File Name: Complaint under the Human Rights Act involving Dwayne McLellan and MacTara Limited.

Date of Decision: June 4, 2004
Area(s): Employment
Characteristic(s): Physical disability
Complaint: Dwayne McLellan was hired in September 1999 as a Wood Room Cleaner. He successfully completed his probationary period and did not receive any formal warnings. In approximately February 2000, he developed symptoms of a back injury and was diagnosed, in late March, with 2nd degree Degenerative Disc Disease. On April 4, 2000, he was fired.

Decision: The decision to fire Mr. McLellan was based in part, on his disability.

Employer's Duty to Accommodate
The employer has a responsibility to reasonably accommodate a disabled employee to the point of undue hardship. As part of this process, an employer has to "patiently and carefully assess a disabled employee" and there should be a dialogue with that person. The employer does not have to create positions for an indefinite period of time. The Board found that MacTara initially accommodated Mr. McLellan's physical restrictions, but mistakenly made the decision to fire him instead of doing the things they should have done to accommodate his disability. Accommodations they could have reasonably offered included layoff until he was better.

Disability a factor in Treatment
The disability does not have to be the only factor in a decision to fire someone for discrimination to occur. The Board found that there were many difficulties with Mr. McLellan's employment relationships and concluded that "the discrimination based on physical disability was neither the exclusive, nor likely the primary cause of the termination." However, the disability was a factor in the decision to terminate his employment and therefore discrimination occurred.

Remedy: The Board ordered the following remedies:

Individual Remedies:

- General Damages (emotional harm): $1000.00
- Lost wages ($9.12/hour for the number of hours of a regular work week for 5.5 months).
- Letter of reference
- Reimbursement for Travel/incidentals for the Complainant to attend the hearing

2004-NSHRC-4

Decision on Discrimination Allegation June 4, 2004 Page 1 of 35

Complaint under the Human Rights Act, R.S.N.S. 1989, c.214, as amended by S.N.S. 1991, c.12

Case Number: 04-00-0145

Proceedings brought by the Nova Scotia Human Rights Commission

Involving:

Dwayne McLellan Complainant

- and -

MacTara Limited Respondent

DECISION: DISCRIMINATION ALLEGATION

1. This is an inquiry into the complaint of Dwayne McLellan dated November 2000, against MacTara Limited, alleging discrimination in employment by reason of MacTara's termination of him based on an actual or perceived physical disability.

2. The Inquiry heard evidence on May 19, 20, 25, and June 2, 2004, from the complainant, Mr Dwayne McLellan, as well as from Mr Andrew Wright, currently the Operations Manager of MacTara, Ms Bernadette Willigar, currently the Human Resources Manager at MacTara, and Mr McLellan's physician, Dr David Sheehy of Shubenacadie, Nova Scotia. Robin Godfrey of Atlantic Gardens, a former employer of Mr McLellan, was also called to testify. Mr McLellan considered calling further evidence and was offered the opportunity but decided not to do so.

Overview

1. MacTara is a producer of kiln dried dimension lumber and wood pellets located in

Musquodoboit, Nova Scotia. Mr McLellan was hired into the operation on or about September 21, 1999, as a Wood Room Cleaner – at that time the lowest position in the hourly paid hierarchy at MacTara. He was terminated from his employment on April 4, 2000 in a meeting with Mr Andrew Wright.

2. During his time with the company, Mr McLellan successfully completed his probationary period and became a full time employee. Mr McLellan was not formally disciplined for either poor work performance or other misdeed during his entire time with MacTara. He was spoken to by superiors on a few occasions about his work behaviour, and these occasions were noted in the day logs or agendas of Mr Wright and Mr Daye.

3. Mr Daye was Mr McLellan's immediate supervisor in the Wood Room. At the Inquiry, Mr McLellan expressed a different version of some of the events described in the notes of Daye and Wright (Exhibit 4) and in some instances did not recall an occasion described in the evidence of Mr Andrew Wright. For example, it had been noted that Mr McLellan was spoken to about hanging out with the operators in the Wood Room during shift. Mr McLellan acknowledged that there was an occasion where hanging out with the operators was discussed, but not that it was an "issue". Mr McLellan recalled the discussion as being that Mr Daye told him to be sure his cleaning job was being done – not that he could not hang out with the operators. Mr Wright's recollection of this issue was that the Wood Room Operators had complained about some level of interference in doing their jobs by the uninvited presence of Mr McLellan in their control booths, prompting the necessity for Mr McLellan to be spoken to by superiors.

4. Similarly, Mr McLellan once stated that he could not recall any discussion during his time at MacTara about the Wood Room not being kept clean enough. However, he related an incident where he had to speak to Mr Wright about another employee, who was supposed to be sharing the cleaning duties, not doing what this other employee was required to do. This situation occurred within a couple of months of Mr McLellan's arrival at the company, and the other employee was slightly senior to Mr McLellan.

5. Based on the evidence heard from Mr Wright and Ms Willigar, I understand that Mr McLellan experienced some difficulty fitting in with the prevailing culture at MacTara. Mr McLellan expressed himself on an internal job posting of December 7, 1999, as being of "more use" to the company in a higher rated position than as a Wood Room Cleaner. Ms Willigar found this "pushy". Other internal applications by Mr McLellan dated December 1999 and March 2000 expressed a similar theme. Both Mr Wright and Ms Willigar felt that this demonstrated that Mr McLellan did not want to be in the job that he was in, that he was "better" than the Cleaner job. Mr Wright and Ms Willigar drew the same conclusion from the occasion or occasions when Mr McLellan spent some time

in Wood Room Operators' booths, inquiring about how the operators ran their machinery. I believe that it is relevant to this point that Mr McLellan conceded, on cross-examination, that he may have told the Wood Room Operators that "I was doing the same kind of job" and that he felt himself "almost equal" to them.

6. Having listened closely to all of Mr McLellan's evidence at this Inquiry, including his argument, it is my view that he has a healthy and confident sense of his own abilities. This confidence can sometimes exceed his actual ability or competence, measured objectively. For example, he was asked about his comments on the job posting of April 3 2000, when he claimed the ability and experience of having operated a "loader". This was not in fact correct. When claiming the ability to operate the loader, he says that he meant that he had operated a tractor with a bucket on the front, and that he believed that he had the skills to be able to be trained to operate the loader. When asked the direct question by counsel for the Commission about whether he in fact had operated a loader, Mr McLellan's answer was that he had "not done that before".

7. Another example of Mr McLellan's sense of self-esteem exceeding his actual skills or competence arises from his reaction to his termination by MacTara in April 2000. Mr McLellan said that after sitting at home for several weeks, he decided to go into business for himself. He advised the Inquiry that the steps he took to go into business for himself were to obtain a business name (which was a name very similar if not identical to the name of a concern with which he had worked in the United States), to make up signs, to prepare pamphlets on his computer about his business, and to distribute them. Other than one unaccepted proposal for landscape work, a bartered landscape job with a chiropractor, and perhaps a couple of other jobs producing revenue of about $2000, Mr McLellan described no other steps about setting up

this business. There was no information about opening bank accounts, arranging for accounting assistance to set up business books of account or doing so on his own with commercial software, obtaining GST billing numbers, developing a business plan, or even where he was offering his landscaping services. Actually starting a business is a much more complex affair than Mr McLellan's description suggests. Again, this tells me that his actual skills and abilities do not in fact match his claims.

8. This evidence about the business set – up and the loader application, in the context of all the evidence that I heard, demonstrates to me a tendency on the part of Mr McLellan to exaggerate his experience and skills and efforts. There are other examples of this kind of thing in his evidence which are not necessary to recite. I do not take his exaggeration in an entirely negative way because I do not think this exaggeration arises from an intention to mislead. The tendency to exaggerate instead is a consequence of Mr McLellan's good opinion of himself, of his skills, and of his adaptability to different work situations. His exaggeration is significant to me in coming to the conclusions I have reached in this decision, because I have had to exercise caution with the evidence of Mr McLellan. I do not accept it wholeheartedly, and sometimes not at all.

9. I have also assessed the evidence of Mr Andrew Wright and Ms Bernadette Willigar carefully. On an objective basis, they should have been pleased to have acquired an employee like Dwayne McLellan who had a good opinion of his own skills and adaptability, who had a long-term interest in advancing within the company over time and enhancing his remuneration, and who had an interest in learning about the higher rated jobs and operations of the business. What seems to have discomfited Mr Wright and Ms Willigar was Mr McLellan's impatience at being stuck in the entry-level Wood Room Cleaner job. Although some people had moved through that position quickly in the past, the workforce situation at MacTara from September 1999 through to April 2000 did not provide an early opportunity for Mr McLellan to move out of that position. Mr McLellan's obvious restlessness at remaining in that cleaning position was described as both "pushy" and regarded as a demonstration of an inability to work appropriately with others. It is my view that this attitude on the part of Ms Willigar and Mr Wright significantly influenced their thinking about Dwayne McLellan when the decisions about his physical restrictions began to be made.

10. Both Ms Willigar and Mr Wright were quite candid in saying that they believed that Mr McLellan did not want to be in the Cleaner job. I believe that they were correct in that impression. I also understand that on April 4, 2000, Ms Willigar and Mr Wright believed that to give Mr McLellan any other permanent job at MacTara would be the equivalent of giving him a promotion from the Cleaner job outside the normal promotion process. That perception eventually led Ms Willigar at least to the conclusion that Mr McLellan was exploiting the opportunity of an alleged workplace injury to obtain a promotion out of the Cleaner job.

11. There could be some support for that inference in the evidence of Mr McLellan himself. Within less than 2 weeks of his termination by MacTara when he was not capable of doing much physical labour, Mr McLellan says that he told Dr Sheehy to give him a note or authorization that he was not in fact physically restricted in any way. Mr McLellan said he wanted unemployment insurance and so could not be physically restricted. Dr Sheehy complied with Mr McLellan's request (Exhibit 1, Tab 29). Mr McLellan reported no physical complaints about any landscaping, forestry or factory work that he has engaged in since April 2000, most of which has been described as physically demanding. Added to these concerns is the impression left with me by Dr Sheehy's evidence. His recollection after 4 years was necessarily weak. He did not recall, for example, why he had made the critical prognoses on March 25, 2000, that Mr McLellan was unable to perform his Wood Room Cleaner job "until further notice", and to avoid the tasks of that job "for the foreseeable future" (Exhibit 1, Tab 26). He even tried to ask Mr McLellan, during his testimony and in response to questions from Commission counsel, if Mr McLellan could help him with the answer to that issue. One might therefore legitimately wonder what the actual and medically necessary restrictions were on Mr McLellan's functioning in April 2000, and who was the critical decision-maker in that doctor-patient relationship. Dr Sheehy obviously relied heavily on self-report data from Mr McLellan to make his diagnoses and prognoses, but I accept his opinion that Mr McLellan was in fact physically disabled from late February until early April, 2000.

12. I am not prepared to conclude based on the whole of the evidence that Mr McLellan was promoting a false physical restriction in March 2000 in order to avoid having to continue in the Wood Room Cleaner position. I am prepared to conclude that it was unknown on April 4, 2000, how long it would take before Mr McLellan was no longer physically restricted in what he could do. I am prepared to conclude that Mr McLellan would have recognized and did recognize that his physical limitations provided an opportunity, or enhanced his opportunity, to perhaps move out of the cleaner position.

13. As a result of my assessments of credibility and the whole of the evidence in this case, I have decided that what actually happened here was ultimately the result of Mr McLellan permitting an exaggerated statement of his true physical restrictions being made to MacTara and others. Actual physical restrictions existed in March 2000 and at the time of Mr McLellan's termination. As Mr McLellan healed through rest and physiotherapy in April, the stated restrictions became exaggerated. They were likely exaggerated even on April 4, 2000. The situation was complicated for everyone by the discovery in March of a predisposing but not causative degenerative disc problem. Mr McLellan was more able than had been recorded on paper. Unfortunately, by April 3 and 4, 2000, Mr Wright and Ms Willigar were responding more to their perception of Mr McLellan's attitude than to his real physical restrictions.

14. MacTara called Robin Godfrey of Atlantic Gardens, a retailer, wholesaler and grower of landscape and gardening materials. Mr McLellan was once an employee at Atlantic Gardens. Robin Godfrey testified, and his evidence was actually confirmed in all major respects by Mr McLellan: that Mr McLellan talked freely of his potentially disabling disc issue, his motivation to recoup significant financial compensation from MacTara, the fact that Mr McLellan claimed to have worked in the landscaping business in the United States as early as October 2000, and at least one nonCustoms entry to the United States. The evidence about Mr McLellan's employment in the United States, which seems to have been undocumented employment without U.S. government authorization, was first raised in this case during Mr McLellan's evidence in chief. Mr McLellan and Atlantic Gardens are currently in the midst of legal proceedings in which Atlantic Gardens has a financial claim within the jurisdiction of the Small Claims Court against Mr McLellan.

15. All that I take from Mr Godfrey's evidence is what Mr McLellan himself confirmed, but that still tends to further reduce my confidence in the trustworthiness of Mr McLellan's evidence. I would have come to the conclusions I did about the reliability of Mr McLellan's evidence without hearing from Mr Godfrey.

Proof of Disability

16. Under the *Human Rights Act*, s.3(l)(ii):

> "physical disability or mental disability" means an actual or perceived . . .
> (ii) restriction or lack of ability to perform an activity, ...

17. Although not mentioned in his direct evidence before me, nor in his initial claim to the Workers' Compensation Board, I understand that Mr McLellan believes that he began having soreness in his back as a result of the extra cleaning work required because of a machinery disorder in the Wood Room in mid to late February, 2000 – specifically a hole in one of the Wood Room conveyors. Exhibit 6 was reviewed by Mr Andrew Wright, who confirmed that there "must have been" a hole in the 501 conveyor and chip screen – though the date of the work order would indicate that this was a problem at the beginning of February. Mr McLellan's reports to Dr Sheehy tend to indicate a putative date of injury as February 21, 2000. In any event, I do accept that Mr McLellan's work requirements in February 2000 resulted in a developing soreness in his back as a result of the shovelling, lifting, twisting, and sweeping that the cleaning job required.

18. Mr McLellan identifies February 20, 2000 as “around” the date when his back pain had accumulated to the point where he felt unable to go to work. Dr Sheehy’s notes indicate February 21. Mr McLellan called in sick for one day, and then went on 5 or 6 scheduled days off. The back pain did not dissipate, and that is when Mr McLellan visited Dr Sheehy - on February 28, 2000. Dr Sheehy recommended another 5 days off, and in due course filled out documentation for Workers’ Compensation and MacTara about a “muscle pull” affecting Mr McLellan’s back and shoulders. Dr Sheehy prescribed an anti-inflammatory medication.

19. When Mr McLellan returned to work in early March he was placed in the filing room, assisting the filing room employees with their work sharpening and repairing saw blades and other cutting implements. This was not physically demanding work. Mr McLellan says that this placement was in response to his request for something that was easier on his back. Mr Wright, who placed Mr McLellan in the filing room, says that the placement was at his initiative. It really matters not whether Mr Wright or Mr McLellan first broached the idea of alternative duties. Mr McLellan was able to do the work he was given in the filing room, and MacTara had a need for catch-up work to be done in the filing room.

20. I understand from the evidence that while this file room work constituted a modified work opportunity for Mr McLellan at the time, the company did not yet have an actual, formal Modified Work Program in place for injured employees in March, 2000. The work provided to Mr McLellan was not, as Mr McLellan claimed, “a work hardening program to rehab me into my regular position”. The limited filing room tasks given to Mr McLellan were tasks that fit Mr McLellan’s physical abilities at that time. He was not expected or permitted to perform all of the tasks required of those who worked in the filing room. Mr McLellan says that the filing room work was easier on his back but the pain was not going away. There was nothing about the work that attempted to rehabilitate his ability to sweep or shovel.

21. As the excess work in the filing room was coming to completion, so was Mr McLellan’s claim to the Workers’ Compensation Board for the work time he had missed. The Workers’ Compensation decision arrived at MacTara on April 3, 2000, and fixed on the fact that in late March, Mr McLellan had been diagnosed as having 2 degree Degenerative Disc Disease – a non-work related, noncompensable injury. Meanwhile, Dr Sheehy had provided an update to MacTara on or about March 25, 2000, indicating greater restrictions on Mr McLellan’s physical functioning than had existed at the time of his first report on or about March 6, 2000 (Compare Exhibit 1, Tabs 20 and 26). There was also a report prepared for the WCB on March 10, 2000 by Dr Sheehy (Exhibit 1, Tab 22), that would have been in the hands of MacTara, identifying Dr Sheehy’s diagnosis as “rhomboid strain”, or muscle strain, requiring treatment by physiotherapy.

22. The receipt of these reports about Mr McLellan did not provide Mr Wright or Ms Willigar with any guidance as to when Mr McLellan would again be able to do his job as a Wood Room Cleaner. In fact, the March 25, 2000 "Treatment of Memorandum" (Exhibit 1, Tab 26), said that Mr McLellan was "fit for Modified duties . . . until further notice", and that:

> *X-rays show T6 – 7 disc degeneration. The problems he has are consistent with this diagnosis. I feel he should avoid the shovelling, [and] heavy lifting [with] repetitive turn movement for the foreseeable future.*

23. Mr McLellan did not provide any further information to MacTara about his condition. That was the evidence of his "restriction", and constitutes the basis of the "disability" finding that I make pursuant to s.3(l)(ii) of the *Act* – an actual or perceived restriction on Mr McLellan's ability to do his job. It was an actual physical restriction that existed from about February 21, 2000, and continued to exist on April 4, 2000.

24. Before turning to MacTara's response, there was one other piece of information that came to the attention of Mr Wright and Ms Willigar before the termination decision of April 4, 2000. That additional piece of information was the "Treatment of Memorandum" apparently submitted by a physiotherapist (who did not testify herself) that indicated that Mr McLellan was fit for modified duties "Until: unable to say at this time". Ms Willigar says that she asked the physiotherapist in a telephone conversation to suggest duties that would "speed up his recovery process", but no such suggestions ever got made. It was Dr Sheehy's view that physiotherapy was an integral part of the healing process for Mr McLellan's disability. He testified that with physiotherapy, a cure could be effected within a few weeks or perhaps months. Unfortunately, he did not say so explicitly on any of his communications with MacTara or the WCB prior to April 4, 2000.

25. Based on the foregoing, I am able to conclude and do conclude without doubt that in March and April 2000, Mr McLellan had a real and existing physical disability that restricted his ability to perform his job as a Wood Room Cleaner at MacTara. This restriction was a disability within the meaning of s.3(l)(ii) of the *Human Rights Act*. The existence of this disability was known to MacTara, even if its dimensions and potential duration were imperfectly understood.

The Decision to Terminate

26. The decision to terminate Mr McLellan from his employment at MacTara was made by Ms Bernadette Willigar, after discussion with Mr Andy Wright. Mr Wright informed Mr McLellan of the termination during the day shift on April 4, 2000. Although he was to be escorted from the property, Mr McLellan ran off to Ms Willigar's office to confront her about the termination decision. I have no doubt that Mr McLellan found the decision to terminate his employment an upsetting surprise. As a result, I believe that his memory of who said what, and exactly what was said, is not reliable. I appreciate, as he argued, that this was a significant and memorable life event. However, I do not find his memory of his encounters with MacTara personnel on April 4, 2000, reliable. For example, if he had testified that Mr Wright told him that the decision had been made "higher up", I would have believed that based on what Ms Willigar herself had to say, and the fact that Ms Willigar was involved in the termination decision. I do not accept Mr McLellan's assertion that it was Ms Willigar who told him that the decision to terminate him had been made "higher up".

27. I also do not believe that Mr Wright told Mr McLellan on April 4, 2000, that he was terminated because he was "prone to injury down the road". Mr Wright said that that was "absolutely false". I believe and accept that denial as the truth. Mr Wright did not have any information and had not made any inquiries prior to April 4, 2000 about the significance of the degenerative disc disease into the future. Mr Wright's own evidence acknowledges that all he knew about the degenerative disc disease was based on the WCB decision received April 3. All that he concluded from the Worker's Compensation decision in relation to the degenerative disc disease was that Mr McLellan's injury did not happen at work.

28. I also do not believe Mr McLellan's assertion that Mr Wright said "We have no duty to accommodate you" in the course of the termination discussion with Mr McLellan. First, I believe Mr Wright's denial about saying this to Mr McLellan. Second, this assertion by Mr McLellan only arose during the course of cross-examination by counsel for MacTara. Had it really been said, I have no doubt that Mr McLellan would have been careful to mention that in his direct evidence, as he was with respect to many other issues of fact. This is not something that he would likely forget, even under the stress of testifying at a proceeding such as this Inquiry. It is, again, an exaggeration or perhaps a conclusion that Mr McLellan drew from his conversation with Mr Wright. It is not something that Mr Wright said. I accept Mr Wright's testimony that he knew there was an obligation to accommodate to the point of undue hardship. The evidence also shows that Ms Willigar was making inquiries of the physiotherapist about that very issue prior to April 4, 2000, and that MacTara had in fact been accommodating Mr McLellan since early March.

29. What I find was said at the time of termination, based primarily on the evidence of Mr Andrew Wright, was that Mr McLellan was being terminated because he could not do his job, his injury did not happen at work, and there was nothing else available that he could do. I find that the explanation provided by Mr Wright to Mr McLennan about why he was being terminated was said sincerely in the sense that it was what Mr Wright believed to be the truth.

30. In response, I believe that Mr McLellan raised the issue of the posted loader operator job. Mr Wright was not prepared to consider Mr McLellan for that position. At the time Mr Wright was, to use his own word, "frustrated" about Mr McLellan's situation. Given his previous interactions with Mr McLellan, neither he nor Ms Willigar were prepared to consider that Mr McLellan had demonstrated sufficient ability to work with others to deserve or justify a promotion, and any other position beyond cleaner would have required a promotion. I do not need to decide what was actually said in the back and forth about the posted loader position because even if he had been the most qualified and most senior candidate, I am not prepared to assume that Mr McLellan was physically able to perform the tasks of a loader operator on April 4, 2000.

31. All of these findings allow me to conclude that MacTara, through Mr Andrew Wright and Ms Bernadette Willigar, made an employment decision about Mr Dwayne McLellan based in part on a "physical disability" that he had on April 4, 2000. That is, MacTara made an employment decision about Mr Dwayne McLellan on April 4, 2000, based in part on "an actual or perceived restriction or lack of ability to perform an

> 5(1) No person shall in respect of . . . (d) employment . . . discriminate against an individual or class of individuals on account of. . . (o) physical disability . . . .

33. Under the *Human Rights Act*, an employment decision that is based *in part* upon a prohibited ground like actual or perceived physical disability is an act of "discrimination". This is explained in authorities such as *Bernard and CHRC v. Waycobah Board of Education* (1999), 36 C.H.R.R. D/51 (Can. Trib.), at paras.39, 41; and *Basi v. Canadian National Railway Company* (1988), 9 C.H.R.R. D/5029 (C.H.R.T.), at paras.38496 and 38497.

Duty to Accommodate

34. A defence exists to any prima facie case of discrimination under s.6 of the *Human Rights Act*:

> 6(1) Subsection (1) of Section 5 does not apply . . . (e) where the nature and extent of the physical disability or mental disability reasonably precludes performance of a particular employment or activity; . . . .

35. The parties all submitted that this case was really about the scope of MacTara's duty to accommodate. Mr Wood suggested that the duty to accommodate is part of what is involved in a bona fide occupational qualification. Although similar issues arise when assessing bona fide occupational qualifications and the duty to accommodate, I am of the view that they are distinct inquiries under the Nova Scotia *Act*. Whether someone is *reasonably* precluded from a particular employment or activity is dealt with under s.6(1)(e), while the "defence" of a *bona fide* qualification is dealt with in s.6(1)(f)(i).

36. I understand all the parties to be in agreement that on April 4, 2000, Mr McLellan was unable to perform the necessary tasks of a Wood Room Cleaner. Had this agreement not appeared, it is a finding that I would have made based on the evidence that I heard. I was not persuaded, nor was it pressed in argument, that the Wood Room Cleaner job requirements could realistically be changed for Mr McLellan. The job reasonably required shovelling, sweeping, twisting and turning and lifting. Therefore, what I need to address under s.6(1)(e) of the *Act* is MacTara's duty to accommodate someone who could not physically do those things.

37. The extent of an employer's duty to accommodate physically disabled employees under s.6(1)(e) of the *Human Rights Act* is to accommodate to the point of undue hardship. The test, taken from *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance),* [1999] S.C.J. No.46, at para.54, is:

> . . . it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

38. The purpose of accommodating the physically restricted was described in the earlier case *of Central Okanagan School District No.23 v. Renaud*, [1992] 2 S.C.R. 970, at para.25:

> The case law of this court has approached the issue of accommodation in a more purposive manner, attempting to provide equal access to the workforce to people who would otherwise encounter serious barriers to entry.

39. In the specific context of this case, the question that must be addressed in considering this defence for discrimination is this: *Whether the nature and extent of Mr McLellan's physical disability reasonably precluded performance of work at MacTara?* I can find that the actual or perceived disability reasonably precluded performance of work at MacTara if I find that it would cause undue hardship to MacTara to accommodate Mr McLellan's ability to work: *Shirley v. Eecol Electric (Sask.) Ltd.* (2001), 39 C.H.R.R. D/168 (Sask. Bd. Inq.), at para.43.

40. Determining what is "undue hardship" is the same as determining what is "reasonable" in terms of accommodation: see again, *Central Okanagan School District No.23 v. Renaud*, *supra*. I base my conclusions about what is reasonable under s.6(1)(e) of the Nova Scotia *Act* on the authorities referred to me by the parties, and particularly *Conte v. Rogers Cablesystems Ltd.* (1999), 36 C.H.R.R. D/403 (Can. Trib.), at para.81:

> In considering whether Rogers has met its duty to accommodate Ms Conte, the relevant inquiry is: at the time of making its decision to terminate Ms Conte, did Rogers make proper inquiries to determine the nature of her disability, what was the prognosis, what accommodation was required, and was there other work that Ms Conte could do? It is clear that Rogers did not make any of these inquiries.

41. See also, *Metsala and Ontario Human Rights Commission v. Falconbridge Limited* (2001), 39 C.H.R.R. D/153 (Ont. Bd. Inq.), at paras.40 and 47.

42. I am not suggesting that there is some procedural obligation in the duty to accommodate. The duty to accommodate however does involve the employer finding out what they can about the time and capacity dimensions of the physical

restriction afflicting their employee. Having informed themselves as much as possible, the employer must consider whether there is something that the employee can do.

43. Mr Wright and Ms Willigar were both questioned about work placement decisions for Mr McLellan. On April 3, 2000, they had medical advice that Mr McLellan could not lift beyond 5 kg. This was a reduction from the 10 kg permitted by medical advice given soon after the claim of injury. The inability to perform regular duties was extended from about 3 weeks at the beginning of March to the "foreseeable future" at the end of March. In addition to the inability to perform regular duties, it was discovered between the beginning and end of March that Mr McLellan apparently had a degenerative disc disease.

44. On paper, Mr McLellan's health situation was looking bleaker on April 3 than it had about a month earlier. This should not have been cause for alarm. Health conditions are dynamic, and may get worse over time before getting better. As it was, Dr Sheehy left the Inquiry with the impression that there really had not been a fundamental change in Mr McLellan's condition between March 10 and 25, 2000. There had really only been a change in what he wrote on MacTara's form. MacTara could and would have discovered this by calling Dr Sheehy. Dr Sheehy indicated on MacTara's form that he was willing to be contacted. Ms Willigar had contacted the physiotherapist. I conclude that neither Mr Wright nor Ms Willigar informed themselves as much as they could have about the dimensions of Mr McLellan's physical restrictions before terminating him.

45. What is important is that on April 3, 2000, it was correctly understood by everyone that Mr McLellan was not able to do the tasks required of the Wood Room Cleaner. There was no necessary significance to Mr McLellan having being placed on lighter duties and the failure of his health condition to immediately improve. That, however, is what appears to have frustrated Mr Wright and clouded Ms Willigar's thinking. I expect that Mr Wright's frustration and Ms Willigar's perceptions about what needed to be done were influenced by their attitude towards Mr McLellan as a result of the other workplace issues that I discussed earlier at paragraphs 7 and 11. The disability was a medical condition, and understanding the dimensions of that condition required care and patience that Mr Wright and Ms Willigar did not provide.

46. This obligation to patiently and carefully assess a disabled employee has existed in human rights law for some time. For example, this was said in *Belliveau v. Steel Co. of Canada* (1988), 9 C.H.R.R. D/5250 (Ont. Bd. Inq.), at para.39568:

> 39568 The structure of the Code places the onus upon the employer to establish that the handicapped person is incapable of performing

> the essential duties of the job, and at the same [time] establish that the employer cannot take affirmative steps to reasonably accommodate the individual's handicap. . . . Undoubtedly, this approach was taken by the Legislature because many employer's prejudge the ability of the handicapped to their disadvantage, and it is within the employer's knowledge as to what the essential duties of the job are, and what are the possibilities of reasonable accommodation.

47. This assessment of ability is supposed to be a dialogue involving the disabled individual. Again, from the *Belliveau* decision, *supra*, at paras.39607 and 39609 – 39610:

48. 39607 In my opinion, a disabled person in Mr Belliveau's position must effectively communicate that he clearly believes he is capable of doing the essential requirements of the job. An employee cannot simply remain silent when decisions are made in good faith that affect his interest, and say later that the company failed to take initiatives. Mr Belliveau was the person mainly responsible for not quickly sorting out and clarifying his medical situation following upon the June 6 rejection of his regular duties at Stelco. . . . 39609 Thus, there must be a delicate balancing of the interests of employer and employee, as seen in the instant situation.

> 39610 Stelco had reasonable grounds for thinking the complainant was medically unfit. However, it did not take all the steps appropriate to determine the issue of fitness.

49. Of specific relevance to this case and the continuing assessment of changing health conditions, see also*: Wilson v. Douglas Care Manor Ltd.* (1992), 21 C.H.R.R. D/74 (B.C.C.H.R.), at paras.21 - 23.

50. In this case, MacTara initially accommodated Mr McLellan's physical restrictions in early March by placing him in the filing room. I accept that by April 3, 2000, the work made available in the filing room to Mr McLellan was nearing the end of its availability. Mr McLellan had assisted that area in catching up with its own workload. I also accept that there was not a permanent or even temporary vacancy in that department that could have been filled by Mr McLellan. I accept the evidence of Mr Andrew Wright and Ms Bernadette Willigar that there was no other job available on that date in which to place Mr McLellan, given the apparent restrictions on his ability to work. No one has suggested that MacTara should have bumped any other employee back to the cleaner position to make way for Mr McLellan to have work that was within his capabilities. I do not think such a thing would have been reasonable.

51. Mr Andrew Wright did say that if it had been known when Mr McLellan could

return to full duties, and if that time was 2 or 3 weeks, then he could probably have continued to employ Mr McLellan. MacTara would have found something for Mr McLellan to do for a relatively short period of time, until he could return to "his regular position". They could not create a new job for an indefinite future period. They could also not partition duties from the Wood Room Cleaner position for an indefinite period because that would require the hiring of a second person to do the remaining work for an indefinite period.

52. An employer is not required to create positions, to make work, for an indefinite period of time. As discussed in *Re Canada Post Corp. and C.U.P.W.(Godbout)* (1993), 32 L.A.C.(4) 289 (T.A.B. Jolliffe):

> I do not understand that the issues of productivity and ability to perform should be considered in quite the same light as with temporarily disabled employees who are expected to recover to the point of full capacity. It is one thing to structure temporary light duties to assist a person toward recovery where the emphasis need not be on the economic worth of the activity to much or any degree. The alternative, after all, is to place the employee on paid injury/illness leave for a time while recovery continues. It is quite a different issue when structuring duties suitable for a disabled person on a permanent basis which I suspect invites more weight to be placed on the productivity/financial cost side of the equation. There might be any number of temporary modified duties situations which can develop which do not bear up well under the scrutiny of undue hardship when it is a matter of accommodating an employee on a permanent basis.

53. I would obviously equate "indefinite" with "permanent" here, and adopt the reasoning in that case as applicable to assessing undue hardship in the human rights context.

54. Since MacTara could have found something for Mr McLellan to do for a short time, I come to the conclusion that the termination on April 4, 2000, was based more on frustration with Mr McLellan and his employment attitude issues than it was on his current inability to perform all of the duties of the Wood Room Cleaner position. As mentioned earlier, a termination will still be discriminatory even if it is not exclusively for discriminatory reasons. Unfortunately, the frustration and other emotions felt by Mr Wright and Ms Willigar in dealing with Mr McLellan's situation distracted them from what they should have done here. The termination was based in part on the physical inability to do the Wood Room Cleaner job, and was not the necessary alternative in the circumstances.

55. In accommodating an employee's physical restrictions, an employer should have

a free hand to assess the disability and assign employees through its operations. All this Board should do after the fact is assess the evidence to determine whether there is something that could reasonably have been done that would have been less burdensome for Mr McLellan. Is there something that could reasonably have been done that would have been less catastrophic than the termination of his employment? This is important because I do not see my role as deciding the accommodation issue by considering whether MacTara should have promoted Mr McLellan to a loader position or an operator position. The question is whether the evidence has established that there was a reasonable alternative that was less drastic for Mr McLellan than the step MacTara chose to take. That is the spirit in which I draw the following conclusions.

56. It was apparent to me that the absence of a fixed return date was problematic for MacTara. They had few work options for Mr McLellan and an unknown dimension of time within which this kind of accommodation would have to continue. If the absence of a fixed return date was indeed a problem for MacTara on or about March 26, 2000, then Mr Wright or Ms Willigar should have made enquiries of Dr Sheehy and Mr McLellan about that. If degenerative disc disease was a concern, enquiries ought to have been made about what specifically was its prognosis and likely contribution or detraction from Mr McLellan's abilities. This obligation of assessment has been established by the cases cited earlier, and particularly *Metsala, Belliveau, and Wilson, supra*.

57. If there was no work available that Mr McLellan could do that was easier on his back than the Wood Room Cleaner job, and if Mr MacLellan did not qualify for any other open positions with the company, Mr Wright or Ms Willigar should have presented Mr McLellan with the fact that there was a difficult choice to make. Either he could be re-assessed to determine whether he could go back to the Cleaner job, or he could be laid off until such time as MacTara had work available that Mr McLellan was capable of doing, or until he was physically able to do his Wood Room Cleaner job. A similar approach was initially taken in the *Wilson* case, *supra*, at para.21.

58. We know that in fact Mr McLellan and his physician felt that he could work without physical restriction by April 17, 2000. Mr McLellan did not ask about going back or trying to go back into his regular position at the time of his termination. Mr Wright and Ms Willigar did not ask about that – partly because the forms indicated that he was unable and partly because they did not believe that he would ever be willing to go back to the Wood Room Cleaner position.

59. I have concluded that MacTara did not do the things it should have done with respect to Mr McLellan's physical disability because of an animus that had developed towards him by Mr Andrew Wright and Ms Bernadette Willigar, and perhaps others, over the short course of Mr McLellan's employment. There

were accommodations MacTara could reasonably have offered but did not, including layoff, that would have provided time for Mr McLellan to heal properly. Therefore, I conclude that the discrimination based on physical disability was neither the exclusive, nor likely the primary cause of the termination. However, without the discrimination based on physical disability, his physical restriction as a result of injury, the termination would not have happened. Therefore, Mr McLellan is entitled to a remedy.

Remedy

60. A remedy in this matter should attempt, so far as possible, to put the parties back in the same position that they would have been in had the discrimination not occurred. I have been satisfied by the evidence that if Mr McLellan had not been terminated on April 4, 2000, he likely would have continued to work at MacTara until the layoffs of December 27, 2000. I expect that after that date, Mr McLellan's employment at MacTara would have been sporadic at best, and that it is more likely than not that Mr McLellan would have pursued more regular employment elsewhere – as he in fact did. In addition, the contingencies of being thrown out of work in 2000 would have resulted in the same kind of employment efforts as Mr McLellan in fact engaged in after his termination. I am not convinced that Mr McLellan's desire for stable, long-term employment at MacTara would necessarily have persisted through the layoffs that have occurred since December 2000.

61. Because of his termination, Mr McLellan made some efforts at self-employment, and then pursued employment in the United States commencing in October, 2000. I have considered the various significant dates in Mr McLellan's health and employment history since April 4, 2000 as described by counsel for MacTara, and have concluded that in order to make him whole as a result of the discriminatory decision, he should be compensated for lost income for the period from April 17 to October 1, 2000.

62. April 17, 2000, is the date that Dr Sheehy was prepared to say that Mr McLellan was no longer physically restricted in his functioning at all. While Mr McLellan's motivation for this change in his status may have been the ability to acquire unemployment insurance, I am of the view that the time frame fits with the general prognosis laid out by Dr Sheehy for Mr McLellan to get better from his overuse injury due to rest and a course of physiotherapy. I also accept that Dr Sheehy was prepared to identify this date as when Mr McLellan was able to perform any kind of work – as Mr McLellan in fact did without medical incident after that date.

63. October 1, 2000, is the date that fits with Mr McLellan's resume of employment provided to Atlantic Gardens in 2001 (Exhibit 10). That is the date when Mr McLellan recommenced employment for his brother's father-in-law in the Philadelphia area of the United States. This was employment that Mr McLellan chose. I am left in a state of uncertainty by Mr McLellan as to the precise

amount of his earnings, or the value of his work, while in the United States. Had the value of his earnings been fully reported to government, it would have been a straightforward matter to prove. Therefore, I am not prepared to consider that any income was "lost" after October 1, 2000.

64. Mr McLellan was earning $9.12/hour at the time of his termination. His loss of income should be calculated at that rate multiplied by the number of regular hours of work per week between April 17 and October 1, 2000. This calculation should not include any overtime beyond the half hour per day that was part of the normal workday. The income calculated should include pay for statutory holidays between April 17 and October 1, 2000 worked by the shift with which he had been associated when he was Wood Room Cleaner. Vacation pay in the amount of 4% should be added to the total income figure. As Mr McLellan received "pay in lieu" of notice at the time of his termination, that amount should be deducted from the loss of income calculation to determine an amount payable by MacTara to Mr McLellan. I expect the parties to be able to calculate the loss of income figure. In the event that the parties are unable to do so by June 30, 2004, I retain jurisdiction to receive submissions and, if necessary, evidence as to the appropriate calculation for the loss of income.

65. In addition to the monetary portion of this award, I am ordering that Mr McLellan have what he should have expected to have if he had voluntarily terminated his employment – a recommendation for a new employer. This letter of recommendation should identify the dates between which Mr McLellan was employed, his record of absences during that time, and the advice that during his employment as a Wood Room Cleaner there were no formal discipline proceedings taken against him.

66. I note that these proceedings arose as a result of events in March and April, 2000. It is now June, 2004. I have not been informed by counsel or by evidence as to the cause of such a long delay. It causes the Board concern. However, not knowing the cause of the delay, I am not prepared to order any interest on the monetary award for lost income.

67. I have considered and rejected Mr McLellan's request for reinstatement. I do so for several reasons:

- 1. I do not know whether there is a vacant entry position towhich to restore Mr McLellan;
- 2. I have already explained that Mr McLellan's termination wasnot exclusively the result of physical disability discrimination. He was terminated with notice;
- 3. the passage of time has been lengthy and the workplaceadjustments at MacTara since would mean that a reinstatement order could unintentionally

privilege Mr McLellan above other longer term MacTara employees who today remain on layoff;

- 4. Mr McLellan doubts that reinstatement would be a positive experience for himself;
- 5. I do not believe that it would benefit the public interest,or serve any instructive purpose for MacTara, in any way.

68. In coming to these conclusions, I have considered *Ford Motor Company of Canada Ltd. et al. v. Ontario Human Rights Commission et al.* (2001), 209 D.L.R.(4th) 465 (Ont. C.A.), and Christie's *Employment Law in Canada*, particularly at paragraphs 5.173 and 5.174, with its thoughtful analysis concerning the purpose and efficacy of the reinstatement remedy.

69. It has been suggested that I order MacTara to conduct general Human Rights training for its managers. Counsel for MacTara advises that this is already done. In any event, I am not prepared to make the order requested. The decision to terminate Mr McLellan was a breach of s.5(1)(e) and (o) of the *Human Rights Act* because it *in part* was based on physical restriction, and MacTara failed in its duty to sufficiently accommodate that physical restriction. The failure to accommodate was not an absolute failure, since some inquiries were made by Ms Willigar of the physiotherapist about what work Mr McLellan could do, and Mr Wright provided alternative duties for about a month leading up to the termination decision. Any order for rights training should be limited to the specific managerial failures in this case, and that educational function will no doubt be achieved by circulation of this decision among MacTara managers.

70. It has been suggested that MacTara be ordered to pay general damages to Mr McLellan as compensation for the discriminatory decision that deprived him of employment at MacTara. I will do so but I am not making this award based on Mr McLellan's asserted emotional distress after his termination. He was confident and aware enough of his own abilities to pursue what he saw as a wrong decision by the WCB. He was comfortable enough to be able to instruct his doctor to remove any restriction on his ability to work. He made efforts that he believed were steps to establishing his own business. He spoke freely about his disc condition and his dissatisfaction with MacTara's treatment of him to his employers at Atlantic Gardens. The general damages instead should reflect the intrinsic value of the human right that has been contravened. The case most often cited in this regard is *Cameron v. Nel-Gor Castle Nursing Home* (1984), 5 C.H.R.R. D/2170 (Ont. Bd. Inq.). A Nova Scotia application of that decision is *Morrison v. O'Leary Associates* (1990), 15 C.H.R.R. D/237 (N.S. Bd. Inq.).

71. There is always difficulty in assessing the appropriate amount to award as general damages. I am of the view that while there is a range within which general

damages of this type ought to fall, I believe that this case merits an award towards the lower end of the scale. I arrive at this conclusion because the discriminatory element of the termination decision was not the exclusive, nor the primary, motivator of the decision. In my view, the termination likely happened more because Mr Wright and Mr McLellan and Ms Willigar did not communicate effectively, than because Mr McLellan was temporarily restricted in his physical capabilities. Having said that, an abrupt decision to terminate is not an appropriate response to an employee who has developed a physical restriction that is probably temporary. I fix the award for general damages at $1000.

72. I am prepared to make an award for out of pocket expenses to Mr McLellan for travel and incidentals on the 4 days of this hearing, and which I fix in total at $200.00.

73. There will be no interest on the general damages or the out of pocket expenses.

74. All of the remedial orders made in paragraphs 49 – 66 have been made under s. 34(8) of the *Human Rights Act*. When the parties are able to calculate the lost income figure, they should agree on a form of Order for my signature.

Dated this 4th day of June, 2004.

_____
Donald C. Murray, Q.C., Board of Inquiry