

AH807-S

**IN THE MATTER OF AN ARBITRATION UNDER THE *Canada Labour Code, RSC*
1985, c L-2.**

BETWEEN:

Teamsters Canada Rail Conference

(TCRC)

-and-

Canadian Pacific Kansas City Railway

(CPKC)

Conductor Willard Calibaba – AH807 – Reinstatement Disputes

Arbitrator: Graham J. Clarke

Date: April 16, 2025

Appearances:

TCRC:

K. Stuebing: Legal Counsel

D. Fulton: General Chairman, CTY West

J. Hnatiuk: Vice General Chairperson, CTY West

W. Calibaba: Grievor

CPKC:

F. Billings: Director, Labour Relations

A. Birdsell: Manager Health Services

Supplemental arbitration held via videoconference on March 18, 2025.

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Award

BACKGROUND

1. On March 18, 2025, to the parties' credit, they initially mediated this case under the *Code*¹ to explore alternatives to having the arbitrator decide the case on the merits. Unfortunately, despite their efforts, they advised that the gap between them remained too large. They pleaded this case that same day.

2. In AH807², issued on December 20, 2022, the arbitrator upheld the TCRC's grievance and ordered CPKC to reinstate Conductor Mr. Willard Calibaba:

Disposition

54. For the above reasons, the arbitrator concludes that CP had no reasonable grounds to test Mr. Calibaba. Consequently, it had no grounds to impose any discipline.

55. The arbitrator grants the TCRC's remedial request that Mr. Calibaba be reinstated to his position with no loss of seniority and full compensation for all lost wages and benefits. Mr. Calibaba is entitled to interest on these amounts.

56. The arbitrator remains seized for any issues which result from this award.

3. CPKC has yet to reinstate Mr. Calibaba despite the December 20, 2022 statutory order or decision (also referred to herein as "SDO") issued pursuant to the *Code*³.

4. Notwithstanding that AH807 concluded that no reasonable grounds existed to test Mr. Calibaba, and despite his further passing of a reinstatement drug/alcohol test on December 27, 2022, CPKC refused to reinstate him, in part, unless he agreed to undergo a Substance Abuse Professional (SAP) assessment. CPKC maintained that Mr. Calibaba had refused to cooperate with the SAP requirement and later advised him that his reinstatement file had been closed.

¹ [Canada Labour Code, RSC 1985, c L-2](#) at section 60(1.2).

² AH807 - [Teamsters Canada Rail Conference v Canadian Pacific Railway Company, 2022 CanLII 120899](#).

³ *Code* at sections 60(2) and 66.

5. The TCRC argued that CPKC had failed to respect AH807 and that its actions, besides depriving Mr. Calibaba of access to crucial collective agreement (CBA) benefits, had further discriminated against him because of disability under the *Canadian Human Rights Act*⁴ (CHRA).

6. The Record confirmed that CPKC's failure over more than two years to respect the SDO and reinstate Mr. Calibaba has caused him significant prejudice, including both financially and to his health.

7. For the following reasons, the arbitrator orders CPKC to reinstate Mr. Calibaba immediately. This award will describe the additional compensation owing to Mr. Calababa, some of which the parties may need to calculate. The arbitrator also grants the TCRC's request for an order that CPKC pay a total of \$20,000 damages.

CHRONOLOGY OF KEY EVENTS

8. The parties filed an extensive Record for this arbitration, including entries from CPKC's Occupational Health Services' (OHS) case notes⁵. These excerpts from the Record help provide the context for this award.

9. **November 6, 2020:** CPKC terminated Conductor Calibaba's employment for "Your violation of the CP Alcohol and Drug Policy and Procedure (HR 203 and 203.1) – Canada". CP had received an anonymous tip on its Alert Line (A-Line) about Mr. Calibaba's alleged marijuana consumption and an intent to "clean his system" in the event of a urine test.

10. **December 20, 2022:** In AH807, the arbitrator ordered CPKC to reinstate Mr. Calibaba since it had no grounds to conduct a drug or alcohol test based on an anonymous tip. Certain extracts including key dates from AH807 explain this conclusion (Footnotes omitted):

5. For the reasons which follow, the arbitrator orders CP to reinstate Mr. Calibaba with full compensation and seniority. CP failed to demonstrate how an anonymous tip from its A-Line provided it with reasonable grounds to test Mr. Calibaba for drugs and alcohol. The Record also did not disclose any steps CP took under its Drug and Alcohol Policy (Policy) to ensure it had reasonable

⁴ [RSC 1985, c H-6](#)

⁵ TCRC Documents, Tab 3

grounds before proceeding with testing. Even if there had been grounds for testing, the results showed that Mr. Calibaba was not impaired when subject to duty.

...

8. May 17, 2020: CP laid off Mr. Calibaba.

9. July 31, 2020: Mr. Calibaba used cocaine during a celebratory event.

10. August 17, 2020: Mr. Calibaba was deemed fit for non-safety sensitive modified duties.

11. August 18, 2020: Mr. Calibaba was recalled from layoff.

12. August 31, 2020: Mr. Calibaba was deemed fit for full safety critical duties.

...

16. September 23-24, 2020: The parties did not dispute that Mr. Calibaba tested negative on the breath alcohol, oral fluid and urine drug tests. Mr. Calibaba, who said he agreed to a hair sample test under duress, tested non-negative for cocaine:

Cocaine quantitative level = 29.0 ng/10 mg

Cocaine metabolite (benzoylecgonine) quantitative level = 1.08 ng/10 mg.

Cocaine metabolite (cocaethylene) quantitative level= 0.81 ng/10 mg.

...

23. This case is not about CP's legitimate concerns over safety. A railway is an inherently dangerous undertaking. There have been tragic deaths in this industry. The Criminal Code and the Canada Labour Code have been amended in recent years to increase everyone's safety obligations.

...

26. But no matter how legitimate CP's safety concerns may be, the courts have established a legal framework which governs employee testing for drugs and alcohol.

...

29. The SCC made it clear that an employer cannot test first to see if it has reasonable grounds. Rather, an employer must first gather the evidence and then decide if it has reasonable grounds before any testing can take place.

...

Can an anonymous allegation provide reasonable grounds for a drug and alcohol test?

33. No.

34. These days, social media and others may treat allegations as fact. But the proportionality exercise for drug/alcohol testing requires facts not anonymous allegations. Allegations may be true. But they may also be false or made maliciously for some ulterior motive. The arbitrator has difficulty thinking of any scenario where an anonymous allegation alone would justify depriving an employee like Mr. Calibaba of his privacy rights.

35. An allegation may lead to an employer investigating a matter, but cannot, by itself, trump an employee's privacy rights given the invasiveness of drug and alcohol testing.

...

42. CP's Policy contains safeguards when analyzing whether drug testing can take place. The TCRC highlighted article 4.2.1 which provides for "reasonable suspicion" testing.

43. At first glance, Superintendent Templeton's memo seems to equate drug testing with the "reasonable suspicion" test:

I then explained to Mr. Calibaba that he was being removed from service and we were going to perform a reasonable suspicion test on him at the facility in Golden.

44. Nothing in the Record suggests a reasonable suspicion test took place before the drug testing. Neither Superintendent Templeton nor Trainmaster Jones referred to any facts which would support testing. It appears instead that they were following other people's directions to test Mr. Calibaba.

...

46. The Record contains no facts which suggest that CP followed any of these safeguards before obliging Mr. Calibaba to take a drug and alcohol test. Instead, CP seemingly relied solely on the anonymous A-Line report. The arbitrator rejects CP's suggestion that the words "including but not limited to" would somehow justify testing Mr. Calibaba in the circumstances of an anonymous A-Line report.

...

48. There is nothing in the A-Line report, or in the Record, to suggest that Mr. Calibaba appeared unfit when preparing to work on September 23, 2020. CP did not demonstrate it had reasonable grounds to test under the provisions of its own Policy.

11. **December 27, 2022:** Mr. Calibaba complied with CPKC's demand for a substance screening test. He tested negative for all substances⁶.

12. **January 5, 2023:** Mr. Calibaba completed an Employment Medical Assessment⁷ which identified various medical conditions which required further reporting.

13. **January 18, 2023:** In addition to asking for further information about certain medical conditions, OHS requested in a voicemail that Mr. Calibaba participate in an SAP assessment. An OHS occupational health nurse described the reasons for the SAP request in her notes⁸:

File reviewed - On EE's EMA in 2018, he disclosed hx of surgeries, SA, HTN, depression since 2015 and ADHD. HS previously received initial sleep study results from 2017 which was indicative of moderate OSA with RDI of 22. No follow up was done as moderate OSA was not a required condition to monitor on an annual basis at the time of hire. It was also noted that EE has elected to try lifestyle changes instead of CPAP machine. HS has received 2 MH med monitoring reports since hire which were favorable therefore monitoring was to be done with every PMA. EE did not disclose any illicit drug use in 2012 on this EMA.

Concerns: Although EE stated on the current EMA dated Jan 5 2023 that his last use of illicit drugs was in 2012, in the arbitration award, it is noted that EE used cocaine on July 31 2022 during a celebratory event.

After review of file with management, as the EE disclosed use of illicit drug use in 2012 that we were not previously aware of, it is reasonable to send this EE to have a SAP Assessment completed due to discrepancy of "last use date" and to provide a history of EEs drug use. SAP Assessment will also confirm if EE has a current SUD dx (with inquiry of use within the past 12 months).

(Emphasis added)

14. **February 17, 2023:** Mr. Calibaba's family physician, Dr. Nair, responded⁹ to OHS and advised of the impact of the 2020 termination on his mental health:

⁶ TCRC Brief, Paragraph 14. The arbitrator will rely on the parties' Briefs for dates/events when reference has not been provided to the specific page in the lengthy Record.

⁷ TCRC Documents, Tab 4.

⁸ CPKC Documents, Tab 2 at OHS notes pages 62-63.

⁹ TCRC Documents, Tab 5.

Please see below response to your request for further information on Mr Calibaba's Mental health condition.

Mr Calibaba does NOT have any mental health conditions currently.

...

He has struggled with Anxiety and Depression in the recent past (from September 2020 until December 2022) and decreased overall mental wellness during this time triggered by the wrongful termination of his employment by CP rail. This subsequently led to comfort/binge eating as a coping mechanism and contributed to the development of type 2 Diabetes from excessive weight gain/ morbid obesity of up to 317 lbs. He pulled through all this remarkably well despite COVID lockdowns and all the additional extreme stress/ anxiety he was put through by the CP rail wrongful termination period.

He has otherwise remained resilient and is currently in good spirits and cheerful. There are no concerns with this currently.

15. **February 21, 2023:** After reviewing Dr. Nair's report, OHS confirmed in its notes that Mr. Calibaba's diabetic condition was well controlled and "meets RAC standards"¹⁰.

16. **March 8, 2023:** OHS determined that Mr. Calibaba was medically fit from a sleep apnea perspective. Based on the medical evidence Mr. Calibaba submitted for a major depressive disorder, OHS required 3 months of stability meaning no return to work until March 20, 2023 at the earliest.

17. **April 23, 2023:** Dr. Nair provided another medical report¹¹ concluding Mr. Calibaba did not have a substance abuse disorder:

Mr Calibaba has had a challenging couple of years brought on by the wrongful termination of his employment by CP rail. He is alleged to have a Substance use disorder based on a hair follicle test that showed the presence of Cocaine. There was no intentional use of this as reported by Mr Calibaba. Inadvertent exposure of course cannot be ruled out. However, assuming this was not a false positive test, this CANNOT be used to claim that Mr. Calibaba has a Substance use disorder. Hair follicle tests can be positive for several months after inadvertent exposure.

In order for an individual to be labelled as having a Substance use disorder, the DSM 5 criteria needs to be met. In order for the criteria to be met there has to

¹⁰ TCRC Documents, Tab 3 at OHS notes pages 45-46.

¹¹ TCRC Documents, Tab 7.

be a persistent/continuous use with evidence of impaired control, Inability to cut down due to cravings & withdrawal symptoms, functional impairment leading to neglect of responsibilities, relationship difficulties, other social impairment, pattern of compulsive use despite health and other risks.

It is clear from this that Mr Calibaba DOES NOT have a substance use disorder. He is willing to undergo Independent assessments and additional drug screens to further support this according to the collective bargaining agreement. (sic)

(Capitals in original)

18. **May 2, 2023:** Mr. Calibaba advised¹² OHS of the financial and health difficulties arising from the lack of full compensation ordered under AH807. He also advised that he was no longer in an acceptable state of remission for his Major Depressive Disorder.

19. **May 3, 2023:** CPKC Labour Relations (LR) contacted TCRC to discuss Mr. Calibaba's May 2 email to OHS. LR could not provide TCRC with a copy of the email since it was confidential and sent directly to OHS:

Need to discuss Mr. Calibaba. He is continuing to refuse to sign the referral for a Substance Abuse Professional Assessment.

On May 2, 2023, Health Services received an email from Mr. Calibaba reporting a medical condition that is no longer stable and requires further treatment (unrelated to the SAP Assessment requirement). He has requested no further contact or communication be made by Health Services with him.

I am in Vancouver this week, but am wondering if you could look into this so we can discuss how to proceed with his file/pursuant to the arbitration decision.

20. **June 14, 2023:** Mr. Calibaba advised OHS¹³ that he would be sending a questionnaire to understand better the SAP request and provided an update on this condition:

I'm "in the Process of Recovery" ...within the 90 Day Period of Remission, applying Daily Positive Steps, as I am Moving Forward in this process, towards a Peaceful Recovery.

*** My Next "Medical Evaluation" is set for June 26, 2023 @ 1pm (sic).

¹² TCRC Documents, Tab 3, OHS notes Pages 27-28.

¹³ CPKC Brief, Paragraph 28; TCRC Documents, Tab 3, OHS notes Page 23.

21. **August 4, 2023:** LR wrote to the TCRC¹⁴ about the SAP, among other items:

I have been discussing the status of Mr. Calibaba's medical with Health Services and been advised that Mr. Calibaba continues to refuse to attend an Substance Abuse Professional assessment and that the last correspondence from Mr. Calibaba advised that he would be submitting a questionnaire on this subject to HS prior to agreeing to the SAP. The SAP is a required assessment in order to determine his fitness for duty.

HS also required an update on another medical condition which has been unstable.

Can you advise on the status of the SAP from the Union's perspective? Can you also advise on when Mr. Calibaba will be supplying information related to the abovementioned medical condition?

22. **August 23, 2023:** In response to a lengthy email Mr. Calibaba had written to the TCRC, OHS and LR, LR advised¹⁵:

For all our records, I will not be responding to Mr. Calibaba directly and am instead responding to you as his Union Representative. The Company remains committed to continuing with our standard and normal processes and procedures.

Please let me know if a conversation is required and/or proposed next steps from the Union's perspective.

23. **September 2023:** Mr. Calibaba sent 3 lengthy emails¹⁶ to the TCRC, OHN and LR demanding reinstatement and restoration of his benefits package given the critical medications he had to take. CPKC alleged that OHS left a voicemail with Mr. Calibaba requesting a call back¹⁷.

24. **September 6, 2023:** Mr. Calibaba's email¹⁸ advised CPKC of some of the issues he faced by not being reinstated:

And yet, I continue to remain vilified and victimized, some 8+ months later, as I have NOT received my FINAL Arbitration Award, nor ANY of My Benefits Package Restored, which ARE ALL desperately NEEDED for Critical Medications, to continue to keep under control, the Medical conditions of

¹⁴ CPKC Documents, Tab 6.

¹⁵ CPKC Documents, Tab 7.

¹⁶ CPKC Documents, Tabs 8-10.

¹⁷ CPKC Brief, Paragraph 34.

¹⁸ CPKC Documents, Tabs 8 and 9. Tab 9 is a revised version of the Tab 8 September 6 email.

Cardiovascular, Diabetes, High Blood Pressure, and Vision wear of necessary READING Glasses, and Chiropractic, Massage, and Naturopath benefits, that are made readily AVAILABLE to Any and EVERY Employee, that has a Registered Employee # (to which mine is #1009859) ...yet, No Benefits Package Access offered, ZERO, Nada, Nothing, and Critical and Much NEEDED and Used DENTAL Services, and LIFE INSURANCE... WHY ? WHY ? WHY?

*** and it would be of great Benefit that I have access to the EFAP counselling program, especially with the issues presenting with the "Major Depression Disorder", to which would most favourably expedite my healing and mental wellness issues, in a critical and yet positive manner towards my swift return to duty.***

25. **September 8, 2023:** Mr. Calibaba wrote CPKC and others another similar email¹⁹ about his predicament in which he raised concerns about his lack of access to benefits and the SAP:

I positively look forward, and eagerly to being able to effectively and swiftly return to duties as a qualified train conductor. I believe that when this very important and vital requested information is received, and the balance of the final payments also dispersed and received, that all of these unnecessary stressors, that feed the anxieties and major depression disorder, will be eliminated.

At that time, I will then address SAP requirements as requested by the company CPKC railways, with a detailed questionnaire for the OHS nurse regarding SAP assessment testing.

In summary, I see no restrictions, nor reasons after all of these employee health benefits are activated and reassigned for immediate access for myself, as an employee, with a valid employee # and also with the full and complete calculations for each of the years of 2020 and 2021 and 2022 and 2023 up to and including end of August of 2023.(and each years assigned earnings readily available for the (CRA) Canada Revenue Agency, to establish the correct Federal Tax deduction obligations) which would only be more than fair and proper accounting practices, by such a great and revered organization as CPKC is, and can continue to be as one of Canada's top employer's.

¹⁹ CPKC Documents, Tab 10.

26. **September 8, 2023:** OHS case notes²⁰ indicated that the SAP remained an essential condition for reinstatement and that LR was discussing the matter with the TCRC:

OHN copied in email string from EE - August 15, 2023 and Sept 6 2023. EE inquired of specific questions addressed to health and medical benefits and arbitration pay therefore no action required by HS at this time.

EE currently in arbitration status. HS requires the following in order to continue to assess their fitness for SCP: 1. SAP assessment 2. Update for MH condition (updated MH report - not yet requested).

At this time, there is a delay with the agreement and referral to complete a SAP Assessment and is currently in review with LR and the union. Will wait for LR direction and decision on SAP assessment.

Plan: SAP assessment to be completed first then will request an update to MH condition.

27. **December 18, 2023:** Mr. Calibaba wrote²¹ the TCRC, OHN and LR noting that he still suffered from a Major Depression Disorder, a condition for which he blamed CPKC. Mr. Calibaba noted that not having access to his CPKC benefits increased delays in accessing specialist services:

***I have been informed that with very LIMITED Healthcare resources HERE in Saskatchewan, regarding access to the very few Mental Health Specialists, from the Sask. Public HealthCare system, that it would have been extremely Beneficial, to have been provided Medical Coverage from the CPKC HealthCare benefits provided by SUN-LIFE, for QUICKER ACCESS TO THE "PRIVATE SECTOR" of MENTAL WELLNESS providers, instead of the lengthy wait time of over 8+ months, to seek help... Shame on you CPKC, shame on you.

Mr. Calibaba also attached to his email another letter²² from Dr. Nair:

Mr Calibaba was seen here on the following dates: Sept 07, Oct 05, Nov 03, Nov 23 and Dec 18. He has follow up on Jan 15th. As you are aware he is struggling with on going Mental health issues due to the challenges he is facing with CP rail. He has also seen the Psychiatrist Dr Moorti on Nov 24th. He has further follow up arranged on Jan 10th and Feb 28th. At the moment he is in compliance with all the treatment plans.

²⁰ TCRC Documents, Tab 3, Page 20 of OHS notes.

²¹ CPKC Documents, Tab 11.

²² CPKC Documents, Tab 8.

28. **January 9, 2024:** OHS noted²³ that “LR and operations” required the SAP as part of the medical assessment:

Update rec'd from LR confirming that the direction upon discussions between LR and operations is that the EE is required to complete the SAP as part of the medical assessment.

Awaiting further direction on what has been communicated to the union/employee and confirm a date that the employee is expected to comply with the request.

Plan: Once the deadline is confirmed, re-send the SAP assessment referral form to the EE to be signed in order to initiate the SAP assessment and confirm deadline with EE.

Due date adjusted to Jan 22, 2024

(Emphasis added)

29. **January 13, 2024:** OHS added a note²⁴ regarding an update it had received from LR:

Update rec'd from LR confirming that a deadline was not provided however confirmation that EE has an obligation to comply.

Plan: OHN to follow-up with EE to confirm that the following medical reports are now due - SAP assessment, send consent via DocuSign with 2 week due date - if not received by 2 week deadline, send notification to LR to confirm EE remains non compliant - MH, CV and Sleep Apnea reports have all been sent to EE with due date of March 31, 2024.

(Emphasis added)

30. **January 15, 2024:** The TCRC alleged²⁵ that OHS communicated with Mr. Calibaba for the final time on this date:

Unfortunately, I was unable to reach you via telephone today. As discussed in my voicemail, CPKC Health Services requires the following to be completed by no later than JANUARY 15, 2024. “Signed Substance Abuse Program Assessment Referral” via DocuSign website. The link to this document was forwarded to your email address on January 15, 2024.

²³ TCRC Documents, Tab 3 at OHS notes page 14.

²⁴ TCRC Document, Tab 3, OHS notes page 13.

²⁵ TCRC Brief, Paragraphs 36-37.

The following are due MARCH 31, 2024: 1. Mental Health Report 2. Cardiovascular Report 3. Sleep Apnea Report

Please let me know if you have any further questions. (sic)²⁶

31. **February-March 2024:** OHS did not receive the document back via DocuSign. The TCRC and LR emailed about this situation²⁷. CPKC alleged in its Brief that it had advised the TCRC that if Mr. Calibaba did not comply then OHS would close his file²⁸.

32. **February 9, 2024:** OHS provided another update²⁹ to LR:

This employee was sent the SAP Assessment referral document on January 15, 2024.

OHN asked the employee to sign and return the referral document by January 29, 2024. To present date, Health Services has not received the signed document.

The employee is also required to submit 3 additional medical reports, which are due by March 31, 2024.

Please review and provide your direction regarding next steps, as it appears that the employee has been non-compliant with Health Services's™ requests. We require the SAP Assessment referral document to be signed to progress our evaluation of this employee's™ medical fitness for duty, as part of their reinstatement to work. (sic)

That same day, OHS added an additional note:

Response from LR: â– LR requested OHN to send email to LR inbox regarding EE's non-compliance

Email sent to LR inbox

PLAN: Reinstatement â– SAP referral â– Medical monitoring (due MAR 31, 2024) - MH, CV, SA â– OHN - have we received LR determination of next steps? >> OHN f/u FEB 23 (sic)

(Emphasis added)

²⁶ The original OHS notes from the parties contained the strange characters reproduced in these citations.

²⁷ CPKC Brief, Paragraph 36; CPKC Documents, Tab 12.

²⁸ CPKC Brief, Paragraph 38.

²⁹ TCRC Documents, Tab 3, OHS note Page 11.

33. **February 23, 2024:** LR asked OHS³⁰ for an update:

Iâ€™ve flagged this with the Union and they are attempting to get ahold of Mr. Calibaba on the SAP piece. I see that we are also waiting on 3 additional medical reports with a due date of March 31, 2024 â€“ have we received this information? (sic)

34. **February 26, 2024:** OHS advised³¹ LR that:

Health services has not received any of the three medical reports that were requested on Jan 5, 2024 and due on March 31, 2024.

35. **May 2, 2024:** At the TCRC's request, Mr. Calibaba sent³² a lengthy email and further medical information to OHS after being advised that CPKC considered him non-compliant. Mr. Calibaba also asked OHS to detail what information they were requesting:

***ALSO - Please SEND EXACTLY DETAILED Information that you have previously REQUESTED regarding My previous "other Health Conditions" of:

1. Mental Health Report (specifically)
2. Cardiovascular Report (specifically) 3. Sleep Apnea Report (specifically)

***as I do have an Appointment set for NEXT Monday, on May 6, 2024 with My (GP) Dr. R. Nair and We want to provide your office with EXACTLY what is Required... as My "Previous Reports" of these Medical Condition(s) to each of these THREE, remain UNCHANGED from those that were Presented One year ago... Respectfully, I know that there are certain "criteria" regarding Medical issues, as required by the RAC Medical Guidelines, as well as Transport Canada, and CPKC Railways, but to Expedite "Exact Info" required, please Detail all that is Required to Satisfy your Requests, smoothly and expeditiously. (sic).

Among the information provided, Mr. Calibaba attached a March 13, 2024 medical report³³ from a psychiatrist, Dr. Olabisi, which noted, *inter alia*, the impact of ongoing financial issues on his health:

³⁰ TCRC Documents, Tab 3, OHS notes page 7.

³¹ TCRC Documents, Tab 3, OHS notes page 7.

³² TCRC Documents, Tab 3, OHS notes pages 3-5.

³³ TCRC Documents, Tab 9. TCRC Brief, Paragraph 46.

6. I would strongly advocate that his employer resolve his financial issues as stated in the binding arbitration agreement award. This would significantly improve his mental health.

36. **May 3, 2024:** Mr. Calibaba sent OHS a questionnaire³⁴ about the requested SAP. His concluding paragraph stated:

So finally, now in an effort to expedite and accommodate a swift reinstatement and return to active duty, as a freight train conductor, with a perfect and without blemish, employee safety record, I will submit to an "Independent Third Party" for a (SAP) "Substance Abuse Professional Assessment" once the Questionnaire attached is COMPLETED and SATISFACTORY for Unbiased results. (sic)

37. **May 7, 2024:** OHS decided³⁵ not to respond to Mr. Calibaba's email:

Consulted HS manager. Advised no action required by OHN at this time.

38. **September 23, 2024:** CPKC wrote³⁶ to Mr. Calibaba, reviewed various events, and advised that it had ended his reinstatement process:

Following a comprehensive review of your file, it has been determined that there is no evidence of your intent to complete the required medical assessment necessary for evaluating your fitness for work. Consequently, due to the absence of the requested medical information, Health Services has closed your reinstatement medical assessment file.

39. **December 2, 2024:** At the TCRC's request, the arbitrator held a case management conference. The parties agreed to present their respective positions on March 18, 2025 via teleconference.

ISSUES

40. The above chronology and the parties' submissions require the arbitrator to examine 3 issues:

1. Mitigation: Was CPKC entitled to deduct 40% from Mr. Calibaba's compensation for the period January 1, 2023 to May 2, 2023?

³⁴ CPKC Documents, Tab 13. TCRC Documents, Tab 12.

³⁵ TCRC Documents, Tab 3, OHS notes page 1.

³⁶ TCRC Documents, Tab 2. CPKC Documents Tab 14.

2. Did CPKC fail to respect AH807's statutory decision or order from May 2, 2023 onward?; and
3. Should the arbitrator award damages?

MITIGATION: WAS CPKC ENTITLED TO DEDUCT 40% FROM MR. CALIBABA'S COMPENSATION FOR THE PERIOD JANUARY 1, 2023 TO MAY 2, 2023?

41. CPKC had originally terminated Mr. Calibaba on November 6, 2020. On December 20, 2022, AH807 ordered CPKC to reinstate Mr. Calibaba with compensation.

42. The parties agreed on, and CPKC has paid, the compensation owing to Mr. Calibaba for the 2020-2022 time frame. However, for the period from January 1, 2023 to May 2, 2023 (Period), CPKC unilaterally withheld 40% of the compensation.

43. In its Brief, the TCRC argued that CPKC had no justification not to pay Mr. Calibaba his full compensation for the Period:

114. It is submitted that the law in support to the issues of whether an employee has taken enough steps to mitigate his or her damages is fairly settled. Each case turns on its own specific circumstances, including an assessment of the Grievor's reasonable prospects vis-à-vis his unique situation.

115. In these unique circumstances, the Union respectfully submits that Mr. Calibaba could not have done more to expedite his return to work in this period. He attended multiple assessments for multiple conditions in support of the reinstatement process during the period from January 1, 2023 to May 2, 2023. By May 2, 2023, his Major Depressive Disorder no longer in an acceptable state of remission.

44. CPKC argued that reinstated employees had a duty to mitigate any losses during the reinstatement process:

73. The Company maintains that until an employee is cleared for duty and able to work, an employee has an obligation to mitigate loss of income. As such, the Grievor's compensation owed from January 1 through to May 2, 2023 ought to be subject to the standard 40% reduction. Furthermore, the Grievor has not provided evidence or plausible rationale demonstrating how he could not legitimately fulfill his obligation to mitigate his losses.

...

77. The Company maintains that the Grievor's obligation to mitigate loss of income did not immediately cease upon receipt of AH 807 and absent any evidence of his efforts to mitigate such loss, a 40% reduction is in line with arbitral jurisprudence.

78. The Company has complied with the Award and compensated the Grievor up to and including May 2, 2023 less the mitigation in disputed above. Moreover, the Company maintains that the Grievor is not entitled to any additional compensation as he has failed to participate in the reinstatement process. (sic)

45. In its Reply, CPKC reiterated its mitigation argument:

11. Concerning compensation owed to the Grievor, the Company maintains that it has complied with the Arbitrator's award. Compensation was paid to the Grievor from the time he was dismissed up to May 2, 2023. In addition and in accordance with the Award, the Company and the Union have recently agreed on interest owing. The request for payment has been made to the Company's Employee Services department and the payment will be processed soon. As such, the only remaining issue concerning compensation up until May 2, 2023 is the mitigation for 2023. The Company relies upon arguments within its brief in chief, in that 40% mitigation for this period of time is appropriate and consistent with arbitral case law.

46. At the hearing, CPKC suggested, as the arbitrator understood the argument, that if Mr. Calibaba had worked elsewhere during the Period, then CPKC should get the benefit of any sums earned.

47. The recent award in AH823-S³⁷ summarized the applicable mitigation principles. CPKC, in deducting 40% from the amount owing for the Period, had the burden to demonstrate that Mr. Calibaba failed to mitigate his damages³⁸.

48. The arbitrator dismisses CPKC's mitigation argument.

49. First, CPKC suggested in its written submissions that Mr. Calibaba had to provide evidence that he could not mitigate his losses during the Period. No legal presumption

³⁷ [Conférence ferroviaire de Teamsters Canada c Via Rail Canada inc., 2024 CanLII 114711](#) (unofficial Google translate version provided solely for the parties' convenience)

³⁸ [Red Deer College v. Michaels, 1975 CanLII 15 \(SCC\)](#)

exists that an employer can withhold 40% of the compensation owing under an SDO unless the employee demonstrates he could not mitigate his losses.

50. Similarly, if CPKC alleged that Mr. Calibaba had earned sums elsewhere, which appears to be the position advanced at the hearing, then CPKC had the obligation to prove it³⁹.

51. The concepts CPKC advanced remain distinct. Sums actually earned during the Period may be deductible. However, a reduction in the compensation owing may only occur when an employer demonstrates that an employee failed to make reasonable attempts to mitigate.

52. Second, the above chronology for the Period demonstrated that Mr. Calibaba diligently provided medical information to CPKC⁴⁰. There is nothing in the Period which would justify CPKC withholding 40% of the compensation that AH807 had ordered.

53. The arbitrator already dealt with this exact type of situation in CROA 4504-S⁴¹, a case involving these same parties:

41. However, the TCRC satisfied the arbitrator that Mr. Danchilla should be compensated for the period in 2017 when CP required certain medical testing prior to reinstating him. While there were slight delays, CP did not satisfy the arbitrator that they were solely caused by Mr. Danchilla.

54. In the instant case, no delays occurred. On December 27, 2022, Mr. Calibaba passed a CPKC imposed substance screening test. On January 5, 2023, he completed an Employment Medical Assessment. On February 17, 2023, Dr. Nair provided further medical information at OHS' request.

55. In February-March 2023, OHS concluded that in certain respects Mr. Calibaba was fit to work. In April 2023, Dr. Nair confirmed to OHS that Mr. Calibaba did not have a substance abuse disorder. Unfortunately, Mr. Calibaba became unfit to work on May 2, 2023.

³⁹ AH664-S: [*Canadian National Railway Company v International Brotherhood of Electrical Workers System Council No. 11*, 2018 CanLII 118327](#)

⁴⁰ CPKC's requirement for an SAP will be dealt with as a separate topic.

⁴¹ [*Canadian Pacific Railway Company v Teamsters Canada Rail Conference*, 2020 CanLII 48641](#)

56. CPKC provided no justification not to pay Mr. Calibaba his full compensation for the Period.

57. The TCRC in its Brief asked for this remedy for the mitigation issue:

152. For all of the foregoing reasons, TCRC seeks the following Orders:

...

c. Compensate the Grievor for his outstanding losses, including:

...

ii. Finalizing the calculation of lost wages between his dismissal and May 2, 2023 to exclude a reduction for failure to mitigate for the period of January 1, 2023 to May 2, 2023

58. The above facts confirm that CPKC had no legal basis to deduct 40% from the compensation owing to Mr. Calibaba for the Period. CPKC shall pay this remaining compensation for the Period immediately with interest.

DID CPKC FAIL TO RESPECT AH807'S STATUTORY DECISION OR ORDER FROM MAY 2, 2023 ONWARD??

59. To date, CPKC has not reinstated Mr. Calibaba. He has not received any compensation from May 2, 2023 onward. Mr. Calibaba had been deprived of access to his CBA benefits including those for weekly indemnity benefits (WIB) which exist to assist employees experiencing health issues.

TCRC Position

60. The TCRC referred to CPKC's December 13, 2023 email⁴² describing the reasons for Mr. Calibaba not being reinstated or having access to his benefits:

I do not agree that we've "discussed this for, now, months." Again, I must ask if you can advise if Mr. Calibaba's condition allows for the medical reinstatement process to continue? I understand the Company still requires a SAP Assessment to be completed and an updated report which has not yet been received.

I have looked into your request and the Company is unable to put Mr. Calibaba on WIB or reinstate his benefits.

⁴² TCRC Documents, Tab 29.

Regarding the HS file, please submit all such requests to Health Services including any requests for an update.

61. The TCRC asked the arbitrator to find CPKC had not complied with AH807, a failure that had aggravated Mr. Calibaba's health:

121. TCRC respectfully submits that, in the Company's failure to reinstate benefits and conclude the compensation and reinstatement in a timely manner, CPKC aggravated Mr. Calibaba's underlying mental health condition leading to its instability. Dr. Nair spoke to this Major Depressive Disorder in his February 23, 2023 letter, and this condition has worsened as reflected in subsequent assessments by Dr. Moorti and Dr. Olabisi. As detailed above.

122. TCRC submits that but for the Company's actions stemming back to September 2020, Mr. Calibaba would have worked through this entire period without any issue. The exacerbation of his underlying mental health issues flow from CPKC's wrongful actions.

62. The TCRC argued that the facts demonstrated *prima facie* discrimination, but CPKC had made no effort to accommodate Mr. Calibaba:

127. TCRC submits that, in short, but for his medical disabilities, Mr. Calibaba would not have remained withheld from service. The Union submits that its evidentiary onus of establishing a *prima facie* case of discrimination is met; the Company failed to provide any options for modified work or accommodation that would permit Mr. Calibaba to work in connection with his disability.

128. CPKC's refusal to extend accommodation opportunities to Mr. Calibaba is arbitrary and unjustified.

63. The TCRC also noted the impact on Mr. Calibaba when CPKC failed to reinstate him along with his benefits:

9. Egregiously, throughout the period following your December 2022 Award to date, CPKC refused to reinstate Mr. Calibaba's benefits. This unprecedented and discriminatory measure effectively denied Mr. Calibaba any access to critical support that he needed in 2023 and 2024 in respect of multiple medical disabilities, including his major depressive disorder. He was denied the opportunity to attend to pressing dental care issues among other personal matters.

10. CPKC's conduct following the release of Ad Hoc 807 has caused real harm and have denied Mr. Calibaba access to benefits including Weekly Indemnity

Benefits (WIB - short term disability) to which he ought to have been entitled by virtue of his medical disabilities.

...

79. In your Award in Ad Hoc 807, you ordered Mr. Calibaba to be reinstated to his position with no loss of seniority and full compensation for all lost wages and benefits. TCRC submits that it is self-evident that Mr. Calibaba was to be made whole for lost benefits and that his benefits were to be reinstated forthwith and continue until he commences service.

80. There can be no excuse for CPKC neglecting to reinstate his benefits. However, CPKC decided not to reinstate his benefits for the entire period from December 2022 until “file closure” on September 2024.

81. The Company’s final response to reinstating benefits was simply “I have looked into your request and the Company is unable to put Mr. Calibaba on WIB or reinstate his benefits.” No actual reason, completely ignoring the fact it was ordered in the award.

...

83. Applying these principles to the instant dispute, the Union submits that but for the Company’s breach of the Collective Agreement in November 2020 by unjustifiably terminating Mr. Calibaba outright, it never would have interrupted his benefits.

...

87. The above-summarized benefits entitlements are fundamental entitlements of employees by virtue of their employment status with CP. Employees rely on these benefits entitlements for basic well-being and quality of life. These entitlements ought not to be subject to the arbitrary whims of the Company.

...

89. Likewise, following his reinstatement Mr. Calibaba ought have remained entitled to claim WIB benefits, if necessary. As you are aware, the ability of members to submitting a WIB claim on their own behalf is an issue before you in AH 891. The Union takes the position that employees ought to be able to submit an application for WIB for adjudication. The Company’s position and current process for weekly indemnity is that it will be initiated by a manager through Canadian Pacific status change form. The Company refused to initiate it and Mr. Calibaba could not submit on his own behalf.

...

94. Given the overarching principle “that a wronged plaintiff is entitled to be put in as good a position as he would have been in if there had been proper

performance by the defendant,” TCRC respectfully submits that Mr. Calibaba’s benefits must be reinstated without further delay.

95. Mr. Calibaba was effectively destitute following December 2022. CPKC’s denial of benefits in this critical period caused real, significant harm. TCRC encloses Mr. Calibaba’s sample debt collection notices and bills past due at Tab 23.

96. As he lacked funds through this period, Mr. Calibaba did not incur any out-of-pocket benefit expenses as he simply could not afford them. Mr. Calibaba received SK social assistance, who also covered his numerous drug prescriptions to date.

CPKC Position

64. CPKC alleged Mr. Calibaba failed to cooperate with the reinstatement process. It referenced the importance of safety in the railway sector for those occupying safety critical positions:

46. As such, those occupying a Safety Critical Position must be able to report to work in a condition that enables them to safely and effectively perform their duties. Employees working in a Safety Critical Position are required to comply with specific standards and to report to work fit and remain fit to work.

47. The Company has a legitimate interest and obligation in ensuring its employees working in a safety critical capacity have certification of fitness to perform the core functions of their job. The Company respectfully maintains it has the responsibility, obligation and entitlement to verify the fitness of its employees working in a Safety Critical Position.

65. CPKC also blamed Mr. Calibaba for certain inconsistencies about prior substance use:

49. As outlined above, following receipt of AH 807, the Company initiated a reinstatement medical for the Grievor. During the reinstatement medical process and review of the Grievor’s medical file, it was determined that there were inconsistencies concerning the Grievor’s prior substance use.

50. During his EMA on January 5, 2023 he disclosed Illicit drug use in July of 2012 (as cannabis was considered an illicit drug as the time) - in June of 2012, he suffered an injury and was prescribed opioids but explored CBD cannabis oil for pain management and that CBD cannabis oil was used for about 18 months (Tab 2). He also disclosed that in June of 2014, he was prescribed medical cannabis for pain management however, there was no indication that he had disclosed his prior use of cocaine despite his using cocaine on July 31, 2020 during a self-described, celebratory event (Tab 1).

51. Due to this and in accordance with Company Policy and regulations, an SAP assessment was required to assess the Grievor's medical fitness for duty for his safety critical position.

66. CPKC relied on these alleged inconsistencies to justify its requirement that Mr. Calibaba submit to an SAP:

54. Despite this and many subsequent telephone calls and e-mails, the Grievor repeatedly avoided, postponed through stating that a questionnaire was forthcoming, or flat out ignored the Company's requests for him to complete the SAP referral form so that an SAP Assessment could be scheduled.

55. Health Services and/or the Occupational Health Nurse corresponded with the Grievor via telephone and e-mail extensively and during this correspondence, the Grievor was provided with explanations as to why an SAP was required several times as well as the process.

67. CPKC argued that Mr. Calibaba's failure to undergo the SAP justified closing his reinstatement medical file:

63. Due to Grievor's lack of participation during the reinstatement medical review process for over a year and a half, the Company was reasonable in closing his Health Services reinstatement medical file.

68. CPKC also argued that Mr. Calibaba's failure to participate in the process prevented him from accessing his collective agreement benefits:

66. In accordance with the Benefits Booklet (Tab 22), employees are eligible for group benefits when they are a permanent employee working in Canada, when they are actively working as determined by your employer and they have completed the waiting period.

67. As the Grievor failed to participate in the reinstatement medical process the Company could not assess his fitness for duty and potentially return him in any capacity. As such, he was not actively working as determined by the employer and his benefits were not re-activated.

68. In addition, the Benefits Booklet (Tab 22) states that if you are not actively working on the date coverage would normally begin, your coverage will not begin until you return to active work. This is abundantly clear and unambiguous language that is not in dispute.

69. Based on the above, the Company had no obligation to activate the Grievor's benefits as he did not return to active work.

Decision

69. This is unfortunately not the first case where a trade union has had to come back to the arbitrator to ask for enforcement of an SDO.

AH807 and drug testing

70. Drug testing remains challenging in safety critical industries. AH807 noted that the legal principles appear well established. The arbitrator even encouraged the parties “to update the arbitrator on any nuances from recent decisions”⁴³ given the jurisprudential obligation to balance safety with privacy interests.

71. AH807 concluded that CPKC could not ignore Mr. Calibaba’s privacy rights and conduct a drug/alcohol test based only on an anonymous allegation⁴⁴. In Canada, decisions impacting employees’ privacy rights and their livelihood must be supported by facts rather than suspicions.

72. In AH807, the parties had a full opportunity to put forward their positions on the facts and the law. CPKC did not meet its burden of proof to justify Mr. Calibaba’s dismissal which led to this remedial disposition:

54. For the above reasons, the arbitrator concludes that CP had no reasonable grounds to test Mr. Calibaba. Consequently, it had no grounds to impose any discipline.

55. The arbitrator grants the TCRC’s remedial request that Mr. Calibaba be reinstated to his position with no loss of seniority and full compensation for all lost wages and benefits. Mr. Calibaba is entitled to interest on these amounts.

73. CPKC did not judicially review AH807. It could have asked a court to rule whether AH807 was unreasonable when it concluded that an anonymous complaint could not justify drug/alcohol testing. Neither did CPKC ask the arbitrator for clarification about any issues resulting from the SDO despite the reserve of jurisdiction in AH807:

56. The arbitrator remains seized for any issues which result from this award.

⁴³ AH807 at paragraph 27.

⁴⁴ Ibid. paragraphs 34-37.

The SDO in AH807

74. The arbitrator's SDO in this case differed from those made in other cases where the arbitrator reinstated an employee for human rights reasons. For example, in AH810⁴⁵, the arbitrator included substance testing as part of the reinstatement process, given the importance of safety to CPKC's operations:

64. The arbitrator has concerns about the grievor's candour given his work as an LE. The evidence in the Record provides no reasonable explanation for the positive test other than consumption.

65. However, CP failed to follow the procedure contained in its RPA. It instead treated an RPA violation as providing just cause.

66. To protect both parties' interests, the arbitrator will reinstate the grievor, but on the following conditions:

1. CP will reinstate the grievor, without loss of seniority, but without compensation for any wages and benefits lost;
2. The grievor will not return to CP until its Health Services has confirmed he is fit to work after the reasonable and appropriate testing for substance addiction which that staff deem appropriate;
3. For a two-year period starting from the grievor's return to work at CP, he will be subject to random, unannounced drug and alcohol testing, to be administered in a non-abusive fashion;
5. The parties will prepare a "Last Chance Agreement" or a "Continuing Employment Reinstatement Agreement", if they use that type of document, which incorporates these conditions and any human rights obligations; and
6. If the grievor violates any of the conditions, he shall be liable to termination with recourse to arbitration only for the purpose of determining whether a violation of these conditions occurred.

75. In AH810-S⁴⁶, the TCRC had to return to the arbitrator after CPKC had added additional conditions unilaterally via OHS before it would comply with the SDO. The arbitrator concluded that CPKC and its medical professionals had no justification for imposing additional conditions inconsistent with the SDO (Footnotes omitted):

67. Paragraph 5 of the SDO made it explicit that the parties' agreements ("Agreements") must still "incorporate[s] these conditions". In other words, those

⁴⁵ [*Teamsters Canada Rail Conference v Canadian Pacific Railway Company*, 2023 CanLII 8754](#)

⁴⁶ AH810-S [*Teamsters Canada Rail Conference v Canadian Pacific Kansas City Railway*, 2023 CanLII 83425](#)

Agreements, and any decisions made under them, cannot ignore the underlying SDO. CPKC seemingly treated the situation as a new case, such as what had occurred originally in 2019, rather than one involving Mr. X's return to his RPA situation following appropriate drug and alcohol testing. The Conditions do not respect the SDO since some of the key requirements, like testing prior to reinstatement, have not taken place.

...

69. However, even if the arbitrator assumed, for the sake of argument only, that the parties' Agreements allowed CPKC to ignore the SDO's terms and impose the Conditions, it still had an evidentiary burden to meet.

...

71. The parties decided to proceed via written submissions. **But this mutual decision does not reduce the burden on CPKC to justify its addition of the Conditions, particularly when it relies on medical evidence.** While the railway model of arbitration frequently proceeds with only written briefs, exceptions exist when contested medical evidence is at issue. **As noted, the SDO called for testing (paragraph 2) before any reinstatement would take place. But, despite no testing, CPKC added the Conditions.**

...

73. **But the lack of such evidence does not mean that the arbitrator will blindly adopt whatever the medical professionals have written in the IME/Addendum or in clinical notes. The Addendum's 180-degree change to the IME seemingly occurred within hours, or at most a day, of Dr. Lim receiving CPKC's request for a clarification. This abrupt change required an explanation.**

74. Decision makers routinely evaluate medical evidence, including for experts, via document production, testimony, and cross-examination. The complete context behind a contested expert report, including all communications with the expert, remains crucial for any decision maker. The arbitrator notes further that, despite the parties' negotiated tripartite last chance agreement, the Addendum request occurred without the knowledge of, or input from, Mr. X.

75. **Similarly, the extent of the Conditions required an explanation. Finding otherwise would essentially allow CPKC, or its medical professionals, to decide unilaterally the appropriate remedy for Mr. X, without regard to the SDO's clear terms.**

76. In summary, even if the Agreements allowed CPKC to modify the SDO's remedy, CPKC did not meet its evidentiary burden to justify the imposition of the Conditions.

(Emphasis added)

76. Since AH807 concluded that CPKC had no grounds to test Mr. Calibaba, and violated his privacy rights when it so proceeded, the arbitrator did not include any substance testing conditions in the SDO.

CPKC's SAP imposed an unjustified barrier to Mr. Calibaba's reinstatement

77. CPKC suggested that the Canadian Medical Rules Handbook⁴⁷ (Handbook) allowed the Chief Medical Officer to determine the assessments required for medical fitness for duty⁴⁸.

78. But nothing in the Handbook authorizes a party to ignore an SDO.

79. In AH822⁴⁹, CPKC did not reinstate an employee back to his original position, but instead to a lower paying one outside the bargaining unit, due to contradictory medical reports arising during the accommodation process. In that case, CPKC did not explain why it discounted the employee's medical evidence:

67. **The IBEW has satisfied the arbitrator that CP did not respect its duty to accommodate obligations.** The arbitrator has some sympathy with both side's positions, however.

68. For Mr. X, he did everything CP asked of him after the Original Decision ordered him reinstated in his position. He underwent multiple medical exams and understood from his doctors that no medical impediment prevented him from returning to his position as an S&C Maintainer. Despite this evidence, CP placed him in a lower-paying temporary position outside the bargaining unit. Mr. X performed these duties while awaiting the outcome of this arbitration.

69. **For CP, the medical reports may well raise some concerns. CP generally has concerns about ensuring safety in its operations. But there needs to be some explanation for CP rejecting Mr. X's doctors' opinions, including that of his neurologist.**

...

71. **The arbitrator orders CP to reinstate Mr. X in his original S&C Maintainer position, at least on paper. CP will fully compensate Mr. X, less any sums he earned in his non-bargaining unit position.**

⁴⁷ [Handbook](#)

⁴⁸ CPKC Brief, paragraphs 58-59.

⁴⁹ [International Brotherhood of Electrical Workers System Council No. 11 v Canadian Pacific Railway Company, 2023 CanLII 13643](#)

72. The arbitrator orders reinstatement “at least on paper”. While Mr. X should not suffer prejudice due to the delays in this matter, the parties still need to complete a proper duty to accommodate analysis. This includes addressing the conflicts in the medical evidence about whether Mr. X can resume his full duties.

(Emphasis added)

80. AH822 ordered the employee reinstated to his original position “on paper” to avoid prejudice. Unlike in the instant case, the Record in AH822 did contain possibly contradictory medical evidence, though for reasons unknown, OHS had simply disregarded all the medical reports coming from the employee’s doctors and had instead imposed its own medical conclusion⁵⁰.

81. The above cases demonstrate that legitimate disagreements may arise during an employee’s reinstatement process during a duty to accommodate process. But Mr. Calibaba’s case is clearly different. CPKC never even considered its duty to accommodate, *infra*.

82. CPKC’s reference to the Chief Medical Officer (CMO) as justification for its actions is problematic since it did not refer the arbitrator to where in the process the CMO had decided Mr. Calibaba must complete an SAP.

83. The underlying context in this case arises from a situation where CPKC had no reasonable grounds to test Mr. Calibaba. CPKC did not direct the arbitrator to where in the Record the CMO had considered the negative drug test Mr. Calibaba passed on December 27, 2022 or Dr. Nair’s medical opinion that Mr. Calibaba did not have a substance abuse disorder.

84. Indeed, the extracts in the Record provided to the arbitrator seem to suggest that others imposed the SAP rather than the CMO acting pursuant to any statutory authority. For example, on January 18, 2023, the OHN nurse wrote this in the notes⁵¹:

⁵⁰ See also AH837-S where the arbitrator had to reiterate that the reinstatement order stood as originally ordered - [International Brotherhood of Electrical Workers \(System Council No. 11\) v Canadian National Railway Company, 2024 CanLII 80301](#)

⁵¹ CPKC Documents, Tab 2 at OHS notes pages 62-63.

Concerns: Although EE stated on the current EMA dated Jan 5 2023 that his last use of illicit drugs was in 2012, in the arbitration award, it is noted that EE used cocaine on July 31 2022 during a celebratory event.

After review of file with management, as the EE disclosed use of illicit drug use in 2012 that we were not previously aware of, it is reasonable to send this EE to have a SAP Assessment completed due to discrepancy of "last use date" and to provide a history of EEs drug use.

(emphasis added)

85. It is unclear from the Record who "management" is. While not determinative, in other cases, where OHS doctors make decisions, the OHS notes refer to them by name or title⁵².

86. Similarly, a September 8, 2023 note suggested OHS was awaiting guidance from LR on the SAP⁵³:

At this time, there is a delay with the agreement and referral to complete a SAP Assessment and is currently in review with LR and the union. Will wait for LR direction and decision on SAP assessment.

87. On January 9, 2024, the OHS notes⁵⁴ indicated:

Update rec'd from LR confirming that the direction upon discussions between LR and operations is that the EE is required to complete the SAP as part of the medical assessment.

88. CPKC did not demonstrate why it refused to reinstate Mr. Calibaba until he complied with the SAP. Neither did they demonstrate why the December 27, 2022 substance testing, which came back negative, remained insufficient to reinstate Mr. Calibaba pursuant to the arbitrator's SDO. CPKC did not explain why it dismissed Dr. Nair's opinion that Mr. Calibaba had no substance abuse issues.

⁵² See, for example, AH822 at paragraph 20.

⁵³ TCRC Documents, Tab 3 at OHS notes page 20.

⁵⁴ TCRC Documents, Tab 3 at OHS notes page 14.

89. Instead, someone justified the SAP based on Mr. Calibaba's own disclosure in his Employment Medical Assessment⁵⁵ to using cannabis oil in 2012⁵⁶, an event which occurred 6 years prior to CPKC first hiring him in 2018. Similarly, someone further justified the SAP based on Mr. Calibaba's lack of reference to the non-negative test for cocaine which came to light when CPKC conducted the unreasonable drug/alcohol test described in AH807.

90. While the parties know the career-ending consequences for employees who take cocaine and work while impaired⁵⁷, Mr. Calibaba was on layoff at the time when he admitted during his investigation in AH807 to taking cocaine on July 31, 2020.

91. While good faith it always presumed, CPKC's seizing upon Mr. Calibaba's reference to cannabis oil in 2012, and its continued reliance on its own unreasonable drug/alcohol testing, raises serious concerns about its intent to comply with the SDO in AH807. These concerns remain despite the suggestion that Mr. Calibaba seemingly told his doctor a different story about the July 31, 2020 cocaine use compared to his version in AH807⁵⁸. For reasons unknown, CPKC disregarded the negative drug test Mr. Calibaba had passed on December 27, 2022 and instead imposed new conditions for reinstatement.

92. CPKC's imposition of the SAP requirement created an unreasonable barrier blocking Mr. Calibaba's reinstatement. CPKC's actions violated the plain wording of the SDO in AH807. The TCRC is entitled to remedial orders as a result.

Remedy

93. The TCRC asked the arbitrator to issue the following remedies (the issue of damages will be considered in a separate section):

152. For all of the foregoing reasons, TCRC seeks the following Orders:

- a. Resume the reinstatement process, including providing the Grievor particulars of his pending SAP assessment.
- b. Reinstatement the Grievor's benefits forthwith.

⁵⁵ TCRC Documents, Tab 4.

⁵⁶ CPKC's Brief at paragraph 50 suggested Mr. Calibaba had explored the use of CBD cannabis oil in 2012 and medical cannabis in 2014.

⁵⁷ The presumptive penalty remains dismissal for cause: AH877 - [*International Brotherhood of Electrical Workers, System Council No. 11 v Canadian Pacific Kansas City Railway*, 2024 CanLII 62438](#) at paragraphs 49-56.

⁵⁸ TCRC Documents, Tab 7.

- c. Compensate the Grievor for his outstanding losses, including:
 - i. An order that Mr. Calibaba be compensated for his lost benefits following his dismissal to date.
 - ii. Finalizing the calculation of lost wages between his dismissal and May 2, 2023 to exclude a reduction for failure to mitigate for the period of January 1, 2023 to May 2, 2023
 - iii. Compensation from May 2, 2023 forward:
 - 1. Lost wages similarly calculated with the same comparator for the period of May 3, 2023 to his return to active service with no reductions.
 - 2. In the alternative, consistent with such non-safety critical accommodated work as ought to have been made available to Mr. Calibaba, pursuant to the Company's statutory duty to accommodate, until he became fit for safety critical duties;
 - 3. In the alternative, compensation per the equivalent of the WIB rate from May 3, 2023 until he became fit for his safety critical duties and his return to active service.
 - iv. Interest owing on prior and current payments

94. The TCRC has demonstrated that CPKC failed to respect the SDO in AH807 which required Mr. Calibaba's reinstatement. The arbitrator orders CPKC to reinstate Mr. Calibaba immediately. That reinstatement, which includes access to all entitlements under the CBA, can be done "on paper", as occurred in AH822. Mr. Calibaba may still have current medical issues which impact his immediate return to his safety critical position.

95. While the TCRC's requested order included "providing the Grievor particulars of his pending SAP assessment", the arbitrator has concluded that the SAP constituted an unreasonable barrier CPKC put in place which has delayed Mr. Calibaba's reinstatement. It is commendable that the TCRC attempted to work out a labour relations solution with CPKC for this unilaterally imposed item. However, the voluntariness of Mr. Calibaba's reluctant conditional agreement to participate is undermined by the economic and health prejudice he suffered by CPKC's continuing refusal to reinstate him.

96. The arbitrator grants the TCRC's request for an order that Mr. Calibaba be compensated for his lost benefits following his dismissal. The arbitrator leaves to the parties the calculation of those sums.

97. The TCRC set out three alternative remedies for compensation from May 2, 2023 forward. Given the medical evidence about Mr. Calibaba's health, the arbitrator orders CPKC to pay Mr. Calibaba compensation per the equivalent of the WIB rate from May 3, 2023. These payments will continue until Mr. Calibaba resumes his safety critical duties or, based on a proper duty to accommodate analysis, he is temporarily accommodated in an appropriate position.

98. Mr. Calibaba is also entitled to interest owing on prior and current payments.

99. The arbitrator remains seized for the various issues which may arise from these required additional remedies which are designed to put Mr. Calibaba back into the position he should have been in had CPKC never unjustly terminated his employment.

SHOULD THE ARBITRATOR AWARD DAMAGES?

100. As noted in the introduction, the TCRC demonstrated that this case required an award of damages. These are the reasons for that conclusion.

Parties' positions

101. At the hearing, the TCRC asked the arbitrator to award \$10,000 damages and a further \$10,000 punitive damages pursuant to the *Canadian Human Rights Act (CHRA)* and general arbitral law (Footnotes omitted):

139. The Union reminds the Arbitrator that the Grievor suffered many other losses well above and beyond his lost wages. As evidenced by the psychiatric consultations of Dr. Moorti and Dr. Olabisi, CPKC's unjust termination and delay in providing compensation/benefits to Mr. Calibaba upon your Award has had significant, detrimental impacts on his health.

140. TCRC Claims general and punitive damages in these circumstances of prima facie discrimination and denial of Mr. Calibaba's access to health, dental and WIB benefits needed in respect of his diagnosed medical disabilities.

...

142. In the federal jurisdiction, pursuant to s. 53(2)(e) of the Canadian Human Rights Act, arbitrators may award damages for any pain and suffering that the victim suffered as a result of discrimination.

143. Arbitrators recognize that being subject to discrimination itself constitutes injury that warrants compensation, as discrimination is inherently damaging.

144. The Union respectfully submits that an award of general damages is appropriate in this case to compensate for the additional harm to which CPKC subjected Mr. Calibaba in breach of his statutorily protected human rights.

...

145. In the Union's respectful submission, the Grievor is entitled to aggravated and punitive damages as a result of the Company's bad faith manner of denying his entitlements following AH 807.

146. The Union recognizes that such damages are generally exceptional remedies. However, this case is one of those exceptions. The Company's actions in this instance are so unreasonable that they are deserving of both sanction and dissuasion in the form of additional damages.

...

150. A party's misconduct merits punitive damages if the misconduct is "malicious, oppressive and high-handed", "offends the court's sense of decency", and represents a marked departure from ordinary standards of decent behaviour.

151. In the present matter, TCRC submits that CPKC's conduct has been egregious to merit punitive damages as the Arbitrator sees fit.

102. In its Reply, CPKC argued the facts did not justify an award of damages:

14. In terms of the Union's request for damages, the Company maintains such request is without merit as the Union has provided insufficient support to their claim. Jurisprudence has held that damages are reserved for conduct, which is found to be harsh, vindictive, reprehensible and malicious, as well as extreme in its nature as established in the notable *Honda v. Keays* Supreme Court of Canada decision (Tab 1). As the record shows, this is not the case before the Arbitrator, therefore damages are not warranted.

The context supporting an award of damages

103. The arbitrator set out above a detailed chronology of what happened to Mr. Calibaba after AH807 ordered CPKC to reinstate him with compensation. This section will briefly summarize some of those factors for ease of reference:

- Since December 20, 2022, CPKC has failed to respect AH807's SDO requiring Mr. Calibaba's reinstatement;

- This failure deprived Mr. Calibaba of access to the CBA's health and dental benefits;
- CPKC further denied Mr. Calibaba access to the CBA's WIB, despite receiving medical evidence that he was no longer in an acceptable state of remission from his Major Depressive Disorder;
- CPKC never took the initiative to return before the arbitrator to raise any remedial questions resulting from AH807;
- Despite the law on mitigation, including cases involving these same parties, CPKC presumptively and unilaterally withheld 40% of Mr. Calibaba's compensation for the Period, *supra*;
- Mr. Calibaba successfully completed a December 27, 2022 substance abuse test. While the TCRC disputed CPKC's right to impose such a test given the conclusions in AH807⁵⁹, those results nonetheless buttress its claim for damages;
- Despite the clean drug test, CPKC still insisted Mr. Calibaba undergo the SAP as a unilaterally imposed condition precedent to reinstatement;
- In addition to the findings in AH807, OHS had access to additional medical evidence on file from two of Mr. Calibaba's doctors confirming he had no substance abuse issues;
- CPKC later claimed that Mr. Calibaba's lack of cooperation with the SAP justified the closure of his reinstatement file;
- As a result of the failure to reinstate, Mr. Calibaba's health situation deteriorated effective May 2, 2023;
- Mr. Calibaba alerted OHS of his resulting financial and health difficulties;
- Mr. Calibaba's lack of access to his CBA benefits also impacted his ability to consult specialists quickly.

Arbitral awards for damages in railway cases

104. While the TCRC acknowledged the exceptional nature of a damages award on top of a remedial make whole order, arbitrators will award them in appropriate cases. A few cases help illustrate situations where railway arbitrators felt compelled to award damages.

105. In SHP713⁶⁰, CP's conduct led to a \$5000 damages award:

74. The Company's conduct was not consistent with its "obligation of good faith and fair dealing" because it dismissed the grievor exclusively on the basis

⁵⁹ TCRC Brief, paragraph 14.

⁶⁰ [*Canadian Pacific Railway Company v Unifor and its Local 101R*, 2014 CanLII 22982](#)

of the odor of alcohol. It failed to obtain the substance tests and had no other supporting evidence. The company disregarded the evidence of its own investigation and cannot be seen as fair and reasonable.

...

76. I have no doubt that the grievor suffered distress and injury beyond the usual hurt feelings associated with the loss of a job. He had served the company for 36 years and had announced his intention to retire. He felt secure in his job and reasonably believed that he need not fear arbitrary or capricious discharge or discipline. He took pride in his work as an important part of the team that was called in for emergency work involving wrecks and derailments. He knew others relied on him. He was humiliated and disgraced by the Company's unfounded allegations of gross negligence that he had consumed alcohol contrary to his obligations as a Supplementary Service employee.

77. Perhaps inevitably, the reasons for his dismissal became known to his co-workers and also to prospective employers who were already aware of his circumstances when he contacted them in his attempts to secure alternative employment. His wife has a medical condition and telling her that he'd been discharged for cause resulted in severe emotional distress. Since his termination in March, 2013 he has been without income and benefits. He has struggled to pay his wife's monthly medical expenses and was unable to keep current with his rent. He was distraught when he learned that due to his dismissal, he was no longer eligible for early retirement benefits and the pension he now desperately needed was reduced by half. He was embarrassed and humiliated and in tears when co-workers brought his family a Christmas hamper.

78. The Company's disregard for its obligations of good faith and fairness in the termination of the grievor's employment caused him mental distress severe enough to warrant an award of bad faith damages which I assess at \$5000.

106. In AH727⁶¹, disingenuousness led to an award of \$5000 damages:

68. I am, however, persuaded that aggravated damages in the amount of \$5000 are warranted. I make this order in the face of the Company's blatant disregard of its disclosure obligations under article 18.2 (d) of the collective agreement, and its apparent failure to follow its own Job Aid, notwithstanding the final result of the oral fluid test in the face of CROA jurisprudence. Though the Company submits that it weighed the evidence before it appropriately, I find that claim to be somewhat disingenuous having regard to all the circumstances.

⁶¹ [*Canadian National Railway Company v United Steelworkers, Local 2004*, 2021 CanLII 30111](#)

107. In AH895⁶², a lack of reasonable cause to conduct a drug/alcohol test led to an award of \$5000 damages⁶³:

In respect of remedy, I find that the Employer's decision to drug test the Grievors without a reasonable basis for doing so constitutes a breach of their privacy. The Employer knew, or certainly ought to have known, that it did not have the right to require the Grievors to submit to testing after learning that their actions were not responsible for the accident. In light of that, I order the Employer to pay each of the Grievor's \$5000 as aggravated damages, which I hope will act as a deterrence for future breaches of this nature.

108. Similarly, arbitrators may award aggravated and punitive damages for inappropriate procedural conduct⁶⁴:

37. The failure of the investigating officer to question exculpatory witnesses in CROA 4853 and subsequent discipline would undoubtedly have caused unnecessary stress to the grievor. I find that he is entitled to aggravated damages of \$5000.

38. The failure of the Company to provide a copy of the key piece of evidence to the Union for two years in CROA 4852, despite repeated demands, is inexplicable and cannot be condoned. I find that the Union is entitled to \$5000 in punitive damages.

109. These cases awarded damages in non-CHRA situations. Mr. Calibaba's situation, as the TCRC noted, also brought the CHRA into play.

CHRA damages

110. Canadian railways have experience with CHRA violations leading to damages awards.

111. In *McFee v. Canadian Pacific Railway Company*⁶⁵ the Canadian Human Rights Tribunal (CHRT) awarded damages for an employee's termination based in part on his disability:

⁶² [CPKC v. IBEW](#) (August 27, 2024).

⁶³ See also AH-879 - [International Brotherhood of Electrical Workers, System Council No. 11 v Canadian Pacific Kansas City Railway, 2024 CanLII 60992](#) at paragraph 55.

⁶⁴ [CROA 4852 & 4853 – Supplemental.](#)

⁶⁵ [2019 CHRT 28](#)

[103] In conclusion, the termination of the Complainant was due in part to his disability and the Respondent has not successfully refuted the allegation that the disability was a factor in his termination. It is accepted law that the Complainant alleging the discriminatory practice has the onus to establish same pursuant to the civil standard on the balance of probabilities. The Complainant has met this onus. Further, the Respondent has not established on a balance of probabilities that it has accommodated the Complainant to the point of undue hardship. I therefore conclude that the allegation of a discriminatory practice in respect of the Complainant's termination is substantiated.

112. The Tribunal further awarded damages for pain/suffering as a result:

[135] I found the Complainant credible and accept his submission that he did suffer the foregoing pain and suffering and emotional harm, both directly stemming from the termination itself, and indirectly, as a result of the financial and social consequences of the termination. The Tribunal has regularly ordered awards for pain and suffering in the absence of either corroborating evidence and proof that the harms resulted in a need for medical assistance. See for example *Milano v. Triple K Transport Ltd.*, 2003 CHRT 30; *Hicks v. Human Resources and Skills Development Canada*, 2013 CHRT 20 respectively.

...

[137] It is clear that the Complainant did suffer and as such there will be an award of \$15,000.00.

113. The Tribunal also awarded an additional \$15,000 for the employer's reckless behaviour:

[141] In the case at hand it appears that the respondent was so determined to terminate the Complainant that it failed to make basic inquiries to Human Resources or the Return to Work program before terminating him. Furthermore, the key decision-makers were aware of his status as a Return to Work employee, and had fought against his joining their team at the outset. Even if they were not privy to his exact condition or specific limitations, they should have taken the minimal effort to enquire whether his performance and attitude issues were related to his disability, and they did not.

[142] I find that the Respondent behaved recklessly in terminating the Complainant, and consequently I order an award in the sum of \$15,000.

114. Decisions involving other railway companies illustrate the types of damages awards granted under the *CHRA*⁶⁶.

Did the TCRC prove *prima facie* discrimination?

115. The parties know the impact of human rights legislation on labour arbitrations. For example, AH835⁶⁷, a case involving CPKC, referenced an arbitrator's authority to apply the *CHRA*, including its provisions regarding damages. AH835 also referenced *Luckman v. Bell Canada*⁶⁸, a case which provided a helpful analysis for situations involving employees with *CHRA* disabilities.

116. The TCRC argued it had demonstrated *prima facie* discrimination. It further argued that CPKC had provided no justification for discriminating against Mr. Calibaba.

117. The arbitrator agrees.

118. As noted in myriad cases, such as *Petrovic*⁶⁹, the test for *prima facie* discrimination asks 3 questions.

119. First, did Mr. Calibaba have a *CHRA* protected characteristic? The medical evidence clearly established that Mr. Calibaba suffered from one or more disabilities. For example, as noted in the chronology, OHS knew Mr. Calibaba suffered from a major depressive disorder. This led to OHS initially requiring 3 months of stability before allowing him to return to work. CPKC remained aware of Mr. Calibaba's medical issues as they worsened.

120. Moreover, a disability under the *CHRA* includes a perception or impression of a disability⁷⁰. In this case, despite the evidence in AH807, the December 27, 2022 negative substance abuse test and opinions from two doctors, CPKC still insisted Mr. Calibaba undergo the SAP. CPKC treated him as suffering from a perceived disability despite all the medical evidence to the contrary.

⁶⁶ See, for example, [Young v. Via Rail Canada Inc., 2023 CHRT 25](#) (15K), [R.L. v. Canadian National Railway Company, 2021 CHRT 33](#) (15K) and [Lafrenière v. Via Rail Canada Inc., 2019 CHRT 16](#) (25K).

⁶⁷ [International Brotherhood of Electrical Workers \(System Council No. 11\) v Canadian Pacific Kansas City Railway, 2023 CanLII 73603](#) at paragraphs 95-98.

⁶⁸ [Luckman v. Bell Canada, 2022 CHRT 18](#). See also [Houle v. Transports Canada, 2024 CHRT 22](#) and [Lock et al. v. Peters First Nation, 2023 CHRT 55](#).

⁶⁹ See, for example, [Petrovic v. TST Overland Express, 2021 CHRT 26](#).

⁷⁰ *Petrovic* at paragraph 40.

121. Second, did Mr. Calibaba suffer an adverse impact with respect to his employment? Due to the perception of disability, and despite knowing of his other verified medical conditions, CPKC refused to reinstate Mr. Calibaba. The medical evidence in the Record suggested that those delays aggravated his medical conditions and prevented him from returning to work. During all this time, despite the SDO in AH807, CPKC failed to reinstate Mr. Calibaba, a refusal which impacted him by denying him access to his CBA benefits and entitlements.

122. Third, were Mr. Calibaba's disabilities, both real and perceived, a factor behind CPKC's refusal to allow him to return to work? CPKC provided no evidence that anything other than Mr. Calibaba's disabilities prevented him from returning to work. CPKC did not plead a *bona fide* occupational requirement. Neither did it commence any duty to accommodate analysis despite the ample medical information in OHS' file.

123. Instead, CPKC relied on the SAP, its own unilaterally imposed barrier, essentially to terminate Mr. Calibaba a second time. Put more precisely perhaps, CPKC relied on the SAP, and Mr. Calibaba's alleged lack of cooperation, as justification for its continual refusal to reinstate him, despite AH807's statutory decision or order.

124. CPKC's discriminatory conduct, given the overall context and the well-known jurisprudence under the *CHRA*, justifies a damages award.

Damages for Mr. Calibaba

125. Following a successful complaint, the *CHRA* contains 2 significant provisions, one for "pain and suffering" damages and the other for "special compensation" damages:

Section 53(2)(e):

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

...

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

Section 53(3):

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

Pain and suffering damages (CHRA s.53(2)(e))

126. The TCRC asked for \$10,000 in pain and suffering damages. In *Currie*⁷¹, the CHRT described a 2-step framework used to help evaluate compensation under s.53(2)(e). The first question examined the objective seriousness of the conduct. The second question looked at the effect on the particular applicant who experienced discrimination.

127. Objectively, the above chronology demonstrated the seriousness of CPKC's conduct when it failed to comply with the AH807 reinstatement for someone that it clearly knew suffered from one or more disabilities. Instead, CPKC created a new barrier to reinstatement, something the AH807 SDO never mandated. This action denied Mr. Calibaba access to important CBA entitlements, including health/dental benefits and WIB.

128. The chronology similarly showed the impact on Mr. Calibaba. Being deprived of the compensation to which he was entitled caused him evident financial difficulties. The medical evidence in the Record further suggested that CPKC's conduct worsened Mr. Calibaba's medical condition making it even more difficult for him to return to work.

129. On multiple occasions, Mr. Calibaba advised CPKC and others of the impact on his health from the lack of a reinstatement.

130. The TCRC has justified its request for \$10,000 in damages under CHRA s.53(2)(e).

Special compensation (or punitive) damages

131. Technically, it does not appear the TCRC explicitly referenced CHRA s.53(3) when it claimed a further \$10,000 for punitive damages. At the hearing, the TCRC asked for \$10,000 punitive damages under general arbitral principles.

⁷¹ [Currie v. Bear River First Nation, 2024 CHRT 82](#) which in turn referenced [Christoforou v. John Grant Haulage Ltd., 2021 CHRT 15](#)

132. The arbitrator is satisfied that, whether under the analysis for *CHRA* s.53(3) “special compensation” or “punitive” damages, CPKC should pay an additional \$10,000 in damages.

133. Section 53(3) requires a finding that a person “has engaged in the discriminatory practice wilfully or recklessly”. The arbitrator concludes that CPKC acted recklessly when it ignored the SDO in AH807 and unilaterally imposed the SAP barrier on Mr. Calibaba. Withholding 40% of his compensation for the Period based on an untenable mitigation argument similarly met the recklessness test.

134. The consequences of this reckless behaviour resulted in Mr. Calibaba’s health conditions worsening and severe financial issues. CPKC’s conduct further denied Mr. Calibaba access to the negotiated CBA benefits at a time when he desperately needed them.

135. In the circumstances of this case, the arbitrator is satisfied that a remedy under s. 53(3) remains available even in the absence of a party’s specific reference to that *CHRA* section. However, if it had been necessary, the arbitrator would have agreed with the TCRC’s submissions⁷² to award a comparable amount of non-*CHRA* punitive damages. Put summarily, CPKC’s treatment of a disabled employee like Mr. Calibaba justified an award of punitive damages⁷³.

136. The TCRC has justified its claim for \$10,000 in damages whether under a s.53(3) *CHRA* analysis or general punitive damages principles.

DISPOSITION

137. For the reasons described above, the arbitrator orders CPKC to:

- Reinstatement Mr. Calibaba immediately to his position “on paper” which includes access to all his CBA entitlements;
- Pay Mr. Calibaba immediately, with interest, the 40% compensation improperly withheld for the Period (January 1, 2023 to May 2, 2023);
- If required based on the current medical evidence, immediately commence the duty to accommodate process;

⁷² TCRC Brief, paragraphs 145-151.

⁷³ [*Greater Toronto Airports Authority v. Public Service Alliance Canada Local 004*, 2011 ONSC 487](#)

- Compensate Mr. Calibaba, with interest, for any lost benefits, the particulars of which the arbitrator leaves to the parties to calculate;
- Pay Mr. Calibaba immediately, with interest, compensation per the equivalent of the WIB rate from May 3, 2023 onward, until either he returns to his home position or to a reasonably accommodated position;
- Pay immediately \$20,000 in damages to Mr. Calibaba.

138. The arbitrator remains seized for any continuing issues arising in this matter.

SIGNED at Ottawa this 16th day of April 2025.

A handwritten signature in black ink, appearing to read 'G. Clarke', written in a cursive style.

Graham J. Clarke
Arbitrator