

# HUMAN RIGHTS PANELS OF ALBERTA

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**BETWEEN:**

**Andre (Bill) Jodoin**

**Complainant**

**-and-**

**City of Calgary**

**Respondent**

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## DECISION

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**Panel Chair:** Beth Bryant

**Date:** November 24, 2008

**File Number:** S2004/10/0259

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**APPEARANCES**

Andre (Bill) Jodoin )  
Complainant )

Director of the Human Rights )  
and Citizenship Commission )

Mr. Arman Chak, Legal Counsel

City of Calgary )  
Respondent )

Ms. Deborah Dalton, Legal Counsel

[1] On October 19, 2004, Mr. Andre (Bill) Jodoin (the complainant) filed a complaint against the City of Calgary (the respondent). Mr. Jodoin alleged he suffered discrimination in the area of employment on the ground of physical disability contrary to section 7(1)(b) of the Human Rights, Citizenship and Multiculturalism Act (the Act).

## **Issues**

- 1) Did the complainant have a physical disability within the meaning of the Act?
- 2) If so, was this physical disability known to the respondent and a factor in his dismissal?
- 3) If so, before dismissing the complainant, did the respondent attempt to accommodate the complainant's physical disability to the point of undue hardship?

## **Relevant Evidence**

[2] The following persons provided evidence at this hearing: Mr. Bill Jodoin, the complainant; Ms. Doris Duncan, return to work coordinator, City of Calgary; Ms. Maria Gagliardi, administrator, Municipal Employees Benefit Association of Calgary (MEBAC); and Mr. Terry Hryniw, acting manager, Labour Relations, City of Calgary.

[3] Mr. Jodoin was first hired as a City of Calgary employee on May 18, 1999. His work was seasonal and he was laid off in September 1999. He was recalled on April 10, 2000 as a permanent employee. Mr. Jodoin was a member of the Canadian Union of Public Employees (CUPE) Local 37.

[4] Mr. Jodoin testified that he had been a professional wrestler and truck driver. He wanted to work for the City so that he could remain at home and have a stable job that would carry him through to retirement.

[5] Prior to working at the waste and recycling department, Mr. Jodoin stated that he had to complete a physical examination which he passed with "flying colours." Mr. Jodoin was happy performing his job and had no health issues.

[6] On September 12, 2002, while working in the waste and recycling department as a driver/labourer, he was injured at work. He stated that he felt pain in his lower back as he lifted a garbage can.

[7] Mr. Jodoin was taken to the Columbia Health Centre by his supervisor, Mr. Rick Billington. A Workers' Compensation Board (WCB) Workers Report of Injury and Occupational Disease states that he was examined by Dr. Hickie.

[8] On September 16, 2002, Mr. Jodoin's claim for compensation was accepted by WCB.

[9] From September 2002 to February 2003, Mr. Jodoin underwent a series of medical tests in anticipation of surgery. During this time he was being seen by his personal physician, Dr. D. A. Malus and Dr. T. Lynch of Columbia Health Centre. As per reports from Dr. Lynch, Mr. Jodoin was not fit for work during this time.

[10] On February 7, 2003, Mr. Jodoin underwent spinal decompression surgery. Mr. Jodoin stated that he thought he would be able to return to work after his operation, as the surgery was to give him better mobility and less pain.

[11] During the time that Mr. Jodoin was awaiting his surgery, Ms. Maria Gagliardi testified that he would have received a package of materials informing him of Long Term Disability (LTD) benefits.

[12] Ms. Gagliardi explained that after Mr. Jodoin's injury on September 12, 2002, he would have received Short Term Sickness and Accident (S&A) benefits which are payable for a maximum period of 119 days. The LTD plan is intended to provide wage loss coverage after the S&A period lapses on the 120<sup>th</sup> day.

[13] She stated that S&A benefits are paid for by the City, while the LTD program is paid for by premiums paid by the employee. The LTD program is administered by Great West Life (GWL).

[14] The respondent produced a letter from GWL to Mr. Jodoin, dated December 30, 2002, which stated that they were in receipt of a partial application for LTD benefits but were missing the Employee's Submission Guide and Attending Physician's Statement. A following letter to Mr. Jodoin, dated February 12, 2003, stated that GWL had received the Employer and Employee Statements for his LTD claim, but the Attending Physician's Statement was still missing. These letters were copied to Ms. Doris Duncan, return to work coordinator, Ms. Flo Campbell, benefit services administrator, and CUPE Local 37.

[15] In the "Chronology of Andre Jodoin" prepared by Ms. Duncan, it is noted that on November 6, 2003, another letter was received from GWL stating that an Attending Physician's Statement had not been received. This letter was not in evidence.

[16] Ms. Gagliardi testified that in order to be eligible for LTD benefits, an employee must forward the information required within six months of the date of the disability. In this case, the Panel notes the date would be March 13, 2003.

[17] In his testimony, Mr. Jodoin stated that he never received an LTD application and could not recall receiving the letters from GWL. He stated that if he had received the letters, he definitely would have fulfilled their request.

[18] Ms. Duncan testified that if an employee had not completed an LTD application, she would contact them, as the City would be concerned that this be done in the event that something went wrong with the employee's WCB benefits. She testified that she would have followed up on the GWL letter of December 30, 2002 with Mr. Jodoin. Although she did not recall Mr. Jodoin's response, she noted that the employee information was subsequently submitted to GWL.

[19] Ms. Duncan also believed she followed up with Mr. Jodoin after receipt of the second letter from GWL on February 12, 2003. She did not recall his response as to why the Attending Physician's Statement was missing. When asked by counsel for the claimant why she did not follow up with Mr. Jodoin by letter, she testified it was not part of her job description.

[20] From February to June 2003, Mr. Jodoin recuperated from his surgery and participated in physiotherapy at the Columbia Health Centre.

[21] On June 23, 2003, Dr. Lynch recommended that Mr. Jodoin could return to work half days on a two-man truck. Ms. Duncan testified that Mr. Jodoin went back to work on alternate half days on June 25, 2003.

[22] On July 9, 2003, Mr. Jodoin's work restrictions changed as a result of Dr. Lynch's assessment. He stated that Mr. Jodoin would "need to consider being accommodated in a lighter job. Light duties and no heavy lifting." Consequently, Mr. Jodoin was taken off the garbage truck and sent to work at the landfill site where there was lighter work.

[23] On August 11, 2003, Dr. Lynch reported that Mr. Jodoin was not able to work due to this current work exacerbating his lower back pain.

[24] On August 18, 2003, Dr. Lynch reported that Mr. Jodoin could work half days with no heavy lifting in excess of 20 pounds.

[25] Mr. Jodoin testified that he was given a "throw and go" job at the landfill site. For the first few days he was told he could sit, but he still had to see people and move things such as tires from place to place. However, after the fourth day, a new foreman told him to move refrigerators on a dolly. When Mr. Jodoin stated that he could not perform this task, the foreman told him to either move the refrigerators or go home. Mr. Jodoin phoned his supervisor, Mr. Dave Billington, who told him to leave.

[26] Mr. Jodoin stated that at a subsequent appointment with Dr. Lynch, the doctor told him that he could not return to that job. From September 16, 2003 to March 8, 2004, Mr. Jodoin underwent further testing to get an accurate assessment of his disability and attended a pain management program.

[27] During this time, Ms. Duncan testified that she was getting medical updates that Mr. Jodoin was not capable of working, therefore she was not looking for accommodated work. Ms. Duncan stated that she was in regular contact with Mr. Jodoin and spoke daily with him after his pain management program began in March 2004.

[28] Mr. Jodoin testified that his principle contact person was Mr. Billington, and he did not speak that frequently with Ms. Duncan. Further, he stated that during that time period he was at Columbia College. He would leave home at 8:30 and get home between 4:15 and 5:00, making it impossible to speak daily with Ms. Duncan.

[29] On September 15, 2004, Dr. Ablett of the Calgary Visiting Specialist Clinic, Health Resource Centre, provided WCB with an "Initial Medical Evaluation." His recommendations in part stated "Since his injury date in September of last year, he underwent an L4-5 discectomy by Dr. Paul Salo in February ... His leg pain improved following surgery but he is severely limited by ongoing back pain." Further, "Although on the surface Mr. Jodoin appeared to demonstrate some overt pain behaviours, given the fact that my examination is highly suggestive of discogenic pain I would favour the latter diagnosis. I think we have to give this man the benefit of the doubt."

[30] Dr. Ablett also recommended a provocative discography and referred Mr. Jodoin to Dr. Frizzell at the Foothills Hospital. He also requested an updated MRI.

[31] Dr. Ablett closed his letter by stating, “I cannot see how this man can possibly work as he obviously is extremely sore with back pain probably of a discogenic nature.”

[32] In an article by Jonathan Cluett, M.D., dated June 21, 2005, it states “sometimes the cause of back pain is thought to be due to degeneration, or wearing out, of the lumbar intervertebral discs. This condition is called discogenic back pain or lumbar disc pain.”

[33] The article further states that the primary test used to diagnose discogenic pain is called a discogram. It states that discogenic back pain is a difficult treatment program. Basic treatments include anti-inflammatory medications, exercise and therapy.

[34] In March and April 2004, a series of assessments of Mr. Jodoin’s condition took place.

1) On March 9, 2004, Dr. Ablett released his final assessment which stated in part:

*The provocative discography revealed what appears to be discogenic pain arising from the L3-4 level, as well as problems which we have known about at the L4-5 level.*

*Prognosis is dismal and I cannot foresee Bill returning to gainful employment certainly doing any lifting, twisting and being on his feet as he was in the past. He is looking at doing fairly sedentary occupations in the future, if indeed he can be retrained.*

*Sorry that I cannot do really anything else for Bill, but I think at least we have a good solid diagnosis here and there is no question in my mind of embellishment of symptoms of secondary gain or anything else. I find Bill a most pleasant and genuine individual.*

2) In her chronology, Ms. Duncan stated:

*In March 2004 will need permanent accommodation, unable to work, Dr. Lynch. Doris called Dr. Lynch on 16 March 04 – fit for sedentary work only.*

[35] According to the WCB Alberta Disability Duration Guidelines – Job Classifications, sedentary work is defined as:

*Exerting up to 10 pounds of force occasionally and/or a negligible amount of force frequently or constantly to lift, carry, push, pull or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.*

3) In a letter dated March 26, 2004 from WCB to Mr. Jodoin, it stated in part:

*Further to Gillian’s case plan letter dated November 7, 2003, you have been seeing the specialist, Dr. Ablett, regularly for appointments. I have Dr.*

*Ablett's most recent report file dated March 9, 2004, which indicates that you are not a candidate for further surgery and that conservative management is recommended.*

*Permanent Work Restrictions*

*Dr. Ablett also indicates that you will have permanent work restrictions and will be capable of performing only sedentary occupations in the future.*

*Permanently Modified Work*

*The Human Resource Department at the City of Calgary had requested that you be referred to an employment counselor for the purposes of developing an updated resume and for the creation of a job focus assessment report. The City of Calgary will be exploring possibilities for permanently modified work for you that is sedentary in nature; however, there are no guarantees that they will be able to locate permanent alternate work within your work restrictions. They have requested a copy of your resume and a Job Focus Assessment report from the employment counselor once you have had a few sessions with her.*

4) On April 22, 2004, Mr. Ryan O'Donoghue, Kinesiologist, Pain Management Program, Columbia Health Centre, provided the following information to Ms. Duncan:

*April 22, 2004*

*Mr. Jodoin is in week 6 of the ORIII (Pain Management) Program. His date of discharge will be Friday, April 30<sup>th</sup>, 2004. The following outlines Mr. Jodoin's observed abilities and functional tolerances to date. It has been recorded, by Dr. Ablett, that the nature of this injury is quiet severe and chances of progressing further functionally are very slim.*

*Limitations and Restrictions:*

- Due to the nature of Mr. Jodoin's injury, he is unable to participate in functional lifting and carrying.*
- Walking has been observed over short distances of approximately 80 meters before a seated rest break is needed.*
- Sitting tolerance has been observed at approximately 50-60 minutes.*
- Fine manual handling activity can be sustained for periods up to 50-60 minutes.*

*Please review the above work restrictions and indicate if the City of Calgary is able to accommodate a permanent modified or a suitable alternate position.*

[36] Ms. Duncan testified that the process of finding accommodation for an employee involved five steps:

- i) She would first go back to Mr. Jodoin's home work unit which was the Spy Hill Landfill Site. She stated that the waste and recycling department was normally very good at accommodating, as they had 400 employees and most accidents occur there due to the nature of the work,
- ii) Her next step would be to contact all departments within waste and recycling,
- iii) She would contact all City departments within CUPE Local 37,
- iv) She would make contact outside of CUPE Local 37, and
- v) She would make inquiries corporate wide.

[37] Utilizing the restrictions outlined in Mr. O'Donoghue's letter, Ms. Duncan sent out an e-mail on April 29, 2004 to waste and recycling supervisors looking for long term accommodation for Mr. Jodoin. Four of the supervisors stated that they were unable to accommodate him.

[38] On April 29, 2004, Mr. Jodoin completed his Job Focus Assessment and Resume and a report was issued by Ms. Tyla Jones, his vocational counselor at Columbia Health Centre.

[39] Ms. Jones identified four job targets based on Mr. Jodoin's documented functional abilities, work experience, transferable skills, education level, and interests. These were 1) security guard, 2) weigh scale operator, 3) trucking dispatcher, and 4) truck leasing and rental representative. When asked by counsel for the director if she had considered these positions for Mr. Jodoin, Ms. Duncan stated that the City did not have security guards, trucking dispatchers or truck leasing and rental representatives. The City did have weigh scale operators but she received no positive response.

[40] Ms. Jones' report also indicated that "Mr. Jodoin presents with a low self-concept and belief of employability which may affect his ability to locate suitable employment."

[41] Mr. Jodoin was discharged from the Complex Return to Work program on April 30, 2004 as fit for full time sedentary work.

[42] On May 5, 2004, Mr. Jodoin attended a case conference meeting to discuss a Return to Work Plan. In attendance were Ms. Duncan, Ms. Jones and Ms. Gillian Budge, WCB case officer.

[43] In a letter dated May 6, 2004, Ms. Budge informed Mr. Jodoin and Ms. Duncan that *I have been informed of the results of your functional assessment completed at Columbia Health Center May 3-4, 2004. Unfortunately, there were inconsistencies – your performance and lack of effort due to complaints of pain which self-limited your performance.*

[44] Ms. Budge declared the assessment invalid and did not use it in determining Mr. Jodoin's fitness for work. She made reference to an April 26, 2004 medical advisor's opinion that Mr. Jodoin should not be doing any heavy lifting in the future and she determined that Mr. Jodoin's fitness for work included being capable of doing work that does not require heavy lifting.

[45] Ms. Duncan testified that she contacted Ms. Budge to seek clarification of Mr. Jodoin's level of fitness and was told it was assessed at medium.

[46] Referring to the WCB Alberta Disability Duration Guidelines – Job Classifications, medium work is defined as:

*Medium Work – Exerting up to 50 pounds of force occasionally, and/or up to 20 pounds of force frequently, and/or up to 20 pounds of force frequently and/or up to 10 pounds of force constantly to move objects.*

[47] A Functional Capacity Evaluation was conducted by Mr. Dave Sawatzky, physical therapist. In his report, he stated that Mr. Jodoin attempted all tasks requested, however he did not provide maximum effort and this was indicated through his physiological indicators.

[48] Mr. Jodoin testified that he did the best he could on this evaluation because he wanted to get back to work. He stated that there was no financial gain to be out of work. He testified that after the test he had to sit down and medicate.

[49] In her letter of May 6, 2004, Ms. Budge also stated “there is no requirement under the WCB for employers to rehire injured workers. However, under human rights legislation employers have a duty to accommodate workers with disabilities.”

[50] Consequently she stated that “your employer is being provided up to 30 calendar days to search for appropriate modified work.” During this time, May 6 – June 4, 2004, Mr. Jodoin would receive an interim program allowance.

[51] As a result of Ms. Budge’s letter and subsequent phone conversation, Ms. Duncan testified that she changed Mr. Jodoin’s permanent restrictions to reflect the medium work category.

[52] Counsel for the director asked Ms. Duncan why she would change his restrictions from sedentary to medium work without speaking with Dr. Ablett or Dr. Lynch. Ms. Duncan responded that she did not have access to Dr. Ablett, but did have access to Dr. Lynch. As this occurred four years ago, she had no idea why she did not contact Dr. Lynch. She also testified that she was not aware that Dr. Lynch was still involved with Mr. Jodoin after April 29, 2004.

[53] On May 6, 2004, Ms. Duncan again sent an e-mail to four supervisors in the waste and recycling department asking for permanent accommodation for Mr. Jodoin in positions now requiring medium work restrictions. All supervisors reported that they had no work for a person with these restrictions.

[54] On May 17, 2004, Ms. Duncan sent an e-mail to human resources and other return to work coordinators requesting accommodation in positions reflecting Mr. Jodoin’s updated restrictions. A follow-up e-mail was sent to human resources consultants on June 3, 2004. Ms. Duncan received no potential jobs.

[55] On May 18, 2004, Mr. Jodoin requested computer training which was subsequently denied. Mr. Jodoin testified that he did not think he could be accommodated in waste management. Therefore, he looked for computer training so that he could be more employable.

[56] In a note to file dated June 4, 2004, Ms. Budge indicated that she was attempting to call Mr. Jodoin to inform him that she was referring him for Supportive Job Search Services at Columbia

Health Centre. She was making this referral because the 30-day period in which the City was to seek appropriate modified work had lapsed and she assumed that no modified work was available.

[57] The file note stated that Mr. Jodoin's phone number was no longer in use, but she got his brother's phone number from Columbia Health Centre and left a message at his house for Mr. Jodoin.

[58] Ms. Duncan also testified that she was unable to contact Mr. Jodoin from the beginning of June to the beginning of July, because he had moved and had not provided her with a new phone number. During this time, however, she stated that she spoke to him a couple of times when he contacted her. Mr. Jodoin testified that he had provided a contact number to Mr. Billington who used it to contact him at a later date. Mr. Jodoin stated that he was told he had to be in contact with Mr. Billington and his supervisor, Emil. Consequently he had little contact with Ms. Duncan.

[59] Mr. Jodoin stated that he participated in the Supportive Job Search Program up to the point of actually searching for another job. Mr. Jodoin testified that he believed that he was still with the City even though they had not found him another position. He stated that he did not know why he had to look for another job when he wanted to work for the City and as far as he knew he was still employed by the City.

[60] On June 21, 2004, Dr. Lynch's report indicated that Mr. Jodoin needed accommodation in a sedentary position. He also commented that Mr. Jodoin is "confused about job search since he is still employed by City and seeking accommodation."

[61] In a letter dated July 6, 2004 from Ms. Budge, Mr. Jodoin was informed that WCB was suspending the Supportive Job Search Program services and re-employment assistance benefits effective on this date. This letter was cc'd to the City of Calgary.

[62] Ms. Duncan testified that on July 6, 2004, WCB suspended Mr. Jodoin's benefits because he was not cooperating with the process. She stated that now they were in trouble because Mr. Jodoin would have no paycheque. Consequently, she notified Mr. Jodoin's department.

[63] On July 15, 2004, Mr. Jodoin received a letter from Mr. Billington regarding his employment status. The letter acknowledged that Mr. Jodoin's employment benefit from WCB had been terminated because he "was not cooperating in the rehabilitative process." Consequently, Mr. Jodoin was without employment status with the City.

[64] Mr. Billington stated that the City was prepared to grant Mr. Jodoin an unpaid Leave of Absence (LOA) for 30 days in order to rectify the situation with WCB.

[65] Mr. Jodoin was instructed to complete an enclosed LOA form and return it to Mr. Billington by 4:30 p.m. on July 22, 2004. Failure to return this form or be reinstated by WCB would result in the termination of his employment.

[66] Mr. Jodoin testified that he had cooperated with WCB except he would not "land a job" outside of the City. He believed that Mr. Billington's letter meant that he was being pushed out the door. With regard to the LOA, Mr. Jodoin testified that he could not believe he was being pushed out the door because he was sick. He wondered what he would do. He discussed the LOA with a friend in

the union who told him that if he signed the form he “was done.” Mr. Jodoin testified that Mr. Billington left approximately 15 messages asking him “to come in and sign, we’re buddies.”

[67] Mr. Terry Hryniuw testified that LOA is a tool that can be used by an employee to bridge their employment status. He stated that in cases where benefits are denied, an employee can either return to work or take an LOA if they wish to appeal the benefit decision. Otherwise an employee is considered AWOL, and if they are gone more than five consecutive days they will be terminated with cause.

[68] On July 19, 2004, Mr. Jodoin wrote a letter to Mr. Billington regarding “Cooperation with the WCB Rehabilitative Process.” Mr. Jodoin testified that he did not get a response to this letter. During this time there was also no communication with Ms. Duncan.

[69] On July 23, 2004, Mr. Jodoin received a Notification of Disciplinary Action signed by Mr. Billington. It stated *in accordance with section 3203.03 (desertion from service) of the City of Calgary Administration Manual and clause 4.32 (subclause 3, loss of security) of the CUPE Local 37 Collective Agreement, we interpret your actions to be a voluntary resignation effective 2004 July. Your rehire recommendation will be documented as ‘do not rehire in any capacity with the City of Calgary.’*

[70] Mr. Jodoin testified that after receiving this correspondence he spoke with a union official who he believed was Mr. Donahue, who told him it was a “done deal.” He also talked to Mr. Billington who said “it was out of his hands.” Mr. Jodoin stated that he was confused. He did not quit his employment and felt that the City never acknowledged his illness.

[71] The City of Calgary has a policy on The Duty to Accommodate in Employment and Guidelines for Reasonable Solutions. Ms. Duncan was asked a series of questions related to this document and the accommodation process.

[72] Ms. Duncan had outlined a series of five steps that she would follow in the search for accommodation. She testified that in July 2004 she was still working on finding an accommodated position with waste and recycling and corporate wide with Local 37. Steps four and five had not yet been implemented.

[73] Ms. Duncan stated that the City of Calgary had approximately 12,000 employees in 2003/2004 and that it could take six to eight months to accommodate an employee.

[74] Ms. Duncan was asked if she followed the duty to accommodate policy utilizing the guidelines and checklists provided.

[75] Ms. Duncan responded that she applied the guidelines that related to Mr. Jodoin, but she did not utilize the recommended checklists. She stated that there was a process in her head that she followed. She did not fill out checklists as she had 40 to 50 files and it would mean a lot of writing. When asked if she met face to face with Mr. Jodoin, Ms. Duncan stated that it happened a couple of times but it was easier on the phone. She also did not explain LOA to Mr. Jodoin as she had no contact with him since his move at the beginning of June 2004. However, she spoke to Mr. Jodoin about LOA before June, but did not know if he understood her. She did not know if Mr. Billington had a contact number for Mr. Jodoin.

[76] Ms. Duncan testified that when she asked Mr. Jodoin what jobs he could do, he would respond that he could do nothing. Consequently, she stated that she needed help. Mr. Jodoin was seriously injured and she thought that she could not keep him in waste and recycling, so she e-mailed all human resources consultants in June 2004. Mr. Jodoin could not recall making this statement to Ms. Duncan, although he did think that he could do jobs in waste and recycling.

[77] Ms. Duncan testified that she would talk with all employees, including Mr. Jodoin about the union. She would suggest that if they needed further assistance or clarification, they could go to the union. She stated that in the one discussion she had with Mr. Jodoin about the union, he said he had no use for the union. Mr. Jodoin denied having made this statement. However, there is no evidence before the Panel of any union involvement in Mr. Jodoin's case.

[78] In a medical report from Dr. Lynch to Human Resources Development Canada, Income Security Program, dated September 2004, the doctor states that Mr. Jodoin has a permanent impairment. Further, he notes "it is extremely unlikely he can do even part time work because of ongoing symptoms with sitting, standing and walking."

[79] Throughout the hearing, Mr. Jodoin commented on the impact of his disability on his life.

[80] After receiving the diagnosis from Dr. Ablett on March 9, 2004, Mr. Jodoin stated that when the doctor first told him that he was not going back to any kind of work, he was really disappointed and almost distraught. He said that he wanted to go back to work and liked his job as a garbage man.

[81] When this diagnosis was confirmed by Dr. Lynch, who told him he could only do non-physical work, Mr. Jodoin wondered what it was that he could do. He testified that everything in his whole life had revolved around physical activity and to have this taken away was disturbing.

[82] Mr. Jodoin stated that he was a healthy person when he joined the City, but since his accident it was a downhill run. He testified that his life had changed. He now sleeps a maximum of four hours per night, he cannot do things he liked to do like fishing and camping, and he has not dated in five years. Further, before the injury, stating he was 285 pounds and in good shape, but now he weighed 370 pounds. Mr. Jodoin concluded by stating "I'm like I never thought my life would be." On October 19, 2004, Mr. Jodoin filed a human rights complaint.

### **Key Arguments of the Director**

[83] The relevant provision of the Act is:

*7(1) No employer shall*

*(a) refuse to employ or refuse to continue to employ any person, or*

*(b) discriminate against any person with regard to employment or any term or condition of employment,*

*because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status of that person or of any other person.*

[84] Counsel for the director argued that it was after September 4, 2003 that the City of Calgary started their discriminatory actions against Mr. Jodoin and conducted themselves in a manner that led to his medical condition becoming worse.

**Issue: Prima facie discrimination**

[85] In analyzing the issue of whether there has been prima facie discrimination, the Alberta Court of Appeal<sup>1</sup> confirmed the law in this matter:

*I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.*

[86] The director argued that the City discriminated against Mr. Jodoin in the following ways:

- 1) Mr. Jodoin was assigned to a “throw and go” position in waste and recycling, and asked to perform tasks beyond his physical capabilities. When he could not perform these tasks, he was asked to leave the site.
- 2) The City failed to seriously look for any permanent modified position after March 9, 2004 when they had a confirmed diagnosis of only sedentary positions.
- 3) The City completely ignored the medical reports of Dr. Ablett and Dr. Lynch when it accepted the “medium work” classification as determined by WCB.
- 4) Mr. Jodoin was faced with the threat of termination if he did not apply for an unpaid leave of absence.
- 5) The City of Calgary failed to do the following in their letter of July 15, 2004:
  - a) failed to offer any modified employment
  - b) failed to indicate why they were looking for a reinstatement of WCB benefits
  - c) failed to indicate to Mr. Jodoin why he was without employment status

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<sup>1</sup> *Co-operators General Insurance Co. v. Alberta (Human Rights Commission)* [1993] A.J. No.828 (Alta. C.A.) – paragraph 33

- d) failed to explain that LOA could provide them with further time to explore other modified positions
- e) failed to address his disability and any third party benefits provider that was part of the Collective Agreement
- f) failed to address why he was only given seven days to respond.

[87] Further, the City did not respond to Mr. Jodoin's letter of July 19, 2004 seeking clarification of some of these issues, nor did anyone from the City meet with him. Rather on July 23, 2004, Mr. Jodoin was informed that the City considered him to have "voluntarily resigned."

[88] The director argued that the termination process was disrespectful and completely discriminatory to a disabled employee. It created an artificial distinction between a disabled employee and a regular employee of the City of Calgary.

### **Accommodation**

[89] Mr. Jodoin was never informed of opportunities within the City of Calgary and he was not informed of what steps were being taken and with whom, in order to put him back into his position or other positions of employment.

[90] The medical evidence is clear that the City knew that Mr. Jodoin was restricted in the kind of work he could do. The City is a large employer with over 11,000 positions and the resources to provide modified work for Mr. Jodoin.

[91] The director argued that the respondent ignored the whole test in *Meiorin*. Specifically, the third part of the test where they do not deal within their obligation to show that any other alternative except for termination would cause undue hardship.

[92] The test as outlined by the Supreme Court of Canada<sup>2</sup> is:

*I propose the following three-step test for determining whether a prima facie discriminatory standard is a BFOR. An employer may justify the impugned standard by establishing on the balance of probabilities:*

*(1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;*

*(2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and*

*(3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.*

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<sup>2</sup> *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union* (B.C.G.S.E.U.) [1999] 3 S.C.R. 3

[93] While the respondent does not outline why no position could be found for Mr. Jodoin, it makes reference to a number of safety nets provided to Mr. Jodoin, some of which he chose not to pursue.

[94] With regard to the safety net of WCB, the director noted that WCB is a government agency and cannot be seen to be part of the City's duty to accommodate. This is also confirmed in the evidence put forward by WCB. Further supplementation of compensation pursuant to Schedule J of the Collective Agreement was never mentioned to Mr. Jodoin.

[95] The director also argued that the City did not follow their own policy guidelines regarding the duty to accommodate.

[96] The City of Calgary failed to provide any options for "sedentary" positions. When Mr. Jodoin required accommodation, they created an artificial barrier to his return to work and terminated him with no effort whatsoever at accommodating him. Further, their actions led to further financial strain and denial of benefits he would have received if the employer acted properly.

[97] The director submits that the respondent's conduct and termination of Mr. Jodoin was based on his physical disability and not for a bona fide occupational requirement.

### **Key Arguments of the Respondent**

[98] Counsel for the City of Calgary stated that the City accepts it has a duty to accommodate, and that accommodation involves the employee, the employer and the union.

[99] In this case, Mr. Jodoin knew that he was represented by a union but stated that he had no use for the union, consequently, there is no union involvement.

[100] The City stated that there were four safety nets available to Mr. Jodoin:

- 1) Workers' Compensation Benefits (WCB)
- 2) Long Term Disability (LTD)
- 3) Supplementation of Compensation pursuant to Schedule J of the Collective Agreement
- 4) Leave of Absence

[101] Counsel argued that benefits are a way of accommodation.

[102] In Mr. Jodoin's case, he received WCB benefits; he did not complete the LTD application; he never applied for Supplementation of Compensation benefits even though Ms. Duncan told him to call his union; and he refused to sign the request for the leave of absence.

[103] As Mr. Jodoin did not sign the request for the leave of absence, the employer-employee relationship was not preserved and Mr. Jodoin's employment with the City came to an end.

[104] Counsel stated that in March 2004, Mr. Jodoin was in a pain management program. His discharge date was April 30, 2004. Ms. Duncan began a search for long-term sedentary work accommodation through a series of e-mails to Spy Hill, waste and recycling, and Local 37 corporate wide.

[105] WCB asked Mr. Jodoin to participate in a functional capacity test to assess the kind of work he could do. A WCB report related to this test stated that Mr. Jodoin did not participate fully and did not demonstrate 100% of his physical capacity. Consequently WCB determined that Mr. Jodoin was capable of medium level work.

[106] Ms. Duncan utilized this information to combine Mr. Jodoin's previous restrictions with this new assessment regarding his lifting capabilities.

[107] Counsel commented on the criticism being leveled at Ms. Duncan for not contacting Dr. Lynch. She referred to Dr. Lynch's medical report to Human Resources Development Canada, dated September 2004, where he states that Mr. Jodoin has a permanent impairment. Further, Mr. Jodoin told Ms. Duncan that he was not capable of doing anything. Consequently, if Ms. Duncan had phoned Dr. Lynch, he would have said Mr. Jodoin was totally disabled and how could she have accommodated someone who was totally disabled.

[108] Counsel referred the Panel to an arbitration decision in the matter of a Collective Agreement for the period 2000-2001; and in the matter of the grievance of Ken Sahil, between the City of Calgary and the Canadian Union of Public Employees, Local 58 February 10-12, 2003. In this case, Mr. Sahil was not on vacation or receiving benefits and the City terminated him because he had no status. The Panel chair states that *while it is clear that recording the Griever's desertion of service as a resignation does not make it a resignation in the absence of anything more than just being absent without leave, it is equally clear that being absent without leave is a matter that goes to the heart of the employment relationship ... Absence without leave is a serious offense in and of itself.*

[109] Counsel argued that Mr. Jodoin was told that the only way he could resume his employment status was LOA. Mr. Jodoin's evidence was that Mr. Billington encouraged him to sign but on the advice of a friend, he did not sign.

[110] Counsel referred the Panel to a Court of Queen's Bench decision<sup>3</sup> where Justice Phillips states:

*[124] Counsel for the Union also argued that requiring termination of employees in order for them to be eligible to receive disability pension benefits under Articles 14.1 and 14.2, would offend Human Rights principles, particularly the duty to accommodate. The City argued in that regard that if a firefighter becomes disabled, then he has choices - long-term disability, workers' compensation, pension, or Supplementation of Compensation – and he is given the opportunity to seek competent advice as to which option to choose. Counsel for the Union acknowledged this, in argument before this Court. I accept that disabled firefighters have 4 options, and they receive competent advice from the Union before they choose an option. Accordingly, there is no discrimination, nor breach of the City's duty to accommodate.*

[111] Counsel referred the Panel to the January 12, 2005 decision of the Decision Review Body of the WCB. Counsel argued that this decision was crucial to their case. In this decision, it states that they found Mr. Jodoin uncooperative and that the Functional Capacity Evaluation did not give a

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<sup>3</sup> *Calgary (Cityof) v. International Association of Fire Fighters (Local 255)*, 2006 ABQB 133

true picture of what he could do. It further determined that part of Mr. Jodoin's physical problems are not a result of his accident while working for the City in September 2002. Consequently, the City is not responsible for all his physical difficulties.

[112] In her opening statement, counsel for the City stated that the evidence did not support that Mr. Jodoin was completely disabled.

[113] In her closing submission, counsel argued that Mr. Jodoin was presenting himself as totally disabled, therefore it was difficult for Ms. Duncan to find accommodated work. The City did all it could do, but Mr. Jodoin did not fulfill his duty.

[114] Mr. Jodoin's disability was not a factor in his employment coming to an end. His employment ended because he did not apply for leave of absence to preserve his employment relationship with the City of Calgary.

## **Analysis**

### **1. Did Mr. Jodoin have a physical disability within the meaning of the Act?**

[115] The Act defines physical disability as:

*any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness*

[116] The Panel accepts that Mr. Jodoin injured his back on September 12, 2002 while working for the waste and recycling department of the City of Calgary. This injury required spinal decompression surgery which occurred on February 7, 2003.

[117] The Panel also accepts the March 9, 2004 report from the specialist, Dr. Ablett, which states that Mr. Jodoin appears to have "discogenic pain arising from the L3-4 level as well as problems which we have known about at the L4-5 level." He states that Mr. Jodoin's prognosis is dismal and that he cannot do any "lifting, twisting and being on his feet as he was in the past. He is looking at fairly sedentary positions in the future."

[118] Counsel for the City referred the Panel to the report of the WCB Decision Review Body, which determined Mr. Jodoin was uncooperative and that part of Mr. Jodoin's physical problems were not a result of his accident while working for the City in 2002. Counsel for the director argued that the WCB report could not be used for the proof of the truth of its contents as it is the factual finding of another tribunal. The Panel agrees.

[119] The WCB report is the decision of another tribunal which was deciding a different issue with a different set of criteria.

[120] In this case, it is immaterial that Mr. Jodoin's injury may have exacerbated an existing condition or that further implications may have arisen as a result of his injury. It is a fact that Mr. Jodoin injured his back while lifting a garbage can while employed by the City of Calgary. Further, this injury was found to be eligible for compensation benefits from WCB.

[121] It is the finding of this Panel that Mr. Jodoin suffered a physical injury which required an L4-5 discectomy and resulted in a diagnosis of discogenic pain. The Panel finds that this is a disability as defined by the Act.

## **2. Was Mr. Jodoin's physical disability known to the City of Calgary and a factor in his dismissal?**

[122] The issue before the Panel is whether the actions taken by the City of Calgary constitute discrimination on the basis of Mr. Jodoin's physical disability.

[123] The burden of proof rests with Mr. Jodoin and the director to establish a prima facie case of discrimination. Such a case is made out if the complainant/director establishes, on the balance of probabilities that the acts of discrimination occurred in the circumstances of the case. If such a burden is met, the onus shifts to the City of Calgary to prove, on a balance of probabilities, that the contravention was reasonable and justifiable in the circumstances. The rationale for this standard is set forth in the case of *O'Malley v. Simpson Sears*<sup>4</sup>:

*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 answer from the respondent-employer.*

[124] The Panel finds that the City of Calgary was well aware of Mr. Jodoin's physical disability. Mr. Jodoin had been receiving WCB benefits since September 2002. The documentary evidence showed that the City was kept advised of the steps being taken, such as physiotherapy and pain management to assist him in his return to work.

[125] Having determined that the City was aware of Mr. Jodoin's disability, did the actions of the City of Calgary between September 4, 2003 and July 23, 2004 constitute discrimination as a result of his disability?

[126] Employers are expected to make reasonable efforts to accommodate individuals with disabilities.

[127] The City argued that WCB benefits, Long Term Disability, Supplementation of Compensation and a Leave of Absence were safety nets and a means of accommodation. The Panel disagrees.

[128] It is the finding of the Panel that:

- 1) WCB is an insurance policy for employees which allows the employer not to have to bear the cost of death or injury to an employee. If WCB ends, the employer still has an employment relationship with the employee, and consequently has a duty to accommodate.
- 2) There was a lot of evidence led regarding LTD. In the end, Mr. Jodoin did not get LTD benefits because he did not pursue the application. This was Mr. Jodoin's decision. However, LTD is an employee benefit designed to provide wage loss coverage after short term sickness

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<sup>4</sup> *O'Malley v. Simpson Sears* (S.C.C.)(1986) 7 C.H.R.R. D/3102

and accident benefits end, and is paid for by the employee. It does not bear directly on the employer's duty to accommodate.

3) There is no evidence that Mr. Jodoin was made aware of Supplementation of Compensation pursuant to Schedule J of the Collective Agreement. Further, according to the definition of "disabled" contained in the agreement, Mr. Jodoin may not have qualified at the time he was deemed to have voluntarily resigned.

4) LOA may have been a means of accommodation if within the 30-day period the City was actively searching for a modified sedentary position. However, this was not offered to Mr. Jodoin as an option.

[129] It is the finding of this Panel that the City was not prepared to provide any modified position for Mr. Jodoin after September 4, 2003 or to provide him with any accommodation. This finding is based on the following evidence:

### **1. Medical Evidence**

[130] In March 2004, the medical assessments of Dr. Ablett and Dr. Lynch made it clear that Mr. Jodoin would not be able to return to his position of driver/labourer with the waste and recycling department. Both doctors stated that Mr. Jodoin was fit for sedentary work only and would need permanent accommodation. This opinion was also supported by the WCB case manager and Mr. O'Donoghue of Columbia Health Centre, in a letter dated April 22, 2004 to Ms. Duncan.

[131] However, on May 6, 2004, the WCB manager, Ms. Budge, stated that she was declaring Mr. Jodoin's functional capacity assessment invalid because of "his lack of effort due to complaints of pain which self limited his performance." The Panel notes two things:

1) that this assessment was conducted by a physical therapist who also stated that Mr. Jodoin "attempted all tasks requested of him," and

2) Dr. Ablett stated that "manual exercise is normally not well tolerated by people with discogenic pain."

[132] The significance of declaring this assessment to be invalid was that Mr. Jodoin's level of work was assessed at medium which was diametrically opposed to the medical opinions of a sedentary work level.

[133] Further, Ms. Duncan testified that she accepted the WCB medium work assessment and revised Mr. Jodoin's work restriction in her e-mails to waste and recycling and human resources accordingly. This was done with no consultation with either Dr. Ablett or Dr. Lynch.

[134] The Panel finds that these modified work restrictions would have set Mr. Jodoin up for failure in any position that might have been found for him. Medical evidence stated clearly that he was able to function in a sedentary position only.

## **2. Search for Permanent Accommodation**

[135] The Panel finds that the search for permanent modified work was both limited and ineffective. E-mails were continuously sent to waste and recycling, even though Ms. Duncan stated that she seriously doubted that Mr. Jodoin could return to work in that area. The evidence indicated that supervisors stated that there were no suitable positions, but there is no record of what positions they considered. There is only one instance where a human resource consultant stated the positions she had vacant, and why they were not suitable. On the whole, there is no inventory of the positions considered.

[136] The City has a policy and set of procedural guidelines for its duty to accommodate. The City argued that the duty to accommodate involved the employee, employer and the union.

[137] In its guidelines, it states “where the accommodation involves some aspect of the Collective Agreement, a union must be involved.” In this case, the City has stated that one of Mr. Jodoin’s safety nets was Supplementation of Compensation pursuant to Schedule J of the Collective Agreement. It also stated that Mr. Jodoin never applied for this benefit while Mr. Jodoin stated that he was never informed of this.

[138] The policy guidelines also state that “on requests that involve accommodating someone for more than 10 consecutive working days, these guidelines must be followed and appropriate unions notified.”

[139] While there are some WCB documents that indicate the union has been copied, there is no documentary evidence of any meeting involving the union, the City and Mr. Jodoin, and no documentary evidence either to or from the City to CUPE Local 37 regarding Mr. Jodoin’s case. It is Ms. Duncan’s testimony that Mr. Jodoin stated that he had no use for the union. However, this statement has little relevance as her responsibility was to involve the union as per the accommodation guidelines.

[140] These guidelines also state that “an essential component of this process is open communication among all parties.” In this case, both Ms. Duncan and Mr. Jodoin agree that there were only “a couple” of face to face meetings. However, there is a great discrepancy on the amount of contact they had with one another. Ms. Duncan testified that contact ranged from daily to frequent. Mr. Jodoin testified that Ms. Duncan was not his principle contact and he had infrequent contact with her. He also testified that during the time of her alleged daily contact, he was at Columbia Health Centre all day.

[141] The Panel notes that in her “Chronology for Andre Jodoin” there is no reference to any frequent discussions with Mr. Jodoin. It is the opinion of the Panel that the evidence does not support that there was frequent contact or “open communication” amongst the parties.

[142] The guidelines also provide two checklists to assist in the accommodation process. The first is the “Asking for Accommodation Checklist” and the second is “Exploring and Assessing Options Checklist.” Ms. Duncan testified that she did not fill out these checklists for Mr. Jodoin, as she follows the process “in her head” and it would be time consuming to do this for her 40-50 files.

[143] The Panel finds that the City has policy guidelines which would be helpful to all parties in any search for accommodation. In this case, however, there is no evidence that these guidelines were followed effectively.

[144] The Panel also finds that at the time of Mr. Jodoin's dismissal, the search for modified work had not been extended to City departments outside of CUPE Local 37 or corporate wide. Consequently, all possibilities had not been pursued.

### **3. Fitness for Work**

[145] On April 30, 2004, Mr. Jodoin was discharged from the Complex Return to Work Program and declared fit for work in a sedentary position.

[146] On June 21, 2004, Dr. Lynch reported that Mr. Jodoin could perform modified or alternate work and that he "needs accommodation in a sedentary position."

[147] On July 6, 2004, WCB suspended Mr. Jodoin's supportive job search services and his re-employment assistance benefits. The City argued that if an employee is not receiving a benefit and not at work, their absence is not authorized.

[148] Mr. Hryniuw testified that in cases where benefits are denied, an employee can either return to work or take a LOA if they wish to appeal the benefit decision.

[149] In this case, Mr. Jodoin was not given the option of returning to work even though he was medically capable of working in a sedentary position. Instead, he was offered a LOA so that he could appeal the WCB decision. This was done with no face to face meeting with Mr. Jodoin, and no explanation as to why he should appeal the WCB decision. Further, this action was taken while Mr. Jodoin was still under the impression that the City was searching for a sedentary position for him.

[150] At no time did the City inform Mr. Jodoin that they could not find appropriate sedentary work for him. Instead, they threatened him with termination if his WCB benefits were not reinstated or if he did not sign the LOA. This was done with Mr. Jodoin being given no opportunity to seek or be provided with competent advice as to how he should proceed. In a complex employment situation such as this, the City had a responsibility to meet with Mr. Jodoin and to explain his options and the consequences of his failure to sign the LOA.

[151] Considering all of the evidence, the demeanor of the witness says, the medical information, and the City's actions in totality, it is the finding of this Panel that a prima facie case of discrimination exists on the ground of physical disability in employment.

[152] Further, the Panel finds that Mr. Jodoin's physical disability was known to the City and was a factor in his employment coming to an end.

### **3) Did the City of Calgary accommodate Mr. Jodoin's physical disability to the point of undue hardship?**

[153] As in the *L'Archeveque* decision<sup>5</sup> this Panel accepts the state of law to be as stated by Justice Fraser that:

*As a matter of law, it is well established that an employer's duty to accommodation arises when the complainant satisfies the threshold test of demonstrating a Prima facie case of discrimination.*

[154] The law is also well established that once a prima facie case of discrimination is made, the employer has a duty to accommodate the disability of the employee to the point of undue hardship.<sup>6</sup> This Panel accepts the three-pronged test set out in *Meiorin* as setting out the state of the law in Canada today. Once a prima facie case of discrimination has been made out, the onus falls on an employer to prove, on a balance of probabilities, that the discriminatory standard is a BFOR or has a bona fide and reasonable justification.

[155] The City argued that Mr. Jodoin presented himself to Ms. Duncan as being totally disabled and not capable of doing anything. Consequently, Ms. Duncan found it very difficult to find appropriate work. The City also made reference to Dr. Lynch's medical report of September 2004, in which he stated that Mr. Jodoin had a permanent impairment.

[156] The Panel finds that in July 2004, the City was not aware that Mr. Jodoin had a permanent impairment. In fact, in her opening statement, counsel for the City stated that the evidence did not support that Mr. Jodoin was completely disabled. Consequently, to argue that from the time that WCB suspended his benefits to when Mr. Jodoin's employment ended, they were unable to find modified work for a totally disabled employee is not supported by the evidence. Further, this jump from one conclusion to another highlights the failure of the employer to follow the necessary process in meeting the duty to accommodate.

[157] The Panel notes that the documentary evidence from WCB and the City suggests that Mr. Jodoin was: 1) not trying very hard to participate in the rehabilitation process and thus was uncooperative, and 2) was exaggerating his symptoms. Phrases such as "unable to identify a desired occupational direction;" "poor self-concept and belief of employability;" "did not provide maximum effort;" "lack of effort due to complaints of pain;" and "not cooperating in the rehabilitation process" are examples of this perception.

[158] On the other hand, the evidence from Dr. Ablett states "there is no question in my mind of embellishment of symptoms for secondary gain or anything else. I find Bill a most pleasant and genuine individual." Even Dr. Lynch referenced Mr. Jodoin's confusion at being asked to search for work while still being employed by the City and seeking accommodation.

[159] It was Mr. Jodoin's testimony that he felt almost distraught when Dr. Ablett and Dr. Lynch outlined their prognosis for his future work restrictions. His work up to this point had revolved around physical activity and this was no longer possible for him.

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<sup>5</sup> *L'Archeveque v. Calgary (City of)*, 2003 ABQB, 220, para 59

<sup>6</sup> *British Columbia (Public Service Employee Relations Comm.) v. B.C.G.E.U.*, (1999) 35 C.H.R.R.D. 257, (S.C.C.) (*Meiorin*)

[160] Mr. Jodoin stated that he believed he did everything required of him. He attended physio, the pain management program, and cooperated in a job search program up to the point of “landing a job.” He testified that he felt like the City never acknowledged his injury.

[161] The Panel finds that the City failed to accommodate Mr. Jodoin by: 1) taking his statement at face value that he could do nothing and failing to seek further information 2) not following up with Dr. Ablett’s assessment, and 3) only relying on the impressions of WCB. It did not take into account the significant impact his disability had on his lifestyle. Further, Mr. Jodoin was unsophisticated in his knowledge of the functioning of a large corporation; he was ill and quite possibly depressed and he required help from the City, not just WCB, to determine what jobs he might possibly do. The Duty to Accommodate Policy states that “each person’s request (for accommodation) is unique and will be assessed on an individual basis. The employer will solicit the individual’s input when evaluating the options and solutions.”

[162] However, there is no indication that this policy was followed in Mr. Jodoin’s case.

[163] The court in *Meiorin* required that the employer must accommodate the individual to the point of undue hardship.

[164] In this case, there is no evidence that the City would have suffered undue hardship by continuing to employ Mr. Jodoin in a sedentary position. There is also no evidence that the City exhausted the accommodation process in their search for a modified position for Mr. Jodoin amongst its 12,000 employees.

[165] As no offers of accommodation were forthcoming by the City, it is impossible to determine what the economic consequences of any accommodation might have been to the City. Therefore, it is impossible to find that the City would have suffered undue hardship if it had provided accommodation.

[166] The Panel notes that no argument was made by the City as to whether or not the discrimination was justified by the City as a bona fide occupational requirement.

[167] It is therefore the finding of this Panel that the City of Calgary did not accommodate Mr. Jodoin’s disability to the point of undue hardship.

### **Order or Remedy Requested**

[168] General damages: That the City of Calgary pays to Mr. Jodoin general damages for pain and suffering in the amount of \$5,000 for discrimination based on physical disability.

[169] Interest on the above non-pecuniary amounts from July 15, 2004 to the date of the decision at the rate of 4% pursuant to Section 4(1) of the *Judgment Interest Act* R.S.A. 2000 C.J-1.

[170] Lost wages: The amount of recommended lost wages is based on the five months Mr. Jodoin was entitled to as a result of being terminated without cause. The total amount claimed is \$17,307.69 (less statutory deductions).

[171] Interest on the above pecuniary amounts (lost wages) from July 15, 2004 to the date of the decision at the rate of 3.75% pursuant to the *Judgment Interest Regulation* AR 369/2003.

[172] The director is also asking that the City of Calgary undergo workshop training in the area of duty to accommodate to recognize the duty and obligations it imposes on employers to treat a disabled employee with respect, dignity and to take responsible steps when addressing modified work as well as permanent accommodations.

### **Decision**

[173] The Panel awards Mr. Jodoin general damages in the amount of \$5,000 and lost wages in the amount of \$17,307.69 (less statutory deductions).

[174] The City of Calgary is directed to pay interest on both general damages and lost wages from July 15, 2004 to the date of the decision based on the rate of 4% pursuant to Section 4(1) of the *Judgment Interest Act* R.S.A. 2000 C. J-1 and at the rate of 3.75% pursuant to the *Judgment Interest Regulation* AR 369/2003.

[175] The Panel acknowledges that the City of Calgary has a Duty to Accommodate Policy and Guidelines. This policy and pursuant guidelines clearly and effectively outline the process that must be followed. The Panel recommends that the City impress upon their employees the importance of following the guidelines and to outline the effect it can have on the dignity of an employee when the guidelines are not followed with sensitivity and fairness.

November 24, 2008

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Beth Bryant  
Panel Chair