

File Name: In the matter of: A complaint under the human rights act by Joseph Howard Cottreau and R. Ellis Chevrolet Oldsmobile Limited and/or Richard Ellis

Date of Decision: July 2007

Area(s): Employment

Ground(s): Physical disability

Complaint: Joseph Cottreau worked at R. Ellis Chevrolet as the Service Manager. Due to a back condition called degenerative disc disease, he was off work on short-term disability. When he returned to work, he was fired. He alleged this was because of his disability.

Decision:

Mr. Cottreau was fired due to his disability.

Accommodation up to the point of undue hardship.

An employer has a duty to accommodate an employee who has a physical disability. The employer must take the initiative to get medical opinions and advice about what the employee can and cannot do, and how long the employee will need to be accommodated. The employer then needs to find what the disabled employee can do in the workplace and then take reasonable steps to try and accommodate them.

In this case, the Board found that Mr. Ellis did not know that he had to accommodate Mr. Cottreau because of his disability – claiming instead that he dismissed Mr. Cottreau because the position did not exist anymore, and because he had been a bad employee. The Board did not accept those reasons: the work Mr. Cottreau had been doing still had to be done (it had been distributed among other employees) and the evidence suggested that he was a good and well-liked employee.

Remedy: The Board found that Mr. Cottreau had been badly affected by the discrimination and awarded the following remedies:

Individual Remedies

- General damages (emotional harm): \$10,000 plus 2.5% interest.
- Special damages (lost wages): \$8,800 plus 2.5% interest

Public Interest Remedies

- R. Ellis Chevrolet Oldsmobile shall arrange for the following training for themselves, their employees and new employees:
 - sensitivity training,
 - training with respect to the effect of power differentials in the context of discrimination
 - human rights education, particularly in reference to injured workers and workers with other disabilities
- R. Ellis Chevrolet Oldsmobile shall allow the NSHRC to monitor their employment practices for a period of 3 years.

INDEX

1. INTRODUCTION

2. BACKGROUND

3. EXHIBITS

4. EVIDENCE

5. THE LAW

6. DECISION

7. REMEDY

1. **INTRODUCTION**

[1]This matter arises out of a formal complain by Mr Joseph Howard Cottreau filed with the Nova Scotia Human Rights (Commission) dated May 26, 2004, alleging that R. Ellis Chevrolet Oldsmobile Limited and/or Richard Ellis discriminated against him in the matter of his employment because of his physical disability contrary to **Section 5(1)(d)(o)** of the **Nova Scotia Human Rights Act**, R.S.N.S. 1989, c.124, as amended 1991 c.12.

[2]A single person Board of Inquiry (hereinafter referred to as the “**Board**”) was appointed pursuant to **Section 32(a)** of the **Act** by the Chief Judge of the Provincial Court of Nova Scotia.

[3]The Parties to these proceedings are the Complainant, Mr Joseph Howard Cottreau, who is not independently represented. The Respondents, R. Ellis Chevrolet Oldsmobile Limited and/or Richard Ellis, who are represented by Mr Gregory D. Barro. The Commission is represented by Ms Jennifer H. Ross.

[4]Notice of Hearing was properly given and advertising was placed in local papers. The hearing into the complaint was held at Cornwallis, Nova Scotia, on October 11, 12, 13, 2006, at the Annapolis Basin Conference Centre, Kespuwick Hall, Broadway Avenue, Cornwallis Park, Cornwallis, Nova Scotia.

2. **BACKGROUND**

[5]The Complainant, Joseph Howard Cottreau, was employed by R. Ellis Chevrolet Oldsmobile Limited in Digby, Nova Scotia, in the early to mid-1990s leaving around 1997 and subsequently returned to work at R. Ellis Chevrolet Oldsmobile Limited as the Service Manager in 2000. He went on Short-Term Disability ("**STD**") on or about Monday, October 13, 2003.

[6]In his complaint filed with the Nova Scotia Human Rights Commission he alleges that when he returned to work on or about January 6, 2004, his employment was terminated because of his disability (back condition), contrary to **Section 5(1)(d)(o)** of the ***Nova Scotia Human Rights Act***.

[7]The Commission called as witnesses the Complainant, Joseph Howard Cottreau, Dr Roy A. Harding, the Respondent, Richard Maxwell Ellis, Wallis Norman Weir, Jr., Daniel Paul Potter, Pat Claire, and Vanessa Joyce Zinck. Gregory D. Barro did not call any evidence on behalf of the Respondents.

B.

3. ***EXHIBITS***

1. Exhibit Book
2. Copy of File of Canada Life Assurance Company

4. ***EVIDENCE***

[8]The Complainant, Joseph Howard Cottreau, testified he is presently 41 years of age. He is separated and has lived in the Digby area all his life. He graduated from High School in 1982, followed by two (2) years in Vocational School in Middleton, Nova Scotia. He has also had courses through General Motors as a Service Advisor.

[9]He is now employed by Belleveau Motors in Digby for the past two and half (2 ½) years and runs their Parts Department. He had previously been employed with Ellis Chev Olds. He initially started there in 1993 or 1994, he left around 1997 and came back.

[10]He was employed in a Small Engine Repair Shop when he was approached by Richard Ellis to go back to work as a Service Manager in 2000.

He was on salary at \$550.00 per week or \$30,000.00 per year. Benefits included Medical and two (2) weeks vacation, but no sick leave. Nor was there any provision for overtime.

[11]His job duties included among other things: making customer appointments, making sure the technicians kept busy as they were on flat rates, looking after payroll, opening and closing work orders.

[12]At the time there were four (4) Technicians plus one (1) fellow who just did oil changes. The Parts Department had two (2) employees. The Body Department had two (2) employees. Sales had four (4) to five (5) Salespersons at the time plus other persons in the Office. Administration consisted of a Financing Officer, Wally Weir, and a person on the phones.

[13]Richard Ellis was the Dealer Principal and the head of sales. Ellis Chev Olds was a full service dealership and he reported to the General Manager, Danny Potter and Richard Ellis. Joseph Cottreau's hours were 8:00 a.m. to 5:00 p.m. Sometimes he would come in earlier and he used to also help in the Parts Department.

[14]Joseph Cottreau testified that he has Degenerative Disc Disease in his lower back plus scar tissue which causes back pain. Every once in a while he will have a back spasm which causes a curvature of the spine and pain. He is now 41 years old, he has had this since he was 18 or 19 years old. At times it will take him to his knees and he cannot drive or walk. Sleeping is not comfortable. It is not constant but comes and goes over more than twenty (20) years.

[15]He has a nine (9) year old daughter. At times he cannot pick her up. He cannot lift anything heavy. In fact he is scared to lift anything. Nor can he drive when his back is in

spasm. He can work as long as he does and will usually get a young fellow to do any lifting and tugging or to move something. This condition will prevent him from going to work probably twice a year. Sometimes for three (3) or four (4) days, sometimes a week at a time.

[16]He has had Spinal Epidurals, Cortizone shots, Nerve Blocks, and Steroids injected. He has also had Message Therapy and Physiotherapy, where he was put on a TENS Machine, a Treadmill, and Rack. He has been referred to a number of specialists by Dr Harding.

[17]On October 11, 2003, Saturday, he was preparing to take his daughter to his nephew's wedding when his back spasm'd around 8:00 or 9:00 a.m. He got his daughter to call his ex-wife to come and get her and then called his sister to take him to the hospital where he attended at the Outpatient Department. He got a shot of Demerol in his hip. He did not go to the wedding that day. He called Wally Weir Sunday night and told him he was not coming in on Monday. He would take care of telling Danny Potter and Richard Ellis.

[18]On Monday he went to see Dr Harding who gave him pain killers. He subsequently started receiving Disability Benefits. Wally Weir from the Dealership brought the forms to his house. He did not recall when exactly. He did not receive any salary from the Dealership while on Disability. The cheques went to the Dealership and Wally Weir brought them to him, or other friends brought the cheques out to him.

[19]While on Disability Joseph Cottreau testified he went in to the Dealership quite a bit. He saw Wally Weir and other friends, Rick Milne in Parts, Kevin Brown, Technician. He also talked to Allan in Parts. They also came out to his house to see him and see how he was getting along.

[20]He saw Richard Ellis a very few times in person when he went to the Dealership. Most of the time he would speak to Danny Potter, General Manager, to tell of his status.

He generally would see Danny Potter two (2) or three (3) times a week when he went into the Dealership. Richard Ellis when he did see him did not seem like he wanted to talk about it and would just turn and walk away.

[21]Joseph Cottreau said he made it clear to Danny Potter that he was off because of his back condition.

[22]If any doctors' notes were handed in, Wally Weir would have looked after those as he handled the Insurance. While he had taken time off before, two (2) or three (3) times a year, he had never been on Short-Term Disability before.

[23]In addition, when he was off, Wally Weir would bring over the Payroll and he would help him do it. This would generally consist of reviewing the work orders and tabulating the Technicians' hours.

[24]In describing the Work Orders, Joseph Cottreau stated initially when he first started they were handwritten but then when he returned to Ellis Chev Olds in November 2000 it was all computerized. Work Orders could be made up by Vanessa Zinck or himself. Sometimes Ricky who worked in Parts would also open a Work Order, but he did not close them. Vanessa Zinck did all of the Warranty Work Orders. He never did any of them and he did not think that anyone else did in his absence.

[25]In December he met with a Representative from Canada Life, he also believed that she was in contact with Dr Harding. He also believed that she was going to be talking with Richard Ellis regarding a return to work. At that time his spasms were gone but he still had some discomfort and pain. He understood the plan was to start off with three (3) hours a day for a couple of weeks and gradually move to an eight (8) hour day over a couple of weeks at a time. This would start the first part of January after the holidays. His next contact with the Canada Life Representative was the day he was terminated when he called and told her that.

[26]In December he was also told by several people in town that he was apparently no longer working at the Dealership. One was a Frank MacIntosh, who he has known since he was a kid, also a customer at the Dealership, as well as a lady in the grocery store whose name he cannot now recall.

[27]He went to see Danny Potter about this and was told he did not know where they were getting their information from. Danny Potter stated, **"Your job is there when you come back to work"**.

[28]The day before he went back to work he dropped into the Dealership to work out his hours. He spoke to Danny Potter and Kevin Brown. It was determined that his hours would be from 9:00 a.m. to 1:00 p.m. The next day he dropped his daughter off at school around 8:30 a.m. and then went to the Dealership. At approximately 10:00 a.m. he went to speak to Richard Ellis who told him that his services were no longer needed at the Dealership. Joseph Cottreau was referred to the Record of Earnings which appears as Exhibit "1" Tab "9". The reason for dismissal from work was **"shortage of work"**. This was not Joseph Cottreau's understanding. In fact, after he left, Wally Weir was switched to the Service Department from Accounting. It was busy at that Dealership. There were a lot of repeat customers.

[29]Joseph Cottreau said no one ever spoke to him with problems regarding the Warranty Work Orders; with losing money on the Work Orders from GM; Nor about time off.

[30]On days that he was not able to come in he would usually call in the morning and speak to either Danny Potter or Rosie, who was always in the office early.

[31]After he was terminated he got a job at Belleveau Motors on April 22, 2004. He had

applied by word of mouth and talking to friends. He was given a job offer from Canadian Tire but did not take it. The job at Belleveau Motors was a pay cut. He is now on an hourly rate. He was earning approximately \$30,000.00 when he left Ellis Chev Olds and now he makes \$22,000.00 to \$23,000.00.

[32]On Cross-Examination Joseph Cottreau noted the additional work that he did as Service Manager as opposed to being a Service Advisor was that he applied for Warranty Work, he worked the extra time, did the Payroll and Hours, he oversaw the Work Orders, consulted with the Technicians regarding the Work Orders, would test drive vehicles for customers or with Technicians. He also attended other courses through GM in person in Halifax as well as on the computer. He believed that he was paid more than the Service Advisor, but did not know what she was paid.

[33]When asked about his salary he confirmed that his take home pay was \$550.00 per week, gross was \$700.00 and some odd dollars. While he was on salary some days that he took off he was docked pay. He was aware that Richard Ellis has an open door policy. He confirmed that the Initial Intake Questionnaire, at Exhibit "1" Tab "1" page 2, he wrote that Richard Ellis had told him **"a service manager was no longer needed at his dealership"**. He also felt that Canada Life had let him down by cutting off benefits as of January 3.

[34]Dr Roy A. Harding, Joseph Cottreau's physician, testified he has been seeing Joseph Cottreau as a Patient since July 1992. Joseph Cottreau has reoccurring back pain and he has been referred to the Pain Clinic on at least three (3) occasions, and also to Dr Walker and Dr Connolly in Kentville, and to Dr Oxner in Halifax, Nova Scotia.

[35]Dr Harding's Chart Notes were reviewed in detail. Dr Harding noted that he had a lot of recurring back pain which would go from chronic to acute. Dr Harding was in fact the doctor at Outpatient's and saw Joseph Cottreau on October 11, 2003. As well in his office on October 14, 2003, when it was noted he had marked Scoliosis. Coughing would increase the pain level. Joseph Cottreau has in fact been diagnosed with Degenerative Joint Disease and Lumbar Disc Disease. These problems cause chronic back pain.

Dr Harding recalled with Pat Claire, Insurance Representative, who attended at his office and did discuss an Ease Back Program for Joseph Cottreau with her.

[36]Richard Ellis, Respondent, testified that he is now 69 years of age. He is the dealer, principal, businessman and the owner of Ellis Chev Dealership, and has been for some twenty-eight (28) years. Before that he had a Texaco Distributorship, Wholesale Retail, for some eighteen (18) years, in which he employed up to eight (8) people at a time. Also a wood operation in which he employed up to twenty (20) people at a time. This involved buying land, cutting logs, and pulpwood.

[37]When he took the Texaco Dealership he was twenty-four (24) years old, the youngest in

Canada. Before this he had an Independent Service Station from 1959 to 1965. He was twenty (20) years old when he took over the Service Station. He has a Grade 11 education. He has taken courses over the years and been involved in Community Affairs. He was Chair of the Digby Hospital for some six (6) years and on the Board for sixteen (16) years and he is a member of the Hospital Foundation.

[38]He has not taken any specific management courses, but rather the "***school of hard knocks***".

[39]In managing employees he has not relied on others except when he had the woods operation he had a Foreman to supervise.

[40]The company is now known as Ellis Chevrolet Limited, he no longer sells Oldsmobiles. That changed approximately a year ago. His Dealership now has twenty-two (22) or twenty-three (23) employees. That is reasonably constant, although it has increased a bit in the last couple of years. When he first opened in October 1978 he had fourteen (14) to fifteen (15) employees. He had at least two (2) more employees then when Joseph Cottreau was there. He now has in the Service Department one (1) oil changer, five (5) to (six) technicians, and two (2) service advisors, but no service manager.

[41]When Richard Ellis first heard from Human Rights about Joseph Cottreau's complaint he thought it was a joke and threw it in the waste basket because he had done nothing wrong and this whole process was a complete farce. It was done as a business decision and nothing else. He saw it as a way to save money and increase his profits. Richard Ellis testified he terminated very few people over the years, no more than two (2) including Joseph Cottreau. Joseph Cottreau's position was eliminated.

[42]Richard Ellis denied approaching Joseph Cottreau at his previous place of work in 2000; however agreed that it was possible that he had asked him to come back as a service manager because he knew the business and he had no faults with him other than Joseph Cottreau's time off and not telling people that he was not coming in. He was the first person to start questioning the Service Department to get the monthly statements and was always on the lookout to make it more profitable. His Service Department was in fact losing money. With Joseph Cottreau off work no one was hired to take his place. It was filled by Vanessa Zinck and Ricky from Parts. It was almost a year later before he hired anyone else full time. He has not hired anyone as a Service Manager.

[43]Richard Ellis testified that he does not keep a diary and at the time document problems with employees. He did not document Joseph Cottreau's days that he missed or when he spoke to any employees. As Service Manager he had been paying Joseph Cottreau approximately \$30,000.00 per year; he now has a Service Advisor, paying half of that and saving approximately \$15,000.00.

[44]Richard Ellis spoke of a service or warranty audit conducted by GM in 2002 or 2003 whereby he lost work costing him some \$20,000.00. That is when the Service Department first became a concern to him. He could not recall speaking directly to Joseph Cottreau but everyone knew it because he preached to all including some of the Technicians.

[45]Richard Ellis spoke of complaints that he received from other employees and customers about Joseph Cottreau. He could not recall specifically at to what the complaints were but he agreed that not all were necessarily valid. He did not document the complaints.

[46]When asked about Joseph Cottreau's absentee time, he also agreed that he did not document this. It was noted that it was his impression that Joseph Cottreau would take more time off than others. When he made any inquiries he was always told he was sick but he had no idea as to what sort of sickness. He was in fact aware that Joseph Cottreau did have a back condition. He never spoke to Joseph Cottreau regarding his back, made any inquiries as to what could be done to make Joseph Cottreau more comfortable, or to buy any ergonomic chairs, or accessories to make the job more comfortable for Joseph Cottreau.

[47]Richard Ellis spoke of being suspicious of Joseph Cottreau's absences, stating they always seemed to come at the first of the week.

[48]Richard Ellis spoke of when someone was sick the procedure would be for them to come in and tell him that they were going to be off work or that the doctor was putting them off on disability. He then reviewed several other employees including Fred Spatz, Ronnie Merritt, Evan Banks, but he got nothing from Joseph Cottreau. In fact he spoke to Joseph Cottreau **"very few times"**.

[49]Richard Ellis believed he had the right to know his employee's status and that the employee has an obligation to tell him when he is going to be coming back, if he is coming back, or how long he will be off. However he could not say what conversations he had with Joseph Cottreau. Basically they **"hardly talked"**.

[50]Richard Ellis recalled a meeting with Pat Claire, Canada Life. However he did not recall any of the conversation. He does not believe that she talked about an Ease Back

Program. He doubts that he would have discussed eliminating the Service Manager's position with her.

[51]Richard Ellis then testified that he did not know Joseph Cottreau was coming back on January 5. No one had come to him. He was surprised to see Joseph Cottreau in the Service Department that morning. Richard Ellis did not know why he did not tell Joseph Cottreau immediately that the job was no longer there. He had no explanation as to why he waited until Joseph Cottreau approached him around 10:00 a.m.

[52]Richard Ellis stated that he did not consider Joseph Cottreau for another position or any type of reorganization or any other options. This was **"strictly a business decision based on financial performance"**. He did however agree that he told Joseph Cottreau **"his services were no longer required at the Dealership"**, and that if Joseph Cottreau had not been off on sick leave or Short-Term Disability he probably would not have reached the decision to eliminate the service manager's position when he did. That decision probably would have taken longer to come to.

[53]Richard Ellis also agreed that Joseph Cottreau's sick leave did in some way play a role in his dismissal.

[54]Richard Ellis spoke of the Warranty Audit done by GM and it costing him \$20,000.00 due to the poor documented Work Orders. He agreed that he knew very little of the Warranty work or requirements and depended on employees to look after that. He had no independent recollection of speaking to Joseph Cottreau or Vanessa Zinck about that problem. While he agreed that Joseph Cottreau was not the Warranty Clerk he was in fact responsible because he was the Manager of the Service Department.

[55]Richard Ellis spoke of Joseph Cottreau's poor attitude to fellow workers and customers. He agreed that Joseph Cottreau could be overbearing, gruff, abrasive, but he could not name any fellow workers who complained and took no customer complaints in writing. He

agreed that some complaints were probably not all valid. He could not answer why he had not spoken directly to Joseph Cottreau regarding them.

[56]Richard Ellis was referred to Exhibit "1" Tab "12", the Statement of Pat Claire, and whether or not he had told her that **"he felt strongly that Cottreau knew he was about to be fired and chose to go off on disability"**.

[57]Richard Ellis did not recall saying that but if she said it, it was probably said.

[58]When asked whether or not he felt strongly whether Joseph Cottreau knew he was going to be fired, Richard Ellis said he did not know; and whether or not he recalled telling Pat Claire that Joseph Cottreau was unreliable, he admitted he probably did. He probably made the comment that Joseph Cottreau did not call in. However he could not say how many times Joseph Cottreau failed to call in. He made those comments through his own observations. As well as the statement that Joseph Cottreau had missed more time than all ten (10) employees combined. However, this was not documented at the time.

[59]Richard Ellis stressed that there was **"no plan to fire Joey Cottreau before the end of October"**.

[60]After Joseph Cottreau was gone the customers hardly noticed any change whatsoever. Business went on as usual.

[61]When asked about whether or not he was aware of any duty to accommodate to the point of undue hardship Richard Ellis said that he had never heard of that before; although he agreed that the Company was not approaching bankruptcy and at no point was he unable to pay his bills, he was making due, and he was not prevented from meeting payroll, except perhaps that particular department.

[62]When asked about who filled in after Joseph Cottreau was off, Richard Ellis said Ricky Milner from the Parts Department filled in when necessary. Although he was not sure for how long. That was a stop gap solution. Wally Weir subsequently came to him and indicated that he would like to be Service Advisor, so he moved to Service and Richard Ellis hired a new Clerk in the Accounting Department around March. There was no change in salary for Wally Weir. Ricky Milner when back to doing Parts. The Clerk he hired for Accounting saved him between \$10,000.00 and \$15,000.00 from Joseph Cottreau's salary. He subsequently hired another Technician for the Service Department.

[63]Steve MacDermitt came in as a Service Writer. Although Richard Ellis was not sure when. He just stayed a short time. As well, Vanessa Zinck helped out at the Service Desk as well as Matt O'Neill who used to do the oil changes.

[64]Richard Ellis testified that he does not have an Employee Manual or Policy and Procedure Manual, although GM does, and that each Department has a copy of the same. He had no policies regarding Human Resources, such as Sexual Harassment, or joking in the workplace. The issue of Pay Equity has never come up. Richard Ellis stated that basically all male and female staff doing the same job are paid basically the same. He was not aware of the GM Policy regarding Harassment.

[65]Richard Ellis told Gregory Barro that when Joseph Cottreau went off in October there was some thought of changing the Service Department because it had been losing money. There have been no recent complaints concerning the Service Department from staff and no more than usual complaints from the Customers.

[66]Richard Ellis testified that he realized that he did not need to have a Service Manager when he (Joseph Cottreau) was off for three (3) months and the Department ran smoothly without him.

[67]Wallace Norman Weir, Jr., called Wally Weir, testified that he was forty-seven (47) years of age, employed at Ellis Chev for some six (6) years. He was previously employed at Conway Co-op in Digby. His current position is as Service Advisor. He waits on Customers, he arranges the Technicians' work for the day. Before that he worked in Accounts Receivable and Payroll. The Company has approximately the same number of employees now as in 2003. He was friends with Joey Cottreau, although not before they worked together at the Dealership. He no longer sees him on a social basis.

[68]He was the one responsible to coordinate the medical benefits, fill out the forms, and file the Employee/Employer forms and doctors' forms. He was also listed as the contact person for the Disability Insurer. He recognized the letters that appeared as Exhibit "1" Tab "1" at pages 9, 10, and 11 from Canada Life. It was all placed in Joseph Cottreau's file. He does not think that he showed them to Richard Ellis, nor did Richard Ellis ask to see them.

[69]When Joseph Cottreau was off on Disability he did help with the Service Department, generally a couple of hours a day, off and on when Vanessa Zinck needed help. He did consult with Joseph Cottreau while he was off for help calculating the Payroll for the Tax and reviewing the Work Orders, four (4) to five (5) different times approximately every two (2) weeks. He was not sure if Vanessa Zinck could have done it but she was generally too busy.

[70]When he was referred to Exhibit "1" Tab "9", he identified the Record of Earnings he signed on January 7 for Joseph Cottreau. He entered the Code A. This document was prepared by ADP, an outside Payroll Service. He requested ADP to prepare it. He was not sure of when. Richard Ellis had come to him and said he needed a Record of Earnings. He probably did the same day or around the same time. When it was pointed out to him that Joseph Cottreau was fired on January 6, he agreed it was possible that Joseph Cottreau came to him before that day. He could not recall his discussions with Richard Ellis. The normal procedure was to request ADP to do it and they would send it

out with the next pay cheques. Generally it would take a week or so. He instructed ADP to enter Code A on Richard Ellis' instructions.

[71]When asked about the procedure when someone called in sick, Wally Weir testified there are no records kept. If it was someone in the Service Department they were to call the Service Manager or person in charge of the Department. He also stated that Joseph Cottreau would usually call in on any day that he was not coming in.

[72]Daniel Potter testified that he is fifty-five (55) years of age and has been employed for the last six (6) years as the Sales Manager for Ellis Chevrolet. Previously he had worked as a Car Salesman for probably three (3) years. The Dealership currently has around twenty (20) employees and it was about the same when he started. The level of sales has been steady in the last eight (8) or nine (9) years. He has four (4) Salesmen under him plus himself. He reports to Richard Ellis. No one in the other Departments report to him; although when there is talk of hiring or firing someone the other Department Heads might discuss it with him as he knows everyone in the area. They would look for his opinion. He testified there is no Department Head in Service. Wally Weir is working there and Vanessa Zinck is the Warranty Clerk among other jobs and Ronald is the Body Shop Head.

[73]When asked about a Policy or Procedure Manual, he said that GM has one and agreed that it was about two (2) inches thick. He never referred to it. He believes there are chapters on employees and on harassment polices and the like. It was more of a reference manual such as a dictionary. He was not aware of any other Human Resources Manuals at the Dealership.

[74]Daniel Potter has know Joseph Cottreau for some twenty (20) years. He was there when he became Service Manager around 1997 and then when Joseph Cottreau left and came back. He believed that he was involved in bringing him back as he recalled talking to Joseph Cottreau as to what he would want by way of pay and the like to return to the Ellis

Dealership. He would not have done this had he been aware of any previous problems with Joseph Cottreau.

[75]He was not aware of anyone abusing sick time privileges. He had no knowledge of Joseph Cottreau's back condition although he heard about it. He had no reason to doubt that he had a back disability.

[76]When asked about Joseph Cottreau's absences from work, he said he probably would have heard about it at the time. But if Joseph Cottreau was not there he would deal with someone else in that department. Joseph Cottreau may have been absent more than one (1) day at a time two (2) or three (3) times that he could recall other than the last time.

[77]When Joseph Cottreau was off he would call in and tell him that he had been to see the doctor or this or that and be off for another several weeks. He talked with Joseph Cottreau on a regular basis. Joseph Cottreau would generally call first thing in the morning and he agreed that Joseph Cottreau had some other contact with people at the Dealership to file documents. He believed he would usually tell Richard Ellis about it and Richard Ellis would say little or nothing. He presumed that Joseph Cottreau was in contact with Accounting as that is how he got paid.

[78]Daniel Potter did have discussions with Richard Ellis about eliminating Joseph Cottreau's position as Service Manager. He did not recall any discussions about keeping Joseph Cottreau on in another position. They had looked at the Service Department several times and reviewed the facts and figures at the end of each month. At one point there was some discussion about closing the whole Department as it was costing approximately \$20.00 for every vehicle that came through the door. That Department had three (3) Administrative positions. The Department had to increase the volume or make it more efficient. When Joseph Cottreau was off the Department saved by not paying him. As he recalls, the Department was losing \$8,000.00 per month.

[79]Daniel Potter recalled telling the Human Rights Investigator that if Joseph Cottreau had not been off work he probably would still be the Service Manager as it probably would not have come to their attention that they could operate without that position. Previously they felt that position needed to be filled, but once Joseph Cottreau was not there it was realized that his position was not necessary.

[80]Other changes besides eliminating Joseph Cottreau's position was to hire more people to do the actual work; that is more technicians or mechanics. Daniel Potter insisted that Joseph Cottreau was not being eliminated but his position was.

[90]Daniel Potter testified that he thought that Joseph Cottreau dealt with people well. Vanessa Zinck did the paperwork, but Joseph Cottreau could get people to the counter, he could tell what they wanted, he was also decisive and could make decisions and inform customers of that decision. He would not keep them waiting or string them along. He did not receive complaints regarding Joseph Cottreau but regarding cars. He felt that Joseph Cottreau's attitude was fine or okay. He thought he would have been in a position to hear otherwise.

[91]Daniel Potter recalled Joseph Cottreau coming to him regarding the rumors in the Community that his job was being terminated. He probably told him that decision had not been made. He was not sure when the decision was made. He stated there was never any discussion modifying Joseph Cottreau's work or his position.

[92]On cross-examination Daniel Potter recalled Joseph Cottreau coming in on January 6, 2004, and not long after that him going out the door. He did not recall any discussion with him however he thought it occurred on a Monday. He did recall some discussions regarding hours of work with Joseph Cottreau, but was not sure when.

[93]The next witness was Pat Claire who is a Rehabilitation Consultant with Great West Life, formerly Canada Life. She was appearing under Subpoena and brought with her the

Great West Life file as it related to Joseph Cottreau. This was entered as Exhibit "2", and then reviewed by the Parties before the commencement of Pat Claire's evidence.

[94]Pat Claire testified that she has been a Rehabilitation Consultant for some seven (7) years. Her job is to get people back to work. She received the referral on November 26, 2003. Her first contact would have been by telephone to set up appointments with the Employer, Richard Ellis, and with Joseph Cottreau and his doctor. These appointments were all set for December 11.

[95]She met with Joseph Cottreau on December 11 for approximately 1 ½ to 2 hours. They talked about his medical background, appointments, his education, his work history, goals, as well as skills. She prepared an Initial Report dated December 15, 2003, from her notes, which notes were then disposed of.

[96]She also met with Richard Ellis that day at the Dealership. The meeting was probably 30 to 40 minutes. She testified that she was told by Richard Ellis that there was no position for Joseph Cottreau to come back to. He also told her that Joseph Cottreau knew he was about to be fired and chose to go off on disability and that Joseph Cottreau was unreliable. He would not call if he was not coming back into work. The public did not like him. He missed more time than all ten (10) employees combined.

[97]She met with Dr Harding as well on December 11. Dr Harding had not seen Joseph Cottreau since October 14 and was not prepared to say he could go back to work until he did in fact re-assess him. Joseph Cottreau made an appointment to see Dr Harding on December 16. As a result she sent Dr Harding a letter dated December 16, 2003 and Dr Harding's response is by letter dated December 22, 2003. She felt that Joseph Cottreau was able to return to work. He was not taking any medication for pain and he had what was termed a "**lighter sedentary type of job**".

[98]She next spoke to Richard Ellis on January 5, 2004, who again told her that Joseph Cottreau did not have a job to go to. She then called Joseph Cottreau on the same date and advised him to contact his employer right away about a return to work. She said he did not appear to be aware that his job was in jeopardy.

[99]She identified an email dated January 5, 2004, that she sent to Bridget L'Heureux, the Canada Life Disability Claims Examiner.

[100]She also identified in the file a file note dated November 27, 2003, by Bridge L'Heureux, in which it is noted,

“Pat also spoke with / me today to advise me that the EER has terminated Mr Cottreau’s position. The EER stated that before his DCD Mr Cottreau missed as much time as ‘the other ten employees put together’ and that the EER had planned on laying Mr Cottreau off with a severance package. The EER plans to follow through with the lay-off”.

[101]Pat Claire stated that from this note that it looked like she spoke to Richard Ellis on that date. Although she does not recall him telling her that. She does recall phoning Richard Ellis on January 5, 2004, and sending that email to Bridget L'Heureux.

[102]Pat Claire was also aware of the note of Peggy MacDonald dated November 24, 2003, in which Joseph Cottreau was reported to be a ***“malingerer”*** and that he is reported to be ***“renovating his house”***. She said for that reason the file was probably referred to her, but her role is not to investigate but to get people back to work.

[103]When she met with Joseph Cottreau she did ask him about renovations, he said it was mostly painting and he had to get his family and friends to do that. His friend Wally from work did the stucco on the ceiling. She had no idea of the time frame.

[104] Usually when someone is returning to work on an ease-back program she will send a schedule to go out to the employee, the employer and the doctor. That did not happen in this case.

[105] Vanessa Joyce Zinck was also called by the Commission. She is employed with R. Ellis Chevrolet Oldsmobile and termed herself a **“jack of all trades”**, she acts as Customer Service Representative for Hertz, Assistant Administrator, and Training Coordinator. Vanessa Zinck stated she had been an employee with R. Ellis Chevrolet Oldsmobile for the past nine (9) years except for two (2) months that she spent at Convergies. She initially started work as a Service Advisor. At one point she left the Service Department to do Warranty Work. She has been back and forth between the two.

[106] Vanessa Zinck was questioned regarding her interview report which appears at Exhibit “1” Tab “13”. In particular the statement at question 4 about, **“it seems like he was never here”**. She stated this statement referred to him picking up customers’ cars or returning them, it was all part of Dealership work but not necessarily the Service Manager’s job. When she referred to him **“never here”**, this was not part of sick leave times. She had no recollection of how long his sick leaves were or how often he took them. She understood the main reason he was off work was because of his back problem.

[107] At the Dealership there was no set policy or procedure if someone was taking time off from work. If you were sick you informed the people involved.

[108] She also stated Joseph Cotreau missed the occasional day when his back went out on him.

[109] If she was sick she would call Rosie, the Accountant.

[110] Vanessa Zinck testified that when Joseph Cotreau was away on Disability it was realized that the work was being done just as effectively as when he was there; and that

they did not need the position of Service Manager as the work was done anyway. Some people would help out in the Service Department, Ricky from Parts would come over a few times, and Wally from the Front Office, and Matt as well if she had to go someplace. When she was in the Dealership at the end of June she thought that Wally and Stan MacDonald were both in the Service Department. They were both doing service work.

[111]When asked about whether or not you need two (2) people in the Service Department, Vanessa Zinck stated it depended on the ability and experience of the people involved.

But there was enough to justify two (2) people.

[112]Vanessa Zinck testified that the Hertz Franchise did not really result in more work for the Service Department but it did take away any spare time that she had and she could no longer fill in for Wally.

[113]With regard to complaints about Joseph Cottreau being rude, she said a few people did not want to deal with him, they found him intimidating. She had no recollection of discussions about these complaints with Richard Ellis.

[114]She advised that she was not consulted or asked for her input regarding the dismissal of Joseph Cottreau.

5. ***THE LAW***

[115]In making my Decision I am guided by a number of well established Principles as set out in the case law. They are as follows:

Burden of Proof

[116]It is well settled that the Burden is that of the Civil Standard which is being described as being on a balance of probabilities. This was defined by Adjudicator Bright in **McLellan v. Mentor Investments Limited** (1991) 15 CHRR D/134 (NS Board Inquiry Inq) at paragraph 16,

“The civil burden or preponderance of evidence or proof of fact on a balance of probabilities has been described as follows: that degree is well settled. It must carry a reasonable degree of probability but not so high as is required in a criminal sense. If this evidence is such that the Tribunal can say we think it is more probable not the burden is discharged, but, if the probabilities are equal, it is not. Milner v. Minister of Pensions [1947] 2 All E.R. 372 (CA) at 374 per Lord Denning”.

[117]Thus the burden in the present case is on Joseph Cottreau to establish a **prima facie** case on the civil balance of probabilities that his employment was terminated because of his disability.

[118]The Supreme Court of Canada in **O’Malley v. Simpsons Sears Limited** (1985) 7 CHRR D/3102, at D/3108 [para. 24782] it is stated,

“The Complainant in proceeding before Human Rights Tribunals must show a prima facie case of discrimination. A prima facie case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the Complainant’s favour in the absence of an answer from the Respondent Employer”.

[119]The relevant prohibition against discrimination in the Human Rights Act is as follows:

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

[120]Physical disability or mental disability" is specifically defined in the Act as follows:

- “3 In this Act,
(l) physical disability or mental disability means an actual or
perceived
(i) loss or abnormality of psychological, physiological or
anatomical structure or function,
(ii) restriction or lack of ability to perform an activity,
(iii) physical disability, infirmity, malformation or
disfigurement, including, but not limited to, epilepsy and
any degree of paralysis, amputation, lack of physical
coordination, deafness, hardness of hearing or hearing
impediment, blindness or visual impediment, speech
impairment or impediment or reliance on a hearing-ear
dog, a guide dog, a wheelchair or a remedial appliance
or device,
(iv) learning disability or a dysfunction in one or more of the
processes involved in understanding or using symbols
or spoken language,
(v) condition of being mentally handicapped or impaired,
(vi) mental disorder, or
(vii) previous dependency on drugs or alcohol”.**

[121]Discrimination is defined at Section 4 of the Act as follows:-

“For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or class of individuals not imposed upon others or which withholds or limits

access to opportunities, benefits and advantages available to other individuals or classes of individuals in society".

[122] Thus the Complainant must first show that he had a disability or was perceived to have a disability within the meaning of the Legislation and that he was wrongly treated by his or her employer and that there was evidence from which it could be concluded that the disability was a factor in the adverse treatment.

[123] In ***Silvester v. British Columbia Society of Male Survivors of Sexual Abuse*** (2002) 43 CHRR D/55, at paragraphs 30 and 31 it was stated,

"To succeed the Complainant need only show that the ground alleged was a factor in the Respondent's conduct. It does not need to be the sole or overriding factor".

[124] And at paragraph 32,

"Accordingly to establish a prima facie case the burden is on the Complainant to establish that she had a disability, the Respondent refused to continue her employment and it is reasonable to infer from the evidence that her disability was a factor in that refusal".

[125] Thus once the Complainant has demonstrated that he was suffering from a disability within the meaning of the **Act** or is perceived to have a disability and that this disability was a factor in his termination he has made out a **prima facie** case and the burden then shifts on to the Employer to show that they were unable to accommodate the Complainant to the point of undue hardship.

Burden on the Employer

[126]The leading case in this area is that of the Supreme Court of Canada commonly referred to as the **“Meiorin Decision”**. **British Columbia Public Service Employee Relations Committee v. BCGEU** (1999) 35 CHRR D/255 SCC. This standard is now generally framed as to whether the Employer is able to demonstrate that the standard or freedom from a disability or particular characteristic is a bona fide occupational requirement and that it is impossible to accommodate individual Employees sharing the characteristics of the Claimant without imposing undue hardship upon the Employer.

[127]This issue or defence has not in fact been raised in the present case.

[128]In Nova Scotia the duty to accommodate has been considered in **McLellan v. McTarra** No 2 (2004) 51 CHRR D/103 (NS Board of Inquiry), at paragraph 34 where it was stated,

“The extent of an Employer’s duty to accommodate physically disabled Employees under Section 6(e) of the Human Rights Act is to accommodate to the point of undue hardship”.

[129]And further on at paragraph 37, it was stated,

“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”.

[130]And at paragraph 46, a question was framed,

“Is there something that could reasonably have been done that would have been less catastrophic than the termination of his employment?”

[131]This duty to accommodate also appears to place the burden on the Respondent Employers to make enquiries about the Complainant’s condition. See paragraph 57, ***Hall v. Seetharamdoo*** (2006) CHRR D/06-502 (NS Board of Inquiry).

[132]The failure to obtain medical opinions or advice by the Employer was also a factor in the Decision, ***Shirley v. Eecol Electric (Saskatchewan Limited)*** (2001) 39 CHRR D/168 (Saskatchewan Board of Inquiry).

6. ***DECISION***

[133]In the present case Joseph Cottreau testified that he has had a longstanding back problem, deteriorating discs in his lower back, which will cause his back to “***spasm***” to the point of causing Scoliosis or curvature of the spine into an “***S***” shape with great pain, which would prevent him from doing most jobs. He has had this condition for almost twenty (20) years.

[134]His evidence in this regard was confirmed by Dr Harding, who testified he has been treating Joseph Cottreau since 1992 and that he has chronic back pain which will on occasion spasm and become acute.

[135]A review of the doctor’s Chart Notes indicate many consultations for back pain over the years.

[136]I am therefore satisfied that Joseph Cottreau suffers from a back condition or disorder which would constitute a disability within the meaning of the **Human Rights Act** and that this condition restricts his abilities or otherwise impairs his ability to function.

[137]Having therefore found that Joseph Cottreau does have a disability within the meaning of the **Act** the burden is then as previously noted shifted to the Employer.

[138]In this case the Employer did not argue that there was a bona fide occupational requirement that someone in Joseph Cottreau's position not suffer from his particular disability; nor did the Respondent argue that it was impossible to accommodate a person such as Joseph Cottreau.

[139]Instead the Respondent has argued that this was simply a business decision based on financial performance. Richard Ellis insisted throughout his testimony that the decision to terminate Joseph Cottreau was based on the premise that Joseph Cottreau's position was being terminated and not Joseph Cottreau himself.

[140]This evidence is simply not accepted. It flies in the face of Richard Ellis' conversations with Pat Claire, who in her initial meeting with Richard Ellis was told that there was no position for Joseph Cottreau to come back to, that Joseph Cottreau knew he was about to be fired and chose to go off on disability and that he was unreliable, the public did not like him, he would not call if he was not coming back to work, and he missed more time than all ten (10) employees combined.

[141]None of these complaints were substantiated during the Hearing. In fact, the evidence was that Joseph Cottreau would in fact call if he was unable to go to work. There was no evidence led that Joseph Cottreau missed more time than all ten (10) employees combined. Nor was it substantiated that Joseph Cottreau was unreliable or that the public did not like him.

[142]Certainly, Joseph Cottreau appeared to get along reasonably well with his fellow employees, most of whom testified that they visited him at home and saw him socially; although their relationships certainly petered off over time.

[143]While Richard Ellis may have eliminated the position of “**Service Manager**” the work that Joseph Cottreau was doing still had to be done and was in fact accomplished through the shifting around of the duties and responsibilities of other employees.

[144]The lines of responsibility at R. Ellis Chevrolet Oldsmobile Limited were certainly unclear. Joseph Cottreau and most of the other employees seem to look upon Daniel Potter as the General Manager and he was the first one they went to if they had any problems or questions. However, Daniel Potter stated his job was just solely that of Sales Manager and that no other Departments reported to him.

[145]Richard Ellis also raised the argument that because of the two (2) negative Warranty Audits it showed that Joseph Cottreau was not doing his job. However this complaint was also not substantiated. In fact it was unclear as to when these Audits had been performed in relation to Joseph Cottreau’s employment at the Respondent Dealership.

[146]The Respondents made no attempt to accommodate, in fact Richard Ellis testified that he had never heard of that duty to do so.

[147]While there may have been some economic reasons to eliminate Joseph Cottreau’s position, I am satisfied that Joseph Cottreau’s disability was in fact a factor in his dismissal. In my opinion most likely the major factor.

[148]In short, the Complainant, Joseph Cottreau, does in fact have a disability within the meaning of the **Act** and he has been adversely treated as a result of that disability in that his employment was terminated.

[149]In view of the foregoing I am persuaded on the balance of probabilities the actions of the Respondent, Richard Ellis, in terminating Joseph Cottreau's employment violated the ***Nova Scotia Human Rights Act*** pursuant to **Section 5(1)(d)(o)**.

[150]While there was no evidence as to the Shareholding of the Corporate Defendant, R. Ellis Chevrolet Oldsmobile Limited, now R. Ellis Chevrolet Limited, it was clear from all of the testimony that Richard Ellis was the operating mind of the Corporate Respondent, and both Respondents should be held jointly and severally liable.

7. **REMEDY**

[151]The powers available to award damages in this matter are found in **Section 34(8)** of the ***Nova Scotia Human Rights Act***, which states,

“A Board of Inquiry may order any party who has contravened this Act to do any act or thing that constitutes full compliance with Act and to rectify any injury caused to any person or class of persons or to make compensation thereof”.

[152]In ***Hinwood v. Gerry Van Wart Sales Inc*** (1995), 24 CHRR, D/244 (Ont Bd Inq), in speaking of purposes of remedies and damage awards in Human Rights matters, it was stated at paragraph 33,

“These remedial provisions should be construed liberally to achieve the purposes and policies of Human Rights Legislation: Cameron v. Nel-Gor Castle Nursing Home (1984), 5 C.H.R.R. D/2170 (Ont. Bd. Inq.) At D/2196. It is a principle of human rights damage assessment that damage awards ought not to be minimal, but ought to provide true compensation. This is necessary in order to meet the objective of restitution and also to give true compensation to a complainant to meet the broader policy objectives of the Code. The objectives of the Code are to put the complainant in the same position she would have been

in had her human rights not been infringed by the respondents: Cameron at p. D/2196, paras, 18526-27. The measure of monetary damages in a case such as this is the amount that the complainant would have earned had she not been denied the employment opportunity: Cameron at p. D/2197, para. 18532; Piazza v. Airport Taxicab (Malton) Assn. (1985), 69 O.R. (2d) 281 at 284 [10 C.H.R.R. D/6347] (C.A.). The complainant in this case had a duty to mitigate her damages; however, the onus of proving a failure to mitigate lies upon the respondents, as it does in other areas of the law: Gohm v. Domtar Inc. (No. 4) (1990), 12 C.H.R.R. D/161 at D/180 (Ont. Bd. Inq.), citing Red Deer College v. Michaels, [1975] 2 S.C.R. 324”.

[153]I am also mindful of the comments made in the Decision of *Hill v. Misener*, (No. 2) (1997) CHRR, Doc. 97-215 (NS Bd Inq),

“In a physical injury, damages in the range of \$2,000.00, [sic] to represent an extremely minor physical problem which resolves quickly. People who sustain minor physical injuries do not question who they are, they do not question their self-worth, they do not question their value as human beings. An injury to one’s self-respect, dignity and self-worth is an injury that is far more destructive and painful and takes a longer time to heal than a minor physical injury.

General damage awards which have not properly applied the compensatory principles do not reflect the serious nature of discrimination and fail horribly to uphold the principles which have been established by Human Rights Legislation”.

[154]In the *Hill v. Misener* Decision, the Board found that had the complaint been made out he would have awarded General Damages of \$15,000.00 plus interest at 2.5%.

[155]Other recent Nova Scotia cases award General Damages in the range of \$10,000.00 (*Johnson v. Sanford and Halifax Regional Police Service* [2003] 48 CHRR, D/307 [Bd Inq]) to \$25,000.00 (*Willow v. Halifax Regional School Board* [2006] CHRR, D/06-284 [NS Bd Inq]). In *Nova Scotia Construction Safety Association v. Nova Scotia Human*

Rights Commission, (2006) NSCA 63, the Board awarded \$13,000.00 for General Damages.

[156]In the present case there was no evidence from Joseph Cottreau that he suffered any long term psychological damage or injury to his self-worth. In fact, Joseph Cottreau seemed to be very resilient in terms of not only his physical disability but also in his ability to seek out and obtain other employment. With regard to General Damages I therefore award Ten Thousand Dollars (\$10,000.00) together with interest at 2.5% from January 6, 2004.

[157]Joseph Cottreau is entitled to Special Damages. His position at R. Ellis Chevrolet Oldsmobile Limited paid him Thirty Thousand Dollars (\$30,000.00) annually. He was able to obtain other employment in the local area in less than four (4) months at however a lower income of Twenty-Two Thousand Dollars (\$22,000.00) to Twenty-Three Thousand Dollars (\$23,000.00) per annum. He had other job offers, however this would have involved either travel or relocation to the Yarmouth area. In this regard, I am satisfied that Joseph Cottreau has in fact fulfilled any duty to mitigate his damages.

[158]Joseph Cottreau was dismissed on or about January 6, 2004, and at the time he was given two (2) weeks severance pay. He subsequently obtained employment with Belleveau Motors on or about April 22, 2004. Sixteen (16) weeks salary at Five Hundred and Fifty Dollars (\$550.00) per week would therefore be Eight Thousand Eight Hundred Dollars (\$8,800.00), which amount is awarded to Joseph Cottreau as Special Damages, together with interest at 2.5% from January 6, 2004.

[159]Counsel for the Commission stated that this was not a case for punitive or exemplary damages and none are awarded.

[160]Of more importance in the present case are the public interest remedies. Richard Ellis, Principal of the Corporate Defendant, was unaware of any duty to accommodate. In addition, both Respondents, their present employees, and any new employees, shall take

sensitivity training, training with respect to the effect of power differentials in the context of discrimination, and in all aspects of the ***Human Rights Act*** particularly as they refer to injured workers and workers with other disabilities. In addition, the Corporate Respondent is directed to ensure that all employees and other Parties know of their rights and obligations of the employer and employee. All training is to be conducted at the expense of the Corporate Respondent. The Respondents, both Corporate and Individual, shall allow the Nova Scotia Human Rights Commission to monitor employment practices of the Respondents in any operation or business they may obtain in Nova Scotia for a period of three (3) years following this Decision.

[161]All education programs to be completed within one (1) year.

[162]While a Board of Inquiry has no power to order that the Corporate Respondent put in place clear and written policies that would aid in preventing a reoccurrence, it would strongly be recommended that they do so or at least use the Policy Manual as provided by GM as more than a dictionary.

DATED at Berwick, Kings County, Nova Scotia, this _____ day of July, A.D., 2007.

ROBERT C. STEWART, Q.C., Chair
Human Rights Board of Inquiry