Date: 20190516

Files: 566-34-12722 to 12726

Citation: 2019 FPSLREB 53

Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

A.B.

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
A.B. v. Canada Revenue Agency

In the matter of individual grievances referred to adjudication

Before: Bryan R. Gray, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Pamela Sihota, Public Service Alliance Canada

For the Employer: Zorica Guzina, counsel

Heard at Calgary, Alberta,
October 24 to 27, 2017.

I. Summary

[1] The evidence presented at the hearing showed A.B. ("the grievor") to be a hard-working and law-abiding Canadian. He obtained college and university educations and worked hard to advance his career, to better his life and that of his family.

[2] This decision considers five individual grievances that arose from the same events, which led to the grievor's reliability status being suspended and then revoked and then to his employment being terminated due to his lack of reliability status. He filed grievances alleging racial and religious discrimination. He was born and raised in Afghanistan and self-identifies as a person of Muslim faith.

[3] The grievor's life began under challenging circumstances in Kabul, Afghanistan. His family emigrated to Canada in 1999, where they began life anew. Growing up in war-torn Kabul left the grievor with very strongly held views of the Afghanistan conflict, which shaped his early years. His views are from a very different perspective than a person born and raised in North America might possess who had learned of the war only by consuming mainstream American news media. The grievor stated that the TV news in North America does not tell the truth.

[4] As witnessed by his social media posts, the grievor was left with bitterness towards NATO military activities in his homeland. He had a voracious appetite for social-media-based news from his homeland and became prolific in his own social media posts, including voicing his strongly held views when he became impassioned by events occurring in the ongoing conflict in Afghanistan and elsewhere.

[5] The grievor enjoyed 10 days of term employment spent training at the offices of the Canada Revenue Agency ("the employer" or CRA), which were co-located with the Calgary International Airport (YYC) in Calgary, Alberta. A co-worker there recognized the grievor and remembered something from a previous common employer. It caused her to report a concern about him to CRA security.

[6] The employer quickly discovered that the grievor had made several disturbing social media posts that were openly displayed for the world to see on his Twitter page. They appeared to glorify the Boston Marathon terror bombing, celebrate the deaths of NATO military personnel, and cheer the downing of aircraft.

[7] Some of his posts referenced ISIS and another group that the Government of Canada had declared was a terrorist. Very soon after that, his reliability status was

suspended, and he was removed from the workplace.

[8] For the reasons explained later in this decision, I find that the suspension and revocation of the grievor's reliability status were *bona fide* administrative actions based upon valid reasons. I am therefore without jurisdiction to rule on the suspension grievance. I similarly find the termination of employment due to the loss of reliability status to have been reasonable and justified under all the relevant circumstances. I also conclude that there is insufficient evidence upon which to award the grievance alleging a violation of the no-discrimination clause of the collective agreement and reject it.

[9] For the reasons explained below I have accepted the grievor's request and order his name be removed from this decision and order the sealing of three photos to protect him from the risk of his suffering discrimination arising from the various matters contained herein.

II. The grievor's evidence

[10] The grievor commenced his term employment as a customer service representative in training (classified CR-04) with the CRA on January 12, 2015. He was escorted off the CRA's premises 10 days later, on January 22.

[11] The grievor testified to his difficult circumstances of growing up in war-torn Afghanistan. He suffered a gunshot wound while riding his bicycle when he was 13 years old. He believes that he was shot by a militant group that was fighting in alliance with the United States of America (US). His hospital was bombed while he was recovering from being shot and his family then fled to an austere refugee camp in Pakistan, where children were not allowed to attend school. The grievor explained that boys in the camp lived in fear of being beaten and raped by the police. He explained that his parents were both well-educated and that they had been enjoying successful careers when war engulfed their land.

[12] The grievor's testimony and the evidence of his social media posts, which shall be examined later in this decision, make it clear that he considers that his painful upbringing as being caused by NATO and US intrusions, be they political, economic or military, into Afghan life. He noted that other witnesses that the employer called referred to the Taliban as terrorists. He clarified that the US had funded it $250 million to secure an oil pipeline.

[13] The grievor described his life in Canada as a Muslim and said that he and his wife were regularly subjected to racist treatment subsequent to the 9/11 terror attack in New York City in 2001. He said that even though his wife practices Islam, she does not wear her hijab for fear of being subjected to racism.

[14] The grievor testified as to how difficult he felt in Canada wearing a long beard and being the only brown-skinned person in the office of the business he worked for in Calgary. He said that when he travelled to small towns to meet clients, he felt that people would "give [him] the 'look', like [he] was going to blow up the building." He described how he would bring his halal food to eat at lunch and get into what he thought were lively but respectful discussions with his co-workers about world affairs. He said that he always felt that he got along very well with his co-workers and that he treated them as if they were family. He testified that he put his complete trust in his co-workers. He and his co-workers socialized together. He stated that his trust came back to hurt him.

[15] The grievor testified that during his successful four years at a private-sector business in Calgary, during one of his many lunchtime conversations, he was asked about what was going on in Afghanistan. He replied that in his view, Canadians had the wrong information because cable TV news in Canada does not tell the truth. He stated that he was very "pissed off" by how the news lies.

[16] He explained that he felt there were many innocent victims of the US military intervention in his homeland and that Canadian military personnel counted among the victims, along with Afghan citizens. In his testimony, the grievor emphasized that he never said it was good when Canadian soldiers were killed in Afghanistan. He testified that later, he learned that someone overhearing the conversation reported thinking that he had spoken in support of the Taliban.

[17] The grievor explained that one day, while he was out of the office meeting with a client of the business, the Royal Canadian Mounted Police (RCMP) visited his office, looking for him. Speaking loudly enough that the staff could hear them, the officers indicated that they were investigating a terrorism issue.

[18] The grievor stated that he had to make two calls to the RCMP Officer who had visited his office to speak to him and to inquire what had prompted the visit. The grievor testified that the RCMP told him that the matter had been referred to the Canadian Security Intelligence Service (CSIS) and that this was the end of his dealing

with the RCMP. He asked for contact information so that he could call CSIS and was told he would have to wait as it would call him. He said he asked the authorities to stop contacting his office in a disruptive manner.

[19] The grievor explained that a CSIS officer phoned him and that he invited the Officer to his home to meet and talk. The grievor explained that he had to have his family leave home on the day that the CSIS Officer was to visit because in his homeland, if the police visit your home, it is usually because they are going to kill you. The Officer explained that one of the grievor's office colleagues had called and expressed a concern that a terrorist was in the office. The grievor testified that the Officer asked him about his time in the refugee camp in Pakistan and then asked him if he would agree to work for CSIS.

[20] The grievor testified that he met with a CSIS officer twice and that each time, he assured him that he knew about ISIS or Al Qaeda only from what he heard in the news. He told CSIS that he was not interested in working for it and that he would call the police to report any contact that he might ever receive from a terrorist.

[21] The grievor testified that his business manager later spoke to him to apologize for the unfair treatment he was given due to one of his colleagues calling the police.

[22] When he was asked about his four years of work as an insurance broker with which many police officers and military personnel did business, and at which he had access to client records and personal information, the grievor replied that he enjoyed the work, was successful in building a profitable book of business, and never had any problems with his manager. He said that only because of the CRA's racism was he accused of being untrustworthy with respect to access to taxpayer records and personal information.

[23] The grievor explained how he read the news every hour and that he became active on Twitter in 2011. He described how proud he was to be offered a job with the federal government at the CRA as he said that Afghans believe all such good government jobs are reserved for Caucasians. He added that it is rare for Afghans to secure a white-collar job.

[24] In examination-in-chief, when he was asked about his efforts to obtain career-related employment after university, the grievor stated that he had been optimistic as he had a good education and no criminal record and in 20 years of work, he had never

had a problem with a manager and had never been fired. He stated that only the CRA had a problem with him being a Muslim, reading the news, and tweeting.

[25] When asked about his being suspended, the grievor testified that he was taken out of his training room with one security guard in front of him and another one behind him and that he felt ashamed as this was done in front of all his co-workers. He said that the security detail took him out of the building and then went back in and again, in front of all his co-workers, emptied his office of all his personal belongings.

[26] The grievor testified that he immediately sought to cooperate and then he offered the card of the CSIS Officer who had interviewed him. He told CRA officials that they could call the Officer and verify that there were no problems.

[27] When the grievor was questioned about the preliminary risk assessment, which shall be examined in detail later in this decision, he spoke of his friendly relationship at his previous private-sector job with a colleague. He said that he recognized her as also working with the CRA immediately on starting his training. He said that they had been connected on Facebook years earlier. He also stated that when he saw her at the CRA, he thought that if she shared information about the RCMP's visit to their former employer a few years earlier, it might lead to a problem for him.

[28] The grievor testified that he had joined a political party in Alberta and that when he was reunited at work with his former co-worker, he asked her for advice on whether he needed to declare that membership and the fact that he drove a taxi, as they had received instructions on being very careful about conflicts of interest and corporate security.

[29] The grievor then shared his view that his co-worker reported him to security because he is Muslim.

[30] When in his examination-in-chief, the grievor was asked about his religious beliefs and practices, he stated that he is a practicing Muslim and that he regularly attends mosque to pray. He stated that Muslims pray five times per day and that because he drove a taxi, he went to the downtown mosque as it was near a taxi stand where he would wait for fares.

[31] The grievor testified that he rarely saw white people at his mosque, so it stood out in his memory that one day, he saw a white man attending prayer at the downtown mosque. He said that he walked past the white man one day and said, "Peace be to

you", as his faith requires. He stated that he had no further contact, conversations, or meetings with that man, named Damian Clairmont, who would later become known as "Mustafa".

[32] The grievor testified that later on, officers from the CSIS went to the mosque and interviewed everyone about Mr. Clairmont. He explained that the mosque's imam later informed worshippers that the authorities were watching the mosque because some men had travelled to Syria to fight in the war there. That caused problems for everyone who attended prayer there.

[33] Helen Brown, the then-director general of security, oversaw the investigation into the grievor. She testified that her long career in security had provided her with contacts in the RCMP and CSIS. She stated that she used those contacts to inquire about any knowledge they had of the grievor. She testified that both had indicated to her only that he was a "person of interest" and that he was not assisting CSIS.

[34] Ms. Brown further testified that information that the grievor provided when CRA security interviewed him added to her concern about the risk he posed. During questioning, he volunteered that before his brief employment with the CRA, he had worshipped at the same mosque in Calgary as the highly publicized Mr. Clairmont, who had become radicalized in his home city of Calgary, who was reported to have travelled to Syria late in 2012 as a jihadist foreign fighter in the war there, and who was reported in the news as having been found dead during fighting alongside ISIS forces.

[35] In her testimony on this matter, Ms. Brown stated that the grievor's admission showed her that among other things, he was "in a milieu of potential violence", which added to her concerns about him. When this statement was taken up with her in her cross-examination to inquire if her use of "milieu" meant a Muslim man attending prayer at a mosque, she replied that that was incorrect. She stated that it meant a person calling for death to NATO troops openly on social media; she did not refer simply to a man being Muslim.

[36] In examination-in-chief, the grievor was questioned about some of his tweets. Hundreds of them were submitted as evidence, but only a few were examined at the hearing. He testified about starting on Twitter in January 2011. He explained that he did not know about the "@" or "#" functions of Twitter when he began to use it.

[37] Having discussed the matter of Twitter functionality with both parties, I take arbitral notice of the fact that the "@" function in a tweet has the effect of sending a message or at least linking your message to the person whose Twitter name follows the @ symbol. It may also be used as a way to have a tweet appear and be filed on the Twitter feed of the person whose name follows the "@" symbol. The hashtag symbol ("#") is used in Twitter as a nomenclature for the organization of tweets related to a particular subject as defined by the word following the hashtag.

[38] The grievor's examination-in-chief proceeded with the following and other tweets, all of which he confirmed his authorship of. He was asked to explain each one, including: "2011-02-01 #Haqanigroup is started by me and it refers to one the [*sic*] resistance groups in Afghanistan against the US occupation of the country."

[39] The grievor testified that he could not recall exactly why he made that tweet. He said that maybe it was just that that topic had been trending. He added that maybe the Haqani group had been in the news that day. He said that he had used that hashtag for only two days and that he did not know that "Haqani" is the name of a terrorist group.

[40] Given that the grievor's reply seemed somewhat oblivious to the content of his tweet, I invited him to re-read it, reflect on its content, and consider the question again of what he was thinking when he wrote it.

[41] Upon reflection, the grievor testified that indeed, he is aware that Haqani is a militant group that fights against the US. But he explained that in the 1980s, it was a US ally, which supplied it with sophisticated weapons to use against the Soviets. He said that he did not know that the Haquani group had been declared a terrorist force under Canadian law.

[42] He tweeted, "2012-05-11 #Osman Fatihi our Facebook friend martyred today in Khost province in face to face fight with US pigs. May Allah accept him. Lucky guy".The grievor testified that he did not know who Osman Fatihi was and that he had just seen Mr. Fatihi's Facebook page. The grievor testified that he would just copy text from websites and post it on his Twitter account, such as: "2012-06-20 @BBCBreaking sorry to hear about civilian casualties in eastern #Afghanistan but really happy to see #Nato casualties.they [*sic*] deserve it."

[43] The grievor testified that he did not remember writing that tweet. However, he did recall that on the day it was written, he had woken up in the night and had seen on

social media news that a member of the US military, who he named, who had murdered 18 Afghan civilians and then burned the bodies.

[44] The grievor continued with a lengthy description from memory of many civilian casualties in Afghanistan. He listed dates and the locations and the number of bombs dropped when he said US forces killed civilians. He also talked about news reports that stated that a member of the US armed forces had desecrated a copy of the Koran, which is the holy book of his Muslim faith.

[45] The grievor stated that he would never support killing innocent people. He then shared his opinion that "we aren't considered full citizens here in Canada."

[46] Just before his representative asked him about his #bostonmarathon tweet, the grievor offered, "I know the way I put the tweets was not good." The tweet was as follows: "2013-05-03 @nytimesworld any harm to US occupier army in #Afghanistan is a good [*sic*] news. #bostonmarathon. Hope more of this to follow."

[47] When the grievor was asked why he wrote that tweet, he stated that he did not know. He said that his English is not good and that maybe #bostonmarathon was trending that day, so he might have just added it into the middle of his tweet and then followed it by writing, "Hope more … to follow."

[48] After allowing a long pause in his testimony, I asked the grievor if he had any knowledge of the Boston Marathon or whether he was generally interested in marathons. He replied that he did and that he was aware that an attack had been carried out at the Boston Marathon (approximately two weeks before that tweet was posted) that had resulted in many people being killed, burned, and maimed, including women and children. He then testified that when he wrote the tweet, he meant to connect the harm from the marathon attack to more harm to members of the US military in Afghanistan.

[49] The grievor's representative took up the issue of the Haquani group in her cross-examination of Ms. Brown, who testified that it is a terrorist group operating in Afghanistan and that it is considered "one of the most significant threats to NATO military forces overseas."

[50] Several questions were posed to Ms. Brown and later to the grievor about the matter of the Haquani group being designated a terrorist group under Canadian law by the Government of Canada, such as when it was so designated and what the grievor

understood about this designation under Canadian law. She was also asked whether the grievor had deleted all his Twitter posts before or after the CRA interviewed and hired him.

[51] Those questions and answers have no probative value as the matter of the Haqani group being active in armed conflict and combat was not contested. Whether the grievor knew the group was named under Canadian legislation as an officially recognized terrorist group is a separate and unrelated matter to the risk posed by the grievor's social media activities referencing the group.

[52] The grievor's representative also took up the issue of the preliminary risk assessment's finding that the grievor's workplace was located at YYC. The assessment stated that the CRA call centre is connected by hallway to YYC and that CRA staff regularly go to YYC for its concession facilities. The assessment stated that the fact the offices are located at YYC was noted in the job opportunity advertisement for the grievor's position. The assessment concludes on this point that "[w]hile there are no indications at this time that [the grievor] sought employment specifically for the purpose of gaining regular access to the location, this possibility cannot be discounted."

[53] In cross-examination, Ms. Brown was asked if, given that information, she was concerned about a Muslim man working at YYC tweeting about downing airplanes. In the file of the grievor's tweets entered into evidence as an exhibit, it was noted that he tweeted the following on May 3, 2013: "@piersmorgan Mr. Morgan there's a [*sic*] wonderful news out there. Another plane connected to occupation of #afghanistan crashed. #bostonmarathon". Note that the Boston Marathon bombing occurred approximately two weeks before that tweet was made.

[54] Ms. Brown replied, stating that, no, the concern over the grievor's proximity to YYC had nothing to do with Muslims. Rather, she explained that it was the fact that he had made tweets that appeared to celebrate and glorify terrorist acts and that called for attacks upon NATO forces, including his celebrating an aircraft crash.

[55] The grievor's representative then asked Ms. Brown if she would be concerned if a Caucasian person were critical of NATO and celebrated the downing of aircraft. She replied that race and religion do not matter and pointed to a case in which a Caucasian CRA employee had been compromised by a potentially violent criminal organization to divulge taxpayer personal information for criminal purposes. Ms. Brown explained how

in that case, the CRA acted immediately to involve security and police authorities to try to protect the personal information and to criminally prosecute the (Caucasian) employee.

[56] Other matters the grievor spoke to in his examination-in-chief included that he tweets often about politics, municipal government, and housing. He explained that he wants to be a productive member of society and that other Afghans ask him for help and money to come to Canada.

[57] He testified that he finds that Canada has a high level of racism. He said that the federal government paid $31 million for the wrongful imprisonment of Muslims in Syria and that people have been sent to Canada to be tortured. He testified to being subjected to racist name-calling in his community and said that people have asked him why he is in Canada. He also explained that Canada's former prime minister unleashed racism against Muslims.

[58] The grievor testified to the ill effect his termination of employment has had upon his health. He said that he is scared to speak with the police now and that he feels like people follow him when he drives his car. He said that every time he comes home to his apartment, he fears that the police are waiting for him, to take him away. He said that he had to quit taking courses as he cannot concentrate and said that he cannot find new employment due to the CRA stating in a letter (dated March 4, 2015) that he had admitted to knowing an individual who left Canada to fight with ISIS. He said that that labelled him a terrorist.

[59] When he was questioned about more of his tweets that among other things mentioned ISIS, North Korea, and Israel, the grievor testified that his use of the hashtag #ISIS does not mean that he supports it. He also stated he does not support North Korea. He refuted the notion that his tweets about Israel could be seen as anti-Semitic. He explained that his tribe, from Kandahar province, descended from Jewish people.

[60] Finally, the grievor testified that his CRA work provided no special access to YYC and that it was ridiculous and racist when the CRA stated that he was a threat to blow up airplanes.

III. Analysis

A. The law with respect to the discrimination claim

[61] For the purposes of the hearing, article 19 of the relevant collective agreement essentially incorporates as follows the prohibitions on discrimination in the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*).

> **19.01** *There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, family status, mental or physical disability, membership or activity in the Alliance, marital status, or a conviction for which a pardon has been granted.*

[62] Section 226(2)(a) of the *FPSLRA* authorizes the Federal Public Sector Labour Relations and Employment Board ("the Board") to interpret and apply the *CHRA* in matters referred to adjudication.

[63] Section 7 of the *CHRA* states that it is a discriminatory practice to adversely differentiate against an employee in the course of his or her employment on a prohibited ground of discrimination, including race and religion (see also s. 3(1)).

[64] To determine if an employer engaged in a discriminatory practice, a grievor must first establish a *prima facie* case of discrimination, which is one that covers the allegations made and that if the allegations are believed, would be complete and sufficient to justify a finding in the grievor's favour in the absence of an answer from the employer (see *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536 at 558 and 559 ("*O'Malley*")). An employer faced with a *prima facie* case can avoid an adverse finding by providing a reasonable explanation that shows that its actions were in fact not discriminatory or by establishing a statutory defence that justifies the discrimination (see *A.B. v. Eazy Express Inc.*, 2014 CHRT 35 at para. 13).

[65] A grievor is not required to show that the employer intended to discriminate against her or him; see *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para. 40. Sometimes, through subtle and unconscious biases, racial stereotypes may occur, without necessarily any discriminatory intent. This is detailed in that case as follows:

> *[40] Before we consider the three elements of discrimination, we believe it will be helpful to point out that under both Canadian law and Quebec law, the plaintiff is not required to prove that the defendant intended to discriminate against him or her:*

> *To … hold that intent is a required element of discrimination under the Code would seem to me to place a virtually insuperable barrier in the way of a complainant seeking a remedy. It would be extremely difficult in most circumstances to prove motive, and motive would be easy to cloak in the formation of rules which, though imposing equal standards, could create . . . injustice and discrimination by the equal treatment of those who are unequal . . . . [Citations omitted;* O'Malley, *at p. 549.]*
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> *(See also* Andrews v. Law Society of British Columbia, *[1989] 1 S.C.R. 143, at p. 173;* City of Montréal, *at para. 35;* Commission des droits de la personne du Québec v. Ville de Québec, *[1989] R.J.Q. 831 (C.A.), at pp. 840-41, leave to appeal refused, [1989] 2 S.C.R. vi.)*
>
> *[41] Not requiring proof of intention applies logically to the recognition of various forms of discrimination, since some discriminatory conduct involves multiple factors or is unconscious.*
>
> …

[66] To prove that the respondent engaged in a discriminatory practice, the complainant must first establish a *prima facie* case of discrimination. The Supreme Court of Canada stated as follows in *O'Malley*: "A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer."

[67] In cases such as this, an employer can answer and rebut an allegation of *prima facie* discrimination by showing that it reasonably accommodated the employee or that accommodating the employee's needs would have imposed undue hardship on it (see s. 15(2) of the *CHRA* and *Boivin v. President of the Canada Border Services Agency*, 2017 PSLREB 8 at para. 59).

[68] Under s. 15 of the *CHRA*, an employer can answer and rebut a case of *prima facie* discrimination by showing a *bona fide* occupational requirement that justified its action; this analysis includes considering reasonable accommodation to the point of undue hardship.

B. Has the grievor established a *prima facie* case that he has been discriminated against?

[69] In her submissions, the grievor's representative alleged that the employer showed bad faith by treating him in a biased manner due to his religion and ethnicity.

She argued that the initial report of his co-worker, who told the CRA's security officials that he had been investigated for terrorist sympathies, biased the minds of the officials involved in the investigation who later recommended suspending and revoking his reliability status.

[70] She suggested that the bias persisted despite the grievor's honesty and cooperation with the employer's investigation, which found that he had no criminal record. It eventually concluded that he did not present a risk of violence. His representative argued that the investigators read his many tweets and then made assumptions about him due to his ethnicity and religion.

[71] The grievor's representative pointed out that his cooperation and honesty included volunteering information about his mosque and the fact that an individual who worshipped there had become radicalized, which she said would not have otherwise been known to the investigators.

[72] The grievor's representative pointed to Ms. Brown's statement about her concern over the milieu in which the grievor attended religious worship as evidence of a racial and religious bias that she harboured, which prejudiced her view of his risk assessment.

[73] The grievor's representative pointed to the grievor's testimony stating that CSIS had asked him to work for it and to help identify anyone involved in radicalizing people at his mosque and that the employer linked this to the grievor himself being a risk in this milieu despite this issue not being in the final risk assessment report.

[74] The grievor's representative summarized her argument on this point by stating that the grievor suffered prejudice and bias solely because he worshipped at a mosque where another person had been radicalized.

[75] The grievor's representative cited the decision of the British Columbia Human Rights Tribunal (BCHRT) in *Mezghrani v. Youth Orange Network Inc.*, 2006 BCHRT 60 at para. 28, as it finds "[d]irect evidence of racial discrimination is rarely available …" and that as racism has over time in Canada become less acceptable, the "… 'subtle scent of racism' may have become very hard to detect." The Tribunal concluded that it had to look at the evidence as a whole to determine if there was a reasonable basis for concluding that racism might have occurred (see paragraph 29).

[76] Counsel for the employer submitted that the onus was on the grievor to

establish a *prima facia* case of rights being violated. She argued that there was no evidence of the grievor being treated in a different and adverse manner as the evidence clearly showed any person regardless of race or religion in the same circumstances as the grievor would've been treated the same way.

[77] After careful consideration of all the evidence and arguments of both parties on this point, I conclude that the grievor has not established evidence to support a finding of a *prima facia* case of discrimination.

[78] There is no evidence to suggest that the mere fact that the grievor worshipped at a mosque led the employer to consider him a risk. The fact that an individual who had become radicalized had gone to the same mosque as the grievor and that the grievor, through his many disturbing tweets, was at risk of being recruited by terrorists provided a reasonable and non-prejudicial link to the concern of risk.

[79] For greater certainty, despite my finding that the grievor failed to establish a *prima facia* case of discrimination, I shall continue with my analysis of the evidence and consider whether the employer's decision to revoke his reliability status was based upon a *bona fide* occupational requirement.

C. Did the CRA provide a reasonable explanation for suspending and revoking the grievor's reliability status?

[80] Theresa Gill was the assistant director of the CRA's Southern Alberta CRA call centre, where the grievor was hired to work as a customer service representative, classified CR-04. She testified that a CR-04's duties include answering phone calls from citizens, businesses, and taxpayer representatives and providing them with accurate and timely information. She described the computer system and database that a CR-04 uses and explained how all the information that the CRA possesses about taxpayers is readily available through that database. She testified that it contains personal information about taxpayers, including full names, home and work addresses, family members and ages, social insurance numbers, investments, daycare information for children, bank details, and wage garnishment details.

[81] Ms. Gill testified that one of her trainers told her that during a class about ethics and conflicts of interest, the grievor had asked if he had to disclose political affiliations and whether his taxpayer file computer searches would be tracked and if so, how often.

[82] Ms. Gill then noted how one of her trainers recognized the grievor from a previous employment location that they had shared and that she relayed a security concern about the grievor having been investigated for terrorism links, which had arisen during that former employment. She testified that these matters were sent to the employer's national security office on January 14, 2015. She also testified that on January 21, 2015, a teleconference was held. On a review of the preliminary risk assessment, it was determined that the grievor's reliability status would be suspended and that he would be escorted from the workplace.

[83] Ms. Gill testified that at the grievor's first break that morning, he was asked to come to a meeting, where he was informed of the decision. She said that he immediately replied that he knew what it was about and that he offered to explain everything. She said that he was very professional and that he was not upset.

[84] Ms. Gill testified that she was part of an effort by the employer's management to consider alternatives to address the security concerns but to allow the grievor to continue his employment. She explained that it considered whether he could perform call centre tasks for clients who did not require accessing the full database. She said that that idea was found not feasible as all calls are simply directed to the general call centre floor, and the call-handling system would have had to be redesigned to screen calls and to route those of a general inquiry nature specifically to the grievor. She said that it would be very cumbersome and costly to redesign the flow of incoming calls to accomplish that goal.

[85] On January 19, 2015, the CRA prepared a preliminary security risk assessment that in its report cited, as follows, the Treasury Board *Personnel Security Standard*, which arose from the *Policy on Government Security*:

> …
> "in checking reliability, the question to be answered is whether the individual can be relied upon not to abuse the trust that might be accorded. In other words, **is there reasonable cause to believe that the individual** may steal valuables, exploit assets and information for personal gain, fail to safeguard information and assets entrusted to him or her, **or exhibit behavior that would reflect negatively on their reliability."**
> …
> [Emphasis in the original]

[86] The report noted the following background:

> ***Background***

On January 14, 2015, the Security and Internal Affairs Directorate (SIAD) was advised by management of concerns regarding new Calgary Call Centre employee [A.B]. Reportedly, another employee at the Calgary Call Centre, [Redacted] *approached her management team on January 12, 2015— [A.B.] first day as a CRA employee—to share information and express concerns regarding [A.B.].*

According to [Redacted], *the two began working together in October 2010 at an insurance firm … located in Airdrie, AB. On* [Redacted third party name]'s *first day of work, the RCMP visited* [the office] *and requested to speak with [A.B.]. They were referred to management for further assistance.*

[A.B.] later approached [Redacted] *to disclose the reason for the police interest in him saying that he didn't want her to feel uncomfortable about him given that they have to work together. He is alleged to have said that he was under investigation for potential links to terrorism and/or a terrorist organization(s).*

[A.B.'s] honesty and openness eased [Redacted] *discomfort (the specifics of the conversation were not made available) and the two grew to be friends. [A.B.] was very personable and open about his life including his religious beliefs and practices.*

In October 2011, [Redacted] *ceased her employment with* [Redacted] *and she and [A.B.] exchanged Facebook information in order to keep in touch. She friended [A.B.] on the site and, over approximately the next year to a year and a half, noticed that [A.B.] made frequent posts about the war in Afghanistan. She said that his posts were mainly in support of the terrorist organizations. Further, when Canadian or American soldiers were killed he would post celebratory and supporting messages. When terrorist plans were thwarted or disrupted he would post empathetic messages. The posts are said to have been frequent. Sometimes the messages were posted in another (unknown) language(s), as were responses from his Facebook friends.*

…

Current

Since commencing employment with CRA, [A.B.} has made two concerning inquiries to [Redacted], *who was responsible for training the new hires. The first pertained to the Conflict of Interest form and whether he must close his political affiliations or ties to political groups. The second was following the security awareness presentation when he asked how often the security checks are run on each employee. The presentation discussed monitoring of CRA business systems including LAN and mainframe accesses.*

[Redacted] *stated that she was bothered by the information*

she knows from their previous employment together, and by the two questions posed to her during training. She felt compelled to share information in case something were to happen in the future. She expressed feeling unsafe and wanting to remain distanced from anything that may arise from her sharing information.

…

Preliminary Fact Finding

Open source searches were unable to uncover a Facebook profile for [A.B.]. However, a Twitter account was uncovered (@[A.B.]) and revealed some information of concern to SIAD. [A.B.] has been observed using Twitter to glamourize martyrdom and the insurgency against NATO troops in Afghanistan; express sympathy for the Haqani network, a listed terrorist entity in Canada; and, justify terrorist attacks in the West.

Consider the following:

2011-02-01

#Haqanigroup is started by me and it refers to one the resistance groups in Afghanistan against the US occupation of the country.

2012-05-11

#Osman Fatihi our Facebook friend martyred today in Khost province in face to face fight with US pigs.May Allah accept him. Lucky guy.

2012-06-20

@BBCBreaking sorry to hear about civilian casualties in eastern #Afghanistan but really happy to see #NATO casualties.they deserve it.

2013-03-02

@BBCBreaking we the Afghans want these murderers out of #Afghanistan now. Ppl do not want "sorry". We want revenge. NATO must pay the price.

2013-03-12

@BBCBreaking it is getting better & better by the day. Hope to see more US/NATO sufferings in the coming days.

2013-04-01

@globeandmail the occupation deserves this. We salute the courage of this kid. [it is suspected that [A.B.] tweeted this in reference to the murder (by stabbing) of a US soldier by an

Afghan teen, in Afghanistan]

2013-04-22

@BBCBreaking #Taliban need to secure the release of Mujaheddin in exchange for the foreigners if they refuse they should be executed all.

2013-05-03

@nytimesworld any harm to US occupier army in #afghanistan is a good news. #bostonmarathon. Hope more of this to follow.

…

Identification of risk to employees, information and assets

[A.B.] is deemed to present a risk to CRA employees, information, and assets.

Employees and Assets

Extremist groups have long encouraged their ideologues to launch attacks on targets in the West. Recent violent attacks in North America, Australia, and Europe suggest that individuals radicalized to violence are answering these calls to arms.

As above, [A.B.] has been observed glamourizing martyrdom, expressing sympathy for a listed terrorist entity in Canada, and justifying terrorist attacks in the West. While [A.B.'s] actions to date have not been violent in nature, he has expressed support for the violent actions of others.

Were [A.B.] decide to use/facilitate violence as a means to further the radical agenda which he appears to support, CRA staff and/or infrastructure could be targeted.

Information

The nature of [A.B.'s] position requires him to have access to the CRA systems. The risk is present that [A.B.] may use this information for malicious purposes.

Consider the following:

In October 2014, two Canadian Forces (CF) members were killed on Canadian soil by violent radicals. It is widely believed that both CF members were targeted due to Canada's active participation in the international fight against violent extremism, and that both murderers were inspired by ideology espoused and propagated terrorist organizations based overseas. Also in October (2014), a US Army intelligence bulletin warned US military personnel to be vigilant after ISIS militants called upon supporters to scour

> *social media for addresses of their family members and to "show up [at their homes] and slaughter them."*
>
> *Should [A.B.] continue to have access to taxpayer information, the risk exists that he could use it to gain access to personal information of Canadians, including CF members and law enforcement officials, and use/share it for purposes other than for it was intended.*
>
> ***Potential aggravating factors***
>
> ***Harm to the Agency's reputation***
>
> *Were [A.B.] to carry out/facilitate an act of violence involving CRA employees and/or assets, or were he to use CRA information to facilitate an act of violence, the CRA would suffer serious reputational damage.*
>
> ***Calgary call centre location***
>
> *The Calgary Call Centre site is located at the Airport Corporate Centre which is connected by an indoor walkway to the Calgary International Airport. Employees from the call centre regularly attend the airport terminal to access concession facilities.*
>
> *It should be noted that the fact that the Calgary Call Centre is located at the Airport Corporate Centre was advertised on the public Notice of Job Opportunity, the competition that resulted in [A.B.'s] current employment with the Agency. While there are no indications at this time that [A.B.] sought employment specifically for the purpose of gaining regular access to the location, this possibility cannot be discounted.*
>
> …
>
> [*Sic* throughout]
>
> [Emphasis in the original]

[87] Michael Lafleur was the manager overseeing the investigation into the security concerns involving the grievor. He testified to the contents of the security risk assessment. He interviewed the grievor as part of the investigation and authored the recommendations that led to suspending and revoking the grievor's reliability status.

[88] Mr. Lafleur referenced the employer's policy regarding review for cause of a reliability status, at paragraph 15 – appendix A, that amongst other things cites the safeguarding of CRA information and the exhibiting of behaviour that would reflect negatively on the integrity of the CRA as issues to consider in the review of whether reasonable cause exists to revoke reliability status.

[89] Mr. Lafleur testified that due to the concerns raised about a police investigation

carried out in 2010, he contacted the RCMP to explain the current situation and to ensure that nothing the employer did would interfere in any potential ongoing police matter. He said that the RCMP confirmed some past interest in the grievor but assured him that there were no conflicts with RCMP activities and that the CRA should proceed however it normally would.

[90] Mr. Lafleur reviewed an exhibit containing 303 tweets that the grievor had acknowledged authoring. Mr. Lafleur testified that they had been sourced openly from the Internet, which meant that anyone could access and view them and that no privacy controls had been put in place.

[91] Mr. Lafleur testified that they fit into these four categories:

> i) personal tweets, such as to the mayor of Calgary about civic issues;
>
> ii) tweets on politics and world affairs, often addressed specifically to members of the news media and elected leaders such as President Obama, which constituted the highest volume of his posts;
>
> iii) tweets promoting or justifying violence; and
>
> iv) tweets to or about radicalized individuals and extremist groups listed by the Government of Canada as terrorist organizations.

[92] Mr. Lafleur noted that the grievor had started #Haqanigroup and had mentioned it in four of his tweets and that the Government of Canada has listed a group by that name in Afghanistan as a terror group. His tweet stated that that group refers to "… one [*sic*] the resistance groups in Afghanistan against the US occupation of the country."

[93] Mr. Lafleur noted that the grievor retweeted two posts made by "@ABalkhi" who he testified is an official spokesperson for an Afghan insurgent group that is fighting against NATO forces. An Internet posting from @ABalkhi was tabled as an exhibit. It displays the banner "ISLAMIC EMIRATE OF AFGHANISTAN" and then the words "VOICE OF JIHAD".

[94] Mr. Lafleur also noted tweets by the grievor that used the hashtag #Osman

Fatihi and that stated, "… our Facebook friend martyred today in Khost province in face to face fight with US pigs. May Allah accept him. Lucky guy".

[95] He also pointed to the grievor's retweet, "@zabihmujahid …", and stated that the person referenced in it was one of two official spokespersons for the Taliban in Afghanistan.

[96] Mr. Lafleur testified that with these tweets in mind, and in light of others reproduced earlier in this decision that glamourize martyrdom, appear to promote terrorist groups, celebrate and justify violence, and call for the execution of foreign hostages, he considered the grievor a target for recruitment and radicalization by extremist groups to provide taxpayer data to use in preparing an attack on Canadian soil.

[97] Mr. Lafleur noted that only a few months earlier, two members of the Canadian military had been attacked in separate terrorist-inspired murders on Canadian soil and that the attacker in the incident in Ottawa, then proceeded to attack the Parliament buildings before he was stopped. Mr. Lafleur explained that at that time, security intelligence information warned that terrorist groups were calling on their supporters to seek out military service members at their homes in their homelands and slaughter them. Mr. Lafleur also testified to the fact that recently, a terror-inspired attack had been carried out on a member of the British military as he walked through his community after doing some shopping.

[98] Mr. Lafleur testified that if a terrorist organization had recruited the grievor, he would have had access to the personal information of every Canadian taxpayer, including their home addresses, information about their spouses and children, and details such as daycare addresses, as it is all in the CRA's electronic files. He also testified that members of Canada's armed forces could be identified through their CRA tax files.

[99] In his testimony explaining the preliminary risk assessment, which had deemed the grievor an imminent security risk to the CRA's employees, assets, information, and reputation, Mr. Lafleur pointed to the grievor's tweets in which he celebrated the killing of people and the downing of a plane and called for executing hostages and shooting accused rapists in their heads. Mr. Lafleur drew special attention to the grievor's tweets made approximately three weeks after the terrorist attack on the Boston Marathon in which he stated, "Hope more of this to follow." That attack

resulted in many men, women, and children being killed and maimed. Mr. Lafleur said that in his view, the grievor clearly had violent thoughts.

[100] Mr. Lafleur also testified that in the past, CRA employees were compromised by criminal organizations. One example was when a biker gang recruited and coerced a CRA employee to make unauthorized computer searches to provide the bikers with personal information on people who owed them money, on police officers, and on a lawyer. He explained that that case, from 2009, resulted in former CRA employee, who he referenced by name, being sentenced to prison and that a second, similar case was currently before the courts. He testified that these two cases show that the CRA must be vigilant at all times, to protect Canadians' personal information from criminal misuse.

[101] In his testimony about the proximity of the grievor's workplace to YYC, Mr. Lafleur testified that it is widely known among law enforcement and security services that terrorist attacks are most often based upon surveillance of the target, to assist in planning the attack. He said that this added to his concern of the grievor's location at the CRA offices connected to YYC as he would have had daily access and use of the airport, and his presence there would not have been noticed, as many CRA employees go to the airport for coffee and lunch breaks.

[102] After the preliminary risk assessment, the grievor attended a "Resolution of Doubt" interview, accompanied by his union local president, to respond to the concerns. Mr. Lafleur testified that the grievor was cooperative in the interview and that he had been asked to explain his many tweets. He admitted that he had made them. As for the contents of the many tweets that were discussed, he reportedly explained that he knew that the Haqani group was a known group of ISIS fighters, but he assured the security staff that he did not personally know anyone in it. Mr. Lafleur testified that the grievor also explained that Haqani militants were fighting only in areas occupied by the US military. Therefore, it was unlikely that they had killed any Canadians.

[103] Mr. Lafleur testified that the grievor was asked if he had any interest in YYC. The grievor replied by describing his educational and career development efforts, which had led him to seek employment with the CRA. He stated that a good job had been his goal. YYC had been only coincidental to his job search.

[104] Mr. Lafleur testified that the grievor was asked if he knew any radicalized

people and whether any of them had travelled to Syria to fight with ISIS. He was specifically asked about his tweets about Mr. Fatihi, whom the grievor glorified about being a "[l]ucky guy" to be martyred in battle against "US pigs". Mr. Lafleur testified that the grievor explained that he knew that Mr. Fatihi had been a fighter in an insurgent military group fighting in Afghanistan but that he did not know him personally. He had only copied material from the "Fatihi-Jihad" website and had pasted it into his tweets.

[105] Mr. Lafleur testified that the grievor replied to the foreign-fighters question, volunteering information that he did indeed know one, which he had already disclosed to CSIS. Mr. Lafleur explained that the grievor had mentioned during the interview that he knew one man, named Mustafa, but that he had only greeted that man in passing at the mosque where he worshipped. The grievor had mentioned that Mustafa's real name was Damian (Clairmont). Mr. Lafleur stated that Mr. Clairmont had in fact been a resident of Calgary who had been publicized because he had converted to Islam and through radicalization in Canada had decided to travel to Syria, where it was widely reported that he died in 2014 while fighting with ISIS.

[106] Mr. Lafleur testified that when the grievor was asked if that was the same person he had mentioned, he admitted as much, but that he was otherwise evasive and looked uncomfortable when he was asked more questions about his contacts with Mr. Clairmont or other radicalized individuals. Mr. Lafleur testified that the grievor shared his history of speaking to both the RCMP and CSIS and of how he declined requests to become an informant for them. He said that CSIS interviewed him three times, the last one after several Calgary men had become radicalized and had travelled to Syria to fight with ISIS.

[107] Mr. Lafleur stated that the grievor was interviewed a second time, at which he was able to respond to the findings on the risks he posed. Mr. Lafleur testified that the grievor stated that he had never considered committing an act of violence against anyone and that he is a religious person, whose beliefs would never allow him to commit an act of violence. He said he would call the police to report any efforts by others to recruit him for criminal purposes. He said that he would never steal or misuse CRA data and that he wished it was possible to erase all his social media posts. He stated that he had tried to remove all the posts by shutting down his Facebook and Twitter accounts. He added that he would never use social media again. He pointed out to the interviewers that he had worked for four years at an insurance brokerage,

during which he had access to all the client files, including those of some military and police personnel, and that he never once did anything improper.

[108] Mr. Lafleur testified that at the second interview, the grievor was again asked about knowing Mr. Clairmont. He said that the grievor assured him that he had known Mr. Clairmont only to the level of greeting him in the mosque and that he had had no contact with him outside it. The grievor again assured him that he would never misuse CRA data and that if anyone with criminal intent contacted him, he would report it to the police.

[109] In cross-examination, Mr. Lafleur was asked if the grievor hid any information during his CRA interviews. Mr. Lafleur replied that he did not believe that he did but added that it was of concern that the grievor claimed to know very little about the highly publicized case of Mr. Clairmont and that he used qualifying phrases, such as that he would not support violence **here** and that he would never support the killing of **innocent** people. Mr. Lafleur stated that he was concerned that this possibly meant that the grievor would support the use of violence elsewhere.

[110] The cross-examination also confirmed that in Mr. Lafleur's view, the grievor's most concerning tweets might have been "emotional outbursts" after he became impassioned by reading news from Afghanistan.

[111] The cross-examination also pointed out that the grievor had addressed many tweets to world figures such as US President Obama and CNN and BBC news celebrities but that the employer did not allege that he was a personal acquaintance of those people.

[112] The final security risk assessment report, dated March 3, 2015, noted the many tweets quoted earlier and made many positive observations about the grievor's cooperation and candour during the investigation. The report noted his vehement expression of loyalty to Canada and repeatedly expressed his dedication to honour his public service oath. The report concluded that he presented a very low risk to commit an act of violence within or in proximity to a CRA facility and that it was accepted that the grievor's interest in a CRA career only coincidentally was near YYC.

[113] The Report also concluded that it was impossible to adequately mitigate the risk that at some point in the future a third party might influence or coerce the grievor for sensitive information from the CRA's database, which extremist groups could use to

harm others in Canada. The report found that the grievor's online postings exhibited ideology of a serious security concern, particularly if he continued to exhibit it in the wider community, where radicalized individuals might be interested in befriending him. Finally, the report assessed the risk of significant damage to the CRA's reputation as very low should a security incident arise while he was employed there.

[114] Summarizing his conclusions about the risk posed by the grievor, Mr. Lafleur stated that CSIS's repeated contact with the grievor showed that he either was in contact with or could be contacted by persons of high interest to the authorities. While he concluded that the grievor would not instigate an attack, his many social media posts supporting and justifying violence and the links to extremist propaganda meant that he could be recruited and influenced to misuse personal taxpayer data.

[115] Mr. Lafleur provided a very detailed analysis of the grievor's social media posts and noted that he continued to post content supportive of terrorist and extremist actions even after the RCMP and CSIS had contacted him about it. Mr. Lafleur stated that the details of the grievor's posts were so clearly directed at #Taliban and #ISIS lists of posts, to cite only two of the many examples that also included direct tweets "@" known terrorists, he could easily have been identified as a recruit by terrorists or extremists anywhere in the world.

[116] Mr. Lafleur testified that potential measures were considered to mitigate the risks posed by the grievor's prolific online presence and stated that at that time, data security existed to track file access by employees, but that this was not able to be done in real time. Therefore, if CRA employees were compromised by criminal organizations, the resulting misuse of taxpayer data would be discovered only after the fact. He further testified that given the fact that recent attacks had been carried out on Canadian soil that had been inspired by extremist ideology, it was concluded that another terror-inspired attack could be so catastrophic that the risk of the grievor potentially being recruited or influenced to misuse taxpayer data could not be accepted.

[117] Once that risk determination was made, the grievor's reliability status was revoked. Since that status is a fundamental term of employment, his employment was then terminated.

[118] Two of the five grievances that are before me in this matter cite "Discipline" under the heading of provisions of the collective agreement that is the subject of the

individual grievance. As Article 17 of the collective agreement was not cited in any of the grievor's submissions I will not address that part of the agreement in my conclusions.

IV. Conclusion

[119] In her concluding argument, the representative of the grievor submitted that the actions of the employer were disciplinary and discriminatory. She pointed to the evidence which showed the grievor to be a law abiding Canadian who had been asked to assist CSIS and who had promised to contact the police if was ever contacted by criminals or others with mal-intent. She pointed to the evidence of the employer's own investigators who stated that the grievor was polite and professional and that it was the grievor himself who volunteered the information himself of having once seen Mr. Clairmont who would later travel to Syria to fight with ISIS. She pointed out that the evidence established that there was no relationship whatsoever between the grievor and Mr. Clairmont. It was noted in argument that the mere fact the grievor attended religious worship at this mosque was used against him, thus causing religious based discrimination.

[120] It was also noted that the final risk assessment concluded that the grievor expressed regret for his many Tweets that were at issue and that he had deleted his Twitter account and that it was determined that he was not a potential risk to CRA employees or facilities.

[121] The grievor's representative pointed to the testimony of Ms. Brown who said she was concerned about the grievor's milieu as she argued this actually referred to the fact the grievor was a Muslim and worshipped at a mosque, which was clear evidence of discrimination in her submission. She also pointed to the fact that the employer was initially concerned that the grievor posed a risk to YYC and airplanes as a discriminatory gesture as she suggested this was linked to his being Muslim as well.

[122] The grievor's representative argued that his many tweets that were at issue were simply emotional outbursts in response to his passion about world events and his constant monitoring of news from his homeland. She pointed to his testimony that he did not intend to actually communicate directly with terrorists by Tweeting "@" specific people named in his tweets and that he explained his use of hashtags such as #ISIS and #Bostonmarathon was simply to use tags that were trending that day. She

noted his testimony where the grievor admitted his most concerning tweets, related to celebrating the death of or calling for the murder of people, were not good.

[123] In response to the allegation of discrimination, Counsel for the employer submitted that the evidence established that the actions taken in response to the concerns would have occurred regardless of the grievor's race, creed, colour, or religion. She cited as follows the Board's decision in *Bassett v. Treasury Board (Correctional Service of Canada)*, 2017 PSLREB 60 at para. 59:

> [59] *It is insufficient to meet his burden of proof and to establish a prima facie case of discrimination for the grievor to merely state that the employer knew he had a disability and that anything that upset him would constitute discrimination. A grievor must show a nexus between a prohibited ground of discrimination and the distinction, exclusion, or preference of which he or she complains or in other words that the ground in question was a factor in the distinction, exclusion, or preference. It is not essential that that nexus be exclusive; for a particular decision or action to be considered discriminatory, the prohibited ground need only have contributed to it (*see Quebec (Commission des droits de la personne et des droits de la jeunesse v. Bombardier Inc. (Bombardier Aerospace Training Centre), *2015 SCC 39 at paras. 48 and 52; and* Bodnar v. Deputy Head (Correctional Service of Canada), *2016 PSLREB 71 at para. 142).*

[124] Counsel for the employer argued that the nexus noted in *Bassett* that is required to sustain a discrimination allegation is missing in the evidence before me.

[125] Given the totality of Ms. Brown's testimony, I find her impugned "milieu" comment directly linked to the fact that, as she testified, another Calgary resident, Mr. Clairmont, who had worshipped at the same mosque as the grievor, was in fact radicalized while in Canada. He later joined ISIS and travelled to fight in the Syrian conflict.

[126] I accept the employer's submission that any employees, regardless of race or religion, who exhibited the same disturbing behaviour as the grievor would face the same consequences of having their reliability status revoked for fear of them being risks to Canadians' well-being due to their access to personal taxpayer information possibly being compromised.

[127] This fact made the employer's concern reasonable and rationally linked to the radicalization of a Canadian at the same mosque as the grievor. Therefore, it was not objectionable since it was not motivated by the grievor's race or religion or any other prohibited ground of discrimination.

[128] If I have erred in my conclusion that insufficient evidence exists to find a *prima facie* case of discrimination, in any event, I would conclude that the employer's actions were allowed under s. 15 of the *CHRA*, which allows an employer to rebut a case of *prima facie* discrimination by showing a *bona fide* occupational requirement that justified its action. That analysis includes considering reasonable accommodation to the point of undue hardship.

[129] Counsel for the employer objected to my having jurisdiction to hear the grievance related to the suspension of the grievor's reliability status as she submitted that it was done for valid administrative reasons linked to a risk assessment and the grievor's trustworthiness. Based upon all the evidence I have documented earlier, I accept this submission and conclude that the employer's concerns over the grievor posing a risk were reasonable and validly linked to their duties to ensure employee reliability. This action was therefore administrative and not disciplinary and I am therefore without jurisdiction to consider it.

[130] The employer acknowledged that the Board has jurisdiction (under s. 209(1)(c) of the *FPSLRA* and s. 12 (1)(e) of the *FAA*) to consider the merits of whether an administrative or disciplinary termination was conducted properly and was "… based on a valid reason" (see *Canada (Attorney General) v. Féthière*, 2017 FCA 66 at para. 32). That is also now settled law.

[131] Consistent with its decision in *Féthière*, the Federal Court of Appeal expanded upon the issue of non-disciplinary terminations due to revocations of reliability status in *Canada (Attorney General) v. Heyser*, 2017 FCA 113 at para. 77, where it stated the following:

> *[77] … if the revocation is justified on the basis of the relevant policies then the resulting termination was for cause. In other words … when the employer terminates an employee on non-disciplinary grounds, i.e. because the employee has lost his or her reliability status, the Board must determine if the revocation leading to the termination is justified.…*

[132] In *Heyser*, the Court also cited its decision in *Bergey v. Canada (Attorney General)*, 2017 FCA 30 at para. 23, where it found that "[r]eliability status refers to an

employee's reliability, trustworthiness and loyalty insofar that the employee can be trusted to deal with confidential matters and government property."

[133] The grievor's representative submitted that I should find both *Heyser* and *Féthière* as being persuasive in the grievor's cause. I disagree and distinguish the outcome of both due to their different facts.

[134] The employer reasonably concluded that given the knowledge that terrorist groups were seeking to recruit sympathizers to attack NATO forces at home (which in fact occurred twice, when members of the Canadian military were murdered on Canadian soil), the grievor presented a risk of being recruited to provide assistance to terrorist or extremist groups.

[135] As noted in the employer's in its policy regarding review for cause of a reliability status, at paragraph 15 – appendix A, the safeguarding of CRA information required the employer to avoid the risk posed by the grievor's sympathies with extremist and terrorist groups, which made him vulnerable to recruitment for improper purposes. I also find that the measures required to completely mitigate the risks would have been an undue hardship upon the employer.

[136] I also accept the employer's submission that to do otherwise, meaning to allow a person of any race, creed, colour, or religion who celebrated and advocated for the death of NATO military personnel and the murder of hostages to occupy a position in the federal public service with open access to personal information about every taxpayer, would create an unacceptable risk to the employer's information and reputation.

[137] Given these findings, I conclude that the revocation of the grievor's reliability was for cause and as such, that resulting termination of his employment was justified.

V. Request to anonymize this decision

[138] The grievor testified that he lives in constant fear of being labelled a terrorist. He testified as to how he and his wife have had racist comments directed at them and how she does not wear a hijab due to the racial stigmatization that doing so causes her.

[139] The grievor stated that he fears that due to the racism he suffers from, he will become unemployable if this decision is published identifying him as he is concerned

that the evidence of his social media activity will leave the impression that he is a terrorist sympathizer.

[140] The grievor requested that this decision be anonymized, to protect his identify. His representative submitted that there is no evidence that the grievor is linked to terrorism and that he only made tweets. She argued that if this decision identifies him, it would create a substantial risk that he will be treated as a terrorist sympathizer and that he will face significantly more racism in his life and career.

[141] The grievor relied upon the BCHRT's decision in *LD v. A Health Authority*, 2015 BCHRT 13, in support of the anonymization request. That decision considered a motion to dismiss a claim as having no chance of succeeding at a full hearing on the merits of the case.

[142] The case arose from a hospital patient alleging that treating physicians denied her access to rehabilitation services because of her obesity. The motion to strike the claim failed, and an anonymization order was granted upon the request of the respondent doctors, who claimed that they shared an interest with the complainant in protecting their privacy. They claimed that the yet-unproven allegations jeopardized their professional reputations and relationships with other patients (see paragraphs 65 to 68). Paragraphs 76, 77, and 86 read as follows:

> *[76] Madam Justice Gray noted that the BC Supreme Court has recognized "that the essence of such a balancing process lies in assessing reasonable expectation of privacy, and balancing that expectation against the necessity of interference from the state." (citation omitted) Evidently, the greater the reasonable expectation of privacy and the more significant effects flowing from its breach, the more compelling must be the state objective, and the salutary effects of that objective, in order to justify interference with this right. See* Dagenais, supra. *She then commented that "privacy … once invaded, it can seldom be regained."*
>
> *[77] The compelling state objective of an open and accessible justice system has long been recognized in law. However, the irreparable harm that may flow from the destruction of a person's, particularly a doctor's or other professional's, reputation by unproven allegations of misconduct or, as in this case, violation of a person's human rights, has also been recognized in law. It is this balancing of interests that presents the problem in this case.* ***As in all cases, context is important.***
>
> …
>
> *[86] In every case where the Tribunal has granted*

> *anonymization, the Tribunal has said that the public interest in accessing Tribunal decisions can be served by making the anonymized decision public thereby providing the background, issues, arguments and reasoning without disclosing identities. In* Mr. K v. Z and others, *2012 BCHRT 41, where the respondents opposed anonymization, the Tribunal held that public access could be preserved with anonymization. In that case, the complainant had a mental disability. In* W v. Public Service Agency and others, *2010 BCHRT 201, the Tribunal held that privacy interests are heightened when a party's livelihood could reasonably be affected. (See:* ND, *para. 69) and that there was a risk of a negative impact on the livelihood of the individual respondents and for W in identifying them in the decision.*
>
> [Emphasis added]

[143] Counsel for the employer opposed the request on the grounds of the constitutionally recognized open court principle, which is a cornerstone of Canada's democracy and the rule of law upon which it is based. She noted the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, as authority for the proposition that when considering a request for a confidentiality order, the interest sought to be protected "… cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality" (see paragraph 55).

[144] Counsel for the employer also referred to the Board's decision in *McKinnon v. Deputy Head (Department of National Defence*), 2016 PSLREB 32 at paras. 70 and 71, in which the Adjudicator rejected a request to anonymize a name because there was no evidence of alleged challenges linked to undisclosed health issues. Counsel argued that the grievor claimed mere challenges, which were found insufficient justification. I distinguish that case on its facts as the matter before me presented evidence that the grievor was subjected to racist treatment.

[145] I considered a request to anonymize the decision by the complainant in *Abi-Mansour v. Deputy Minister of Fisheries and Oceans*, 2018 FPSLREB 53, and noted the following jurisprudence:

> …
>
> *[19] … the Supreme Court of Canada has stated in* Dagenais v. Canadian Broadcasting Corporation, [1994] 3 S.C.R. 835 *and* R. v. Mentuck [2001] 3 S.C.R. 442 *that given the common law and* Charter *protection of the open court principle that confidentiality orders should only be granted when:*
>
> *- such an order is necessary in order to prevent a serious*

> *risk to the proper administration of justice because reasonable alternative measures will not prevent the risk; and,*
>
> - *the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.*

[20] In Re Vancouver Sun, *[2004] 2 S.C.R. 332, the Supreme Court reconfirmed the* Dagenais/Mentuck *test, noting that openness is integral to the independence and impartiality of courts, as well as to both the public's confidence in the justice system and its understanding of the administration of justice.*

[21] In considering the open court principle in the context of a quasi-judicial administrative tribunal, the Federal Court of Appeal stated in Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 140 the following at paras. 35-37:*

> [35] In determining whether or not it was appropriate to limit the application of the open court principle in each of these matters, the courts adopted the approach taken by the Supreme Court in *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12 and *Mentuck* (the so-called *Dagenais/Mentuck* test). This test was described in *Toronto Star Newspapers*, at paragraph 4, as follows:
>
> > Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of justice or unduly impair its proper administration.*
>
> Stated another way, the test is whether the salutary effects of the requested limitation of the open court principle will outweigh the deleterious effects of that limitation.
>
> [36] Another important consideration is whether the open court principle applies only to courts or whether it also applies to quasi-judicial tribunals.
>
> *The Agency and the Open Court Principle*
>
> [37] In this application, all parties are agreed that the open court principle applies to the Agency when it

> undertakes dispute resolution proceedings in its capacity as a quasi-judicial tribunal. Support for this proposition can be found in *R. v. Canadian Broadcasting Corporation*, 2010 ONCA 726 (CanLII), 327 D.L.R. (4th) 470, at paragraph 22, where Sharpe J.A. stated:
>
> > [22] The open court principle, permitting public access to information about the courts, is deeply rooted in the Canadian system of justice. **The strong public policy in favour of openness and of "maximum accountability and accessibility" in respect of judicial or quasi-judicial acts pre-dates the Charter:** *Nova Scotia (Attorney General) v. MacIntyre*, 1982 CanLII 14 (SCC), [1982] 1 S.C.R. 175, [1982] S.C.J. No. 1, at p. 184 S.C.R. As Dickson J. stated, at pp. 186-87 S.C.R.: **At every stage the rule should be one of public accessibility and concomitant judicial accountability" and "curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance".**
> >
> > [Emphasis added]
>
> *[22] And finally, I note the Supreme Court of Canada's application of the* Dagenais/Mentuck *test in determining whether a confidentiality order should be granted to a Crown corporation in respect of certain documents. The Supreme Court emphasized the importance of considering whether the request for confidentiality in the court proceedings was necessary to prevent a serious risk to an important interest and whether this outweighs the deleterious effects including the public interest in open and accessible court proceedings* (Sierra Club of Canada v. Canada (Minister of Finance), *[2002] S.C.R. at 53).*
>
> …
>
> *[24] As noted by the respondent in their reply to this motion, all employees who are considering filing a complaint under the* Act *are advised by the Board's* Policy on Openness and Privacy *that, "they are embarking on a process that presumes a public airing of the dispute between them, including public availability of decisions." It further states that, "Board decisions identify parties and their witnesses by name."*
>
> …

[146] On the important matter of the Board's *Policy on Openness and Privacy*, I quote the following, which is available on its website:

> ***Open justice***
>
> *The Federal Public Sector Labour Relations and Employment Board ("the Board") is an independent quasi-judicial tribunal that operates very much like a court when it conducts*

> *proceedings under several labour-related statutes, including the* Federal Public Sector Labour Relations Act, *the* Parliamentary Employment and Staff Relations Act, the Public Service Employment Act *and Part II of the* Canada Labour Code. *The mandate of the Board is such that its decisions can impact the whole public service and Canadians in general. This document outlines the Board's policy on the openness of its processes and describes how it handles issues relating to privacy.*
>
> *The open court principle is significant in our legal system. In accordance with this constitutionally protected principle, the Board conducts its hearings in public, save for exceptional circumstances. Because of its mandate and the nature of its proceedings, the Board maintains an open justice policy to foster transparency in its processes, accountability and fairness in its proceedings.*
>
> *The Board's website, notices, information bulletins and other publications advise parties and the community that its hearings are open to the public. Parties that engage the Board's services should be aware that they are embarking on a process that presumes a public airing of the dispute between them, including the public availability of decisions. Parties and their witnesses are subject to public scrutiny when giving evidence before the Board, and they are more likely to be truthful if their identities are known. Board decisions identify parties and their witnesses by name and may set out information about them that is relevant and necessary to the determination of the dispute.*
>
> …

[147] Having carefully considered the evidence, arguments, and cases submitted by both parties, I am persuaded by the grievor's testimony that he has been subjected to racist treatment (not related to matters raised in this hearing) but in his day to day life in Canada. I accept the submissions of his representative that this decision, if it is published with his full name, could significantly increase the risk of this racist treatment being exacerbated. Given the evidence that he and his wife have already suffered racist treatment, I find this risk is not purely speculative.

[148] In arriving at the decision to anonymize the decision, I considered the risk presented by his representative that the grievor fears that he could be unemployable if this decision identifies him (as he suggests may happen) as a terrorist sympathizer. However, I cannot accept this submission given the very clearly established facts that literally, he was the author of his own misfortune by writing disturbing tweets that were posted on the Internet, open for anyone with a computer or smartphone to read. Therefore, I reject his claims that the risk of economic harm to him justifies

anonymizing his case.

[149] While the Board is very concerned to at all times be open and accountable in its decisions, to enhance confidence in the administration of justice in Canada, on the balance of interests as set out in the *Dagenais/Mentuck* test, I find that in this case, anonymizing is necessary, to prevent a serious risk to the proper administration of justice. And I find that the salutary effects of the order outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression and on the efficacy of the administration of justice.

[150] The grievor attended an open public hearing, and all the relevant details of the hearing and the detailed rationale supporting my findings and conclusion will be published for public edification, to assure the Board's accountability.

[151] Given what I expect will be exceedingly rare instances of a member of the public service making prolific social media postings that are sympathetic to groups considered terrorists by the Government of Canada, I consider this anonymized decision an extraordinary gesture to protect social values of superordinate importance, as stated by Dickson J. in *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175, those being the avoidance of a high probability that otherwise, the grievor would be subjected to racist treatment.

[152] All of Canada benefits from the avoidance of prejudiced behaviour that anyone faces, thus satisfying the requirement set out in *Sierra Club of Canada* that the justification for the anonymization request not simply be of a personal benefit to the party making it.

[153] I also order sealed the photos of the grievor's home and family that appear at Tab 5 of Exhibit 1 in order to protect the personal privacy of the grievor's family.

[154] For all of the above reasons, the Board makes the following order:

VI. Order

[155] The grievances are dismissed.

[156] The three photos at Tab 5 of Exhibit 1 are sealed.

May 16, 2019.

Bryan R. Gray,
a panel of the Federal Public Sector
Labour Relations and Employment Board