Date Issued: January 28, 2021
File: 10996

Indexed as: Francis v. BC Ministry of Justice (No. 5), 2021 BCHRT 16

IN THE MATTER OF THE *HUMAN RIGHTS CODE,*
RSBC 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

BETWEEN:

Levan Francis

COMPLAINANT

AND:

Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Justice, North Fraser Pre-trial Centre

RESPONDENT

REASONS FOR DECISION
REMEDY

Tribunal Chair:	Diana Juricevic
Counsel for the Complainant:	Larry W.O. Smeets
Counsel for the Respondent:	Peter A. Gall, Q.C., and Andrea L. Zwack
Dates of Hearing:	December 1, 2, 3, 4, 7, 8, 9, 10, 11, 2020 January 22, 2021
Location of Hearing:	Video Conference
Submissions Completed:	January 22, 2021

I INTRODUCTION

[1] By decision dated July 4, 2019, the Tribunal found that Levan Francis [**Francis**] was discriminated against in his employment based on his race and colour by Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Justice, North Fraser Pre-trial Centre [**North Fraser** or the **Respondent**] in violation of s. 13 of the *Code* and retaliated against in violation of s. 43 of the *Code*. This decision is set out in *Francis v. BC Ministry of Justice* (No. 3), 2019 BCHRT 136 [***Liability Decision***].

[2] The purpose of this hearing was to determine what remedies Francis is entitled to under s. 37(2) of the *Code*. Francis stopped working at North Fraser in July 2013. He has not worked in any capacity since then. Francis now suffers from a serious mental illness which disables him from working in any occupation.

[3] Although the parties agree that Francis is entitled to remedies under s. 37(2) of the *Code*, they disagree on what amount of compensation should be ordered. Francis seeks a total remedy of approximately $1,200,000 dollars. The Respondent says that a remedy under $400,000 dollars is fair and appropriate.

II ISSUES ON REMEDY

[4] The purpose of compensation is to restore Francis, to the extent possible, to the position he would have been in had the discrimination and retaliation as found in the *Liability Decision* not occurred [**original position**]. This reflects a foundational principle of compensation for damages under the common law: *Blackwater v. Plint*, 2005 SCC 58 [***Blackwater***], para. 74, citing *Athey v. Leonati*, [1996] 3 S.C.R. 458 [***Athey***], para. 32. Put simply, the Respondent is not required to compensate Francis from losses that he would have suffered anyways because this would put Francis in a better position than his original position:

> The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any

damages he would have suffered anyways. (*Blackwater*, para. 78; See also *Sangha v. Chen*, 2013 BCCA 267, paras. 29-30).

[5] As such, the courts have firmly rejected the proposition that "once a tortious act has been found to be a material cause of injury, the defendant becomes liable for all damages complained of after, whether or not the defendant was responsible for those damages": *Blackwater*, para. 78. As will be discussed below, the Tribunal may apply these common law principles in deciding remedies under s. 37(2) of the *Code*.

[6] This decision turns on the issue of causation. The starting point is to review the incidents that were found to contravene the *Code*. I then consider their causative role in the development and worsening of Francis' mental health.

A. Liability Decision

[7] As set out in the *Liability Decision*, nine incidents constituted discrimination contrary to s. 13 of the *Code,* two incidents constituted retaliation contrary to s. 43 of the *Code*, and taken together, they amounted to a poisoned work environment for which the Tribunal must now determine the appropriate remedy [**Contraventions**]:

> [371] Taken together, my findings of discrimination and retaliation lead to the inescapable conclusion that Francis was subject to a poisoned work environment by July 2013.
>
> […]
>
> [374] The following factual findings support a reasonable inference of a poisoned work environment. Francis was stereotyped as slow and lazy. He was perceived by some supervisors and officers as being slower to open doors in Control, and those perceptions were based on misconceptions and incomplete information. He was then confronted by his trainer in the "step up your game" incident. He was also referred to as a "Lazy Black Man" by another supervisor during his time at North Fraser that supported the stereotype that he was both slow and lazy. Francis made mistakes on the job and those mistakes were treated differently than his colleagues. Francis was singled out to attend muster by a supervisor contrary to common practice. Francis was ordered to breach protocol by another supervisor, who then reprimanded him for doing so. That the supervisor did not report the breach, but rather warned him to perform other duties was reasonably perceived by Francis as

a threat in those circumstances. Francis also experienced everyday racism in the form of denigrating comments and racial slurs. Francis was publicly denigrated as "because you're Black" by a supervisor in front of other officers and an inmate. Francis was called a "Toby" by his Control partner. Francis also heard about other black-skinned officers being called racial slurs by supervisors. This included the Firlotte "nigger" incident and Polonio "turn on the lights" incident.

[375] Francis reported many of these incidents in a timely manner and requested that they be investigated. Francis was advocating for human rights and equitable practices in the workplace. Some of those incidents were not investigated in a timely manner. There were a number of myths and misconceptions that arose when Francis alleged race discrimination which created a climate that prevented any kind of effective response to racial inequality. Francis was regarded as too sensitive and overreacting and having a chip on his shoulder. Francis was regarded as playing the "race card" to manipulate people to get what he wanted. Francis was blamed for the disadvantage he experienced in the workplace in bringing allegations forward. Francis was also criticized for not bringing allegations forward even after investigations did not proceed in a timely way. Francis was also regarded as someone who had been treated acceptably in the past and thus should not be complaining.

[376] When Francis escalated the conflict by filing a human rights complaint, his actions were met with surprise by management and hostility by colleagues and supervisors. He was subject to retaliation by two supervisors. One supervisor retaliated against Francis by misreporting his behaviour to management, in response to a protocol breach, which led him to receive his first letter of reprimand in all of his years of service. On the same day that he received this letter of reprimand, another supervisor ordered Francis to breach protocol and then reprimanded him for doing so. […] By July 2013, Francis was regarded as a troublemaker. The "sorry you have to work with that nigger" comment reflected the general sentiment at North Fraser of not wanting to work with Francis and denigrating him as a "nigger". His Control partner no longer wanted to work with him. His Control partner approached management at the behest of some supervisors, including a retaliatory supervisor, to provide information to discredit Francis' allegations and cast him in a negative light.

[377] […] Francis was subject to racially discriminatory commentary and treatment in the workplace that management at North Fraser failed to address adequately or prevent, and this failure contributed to a poisoned work environment for Francis.

> [378] Most Respondent witnesses gave evidence that they never experienced or witnessed any racism at North Fraser. Of those witnesses, many of them acknowledged that racial slurs and jokes were prevalent in the workplace. This was indicative of a workplace culture that downplayed the very incidents that Francis raised as discriminatory.
>
> [379] Where there is a poisoned work environment, there may be no reasonable option but for the employee to depart. […]

[8] The Respondent acknowledges that the Contraventions contributed in some part to the development of Francis' mental illness and his absence from work beginning in July 2013. The question before me is the extent to which the losses claimed by Francis are attributable to the Contraventions. This is a question of fact. The parties have different views on how that question should be answered.

B. Other Allegations

[9] Before I proceed further, I need to address two arguments advanced by the parties.

[10] First, the Respondent points to the fact that the majority of the allegations made by Francis were ultimately dismissed by the Tribunal. There is no dispute that Francis' human rights complaint contained a total of 32 separate allegations of racial discrimination and retaliation contrary to ss. 13 and 43 of the *Code*. Of those, the Tribunal had previously dismissed 15 allegations as being out of time in *Francis v. BC Ministry of Justice* 2014 BCHRT 39. These allegations were in reference to incidents before 2012. Included in those allegations was the 2009 Chair Incident. No findings of fact were made. Whether those events occurred, as alleged, were not matters before me in the *Liability Decision*.

[11] I accept the Respondent's argument that the Tribunal cannot compensate Francis for damages arising from incidents that occurred before the Contraventions, even if they were alleged to constitute racial discrimination. This is because the Respondent cannot be held responsible for conduct that is statute barred even if it is similar to the conduct that was found to be discriminatory: *Konesavarathan v. University of Western Ontario*, 2017 HRTO 1152, para. 51. As the Supreme Court of Canada held in *Blackwater*, to require a respondent to compensate a complainant for harms flowing from statute barred claims

would compensate for harms "that have been alleged but not proven", "override legislative intent and fix liability in the absence of legal proof": at para. 85.

[12] The remaining 17 allegations were assessed on their merits in the *Liability Decision.* Although there is a discrepancy between the Respondent's understanding and my understanding of the number of allegations that were found to be justified, that does not detract from the gist of the Respondent's argument that several incidents were found not to amount to a contravention of the *Code*. I will refer to the allegations that occurred before 2012, and the allegations between 2012-2013 that were found not to constitute discrimination or retaliation under the *Code*, as the **Other Allegations**. I will need to decide what causative role, if any, the Other Allegations had in the development and worsening of Francis' mental health.

[13] Second, the Respondent argues that Francis alleges discrimination in relation to the administration of benefits that occurred after July 2013. While Francis disputes this characterization of his argument, I observe that a new allegation of discrimination is reflected in the declaratory order sought by Francis*.* Francis seeks a declaration that the Respondent and the insurer failed in their duty to accommodate him in the administration of benefits, and that such failure was continued discrimination contrary to the *Code.* Furthermore, there is no dispute that a significant amount of evidence was led on the reasonableness of conduct of both parties in the administration of benefits. To be clear, this is not a claim which can be advanced in this proceeding or for which any remedy can be granted because it is not legally available. I have already determined liability and have only retained jurisdiction to determine remedy: *Liability Decision*, at para. 381. To the extent that these arguments are being advanced, I will not consider them further.

III FACTS

[14] My findings of fact are derived from the *Liability Decision* and evidence submitted by the parties through 10 witnesses and 9 days of evidence as well as over 290 documentary exhibits including expert reports. The parties made written closing submissions and spent one additional hearing day on oral closing submissions. I have reviewed and considered all

of the evidence and submissions presented by the parties at this hearing. I have not referred to all of the evidence that I have reviewed. In these reasons, I set out only that evidence required to come to my decision.

C. Witnesses

[15] Six witnesses testified on behalf of the Complainant:

i. **Levan Francis** testified on Dec 1, 2, 3, and 4, 2020.

ii. **Dr. Patrick Myers** is a clinical psychologist and has been counselling Francis intermittently over seven years. He testified on Dec 2, 2020.

iii. **Dr. Malcolm MacDonald** is a family doctor and has been Francis' physician for over thirty years. He testified on Dec 4, 2020.

iv. **Mark Szekely** is an economist. He was qualified as an expert in the field of labour economics with respect to the assessment of damages in personal injury and fatality claims including wage and pension loss and cost of future care. He gave expert testimony, supplemental to three expert reports, on Dec 7, 2020.

v. **Michelle Gallant** is Francis' spouse. They have been together for eighteen years and have two children. She testified on Dec 8, 2020.

vi. **Shannon Murray** attended meetings as Francis' union representative. She testified on Dec 8, 2020.

[16] Three witnesses testified on behalf of the Respondent:

i. **Zrinka Radic** is employed by Canada Life, the company that administered long-term disability benefits to Francis [the **insurer**]. She testified on Dec 8 and 9, 2020.

ii. **Noreen Hall** was employed by the Public Service Agency and was involved in making decisions about the administration of benefits to Francis [the **employer**]. She testified on Dec 9 and 10, 2020.

iii. **Nicholas Coleman** is an economist. He was qualified as an expert in the field of labour economics with specific expertise in valuing income and pension loss and cost of future care in personal injury and wrongful death claims. He gave expert testimony, supplemental to one expert report, on Dec 10, 2020.

[17] One witness testified as a joint expert witness on behalf of both parties:

i. **Dr. Derryck Smith** is a psychiatrist who conducted two independent medical assessments of Francis in 2014 and 2020, respectively. He was qualified as an expert in psychiatry with specific expertise in the assessment and treatment of mental health disorders and assessment of disability resulting from mental health disorders. He has completed more than 5,000 independent medical examinations. He gave expert testimony, supplemental to two expert reports, on Dec 11, 2020.

[18] Where I have had to resolve conflicting evidence, I am guided by the principles summarized in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, leave to appeal refused [2012] S.C.C.A. No. 392 at para. 186:

> Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides … The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally … Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time. [citations omitted]

[19] Since the burden of proof in this case in on a balance of probabilities, credibility and reliability are separate, but related, considerations: *Insurance Corporation of British Columbia v. Singh*, 2020 BCSC 1320 [***Singh***] at para. 174. One way of understanding the distinction is that credibility is about whether a witness is telling the truth and reliability is about whether their evidence is accurate: *Andreas v. Vu*, 2020 BCSC 1144 at para. 40. I have taken into consideration that a credible witness can give unreliable evidence: *Singh* at para. 174. When necessary, I have assessed the credibility and reliability of the evidence of each witness. My findings are set out below.

D. Findings of Fact

1. Losses

[20] In this section, I make findings of fact regarding what losses Francis experienced and when they occurred.

Employment

[21] I find that Francis lost his employment. Francis has not worked since he left North Fraser in July 2013. The Respondent acknowledges that Francis is not medically able to return to work at North Fraser. The Respondent acknowledges that it is not feasible that Francis will ever return to work at North Fraser. As of January 2020 and August 2020, when Francis was assessed by Dr. Waisman and Dr. Smith, respectively, Francis was totally disabled from working in any occupation.

[22] The Respondent acknowledges that the Contraventions contributed in some part to Francis' absence from work beginning in July 2013. My findings of fact regarding the extent of that contribution are set out below.

Mental Health

[23] I find that Francis suffers from a serious mental illness. Francis has been diagnosed with Major Depressive Disorder, Generalized Anxiety Disorder, Obstructive Sleep Apnea. He also has paranoid symptoms which could be attributed to a severe form of Major

Depressive Disorder. Dr. Smith and Dr. Waisman describe his symptoms as "severe". Dr. Smith opines that Francis is "seriously ill from a psychiatric point of view".

[24] I find that Francis' mental health problems have worsened considerably over time. Dr. Macdonald's diagnostic impression of Francis is that he is suffering from symptoms that "at the start were of a less significant nature" but have become "very deeply rooted", "very chronic", and "have not changed for some time". Dr. Smith opines that Francis' mental health has worsened considerably over the six years between his independent medical examinations [**IME**] in 2014 and 2020, respectively.

[25] The Respondent acknowledges that the Contraventions contributed to the development of Francis' mental illness. My findings of fact regarding the extent of that contribution are set out below.

Physical Health

[26] I find that the Contraventions have caused Francis to experience a deterioration in his physical health. My finding is reasonably inferred from the following facts.

[27] First, I find that Francis was in good physical health before the Contraventions. Dr. Macdonald testified that Francis was healthy and athletic. Francis had soft tissue injuries in his neck and back following motor vehicle accidents and athletic injuries in the 1990s. Dr. Macdonald testified that they were transitory in nature and that Francis fully recovered. No major illness stood out at that time. Most visits were for minor complaints -- coughs, colds, athletic injuries -- things of that nature. Dr. Macdonald's recollection is corroborated in his clinical records which indicate some minor physical injuries from which Francis fully recovered including minor knee surgery in 2011.

[28] I find that these physical injuries do not amount to what is contemplated as a physical disability under the *Code*. The Tribunal has defined disability broadly. As set out in *Naser v. Zellers and McNally* (No. 2) 2006 BCHRT 427 [***Naser***], "one frequently referred to definition states that the concept of physical disability generally indicates a state that is involuntary, has some degree of permanence, and impairs a person's ability, in some

measure, to carry out the normal functions of life": at para. 95. Applying this broad definition of physical disability to the facts of this case, it is clear that the physical injuries were transitory in nature and did not impair Francis' ability to carry out his work duties. Francis was off work for only brief and intermittent periods of time. He returned to work performing his full duties and was able to work in that capacity until he left North Fraser in July 2013. The factual circumstances are analogous to those in *Winter v. Dollar Tree*, 2013 BCHRT 285, at paras. 21-24. For all these reasons, I find that the physical injuries experienced by Francis prior to the Contraventions do not amount to a physical disability, and as such, cannot reasonably be considered a pre-existing condition as contemplated in *KAK v. British Columbia*, 2011 BCSC 1391 [***KAK***].

[29] My conclusion that Francis did not have a pre-existing physical condition is bolstered by the expert medical opinion evidence of Dr. Smith. Dr. Smith opined that since his last assessment of Francis in 2014, Francis has been in two minor "fender benders" which have added to his general distress and increased the pain in his back and neck. However, Dr. Smith noted in 2020, on the basis of his own assessment and that of at least three other psychiatrists, that Francis has not sustained any concussions or brain injuries and has not developed any new medical problems in regards to any of the physical injuries he sustained as a result of athletics or motor vehicle accidents.

[30] Second, as found in the *Liability Decision*, Francis reported to Dr. Macdonald a wide variety of stress-related physical symptoms in 2013 before he left the workplace in July 2013. These included sleep disturbances, stomach upset, tingling sensations and numbness in his arm, and stress-related back pain. As found in the *Liability Decision*, Francis experienced stress-related physical symptoms after he received the letter of reprimand in April 2013 that formed part of the retaliatory conduct of a supervisor contrary to s. 43 of the *Code*.

[31] Third, Francis continued to report a wide variety of stress-related physical symptoms after he left North Fraser in July 2013. Over that summer, Dr. Macdonald noted that Francis had sleep disturbances, diarrhea, and stomach upset. In October and November 2013, Dr. Macdonald noted that Francis continued to have sleep disturbances,

diarrhea over months, as well as anxiety and headaches. In January 2014, Dr. Macdonald noted that Francis continued to have sleep disturbances, diarrhea, and stomach upset. Francis described not sleeping or eating properly. The anxiety caused him to vomit. He repeatedly had violent dreams, waking up in a rage in the middle of the night, and even punching the wall. Francis testified that due to stress he either sleeps too much or too little and feels exhausted most of the time.

[32] I find that Dr. Macdonald was a credible witness. He was honest and forthright and readily admitted mistakes. His opportunity for knowledge was very strong because he has been Francis' family doctor for over 30 years. He took over the family medicine practice from his father, and both of them had clinically treated Francis and his extended family. Although Francis officially became Dr. Macdonald's patient as a young adult, the records show that Dr. Macdonald saw Francis as a child for "loss of consciousness" but "no sequalae".

[33] At issue was the reliability of some of his oral evidence. Dr. Macdonald had difficulties remembering specific details which I have attributed to the passage of time. Due to vision problems, he was unable to read his clinical notes at the hearing. He can only read them with assisted technology and admitted that he did not have time to review thirty years of records prior to the hearing. As such, he relied primarily on his memory which impacted his ability to recall events. Where there is a conflict in the oral evidence of Dr. Macdonald with his clinical notes, I prefer his clinical notes.

[34] I found no reason to doubt the accuracy of those clinical records. Dr. Macdonald's clinical assessments were sound and relied on by psychiatrists in their assessments of Francis. I have confidence in Dr. Macdonald's clinical judgment. Dr. Smith testified that Francis received excellent primary care from Dr. Macdonald. However, I was unable to review a complete set of his clinical records because his handwriting was at times illegible and a complete set of treatment records were not entered into evidence due to an administrative error from counsel.

Financial Stress

[35] I find that Francis experienced financial loss after leaving North Fraser in July 2013. Francis received no income for a period of time after his STIIP benefits were denied in 2013. Francis received no income during disruptions in the administration of his LTD benefits and after his LTD benefits were terminated in February 2018. Due to an administrative error, there were also times during this five-year period when Francis received overpayment or underpayment of benefits.

[36] I find that these financial difficulties have contributed to the loss of their family home. Francis and Gallant purchased their family home in 2005. After Francis left North Fraser in July 2013, their family home was foreclosed on twice. The first foreclosure occurred during the dispute over STIIP benefits. Although Francis could not remember the exact year -- 2014 or 2015 -- he testified that it was in the month of February and shortly after he was "taken off his STIIP disability payments again". His oral evidence is corroborated by the counselling record of Dr. Myers that records the date as February 2015. Francis was forced to take out a third party loan which resulted in higher interest payments. Francis started to cry when he talked about his wife having to work overtime to keep their home. They sold their house as a result of another foreclosure in March 2018. After they sold their house, they have been moving from one place to the next as renters. With the real estate market in the lower mainland, they have rented several times from owners who ultimately sold the house which required them to move again.

[37] My findings of fact regarding the extent of that contribution are set out below.

Social Impact

[38] I find that the Contraventions have contributed to social losses experienced by Francis.

[39] Before the Contraventions, Francis was athletic and involved in a number of sports and extra curricular activities. He worked out at the gym almost every day of the week. He organized sports activities with work colleagues in Vancouver. He also coached children's sports. He had a lot of friends. Gallant described Francis as "healthy", "athletic" with "lots of

friends", "empathy", "spunk", and "drive". This evidence is uncontroverted and taken from the oral evidence of Francis and Gallant and has been corroborated in the records of Dr. Macdonald and reports of Dr. Smith.

[40] After leaving North Fraser, Francis has lost interest in sports and extra curricular activities. He has not attended a gym for some time now. This has resulted in poor health and deconditioning. Francis has lost friendships and has lost interest in socializing. Francis has developed poor hygiene and consumes alcohol. Dr. Smith opines in 2020 that Francis has a probable Alcohol Use Disorder.

[41] Francis testified that he had always been active in coaching children and young people because it had been a passion of his. He stopped coaching a few seasons after he left the workplace in July 2013. Although he could not remember exactly when, he testified that there are several coaching seasons in any given calendar year. It is reasonable to infer on these facts that Francis stopped coaching sometime in early 2014.

Family Life

[42] I find that the Contraventions have contributed to family losses experienced by Francis.

[43] Before the Contraventions, Gallant describes a happy and stable relationship with Francis and their children. Gallant described Francis as "so full of life", "happy", and "charismatic". She describes him as a great father and husband. She observed him treat people with dignity. At work she observed him speak with inmates in a calm and non-judgmental way. She admired his ability to diffuse heated arguments so easily. She recalled moments when they were walking in public and Francis would buy a hot meal for someone on the street. She started crying when she shared that her son asks her to buy a Tim Horton's coffee and muffin to a person that they see on the sidewalk in their neighbourhood. She explained that the "kindness of feeding somebody and giving them a hot cup of coffee, that comes from Levan's heart". She testified that he is a good person.

[44] After leaving North Fraser, Francis' relationship with his spouse and children have suffered. Gallant feels "sickened" by how the Contraventions have impacted her husband and their family as a four. She describes their relationship as "horrible". She explains that there were times when Francis has not come home at night, and other times, when Francis would return home late, after she went to sleep in order to avoid any conversation, and then sleep the entire next day. Her evidence is corroborated by what Francis has reported to psychiatrists. Gallant testified that she has been late for work because Francis was not home and she could not leave her young children alone in the house. Gallant testified that she had to switch jobs as a shift nurse at the hospital to have a work schedule that complemented the school schedule of her children so that she would be available to take them to sports activities and medical appointments. One of the biggest things that she feels personally is that Francis has lost a decade with his children. He has missed birthday parties and sports activities. She testified that what happened at North Fraser has "destroyed him as a human".

2. Cause of Mental Illness

[45] The Respondent argues that the Contraventions have contributed in some part to the development of Francis' mental illness and his absence from work after July 2013. Francis argues that his mental illness and ongoing absence from work is due entirely to the Contraventions.

[46] I find that the Contraventions caused Francis' mental illness and departure from work after July 2013. My finding is reasonably inferred from the following facts. First, Francis had no pre-existing mental health conditions. Second, the 2009 Chair Incident caused only some mental injury to Francis from which he fully recovered. Third, the Other Allegations played no role in the development of his mental illness. Fourth, Francis' mental illness developed during the Contraventions. Fifth, Francis left the workplace because it was poisoned by the Contraventions. Sixth, the 2013 Inmate Death triggered his departure. Seventh, the workplace conflict contributed to the worsening of his symptoms.

No Pre-Existing Mental Health Conditions

[47] I find that Francis did not suffer from a pre-existing mental health condition before the Contraventions. My finding is reasonably inferred from the following facts and medical opinions. I will explain later why the 2009 Chair Incident does not detract from my finding.

[48] First, I accept the expert medical opinions of Dr. Smith and Dr. Waisman that Francis did not suffer from a pre-existing mental disorder or condition. Their expert medical opinions are based on what Francis reported to them, their own clinical assessments, and their review of the clinical records of Dr. Macdonald.

[49] I find Dr. Smith to be a credible witness. He was called as a joint expert witness by both parties. He testified sincerely and credibly within the scope of his knowledge. He readily acknowledged the assumptions upon which his expert opinion was based, and at times, questioned his own clinical observations. His evidence was logically relevant and necessary to assist the trier of fact. In my view, he is a properly qualified expert whose opinion is impartial, independent, and free of bias. I have accepted his expert medical reports from 2014 and 2020 in their entirety. Since Dr. Smith was able to assess Francis over a six-year period, his opportunity for knowledge was greater in relation to the other psychiatrists who only assessed Francis on one occasion.

[50] Although Dr. Waisman did not testify at this hearing, I have accepted his expert report because it was admitted into evidence without objection, has been relied on by both parties, and is consistent with the expert medical opinions of Dr. Smith. As such, I often refer to them together.

[51] Second, for the reasons set out above, I accept the evidence of Dr. Macdonald that, prior to 2009, Francis was healthy with only minor physical ailments or injuries.

[52] Third, I reject the Respondent's argument that Francis had pre-existing mental health concerns documented in the medical chart notes of Dr. MacDonald. I acknowledge one clinical entry that Francis sought counselling in 1995 in relation to some issues involving his aunt and uncle. Dr. Macdonald does not remember this entry but does not

consider it notable. Dr. Smith has reviewed this entry and discounts it on the basis that there is only a single reference concerning this issue. Dr. Smith and Dr. Waisman did not identify anything notable in Dr. Macdonald's clinical records of Francis over the next decade. They both note that most of the issues recorded in Dr. Macdonald's clinical records refer to physical injuries for which Francis recovered. I have no reason to doubt the expert assessments of either Dr. Smith or Dr. Waisman.

[53] Fourth, I reject the Respondent's argument that Francis misreported information to his doctors about the existence of mental health issues. Francis testified that he had a very good childhood. He was born in Barbados, the youngest of six children, and as a child, came to live with his aunt and uncle in Canada. His evidence is corroborated in the clinical records of Dr. Macdonald who also had the opportunity to observe members of his extended family since they were also his patients or that of his father.

[54] Although the Respondent pointes to unreliable perceptions in November 2019, there is no evidence that Francis' perceptions were unreliable at that time. As set out in the *Liability Decision*, Francis misperceived some workplace incidents in June and July 2013 because he believed that everyone in the workplace was against him: paras. 238-241. There is no evidence that he misperceived events prior to the Contraventions.

[55] Dr. Macdonald acknowledges that he had to rely on what Francis reported to him but he had no reason to doubt what he told him. Dr. Macdonald took Francis at his word. He was very straightforward and very honest with him. Both Dr. Smith and Dr. Macdonald testified that Francis was honest and forthright with them, and what he reported was consistent with their clinical assessments.

2009 Chair Incident

[56] The Respondent argues that it is clear from the medical evidence that Francis had mental health problems attributable to the 2009 Chair Incident, which precluded him from working at times, well before the incidents that were held to constitute discrimination and retaliation in this case.

[57] I find that the 2009 Chair Incident caused only some mental injury to Francis from which he fully recovered. My finding is inferred by the following facts and opinions.

[58] First, Francis testified being impacted by a workplace incident involving an alleged assault by a supervisor and a chair in 2009 [**Chair Incident**]. Francis testified that his first feeling of stress in the workplace was in 2009. His oral evidence is corroborated by a medical questionnaire that he filled out in support of one of his benefit applications where he refers to the Chair Incident. His evidence is corroborated by Gallant.

[59] My findings on the credibility and reliability of Francis' evidence are consistent with those in the *Liability Decision*: paras. 32-38. Francis was sincere in his testimony and acknowledged facts that went against his interests.

[60] At times, Francis was mistaken about what he observed. Dr. Smith has attributed some misperceptions to paranoia. As set out in the *Liability Decision*, in the month leading up to Francis' departure from the workplace, Francis was misperceiving some events because he had persuaded himself that everyone in the workplace was against him and his belief magnified over time: para. 229. I found that his beliefs were genuinely held even when there were not that of a reasonably objective observer.

[61] Although his paranoid symptoms impacted his perception of the behaviour of others, there is simply no credible evidence that Francis fabricated the hardships that he has experienced or imagined them due to mental health issues. His evidence on the harm that he has experienced is consistent with the evidence of independent witnesses, credible witnesses, and corroborated by medical documents.

[62] I also observed that Francis had a propensity to question evidence that cast him in a negative light. For example, when confronted with Dr. Smith's decision to report his death threat to the police, he had a knee jerk reaction questioning the judgement of Dr. Smith.

[63] Second, Francis reported these injuries to Dr. Macdonald. Dr. Macdonald generally recalls Francis reporting a number of incidents in 2009 at the workplace which resulted in some physical and emotional injury. Dr. Macdonald recalls this incident, in particular, and

that Francis went off work for two months with what Dr. Smith noted in his 2014 independent medical assessment sounds like depression.

[64] Third, I reject the Respondent's argument that the impact of the 2009 Chair Incident amounted to a pre-existing mental health condition. The Respondent challenges this evidence on the grounds that Dr. Macdonald filled out a WSBC form in June 2020 which noted that Francis had "post-traumatic symptoms" and in February 2014 which noted that by July 2013 Francis had experienced workplace harassment for approximately four to five years. Dr. Macdonald acknowledges that Francis was feeling harassed at work and felt traumatized by the 2009 Chair Incident. However, Dr. Macdonald testified that Francis went back to work a few months after the 2009 Chair Incident and drifted off his radar screen for the next couple of years. He recalls a gap in time, and then a separate set of incidents that brought Francis to the doctor's office in 2012-2013. It is on the basis of this discontinuity in care that Dr. Macdonald reasonably concluded that the impact of the 2009 Chair Incident was transitory. That Dr. Smith opines that Francis' symptoms appear to have started sometime in December 2009 does not detract from my conclusion that his mental injuries were transitory.

[65] I find that the mental injuries suffered by Francis as a result of the 2009 Chair Incident do not amount to what is contemplated as a mental disability under the *Code*. Applying the broad definition of disability in *Naser* to the facts in this case, it is clear that the mental injuries were transitory in nature and did not impair Francis' ability to carry out his work duties. Francis was off work for a few months. He returned to work performing his full duties. Francis testified that in 2009 to 2010, his feelings of stress were at a 1 out of 10. Dr. Macdonald testified that he drifted off his radar screen until the time period of the Contraventions from 2012 to 2013.

[66] For all these reasons, I find that the mental injuries experienced by Francis prior to the Contraventions do not amount to a mental disability, and as such, cannot reasonably be considered a pre-existing condition as contemplated in *KAK.*

Other Allegations

[67] The Respondent argues that it is possible and even likely that Francis would have developed a mental illness resulting in a prolonged absence from work even in the absence of the Contraventions. The Respondent argues that the Other Allegations were significant contributing factors in the development of Francis' mental illness.

[68] I reject this argument on the facts because there was no credible or reliable evidence led in this hearing, nor found in the *Liability Decision*, that reasonably supports a conclusion that the Other Allegations impacted Francis' mental health.

[69] The Respondent relies on the clinical notes of Dr. Myers in support of its argument that the 2009 Chair Incident and Other Allegations had a significant ongoing impact on Francis and contributed to his mental health issues. The Respondent argues that as can be seen by Dr. Myers' clinical notes, with the sole exception of the intake session, in which there is discussion of racial discrimination dating back many years, there is no evidence of any discussions related to the Contraventions themselves, or their impact on Francis. Rather, the Respondent argues that from the second session onwards in September 2013, the focus of Francis' counselling sessions with Dr. Myers are almost exclusively about Francis' legal proceedings, his negative views of his lawyers, and issues regarding his benefit claims.

[70] However, I find the clinical notes of Dr. Myers to be unreliable. As such, I have discounted them. There is no dispute that the counselling sessions that began in September 2013 were through the Employee Assistance Program [**EAP**]. The clinical notes of most of the counselling sessions between Dr. Myers and Francis were entered into evidence. By his own admission, his notes were not 100% accurate recording, they were a reflection of the highlights of what they discussed. As it relates to the clinic notes made at this time, Dr. Myers acknowledges misrepresenting information in order to maximize the number of sessions that Francis could receive through the EAP. For example, Dr. Myers acknowledges documenting "some improvement" when there was actually "no improvement" because he was "playing politics" with the insurer to encourage them to allow him to continue to see

his client. As such, I have not accepted Dr. Myers' clinical notes for the truth of their contents. I have relied on them to corroborate dates.

[71] Furthermore, Dr. Myers' belief systems and perceptions undermined the credibility of his evidence. I am satisfied that Dr. Myers testified to the best of his recollection, and had a genuine interest in being accurate. As it relates to the number of sessions he had with Francis in private practice, Dr. Myers initially overestimated the number of sessions with Francis since starting private practice and corrected himself after reviewing records. However, I did not find his evidence credible for two reasons.

[72] However, by his own admission, Dr. Myers does not believe in the truth. Dr. Myers was initially not responsive to my administration of his oath because, as he explained, he does not believe in the truth, and as such, could not solemnly promise that the evidence he was able to give will be the truth, the whole truth, and nothing but the truth. After consultation with counsel, and in the absence of any objections, I administered his oath noting his objection on the record. This impacted the reliability of his testimony because he was relying on his own perceptions. He understood that Francis shared information based on his perceptions. Dr. Myers explained moving in the world of perceptions and not truth.

[73] Furthermore, Dr. Myers presented as an advocate for Francis. His testimony was influenced by his feelings of admiration for Francis' dedication to fighting for "what is right and wrong". He expressed guilt for discouraging Francis from fighting and apologized to Francis for suggesting that he walk away from this conflict. This influenced his interpretation of what he understood to be the facts.

[74] For all these reasons, I find that the Other Allegations played no role in the development of Francis' mental illness.

Onset of symptoms during Contraventions

[1] I find that Francis' mental illness developed during the time period of the Contraventions from 2012 to 2013. My finding is reasonably inferred from the following facts.

[2] First, I find that the onset of his symptoms happened during the retaliatory incidents as found in the *Liability Decision*. Take, for example, what happened after Francis complained about racism in the workplace. After he reported incidents to management in June 2012, Francis was called a "rat" and told that he had a "target at his back".

[3] After he filed his human rights complaint in October 2012, Francis was retaliated against by two supervisors. The first incident occurred in the context of Francis breaching protocol and admitting to that mistake in February 2013. The retaliatory supervisor misrepresented Francis' reactions to management which contributed to his removal from his post and his first letter of reprimand in all of his years of service at the end of April 2013. As found in the *Liability Decision*, that supervisor had discriminated against Francis in the "Because you're Black" incident and told Francis that this was "payback" for making a complaint against him earlier. On the day that Francis received his first letter of reprimand, he was retaliated against by another supervisor who ordered him to breach protocol and then reprimanded him for doing so. As found in the *Liability Decision*, that supervisor had discriminated against Francis by calling him a "Lazy Black Man" which reinforced the stereotypes that Francis was "slow" and "lazy". Francis took a six-week leave of absence starting the next day.

[4] Second, Francis testified that his symptoms of depression were "severe" and "noticeable" after he filed his human rights complaint in October 2012. Francis described a wide range of stress symptoms: "you name it I have dealt with it". Francis felt angry, frustrated, stressed, and tired all the time. He described the stress manifesting in his body as "tingling sensations". He was not eating and having diarrhea. He had chest pains and night fears. He had some pretty disturbing dreams involving people in the workplace. He was withdrawn and very removed at home. He would go to a room and just stay there. He felt disconnected from the simple pleasures of life. He does not scare easily but he did not feel safe at work. He testified that "the actual fear was there". By the spring of 2013, Francis described the stress as "unbearable". He started to miss work due to the stress and anxiety.

[5] Third, as found in the Liability Decision, Francis was frequently absent from work in the spring of 2013. He was on leave from work from March 20 to 23, 2013; April 12 to 14,

2013; April 30 to June 17, 2013; and June 24 to July 4, 2013 before his permanent departure on July 28, 2013.

[6] The Respondent argues that Francis' work absences in 2013 were not related to stress or anxiety. The Respondent points to a May 2013 WSBC report authored by Dr. Macdonald refers to a soft tissue injury in his back from picking up bins and that he was referred to therapy. The Respondent argues that the six-week absence in "May and June 2013" was related to a back injury.

[7] However, the Respondent's argument is not borne out in the evidence. As found in the *Liability Decision*, Francis went off work on April 30, 2013 after experiencing retaliation. The day before, Francis received his first letter of reprimand in all of his years of service which formed part of the retaliatory conduct of one supervisor: *Liability Decision*, paras. 179, 205, 206. He was off work for the next six weeks from April 30, 2013 to June 17, 2013. This corresponds to the time period of "May and June 2013" referenced by the Respondents. Although Dr. Macdonald did not remember the details of his WSBC report, his recollection is that Francis was experiencing stress and anxiety in the spring of 2013. His recollection is consistent with the opinion evidence of Dr. Smith that by the spring of 2013 Francis was having significant problems with stress, anxiety, and insomnia.

[8] Fourth, Francis' symptoms worsened in the month before his departure from the workplace. As found in the *Liability Decision*, Francis lost trust in his colleagues because of the discriminatory and retaliatory behaviour, and as such, the necessary work relationship among officers was compromised along with Francis' own safety and security. Francis faced insurmountable challenges in having his views taken seriously. By seeking redress in the context of a work environment that became "poisoned", there were no viable avenues of recourse open to him making him particularly vulnerable.

[9] As found in the *Liability Decision*, by the beginning of July 2013 a correctional officer told his control partner, "sorry you have to work with that Nigger" which reflected the general sentiment at North Fraser that no one wanted to work with Francis. His Control partner did not want to work with him, and at the behest of a retaliatory supervisor and

others, provided information to management to discredit his allegations and cast him in a negative light. His interpersonal difficulties arose not because of poor work performance but because he raised human rights allegations. By the time he left the workplace at the end of July 2013 Francis was subject to a poisoned work environment. That month, Francis was misperceiving some events because he had persuaded himself that everyone in the workplace was against him: *Liability Decision*, para. 229.

[10] Fifth, Francis reported more mental health symptoms to Dr. Macdonald during the time period of the Contraventions from 2012-2013, and in particular, when he was subject to retaliation in the workplace in the spring of 2013.

[11] This is corroborated by Dr. Macdonald. Dr. Macdonald testified that a "new set of upsetting situations in 2012 and 2013" that brought Francis to see him. Dr. Macdonald testified that Francis reported feeling harassed and discriminated against at North Fraser. During clinical visits, Dr. Macdonald noted a wide range of symptoms including fever, stress, increased anxiety, labile moods, depressed moods, difficulties sleeping.

[12] This is also corroborated in his clinical records. For example, after Francis received the letter of reprimand, he went to see his family doctor. Dr. Macdonald noted the letter of reprimand, that there was considerable stress in the workplace, and Francis was experiencing symptoms of anxiety. Dr. Macdonald wrote in his July 2016 medical legal report:

> "I initially started to see Mr. Francis on a fairly regularly basis in the spring of 2013. At that time he was experiencing a great deal of angst due to the situation had arisen at work. He related to me at that time that the work environment was toxic and that there were a number of outstanding grievances and human rights concerns. He had retained legal counsel and was extremely stressed with the ongoing difficult situation at work."

[13] Sixth, I consider Gallant's evidence. Gallant gave sincere evidence about the changes that occurred to Francis over the past two decades. In the decade before the Contraventions, Gallant described Francis as healthy, social, athletic, and fun to be around. Gallant testified that the turning point in her mind was around 2009. Gallant remembers

her husband talking about the assault with the manager, something about a chair being thrown. She testified that things got a lot worse for Francis in 2012 and 2013. She noticed a "substantial change" in him. She testified that Francis did not feel safe in the workplace. She found him impatient, angry, upset. He stopped going to the gym and football sort of dwindled off. They argued more and he spent less time with the children.

[14] I find that Gallant is a credible witness and her evidence was, for the most part, reliable. She was honest, sincere, and forthright in her testimony and readily acknowledged facts that went against her interests. Her opportunity for knowledge about Francis spanned almost two decades. They have lived together for approximately 18 years and have two children. As a nurse, she had a medical awareness of some of the symptoms that Francis was experiencing. For example, she worked for a period of time in the cardiac unit at a hospital and called an ambulance after observing Francis suffer from chest pains. Gallant had difficulties remembering dates which I have attributed to stress and the passage of time. Although Gallant was unable to remember specific dates, which was "stressing", she accurately pinpointed events in relation to the birth of her first child. She explained, "I revolve everything around the birth of my first child". Since the cross-examination consisted of one question, her evidence is largely uncontested.

Poisoned Work Environment

[15] I find that Francis left the workplace because it was poisoned by the Contraventions. My finding is reasonably inferred from the following facts.

[16] First, as found in the *Liability Decision*, there was no other reasonable option for Francis but to leave the workplace by July 2013 because it was poisoned by the Contraventions, and Francis was not required to continue subjecting himself to discriminatory practices: *Liability Decision*, paras. 371-379.

[17] Second, the Respondent acknowledges that Francis is not medically able to return to work at North Fraser and that it is not feasible that Francis will ever return to work at North Fraser.

[18] Third, Dr. Macdonald testified that Francis was 100% not able to return to the workplace at North Fraser after July 2013. His oral evidence is corroborated by his July 2016 report. Dr. Macdonald testified that the information Francis provided to him painted a picture of a chronically dysfunctional workplace where he was not welcome.

[19] Fourth, I prefer the evidence of Dr. Macdonald over Dr. Smith. Dr. Smith opines that it remains impossible for him to determine exactly when Francis became disabled due to psychiatric illness and was unemployable. This is reasonable given that Dr. Smith only assessed Francis in March 2014. At that time, Dr. Smith opined that Francis was unable to work:

> "I do not believe that Mr. Francis is capable of returning to work in any capacity at this point in time. I have some significant concerns that given the poisoned atmosphere in the workplace, at least based on his perception, he would not be able to return to his current employment."

[20] To the extent that there is a discrepancy in their evidence, I prefer the evidence of Dr. Macdonald because his opportunity for knowledge was significantly greater than that of Dr. Smith. Dr. Macdonald has thirty years of clinical observations upon which to base his diagnostic impressions while Dr. Smith's opportunity for knowledge is limited to the clinical observations he made of Francis over the period of approximately one hour on two separate occasions in March 2014 and July 2020, respectively.

[21] While Dr. MacDonald does not have the same level of expertise as a psychiatrist, family physicians may be qualified to diagnose mental health issues depending on the scope of their training and expertise. There is no dispute that Dr. Macdonald diagnosed Francis with depression. Medical evidence tendered to establish the existence of a mental disability must be reliable, but it does not necessarily need to emanate from a psychiatrist. The type of evidence required will depend on the nature of the mental disability at issue: *Bertrend v. Golder Associates*, 2009 BCHRT 274, para. 191. For example, courts have consistently found that family physicians can opine on diagnoses of depression. A family physician who is qualified to diagnose depression is also qualified to opine on where it came from. Dr. Smith testified that Francis received excellent primary care from Dr.

Macdonald. Given this context, I find that the evidence that Dr. Macdonald has given in relation to Francis' inability to work and the diagnosis and treatment of Francis's depression, anxiety, and their related symptoms, is reliable: *H.P. v. C.T.P.* 2014 BCSC 2024, para. 84; *Sharma v. Kandola*, 2019 BCSC 349, para. 81. *Dubitz v. Knoebel*, 2019 BCSC 1706, para. 144.

[22] Although Dr. Smith opined in 2014 that there was no medical reason why Francis could not attend meetings with his employer, Dr. Macdonald did not support return-to-work planning. Dr. Macdonald testified that he did not support return to work planning because given the issues – which he described as including harassment and racism – at the workplace it was not plausible that Francis would return to that workplace or that environment.

Inmate Death in July 2013

[23] I find that the death of an inmate on July 27, 2013 [**Inmate Death**] triggered Francis' departure from the workplace on July 28, 2013. As set out in the *Liability Decision*:

> Francis' last day of work was July 28, 2013. It coincided with the unexpected death of an inmate in segregation. […] After finding out that an inmate had died, Francis could not stop crying. He felt embarrassed that he was crying in front of colleagues and the emergency response team. Francis acknowledges that he was emotionally unstable. He left work that day and has not returned (at para. 254).

[24] Francis acknowledges that the inmate death triggered his departure from the workplace. He testified that he went home because he was "emotionally upset" by the inmate death and "my emotions got the best of me". His evidence is corroborated by Gallant.

[25] I reject the Respondent's argument that the Inmate Death substantially contributed to Francis' departure from the workplace. The Respondent argues that Francis had a flashback of the Inmate Death six years later after seeing a man flat-line at the gym.

[26] The Respondent points to the fact that Francis filed a WSBC claim for mental stress following the inmate death. However, the scope of Francis' original claim to WSBC was

broader than that. In his original claim, Francis sought injuries from a series of incidents involving bullying and harassment (which reflected the Contraventions) as well as the death of the inmate. It was WSBC that decided to split his original claim into two separate claims for investigative purposes. The one referenced by the Respondent became the Inmate Death claim for mental stress, and the other became the Contravention claim for injuries resulting from bullying and harassment. In a phone call logged with WSBC, Francis described the Inmate Death as the "last straw".

3. Intervening Events

Benefit Administration

[27] There is no dispute that the administration of benefits is an intervening event that has contributed to the deterioration of Francis' mental health. At issue is the extent of that contribution and who is responsible for it.

[28] I find that the administration of benefits is not related to the Contraventions. My finding is reasonably inferred from the following facts. First, Francis was required to apply for those benefits. Second, the North Fraser employee who administered Francis STIIP benefits was not responsible for the Contraventions. Third, the LTD benefits were administered by a non-party to this complaint.

[29] I find that the disruption in benefits had a negative impact on Francis. Dr. Macdonald wrote in his July 2016 report that Mr. Francis' situation was exacerbated by the fact that he was forced to remain off of work without pay and benefits for a period of time:

> For reasons unbeknownst to me the employer refused to pay his short-term disability for a period of time. […] This added financial stress clearly contributed to his anxious and depressed state.

[30] Francis found letters and phone calls upsetting. He described feeling like he was "under a microscope" during the administration of benefits and there was just "too much negative all the time". Francis was angry and shaken by decisions that disrupted his benefits. Francis' house went into foreclosure in 2015 and was ultimately sold as a result of a foreclosure in 2018. Francis described that process as a "complete nightmare" for his

family. He started to be impacted by any communications that he received on a Friday. He felt that, every Friday, something was coming his way. He felt ambushed and harassed. After receiving a letter from his employer to participate in return-to-work planning, he describes his reaction as "explicit": "what the fuck" and "here we go again". On one particular occasion, Francis described the impact of receiving terrible news about his LTD benefits. Francis was watching his child play sports at the time and had to leave immediately. He left his child at school without any means of getting home. Gallant remembers that this happened once again on a Friday. Her child called to tell her that dad had stormed out angrily on the phone. Francis then messaged Gallant and asked her to pick up their child because he could not be there. Since she was at work, she had to use her "community support" to pick up her child and bring her home. Francis was visibly upset when recalling this incident.

Legal Processes

[31] There is no dispute that the legal processes are intervening events that have contributed to the deterioration of Francis' mental health. This includes the WorkSafe BC process as well as the grievances that were filed in relation to his benefit claims.

[32] I find that these legal processes are unrelated to the Contraventions. My finding is reasonably inferred from the following facts. First, Francis had to make WSBC claims. Second, the grievances and arbitration were in relation to the administration of benefits which I have found already to be unrelated.

[33] I find that these legal processes had a negative impact on Francis. For example, after a meeting with a WSBC investigator, Francis felt exhausted and had a nap at home. He felt a sense of rage and was going to get up and totally destroy the area he was in. It took a lot to stop himself and get up and dismantle that room to little bits and pieces. All of that anger really scared him. After Francis found out that his WSBC claims had been denied, he described feeling "shocked" and "hitting the wall every time". Dr. Macdonald noted that Francis was chronically tired and worn out by the legal situation.

[34] Dr. Smith opines that the whole situation of conflict at work has made Francis' psychiatric condition worse. Dr. Macdonald testified that it was very frustrating to try to help an individual get better when the real elephant in the room is the workplace situation and harassment and racial discrimination and the difficulties that Francis was experiencing with his benefit providers. Dr. Macdonald testified that there were lots of things on the table. In his July 2016 report, Dr. Macdonald wrote:

> I know Mr. Francis extremely well and have seen him regularly for many, many years. He is a genuine individual who has always been honest and straightforward with me. He has a very real and moderately severe symptom complex and has been under a great deal of stress over the last 3 years. His condition has no doubt been exacerbated by the fact that on repeated occasions the employer has seemingly stonewalled him for no good reason. Initially his short-term benefits were denied, the findings of Dr. Smith were not acknowledged, and ultimately his long-term benefits were denied. All of these factors have been an impediment to Mr. Francis' recovery.

[35] Dr. Smith observes that Francis has been "preoccupied with the ongoing legal issues to the detriment of his social life and his role as a father".

4. Duty to Mitigate

[36] The Respondent argues that Francis failed to provide ongoing medical information to support his continuing disability and failed to comply with the required medical treatment. The Respondent argues that, in this case, Francis' failure to mitigate his damages not only resulted in the prolonging and exacerbation of his mental illness but also directly caused the suspension of his LTD benefits in February 2018.

[37] In assessing the reasonableness of Francis' conduct, I have applied the same contextual reasonableness standard as set out in the *Liability Decision*: paras. 284-290, cited with approval in *Safaei v. Vancouver Island Health Authority,* 2020 BCSC 1410, para. 58.

Administration of STIIP Benefits

[38] I reject the Respondent's argument that the delay in the administration of STIIP benefits was due to Francis' failure to provide medical information and participate in an independent medical assessment.

[39] I find that, when considered in context, Francis was being reasonable when he asked to choose the psychiatrist who would be assessing him. My finding is reasonably inferred from the following facts.

[40] First, as set out in the *Liability Decision*, management was investigating Francis' allegations in August and September 2013. After Francis left work, his Control partner offered information to discredit him in two separate interviews around July 2013 and September 2013: *Liability Decision*, paras. 255 to 268. The second interview was held around the same time that Francis received a letter that his STIIP benefits were being denied in September 2013.

[41] Second, Dr. Macdonald was providing medical information in a timely manner. He submitted a number of forms in support of the STIIP benefits and WSBC claims. Dr. Macdonald documented that Francis was experiencing anxiety, workplace harassment, and bullying. In August 2013, Dr. Macdonald wrote that Francis has reported being harassed at work. The employer took the position that workplace harassment is not a medical diagnosis. In September 2013, Dr. Macdonald wrote that Francis is unfit for work due to anxiety and insomnia. He also wrote on another form that Francis was unfit to work because of anxiety, depression, and insomnia. Dr. Macdonald took the position that Francis was unable to work in any capacity.

[42] Third, The Respondent took the position that there was insufficient medical information to justify STIIP benefits, while at the same time, requested that Francis return to a poisoned work environment. In September 2013, the Respondent advised Francis that there was insufficient medical information to justify STIIP benefits so they requested that Francis undergo an IME with a psychiatrist named Dr. Levin. They also asked Francis to attend a meeting at North Fraser to discuss his workplace harassment concerns. With his

STIIP claim denied, Francis was considered to be on leave without pay from July 2013 onwards.

[43] Fourth, after finding out that the employer picked the psychiatrist, Francis declined to see Dr. Levin. He explained that "it is my body and I said no". He was willing to undergo an independent medical assessment with a psychiatrist that he could choose. His view was shaped by his clinical psychologist, Dr. Myers. In September 2013, Francis started counselling with a clinical psychologist Dr. Myers. Francis was advised by Dr. Myers that he had the right to choose a psychiatrist to conduct an IME a short time after starting counselling sessions with him in September 2013. Dr. Myers explains cautioning Francis that employers have a tendency to hire psychiatrists who favour their positions and that they do not tell employees that they can choose an examiner. Dr. Myers suggested to Francis that he should ask his employer to choose the psychiatrist so that he would have a "truly independent" medical assessment.

[44] Finally, the employer agreed with the union that Francis could select his own psychiatrist. The employer came back with two more doctors. Francis chose Dr. Smith. Francis attended the IME with Dr. Smith in March 2014 who concluded that Francis was disabled from working in his own occupation. Francis subsequently received STIIP benefits. The delay amounted to only a few months.

Application for LTD Benefits

[45] I reject the Respondent's argument that the delay in the adjudication of Francis' LTD application was due to his failure to be diligent. There is no dispute that Francis' application for LTD benefits was late and that this resulted in a delay in the assessment of his application.

[46] I find that, when considered in context, Francis was being reasonable when he applied for LTD benefits. My finding is reasonably inferred from the following facts. First, Francis filled out his portion of the application in August 2014, but due to workload, Dr. Macdonald was delayed in filling out his portion of the application. Dr. Macdonald testified that it was through no fault of Francis that the application was submitted late.

[47] Second, Noreen Hall [**Hall**] made a discretionary decision in December 2014 not to accept the late application. Even after receiving letters from Dr. Macdonald and Francis explaining the reason for the delay, she did not reconsider her decision. Her view was that the reasons both Francis and his doctor provided were not sufficient to allow the claim to be processed. She did not feel that Francis was making much of an effort to get his application submitted on time. She expected him at the very least to have submitted his portion in on time. After she was confronted with his signature that dated his application on time, she questioned the authenticity of that document.

[48] Hall was influenced by her impression that Francis was difficult. That impression was formed by information she received form a colleague who was having difficulty getting Francis to send things in a timely manner. Notwithstanding her background in mental health, she did not attribute those delays to his depression. Rather, she assumed that he was not behaving diligently. She was aware that the Respondent took the position in September 2013 that Francis' claims had no merit: "any allegation of direct bullying or harassment in the workplace is unfounded", and that "there have been labour relations issues with this employee which have resulted in disciplinary action taken by the employer". Hall understood that no investigation had been conducted by North Fraser because Francis did not want to participate in the investigation. Her impressions do not accord with the findings in the *Liability Decision* regarding the investigations that occurred after Francis left the workplace in July 2013: at paras. 255 to 277.

[49] Third, Francis' union grieved the employer's decision not to consider his late application. The employer agreed to resolve the grievance by directing the insurer to proceed with the adjudication of the application which occurred in September 2015. Francis was asked to provide additional medical information at that time, and with the assistance of his wife, Francis completed the medical questionnaire promptly. There is no dispute that Francis and Dr. Macdonald returned the necessary forms in a timely manner. In October 2015, his LTD application has been approved and he was not considered "totally disabled in own occupation".

Disruption in LTD Benefits

[50] The Respondent argues that the disruption in LTD benefits was due to Francis' failure to provide adequate medical information to support the continuation of benefits. This included the failure to be assessed or comply with treatment recommendations. The Respondent argues that Francis refused to obtain psychiatric assessment from March 2014 to January 2020, and that this demonstrates that he failed in his duty to mitigate his losses.

[51] I reject the Respondent's argument that the disruption in LTD benefits was due to Francis' failure to provide adequate medical information to support the continuation of benefits. I find that, when considered in context, Francis was being reasonable in providing medical information in support of the continuation of his benefits. My finding is reasonably inferred from the following facts.

[52] First, Francis provided the medical information he was asked to provide, but it was not to the satisfaction of the insurer. For example, In April 2016, leading up to the change in definition date, the insurer advised Francis that he needed to provide medical documentation to establish that he was disabled from any occupation. While Francis provided additional documentation from Dr. Macdonald, Radic was of the view that this information did not establish that he was disabled from any gainful occupation. Radic advised Francis that they needed an updated report from a psychiatrist, and attempted to schedule an IME.

[53] Second, Francis agreed to attend another IME but wanted to see Dr. Smith. Francis explained that he had seen Dr. Smith before, and that it was easier on his health to see the same psychiatrist. Francis advised her "that it places too much trauma on a person to go to another IME provider and Dr. Smith already knows his case". He wanted to attend the IME with Dr. Smith "given his familiarity with my health position". He indicated that "it's more impacting to my health to rehash all details that contributes to my mental distress and traumatic phycological impact". His request was denied, and the insurer denied his claim. Francis successfully appealed to the Claims Review Committee. The chair of that committee

was a psychiatrist that conducted its own assessment of Francis in November 2016 and held that he was totally disabled from any occupation.

[54] Third, Francis' understanding of the Claims Review Committee decision was consistent with the understanding of Dr. Macdonald and Dr. Smith. Although Francis described the process as a "foreign language", he did understand that the panel determined that he was totally disabled from any gainful occupation. He understood that he participated in an assessment that was like an independent medical examination with three doctors before they made that decision.

[55] Dr. Smith testified that claims review committees are typically the same as an independent medical assessment. He described it as a thorough assessment involving three doctors, including a psychiatrist. Dr. Smith understood the decision of the Claims Review Committee that Francis was totally disabled from any occupation as of October 26, 2016. Dr. Smith testified that the Claims Review Committee diagnosed Francis and recommended psychiatric treatment.

[56] Fourth, Radic and Hall interpreted the Claims Review Committee decision as mandating another independent medical assessment of Francis. They booked another assessment for Francis without consulting him on the dates that were not possible for him to attend. The assessment was booked with Dr. Smith at 8:30 am in Vancouver on February 1, 2017. Francis was unable to attend an appointment at that time because his family lived in Delta and his wife was working twelve hour 7 am to 7 pm shifts at the hospital. Their school age children were young, and Francis was unable to leave them unattended.

[57] It is simply not realistic that Francis could drive to the appointment location in Vancouver from his residence in Delta in 30 minutes at that time of day. The distance corroborates his account that he did not have enough time to get to the appointment. Francis tried to explain the problem to Radic but was met with a bureaucratic response that his family obligations were considered a non-medical barrier and that he should be making more of an effort to participate in the IME process. She thought she was doing Francis a favour by booking him to see his preferred psychiatrist, Dr. Smith. Francis did not

understand why he was now allowed to see a psychiatrist that he was not allowed to see six months earlier. This further cemented his distrust of the process and the intentions of the benefit providers.

[58] Fifth, Francis tried to seek accommodation for his mental illness. After Francis was told that his benefits would be suspended if he did not participate in the IME, he wrote to Radic and described himself as an "ILL PERSON" and that he "jumped thru all the hoops you want and the outcome hasn't changed". He asked her to cancel the February appointment and consult with his family physician. He wrote that he is "continuously" and on a "daily basis" dealing with health issues and that the constant grilling and harassment is "making it difficult" for him "to have some peace" and "is totally a hinderance to my health conditions". Radic subsequently contacted Dr. Macdonald and asked him to book Francis for an independent medical assessment with a psychiatrist.

[59] Sixth, Francis has a reasonable explanation for why he did not attend the appointment with Dr Wiebe. Although Dr. Macdonald originally indicated "date not set" and "no thanks" to an IME, he ultimately made a referral to Dr. Wiebe in February 2017. He noted: "for psych referral per his insurer. Compliant with their request". Three months later, the psychiatrist's office advised Dr. Macdonald that they had made numerous attempts to reach Francis to schedule his appointment but have been unable to reach him. This was not surprising since around this time Francis' house went into foreclosure again and they were forced to sell their home. Francis testified that he never received this referral and was unaware of its existence. Francis testified at the hearing that "this is the first time I've even heard about any appointment" with Dr. Wiebe. Hi evidence is corroborated by Gallant and Dr. Macdonald who does not recall having a discussion with Francis about why he did not follow up with this appointment. Francis had no idea that a referral had been made.

[60] Seventh, Francis made genuine and good faith attempts to attend another assessment with a psychiatrist referred to by Dr. Macdonald. This as in response to a deadline set by Hall and Radic in October 2017 that his benefits would be suspended if he did not produce a referral. In response to their requests, Francis testified that he had to

prove that an appointment had been made. His family physician, Dr. Macdonald, made an appointment for him to see a psychiatrist, Dr. Khan. The clinical notes of Dr. Macdonald indicate that he referred Francis to see a psychiatrist named Dr. Khan. Francis was even more stressed and frustrated by this situation. It was over Christmas and New Years and he said that they should have known how hard it is to get anything done in adequate time. He perceived this as being done deliberately to get him more stressed and strained and worried. He felt like he was being tricked and did not trust what was going on.

[61] Neither Hall nor Radic found this referral acceptable. Radic called his office in December 2017 and confirmed that Dr. Khan does not do IMEs and that his next available appointment was in June 2018. Radic subsequently spoke to Hall who found the six-month delay unacceptable. So they decided to book an IME with one of their psychiatrists in February 2018. They did not consult with Francis beforehand. Hall believed that she was being reasonable because they were giving him one more chance to attend an IME and give them the information they wanted. She did not want to be in a position where they paid him for those six months and he did not go to the appointment then they would be 1.5 years from the CRC decision. Hall never conceded that her interpretation of the CRC decision may have been misguided.

[62] Francis was advised that he had been booked into another IME on February 14, 2018 at 11 am with a psychiatrist named Dr. Scarth. He did not understand why they would not accept his appointment with Dr. Khan after asking him to make one. He was really upset when he found out that someone had called Dr. Khan's office inquiring about his appointment. Francis felt that his privacy was being invaded. Francis said, "I could not believe that I was being put through all of that stuff". From his perspective, he did everything he could do to get an appointment, confirm an appointment, and only to find out that someone was trying to sabotage that appointment.

[63] The following day, Francis emailed Radic and told her that he is feeling harassed and this is contributing to the deterioration of his health. He testified that there was no reprieve from this harassment. Francis acknowledges that his communications were "heated" and

"not cordial". He described getting phone calls on Fridays and he would be miserable for the whole weekend.

[64] Francis did not attend the IME with Dr. Scarth in February 2018, and as a result, his LTD benefits were suspended. Francis did attend an assessment with Dr. Khan in June 2018, but neither Radic nor Hall found the medical information to be sufficient to justify continuation of his LTD benefits. They were terminated in November 2018.

Compliance with Treatment

[65] I find that Francis complied with his treatment. My finding is reasonably inferred by the following facts.

[66] First, Francis followed the treatment plan developed by his family doctor which was appropriate at the time. The treatment plan included medication, counselling, and lifestyle changes such as regular exercise, dietary care, moderation of alcohol, and avoidance of substances. Dr. MacDonald involved a registered psychologist in the care of Francis, but did not involve any other health professionals. Dr. Macdonald also prescribed an anti-depressant and anti-anxiety medication. Dr. Macdonald says that Francis was very compliant with treatment and therapy. In his experience, Francis made appointments, showed up on time, and was compliant with the therapy. His oral evidence is corroborated in his July 2016 report in which he wrote that Francis has been seen regularly for his condition and has been compliant with therapeutic recommendations.

[67] Second, the treatment plan by Dr. Macdonald was appropriate at the time. Dr. Macdonald developed a treatment plan to assist Francis, which was consistent with the treatment of mental health issues. Dr. Smith testified that Francis received excellent primary care from Dr. Macdonald. Dr. Smith explained that at the outset, most people with major depression are treated by a family physician. Dr. Smith endorsed the approach that Dr. Macdonald took at the beginning which included medication, cognitive behavioural therapy, and programs of vigorous exercise.

[68] Third, the concerns that Dr. Smith expressed about the type of treatment Francis received was in response to the deterioration of his mental health between 2016 and 2020. Dr. Smith testified that, since Francis' mental health condition has gotten worse over time, he strongly recommends that Francis receive treatment from a psychiatrist and mental health team that could provide a broader range of services. Dr. Smith could not determine whether Francis has received cognitive behavioural therapy. Dr. Macdonald referred Francis for cognitive behavioural therapy with a clinical psychologist in 2013. Dr. Myers acknowledged that he offered a Rogerian style of therapy which he describes as active listening and being a sounding board for Francis' concerns.

[69] Fourth, that there was a break in Francis' counselling sessions with Dr. Myers is due to his financial situation. It cannot reasonably be attributed to non-compliance. From 2013 to 2017, Francis attended over 31 sessions of counselling that were covered through the Employee Assistance Program. Since 2018, Francis has been attending counselling sessions with Dr. Myers in his private practice. Francis has been unable to afford treatment sessions, and as a result, Dr. Myers has been offering them to him at a discounted rate. In these circumstances, it cannot be reasonably attributed as a failure to mitigate.

[70] Fifth, it is only recently that Francis has not always been complying with treatment. Gallant reported to Dr. Smith in July 2020 that Francis loses track of what he is doing and forgets to take his medication sometimes. That is due to the severity of his mental illness. Both Dr. Smith and Dr. Waisman note that Francis has experienced cognitive decline. Francis has reported to Dr. Smith in 2020 that he has problems with memory and loses track of what he is doing.

[71] The Respondents refers to *Cassells v. Ladolcetta*, 2012 BCCA 27, para. 17 for the proposition that damages were reduced to take into account that the claimant was found to have failed to mitigate losses stemming from an accident that exacerbated a pre-existing medical condition and ultimately rendered the claimant unable to work. The court found that the condition likely could have been successfully treated but for the claimant's refusal to undertake reasonable treatment options and reduced damages accordingly. I distinguish

Cassells on the grounds that Francis did not refuse to undertake reasonable treatment options.

[72] The Respondents refer to *Brown v. PML and Wightman (No. 4)* 2010 BCHRT 93, para. 1158 for the proposition that the complainant was not entitled to wage loss damages because she was not disabled, as she claimed or in the alternative, she failed to take reasonable steps to treat those conditions. I distinguish *Brown* on the grounds that Francis is disabled from working in any occupation and took reasonable steps to treat his conditions.

[73] I now turn to the legal consequences that flow from these factual findings.

IV REMEDIAL ORDERS

A. Cease Contravention

[74] Since I have found part of Francis' complaint justified under s. 13 and s. 43 of the *Code*, I must order the Respondent to cease the discrimination and retaliation found in the *Liability Decision* and to refrain from committing the same or similar contraventions: *Code*, s. 37(1)(2)(a).

B. Declaratory Order

[75] Under s. 37(2)(b) of the *Code*, I may declare that the Respondent's conduct was discrimination and retaliation contrary to the *Code*. Francis seeks a declaration that the Respondent and the insurer failed in their duty to accommodate him in the administration of benefits, and that such failure was continued discrimination contrary to the *Code*.

[76] I decline to make this order because it is based on a claim that cannot be advanced in this proceeding. Francis is seeking an order on the basis of a finding of liability in the administration of his benefits. However, I only have the jurisdiction to decide the remedy that Francis is entitled to as a result of the *Liability Decision*. The insurer is not a party to

this proceeding and no findings of liability have been made in relation to the administration of benefits.

[77] While I have declined to issue the specific order requested by Francis, given that a request has been made, and in keeping with the purpose of s. 37(2)(b), I exercise my discretion to make a declaratory order that the Respondent's conduct as found to have occurred in the *Liability Decision* is discrimination and retaliation under the *Code*.

C. Wage Loss

[78] Francis is seeking a total of $917,030 in compensation for lost wages. Of that total amount, he seeks $236,939 for net past income loss; $616,975 for future income loss[1]; and $63,116 for pension loss. Francis argues that this corresponds to the amount that he would have earned had he continued working as a corrections officer until he retired at 65 years.

[79] The Respondent accepts that some proportion of past income losses are attributable to the impact of the Contraventions. The Respondent argues that the proportion of those incomes losses attributable to the Contraventions diminishes over time. On this basis, the Respondent is willing to provide Francis with a lump sum equal to 50% of the amount of the difference between his actual income from July 28, 2013 to February 13, 2018 and what he would have earned had he remained actively employed.

[80] The Respondent submits that there is no principled basis in this case for any compensation for income or pension loss after February 2018 on the basis that Francis failed to mitigate his losses. The Respondent attributes the termination of Francis' LTD benefits in February 2018 to what it argues is his failure to comply with the requirements to maintain his benefits. That said, on the bases that Francis would likely have remained on LTD benefits for at least some period after 2018 had he complied with the requirements of

[1] There is a discrepancy between the amount of future income loss requested at paragraphs 74 and 259 of Francis' closing submissions. The discrepancy is in the amount of $63,116 which corresponds to the pension loss requested. Since I am addressing pension loss separately, it should not also be included in the calculation of future income losses. I rely on the representation made in paragraph 74 of the closing submission (i.e. $616,975) because it corresponds to the projected value of future income set out at para. 21(t)iii of the Szekely Report (i.e. $616,975).

the LTD plan, and that he is currently disabled from working in any occupation, the Respondent is willing to put Francis in the same position, from an income and pension perspective, as if he had been compliant under the LTD plan.

[81] Regarding past LTD benefits, the Respondent is willing to provide Francis with a lump sum equal to the amount of the LTD payments he would have received had he remained on LTD for the period February 14, 2018 to November 30, 2020.

[82] Regarding future LTD benefits, the Respondent is willing to provide Francis with a lump sum payment equal to the present value of the LTD benefits he would have received had he remained on LTD from December 1, 2020 to the retirement age of 55 years.

1. General Principles

[83] Section 37(2)(d)(ii) of the *Code* gives the Tribunal discretion to compensate the person discriminated against for wages lost by the contravention. The purpose of this remedy is to restore the person, to the extent possible, to the position they would have been in had the discrimination not occurred: *Gichuru v. The Law Society of British Columbia (No. 9)* 2011 BCHRT 185 [***Gichuru***], at para. 300, upheld in *Gichuru v. The Law Society of British Columbia*, 2014 BCCA 396 [***Gichuru Appeal***] at para. 43. The burden of establishing an entitlement to compensation is on the complainant. It is open to the Tribunal to deny compensation when there is insufficient evidence to support a claim: *Gichuru Appeal* at para. 51.

[84] Causation is "simply an expression of the relationship that must be found to exist" between the wrongful act of the respondent and the injury to the complainant in order to justify compensation: *Snell v. Farell* [1990] 2 SCR 311 at p. 326. Before proceeding any further, I observe that the causation required to establish liability is different from the causation required to assess remedy under the *Code*. As stated by the Tribunal in *Gichuru* at para. 289:

> I accept the proposition that the law does not excuse a respondent from liability merely because other causal factors for which they are not responsible helped produce the harm. However, this is not helpful in determining an appropriate award

> for wage loss. In the context of complaints before the Tribunal, a prohibited ground of discrimination need be only a basis, not the only basis, for any adverse treatment to amount to discrimination. This is a matter of liability. In the matter before me, liability has been determined. I am tasked with a separate issue, which is the assessment of remedy.

[85] The first step in this assessment is for the complainant to show "some causal connection" between the discriminatory act and the loss claimed: *Gichuru*, at para. 302, upheld in *Gichuru Appeal* at para. 43. In this case, the Respondent acknowledges that there is "some causal connection" between the Contraventions and Francis' wage loss. Francis' wage loss was the result of him going off work. He went off work because of his medical condition. There is a causal connection between his medical condition and the Contraventions. Thus, there is no dispute that a causal connection has been established.

[86] This decision turns on the second step in the assessment. Once a causal connection has been established, it is necessary to determine the amount of compensation. The amount of compensation "is a matter of discretion, to be exercised on a principled basis, in light of the purposes of the remedial provisions of the *Code*, and the purpose of the award": *Gichuru Remedy,* at para. 303, upheld in *Gichuru Appeal* at para. 43.

[87] Since I have found that the Contraventions are causally connected to a particular loss, there are a number of key principles that guide my assessment of damages flowing from that fact. These principles are found in the common law. The application of common law principles is compatible with the purpose of compensation under s. 37(2)(d)(ii) given the remedial nature of this provision in the context of the broader purposes set out in s. 3 of the *Code*: *Gichuru Appeal*, para. 46.

[88] While not bound by common law principles in the exercise of discretion, I find it helpful to apply them in assessing damages to ensure that my discretion is exercised on a principled basis: *Gichuru v. The Law Society of British Columbia* 2013 BCSC 1325, at para. 34; *University of British Columbia v. Kelly*, 2016 BCCA 271 [***Kelly Appeal***], para. 53.

2. Contingencies

[89] The Tribunal may reduce a wage loss award to account for contingencies. Contingencies account for the fact that the harm suffered as a result of discrimination may have been suffered in any event due to other non-discriminatory causes or unrelated events: *Gichuru Appeal*, para. 46; *Burke v. Schwetje*, 2017 BSCS 2098, at paras. 31-32; *TWNA v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670, para. 36.

Other Contributing Causes

[90] A wage loss award should fully compensate the complainant for income lost solely as a result of the discrimination: *Basic v. Esquimalt Denture Clinic and another*, 2020 BCHRT 138, para. 173.

[91] In some cases, it may be difficult to apply this principles where there are multiple causes of a particular harm or loss. It may be difficult or impossible to separate the sources and contributing causes of particular harms, to determine what harms a complainant could have suffered in the absence of the discriminatory conduct, or to estimate the extent to which various causes contributed to an underlying loss. However, the Tribunal must make an effort to do just that. As the Supreme Court of Canada explained in *Blackwater*:

> Untangling the different sources of damage and loss may be nigh impossible. Yet the law requires that it be done, since at law the plaintiff is entitled only to be compensated for the loss caused by the actionable wrong (at para. 74)

[92] The Respondent argues that there were other causes to Francis' medical condition which contributed to the wage losses that he suffered, and to the extent that compensation is owed, that he will suffer moving forward. The Respondent says that an attempt should be made to apportion damages based on the harms reasonably attributable to the Contraventions, but no further. I agree, in principle, that a respondent is not required to compensate a complainant for any harms that a complainant would have experienced anyway. As explained in *KAK v. British Columbia*, 2011 BCSC 1391 at para. 19:

> […] a plaintiff is only to be restored to his or her original position, and not a better position. A defendant is not required to compensate a plaintiff for any debilitating

> effects arising from a pre-existing condition that the plaintiff would have experienced anyway, and if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, this is to be taken into account in reducing the overall award. In addition, damages caused by other wrongful acts or non-tortious causes that occur after the defendant's wrongful act must be taken into account. This is referred to as the "crumbling skull" doctrine. It is important to note that any reduction made to take these factors into account does not reduce the damages; it simply awards the damages which the law allows [citations omitted].

[93] I find that the Contraventions caused Francis' mental illness and departure from work after July 2013. My finding is reasonably inferred from the following facts. First, Francis had no pre-existing mental health conditions. Second, the 2009 Chair Incident caused only some mental injury to Francis from which he fully recovered. Third, the Other Allegations played no role in the development of his mental illness. Fourth, Francis' mental illness developed during the Contraventions. Fifth, Francis left the workplace because it was poisoned by the Contraventions. Sixth, the 2013 Inmate Death triggered his departure. Since the Contraventions caused Francis' mental illness, there will be no discount to the wage loss award on this basis.

Intervening Events

[94] The Respondent argues that the Tribunal cannot compensate Francis from the losses resulting from the prolonging and exacerbation of his mental illness arising from his disputes over STIIP and LTD benefits or the litigation process relating to his workplace issues or this human rights complaint. The Respondent says that this has to be taken into account in providing the fair, reasonable, and appropriate compensation to Francis for the wage loss he has suffered as a result of the Contraventions.

[95] I agree that these intervening events are not sufficiently related to the Contraventions to justify compensation. I have taken into account the events occurring after the Contraventions through a reduction in damages because the Respondent is only responsible for the damages they directly cause, and in other words, for the damages that flow from the Contraventions: *Friesen v. Moo*, 2018 BCSC 1866, at para. 152. There will be a discount to the wage loss award on this basis.

[96] In the alternative, the Respondent argues that even if all of Francis' injuries were in fact caused by the Contraventions, they were too remote to warrant damages, and therefore, legal causation has not been established. The Respondent submits that a person of ordinary fortitude would not have developed a mental health condition as a result of the Contraventions, or if they did, they would not have experienced it with such severity.

[97] I do not accept this argument for the following reasons. Under the common law, a plaintiff advancing a claim for negligence is required to prove that his damages were caused both in fact and in law by the defendant's breach of the duty of care so as not to be too remote to warrant recovery. The Supreme Court of Canada in *Mustapha v. Culligan of Canada Ltd.* 2008 SCC 27 discussed this remoteness inquiry as follows:

> [12] Much has been written on how probable or likely a harm needs to be in order to be considered reasonably foreseeable. The parties raise the question of whether a reasonably foreseeable harm is one whose occurrence is probable or merely possible. In my view, these terms are misleading. Any harm which has actually occurred is "possible"; it is therefore clear that possibility alone does not provide a meaningful standard for the application of reasonable foreseeability. The degree of probability that would satisfy the reasonable foreseeability requirement was described in The Wagon Mound (No. 2) as a "real risk", i.e. "one which would occur to the mind of a reasonable man in the position of the defendant … and which he would not brush aside as far-fetched" (Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty., [1967] A.C. 617, at p. 643).
>
> [14] The remoteness inquiry depends not only upon the degree of probability required to meet the reasonable foreseeability requirement, but also upon whether or not the plaintiff is considered objectively or subjectively. One of the questions that arose in this case was whether, in judging whether the personal injury was foreseeable, one looks at a person of "ordinary fortitude" or at a particular plaintiff with his or her particular vulnerabilities. This question may be acute in claims for mental injury, since there is a wide variation in how particular people respond to particular stressors. The law has consistently held — albeit within the duty of care analysis — that the question is what a person of ordinary fortitude would suffer: see White v. Chief Constable of South Yorkshire Police, [1998] 3 W.L.R. 1509 (H.L.); Devji v. Burnaby (District) (1999), 180 D.L.R. (4th) 205, 1999 BCCA 599; Vanek. As stated in White, at p. 1512: "The law expects reasonable fortitude and robustness of its citizens and will not impose liability for the exceptional frailty of certain individuals."

> [15] As the Court of Appeal found, at para. 49, the requirement that a mental injury would occur in a person of ordinary fortitude, set out in Vanek, at paras. 59-61, is inherent in the notion of foreseeability. This is true whether one considers foreseeability at the remoteness or at the duty of care stage. As stated in Tame v. New South Wales (2002), 211 C.L.R. 317, [2002] HCA 35, per Gleeson C.J., this "is a way of expressing the idea that there are some people with such a degree of susceptibility to psychiatric injury that it is ordinarily unreasonable to require strangers to have in contemplation the possibility of harm to them, or to expect strangers to take care to avoid such harm" (para. 16). To put it another way, unusual or extreme reactions to events caused by negligence are imaginable but not reasonably foreseeable.
>
> [16] To say this is not to marginalize or penalize those particularly vulnerable to mental injury. It is merely to confirm that the law of tort imposes an obligation to compensate for any harm done on the basis of reasonable foresight, not as insurance. The law of negligence seeks to impose a result that is fair to both plaintiffs and defendants, and that is socially useful. In this quest, it draws the line for compensability of damages, not at perfection, but at reasonable foreseeability. Once a plaintiff establishes the foreseeability that a mental injury would occur in a person of ordinary fortitude, by contrast, the defendant must take the plaintiff as it finds him for purposes of damages. As stated in White, at p. 1512, focusing on the person of ordinary fortitude for the purposes of determining foreseeability "is not to be confused with the 'eggshell skull' situation, where as a result of a breach of duty the damage inflicted proves to be more serious than expected". Rather, it is a threshold test for establishing compensability of damages at law.

[98] In Francis' circumstances, there can be no question that, given the duration and severity of the Contraventions and the resulting poisoned work environment that flowed from those Contraventions, it is reasonably foreseeable that a person of ordinary fortitude would have suffered a significant mental injury from the Respondent's discriminatory acts. That Francis may have suffered greater mental injury than others in his circumstances is immaterial. The Respondent must take their victim as they find him and compensate him for the actual harm caused by their discriminatory conduct.

Mitigation

[99] A complainant will not be able to recover for those losses which he could have avoided by taking reasonable steps. This has been described as the duty to take such steps

which a reasonable person in the employee's position would take, based on their interest in maintaining a position and level of income in their job: *Gichuru Remedy*, para. 370, cited with approval in *Gichuru Appeal*, para. 47. The Tribunal may reduce a wage loss award where a complainant has failed to reasonably mitigate damages: *Gichuru Appeal*, para. 46.

[100] The burden of establishing a failure to mitigate is on the respondent: *Gichuru Remedy*, para. 370, cited with approval in *Gichuru Appeal*, para. 47. In the context of tort actions, the Supreme Court of Canada has explained that the defendant "needs to prove both that a plaintiff has failed to make reasonable efforts to mitigate and that mitigation was possible": *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, paras. 23-24.

[101] The Respondent has not met its burden in this case. I have applied the contextual reasonableness standard as set out in the *Liability Decision*: paras. 284-290, cited with approval in *Safaei v. Vancouver Island Health Authority,* 2020 BCSC 1410, para. 58. It is simply not the case that Francis was being unreasonable when he asked to choose the psychiatrist who would be assessing him. Francis was diligent when he applied for LTD benefits. He participated in independent medical assessments. He complied with treatment. He went to see his family doctor on a regular basis. Since Francis has fulfilled his duty to mitigate his losses, there will be no discount to the wage loss award on this basis.

3. Reduction for Contingencies

[102] In light of all of the circumstances of this case, how should the Tribunal exercise discretion in formulating a wage loss award when the Contraventions caused Francis' mental illness, the intervening events prolonged and worsened his mental illness, and Francis reasonably mitigated his losses?

[103] I find that a reduction of 20% for contingencies is fair, reasonable, and appropriate in these circumstances. This reflects a reasonable estimate that 80% of the losses that Francis experienced flow from the Contraventions for which the Respondent should be held responsible.

[104] The Contraventions caused Francis' mental illness and the impacts on him were extreme. Not only did Francis lose his employment, but he has also lost his ability to work. In addition to the extreme losses to his employment and mental health, he has also experienced a wide variety of negative social impacts and deterioration in his physical health. He experienced financial stress which included the loss of his home. Although his wife continued to work, they had to borrow money from friends and went to the food bank to get groceries. His relationship with his wife has suffered, and he has lost a decade with his children. His wife feels sickened by how this case has impacted her husband. Her view is that this has destroyed him as a human

[105] I accept Francis' evidence that his mental illness has been prolonged and worsened by the events that occurred after he left the workplace. It began with the handling of his application for short-term disability benefits and continued on into the handling of his application for long-term disability benefits. I acknowledge that the harm Francis experienced from the administration of benefits is not attributable to the Contraventions and have discounted the award accordingly. A discount of 20% is commensurate with the additional losses that Francis experienced from these intervening events for which the Respondent is not responsible. These additional losses include Francis feeling harassed by the communications. They include the financial stress that ultimately resulted in the loss of his home. He experienced social impacts that harmed his family including one incident when he left his child at school unattended after receiving a phone call from the insurer. In another incident he went to the hospital with chest pains after receiving the news that his benefits may be terminated. While both of these impacts were significant on Francis, they were transitory in nature.

4. Past Loss of Earnings

[106] Francis is seeking past wage losses up to November 30, 2020 and future losses after December 1, 2020. Before determining what Francis' income losses to date and likely income losses into the future are, it is first necessary to establish what Francis would have earned had he continued working. But for the Contraventions, Francis would have

continued working as a corrections officer. In terms of what he would have earned, two expert witnesses provided three different scenarios.

[107] A loss of income and pension report dated August 31, 2020 was prepared by economist Mark Szekely [***Szekely Report***] updating his initial report dated August 7, 2018 and correcting his report dated May 27, 2020. A report dated September 22, 2020 commenting on the Szekely Report and earlier reports was prepared by Nicholas Coleman [***Coleman Report***].

[108] The Szekely Report and the Coleman Report quantify Francis' income losses to date and likely income losses into the future. Their quantifications differ because they have made different assumptions about what Francis would have earned had he continued working, and in particular, what a representative year of earning levels would look like for Francis.

[109] The Szekely Report assumed that Francis would have continued to work at his 2012 earning levels, which was Francis' last complete year of work as a corrections officer. The year 2012 was taken as it represented a typical level of work activity for Francis [**Actual Earnings of Francis**].

[110] The Coleman Report disagreed with the use of one year of Francis' actual earnings, and instead, proposed to use average earning levels from 2014-2017 of corrections officers immediately above and immediately below Francis in seniority [**Average Earnings of Peers**]. This was due to his opinion that Francis' actual 2012 earnings may have been unusually high or unusually low and could not be used to predict average earning levels.

[111] As a preliminary matter, I find that Szekely and Coleman were credible expert witnesses. They were both qualified as experts in labour economics on income and pension loss valuation. Their evidence was logically relevant and necessary to assist the trier of fact. They disclosed all of the facts and assumptions on which they based their opinion. I did not detect that either of them was advocating for the person who has hired them. In these circumstances, their evidence was given by a properly qualified expert whose opinion is

impartial, independent, and free of bias: *White Burgess Langill Inman v. Abbott and Haliburton Co.*, 2015 SCC 233.

[112] My decision turns on which assumption I prefer regarding what a representative year of earning levels would look like for Francis. I prefer the Szekely Report because in my view the **Actual Earnings of Francis** is more accurate than **Average Earnings of Peers.** In my view, one year of Francis' actual earnings is more representative than the average earning levels of his Peers because it is more personalized to Francis' actual and historical performance. I reach this conclusion for the following reasons.

[113] First, that Francis earned more than his base salary in 2012 does not reasonably indicate that his earnings were "unusually high" that year. Coleman did not have the Peers' earnings in 2012 and thus could not provide an actual comparison with Francis' known earnings. Coleman agreed that Francis earned more than his base salary in 2012 (and the average earnings of his Peers) but could not comment on why that was the case. In his expert report, he noted that Francis' 2012 earnings included income from overtime hours and that the average earnings of his peers did not include premiums for relieving in a supervisory capacity.

[114] Second, the fact that Francis was earning higher than his base salary in 2012, even in the middle of his ongoing discriminatory treatment by the Respondent, suggests that Francis could have continued surpassing his base salary in other years. Francis had received only positive performance reviews on his work performance for over a decade.

[115] Third, Coleman's model makes projections for peers in 2014 to 2017 without consideration for Francis' individual or historical performance. Coleman acknowledges this when he sets out his additional assumptions at page 12 of the Coleman Report:

> The individual was working full-time as of July 28, 2013 and over a period of 10 years his probability of unemployment and unemployment beyond the official definition would have approached and finally matched the average for a male of his age and education. Beyond this the factors do not rely on any information that is specific to Mr. Francis.

[116] Fourth, the Coleman Report uses an overly broad comparison group of males of the same age and education without reference to sector, employer, unionization, or job (i.e. college or other non-university certificate or diploma – total). This renders estimates that are unreasonably removed from Francis' actual employment situation. There is no dispute that Francis was a unionized employee of the government working in a single profession as a corrections officer for over a decade. On cross-examination, Coleman agreed that unionized employees and non-unionized employees are treated differently.

[117] Fifth, Coleman assumed and discounted for negative employment contingencies only, but did not factor in positive employment contingencies such as potential promotions. He attributed $22,756 of net loss including past interest to negative employment contingencies. However, it would have been reasonable to factor in potential promotions. As set out in the *Liability Decision*, Francis was subjected to discrimination shortly after he started a new position that was regarded as a promotion by many of his colleagues. Six witnesses who testified in the merits hearing were promoted from the positions they held at North Fraser including several correctional officers who had worked with Francis.

[118] These factors render Mr. Coleman's calculations based on **Average Earnings of Peers** of questionable utility. For all these reasons, I find that the **Actual Earnings of Francis** is more accurate because it is more personalized to Francis' actual and historical performance. As such, I have relied on the Szekely Report in quantifying Francis' income losses to date and likely income losses into the future.

[119] Szekely calculated the difference between Francis' actual income from July 28, 2013 to November 20, 2020 and what Francis could have earned had he remained actively employed. Szekely estimated that past wage loss net of taxes and including interest would be $236,939. It is this amount that Francis claims for past income losses.

[120] There are two issues with this request. First, the amount does not deduct for the STIIP benefits that Francis received from March 26, 2014 to September 25, 2014 [**STIIP Benefits**]. There is no dispute that Francis received STIIP benefits at 75% of his normal rate of pay for a period of six months. These should properly be deducted from any wage

loss request. Szekely did not account for any repayment of STIIP benefits because the 2014 income tax returns only showed total amounts received by Francis for T4 income. Szekely expected the parties to have documentation that showed precise amounts which was better than anything he could estimate. I have been unable to find those precise amounts in the documentary evidence before me. As such, I have reasonably estimated the amount of STIIP Benefits to be approximately $22,000 by taking 75% of six months of the average annual earnings of two employees in the Coleman Report who were just above and just below Francis' normal rate of pay in 2014. That number is supposed to be lower than Francis' actual T4 earnings in 2014, which it was. As such, I am deducting the past wage loss award by $22,000.

[121] Second, the amount is for **net** past income loss. While net past income losses are awarded in the context of personal injury cases, where the legislation requires that they be awarded in this manner, there is no dispute that the Tribunal typically awards past income loss in **gross** terms. The Tribunal also estimates the income taxes and adds them to the gross amount to ensure that the complainant is restored to his **original position** and not put into a worse position because of the Contraventions.

[122] From my review of Table 2 of the Szekely Report, I have identified the Gross Income Loss to be $293,947 and income taxes payable to be $58,128. This should be an amount sufficient to offset any additional income tax liability Francis may incur as a result of receiving compensation for past loss of earnings in a lump sum. From this total amount of $352,075, I have deducted $22,000 for repayment of STIIP Benefits to arrive at total compensation for past wage loss in the amount of $330,075. **After discounting for a 20% contingency, I find that Francis is entitled to compensation for past wage losses in the amount of $264,060.**

5. Future Loss of Earnings

[123] The Respondent argues that, in this case, even if it is found that the Contraventions contributed to Francis' initial inability to work, it is simply not possible to determine whether and for how long Francis will be unable to work, to determine in what capacity he

may be able to hold future employment, or to assess whether and to what extent this will be caused by a failure to reasonably mitigate those losses. The Respondent argues that these contingencies are compounded by the fact that any claim for future wage losses extends out into the uncertain future making it less and less certain that any compensation – even proportionately reduced to account for contingencies – is justified.

[124] I acknowledge that the highly speculative nature of future wage loss claims, as well as common law considerations, has meant that this Tribunal has been very reluctant to make awards for future wage losses except in the clearest of cases, and when it has done so, these awards have been lower than the amount claimed in this case. This is due to the nature of the assessment. In relation to past income loss, while the damages caused "solely" by the discriminatory incidents may be difficult to assess, the Tribunal is at least able to determine that a person was or was not out of work for a specific period of time, as well as make some attempt to determine the extent to which the discriminatory incidents directly caused those losses, based on the evidence tendered. In the case of future wage losses, the Tribunal does not even know whether the complainant may be able to return to work, in what capacity, or how that may be impacted by future events.

[125] I can only make this kind of an award in extraordinary circumstances, and in some cases, it may be speculative: *Pilon v. Cornwall (City)* 2012 HRTO 177 [***Pilon***], para. 14. I distinguish *Pilon* on the basis that the complainant was engaged in ongoing efforts to mitigate wage losses post hearing. In this case, after multiple independent assessments over a period of years, Francis has been deemed unable to work in any capacity and his prognosis for recovery is guarded. This is a factor that weighs in favour of assessing Francis' future loss of earnings. As explained in *Warick v. Diwell*, 2017 BCSC 68:

> Damages for the cost of future care are assessed, not mathematically calculated: *Uhrovic v. Masjhuri*, 2008 BCCA 462 at paras. 28-31. There is an inherent degree of uncertainty and discretion in making such awards. Because awards are made "once and for all" at the time of trial, judges must "peer into the future" and fix the damages "as best they can". This includes allowing contingencies for the possibility that the future may differ from what the evidence at trial indicates: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, at para. 21. (at para. 207)

[126] This is simply not a case where it may be "too uncertain to warrant any compensation" for future wage loss: *Bitonti et al. v. College of Physicians and Surgeons of BC*, 2002 BCHRT 29, para. 37. In my view, the Tribunal can apply a future loss of earnings analysis found in personal injury cases to a determination of compensation for future loss of earnings under s. 37(2)(d)(ii) of the *Code*: *Kelly Appeal*, paras. 43 and 54. As explained by the Tribunal in *Gichuru Remedy*:

> I accept that it is appropriate to compensate a complainant for an impairment to their earning capacity resulting from discrimination. However, the burden continues to be on the complainant to establish, first, that there is an impairment to his earning capacity, and second, that any such impairment resulted from the discrimination found (at para. 307)

[127] It is to these factors that I now turn.

Permanent Impairment

[128] I find that Francis has met his burden in this case. I find that there is permanent impairment to Francis' earning capacity that resulted from the Contraventions. My findings are reasonably inferred from the following facts. First, Francis has not worked since he left North Fraser in July 2013. Francis is not medically able to return to work at North Fraser. It is not feasible that Francis will ever return to work at North Fraser. As of the date of his most recent assessment, which is consistent with previous assessments, Francis is totally disabled from working in any occupation.

[129] Second, I accept the expert medical opinion of Dr. Waisman that Francis' prognosis for a full recovery is guarded. In his expert report, Dr. Waisman noted that Francis is not able to return to work at this time because he is unable to regulate his emotions to be able to interact with colleagues and clients, which are essential skills to be able to persist at the workforce. His report noted that the synergistic effects of Francis' anxiety and depression have led to a number of different impairments.

[130] Third, Dr. Smith cautioned about the uncertainty of a positive outcome for Francis, and like Dr. Waisman, was cautious in his prognosis for full recovery. Dr. Smith explained that the longer an individual suffers from a psychiatric illness the worse the prognosis. This

is because more diagnoses correspond to a more serious psychiatric condition. In this case, Francis has had a number of serious psychiatric diagnoses.

[131] Fourth, I reject the Respondent's argument that Francis did not seek or follow appropriate psychiatric treatment between 2014 and 2020. I accept that the duty to mitigate includes a duty to take reasonable steps to obtain treatment: *Ueland v. Lynch*, 2019 BCCA 431, paras. 17-3. I find that, when considered in context, Francis took sincere and reasonable steps to obtain treatment.

[132] Fifth, I reject the Respondent's argument that with proper treatment in the past, Francis might well have recovered his mental health sufficiently to be able to return to work in some capacity long before now. This argument is speculative. Dr. Smith acknowledged that it is difficult for him to address the expected duration of Francis' inability to work had he received proper treatment. Dr. Smith opines that "response to optimal treatment is variable with depression". He anticipates that Francis' condition could be improved if four conditions are met: enhanced psychiatric treatment, sleep problems are addressed, paranoid thinking is better managed, and the current legal processes are resolved. Dr. Smith wants to be clear that "psychiatric treatment is not a magic bullet". Even with enhanced psychiatric treatment, Dr. Smith could not guarantee that Francis could be employable in the future. That would depend on Francis improving clinically in the other areas. This includes better managing his paranoid thinking and addressing his sleep problems. Dr. Smith noted that Francis' sleep is grossly disturbed leading to daytime fatigue and exacerbating his other psychiatric symptoms.

[133] Dr. Smith cautions that, even with enhanced psychiatric treatment, it is probable that Francis' psychiatric symptoms and subsequent disability will continue as along as the legal processes remain unresolved. He explains that one of the major driving forces of Francis' depression is the conflict in the workplace. He opines that it is likely that for complete resolution of his symptoms there will have to be some resolution to the workplace situation. Dr. Smith testified that in his opinion, it is not just a medical solution, but there is also a social and legal dimension to Francis' recovery as well.

[134] Sixth, the expert medical opinion of Dr. Smith is consistent with the clinical observations of Dr. MacDonald. Gallant testified that Francis needs closure and his road to recovery will take time. She testified that it is going to be a lot of time for him to heal and get over the anger and resentment and unfairness that he has experienced. She testified that it is "not like a light switch" and "it will haunt him for a long time". With proper closure, and with time, she hopes that he is going to be okay.

[135] I acknowledge the possibility that Francis may improve upon resolution of the legal process. Take, for example, what happened when Francis went to visit his ailing father in Barbados. Dr. Macdonald noted that Francis was in "good spirits" after he had returned from seeing his family in Barbados. Francis also reported to Dr. Smith that he returned from a visit in Barbados and felt more relaxed and his sleep was better. Gallant described Francis as a "totally different man" when he was in Barbados. She described him as happy and social even though he was "dealing with a dad who was knocking on the door upstairs". She observed his demeanour change when transferring flights in Toronto. She testified that "his shoulders are up in his ears" as he started asking about the legal processes.

[136] I also acknowledge the possibility that Francis may not improve upon resolution of the legal process. Dr. Macdonald noted a deterioration in Francis' health in November 2019 notwithstanding that the *Liability Decision* had been issued four months earlier in his favour. Furthermore, whether or not there is a resolution to the current legal processes depends on whether any decision is judicially reviewed. Dr. Smith opines that it is very difficult to cope with conflict that is this widespread and involving so many different parties. Dr. Smith says that resolution of the entire conflict with the employer and insurer and union would be very important in making Francis feel more comfortable and reduce his paranoid symptoms.

[137] I distinguish *Dhillon v. Planet Group*, 2013 BCHRT 83 and *Benton v. Richmond Plastics*, 2020 BCHRT 82 [***Benton***] on the grounds that Francis is unable to work in any occupation and his prognosis for recovery is guarded. In both cases, the wage loss award was reduced to account for the contingency that the complainants may not have continued working because of performance concerns. I distinguish *Basic v. Esquimalt Denture Clinic* on

the grounds that the complainant failed to mitigate her damages through her own conduct when she was delayed in getting a new job because she lied during an interview. No such circumstances exist for Francis given his inability to work in any occupation.

[138] I distinguish the following cases on the grounds that Francis has suffered a permanent impairment to his earning capacity as a result of the Contraventions. In *City of Calgary and Canadian Union of Public Employees*, Local 38, 2013 CanLII 88297 the medical evidence established inability to return to work for a further five years. In *Corporation of the City of Calgary v. CUPE*, *Local 37*, 2018 CanLII 53482, the medical evidence established that the overall prognosis for a return to work was good. I distinguish the cases where the Tribunal refused to make an award for future wage loss, or where a future wage loss was discounted, on the facts: *Jones v. Eisler*, [2001] BCHRTD No. 1; *Meldrum v. Astro Ventures*, 2013 BCHRT 144; *Morris v. BC Rail* 2003 BCHRT 14. I distinguish *Tahmourpour v. Canada (Royal Canadian Mounted Police)* 2010 CHRT 34, para. 9, remitted back on appeal in *Tahmourpour v. Canada (Royal Canadian Mounted Police)*, 2010 FCA 192, on the basis that there was no evidence that the discriminatory conduct caused any permanent impairment to earning capacity beyond two years. The Tribunal in *Gichuru* did not award any amount for future wage loss. I distinguish *Gichuru* on the medical evidence that Francis has suffered a permanent impairment to his earning capacity.

[139] The Respondent acknowledges that in *Kelly*, the Tribunal awarded wage losses beyond the date of judgment based on an assessment that the discrimination directly caused a six year delay in entering the medical profession with appropriate reductions for various contingencies. Beyond the exceptional circumstances in *Kelly*, where the Tribunal was able to find a "clear causal link" between the past discrimination and certain future wage losses, the Respondent argues that Francis has not identified a case in which wage losses were projected out into the future beyond the date of the Tribunal's decision. I distinguish *Kelly* on the basis that there was no permanent impairment to his earning capacity because at the time of the remedy decision, he was proceeding successfully through his training program.

[140] In my view, the extraordinary circumstances of this case warrant a future loss of earnings award.

Contingencies

[141] Given my findings, the only contingency that matters in the future loss of earnings analysis is how long Francis would have continued to work. When dealing with the question of length of career, one approach is to default to general statistics (as Coleman did) or to start with a range of retirement ages (as Szekely did) and then decide which retirement age is appropriate for Francis' particular circumstances. Since I prefer Szekely's approach, and have accepted that 2012 would have been a representative year while Francis stayed in the labour market, then the only contingency that needs to be decided is his retirement age.

[142] I reject the Respondent's argument that I should also account for the labour market contingencies set out in the Coleman Report. It would not be appropriate to truncate the calculation to the age Francis would have retired and then also account for labour force participation rates in the future. By doing that, the calculation allows for the possibility of even earlier retirement but does not account for the possibility of even later retirement. Furthermore, Coleman accounted for the likelihood of unemployment or reduction in income for reasons related to physical disability. I reject the Respondent's argument that Francis had frequent pre-existing physical injuries. I find that Francis was in good health before the Contraventions. He had some minor physical injuries from which he fully recovered. Francis did not have a pre-existing physical condition. His absences from work in the spring of 2013 were due to the stress and anxiety he was experiencing from retaliation in the workplace.

[143] The next step is to decide how long Francis would have continued to work. Francis argues that he would have worked until the retirement age of 65 years. The Respondent argues that Francis would have retired a decade earlier at 55 years. Szekely produced a range of retirement ages from 55 years to 65 years which have been of assistance. I find

that 63 years is a reasonable estimate of the retirement age for Francis. My finding is reasonably inferred from the following facts.

[144] First, Francis was planning for a career of longevity. Francis testified that wanted to work in the public sector because he wanted a "career of longevity so that he could live his life". His evidence is corroborated by his actions in the decades before the Contraventions. After finishing high school, Francis had a brief stint in athletics as a football player and in the private sector. He then took further education through the Justice Institute in 1999 to pursue a government career in corrections. He worked as a corrections officer for the next thirteen years. In the interim, he met his wife and they started a family. They have been together for almost two decades.

[145] Second, I accept Francis' evidence that he would have worked until the age of 65 years. Gallant testified that they talked a lot about retirement and there was no discussion of early retirement. Francis enjoyed working as a corrections officer in Vancouver and was contemplating working up until the age of 65 years. At that time, she was working twelve-hour shifts as a nurse and did not want to do shift work into her 60s. She contemplated moving into day-time or part-time jobs as a nurse. They are of similar ages and contemplated retiring around the same time.

[146] Third, I reject the Respondent's argument that Francis would have retired at the age of 55 years. That Francis was eligible to retire at 55 years on an unreduced pension is not determinative. Coleman relied on rational decision-making theory that was speculative in the particular circumstances of this case. He testified that had Francis retired at 55 years, he would have received 46% of his salary. Coleman says that it is not rational for Francis to have continued working because he would only be working for 54 cents of every dollar he earns. Coleman testified that Francis could have taken a retirement salary and then worked elsewhere to make a lot more money. While that may be true, it is speculative in the circumstances of this case. There is simply no evidence that Francis was contemplating this kind of a post-retirement work arrangement or that one was even possible for him given his education and interests.

[147] Fourth, I have discounted for the possibility that some of the workplace issues that Francis experienced at North Fraser were not due to the Contraventions. In this way, I accept the Respondent's argument that there may have been other conflict in the workplace that would have resulted in Francis retiring earlier than he intended. However, the arguments advanced by the Respondent regarding the extent of this discount are speculative. Francis had worked in the same job for a long time. Even after the 2009 Chair Incident, Francis returned to work with no modifications. Francis also discussed the possibility of moving jobs to a new location, like Surrey, with his union representative. While the timing of that relocation was not feasible given his mental health condition, it is probable that Francis could have continued his longevity as a corrections officer in a different location, like Surrey, had conflict in the workplace at North Fraser persisted.

[148] Fifth, I have discounted for the possibility that Francis and his wife wanted to travel in their retirement. Gallant testified that they did discuss, at one point, living in Canada and Barbados part-time. She explains, however, that they had kids late and put that their dreams aside to focus on raising their family and putting the interests of their children first. I accept the evidence of Francis – which was corroborated by Dr. Macdonald, Dr. Smith, and Dr. Myers – of his genuine and sincere commitment to his children and the wellbeing of his family. Gallant gave detailed information about the ages of their children and the number of years they had left in school, as well as her hopes that they may pursue post-secondary education. She testified that, hopefully, they will see their kids finish school and get into their careers. Based on their children's ages, and their commitment to financially supporting their education, it is reasonable to infer that their financial commitment to their children would have extended into the future for another 10 years. That would bring Francis to a retirement date of 61 years.

[149] Finally, I accounted for their difficult financial situation and the likelihood that they may need to work longer. Although Gallant contemplated retiring before 65 years, when she was working shifts as a nurse, she now has a job that she likes and allows her to work during weekdays. There is no reason to believe that she would retire early. I also account for the fact that Szekely estimated a retirement age of 63 years based on Francis' education

level and reasonable assumptions on life expectancy and average propensity to stay in the workforce.

[150] In all of these circumstances, I find that a retirement age of 63 years is a reasonable estimate for Francis given the particular circumstances of this case. I rely on Table 3 of the Szekely Report for Future Loss of Earnings calculations to retirement. Coleman took no issue with the accuracy of these calculations given the assumptions made, which I accept. Szekely estimates the future loss of earnings to the retirement age of 63 years to be $539,501. **Discounting this amount by 20% for contingencies, I find that the future loss of earnings for Francis to the retirement age of 63 years is $431,601.**

6. Pension Loss

[151] Francis is seeking $63,116 as pension loss with the age of retirement at 65 years. I decline to grant this amount on the basis of my finding that 63 years is a reasonable estimate of the retirement age for Francis. I rely on Table 4 of the Szekely Report to estimate the total pension loss. Coleman took no issue with the accuracy of these calculations given the assumptions made, which I accept. Szekely estimated the total pension loss payable to age 63 years as $82,351. **Discounting this amount by 20%, I find that the pension loss for Francis to the retirement age of 63 years is $65,881.**

D. Injury to Dignity

[152] Francis seeks an award for $220,000 in damages for his injury to dignity, feelings, and self-respect. The Respondent says that the extremely high award sought by Francis is not justified and that damages should be in the range of $20,000 to $35,000.

[153] A violation of a person's human rights is a violation of their dignity. That is why s. 37(2)(d)(iii) of the *Code* confers discretion on this Tribunal to award damages to compensate a person who has been discriminated against for injury to their dignity, feelings and self-respect or to any of them [**injury to dignity**]. There is no cap on injury to dignity awards under the *Code*: *Kelly Appeal*, para. 60. Whether to order compensation and

how much compensation to order are solely within the discretion of the Tribunal: *Gichuru Appeal*, para. 71.

[154] This discretion, however, must be exercised on a principled basis. The purpose of an injury to dignity award is to compensate the complainant for the actual harm they have suffered as a result of the discrimination: *Kelly Appeal*, at paras. 60-62. This assessment is based on the evidence before the Tribunal and all of the relevant circumstances of the case:

> The Tribunal has frequently stated that injury to dignity awards are compensatory, not punitive, and should place the complainant in the position they would have been in absent the discrimination. But what does that mean in the context of a non-pecuniary award? The fixing of a monetary amount to compensate for the impact of discrimination on a complainant's dignity, feelings and self-respect is highly contextual and fact-specific (*Gichuru*, para. 256)

[155] A number of factors may be relevant to the quantification of such an award. The Tribunal generally considers three broad factors: the nature of the discrimination, the person's vulnerability, and the effect of the discrimination on that person: *Basic v. Esquimalt Denture Clinic and another*, 2020 BCHRT 138, para. 193. A more nuanced approach is necessary in the circumstances of this case. I will consider five factors set out by the Tribunal in *Gichuru* that can and have been applied to assist in the quantification of an injury to dignity award in these kinds of cases:

- the nature of the discrimination found;
- the time period and frequency of the discrimination;
- the vulnerability of the complainant;
- the impact of the discrimination upon the complainant; and
- the totality of the relationship between the parties (at para. 260; cited with approval in *Gichuru Appeal*, at paras. 53-56.).

[156] As a preliminary matter, the Respondent argues that injury to dignity damages are meant to compensate only for those injuries that are a reasonably foreseeable consequence of the contravention. They rely on three cases in support of this proposition: *Nixon v.*

Vancouver Rape Relief Society, 2002 BCHRT 1 [***Nixon***]; *Ballendine v. Willoughby and others (No. 4),* 2007 BCHRT 162 [***Ballendine***]; and *Chong v. Violetta Industries and Sommerville (No. 2*), 2007 BCHRT 163 [***Chong***].

[157] These cases do not support the proposition for which they are being advanced. In *Nixon*, the Tribunal stated "the goal of a remedial order is, to the extent possible, to make whole the victim of the discriminatory practice, taking into account principles of reasonable foreseeability and remoteness": para. 226. However, the Tribunal in *Nixon* did not actually apply the principle of reasonable foreseeability as a factor when making the award. *Chong* and *Ballendine* were decided by the same Member in decisions that were issued less than one week apart. In both cases, the Tribunal quoted *Nixon* but did not apply the principle of reasonable foreseeability as a factor when making the award. In these circumstances, I am not prepared to add a reasonable foreseeability requirement to the assessment of injury to dignity awards. As set out in *Kelly Appeal*, the purpose of an injury to dignity award is to compensate the complainant for the actual harm they have suffered as a result of the discrimination. It does not follow from these cases that compensation is limited to only those actual harms that are a reasonably foreseeable consequence of contravention.

[158] I now turn to the application of the *Gichuru* factors to assess the actual harm that Francis has suffered as a result of the Contraventions.

1. Nature, Time Period, and Frequency of the Contraventions

[159] I consider the first three *Gichuru* factors together. The nature of the discrimination was serious. The contraventions in this case cover both racial discrimination under s. 13 of the *Code* and retaliation under s. 43 of the *Code*. This is not a case where the connection to Francis' race and colour was subtle. The comments and actions of his coworkers and supervisors struck at the core of Francis' identity and feelings of self-worth and emotional well-being. What Francis experienced encompasses virtually the entire spectrum of racial discrimination and harassment in the workplace, escalated into retaliatory behaviour, and

resulted in a poisoned work environment, necessitating a significant award of compensation.

[160] Francis was subjected to discrimination shortly after he started a new position that was regarded as a promotion by many of his colleagues. Over the next six months, Francis was stereotyped as "slow" which did not reflect his actual performance. He was confronted by his trainer to "step up his game". He was singled out, more than other officers, for criticism that was not formally documented. The criticism was based largely on gossip, and when confronted, Francis' reaction was then reported to management. The stereotype of Francis being "slow" and "lazy" persisted even after he left the workplace. He was called a "Lazy Black Man" by a supervisor who subsequently retaliated against him.

[161] Francis experienced "everyday racism" in the form of racialized comments and slurs. The Respondent seeks to minimize the severity of four of these comments on the grounds that Francis was not present when the "nigger" and "turn on the lights" comments were made, the supervisor apologized after directing Francis to do something "because you're black", his Control partner stopped calling Francis a "Toby" after he made clear that he did not like the name. Regardless of the view taken by the Respondent, all of these comments and slurs were found in the *Liability Decision* to amount to racial discriminatory harassment in contravention of the *Code*. That Francis was not present when two of them were made does not detract from the finding that the cumulative effect of the Contraventions was profound on Francis: *Liability Decision*, para. 336. Attempts to trivialize the impact of racialized comments and slurs on Francis plays into the myth and misconception that, as a racialized person, Francis was too sensitive and overreactive: *Liability Decision*, para. 289.

[162] Francis reported many of these incidents in a timely manner and requested that they be investigated. There were a number of myths and misconceptions that arose when Francis alleged race discrimination which created a climate that prevented any kind of effective response to racial inequality. Francis was regarded as someone who had been treated acceptably in the past and thus should not be complaining. Francis was regarded as having a chip on his shoulder and playing the "race card" to get what he wanted. Francis

was blamed for the disadvantage he experienced in the workplace in bringing allegations forward. Francis was also criticized for not bringing allegations forward even after investigations did not proceed in a timely way.

[163] When Francis filed a human rights complaint, his actions were met with surprise by management and hostility by colleagues and supervisors. He was called a "rat" and told that he had a "target on his back". He was subject to retaliation by two supervisors in 2013.

[164] The Respondent relies on the fact that only part of the complaint was justified, and that some of Francis' allegations were dismissed. I have considered the causative role that the Other Allegations had in the development and worsening of Francis' mental health. I find that the actual harm Francis suffered did not flow from the Other Allegations. I reach this conclusion for the following reasons. First, there is no principled reason in the *Liability Decision* to discount the award on this basis. Second, I have found no credible or reliable evidence that reasonably supports a conclusion that the Other Allegations impacted Francis' mental health. Third, taking the Respondent's argument at its highest, I have considered two incidents that were dismissed in the *Liability Decision* to determine what losses, if any, can be attributed to these incidents.

[165] These two incidents were found to have occurred around July 2013 but misperceived by Francis, who at the time, acknowledges being emotionally unstable: *Liability Decision*, para. 230. The "Late Incident" and the "Bahia Incident" occurred shortly before Francis left the workplace, and Francis acknowledges experiencing a range of negative emotions and a tingling sensation in his body: *Liability Decision*, paras. 245-253. Aside from these feelings, there is no evidence to suggest that these incidents created additional harm to Francis. Rather, they support my finding that Francis was experiencing mental health problems before he left the workplace in July 2013.

[166] The Respondent argues that the Contraventions, while serious, are not of the same nature and severity as those for which very high awards for injury to dignity have been granted. The Respondent refers to *C.S.W.U. Local 1611 v. SELI Canada and others (No. 8)*, 2008 BCRT 436 [***SELI***] for the proposition that the complainants only got $10,000 for injury

to dignity even though they were subject to terms and conditions of employment for two years that were substantially lower than those of European workers employed on the same project. In recognizing their unique vulnerability, the Tribunal noted that they were foreign workers in Canada on temporary work permits who did not speak English and were wholly dependent on the employer for wages, accommodation, food, and transportation back to their homes and families. The Respondent also refers to *Malin v. Ultra Care and another (No. 2)*, 2012 BCHRT 158 [***Malin***] for the proposition that the complainant only got $20,000 for injury to dignity even though the complainant was HIV positive and the core of the discriminatory conduct was based on stereotyped perceptions that excluded him on the basis of his HIV status and forced him to move out of his house and leave a community that he had been residing in for ten years. I distinguish *SELI and Malin* on Francis' unique vulnerability and the actual impacts of the Contraventions on him.

2. Vulnerability of Francis

[167] Second, I consider Francis' vulnerability. Employees are, to some extent, inherently vulnerable. They are, however, particularly vulnerable at the time of a departure from a poisoned workplace. Their "vulnerability stems not only from economic subordination to their employers but also from being a captive audience to other perpetrators of discrimination, such as a harassing co-worker": *Schrenk*, para. 67.

[168] In this case, Francis was subject to discrimination and retaliation by both co-workers and supervisors. As found in the *Liability Decision*, a number of North Fraser employees engaged in or threatened to engage in retaliatory conduct against Francis. Francis was called a "rat" and told that he had a "target on his back" which reflected a general sentiment at North Fraser that colleagues were targeted for getting other colleagues into trouble. He was retaliated against by two supervisors in the spring of 2013. Supervisors also advised his Control partner to approach management to raise concerns about Francis in the spring of 2013. That Control partner was motivated to cast Francis in a negative light based on his misperception that Francis made unfounded allegations against colleagues who he regarded in high esteem. Francis had to work closely with a Control partner who participated in the incidents that amounted to discrimination and retaliation

against him: *Liability Decision*, paras. 168, 351-358. This negative sentiment at North Fraser reflected a general reaction among colleagues who frowned upon Francis for reporting on his peers. He lost his friendships and suffered socially at work by raising concerns about discriminatory behaviour.

[169] The actual harms that Francis experienced were exacerbated by the nature of his position as a segregation officer. The job description for a segregation officer at North Fraser states that the position "requires a high level of vigilance". Dr. Smith describes Francis' job as a "safety-sensitive position" that required Francis to work in a "high stress environment" directly with inmates. Gallant testified that, because there are hostile people incarcerated and fights break out, there needs to be trust and cooperation among officers to ensure the safety and security of everyone. Feeling safe and being able to trust colleagues was essential to his job given that he can be attacked by inmates at any time.

[170] The nature of his job at North Fraser left Francis particularly vulnerable to the impacts of the Contraventions. Similar to the complainant in *PN v. FR* 2015 BCHRT 60, his physical safety was threatened and compromised by the discriminatory and retaliatory behaviour of both officers and supervisors who he needed to count on to be safe at work. He had a genuine fear that if something dangerous were to happen at work, he could not count on his colleagues for help.

[171] Francis testified that he did not feel safe at work, and did not trust that his coworkers had his back. His evidence was corroborated by Gallant, who testified that Francis was concerned about his safety, could not trust the people he worked with, and did not feel his back was covered in case of an emergency. As set out in the *Liability Decision*:

> [336] The cumulative effect of these comments and incidents were profound on Francis. Francis testified that it got to the point where he did not feel safe at work. His evidence was corroborated by Gallant who testified that it was essential that employees trust their coworkers because they can be attacked at any time by inmates. Gallant had previously worked in these facilities and was familiar with the workplace culture. She testified that there must be trust that coworkers have each other's back. Francis confided in Gallant to feeling vulnerable and that his coworkers did not have his back. Francis testified:

> I'm from a place where we're a race that have a lot of pride in ourselves and respect people. And to me, I felt that anyone, you know, can make a mistake, but when it keeps happening over and over again and when you look to the people that's supposed to help you protected you from these kinds of things and it seems like they made it worse … it kind of plays on … your psyche in the sense of, like, it was making me feel I was not safe in the work environment. It's impacted my health in many, many ways. I mean, I have now suffered from depression. … I have always been a fit individual. It's hindered … a lot of my extracurricular activities. It's hindered and interfered with my sexual life. It's somewhat stagnated my relationship with my children.

[172] The Respondent argues that, while the Tribunal will consider a complainant's unique vulnerability, the Tribunal's case law demonstrates that this is a high bar. The Respondent argues that analogous cases in employment have granted injury to dignity awards that are a fraction of what Francis is seeking for contraventions that are more serious in nature and involve complainants who are more vulnerable.

[173] The Respondent refers to a number of cases involving sexual harassment and sexual assault. The Respondent refers to *Hashimi v. International Crown Management Inc.*, 2007 BCHRT 66 [***Hashimi***] for the proposition that the complainant only got $10,000 for injury to dignity even though the Respondent had engaged in serious and offensive verbal incidents of sexual harassment including biting the rear end hard enough to cause bruising.

[174] The Respondent refers to *Wells v. Langley Senior Resources Society*, 2018 BCHRT 59 [***Wells***] for the proposition that the complainant only got $30,000 for injury to dignity even though she had to make significant changes to her life to take the job with the respondent including moving her family to a new city and on her first day back at work after a leave, was "ambushed" by having her employment terminated by the front door of the workplace.

[175] The Respondent refers to *PN v. FR* 2015 BCHRT 60 [***PN***] for the proposition that the complainant only received $50,000 for injury to dignity even though the case is clearly much more severe than the case at hand. The complainant was forced to perform sexual acts at the whim and insistence of her employer, was underfed and treated like she was sub-human all because she was a young Filipino mother who needed the job to take care of

her own children. She was forced to flee her employer with nothing, not even clothes, and her employer continued to torment her by lobbying to have her deported from Canada.

[176] I acknowledge that high injury to dignity awards have been granted in cases involving egregious conduct akin to criminal conduct such as egregious sexual harassment that amounts to sexual assault. However, while these cases involve sexual harassment, they do not mean that similar or significant degrees of harm cannot result in other circumstances. As set out in *Kelly Appeal*, the purpose of an injury to dignity award is to compensate the complainant for the actual harm they have suffered as a result of the discrimination. While the Tribunal's case law is helpful, my focus is not on finding a range established in previous cases: *Kelly Appeal* at para. 60. I do not find *Hashimi*, *Wells*, or *PH* particularly helpful since the actual harm Francis suffered as a result of the Contraventions differs from the complainants in those cases.

3. Impacts on Francis

[177] The most significant factor in my award is the effect that the Contraventions had on Francis.

Employment

[178] The immediate impact was Francis' departure from a workplace that was poisoned by the Contraventions in July 2013. There was no other reasonable option for Francis but to leave that workplace in July 2013. Francis was not required to continue subjecting himself to discriminatory and retaliatory practices: *Liability Decision*, paras. 371-379.

[179] Not only did Francis lose his employment, but he also lost his ability to work. Francis has not worked for over seven years. Francis is not medically able to return to work. This is serious. The Supreme Court of Canada in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313 described the significance of a person's employment to their financial and emotional well being:

> "Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role

in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being": at p.368.

Mental Health

[180] Gallant started crying when she was asked to describe the impact of the Contraventions on Francis' mental health. She did not know where to start. She said that when she first met Levan, he was "so full of life". She described him as "happy and charismatic". He had a "good persona". He was "healthy", "athletic" with "lots of friends". He had "empathy", "spunk", and "drive". She describes being so in love with him. From her perspective, he was everything she could have asked for and then some. She describes the impacts on her husband as "horrible". She does not recognize him anymore and considers him a "totally different person". She testified that what happened to Francis at North Fraser has "destroyed him as a human".

[181] Gallant testified that there are so many times when she wanted to drive her car off the bridge on the way to work. She knows that the kids need her and Francis needs her, and somebody has to be there. She testified that it has been the hardest decade of her life and she wants it over. She wants Francis back to the way he used to be and she does not know if he will ever get there.

Physical Health

[182] Francis has experienced deterioration in his physical health caused by the Contraventions. Francis was in good physical health before the Contraventions. He did not have any pre-existing physical conditions. He had minor physical injuries from which he fully recovered. He has experienced a wide variety of stress-related physical symptoms flowing from the Contraventions that include sleep disturbances, stomach upset, diarrhea, headaches, and tingling sensations that have worsened over time.

[183] The medical evidence is clear. After leaving North Fraser, Francis would repeatedly have dreams, waking up in a rage in the middle of the night, and even punching the wall. He was not sleeping or eating properly. By October 2013, Francis reported a lack of solid bowel movements over a period of months. By November 2013, he reported experiencing

headaches, anxiety, and sleep disturbances. By January 2014, he reported sleep disturbances, diarrhea, and stomach upset. His health continued to decline. He underwent a sleep study in September 2016, which found that he has severe daytime hypersomnia. He reported that due to stress he either sleeps too much or too little and feels exhausted most of the time.

[184] Despite having a poor appetite, Dr. Smith noted in 2020 that Francis has gained weight over the last year. He also experienced acute tachycardia suggestive of panic attacks. The anxiety caused him to vomit. Gallant reported to Dr. Smith in 2020 that her husband has experienced significant physical symptoms over a number of years and that she has had to take him to the hospital emergency for chest pains. As a nurse who used to work in the cardiac unit, she is worried that he is going to have a heart attack. She describes him as not being able to breathe.

Financial Stress

[185] Francis experienced financial loss after leaving North Fraser in July 2013. He received no income for periods when his benefits were disrupted. These financial difficulties have contributed to the loss of their family home.

[186] Francis was continuously under financial strain, believing that the Respondent was "playing games" by not paying his STIIP benefits and leaving him behind on his mortgage payments. He did not receive pay or benefits for a period of time, which added to his anxious and depressed state. Although some of this was due to administrative errors, he felt that management at North Fraser was trying to starve him out of his benefits. While he waited for the Respondent to pay out his disability benefits, his bank threatened foreclosure. His family home was foreclosed on twice. Francis started to cry when he talked about his wife having to work overtime to keep their home. The first time, they were able to catch up on mortgage payments after LTD benefits were granted. The second time, they were forced to take out a third party loan, which resulted in higher interest payments over three years. When his LTD payments were suspended in February 2018, they lost their home. They were forced to sell their house as a result of a foreclosure the following month.

After the family was forced to sell their home, Francis became even more worried about their finances. Francis is extremely angry that his children and family have experienced hardship, both financially and emotionally.

[187] Gallant testified about the importance of their home to their family. Their children were basically raised in that home. She begged Francis not to sell their home but understood that, realistically, it was not in their interest to hold it any longer. She explains that by that point, they were paying $3200 a month for the mortgage, interest, and brokerage fees, and this did not include utilities, groceries, or car payments. Gallant testified that they borrowed money from family and friends. They even went to the food bank to get groceries. She testified that there were times when she went two or three days a week with one meal a day. She would often eat at the hospital so they could feed the kids. Gallant testified that, although she makes a good living as a nurse, she does not make enough money to raise a family of four and pay a mortgage, electricity, water, car payments, and the basic necessities like food and clothing. Gallant testified that the many years of all this crap is destroying the whole house. After they sold the house, they have been moving from one place to the next as renters. With the real estate market in the lower mainland, they have rented several times from owners who sold the house, so they had to move again. She testified that this is completely disruptive to the children. She has done her best to protect her children but the reality is that they have moved three times over the past three years. Time to move again, and pack up the house, and move again. She finds it very stressful.

Social Impact

[188] The social impact of the Contraventions on Francis has been severe. Francis has lost interest in things he previously enjoyed such as gardening and sports and other extra curricular activities. He has lost interest in coaching and socializing. Dr. Smith noted that, although Francis is catholic, he no longer attends mass. Gallant reported to Dr. Smith in 2020 that it takes her husband four hours to mow the grass now when it used to take him just one hour. She describes him as having no energy. Dr. Smith noted that Francis previously was heavily involved in coaching children, but now no longer coaches. Instead,

he tries to visit his children's sports games although he becomes excessively irritable and starts yelling.

[189] Francis acknowledges that he is not motivated to exercise or go to the gym. He testified that he used to work out at the gym daily. Gallant remembers Francis doing this before the Contraventions. Dr. Smith notes that, although Francis used to attend the gym seven days per week for two to three hours, he has not attended a gym for some time now. He said he has low motivation. His only exercise is waking the dog every night. In the past, Francis was very active and played football and hockey. He does not play any sports now. Dr. Smith opines that this has resulted in poor health and deconditioning.

[190] Francis has developed poor hygiene and consumes alcohol. Gallant testified that Francis showers on an intermittent basis every several days. She described the impacts of his poor hygiene. Dr. Smith opined in 2020 that that there is a probable Alcohol Use Disorder.

[191] Francis has lost his friendships. Francis reported to Dr. Smith in 2020 that he has very few friends. He has lost interest in socializing. His wife added that he does not like socializing even with her. Gallant testified that Francis has a pattern of losing friendships and she attributes that in part to his paranoia. Dr. Smith noted that Francis reported that he does not trust anyone and is suspicious of his neighbours and even the postal delivery person. Francis acknowledges that he does not trust anyone.

[192] Gallant testified that interacting with Francis is really tiring and she does not have the space in her mind to deal with it. She just listens, nods her head, and says yup and yup. She expressed relief that Francis has one friend that he talks to a lot. She testified that, recently, Francis sat in the car of their driveway for 3.5 hours because she can't have him yacking about all of this stuff at home because it is too much. She says that he takes the dog into the car with him.

[193] Gallant testified that even when they walk the dog together he still talks about himself and this litigation. She said that this should be her time to share with him what is going on at work, school, something other than his world. She explained that she has been

dealing with a lot of stress at work, especially through the COVID pandemic, and there have been “changes like crazy at work and in the hospital”. She also described recent illnesses in the family. She says that Francis expects her to listen to all of his stuff but does not have the capacity or empathy to listen to what she is going through.

[194] Recently, Francis has expressed violence towards others. Francis acknowledges that he has had “thoughts of taking other families out”. He feels that this would be just retribution for the fact that his family has been forced to experience hardship.

Family Life

[195] Gallant feels sickened by how this case has impacted her husband. It has been unfair and has impacted their family as a four. One of the biggest things that she feels personally is that Francis has lost a decade with his children. He has lost time and moments. He is not as close to them as he should be as their father.

[196] Gallant testified that, although Francis has never been physically abusive to her and the kids, he just “rages and gets really mad”. She says that they walk on tippy toes around the house. He would just lose it and start screaming. She testified that he is not the person she fell in love with. She has stood by him all of this time because she believes in him and believes in “us”. She acknowledged that there are many times when she just wanted to run away and take the kids and leave.

[197] Gallant testified that there is so much tension in their family. They never know what kind of Levan they are going to get. She described phone calls and emails as triggering and they do not know what kind of mood he is going to be in. She will send her children a text, let them know that dad got a call -- from the employer, insurer, union, or lawyer -- and ask them whether they can just stay quiet today. Gallant testified that she has kept stuff away from the kids, a lot of stuff in the last decade that the young minds do not need to know. However, recently, as her children are getting older, they found out what has been going on. Her children have had health impacts.

[198] Gallant testified that there were times when Francis has not come home at night. When the kids were younger, it was 5:45 am and she could not leave the house to get to work until he got home. That was when she was working twelve-hour shifts from 7 am to 7 pm as a nurse. She has been late for work because he was not home. She says that Francis sometimes gets in the car and just drives around the lower mainland. He has driven to Merritt and back. He has driven to Whistler and back. He waits until she and the kids are in bed before he comes home so he does not have to talk to any of them. Dr. Smith noted that Francis would return home late, after his spouse went to sleep in order to avoid any conversation, and then sleep the entire next day.

[199] Gallant testified that she had to switch jobs as a shift nurse at the hospital to have a more regular routine to be there for her children. Based on her evidence, it appears that she has been working in this capacity for the past few years. As a nurse, she used to work two day shifts and two night shifts. She transferred jobs to work at a clinic from 7 am to 3:30 pm Monday to Friday so that she can be there for her children who are busy in school and sports. She had found it tiring working shifts and juggling the responsibilities for her children which included medical appointments, sports, homework, and school. She testified that her biggest issue is that she could not rely on Francis to get the kids up for school or to a doctor's appointment. She said that there were days when he slept all day, and it would be better for their home life if she was home in the evenings to take the burden off the house. She testified that "it was too much on Levan to expect him to be there for the kids". She acknowledged that this broke his heart because he is a good man.

[200] Gallant acknowledged that their relationship has suffered. She felt burdened by his issues. She did not have the capacity to deal with his problems between her shift work and raising two kids. She explained that it was not that she did not care, but she just did not have the space on her shoulders to deal with his issues given her responsibilities at work and their two kids who needed her and some stability in the home.

[201] Gallant testified that Francis has missed birthday parties, dinners, and family gatherings. Dr. Smith noted that Francis has been so upset and mentally absent at times that he has forgotten to attend his children's birthdays. Due to poor sleep, he no longer

takes his children to school unless his wife is unable to. Gallant testified that she has suffered as his wife. She describes there being no communication, romance, or intimacy for years. Francis acknowledges having a real issue with love and passion. He describes being disconnected, feeling numb, and senseless. He does not like that feeling at all.

Conclusion

[202] The impacts on Francis were extreme. He developed a mental illness. Not only did Francis lose his employment, but he has also lost his ability to work. In addition to the extreme losses that Francis has experienced in regards to his employment and mental health, he has also experienced a deterioration in his physical health and social well being. He experienced financial loss which included the loss of his home. Although his wife continued to work, they had to borrow money from friends and went to the food bank to get groceries. His relationship with his wife has suffered. He has lost a decade with his children. His wife feels sickened by how this case has impacted her husband. Her view is that this has destroyed him as a human.

4. Totality of Relationship Between the Parties

[203] The totality of the relationship between the parties exacerbated Francis' vulnerability and the impacts that he experienced as a result of the Contraventions. He experienced discrimination and retaliation that did not come from one source only, but from a number of officers and supervisors in his workplace. After he reported incidents to management at North Fraser, and filed a human rights complaint, he was also retaliated against by two supervisors, which contributed to a workplace climate that prevented any kind of effective response to racial inequality.

[204] Francis lost trust in his colleagues because of the discriminatory and retaliatory behaviour, and as such, the necessary work relationship among officers was compromised along with Francis' own safety and security. Francis faced insurmountable challenges in having his views taken seriously. By seeking redress in the context of a work environment that became poisoned by the Contraventions, there were no viable avenues of recourse open to him making him particularly vulnerable.

5. Conclusion

[205] The Respondent argues that the amount sought by Francis under this heading is higher than any award ever made by the Tribunal. The Respondent argues that the highest ever award by the Tribunal was $75,000 for a complex and multi-year discrimination involving a medical resident with a mental disability: *Kelly v. UBC*, 2013 BCHRT 302 [***Kelly Remedy***]. The Respondent argues that these facts do not apply to Francis' circumstances.

[206] The Respondent refers to *Gichuru v. Law Society of British Columbia (No. 9)* 2011 BCHRT 185 for the proposition that the complainant only got $25,000 even though he had been subjected to discriminatory and highly intrusive questioning about his mental health. The Tribunal found that the Law Society had wrongfully discriminated against the complainant by way of a systemically discriminatory question concerning mental health in his application for articles, and by discriminating against the complainant on the basis of mental disability in connection with his application. The discrimination resulted in a ten-month delay in his call to the bar.

[207] I distinguish *Gichuru* and *Kelly* on the severity of the impacts on Francis. The impact of the discrimination and retaliation on Francis has been extreme. While both cases involve professionals who were delayed, they were ultimately able to enter the career of their choice. In the present case, Francis has not worked for seven years. He is unable to work in any occupation and his prognosis for recovery is guarded.

[208] Francis refers to a number of decisions where high injury to dignity awards have been granted including *City of Calgary v. CUPE, Local 38*, 2013 CanLII 88297 [***Calgary***] where the arbitrator awarded $125,000 as injury to dignity and *A.B. v. Joe Singer Shoes Limited*, 2018 HRTO 107 [***Singer***], where the tribunal ordered $200,000 as compensation for injury to dignity.

[209] The Respondent seeks to distinguish the *Calgary* case on the basis that it is an arbitration decision that has not been followed by this Human Rights Tribunal or any adjudicative body in Canada. While I disagree with that characterization, even if that were to be the case, that fact is not determinative. The Tribunal may consider arbitration

decisions on human rights matters. The Tribunal may give preference to a consideration of case law developed under human rights legislation in this and other jurisdictions to redress the specific types of injury to be compensated under ss. 37(2)(d)(iii) of the *Code* over consideration of damage awards in civil litigation actions that aim to redress other kinds of wrongs: *Gichuru v. Law Society of British Columbia*, 2013 BCSC 1325, at para. 56; upheld in *Gichuru Appeal*.

[210] I distinguish *Calgary* on the basis that the impacts on Francis are more extreme. In *Calgary*, the arbitrator awarded less than what the union was seeking, which was an award in the amount of $150,000. The arbitrator reduced the award to $125,000 because there was not the certainty of many years of suffering and limited functioning having been documented as there was in the case relied on by the union and there was evidence that the grievor's functions might improve. In this case, Francis is unable to work in any occupation and his prognosis for recovery is guarded.

[211] In my view, the particular circumstances of Francis are similar to the complainant in *A.B. v. Joe Singer Shoes Limited*, 2018 HRTO 107 [***Singer***]. On the one hand, Francis' case is distinguishable from *Singer* in which the tribunal awarded the complainant $200,000 for injury to dignity because the nature of the discrimination in *Singer* was more egregious as the respondent was found to have harassed and repeatedly sexually assaulted the complainant over the course of about 20 years. On the other hand, the extreme impacts of the Contraventions on Francis are more severe.

[212] It is helpful to consider *Sulz v. Attorney General of Canada et al*, 2006 BCSC 99 [***Sulz***], upheld 2006 BCCA 582, where the court awarded $155,000 (inflation adjusted) for the pain and suffering experienced by an RCMP officer who experienced harassment by a superior officer and others based, in part, on her pregnancy. The time frame of the harassment for *Sulz* was two years which is comparable to the eighteen months of harassment that Francis experienced and both of them experienced psychological harm. As stated by the Court:

> [56] Unfortunately, despite extensive psychotherapy and medication, the plaintiff has not recovered from her depression. She remains unable to cope with any form of regular employment.

> [159] Although there are many other stresses in the plaintiff's life, and although she may tend to personalize incidents that others might not, the evidence as a whole shows that the harassment which she experienced in 1994 and 1995 was the proximate cause of her depression, which in turn, ended her career in the RCMP.
>
> [164] The plaintiff's depression affects her relationship with her husband, her children, and her friends. Her concentration, memory, and ability to make decisions has been adversely affected. She must avoid stress in every aspect of her daily life. Her condition obviously has had a severe impact, not only on her ability to work, but also on the extent to which she can enjoy her life and function as a member of her family and her community.
>
> [165] The defendants' assertion that the plaintiff was more susceptible to depression than others would have been does not excuse the defendant Smith's conduct or lessen the vicarious liability of the Provincial Crown. The defendants must take their victim as they found her. Thus, according to Athey v. Leonati, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235, the defendants must assume full responsibility for the plaintiff's disabilities that were caused or materially contributed to by the defendant Smith's actions.

[213] In *Sulz*, the Court awarded the plaintiff $950,000 in damages comprised of $225,000 for past wage loss, $600,000 for future wage loss, and $125,000 for pain and suffering. When adjusted for inflation, the $125,000 amount is approximately $155,000 in today's dollars.

[214] In keeping with the individualized nature of these awards, none of these cases mirror Francis' circumstances exactly. In my view, the factors that warrant a higher injury to dignity amount in this case are the extreme impacts of the retaliation and safety concerns that Francis had which *Sulz* did not.

[215] In assessing damages, I need to look closely at the actual suffering Francis has experienced. I cannot say what the injury is worth without looking to see how it has affected Francis' life. This is a matter of discretion, to be exercised on a principled basis, in light of the purposes of the remedial provisions of the *Code*, and the purpose of the award. It is open to the Tribunal to make an award that adequately compensates Francis, to the extent possible, for the extreme losses that he has suffered as a result of the

Contraventions even when that award falls outside the range of past awards for injury to dignity.

[216] The Contraventions amounted to an exceptionally damaging affront to Francis' dignity. The evidence presented to this effect was abundant, clear, and compelling. The nature of the discrimination was serious. This is not a case where the connection to Francis' race and colour was subtle. The comments and actions of his coworkers and supervisors struck at the core of Francis' identity and feelings of self-worth and emotional well-being. What Francis experienced encompasses virtually the entire spectrum of racial discrimination and harassment in the workplace, escalated into retaliatory behaviour, and resulted in a poisoned work environment, necessitating a significant award of compensation. Francis was particularly vulnerable because of the nature of his job. His physical safety was threatened and compromised by the discriminatory and retaliatory behaviour of officers and supervisors who he needed to count on to be safe at work. He had a genuine fear that if something dangerous were to happen at work, he could not count on his colleagues for help. The impacts on Francis were extreme, and as Dr. Macdonald observed, his mental illness has become more deeply rooted over time. As Dr. Smith observed, Francis is "seriously ill from a psychiatric point of view". Not only did Francis lose his employment, but he has also lost his ability to work. His wife feels sickened by how this case has impacted her husband -- "it has destroyed him as a human". That is what happened to Francis and, as such, he is entitled to an award commensurate with that loss of security and dignity.

[217] As set out in *Kelly Appeal*, the purpose of an injury to dignity award is to compensate the complainant for the actual harm they have suffered as a result of the discrimination. When assessing the impacts set out in the evidence, "it is for the Tribunal to measure the weight of these things": Kelly Appeal, para. 62. I have taken into account that some of actual harms that Francis has suffered are unrelated to the Contraventions. These include the losses he has suffered as a result of disputes over STIIP and LTD benefits or the litigation process relating to his workplace issues or this human rights complaint.

[218] In all of the circumstances, I find that an award of $220,000 is reasonably proportionate to the extreme injury to dignity, feelings and self-respect suffered by Francis. **Accounting for a 20% contingency, I order $176,000 as damages for injury to dignity under s. 37(2)(d)(iii) of the *Code*.**

E. Expenses and Disbursements

[219] Section 37(2)(d)(ii) of the *Code* grants the Tribunal discretion to order compensation for expenses and disbursements incurred by the Contraventions.

1. Expenses

[220] Francis initially sought compensation for a quarter of a million dollars in the legal expenses incurred after the filing of his human rights complaint. In doing so, Francis raised the issue of the scope of the Tribunal's jurisdiction to award legal expenses under s. 37 of the *Code*. In *Francis v. Ministry of Justice* (No. 4) 2020 BCHRT 160, I held that the Tribunal does not have the authority to reimburse for the legal expenses incurred after the filing of a human rights complaint. Since the Tribunal cannot award this kind of a remedy under s. 37(2)(d)(ii) of the *Code*, no such evidence was admissible at the hearing.

[221] Francis substantially amended his request as a result of this ruling. Francis now seeks a total of $1425 for expenses in relation to counselling and health-related therapy. Francis has provided sufficient particulars. Although the Respondent disputes whether these expenses flow from the Contraventions, the Respondent agrees to pay for them on the assumption that they would have been covered through the benefit plan.

[222] **Accounting for a 20% contingency, I award $1140 for expenses under s. 37(2)(d)(ii) of the *Code*.**

2. Disbursements

[223] Francis seeks a total of $31,894.05 in disbursements. The Respondent disputes this claim and has raised three main arguments to support that only part of these disbursements is compensable.

[224] First, the Respondent argues that the first two expert reports of Szekely are not compensable since Francis did not ultimately rely on them in the hearing, and as such, they were not reasonably necessary for the presentation of his case. Since Szekely's invoices relate to all three expert reports, the Respondent submits that only 50% of the overall invoices for Szekely should be compensable.

[225] Francis has provided a reasonable explanation for why all three expert reports for Szekely were produced. The first report dated August 7, 2018 was disclosed pursuant to the *Rules of Practice and Procedure* in contemplation of a hearing that was scheduled three months later. At the time that report was ordered, or even completed, Francis did not know of my decision to bifurcate the hearing. That decision was made on August 20, 2018. The second report dated May 27, 2020 was subsequently corrected and resubmitted on August 31, 2020. Those corrections were necessary to assist me as the trier of fact. In these circumstances, they were reasonably necessary in the presentation of Francis' case.

[226] Second, the Respondent disputes reimbursement for the hearing fees of Dr. Macdonald and Dr. Myers on the basis that they testified as lay witnesses. The Respondents cite *Cassidy v. Emergency and Health Services Commission and another* (No. 3) 2009 BCHRT 110 **[*Cassidy*]** in support of their argument that the testimony of lay witnesses should not be compensable. However, *Cassidy* does not stand for that proposition. The material issue in *Cassidy* turned on whether there was a legal obligation to pay witnesses "conduct money" to secure their attendance at a hearing. The Tribunal concluded that there was no such legal obligation and that no facts had been put forth to show that payment of conduct money was necessary to secure witness attendance in this case. It was on this basis that the Tribunal denied the complainant's claim: *Cassidy*, at paras. 142-8 and 158-9. I observe that money paid to compensate witnesses for wage loss incurred as a result of attendance at a hearing was not at issue: *Cassidy*, para. 136. The Tribunal further observed:

> […] the Tribunal has the power to order respondents to pay compensation to complainants for expenses incurred by them to pay for their witnesses' travel expenses. While the parties did not bring these cases to my attention, I am aware of two Tribunal cases in which such orders have been made: *Willis v. Blencoe*, 2001 BCHRT 12, paras. 70-71 (compensation for witness air fare and accommodation);

> and *Vestad v. Seashell Ventures Inc*., 2001 BCHRT 38, para. 82 (expenses incurred by complainant to bring witness from out of province). Therefore, where a complainant incurs expenses to bring a witness to the hearing, those expenses may be compensable under s. 37(2)(d)(ii). There is no need to imply an obligation to pay conduct money to ensure complainants are not prevented from pursuing their complaints by virtue of the expense of witness travel. (at para. 151)

[227] In my view, incurring an expense for a professional's time to attend a hearing is analogous to wage loss. Since this issue was not decided in *Cassidy*, it remains open for me to decide on the general principles of whether this is an expense incurred by the discrimination. Given the scheduling of witnesses, and the efforts made by this Tribunal to facilitate the scheduling of these particular witnesses, I am persuaded that these expenses were necessary to secure the attendance of Dr. Macdonald and Dr. Myers at the hearing. Since the evidence shows that the expenses incurred were necessary, I order compensation.

[228] Third, the Respondent disputes the remainder of the disbursements claimed by Francis for service, postage, photocopies, faxes, office supplies, and document production. The Respondent refers to *Wollstonecraft v. Crellin*, 2000 BCHRT No. 37 [***Wollstonecraft***] in which the Tribunal held that such "hearing-related disbursements" are properly classified as non-recoverable legal costs rather than compensable expenses: para. 123.

[229] This decision was issued over twenty years ago, and since then, the Tribunal has issued a long line of cases where such expenses have been awarded. These cases have not been successfully judicially reviewed on this issue: *J.J. v. School District No. 43 (No. 5)*, 2008 BCHRT 360 at para. 535; *Weihs v. Great Clips and others (No. 2)*, 2019 BCHRT 125 at para. 113; *Hall v. B. C. (Ministry of Environment) (No. 6)*, 2010 BCHRT 189 at para. 46-9; *MacGarvie v. Friedmann (No 4.),* 2009 BCHRT 47, upheld in 2012 BCCA 445, at para. 180; and *Basic v. Esquimalt Denture Clinic and another*, 2020 BCHRT 138, at para. 189. Even in *Toivanen v. Electronic Arts (Canada) (No. 2)*, 2006 BCHRT 396, another case cited by the Respondent, the Tribunal awarded compensation for the expense of securing medical records: at para. 98. Despite this consistent and long-standing interpretation of the scope of the Tribunal's remedial jurisdiction, the Legislature has not amended the *Code* to express

any contrary legislative intention. Accordingly, it is my view that the Tribunal has discretion to award compensation for these kinds of expenses and the amount requested is reasonable given the complexity and duration of this case.

[230] For all these reasons, Francis' request for disbursements in the amount of $31,894.05 is granted in its entirety. **Accounting for a 20% contingency, I award $25,515.24 in disbursements under s. 37(2)(d)(ii) of the *Code*.**

V APPLICATION FOR COSTS

[231] Francis seeks costs against the Respondent in the amount of $3,000 for improper conduct under s. 37(4) of the *Code*. The Respondent denies that it has engaged in any improper conduct.

[232] Awarding costs under s. 37(4) of the *Code* is a punitive power that is meant to safeguard the integrity of the Tribunal's process: *Terpsma v. Rimex Supply* (No. 3), 2013 BCHRT 3 at para. 102. It aims to punish and deter conduct "which has a significant impact on the integrity of the Tribunal's processes, including conduct which has a significant prejudicial impact on another party": *McLean v. BC (Ministry of Public Safety and Solicitor General)* (No. 3), 2006 BCHRT 103 at para. 8.

[233] Francis says that the Respondent's conduct in this legal proceeding amounts to litigation bullying. At the hearing on the merits, which resulted in the *Liability Decision*, Francis takes issue with how his credibility was challenged, and with the Respondent's arguments that he used accusations of racism as a shield when his performance was criticized and fabricated allegations for his human rights complaint. Francis argues that these positions went beyond that which was fair when they tried to portray him as a manipulative liar and mentally ill. Francis testified sincerely about how callous and demeaning it was to have his mental health questioned when his human rights complaint was about racial discrimination and retaliation in the workplace.

[234] Given the nature of adversarial proceedings, and the obligations of counsel that flow from them, I am not persuaded that the positions advanced by the Respondent amounts to

improper conduct that has significantly prejudiced Francis or the integrity of these proceedings. The Respondent is entitled to challenge the evidence, including the credibility of witnesses, and advocate for its interest. I note that these arguments have already been addressed in the *Liability Decision*, and ultimately, that decision was decided in Francis' favour. This situation is similar to the one that arose in *Gichuru v. The Law Society of British Columbia* (No. 11) 2012 BCHRT 275, where the Tribunal denied an application for costs notwithstanding the allegations of litigation bullying because the Tribunal found that there was no conduct by the respondent that had a significant and detrimental effect on the integrity of its processes. In my view, the same situation arises here.

[235] Francis says that the Respondent also caused significant delay in these proceedings. While Francis acknowledges other contributing factors, he maintains that the Respondent did not act responsibility to mitigate that eight-year delay in this case. This includes giving unreasonable estimates about the number of witnesses and hearing days ranging from 20 days in 2015 to 45 days in 2017 which impacted Francis' ability to organize legal representation and the Tribunal's ability to complete the case in a timely manner. With respect to hearing estimates, I accept the Respondent's explanation that these were in contemplation of one hearing that dealt with both liability and remedy in which all witnesses gave their full evidence *viva voce*. Had the hearing proceeded in this manner, those estimates likely would have been accurate.

[236] I agree that pursuing a complaint to hearing, and the hearing process which follows, will frequently be difficult for a party. This process has been exceedingly difficult. Francis gave sincere testimony about the harms that these legal proceedings have caused. Gallant testified that her husband has been consumed by this case.

[237] I have already commented in the *Liability Decision* that there have been various delays to this proceeding which has made the adjudication of this complaint more difficult than necessary: *Liability Decision*, paras. 6 to 8. The Tribunal issued a number of decisions to facilitate the just and timely resolution of this complaint under s. 27.3 of the *Code* which are attached as appendices to that decision. This included the decision to bifurcate the hearing on the merits and proceed by way of a hybrid hearing where the direct evidence of

all witnesses, with the exception of Francis, was given through affidavit and subject to *viva voce* cross-examination.

[238] The responsibility for controlling this process rests with the Tribunal, and not the parties. As is evident in the procedural history of this complaint, the inordinate delay in this proceeding is not only attributable to the actions of the Respondent alone. I observe that both parties changed legal counsel after the hearing started in 2014 and recommenced four years later in 2018. I observe that three Tribunal members were involved in the adjudication of this matter. The presiding member in 2014 adjourned the hearing and encouraged the parties to engage in mediation. The parties have made good faith efforts to engage in mediation on three separate occasions since then. Since these mediations are confidential and *without prejudice*, I have not taken into account the arguments advanced by both parties about the propriety of the positions taken by the other side. While the inordinate delay has significantly prejudiced the integrity of these proceedings, given this context it would not be appropriate to hold any one party responsible. The Tribunal, like other adjudicative bodies, has a lot to learn about how to offer trauma-informed processes in the context of adversarial proceedings.

[239] For all these reasons, the application is denied.

VI CONCLUSION

[240] I order the following remedies:

(1) Pursuant to s. 37(2)(a) of the *Code*, I order that the Respondent cease the discriminatory, retaliatory, or any similar conduct as found to have occurred in the *Liability Decision*, and refrain from committing the same or a similar contravention.

(2) Pursuant to s. 37(2)(b) of the *Code*, I make a declaratory order that the Respondent's conduct as found to have occurred in the *Liability Decision* is discrimination and retaliation under the *Code*.

(3) Pursuant to s. 37(2)(d)(ii) of the *Code*, I order that the Respondent pay to Mr. Francis compensation for wages lost as a result of the Contraventions:

(a) **$264,060 as compensation for past loss of earnings;**
(b) **$431,601 as compensation for future loss of earnings; and**
(c) **$65,881 as compensation for pension loss.**

(4) Pursuant to s. 37(2)(d)(ii) of the *Code*, I order that the Respondent pay to Mr. Francis compensation for expenses and disbursements incurred as a result of the Contraventions:

(a) **$1,140 as compensation for expenses; and**
(b) **$25,515.24 as compensation for disbursements.**

(5) Pursuant to s. 37(2)(d)(iii) of the *Code*, I order that the Respondent pay to Mr. Francis compensation for injury to his dignity, feelings, and self-respect in the amount of **$176,000**.

(6) I order pre and post-judgment interest on the awards outlined in **(3)** and **(4)**, and post-judgment interest on the award outlined in **(5)**, based on the rates set out in the *Court Order Interest Act*, R.S.B.C. 1996, c. 79, as amended.

[241] The application for costs under s. 37(4) of the *Code* is denied.

Diana Juricevic
Tribunal Chair