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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:

Patrick Mynett

**COMPLAINANT**

AND:

Associated Engineering (B.C.) Ltd.

**RESPONDENT**

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**REASONS FOR DECISION**

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Tribunal Member:

Emily Ohler

Counsel for the Complainant:

Richard B. Johnson and David M. J. Brown

Counsel for the Respondent:

Craig Neuman, QC

Date of Hearing:

September 7-9, 16, 26 and October 24, 2022

Location of Hearing:

Videoconference

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## I INTRODUCTION

[1] Patrick Mynett worked for Associated Engineering (B.C.) Ltd. [**Associated**] for seventeen years as a civil engineering technologist.

[2] Mr. Mynett alleges that his physical disability was a factor in Associated's decision to terminate his employment. Specifically, he argues that Associated terminated his employment and benefits when it realized he was going to apply for long-term disability benefits [**LTD**]. He also says Associated failed to accommodate him when it terminated his benefits before he could submit his LTD claim. He says these things amount to discrimination on the basis of physical disability contrary to s. 13 of the *Human Rights Code* [**Code**] in the area of employment.

[3] Associated denies that Mr. Mynett's disability factored into its termination of Mr. Mynett's employment and benefits. It says that it laid Mr. Mynett off because of a lack of suitable work for him, and that it terminated his employment after he failed to respond to their offer of a contract-based employment arrangement that would better align with the ebb and flow of available work. It says the termination of his benefits flowed from the termination of his employment. Associated also denies that it was obligated to accommodate Mr. Mynett by leaving his benefits available to him for a longer period of time than it did following the termination of his employment.

[4] I acknowledge that the parties have waited a considerable length of time for this decision. I apologize for the delay and thank them for their patience. I heard this matter over six days. Four witnesses gave evidence. Both parties filed written closing submissions.

[5] The issues I must decide to resolve this complaint are:

- Whether the timing of Associated's lay-off and termination of Mr. Mynett's employment and benefits gives rise to an inference that his physical disabilities were a factor in those impacts; and

- Whether the termination of Mr. Mynett’s benefits before he submitted an LTD claim constituted a breach of the duty to accommodate Mr. Mynett.

[6] Having considered all of the evidence, I have found that on a balance of probabilities, while Associated’s termination of Mr. Mynett’s employment was not discriminatory, the termination of his benefits was. As a result, for the reasons set out below, I have found the complaint justified in part.

[7] Below are my reasons. I begin by summarizing the evidence and my findings of fact. Next, I set out the law and apply it to my findings in this case.

## **II WITNESSES**

[8] Mr. Mynett gave evidence on his own behalf. He did not call any other witnesses.

[9] The Respondent called three witnesses. Don Daigneault is the Area Manager who oversaw the office where Mr. Mynett was based. Leslie Mihalik is the General Manager for the Respondent’s operations in British Columbia and the Yukon Territory. Christine Lee joined Associated in 2018 as a human resources generalist.

[10] On the whole, I have found all of the witnesses to be credible, doing their best to provide an accurate recollection of events within their knowledge. At times, however, the evidence of certain witnesses differed from the evidence of other witnesses in respect of events relevant to the questions above. Where that is the case, I have had to decide whose evidence to prefer. In doing so, I start from the presumption that witnesses are telling the truth: *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 10. Where testimony conflicts with other evidence, I assess the trustworthiness of their testimony “based on the veracity or sincerity of [the] witness and the accuracy of the evidence that the witness provides”: *Bradshaw v. Stenner*, 2010 BCSC 1398, aff’d 2012 BCCA 296, leave to appeal refused, [2012] SCCA No. 392 (QL) at para. 186.

[11] I have considered “the witness’ ability and opportunity to observe events, the firmness of their memory, their objectivity, whether the witness’ evidence harmonizes with independent evidence that has been accepted, whether the witness changes his pre-trial evidence by the time of trial or their testimony at trial during direct and cross-examination, whether the witness’ testimony seems implausible, and the demeanor of a witness generally”: *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2019 BCSC 739 at para. 90. At times, a witness may testify honestly but their evidence may not be reliable because of their inability to accurately observe, recall, or recount the event: *R. v. H.C.*, 2009 ONCA 56 at para. 41; *Youyi* at paras. 89-90. Where I have preferred the evidence of one witness over another, I have explained why.

### III EVIDENCE AND FINDINGS OF FACT

[12] In this section I set out my findings of fact, which are based on the evidence I heard and the documents submitted at the hearing. I do not refer to everything that was presented at the hearing, but only what is necessary to reach my decision.

[13] Mr. Mynett worked as a welder, fitter and supervisor on steel erection projects in his early career. He sustained back and neck injuries in 1989 and 1996, respectively. He received permanent partial disability pension benefits from Worksafe BC based on permanent impairments of function of 1.5% and 3% related to those injuries. He also injured his knee in 1989 in a non-work-related event.

[14] In 2003, Mr. Mynett completed a civil engineering technologist education program through vocational rehabilitation supported by Worksafe BC. Associated hired Mr. Mynett as a civil engineering technologist working out of the Kelowna office under an employment contract dated April 15, 2003 [**Employment Contract**]. Over time, Mr. Mynett eventually came to hold the role of Level 3 Engineering Technologist with Associated.

[15] Mr. Mynett’s work with Associated was focused on performing field inspections. This entailed walking to and around work sites, sometimes climbing ladders as well as sometimes

residing on or near the site for several days. Mr. Mynett also became proficient in using a software called AutoCAD, but Associated preferred to deploy him in the field because of his experience. He noted that sometimes there would be periods without enough field work available in which case he would work in the office.

[16] Mr. Mynett enjoyed working in the field and acknowledged in his testimony that he was excellent at it. Early in his testimony, Mr. Mynett said that he also liked office work and wanted more office time to develop his skills. He said that technology changes so fast and you can miss out on things if you are not in the office, though he did still use AutoCAD when in the field.

### **A. Mr. Mynett's disabilities**

[17] On joining Associated, Mr. Mynett did not identify any physical limitations or restrictions on his ability to perform his job. Over the course of his employment with Associated, Mr. Mynett never reported a work-related injury, or a recurrence or aggravation of a previous work-related injury. There is a question about what Associated knew or should have known about the impacts Mr. Mynett's disabilities were having on his ability to work.

[18] Mr. Mynett testified that he experiences near constant pain related to his injuries. He explained that when doing his work, he would sometimes have little pain and other times a lot. He tried to stay off hard ground and would look for softer ground. He would buy good work boots. He said that climbing down ladders became a problem so he would not go down ladders anymore, and he also could not squat down, hop up or down riverbanks, or climb over boulders because of his knee problems. Mr. Mynett also said that his back and neck pain worsened over time so he would try to pick worksites that were less busy and would require less walking around. He noted, "if you want to be a good inspector, you've got to walk".

[19] He said that his colleagues in the field were aware of his challenges and would sometimes make him a clean pile of sand to lie on during breaks to stretch his back. Mr. Mynett also testified that he would tighten up in the office and needed breaks every 2 hours. There was no indication that Associated prevented him from doing this or otherwise was unresponsive

where Mr. Mynett indicated he needed accommodation such as a new chair, breaks, or less busy worksites, for example.

[20] In his evidence, Mr. Mynett testified that he told Mr. Daigneault, who he considered a friend, that he was having trouble. He could not recall if this was in 2015 or 2017. It is not clear what exactly he said.

[21] Mr. Daigneault testified that it was a common thing for Mr. Mynett to make general comments about his aches and pains. He said that the stories of Mr. Mynett's neck and back injuries were "common knowledge", and his knee pain was known because of a story about a deer. At the same time, however, he noted that Mr. Mynett never missed work, taken time off for injuries, or made specific comments about disability-related workplace limitations beyond indicating that office work was difficult because of all the sitting. He said that Mr. Mynett never talked about his aches and pains being limiting at work, and he would just do his work whether in the office or the field.

[22] Mr. Mihalik testified that around February 2020, Mr. Daigneault mentioned something about Mr. Mynett not being able to do any climbing work on construction sites, and Mr. Mynett mentioning not being able to sit for more than four hours. However, again, the prevailing observation from Associated's witnesses was that Mr. Mynett did the work he was assigned.

[23] Mr. Mynett himself gave ample evidence suggesting that he likely consistently downplayed the extent of any "trouble" he was having. For example, he said that he did not like to medicate the pain and was trying hard to manage things. He recalled a time on a project site when he had slipped a couple of times but just "popped up and did not tell anyone". He said he was getting really limited with what he could do but kept pressing on because he was worried he would lose his job. He did not say that this worry arose because of the words or actions of colleagues at Associated rather he tied this worry to the nature of the work.

[24] In personal notes that Mr. Mynett created on February 25, 2020 [**February Notes**], Mr. Mynett expressed his view that he had "become a less desirable future employee" due to his condition. He noted that he "should have sought out help, but my pride and work ethic

deterred me from doing so”, and that he did not want to incur any costs to Associated due to his condition. He wrote in his notes that he believed he could “withstand the pain” until he reached early retirement.

[25] Mr. Mynett testified that around May 2018, Mr. Daigneault “knew” that he was scheduled for knee surgery and that they were looking at the benefits plan together to understand the benefits for a related leave. Mr. Daigneault said that he knew Mr. Mynett was on the surgery list.

[26] I accept that at some point around this time, Mr. Mynett told Mr. Daigneault that he needed knee replacement surgery. I also accept that Mr. Daigneault knew he would not be able to do some jobs, like emergency flooding repair work that involve steep, slippery surfaces, or lots of obstacles and walking, because of his knee. However, it was difficult to ascertain how clear he may have been with Mr. Daigneault about the limitations before the surgery or the timing of it. Among other things, Mr. Mynett observed in his testimony that he did not talk with him about it much.

[27] At some points around 2017, Mr. Mynett’s doctor recommended he undergo knee replacement surgery, and put him on a waiting list. In 2019, Mr. Mynett asked his doctor to remove him from the list. Mr. Daigneault acknowledged in his evidence that he knew Mr. Mynett had said at some point been recommended for knee replacement but did not want the surgery and had said his knee was improving with exercises.

[28] On the whole of the evidence, I am satisfied that Associated knew that Mr. Mynett experienced regular pain and discomfort related to historic injuries but was not aware the extent to which his injuries impeded his work.

## **B. The Earlier Layoffs, 2020 Termination, and Contract Work Offer**

[29] Associated periodically issues layoffs when there is a lull in work. Associated first laid Mr. Mynett off for this reason in 2016 for a 2-month period.



[30] Associated again laid Mr. Mynett off in April 2019 “due to a sustained workload decline in [his] area of practice”, according to the layoff letter. Ms. Lee prepared the layoff letter, dated April 8, 2019, at Mr. Daigneault’s request, when he identified a shortage of work. The lay-off letter provided, among other things, that during the time of the lay-off, Mr. Mynett would “be eligible for work with us during this period on an ‘as and when’ basis”, where Associated would contact him to request that he come in to work. It said that Associated hoped he could return to work on or before June 3, 2019 “should our workload improve and projects come on stream”.

[31] Associated recalled Mr. Mynett in May 2019 to perform seasonal field inspection work on a project managed out of its Whitehorse, Yukon Territory office.

[32] On November 15, 2019, Associated again issued Mr. Mynett a layoff notice effective November 18, 2019, when Kelowna field work again ran out. The layoff letter noted that Mr. Mynett would retain his seniority and benefits. It said, “[i]t is our understanding that you will return to Associated Engineering on or before February 14, 2020, should our workload improve and projects come on stream.” Associated chose the February 14 date because its understanding was that the applicable employment standards legislation caps temporary layoffs at 13 weeks.

[33] Mr. Daigneault explained and Mr. Mynett did not dispute that between November 2019 and February 2020, opportunities for field inspection work did not pick up and work remained slow. The nature of projects began changing as well, with many larger clients including terms in their contracts that no longer included having inspectors on-site full-time.

[34] Mr. Mynett testified that his back was hurting a lot after the Yukon job. He recalled that Mr. Daigneault phoned him sometime in the new year to say that the temporary layoff was reaching the 13-week deadline and Associated had to make a decision. Mr. Mynett said he asked about returning to work in the office but Mr. Daigneault said that they could not do that, and explained that they would be making an offer of contract work instead. Mr. Mynett said he

was shocked by this, though earlier in his testimony he said that Mr. Daigneault had raised the possibility of contract work at various times before over the years.

[35] Mr. Daigneault explained that with Mr. Mynett's focus on field inspection work, it had at times been difficult to keep him busy between projects prior to the November layoff. They would try to find office work for him when it was available. There was a dispute about Mr. Mynett's proficiency levels in respect of the kind of work available in the office. I address this below.

[36] Mr. Mynett then met with Mr. Daigneault and Mr. Mihalik on February 14, 2020. Mr. Mynett was a bit nervous because he had never spoken with Mr. Mihalik before, who usually worked out of the Vancouver office. During the meeting, Associated provided Mr. Mynett with a letter outlining what Mr. Daigneault had referred to. The letter, dated February 14, 2020, advised that Associated was terminating Mr. Mynett's permanent employment position, but was offering him a contract position where he could be brought in to perform field inspection work when it became available [**Contract Work Offer**].

[37] Ms. Lee testified that she prepared the Contract Work Offer at Mr. Daigneault's request when there continued to be a shortage of field inspection work and the temporary lay-off period was ending. She testified that the approach set out in the Contract Work Offer would allow Associated to wait for work while also absorbing lulls in contracts to avoid the cycle of temporary layoffs. She testified that Associated had used this kind of arrangement before where there is not steady 40 hour per week work available. Mr. Daigneault testified that Associated has several of these types of arrangements in place across the company.

[38] The Contract Work Offer said it would commence on the date of the meeting (February 14, 2020) and run until December 31, 2020, with a possibility of an extension to "be discussed as the end date nears". The Contract Work Offer included Accidental Death & Disability insurance and Provincial Workers Compensation coverage, but no company benefits or paid sick leave. Mr. Mynett's benefits as a regular, full-time employee included a dental plan, extended health, and LTD. These would be lost as a result of accepting the Contract Work Offer.

However, Mr. Daigneault explained in an email of February 14, 2020, the Contract Work Offer included an increased hourly rate from his permanent position to account for the loss of benefits. Mr. Mynett testified that Mr. Mihalik had told him that he could transfer his group benefits over to individual benefits replacement coverage [**Individual Benefits**].

[39] There was a conflict in evidence about whether the possibility of office work was discussed at this meeting, and whether upcoming fieldwork opportunities were discussed at that time. There was a further conflict in the evidence regarding whether possible field inspection projects (that is, contract projects) were discussed at the meeting. I have not found it necessary to resolve these conflicts because they are not material to the question of whether Mr. Mynett's disabilities factored into Associated's decision making about the termination of his employment or benefits.

[40] The meeting ended with Associated asking Mr. Mynett to consider the Contract Work Offer and advise Associated of his decision. Mr. Mynett emailed Mr. Daigneault on February 20 and 25, 2020, apologizing for not phoning to discuss the Contract Work Offer, and mentioning that he was "trying to put some questions together [to] discuss with Christine Lee." He also asked for the date the temporary layoff would expire and whether he owed payments toward the current benefits plan.

[41] Mr. Daigneault testified that he and Mr. Mihalik expected Mr. Mynett to get back to them about the Contract Work Offer, but he said that there were no questions until March 2.

### **C. Disability Benefits Claim & Termination of Benefits**

[42] Mr. Mynett testified and I accept that he phoned Mr. Daigneault around February 28, 2020, to tell him he was planning to file an LTD claim. He said that Mr. Daigneault referred him to Ms. Lee. Mr. Mynett testified that it was only after the Contract Work Offer that he decided to pursue an LTD claim.

[43] On March 2, 2020, Mr. Mynett emailed Mr. Daigneault with the subject line, "Disability Claim". He told Mr. Daigneault that he would be filling out the disability forms with his doctor

the next day and asked to be emailed a PDF of Associated's group benefits booklet. Mr. Daigneault forwarded that email to Ms. Lee, saying, "I don't know what to do with this?"

[44] Mr. Mynett recalled discussing disability benefits with Ms. Lee. Mr. Mynett gave evidence that during one conversation with Ms. Lee, she had told him that the group benefits would not cover him for his neck and back because they related to a previous WCB claim. He also said that he indicated to Ms. Lee that he wanted to pursue a disability claim, but also said that when he tried explaining to Ms. Lee some of the points from his February Personal Notes, she said something to the effect of not needing to hear his medical history. On March 2, 2020, Mr. Mynett spoke with Ms. Lee about her arranging contact with the insurance provider to explore Individual Benefits options were he to accept the Contract Work Offer.

[45] In her evidence, Ms. Lee recalled conversations with Associated's payroll and benefits manager about getting Mr. Mynett information about Individual Benefits options. She recalled Mr. Mynett asking if he could remain on Associated's group benefits plan and she explained that he could not. Ms. Lee emailed her colleague after one of her conversations with Mr. Mynett and asked to have an insurance representative contact Mr. Mynett. She emailed Mr. Mynett telling him to expect a call from the insurance provider. She directed Mr. Mynett to her colleague for any benefits-related questions. She also emailed Associated's payroll department, marking the email with high importance, saying, "Can you please set Pat Mynett up with a call with [... the insurance benefits provider]."

[46] On March 3, 2020, Mr. Mynett emailed Ms. Lee noting that no one had yet contacted him about the Individual Benefits plan and asking for contact information. Ms. Lee emailed Mr. Mynett that same day providing the employment agreement and group benefits booklet. Ms. Lee testified that she did not recall if she followed up with anyone about Mr. Mynett seeking information about Individual Benefits or an LTD claim.

[47] Mr. Mynett did not follow up himself with the colleague Ms. Lee had referred him to, but did undertake his own research. He emailed Ms. Lee on March 4, 2020, about the cost to

obtain “good coverage”. Mr. Mynett noted in his email that the Individual Benefits plan did not have short or long term disability coverage.

[48] Also on March 4, 2020, the insurance benefits provider tried unsuccessfully to reach Mr. Mynett regarding the Individual Benefits available were he to accept the Contract Work Offer.

[49] Later that same day, Mr. Daigneault went to Mr. Mynett’s home and hand delivered a letter [**Termination Letter**]. The two chatted, and Mr. Daigneault told Mr. Mynett that it was a really good offer. The Termination Letter explained that Associated’s “forecasts predict that the workload will continue to decline”, resulting in its decision to restructure its operations and reduce staff. It noted that Associated would continue to pay his usual salary from February 14, 2022, to the date of the letter. It also flagged that his benefits coverage would terminate at midnight on March 4, 2020. Associated offered Mr. Mynett two options in the Termination Letter:

- accept the Contract Work Offer and receive severance pay in an amount that exceeded his contractual entitlement to severance under his 2003 employment agreement; or,
- opt to receive the severance pay without having to accept the Contract Work Offer.

[50] The Termination Letter included a release for Mr. Mynett to sign. It purported to release Associated from any action related to the end of Mr. Mynett’s employment for accepting the specified severance pay as “full compensation and consideration” for his loss of employment benefits.

[51] Associated gave Mr. Mynett until March 11 to advise of which option he selected. However, as noted above, the Termination Letter said Mr. Mynett’s benefits would terminate that night at midnight. At the hearing, Mr. Mynett testified that he did not make his LTD claim that day before the cut-off because he did not understand the cut-off.

[52] Mr. Mynett testified he was devastated by how Associated treated him after 17 years of employment. He was and remains very hurt by the way Associated cut off his benefits so abruptly when they knew he was thinking of pursuing an LTD claim. He did not want to take either option, he explained at the hearing. What Mr. Mynett says he wanted was to have work in the office with the proper set-up to accommodate his disabilities.

[53] Ms. Lee testified that the delay between the initial start date of the Contract Work Offer and the March 4 actual effective date was driven in part by Mr. Mynett not being happy with the Contract Work Offer and Associated's trying to find him projects. This, in my view, is consistent with the evidence about discussions at the February meeting about possible projects that could be available to Mr. Mynett were he to accept the Contract Work Offer. She also acknowledged that it was also partly because of her own tardiness. Mr. Mihalik testified that there was nothing particularly special about the March 4 date, except that they needed certainty given weeks had passed since the Contract Work Offer and Mr. Mynett had not indicated when he would make his decision.

[54] On March 10, 2020, Associated's Manager of Payroll and Benefits emailed Ms. Lee noting that the benefits provider had been trying since the previous week to reach Mr. Mynett but had been unable to. She wrote that Mr. Mynett would have to reach out to her directly if he was still interested and provided telephone numbers. Ms. Lee responded that she believed Mr. Mynett would no longer require that assistance, "but to be confirmed by end of the week".

[55] Between March 4 and March 11, Mr. Mynett did not contact Associated. Associated proceeded to process the termination of Mr. Mynett's employment.

[56] I note that the parties put into evidence a without prejudice letter from Mr. Mynett's counsel to Associated, and Associated's response. I also heard evidence on a meeting held between Mr. Mynett's counsel and Associated. The contents of this evidence related to what appears to me to have been efforts to resolve the matter. I have not found that evidence material to the issues before me, as it consists largely of the positions each party has taken in this complaint, so I do not set it out in this decision.

#### **IV APPLICABLE LAW AND FINDINGS ON DISCRIMINATION**

[57] In a human rights complaint, the burden of establishing discrimination rests with the complainant. It is not up to the respondent to prove that they did not discriminate: *Heyman v. Saunders (No. 2)*, 2010 BCHRT 88 at para. 6. In order to establish discrimination in this case, Mr. Mynett must prove that he experienced an adverse impact regarding his employment and that it is reasonable to infer from the evidence that his physical disability was a factor in that adverse impact: *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33. This is referred to as Mr. Mynett's case. If Mr. Mynott fails to prove his case there is no discrimination and no breach of the *Code*: *Rai v. Shark Club of Langley (No. 2)*, 2013 BCHRT 204 at para. 361.

[58] If Mr. Mynett is successful in establishing his case, the burden shifts to the respondent to justify its conduct: *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (Meiorin Grievance)*, [1999] 3 S.C.R. at para. 70. For the reasons set out below, I find that Mr. Mynett has proven his case in part.

[59] It is not disputed that Mr. Mynett has physical disabilities impacting his back, neck and knee. It is also not disputed that the layoff and subsequent termination of Mr. Mynett's employment and his concomitant loss of benefits constituted adverse treatment. At issue is whether Mr. Mynett's disability was a factor in the layoff, termination, or loss of employment benefits.

##### **A. Was Mr. Mynett's disability a factor in the termination of his employment?**

[60] I first must decide whether Mr. Mynett has made out his case that Associated discriminated against him in the decision to terminate his employment. This turns on whether I can draw a reasonable inference, on all the evidence before me, that Mr. Mynett's disability was a factor in that decision.

[61] To support the inference, Mr. Mynett points to the fact that Associated posted a position for a Civil Technologist based in its Kelowna office in or around June 2022. He says this

suggests that it was not, in fact, a downturn in work that drove Associated's decision to terminate him because Associated sought to fill the same position via this posting. I am not persuaded that this posting supports an inference that Associated terminated Mr. Mynett, at least in part, because he had a disability. The new position was posted roughly one and a half years after Mr. Mynett's termination. If Associated did not, in fact, have enough work for Mr. Mynett but was using this as an excuse, essentially, for justifying the termination, it does not make sense that it would wait such a long time to fill his position. Such a long period of time between Mr. Mynett's termination and Associated advertising the position rebuts an inference that Associated terminated Mr. Mynett's employment for reasons other than what it said at the time.

[62] Mr. Mynett also argues that the Termination Letter "strongly implies that there was a larger reorganization happening in the organization resulting in the abandonment or elimination of the role Mr. Mynett held (i.e. Civil Tech 3) and a widespread reduction in staff." The argument appears to be that Associated tried to use the implication of a restructuring to justify the termination, and because no restructuring took place, I should infer that this was a lie meant to distract from the real reasoning. I find this argument tenuous. An 'implication' of a larger restructuring is not enough to support an inference that in the background, Mr. Mynett's disability was factoring into the termination decision. It does not show that Associated considered Mr. Mynett's disability, and it does not rebut the evidence that Associated was experiencing an ongoing downturn in work generally and in demand for on-site inspection work more specifically.

[63] Next, Mr. Mynett points to the timing of the termination and Associated's arguments about it. He says that Associated now says that the Contract Work Offer was triggered by the maximum permitted duration of a temporary layoff under the *Employment Standards Act* but that period had lapsed over 2 weeks prior without action. It was only when Mr. Mynett raised the possibility of submitting an LTD claim that Associated finally and suddenly moved for certainty on the Contract Work Offer, he says. While this is relevant in respect of the



termination of Mr. Mynett's benefits, which I address in the next section of this decision, I do not find it helpful in respect of the decision to terminate, for the reasons set out below.

[64] On a balance of probabilities, on the whole of the evidence, I find that Associated made the decision to terminate Mr. Mynett's employment, at the latest, on February 14, 2020, when it made the Contract Work Offer. I further find that Associated decided to terminate Mr. Mynett's employment based on its assessment that there was a lack of current and future work Mr. Mynett could do. February 14, 2020, was the end date of Mr. Mynett's November 2019 layoff, as set out in Associated's letter notifying Mr. Mynett of that layoff. That letter also said that Mr. Mynett's active employment would recommence on February 14 "should our workload improve and projects come on stream." Accordingly, I find that Associated gave Mr. Mynett notice that if there was not an increase of work by February 14, then it contemplated something other than returning him to full-time work. I have accepted that between the November layoff letter and the Contract Work Offer of February 14, Associated did not experience an increase in inspection work. Therefore, it determined, at the latest, on February 14 that it could not sustain a full-time return to regular work for Mr. Mynett.

[65] Mr. Mynett testified that he did not understand that the Contract Work Offer meant that he would lose his job if he did not accept the Contract Work Offer. However, the Contract Work Offer letter was plain on its face that Associated was ending their regular, full-time employment relationship and providing Mr. Mynett with two options: complete severance of his employment ties or the Contract Work Offer. As Mr. Mihalik said in his evidence, the whole point of his meeting with Mr. Mynett and Mr. Daigneault in February was to set out the terms of the Contract Work Offer. The Contract Work Offer would commence on February 14, 2020 and run until December 31, 2020 with a possibility of an extension to "be discussed as the end date nears". I also note that Mr. Mynett referenced a "permanent layoff" in his March emails with Ms. Lee, suggesting that he had some understanding of the situation.

[66] The evidence is consistent that Associated did not know Mr. Mynett intended to file an LTD claim at the time it made its decision to terminate. At best, Mr. Mynett's own evidence supports a finding that he spoke often about his pain but downplayed work-related limitations.

He may have referenced a potential future need for disability benefits but never actually made a claim or even decided to do so until after he was given the Contract Work Offer on February 14. Mr. Mynett himself acknowledged these things at various points in his evidence.

[67] There is no evidence that Associated set a deadline for Mr. Mynett to select between severing the working relationship completely or accepting the Contract Work Offer. However, I find it had decided by February 14, 2020, that the regular, full-time employment relationship had come to an end. I am not persuaded on a balance of probabilities that Mr. Mynett's disabilities factored into that decision making. Rather, on all the evidence, I accept that Associated's decision to terminate was made for entirely non-discriminatory reasons; specifically, it did not have sufficient work for Mr. Mynett to continue to employ him full-time. However, that is not the end of the inquiry.

[68] In addition to arguing that the termination was discriminatory, Mr. Mynett argues that Associated's "failure to inquire constitutes discrimination." He seems to argue this in respect of the termination of Mr. Mynett's benefits. However, while Mr. Mynett cites a number of cases which deal with the duty to inquire, it is not clear what exactly he is saying Associated did in respect of any such duty that was discriminatory. He also argues that Associated discriminated by failing to accommodate Mr. Mynett by "keeping his position open or exploring alternatives". The manner in which these arguments are set out suggest a misunderstanding about the way these duties operate.

[69] First, there is no freestanding duty to accommodate under human rights law. The duty to accommodate is part of a respondent's *bona fide* occupational requirement defence. One aspect of the duty to accommodate that arises in some cases is the duty to enquire. But the Tribunal need only consider whether the duty to enquire was met, like all aspects of the duty to accommodate, as part of a respondent's defence. As such it is only after a complainant has established their case that the Tribunal considers whether the duty to accommodate has been met: *Kelly v University of British Columbia*, 2012 BCHRT 32 at para. 452; *Dunkley v University of British Columbia*, 2015 BCHRT 100 at para. 387; *DL v British Columbia (Ministry of Children and Family Development)*, 2022 BCHRT 66 at para. 66.

[70] In this case, Mr. Mynett has not persuaded me that there was a nexus between Associated's decision to terminate him and his disabilities. Therefore, he has not made out his case for discrimination regarding the decision to terminate and the duty to accommodate does not arise.

[71] Mr. Mynett argues that "several options short of dismissal were available" to Associated, but it did not consider them. He suggests that these included holding off on the termination given his benefits issues; amending the Contract Work Offer to include benefits; or continuing the layoff as examples of possibilities. All of that may be true and perhaps even good employment practice for an employee of such long duration. Nonetheless, I do not find this review of other possible options particularly helpful.

[72] The fact that Associated may have had options short of termination does not give rise to an inference that Mr. Mynett's disabilities played a role in the decision to terminate. When an employer makes a non-discriminatory decision to terminate an employee's employment, it is not obligated under the *Code* to examine all possible options for keeping that employee on or to continue to provide access to benefits that accrue only in relation to their employment.

[73] Here I note that I heard a great deal of evidence on the disputed question of Mr. Mynett's proficiency with office work. I have not found it necessary to resolve this dispute. The question of whether he was sufficiently proficient to be accommodated into an office role, had there been one, would only require determination if a duty to accommodate had been triggered. It was not and therefore the question of whether Mr. Mynett had the necessary skills and abilities to fill any available office job as an accommodation is moot.

[74] Second, to the extent Mr. Mynett is arguing that he should have been accommodated with office work prior to being terminated, the evidence shows Associated reasonably accommodated him. The evidence is that Mr. Mynett was experiencing some disability-related barriers at work. For example, he had to take breaks, lay down, stretch, avoid ladders and so on. He took his ATV and trailer to the Yukon project. There is no evidence that Associated had any concerns with or prevented him from managing his disability by taking breaks, avoiding

climbing ladders, and so on. To the contrary, the evidence is consistent that what Mr. Mynett said he needed to accommodate his disabilities on the job, he got.

[75] I pause to note that in his closing submissions, Mr. Mynett suggested that Associated blamed him for not taking sick time, not taking earlier short term or LTD leaves, and accused Associated of “victim blaming”. I do not read Associated’s arguments on these points as “victim blaming”, as argued by Mr. Mynett. I have some discomfort with the use of this term in the context of the circumstances of this case. This is terminology borne from sexual assault and sexual harassment cases. Historically, victims of such misconduct were impugned in ways that served to entrench stereotypes and penalties for women’s exercise of autonomy while obfuscating blame from perpetrators. While there is certainly room for an aggrieved party in other circumstances to be viewed as a victim of misconduct or other harm, I urge parties to take care in invoking such terminology in a way that could diminish the specific harms it is generally understood to embody. In any event, there was nothing improper about Associated’s arguments or the evidence they relied upon in bringing them.

[76] In sum, for the reasons above, on a balance of probabilities, I find that the termination of Mr. Mynett’s employment was not discriminatory.

### **B. Was Mr. Mynett’s disability a factor in Associated’s short-notice termination of his benefits?**

[77] I turn now to decide whether Mr. Mynett has made out his case that Associated discriminated against him by cutting off his benefits, which included his eligibility for LTD, on very short notice. This turns on whether I can draw a reasonable inference, on all the evidence before me, that Mr. Mynett’s disability was a factor in Associated’s decision to terminate his benefits on March 4, 2020 – the same day they provided him with the Termination Letter.

[78] The Tribunal may draw an inference from the timing of an event that a protected characteristic was a factor in a complainant’s adverse treatment: *Gruber v. Mansini Steel Manufacturing and others*, 2019 BCHRT 122 at para. 53. A respondent can rebut the inference by providing a reasonable non-discriminatory explanation for the conduct: *Probyn*

*v. Vennon Dodge Jeep*, 2012 BCHRT 87 at para. 28. On the evidence before me, I find that Associated has not rebutted that inference.

[79] As noted above, there is no dispute that Mr. Mynett has disabilities that are protected under the *Code*. Further, the parties appear to agree that cutting off an employee's benefits, as is the case here, is an adverse impact. What remains for me to determine is whether Mr. Mynett's disabilities were a factor in that adverse impact.

[80] There is no dispute that Associated did not give Mr. Mynett a deadline to respond to its Contract Work Offer, either in the offer itself or at any time up to when it terminated him on March 4, 2020. Associated argued strongly that Mr. Mynett failed to respond to its offer. However, Associated failed to explain why it did not communicate to Mr. Mynett that it needed a response by a certain date and what the consequences would be if he did not respond.

[81] It is similarly not disputed that Associated knew Mr. Mynett was looking into the Individual Options for benefits coverage and that he intended to make an LTD claim.

[82] I found Associated's evidence on the circumstances that gave rise to the decision to terminate the employment under the Contract Work Offer clear and consistent. I found its evidence about why it cut off Mr. Mynett's benefits at midnight on the day it issued the Termination Letter, far less so.

[83] Associated's evidence was that there was no particular reason it chose March 4 to give Mr. Mynett the Termination Letter and its deadline for making a selection between the Contract Work Offer or severing ties. In essence, they say that they simply wanted to have closure one way or another. However, the proximity of the timing of the termination of benefits and Mr. Mynett's clear communication to Associated of his intention to file an LTD claim supports an inference that this factored into their decision not only to put a deadline on Mr. Mynett's decision about the Contract Work Offer, but the almost immediate termination of his benefits.

[84] I have also given weight to the fact that while Associated left the Contract Work Offer open to Mr. Mynett for a week following the Termination Letter, it did not do so for his benefits. It is curious to me, in the face of his known intention to file an LTD claim, or at least that he was visiting his doctor and making clear enquiries about it, that Associated would not allow the two timelines – the timeline to elect and the termination of his benefits – to run concurrently. Associated provided no explanation for the divergent dates.

[85] Associated was not obligated to maintain Mr. Mynett's benefits indefinitely on the basis of a possible future need for benefits. This would create an unreasonable obligation on employers generally. However, as Mr. Mynett argues there was no "compelling reason why Mr. Mynett's dismissal had to occur on March 4, 2020, and could not be put off". While the Contract Work Offer provided for an effective date of February 15, were Mr. Mynett to have accepted the contract option, it provided no "decide-by" date, as I have noted above. The only thing that had changed by March 4 was that Mr. Mynett had expressed an interest in submitting an LTD claim under benefits that he would be losing. I am satisfied on a balance of probabilities that this development was a catalyst for Associated to act, terminating Mr. Mynett's benefits immediately even while leaving the Contract Work Offer – though now with a release of all claims for Mr. Mynett to sign – open for a further week. Mr. Mynett's potential LTD claim may not have been the only factor or the predominant factor in Associated's decision to proceed when and how it did, but I am satisfied that it was a factor.

[86] At the same time that Associated had no evidence of why they were so pressed to suddenly have closure, Associated emphasized the amount of time that had passed since the Contract Work Offer. However, in fact, it was only a matter of weeks. Further Mr. Mynett was not the only one who could have followed up, including to set a deadline. In any event, Mr. Mynett was in fairly regular contact with Mr. Lee and Mr. Daigneault during this time and made plain that he was looking into not only the Individual Benefits plan options but the possibility of making an LTD claim.

[87] In the context of a 17-year employment relationship, where the employer set no deadline and knew Mr. Mynett was trying to determine the best options for himself moving

forward, including applying for LTD - which necessarily means scheduling at least one appointment with his doctor - less than three weeks to respond hardly seems unwarranted. This is particularly so when he was being asked to agree to severing his employment relationship in exchange for a severance package that would have required him to sign a release of all claims. Releasing an employer from future claims related to termination is a significant decision that often necessitates seeking legal advice.

[88] For the reasons set out above, I find that Mr. Mynett has established his case and shown that his intention to apply for LTD benefits was a factor in Associated's decision to end his benefits with less than a full day's notice. That is, by moving swiftly to terminate Mr. Mynett's benefits before he could submit his LTD claim. I find further that Associated has not succeeded in rebutting that case. As mentioned, while Associated's evidence to rebut any inference that Mr. Mynett's disability factored into the termination of employment was clear, it did not lead evidence that tips the balance in its favour regarding the short-notice termination of benefits. The evidence that there was 'nothing special' about March 4 and that they needed certainty has not persuaded me, on a balance of probabilities, that the inference raised by the evidence I have reviewed above is rebutted.

[89] Mr. Mynett also argued that Associated should have left his benefits open to him as an accommodation of his disabilities. I have not addressed their arguments in that respect because (a) I have found that the termination of Mr. Mynett's benefits on short notice was discriminatory and (b) Associated put forward a non-discriminatory explanation for that decision not argue a *bona fide* and reasonable justification for it.

## **V REMEDIES**

[90] While Mr. Mynett submitted lengthy arguments about the impact of losing his benefits, he submitted little in respect of the value of that loss. I cannot determine an appropriate award in respect of the loss of benefits without further information and specific submissions from the parties.

[91] In respect of Mr. Mynett's claim to damages for injury to dignity, feelings, and self-respect as well, I cannot render an award based on the submissions before me given that he has been only partially successful in his complaint. In my view, in these circumstances and in the interests of fairness, I would benefit from specific submissions on damages for injury to dignity, feelings, and self-respect.

[92] I remain seized of this matter. The Case Manager will contact the parties to set a submissions schedule on the question of remedy. It remains open to the parties in the meantime to resolve this element without further Tribunal involvement if they are able to reach an agreement.

## **VI ORDER**

[93] I have found Mr. Mynett's complaint of discrimination justified in part. I order as follows:

a. Pursuant ss. 37(2)(a) and (b) of the *Code*, I declare that Respondents' conduct was discrimination contrary to the *Code* and I order them to cease the contravention and refrain from committing the same or a similar contravention.

b. Pursuant to s. 37(2)(d)(iii), I remain seized of this matter in respect of determining the appropriate remedies. The Case Manager will contact the parties to set a PHC with me to determine next steps.

Emily Ohler  
Tribunal Chair