Date: 20210416

File: 566-02-11244

Citation: 2021 FPSLREB 43

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

RICHARD BOURDEAU

Grievor

and

TREASURY BOARD
(Immigration and Refugee Board)

Employer

Indexed as
Bourdeau v. Treasury Board (Immigration and Refugee Board)

In the matter of an individual grievance referred to adjudication

Before: Dan Butler, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Mariah Griffin-Angus, Public Service Alliance of Canada

For the Employer: Holly Hargreaves, counsel

Heard by videoconference,
October 20 and 21, November 27, and December 16, 2020.
(Written submissions filed December 15, 17, 18, and 22, 2020.)

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] As described by the grievor, Richard Bourdeau, diplopia is a visual impairment in which the images seen by each eye cannot focus together. The images travel through the optic nerves at fractionally different times, resulting in a form of double vision, a condition known as convergence insufficiency. In some cases, the condition can be cured by surgery. In the grievor's case, the diplopia is inoperable.

[2] In the matter before the Federal Public Sector Labour Relations and Employment Board ("the Board"), the grievor alleges that his employing department, the Immigration and Refugee Board of Canada ("IRBC"), discriminated against him on the basis of his visual disability. In a grievance filed on January 22, 2015, he detailed his allegations as follows:

> *I grieve the Employer's termination of my employment and rejection on probation, which was discriminatory and in bad faith;*
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> *I grieve the Employer's harassment and discrimination against me due to my disability and medical condition;*
>
> *I grieve the Employer's failure to provide me with a harassment-free, safe and healthy work environment;*
>
> *I grieve the Employer's failure in its duty to accommodate my disability and medical condition;*
>
> *I grieve Article 19.01 of the Collective Agreement;*
>
> *I grieve the Employer's violation of my rights (and their obligations) under the Canadian Human Rights Act;*
>
> *I believe the Employer's actions are harassing, discriminatory, willful, reckless, punitive and disciplinary in nature;*
>
> *I grieve all other related Collective Agreement articles;*
>
> *I grieve the Employer violating its delegated authority and abuse of authority.*

[3] The grievor requested the following corrective action:

> *That my termination and rejection on probation be rescinded, and that I return to my employment and be accommodated in the workplace;*
>
> *A declaration that Article 19.01, and the Canadian Human Rights Act was violated;*

> *A declaration that the Employer was discriminatory in its actions against me;*
>
> *Make-whole compensation for all losses in wages, benefits, superannuation contributions, costs and expenses incurred by me as a result of the Employer's violation;*
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> *Damages for pain and suffering experienced by me as a result of the Employer's violation pursuant to the Canadian Human Rights Act;*
>
> *Damages for the Employer's willful and reckless discriminatory practice against me pursuant to the Canadian Human Rights Act;*
>
> *Any further compensation and corrective measures that a Board or Tribunal may deem appropriate;*
>
> *That I be made whole.*

[4] The Program and Administrative Services Group ("PM") collective agreement between the Treasury Board ("the employer") and the Public Service Alliance of Canada ("the bargaining agent") under which the grievance was filed expired on June 20, 2014 ("the PM collective agreement").

[5] Clause 19.01 of the PM collective agreement reads as follows:

> *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.*

[6] Unsuccessful in challenging the IRBC's actions through the internal grievance procedure, the grievor referred the matter to adjudication on June 4, 2015, with the support of the bargaining agent, to the (then) Public Service Labour Relations and Employment Board (PSLREB) under s. 209(1)(a) of the (then) *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; "*PSLRA*").

[7] At the same time, the grievor filed notice to the Canadian Human Rights Commission ("the CHRC") as is required when a grievance raises an issue involving the interpretation or application of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*). On June 22, 2015, the CHRC advised that it did not intend to make submissions in the matter.

[8] Shortly before the hearing, the grievor withdrew a second grievance (FPSLREB File No. 566-02-11245) referred to adjudication under s. 209(1)(b) of the *PSLRA* as a matter involving a probationary termination. The wording of the second grievance appears to have been identical to that of the grievance before me. During the hearing, uncertain about the nature of the grievor's position, I asked whether he intended to argue that the termination on probation was a discriminatory act. He stipulated that the termination on probation was not the subject of litigation. The hearing continued on that understanding.

[9] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations and Employment Board Act* and the *PSLRA* to, respectively, the Federal Public Sector Labour Relations and Employment Board, the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act* ("*FPSLRA*").

[10] After considering the evidence led by the parties and their arguments, I have ruled that the grievor made out a *prima facie* case of discrimination but that the employer provided reasonable accommodation to him, thus offering a non-discriminatory explanation for its actions. On that basis, I dismiss the grievance.

II. Summary of the evidence

[11] In advance of the hearing, the parties filed an agreed statement of facts that reads as follows:

> *1. Richard Bourdeau, the grievor, filed his grievance on January 22, 2015 for: rejection on probation (discriminatory and bad faith); harassment and discrimination relating to his disability; failure to provide a harassment free [sic], safe, and healthy work environment; duty to accommodate; violation of rights under* Canadian Human Rights Act*; and that the Employer's actions were harassing, discriminatory, wilful, reckless, punitive, and disciplinary in nature; and all other relevant collective agreement articles.*
>
> *2. On October 16, 2020, the Bargaining Agent wrote to the Board withdrawing Board file 566-02-11245 (the termination grievance).*

> *3. Mr. Boudreau [sic] was offered a full-time indeterminate PM-06 appointment as a Member of the Refugee Protection Division of the Immigration and Refugee Board ("IRB") on November 22, 2012.*
>
> *4. He filled out an employee employment equity self-identification form, in which he self- identified as having a disability, on November 20, 2012.*
>
> *5. On November 22, 2012, Mr. Bourdeau sent an email to Chrystal Hitchcock, Human Resources Advisor at IRB, asking for accommodations at the mandatory training session for new Members. He requested double spaced documents or materials in electronic format.*
>
> *6. Mr. Bourdeau's Coordinating Member was James Railton from November 27, 2012 until January 6, 2014 when he was transferred to a new team with a new coordinating Member, Diane Tinker.*
>
> *7. The second level was heard on February 23, 2015 and a reply was issued March 13, 2015 by Ross Pattee, Deputy Chairperson, Refugee Protection Division.*

[12] Three witnesses testified, the grievor on his own behalf and Diane Tinker and Ross Pattee on behalf of the employer.

A. The grievor

[13] The grievor's diplopia was first diagnosed during his time as a university undergraduate and then was identified as a disability while he attended law school, where it was accommodated. Subsequently practicing law as a sole practitioner, the grievor employed two clerks to convert documents into a format that he could read. After eight or nine years, the difficulties caused by his condition became more acute. To cope, he sometimes used screen-reader computer software belonging to his wife, who is blind. The effort required to refocus constantly when reading documents was physically exhausting; he had to rest after brief periods of work.

[14] In 2012, the grievor applied for a position as an IRBC board member, classified at the PM-06 group and level. He testified that he disclosed his disability from the beginning when filling out forms and in conversations with representatives from Human Resources. However, when he was offered the position, he was told that there was nothing on his file about his disability. On November 20, 2012, he emailed Mr. Pattee, the hiring manager. He attached an "Employee Employment Equity Self-identification Form", on which he indicated that he was a person with a disability. Two days later, he sent his formal acceptance of the position to Human Resources by email,

indicating that "[a]ccommodations would be double-spaced documents or materials in electronic format".

[15] During a three-week training period, the grievor did receive electronic documents, which he had to convert to double-spaced format in a different font. He found it very difficult to keep up and was not permitted to take the training documents home for further work. Charts posed special problems. He eventually gave up, finding that he "couldn't do it all."

[16] When he started working in his position in the Refugee Protection Division (RPD) of the IRBC in Toronto, Ontario, the grievor found that his office equipment was inadequate. He asked his supervisor, James Railton, to upgrade the equipment to provide more processing power to accommodate his requirements. He had encountered Mr. Railton during training and testified that Mr. Railton was aware "that there's a problem." The grievor stated that the requested upgrade was not made available for over a year.

[17] In February or March of 2013, the grievor told Mr. Railton that he needed a scanner to facilitate optical character recognition (OCR) and JAWS, which is computer-screen-reading software. As Mr. Railton had pointed out that the grievor's typing skills were not up to par, the grievor also asked for Dragon Dictate software.

[18] The grievor recalled that Dragon Dictate was purchased at some point, that JAWS came later, and that he was provided an old scanner. However, because his computer system was not strong enough, it crashed repeatedly.

[19] The grievor acknowledged that the assistant director of his division signed off on his request for an upgraded computer. Shared Services Canada provided two computers of similar vintage to his own that he soon found could not communicate with each other. Moreover, JAWS did not work. In the grievor's words, "It was a disaster."

[20] As a new employee, the grievor was expected to complete three cases per week. Although he occupied an English-language position, the first cases that he was assigned were in French.

[21] In March 2013, the grievor received his first performance evaluation, but it was in a format that he could not read. He replied to the evaluation, indicating that the accommodation that he needed was not in place.

[22] When the grievor received a basic file from a refugee claimant, he had to scan it, save the scanned material in a file, then open the file in JAWS. If the process worked, he needed to move document components around so that he could read the contents of each cell of the claim form. The scanner was old, and its software was poor. Often, the computer crashed. The grievor also experienced eye strain because the documents were in a 12-point font, and the screen was small.

[23] On June 11, 2013, Mr. Railton asked the grievor in an email whether he had been fully accommodated. The grievor testified that he could not recall the circumstances surrounding that email.

[24] On December 3, 2013, the grievor and Mr. Railton exchanged emails about the time the grievor required to complete files. The grievor testified that he was running way behind and that he felt inordinate pressure to get his work done. According to him, management now expected him to complete 5 files per week, but each file on average normally required 14 hours, plus 2 additional hours in his case for scanning and manipulating documents and because of a slow and inefficient printer. Overall, he believed that he was being asked to accomplish 2 weeks of work in 1 week. He could not do it.

[25] In view of his continuing concerns about the grievor's performance and the grievor's belief that he had not been accommodated, Mr. Railton wrote a request on December 4, 2013, for a fitness-to-work evaluation (FWE) by Health Canada. The grievor testified that he was happy to undertake the FWE, hoping that it would help.

[26] In the FWE request, Mr. Railton stated as follows:

> …
>
> *… the RPD provided the member with a larger than normal tiltable monitor, a scanner, Dragon Dictate, JAWS, an ergonomic keyboard, and headphones. When all in [sic] place, the employee agreed that he had been* ***accommodated*** *by 15 April 2013, which is the commencement of his probation date.*
>
> …

> *The employee may still not have been accommodated and this is the reason for this request….*
>
> …
>
> [Emphasis in the original]

[27] Reflecting on Mr. Railton's statement in the request that the grievor was accommodated by April 15, 2013, the grievor recalled that the accommodation had looked good at that time but that later, he found that it did not work because his computer continued to crash due to insufficient power. However, he acknowledged that he had received what he had requested at that time.

[28] In January 2014, management transferred the grievor to a team led by Ms. Tinker for reasons unknown to him. Before the transfer, he met with an information technology (IT) manager from Shared Services Canada to discuss all required accommodations. He testified that the manager said that he understood the problems and that he agreed to "get this and that".

[29] On January 16, 2014, the grievor emailed Ms. Tinker, telling her that his scanner was not communicating with his laptop and that software was not functioning properly. An IT "Service Desk Notification" dated January 30, 2014, noted that the grievor had received a new monitor, which he testified "seemed to resolve the problem."

[30] On January 30, 2014, Ms. Tinker wrote to the grievor to indicate her understanding that he had received all the required equipment and that the equipment was fully functional. She found that the grievor "… [has] been fully accommodated unless [she] hears differently from [him] …." Ms. Tinker stated that the grievor would begin his probationary term as of February 1, 2014.

[31] When asked his reaction to Ms. Tinker's statements, the grievor said that he did not agree that his equipment was working properly and that he felt harassed by being asked constantly whether he had been accommodated. In emails from January 30 and 31, 2014, he confirmed to Ms. Tinker that he had received the required equipment but that there were still "glitches and … bugs" in the operation of the software. He related that he could not accept any suggestion that he was fully accommodated. While he had the tools, he had not received adequate training on how to use them.

[32] Nonetheless, the grievor outlined that there was “great improvement” after February 2014 and that he was catching up on his reasons for a few weeks. He characterized his relationship with Ms. Tinker as “nothing extraordinary” and stated that he had interesting discussions with her that went nowhere and that he believed that she did not understand his problem.

[33] In July 2014, the grievor exchanged emails with Thomas Vulpe, the new assistant deputy chairperson for the Toronto Region, about scheduling. He disputed the schedule of 3.5 cases per week that had been recommended because he needed more time than average to complete files. He outlined that the recommendation assumed that all cases could be completed in 1 day but that that was rarely the case. He indicated to Mr. Vulpe that the schedule was not workable.

[34] The grievor reported that, from later conversations with IT personnel, he understood that a predecessor IT manager had not been prepared to accommodate him, although he could not recall whether he reported that fact to management. He testified further that he continued to receive documents in a format that he could not read unless he scanned them. The same problem occurred in training sessions, during which he felt embarrassed, left out, and unable to benefit from the training opportunities.

[35] In cross-examination, the grievor confirmed that in response to his accommodation request for double-spaced documents or material in electronic format, he did receive documents in electronic format. When asked whether he received what he asked for, the grievor replied in the affirmative.

[36] The grievor reconfirmed that he requested updated equipment when he found the old equipment inadequate after the training ended. When asked whether his supervisor, Mr. Railton, had acted on the request, the grievor answered that he assumed so. The grievor also confirmed that he was provided Dragon Dictate after asking Mr. Railton for help securing it in August 2013.

[37] In the same request to Mr. Railton, the grievor asked for news about securing OmniScan software. He could not recall whether it was provided at that time, but when he was asked whether it was installed when his probation started months later, he said, “No.” When shown an IT Service Desk Notification dated January 29, 2014, the grievor agreed that OmniScan was in place by January 2014 but related that he

experienced problems using it. He recalled that the problems were then resolved with IT's assistance.

[38] When asked whether national documentation packages, which described conditions in countries, were available online, the grievor confirmed that they were available in electronic format. When asked further to confirm that as a result, there was no need to scan the packages, the grievor stated that he never tried. He then said that his memory was not clear on the point but that he might have experimented at home with the documents for a few weeks. He also stated that the documents were in "PDF" format, did not have the necessary "tags", and did not work.

[39] In February 2014, Diane Forsey, one of the grievor's mentors, asked him whether assigning a staff person to assist with scanning would help him with his decision writing. He confirmed that subsequently, two assistants were tasked to help with his scanning. However, because they were not dedicated to him, they could assist him only when they were available. He also stated that he was not given any time to train them on how to use the scanner with the specific software that he used. Because they were not always available when he needed them, he did not use them.

[40] When shown a December 2013 equipment request form for a new printer-canner, the grievor agreed that management did provide the specified new equipment as well as, in the same period, a more powerful laptop. He reconfirmed receiving Dragon Dictate earlier in the year as well as the requested JAWS software. He also received a DVD player so that he could listen to recorded hearings. He did so a few times but had a DVD player built-in to his office computer for the same purpose.

[41] The grievor agreed that he requested a second computer monitor for his office in September 2014 and that he received it the same day. He also confirmed undergoing an ergonomic assessment and being provided an ergonomic keyboard, headphones, and a chair. Further, when he requested temporary accommodation in the form of permission to work at home, where his wife had most of the equipment that he required, Mr. Railton approved it.

[42] In an email dated January 31, 2014, to Ms. Tinker, the grievor agreed that he had received "… all the equipment necessary to address [his] accommodation needs" but indicated that he needed time to resolve software issues. He testified that JAWS is very complicated, that he knew the basics, but that he could not manipulate it adequately

and needed professional training. He confirmed that his request for two weeks to "work out those bugs" was granted but in his words "not without a fight" and that that period turned out to be four weeks.

[43] The grievor agreed that IRBC lawyers provided him retraining in 2013, which consisted of a review of the materials in the basic three-week training course, of legislation, and of how to write decisions.

[44] The grievor's performance review and assessment form for April 1, 2013, to March 31, 2014, indicated that he had 23 outstanding decisions to write when he joined Ms. Tinker's team and that those cases originated from the Caribbean islands, were not complex, usually involved single issues, and were presented in English. He agreed that the reduced schedule of 2 cases per week, referenced in the assessment, represented an accommodation of his situation. He also agreed that he had been given time without hearings to work on his decisions, as referenced in the assessment, although he believed that it had been 1 month rather than the 6 weeks stated in the document. By the end of February or early March, he had completed all but 1 of the decisions.

[45] The grievor qualified as accurate the statement that he did not assume a full hearing schedule until June 2014. However, he stated that he did not know whether it was true that he had not been assigned to all the countries covered by Ms. Tinker's team. When asked whether it was true that he was taken off the hearing schedule four times in 2014 to catch up on decision writing, the grievor replied in the affirmative.

[46] In his examination-in-chief, the grievor mentioned that Ms. Tinker wanted him to wear a tie at work. When asked about this request in cross-examination, he elaborated that Ms. Tinker had asked him to be properly dressed by wearing a tie. He indicated that he was not the only male Board member who did not wear one and that he felt that the request was discriminatory. He further stated that he has always questioned what comprises appropriate business attire.

[47] The employer sought clarification about when the grievor believed his probation began. He answered that he did not have the relevant documentation but that he thought that February 27, 2014, was the correct date.

B. Ms. Tinker

[48] Ms. Tinker is currently a part-time member of the RPD but was a full-time coordinating member (CM) there from November 2013 to January 2015. A CM's role is to manage a team of members, help them reach performance requirements, schedule their work, answer their questions, ask about outstanding reasons for decision, approve leave, and attend management meetings. As of January 2015, Ms. Tinker had been a member for 11.5 years and a CM for almost 6 years, always in the Toronto office.

[49] Ms. Tinker outlined that she met the grievor when he joined the IRBC in November 2012 but that she became his CM only in January 2014 when she replaced Mr. Railton. She explained that the grievor was transferred to her team because the assistant deputy chairperson knew that he was struggling and thought that having more experience, she would be better able to help him than was Mr. Railton, who was new to his CM position.

[50] According to the witness, members in the RPD receive claims for refugee status, review the files, usually hold hearings, and then decide whether the claimants are "convention refugees" or need protection. The decisions may be oral or written.

[51] Members at the PM-06 level are expected to complete 3.5 cases per week. When the determination is in favour of the claimant, 80% of the decisions are rendered orally, and only 20% are rendered in writing. For decisions that are reserved, 80% are to be issued within 20 days of the conclusion of the hearing, and the remaining within 30 days, unless otherwise agreed with management. For those decisions involving Caribbean countries — to which the grievor was assigned — typical hearings lasted 2 hours, and decisions normally were 3 to 4 pages in length. Some decisions involving more complicated issues could be as long as 30 pages, but Ms. Tinker indicated that the grievor was not assigned decisions of that type.

[52] Ms. Tinker indicated that the grievor had 23 outstanding decisions when he transferred to her team. Additionally, one final decision was not yet issued. The outstanding decisions involved short hearings without interpretation requirements in which individual claimants brought forward single, non-complex issues. Given that situation, Ms. Tinker took the grievor off the hearing schedule for 6 weeks to catch up with his decision writing and assigned him a mentor, Ms. Forsey. When he indicated

that he needed certain equipment, she agreed and requested what had not already been provided. She referenced an email exchange with IT dated January 14, 2014, to substantiate that she took action in response to the grievor's requests.

[53] On January 15, 2014, Ms. Tinker met with the grievor and Ms. Forsey. She summarized their conversation in meeting notes. She related that the grievor said that he needed a driver for his scanner and for JAWS. She followed up with IT. She also told the grievor that she could have assistants trained to help him with scanning, if he needed assistance. In a second conversation the next day, Ms. Tinker's meeting notes indicate that the grievor stated that he was having difficulty keeping track of his decisions, that he had too much going on, and that he believed that he was not being accommodated at that time.

[54] In an email dated January 22, 2014, the grievor asked Ms. Tinker what she meant during a conversation the day before when she said that he should be "proactive". Ms. Tinker testified that her intent was to remind him that he needed to tell her or to contact IT when his scanner was not working. She also wanted him to be proactive about three cases that Legal had referred back to him and noted that he was responsible for tracking his decisions.

[55] Ms. Tinker confirmed that she instructed IT to provide the grievor with whatever equipment he needed to assure his accommodation and to verify that the equipment was functioning properly. She checked back with IT on several occasions, when there were problems, and arranged for IT to fix those problems.

[56] In an email dated January 31, 2014, to a consultant hired by the assistant deputy chairperson, Ms. Tinker disputed a claim by the grievor that he had requested but had not been provided training. She wrote that he had not requested training and that he had told her that he had worked with the equipment in question at home. She also wrote that his claim that his mentor had characterized his reasons as fine was a lie.

[57] On February 3, 2014, the IT team leader responsible for the Toronto office wrote to Ms. Tinker and others. The leader stated that IT was doing its best to accommodate the grievor, indicated the equipment that had been provided and the adjustments that had been made, and committed to contacting the grievor regularly in person and by email to see if he was satisfied.

[58] On the same day, Ms. Tinker met with the grievor. Her meeting notes indicate that at the meeting, he agreed to a start date of February 17, 2014, for his probation period. She said that she would add Pakistan to the list of countries whose cases would be assigned to him starting March 1, 2014, and that he would hear three claims per week. Ms. Tinker testified that cases from Pakistan were generally not complex but involved hearings of normal rather than shorter length.

[59] Ms. Tinker discussed the grievor's work with his mentor, Ms. Forsey, on March 18, 2014. Her meeting notes indicate that "things were working well" with his equipment and that he was more organized. Ms. Tinker added Turkey and Syria to the grievor's list of countries.

[60] In an email dated April 14, 2014, IT indicated to Ms. Tinker that it was "staying on top" of the grievor's needs and that it gave his calls high priority.

[61] After his arrival at the Toronto office, Mr. Vulpe asked, on July 16, 2014, to speak with Ms. Tinker about the grievor. He did not agree with the grievor's claim that it took 10 hours to complete a file and was surprised by the grievor's comment in an email exchange with him that the grievor had problems with his accommodation. Ms. Tinker testified that the cases assigned to the grievor generally required 5 to 6 hours if they were not complex. Caribbean claims often required only 4 hours from start to finish.

[62] On December 16, 2014, Ms. Tinker wrote to Mr. Vulpe about the grievor's performance. She reported that the grievor wanted his mentor to review all his reasons, that he was finding it hard to keep up, that he was not using the assistants to help him with scanning, that he felt that his vision was deteriorating, and that he was pushing himself too hard. Ms. Tinker informed Mr. Vulpe that she had taken the grievor off the schedule at least three times, which she could not continue to do. Reflecting on the email, Ms. Tinker testified that removing the grievor from the schedule was unfair to other members. She emphasized that he had been fully accommodated since February 2014.

[63] Ms. Tinker met with the grievor on December 29, 2014. He asked her for more direction on a weekly basis. She replied that he was receiving weekly direction from her or Ms. Forsey. Finding that he was not making the necessary progress in a follow-

up action plan, on January 8, 2015, she told him to concentrate on writing decisions. To assist him, she removed four files scheduled for hearing the following week.

[64] In a note to Mr. Vulpe drafted January 15, 2015, Ms. Tinker outlined her concerns about the grievor's performance. She reported his stated difficulty keeping a full schedule. In response, she had removed him from the schedule four times and did not assign him all of the countries for which Team 3 was responsible. She detailed a series of deficiencies in his work and summarized that while he had been fully accommodated since February 17, 2014, he had not reached the level of competency required for his position.

[65] In cross-examination, Ms. Tinker agreed that she was aware as of the grievor's transfer to her team that he was having problems with technical adaptations that did not work all the time. She also agreed that some of the software he required, including JAWS, was sophisticated and that people like her would not know how to use it. She accepted that without technical adaptations, work would be difficult for him.

[66] As for her conclusion in her January 30, 2014, note to the grievor that he had been fully accommodated as of that date, Ms. Tinker accepted that full accommodation was not provided before February 1, 2014. She agreed that to her, full accommodation meant that the technology was working. When asked about any other form of accommodation, she replied, "That's all he asked for."

[67] Ms. Tinker recalled that at the end of January, the grievor reported that there were still "bugs" in the system but noted the report dated January 31, 2014, from IT, which indicated that all the necessary hardware and software were working fine.

[68] As for her earlier testimony that the grievor had not asked her for training, Ms. Tinker agreed that he had reported making requests in his email of January 31, 2014. When asked whether he had ever received the requested training, she replied that she did not know and that IT would have provided it. When asked further why she never followed up, Ms. Tinker stated that she followed up with IT to assure that the grievor received the equipment he needed and that it functioned. She also outlined that in an email to Conrad Leger, a human resources consultant, she asked for advice because it was her first time dealing with accommodation requirements involving computer hardware and software. She wanted to make sure that she was doing things correctly to ensure a successful accommodation.

[69] When Mr. Leger replied to Ms. Tinker's email, he advised her to "keep calm". When asked by the grievor's representative whether that meant that Ms. Tinker's relationship with the grievor was fraught, she answered in the negative but accepted that it was odd for someone to tell her to keep calm.

[70] Ms. Tinker could not recall whether the grievor had specifically told her that it took two hours per file for scanning but agreed that she was aware that scanning took time. She also could not recall whether he had informed her that his scanner and equipment jammed frequently but stated that if he had informed her to that effect, she would have asked IT to assist. With respect to the assistants that she had designated to help the grievor with scanning, Ms. Tinker agreed that they had other duties and that they were not exclusively dedicated to helping him. She was not aware that as he stated, they were often unavailable, but did recall him telling her that he never used them. She disputed the suggestion that the assistants were not trained in the use of the scanner.

[71] When asked whether she was unsympathetic when she mentioned in her email of December 16, 2014, to Mr. Vulpe the grievor's claim that his vision was deteriorating and that he was pushing too hard with his decisions, Ms. Tinker stated that she could not agree. She acknowledged that she did not say anything in the email about the impact of the vision issue other than that she had taken the grievor off the schedule to catch up. She could not recall asking him to clarify his comment about his vision.

[72] In an earlier email dated September 14, 2014, and copied to the witness, an IT representative mentioned a statement by the grievor that his eyes were straining because his computer screen was too small. When asked whether she followed up on it, Ms. Tinker stated that she could not recall. She agreed that she never filled out a Health Canada FWE form for the grievor but stated that doing so was never suggested to her. She also never asked the grievor for additional doctor's notes about his disability; nor was she familiar with diplopia.

[73] When probed further about the eye-strain issue, Ms. Tinker stated that she did not take steps about it despite the grievor mentioning his deteriorating vision and his need for extra time because no one, including him, suggested additional steps to her. While she did not ask anyone for help managing the grievor's eye strain, she

emphasized that the organization had assisted him with equipment and with his requested updates.

[74] When confronted with the assertion that she did not believe that the grievor's accommodation needs had changed over time, Ms. Tinker replied that they had changed and that for example, management provided a second computer monitor and updated software in response to the requirements that he identified. When pressed further, Ms. Tinker insisted that the grievor had advised her about all the necessary equipment and technical requirements to meet his accommodation needs.

C. Mr. Pattee

[75] Mr. Pattee currently serves as an assistant deputy minister at Crown-Indigenous Relations and Northern Affairs Canada. From November 2012 to January 2015, he was the deputy chairperson of the Refugee Protection Division (RPD), which is one of four divisions within the IRBC. He was hired to set up the new Refugee Protection Program that came into force on December 15, 2012, requiring him to ensure that a full staff of trained adjudicators was prepared to start work on December 16, 2012. He subsequently hired every RPD employee on strength when its work began.

[76] Three assistant deputy chairpersons reported to Mr. Pattee, each responsible for one of three regions (Vancouver, Montreal, and Toronto). In turn, Mr. Pattee reported directly to the chairperson of the IRBC. In Toronto, Assistant Deputy Chairperson Karin Michnick supervised RPD work through 7 CMs, one of whom was Ms. Tinker. Ms. Tinker's team included 10 to 15 refugee adjudicators.

[77] Mr. Pattee first interacted with the grievor by telephone, likely on November 20, 2012. The grievor was the last decision maker hired by Mr. Pattee before training began on November 27, 2012. Mr. Pattee encountered him in person for the first time at the training session.

[78] The witness testified that his relationship with the grievor was the same as his relationship with any of the other adjudicators, all of whom were several levels removed from him in the organization's hierarchy.

[79] From the beginning, Mr. Pattee was well aware of the grievor's visual impairment. Mr. Pattee received an internal email on November 20, 2012, asking him to confirm that the grievor had not declared himself as belonging to an employment

equity group. Mr. Pattee brought up the matter in his call with the grievor. Subsequently, Mr. Pattee forwarded to Human Resources the Employment Equity Self-identification form provided by the grievor.

[80] Referring to the formal offer of employment to the grievor dated November 22, 2012, which he accepted, Mr. Pattee noted the IRBC's commitment stated in the letter to a "skilled and diversified workforce" and to complying "with obligations under the *Employment Equity Act*". Mr. Pattee testified that he wanted decision makers in the RPD who reflected the applicants who appeared before adjudicators and that he felt that lawyers would be useful. Two attributes of the grievor were attractive to Mr. Pattee; i.e., his disability and his being a lawyer.

[81] In one of his regular walkabout visits to the Toronto office during the first year of the program, Mr. Pattee encountered the grievor, who asked him into his office. According to Mr. Pattee, the grievor was excited to show him his elaborate computer setup. Mr. Pattee characterized the grievor as "exuberant" about the technology and systems and stated that the grievor told him that he would be able to do the job with the hardware and software provided to him.

[82] The witness outlined that he was briefed constantly about the accommodations provided to the grievor — in his words, "dozens or hundreds of times" — including in bilateral meetings with Ms. Michnick and Ms. Tinker and in discussions with his labour relations advisors. The accommodations provided for the grievor were extensive and had all been put in place in consultation with him. Included were two large computer screens, an ergonomic keyboard and mouse, software (such as Dragon Dictate, JAWS, and OMNIScan), and special printers and scanners. Further, the grievor was given the opportunity to take the three-week training session for a second time because he was struggling to keep up; his hearing caseload was reduced, he was taken off the schedule several times, he was provided a senior, experienced mentor on almost a full-time basis, and administrative assistants were assigned on standby to assist him with photocopying and scanning documents. In Mr. Pattee's opinion, every effort was made to help the grievor succeed.

[83] When asked about Health Canada FWEs, the witness indicated that he had used them two or three times as a tool that provided an independent medical review of a work situation when there was a concern about an employee's ability to do the job. In

the grievor's case, Mr. Pattee felt that a FWE was not required because his accommodation needs were known exactly, through continuing interactions with him.

[84] Mr. Pattee acknowledged that it took time to secure what the grievor needed, which was also why the employer extended his probation until he was fully accommodated. The normal probation period is one year, but that did not apply in his case because he was not accommodated by the end of one year.

[85] Mr. Pattee stated that on a number of occasions, he reminded IT that accommodating the grievor was a high priority. He was later troubled to learn that a particular IT manager was not prepared to arrange the necessary accommodations, but what an IT manager thought did not matter. Accommodation was the responsibility of line management. The witness reiterated that he had made it abundantly clear throughout that the employer would do everything to assist the grievor.

[86] Why did the grievor's probation period start on February 17, 2014? Mr. Pattee answered that it took until then to accommodate the grievor and that he confirmed at that time that he was accommodated.

[87] Mr. Pattee described the "Member Capacity Exercise" held on October 1, 2013, in the Toronto office to address productivity challenges in the IRBC's central region and to find ways to reach performance targets. The exercise broke down activities by the hour and minute in an effort to identify initiatives to save time, such as transferring some adjudicator duties to administrative support staff, to allow the adjudicators to concentrate on hearings and decision writing. According to the witness, 100% of the Toronto office participated.

[88] In cross-examination, Mr. Pattee confirmed that he knew about the grievor's disability before the grievor started to work and that he informed his team about it. He indicated that the team was not fully aware of the grievor's accommodation needs at that time. The first concrete accommodation measure taken was to provide him with a separate laptop loaded with training documents in double-spaced format. Other measures took longer. The witness described it as an evolutionary process undertaken in consultation with the grievor.

[89] When asked whether one specific person was designated to discuss accommodation with the grievor when he began, Mr. Pattee answered that that was not

entirely the case but that the person leading the training component took a main role in the beginning.

[90] Concerning the length of time taken to accommodate the grievor, Mr. Pattee attributed the need to work on the necessary technology and software as the primary source of the delay.

[91] The witness testified that he was aware that the grievor asked Ms. Tinker for specialized software training but stated that he did not know that the grievor did not receive it.

[92] Did Mr. Pattee know that the scanning and photocopying assistants were not assigned to the grievor on an exclusive basis? The witness agreed that it was not a full-time assignment but indicated that he was never told that the arrangement was unsatisfactory. He was also unaware that the assistants were not trained in the use of the scanners and printers.

[93] Mr. Pattee repeated that he was troubled about the report of an IT manager not cooperating in the accommodation effort, and he followed up with his management team. He reiterated that it was the responsibility of line management, not IT, to make accommodation happen.

[94] The witness testified that he did not recall that Mr. Railton filled out the FWE form or knew that Mr. Railton thought that an FWE would be useful. He repeated that an FWE is helpful if the issues and needed measures are unknown but that the grievor's situation was known from the outset.

[95] In re-examination, Mr. Pattee confirmed that he first came to know about the report concerning the IT manager at the second-level grievance hearing after the grievor's termination and that he wrote in his March 9, 2015, reply that he would follow up. When he was asked about when he followed up, he stated that he went back to his managers at the time and asked them to look into the situation.

III. Requests for accommodation

[96] The Board granted an accommodation request from the grievor's representative that it provide the services of a simultaneous transcriber during the videoconference proceedings.

[97] On December 10, 2020, the Board received a request from the bargaining agent that it allow the grievor's representative to submit closing arguments in writing, as well as any reply arguments, as a further accommodation measure. The employer objected to proceeding by way of written submissions, noting that the parties had earlier agreed to proceed by way of oral arguments.

[98] I granted the new accommodation request with respect to the final argument phase of the hearing on December 16, 2020. Nonetheless, the employer's concern about deviating from the previously agreed procedure and its stated reasons that it would be difficult for it to proceed in writing were reasonable. Therefore, on my direction, the Board issued the following instructions:

> …
>
> *The grievor's representative shall submit her written closing arguments to the Employer and to the Board no later than noon on Tuesday December 15, 2020.*
>
> *The grievor's representative shall attend the hearing on Wednesday December 16, 2020 to answer any questions that the Board Member may have about her written closing arguments and to receive the employer's oral arguments.*
>
> *The employer's representative will provide her closing oral arguments as well as oral rebuttal arguments at the hearing.*
>
> *The grievor's representative shall submit her written arguments in reply, if any, no later than Wednesday December 23, 2020.*

[99] On the eve of the final December 16, 2020, hearing day, the bargaining agent's representative requested additional accommodation in the form of permission to answer any question posed by the Board about her final argument in writing after being allowed a brief pause in the proceedings. Circumstances did not arise on December 16, 2020, requiring that I rule on the request.

IV. Timeliness

[100] As noted above in response to a question that I posed during the hearing, the grievor's representative stipulated that the grievor was not litigating his rejection on probation. That stipulation raised in my mind a possible issue of timeliness.

[101] The grievor filed his grievance on January 22, 2015. The first allegation in the grievance reads, "I grieve the Employer's termination of my employment and rejection on probation, which was discriminatory and in bad faith". The grievor identified

January 21, 2015, as the date on which the matter giving rise to his grievance occurred. The letter of rejection on probation that he received is dated January 20, 2015. The grievor also added in handwriting the words "ongoing & continuous" when he specified "January 21st, 2015," as the triggering date for his grievance.

[102] Clause 18.15 of the PM collective agreement requires an employee to file a grievance no later than the 25th day "… after the date on which the grievor is notified or on which the grievor first becomes aware of the action or circumstances giving rise to the grievance."

[103] The sequence of events reasonably suggests that the precipitating action giving rise to the original grievance was the rejection-on-probation letter. As such, there was no reason for the employer to object based on timeliness then or subsequently. Neither the Board nor, apparently, the employer knew that the rejection on probation was not before the Board until some time into the hearing. While the grievor's withdrawal shortly before the hearing of a second grievance referred to adjudication as a matter involving a termination of employment might have presaged that result, nonetheless, the remaining active grievance clearly identified the rejection on probation as a subject of litigation.

[104] Given the grievor's stipulation during the hearing that the rejection on probation was **not** at issue, it seemed to me appropriate to ask what action or actions comprise the discrimination that **was** the subject of a timely grievance filed on January 21, 2015. With that possible issue in mind, I asked the parties for their submissions on whether I needed to address an issue of timeliness in this decision.

[105] In his written final argument, the grievor specified that the two following issues comprise the discrimination in breach of the PM collective agreement:

> *The Employer took far too long to implement accommodations which had a significant impact on Mr. Bourdeau's ability to perform his job as a Member.*
>
> *The Employer did not consider how the technological failures and the length of time required to make Mr. Bourdeau's files accessible would impact his work.*

[106] In response to my question about timeliness, the grievor submitted as follows:

…

> *The grievance, filed in January 2015, states that "I grieve the Employer's… discrimination against me due to my disability and medical condition", "I grieve the Employer's failure in its duty to accommodate my disability and medical condition", and "I grieve Article 19.01 of the Collective Agreement". These allegations of discrimination were raised at the same time as the rejection on probation but contain distinct allegations regarding the entirety of his experience at Immigration and Refugee Board.*
>
> *The probationary period was deemed to have started in February 2014 but Mr. Bourdeau testified to his experiences after that date. Ms. Tinker, for instance, testified to a conversation she had with Mr. Vulpe regarding Mr. Bourdeau's concerns regarding his eyestrain and workload in December 2014. Mr. Bourdeau testified that his lack of accommodation continued on until January 2015, when he filed his grievance, which means the discrimination spanned the entirety of Mr. Bourdeau's time at the IRB. It was reoccurring and on-going [sic], which means the breach of the collective agreement was continuous.*
>
> *As previously mentioned in the Bargaining Agent's written submissions, the Supreme Court of Canada has ruled that discrimination can be subtle which "rises in the aggregate to the level of systemic discrimination…" [*BCGSEU*, 29 at page 17]*
>
> *In addition, the Employer did not raise any concerns or objections about the timing during the hearing. The four days set aside over almost two months would have allowed plenty of time for any objection to be raised.*
>
> …

[107] The employer replied as follows:

> …
>
> Canada (Attorney General) v. Duval[1] *sets out the two concepts of timeliness. As per the second concept in* Duval*, a grievance alleging a failure to accommodate is a continuing one as the alleged failure re-occurs [sic] each day.*[2]
>
> *The Employer recognizes that in a continuing grievance, the failure to grieve the first time the breach occurs does not render the grievance inarbitrable.*[3] *Rather, the time limit in the grievance procedure instead serves to limit the period of time in respect of which damages may be awarded, as per* National Film Board of Canada v. Coallier.[4] *…*

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[1] *2019 FCA 290 (*"Duval"*), Employer's Book of Authorities at Tab 1 at paras 27–30.*
[2] Duval *at para 30.*
[3] Duval *at para 31.*
[4] *[1983] F.C.J. No. 813, 25 A.C.W.S. (2d) 104 (Fed. C.A.) [*Coallier*] as cited in* Duval *at para 31.*

…

[108] The text of the grievance can be reasonably read as challenging allegedly discriminatory behaviour on the part of the employer that spanned the grievor's time at the IRBC. That he added the handwritten words "ongoing & continuous" on the grievance form confirms that intent. Although he chose not to litigate the rejection on probation at the hearing, dropping that element of the grievance did not disturb other allegations against the employer's actions outlined on the grievance form.

[109] The employer does not dispute the grievor's depiction of the other elements of his grievance as reoccurring and ongoing. While it is open to the Board to disagree when parties commonly characterize a dispute as involving a continuing matter, I find no reason to in this case.

[110] I have chosen not to reopen the timeliness issue, as the grievance is best determined on other bases.

V. Summary of the arguments and analysis

[111] These reasons depart somewhat from the more standard format of Board decisions. Rather than summarizing the parties' arguments in their entirety before proceeding to an analysis of the issues, I will proceed directly to the principal issues, reporting the parties' relevant submissions on each issue in turn. For the sake of accuracy and completeness, I have reproduced virtually all of the grievor's written submission of December 15, 2020, and the employer's aide-memoire submitted on December 17, 2020, the text of which the employer read as its oral argument.

A. Framework for analysis

[112] According to s. 226(2) of the *FPSLRA*, the Board may interpret and apply the *CHRA* to matters referred to it for adjudication. A collective-agreement grievance that alleges a breach of the "no discrimination" clause imports into the analysis provisions of the *CHRA*, as follows:

…

> ***Prohibited grounds of discrimination***
>
> ***3 (1)*** *For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and*

> *conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.*
>
> …
>
> ***Employment***
>
> ***7*** *It is a discriminatory practice, directly or indirectly,*
>
> ***(a)*** *to refuse to employ or continue to employ any individual, or*
>
> ***(b)*** *in the course of employment, to differentiate adversely in relation to an employee ….*
>
> …
>
> ***Exceptions***
>
> ***15 (1)*** *It is not a discriminatory practice if*
>
> ***(a)*** *any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a* ***bona fide*** *occupational requirement ….*
>
> ***(2)*** *For any practice mentioned in paragraph (1)(a) to be considered to be based on a* ***bona fide*** *occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a* ***bona fide*** *justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.*
>
> [Emphasis added to ss. 15(1)(a) and (2)]
>
> …

[113] The basic analytical framework for a case featuring an allegation of discrimination is well established. In the first instance, the grievor bears the burden of establishing a *prima facie* (or "on first view") case of discrimination. A *prima facie* case is one that covers the allegations made and that if believed, comprises a complete and sufficient justification of a finding in favour of the grievor; see *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 SCR 536 ("*O'Malley*"), and *Ontario Human Rights Commission v. Etobicoke*, [1982] 1 SCR 202.

[114] If the analysis finds a successful *prima facie* case, the employer's burden is to provide a non-discriminatory defence, on the balance of probabilities, or to rely on an exception under s. 15(1) of the *CHRA*.

[115] Following the case law, I adopt this two-stage analysis:

1. Has the grievor made out a *prima facie* case of discrimination?

2. If so, can the employer provide a non-discriminatory defence for its actions?

[116] If the answer to the second question is "no", the analysis turns to a final issue:

3. What corrective action is appropriate?

B. Has the grievor made out a *prima facie* case of discrimination?

[117] In *Moore v. British Columbia (Education)*, 2012 SCC 61, the Supreme Court of Canada sets out the three-part test for establishing a *prima facie* case of discrimination, which I will refer to as the *Moore* test. In its aide-memoire, the employer described the approach in the following terms:

…

> • ***Moore v British Columbia (Education)**, 2012 SCC 61, [2012] 3 SCR 360 at para 33 sets out the test for* prima facie *discrimination (Tab 6 of the Employer's Book of Authorities). According to* Moore*, the grievor must demonstrate (1) that he has characteristic [sic] protected from discrimination under the* Canadian Human Rights Act*; (2) that he experienced an adverse impact with respect to his employment; and (3) that the protected characteristic was a factor in the adverse impact. The grievor must show a nexus between a prohibited ground of discrimination and the distinction, exclusion or preference of which he complained of. In other words that the ground in question was a factor in the distinction, exclusion or preference.*
>
> [Emphasis in the original]

[118] The grievor, relying on *Moore*, also referred to the Supreme Court of Canada's decision in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employe□s de l'Hôpital ge□ne□ral de Montreal*, 2007 SCC 4, as follows:

…

> *The Bargaining Agent bears the burden of proving a* prima facie *case of discrimination. The appropriate analysis for determining a* prima facie *discrimination can be found in* McGill University Health Centre vs. Syndicat des employe□s de l'Hôpital ge□ne□ral de Montreal *2007 SCC 4: "It is the link between that group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact that triggers the possibility of a remedy." [49 at page 22].*
>
> …

[119] The grievor summarized further guidance offered by the Canadian Human Rights Tribunal (CHRT) in *Tanzos v. Az Bus Tours Inc.*, 2007 CHRT 33 at para. 31, as follows: "In *Tanzos*, the Canadian Human Rights Tribunal stated that the test should be flexible and the complainant is not required to adduce 'any particular type of evidence to prove that [they are] a victim of a discriminatory practice.'"

[120] I turn, then, to the *Moore* test. On the three *Moore* questions, the grievor contends that he successfully made out a *prima facie* case of discrimination. He contends further that the employer failed to accommodate him to the point of undue hardship. The employer maintains that it did not breach the "no discrimination" provision of the PM collective agreement, that the grievor failed to make out a *prima facie* case, and that in the alternative, it met its duty to accommodate by providing reasonable accommodation.

1. Does the grievor have a characteristic protected from discrimination under the *CHRA*?

[121] There is no contest between the parties that the grievor has a physical disability protected from discrimination under the *CHRA*.

2. Did the grievor experience an adverse impact in his employment?

[122] In support of his position that he has met the requirement to establish a *prima facie* case of discrimination, the grievor submitted the following written argument:

> …
>
> *Mr. Bourdeau experienced significant adverse impact due to the Employer's lack of accommodations; because of this, he was unable to perform his job to the standard required of Members. This caused him, as he testified, significant anxiety and stress.*
>
> *The Employer admitted multiple times that Mr. Bourdeau was not accommodated.*
>
> *In April 15, 2013, for instance, Mr. Railton (Mr. Bourdeau's case manager at the time) stated that Mr. Bourdeau was not accommodated prior to this date and thus his probation period would commence then. [Tab 7 of the BA book, page 50] Yet by June 2013, Mr. Bourdeau testified that Mr. Railton expressed concerns that he was still not accommodated.*
>
> *Further, Ms. Tinker testified that Mr. Bourdeau was deemed accommodated in February 2014 and that his probationary period would start then (see also Tab 23 of the JBOD at page 55). This suggests that he had not been accommodated prior to this date.*

There is a direct link between the lack of accommodation of Mr. Bourdeau's disability and his ability to fully perform his job. There were any number of steps the Employer could have taken to address this and chose not to.

The accommodations that were in place did not particularly help Mr. Bourdeau. Mr. Bourdeau testified that the software frequently crashed and made it difficult for him to do his work. That Mr. Bourdeau had significant technological issues is not in dispute by any of the witnesses. Numerous documents were admitted regarding software crashes (for instance: Tab 15 of the JBOD at page 34; Tab 20 of the JBOD at page 50; Tab 22 of the JBOD at page 53; Tab 30 JBOD at page 72; Tab 32 JBOD at page 75). These issues occurred the entire time Mr. Bourdeau was employed at the IRB.

By turning to examine what constitutes accommodations, the Supreme Court ruled in British Columbia (Superintendent of Motor Vehicles) vs. British Columbia (Council of Human Rights) *1999 3 SCR 868 that "accommodation refers to what is required in the circumstances to avoid discrimination" and that standards must be inclusive as possible. [15] Further, in* Attorney General of Canada vs. Duval *2019 FCA 290, it was ruled that it is a question of fact to determine if the complainant was accommodated to the point of undue hardship. [25]*

What are the facts?

The employer was aware of Mr. Bourdeau's disability when they hired him; Mr. Bourdeau repeatedly disclosed this to the employer and outlined his requests in a timely fashion. [see: Tab 2 of BA Supplementary at page 217; Tab 4 of JBOD, page 14] When Mr. Bourdeau realized that he required more accommodations, within weeks of starting work in 2012, he testified that he notified his supervisor right away.

Mr. Bourdeau did not receive much-needed software/hardware including a scanner, Dragon Dictate, and Jaws, until April 15, 2013. [see: Tab 5 of JBOD at page 15; Tab 7 of BA book, page 25] Mr. Bourdeau testified that this scanner was older, and thus slow and prone to jamming. The scanner was the first step in the process for Mr. Bourdeau to make his files accessible and without this, it would be nearly impossible for Mr. Bourdeau to read his files.

In July 2013, Mr. Railton asked IT to provide a more robust computer to handle software needs but by December 2013, this still had not happened and the computer regularly crashed. [Tab 7 of BA book, page 51] No explanation was given as to why six months later, Mr. Bourdeau did not have the upgraded equipment he needed to complete his work.

By January 2014, he had been moved to a new team and Ms. Tinker, his new Case Manager, testified that she got him a new scanner [Tab 15, JBOD, page 34-37]. Mr. Bourdeau testified that he was not familiar with the software like JAWS which was complex

> *and challenging; he struggled to use it properly. He asked Ms. Tinker for training but this request was denied. Ms. Tinker testified that this would be a request that would normally go through IT and it was not her responsibility. Yet, Ms. Tinker was his supervisor, responsible for providing accommodations; in addition, she testified that she would follow up with IT on other service requests. If her employee required training to do their job properly, why wouldn't she look into getting training for them?*
>
> *Ms. Tinker testified that she assigned two assistants to Mr. Bourdeau to assist him with scanning and preparing documents. This would, in theory, allow Mr. Bourdeau to spend more time on his substantive work. Ms. Tinker stated that the assistants were trained but was unable to articulate what exactly they were trained in. If Mr. Bourdeau did not receive any training in using the software, it is improbable that the two assistants received this training. In addition, the assistants were not exclusively assigned to him and were often busy. These assistants, then, did little to assist Mr. Bourdeau.*
>
> *Ms. Tinker testified regarding her concerns about Mr. Bourdeau falling behind with his work. According to the performance standards that Members were expected to adhere to, Ms. Tinker stated that members were expected to complete a minimum of 3.5 decisions per week. [Tab 78, JBOD, page 338] She also stated she rarely spent more than a few hours completing a file per week. Under cross-examination, however, Ms. Tinker admitted that this was her own personal experience.*
>
> *The data presented in the Member Capacity Exercise Central Region RPD came from Members' who recorded their daily activities and how long it took to complete. [Tab 32, BA Book, page 101] A key finding was that it took 14.5 hours to process a case [page 103]. Mr. Pattee testified that this exercise was undertaken because members in the Central Region of the RPD were struggling to meet their caseload. Clearly, then, Mr. Bourdeau was not the only one struggling to meet these expectations.*
>
> *It is unreasonable to expect that a Member who must make all of his files accessible through the laborious process of scanning and loading the documents into specialized software would have to meet standards that even an able-bodied members were struggling to meet.*
>
> *The adverse impact on the grievor's ability to do his job was significant. From November 2012 to January 2015, the grievor was unable to do his job properly; he was frequently stymied by the lack of support from his Employer and struggled to keep up with his workload. The Employer chose not to treat his accommodations as an on-going process.*
>
> …
>
> [*Sic* throughout]

[123] The employer's response, as reproduced in its aide-memoire, reads as follows:

…

- *… with respect to the second criterion of the test, the bargaining agent has failed to identify and demonstrate that the grievor has experienced an "adverse impact" with respect to his employment. On November 27, 2020, the bargaining agent confirmed that it was not relying on the rejection of probation for this point. Therefore, no triggering event has been identified.*
- *Only "hurtful, harmful, or hostile" consequences are protected under human rights legislation. The term "adverse differentiation" was examined in the case of* **Tahmourpour v. Canada (Royal Canadian Mounted Police)**, *2009 FC 1009 at para 44 (Employer's Supplementary BOA). There, the Federal Court stated:*

  > *[44] What is the meaning of "adverse differentiation"? "Differentiation" is a noun that in its ordinary meaning means a distinction between things. "Adverse" is an adjective that in its ordinary meaning means harmful, hurtful or hostile. In my view, "adverse differentiation" means a distinction between persons or groups of persons that is harmful or hurtful to a person or a group of persons. It can also, in my view, mean a distinction that is made or indicated in a hostile manner, where it is the manner of its making that harms or hurts. If it is to be an adverse differentiation that is prohibited by human rights legislation, the distinction must be based on or made because of one of the prohibited grounds set out in the legislation.*

- *The Federal Court of Appeal also considered these circumstances in* **Tahmourpour v. Canada (Royal Canadian Mounted Police)**, *2010 FCA 192 at para 12 (Employer's Supplementary BOA) and confirmed that discrimination requires something more which is correctly described as "harmful, hurtful or hostile….".*

  - *[12] The immediate result of Sergeant Hébert's announcement at the first physical training class at the Depot was to make the whole class aware of Mr. Tahmourpour's religion and his request for accommodation in relation to his religious pendant. The evidence of that announcement established the element of differentiation on the basis of religion, but it did not by itself establish discrimination. Discrimination requires something more, which the judge correctly described as something harmful, hurtful or hostile….*

- *So essentially, pursuant to these two cases, the "adverse impact" must be objectively measurable as harmful, hurtful, or hostile.*
- *While the bargaining agent asserts that the grievor experienced "significant adverse impact due to the Employer's lack of accommodations" and that he was "unable to perform his job to the standard required of Members". And that this caused him*

> *"significant anxiety and stress". However, these are not effects or consequences that are objectively measurable as harmful, hurtful or hostile. Therefore, this criterion has not been met.*
>
> …
>
> [*Sic* throughout]
>
> [Emphasis in the original]

[124] Establishing the second element of the *prima facie* case is not as simple as it would have been had the grievor chosen to litigate his rejection on probation. It seems clear that his termination would have comprised an "adverse impact", meeting the second element of the test. His decision not to challenge his termination required that he identify an alternate act or acts that adversely impacted him.

[125] The grievor's depiction of the discrimination that he experienced specified two defining elements: (1) the length of time the employer took to implement required accommodations, and (2) the employer's alleged failure to consider the impact on the grievor's work of technological problems and the time required to access files. According to him, those elements adversely impacted him, to a substantial extent. He was unable to perform his job to the standard required of members, resulting in significant anxiety and stress.

[126] The evidence is that it took from the grievor's hiring in late November 2012 until February 2014 before the employer considered that the accommodation of his disability had been achieved and that his one-year probation period could begin. Was that period too long? Accepting for the purposes of argument that it possibly was, the question becomes, "What then was the adverse impact?"

[127] The grievor prefaced his argument by stating that the employer's failure to accommodate him meant that he was unable to meet the required standards for his work, which, he testified, caused him anxiety and stress. What evidence establishes his experience of anxiety and stress?

[128] Supportive of a possible adverse impact in the form of stress and anxiety are elements of the grievor's testimony, such as the following:

1) he could not "do it all" during the initial three-week training session, and he "struggled to get through";
2) he felt embarrassed and left out during training when he could not read documents without scanning them;

3) he experienced eye strain on different occasions;
4) he felt an inordinate amount of pressure to meet caseload requirements;
5) he felt harassed by being constantly asked whether he had been accommodated; and
6) he felt very unhappy on learning about a manager who was not prepared to make accommodations.

[129] Beyond the grievor's more subjective testimony, he cited in argument facts such as the following as indicative of the discrimination that he faced:

1) he did not receive software or hardware including a scanner, Dragon Dictate, and JAWS until April 15, 2013;
2) in July 2013, Mr. Railton asked IT to provide a more robust computer to handle the software needs, but it did so only in December 2013;
3) the grievor asked Ms. Tinker for training in the use of software, such as JAWS, but his request was denied;
4) the assistants assigned to help him with scanning and preparing documents probably did not receiving training, were not exclusively assigned to him, and often were often busy;
5) he was not the only person in the Toronto office who struggled to meet the caseload expectations;
6) the employer's expectations did not take into account the laborious process of scanning and loading the documents into the specialized software;
7) the grievor was unable to do his job properly from November 2012 to January 2015 because of a lack of support from the employer; and
8) the employer did not treat his accommodations as ongoing.

[130] From the evidence, it is apparent that the grievor faced adversities during the period from his hiring date until February 2014, when the employer determined that he was accommodated. Does that evidence satisfy the second element of the *Moore* test?

[131] Accepting at this stage the grievor's examination-in-chief evidence on its face, I find it reasonable to conclude that he did feel stress and anxiety at different times during the period from his hiring in November 2012 to February 2014. I also find that the difficulties in the accommodation process that he described in his examination-in-chief provide a factual context within which feelings of stress and anxiety were plausible results. His examination-in-chief also suggested at least one concrete example of a possible shortcoming in his accommodation — the alleged denial of his request for training in the use of software such as JAWS. Other testimony about delays securing equipment and software may also suggest temporary shortcomings causing anxiety and stress, although they were resolved in time, as he admitted.

[132] The grievor testified further about Mr. Railton's request to Health Canada for an FWE dated December 4, 2013 (Exhibit G-1, tab 7), which the grievor had welcomed. What became of that request is unclear, other than that Mr. Pattee testified that he felt that an FWE was not required because the employer had clear information from the grievor about the accommodations that he needed. Presumably, no FWE was conducted. Had there been direct testimony that for example, the employer blocked Mr. Railton's request, such an action might have been argued to have had an adverse impact on the grievor. As is, I am unable to find adverse differentiation in the evidence about the FWE request.

[133] Considering the grievor's evidence as a whole, answering the second element of the *Moore* test with confidence is somewhat difficult. Certainly, the dearth of more substantial factual evidence depicting ongoing adverse impacts over the period from November 2012 to February 2014 is not helpful. As well, the somewhat imprecise way in which the grievor describes the two alleged elements of discrimination that he argues — particularly the second — adds to the challenge.

[134] While the evidence is modest, however, it does, if believed, establish that he experienced adverse impact in the form of stress and anxiety. As mentioned, there is at least some factual context within which that stress and anxiety were credible consequences of what happened during his accommodation.

[135] On that basis, and so as not to set the bar for establishing a *prima facie* case too high, I am prepared to accept that the limited evidence of adverse impact the grievor offered satisfies the second element of the *Moore* test allowing an examination of its third element.

3. Was the grievor's disability a factor in the adverse impact?

[136] The grievor submitted the following argument in support of his contention that his disability was a factor in the adverse impact:

> …
>
> *Mr. Bourdeau's disability was a significant factor in the adverse impact. Without his disability, he would have been able to perform his work duties, similar to his abled-bodied [sic] colleagues.*
>
> *Ms. Tinker agreed, under cross-examination, that preparing his files and drafting decisions would be difficult for Mr. Bourdeau without proper accommodations. Regardless if Mr. Bourdeau was*

> *working on a 'short' hearing involving a single individual with a single issue (i.e., the Caribbean files) or more complex files, he still had to scan his documents in order to make them readable via JAWS and Dragon Dictate. This was a time-consuming process that was prone to technological failure. Mr. Bourdeau testified that it would take at least two hours to render each file accessible, provided that the software/hardware worked properly. If he was expected to do 3.5 files per week, that is significant administrative time that impedes his ability to complete his work.*
>
> *Mr. Bourdeau does not deny that it took him longer to complete files than expected. He testified that he told James Railton, Diane Tinker, and Thomas Vulpe that he required extra time to scan and prepare documents. In July 2014, the grievor told Mr. Vulpe, the Assistant Deputy Chair, he needed more time per file and was constantly behind. [Tab 44, JBOD, page 155-6]*
>
> *The Employer will say that they dealt with this by taking him off the schedule four times to catch up on reasons. But this was a band-aid solution and it didn't address the core issues: which was that the technology frequently crashed and that when it did work, the process was time consuming as Mr. Bourdeau had to essentially make his entire file accessible.*
>
> *Even by January 2015, Mr. Bourdeau still was not provided with support to assist him in making his workload accessible. This was treated as something that was Richard's fault rather than something that was beyond his control. Ms. Tinker testified that she told Mr. Vulpe, in December 2014, that she repeatedly took him off the schedule but 'could not continue to do this anymore' [Tab 60, JBOD, page 241].*
>
> *In* BCGSEU, *the SCC said that skills, capabilities and potential contributions of the claimant must "be respected as much as possible". [64 at page 34] We don't know what Mr. Bourdeau's potential contributions or capabilities would have been like had he been fully accommodated. But that is the crux of the issue: he was never given a chance to succeed or fail on his own merits, to measure up properly against his colleagues and standard benchmarks.*
>
> *This is discrimination.*
>
> …

[137] The employer responded to the grievor's argument as follows:

> …
>
> · *… there is no nexus between the grievor's disability and any adverse impact with respect to his employment. No adverse impact has been identified. Therefore, the third criterion has not been met.*

> · *Therefore, the grievor has failed to make out a* prima facie *case of discrimination based on disability – it has not established that the employer engaged in a discriminatory practice (***Leclair v Deputy Head (Correctional Service of Canada)***, 2016 PSLREB 97, para 120; Tab 4 of the Employer's Book of Authorities).*
>
> …
>
> [Emphasis in the original]

[138] To establish the third element of the *Moore* test, it must be demonstrated that the protected characteristic was a factor in the adverse impact, recognizing that there may be other factors; see *Holden v. Canadian National Railway Company* (1990), 14 C.H.R.R. D/12 (C.A.) at para. 7, and *Public Service Alliance of Canada v. Canada (Department of National Defence)*, [1996] 3 FC 789 (C.A.). A bare assertion that a protected characteristic is a factor is insufficient without supporting evidence; see *Filgueira v. Garfield Container Transport Inc.*, 2005 CHRT 32; aff'd 2006 FC 785; *Bassett v. Treasury Board (Correctional Service of Canada)*, 2017 PSLREB 60 at para. 62.

[139] There is no requirement to establish an intent to discriminate to meet the third element of the *Moore* test; see *Shaw v. Phipps*, 2010 ONSC 3884, as quoted in *Meneguzzi v. Director Public Prosecutions*, 2019 FPSLREB 77, at para. 123.

[140] The employer's submission can be discounted. It essentially argues that because there was no adverse impact, the third element of the *Moore* test cannot be met. The only decision it specifically cited in support of its position is *Leclair v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 97. However, the reasons in *Leclair* focus primarily on the reasonableness of the accommodation measures taken by the employer rather than how the protected characteristic in that case was a factor in the adverse impact.

[141] In my view, the grievor's argument does not venture very far beyond stating that his disability was a significant factor in the adverse impact. However, establishing through some evidence a link between his disability and the adverse impact is all that is required.

[142] There is no doubt that the grievor found it difficult at times, if not impossible, to meet the employer's caseload standards. Using a scanner and several types of software to do his work required more time and must have been very taxing. However, by his own testimony, getting work done with screen-reader technology was not a new

problem. He testified in examination-in-chief that as his condition became more acute in private practice, the effort required to refocus constantly was physically exhausting, requiring him to rest after brief periods of work. It is not surprising then that he encountered similar challenges at the IRBC. The grievor also pointed to software and hardware malfunctions that further burdened his efforts to do the work.

[143] The grievor alleges that everything in this case ultimately flows from the reality of his disability. The grievor had diplopia and required accommodation. He wanted to perform the work but found that his disability made it difficult for him to reach the standards expected of members.

[144] The challenges that he faced in setting up, adjusting, and fixing the equipment and software needed to do the work resulted in reduced productivity but more importantly caused feelings of anxiety and stress as it was apparent to him that he was falling short of the employer's expectations. Whether and to what extent the employer's conduct contributed to that stress and anxiety is not determinative at this stage of the analysis. Had the grievor not contended with diplopia, it is reasonable to believe that his experience in the workplace would have been very different.

[145] There are problems with the evidence but on balance, it is sufficient to establish an underlying nexus between the grievor's disability and the anxiety and stress that he experienced. The evidence of that nexus, albeit limited, satisfies the third element of the *Moore* test.

[146] Therefore, I find that the grievor has made out a *prima facie* case of discrimination.

C. Did the employer provide a non-discriminatory defence for its actions?

[147] In the face of a *prima facie* case of discrimination, the burden shifts to the employer to provide a reasonable explanation demonstrating that the alleged discrimination either did not occur as alleged or that the conduct was somehow non-discriminatory or justified based on an exception under s. 15(1) of the *CHRA*.

[148] The parties' written submissions are lengthy but are reproduced in full to capture all the elements of their respective arguments.

[149] The employer submitted as follows:

…

The employer provided reasonable accommodation

- *An accommodation is a balance between the rights of an employee and the right of an employer to operate a productive workplace. Accommodation aims to enable employees to achieve employment and performance standards – the duty to accommodate is not about employee preferences. Accommodation is about removing barriers to enable an employee to perform and to contribute his skills to the organization. There is no set formula for accommodation.*
- *The employer has a duty to find a reasonable accommodation. It knows its needs, its workplace, and its resources. (***Leclair v. Deputy Head (Correctional Service of Canada)***, 2016 PSLREB 97 at para 133 (Tab 4 of the Employer's Book of Authorities) citing* **Renaud** *at 994-995 (***Central Okanagan School District No. 23 v. Renaud***, 1992 CanLII 81 (SCC), [1992] 2 S.C.R. 970)).*
- *An employee is not entitled to his choice of accommodation or his preferred accommodation. Nor is an employee entitled to an instant or perfect accommodation but only to a* ***reasonable*** *accommodation. If reasonable accommodations can be put in place without reaching the point of undue hardship, then they are sufficient to discharge the employer's duty to accommodate. (***Leclair v. Deputy Head (Correctional Service of Canada)***, 2016 PSLREB 97 at para 127 and 134 (Tab 4 of the Employer's Book of Authorities)). The bargaining agent seems to suggest that that perfect accommodation is the standard, but it is not.*
- *The jurisprudence has firmly established that the duty to accommodate is a "two-way street" and that the person seeking accommodation cannot dictate what that accommodation should be. Some "give and take" to address the restrictions and limitations is expected. Accommodation entails compromise and cooperation on the part of an employee (***Georgoulas v. Canada (Attorney General)***, 2018 FC 652 at paras 160-161; Tab 3 of the Employer's Book of Authorities).*

In the instant case, the employer went above and beyond in accommodating the grievor. The evidence is clear.

- *The issue here isn't one of undue hardship. The employer is not, and never claimed to rely on subsection 15(2) of the CHRA as a statutory defence to what would otherwise have been an act of discrimination against the grievor.*
- *The employer did not refuse to accommodate the grievor. Mr. Pattee testified that it was abundantly clear to management that they must do everything in their power to accommodate the grievor. In fact, the employer went* above and beyond *in accommodating the grievor. Even though a grievor is not entitled to dictate their accommodation, that is precisely what happened here. The employer dealt with anything that the grievor*

requested – right from the beginning of his employment as a Member. For example, through the evidence we heard that:

- *The grievor asked for an accommodation for New Member training – specifically he asked for either double spaced documents or material in electronic format. The grievor testified that he was given material in electronic format and a laptop as he had requested.*
- *The grievor testified that at some point after the New Member training, he made spoke to his Coordinating Member ("CM"), James Railton and requested equipment.*
- *By April 15, 2013, the grievor confirmed that he had been provided the following : (1) a larger than normal tiltable monitor, (2) a scanner, (3) Dragon Dictate, (4) JAWS, (JT – Tab 5 at page 15); (JT – Tab 12 at page 29) an (5) ergonomic keyboard and headphones. (G1 – Tab 7 at page 50). In his examination in chief, the grievor confirmed that he had received what he requested.*
- *In addition to the accommodations mentioned above, it was also entered into evidence that the grievor was given the following for accommodations (G1 – Tab 1 at page 5):*
- *Additional new member training, delivered one on one;*
- *A new, specialized/printer scanner (JT – Tab 11 at page 28);*
- *Omnipage OCR;*
- *A high powered laptop (G1 – Tab 15 at page 60);*
- *A microphone to along with Dragon Dictate;*
- *Two customized, large computer monitors, in both his office and in the hearing room;*
- *Court player to listen to audio recordings from the hearings;*
- *An ergonomic chair;*
- *Two administrative assistants were made available to assist with any scanning at his request. (JT – Tab 32 at page 75) Diane Tinker testified that they were both trained to scan for him (JT–Tab 60). However, on cross examination, the grievor indicated that he did not use these administrative assistants. He chose not to make use of this resource that was made available to him. This is also corroborated by JT – Tab 60 at page 241.*

In addition, in her testimony, Diane Tinker testified that the grievor was also:

- *Taken off the schedule to receive individual retraining from the legal department;*
- *Taken off the schedule completely for six weeks (around February 2014) to catch up on his 23 outstanding reasons;*

- *He was given at least two weeks to "work out the bugs" in the equipment before his probationary period started in February 2014 (JT – Tab 26 at page 61);*
- *She testified that she asked the grievor to be proactive in telling her or IT if his scanner was not working (JT – Tab 20 at page 50).*

On cross-examination, the grievor:

- *confirmed that he had been taken off the schedule at least four times to catch up on his reasons (JT – Tab 77 at page 335);*
- *agreed that his* workload had been reduced *to accommodate him – he was only hearing 2 claims per week from the Caribbean islands – which were non-complex claims. They were single issue and in English (therefore, no translator necessary). (JT – Tab 37 at page 91) Also on cross-examination, he confirmed that he did not carry a full schedule until around June 2014 (JT – Tab 77 at page 335).*

- *There is some dispute as to training that the grievor had allegedly requested. Diane Tinker testified that the grievor never requested training because he had the equipment at home. It is incorrect to say that the training was denied – as is alleged by the Bargaining Agent – rather, the employer disputes that it was ever requested. This is corroborated in JT – Tab 26 at page 61 where Diane Tinker writes exactly this to a consultant. This was also confirmed on cross examination, when the grievor indicated that he had all the necessary software at home (G1 – Tab 10 at page 54); and that he was familiar with most of it (G1 – Tab 13 at page 58). On cross-examination, the grievor also confirmed that he had basic working knowledge of the programs.*
- *But in any event, this allegation does not render the employer's accommodation unreasonable. No evidence was adduced to indicate that this training would have been necessary to accommodate the grievor's diplopia. He had the equipment he needed, and he conceded that he had knowledge of the programs. The Board upheld a similar argument in* Currie v. Deputy Head (Department of Fisheries and Oceans), *2010 PSLRB 10 at para 58; Tab 2 of the Employer's Book of Authorities) where the Board determined that the employer had dealt with anything the grievor had requested for his accommodation except for one request. With respect to that one outstanding request, the Board ultimately found that there was no evidence adduced that such an accommodation was required for the grievor.*

Again, the evidence is clear. With respect to any technological issues that arose, management made sure that IT was made available to the grievor for anything he needed, demonstrating that the accommodations were reasonable.

- *Again, there are lots of examples, and I will not go through them all. One is found in JT tab 45, at page 158, where Paul Black from IT instructed that a previous version of Adobe be removed and that the new version, Adobe Pro 11, be installed. He indicated that the grievor had said that he "would appreciate" a second monitor. That same day, at 4:08 p.m., another person from IT, Fred Tobar, notified Mr. Black that a second monitor and Adobe 11 had been installed. This means that the grievor's request was met about three hours later.*

In JT - tab 22, at page 53, Ms. Tinker wrote to Mr. Black from IT to inquire if all the grievor's equipment was working. IT replied four minutes later.

- *In JT – Tab 30 at page 73, the Assistant Deputy Chair emailed IT to say that they were to identify one IT team member in Toronto who the grievor could call whenever there was a problem with the equipment and that he contact this employee as soon as he encountered any problem so that it could be promptly assessed and corrected. In this Tab, Jean-Francois Lacelle enumerated everything that IT had done between Summer 2013 and February 2014 for the grievor.*
- *In JT – Tab 40 at page 117, Fred Tobar of IT confirmed to DT that they were staying on top of the grievor's needs. ITSD was notified that the grievor's calls were high priority.*
- *These are just a few examples of the many email chains in evidence demonstrating that IT was diligent in troubleshooting and resolving IT and computer issues.*
- *In his testimony, the grievor talked about an incident where he alleged that there was a manager of IT who he couldn't name, who was not prepared to make the requested accommodations. However, it was management who was ultimately responsible for the grievor's accommodation, not the IT department, as was testified by Ross Pattee. In fact, with respect to this alleged incident – Mr. Pattee testified that, quite frankly, it didn't matter what the IT Manager said.*

IT or computer issues do not amount to hurtful or hostile actions.

- *Further, while there was speculation that any IT issues the grievor experienced were because of various software and hardware, but no evidence has actually been advanced demonstrating that these IT issues are attributable to the fact that he had certain software and hardware on his devices. The employer, being a good manager, listened to the grievor and did everything it could to minimize the computer issues, but the fact is that there is no explicit evidence demonstrating a nexus between the technical issues that the grievor experienced and his disability.*
- *IT or computer issues do not amount to hurtful or hostile actions; and there is no evidence of any objectively measurable harm. Nothing in the evidence suggests that the grievor's*

computer issues or IT issues happened in a discriminatory manner. The computer, which is a machine, does not have the capacity to discriminate against the grievor. The people approving the purchase of software and hardware and the people who were doing the troubleshooting – i.e. management and IT support people – they did everything the grievor asked for and they did it quickly. There is no evidence of an adverse outcome resulting from the computer or technological issues and no nexus between those issues and the grievor's disability. In fact, a clear indication of good faith was provided on behalf of management and IT by resolving issues in a timely fashion and providing the grievor with any and all equipment requested.

Frustration and hurt feelings do not equal discrimination.

- *Rather, as mentioned above, only "hurtful, harmful, or hostile" consequences should be protected under human rights legislation (***Tahmourpour v. Canada (Royal Canadian Mounted Police)***, 2009 FC 1009 at para 44;* **Tahmourpour v. Canada (Royal Canadian Mounted Police)***, 2010 FCA 192 at para 12; both in the Employer's Supplementary BOA)*
- *The grievor mentioned that he was frustrated with his computer issues. He testified that it was frustrating to use JAWS and it was frustrating when he had technological problems. However, personal feelings of frustration or hurt feelings do not equal discrimination. (***Eady v. Treasury Board (Correctional Service of Canada)***, 2019 FPSLREB 71 at paras 91 and 107; Employer's Supplementary BOA) Frustration is not a tangible or measurable adverse effect, which is a necessary component of a discrimination claim.*

The Health Canada assessment was simply not required.

- *Diane Tinker testified that she saw a medical note. Mr. Pattee testified that he did not question the grievor's diplopia. They were satisfied with the information the grievor had provided them. Mr. Pattee testified that Mr. Bourdeau was very, very clear on what he needed. The implementation of the accommodations was done in full consultation with the grievor which is why there was no Health Canada assessment done.*
- *The fact that a Health Canada assessment was not completed does not mean that the employer discriminated against the grievor or that it failed to reasonably accommodate him. While doctors may suggest what type of accommodation is needed –it is not their role to decide if an employee can be accommodated or direct that an employee be accommodated in a certain position. A physician's role is to provide a professional opinion and not to act as an advocate for their patient in the employer-employee relationship. Their opinion cannot circumvent the employer's workplace organizational needs. The doctors' role, if necessary, is to simply identify their patients' needs and limitations, and based on that, the employer must determine how best to accommodate those needs and limitations in the workplace.*

(**Leclair v. Deputy Head (Correctional Service of Canada)**, *2016 PSLREB 97 at para 133; Tab 4 of the Employer's Book of Authorities). But it wasn't needed in this case.*

- *In any event, the FCA has held that there is no separate procedural right to accommodation that imposes any particular procedure that an employer must follow in seeking to accommodate an employee. Rather, in each case, it will be a question of fact as to whether the employer has established that it accommodated a grievor. (***Canada (Attorney General) v. Duval**, *2019 FCA 290 at para 25; Tab 1 of the Employer's Book of Authorities). The grievor relies on a Board decision called* **Panacci** *from 2011 to attempt to argue that the employer had a duty to complete a Health Canada assessment. However, this is not what the case says. Rather, it simply says that the procedural aspect of the duty to accommodate requires the employer to obtain all relevant information about the grievor's disability which* could *include obtaining information about the grievor's current medical condition, etc. In the instant case, the employer obtained all relevant information about the grievor's disability from the grievor himself.* **Panacci** *doesn't say that it necessarily includes obtaining information about the greivor's medical condition. It simply says that it* could. **Panacci** *also says that a failure to give any thought or consideration to the issue of accommodation is a failure to satisfy the duty to accommodate. This was certainly not the case here, given the sheer amount of evidence to the contrary demonstrating that the employer went above and beyond in accommodating the grievor.*
- *In any event,* **Duval** *is an FCA case from 2019, whereas Panacci is a Board decision from 2011. Therefore,* **Duval** *is more authoritative case and should be relied on.*
- *Here, a decision was made that the grievor was fully aware of his needs and that as a result, the employer would take every measure that they could to ensure that he was provided with the tools and the environment to succeed (G1 – Tab 1 at page 4).*
- *Based on the above evidence, it is abundantly clear that the grievor was reasonably accommodated. The standard for is not perfection – only reasonableness.*

<u>Response to the bargaining agent's arguments raised in its written submissions</u>

The bargaining agent argues that the "employer admitted multiple times that Mr. Bourdeau was not accommodated". However, this is not determinative of the case. The question of whether Mr. Bourdeau was reasonably accommodated is a legal one based on findings of fact made by an adjudicator – in this case, Mr. Butler. The fact that a manager may believe someone may or may not have been accommodated does not determine or limit an adjudicator's responsibility to decide the issue. This proposition is supported by **Flatt v Treasury Board (Department of Industry)**, *2014 PSLREB 2 at para 99 (JR dismissed in* **Flatt v. Canada**

(Attorney General), *2015 FCA 250; Employer's Supplementary BOA).*

- *In any event, the examples provided by the bargaining agent do not constitute admissions that the grievor had in fact established a* prima facie *case of discrimination or that he was not accommodated reasonably. Rather, this demonstrates that management was being a considerate employer. Most rational and reasonable employers, acting in good faith, will in ordinary course listen to and consider an employee's request for accommodation. That does not mean that they agree that a reasonable accommodation had not been provided. That is what good labour relations is all about. A finding that such discussions constitute an admission that an accommodation has not been reasonable casts a chill on good-faith labour relations (***Flatt v Treasury Board (Department of Industry)**, *2014 PSLREB 2 at para 99 (JR dismissed in* **Flatt v. Canada (Attorney General)**, *2015 FCA 250; Employer's Supplementary BOA).*
- *The bargaining agent argues that Mr. Bourdeau was not the only RPD Member struggling to meet workload expectations. This is irrelevant. This grievance is not about whether the general workload of members back in 2012-2015 was appropriate or whether the hours required of Members breached the collective agreement. That is simply not the issue here.*
- *Contrary to the Bargaining Agent's assertion, to say that it took 14 months to get Mr. Bourdeau his technology is simply inaccurate. The bargaining agent alleges there was a delay in getting the grievor's software/hardware and that it was not received until April 15, 2013. According to JT – Tab 5 at page 15, the griever only requested Dragon Dictate on April 5, 2013. His request was approved by his manager a mere 3 hours later. In that same exhibit, Mr. Railton indicated that "Richard loves his Jaws" which indicates that he already had JAWS at that time.*
- *G1 – Tab 7 at page 50 indicates that subsequent to a meeting in February 2013, the RPD provided the grievor with a large than normal tiltable monitor, a scanner, Dragon Dictate, JAWS, and ergonomic keyboard and headphones. When all of this was in place, the grievor agreed that he had been accommodated by 15 April 2013. This demonstrates that it took about 2 months to acquire these accommodation items which is a very reasonable timeframe. Rather, as mentioned above, this demonstrates that management was being a considerate. Here, management listened to the grievor: asking him whether he felt he had been accommodated and not beginning his probationary period until he agreed that he felt he was accommodated (JT – Tab 6 at page 16; JT – Tab 44 at page 154; G1 – Tab 7 at page 50)*
- *With respect to the date the grievor agreed he was accommodated, February 17, 2014, the bargaining agent's argument is untenable. On the one hand, the bargaining agent argues that the employer took too long to implement the grievor's accommodations, but then on the other hand, argues*

> *that the employer and the grievor shouldn't have agreed on a date as to when the grievor was deemed accommodated. However, the employer needed to pinpoint a date on which the grievor was deemed accommodated so that his probationary period could begin – this was set out in his rejection on probation letter (JT – Tab 73 at page 324). It would have been very problematic to not afford the grievor with a probationary period.*
>
> · *Having the employer and grievor agree on a date as to when the grievor was deemed accommodated in no way demonstrates that the grievor's accommodation was not ongoing. Therefore, the bargaining agent's assertion that the grievor was frequently stymied by the lack of support from the employer and its allegation that the employer chose not to treat his accommodations as an ongoing process is inaccurate. There are numerous documents in evidence demonstrating that the employer continued to provide reasonable accommodations after the "date" of February 17, 2014 when the grievor had agreed he had been accommodated (JT – Tab 38 at page 97; JT – Tab 40 at page 117; JT – Tab 44 at page 154; JT – Tab 45 at page 158; JT – Tab 60 at page 241; JT – Tab 77 at page 336). These demonstrate consistent, sustained efforts by the employer to support the grievor and provide reasonable accommodation.*
>
> …
>
> [*Sic* throughout]
>
> [Emphasis in the original]

[150] The grievor submitted as follows:

> …
>
> *The Employer may argue that they did not intend to discriminate against Mr. Bourdeau but there is no distinction between direct and indirect discrimination. [*BCGSEU*, 29 at page 17]*
>
> *In* Panacci*, Arbitrator Mackenzie wrote that the procedural aspect of the duty to accommodate requires the Employer to obtain all relevant information about the grievor's condition. [86] The Employer in this case failed to do so. Mr. Railton's letter to Health Canada, dated December 4, 2013, demonstrates that Mr. Railton was concerned about Mr. Bourdeau's accommodations. He wrote "any failure to meet expectations can all be placed on the fact that he has yet to be accommodated… To this date the computer has not been upgraded and there are hardware/software conflicts that causes regular computer crashes". [Tab 7, BA page 50 -1] This letter, for unknown reasons, was never sent out.*
>
> *Mr. Pattee testified that a Health Canada assessment was not necessary because he felt the grievor knew what he needed to be accommodated, despite Mr. Bourdeau frequently asking for*

additional accommodations that were not implemented. Despite this, Mr. Pattee was not aware Mr. Railton had written this letter.

Ms. Tinker testified that not only did she did not ask for a Health Canada assessment but that she never even thought of asking for one. She described herself as having 'more experience' than Mr. Railton which is why she became Mr. Bourdeau's supervisor in January 2014, yet she did not take any steps to assess what was going on.

Indeed, Ms. Tinker, under cross-examination, was vague about her understanding of Mr. Bourdeau's disability. She testified that she didn't know "the exact disability. I knew there was one" and that she saw a medical note that mentioned he had problems reading. This is a rather understated way of describing diplopia and suggests that she did not understand the extent of Mr. Bourdeau's disability.

*When Mr. Bourdeau mentioned eye strain due to his work to Ms. Tinker, for instance, she did not ask for more information. Ms. Tinker mentioned this eye strain in a conversation with Mr. Vulpe [Tab 60, JBOD, page 241], saying "Richard now claims that he [*sic*] vision is deteriorating"; Ms. Tinker also agreed that she would have seen the email from Paul Black, which she was cc'd on, where he mentions that Richard told him he was suffering from eyestrain. [Tab 45, JBOD, page 158] There is no evidence that the Employer took this seriously or considered ways to accommodate this. The grievor testified that he brought up his eyestrain to the employer and did not receive any support. Complaints of eye strain from a member with a significant visual impairment should raise concerns but it appears that the Employer did not pay attention to this.*

Mr. Pattee testified that he agreed with what he had written in the second level grievance response, that he was "very sensitive to allegations of discrimination". He acknowledged under cross-examination that Mr. Bourdeau had told him about a manager in Shared Services who would not accommodate him. [Tab 1, BA, page 4] Mr. Pattee was vague on details as to exactly how *he followed up on this. Even if Mr. Bourdeau was no longer working at the IRB, surely, they should be concerned by allegations of discrimination.*

The employer is relying on Leclair, *where it was ruled that the employer made reasonable effort to accommodate him based on medical information and that the grievor was not willing to consider options put forward. [134] In this situation, though, the employer did not ask for medical information to clarify their understanding of Mr. Bourdeau's disability and Mr. Bourdeau* was *willing to work with the employer. He did not reject or turn down any accommodations.*

Similarly, they are relying on Georgoulas, *a Federal Court decision, where the issue was whether the employee was too inflexible in the accommodation process. They cited* Central Okanagan School

District, *where the SCC wrote that the employer is in the best position to determine how the complainant could be accommodated. Ms. Tinker did not seek further information or clarification as to what his disability was or required. How could this particular Employer be in the best position to consider how the grievor could be accommodated when they don't even fully understand why he needs to be accommodated or to look at why the accommodations weren't working?*

*Accommodations must be individualized and timely. [*Panacci vs Treasury Board 2011 PSLRB 2, *99] That it took fourteen months (Nov 2012-January 2015) to get Mr. Bourdeau his technology is unacceptable. Mr. Pattee testified that it took so long because it was a complex set of tools; but are tools like a new scanner or a new computer really so complex? Did it need to take that long to acquire these materials?*

In Tanzos vs Az Bus Tours 2007 CHRT 33, *the panel cited* Meiorin *in that "the skills, capabilities and potential contributions of the individual complainant and others like him or her must be respected as much as possible". [44]. Indeed, Mr. Bourdeau's accommodations go beyond just acquiring technology and software, something the Employer did not seem to recognize. Mr. Bourdeau needed to know* how *to use the software. Accessible equipment is of little use if the claimant does not know how to use it.*

If the process for accommodations involves failure to the point where the employee cannot do their work, that is not accommodation.

In Kirby vs Treasury Board 2015 PSLREB 41, *Adjudicator Shannon found that there is a positive obligation on the employer to explore all options in order to accommodate the grievor. [93] The Employer did not do that. They did not consider that accommodations are an on-going relationship; it is not a* pro forma *process. It's an on-going process that must respond to individualized needs. His accommodations all came with an asterisk next to them and Mr. Bourdeau was treated as someone who was difficult, who was not carrying equal weight but he was not able to do so. Indeed, the Supreme Court has ruled that:*

> *The scope of the duty to accommodate varies according to the characteristics of each enterprise, the specific needs of each employee and the specific circumstances in which the decision is to be made. Throughout the employment relationship, the employer must make an effort to accommodate the employee. [McGill University, 22]*

If Ms. Tinker, the person directly responsible for Mr. Bourdeau, did not understand the nature of Mr. Bourdeau's disability, it is difficult to see how the Employer could accommodate his specific needs. The duty to accommodate did not end in February 2014 when Ms. Tinker deemed him 'accommodated'; the fixation of the Employer on pinpointing a specific date by which accommodation

'occurs' is contrary to the understanding that the duty to accommodate is on-going process. It can change and shift as the parties navigate the employment relationship to determine what works and what does not work for the employee. Mr. Bourdeau testified that he told Ms. Tinker he had been 'accommodated for now' as of February 214, but that he was still struggling with navigating complex software that was prone to crashing. The Employer did not seem to understand this.

*Discrimination can often appear to be subtle, which the SCC characterized as something that "rises in the aggregate to the level of systemic discrimination…." [*BCGSEU, *29 at page 17]*
*The process of accommodation isn't always easy but the Employer was not out of options. The duty to accommodate requires the Employer to accommodate to the point of undue hardship. The Employer has the burden of proving that it could not have accommodated Mr. Bourdeau any further without it causing undue hardship. [*Panacci, *para 89] They did not prove this. Would it have been undue hardship to provide software training to Mr. Bourdeau? Would it have been undue hardship to assign two assistants exclusively to Mr. Bourdeau?*

In Nicol vs Treasury Board *2014 PSLREB 03, Adjudicator Howes took notice of the fact that the employer failed to establish that they could not accommodate him further to the point of undue hardship. [145] The Employer tendered no evidence that seeking further or alternate accommodations for Mr. Bourdeau would have been undue hardship. They did not ask for a medical assessment, they did not provide training, they did not look at what could be done to account for that the accommodations provided still required lengthy preparation time from Mr. Bourdeau.*

In Panacci, *Adjudicator Mackenzie noted that in addition to the employer failing to undertake an individualized assessment of the grievor's limitations, "the employer did not meet its burden of demonstrating that accommodating the grievor in her assignment or a similar position was an undue hardship". [99] Indeed, Mr. Pattee testified that he stayed actively informed regarding Mr. Bourdeau's accommodations, stating he attended 'dozens' of meetings. Mr. Pattee also testified that the investment and training into members was not 'insignificant', totalling a quarter of a million dollars per member and that he wanted decision makers to succeed. Yet he did not know that Mr. Bourdeau had asked for training but did not receive it. He did not know that the two assistants were not exclusively assigned to him and were often busy. Mr. Pattee's assessment that there was no discrimination is based on an incomplete understanding of Mr. Bourdeau's situation.*

…

[*Sic* throughout]

[151] The grievor's rebuttal focussed on the issue of timeliness, as indicated earlier in this decision. He did not comment further on the employer's reading of the case law or interpretation of the evidence.

[152] The grievor maintained that the employer must prove that it accommodated him to the point of undue hardship. The employer argued that it must establish that it provided reasonable accommodation. "Undue hardship", in the employer's submission, is not an issue because it did not mount a statutory defence under s. 15(2) of the *CHRA*.

[153] Broaching the concept of undue hardship, I find it helpful to recall the following passage from *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43 at para. 14:

> *[14] … the goal of accommodation is to ensure that an employee who is able to work can do so. In practice, this means that the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work. The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.*

[154] In the matter before the Board, the employer need not defend applying to the grievor a standard, factor, requirement, or rule as a *bona fide* operational requirement (BFOR). Such an argument, arising out of s. 15(2) of the *CHRA*, would engage the three-part test set out in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 at para. 54 ("*Meiorin*"). That test is not necessary in this case.

[155] The inference underlying the employer's position is that because the case does not involve an exception under s. 15(2) or any assessment of a BFOR, the concept of undue hardship does not come into play. As long as the employer can prove that it provided reasonable accommodation, it will successfully counter the grievor's *prima facie* case.

[156] In support of reasonable accommodation as the appropriate standard, the employer relies on *Leclair*, at paras. 133 and 134, which read in part as follows:

> ***133*** *The employer has a duty to find a reasonable accommodation. It knows its needs, its workplace, and its resources (see* ***Renaud*** *at 994-95).…*

> ***134*** *Many employees, like the grievor, think that finding an accommodation is carte blanche to be given the position of their choice because of the employer's duty to accommodate them to the point of undue hardship. This is a misconception; employees are not entitled to their preferred accommodations. They are entitled to reasonable accommodations that meet their identified needs. The employer in this case made the effort to find a reasonable accommodation based on the medical information it had been provided. The grievor was not willing to consider the options being put forward, and he delayed the process.*
>
> [The cited decision is *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970.]

[157] I note, as well, paragraph 127 of the same decision, which reads as follows:

> ***127*** *The grievor was focused in his dealings with the employer on the SMO position. Even at the hearing, his focus was on that position, although his counsel argued that the grievor was not seeking to be appointed to it. The grievor is not entitled to his choice of accommodation. Nor is an employee entitled to an instant or perfect accommodation but only to a reasonable accommodation … Furthermore, the employer's decision not to appoint him to the SMO position was not a failure to accommodate the grievor. If reasonable accommodations can be put in place without reaching the point of undue hardship, then they are sufficient to discharge the employer's duty to accommodate.*

[158] The Board and its predecessors have embraced reasonable accommodation as the required standard elsewhere, as illustrated in the following five recent decisions.

[159] In *Taticek v. Treasury Board (Canada Border Services Agency)*, 2015 PSLREB 12 at para. 104, the PSLREB stated as follows:

> ***104*** *An employer faced with a* **prima facie** *case can avoid an adverse finding by calling evidence to provide a reasonable explanation that shows its actions were in fact not discriminatory; or, by establishing a statutory defence that justifies the discrimination (***A.B. v. Eazy Express Inc.***, 2014 CHRT 35, at para. 13) ….*
>
> [Emphasis added]

[160] In *Nash v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 4 at para. 102, the PSLREB concluded as follows:

> *102 Thus, the employer provided a reasonable explanation demonstrating that the grievor was in fact fully accommodated. While the accommodation might not have been perfect, it met the grievor's limitations and was reasonable. Therefore, even if*

> *a* **prima facie** *case of discrimination had been established, the employer provided a valid defence. The grievor's allegations that the employer engaged in a discriminatory practice have not been substantiated.*
>
> [Emphasis added]

[161] In *Jones v. Deputy Minister of National Defence*, 2017 FPSLREB 49 at para. 62, the Board stated as follows: "In order to rebut the ***prima facie*** case, the respondent must demonstrate that it reasonably accommodated him, and if not, that the necessary accommodation would have caused it undue hardship" [emphasis added].

[162] *A.B v. Canada Revenue Agency*, 2019 FPSLREB 53 at paras. 64, 67, and 68, states as follows:

> *64 … 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).*
>
> …
>
> *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.*

[163] In *McCarthy v. Treasury Board (Correctional Service of Canada)*, 2020 FPSLREB 45 at para. 84, the Board found as follows:

> *84 In response to the* prima facie *case, the employer may show that its actions did not amount to discrimination. In this case, as stated earlier, the employer argues that the grievor has not established* prima facie *discrimination as he did not suffer any adverse impact. If the Board does find* prima facie *discrimination, then the employer's argument is that it reasonably accommodated the grievor.*

[164] I believe that the case law does not find that undue hardship applies only when an employer argues a statutory exception under s. 15(2) of the *CHRA*. Instead, "undue

hardship" and "reasonable accommodation" are linked concepts in any analysis of discrimination. When s. 15(2) is not engaged, the employer's onus is to provide reasonable accommodation. If the evidence reveals that an employer has reasonably accommodated an employee, the employer has defended itself against the discrimination allegation. In that sense, the issue of undue hardship does not necessarily arise, at least initially.

[165] The employer, in my view, does not have an overarching burden in all cases of alleged discrimination to prove that it acted to the point of undue hardship. Nonetheless, an employer may argue in the first instance that going beyond the accommodation measures taken would impose undue hardship.

[166] However the employer approaches its defence, it is open to an employee to argue that an accommodation was not reasonable because the steps taken by the employer did not meet the employee's accommodation needs or that there were other measures that the employer could have and should have taken. The employer's defence in the face of the latter argument is to demonstrate why the additional measures were not necessary under the circumstances or that they would not have provided the accommodation required or that taking them would impose undue hardship.

[167] The principal task is to examine the facts. The onus falls on the employer. Has it offered evidence that establishes on a balance of probabilities that it provided reasonable accommodation to the grievor?

[168] The case law holds that when it seeks to discharge its onus, an employer does not need to provide instant accommodation, perfect accommodation, or the employee's preferred accommodation; see *Leclair*, at para. 127, and *Nash*, at para. 102. An employee is obligated to cooperate in the accommodation process and to accept reasonable accommodation. The accommodation process involves compromise and cooperation; see *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 SCR 970 at 994 and 995, as quoted as follows in *Georgoulas v. Canada (Attorney General)*, 2018 FC 652 at paras. 160 and 161:

> *[160] The jurisprudence has firmly established that the duty to accommodate is a "two way street" and that the person seeking accommodation cannot dictate what that accommodation should*

> *be. Some "give and take" to address the restrictions and limitations is expected….*
>
> *[161] In* Central Okanagan School District No 23 v Renaud, *[1992] 2 SCR 970, 1992 CanLII 81 [*Renaud*], the Supreme Court of Canada considered the duty to accommodate, including whether the employee had been too inflexible in the accommodation process. The Court explained that accommodation entails compromise and cooperation on the part of an employee, noting at pages 994-995,*
>
> > *The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation… …*
> >
> > *This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. <u>While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business.</u> When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in* O'Malley. *The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.…*
>
> [Emphasis in the original]

[169] The parties' written arguments assessing the evidence are relatively dense. I have considered all the points they both made and the underlying evidence, but I have been particularly influenced by the considerations addressed in the following paragraphs.

[170] The evidence indicates that the employer, acting on requests from the grievor or on its own initiative, undertook a substantial number of accommodation measures, including the following:

1) purchased a specialized printer and scanner;
2) it provided him a new laptop computer;
3) it provided him large computer monitors, including a second monitor furnished within three hours of his request;

4) it purchased specialized software, including JAWS, Dragon Dictate, and OMNIScan;
5) it provided him ergonomic office equipment;
6) it provided an audio player so he could listen to hearing proceedings;
7) it provided him one-on-one retraining by legal staff;
8) it assigned the assistants for scanning help;
9) it provided him time off from the hearing schedule several times, so he could catch up on his decisions;
10) it provided him a mentor; and
11) it provided him extra time to address equipment problems.

[171] There is undeniable evidence that some purchases of equipment or software took time, sometimes months, and that the functionality of some equipment was at times less than ideal, causing delays and contributing to the grievor's stress and anxiety. Certainly, he had reason to complain and to maintain at certain junctures that he had yet to be fully accommodated.

[172] On the other hand, there is also considerable evidence that the employer responded positively to most of the grievor's requests, sometimes quite rapidly, that he confirmed a number of times that his requests were answered, and that steps taken by the employer provided the required accommodation. In his testimony, for example, he indicated as follows:

1) he agreed in April 2013 that he had received what he required to do the work;
2) he confirmed that he received double-spaced documents and material in electronic format, as requested;
3) he confirmed that in December 2013, he received a new printer-scanner and, in the same period, a more powerful laptop, as requested;
4) he confirmed that he received JAWS "earlier" than December 2013;
5) he assumed that Mr. Railton acted on his requests for updated equipment;
6) he agreed that problems with the OMNIScan software were resolved;
7) he confirmed that he received a new monitor in January 2014 that "seemed to resolve the problem";
8) he agreed that he received a second monitor in September 2014 on the day that it was requested;
9) he confirmed in a 2014 January email to Ms. Tinker that he had "… received all the equipment necessary to address [his] accommodation needs";
10) he verified that a reduction in his workload to two cases per week was an accommodation measure and that he did not assume a full caseload until June 2014; and
11) he agreed that the employer approved his request to work from home.

[173] With respect to the January 2014 email statement that he had "… received all the equipment necessary to address [his] accommodation needs", it must be noted that the grievor also testified that he did not agree that his equipment was working properly and that there were still "glitches and … bugs" in the operation of the

software. He then testified that he could not accept any suggestion that he was fully accommodated.

[174] Ms. Tinker summarized a meeting with the grievor on February 3, 2014, in an email that reads in part as follows:

> *This email will confirm our meeting today. You agreed that your probation period will commence on February 17, 2014 in order to give you a chance to ensure that all your equipment is working correctly. I have indicated to you that Karin Michnick has contacted Jean Francois Lecelle to ensure that you just contact him if you have any problems and that he will have someone help you as soon as possible. You have made great strides in getting your outstanding reasons completed which is such good news….*

[175] Unless Ms. Tinker entirely misreported her conversation with the grievor at the February 3, 2014, meeting, for which there is no persuasive evidence, it is difficult to understand why he would agree to start his probation period if he felt that he remained unaccommodated. Surely, he would have stated to Ms. Tinker at the meeting that he had yet to be fully accommodated, if that was the case. It appears more likely that he told her that there were persisting "glitches and … bugs" that needed to be addressed, not that the accommodation was insufficient. The evidence confirming that Ms. Tinker delayed the start of his probation by two weeks to allow him, with IT's assistance, to deal with the bugs and glitches provides support for that interpretation of the meeting. It is further supported by the grievor's testimony that there was "great improvement" after February 2014, at least for a while.

[176] Adding to the evidence that the employer responded positively to accommodation requests, Ms. Tinker testified that she requested whatever equipment the grievor indicated was necessary. She instructed IT to provide the equipment that was required and to verify that it was functioning properly. She stated that she checked back with IT several times about accommodation measures. She noted in her record of a meeting on March 18, 2014, with the grievor's mentor that "things were working well with his equipment", suggesting confirmation by an independent observer that the accommodation provided was functional. She received confirmation in April 2014 that IT was giving high priority to the grievor's calls.

[177] There is further confirming evidence from Mr. Pattee. He recounted his experience during a walkabout in the Toronto office when an "exuberant" grievor

asked him into his office, was excited to show him his elaborate computer setup, and told him that he would be able to do the job with the hardware and software provided to him. Mr. Pattee also indicated that he was briefed "dozens or hundreds of times" about the accommodation measures taken to assist the grievor. He testified that a number of times, he reminded IT that accommodating the grievor was a high priority.

[178] Ms. Tinker also testified that she took the grievor off the hearing schedule multiple times to allow him to catch up with his decision writing. In cross-examination, he agreed that he had been given time for that purpose.

[179] The picture drawn by the foregoing evidence and by other testimony is of an employer that at least in substantial part acted on the grievor's accommodation requests, listened to him, and treated accommodation as a priority and as a continuing, consultative process. The accommodation measures were not always provided quickly and did not always function immediately as intended. There were problems, but IT was repeatedly instructed to act on his accommodation requests and to give high priority to assisting him when he encountered problems.

[180] Obviously, the grievor disagrees with that depiction. He advanced a series of arguments challenging the employer's commitment to accommodation and alleging failures to provide him what he needed to succeed in his work.

[181] The grievor cites *Panacci v. Treasury Board (Canada Border Services Agency)*, 2011 PSLRB 2 at para. 86, for the proposition that the employer was obliged to seek all relevant medical information about his disability. He argues that the employer failed to, citing the fact that it did not pursue the FWE contemplated by Mr. Railton. The employer counterargues that there is no procedural right to accommodation that imposes a particular procedure on the employer; see *Canada (Attorney General) v. Duval*, 2019 FCA 290 ("*Duval*") at para. 25.

[182] *Duval* prevails in this case. But, perhaps more to the point, the preponderance of the evidence indicates that the grievor made known to the employer from the beginning the precise nature of his medical condition and that after that, he indicated clearly to the employer the accommodation measures that were necessary to address his diplopia.

[183] While it may be true that, as argued by the grievor, Ms. Tinker was not fully conversant with his condition, the evidence does not prove to my satisfaction that it inhibited her ability to act on his accommodation requests. As to an FWE, Ms. Tinker testified that securing one was never suggested to her. Even had the grievor pursued the possibility of one with her, which he apparently did not, management had the right to determine which accommodation measures were needed and consistent with its operation, provided that the overall accommodation was reasonable.

[184] Was the determination not to proceed with an FWE unreasonable? Lacking clear evidence about what exactly became of the FWE after Mr. Railton drafted the requesting letter, it is difficult to make a confident judgment. However, I do not find it unreasonable that Mr. Pattee should express the opinion that an FWE was not needed based on the evidence that the grievor made known the nature of his disability from the outset and that he consistently and specifically identified the accommodation measures that he needed.

[185] The grievor argues that the employer never took seriously the associated issue of his eye strain and that it did nothing to accommodate it. The basic evidence on this point is as follows:

1) the grievor testified that he experienced eye strain and that he mentioned it to the employer on several occasions;
2) Ms. Tinker stated that he did not suggest further measures to address the eye strain; and
3) the employer did not act to identify and introduce a specific accommodation measure for the eye strain.

[186] The grievor's experience of eye strain was not new, as indicated by his testimony about difficulties refocussing and attendant exhaustion during his time in private practice. With that experience, one wonders why he did not suggest anything additional to address the eye-strain problem. Certainly, the evidence reveals no hesitation on his part to identify other accommodation requirements. That said, as set out in *Renaud*, the grievor was not obliged to identify a specific accommodation measure to address the eye-strain problem.

[187] In my view, underlying the grievor's argument is an inference that the employer was obligated to respond to his eye-strain comments by identifying and implementing a unique accommodation response. That the employer did not proves a failure to accommodate. I could accept that proposition if I were convinced that the grievor's eye

strain was somehow a problem separate from his underlying condition of diplopia. I do not believe that the evidence, on balance, supports such a finding. His eye strain was part and parcel of the unfortunate challenges he faces viewing and manipulating documents, all caused by his underlying visual disability.

[188] To that extent, judging the employer's response to the grievor's eye strain in isolation is not appropriate. Instead, the wider evidence about its agreement to provide the equipment and software he requested to help him read documents must also be considered when evaluating its response to his eye-strain entreaties. The fact that the employer modified his workload is also not unimportant. On balance, I do not find that the evidence about the eye strain detracts from other evidence that the employer provided reasonable accommodation for the grievor's visual disability.

[189] The grievor maintains that the employer did not recognize that the accommodation went beyond acquiring technology and software for him. He also needed to know how to use the software. His direct evidence on the issue of training was somewhat limited. He stated in examination-in-chief that while he had the tools, he did not receive adequate training. The only specific example provided concerned JAWS, which he described as very complicated, allowing that he knew the basics but could not manipulate it adequately without professional training.

[190] In her examination-in-chief, Ms. Tinker disputed the grievor's claim that he had requested but had not been provided training. She indicated that he had told her that he had worked with the equipment in question at home, although it is not clear whether her reference to "equipment" includes software such as JAWS.

[191] In cross-examination, Ms. Tinker agreed that some of the software required by the grievor, including JAWS, was sophisticated and that people like her would not know how to use it. She agreed further that the grievor requested training in his email dated January 31, 2014, and she conceded that she did not know whether he received it, stating that IT was responsible for the follow-up. Elsewhere in her testimony, Ms. Tinker agreed that full accommodation meant to her that the technology was working. When asked about any other form of accommodation, she replied, "That's all he asked for."

[192] I find Ms. Tinker's testimony on the training issue somewhat unpersuasive. It stands, in my view, as the one area of evidence that potentially calls into question the reasonableness of the employer's actions.

[193] The grievor criticizes Mr. Pattee for his allegedly vague testimony about following up on the grievor's allegation that a manager in Shared Services Canada did not want to accommodate him. However, the grievor admitted that he could not recall whether he reported the issue to management. He testified that he learned "later" from unidentified IT personnel about the IT manager. The lack of precision in the grievor's testimony — how much later and exactly from whom — and its probable hearsay character substantially undermines its weight.

[194] Against the grievor's testimony is Mr. Pattee's uncontradicted statement that he came to know about the report about the IT manager only at the second-level grievance hearing in March 2015, after the grievor's termination. Given that the grievor did not establish deficiencies in Mr. Pattee's follow-up with respect to the IT manager in the period before he filed his grievance, his argument must be discounted.

[195] The grievor alleges that he was treated as being difficult. I note Mr. Leger's email advice to Ms. Tinker "keep calm" in her dealings dealing with the grievor. The reference is curious but otherwise unsupported. Ms. Tinker denied that her relationship with the grievor was fraught. The grievor did not offer reliable evidence to counter her testimony. Instead, he characterized his relationship with her as "nothing extraordinary". He mentioned his disagreement with her about wearing a tie in the workplace, but such a disagreement is hardly a reliable indication that he was treated as a difficult employee.

[196] There are further suggestions in the evidence that the employer found it necessary at times to counsel the grievor to change his behaviour, as in Ms. Tinker's urging that he should be more proactive in contacting IT to identify problems and in monitoring the status of his decisions. Once more, the need to provide counselling does not establish that the grievor was necessarily difficult and that he was treated as such.

[197] The grievor suggests that the employer was "fixated" on pinpointing a specific date on which accommodation was achieved. He argued that its alleged fixation indicates a failure to understand that accommodation is an ongoing process.

[198] I accept that the grievor might have been discomforted by repeated inquiries about the state of his accommodation. (I note that at the hearing, he did not advance an argument alleging harassment despite two references to harassment in the originating grievance.) However, the evidence reveals a credible reason for the employer's inquiries; i.e., its desire not to begin the grievor's probationary term until it judged that in its words "full accommodation" was in place.

[199] Asking him periodically whether he was being accommodated can also credibly be viewed as part of a continuing effort to monitor the effectiveness of the accommodation measures. The evidence suggests that Ms. Tinker touched base multiple times with IT and with the grievor about several elements of accommodation, that she discussed the progress of accommodation with his mentor, and that she engaged a consultant to help her understand his accommodation needs. Such evidence does not support the charge that she failed to understand accommodation as an ongoing process. As to the grievor's assertion that the duty of accommodate did not end in February 2014 when Ms. Tinker deemed that he had been accommodated, the proposition itself is obvious, but I have not found persuasive evidence that reasonable accommodation efforts ceased after February 2014.

[200] Further to the charge that the employer did not understand the ongoing nature of its accommodation responsibilities, I refer again to the uncontested evidence of Mr. Pattee that he was briefed "dozens or hundreds of times" about the grievor's accommodation, including in bilateral meetings with Ms. Michnick and Ms. Tinker and in discussions with his labour relations advisors. His testimony about repeatedly stressing to IT the high priority that it should assign to resolving issues identified by the grievor also suggests that the grievor's accommodation was a preoccupation for the employer throughout his time at the IRBC.

[201] As noted, the case law holds that an employee must cooperate in accommodation measures and must accept a reasonable accommodation. There is no substantial evidence in this case to suggest that the grievor failed in that respect. Nonetheless, the evidence that he did not use the assistants that were assigned by Ms. Tinker to help him with document scanning is somewhat troubling. He stated that he did not use them because they were not always available to him, and he maintained that he was not given the time to train them in the use of the scanner. Ms. Tinker responded that she was not aware that the assistants were often unavailable, as

alleged, but did recall the grievor telling her that he never used them. She refuted the suggestion that the assistants were not trained in the use of the scanner.

[202] I cannot confidently resolve the conflicting testimony about the availability of the assistants or whether they were adequately trained. Hard evidence is entirely missing. However, on balance, it seems likely that the grievor chose not to use them because he could not access their services whenever he wanted to. In that sense, the accommodation measure was not perfect in his eyes, but again, drawing from the case law, perfection is not the applicable standard.

[203] In his final argument, the grievor asks, "Would it have been undue hardship to assign two assistants exclusively to Mr. Bourdeau?" In my opinion, undue hardship is not an issue here. The real issue is what was reasonably required operationally to allow the grievor to do his work. From that perspective, the suggestion that the two assistants should have been exclusively available to him at all times simply does not make sense. Their contribution to his accommodation was to help him by scanning documents. There is no evidence to suggest that document scanning was a constant, full-time requirement or a contingency that could arise at any moment, requiring immediate action.

[204] The grievor should have understood that the assistants might not be available at all times, that the employer was entitled to assign them other duties, and that he should have been prepared to adjust his work to some extent to accommodate their availability.

[205] In argument, the grievor also asked why it took so long for the employer — "fourteen months (Nov 2012-January 2015)" — to provide tools such as a scanner and a new computer, challenging the notion that the tools were "complex". November 2012 to January 2015 is obviously not 14 months. Presumably, the grievor meant an earlier date.

[206] Evidence already canvassed established that the employer ordered a new printer-scanner and other accommodation measures in December 2013. The grievor agreed that the employer acted to secure a more powerful laptop in the same period and stated that "earlier", he received JAWS. By January 2014, the grievor confirmed in an email to Ms. Tinker that he had "… received all the equipment necessary to address [his] accommodation needs." Mr. Pattee testified about the "exuberance" of the grievor

as to his elaborate computer setup and his confirmation that he would be able to do the job with the hardware and software provided to him — reactions encountered during a walkabout in the Toronto office during the first year of the program; i.e., sometime within 12 months of December 2012.

[207] Was 14 months too long? In a perfect world, perhaps, the employer should have resolved earlier all the equipment and software problems that the grievor encountered. However, I am not persuaded that the evidence confidently establishes that 14 months was unreasonable.

[208] Accommodation was an evolving process during the grievor's early months at the IRBC. Different issues arose as he began to do the work. The requirements were not all identified at once, but when he identified them, more often than not, the employer took relatively prompt action. Once more, I also view it as significant that the employer understood that it could not initiate the grievor's probationary term until it believed that reasonable accommodation measures were in place and that it was prepared to take the time necessary to reach that point.

[209] As to the suggestion advanced by the grievor that the tools required for accommodation were really not so "complex", I note that for example, he testified that JAWS is very complicated. He also indicated several times that there were equipment and software "glitches and … bugs" that needed to be addressed, sometimes requiring expert IT assistance. Whether complex or not, the accommodation issues identified by him and faced by the employer were novel to the IRBC workplace, at the very least. It is not unreasonable that it took time to identify and implement solutions. Even then, tools sometimes had to be reworked or replaced, also requiring time.

[210] Viewed in its entirety and on balance, I find that the evidence demonstrates that the employer provided reasonable accommodation to the grievor. The accommodation was not perfect and was not always timely. There were certainly "glitches and … bugs" along the way with hardware and software, but such problems would indicate only a failure of accommodation if they were not addressed and resolved.

[211] The preponderance of the evidence, in my opinion, is that the employer acted reasonably in its response to problems identified by the grievor. Furthermore, I do not accept that it failed to understand that accommodation is an ongoing, cooperative process. The balance of evidence of what occurred between the grievor's hiring in

November 2012 until February 2014 indicates a recurrent effort to understand what he needed and to meet those needs.

[212] There were flaws, as in the treatment of the grievor's request for training in the use of JAWS, but I find that flaws were exceptional. They do not dissuade me from finding that the employer has offered a reasonable non-discriminatory explanation for its actions, on the balance of the evidence.

[213] For the reasons stated, I rule that the grievance should be dismissed.

[214] The Board makes the following order:

(The Order appears on the next page)

VI. Order

[215] The grievance is dismissed.

April 16, 2021.

Dan Butler,
a panel of the Federal Public Sector
Labour Relations and Employment Board