Transport Ltd.*, [2000] C.L.A.D. No. 90; *Faryna v. Chorney*, [1951] B.C.J. No. 128; *Evans v. Teamsters, Local 31*, 2008 SCC 20 (S.C.C.); *Farquhar v. Butler Brothers Supplies Ltd.* (B.C.C.A.), [1988] B.C.J. no. 191 (B.C. C.A.); *Cox v. Robertson*, [1999] B.C.J. No. 2693 (B.C. C.A.); *Mifsud v. MacMillan Bathurst Inc.*, (C.A.), [1989] O.J. No. 1967 (Ont. C.A.); *Wilding v. Owest Foods Ltd.* (B.C.C.A.), [1994] B.C.J. No. 1080 (B.C. C.A.); *Cardwell v. Young Manufacturer Inc.*, [1988] O.J. No. 2932 (Ont. Dist. Ct.); *Rowe v. General Electric Canada Inc.*, [1994] O.J. No. 3137 (Ont. Gen. Div.); *George Willberg and Jo-Ann Trucking Ltd., Brooks Alberta* (Canada Labour Code Adjudication November 10, 1982 (England)); *Manitoba Assn. of Native Fire Fighters Inc. v. Perswain*, [2003] F.C.J. No. 533 (Fed. T.D.); *Scarfe v. Saskatchewan Indian Cultural Centre*, [1996] C.L.A.D. No. 1088 (Can. Adjud. app. under Can. Lab. Code); *Naotkamegwanning First Nation v. Gauthier*, [2000] C.L.A.D. No. 45 (Can. Adjud. app. under Can. Lab. Code); *Starr v. Sandy Bay First Nation*, [2006] C.L.A.D. No. 410 (Can. Arb. Bd.); *Eileen Wilson and Bell Mobility Limited*, (Canada Labour Code Adjudication, May 4, 2005 (M. R. Newman)); *Hollett v. Air Atlantic Ltd.*, [1994] C.L.A.D. No. 668; *Banca Nazionale del Lavoro of Canada Ltd. v. Lee-Shanok*, [1988] F.C.J. No. 594 (Fed. C.A.); *Drew v. Canadian National Railway Co.*, [2007] C.L.A.D. No. 27; *Rishy Maharaj v. Air Georgian Ltd.*, [2000] C.L.A.D. No. 542; *Lynne Fisher and Business Development Bank of Canada*, [1998] C.L.A.D. No. 19; *Little Leaf v. Peigan Board of Education*, [2001] C.L.A.D. No. 396.

Respondent's Submissions

150 The respondent denies that it constructively dismissed Ms. Drew. It asserts that Ms. Drew has the onus of proving such a dismissal and has failed to do so.

151 The respondent argues that credibility is at the crux of this case and that Ms. Drew's and Mr. Tucker's testimony was not credible. It maintains that where their testimony conflicts with that of the company's witnesses the evidence of the company's witnesses should be preferred. It maintains that if it is not possible to determine which version of events is most credible, Ms. Drew's claim must fail because she has the onus.

152 The respondent contends that Ms. Drew's submission that she is only relying upon the allegations of verbal harassment for her constructive dismissal claim was a last minute concession and supports its contention that Ms. Drew should not be believed. The company argues that all of Ms. Drew's allegations about her pre Mac Yard treatment have been proven false and that has irreparably damaged her credibility. It contends that all of her evidence about what happened after she arrived at Mac Yard should therefore not be believed.

153 The company argues that Ms. Drew's evidence about being demoted from the position of Trainmaster at Malport should not be believed because she said it took place in 1999 but the individuals involved were not responsible for that Yard until a year later. It submits as well that Ms. Drew could not have been replaced as Relief Trainmaster because "Relief Trainmaster" is not a actually a "position". It also asserts that Ms. Drew's testimony was different from the written particulars which had been provided. It asserts that the meeting between Ms. Drew, Mr. Bowness and Mr. Chorkawy happened before Mr. Allen became a Relief Trainmaster. It argues that Mr. Allen was promoted to Trainmaster outside of Malport at the same time as Ms. Drew was promoted to BIT.

154 The company contends that Ms. Drew was not telling the truth when she testified that her move from BIT to Conport was a promotion. The company says it was a lateral move because it was within the same grade classification and she remained classified as an operations officer. It asserts that the job description was written by Ms. Drew.

155 The company further maintains that the move from Conport to Mac Yard was a promotion and not a demo-

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tion as Ms. Drew claimed. Ms. Drew moved from a Grade 10 classification up to a Grade 8 and she would have known that she was being promoted. It contends that Conport was unprofitable and closing and Ms. Drew was moved to where her skills could be best used. It contends that her claim of being told by a man with a southern accent that "no goddamned woman can run a railroad" is not credible. It maintains that Mr. Carroll never received the e-mail she sent about the possible transfer to Malport. It says it was not true that Todd Bouma replaced her at Conport.

156 The company claims that Ms. Drew's testimony about her Trainmaster salary was also not credible. She claimed that she asked for a raise but did not hear anything until March 2004 when in fact she received a five per cent raise in October 2003 retroactive to September 2003. She received another three per cent six months later plus the annual raise. It asserts that she was paid within the salary band for the position.

157 The company asserts that Ms. Drew's allegation that Mr. Orr and Mr. Carroll verbally abused her should not be believed. It insists that she never complained about such treatment. It contends that her assertion that she complained to Ms. Fusco should not be accepted particularly as there are no e-mails to back it up. The company claims that Ms. Drew could not have put the e-mail complaining about the way she was being treated under Ms. Fusco's door because she had no door. It asserts that the fact that she did not follow up when she got no response undermines her evidence. It maintains that the comment Mr. Carroll is alleged to have made about her working weekends could not have been made because Trainmasters regularly work weekends. It also claims that Ms. Drew only worked Tuesday to Friday during the strike and that Mr. Tucker worked nights on those dates.

158 It argues as well that Ms. Drew's testimony about Mr. Carroll and Mr. Orr swearing at her should not be believed as it was vague and she was unable to provide dates and details. It also relies on the Human Rights Investigator's report which finds that there was no evidence of directed swearing. It also notes that Ms. Drew did not allege that Mr. Orr swore at her in the human rights complaint

159 The company argues further that Ms. Drew and Mr. Tucker should not be believed because they did not testify about the same incidents. It maintains they would have remembered those incidents if they had happened. It asserts that Mr. Tucker's contention that Ms. Drew was "knocked down" by Mr. Orr in staff meetings should not be believed as they were unable to give specifics and because Mr. Orr said that he did not have such meetings. The company argues further that Mr. Tucker should not be believed as he did not report the abusive treatment of Ms. Drew to Human Resources.

160 The company also submits that Mr. Tucker should not be believed as he and Ms. Drew are close friends and because he and Mr. Orr did not get along. It relies upon the criticism that Mr. Orr imposed on Mr. Tucker. It claimed that Mr. Tucker became defensive when questioned about the criticism and therefore revealed his bias. It asserts that Mr. Tucker is now back in the bargaining unit and had nothing to lose by testifying or not telling the truth in the proceeding.

161 The company argues that Ms. Drew's evidence about the CAW strike should not be believed because it is not consistent with Mr. Orr's evidence. Mr. Orr testified that the operation ran more smoothly during the strike than it usually did so Ms. Drew's evidence about the hardships should not be believed. It says that her evidence that Mr. Orr was abusive during the strike and that she complained to Ms. Fusco should also not be accepted.

162 The company claims that it did not discriminate against Ms. Drew with respect to time off for working during the strike. It says that Mr. Orr merely submitted the hours and head office implemented the formula It disputes that Mr. Orr denied Ms. Drew the one day off to which she was entitled because he was not responsible for implementing the formula It denies that employees were asked to submit their hours and claims that Ms. Speers kept track of them. It maintains that the document prepared by Mr. Orr right after the strike is the best evidence and should be accepted.

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163 The company asserts that Ms. Drew's evidence about applying for a job in the Solutions Centre should not be believed because the Centre had not yet been established and she could not remember the last names of the people she spoke to.

164 The company denies that Ms. Drew had any medical restriction on doing investigations and says that the only restrictions she had were from doing sensitive/safety critical work and heavy exertion. It asserts that the evidence does not support her claim that she was working 10 to 12 hour days within a few weeks of returning to work.

165 CN argues that its witnesses' version of what occurred on November 24, 2004 should be preferred to that of the complainant's witnesses. It denies that the phone call between Mr. Orr and Ms. Drew was adversarial and claims that Mr. Orr would have no reason to claim that Mr. Tucker was present if he was not Mr. Orr's e-mails demonstrate that he expected Ms. Drew to show up for work the next day because there had not been a confrontation.

166 The company argues that Ms. Drew did not cooperate in the investigation because she did not return Mr. Gallagher's phone calls of November 25 and 26. It claims that she was not communicating with anyone at CN at that time so the harassment claim was at a standstill. It denies that any inference can be drawn from Mr. Gallagher's failure to interview Mr. Tucker. It argues that the letter from Ms. Drew's counsel was not an adequate response to Mr. Gallagher's letter of January 25, 2005 and that Ms. Drew should have made herself available to be interviewed as part of the investigation process. It claims that since she did not, its hands were tied. It argues further that when Ms. Drew was offered the position at GO in 2006, she claimed that nothing had been resolved but that was only because she had not engaged in the investigation process.

167 CN argues that it was appropriate for it to send a letter advising Ms. Drew that if she did not return to work by March 3, 2005 she would be deemed to have resigned because she was not responding to its letters. It says however, that when it received the letter from Ms. Rubin it understood that Ms. Drew had not resigned. It accepted that she was off on medically supported leave. Ms. Drew nevertheless took the position that she had been dismissed.

168 CN also argues that Ms. Drew did not know what contact she would have with Mr. Orr if she took the GO position but she refused it anyway. It maintains that she could not claim that she had been previously dismissed when she had been receiving benefits and had received no record of employment or severance pay.

169 The company argues that this complaint is untimely as it was not filed within 90 days of the alleged dismissal. It contends that any constructive dismissal had to have taken place on November 24, 2004 and it is unreasonable for Ms. Drew to claim that the dismissal took place on March 3, 2005. It submits that in early 2005 there were two parallel processes taking place. The first process was the harassment complaint and the investigation being handled by Mr. Gallagher. It asserts that Ms. Drew failed to respond to Mr. Gallagher's two phone calls, or to his letter of January 25. The company denies that Ms. Rubin's letter of February 4, 2005 is a response to Mr. Gallagher's letter of January 25, 2005 because it is addressed to Mr. Orr and does not mention the January 25 letter. It claims that by asking for a different position in the letter, Ms. Drew appeared to take the position that she was not interested in pursuing her complaint of harassment. Mr. McMurray responded that Ms. Drew should contact Mr. Gallagher but she did not. It asserts that Ms. Drew admitted in cross-examination and through her actions that she was not proceeding with her harassment claim. It claims that there is therefore no basis for the contention that the constructive dismissal took place on March 3, 2005 and that the only other time it could have taken place was November 24, 2004. It was therefore out of time.

170 The second process was related to Ms. Drew's entitlement to disability benefits which was being handled by Ms. Fusco men by Ms. Moodie and Mr. Ryhorchuk. CN says it had been advised that Ms. Drew had not sent the insurer the necessary medical documents so it was completely appropriate for Mr. Ryhorchuk to send the February 18 letter to Ms. Drew. The company argues that he did not demand that she return to her former position. It contends

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that it was also appropriate for Mr. Ryhorchuk to send the letter of February 25 asserting that if Ms. Drew did not return to work by March 3 she would be deemed to have quit. However, it accepted Ms. Rubin's letter insisting that Ms. Drew was not resigning.

171 CN argues that Dr. Sadavoy's medical opinion should be preferred to that of Dr. Anderson. It submits that Dr. Ozersky only said that Ms. Drew's depression was caused by her perception of a toxic workplace whereas Dr. Anderson's opinion was based on the view that the workplace was toxic. It claims that Dr. Anderson based her assertion on the human rights investigation which is not reliable. It suggests that there is a contradiction between Dr. Ozersky's report and Ms. Anderson's. It argues that there were many reasons to find that Ms. Drew's perceptions were distorted. It points to Dr. Sadavoy's testimony and claims that her depression had other causes that resulted in her perceiving herself to be harassed at work. It concludes that there is no reason, therefore, to think that Ms. Drew could not return to CN in any capacity.

172 The company argues that if it is found to have constructively dismissed Ms. Drew, she should have mitigated her losses by accepting the position at GO. The company claims that a "reasonable person" would have accepted the offer and that Ms. Drew would not have had to work in an atmosphere of hostility, embarrassment or humiliation. The company says it did not make the offer until June 2006 only because that was when she was able to return to work. It also relies upon the fact that the letter from Ms. Drew's lawyer in February 2005 said she was prepared to consider alternative employment. The fact that she subsequently commenced litigation did not change anything.

173 The company claims that Ms. Drew would have no reporting relationship with Mr. Orr at GO which is located away from Mac Yard and Mr. Carroll had moved to a position in Vancouver. Furthermore, it says, the position was suitable because it did not involve 12 hour rotating shifts and commanded the same salary and compensation as her previous position. It also relies upon the fact that Dr. Anderson did not make inquiries about the position before giving her opinion that it would not be suitable.

174 In conclusion, the company argues that the fact that Ms. Drew did not prove her pre-Mac Yard allegations undermines the credibility of her allegations against Mr. Orr and Mr. Carroll. It asserts that her evidence and that of Mr. Tucker is vague and lacking in detail and that Mr. Tucker's was inherently biased. It claims that Ms. Drew was suffering from a pre-existing depression which caused her to have a "meltdown" in response to criticism.

175 In the alternative, CN submits that this complaint is untimely and, in the further alternative, that Ms. Drew failed to mitigate her damages by accepting the position at GO. It argues that she is therefore not entitled to any damage award.

176 The respondent refers to the following authorities: *Notfall v. Anthony Group Ltd.*, [1999] N.J. No. 65 (S.C. — Trial Division); *Albright and Sokil Transportation Services, A Division of Sokil Express Lines Ltd.*, [1997] C.L.A.D. No. 278 (Read); *Abel v. Autohaus Barrie Ltd.*, [2005] O.J.No. 2417 (Sup. Ct. J.); *McBride v. SNC-Lavalin Inc.*, [2002] N.B.J. No. 44 (N.B. Q.B.); *Svens and Big Grassy (River) Education Authority*, [1977] C.L.A.D. No. 767 (Deeley); *Evans v. Listel Canada Ltd. (c.o.b. O'Doul's Restaurant and Bar)*, [2007] B.C.J. No. 416 (B.C. S.C.); *Colistro v. BMO Bank of Montreal*, [2006] C.L.A.D. No. 345 (Can. Adjud. app. under Can. Lab. Code) (Tadman); *Evans v. Teamsters, Local 31* (2008), 292 D.L.R. (4th) 577 (S.C.C.); *Farber c. Royal Trust Co.* (1996), 145 D.L.R. (4th) 1 (S.C.C.); *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 (B.C. C.A.).

177 The complainant replies that the evidence of the pre-Mac Yard allegations is important to show that she is not an employee who is quick to allege constructive dismissal. She asserts that whether or not all of the allegations were proved, she felt that she had been treated unfairly and yet she continued to perform the responsibilities of her position. That shows she did not make the claim of constructive dismissal lightly.

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178 Ms. Drew also replies that the focus of Mr. Gallagher's inquiries was to find a reason for her coming forward with allegations and not to investigate the complaint. She asserts there is nothing she could have said that would make a difference. She denies that she was unresponsive and says that she gave all of her contact information to Ms. Fusco and after that it became a matter between the lawyers.

179 Ms. Drew denies that she is taking the position that was dismissed by Mr. Ryhorchuk's letter of February 25, 2005. She acknowledges that a previous lawyer took that position on her behalf but that position was not advanced in these proceedings.

180 Ms. Drew asserts that for all the reasons set out in her argument on the preliminary objection, mis application is timely. She says her dismissal took place some time between March 2 and March 11, 2005 when she realized that the company was not going to address her allegations of harassment or make changes to her work environment. She relies upon Mr. Ryhorchuk's letters in February and the company's refusal to consider transferring her to a different department with a different reporting structure.

181 Ms. Drew denies that Mr. Tucker is a close friend. All that was established was that they carpooled to work at times. The complainant denies that there was any bias in Mr. Tucker's testimony. She said that the reason he could not provide details was because, as he stated, the incidents of abuse were so frequent that they "ran together like paint".

182 Ms. Drew argues that whether or not she was suffering from a pre-existing depression does not alter the fact that the abusive behaviour of Mr. Orr and Mr. Carroll resulted in constructive dismissal.

Decision

183 It is appropriate to make a few comments about the evidence and arguments in mis case. Both parties were very well served by their counsel. However, as is inevitable in a case of such length and complexity, not all witnesses were given a full opportunity to comment on the evidence of other witnesses. That was true for both complainant and respondent witnesses and I have considered that in making my determination. Also, it is clear in reviewing the parties' submissions that there are some differences in their notes and recollection of the testimony. This decision is, of course, based on my own notes and recollection as well as the exhibits. Finally, both parties referred to the reports of the human rights investigator at various points. However, I do not find that the conclusion of an investigator who apparently interviewed some of the witnesses before me on the telephone, as well as some people who did not appear in this case, to be of any assistance in making this decision.

Was the compliant filed within the statutory time limits?

184 Section 240(2) of the *Canada Labour Code* requires that complaints of unjust dismissal be filed "within 90 days from the date on which the person making the complaint was dismissed". I find that this complaint was filed within 90 days of the dismissal for the reasons set out in my interim award dated January 17, 2007 as follows:

The elements of the constructive dismissal alleged by the complainant are very different that (sic) those contained in the decisions presented by the parties or commonly found when constructive dismissal is alleged. This is not a situation in which the company repudiated the contract with a particular act on a particular day. The complainant's case does rely to a certain extent on her subjective understanding of what the company was prepared to do to meet her concerns based on the objective evidence of the complainant's letters of February 4, 2005 and March 2, 2005 and the company's responses to them. In the letter of February 4, 2005 the complainant still believed herself to be employed and was seeking an alternative position. She claims that the company's letter of February 25 and its failure to retract the threat contained in the letter after her response of March 2, was the trigger that indicated that her concerns would not be addressed and that she had therefore been dismissed. It

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was the company's lack of willingness to deal with the poisoned work environment that indicated that Ms. Drew's employment was at an end. The company's evidence was that the Terminal Superintendent's letters of February 18 and 25, 2005 were a routine part of its attendance management program. Nevertheless, the letters were sent by someone in authority to Ms. Drew after she had informed the company of her concerns and that she could not return to the workplace without certain changes. By advising her that she must return to her former position or be considered to have abandoned her position the company indicated to her that it was not prepared to respond to her concerns. The company at no time retracted the letter or the threat prior to the filing of the complaint, specifically it did not respond to her letter of March 2, 2005.

The company argued vigorously that the dismissal could not have taken place after Ms. Drew's last day at work and that she had not had further contact with the individuals she claimed had poisoned her work environment after that date. However, there is no reason that a wrongful dismissal could not take place while a person was not at work. For example, a person on sick leave or vacation could be advised that she is being demoted. In a toxic environment case, the constructive dismissal may take place, as it allegedly did here, when the company indicates that it is not prepared to take the measures necessary to resolve the problem. Furthermore, there are other ways to interpret the facts which lead to the conclusion that the complaint was not untimely. In *Fisher and Business Development Bank of Canada (supra)* the Adjudicator confirmed, based on a number of decisions of the courts, that the constructive dismissal does not occur when an employer unilaterally repudiates but rather, that it occurs when the employee accepts the repudiation (as opposed to accepting the proffered unilateral alteration to the contract). Therefore, even if the company repudiated the contract on November 24, 2004, the complainant had a reasonable time to consider whether to accept the repudiation. Even if that reasonable time was no more than a month the complaint is not out of time. Furthermore, even if I accept that the repudiation took place on November 24, the parties were subsequently in negotiations and the constructive dismissal did not occur until those negotiations were at an end and Ms. Drew decided to accept the repudiation. Under any of these interpretations the complaint was filed within 90 days of the "dismissal".

185 The decision quoted above was issued with the caveat that the complainant would be able to prove that she had been constructively dismissed as well as to prove the facts supporting the above determination. The company insists that the letters sent by Mr. Ryhorchuk in February 2005 should not be considered to be responses to the correspondence from Ms. Drew's lawyer. It claims that the company had two parallel processes in place. One process was the investigation of Ms. Drew's complaint of harassment and the second was Mr. Ryhorchuk's response to being advised by the insurer that it did not have all of the documents supporting Ms. Drew's claim to disability benefits. However, whether or not different officials of the company were talking to each other about what was going on with Ms. Drew, the company sent her a letter telling her she must return to work after receiving a letter from her lawyer stating that she had been subject to harassment and should be transferred to a different position. The company argues that the letter did not say she had to return to the same position but there is no other interpretation that could reasonably be drawn. Ms. Drew also received a letter from the company's counsel that said that the company would not consider a new position until Ms. Drew participated in the investigation of her complaint. However, that was in response to a letter from Ms. Drew's counsel which said that the letter itself was a formal complaint. CN's letter also says that the company vehemently denies the allegations made by Ms. Drew "particularly those allegations of verbal abuse and harassment". It then goes on to say that Ms. Drew is not participating in the company's investigation to determine the merit of her allegations. It is not surprising that Ms. Drew did not have confidence in the investigation process since the company was denying her allegations before it had been completed.

186 Ms. Drew did take the position shortly after her complaint was filed, although not in this process, that Mr. Ryhorchuk's letter of February 25, 2005 resulted in her termination when she did not return to work. CN did not carry through with the threatened termination after it received her lawyer's letter but Ms. Drew did not feel that she could return to work, at least without significant changes.

187 It was in light of all of this correspondence that Ms. Drew decided that she could no longer work at CN. And it was at that point that the constructive dismissal occurred. That was within 90 days of the filing of the com-

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plaint The complaint was therefore timely.

Was Ms. Drew constructively dismissed?

188 The parties agree that the jurisprudence conceptualizes claims to constructive dismissal in the circumstances of a toxic work environment in two different ways. The first approach is to find an implied fundamental term in the contract of employment that an employee will be treated with "civility, decency, respect and dignity". (see *Lloyd v. Imperial Parking*(*supra*)) If that fundamental term is breached, the employee can claim that she or he has been constructively dismissed.

189 The second approach does not require the implication of a fundamental term but requires a determination as to whether the conduct of the employer is so intolerable that a reasonable person should not be expected to persevere in the employment. This approach is described in *Shah and Xerox* (*supra*) as follows at paragraph 38:

Where the conduct of management personnel is calculated to cause an employee to withdraw from the employment, it may, in my judgment, amount to a constructive dismissal. The test, I believe, is objective: it is whether the conduct of the manager was such that a reasonable person in the circumstances should not be expected to persevere in the employment. As the particular circumstances are crucial, each case must be decided on its own facts. The test should not be lightly applied. An employer is entitled to be critical of the unsatisfactory work of its employees and, in general, to take such measures — disciplinary or otherwise — as it believes to be appropriate to remedy the situation. There is, however, a limit. If the employer's conduct in the particular circumstances passes so far beyond the bounds of reasonableness that the employee reasonably finds continued employment to be intolerable, there will, in my view, be constructive dismissal whether or not the employee purports to resign.

190 The verbal abuse Ms. Drew experienced working at the Mac Yard amounted to a constructive dismissal on either of the above tests. Ms. Drew was belittled, had her job threatened and was subjected to yelling and swearing. That was a breach of the fundamental term requiring that she be treated with "civility, decency, respect and dignity". Furthermore, no employee could be expected to persevere in employment in such circumstances.

191 The determination as to whether Ms. Drew was subjected to the verbal abuse that she alleged is ultimately a question of credibility. Ms. Drew and Mr. Tucker said it occurred and Mr. Orr and Mr. Tucker said that it did not. In the end I have preferred the evidence of Ms. Drew and Mr. Tucker on this fundamental issue.

192 In *Faryna v. Chorny* (*supra*), referred to by the company, the judge makes the following useful comments about assessing credibility:

The credibility of interested witnesses, particularly in cases of conflict of evidence cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

193 The court is essentially saying that "demeanor" may be the least useful factor in determining credibility.

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Other factors to be considered are the opportunity to observe and to recall events and to resist the pull of self-interest in describing them. However, the most important factor is the one being described by the court above i.e "What makes the most sense in all of the circumstances?"

194 In this case, after considering all of the circumstances, it makes the most sense that Ms. Drew was telling the truth when she claimed that Mr. Carroll and Mr. Orr had verbally abused her. Ms. Drew had worked for CN for eighteen years. She had had a successful career and was well paid. She had children to support. Nevertheless, on November 24, 2004 she left work in tears. She called around to human resource professionals until she found one that she could talk to. She poured her heart out about the abuse she had suffered. By that time she was suffering a serious depression. When she was referred to an independent psychiatric exam she attributed the cause of her depression to the situation at work. She was referred to therapy by the insurance company and spent a year talking to a therapist about the abuse she suffered at work. It is unlikely she would have been lying to the human resource professional she spoke to, the psychiatrist and her therapist. No reason has been presented as to why she would make up such a story. Ms. Drew was not being disciplined and her job was not in jeopardy. If she needed to go off work she did not need to make up stories about Mr. Orr and Mr. Carroll since she really was ill. Dr. Sadavoy suggested that her depression might make her particularly sensitive to criticism but even he never suggested that it would make her imagine that she had been called a "fucking bitch" when she had not been.

195 However, the main reason that Ms. Drew's testimony with respect to the verbal abuse allegations is preferable to that of the company's witnesses is that Mr. Tucker testified that the verbal abuse took place. Mr. Tucker was Ms. Drew's immediate supervisor. He was in a good position to observe her interactions with Mr. Orr and Mr. Carroll. He never claimed, as the company asserts, that he observed all of her interactions with them. However, he was well placed to observe them regularly. He also had little or no motivation to lie on her behalf. The company claims that Mr. Tucker and Ms. Drew were close friends. The evidence disclosed that they sometimes carpooled together and occasionally socialized. However, there was no evidence that they were close. The company has suggested that Mr. Tucker had a vendetta against Mr. Orr because he was subjected to some discipline in 2005 and 2006. However, the discipline was not serious and certainly not significant enough to motivate Mr. Tucker to conspire to lie about Mr. Orr under oath. There was no reason presented as to why he would lie about Mr. Carroll. The company argues that Mr. Tucker would have no concerns about testifying against Mr. Orr and Mr. Carroll because he has returned to the bargaining unit and has just cause protection. However, the fact that employees are in a union does not make them immune to the potential repercussions of testifying about the misdeeds of their employers and the fact that Mr. Tucker was prepared to do so adds to his credibility.

196 There were also aspects of Mr. Orr's and Mr. Carroll's testimony that undermined their credibility, specifically, their refusal to acknowledge that they ever yelled at anyone. Mr. Carroll agreed that he raised his voice and told people to take their heads out of their asses but would not concede that he yelled. Mr. Orr also denied it Mac Yard was a stressful place to work. The pressure on Mr. Carroll and Mr. Orr was enormous. If there are any delays at Mac Yard it affects the whole company. All of the employees have to be working hard. I find it highly unlikely that Mr. Orr and Mr. Carroll never yelled at anyone when things went wrong. They certainly yelled at Ms. Drew. The environment must have been more stressful for Mr. Orr when they were short one Trainmaster since Trainmasters were in short supply to begin with. Having a Trainmaster who was on modified duties must have been very frustrating and it appears that Mr. Orr took it out on Ms. Drew. It is clear that he was very upset with her on November 24, 2004. Even Mr. Carroll acknowledged that he was agitated. There can be no dispute that something caused Ms. Drew to break down and call Mr. Lamarche. She told him it was the altercation with Mr. Orr. Nevertheless, Mr. Orr denied that he was upset or raised his voice. What was also telling about this incident was that it does not appear to have been Ms. Drew's fault that Mr. Foster was sent to Oshawa but Mr. Orr was angry with her anyway. That is the state to which their relationship had degenerated by November 24, 2004.

197 The other evidence that undermines Mr. Orr's and Mr. Carroll's credibility is that they both claim that Mr. Tucker was there when Mr. Orr first spoke to Ms. Drew. However, Mr. Tucker's e-mail to Mr. Orr about what happened that day never mentions the phone call which it surely would have if he had observed it Mr. Carroll told Mr.

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Gallagher that Mr. Tucker was there although Mr. Orr did not. Perhaps Mr. Carroll was mistaken as he was not in the room himself Perhaps he expected Mr. Tucker to support the claims of his two superiors. However, there is no record of Mr. Tucker being interviewed by Mr. Gallagher and in the end Mr. Tucker's evidence supported Ms. Drew.

198 Those are the reasons that I find Ms. Drew's allegations with respect to the verbal abuse to be credible. However, the company argues that she is not credible because she has not been able to prove most of her other allegations. Ms. Drew included many of the other allegations in her lawyer's letter to CN in February 2005 and in the particulars she provided at the beginning of these proceedings. She was clearly relying upon them as part of her case but in the end she abandoned them and said she was only relying upon them to provide background.

199 However, while Ms. Drew was mistaken about many of the other allegations she made I do not find that she lied about them. As stated at the beginning of this lengthy decision, her perception of her history with the company may be somewhat coloured by the circumstances in which it came to an end. Perhaps her depression did make her perceive, in retrospect, that she had been a target even before she got to Mac Yard. However, the events she described could have had the significance she ascribed to them and it was clear that she was hearing the company's explanation about them for the first time. No particulars had been provided by the company prior to the litigation and of course there is no discovery process for these complaints. As the judge said in *Faryna v. Chorly (supra)* "a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken".

200 Ms. Drew alleged that she was replaced as Trainmaster at Malport. There was conflicting evidence about the dates she actually worked there but there is no reason to think that she did not make a mistake. There is no dispute that she worked there as a Relief Trainmaster and that she was not staffed in as management Relief Trainmasters never are apparently. However, there is no evidence that Ms. Drew knew that she did know that at some point she was no longer the person being called when a Trainmaster was needed and that someone else was. She also knew that person was staffed in as management a few months later. She performed that role for 18 months and was not staffed in. She also alleged that Mr. Chorkowy said "if we don't have to deal with women we won't" when she asked what was going on. He denies it, however, Ms. Drew called his superior and they both attended a meeting with her. It was not clear from the company's evidence why such a meeting took place if it was not to deal with a concern raised by Ms. Drew. Therefore, while Ms. Drew may have been mistaken in her belief that Relief Trainmasters are staffed in, the male person who was Relief Trainmaster after her was staffed in after a short time and she was not. Furthermore a meeting was held with Mr. Bowness and Mr. Chorkowy. I cannot find, on the basis of the evidence, that Ms. Drew lied about her experience at Malport so her allegation with respect to being replaced as Trainmaster does not undermine her credibility with respect to her allegations of verbal abuse.

201 Ms. Drew testified that she was promoted from the position at BIT to Assistant Terminal Manager at Conport. The company denies that she was promoted. It said that she did not receive a raise and that it had no position called "Assistant Manager". It claims that she was an "Operations Officer". Whether or not there was an official position titled "Assistant Manager" at Conport that is what Ms. Drew was called. She produced a job description which she said was drafted by the manager Bob Pelland. Ms. Fusco claimed in examination-in-chief that it was not an official job description and Ms. Drew had drafted it. However, in cross-examination Ms. Fusco acknowledged that she did not know who drafted it. Mr. Pelland did not testify. Ms. Drew also had a business card which identified her as "Manager Conport". Furthermore, in an e-mail sent from Ms. Drew to Mr. Carroll dated March 13, 2003, she signed herself Paula Drew, Manager Conport. In her e-mail to Mr. Carroll dated August 28, 2003 she said she is being replaced by Todd Bouma "who is now assistant manager" meaning either that he is taking over her position of assistant manager or she has a higher position and he is moving into it from assistant manager. In her letter to human resources inquiring about a position at the Solutions Centre she said she was the Assistant Terminal Manager at Conport. Therefore Ms. Drew clearly understood herself to be in the Assistant Manager position at Conport so it was not unreasonable for her to see that as a promotion from BIT. It also explains why she may have seen being transferred to an operations position at Mac Yard to be a demotion even if the pay band she was moved to was higher.

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202 Ms. Drew alleged that she had been told by Mr. Carroll that she was being moved to Mac Yard because Conport was too top heavy i.e. it had too many management people. Mr. Carroll agreed that he told her that or something similar. However, when Ms. Drew went to Mac Yard, Todd Bouma went to Conport. She understood that he was doing her job and thought she had been replaced even though she had been led to understand that her position was disappearing. Conport did disappear a few months later. Again, Ms. Drew may have been mistaken but there were reasons why she thought what she did and she did not hear the company's explanation until the adjudication.

203 Ms. Drew also alleged that she was told by someone with a southern accent that "no goddamn woman can run a goddamn railroad". Apparently there are several senior managers at CN with southern accents. Mr. Carroll did not think any of them could be the one she was talking about. However, there is no real evidence to dispute that the statement was made and it is not beyond the realm of possibility that someone at CN could have made a sexist comment. Therefore, there is no reason to find that this allegation undermines Ms. Drew's credibility with respect to the allegations of verbal abuse.

204 Ms. Drew was given a raise when she went to Mac Yard but she was still the lowest paid Trainmaster. Eventually she was the second lowest paid trainmaster. The fact that she alleged that she was the lowest paid trainmaster does not undermine her credibility with respect to the allegations of verbal abuse.

205 Ms. Drew testified that she worked more than two extra shifts during the strike. Mr. Tucker supported that claim. I find Mr. Tucker's evidence to be reliable for the reasons set out previously. Mr. Orr said that Ms. Drew asked not to be scheduled on extra shifts due to her childcare responsibilities. Whether or not Ms. Drew made that request, she did work some extra shifts. Mr. Orr may not have known that when he created the document on which he based his claim that she only worked two extra shifts. It was clear that no one was really keeping track of what people were working. When it came time to submit the hours to head office Ms. Drew was off on short term sick leave so Mr. Orr just used the hours he had noted in March rather than asking her as he had the others. This was a dispute which highlights the difficulty in the relationship between Mr. Orr and Ms. Drew by the autumn of 2004. Why would Ms. Drew claim extra pay or time off if she had not worked any extra time? The dispute could have been resolved if Mr. Orr was prepared to listen to Ms. Drew. However, he had submitted her hours as two extra shifts and would not go back. He did not even acknowledge that, even if she worked two extra shifts, she was entitled to one lieu day until the e-mail from Ms. Speers on November 8, 2004.

206 Ms. Drew worked more than two extra shifts during the strike but did not receive any time off or compensation. The fact that Ms. Drew was treated differently from her colleagues in this respect contributed to her view that Mr. Orr considered her to be less valuable than them.

207 Ms. Drew testified that when she returned from short term sick leave in September 2004, she was under restrictions not to do investigations as they were too stressful. It does not appear however, that her doctor communicated that restriction to the company. There is no evidence that Ms. Drew knew what the doctor had sent to the company. In any event, she agreed to do investigations except for those attended by the UTU unit chair. Mr. Orr agreed that they discussed that. Ms. Drew testified that she started one investigation that had to be finished by Todd Bouma when the UTU unit chair showed up. Ms. Drew testified that Mr. Orr called her a "fucking wuss" on that occasion. He denied it and said that he was glad that she had stopped the investigation. However, I prefer Ms. Drew's evidence on this point for the reasons set out above and because she described this incident to Mr. Lamarche on November 24.

208 Ms. Drew also claimed that she was supposed to work graduated hours but was up to 10 or 12 hour days within three to five weeks. That appears to be an exaggeration. A document was introduced which shows that Ms. Drew did not work her first full 40 hour week until the week of October 22. The document was created by Ms. Speers who did not testify. However, I find it is likely that Ms. Drew was not working full time hours until the end of October. It is possible she was working longer hours after that. Nevertheless, I do not find this exaggeration a sufficient reason to find that Ms. Drew should not be believed when she claims to have been verbally harassed in

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light of the corroboration from Mr. Tucker.

209 The dispute between Mr. Orr and Ms. Drew about her vacation set the stage for the deterioration in their relationship. Mr. Orr was upset that Ms. Drew could go to Mexico but could not return to work although that does not seem that unreasonable given the stressful nature of work at the Mac Yard and the fact that Ms. Drew had a heart problem. However, Mr. Orr was upset by the trip and Ms. Drew was upset that she was asked to give back the week of vacation. She therefore started to ask about other things like the strike pay and a position at the Solutions Centre and the areas of conflict grew.

210 Ms. Drew testified that she applied for or inquired about a position at the new Solutions Centre but was told her supervisor would not release her from transportation at that time. She sent an e-mail to Mr. Orr about it. His response was that she needed to get fully back to work before he could consider it. He testified that he wanted her to come back and start "contributing". This also highlights what was going on between Mr. Orr and Ms. Drew at the time. Mr. Orr wanted and needed her back doing her Trainmaster job. Ms. Drew was resisting to some extent because of her heart and probably because she was getting depressed and finding it harder to cope with the way Mr. Orr and Mr. Carroll interacted with her.

211 Ms. Drew appeared to find something unfair in her PMP rating and Mr. Orr's explanation was not very satisfactory. He said that she had received a lower rating because she had only worked from January until March and he could not consider the work she did on modified duties. In the circumstances, it would not be that surprising if Ms. Drew saw the lower PMP rating as some kind of punishment for being absent or on modified duties.

212 Ms. Drew produced a complaint that she said she had put under Ms. Fusco's door. It was sent from Ms. Drew to herself. She said she sent it to herself so she would have a copy. Ms. Fusco denied receiving the letter and said that she was using a cubicle at the time because her office was being renovated. In any case, it appears that Ms. Fusco did not receive the complaint. If Ms. Drew thought she did receive the complaint, the lack of response might have contributed to her growing despair. The company argues that if she sent the complaint she would have followed up if there was no response. That assumes that there was no anxiety or fear surrounding the making of complaints in the work environment. However, with the two most senior managers on site yelling and swearing at Ms. Drew it would not have been easy for her to complain. It would not have been easy for Mr. Tucker to complain about her treatment either. Still, this claim is one of Ms. Drew's least plausible ones. Nevertheless, the e-mail reads like it was written at the time and not with hindsight. In all the circumstances, I do not find that Ms. Drew's claim that she tried to send this complaint to Ms. Fusco undermines her credibility with respect to the allegations of verbal abuse.

213 For the reasons outlined at the beginning of this section I prefer Ms. Drew's testimony about what occurred on November 24, 2004 to that of Mr. Orr and Mr. Carroll. Mr. Orr was already frustrated with Ms. Drew and he lost his temper. The incident that led to the altercation was not actually Ms. Drew's fault but he blamed her for it anyway. Ms. Drew was depressed and broke down.

The Investigation

214 Mr. Gallagher is the human resource professional responsible for dealing with Ms. Drew's "complaint". Ms. Drew did not file a formal complaint until Ms. Rubin's letter of February 4, 2005 but she certainly complained to Mr. Lamarche and Mr. Gallagher purported to conduct an investigation. The investigation involved calling Ms. Drew on November 25 and then one or two days later. She did not respond, which is not that surprising given the state she was in. He then went on to interview Mr. Orr and Mr. Carroll in December. Mr. Orr and Mr. Carroll denied the allegations set out in Mr. Lamarche's notes. On the basis of those interviews, Mr. Gallagher wrote a report with a "Summary (Conditional)". In that summary he concludes that Ms. Drew was seeking attention and movement from the "rigours of operations". However, there does not appear to have been any basis for that conclusion.

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215 The next step Mr. Gallagher took was to write to Ms. Drew on January 25, 2005 and complain that she had not responded to his repeated attempts to reach her. However, he had only made the two calls two months earlier. He asked her to contact him about a meeting. However, by then Ms. Drew had sought counsel and it was her lawyer who responded. The company has suggested that the investigation has been open ever since although that is hard to understand when it has taken the position throughout that Ms. Drew's allegations are unfounded. A real investigation would require an open mind. To the extent that an investigation took place with respect to Ms. Drew's allegations of November 24, 2004, it was overtaken by this process. However, Mr. Gallagher's dismissal of Ms. Drew's allegations in his report is relevant to the issue of whether she should have accepted the position offered in June 2006.

Medical Evidence

216 The central dispute in the medical evidence is whether Ms. Drew's depression was caused by the situation at work or the death of her parents and other family issues. However, it is not really necessary to decide what caused her depression since I have decided that the verbal abuse took place and that is enough to support her claim of constructive dismissal. However, as noted previously, the medical evidence is relevant to the issue of Ms. Drew's credibility as well as the issue of mitigation. On those issues I prefer the evidence of the experts who actually examined Ms. Drew, in particular Dr. Anderson who treated her.

217 Dr. Anderson met with Ms. Drew 24 times. During those sessions the therapy focussed on Ms. Drew's issues at work. Ms. Drew told her about the verbal abuse and she was consistent with her story so Dr. Anderson felt her perceptions were sound. Dr. Anderson testified that if Ms. Drew had had a personality disorder it would have become apparent during the course of their sessions. She testified that she believed that Ms. Drew's work situation was the cause of her depression because when she was removed from it and they worked on it in therapy she improved. If the cause of her depression had been her parents' deaths or family problems she would not have got better by focusing on workplace issues. Dr. Anderson's evidence is important as it supports Ms. Drew's claim that she was abused by her managers. There is no dispute she was seriously depressed. She attributed it to the abuse and underwent therapy that focused on that abuse. It is highly unlikely she was lying to her therapist about the verbal abuse for an entire year particularly as she was suffering from a severe depression.

218 Dr. Sadavoy has impressive credentials, however, he had never met, let alone assessed or treated Ms. Drew. It was somewhat surprising how far he was prepared to go to contradict the professionals who had had direct contact with her and, in Dr. Anderson's case, had had a clinical relationship with her. However he was quite clear that he was looking for alternative explanations for Ms. Drew's depression which would not involve her work environment in order to determine whether she could return to work. He testified that Ms. Drew is at risk of a relapse of depression no matter where she works since she has had two episodes.

219 Dr. Sadavoy suggested that neither Dr. Ozersky or Dr. Anderson had done enough to rule out a personality disorder. However, he did not go so far as to say that she had one. He suggested that her thoughts might have been disordered by depression and that she would be sensitive to criticism and think people were out to get her. However, he did not suggest that she would actually imagine that people were repeatedly swearing and yelling at her. He testified that Ms. Drew's recovery could be attributed to the medications she was on and not to the therapy she had undergone.

220 The company relies on Dr. Sadavoy's evidence to suggest that Ms. Drew was not perceiving her environment accurately because of her depression. However, there was no evidence that Mr. Tucker was suffering from any illness that would distort his perceptions and his evidence supported Ms. Drew's claims that she was being verbally abused by Mr. Orr and Mr. Carroll.

221 It is true that Ms. Drew had had a prior depression and her mother had a psychiatric illness. Ms. Drew may

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therefore have been predisposed to depression. However, in this case, it was triggered by the work environment and, even applying the purely objective standard of a person not already vulnerable, the abuse she was subjected to was not treatment which any employee should be expected to tolerate.

222 For all of the above reasons I find that Ms. Drew and Mr. Tucker's evidence about the verbal abuse directed at Ms. Drew is credible. In the end, there was simply no explanation as to why Ms. Drew would make up the allegations about Mr. Orr and Mr. Carroll. I find that both Mr. Carroll and Mr. Tucker often yelled at Ms. Drew. I find that Mr. Orr repeatedly threatened Ms. Drew's job. He called her a "fucking wuss" "stupid bitch" and "fucking idiot". He said to Ms. Drew in front of Mr. Tucker "Do you always need someone to hold your hand — can't you do your fucking job?" and similar comments which belittled her or threatened her job. I also find that Mr. Carroll called Ms. Drew a "stupid bitch" or "stupid fucking bitch" or "fucking idiot" and told her to "get her head out of her fucking ass and do your goddamn job". He asked her "what the fuck are you doing here, you don't work Saturdays" during the strike saying that her peers had to work for her. The verbal abuse to which Ms. Drew was subjected made her work environment intolerable and amounted to a constructive dismissal.

Mitigation

223 The company submits that Ms. Drew should have accepted its offer of a position at GO Operations in June 2006 when Dr. Ozersky deemed her fit to return to work. The company argues that it was objectively reasonable for her to accept the position because it was in a different location, she would not be reporting to Mr. Orr or Mr. Carroll, it had the same terms of employment, did not have a night shift and was, overall, a less stressful work environment. However, I find that Ms. Drew was not required to mitigate her damages by accepting the position because this litigation was ongoing and the conflict had not been resolved. The company continued to take the position, as it still does, that her allegations against Mr. Orr and Mr. Carroll, two people very highly placed in the company, were false. The offer did not come with any apology or offer to resolve all of the outstanding issues. As Ms. Drew had made serious allegations against important members of management, she could reasonably expect to face animosity. The letter which was sent to her was signed by Mr. Orr so it was clear that he would still control her destiny. Furthermore, it was Dr. Anderson's opinion that Ms. Drew's depression would likely return if she went back to work at CN.

224 These facts are very different from those before the Supreme Court in *Evans v. Teamsters supra* upon which the company relies. In the *Evans* case, the plaintiff had been terminated by his employer and then entered into negotiations about his severance. When they failed to reach an agreement, his employer directed him to return to work out his period of notice. The majority of the court found that it was not unreasonable for Mr. Evans to return to work out his notice because there was no animosity between the parties and he had been negotiating a package which would have had him continuing to work for a year. The court described the approach to be used in determining whether an employee should be required to mitigate her or his damages by continuing or accepting reemployment with the employer as follows at pg. 588:

I do not mean to suggest with the above analysis that an employee should always be required to return to work for the dismissing employer and my qualification that this should only occur where there are no barriers to re-employment is significant. This Court has held that the employer bears the onus of demonstrating both that an employee has failed to make reasonable efforts to find work and that work should have been found (*Red Deer College v. Michaels*, [1976] 2 S.C.R. 324, 57 D.L.R. (3d) 386). Where the employer offers an employee a chance to mitigate damages by returning to work for him or her, the central issue is whether a reasonable person would accept such an opportunity. In 1989, the Ontario Court of Appeal held that a reasonable person should be expected to do so "[w]here the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious" (*Mifsud v. MacMillan Bathurst Inc.* (1989), 70 O.I.L. (2d) 701, 63 D.L.R. (4th) 714). In *Cox*, the British Columbia Court of Appeal held that other relevant factors include the history and nature of the employment, whether or not the employee has commenced litigation, and whether the offer of reemployment was made while the employee was still working for the employer or only after he or she had "already left (paras. 12-18). In my view, the foregoing

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elements all underline the importance of a multi-factored and contextual analysis. The critical element is that an employee "not be obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation" (*Farquhar*, at p. 94), and it is that factor which must be at the forefront of the inquiry into what is reasonable. Thus, although an objective standard must be used to evaluate whether a reasonable person in the employee's position would have accepted the employer's offer (, [\[1980\] 2 S.C.R. 880](#), 114 D.L.R (3d) 1), it is extremely important that the non-tangible elements of the situation — including work atmosphere, stigma, loss of dignity, as well as nature and conditions of employment, the tangible elements - be included in the evaluation

225 There is no dispute that the salary and working conditions would be the same for the GO Operations job and perhaps the "tangible" conditions would be better than those at Mac Yard. There is nothing inappropriate about the timing of the offer because it was made when the company had been told by Dr. Ozersky that Ms. Drew could return to work. As the company continued to take the position that she had not been dismissed, it was required to offer her an appropriate position. However, as the Court explained in *Evans* above, it is critical that the intangible elements, including work atmosphere, stigma and loss of dignity be considered. In this case, Ms. Drew had alleged that she had been verbally abused by two members of senior management at the company. They were still employed, in fact, they had been promoted. The litigation was ongoing and the company had steadfastly denied that the allegations had any merit One of the people she complained about wrote the letter demanding that she return to work so she knew he would still be in control of her destiny. It is a reasonable conclusion that Ms. Drew would be stigmatized if she returned and that she would face hostility. She had been humiliated by Mr. Orr in the past and would still have some contact with him. Furthermore, Mr. Gallagher continued in Human Resources and he had concluded as far back as December 2004 that he believed Mr. Carroll and Mr. Orr and that Ms. Drew was only seeking attention. Ms. Drew could, therefore, hardly count on an objective response from Human Resources if she had problems. Finally, Ms. Drew had been advised by her doctor that her mental health would suffer if she returned to CN, at least while the conflict was unresolved. I therefore find that it was objectively reasonable for Ms. Drew to reject the offer of the position at GO and that the company has therefore failed to meet the onus of proving that she failed to mitigate her damages.

226 In summary, I find that the complaint is not untimely as it was filed within 90 days of Ms. Drew's constructive dismissal. I also find that Ms. Drew has met the onus of proving on the balance of probabilities that she was constructively dismissed as a result of the poisoned work environment at Mac Yard. I find, finally, that the company has not met the onus of proving that Ms. Drew failed to mitigate her damages when she rejected the position at GO.

227 The parties have asked me to refer the issue of damages back to them. I therefore do so but remain seised in the event that they are unable to reach agreement.

END OF DOCUMENT