Date: 20230803

Files: 566-02-12323, 12324, and 42117

Citation: 2023 FPSLREB 77

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

ANDY MATOS

Grievor

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

Indexed as
Matos v. Treasury Board (Canada Border Services Agency)

In the matter of individual grievances referred to adjudication

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

For the Grievor: Jessica Greenwood and Geoff Dunlop, co-counsel

For the Employer: Viviane Beauregard, counsel

Heard via videoconference,
February 23 to 25 and March 18, 2021.

REASONS FOR DECISION

I. Summary

[1] Andy Matos ("the grievor"), now retired, enjoyed a lengthy and by all indications quite successful career that began in 1981 serving as a border services officer (BSO), classified FB-03, with the Canada Border Services Agency (CBSA) ("the employer") at its Ambassador Bridge District in Windsor, Ontario. On June 5, 2014, he was required to undergo the Health Canada Category III Medical Assessment ("CAT III") medical examination, which was the first step of the implementation of an initiative to arm BSOs with sidearms that the evidence showed his bargaining agent, the Public Service Alliance of Canada ("the bargaining agent"), had aggressively pursued for several years.

[2] Based upon the medical exam report from the grievor's family doctor of 12 years, the Occupational Health Medical Officer of Health Canada wrote about the grievor, stating, "Does not meet medical requirements. Specifically, not fit for the [Combat and Defensive Tactics] CDT training or [Duty Firearm Course] DFC. Mr. Matos [*sic*] medical condition will unlikely change in the foreseeable future."

[3] CDT training was a prerequisite to be passed before taking the DFC. The CBSA's *Directive on Agency Firearms and Defensive Equipment* ("the Directive") stated that a BSO's defensive tools had to be removed on the discovery of a medical condition that could negatively influence the BSO's ability to possess, wear, or use defensive equipment.

[4] Due the grievor's health and the results of the CAT III and what that triggered in the Directive, the grievor could no longer carry his defensive tools, which then required that he no longer work his preferred post at the primary inspection line (PIL). Instead, he was given a choice of other non-enforcement, accommodated posts at the Ambassador Bridge. However, he requested that instead, he be posted to the CBSA post at the UPS-FedEx courier facility, which was part of the same Windsor, Ambassador Bridge District. At all times relevant to this matter, the grievor remained in the same FB-03 group-and-level position at the same hourly rate of pay.

[5] The grievor alleged that having to give up his defensive tools and being removed from his preferred enforcement PIL post due to an "age-induced physical disability"

caused him lost opportunities for overtime income all of which resulted in a human rights violation.

[6] He argued that the CAT III criteria that his health was assessed against are flawed and that they cannot be justified as being linked to his actual BSO duties and further that wearing defensive tools is not a *bona fide* occupational requirement (BFOR).

[7] He also noted that he was not due for a medical fitness reassessment and that requiring one had been unnecessary. He also pointed to evidence that at least two other BSOs had faced similar circumstances but that they had been allowed to continue their frontline work after having had their defensive tools removed. The grievor submitted that even if the Directive were found valid, he was not properly accommodated, as the employer was required to have sought an assessment aimed at identifying his functional limitations (related to his actual duties and not the Directive) and then to have accommodated him at his post rather than moving him to a new post.

[8] While the grievor did engage his health and medical conditions as a prohibited ground of discrimination in his effort to discharge his burden of establishing a *prima facie* case of discrimination, on a balance of probabilities, the evidence did not support a finding that he experienced an adverse impact.

[9] I conclude that removing his defensive tools and asking him to choose a new posting at his same position, grade, and hourly rate of pay within the same Windsor CBSA operation were not adverse impacts.

[10] The grievor alleged that he lost overtime income due to being moved to an accommodated post. The two resulting grievances are denied as I conclude that there was insufficient evidence to establish that his health would have allowed him to accept any more hours of work at the times relevant to these matters such that he was not readily available as is required.

[11] Therefore, without evidence to support that he was available to accept any further overtime, his alleged loss of overtime income cannot stand as an adverse impact to sustain his allegation of discriminatory treatment. I also conclude there is insufficient evidence to support the claim of discrimination on a prohibited ground contained in the third grievance (February 14, 2016) related to overtime.

[12] The grievor had a low threshold to meet to establish a *prima facie* case of discrimination, but nevertheless, it had to be established with clear and compelling evidence, which was lacking.

II. Agreed statement of facts

[13] The agreed statement of facts (ASF) reads as follows:

> *1. These matters relate to three grievances filed by Andy Matos:*
>
> - *Grievance 566-02-12324 (CBSA #14-116651) re Article 19, No Discrimination, filed September 10, 2014 (**Tab 1**).*
> - *Grievance 566-02-12323 (CBSA #14-116623) re Article 28, Overtime, filed September 24, 2014 (**Tab 2**).*
> - *Grievance 566-02-42117 (CBSA #16-120004) re Article 6, 18 and 19, filed February 14, 2016 (**Tab 3**).*
>
> *2. Grievances 566-02-12323 and 566-02-12324 followed a finding that Mr. Matos did not meet the medical requirements of the Health Canada Category III (CAT III) Medical Assessment.*
>
> *3. On February 14, 2016, the Grievor filed a third grievance (FPSLREB File No. 566-02-42117) claiming that he had not been offered overtime work on an equitable basis as required by Article 28.03 of the Collective Agreement.*
>
> *4. The collective agreement provisions at issue in the three matters are contained in the* Agreement Between the Treasury Board and the Public Service Alliance of Canada Group: Border Services (All Employees), *expiring June 20, 2014 and June 20, 2018 (**Tabs 4 & 5**).*
>
> *…*
>
> *5. On November 9, 1981, Mr. Matos began working at the Canada Border Services Agency (CBSA).*
>
> *6. In 2006, the Government of Canada announced its commitment to enhance border security and the safety of its officers by providing them with duty firearms and training (**Tabs 7 and 8**).*
>
> *7. In November 2009, CBSA introduced the CAT III Medical Assessment as a mandatory requirement for all employees occupying an enforcement position to ensure the health and safety of employees and the travelling public (**Tabs 11 and 14**).*
>
> *8. On November 30, 2009, CBSA started proceeding with the CAT III Medical Assessment.*
>
> *9. In June 2014, the Grievor was working as a Border Services Officer (BSO) at the FB-03 group and level at the Ambassador Bridge District within the Southern Ontario Region. Up until July 2014 the Grievor conducted frontline enforcement duties.*
>
> *…*

*10. In June 2014, the Grievor was sent for a CAT III Medical Assessment, which was completed by his family physician, Dr. Paul Loebach (**Tab 17**).*

*11. On July 4, 2014, Dr Shapiro signed the Occupational Health Assessment Report concluding that the Grievor had failed the CAT III medical assessment (**Tab 19**).*

12. In a letter dated July 15, 2014, Dr Shapiro informed the Grievor and CBSA that Mr. Matos had failed the CAT III medical assessment, as follows:

> Does not meet medical requirements. Specifically, not fit for CDT training or DFC. Mr. Matos medical condition will unlikely change in the foreseeable future. Meets vision standard with corrective lenses. Does not meet hearing standard given the information available. TB skin was not done. Mr Matos was notified under separate cover (**Tab 21 & 22**).

*13. On July 31, 2014, Chief Jeffrey Gilmore (Chief Commercial Operations at the Ambassador Bridge) removed the Grievor's defensive tools given he had not met the standards required by the CAT III medical assessment. Chief Jeffrey Gilmore also informed the Grievor that effective on that day, he was assigned to perform non-enforcement duties at the Kiosk, the Electronic Data Interchange (EDI), and at the Commercial Primary Processing (CPP) (**Tab 24**).*

*14. On July 31, 2014, the Grievor requested an assignment to UPS and Fedex (**Tab 30**).*

*15. In a letter dated August 5, 2014, Dr Shapiro provided further details to the grievor on his conclusions. He also invited the Grievor to inform his department should his condition change in the future (**Tab 25**).*

16. On August 7, 2014, Chief Jeffrey Gilmore, emailed the Grievor to explain the position of CBSA with respect to CAT III Medical Assessment, as follows:

> The purpose of the CAT III is to establish that employees are able to perform the enforcement related duties of their position (which includes the wearing of defensive tools) without detriment to their health and safety or that of others. If an employee does not meet the medical requirements of the CAT III it is the Agency's position that they cannot be in a position that requires a CAT III/perform enforcement related duties which require defensive tools (Border Services Officers (BSOs), Superintendents, Chiefs, Intelligence Officers, Investigators, Use of Force Trainers, Regional Managers, Inland Enforcement Officers and Inland Enforcement Supervisors) (**Tab 26**).

*17. Mr. Gilmore went on to explain that the CAT III Medical Assessment is administered by Health Canada (**Tab 26**).*

18. *In an email dated August 21, 2014, Tamara Allard repeated to the Grievor that if he did not pass the CAT III Medical Assessment, he could not be assigned to work on primary lines (**Tab 27**).*

19. *On September 10, 2014, the Grievor presented the individual grievance number 14-116651 (566-02-12324), alleging that he was being discriminated against and harassed by CBSA on the grounds of possible age-induced physical disability, in contravention of Article 19.01 of the Collective Agreement (**Tab 1**).*

20. *On September 16, 2014, the Grievor informed Chief Jeffrey Gilmore that he wished to be placed back on the overtime list. Chief Jeffrey Gilmore informed the Grievor that he would be placed on the list, and that overtime would be offered to him when there is work that meets his accommodation (**Tab 28**).*

21. *On September 24, 2014, the Grievor presented the individual grievance number 14-116623 (566-02-12323), alleging that he was not being offered overtime work on an equitable basis with his peers, in contravention of Article 28.03 (a) of the Collective Agreement (**Tab 2**).*

22. *In October 2014, the Grievor was transferred to the UPS/Fedex facility.*

23. *On October 9, 2014, grievance 14-116651 (566-02-12324) was denied at the first level (**Tab 1**).*

24. *On October 20, 2014, the Grievor sent an email to Dr Shapiro to advise him that he had received his hearing aids, and asked Dr Shapiro whether he should get retested for CAT III Medical Assessment. The Grievor also informed Dr Shapiro that he still suffered from sleep apnea (**Tab 29**).*

25. *On October 29, 2014, grievance 14-116623 (566-02-12323) was denied at the first level (**Tab 2**).*

26. *In a letter dated November 3, 2014, Dr Shapiro responded to the Grievor as follows:*

    …If you and your physician think you would meet these requirements, which include CDT and firearms training, please inform your department that you would like a new Category III periodic medical assessment. Testing your hearing with hearing aids could then be part of the new Category III periodic medical assessment (**Tab 32**).

27. *On December 8, 2014, grievances 14-116623 (566-02-12323) and 14-116651 (566-02-12324) were both denied at the second level (**Tab 1 & 2**).*

28. *At all relevant times, Patricia Wyles, who was a Border Services Officer (BSO), was working at the Windsor border crossing located in another district. Mrs Wyles and the Grievor were therefore reporting to different managers.*

29. *In 2014, Ms. Wyles underwent surgery on her right arm 3 times to treat cancer. As a result, Ms. Wyles failed her CAT III and her defensive tools were removed by CBSA in May 2014 (**Tab 35**).*

30. *Ms. Wyles continued working all regular duties, including Primary Inspection Line ("PIL") at the Windsor border crossing until January 2016, when she was assigned to an accommodated role in an office setting at the Alternate Inspection Service (IAS Unit) (**Tab 39 & 40**).*

31. *Prior to May 2014, Ms. Wyles often worked at the Pelee Island border crossing, which is a small Port of Entry typically staffed by three BSOs. After failing her CAT III and having her defensive tools removed, Ms. Wyles was no longer allowed to work at the Pelee Island border crossing, because of security concerns related to her inability to carry defensive tools.*

32. *At all relevant times, Mrs. Kelly Fry, a BSO, was also working at the Windsor border crossing located in another district. Mrs. Fry and the Grievor were therefore reporting to different managers.*

33. *Ms. Fry was medically unable to complete Controlled Defence Tactics training ("CDT") and carry defensive tools as a result of injuries she sustained outside of work. As a result, Ms. Fry did not receive CDT, nor did she carry defensive tools, at any time during her career with CBSA.*

34. *Ms. Fry worked on PIL until January 2016, when she was also assigned to a role in an office setting at the Alternate Inspection Service (IAS Unit).*

35. *On March 1, 2016, grievance 14-116623 (566-02-12323) was denied at the final level (**Tab 1**).*

36. *On March 18, 2016, grievance 14-116651 (566-02-12324) was denied at the final level (**Tab 2**).*

37. *On March 30, 2016, the Grievor referred the grievances number 14-116623 (566-02-12323) and 14-116651 (566-02-12324) to adjudication before the Federal Public Sector Labour Relations and Employment Board.*

38. *On February 14, 2016, the Grievor presented the individual grievance number 16-120004 (566-02-42117), alleging that the overtime was not being distributed equitably at UPS and Fedex. The Grievor's allegations were that there was secret overtime that was never offered to him despite his superiors being informed that he wanted to work overtime, and that this was discrimination based on age and disability (**Tab 3**).*

39. *On May 4, 2016, grievance 16-120004 (566-02-42117) was partially allowed at the first level. The management concluded that overtime had not been distributed equitably. However, the management refused to compensate the grievor based on the principle of "no work, no pay". The management also*

> *concluded that inequity in the distribution of overtime at UPS and Fedex was not based on discrimination (**Tab 3**).*
>
> *40. On July 7, 2016, grievance 16-120004 (566-02-42117) was partially allowed at the second level. The management confirmed that overtime had not been distributed equitably. The management also maintained its refusal to compensate the Grievor based on the principle of "no work, no pay". The management also maintained that inequity in the distribution of overtime at UPS and Fedex was not based on discrimination ….*
>
> *41. On August 18, 2016, grievance 16-120004 (566-02-42117) was partially allowed at the final level. The management confirmed that overtime had not been distributed equitably. The management also overturned both decisions at previous levels with regards to compensation. Consequently, the management compensated the Grievor for 14.50 hours. However, the "no discrimination" conclusion remained (**Tab 3**).*
>
> *42. On August 6, 2016, the Grievor retired from CBSA.*
>
> *43. On September 25, 2020, the Grievor referred the grievance number 16-120004 (566-02-42117) to adjudication before the Federal Public Sector Labour Relations and Employment Board.*
>
> [*Sic* throughout]

III. Board file no. 566-02-12324: the no-discrimination grievance

[14] The grievor alleged that the employer violated the no-discrimination clause (clause 19.01) of the collective agreement between the Treasury Board and the Public Service Alliance of Canada for the Border Services group that expired on June 20, 2014 ("the collective agreement"). The next collective agreement was signed on July 3, 2018. Therefore, the work conditions as governed by the collective agreement expiring on June 20, 2014, were maintained until the next collective agreement was signed.

[15] He alleged that his defensive tools were taken from him and that he was reassigned, against his wishes, from his preferred PIL post due to "age-induced physical disability".

[16] The requested remedy was to cease that practice and to allow him to fully realize his indeterminate career until retirement, at a date of his choosing, and that he be made whole. While the grievance alleged harassment by the employer, this matter was not pursued at all by his counsel at the hearing.

[17] In this grievance, the grievor alleges that the employer violated clause 19.01, entitled "No Discrimination", of the collective agreement, which states 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.*	***19.01*** *Il n'y aura aucune discrimination, ingérence, restriction, coercition, harcèlement, intimidation, ni aucune mesure disciplinaire exercée ou appliquée à l'égard d'un employé-e du fait de son âge, sa race, ses croyances, sa couleur, son origine nationale ou ethnique, sa confession religieuse, son sexe, son orientation sexuelle, sa situation familiale, son incapacité mentale ou physique, son adhésion à l'Alliance ou son activité dans celle-ci, son état matrimonial ou une ou une condamnation pour laquelle l'employé-e a été gracié.*
…	[…]

[18] I note that the collective agreement does not define "discrimination"; however, s. 7 of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; "the *CHRA*") sets out discriminatory employment practices as follows:

7 *It is a discriminatory practice, directly or indirectly,*	***7*** *Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :*
(a) *to refuse to employ or continue to employ any individual, or*	***a)*** *de refuser d'employer ou de continuer d'employer un individu;*
(b) *in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.*	***b)*** *de le défavoriser en cours d'emploi.*

[19] Section 226(2) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2), vests the Federal Public Sector Labour Relations and Employment Board ("the Board", which in this decision also refers to any of its predecessors) with the legislative authority to interpret and apply the *CHRA* to employment matters such as this, as follows:

Powers of adjudicator and Board	***Pouvoirs de l'arbitre de grief et de la Commission***
226 (2) *An adjudicator or the Board may, in relation to any matter referred to adjudication,*	***226 (2)*** *L'arbitre de grief et la Commission peuvent, pour instruire toute affaire dont ils sont saisis :*
(a) *interpret and apply the* Canadian Human Rights Act *and any other Act of Parliament relating to employment matters, other than the provisions of the* Canadian Human Rights Act *that are related to the right to equal pay for work of equal value, whether or not there is a conflict between the act being interpreted and applied and the collective agreement, if any ….*	***A)*** *interpréter et appliquer la* Loi canadienne sur les droits de la personne*, sauf les dispositions de cette loi sur le droit à la parité salariale pour l'exécution de fonctions équivalentes, ainsi que toute autre loi fédérale relative à l'emploi, même si la loi en cause entre en conflit avec une convention collective* […]

A. The grievor's evidence and submissions

[20] During his testimony the grievor noted that he had enjoyed a long BSO career and that he had worked at many CBSA posts in Windsor, including the Ambassador Bridge, the Detroit-Windsor Tunnel, and the UPS-FedEx courier-package facility. Normally, he was assigned to a PIL post only every other hour. He had worked PIL posts for 25 years without defensive tools or a sidearm. He testified that he was comfortable with that since backup was always nearby and another BSO could always respond quickly if needed. He said that he always felt "normal" on the job and performed his duties fully until he was told to give up his defensive tools and was removed from working PIL posts.

[21] The grievor said that in his 2008 CDT training, he suffered a shoulder injury in the hand-to-hand combat part but was accommodated and was allowed to continue working a PIL post. He then underwent a functional abilities assessment and was accommodated by not having to examine large trucks. He did not take defensive tactics training and was deemed unfit for training exercises. He said that later in 2009, he had to "beg his doctor" to sign the approval so that he could take his requisite CDT training. He was not required to obtain medical clearance before taking the regular periodic 2013 CDT refresher course, which he successfully completed on April 29, 2013.

[22] Despite having recently recertified in his CDT training, in 2014, the grievor said that he was that told another exam was required and that he was presented with options for a medical examination for the CAT III. He was told that it was necessary as the rollout of firearms required new training and the CDT, which in turn required the CAT III. He added that the CDT certification had been for a three-year period and that he should not have had to do it again after only approximately one year.

[23] The grievor stated that he chose to see his doctor of 12 years, who carried out the medical exam. It included a hearing evaluation that revealed some hearing impairment. It was recommended that he acquire hearing aids. He also had sleep apnea but could not use a CPAP (continuous positive airway pressure) machine, so he did not sleep well. He noted that the doctor's report stated that he was "extremely fatigued" and that thus he could not work "overtime or holidays". His wife was also ill then, and he was caring for his aged mother. He said that he got a mouthguard to help sleep.

[24] The grievor testified that his doctor told him that nobody 50 or older should take the CDT training as it involves such a high risk of injury. The grievor testified that while he respected that opinion, he did not agree with it. He felt that he was fit for the CDT training, but his doctor refused to approve his CAT III. He said that he considered seeing a different doctor, for a second opinion, but that he never did. He added that his doctor did not mention any medical problems related to carrying out his duties.

[25] The grievor stated that he worked as much overtime as he could. He said that the overtime availability had never been better as he is bilingual, and the employer continually assigned overtime to ensure that frontline services were always available in both official languages.

[26] The grievor said that he was asked to attend a meeting with management on July 31, 2014. His supervisor, Jeffrey Gilmore, CBSA Chief of Operations at the Ambassador Bridge, was very nice to him during the meeting but took away his defensive tools and explained that it was because he did not pass the CAT III. He was then told that removing the tools meant that he could no longer work in a PIL frontline enforcement post. He was then asked for his preference for an accommodated post, which he stated was the UPS-FedEx depot. He said that he was not asked for any required detailed accommodation. The grievor explained that he knew of two other

BSOs who had their defensive tools removed due to medical issues but who were allowed to remain at their PIL enforcement posts.

[27] The grievor said that he filed a grievance against having to work at an accommodated post. He claimed that it caused him lost overtime income. He said that he repeatedly asked his managers questions, trying to determine his options.

[28] The evidence established that at that same time, he sought assistance through counselling services, which said that it was unaware of his CAT III results. He contacted Health Canada to determine whether obtaining an oral appliance and hearing aids would mean passing the CAT III and would allow him to avoid the accommodated post.

[29] The grievor testified that in January 2016, approximately 18 months later, he become quite upset and frustrated with what he considered overtime being assigned improperly and in a secretive manner by a UPS-FedEx manager rather than his CBSA manager.

[30] The grievor testified that he considered it unethical for the UPS-FedEx manager to assign overtime to the BSOs he liked or who cooperated with him more. The grievor explained how upset he became when he saw overtime being assigned directly by UPS-FedEx courier managers rather than by CBSA management. He also testified as to how upset he was that a FedEx manager told him that if he were more cooperative, he might be assigned more overtime. He testified that the FedEx manager's actions prevented him from doing his job properly.

[31] The grievor added that the FedEx manager's actions were unethical and stated further that only CBSA management can assign BSO overtime. He testified that he felt "hurt" by the events of July 2014 but that the UPS-FedEx episode "crushed" him as he could not do his job as it should have been done.

[32] The grievor testified that he filed a grievance over that overtime issue to send a flare to management so that it would examine the abuse of overtime, which frustrated him as filing the grievance meant that he had to act like a whistleblower.

[33] He stated that he sought counselling during this period around the start of 2016 to deal with his mounting frustration and disconnection from the workplace. The documentary evidence confirmed that he sought counselling services in four one-hour

sessions from January 8 to February 1, 2016. The grievor testified that the overtime problem continued until he retired. He said that he felt compelled to retire early due to these issues.

[34] The grievor's counsel cited the three-part test for the grievor to establish a *prima facie* case of discrimination set out in *Moore v. British Columbia (Education)*, 2012 SCC 61. The grievor carried the initial burden of demonstrating that he has a characteristic protected from discrimination under the *CHRA*, that he suffered a differential and adverse impact from the employer, and that the protected characteristic was a factor in the adverse impact. It is a low threshold, and if it is proven, the burden then shifts to the employer, which can seek to establish undue hardship or a BFOR.

[35] Counsel began their submissions on this point by stating that it was inconceivable that the employer would argue that there was no *prima facie* case of discrimination.

[36] To address the first part of the *Moore* test, which required the grievor to establish that he has a characteristic protected from discrimination, he argued that his medical condition, as his doctor noted in the CAT III report and as his testimony confirmed, was such that he was found unfit for the CDT training. He noted that the evidence of his medical condition was not contested either in cross-examination or by other medical opinions being adduced in evidence.

[37] The grievor submitted that the second step of the *Moore* test, which required him to demonstrate that he suffered differential and adverse treatment, was satisfied by the fact that he was transferred away from his preferred PIL post against his wishes and that he subsequently lost income as his opportunity for overtime income was diminished in his accommodated post at the UPS-FedEx courier facility.

[38] And finally, for the third step of the *Moore* test, which required the grievor to establish that the noted protected characteristic was a factor in the differential and adverse impact he suffered, he argued that but for his state of health and the related CAT III and CDT policy outcomes that were solely based upon his health, none of the events that are the subjects of the three grievances would have occurred.

[39] The grievor added that even the employer acknowledged that he was moved into an accommodated position by admitting in its testimony and in the documentary evidence that his defensive tools were removed, which resulted in moving him from an enforcement post to an accommodated post with modified duties.

[40] The grievor's submissions continued by challenging the CAT III's validity as it does not set out objective health and medical criteria that could be proven to be required to perform a BSO's work at an enforcement post. The CDT was also challenged, as was the related need for defensive tools.

[41] It was also established in evidence that two other BSOs in the district were unable to satisfy the CAT III. Their defensive tools were removed, but they were allowed to continue in their PIL enforcement duties. It was argued that this established the arbitrariness of the grievor's treatment and supported his assertion that the CBSA could not establish the CAT III, CDT, and defensive tools as a BFOR.

[42] The grievor also submitted that serious errors and omissions occurred in the accommodation process, beginning with the complete neglect to try to identify his functional limitations or to try to accommodate him in his post through to the decision to move him out of his preferred enforcement post.

[43] The grievor noted both *Moore* and the Board's decision in *Nicol v. Treasury Board (Service Canada)*, 2014 PSLREB 3, for the proposition that the duty to accommodate must first seek to accommodate an individual in their position before considering any changes to their job.

[44] In *Nicol*, the Board found that the employer acted recklessly by not seeking to accommodate the grievor in that case and instead offering him demoted positions and threatening to terminate his employment. It ultimately forced him into a medical retirement.

[45] I note the following from that decision:

…

> *[121] The duty to accommodate requires the employer to first reasonably accommodate the employee at his or her substantive level before considering lower-level positions. The employer should have made other attempts to accommodate the grievor at his own substantive level before offering positions at a lower classification*

> *and pay level. However, the employer made no such efforts, despite the requests from the grievor and the bargaining agent. The only step the employer took was to encourage the grievor to make his own efforts to find another position at his substantive level.*
>
> …

[46] The grievor also noted the Federal Court's decision in *Coupal v. Canada (Attorney General)*, 2006 FC 255, which dealt with very similar facts of a BSO who required accommodation for medical reasons and was given modified duties that removed the enforcement aspect of her position, but otherwise, she stayed in the same position at the same level and hourly rate of pay. *Coupal* states:

> …
>
> *[20] In* British Columbia (Public Service Employee Relations Commission) v. British Columbia Government Services Employees Union, *[1999] 3 S.C.R. 3 ("*Meiorin*"), the Supreme Court of Canada established a three-step test for determining whether an employment practice or policy constitutes a BFOR. At paragraph 54, Madam Justice Beverly McLachlin (as she then was) stated the test as follows:*
>
> > *… I propose the following three-step test for determining whether a* prima facie *discriminatory standard is a BFOR. An employer may justify the impugned standard by establishing on the balance of probabilities:*
> >
> > *(1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;*
> >
> > *(2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and*
> >
> > *(3) that the standard is reasonably necessary to the accomplishment of that work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.*
>
> *[21] Madam Justice McLachlin went on to state at paragraph 55 of her reasons that if a reasonable alternative exists which would less adversely affect members of a particular group, then the rule or standard is not a BFOR:*
>
> > *… It follows that a rule or standard must accommodate individual differences to the point of undue hardship if it is to be found reasonably necessary. Unless no further accommodation is possible without imposing undue*

> *hardship, the standard is not BFOR in its existing form and the* prima facie *case of discrimination stands.*
>
> …
>
> *[36] In her report, the Investigator essentially recited the positions of the parties. With regards to the "reasonably necessary" requirement of the* Meiorin *test, the Investigator accepts the CCRA's assertion that the alternative of two job descriptions is "operationally unfeasible" as sufficient to satisfy the test. I agree with the Applicant that the Investigator cannot simply accept without further inquiry "bald assertions" by the CCRA that other options are unworkable or "operationally unfeasible". Further, during the hearing the Respondent acknowledged the limited scope of Dr. Deakin's report. It was revealed that Dr. Deakin was only asked to give an opinion as to whether a person able to successfully complete the Use of Force training would meet the physical standard required for the Customs Inspector and/or Customs Superintendent jobs. Dr. Deakin was never asked to consider whether there were alternate ways of meeting the objective which would minimize the adverse effect on employees such as the Applicant. The CCRA essentially relied on Dr. Deakin's evidence to establish that the Policy constitutes a BFOR. In my view, Dr. Deakin's report does not satisfy the CCRA's evidentiary burden of proving that no other options for accommodating the Applicant and other employees which would cause no undue hardship to the CCRA are available to it.*
>
> *[37] The only accommodation offered to Customs Officers unable to complete the "Use of Force Training" involves essentially placing these officers in positions where the Officer Power designation is not required. In my opinion, this changes significantly the Customs Officer's work description. What is not explored by the Investigator is whether this "new standard" is reasonably necessary and whether the CCRA had other options which could have permitted Customs Officers like the Applicant to maintain their jobs with the same responsibilities without causing undue hardship to the CCRA.*
>
> *[38] The Investigator accepted the CCRA's position that other options were "operationally unfeasible" without exploring whether the evidence supported such a finding. If there was no such evidence, then the CCRA failed to meet its burden on the third requirement of the* Meiorin *test and the complaint should not have been dismissed. If such evidence existed, it was not explored or considered by the Investigator. By failing to do so the Investigator omitted to consider fundamental evidence and thereby failed to conduct a thorough investigation into the existence of a BFOR. In the result, the Commission violated the principles of procedural fairness. The Commission's decision will therefore be quashed and the matter returned to the Commission for reconsideration in accordance with these reasons.*
>
> …

[47] The grievor also noted the need for an individualized approach to seek to accommodate each employee as opposed to mechanically relying upon a stated policy and standards as found in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4 ("*McGill*").

[48] The grievor noted these pronouncements on the need for individualized accommodations in the same position, the decision about the impact of modified duties, and what is required of an employer to show a BFOR and finally to sustain a case of undue hardship. He submitted that clearly, the employer in this case failed each of those critical aspects in how it handled him.

B. The employer's evidence and submissions

[49] The focus of the employer's case was to contest that the grievor established a *prima facie* case of discrimination. It argued that he did not meet his burden and that the no-discrimination grievance should be denied.

[50] It did not contest the evidence about the grievor's health and his medical report. Rather, it argued that the decisions to remove his defensive tools and to move him to an accommodated post were based solely upon policy and not his medical condition.

[51] The employer called to testify Calvin Christiansen, Director of Arming Policy and Implementation. He testified as to the history of the CBSA's arming program and the bargaining agent's very strong support for it over the years and its lobbying Members of Parliament to achieve the arming of BSOs. He explained that 3500 BSOs underwent a psychological examination and the CAT III health-and-fitness examination before taking the 3-week CDT course, which is also a required term of their employment. He said that not all the 3500 could be trained at once, so many BSOs with sidearms worked for a period alongside colleagues without them. He stated that the 2007 decision to arm the BSOs followed them being granted expanded powers of criminal arrest.

[52] The employer called to testify Joe McMahon, Director of Operations at the Ambassador Bridge District, and formerly the superintendent at the Detroit-Windsor Tunnel, where issues arose of other BSOs being allowed to work the PIL after having had their defensive tools removed due to not passing the CAT III. He stated that limited opportunity existed at the Tunnel for accommodated duties. When asked about

the two other BSOs at issue, he was challenged to remember events and did not accurately recall facts that were in the ASF.

[53] The employer also called to testify Chief Jeffrey Gilmore. He stated that in 2014 and 2015, he was the chief of commercial operations for the district and the grievor's supervisor as at that time, the grievor was a BSO assigned to the commercial line.

[54] He stated that Health Canada determines the physical abilities required to safely and properly discharge the CBSA's enforcement mandate. He said that the CAT III is the Health Canada medical test that assess those physical abilities and that if a BSO cannot pass that examination, he is notified and will meet with them and remove their defensive tools, per the Directive. He explained that the health-and-fitness criteria are designed to enhance the safety of not only the BSO whose health being examined but also all CBSA staff and the clients whom they serve.

[55] He said that he has had to remove defensive tools at least five times from BSOs in the Ambassador Bridge District and that the grievor was the first to have his defensive tools removed for the reason noted previously.

[56] When he spoke about the different duties that BSOs perform at enforcement posts in his district, he said that arrests happen daily and that use-of-force incidents occur monthly in the district. They can involve a BSO placing a person in a wrist lock to subdue them, discharging OC (pepper) spray, applying a baton, applying handcuffs, and either pointing their sidearm or having it out of the holster at the low, ready position. He added that all those situations are very dynamic and that the BSO or the client may fall or be taken down to the ground and at times be engaged in a hand-to-hand fight.

[57] Mr. Gilmore described the arming initiative and the several policies that led to the requirement to undergo the CAT III, CDT, and DFC and the related health, fitness, and safety demands of the BSO position. He said the CAT III is required every two years for enforcement officers over the age of 45.

[58] He testified that before his defensive tools were removed, the grievor had been regularly rotated through several posts in the Ambassador Bridge District, including those to which he was initially assigned as accommodations. He also said that the

frontline PIL post was assigned for only one hour at a time due to the strong concentration required and the related risk of mental fatigue.

[59] He described the grievor's situation and said that all he knew was that the grievor had failed the CAT III, and he explained that CBSA managers do not know any personal health information as it is considered private and that Health Canada simply advised on whether the CAT III was approved. He said that due to Health Canada's notice, he met with the grievor and said that the grievor was advised that his CAT III was not approved. And that due to the Directive, he would have to take the grievor's defensive tools. He stated that he also informed the grievor of his right to obtain a second medical opinion from a doctor of his choice in case that one might approve the CAT III.

[60] Mr. Gilmore also testified that the grievor was presented with an accommodation agreement, signed in the fall of 2015, setting out the details noted previously in this decision. He stated that the grievor was offered and accepted modified duties not requiring defensive tools, that he has been assigned to work at the UPS-FedEx facility starting October 2014, and that the agreement was temporary and that it would be reviewed and could be changed.

[61] The only other witness that the employer called to testify was Jeremy Adams, Acting Manager of Program Policy and a member of the CBSA's occupational health and safety committee. He testified as to the creation and link between the CAT III and the BSOs' duties. He was examined for several hours on the very lengthy "Occupational Health and Safety Guide", part of which is dedicated to law enforcement. He stated that broad standards are created and that then, each department or agency creates specific standards related to their positions' tasks that arise withing their specific positions' duties.

[62] Mr. Adams testified that the CAT III's health standards are designed to protect the health and well-being of each BSO and other people. He testified that the CAT III for BSOs was designed to ensure their ability to perform the essential tasks of the position. When asked in cross-examination about the specific health-and-fitness requirements to perform BSO duties for criteria like blood pressure and pulse rate under certain conditions, he replied that he did not know.

[63] Mr. Adams confirmed that when the grievor's doctor refused to approve his CAT III, no details of his health or medical condition would have been available to the CBSA. He also confirmed in both his examination-in-chief and cross-examination that usually, a fitness-to-work evaluation is done in a situation of a medically related accommodation, followed by a search for accommodated duties that conform to the employee's functional limitations. He also admitted in cross-examination that accommodations are to be an individualized process and that an individual fitness-to-work evaluation should be carried out as part of an accommodation process.

[64] When challenged in cross-examination to respond to the details of the grievor's medical report and functional limitations related to BSO enforcement duties, Mr. Adams replied that the CBSA had no detailed information about the grievor's health other than being told by Health Canada that he had failed his CAT III. He added that he was aware that the grievor's medical condition, which prevented him from participating in the requisite training, was not expected to change in the future.

[65] The employer's closing submissions on this grievance focused upon its argument that the grievor failed to establish a *prima facie* case of discrimination. It noted the uncontradicted testimonies of Mr. Adams and Mr. Gilmore that they had no knowledge of the grievor's medical condition and knew only from Health Canada that he had failed his CAT III. It then argued that according to the Directive, the grievor was in non-compliance with the requirements of his BSO duties, namely, to carry defensive tools in an enforcement position. Therefore, it presented that non-compliance with the Directive as the reason the grievor was given modified duties.

[66] The employer also relied upon Appendix G to the collective agreement when it argued that the parties had foreseen the grievor's predicament and that they had complied with the agreed-upon recourse to find him alternate work. The employer stated that the appendix was negotiated and signed as part of the preparation for the rollout of sidearms for the BSOs. It states as follows:

…	[…]
If the employee fails to meet the criteria for firearm training and certification, the Employer will make every reasonable effort to find them a placement opportunity within the	*Si l'employé-e ne répond pas aux critères de formation sur les armes à feu et de certification, l'Employeur fera tout effort raisonnable pour lui trouver une possibilité de placement*

public service for employees hired prior to August 31, 2007, if the employee is trainable and mobile.	*au sein de la fonction publique, s'il s'agit d'un employé-e embauché avant le 31 août 2007 et si cet employé-e est apte à la formation et mobile.*
The parties agree to establish a joint consultation committee to discuss the strategy for the placement of employees hired prior to August 31, 2007, who are unsuccessful on the firearm training.	*Les parties conviennent d'établir un comité mixte de consultation pour discuter de la stratégie pour le placement des employé-e-s embauchés avant le 31 août 2007 qui n'ont pas réussis la formation sur les armes à feu.*
…	[…]

[67] The employer then noted that its actions in ensuring that the grievor had accommodated duties was consistent not only with Appendix G of the collective agreement but also entirely with the Supreme Court of Canada's decision in *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, which stated this:

> …
>
> *[14] As L'Heureux-Dubé J. stated, 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.*
>
> …

[68] The employer also noted that the grievor was accommodated in his same position and with most of his same duties and, initially at least, at many of the same posts at the Ambassador Bridge in Windsor that he worked at before his defensive tools were taken.

[69] The employer noted the testimonies of both the grievor and Mr. Gilmore, who explained that a BSO works at the PIL for only one hour at a time, that BSOs regularly rotate through a series of other posts at the Ambassador Bridge operation, and that after a period of several weeks of this work, the grievor requested to be posted at the UPS-FedEx courier facility.

[70] The employer also noted that it enjoys the management rights set out in the *Financial Administration Act* (R.S.C., 1985, c. F-11; "*FAA*") at ss. 7 and 11 that allow it to assign employees to positions and work that included moving the grievor from one post to another in his workplace.

[71] In its submissions, the employer gave emphasis to the Supreme Court of Canada's decision in *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30 ("*Elk Valley*"). The employer said that in *Elk Valley*, the Court upheld the termination of employment of an employee who was found to have failed to comply with a workplace drug policy. Similarly, in this case, it argued that it removed the grievor's defensive tools and assigned him to modified duties within the same position because of his failed CAT III, causing him to be in non-compliance for enforcement duties as per the Directive. The employer said that the Directive and not the grievor's health, as captured in his failed CAT III, was the basis of its actions. That means that the third step of the *Moore* test fails, which required the grievor to demonstrate that his medical condition or disability played a role in the differential and adverse treatment that he allegedly suffered from the employer.

[72] The employer also urged the Board to find that the grievor suffered no adverse impact from its impugned action of removing his defensive tools as it said that he was treated with respect and at all times that he was in the same position at the same FB-03 group and level at the same hourly rate of pay. It also noted that the alleged loss of overtime was contested. In its submissions on remedy, it argued that the grievor suffered no adverse impacts and that he should merit no compensation even if the Board finds fault in the accommodation process.

[73] In defending its reliance upon the CAT III, the employer noted that it had previously successfully defended the CAT III in a case before the Canadian Human Rights Commission (CHRC), which the Federal Court upheld on judicial review of another issue, in *Lessard-Gauvin v. Canada (Attorney General)*, 2018 FC 809. In its review of that matter, the Court considered a CHRC investigation and decision about a person who was rejected as a CBSA applicant due to failing the CAT III and alleged that he was unjustly denied employment due to a disability. The Court noted:

> …
>
> *[12] Next, the investigator reviewed the complaint against the CBSA under section 7 of the CHRA addressing the refusal to*

> *consider the Applicant's application on discriminatory grounds. She concluded that the employer knew that the Applicant had failed the Health Canada medical assessment due to a medical condition. The grounds for rejection were consequently prima facie discriminatory. However, the refusal to employ was rooted in a standard: having applicants undergo a medical assessment as prescribed in the Treasury Board Secretariat's* Occupational Health Evaluation Standard *[OHES]. Health Canada conducts the assessment in accordance with the criteria of the* Health Canada Category III Medical Assessment *developed specifically for CBSA employees. The latter simply accepts the outcome.* ***The investigator concluded that the CBSA adopted this assessment as part of the hiring process for reasons related to the position. Due to the nature of their work, CBSA officers must be in good physical and mental condition. Nothing was raised in the investigation to imply that this practice was adopted other than in the honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose****. This assessment is reasonably necessary to* [*sic*] *fulfilment of that purpose. The CBSA also takes into account requests for accommodation from applicants but did not receive any from the Applicant.*
>
> …
>
> *[15] In the case of Health Canada, this standard is to indicate that an applicant has not met the medical requirements if an unstable medical condition prevents* [*sic*] *assessment of him or her. For the CBSA, it is instead a matter of declining to hire applicants who have not achieved a satisfactory outcome on the medical assessment. In the end, the investigator concluded that for both institutions, the use of this "standard" was warranted according to the three criteria identified in* Meiorin *(at paragraph 54), these being that the standard was adopted for a purpose rationally connected to the performance of the job; that the standard was adopted in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. Each aspect of these conclusions is justified by detailed reasoning.*
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> …
>
> [Emphasis added]

[74] The employer noted that the Federal Court specifically provided a detailed analysis to the Canadian Human Rights Tribunal's (CHRT) examination of the acceptance of the CAT III as a BFOR as measured against the Supreme Court of Canada's test in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*").

[75] And finally, the employer submitted that it is crucial in this matter to note that at all times, the grievor remained at the same FB-03 group and level, that he received the same hourly rate of pay, and that indeed, he was accommodated in his position at posts at which he had regularly worked at the Ambassador Bridge before his defensive tools were removed.

[76] It noted that only when the grievor requested that he be moved to the UPS-FedEx post several weeks later did it agree to his move away from the Ambassador Bridge. It argued that all this was entirely consistent with what the *Coupal* decision required of it, which decision the grievor relied upon.

[77] The employer also noted the many other accommodation cases put before the Board at the hearing that should be distinguished for dealing with employees who had either lost their employment and income or had been denied employment, which it noted was not so in this case.

C. The grievor's rebuttal

[78] In rebuttal, the grievor submitted that Appendix G, cited by the employer, does not relieve it of its duty of accommodation as defined in the Supreme Court of Canada cases noted in this decision. He argued that it is trite law that human rights in Canadian law are quasi-constitutional and cannot be overcome by contract.

[79] The grievor also argued that *Elk Valley* can be distinguished on facts as dealing with very different subject matter, namely, a grievor who was found to have been able to comply with company policy but who chose not to and was disciplined for that.

[80] The grievor also challenged the employer's claim that it had no knowledge of his medical condition. He argued that the failed CAT III in itself gave the employer medical knowledge of him, which was obviously a factor in his alleged differential and adverse treatment.

[81] The grievor then suggested that the doctor's CAT III report spoke only to the grievor's health and fitness related to training and that it was silent on the matter of his health and fitness for his BSO enforcement duties.

[82] The grievor then challenged the employer's argument that he did not make out a *prima facie* case of discrimination and said that if in fact, there is no *prima facie* case

of discrimination, then why did the employer state in both its documentary and *viva voce* evidence that it had accommodated him? He noted that the employer did not contest whether it accommodated him.

[83] The grievor spoke again of the need for an individualized investigation into limitations and then accommodation as set out in *Meiorin*, at para. 65. He also stated that the employer did not even address in its evidence or argument the undue-hardship issue. He also argued that the employer failed to prove that the CAT III's health-and-fitness requirements were truly required for him to perform his BSO enforcement duties.

[84] He said that the employer then failed to establish on evidence how the doctor's reported data on the grievor's body mass index (BMI) and related obesity condition were linked to a requirement for the proper performance of his BSO enforcement duties. He said that all of that was required when applying the facts in this case to the requirements of individualized criteria as set out at paragraph 65 of *Meiorin*.

D. Analysis and reasons

[85] The grievor presented a very well-prepared compendium of human rights jurisprudence. However, scant attention was given in those submissions to applying the facts at bar to the matter of the grievor's burden to establish a *prima facie* case of discrimination. After the grievor's submissions concluded, I asked his counsel to elaborate upon the adverse effect of the differential treatment that the grievor suffered. Counsel replied that, "it was plain and obvious" and restated the alleged loss of defensive tools, the preferred post and overtime opportunities.

[86] I take notice of the fact that the Board regularly closely scrutinizes a grievor proving in evidence a matter of an adverse impact due to differential treatment linked to a prohibited ground of discrimination. (See, for example, *Gueye v. Treasury Board (Canada Border Services Agency)*, 2022 FPSLREB 41 at para. 86; *McNeil v. Treasury Board (Department of Fisheries and Oceans)*, 2021 FPSLREB 89 at para. 318; *Cheung v. Treasury Board (Correctional Service of Canada)*, 2014 PSLREB 1; and *Eady v. Treasury Board (Correctional Service of Canada)*, 2019 FPSLREB 71 at para. 10.)

[87] The grievor relied upon several cases that stand as cornerstones to Canada's employment-related human rights. Most of them deal with employees who lost their

jobs due to discriminatory acts. Losing a job and means of income are obvious and terribly adverse impacts (see *Moore*, *Meiorin*, *McGill*, and *Nicol*). However, such is not the case in the matter at bar. The case that the grievor relied upon with facts most relevant to this matter was *Coupal*.

[88] *Coupal* dealt with nearly the same facts of a BSO being assigned modified duties due to a medical condition. But *Coupal* did not directly address the same issues as in the matter before me. Rather, it involved a judicial review of a CHRC investigation and a decision not to refer a complaint to the CHRT. The reviewing Court concluded that the outcomes of that investigation were not supported by evidence. The grievor in this matter stressed the importance of the Court finding as follows:

> …
>
> *[37] The only accommodation offered to Customs Officers unable to complete the "Use of Force Training" involves essentially placing these officers in positions where the Officer Power designation is not required.* ***In my opinion, this changes significantly the Customs Officer's work description****. What is not explored by the Investigator is whether this "new standard" is reasonably necessary and whether the CCRA had other options which could have permitted Customs Officers like the Applicant to maintain their jobs with the same responsibilities without causing undue hardship to the CCRA.*
>
> *[38] The Investigator accepted the CCRA's position that other options were "operationally unfeasible" without exploring whether the evidence supported such a finding.* ***If there was no such evidence, then the CCRA failed to meet its burden on the third requirement of the*** **Meiorin** ***test and the complaint should not have been dismissed****. If such evidence existed, it was not explored or considered by the Investigator.* ***By failing to do so the Investigator omitted to consider fundamental evidence and thereby failed to conduct a thorough investigation into the existence of a BFOR. In the result, the Commission violated the principles of procedural fairness****. The Commission's decision will therefore be quashed and the matter returned to the Commission for reconsideration in accordance with these reasons.*
>
> …
>
> [Emphasis added]

[89] Although counsel for the grievor did not address it, it could have been reasonably argued that the Court's findings, noted in bold, presume and imply to have found that Ms. Coupal suffered an adverse impact. However, I note that a finding of an

adverse impact was not before the Court in the judicial review that rather found a violation of procedural fairness.

[90] Mr. Gilmore testified that the grievor would have been posted for a maximum of one hour at a time at his preferred PIL post at the Ambassador Bridge. He explained that due to the strict focus required of officers at that position, they are rotated throughout their shifts to staff the several other posts in operation at the border crossing to mitigate the risk of mental fatigue that could erode their focus at the PIL.

[91] For greater certainty, I am neither bound by nor agree with the opinion of the human rights investigator noted in *Coupal* who stated that being moved to a new non-frontline enforcement post changes significantly the Customs Officer's work description. To do otherwise, on the facts before me, would be an infringement, as argued by the employer, of the statutory right granted in the *FAA* to manage the workplace, all for a situation with no material impact upon the grievor being assigned to a post at the same level and hourly rate of pay, where he had worked previously while on the daily rotation explained by Mr. Gilmore. I note that the grievor requested the move to the courier facility which was away from the Ambassador Bridge where his other regular post rotations took place.

[92] The employer relied upon *Elk Valley* as an authority to assert that workplace policy, and not a potentially discriminatory action related to a prohibited ground, was responsible for the grievor being removed from his preferred post.

[93] Despite the fact that the majority decision in *Elk Valley* stands as a legal triumph for workplace health and safety in this country, the grievor replied that, and I agree, *Elk Valley* is not a relevant authority for this matter as it can be distinguished on its facts.

[94] That case addressed a grievor who was found to possess the capacity to choose to bring himself into compliance with the workplace policy that cost him his job.

[95] In the facts before me, the grievor was simply found not medically fit to participate in his workplace training because his doctor refused to approve his CAT III. Thus, the grievor was automatically offside with respect to the Directive once he failed his CAT III. He could not have elected to comply with the workplace policy, contrary to the defining element of the majority decision in *Elk Valley*.

[96] At this juncture, I note that the evidence clearly established that several times, Mr. Gilmore, as well as Dr. Gary Shapiro of Health Canada, told the grievor that, which he had to be fully aware of, he could have sought a second opinion from a different doctor to have his CAT III approved. However, for reasons that were not pursued in cross-examination, he chose not to pursue that readily available option and to potentially pass his CAT III.

[97] The grievor replied that he was moved from his preferred work posting only because of his age and health and that he suffered stress and hurt feelings from that move. He also submitted that he lost overtime opportunities. Both alleged outcomes were relied upon as detrimental impacts of him being treated differently due to his age and medical condition.

[98] The grievor pointed to exhibits of employer emails and memoranda, including Mr. Gilmore's August 5, 2014, email in which he sought to confirm with a colleague that the grievor would receive no further accommodations at the PIL post. An email he sent two days later also stated, "As is the process with any DTA cases an accommodation agreement should be put into place outlining the modified duties the employee is performing …".

[99] The grievor gave uncontradicted testimony of his exemplary 33 years of BSO service. He stated that he had been stationed at other posts in the Windsor area, including the Detroit-Windsor Tunnel, the barge, the airport, and the large, nearby UPS-FedEx courier-package facility. I note that the employer chose not to pursue whether the grievor sought those many other work postings or management posted him there.

[100] I do not find the matter of the employer's communications speaking of the grievor being accommodated or needing an accommodation agreement as dispositive of him having suffered an adverse impact. They are separate matters.

[101] Again, for added clarity, the adverse impacts suffered by the grievors in many of Canada's paradigmatic employment-related human rights cases included losing or being denied employment due to being discriminated against on a protected ground. (for example, *Elk Valley*; *McGill*; *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U. (Meiorin)*, 1996 CanLII 20258 (BC LA); and *Hydro-Québec*).

[102] In this case, the grievor was moved to a new work post at a location within the same Ambassador Bridge District at the same group, level and position and at the same hourly rate of pay. He expressed disappointment in having his tools removed and alleged a loss of opportunity for overtime income, which I conclude later in this decision is not supported by the evidence adduced at the hearing. No allegation was made of the grievor being shamed or being otherwise treated badly. In fact, the evidence shows that the CBSA treated him with respect and discretion to avoid him being shamed or embarrassed in front of other staff.

[103] Given these evidentiary conclusions and my findings later in this decision that the grievor failed to adduce clear and cogent evidence that on a balance of probabilities that he was available for any additional overtime, and therefore suffered no loss of income from being moved from the PIL post, I conclude that he failed to establish on a balance of probabilities that a *prima facie* case of discrimination exists. Therefore, the discrimination grievance is denied.

[104] Given this conclusion, the many other aspects of the grievor's submissions on this grievance are moot. However, out of a concern for transparency and comprehensiveness, the most relevant of them are addressed briefly later in this decision in addressing conclusions alternative to what has just been stated.

IV. The two overtime grievances

A. The September 2014 grievance

[105] The grievance in Board file no. 566-02-12323 is dated September 24, 2014. The grievor alleged that he was not being offered overtime on an equitable basis with his peers because he was on a separate list and that it was discriminatory for the employer to replace accommodated officers with other personnel when work was available that met the officers' accommodations.

[106] The value of the grievor's alleged lost opportunity for overtime work and income was bifurcated and to be left for submissions from the parties should the grievor succeed in one or both of his overtime-related grievances. Any reference in this decision to hours owed is for illustration of other matters and not intended to issue ruling on the hours owed as remedy.

1. The grievor's evidence and submissions

[107] The grievor pointed to his modified duties and accommodated posts at the bridge and later at the UPS-FedEx facility and argued that he did not receive any continuous overtime opportunities. He made a special note in his testimony of what he claimed were his unsuccessful, repeated attempts to see the data on how much overtime was being worked, and by whom.

[108] In both overtime grievances, the grievor alleged that discrimination occurred. However, there was no discrete allegation or evidence of discrimination pursued in argument on these two matters other than the obvious matter of his allegation that he was assigned modified duties thus causing a loss of overtime opportunity.

[109] On September 16, 2014, the grievor emailed his supervisor, Mr. Gilmore, and informed him that due to his wife's health improving, he was now able to "be put on an overtime list" if one was available for him. He added that they had not discussed overtime. Mr. Gilmore replied the same day, stating that he would add the grievor to the overtime list and then the following: "You will however only be offered OT [*sic*] when there is work to be offered that meets your accommodation …".

[110] The grievor testified that after a period of significant personal challenges related to a seriously ill immediate family member, things improved in September 2014, and that by 2015, he felt much better. As noted earlier, the grievor stated that he had obtained an oral appliance designed to ameliorate the ill effect of his sleep apnea to help him sleep. He also testified that he had demonstrated his interest in more overtime by making it known to his supervisor.

2. The employer's evidence and submissions

[111] The employer replied that the grievor was not available for overtime at his former PIL post as he was no longer qualified for that work. It relied upon clause 28.03(a) of the collective agreement when it contested whether the grievor was a readily available, qualified employee.

[112] It pointed to clause 28.03(a) of the collective agreement, which states as follows:

28.03 Assignment of Overtime Work	***28.03 Attribution du travail supplémentaire***

(a) Subject to operational requirements, the Employer shall make every reasonable effort to avoid excessive overtime and to offer overtime work on an equitable basis among ***readily available qualified*** *employees.*	*a) Sous réserve des nécessités du service, l'Employeur s'efforce autant que possible de ne pas prescrire un nombre excessif d'heures supplémentaires et d'offrir le travail supplémentaire de façon équitable entre les employé-e-s* ***qualifiés qui sont facilement disponibles.***
…	[…]

[Emphasis added]

[113] The employer also noted that overtime for accommodated employees must meet their functional limitations and that this was not possible for the grievor to work the PIL hours as he did not have his CAT III medical clearance for defensive tools.

[114] The employer relied upon the Board's decision in *Turcotte v. Treasury Board (Department of Employment and Social Development)*, 2020 FPSLREB 93, which determined that the employer in that matter could rely upon similar collective agreement language related to the need to be available and qualified for a position to seek an equitable distribution of overtime.

[115] The employer also placed emphasis upon the Board's decision in *Barbour v. Treasury Board (Department of Transport)*, 2018 FPSLREB 80 and argued that the grievor could not seek the recovery of a lost opportunity for which he did not establish in evidence that he had been readily available to report to perform overtime work. *Barbour* considered much the same overtime clause as the one at clause 28.03 of the collective agreement, which states that the employer will make every reasonable effort to allocate overtime on an equitable basis among readily available and qualified employees. The decision states this:

> …
>
> ***138*** *In addition, without more specific and exact information about the type of overtime and when and where it was available****, I cannot accept a blanket suggestion that all the grievors were always available****. I have no idea of whether any of them was on any type of leave or for how long or when due to any other reason, they might or might not have been able to take on overtime.*
>
> …

> ***148 The allocation of overtime on an equitable basis does not mean that everyone receives the exact same amount of overtime.*** *The following describes some employees:*
>
> - *they have a greater ability to work overtime than others do;*
> - *they want to work more overtime;*
> - *they make themselves always available for overtime;*
> - *they are prepared to work some overtime but not as much as others;*
> - *they may not want to work any overtime; and*
> - *they may work overtime only as required.*
>
> ***149*** *In addition, depending on the employee and when the opportunities to work overtime occur, some employees may by default have more opportunities.*
>
> ***150 I heard virtually no evidence about the grievors and their availability*** *save and* ***except that Mr. Hann stated that they were all ready, willing, and able to work overtime.*** *However, based on the limited evidence I had, it may or may not be true. And given this lack of evidence, it was clear that they had issues that required explaining.*
>
> …
>
> [Emphasis added]

3. Analysis and reasons

[116] The grievor presented at the hearing as a candid and at all times honourable witness. However, as will be examined in greater detail later in this decision, I find it more likely than not, that he had a sincerely held but mistaken belief in his unreasonably optimistic state of health and fitness to work. This was undoubtedly motivated by his sincerely stated dedication to and enjoyment of his work.

[117] The grievor testified that in June 2014, his doctor was so concerned for the extreme fatigue being caused by one of his medical conditions that he stated that the grievor should not work overtime or weekends. The doctor wrote on the grievor's CAT III report that the grievor had a medical condition that caused him to be "extremely fatigued".

[118] In the summary comments section of that same exhibit and page, the doctor describes in further detail as follows, dated June 18, 2014:

…

> *Mr. Andrew Matos has been my medical patient for twelve years. He was* ***diagnosed with Sleep Apnea in 2001*** *and was prescribed CPAP therapy but has been unable to tolerate the treatment – he suffered from a lot of GI bloating and discomfort and just couldn't manage it.. Subsequently, he* ***remains extremely fatigued*** *…****he showed me his records which reveal that he took 49 "vacation hours" to leave work early, due to fatigue, over the past year. He has declined to work any overtime or holiday hours due to his fatigue..He is unable to do much activty around the house when not working, rather he sleeps / rests a lot when off work duties.*** *Subsequently, he is* ***overweight (BMI 33)*** *and has* ***poor general conditioning / fatigues easily with minimal activity****… Recent screening bloodwork was normal. In my medical opinion, Mr. Andrew Matos in* ***UNfit to do participate in firearms / enforcement training for the above stated medical reasons.*** *I note that he is 57 years old and he states that he has only 2-3 years left to work before he will retire.* ***I do NOT feel that he can manage this training.***
>
> …
>
> [*Sic* throughout]
>
> [Emphasis added and in the original]

[119] The grievor candidly acknowledged his doctor's findings when he testified that his doctor told him that due to his extreme fatigue, he was not only unfit to participate in his training but also that he was unable to work overtime or holidays.

[120] My finding of the grievor's sincerely held but mistaken belief in his being fit to work is supported by the grievor's testimony noted previously which said that he, "… worked as much overtime as he could …" and that there was always overtime available after his shift as he was bilingual and there was always a need for bilingual officers on duty at the PIL post. This statement of him working as much as he could and impliedly working a lot of overtime was contradicted by his own doctor's written report.

[121] Despite his doctor writing a medical report that went into great detail as to how the grievor was so unwell that he struggled to even complete a normal shift and that his health was unlikely to improve for the foreseeable future, the grievor wrote emails asking if he could obtain hearing aids to assist with his hearing deficit if it would allow him to return to enforcement duties with his defensive tools. Later, he inquired about it again after obtaining therapy to ameliorate his sleep apnea.

[122] I note with emphasis the finding of the grievor's doctor of 12 years, who wrote on June 18, 2014, "… **he remains extremely fatigued** …**he showed me his records**

which reveal that he took 49 'vacation hours' to leave work early, due to fatigue, over the past year. He has declined to work any overtime or holiday hours due to his fatigue" [emphasis added and in the original].

[123] On September 16, 2014, the grievor emailed his supervisor, Mr. Gilmore, and informed him that due to his wife's health improving, and his seeking treatment for his sleep apnea during this same period that he was now able to "be put on an overtime list" if one was available for him.

[124] While it is possible that the grievor had indeed experienced a transformational recovery in a relatively short period of approximately 13 weeks, I am inclined to be more convinced by the powerful statement of his own doctor which could not have been more unequivocable not only of the grievor's health and fitness preventing him from working any overtime or holidays but also that this condition was not expected to improve in the foreseeable future.

[125] The grievor's first overtime grievance is dated September 24, 2014. Consistent with his own doctor's findings that I have just quoted, I find, for the same reasons stated by the Board in *Barbour*, that the clear and compelling evidence before me shows that the grievor's health more likely than not rendered him not readily available to work any overtime at all during the period at issue in this grievance.

B. The 2016 overtime grievance

[126] The second overtime grievance is addressed in the ASF, which the parties jointly and helpfully submitted at the hearing. It states the following:

> …
>
> *38. On February 14, 2016, the Grievor presented the individual grievance number 16-120004 (566-02-42117), alleging that the overtime was not being distributed equitably at UPS and Fedex. The Grievor's allegations were that there was secret overtime that was never offered to him despite his superiors being informed that he wanted to work overtime, and that this was discrimination based on age and disability (**Tab 3**).*
>
> *39. On May 4, 2016, grievance 16-120004 (566-02-42117) was partially allowed at the first level. The management concluded that overtime had not been distributed equitably. However, the management refused to compensate the grievor based on the principle of "no work, no pay". The management also*

> *concluded that inequity in the distribution of overtime at UPS and Fedex was not based on discrimination (**Tab 3**).*
>
> *40. On July 7, 2016, grievance 16-120004 (566-02-42117) was partially allowed at the second level. The management confirmed that overtime had not been distributed equitably. The management also maintained its refusal to compensate the Grievor based on the principle of "no work, no pay". The management also maintained that inequity in the distribution of overtime at UPS and Fedex was not based on discrimination (**Tab 3**).*
>
> *41. On August 18, 2016, grievance 16-120004 (566-02-42117) was partially allowed at the final level. The management confirmed that overtime had not been distributed equitably. The management also overturned both decisions at previous levels with regards to compensation. Consequently, the management compensated the Grievor for 14.50 hours. However, the "no discrimination" conclusion remained (**Tab 3**).*
>
> …
>
> [Emphasis in the original]

[127] I note that the third grievance does not allege a violation of article 28 (overtime) of the collective agreement but rather alleges violations of article 6 (managerial responsibilities), article 18 (grievance procedure), and article 19 (no discrimination). In his grievance, he states that the overtime situation shows discrimination toward him based on age and disability.

[128] Despite those articles of the collective agreement being the basis of the third grievance, his submissions and the employer's reply to them were focused upon the contested amount of time allegedly lacking from what the grievor asserted was his equitable share of overtime that should have been offered to him. I note for clarity that the grievor did not allege a violation of the overtime article of the collective agreement in this grievance.

[129] In the parties' pre-hearing conference, written submissions, and as confirmed in the oral arguments, counsel for the grievor stated that the grievor had been paid for 14.5 hours of overtime that should have been offered to him in accordance with the collective agreement. However, he argued that that does not accurately reflect an equitable distribution of overtime. He added that there were three CBSA positions at the UPS-FedEx office and that during the times at issue, two employees occupied one of them. When it calculated the equitable distribution of overtime, the grievor

submitted that it appears that the employer included all four employees instead of looking at the sharing between the three positions.

[130] The grievor relied upon his testimony as to how he had been able to pick up overtime work regularly as he was bilingual, and bilingual BSOs were in high demand on almost every shift before his enforcement duties were taken away. He also pointed to the fact captured in the ASF that the CBSA partially allowed the grievance in file no. 566-02-42117, agreed that "overtime had not been distributed equitably", and provided him with 14.5 hours of pay as "compensation" that should have been offered to him in accordance with the collective agreement.

[131] The CBSA did not allow the alleged discrimination aspect of that grievance, and the number of hours owed under it remained in dispute at the hearing.

[132] The grievor also argued that the employer failed to take into account the statutory holiday opportunities, which attract overtime. Based upon the records provided, the estimated difference in overtime was under 5 hours. Also, 16 statutory holidays were worked, which would average to 5.33 days per employee. The grievor worked only 2, which would mean that he is owed for 3.33 days.

[133] The employer's counsel attorned to the same focus of the grievance as the grievor and raised no objection based upon its substance.

[134] The grievor relied upon evidence in the form of a string of emails from Eric Ballermann that ended on October 18, 2016. His emails state that he was the CBSA's superintendent of the operations branch. The employer adduced the emails as an exhibit. The grievor did not object.

[135] Neither party called Mr. Ballermann to testify. The string of emails includes words from Mr. Ballermann to the grievor and accounts for overtime assigned to the grievor and 2 other BSOs. The accounting shows that the grievor worked 6 hours of overtime and 15 hours of holiday time from October 1, 2014, to March 31, 2016, which add up to less than what the 2 other BSOs worked and slightly less than what a third BSO worked. They all had their names redacted from the exhibit before the hearing. The grievor did not object.

[136] The message from Mr. Ballermann specifically states that the accounting lacks other important information, including hours that were offered but were not

responded to or were declined. He also states later that other records, presumably related to the grievor's overtime, were "purged" and were not made available to him.

[137] However, the email states, "… 26.5 hrs [*sic*] seem to be in question …" and, "This is OT [*sic*] that I believe you were also on shift and available to work. This time should have been offered/charged in an equitable manner as per the contract and is in question." He added this: "I also did an overtime report from COSS for the entire period which shows you were charged and declined four full shifts."

[138] Mr. Ballermann's accounting email concludes by stating that an unnamed CBSA official is aware of the need to contact a CBSA superintendent when assigning overtime. He states that he hopes to have a first-level reply to the grievance ready the next time their schedules align.

[139] His final comment possibly anticipates the fact (as I was advised) that the employer allowed one of the overtime grievances, although the grievor continues to dispute the quantum of the payment.

[140] In support, the grievor relied upon his statement that by then, he had obtained hearing aids and an appliance to mitigate the harmful effects of his sleep apnea. He also testified that his family challenges had ameliorated and together that this allowed his health to improve, which then allowed him to seek overtime assignments by 2015.

[141] The grievor also relied upon Mr. Ballermann's email, which states, "This is OT that I believe you were also on shift and available to work. This time should have been offered/charged in an equitable manner as per the contract and is in question."

[142] On July 15, 2014, a Health Canada occupational health medical officer wrote to the grievor and informed him that he had not been qualified under the terms of the CAT III.

[143] I note the emails tendered as exhibits, which show that the grievor wrote to Health Canada after his doctor declined to approve his CAT III.

[144] On July 31, 2014, the grievor emailed the following to Health Canada:

> *… You determined that I FAILED the hearing portion of my CAT III. My question is this. If I get tested by an audiologist and get hearing aids, would I be in the "pass" category? Did I fail solely on*

> *my hearing disability, or other factors also? I need to know these things because they took away my enforcement tools,*
>
> *And now I can no longer work a line. Please let me know, it is urgent! Thank you for your courtesy ….*

[145] Dr. Shapiro replied to the grievor on August 5, 2014, and stated this:

> …
>
> *… In your case, Dr. Paul Loebach stated that you were diagnosed with sleep apnea in 2001 but could not tolerate CPAP therapy. As a result you were extremely fatigued. He also stated that you were overweight and in poor condition. In Dr. Loebach's medical opinion, you were unfit to participate in firearms/enforcement training for the above stated medical reasons. Dr. Loebach's last comment was that he did not feel that you could manage the required training.*
>
> *Further to my comments regarding your hearing loss, noted in my letter of July 15, 2014, I think I could safely say that you would have likely met the hearing standard with additional testing and possibly hearing aids. Thus, the reason you did not meet the medical requirements for the* [BSO] *position was Dr. Loebach's comments regarding firearms/enforcement training, not your hearing loss.*
>
> …

[146] The grievor then wrote to Health Canada again in a series of emails in September and October 2014. He informed it that he had received his hearing aids. He also stated that he continued to suffer from sleep apnea and that he was discussing with his doctor options to deal with it. He then asked for direction on whether he should be retested for the hearing standards and asked for the "further steps" he could take to meet the CAT III's health standards.

[147] I take special note of the grievor's testimony on the important point that he underwent his CAT III physical exam at his doctor's office, in compliance with CAT III requirements. He testified that his doctor told him that no person over the age of 50 should ever be subjected to the physical stress and risk of harm of the demanding CDT training course. He testified that his doctor reminded him of an earlier shoulder injury from previous CDT training that had been very slow to heal. And finally, his doctor said that the grievor was not fit to participate in the CDT training and that he would not sign to approve the CAT III, which was required.

[148] The grievor then testified with a very sombre and resigned look on his face that after his doctor read the concluding comments that accompanied declining to approve his CAT III, he then left the office "feeling a bit dazed, not knowing what comes next."

[149] The grievor added that he did not agree with his doctor's conclusion to decline to approve his CAT III and his doctor's declaration that he was unfit for the CDT training course but that he respected his doctor. He added that he considered seeing a different doctor, who would not have known his history of having been injured during the CDT training course, and then his voice trailed off without a conclusion as to his decision not to seek the second opinion despite the evidence that showed that his management and Health Canada had told him that a second opinion and the related opportunity to complete a successful CAT III assessment was available to him.

[150] As previously noted, this testimony and the evidentiary record of exhibits, which the grievor confirmed again in his *viva voce* evidence, suggests to me that he had a very sincere but mistaken understanding of his wellness and how it impacted his ability to work.

[151] I also note that the documentary evidence clearly established that the grievor was aware of the employer's policies with respect to the requirement that he successfully complete a CAT III before he could take the CDT training course, which was a prerequisite for his firearms training. The grievor provided no testimony whatsoever that he was unaware or lacked understanding of these policies.

[152] Given the grievor's description of how he left his unsuccessful CAT III with his doctor, of how in the following weeks, he asked questions of his employer and Health Canada about obtaining hearing aids, and of how he searched for options to obtain an approved CAT III, I must conclude that he understood well his predicament and the implications that he would have his defensive tools removed and then be moved from his preferred post. But also, he harboured a very sincere but mistaken belief, which was perhaps a false sense of optimism that he clung to in hopes of somehow avoiding the inevitable.

[153] Given all the evidence before me, I conclude that more likely than not, the grievor also harboured a similar false sense of optimism about his well-being and availability for overtime.

[154] I similarly conclude that if, as he testified, his health improved significantly from 2014 to 2016, that he would have undergone a second CAT III medical assessment either from his own doctor or another, that quite likely, he would have been able to return to his preferred PIL post after being recertified, and that he would have been able to take the requisite training courses to regain his defensive tools and receive his firearm.

[155] The grievor relied upon Mr. Ballermann's email. However, I find that it is less than the clear and compelling standard of evidence necessary on which to make a finding of fact.

[156] The email contains caveats that state that the author does not have access to all the relevant records. There is no information upon which to assess his following statement: "This is OT [*sic*] that I believe you were also on shift and available to work."

[157] It is also important to note that Mr. Ballermann's email lists the comparative hours worked and states that in the period from October 1, 2014, to March 31, 2016, the grievor did work a total of 6 hours of overtime (2 hours on December 21, and 4 hours on December 23, 2015) and further that he worked on two holidays, for 7.5 hours each time (April 6 and November 11, 2015). However, no other information was adduced at the hearing as to how Mr. Ballermann knew that the grievor was available during the time at issue.

[158] This contrasted with the very clear and compelling evidence of the grievor's doctor in the June 2014 email that stated that the grievor was extremely fatigued and that he could not work overtime or weekends. As noted previously, the grievor's doctor wrote that, "… he is overweight (BMI 33) and has poor general conditioning / fatigues easily with minimal activity …".

[159] While the grievor stated that the employer allowed the second overtime grievance during the internal grievance process, I do not rely upon that as evidence of his availability in this matter given the fact established in evidence that the employer had no information regarding the details of the grievor's poor health and fitness to work.

[160] The employer also replied to these grievances in argument, stating that the grievor was no longer qualified to work at his preferred PIL post that had at least,

initially, been used as a benchmark to measure what he alleged was his lost opportunity for overtime.

[161] To the contrary, his testimony and exhibits provided clear and compelling evidence for me to conclude on a balance of probabilities that he was not available for any additional overtime beyond the very few hours documented in the ASF in the employer's response to the 2016 overtime grievance, given his poor health at the times relevant to these matters.

[162] I find it problematic for the grievance that the grievor was unwell when the events at issue began. He was so unwell that, in fact, his doctor wrote that he could not finish a normal 7.5-hour shift some days and that he used vacation hours to leave work early. More so, the doctor saw no prospects for improvement in his health for the foreseeable future. And yet, 12 weeks later, the grievor asked to be put back on the overtime call list, and very shortly after that, he filed a grievance alleging that he was not receiving his equitable share of overtime.

[163] Its possible that together, the improvements in the grievor's well-being were enough to help him regain his energy, vitality, and some better sense of his bodily fitness, as his doctor wrote in June 2014 that the grievor's BMI was so high that it qualified as obese.

[164] But at the risk of understating the matter, the grievor's case for being denied equal opportunity for overtime would have stood on much more solid ground had he tendered some objective evidence to turn the page on his doctor's very strongly worded medical report, especially given the employer's reply to the grievance at adjudication that he was not available for any more overtime.

[165] The grievor's counsel rebutted that claim in argument by pointing out the employer's admission at the final level of the grievance process that upheld the grievance in part and admitted that he had not been offered an equitable share of overtime related to his 2016 grievance. The employer continued to contest that this matter was not tainted in any way by any form of discrimination.

[166] Despite that lack of questioning on this matter of the grievor's health and availability to work, the employer recognized this issue as it cited the Board's decision

in *Barbour*, when it argued that the grievor could not seek the recovery of a lost opportunity for which he did not establish in evidence that he had been available.

[167] *Barbour* considered much the same overtime clause as the one at clause 28.03 of the collective agreement, which states that the employer will make every reasonable effort to allocate overtime on an equitable basis among readily available and qualified employees. The decision states this:

> …
>
> ***138*** *In addition, without more specific and exact information about the type of overtime and when and where it was available****, I cannot accept a blanket suggestion that all the grievors were always available****. I have no idea of whether any of them was on any type of leave or for how long or when due to any other reason, they might or might not have been able to take on overtime.*
>
> …
>
> ***148 The allocation of overtime on an equitable basis does not mean that everyone receives the exact same amount of overtime****. The following describes some employees:*
>
> - *they have a greater ability to work overtime than others do;*
> - *they want to work more overtime;*
> - *they make themselves always available for overtime;*
> - *they are prepared to work some overtime but not as much as others;*
> - *they may not want to work any overtime; and*
> - *they may work overtime only as required.*
>
> ***149*** *In addition, depending on the employee and when the opportunities to work overtime occur, some employees may by default have more opportunities.*
>
> ***150 I heard virtually no evidence about the grievors and their availability*** *save and* ***except that Mr. Hann stated that they were all ready, willing, and able to work overtime.*** *However, based on the limited evidence I had, it may or may not be true. And given this lack of evidence, it was clear that they had issues that required explaining.*
>
> …
>
> [Emphasis added]

[168] In reaching this conclusion, I place importance upon the uncontradicted evidence that the CBSA did not have access to and did not know the many compelling details of the grievor's health as written by his doctor.

[169] The doctor could not have been any clearer or more emphatic that the grievor was unable to and in fact should not work any overtime or holidays and that in fact, in June of 2014, he was at least struggling to work a regular shift due to his poor health. While the grievor said that he was feeling better in the fall of 2014, that his wife's serious illness had improved, and that at some point, he had obtained therapy to ameliorate his sleep apnea, I find it troubling that despite his stated feeling of wellness, he did not then proceed to obtain a new medical opinion, which could very well have seen him pass his CAT III and obtain the necessary training to return to his preferred PIL enforcement post.

[170] The doctor went further and stated that for the reasons detailed in the report, the grievor had not been able to work overtime or holidays due to his extreme fatigue. And furthermore, the doctor's report stated that the grievor told him that he had used 49 hours of vacation leave over the past year so that he could leave work early due to being too fatigued to complete his normal shifts.

[171] The grievor confirmed all those points in his testimony, in which he candidly addressed the same conclusion by his doctor and said that his doctor had said that he could work no overtime or holidays in a prospective manner. And further, the previously noted fact that his doctor concluded that the medical condition was unlikely to change in the foreseeable future.

[172] This leads me to conclude that it is more likely than not that the grievor's health continued to cause him to be limited as to the number of hours and days of rest on which he could accept overtime assignments but that the employer did not know it. That caused it to pay out the 14.5 hours simply based upon comparisons to other BSOs.

[173] As the uncontradicted evidence stated that the CBSA and its managers did not know and could not have known the details of the doctor's medical assessment of the grievor and the resulting failed CAT III, I do not accept the fact that the employer's choice to uphold the 2016 overtime grievance is determinative of the matter before me.

[174] The employer chose to uphold the 2016 overtime grievance and to pay the grievor 14.50 hours of overtime based upon what it agreed was an unequitable

assignment of overtime. The evidence in this case requires that I conclude that on a balance of probabilities, the employer was unaware of the grievor's health challenges.

[175] And yet, he grieved his removal from his PIL post and requested as a remedy that the removal cease and that he be allowed to fully realize his indeterminate career. After stating how badly he wanted to return to his enforcement PIL position, where he prefers to work, and stating that he had his choice of almost daily overtime, he did nothing to obtain a new medical report that could have allowed him to take the CDT training, regain his defensive tools, and return to his regular duties. At the hearing, I heard no testimony from the grievor clarifying this apparent lowering of his goals and him deciding to merely settle for a relatively few hours of overtime at the UPS-FedEx location.

[176] I recognize the evidence from Mr. Ballermann's email that the grievor worked 6 overtime hours plus two 7.5-hour holidays. However, this does not sway my conclusion because, as I have just explained, had the grievor truly regained his health and energy, it strikes me that it was more likely than not that he would have sought a new medical opinion in hopes of passing his CAT III and regaining his much-sought-after PIL enforcement work rather than accepting overtime at the UPS-FedEx courier facility.

[177] I also note that upon the evidence, I cannot find that the grievor's allegation of discrimination on a prohibited ground impacted in any way the distribution of overtime at the UPS-FedEx facility. To the contrary, his testimony clearly established that some unethical behaviour that was not explored by either party in questioning him caused him to fall out of favour with the facility's manager. He testified that he was told that if he cooperated more with the unnamed UPS-FedEx manager, he would be assigned more overtime. It troubled him very much, so much that he sought counselling.

[178] All this occurred in the winter of 2016, approximately 1.5 years after the matter of his failed CAT III and the removal of his defensive tools. While it seems clear that he was justified in appealing to his CBSA managers to perform their proper duties in assigning BSO overtime, none of it engages a protected ground of discrimination.

[179] Given what I have documented as serious doubts as to the grievor's improvement of his health and fitness, which thus made it more unlikely than not that he was available for any more overtime than he was assigned and worked, and the lack

of evidence linking his concerns over the inequitable distribution of overtime, I conclude that the grievor failed to discharge his burden of proof in his 2016 overtime grievance.

V. In the alternative

[180] If I am mistaken in my finding that the grievor failed to establish a *prima facie* case of discrimination, then I would reply upon the CHRC's findings as allowed to stand upon the Federal Court's judicial review in *Lessard-Gauvin* and find that the CAT III fulfilled the Supreme Court of Canada's requirements set out in *Meiorin* and conclude that it is a BFOR. As I noted earlier in *Coupal*, this case did not directly address the question before this hearing, however, unlike *Coupal*, I agree with the conclusion of the human rights investigator in *Lessard-Gauvin*.

[181] The uncontradicted testimony of Mr. Gilmore who addressed the frequency of incident and arrests involving contact and force provides clear and cogent evidence of the need for frontline officers to possess a level of fitness and ability to safeguard their own and client wellbeing during these arduous incidents. He said that arrests happen daily, and that use-of-force incidents occur monthly in the district. They can involve a BSO placing a person in a wrist lock to subdue them, discharging OC (pepper) spray, applying a baton, applying handcuffs, and either pointing their sidearm or having it out of the holster at the low, ready position. He added that all those situations are very dynamic and that the BSO or the client may fall or be taken down to the ground and at times be engaged in a hand-to-hand fight.

[182] I prefer this testimony as a more accurate reflection of the need for fitness to work and defensive tools rather that the grievor's view where he testified that he had never used or felt the need to use his defensive tools.

[183] However, as the grievor argued in rebuttal, the employer's case would fail because it neglected to adduce any evidence before me to make out a case of undue hardship to overcome how it refused to engage in an individualized assessment of the grievor's functional limitations and to seek accommodations for him rather than simply and mechanistically applying policy and moving him into an accommodated post.

[184] The employer felt that it could rely upon the Appendix G of the collective agreement, which it negotiated in good faith with the bargaining agent to accompany the rollout of the arming initiative. However, I would accept his rebuttal submission that jurisprudence has clearly established that human rights cannot be derogated from by means of contract.

[185] With respect to an award of damages for the breach of the no-discrimination clause of the collective agreement, again in the alternative of my findings, the grievor submitted that he suffered an injury to his dignity and noted that he attended counselling sessions to seek the resolution of his frustration and of being very upset about his situation by the end of 2015 and that he felt that he was forced to retire early. He requested maximum compensation of $20 000 under each of the two heads of compensation under the *CHRA*.

[186] The grievor noted the Board's decision in *Nicol*, which concluded with this:

> …
>
> *[153] As for paragraph 53(2)(*e*) of the* CHRA*, the case law relied on by the parties shows that the evidence in each case leads to a range of monetary awards. Each case differs on the amounts awarded because of a given complainant's ability to move on, but this grievor lost that opportunity due to his medical retirement. He should receive the maximum monetary award because of the long-term impact on him. The circumstances make it impossible to remedy the situation other than through money.*
>
> *[154] Throughout the years, doctors said that continuing to delay accommodating the grievor would increase his illness's severity, which increased to the point of post-traumatic distress disorder. Had the employer allowed him to return to work with an accommodation, he might have had access to long-term disability plan benefits, which are higher than medical retirement benefits. He might have continued as a productive employee for many years as the evidence suggests. Instead, he spent almost four years, without income or support, trying to get his employer to remove workplace barriers so he could return to work. The evidence from the grievor, his father and his doctors shows that he suffered significantly during this time. His medical condition worsened to include post-traumatic stress disorder. His financial situation could only be described as desperate; he borrowed from family, extended his credit card debt and borrowed against his house. He contemplated suicide. He became more and more dysfunctional in a social environment.*
>
> *[155] I award a sum of $20,000.00 for pain and suffering, attributable to the discrimination and to the psychological and*

> *physical damages the grievor suffered and will continue to suffer due to the employer's neglect and inability to correct the situation during what should have been his normal pre-retirement years.*
>
> *…*

[187] The grievor also cited *Johnstone v. Canada Border Services*, 2010 CHRT 20 (judicial review allowed in part — on remedies, partly affirmed in *Canada (Attorney General) v. Johnstone* 2013 FC 113; The CHRT found as follows:

> *…*
>
> *[10] Ms. Johnstone alleges that the CBSA's policies forced her into part-time status upon her return to work after having each of two children, resulting in her being given fewer hours of work than she was willing and able to work, with an attendant loss of benefits that are available to full-time employees, including benefits under her collective agreement and pension entitlements under the* Public Service Superannuation Act.
>
> *…*
>
> *[376] It was evident in Ms. Johnstone's testimony that she suffered injury to her person, her personal and professional confidence, and her professional reputation resulting from the discrimination that gave rise to this complaint.*
>
> *[377] Ms. Johnstone testified that she was embarrassed by reference to her as the "human rights" case, and that she was upset by the arbitrary way in which she was dealt with despite her best efforts to try to find a way to create a workable balance between a job that she stated she truly enjoyed and her young children.*
>
> *[378] I award Ms Johnstone $15,000.00 under this heading pursuant to Section 53 (2) (*e*) of the* Act.
>
> *…*
>
> *[380] This Tribunal finds that CBSA, by ignoring so many efforts both externally and internally to bring about change with respect to its family status policies of accommodation has deliberately denied protection to those in need of it.*
>
> *[381] CBSA, and its organizational predecessor's lack of effort and lack of concern takes many forms over many years including: disregard for the* Brown *decision after writing a letter of apology; developing a model policy and then burying it (some management knew of it, some did not); pursuing arbitrary policies that are unwritten and not universally followed; lack of human rights awareness training even at the senior management level; the proffering of a floodgates argument 5 years after the complaint with the Respondent giving insufficient time and data to its own*

> *expert to enable him to provide a helpful expert opinion; and no attempt to inquire of Ms. Johnstone as to her particular circumstances or inform her of options to meet her needs.*
>
> *[382] Given all the circumstances of this case, this Tribunal awards Ms. Johnstone $20,000.00 under this heading. CBSA's conduct has been willful and reckless, showing a disregard for Ms. Johnstone's situation and denying that a duty to accommodate exists on grounds of family status arising for childcare responsibilities such as hers.*
>
> …

[188] The grievor added that in light of *Johnstone*, *Brown v. Canada (Department of National Revenue)*, 1993 CanLII 683 (CHRT) (as cited in *Johnstone*), and then *Coupal*, this matter demonstrates that the CBSA has a wilful and reckless disregard for its employees' human rights, and it must be taken to task.

[189] I find that the case that the parties cited on remedy that is most similar to the facts in this case was tendered by the employer. It is *Besner v. Deputy Minister of Human Resources and Skills Development*, 2014 PSST 2, which the employer said was very similar to the facts in this case in that it detailed a very modest amount of harm suffered by that grievor. The case states as follows:

> …
>
> ***72*** *Although s. 53(2)(*e*) of the CHRA gives the Tribunal discretion in granting this remedy when a complaint is substantiated, that discretion must be exercised judiciously and in light of the evidence before the Tribunal. See* Canadian Human Rights Commission v. Dumont*, 2002 FCT 1280 (CanLII) at para 14. In the present case, the complainant did not adduce any detailed evidence regarding her claim for compensation under s. 53(2)(*e*) of the CHRA other than testifying generally that she felt stressed and frustrated at being selected for lay-off, without elaborating any further on the pain and suffering she experienced. The complainant went on a period of extended medical leave following the SERLO process. While the stress may have been a contributing factor in her subsequent medical condition, there is insufficient evidence before the Tribunal to draw such a conclusion.*
>
> …

[190] Similarly, the grievor in this matter testified to experiencing hurt feelings and frustration at being removed from his preferred PIL post. The evidence detailed that he attended one counselling session very late in 2015 and then four more in early 2016. He testified that the entire matter caused him such frustration and loss of enjoyment

of his career that he felt forced to retire early. He suffered no loss of his regular income and was at all times treated with respect.

[191] No evidence was tendered at the hearing that suggested any longer-term maladies beyond what was noted, other than him testifying that he was forced to retire early due to the stress and disappointment that these matters caused him.

[192] However, the employer replied to this submission and pointed to his CAT III medical report from June 2014, in which his doctor wrote that "… he is 57 years old and he states that he has only 2-3 years left to work before he will retire."

[193] I cannot ascribe any significant harm related to pain and suffering related to an early retirement as set out under that head of compensation in the *CHRA* to an employee who enjoyed a relatively full career spanning the years from 1981 to 2016.

[194] Again, I note the many and detailed health challenges that the grievor faced, including being "extremely fatigued", which his doctor noted in 2014, as casting doubt on how many more years he would have actually worked had none of the events that were the subject of the hearing come to pass.

[195] I accept the employer's submissions that the grievor experienced no harm, or at the worst very little harm, and I would, in the alternative, if I am mistaken in my finding on the matter of a *prima facie* case of discrimination, award a nominal $1000 under s. 53(2)(e) of the *CHRA* for any pain and suffering that he experienced as a result of the discriminatory practice.

[196] I distinguish *Nicol* on its facts as that grievor suffered far worse harm for a longer period than anything experienced on the evidence adduced in this case.

[197] I also distinguish *Johnstone* on its facts as that case before the CHRC involved a grievor who was found to have had a very difficult family situation with young children and working parents forced upon her despite her efforts to organize her shifts in a manner than would have allowed her family status accommodation. The facts in this case differ as the grievor suffered no loss of full-time status and his regular hourly rate of pay and claimed no disruption to his life other than an alleged loss of overtime opportunities, which I have found was not supported by his evidence as he failed to show that he was available at the relevant times.

[198] When I asked the grievor's counsel to comment upon her submission that the grievor is owed $40 000 in compensation under the *CHRA*, I reminded counsel that that would be equal to what Ms. Doro (see *Doro v. Canada Revenue Agency*, 2019 FPSLREB 6) was awarded after suffering terrible sexual harassment at her supervisor's hands both at work and after work hours as he stalked her outside her home.

[199] Ms. Doro was forced off work for approximately 18 months on medical leave for stress and anxiety as she feared for her safety due to the daily harassment at work, even after she made a formal complaint to senior management. The grievor's counsel wisely submitted that Ms. Doro was deserving of much more.

[200] I reject the request for special compensation under s. 53(3) of the *CHRA* for the employer allegedly willfully or recklessly engaging in a discriminatory practice under the *CHRA* as nothing was willful, reckless, or intentional about how it approached this entire matter with the grievor. Rather, it engaged in an accommodation effort with him and his bargaining agent. And it thought that it could rely upon the related provisions in Appendix G of the collective agreement, which had been negotiated in good faith with the bargaining agent.

[201] Importantly, I also note with respect to both heads of *CHRA* damages my finding that at all times, the grievor was treated with respect and that care was taken to preserve his dignity and avoid shaming him by unwise conversations held or notices given in front of other staff. As noted, the grievor wrote to his supervisor to thank him for treating him well through the whole meeting process of advising him that he had failed the CAT II and that he had to be assigned to a post with modified duties.

VI. Sealing order

[202] The grievor requested that the following documents be ordered sealed. The employer did not oppose his request:

- Joint Book of Documents – Volume I: tabs 17, 25, 28, 30, 32, and 47; and
- Supplemental Book of Documents for the bargaining agent: tabs 1, 2, 3, 4, 6, 7, and 10.

[203] All those documents contain personal and sensitive information. One is related to the grievor's family. The rest contain highly detailed and personal information about the grievor.

[204] I accept the grievor's uncontested request and order the listed exhibits sealed.

[205] After the hearing concluded in this case, the Supreme Court of Canada issued *Sherman Estate v. Donovan*, 2021 SCC 25 where the test on the open court principle was reformulated. At paragraph 38, the Supreme Court of Canada set out the test as follows:

> *[38] … In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:*
>
> *(1) court openness poses a serious risk to an important public interest;*
>
> *(2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,*
>
> *(3) as a matter of proportionality, the benefits of the order outweigh its negative effects.*
>
> …

[206] In *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, the Supreme Court of Canada enunciated at para. 36 that the link between openness in judicial proceedings and freedom of expression has been firmly established. The Board has recognized through its caselaw that the right to free expression includes the important public interest in open Board proceedings.

[207] In some instances, it is appropriate to limit the openness of the Board's proceedings to maintain the confidentiality of evidence to protect an individual's privacy. Privacy may be an exception to the open court principle for the purposes of the test, namely, protecting highly sensitive personal information that strikes at an individual's biographical core, and would result not just in discomfort or embarrassment but in an affront to the affected person's dignity.

[208] The medical and other personal issues relevant to the hearing and to understanding this decision have been outlined in the pages of this decision. The Board is normally extremely cautious to not disclose personal matters such as detailed medical information. However, parts of this decision largely rest upon these very details, and the proper administration of justice requires transparency in rendering this decision.

[209] Otherwise, maintaining the openness of the other sensitive personal information in the documents that the grievor requested be sealed is not necessary for the proper administration of justice and poses a serious risk to his privacy. The importance of protecting this other highly sensitive personal information outweighs the right to free expression and the important public interest in open court proceedings.

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

(The Order appears on the next page)

VII. Order

[211] I order that the three grievances are denied.

[212] I order sealed Exhibit E-1, tabs 17, 25, 28, 30, 32, and 47, and Exhibit BA-1, tabs 1, 2, 3, 4, 6, 7, and 10.

August 3, 2023.

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