Date: 20240730

File: 566-02-9138

Citation: 2024 FPSLREB 103

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

THOMAS BARCIER

Grievor

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

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

In the matter of an individual grievance referred to adjudication

Before: Nancy Rosenberg, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Guido Miguel Delgadillo, Public Service Alliance of Canada

For the Employer: Elizabeth Matheson, counsel

Decided on the basis of written submissions, filed November 22 and December 14, 2021, and February 11, 2022.

REASONS FOR DECISION

I. Equitable distribution of overtime - accommodated employee

[1] Thomas Barcier ("the grievor") is a border services officer ("BSO") employed by the Canada Border Services Agency ("the employer") at its Lansdowne Port of Entry in Lansdowne, Ontario ("the port of entry").

[2] He grieved that the employer failed to equitably offer him overtime work, in violation of clause 28.03(a) of the collective agreements between the Treasury Board and the Public Service Alliance of Canada ("the union"), one that expired on June 20, 2011, and one that expired on June 20, 2014 (referred to in this decision in the singular as "the collective agreement"). Clause 28.03(a) obligates the employer to make every reasonable effort to equitably offer overtime to those employees who are readily available and qualified to do the work.

[3] The grievor also grieved that he was discriminated against on the ground of disability, contrary to clause 19.01 of the collective agreement and ss. 3(1) and 7(b) of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; "*CHRA*").

[4] The grievor was on light duties for two lengthy periods spanning several fiscal years between 2009 and 2013. In May 2012, he became aware that some overtime work was not being offered to him because he was on light duties but that it was nevertheless being "charged" against him. That is, it was recorded as having been offered to him and declined by him, thus moving his name down the list and negatively impacting his eligibility for subsequent offers of overtime that he could have worked.

[5] The employer conceded that it violated clause 28.03 and that it discriminated against the grievor on the ground of disability but disputed the amount of overtime lost and submitted that no compensation was warranted for the discrimination. Accordingly, only the remedy is in dispute. The employer also argued that this is a continuing grievance and that any remedy ought to be limited to the 25 days preceding its filing, per *Canada (National Film Board) v. Coallier*, [1983] F.C.J. No. 813 (C.A.)(QL).

[6] This matter was to proceed by written submissions, but once those were filed, the parties requested an oral hearing, which was scheduled for April 4 and 5, 2023. They then asked the Federal Public Sector Labour Relations and Employment Board

("the Board", which in this decision refers to the current Board and any of its predecessors) to conduct a mediation-adjudication instead, to potentially help them resolve the issue. The parties engaged in mediation but were unable to resolve the matter, and they asked the Board to decide it based on their written submissions.

[7] I find that the grievance was timely as it was filed within 25 days of the grievor becoming aware of the inequity in the overtime distribution. I find that the grievor is entitled to overtime pay and associated benefits for the approximate number of overtime hours that he could have worked but for the violation of the collective agreement. I further find that he is entitled to compensation in the amount of $2000 under s. 53(2)(e) of the *CHRA*.

A. The union's submission

[8] On August 10, 2009, the grievor returned to work from leave due to a back injury. He was accommodated on light duties at the Telephone Reporting Centre ("TRC") until September 22, 2010, when he returned to full duties. In March, 2011, he reinjured his back and went on leave again, returning on April 20, 2011. He was again accommodated on light duties at the TRC until January 24, 2013.

[9] On May 10, 2012, the grievor learned from a colleague that he was receiving fewer offers of overtime work than were non-accommodated BSOs, including work in the TRC that did not conflict with his medical limitations. He asked the employer about it and learned that his balance for overtime offers or "callouts" for that fiscal year was 50 hours, although he recalled receiving only 1 offer of overtime at the TRC.

[10] He then learned from a superintendent that when making overtime offers, the superintendents skipped the names of accommodated employees like him but recorded the overtime hours as though they had been offered, thus artificially inflating their overtime balances. As a result, the grievor's priority for future offers was lowered, and non-accommodated BSOs received offers ahead of him. The grievor requested records of overtime hours offered during his accommodation periods, but the employer did not keep such records from previous fiscal years. The union and the employer began discussing the issue.

[11] On May 28, 2012, Mark Pergunas, Chief of Operations for the employer, was advised by the regional labour relations officer that readily available and qualified

accommodated employees should be offered overtime hours and that if the work could not be offered because of medical limitations, they should remain at the top of the list because no offer had been made to them. On June 1, 2012, the employer advised that only overtime hours actually offered would be recorded against accommodated employees' balances. This was a new way of offering overtime hours to accommodated employees that was produced in response to the union's request for a plan.

[12] During his first accommodation period, which was from August 10, 2009, to September 22, 2010, the grievor worked approximately 47.5 hours of overtime. The employer did not retain records of the average overtime offered for the 2009-2010 fiscal year, but the average amount of overtime offered for the 2010-2011 fiscal year, prorated for the period in question, was 509.98 hours.

[13] During his second accommodation period, from April 10, 2011, to June 1, 2012, when the change took place, the grievor worked approximately 81.27 hours of overtime. Employer records for fiscal years 2011-2012 and 2012-2013 (as of July 5, 2012) set out that the average amount of overtime offered, prorated for the same time frame, was approximately 797.80 hours.

[14] The employer conceded that the grievor was readily available for overtime work that did not conflict with his medical limitations, such as at the TRC, and that it had a duty under the collective agreement to equitably offer it to him. He was bypassed for overtime opportunities during both accommodation periods, and by recording his overtime balance incorrectly until June 1, 2012, the employer compounded its failure to offer overtime equitably, as the grievor was moved down the priority list and thus denied further opportunities.

[15] Compensation can be awarded for overtime pay lost due to an employer's breach of the collective agreement. When calculating it, one cannot presume that an employee would have refused overtime opportunities without a basis for such an assumption, such as a long history of refusals. An inequitable distribution of overtime can be remedied by awarding compensation for the difference between the overtime worked by an employee and the average overtime worked for that group of employees. (See Brown and Beatty, *Canadian Labour Arbitration*, 5th edition ("*Brown and Beatty*").)

[16] The employer's records do not set out the exact discrepancy between the overtime hours offered to the grievor and the average hours offered because his

overtime balance was artificially inflated; however, the records do set out that the overtime hours that the grievor worked were a mere fraction (9% or 10%) of the average hours offered. Therefore, and as there is no evidence that he would have refused offered overtime, the Board should award the grievor compensation equal to the average overtime balance, prorated for the periods he was accommodated, less the hours of overtime that he worked.

[17] Retroactive compensation should not be limited to the 25 days preceding the filing of the grievance, as the employer argued. *Coallier* is distinguishable as it dealt with an incorrect rate of pay that was discoverable for over a year before the grievance was filed. The purpose of a time limit on damages claims is to prevent a party from sleeping on its rights, to the other party's detriment (see *Canada (Attorney General) v. Duval*, 2019 FCA 290). Until May 10, 2012, the grievor was unaware that he was being denied overtime opportunities; there is no dispute that he filed his grievance within 25 days of learning of the breach, as required by clause 18.18 of the collective agreement. This is not a case in which a request for relief ought to be denied because a grievor slept on their rights, thus prejudicing the employer.

[18] The grievor's back condition was a disability within the meaning of human rights legislation, and he was adversely impacted while being accommodated for it. That meets the *prima facie* test for discrimination, thus shifting the onus to the employer to offer a reasonable justification for the discrimination. The employer conceded that it discriminated against the grievor on the basis of disability. The grievor seeks compensation under the *CHRA* in the amount of $5000 for pain and suffering and $5000 for its wilful and reckless discriminatory practice.

B. The employer's submission

[19] The employer submitted that overtime was equitably allocated to the grievor for fiscal year 2012-2013, which is the only relevant period. His requested remedy of several years of alleged lost overtime opportunities and substantial human rights damages is unsupported by the evidence and does not accord with the applicable legal principles that should be applied to remedying continuing grievances, calculating lost overtime opportunities, or claims for human rights damages.

[20] The port of entry uses a multi-task model of shift management with BSOs working across seven business lines, as follows:

- The primary inspection business line, which is housed in the main compound - BSOs conduct primary inspections of all travellers and goods, which involves interviewing travellers and verifying paperwork. Of the eight primary inspection posts (six traffic, two commercial), service standards require that one post be manned by a bilingual BSO whenever possible, requiring two BSOs, for trade-off purposes.

- The secondary inspection business line, which is housed in the main compound - BSOs conduct more in-depth inspections of vehicles and travellers, which involves further interviews, document verification, or searches of persons or vehicles.

- The commercial long room or warehouse business line, which is housed in the main compound - BSOs process commercial cargo shipments. This involves checking the list of incoming shipments, conducting intelligence assessments of cargo, reviewing commercial entry packages that entered after hours, liaising with other government departments like the Canadian Food Inspection Agency, and searching commercial tractor trailers.

- The immigration business line, which is housed in the main compound - BSOs conduct immigration-related business such as refugee claims. Service standards require one BSO on the floor (in this business line or another) certified as a minister's delegate, whenever possible. Given the nature of this work, only more experienced or specially trained BSOs are assigned to immigration.

- The cash business line, which is also housed in the main compound - BSOs process customs duties that the primary or secondary inspection lines have determined are owing and answer general phone inquiries.

- The TRC business line, which is housed outside the main compound in a stand-alone building - BSOs answer inquiries from, and dispatch other BSOs to, travellers who arrive at the border by boat, private plane, or snowmobile.

- The marine verification team business line, which works in the field - BSOs are dispatched to locations such as marinas and airports when and where required.

[21] On a normal summer shift, 20 to 30 BSOs work across these business lines, including 1 BSO on cash and 2 to 5 in the TRC. In winter, it is half that number (10 to 15) and fewer work in the TRC, as well.

[22] BSOs working at the main compound rarely work only one business line for an entire shift; rather, they alternate between different business lines and paperwork requirements by, for example, working one hour in primary inspection, then one hour on paperwork, then one hour on secondary inspection, and then one hour on paperwork, depending on operational needs. Those in the commercial long room rotate

with the primary inspection commercial lanes, and BSOs with the appropriate knowledge and training also alternate with the immigration business line.

[23] BSOs working the main compound business lines and the marine verification team must wear protective gear ("blues"), be armed ("tooled"), and be physically fit enough to respond to the physical aspects of the job. This includes being on their feet (both standing and moving around) for long periods and conducting enforcement actions like detentions or seizures of drugs or weapons, as necessary. All BSOs in the main compound are expected to have the capacity to respond to any dynamic or high-risk interaction that might arise.

[24] BSOs working the TRC business line can remain at their assigned posts for their entire shifts and need not wear blues or be tooled to conduct TRC-specific duties. However, when operational needs require (for example, a large-scale seizure is made), those BSOs who are tooled or wearing blues could be recalled from the TRC to the main compound, to assist in the response.

[25] Before October 2012, BSOs who required accommodation due to physical restrictions (i.e., who could not be tooled or perform the physical aspects of the job) were accommodated through full-time assignment to the TRC, cash, or commercial long room business lines, depending on their functional abilities. However, in October 2012, the employer made the national decision to consolidate the TRCs, and it closed the TRC facility at the port of entry. After that, BSOs requiring accommodation for physical limitations were assigned to the cash or commercial long room business lines or were given other administrative duties as they arose.

[26] BSOs working cash could remain at their assigned posts for their entire shifts and did not need to be tooled to conduct cash-specific duties but were nevertheless expected to wear blues for security reasons, given the public-facing location of the desk. BSOs working in the commercial long room could also be limited to untooled, paperwork tasks but were also expected to wear blues, for security reasons. The employer had found that having BSOs in blues who were not tooled increased risks of confusion during dynamic, high-risk interactions. To mitigate this risk, the port of entry had increasingly moved away from allowing untooled BSOs in blues to work in public-facing positions.

[27] The need for BSOs to work overtime varies year by year and depends on factors such as service volumes and staff availabilities (e.g., staffing numbers, sickness, and vacations). As of these events, the employer used a computer operated scheduling system known as "COSS" to help equitably assign overtime opportunities to BSOs over the course of a fiscal year.

[28] Each BSO had an employee profile in COSS that identified certain professional criteria that they met. To fill a shift, superintendents used COSS to generate filtered lists based on these criteria; for example, only those BSOs who were bilingual or who were designated minister's delegates. COSS could also filter for BSOs on a rest day. The superintendents could write notations on an employee's COSS profile, such as whether they needed accommodation or if they had a standing refusal of overtime. These notes could not be used as filters but were displayed beside the BSO's name once the list was generated and printed.

[29] When overtime was required, the superintendent would input the shift and identify the required parameters (bilingual or minister's delegate), and for a full-time overtime shift, only BSOs on a rest day. COSS generated a list of those who fit the parameters, and the superintendent would start at the top and work down, calling BSOs until one agreed to cover the shift.

[30] Then, to formalize the schedule, the superintendent would update COSS with the results of the callout efforts. A new COSS list was generated for each overtime shift. The superintendent would open the generated list and move one-by-one through the employee profiles, selecting either yes, no, or not applicable to record the BSOs' responses to the callout. "Yes" meant that they had accepted the shift, "no" meant that they had declined it, and "not applicable" meant that they were excused from consideration for the shift because they were not readily available and qualified due to an accommodation or a vacation.

[31] All BSOs began each fiscal year with zero overtime in their employee profiles. The first lists that COSS produced were alphabetical, reverse alphabetical, or completely random. When a BSO received a callout for an overtime shift, it was charged (recorded) against their employee profile according to their response. Each time the list was regenerated, it ranked BSOs based on the charges against their names.

The lower the charges, the higher they would appear on the list, and vice versa. A BSO could request their overtime callout balance at any point during the same fiscal year.

[32] Around 90% of all overtime opportunities required a tooled officer to work on the main compound business lines because overtime opportunities arose mostly from the need to replace BSOs scheduled for those lines. On any given day, the vast majority of BSOs work those lines (in summer, 20 to 30, as opposed to 3 to 6 in the TRC and on cash). As well, overnight shifts rarely arose for the TRC or cash.

[33] Superintendents who knew that a BSO required accommodation did not issue them a callout if the overtime was for a business line that they could not work due to their restrictions. For example, if the overtime was to replace a BSO scheduled for primary inspection, they would not issue a callout to a BSO who was functionally restricted to working only in the TRC. This decision was made on a case-by-case basis by the superintendent, who considered each accommodated employee's functional limitations as outlined in their functional abilities form.

[34] Accommodated BSOs were not called for shifts that they could not work, to expediently meet the shift's operational requirements. Each BSO was given five minutes to respond before the next one could be contacted. It would have made no logistical sense to offer accommodated BSOs shifts that they functionally could not perform, let alone wait five minutes for each accommodated BSO (all of whom would be at the top of the list, if charged correctly) to respond before moving to the next BSO.

[35] However, the employer conceded that at times, callouts were erroneously charged against accommodated employees for shifts that they could not functionally have worked and for which they likely were not called. It said that while the extent of the erroneous charges was unknown, they occurred infrequently and were immediately corrected once identified. They likely occurred due to human error, when relatively new or acting superintendents, still learning COSS, were unclear on the data entry protocol and entered "no" rather than "not applicable" against an employee's profile. Such erroneous charges caused by data-entry errors impacted both accommodated and non-accommodated BSOs, as the same error occurred when non-accommodated BSOs were scheduled for vacation.

[36] The grievor brought these errors to management's attention in mid-May 2012, and on June 1, 2012, in response to his concern, and to ensure that others were not

similarly impacted, Mr. Pergunas directed that the errors be rectified. He reiterated to the superintendents the expectations with respect to overtime allocation. He directed that accommodated employees' overtime balances for April 1 to June 1, 2012, be amended to remove all references to overtime charges that they were not eligible to be offered.

[37] Effective June 1, 2012, accommodated employees would be charged only for declined overtime shifts that they could have worked per their functional abilities forms. Overtime assignment prioritization would continue according to the normal protocol, but superintendents would ensure that any overtime opportunities on the cash business line would be offered to accommodated employees whenever possible. Updated guidelines followed shortly after that. In the employer's view, they were not substantively new but rather reiterated and centralized the process already in place.

[38] The employer conceded that between April 1 and June 1, 2012, callout charging errors, combined with the COSS list generation program, might have impacted where the grievor appeared on the overtime list relative to other BSOs. As a result, it is possible that he was overlooked for overtime opportunities for which he might have been readily available and qualified to work (for example, overtime shifts in the TRC). The extent of these errors and how they might have impacted his relative position on the overtime list is unknown. It is also possible that, for example, these errors did not change his relative position on the list.

[39] As this issue was discovered in fiscal year 2012-2013, the employer was able to ascertain and rectify the errors that had occurred in that fiscal year. However, detailed records of responses to overtime offers were retained only for the active fiscal year; accordingly, it was impossible to go back in time and identify, for fiscal years 2009-2010, 2010-2011, and 2011-2012, which overtime shifts had been validly offered and refused by a BSO, and which were callout-charging errors. The employer accepted that charging errors might have occurred in those years but did not concede to their alleged scope or that they were not subsequently corrected in that same fiscal year.

[40] The grievor never challenged the reasonableness of his desk work accommodation in the TRC and never otherwise indicated that it was too restrictive or that he wished to work on other business lines. There appears to be no dispute that

during his accommodation, he was not able to work on the tooled business lines in the main compound or on the marine verification team.

[41] The employer recalled that at one point, the grievor had registered a standing refusal for overtime and that he frequently declined offered overtime shifts. Assuming that he was readily available and functionally able to take them, those refusals would have been properly charged against his profile.

[42] The employer conceded that the grievor's back injuries were a disability within the meaning of the *CHRA*, that he was erroneously charged for overtime hours not offered, and that some of these errors had a sufficient nexus with his disability to constitute discrimination. It further conceded that he learned that he was not receiving as many overtime offers as were his non-accommodated colleagues on May 10, 2012, that on further inquiry he learned that his 2012-2013 charges were higher than the number of hours for which he recalled receiving callouts, that he brought this discrepancy to management's attention, and that he filed the grievance on June 1, 2012.

[43] However, the employer maintained that much of the grievor's claimed overtime fell outside the remedial liability period because as the error compounded over time, the loss of overtime opportunities amounted to a continuing grievance, thus rendering it timely but limited as to remedy. In the context of continuing grievances, both the Board and the Federal Court of Appeal have consistently held that the Board's remedial jurisdiction is limited to the temporal period for reporting the grievance ("the *Coallier* limitation"), which ensures that parties do not sleep on their rights and facilitates the speedy resolution of collective agreement breaches.

[44] The employer further argued that the grievor's rationale that the charging errors were not discovered or discoverable sooner does not apply because the concept of discoverability is relevant only to the timeliness to file a grievance and not to the quantification of the remedy owed on a continuing grievance. Accordingly, there is no equitable or legal justification to not apply the *Coallier* limitation to this matter.

[45] The employer further submitted that even if the concept of discoverability was relevant, the action or circumstance giving rise to the grievance was certainly discoverable earlier. While it is true that the grievor might not have known that he was

being erroneously charged, he could, at any time, have requested his overtime-charge balance for that fiscal year and discovered the discrepancy. He did not.

[46] Equitable allocation must be assessed by considering for which overtime opportunities the grievor was "readily available and qualified" and whether he was treated equitably when those overtime opportunities were distributed. On accommodation, the grievor was functionally able to work only that overtime that did not require him to be tooled or to engage in physical activity; that is, only if the overtime opportunity arose in the TRC or cash business lines, with the latter being available only as of September 2012. This accounts for approximately 10% of all overtime opportunities.

[47] The evidence demonstrated that the grievor was equitably allocated overtime across fiscal year 2012-2013, despite issues at the start of the year. By June 2012, the grievor told management that he was satisfied with how overtime was being offered to him. The data set out that on both July 5 and September 17, 2012, the grievor consistently accrued the fewest number of overtime charges, relative to other BSOs. This meant that he was always at the top of the list for any overtime offered that fit his requirements, unless there was an operational need for a specific profile such as a BSO who was bilingual or a minister's delegate.

[48] There is no evidence that the grievor was bypassed for overtime opportunities for which he was readily available and qualified to work. He points to the difference between the average overtime he worked and the average overtime charged to all BSOs to assert that he was likely not called for shifts that he could have worked. This is comparing apples to oranges. Average overtime hours worked is not the same as average overtime hours charged. A shift worked would be marked only against the one BSO who accepted the shift, while shifts charged would be marked against all those contacted for the opportunity to work. This naturally inflates the average of overtime charged relative to the average of overtime worked.

[49] As well, the Board has recognized that there are several reasons that the amount of overtime worked can vary between employees; for example, some employees want to work more overtime or have a greater capacity to make themselves available for it. The only evidence that the grievor pointed out to demonstrate that he was not offered shifts that he could have worked is that he was called for and worked less than the

average callouts. That is to be expected, given that he was qualified to work only approximately 10% of all callouts made and likely did not accept every overtime shift offered to him.

[50] The employer argued in the alternative that the grievor's damages request must be reduced, as he had the onus of demonstrating that he was reasonably entitled to receive the losses that he claimed. General damages are meant to place an employee in the financial position they would have been in but for the employer's conduct, with as reasonable an estimate as possible, considering all relevant factors.

[51] Granting the grievor's requested remedy would amount to a windfall award, as his position assumes that a reasonable comparator or "similarly situated person" is the average BSO at the port of entry. That is not the case. The grievor was readily available and qualified to work, at maximum, only two out of seven business lines. Best estimates indicate that those two business lines represent approximately 10% of all overtime offered. The grievor was not similarly situated to a BSO capable of working overtime on all business lines.

[52] As there are no reliable statistics on the average overtime worked by accommodated employees with restrictions similar to the grievor, the fairest way to calculate what overtime may be owed, accounting for the grievor's reduced capacity, would be as follows:

$$X = (A - B) * C$$

X = overtime owed
A = average overtime charged for each fiscal year on all business lines
B = overtime hours worked that fiscal year, thus already accounted for
C = % of estimated overtime opportunities for which grievor would have been eligible.

[53] Moreover, the resulting sum from that calculation should justifiably be further reduced as it represents the hours that the grievor theoretically should have been offered, not the hours that he necessarily would have accepted.

[54] The employer accepted that the grievor can seek damages under the *CHRA* to account for the impact of the employer's discriminatory practice (see s. 53(2)(e) of the *CHRA*) and to safeguard against future breaches by virtue of a punitive award (s. 53(3) of the *CHRA*). That said, the available evidence demonstrates that such damages are not justified in the circumstances.

[55] The Board's remedial discretion must be exercised judiciously and in light of all the evidence before it. There is no evidence that the grievor experienced any sort of pain or suffering from the employer's error. He was not adversely affected by the error in fiscal year 2012-2013 as it was quickly remedied once the employer became aware of it, with the end result being equitable treatment over the course of the fiscal year. Likewise, there is no evidence that any discrepancies between overtime charged and overtime worked in prior fiscal years resulted from charging errors and not simply the grievor's decisions. Therefore, damages are inappropriate in the circumstances.

[56] Even were that not the case, the grievor's request is disproportional to the breach, per the Board's jurisprudence. In *Douglas v. Treasury Board (Correctional Service of Canada)*, 2020 FPSLREB 51, damages of $5000 were warranted because visual contact with inmates caused stress to a pregnant correctional officer. In *Duval v. Treasury Board (Correctional Service of Canada)*, 2020 FPSLREB 53, damages of $5000 were awarded for four months of lost salary and the associated stress caused by a delayed accommodation.

[57] An unintentional error, quickly corrected once brought forward, is not comparable. Correcting errors quickly should justify reducing any amounts owed.

[58] In *Canada (Attorney General) v. Douglas*, 2021 FCA 89, the Federal Court of Appeal, citing *Canada (Attorney General) v. Johnstone*, 2013 FC 113, said this:

> …
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> … [*CHRA*] *subsection 53(3) "is a punitive provision intended to provide a deterrent and discourage those who deliberately discriminate. A finding of wilfulness requires the discriminatory act and the infringement of the person's rights under the* Act *is intentional. Recklessness usually denotes acts that disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly."…*
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> …

[59] There is no evidence here of intention or recklessness. It appears that human error and lack of instant familiarity with COSS led to the callout-charging errors. The employer reacted quickly to both retroactively rectify and correct course once it was made aware; there is no evidence that it systemically failed to equitably allocate overtime to the grievor.

C. The union's reply

[60] The employer admits to the inaccurate recording of overtime hours for accommodated employees. It created a guideline on June 1, 2012, to address this specific issue. There was no evidence that it was the first time that it had happened. In fact, it admitted that it might have happened before then but speculated that any errors in previous fiscal years could have been identified and corrected by year-end. There was no evidence to substantiate this claim.

[61] The evidence did not support the employer's claim that the June 1, 2012, policy was a "reiteration" of existing expectations. Rather, it demonstrates that the policy was created at the union's request. Mr. Pergunas notified the labour relations officer about the June 1, 2012, policy, advising that the approach "**will be** as follows" [emphasis added]. The guidelines that the employer said followed "shortly thereafter" were issued over a year after the grievor raised his concerns. As well, no policy pre-dating June 1, 2012, was produced. The breach was clearly ongoing from previous fiscal years.

[62] At the final level of the grievance procedure, the employer conceded that the grievor was available for overtime but in its submissions claimed that he had a standing refusal for overtime shifts. It said that standing refusals were noted in COSS, but there is no such notation by the grievor's name on any available COSS documents. As to alleged frequent refusals, the grievor did not dispute refusing overtime shifts on occasion, but the employer's claim is not supported by the records, which set out that he accepted overtime numerous times when shifts were offered to him.

[63] The employer's interpretation of the collective agreement and *Coallier* is incorrect; the grievor ought not to be penalized for the employer's breach of the collective agreement and its poor record keeping. The employer states that the grievor could have checked his overtime balance, but it is the employer's and not the grievor's obligation to distribute overtime equitably.

[64] The employer did not dispute that the grievance was timely yet submitted that its liability ought to be limited based on case law that is meant to prevent grievors from sitting on their rights. This position lacks internal coherence. The argument that *Coallier* applies to restrict the employer's liability to only 25 days equates to a weakening of the grievor's negotiated rights under the collective agreement and a

mechanism for the employer to evade accountability. Essentially, the argument is that while a breach of clause 28.03 occurs throughout a fiscal year, the remedy can cover only the last 25 days, which would create a windfall for the employer.

[65] None of the decisions cited in support of the employer's *Coallier* argument relate to the inequitable distribution of overtime in which a breach spanned a fiscal year. They are distinguishable on the facts. The Board has ruled that an unconscionable or inequitable result can arise when *Coallier* is interpreted to incentivize an employer's failure to address collective agreement breaches in a timely manner or at all. This is the interpretation that the employer proposes, and it ought to be rejected.

[66] The correct approach when calculating a financial loss is to rely on average overtime numbers and to not presume a refusal of overtime, absent a long history of refusals. Further, there is no requirement that to be compensated for missed overtime opportunities, the grievor must never take any leave.

[67] There is a lack of supporting evidence as to the proportion of overtime in the TRC; therefore, the Board should rely on the existing records of average overtime offered when quantifying the grievor's financial loss. In the alternative, the Board should order the employer to produce documentation of the average overtime that TRC employees worked during the relevant periods and award the grievor the difference in pay between the overtime he worked and the average.

[68] With respect to the request for damages for pain and suffering, it is generally accepted that a grievor need not establish a diagnosis and provide receipts to be compensated for a violation of their human rights. The award by the Canadian Human Rights Tribunal ("CHRT") in *Johnstone v. Canada Border Services*, 2010 CHRT 20, of $15 000 for pain and suffering was based solely on subjective evidence and was not disturbed on judicial review or appeal. The grievor's evidence that he was shut out of overtime opportunities based on his disability is sufficient to justify an award of damages for pain and suffering.

[69] As well, at judicial review, the Federal Court found that the CHRT had been justified in making the special damages award of $20 000 based on the employer's failure to heed previous decisions setting out its human rights obligations (see *Canada (Attorney General) v. Johnstone*, 2013 FC 113). On appeal, the Federal Court of Appeal

rejected the employer's argument that there was no basis for special damages because family status case law was evolving at the time. The Court upheld the CHRT's award of special damages. (See *Canada (Attorney General) v. Johnstone*, 2014 FCA 110.)

[70] An abundance of case law would allow the employer to understand and meet its human rights obligation to treat disabled employees equally. Further, the employer has not substantiated its claim that it acted quickly once it became aware of the breach; rather, a history of erroneous callout charges was not rectified until June 1, 2012. The employer acted recklessly by discriminating against the grievor, and he should be awarded special damages.

II. Reasons for decision

[71] Clause 28.03(a) of the collective agreement reads 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]

A. Remedy - the *Coallier* limitation

[72] The employer argued that the callout-charging errors constituted a continuing breach of the collective agreement, thus bringing the matter within the sphere of the *Coallier* limitation. However, the *Coallier* limitation does not apply to limit the remedy of every continuing grievance simply because it is continuing and regardless of the circumstances. The Federal Court of Appeal in *Coallier* noted this at paragraph 2:

> *Under clause 25.03 of the collective agreement in effect between the parties,* [the] *respondent's grievance had to be filed within twenty working days* ***from the date on which*** [the] ***respondent was informed or learned "of an action or circumstances giving rise to his grievance".***

[Emphasis added]

[73] The *Coallier* decision was based on a timeliness issue about an incorrect rate of pay that the grievor had received for over a year. The grievor had sat on his rights before finally grieving a breach that was repeated each time he received a paycheque. The grievance would have been out of time as it was filed long after 20 working days from when the grievor learned of the circumstances that gave rise to it. However, as a continuing grievance, it was held to be timely, as each incorrect paycheque was another grievable breach of the collective agreement. Accordingly, the grievance was timely but only with respect to the last breach. The grievance could not attract a remedy for the previous breaches as they had not been grieved in a timely way, and the Board had no jurisdiction to remedy them.

[74] In *Duval*, at paragraph 32, the Federal Court of Appeal held that limiting damages to the period for filing a grievance serves the labour relations purposes of encouraging the speedy resolution of workplace disputes and of preventing a party from sleeping on its rights to the detriment of the other party.

[75] This case has nothing to do with the speedy resolution of workplace disputes or grievors sitting on their rights. Until May 10, 2012, there was no workplace dispute in need of a speedy resolution because neither party was even aware that the collective agreement was being violated. Neither the grievor nor the employer knew that he was being incorrectly charged for overtime opportunities not offered. Once notified of it, the grievor did not sleep on his rights. To the contrary, he acted on them immediately.

[76] The employer argued that the grievor could have discovered the errors earlier by asking to see his overtime balance within each fiscal year. That suggestion would effectively have put the onus on him (and on all BSOs) to check their overtime balances at the end of each fiscal year and to try to divine whether there had been an inequitable distribution throughout the year so that, if so, they could grieve within 25 days.

[77] It was not the grievor's obligation to check the employer's system. He was entitled to rely on the employer's obligation to distribute overtime equitably and, therefore, to have a fair, efficient, and functioning system in place, as well as management employees well trained in its operation. (See *Peterman v. Treasury Board (Correctional Service of Canada)*, 2022 FPSLREB 102 at para. 150, *Royal Ottawa Health*

Care Group v. OPSEU, 2015 CarswellOnt 18458, *Royal Ottawa Hospital v. ONA* (1990), 19 C.L.A.S. 553, and *Haldimand-Norfolk (Regional Municipality) v. Health, Office & Professional Employees, Local 175*, 1991 CarswellOnt 6501.)

[78] In *Schlegel Villages v. SEIU, Local 1* (2015), 259 L.A.C. (4th) 225 at para. 39, the arbitrator commented on the following statement of the Supreme Court of Canada in *Bhasin v. Hrynew*, 2014 SCC 71:

> *39 The Supreme Court of Canada has recognized … the principle long accepted in labour law that: "parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily" (per Cromwell J. in* Bhasin v. Hrynew, supra*, at para. 63)….*

[79] The employer conceded that the charging errors might have occurred in previous fiscal years as well as in 2012-2013. Accepting that that was not deliberate, it cannot be said that the employer performed its contractual duties reasonably when the same error occurred repeatedly over a number of years.

[80] The arbitrator in *Canadian Pacific Forest Products v. IWA-Canada, Local 1-85*, 1991 CarswellBC 2612, found that a lengthy failure to include premiums in the job rate for statutory holiday pay purposes was not a matter of interpretation but a sustained administrative error. When brought to its attention, the employer corrected the problem prospectively, but the issue of retroactivity remained. That decision states as follows at paragraph 13:

> *13 I agree with the arbitrator in* B.C. Forest Products Limited (Hammond Division) *that the initial responsibility for adherence to the terms and conditions of the collective agreement — especially those respecting the calculation of employee earnings — rests with the employer. Bringing that lofty proposition down to earth**, the obligation which rests upon an employer … is to have in place the systems necessary to give full effect to the substantive content of the agreement; and to ensure that the persons responsible for the day-to-day administration of the agreement are properly instructed in that regard.***
>
> [Emphasis added]

[81] As soon as the grievor was alerted to a possible issue with his overtime, he made inquiries, gathered information that seemed to confirm it, and then filed a timely grievance. The grievance procedure, which is intended to ensure that grievors do not

sit on their rights and that labour relations issues are dealt with in a timely way, worked exactly as it was meant to.

[82] I said the following in *Peterman*:

> …
>
> *[129] The purpose of the* Coallier *principle is to ensure that parties do not sit on their rights for lengthy periods and surprise the opposing party with significant liability for monies owing. The way it was used in this hearing seems to me to be contrary to its purpose. It was used as a sword, and a surprise one at that, not as a shield against unreasonable liability. The employer made no submission as to why it would be appropriate to apply in this case.…*
>
> …

[83] That was so in this case as well. The employer did not seek to explain why it would be appropriate to limit the grievor's remedy other than stating that its breach of the collective agreement was continuing. It is not proposed as a defence against an unreasonably long period of liability caused by the grievor sitting on his rights. The implicit suggestion is that any continuing grievance should be remedied only to the extent of the grievance filing period set out in the collective agreement, regardless of the circumstances. That is not a logical or reasonable application of the *Coallier* limitation, which is based on a timeliness issue that is absent in this case.

[84] The decision in *Macri v. Treasury Board (Indian and Northern Affairs*, [1987] C.P.S.S.R.B. No. 295; upheld in [1988] F.C.J. No. 581 (C.A.)(QL), made the following observations about the applicability of the *Coallier* limitation in the circumstances of that case:

> …
>
> *52 No issue or argument was raised before me as to the timeliness of the grievance or as to the question of whether Macri could seek to claim acting pay for a period more than 25 days prior to the lodging of her grievance. This question might have seemed relevant because of the decision of the Federal Court of Appeal in Coallier (Court file A-405-83; Board file 166-8-13465) and because of clause 39.10 of collective agreement 503/82. However, I do not feel the Coallier decision prevents Macri from pursuing her claim for the following reasons.*
>
> *53 In the first place, it was accepted by both parties that Macri's proper classification was and had been under review for some*

> *time. This work had not been completed* ***but through no fault of the grievor****… Thirdly, Macri finally demanded an answer to the inconclusive state of her proper classification in March 1985. Her supervisor, seemed to indicate, then, that her case was not as solid as she had previously been led to believe. Within 15 working days thereafter she filed her grievance.* ***I believe the grievor to have acted reasonably and within the time limits available to her in that it was not until 14 March 1985 that she was given an indication that she might have cause to feel aggrieved.***
>
> …
>
> [Emphasis added]

[85] It was through no fault of the grievor that the collective agreement was breached over a period of several years and that he had received no indication that he might have cause to feel aggrieved until May 10, 2012, when his colleague gave him a heads-up.

[86] The *Baker v. Treasury Board (Correctional Service of Canada)*, 2008 PSLRB 34, decision considered whether the *Coallier* limitation should be applied to restrict the remedy and decided that it should, in the circumstances of that case. However, the Board said this about the notion of an automatic application of the limitation to any continuing grievance:

> …
>
> *18 … I also note that the decision in* Macri v. Treasury Board (Indian and Northern Affairs Canada), *PSSRB File No. 166-02-15319 (19871016) (upheld by* Canada (Treasury Board) v. Macri, *[1988] F.C.J. No. 581 (C.A.) (QL)), declined to follow* Coallier. *This was on the basis that a strict limitation of twenty days for a remedy would be an incentive for an employer to delay the grievance procedure. I acknowledge that policy concern, but there is no evidence of that situation in this case.*
>
> *19 In summary, where there is a continuing grievance under the collective agreement there may not be a timeliness issue as a result of the late filing of the grievance. However, any remedy under that grievance is limited to the twenty-five-day period prior to the presentation of the grievance at the first level of the individual grievance process.* ***I agree with the bargaining agent that this admittedly technical approach should not be applied in extreme ways. For example, situations involving waiver, estoppel and other equitable considerations may require deviation from this approach (see*** **Public Service Alliance of Canada v. Treasury Board,** ***PSSRB File No. 161-02-703 (19931220), and*** **St. Raphael's Nursing Home Ltd. v. London and District Service Workers' Union, Local 220** ***(1985), 18 L.A.C. (3d) 430).***

…

[Emphasis added]

[87] In *Barbour v. Treasury Board (Department of Transport)*, 2018 FPSLREB 80, the Board dealt with the same issue that is before me — the equitable distribution of overtime. In that case, the employer told the grievors that it was looking into the issue but did not provide them with the necessary information on overtime distribution. The Board noted that the employer had the information, which it should have provided to the grievors — it could not come before the Board and hide behind a timeliness argument when its failure to act caused the delay.

[88] In this case, the employer did not deliberately fail to provide information that the grievor would have required to file a grievance, as in *Barbour*, but nevertheless, it was responsible for and possessed the information, and the grievor had no realistic access to it.

[89] In *Roy v. Treasury Board (Correctional Service of Canada)*, 2019 FPSLREB 49, the Board noted as follows that the facts before it were different from those in *Coallier* in that the grievors in *Roy* expected that their instructors' allowance would be paid because it had been paid in the past and because their supervisor was looking into the matter:

…

> ***84*** *In* Coallier*, the Federal Court of Appeal decided that the employee who waited 2 years to claim the salary he was due could claim the increase beginning only 25 days preceding his grievance* ***because nothing would have prevented him from filing a grievance from the outset****. The grievors' uncontested testimony is very different.* ***Mr. Bercier had always received the allowance and had expected to continue receiving it****. He suggested to Mr. Roy that it would be paid. According to the grievors' testimony,* ***their immediate supervisor stated that he would look into it****, suggesting that he also expected that the allowance would be paid as before.*
>
> ***85 It was not illogical to wait to see how things would be resolved. That has nothing to do with the inaction seen in*** **Coallier.** ***As soon as it was certain that the allowance would not be paid, at the end of the training, the grievors filed their grievances.***

…

[Emphasis added]

[90] In this case, the grievor had every reason to rely on the employer's system of allocating overtime equitably and had no reason to think that it would not work as it presumably had before he went on light duties. As soon as he was alerted to the fact that it was not working properly when he was on his accommodation, he filed his grievance within the timelines.

[91] The *Macri* decision said this at paragraph 54 with respect to the application of the *Coallier* limitation:

> *54* ***If the decision of the Federal Court of Appeal is to be read as barring Macri, or any grievor, from collecting what is alleged to be owed them for a period greater than the 20th or 25th day (as the case may be) preceding the lodging of a grievance and within which action must be initiated then surely this forces unfortunate consequences on both parties.*** *It will force employees to demand that management take no longer than 20 or 25 days to resolve decisions lest grievances be automatically lodged to protect their positions. This could frustrate delicate negotiations at most inopportune times. It might well lead to an increase in unnecessary litigation before this Board. Conversely, if the rationale of Coallier is as I fear, then there will be every incentive for the employer to delay making decisions in the hopes that an employee will neglect to grieve before the 20th or 25th day, thereby failing to protect his/her interests and becoming barred from claiming what was alleged to be owed. That is to say, there would be an incentive for the employer to fail to act. Such a result would be unconscionable or inequitable.*
>
> [Emphasis added]

[92] I quoted that passage from *Macri* in *Peterman* and continued as follows:

> …
>
> *[140] I agree whole-heartedly. Applying the* Coallier *principle unquestioningly to every continuing grievance, regardless of the circumstances, would certainly force unfortunate consequences on both parties, including providing an incentive for an employer to delay making decisions,* ***whether deliberately or not****.*
>
> *[141] The employer made no submission as to why such a remedial limitation would be appropriate in this case. As a general proposition an employer should certainly not be exposed to extended liability resulting from a potential grievor sitting on her rights and failing to grieve. However, surely that does not mean that a retroactive remedy for every continuing grievance must be automatically limited to a 20 or 25-day timeline. In my view, the*

> *circumstances of every case must be considered carefully to ensure that an unconscionable or inequitable result is avoided.*
>
> …
>
> [Emphasis added]

[93] Those decisions state that an employer should not be able to restrict a grievor's remedy when the employer itself was responsible for causing delays or not sharing information that the grievor required. In this case, there was no suggestion that the employer intentionally delayed the grievance or deliberately failed to provide information.

[94] However, an overtime distribution system is not transparent to employees. Whether or not it was aware of the issue, only the employer had the information that the grievor would have needed in order to know that the collective agreement was being violated. It would not make sense to restrict his remedy in these circumstances. He could have done nothing differently to identify the breach. In *Macri*, the Board said that the grievor in that case was not at fault and that she acted reasonably and within the time limits available to her when she was first given an indication that she might have cause to feel aggrieved. That is precisely the situation in this case.

[95] Limiting the grievor's remedy to the 25 days before his grievance was filed, in the circumstances of this case, would be an unconscionable and inequitable result. As the grievor submitted, it would amount to weakening his negotiated rights under the collective agreement and would provide a mechanism for the employer to evade accountability.

B. General damages

[96] The grievor was readily available and qualified for overtime work in the TRC (or as of September 2012, the cash business line), as long as that work did not conflict with his medical limitations. Therefore, under clause 28.03 of the collective agreement, the employer was obligated to equitably offer any such overtime work to him.

[97] The facts boil down to this. For some period spanning a number of years, some superintendents were unclear on how the overtime data should be entered into COSS, or upper management was unclear about it and had instituted a faulty system. Nothing turns on whether the employer addressed the issue on June 1, 2012, by instituting a new policy or by reiterating to the superintendents the existing policy. Before the

correction, it had been violating clause 19.01 of the collective agreement and s. 7 of the *CHRA* either by not having an appropriate system in place to meet the requirements of clause 28.03 or by not sufficiently training the superintendents in the correct use of that system.

[98] For fiscal year 2012-2013, the evidence set out and I find that the employer was made aware of the issue in June 2012 and that it corrected the problem for that year. There is no dispute that the grievor had told the employer that he was satisfied with how overtime was being charged, that he was on the list with the fewest number of charges as of July and September of that year, and that the inequitability of overtime distribution was remedied by year-end. Accordingly, I find that no damages are owing for overtime pay lost in fiscal year 2012-2013.

[99] As for fiscal years 2009-2010, 2010-2011, and 2011-2012, there is a large gap in the available evidence. The employer is responsible for poor record keeping in that respect. As a result, much is unknown about those years. No records detail the overtime offered or the responses to those offers.

[100] However, this much is known. During his accommodation periods, the grievor was on light duties and could be offered overtime only in the TRC, and as of September 2012, the cash business line. The duties in the other business lines require BSOs to wear blues, to be tooled, and to be sufficiently physically fit to respond to any issue requiring physical intervention. The employer stated that the grievor's functional limitations did not allow him to work the other business lines in his regular shifts, and therefore, he could not work them in overtime. He never sought to broaden the options of where he could work or indicated that his limitations were too restrictive. None of this was disputed.

[101] The employer stated that the best estimates were that the work in the TRC and the cash line accounted for approximately 10% of all overtime opportunities. This was challenged only by the grievor noting that the employer presented no evidence to support that approximation. However, he presented no evidence to refute or call into question the 10% figure.

[102] It was clearly stated only as an approximation, and I accept that it is in the ballpark. It makes sense on the face of it that all the other main business lines would generate the bulk of the workload and therefore the bulk of the overtime. The duties in

the TRC are to respond to the telephone inquiries of travellers who arrive at the border in boats, private planes, and snowmobiles and to dispatch other BSOs to them. Clearly, it would generate a good deal less work and a good deal less overtime than would the other business lines. As well, overnight shifts rarely arise in the TRC or in cash as they do in the other lines.

[103] There was no dispute that the summer staff complement was 20 to 30 BSOs (half that in winter) working the other lines and the marine verification team, while 1 BSO worked cash and 3 to 5 worked the TRC (fewer in winter). In the absence of any evidence to the contrary, I think that 10% is a reasonable estimate of the average amount of overtime that might have been available in the TRC.

[104] The employer suggested that any calculation of the overtime that might have been available to the grievor should be reduced for a number of reasons. It said that there was some recollection that the grievor had a standing overtime refusal. There was no evidence of it and no such notation by his name on any of the available COSS documents. The employer said that the grievor would likely not have accepted all the overtime that should have been offered to him. That is likely true, but in my view, this should not be considered in the absence of a documented long-standing or frequent refusal of overtime on his part. The same goes for the employer's suggestion that he was scheduled to be away for seven days at some point and, therefore, was not readily available to accept overtime work during that time. An employee is entitled to take leave.

[105] In my view, this matter is best resolved by applying a simple formula to calculate an approximation of the grievor's lost overtime opportunities, without attempting to quantify any deductions based on vague allegations and recollections (see *Brown and Beatty* at paragraph 2:24 (WL Can)). I accept the unchallenged evidence that the grievor could have accepted only 10% of the average overtime work offered, based on his functional capacity, and therefore, he was not similarly situated to BSOs who could work all the tooled shifts.

[106] Accordingly, I find that the best approximation of what is owed to the grievor can be calculated as follows: 10% of the average overtime worked by BSOs, prorated for the periods of August 10, 2009 to September 22, 2010, and April 20, 2011 to end of

fiscal year 2011-2012 (given that equitable distribution was achieved for fiscal 2012-2013), minus any overtime that he worked during the relevant periods.

C. Discrimination, and human rights damages

[107] The grievor's back condition was a disability within the meaning of the *CHRA*. He experienced an adverse impact while being accommodated for his disability on light duties and his disability was a factor in the adverse impact. That is sufficient to establish a *prima facie* case of discrimination, which shifts the burden of proving otherwise to the employer. In this case, it conceded the discrimination.

[108] I accept the employer's submission that the discrimination was entirely unintended and quickly rectified once raised. Nevertheless, the employer is responsible for the discrimination that occurred, intended or not (see *Edwards v. Treasury Board (Canada Border Services Agency)*, 2019 FPSLREB 62 at para. 36). As well, the employer did not deny that the charging errors might have occurred in several previous fiscal years, as alleged. It was the employer's obligation to have a fair and functioning system in place and to have adequately trained superintendents. It seems more likely than not that that was not the case for a quite lengthy period, thus allowing the discrimination to occur over a span of time.

[109] And although employees on vacation may have experienced the same wrongful charging of overtime, the grievor was wrongly charged for overtime because he was on light duties. Therefore, his protected characteristic of disability was a factor in the discrimination that he experienced. That disability was not a factor in the adverse treatment experienced by other employees, does not impact his entitlement to human rights damages.

[110] Under ss. 226(2)(a) and (b) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2), the Board can interpret and apply the *CHRA* and award compensation for pain and suffering experienced as a result of a discriminatory practice (see s. 53(2)(e) of the *CHRA*) and special compensation for a wilful or reckless discriminatory practice on the part of the employer (s. 53(3) of the *CHRA*). The grievor seeks compensation in the amount of $5000 for pain and suffering and $5000 for wilful and reckless discrimination.

[111] The employer argued that the grievor experienced no pain and suffering as a result of the discrimination. The grievor submitted that damages under s. 53(2)(e) of the *CHRA* may be awarded without evidence of pain and suffering and referred to the *Johnstone v. Canada Border Services Agency*, 2010 CHRT 20, award of $15 000 that he argued was based solely on subjective evidence and was not disturbed on judicial review or appeal.

[112] As for that award, the CHRT said this:

> …
>
> *[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.*
>
> …

[113] The purposes of damages under s.53(2)(e) of the *CHRA* include vindicating the claimant's dignity and personal autonomy (*Jane Doe v. Canada (Attorney General)*, 2018 FCA 183 at paras. 13 and 28). The wording of s.53(2)(e) clearly indicates that such awards are intended to be compensatory, meaning that the amount awarded is tied to the seriousness of the harm that the complainant experienced. Consequently, for an award to be justified, the complainant must provide evidence that the discriminatory practice actually caused pain and suffering (see *Jane Doe*, at paras. 29 and 33; *Fang v. Deputy Head (Department of Industry)*, 2023 FPSLREB 52 at para. 154).

[114] In *Besner v. Deputy Minister of Human Resources and Skills Development*, 2014 PSST 2, the former Public Service Staffing Tribunal ordered $2000 in damages for pain and suffering. In that case, the complainant testified generally that she felt stressed and frustrated due to her employer's discriminatory actions but did not elaborate any further as to the pain and suffering she experienced. In *Spruin v. Deputy Minister of Employment and Social Development*, 2019 FPSLREB 33, the Board ordered $2000 in damages for pain and suffering. The complainant in that case testified that he suffered

shame, embarrassment, stress, vexation, and anxiety as a result of the employer's failure to accommodate him in a staffing process.

[115] In the present case, the evidence of pain and suffering, subjective or otherwise, put forward by the grievor is minimal. Unlike the complainant in *Johnstone v. Canada Border Services Agency*, 2010 CHRT 20, who testified to injury to her person, her confidence, and her reputation, the grievor's evidence of pain and suffering is limited to his statements that, upon discovering the employer's discriminatory actions, he "… did not understand how that could possibly be fair" and that he was being treated inequitably. I infer from these comments that the complainant experienced some degree of emotional upset as a result of the employer's actions, but I do not find that it was significant.

[116] In light of this limited evidence, I find that an amount of $2000 is appropriate compensation for pain and suffering under s. 53(2)(e).

[117] No special compensation under ss. 53(3) of the *CHRA* is warranted as no evidence was presented of wilful or reckless conduct on the employer's part. The employer was challenged by the inexperience of new and acting superintendents for which it is, of course, responsible, and perhaps by its misunderstanding of how the overtime data should have been entered. As indicated earlier, allowing a sustained administrative error to continue over several years, is not acceptable, but it was not intentional and was swiftly addressed when the employer was made aware of it. This does not suggest a wilful or reckless practice that would warrant special compensation.

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

(The Order appears on the next page)

III. Order

[119] I order the employer to pay the grievor overtime pay and associated benefits for fiscal years 2009-2010, 2010-2011, and 2011-2012, calculated as follows: 10% of the average overtime worked by BSOs, prorated for the periods from August 10, 2009, to September 22, 2010, and from April 20, 2011 to end of fiscal year 2011-2012, minus the overtime that the grievor worked during the relevant periods.

[120] I order the employer to pay the grievor compensation of $2000 under s. 53(2)(e) of the *CHRA*.

[121] I will remain seized for a period of 90 days should the parties have any difficulty implementing this order.

July 30, 2024.

Nancy Rosenberg,
a panel of the Federal Public Sector
Labour Relations and Employment Board