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Files: 566-02-42040 to 42044

Citation: 2024 FPSLREB 143

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

TRENT MCNABB

Grievor

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

and

DEPUTY HEAD
(Canada Border Service Agency)

Respondent

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

In the matter of individual grievances referred to adjudication

Before: Amélie Lavictoire, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Geoff Dunlop, counsel

For the Employer and Respondent: Patrick Turcot, counsel

Heard at Kelowna, British Columbia,

December 12 to 15, 2023.

REASONS FOR DECISION

I. Overview

[1] An employer has a duty to accommodate a disabled employee to the point of undue hardship. That exercise is fact-specific and generally includes considering the employee's needs and the workplace's characteristics, among other factors.

[2] In 2014, Trent McNabb ("the grievor"), a border services officer working at a small port of entry in British Columbia, suffered an injury that resulted in permanent physical restrictions. While they did not prevent him from performing sedentary tasks, they meant that he could not participate in use-of-force training and that he was limited as to the enforcement activities that he could perform. He could no longer use defensive tools, such as a firearm.

[3] As of the events that gave rise to these grievances, border services officers working at a port of entry were required to be armed.

[4] In 2017, the Canada Border Services Agency (CBSA) terminated the grievor's employment for non-disciplinary reasons. Although the Treasury Board of Canada is the legal employer in this case, for the purposes of this decision, the CBSA is designated as the employer ("the employer").

[5] The grievor referred four grievances to adjudication under ss. 209(1)(a) and (c)(i) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). The first two (in Board file nos. 566-02-42040 and 42041) allege that the CBSA breached its duty to accommodate him based on disability and family status. The third grievance (in Board file no. 566-02-42042) pertains to the employer's denial of a request for leave without pay for the care of family that he presented shortly before the events that gave rise to his fourth grievance (in Board file nos. 566-02-42043 and 42044), notably, the termination of his employment for non-disciplinary reasons. The fourth grievance bears two file numbers, one that corresponds to the termination of the grievor's employment and the other, to his allegation according to which his termination was discriminatory.

[6] At the hearing, the grievor withdrew his grievance with respect to accommodation based on family status (in Board file no. 566-02-42041). That file is ordered closed. This decision addresses only the three remaining grievances.

Nevertheless, in the summary of the evidence that follows, I will set out some of the facts relevant to the grievor's request for accommodation based on family status because those facts are relevant to the employer's knowledge of his personal and family circumstances, knowledge that in turn is relevant to the analysis of how it addressed his accommodation request.

[7] In this case, the Federal Public Sector Labour Relations and Employment Board ("the Board") had to decide whether the CBSA met its duty to accommodate the grievor and, as such, had cause to terminate his employment. The Board also had to decide whether the employer's decision to deny the grievor's request for a leave without pay for the care of family was arbitrary or discriminatory.

[8] The grievor did not ask to be reinstated if his termination grievance were allowed, but he requested, among other things, damages under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*).

[9] At the parties' request, the Board ordered the proceedings bifurcated and left the issue of remedy to be addressed at a later stage of the proceedings, were the grievances allowed. Accordingly, this decision addresses only the merits of the grievances. At the parties' request, it also addresses, in very general terms, the grievor's entitlement to damages under the *CHRA*. It does so to assist the parties in settlement discussions, should such discussions occur.

[10] For the reasons outlined in this decision, I conclude that the grievances with respect to the grievor's requests for accommodation based on disability and for leave without pay for the care of family and his grievance with respect to his subsequent termination are allowed. The grievor is entitled to damages under the *CHRA*.

II. Summary of the evidence

[11] The parties filed a detailed agreed statement of facts, and four witnesses testified at the hearing. Roslyn MacVicar, who at the relevant time was the regional director general of the CBSA's Pacific Region ("the Region"), and Terry Velichko, the administrative superintendent for the CBSA's Okanagan and Kootenay District ("the District"), testified on the employer's behalf. Ms. MacVicar's testimony related mostly to the options that were presented to the grievor after he requested accommodation based on disability, her decision to deny his request for leave without pay for the care

of family, and her decision to terminate his employment. Mr. Velichko testified about his involvement in handling and managing the grievor's accommodation request in the initial stages of the search for an accommodation.

[12] The grievor and his spouse testified on his behalf.

[13] First, I will provide a general overview of the employer's accommodation process as Ms. MacVicar and Mr. Velichko described it, followed by contextual information about the grievor's work, work location, and personal circumstances. Then, I will briefly describe the events that led to his requests for accommodation and for leave without pay for the care of family and the employer's treatment of those requests, up to and including his termination due to disability.

A. The employer's accommodation process, generally

[14] The CBSA's operations were described as divided into local, district, regional, and national levels. In the context of this decision, references to the "local level" should be interpreted to mean CBSA operations in relative proximity to the grievor's port of entry, while references to the "district level" should be read as referring to CBSA operations in the District. References to the "regional level" correspond to CBSA operations in the Region, which includes B.C. and the Yukon.

[15] As previously indicated, Mr. Velichko was and is the District's administrative superintendent. The District is in B.C.'s central and southern interior.

[16] He was responsible for handling and managing accommodation requests in the District based on a process map and a checklist that set out the steps to take with respect to a request and the information to be gathered to address it. He described his duties as receiving accommodation requests, liaising with management in the District and the Region, collecting information from local management, and ensuring that files moved forward. He described his involvement in the accommodation process at issue as being "not extensive". Once the search for accommodation was broadened beyond the District, he was no longer involved in the accommodation process in any meaningful way.

[17] As of the events that gave rise to these grievances, handling and managing accommodations requests received in the Region was centralized, with the objective of attaining greater consistency in decision-making. Accommodation requests were also

addressed using a concentric-circles model. Ms. MacVicar and Mr. Velichko's description of this model was generally consistent with the one found in a CBSA "Duty to Accommodate Playbook" ("the Playbook") that was entered into evidence.

[18] Under the concentric-circles model, as it is described in the Playbook, accommodation options must first be investigated in the employee's position and work location. If no suitable accommodations can be found there, then accommodation options in other positions in the employee's work location must then to be explored. If that search is unsuccessful, accommodations at the local level must be sought. If none can be found locally, the employer's search must be expanded to include a search for one in the employee's position but in another work location in the District. If that search is unsuccessful, it is broadened further afield, specifically to the regional level.

[19] Ms. MacVicar and Mr. Velichko described the model more succinctly and as it applied to the grievor's request. According to them, searches for a suitable accommodation had to be conducted first at the employee's work location, in this case, at the Paterson Port of Entry near Trail, B.C. ("the Port of Paterson"). If unsuccessful, the search was to be expanded locally; that is, to other nearby ports of entry. If no suitable accommodation could be found locally, the search would move on to the district level, in this case, to CBSA operations throughout the District. If that search was unsuccessful, it was to be expanded to the Region.

[20] According to Ms. MacVicar, the objective of the concentric-circles model was to accommodate an employee as close to their existing work location as possible. She indicated that the model reflected the fact that direct supervisors were generally seen as the main and best conduits of information for, and communication with, an employee requiring accommodation. They have a relationship with the employee. They have first-hand knowledge of the employee and their personal circumstances. They also are best placed to work collaboratively with the employee, to identify a reasonable accommodation.

[21] As part of this centralized, concentric-circles model, Mr. Velichko was responsible for receiving accommodation requests and collecting related information with respect to accommodations searches conducted at the local and district levels. When the search for a suitable accommodation reached the regional level, he was no longer involved. According to Ms. MacVicar, she likely became involved in the

accommodation process at issue after the search had been deemed unsuccessful at the local and district levels.

[22] In addition to the concentric-circles model just described, the employer's broader accommodation process included an ad hoc labour-management consultation committee that served as a forum in which upper management of the Region, CBSA labour relations personnel, and bargaining agent representatives could discuss the accommodation process in general terms. This committee did not discuss specific cases — including the grievor's.

B. The grievor's work, work location, and personal circumstances

[23] The grievor was a border services officer from May 2001 to his termination on June 20, 2017. His position was classified at the FB-03 group and level. During the period relevant to these grievances, he worked at the Port of Paterson in the District. At the time, the District counted 16 distinct CBSA work locations.

[24] The Port of Paterson is open to cross-border commercial and traveller traffic 24 hours per day. As of the events that gave rise to these grievances, an average of 12 border services officers (BSOs) worked there on 12-hour rotating shifts. Depending on operational requirements, the port was staffed by 2 to 6 BSOs. For most of the year, BSOs were the only CBSA employees working there (all FB-03s), along with a superintendent (classified FB-05). In the summer months, it also had 1 traveller services representative, which was a CR-04 position that was generally staffed by a student.

[25] The grievor described the Port of Paterson as comprising an open-concept office, a detached primary inspection booth, and a covered carport that served as a secondary inspection area. The office contained several desks and an office for the superintendent. According to Mr. Velichko, the office was small, and not much space was available to allow an additional person to work there.

[26] BSOs working at ports of entry — including the Port of Paterson — must be armed when on duty. They are required to undergo use-of-force training.

[27] The grievor described the BSOs' daily tasks at the Port of Paterson, which the employer's witnesses did not contradict. He described them as including working on the primary inspection line and conducting secondary-inspection duties. Although she

did not expressly testify to that effect, it would appear from Ms. MacVicar's testimony that the requirement that BSOs be armed and able to conduct use-of-force duties is directly related to their public-facing border-services enforcement work on the primary and secondary inspection lines.

[28] A BSO's work also included sedentary administrative duties, such as conducting interviews of travellers seeking entry to Canada and preparing paperwork for immigration-related matters.

[29] A BSO's administrative duties at a small port of entry also included reviewing requests for the release of commercial goods for importation into Canada. A broker submits them electronically on behalf of an importer. As the majority of the evidence pertained to the treatment of these requests as of the events that gave rise to these grievances, I will describe their treatment in the past tense.

[30] BSOs located in the port of entry where commercial goods would enter Canada do not need to handle requests to release those goods. They could be — and frequently were — electronically redirected to other ports of entry in the Region, so that BSOs in smaller, less-busy ports of entry could deal with the requests when their workloads allowed.

[31] According to the grievor, the requests could either be "pushed" (i.e., redirected) specifically to the Port of Paterson, or they could be made available for review by BSOs anywhere in the Region or country. After reviewing a release request, a BSO was required to recommend the release of the goods or to refer the request for further review. The rate at which a BSO reviewed these requests could be taken into account in the BSO's yearly performance assessment.

[32] The grievor testified that as a BSO at the Port of Paterson, he would routinely review requests for the release of commercial goods that other ports of entry had received and had made available for review. They were available on a first come, first served basis. When he would log in to the computerized system on which the CBSA received the requests, he would see anywhere from dozens to hundreds of them awaiting review. Very rarely would there be none to review. He testified that BSOs not working on the primary or secondary inspection lines were expected to review these requests.

[33] The grievor also occasionally, but infrequently, worked as a BSO at other ports of entry in the District when they experienced temporary staffing shortages due to absences or training. According to him, there were 3 other ports of entry within a 45-minute drive of the Port of Paterson and 2 within a 90-minute drive. He testified that some of them were larger and busier than the Port of Paterson. They had more employees. They had permanent positions classified at the CR-04 group and level. The employees who occupied them did clerical duties of a sedentary nature. There was no arming requirement for the CR-04 positions.

[34] According to the grievor, BSOs unable to be armed during their pregnancies had been accommodated at the Port of Paterson at least twice. He seemed to vaguely recall a third time but could not be more specific. The two pregnant BSOs whom he could recall having been accommodated did not work on the primary or secondary inspection lines. They did administrative duties, like reviewing commercial-goods release requests. They also took over other BSOs' administrative duties.

[35] The employer's witnesses did not dispute the fact that the BSOs who could not be armed during their pregnancies had been accommodated at the Port of Paterson. However, Mr. Velichko and Ms. MacVicar indicated that more accommodation options were available to the employer when the accommodation need was temporary.

[36] The grievor also testified that a BSO with a permanent disability that prevented him from carrying a firearm had been accommodated at the Port of Kingsgate, which is a larger port of entry that is in relative proximity to the Port of Paterson. When he was asked whether another BSO with a permanent injury had previously been accommodated, Mr. Velichko's testimony was vague but not contradictory to the grievor's.

[37] Now that I have described the grievor's work environment and duties, I will briefly describe his personal circumstances.

[38] At all relevant times, the grievor resided in or around Trail, which is a small community located relatively close to the Port of Paterson. Trail is in B.C.'s southern interior, close to the Canada-U.S. border. It is hundreds of kilometres from Vancouver, B.C.

[39] The grievor is the father of 2 children, born in 2010 and 2011. They were quite young during the events that gave rise to these grievances, being roughly 4 and 6 years of age when he made the request for accommodation based on disability that is at issue.

[40] The grievor's spouse is a physician. During the period relevant to these grievances, she was one of only two physicians with a specialty in obstetrics and gynecology in the Trail area. She worked for the local hospital, on contract. Her job was very demanding, and her work schedule was highly unpredictable and inflexible. When she was not at work, she could often be called in with little or no notice. Because of this, the grievor was the primary caregiver for their two children. At all relevant times, he was responsible for most of the child-rearing and household chores and tasks. He dropped the children off at school and picked them up. He drove them to their extracurricular activities. No members of their extended family lived in the Trail area.

C. The events that led to the grievor's accommodation requests and his termination

[41] In 2014, the grievor suffered a serious shoulder injury. He underwent surgery in April 2014 and went on sick leave. Although the prognosis was originally very good, his recovery was not as straightforward as anticipated. He provided his employer with a doctor's note indicating that he would be unable to work for six months. On July 2, 2014, he began to receive long-term disability benefits. He made — which CBSA management approved — several requests to extend the period of his sick leave without pay.

[42] For a period of roughly two years, there were very few communications between the grievor and the employer other than those between him and his supervisor when he went to the Port of Paterson to present requests to extend his leave. His supervisor was the superintendent of that port, Brad Britton.

[43] On April 6, 2016, while preparing for his return to work but still on sick leave without pay, the grievor informed Mr. Britton that he intended to request accommodation at the Port of Paterson on the basis of disability and family status. During a conversation that the grievor estimated took no more than 30 seconds, Mr. Britton, in general terms, would have told the grievor that it would not be possible to accommodate him at the Port of Paterson because there was not enough work for a BSO who could not be armed. Mr. Britton did not testify at the hearing.

[44] That same day, Mr. Britton emailed Lorne Black, the chief of operations of the Kootenay-area ports of entry. He copied Mr. Velichko. Mr. Britton informed Mr. Black of the grievor's intention to seek accommodation based on disability and family status. He indicated that he had advised the grievor that "… there is little to no work for an accommodated BSO at Paterson …" and that Mr. Black would send the grievor a "… formal letter outlining his options after being on [sick leave without pay] for two years …".

[45] On April 25, 2016, the grievor submitted his two accommodation requests. He provided them to Mr. Britton. Emails admitted into evidence set out that Mr. Britton promptly informed Mr. Black and Mark Zelenika, the Region's director, of the grievor's accommodation requests.

[46] Two days later, a person whom Mr. Velichko described as a duty-to-accommodate coordinator for the Region ("the Coordinator") wrote to Mr. Black, asking him to assess what work was available for the grievor at the Port of Paterson that met his physical restrictions. Mr. Velichko was copied on that email. Six minutes later, Mr. Black responded, copying Mr. Velichko. In his response, Mr. Black expressed the opinion that there was no work available at the Port of Paterson to meet the grievor's restrictions and indicated that any available work there had already been redirected to the Port of Kingsgate to provide work for an accommodated person.

[47] The grievor's accommodation request based on disability indicated that he asked to be accommodated at the Port of Paterson doing "commercial releases and/or office duties". He submitted a "Functional Abilities Form" to support his request that indicated that he was fit to return to work but that he had permanent physical restrictions that would prohibit him from participating in use-of-force training and that would limit enforcement duties, including the use of defensive tools, such as a firearm.

[48] In his second accommodation request, based on family status, the grievor asked to be accommodated with respect to his hours of work. Specifically, he asked to be able to work "accommodated hours", so that he could drop his children off at school and pick them up afterward. The request contained a detailed description of the family-related needs that required accommodation, notably, the need that he be

available to care for the children outside school hours, given his spouse's unpredictable and demanding work schedule.

[49] According to the grievor, when he made his accommodation requests, his spouse was experiencing significant health issues. As a contract worker, she did not have health insurance benefits of her own. The couple was reliant on his health benefits.

[50] On May 6, 2016, Mr. Velichko wrote to the grievor, to obtain additional information about his restrictions as they had been identified by his physician on a Functional Abilities Form. He responded immediately, in writing. He followed up by email on May 13, 2016, to inquire as to whether the information that he had provided was sufficient. Mr. Velichko did not respond; nor did he take steps to speak with, or seek additional information from, the grievor or his physician.

[51] At the hearing, Mr. Velichko indicated that he felt that the grievor's response to his inquiry only repeated the information that the physician had already provided rather than adding anything new. Mr. Velichko testified that he felt that he would just receive more of the same if he communicated with the grievor again. He also believed that he would be unable to obtain more information from the grievor's physician due to privacy concerns.

[52] At the hearing, Mr. Velichko indicated that the search for a suitable accommodation began once the employer received the grievor's accommodation requests. BSOs at ports of entry had to be armed. Since the grievor could no longer be armed and his injury was permanent, he was no longer able to meet the conditions of his BSO position. The need for accommodation would be permanent. According to Mr. Velichko, there were fewer options to accommodate a BSO with a permanent disability that prevented them from carrying a firearm than there were options to accommodate a BSO who could not be armed due to a temporary injury or a pregnancy.

[53] During his testimony about the application of a concentric-circles approach to the grievor's case, Mr. Velichko indicated that he accepted and relied on Mr. Britton's assessment that there was no work at the Port of Paterson for a BSO who could not carry out a BSO's full range of duties. According to Mr. Velichko, as the port superintendent, Mr. Britton was best placed to know if there was work at the port for an accommodated BSO. He did not receive or request documents from Mr. Britton or

Mr. Black to support their assessments that the grievor could not be accommodated at that port. His memory was fuzzy as to whether he discussed with them specific accommodation options at that port. He indicated that he probably had a conversation with one of them, but he could not recall specifics and had no notes from those conversations.

[54] Mr. Velichko testified that he did not know whether Mr. Britton considered redirecting or reassigning administrative duties from other ports of entry to the Port of Paterson or "pushing" requests for commercial-goods release to that port before he concluded that there was no work for an accommodated BSO there. When he was asked whether Mr. Britton had considered the possibility of offering the grievor part-time or temporary work as an accommodated BSO, he indicated that he did not know. When he was asked whether he had considered that possibility, Mr. Velichko indicated that he did not think that anyone would want to be accommodated on a part-time basis.

[55] Mr. Velichko's description of the next step in the concentric-circles approach was very brief. The District is small, and so are its ports of entry. According to him, there was no work that would have met the grievor's permanent restrictions. There is nothing to indicate that he communicated with the superintendents of other ports of entry in the District to inquire about the possibility of accommodating the grievor in those ports. Mr. Velichko's recall as to whether he had discussions with Mr. Black about accommodation options elsewhere in the District can best be described as fuzzy.

[56] Mr. Velichko did not know if someone had asked the grievor if he would be interested in accepting lower-level, temporary, or part-time work in the District if there was no full-time at-level work for an accommodated BSO at the Port of Paterson or in its relative proximity. He did not ask the grievor. He did not speak with the grievor during the accommodation search at the local or district levels.

[57] Ms. MacVicar's testimony was like that of Mr. Velichko in that she indicated that it was determined early on that suitable at-level work that met the grievor's restrictions was not available — on a permanent basis — at the Port of Paterson or at the local or district levels. She did not question that assessment. She also did not know if the grievor had been asked whether he would be interested in accepting lower-level,

temporary, or part-time work. She did not ask him. She did not know him and did not speak with him during the accommodation search.

[58] Ms. MacVicar's testimony focused primarily on the search for accommodation throughout the Region. As previously indicated, Mr. Velichko was not responsible for the accommodation search at the regional level.

[59] According to Ms. MacVicar, at some known work locations in the Region, BSOs worked in secure environments without face-to-face contact with the public and could, if required due to a duty to accommodate, be unarmed.

[60] Several years before, the CBSA had begun to gradually implement a new arming requirement that was applicable to all BSOs. It was also actively preparing for an anticipated need to accommodate an important number of BSOs requiring accommodation following the gradual implementation of the new requirement.

[61] In or around 2015, the CBSA identified the Vancouver International Mail Centre ("VIMC") as a suitable work location for BSOs who could not be armed. According to Ms. MacVicar, vacancies at the FB-03 group and level were intentionally created at the VIMC to allow the CBSA to accommodate unarmed BSOs in at-level positions. The VIMC is located in Richmond, B.C., which is in the greater Vancouver area.

[62] Other work locations that could accommodate unarmed BSOs included three Nexus enrollment centres in the greater Vancouver area. However, when the search to accommodate the grievor was underway, those positions were staffed. A CBSA telephone reporting centre located in Victoria, B.C., and hearing-advisor positions in Vancouver, both of which could accommodate an unarmed BSO, were similarly fully staffed then.

[63] I will now describe the chronology of events once the accommodation search reached the regional level.

[64] Although Mr. Velichko was not actively involved in the accommodation search at the regional level, on May 16, 2016, he received an email from the Coordinator indicating that the Coordinator thought that the grievor's case was "… the 'test case' the RDG wants to use with an offer of a deployment to VIMC." When asked in cross-examination why the grievor's case was described as a "test case", Mr. Velichko indicated that he believed that it was one of the first cases — if not the first case — in

which the employer could offer a deployment to the VIMC to an employee who could no longer meet the arming requirements of his or her position due to a disability. Ms. MacVicar did not understand why the grievor's case was described that way.

[65] By the end of June 2016, the grievor had not received a response from the employer with respect to his two accommodation requests. He had been participating in a return-to-work physiotherapy program that his insurer had recommended and was looking forward to returning to work. He was unaware that the accommodation search had been deemed unsuccessful at the local and district levels and that accommodation options at the regional level were being contemplated.

[66] The grievor's long-term disability benefits ended on June 30, 2016. He was cleared to work. Although he was able to return to work as of July 1, 2016, and he contacted Mr. Black about where he should report to work on that day, he was told not to report because the employer had not yet found work that met his functional restrictions.

[67] The grievor did not return to work. On July 7, 2016, he suffered a serious back injury. He was transported to hospital by ambulance and was then hospitalized. On July 12, 2016, he underwent back surgery. His long-term disability benefits were reinstated, and he remained on sick leave without pay. On July 27, 2016, his physician signed a medical note indicating that the grievor had made a partial recovery after his back surgery and that his prognosis was good but that a complete recovery was unlikely to be rapid.

[68] The grievor's recovery from his back injury and the surgery did not go as anticipated. His recovery was slow and painful and punctuated by setbacks. He continued to have symptoms, including residual pain and numbness in one leg, for a significant time. Despite the slow and difficult recovery, he and his spouse testified that at all relevant times, he intended to return to work for the CBSA. His work for the CBSA was a source of pride.

[69] Less than one month after his back surgery, the grievor received what is commonly referred to as an "options letter" from the employer. In that letter, dated August 10, 2016, but presented to the grievor by Mr. Black on the following day, Ms. MacVicar denied the grievor's request to be accommodated in a BSO position at the Port of Paterson and presented him with an accommodation option that met his

restrictions. Given his insistence on the relevance of the employer's communications with him throughout the accommodation process, I will reproduce the most relevant excerpts of that letter as follows:

> …
>
> *I regret to inform you that, after a thorough review of the information submitted, management is unable to approve your request as there is currently no meaningful* [BSO] *work available at the Port of Paterson that meets your permanent restrictions.*
>
> …
>
> *In order to meet your permanent accommodation needs, the CBSA is offering you a deployment with relocation assistance to a full-time indeterminate position … at the Vancouver International Mail Centre, effective September 12, 2016.*
>
> …
>
> *Please advise* [the chief of operations] *by August 19, 2016, if you accept this offer of deployment to the Vancouver International Mail Centre. Failure to do so will be considered a rejection of the offer. I must advise you that as you have been on Sick Leave without Pay for a continuous period of over two years and have a medical certificate confirming your ability to return to work with permanent accommodation, should you decline a reasonable offer to return to work in a position that fully meets your accommodation needs, your options are limited to retirement, resignation or applying for medical retirement.*
>
> …

[70] In cross-examination, Ms. MacVicar indicated that she had limited knowledge of the grievor and of his personal situation when she signed the August 10, 2016, letter. She was not aware that he had recently had back surgery, that he was still recovering and that he was unable to work. She indicated that she did know that he had been on sick leave without pay for more than two years, and she felt that the employer had taken the necessary steps to identify a suitable accommodation for him.

[71] As indicated in the excerpt, the grievor had nine days — eight days from the date on which the letter was provided to him — to respond to the employer's offer to deploy to the VIMC. At the hearing, Ms. MacVicar indicated that in hindsight, the time frame provided to the grievor was short, but she emphasized the importance of ensuring that accommodation requests keep moving.

[72] On August 17, 2016, the grievor wrote to Ms. MacVicar, asking several questions for which he felt he needed answers before providing an answer to the options letter. He provided her with examples of 2 BSOs who were unable to be armed and who had been accommodated at ports of entry in the District. He asked why he was being treated differently. He also raised a concern about the financial feasibility of moving his family from Trail to Richmond (the VIMC's location), given the difference of roughly $1.4 million in the median cost of a detached home in those 2 cities. Lastly, he indicated that while the CBSA had taken 3.5 months to respond to his accommodation request, he was required to respond to the offer of a deployment within days or risk the consequences of being forced to retire, resign, or apply for medical retirement. He indicated that it felt like a threat.

[73] In his email, the grievor also inquired about the status of his request for accommodation based on family status, indicating that the employer had not yet addressed it.

[74] Two days later, on August 19, 2016, the grievor wrote to Mr. Black, asking for an extension of time to respond to the employer's accommodation offer, citing his ongoing recovery from recent back surgery to support his request for more time to consider, and respond to, the offer. At that point in the accommodation process, he began copying bargaining agent representatives on his email communications with the employer. He did not receive a response from Mr. Black.

[75] Also on August 19, 2016, but a few hours later, John Dyck, the executive director of the Region's Operations Branch, responded to the grievor's email of August 17, 2016, on behalf of Ms. MacVicar. He reiterated that the deployment offer to the VIMC was intended to provide the grievor with a reasonable accommodation that met his permanent medical restrictions. Mr. Dyck also indicated that a review of suitable and meaningful work available to BSOs permanently unable to be armed had been conducted, including work that could possibly be done remotely. There was no available and necessary at-level work at the Port of Paterson due to the nature of the grievor's restrictions, the workload and small size of the port, the port's operational staffing requirements, and the unavailability of permanent administrative duties of the type that had been used for temporary accommodations at other work locations.

[76] Mr. Dyck indicated that if other employees had been accommodated at their own ports of entry, it was "… because there [was] meaningful, at-level, necessary work available for them to perform and other circumstances allow[ed]… options are more limited when the accommodation need is on a permanent basis at smaller, more remote work locations."

[77] Mr. Dyck also responded to the grievor's concerns with respect to the housing-cost differential. He indicated that the employer did not consider them when it sought reasonable accommodation options and reminded the grievor that he would be entitled to relocation assistance. He also informed the grievor that, from the employer's perspective, the grievor's request for accommodation on the basis of family status (i.e., his request with respect to his hours of work) was subsumed by the larger issue of where it could find meaningful, at-level work that met the grievor's medical restrictions.

[78] Lastly, in response to the grievor's concerns about the time he was given to consider the deployment offer, Mr. Dyck offered him an assignment — with travel entitlements — to a BSO position at the VIMC from September 12 to October 7, 2016. At the hearing, Ms. MacVicar described the temporary assignment offer as a way of allowing the grievor more time to consider the deployment offer to the VIMC.

[79] The grievor was given one week to respond to Mr. Dyck's temporary-assignment offer. He was also given until October 7, 2016, to make a decision about the August 10, 2016, deployment offer. Mr. Dyck indicated that if the grievor refused the deployment, he would have the option of remaining on sick leave without pay (because he had been injured again), resigning, retiring, or applying for medical retirement.

[80] At the hearing, the grievor and his spouse testified about the deployment offer to the VIMC in the August 10, 2016, letter. They testified that they felt that the offer was not feasible.

[81] They testified about their ties to the Trail area and the community. The grievor's spouse could not easily leave her employment, given the terms of her contract and her professional obligations to her patients. A move to Vancouver would have been disruptive for their two school-aged children. The distance between Trail and Vancouver was much too great to consider commuting daily.

[82] According to them, accepting the deployment offer would have required the grievor to move to the Vancouver area and the family to live apart, with him commuting to Trail on the weekends. Due to the demanding and unpredictable workload of his spouse, they both felt that childcare obligations would be unmanageable for her.

[83] The grievor testified that the VIMC assignment offer — as with the deployment offer — did not seem to consider his personal situation and provided him very little time to consider what was being offered. According to him, the employer's suggestion of the VIMC assignment also did not recognize the fact that he had not yet been found fit to work after his back injury and that he was unable to work during the proposed assignment period.

[84] The grievor did not respond directly to Mr. Dyck's August 19, 2016, email or to Ms. MacVicar's August 10, 2016, options letter. As indicated, earlier on August 19, 2016, he had written to Mr. Black, requesting more time to consider the accommodation offered on August 10, 2016, but did not hear back from Mr. Black.

[85] The grievor indicated that after he received Mr. Dyck's email, he did not approach Mr. Britton to discuss accommodation options that did not involve a deployment to Vancouver. Mr. Britton's initial reaction to his accommodation requests and the lack of communication from Mr. Britton during the course of the accommodation process up to that point had given him little hope that further discussions with him would serve a useful purpose.

[86] The grievor began more active discussions with his bargaining agent representatives about accommodation options that would not involve moving to Vancouver. He testified that he believed that his bargaining agent representatives discussed such options with the employer. The bargaining agent representative who was most involved in those discussions passed away while the accommodation process was underway. No other bargaining agent representative testified at the hearing.

[87] On September 20, 2016, Mr. Britton provided the grievor a letter from Mr. Zelenika, the Region's director. In it, Mr. Zelenika informed the grievor that the accommodation offer of a deployment to the VIMC that had been previously made to him had been nullified because the grievor had failed to respond to it. The grievor's failure to respond was deemed to constitute a rejection of the offer.

[88] Given that the grievor's long-term disability benefits had been reinstated following his back injury and surgery, Mr. Zelenika requested information from the grievor's physician about the grievor's restrictions, in anticipation of the end of those benefits. The grievor provided that medical information, notably, a September 28, 2016, note from his physician indicating that as of that date, the grievor was not yet fit to return to work. The physician suggested that the grievor's condition be reevaluated in 6 to 12 months.

[89] On October 26, 2016, the grievor was informed that his long-term disability benefits would cease on December 31, 2016. A few days later, he requested that his sick leave without pay be extended until April 1, 2017. The employer again requested information from his physician pertaining to his fitness to work.

[90] On December 7, 2016, the grievor provided the employer with a letter from his physician, indicating that he was now fit to return to work and that he was able to perform sedentary tasks. However, he would not be able to perform use-of-force duties or participate in use-of-force training.

[91] The grievor's long-term disability benefits ended.

[92] Emails dated January 6 and 13, 2017, indicate that by early 2017, the employer was exploring accommodation options in lower-level positions. Those emails indicate that it considered informing the grievor that, other than the BSO position at the VIMC that was already offered to him, no available at-level positions had been identified in the Region, and no available lower-level positions had been found in the District.

[93] The emails indicate that the employer contemplated asking the grievor if he would be willing to consider lower-level positions outside the District. However, the employer did not communicate with him. There is also nothing to indicate that it communicated with bargaining agent representatives. The emails do indicate that by January 13, 2017, Mr. Zelenika had consulted some of his colleagues and had compiled a list of available CR-04 positions throughout the Region. Work began on preparing a new options letter for the grievor.

[94] On January 30, 2017, the grievor wrote to Mr. Black and asked for an update on his accommodation requests. The grievor indicated that over seven weeks had passed since he had sent the employer a letter from his physician confirming his fitness to

work. He had received no response. He also indicated that the employer had still not addressed his April 2016 request for accommodation based on family status. He stated that his accommodation requests based on disability and family status were separate and of equal importance. He did not receive a response from Mr. Black.

[95] On February 8, 2017, Mr. Zelenika wrote to the grievor to inform him that as he had not accepted the deployment offer to the VIMC, the employer had "… conducted a thorough assessment of the available positions in the Region …" that would meet his functional limitations. In the letter, Mr. Zelenika indicated that there were no vacant at-level positions in the Region. The only FB-03 positions in the Region that did not require use of force or arming and that consisted mostly of sedentary tasks were fully staffed.

[96] In his letter, Mr. Zelenika indicated that, given the unavailability of at-level positions, the employer conducted a search for available lower-level positions. He indicated that CR-04 positions were available in the Region. The exact work locations of most of them were not stated in the letter. The available positions were described as positions in "… Corporate Programs and Services Division, Pacific Highway District, Metro District, Trade Operations Division, Vancouver International Airport District, and West Coast & Yukon District." Evidence presented at the hearing confirmed that except for one CR-04 position located at a port of entry a considerable distance from the Port of Paterson, the positions being offered to the grievor were in Vancouver or in the Yukon. None were in the District.

[97] The grievor was given until February 24, 2017, to decide whether he was willing to consider a voluntary demotion to a CR-04 position in one of the districts or divisions listed in the letter, with relocation assistance. Mr. Zelenika's letter indicated that failing to respond with a decision by February 24, 2017, would be considered a refusal. As the grievor had been on leave without pay for more than two years, if he refused the CR-04 job opportunities, his sick leave without pay would have to end through resignation or retirement on medical grounds; otherwise, Mr. Zelenika would have "… to consider recommending the termination of [the grievor's] employment for cause, due to disability."

[98] The grievor testified that he felt confused upon receiving Mr. Zelenika's letter. He had been unaware that the employer was looking into lower-level positions. He was

surprised to be offered positions as far as the Yukon and to, once again, be offered positions in the Vancouver area. He also felt stressed and panicked by the short timeline provided to him to make what he described as a life-altering decision. He requested an extension to respond to Mr. Zelenika's letter so that he could consider the offer and consult his bargaining agent representatives.

[99] The grievor was granted a one-time extension of two weeks (until March 10, 2017) to confirm whether he was willing to consider a voluntary demotion. When he granted it, Mr. Zelenika once again reminded the grievor that if he failed to respond by the new deadline, it would be considered a refusal of the employer's offer, and that if he refused to consider any of the CR-04 job opportunities, his sick leave without pay would have to end through resignation or medical retirement; otherwise, a recommendation could follow to terminate his employment, for cause.

[100] On February 21, 2017, the grievor filed the first two of his grievances (in Board file nos. 566-02-42040 and 42041). As previously mentioned, those grievances alleged that the CBSA breached its duty to accommodate him based on disability and family status. The first-level grievance hearing was held the following day. Five days later, Mr. Britton denied both grievances.

[101] On March 10, 2017, the grievor informed Mr. Zelenika that he would submit a request for Health Canada's approval for medical retirement. Although he wanted to return to work and felt that he could perform sedentary duties, he asked his physician to fill out the forms to support his application. Both the grievor and his spouse testified that they believed that he could work and that it was unlikely that the medical retirement request would be granted. They described the request as having been driven by the grievor's sense of panic, given the prospect of losing his employment, and by a concern over losing his health insurance benefits at a time when his spouse was experiencing significant health issues.

[102] In a letter dated four days later, Mr. Zelenika advised the grievor that as he had opted to end his sick leave without pay through medical retirement, he was deemed to not be considering any of the CR-04 job opportunities that had been presented to him earlier. He was informed that should Health Canada not approve his medical retirement request, Mr. Zelenika would have to consider recommending terminating his employment.

[103] On March 17, 2017, Mr. Black denied the grievor's first two grievances at the second level of the employer's internal grievance process.

[104] On May 2, 2017, the grievor wrote to Mr. Zelenika, to inform him that Health Canada had denied his medical retirement application. He also informed Mr. Zelenika that he had submitted a request for a five-year leave without pay for the care of family, to take care of his children. The leave request covered May 2, 2017 (the date on which it was submitted), to May 1, 2022.

[105] The grievor testified that his understanding was that a request for leave without pay for the care of family was not discretionary; that is, under the collective agreement's terms (the collective agreement between Treasury Board and the Public Service Alliance for the FB group that expired on June 20, 2018; the "collective agreement"), the employer was required to grant it. Both he and his spouse described his request as a legitimate way of allowing him to continue to care for their children while maintaining his employment relationship with the CBSA and providing a buffer of several years during which meaningful work that met his restrictions could potentially become available at the local or district levels.

[106] The grievor did not receive a response to his May 2, 2017, email. He did not hear from the employer with respect to his leave request.

[107] Emails entered into evidence at the hearing indicate that on May 4, 2017, a CBSA labour relations advisor in the Region wrote to the manager of labour relations at CBSA headquarters, asking whether the Region had headquarters' support to proceed with the grievor's termination, given that his medical retirement request had been denied. The labour relations advisor's email indicated that the grievor had requested a five-year leave without pay for the care of family on the same day that his request for medical retirement was denied and that the employer had "… not gotten back to him yet because [the employer's] last letter indicated the recommendation of termination should [Health Canada] not allow medical retirement."

[108] On June 20, 2017, the employer terminated the grievor's employment. The most relevant excerpt of the termination letter signed by Ms. MacVicar is the following:

…

> *On May 2, 2017, you advised management that your application for medical retirement was not approved by Health Canada due to the possibility of you being able to return to work at some time. Rather than consider the offer that was made to you in February 2017, you instead submitted a request for Leave without Pay for Care of Family for five years.*
>
> *As you are aware, leave without pay is granted in order to provide continuity of employment where you are unable to work, however, it cannot be granted indefinitely. You have been on sick leave without pay for over two years, have been offered reasonable accommodation twice and refused, have not been approved for medical retirement, and have refused to select one of the two remaining options, preferring to request another type of leave without pay. Furthermore, you were deemed fit to work performing sedentary tasks, but refused to consider the CR-04 option that would have met your restrictions.*
>
> *It is with regret that I must inform you that I will not be approving further leave without pay beyond June 20, 2017. Consequently, I am terminating your employment with the* [CBSA] *for non-disciplinary reasons effective immediately ….*
>
> …

[109] In cross-examination, Ms. MacVicar testified that when she signed the termination letter, she knew that the grievor's physician and Health Canada had deemed him able to work. She testified that the employer had followed all the necessary steps and that it had explored all the available options — both at-level and at a lower level — to accommodate his disability. He had turned those options down.

[110] When asked about the options and solutions that she explored or inquired about before signing the termination letter, Ms. MacVicar testified that she did not explore or inquire about the possibility of offering the grievor accommodation in a part-time position, providing him with temporary accommodation, helping him find employment with another department, or registering him as a priority within the CBSA or in the broader public service. She also indicated that she did not consider granting his request for leave without pay for the care of family in the event that with the passage of time, a suitable accommodation could become available. She also indicated that she operated under the assumption that local and district managers had been in contact with the grievor throughout the accommodation process and that they had discussed accommodation options with him.

[111] With respect to the grievor's request for leave without pay for the care of family, Ms. MacVicar indicated that she denied it because he had already been on leave

without pay for more than two years, and the employer had exhausted all accommodation options. In cross-examination, she stated that because of the length of the leave requested and the fact that he was already on sick leave without pay, she had not been prepared to approve the leave request.

[112] Also in cross-examination, Ms. MacVicar indicated that her understanding at the time was that the collective agreement prohibited an employee from converting sick leave without pay to another type of leave without pay, including leave without pay for the care of family.

[113] Shortly after the termination of his employment, the grievor filed grievances with respect to the denial of his request for leave without pay for the care of family and with respect to his termination (in Board file nos. 566-02-42042 to 42044).

[114] After his termination, the grievor cared for his children full-time until he completed a retraining program that allowed him to find employment in the private sector, where he has been employed since 2023.

III. Reasons

A. The grievor's request for accommodation and his subsequent termination

1. General principles, and the main issue to be decided

[115] Clause 19.01 of the collective agreement provides that there shall be no discrimination with respect to an employee by reason of family status or physical disability, among other prohibited grounds. Similarly, s. 7 of the *CHRA* provides that it is a discriminatory practice, in the course of employment, to differentiate adversely in relation to an employee on a prohibited ground of discrimination. Section 3(1) of the *CHRA* provides that disability and family status are prohibited grounds of discrimination. Pursuant to s. 226(2)(a) of the *Act*, the Board may, in relation to any matter referred to adjudication, interpret and apply the *CHRA* relating to employment matters.

[116] As previously mentioned, the grievor withdrew his grievance with respect to accommodation based on family status. As his arguments at the hearing focused on the prohibited ground of disability, so to will the analysis contained in these reasons.

[117] The first issue that I must decide is whether the grievor made out a *prima facie* case of discrimination. To demonstrate it, he had to establish that he has a characteristic protected from discrimination under the *CHRA*, that he experienced an adverse impact in the context of his employment, and that the protected characteristic was a factor in the adverse impact.

[118] In response to a claim of discrimination, an employer can lead its own evidence to refute the grievor's claim of *prima facie* discrimination. It can also raise a statutory exception under the *CHRA*. A requirement or action that appears, on its face, to be discriminatory can, in reality, not be discriminatory if it is based on a *bona fide* occupational requirement (see s. 15(1)(a) of the *CHRA*). For a requirement or action to be considered to be based on a *bona fide* occupational requirement, it must be established that accommodating the needs of an individual would impose undue hardship on the employer (see s. 15(2) of the *CHRA*).

[119] In cases where ss. 15(1)(a) and 15(2) of the *CHRA* are invoked, the burden shifts to the employer to demonstrate that it had a *bona fide* occupational requirement and that accommodating the grievor's needs would have imposed undue hardship on it. If it does not meet that burden, it will be found that discrimination occurred (see *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 at para. 54 ("*Meiorin*"); *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33; and *Reece v. Canada Revenue Agency*, 2023 FPSLREB 18 at paras. 87 to 91).

[120] In *Meiorin*, the Supreme Court of Canada elaborated a three-stage test with respect to *bona fide* occupational requirements that is widely used to determine whether an employer discharged its duty to accommodate an employee. In *Reece*, at para. 91, the Board summarized that test as follows:

> 1) Is the occupational requirement rationally connected to performing the job?
> 2) Was it adopted in the sincere belief that it was necessary to fulfil the objectives of the position?
> 3) Is it reasonably necessary, in the sense that the individual cannot be accommodated without the employer suffering undue hardship?

[121] The parties have no dispute that the grievor made out a *prima facie* case of discrimination that triggered the employer's duty to accommodate. Considering the evidence summarized previously, I agree with them that the grievor made out such a case. He is disabled. When he submitted his request for accommodation based on

disability, and when he was terminated, he was fit to work sedentary duties, but due to his permanent disability, he could no longer conduct some of the duties required of a BSO, specifically, participating in use-of-force training and duties and conducting enforcement duties that required carrying a firearm. His employment was terminated. There is no dispute between the parties that his disability was a factor in the termination of his employment.

[122] According to an agreed statement of facts that the parties prepared, the main issue in dispute is whether the employer satisfied the third step of the *Meiorin* test. The grievor did not allege that the employer failed to satisfy the first two steps of the test. He was correct in doing so. At all relevant times, BSOs working at the Port of Paterson were required to carry a firearm, conduct use-of-force duties, and undergo use-of-force training. The parties have no disagreement that those requirements were adopted for a purpose rationally connected to the performance of the job and in an honest and good-faith belief that they were necessary to the accomplishment of a legitimate work-related purpose.

[123] I agree with the parties that the main issue in dispute in this case is whether the employer presented evidence demonstrating that on a balance of probabilities, it satisfied the third stage of the *Meiorin* test. Stated otherwise, I must determine whether accommodating the grievor's needs would have imposed undue hardship on the employer.

[124] The duty to accommodate is a highly individualized process in which rigid rules must be avoided (see *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4 at para. 22; see also *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, at para. 17). Assessing whether an employer has discharged that duty is also a very fact-driven exercise. I have read and considered the cases that the grievor and the employer submitted. However, given the fact-specific nature of the analysis that I must conduct, several of those cases, although informative for their descriptions of the well-established legal framework that I must apply to the facts of this case, are of limited relevance to adjudicating the merits of these grievances. In my reasons, I will refer only to those cases that I find most relevant to the merits of the grievances before me.

[125] The third step of the *Meiorin* test constitutes a defence to a finding of discrimination. To bring itself within this exception to the general prohibition of discrimination, an employer must set out that it could not accommodate the employee without experiencing undue hardship (see *Meiorin*, at paras. 54, 55, and 67). It must demonstrate that before it terminated the grievor's employment, it did everything that could reasonably have been expected of it in its efforts to accommodate his needs (see *Hydro-Québec*, at paras. 12 to 18).

[126] Although an employer may be required to make diligent and vigorous efforts to identify options for accommodating an employee, the obligation is not infinite. The employer is not required to provide "make-work" projects or work that is not meaningful and useful to it (see *Spooner v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 60 at para. 141; and *Hydro-Québec* at paras. 15 to 18).

[127] There is no separate or standalone procedural right to accommodation that requires an employer to follow a specific process or formula when it tries to accommodate an employee (see *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2014 FCA 131 at paras. 16 to 24; see also *Canada (Attorney General) v. Duval*, 2019 FCA 290 at para. 25). That is not to say, however, that the process followed by the employer is irrelevant. As the Supreme Court of Canada wrote in *Meiorin*, at para. 66:

> *… it may often be useful as a practical matter to consider separately, first, the* ***procedure****, if any, which was adopted to assess the issue of accommodation and, second, the* ***substantive content*** *of either a more accommodating standard which was offered or alternatively the employer's reasons for not offering any such standard ….*
>
> [Emphasis in the original]

[128] To demonstrate that it has discharged its duty, the employer must present evidence to support its claim of undue hardship. A mere statement that it is impossible to accommodate an employee, without supporting evidence, does not meet the standard of undue hardship (see *Pepper v. Treasury Board (Department of National Defence)*, 2008 PSLRB 8 at para. 147).

[129] If an employer has identified and proposed a reasonable accommodation, then the employee has a duty to facilitate the implementation of that proposal. If the

employee declines a reasonable accommodation proposal, then the employer's duty is discharged (see *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 at 994-995; "*Central Okanagan*").

2. The employer's main arguments, briefly summarized

[130] I will briefly describe the employer's central arguments before assessing the evidence presented to me at the hearing.

[131] The employer argues that it conducted a search for meaningful work that responded to the grievor's accommodation needs. Using a centralized accommodation process, it searched for accommodation at the Port of Paterson and then expanded the scope of its search from the local level to the district level and then again to the regional level.

[132] The employer submits that it knew what was possible and what was not possible in terms of accommodation at the local and district levels. It states that it was able to rapidly determine that on a long-term basis, there was simply not enough administrative work available at the Port of Paterson or other nearby ports of entry for a BSO who could not be armed. It argues that the nature and volume of the work at smaller, remote ports of entry, the limited workforce, and the physical layout of the Port of Paterson supported its conclusion that the grievor could not be accommodated at that port or elsewhere in the District. The employer submits that the possibility of "pushing" administrative work to the Port of Paterson was considered but was deemed insufficient to keep a BSO busy doing meaningful or useful work.

[133] According to the employer, it identified and proposed a reasonable accommodation, specifically, a work location with available positions where an unarmed BSO with a permanent disability could be accommodated. That work location was in Vancouver, at the VIMC. A deployment was proposed, but the grievor did not accept it.

[134] The employer recognizes that the accommodation offer was not perfect because it required the grievor to move. However, it submits that the case law is clear: whether or not other reasonable forms of accommodation existed that the grievor might have preferred is not determinative. What is determinative is whether the accommodation that was offered was reasonable in the circumstances (see *McMullin v. Treasury Board*

(Correctional Service of Canada), 2021 FPSLREB 55 at para. 90). The grievor was required to accept the reasonable accommodation that was offered to him. He did not.

[135] The employer submits that despite the grievor's refusal of its accommodation offer, it continued to seek suitable accommodation options and made a second accommodation offer by proposing available CR-04 positions. Its counsel described the second offer as a means of inquiring as to whether the grievor would be willing to consider a demotion and as an effort to be responsive to his cost-of-living concerns. The employer argues that the grievor did not respond to the offer and was deemed to have rejected it by seeking Health Canada's approval for a medical retirement. The employer argues that it discharged its duty to accommodate, and the grievor's termination was reasonable in the circumstances.

[136] With that brief summary of the employer's arguments in hand, I will now turn to my analysis of the evidence presented at the hearing.

3. Did the employer meet its burden?

[137] As previously indicated, the employer bore the burden of proof. It had to tender evidence that it met its duty to accommodate the grievor and that the termination of the grievor's employment was for cause.

[138] As stated as follows in *Ontario Public Service Employees Union v. Ontario (Community Safety and Correctional Services)*, 2010 CanLII 7275 (ON GSB), cited by the grievor, at paragraph 128: "There must be evidence that the employer turned its mind to modifying or adjusting work duties to accommodate the individual but could not because it would cause undue hardship. If the employer has taken these steps, the evidence will be clear."

[139] It is reasonable to assume that the employer presented its best evidence at the hearing. If the evidence presented was its best evidence, I have significant concerns with respect to the search for accommodation that was conducted and the accommodation process that was followed.

[140] For the following reasons, I conclude that the employer's evidence was insufficient to support a finding of undue hardship.

[141] Two witnesses testified on the employer's behalf. Both were involved in the accommodation process, but neither was involved in all its stages. Mr. Velichko was involved in the accommodation process only at the local and district levels. Ms. MacVicar was involved only once it reached the regional level; that is, when accommodating the grievor at the local and district levels had been ruled out. The individuals who were actively involved in the identification and assessment of accommodation options did not testify.

[142] Given that the employer described its accommodation process as being based on a concentric-circles model, I will first address the search for accommodation at the local and district levels, followed by the search conducted at the regional level.

a. The search for accommodation at the local and district levels

[143] Mr. Velichko described his role as a collector of information and as being responsible for ensuring that the grievor's file moved forward. His description of his involvement in the accommodation process at the local level generally appeared to reflect his vision of his role as that of an information gatherer. He appears to have immediately accepted, without any further questions, Mr. Britton's assessment that there was no work that the grievor could do at the Port of Paterson.

[144] This is particularly troubling, given the fact that Mr. Velichko indicated that the employer's search for a suitable accommodation began **after** it received the grievor's written accommodation requests. Yet, Mr. Britton's assessment was provided **before** it received the grievor's written request and Functional Abilities Form. Mr. Britton's assessment, set out in an April 6, 2016, email to Mr. Black and Mr. Velichko, appears to have been provided proactively based on information that the grievor conveyed in what he described as a conversation of no more than 30 seconds earlier that day.

[145] Mr. Velichko indicated that he accepted and relied on Mr. Britton's assessment that there was no work at the Port of Paterson for a BSO who could not perform a BSO's full range of duties. He testified that he thought that Mr. Britton's assessment was accurate because, according to him, Mr. Britton, the port superintendent, was best placed to know if there was work, locally, for an accommodated BSO.

[146] While I accept that the port superintendent may have the knowledge and experience required to assess accommodation options, the employer did not present

sufficient evidence to demonstrate that the grievor could not be accommodated at the Port of Paterson. The port superintendent did not testify, and I have no concrete evidence about the options that he considered; nor am I able to assess his efforts to explore all available options. It is difficult for me to believe that he was able to conduct a thorough and diligent assessment within minutes of being informed that the grievor intended to request accommodation and before receiving the grievor's formal accommodation request and the Functional Abilities Form setting out his restrictions.

[147] I do know that Mr. Britton's assessment, which was provided verbally to the grievor immediately once he was informed that an accommodation request would be submitted and that was provided again in writing after his conversation with the grievor, was not subsequently questioned or revisited in any significant way. If Mr. Britton provided the employer with an explanation of the options explored and the efforts he made to assess the accommodation options, this evidence was not presented to me. Mr. Velichko's reliance on Mr. Britton's assessment meant that an accommodation at the Port of Paterson had been ruled out before a formal accommodation request had been submitted.

[148] After the grievor submitted his accommodation request, Mr. Black expressed an opinion like that of Mr. Britton, described previously. Mr. Velichko accepted Mr. Black's assessment that there were no reasonable accommodation options at the Port of Paterson, without further question. Mr. Black's assessment was provided six minutes after he was asked to assess whether there was work at the Port of Paterson that met the grievor's restrictions. His entire assessment comprises four short sentences. Mr. Black did not testify. I have no concrete evidence about the options that he considered; nor am I able to assess the efforts that he made to explore all available accommodation options. It is difficult for me to believe that he was able to conduct a thorough and diligent assessment within six minutes of being asked.

[149] Mr. Velichko's memory as to whether he had discussions with Mr. Britton or Mr. Black in the context of the search for accommodation can best be described as vague. He appeared to have some recollection of a discussion with one of them at some point in the accommodation process, but he was unable to recall whether he had questioned or challenged their assessments in any way. A difficulty recalling events clearly several years later is unsurprising. However, Mr. Velichko's testimony is not the only evidence presented at the hearing with respect to this stage of the accommodation process. Mr.

Britton's and Mr. Black's assessments were provided in writing, via email. Subsequent email exchanges involving Mr. Velichko support a conclusion that he accepted their assessments without further question.

[150] Mr. Velichko did not know the options that Mr. Britton and Mr. Black considered. He either did not know or could not recall whether redirecting administrative work to the Port of Paterson, accommodating the grievor in a part-time position, offering temporary accommodation, or accommodating the grievor in a traveller services representative position had been considered and examined. Although he testified that he was not confident that those options would have resulted in a sufficient quantity of useful work for the grievor, his testimony did not suggest that he made an assessment to that effect when he was responsible for the grievor's accommodation request. Nor was his testimony sufficient to support the employer's position that it knew what was possible and what was not possible in terms of accommodating the grievor at the local and district levels.

[151] Although he knew that pregnant BSOs had been accommodated at the Port of Paterson, Mr. Velichko did not seek assurances from Mr. Britton or Mr. Black that the accommodations offered in those cases had been considered and deemed inappropriate for the grievor's permanent restrictions. At the hearing, Mr. Velichko indicated that he was aware that administrative work from the Port of Paterson had been redirected to the Port of Kingsgate to accommodate another BSO, which Mr. Black described in a very brief April 27, 2016, assessment of accommodation options at the Port of Paterson. Despite this knowledge, it appears that Mr. Velichko did not inquire as to whether a similar arrangement could be made to accommodate the grievor or whether the existing arrangements could be modified to allow the employer to accommodate both employees.

[152] Mr. Velichko testified that he did not think that a BSO would want to be accommodated in a part-time position. However, no one communicated with the grievor to inquire as to what he would be willing to consider or accept. No one asked him about his needs or priorities. Had the employer done so, the accommodation process at issue would likely have unfolded very differently.

[153] The employer would have learned that the grievor's main priorities were remaining close to Trail, so that he could continue to care for his children, and

maintaining his health insurance benefits. He had submitted an accommodation request based on family status, requesting a change in his hours of work. That request could reasonably be seen as a signal to the employer that a full-time work schedule was not his main priority. Yet, no one communicated with him to inquire as to whether being accommodated in a part-time BSO position or in a full-time or part-time lower-level position located in relative proximity to the Port of Paterson or Trail would have been acceptable to him or would have met his needs.

[154] Mr. Velichko described a BSO's work at small, remote ports of entry. He described workforce and workplace factors that may have made it difficult to accommodate the grievor at the Port of Paterson or other nearby ports of entry of a similar size.

[155] Perhaps accommodating him in those work locations would not have been possible without the employer suffering undue hardship; however, its evidence with respect to the first level of the concentric-circles approach was insufficient to support such a conclusion. Mr. Velichko's description of the accommodation process at the local level and the documentary evidence were not indicative of the rigour expected of an employer with an important human rights obligation.

[156] I will now turn to the employer's search for accommodation in the District.

[157] The employer's evidence with respect to its search for accommodation at the district level was general in nature. Mr. Velichko's testimony as to why he ruled out accommodating the grievor at ports of entry elsewhere in the District was vague. It was generally to the effect that if there was not enough work for an accommodated BSO at the Port of Paterson, the result would have been the same at other ports, because they were generally of a similar size and nature, if not smaller.

[158] The Port of Kingsgate is larger than the Port of Paterson, and the evidence presented at the hearing demonstrated that an unarmed BSO had been accommodated there. The employer had redirected administrative work from other ports of entry to the Port of Kingsgate to accommodate that BSO.

[159] Yet, as previously indicated, Mr. Velichko did not inquire as to whether a similar arrangement could be made to accommodate the grievor at the Port of Kingsgate or whether the existing arrangements could be modified to allow the employer to

accommodate both employees. He did not inquire with the superintendents of other ports of entry in the District about accommodation options at those ports. He indicated that he relied on Mr. Black's assessment to rule out accommodating the grievor at the district level. However, Mr. Black's four-sentence assessment in his April 27, 2016, email pertained only to the possibility of accommodating the grievor at the Port of Paterson. It was silent about the possibility of accommodating him elsewhere in the District.

[160] The day after the grievor presented his accommodation request, the Coordinator worked on his file, seemingly taking over from Mr. Velichko, who was responsible for the search at the local and district levels.

[161] After a single day, the employer's search for suitable accommodation had moved on to the regional level, and it never looked back. Ms. MacVicar assumed that all local- and district-level options had been examined and explored. She assumed that the grievor and his superintendent had had the collaborative discussions. She did not ask for or receive confirmation before signing the letter terminating his employment.

[162] The employer argues that the time it took to assess the accommodation options available at the Port of Paterson was not unreasonable when it is assessed considering the employer's knowledge of the grievor's work environment, which was a small, remote, and not-so-busy port of entry with only a dozen employees. As previously indicated, the employer submits that largely, it already knew what was possible and what was not possible in terms of permanent accommodation at the local and district levels.

[163] I accept that the Port of Paterson is small and does not have a significant workforce available; nor does it appear to have large volumes of traffic, particularly in off-seasons. I also accept that many — although not all — of the nearby ports of entry have similar characteristics. I also accept that an employer may have fewer options and less flexibility to offer meaningful, at-level work in a work environment of that nature, particularly when the accommodation need is permanent. In some circumstances, it may be impossible for an employer to provide meaningful work without suffering undue hardship.

[164] However, an employer that invokes the defence of undue hardship has the burden of demonstrating it. It must demonstrate that accommodating the needs of the grievor would impose undue hardship.

[165] The evidence presented at the hearing demonstrated that it relied upon an initial and general impression or understanding that accommodating a permanently disabled BSO at a small port of entry was impossible. It did not take steps to ensure that this was true in the present case and did not present sufficient evidence to the Board to establish that this was indeed the case.

[166] As the Public Sector Labour Relations Board ("the PSLRB", a predecessor of this Board) wrote in *Pepper*:

> …
>
> *153 …* Meiorin *is unambiguous that the aim of human rights legislation is to have employers direct their creative thoughts to positive ways to achieve successful accommodations. An employer's efforts must include an evaluation of the process by which it reached its decision not to accommodate. The rejection out of hand of any consideration of accommodation, without giving the matter adequate reflection or attention or exploring the possibilities, can hardly be described as having taken adequate steps to accommodate.*
>
> …

[167] *Pepper* involved a Department of National Defence employee who was terminated due to disability. The PSLRB concluded that the employer had rushed to a decision that the grievor in that case could not be accommodated. It held that the employer failed to demonstrate that it had applied itself to diligently examining all the possibilities of adapting the workplace to enable the grievor to work.

[168] As examples of other cases in which arbitrators concluded that an employer failed to demonstrate that it conducted a diligent accommodation search, see, among others, *United Steelworkers, Local 1-306 v. Agropur* (2020), 313 L.A.C. (4th) 125 at paras. 96 and 97; and *Ontario Public Service Employees Union v. Ontario (Ministry of Community Safety and Correctional Services)* (2013), 235 L.A.C. (4th) 324 at paras. 56 and 129 to 132).

[169] In this case, the employer rushed to the conclusion that the grievor could not be accommodated at the local or district levels. It ruled out the possibility of

accommodating him in a BSO position at the local level before it received a formal accommodation request. It did so within minutes and never revisited or reassessed that decision.

[170] The employer relied on the assessments of Mr. Britton and Mr. Black, but did not call them to testify. The evidence presented at the hearing indicates that Mr. Britton and Mr. Black appear to have rejected out of hand any consideration of accommodation. There is nothing to suggest that they directed "… their creative thoughts to positive ways to achieve successful accommodations" (see *Pepper*, at para. 153). There is also nothing to suggest that they gave the matter adequate reflection or attention. They drew their initial conclusions within minutes or hours, which the employer did not question; nor were they subsequently revisited in any way.

[171] Within a day of receiving the formal accommodation request, the employer also definitively ruled out the possibility of accommodating the grievor in a BSO position elsewhere in the District. The search for accommodation at the Port of Paterson, locally, or elsewhere in the District was over within one day of the grievor presenting his request. The employer's efforts immediately veered to seeking accommodation at the regional level.

[172] The employer relied on its concentric-circles model to describe its efforts at accommodating the grievor. However, it failed to present evidence that all available options and possibilities were explored and exhausted at the first two levels. It did not demonstrate that it conducted a thorough and diligent search for accommodation at what could arguably be described as the most important levels of the concentric-circles approach that Ms. MacVicar described as aimed at accommodating employees as close to their existing work locations as possible.

b. The search for accommodation at the regional level

[173] At the hearing, the employer put significant emphasis on its search for accommodation in a full-time position at the regional level, including the two accommodation offers that it made to the grievor. Ms. MacVicar provided most of the employer's evidence with respect to the search at the regional level. Although she played a key role in the accommodation process, she was not actively involved in the search for the accommodation options presented to the grievor.

[174] Ms. MacVicar testified that the employer's search at the regional level initially focused on identifying suitable full-time BSO positions. The first accommodation offer made to the grievor was for a BSO position in the Vancouver area. Relocation assistance was offered.

[175] Ms. MacVicar testified about the steps previously taken by CBSA to create BSO positions capable of accommodating unarmed BSOs following the rollout of the arming requirement applicable to all BSOs. Full-time BSO positions had been created at the VIMC for that very purpose. A small number of other positions capable of accommodating an unarmed BSO also existed in the greater Vancouver area and, to a lesser extent, Victoria. Ms. MacVicar indicated that the employer had considered those various positions in the context of the accommodation process at issue here. However, the only positions available at the time were at the VIMC.

[176] The grievor testified that he felt that the employer's response to his accommodation request based on disability was predetermined. He felt that it had previously decided that VIMC was an appropriate work location for accommodated BSOs and that by default, accommodation would be offered there, without giving thought or consideration to accommodation options closer to the Port of Paterson or Trail.

[177] It is not necessary for me to decide whether the employer's offer of accommodation at the VIMC was predetermined. Nonetheless, it is interesting to note that the Coordinator referred to the grievor's case as "… the 'test case' [Ms. MacVicar] wants to use with an offer of a deployment to VIMC." Although Ms. MacVicar indicated that she did not understand why the grievor's situation had been described as a test case, this description of his case, at a time generally coinciding with the CBSA's efforts to create or make available positions at the VIMC for accommodated BSOs who could not be armed, appears to lend credence to the grievor's belief that the employer's go-to offer of accommodation was likely to be at the VIMC. The "test case" description is also not consistent with a concentric-circles model in which accommodation options at the regional level should be explored as a last, or near-last, resort.

[178] An offer of accommodation at the VIMC was made. However, I cannot disregard the fact that the employer should have known that the grievor was unable to accept

the offer at the time it was made. He was recovering from back surgery. He could not have begun to work at the VIMC in September 2016, even if he had wanted to.

[179] The VIMC accommodation offer was a far cry from the grievor's desired or preferred accommodation. He had requested to be accommodated as a BSO working at the Port of Paterson doing administrative duties such as reviewing commercial-goods release requests. However, in law, he was not entitled to an accommodation tailor-made to his personal needs. The standard that an employer is required to meet is not that of perfection. It is not required to create work to accommodate a grievor's preference (see *Duval*, at para. 21). The standard to meet is that of taking reasonable measures to accommodate an employee's limitations.

[180] The employer deemed its first accommodation offer to have been nullified by the grievor's failure to respond to it. I do not agree with the employer's characterization of the grievor's responses as constituting either a failure to respond or a rejection of the accommodation offer.

[181] The grievor responded to the offer. He raised concerns about the offer, and he provided examples of other BSOs who had been accommodated at ports of entry in the District. He asked questions as to why he could not be accommodated in a similar fashion. He wrote to Mr. Black to request more time to consider the offer. He did not receive a response.

[182] He also did not reject an August 19, 2016, offer of an assignment to the VIMC. That assignment was offered to allow him more time to consider the deployment offer to the VIMC. He did not respond to the assignment offer because he had asked Mr. Black for more time to consider the deployment offer and was waiting for a response.

[183] While I accept that circumstances may arise where a disabled employee could intentionally delay, prolong or frustrate the accommodation process by failing to respond to an accommodation offer, the evidence in the present case does not support such a conclusion. As I will describe in greater detail later in these reasons, the grievor's behaviour during the accommodation process can only be described as cooperative and motivated by a desire to return to work as soon as his medical condition would allow.

[184] I will now turn to the employer's second accommodation offer, that is, the offer to accommodate the grievor in one of several lower-level CR-04 positions in the broader Region.

[185] The employer's evidence with respect to its search for suitable lower-level positions consisted of one brief email chain and the testimony of Ms. MacVicar.

[186] Ms. MacVicar testified that, when the grievor failed to respond to the offer of accommodation at the VIMC, it was assumed that that offer had been deemed unacceptable. According to her, Mr. Zelenika, the Region's director, then began liaising with directors throughout the Region to identify suitable accommodation opportunities at a lower level. A list of available CR-04 positions was compiled. That list formed the basis of the employer's second accommodation offer.

[187] The email chain adduced in evidence contained four messages, only two of which are directly relevant. The first relevant message indicates that, in early January 2017, the Coordinator considered sending the grievor a letter to inform him that no lower-level positions had been identified in the District, and to inquire whether he would be willing to consider a lower-level position elsewhere in the Region. The email indicates that the Coordinator considered doing so to avoid identifying and offering lower-level positions that the grievor would not be willing to accept. No one communicated with the grievor.

[188] The second relevant message is an email from Mr. Zelenika to the Coordinator. That email indicates that Mr. Zelenika had "… confirmed with [his] colleagues that there [were] a number of CR-4 positions available throughout the Region." The email contains a list of CR-04 positions. The positions listed are those contained in the accommodation offer dated February 8, 2017.

[189] As was described in the summary of the evidence, the exact location and nature of the positions were not disclosed to the grievor. What was clear to him was that none of them were even remotely close to Trail. Once again, the accommodation offer in no way reflected the grievor's preferred accommodation. Was the accommodation offer perfect? Surely not. However, perfection is not the standard that the employer must meet in accommodating an employee's limitations.

[190] As previously indicated, the standard that an employer must meet is that of taking reasonable measures to accommodate an employee's limitations. Based on the CBSA's own concentric-circles model, those reasonable measures necessarily involve a diligent and thorough accommodation search and consideration of available opportunities, at the local, district and regional levels. With this in mind, the evidence presented by the employer with respect to its second accommodation offer appears cursory at best.

[191] Other than an email that indicates that Mr. Zelenika had consulted some of his colleagues and had confirmed the availability of CR-04 positions in the Region, the employer did not present evidence outlining its efforts to identify lower-level positions capable of constituting suitable accommodation. As previously indicated, Mr. Zelenika did not testify, and Ms. MacVicar was not actively involved in that search.

[192] The email chain described above contains a written statement according to which the Coordinator had contemplated informing the grievor that there were no lower-level positions in the District. The Coordinator did not testify and I was provided no evidence with respect to how or why the Coordinator came to that conclusion.

[193] It is important to recall that it was Mr. Velichko who was responsible for the employer's accommodation search at the district level, not the Coordinator. For that reason, I prefer Mr. Velichko's testimony over the written statement of a Coordinator who did not testify at the hearing. As previously indicated, Mr. Velichko either did not know or could not recall whether accommodating the grievor in a traveller services representative position (a position classified at the CR-04 group and level) had been considered and examined at the district level. I have previously found his testimony to be lacking, and insufficient to ground a conclusion according to which the employer made all reasonable efforts to accommodate the grievor at the district level.

[194] The written statements of Mr. Zelenika and the Coordinator, combined with Ms. MacVicar's testimony, without more, are insufficient to support a conclusion according to which the employer's search for lower-level positions was a diligent and thorough one. It may well have been, but an employer who advances a claim of undue hardship or who argues that it met its duty to accommodate by offering the grievor reasonable accommodation must provide evidence to support its position.

[195] Furthermore, there is nothing to indicate that the employer considered accommodating the grievor by offering him part-time work. During her cross-examination, Ms. MacVicar acknowledged that the duty to accommodate requires the exploration of full-time and part-time job opportunities that meet an employee's accommodation needs. According to her, there is no reason to exclude part-time work or temporary accommodation from consideration in exploring suitable accommodation options. She testified that she did not know whether anyone had taken steps to verify the availability of part-time or temporary accommodation options.

[196] In his testimony, Mr. Velichko indicated that accommodation in a part-time position would likely occur "far out" in the concentric-circles model, a likely reference to the accommodation search at the regional level. Although he testified that he did not think that anyone would want to be accommodated in a part-time position, he acknowledged he was unaware whether part-time accommodation had been considered. During his cross-examination, he also acknowledged that part-time work could constitute a solution to the accommodation needs of a grievor. I was presented with no evidence that the employer turned its mind to this accommodation option at the local, district or regional levels.

[197] I will now turn to the employer's argument according to which the grievor failed to respond to its second accommodation offer or rejected a reasonable offer of accommodation when he sought Health Canada's approval for medical retirement.

[198] I accept the grievor's evidence that he felt stressed and panicked by the short timeline provided to him to consider the CR-04 positions offered to him. He requested more time to consider the accommodation offer. He was granted a one-time extension of two weeks.

[199] The grievor did two things after he received the second accommodation offer. He filed a grievance and made a request to be approved for medical retirement.

[200] I accept that that grievance constituted his response to the accommodation offer. He was entitled to grieve, and he should not be faulted for using that mechanism to signal to the employer that he believed that it was failing in its duty to accommodate him. I also accept the grievor's evidence that his request for approval to medically retire was driven by his sense of panic and by a concern about the prospect of losing his health insurance benefits at a time when his spouse had significant health

issues. I do not accept the employer's argument that this request constituted a rejection of the employer's second accommodation offer. The request must be examined in the context of the very unique circumstances of this case. The request was the action of a man who wanted to, and could, work modified duties, and who was grasping at straws to avoid a looming termination in the context of an accommodation process that had been unfolding without consultation with him.

[201] When the grievor's application for medical retirement was denied, the employer proceeded to terminate his employment.

[202] I accept that an employer cannot be expected to allow a sick leave without pay to go on indefinitely. I also accept that there can come a time where the termination of a disabled employee who is unable to return to work or who refuses reasonable accommodation may become an appropriate avenue. However, an employer who claims that it could not accommodate an employee without experiencing undue hardship must demonstrate that, before it terminated the employee's employment, it did everything that could reasonably be expected of it in its efforts to accommodate that employee's needs (see *Meiorin*, at paras. 54, 55, and 67, and *Hydro-Québec*, at paras. 12 to 18). It must present sufficient evidence to support its claim of undue hardship.

[203] The employer did not demonstrate that it conducted a thorough and diligent search for accommodation at the local, district and regional levels. It did not give the matter adequate attention at each level of its concentric-circles model, regardless of whether those levels are viewed individually or collectively. The evidence presented at the hearing also does not suggest that the employer directed its "… creative thoughts to positive ways to achieve successful accommodations" (see *Pepper*, at para. 153).

[204] I conclude that the evidence presented at the hearing was insufficient to establish that the accommodation offers made by the employer were reasonable or that the grievor rejected them.

c. The grievor's and the bargaining agent's roles in the accommodation process

[205] Although there is no standalone procedural right to accommodation that requires an employer to follow a specific process or formula when it tries to accommodate an employee, I will nonetheless express some concerns with respect to how the accommodation process unfolded in this case. I express those concerns in

response to certain arguments presented at the hearing by the employer, arguments with respect to the roles of the grievor and the bargaining agent, the Public Service Alliance of Canada, in the accommodation process.

[206] The search for accommodation is the employer's primary responsibility (see *Central Okanagan*, at 994; and *Pepper*, at para. 146). However, it is well established in law that the search is a multi-party inquiry that involves the employer, the employee, and the bargaining agent. The employee and the bargaining agent must help secure an appropriate accommodation by facilitating the employer's search for, and implementation of, reasonable accommodation measures. If the employee or the bargaining agent intentionally impedes or frustrates a reasonable accommodation, the Board may find that the employer's duty has been discharged (see *Central Okanagan*, at 993 and 994).

[207] At the hearing, the employer argued that the grievor failed to facilitate its search for a reasonable accommodation because he failed to inform it that he was willing to consider part-time work, a temporary accommodation, or lower-level positions locally or elsewhere in the District, to be accommodated closer to his family. According to the employer, he should not have been allowed to argue at the hearing several years later that he was willing to consider such options if he did not communicate a willingness to consider them during either the accommodation process or the grievance process (see *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.)).

[208] While I accept that the grievor did not communicate an interest or willingness to consider or accept part-time or temporary work at, or near, the Port of Paterson or Trail during the accommodation process, for the reasons that follow, I find that it is unfair for the employer to describe him as having been uncooperative or uncommunicative, if not disingenuous. In no way did he intentionally impede or frustrate a reasonable accommodation or the search for one. He communicated his priorities and interests when the employer engaged with him. Unfortunately, it did not engage with him during the accommodation search and during the accommodation process generally.

[209] From start to finish, the accommodation process was marked by a surprising lack of communication, consultation, and collaboration with the grievor. The evidence

presented at the hearing demonstrated a significant disconnect between Ms. MacVicar's description of what the CBSA's accommodation process based on a concentric-circles approach should be and what occurred in the process at issue.

[210] According to Ms. MacVicar, supervisors at a port of entry are the main conduit of information for, and communication with, a BSO requiring accommodation. Supervisors like Mr. Britton have first-hand knowledge of the employee and their personal circumstances. They have a relationship with the employee. They also are best placed to determine a reasonable accommodation by working in collaboration with the employee.

[211] Contrary to the collaborative and consultative model that Ms. MacVicar described, the evidence presented at the hearing set out that Mr. Britton's and Mr. Black's active involvement in the accommodation process ended within a day. Within two days, the grievor's accommodation request was being handled by staff in the Region. After that, communications with him were almost exclusively via letter or email, which he received from individuals whom he did not know, who were not involved in operations at the local or district levels, and who knew little to nothing about his personal and family circumstances. The employer made no effort to communicate with him about his needs or priorities.

[212] In that sense, his case resembles the circumstances that the Board described in *Gallinger v. Deputy Head (Canada Border Services Agency)*, 2020 FPSLREB 54 at para. 158 (a judicial review application of the decision was allowed in part but not on this issue). In that case, the Board allowed a termination grievance related to an accommodation process that had unfolded almost exclusively through letters and emails. Although not stated in so many words, it is apparent that the Board took the position that a process that unfolds through the exchange of letters and emails lacks the diligence expected of an employer with a duty to accommodate.

[213] Some, but not all, of the grievor's correspondence and inquiries in the context of the accommodation process went unanswered for weeks. Some were never answered. His accommodation request on the basis of family status — although no longer at issue — received a direct response only in the employer's letter that terminated his employment.

[214] The employer did not consult the grievor about what accommodation he would be willing to accept. As previously indicated, the documentary evidence reveals that at one point, it considered asking him whether he would be willing to consider a demotion to a lower-level position, but it did not ask him. It did not inform him of the accommodation options that it had considered and rejected.

[215] Despite his inquiries about the status of his accommodation requests, the grievor was completely in the dark about what options the employer was considering. He did not know that within a day of him submitting his formal accommodation request, the employer had ruled out accommodating him at the local or district levels. He was unaware that it was considering options only at the regional level. He could not have known that by January 2017, it was considering offering him a voluntary demotion to one of several CR-04 positions at unknown locations in the Region.

[216] Had the employer communicated with the grievor, it would have known that he was recovering from major back surgery when he received the first options letter and that he could not have accepted the offer even had he wanted to. It would also have learned that he was willing to entertain accommodation in part-time, temporary, and lower-level positions in relative proximity to Trail or the Port of Paterson.

[217] Had the employer inquired about his priorities, it would have learned that staying close to home was paramount. Maintaining his health-insurance benefits had also become an important consideration because his spouse, who did not have health benefits of her own, was experiencing significant health issues at that time.

[218] As I have previously indicated, the duty to accommodate is a highly individualized, fact-driven exercise. Informing an employee of the progress made on his or her accommodation request and consulting that employee on accommodation options is not only a good practice, it is also likely to make the accommodation process more efficient and effective.

[219] In this case, I cannot accept that the grievor, whom the employer left in the dark through much of the accommodation process and who was unaware of the accommodation options that the employer did or did not consider should be faulted for not proactively informing it that he was willing to consider options such as part-time work, temporary accommodation, or lower-level positions in relative proximity to Trail.

[220] I also do not accept the employer's argument that the grievor should not have been allowed, at the hearing, to raise his willingness to consider options such as part-time or temporary work. Its reliance on *Burchill* is misplaced.

[221] The principle enunciated in *Burchill*, generally speaking, prohibits a grievor from fundamentally altering the nature of the allegations that ground the grievance and that were presented to the employer during the grievance process. The principle seeks to ensure that the employer can ascertain, with some degree of certainty, the case that it must respond to.

[222] Those considerations do not arise in this case. The grievor's allegations pertained — and continue to pertain — solely to the employer's failure to satisfy its duty to accommodate him, to the point of undue hardship. Whether or not he proactively raised his willingness to consider certain options during the accommodation or grievance processes does not alter the nature of those allegations. Had it communicated with, and consulted, him during the accommodation process, it would have known the accommodation options that he was willing to entertain.

[223] Having addressed the employer's arguments with respect to the grievor's alleged failure to communicate, I will now address its suggestion that he was uncooperative. That allegation is unfounded.

[224] The grievor was cooperative throughout the accommodation process. I accept his testimony that he always intended to — and wanted to — return to work at the CBSA. The employer did not challenge that evidence.

[225] Although he was unsure as to the duties that he could carry out given his restrictions, he never wavered in his desire to resume meaningful employment. He participated in a return-to-work physiotherapy program recommended by his insurer. At all times, he promptly responded to the employer's correspondence and requests for information. He was proactive in following up on his accommodation requests, inquiring as to the status of the two he had made by then. Via his comments on the August 10, 2016, options letter, he provided accommodation suggestions. He did so again, in general terms, at the first level of the grievance process. He also provided the medical information that the employer sought, when it was requested.

[226] If at one point the employer was dissatisfied with the medical information that it received, it did not inform the grievor of that fact. He should not be faulted for not providing information that was not requested of him and in circumstances in which he was unaware that the employer was dissatisfied with an earlier response.

[227] As previously indicated, although he did not expressly respond to the employer's accommodation offers in the affirmative or the negative, he did respond. Both times, he asked for more time to consider his options. One of those times, he also wrote back to the employer with a series of questions related to the accommodation offer. He provided examples of accommodation options that had been used in the past. The other time, he filed a grievance when he was confronted with the choice of accepting a voluntary demotion to one of several unspecified and undefined CR-04 positions in the Region, resigning, or retiring on medical grounds. Initially, he was given two weeks to consider those options. He was then given a one-time two-week extension.

[228] I accept the grievor's evidence that when he received the employer's second, and last, accommodation offer, he panicked. He was grasping at straws to avoid the termination of his employment. He made a request for medical retirement that he knew was doomed to fail.

[229] I do not interpret this reaction as a lack of cooperation or as intentionally impeding the accommodation process. When it is considered in the context of the employer's overall communications with him during the accommodation process, it resembles a reasonable reaction from an individual who was kept in the dark for months only to be surprised with a very short time in which to make a life-altering decision for himself and his family.

[230] I will add the following with respect to the accommodation at issue, insofar as it involved the grievor. Although a person requiring accommodation is not entitled to an accommodation that is tailor-made to his or her needs or priorities, the duty to accommodate necessarily involves consideration for the human being requiring accommodation. *Meiorin* teaches that the employer is required to accommodate factors relating to, among others, the individual's inherent worth and dignity, to the point of undue hardship (see *Meiorin*, at para. 62). A certain degree of understanding and compassion for the individual is required from the employer.

[231] Compassion for, and consideration of, the grievor as a human being was sorely lacking in the employer's decision-making. I have already described its failure to ask and to consult him with respect to his needs or priorities. In the summary of the evidence, I described correspondence that it sent to him after weeks or months of complete silence on its part that imposed deadlines of eight days to two weeks for a response to accommodation offers that would have had significant, life-altering impacts on him and his family.

[232] For example, the employer sent the grievor — who was recovering from recent back surgery and was unable to work — an options letter that initially gave him eight days from the date he received it to accept a deployment to a position located hours away from a family that the employer knew or should have known was highly dependent on him on a day-to-day basis, or he would face the looming threat of the termination of his employment. Although at the hearing, Ms. MacVicar acknowledged that the time frame given to the grievor to consider the first accommodation offer was short, she also indicated that short time frames were useful to ensuring that accommodation files advanced to resolution.

[233] I do not wish to suggest that Ms. MacVicar or Mr. Velichko lacked compassion or understanding for the grievor and his personal circumstances. My comments are levelled at the accommodation process itself and not at the individuals involved in it. Unfortunately, the way the accommodation process unfolded resulted in key decisions being made by individuals who did not know the grievor and who had no insight into his personal circumstances, needs, or priorities.

[234] The evidence presented at the hearing indicated that accommodating the grievor was treated as a purely administrative exercise and that it was aimed at ensuring that the file moved forward. Both Ms. MacVicar and Mr. Velichko alluded to that in their testimonies. Those who did have knowledge and insight into the grievor, his priorities, and his personal and family circumstances were not involved in the accommodation process beyond the first 24-hour period. The result was an accommodation process that leaves an overall impression of being devoid of concern and understanding for the employee seeking accommodation.

[235] I turn now to the employer's arguments with respect to the bargaining agent's responsibility in this matter. At the hearing, the employer argued that if the Board

were to conclude that it failed its duty to accommodate, the grievor's bargaining agent should be held partly responsible for the failure. It argued that the bargaining agent did not advocate for the grievor, inform it about his needs and circumstances, or raise concerns about how the accommodation process was unfolding.

[236] Relying on *Central Okanagan*, the employer argued that it would be inappropriate for the Board to find that it breached its duty to accommodate without also finding that the bargaining agent breached its duty to assist in the accommodation search.

[237] I will address this argument only briefly. As previously indicated, the grievor began copying bargaining agent representatives on emails once he received the August 10, 2016, options letter. Months later, in an email to Mr. Zelenika dated February 17, 2017, he indicated that he was consulting his bargaining agent. Little is known about what steps or efforts the bargaining agent took or made at that stage of the accommodation process. The bargaining agent representative who, by all accounts, was most involved in the grievor's case, is now deceased. No bargaining agent representative testified at the hearing.

[238] The documentary evidence does not shed any light on the extent to which the bargaining agent was involved in the process or what information, if any, it conveyed to the employer. It also provides no indication that the employer sought to inform the bargaining agent about its accommodation search or involve it in the accommodation process more broadly. At no point did the employer copy the bargaining agent when it wrote to the grievor.

[239] The bargaining agent was actively involved in ongoing, high-level discussions about BSO accommodation requests in the entire Region. It raised concerns and asked questions that were directly relevant to the grievor's situation. However, those high-level discussions were in a forum in which discussing individual cases was not appropriate.

[240] Generally speaking, the evidence presented at the hearing fell well short of demonstrating inaction or disinterest by the bargaining agent during the accommodation process. It is clear that the bargaining agent was actively involved in the grievance process and that it represented the grievor throughout that process.

[241] Although the evidence with respect to the bargaining agent's involvement in the accommodation process and advocacy for the grievor is not substantial in scope or nature, there is nothing to support a conclusion that the bargaining agent impeded the search for reasonable accommodation, as was the case in *Central Okanagan*.

B. The grievor's request for leave without pay for the care of family

[242] On the same day that he informed the employer that his request for medical retirement had been denied, the grievor submitted a request for a five-year leave without pay for the care of family. For the reasons that follow, I conclude that the employer did not seriously consider that request, and that its inaction was tainted by discrimination.

[243] At the hearing, the employer argued that, at the time the grievor was terminated, he did not have a valid request for leave without pay for the care of family, and its decision to deny the leave cannot constitute a breach of the collective agreement or a discriminatory action. The request was not a valid one because it did not meet all the conditions set out in the collective agreement. It also argued that even if the request had been valid, an employer is not required to grant a leave request made to postpone a termination. Alternatively, it argued that the grievance with respect to the grievor's request for leave without pay for the care of family was rendered moot by his termination.

[244] Article 41 is the provision of the collective agreement that recognizes the importance of access to leave for the purpose of caring for family.

[245] Article 41 is a mandatory one. In order words, an employee who requests leave without pay for the care of family "shall" be granted the leave provided that the leave satisfies the conditions listed in the collective agreement.

[246] There are four conditions listed at clause 41.02 but only one is relevant in the present case. The employee requesting the leave must notify their employer in writing as far in advance as possible but not less than four weeks in advance of the commencement of the leave, unless such notice cannot be given due to urgent or unforeseeable circumstances.

[247] It is not disputed that the grievor did not provide the employer with 4-weeks notice. He submitted his request on May 2, 2017. The request covered the period from

May 2, 2017 (that same day) to May 1, 2022. His leave request did not meet one of the conditions set out in the collective agreement.

[248] The employer did not respond to the leave request at the time it was submitted. No one communicated with the grievor to raise concerns about his failure to provide 4-weeks notice. There is also no reference to the notice period in the termination letter in which the leave request was denied, nor is there an indication that the employer had concluded that the leave request did not meet the conditions set out in article 41. There is also no indication that the notice period was raised by the employer during the internal grievance process. The first time that the employer referenced the 4-week notice period was at the hearing. Even then, Ms. MacVicar did not identify the grievor's failure to provide 4-weeks notice as the reason for which she denied the request.

[249] In light of the documentary evidence and Ms. MacVicar's testimony, it is clear to me that the grievor's failure to provide 4-weeks notice was not the reason for which the request was denied. The employer should not be entitled to raise it for the first time at the hearing.

[250] Even if that were not the case, the grievor's failure to meet all the conditions set out at article 41 of the collective agreement does not mean that his request had to be denied. It only meant that the employer was not required to grant it. It had the discretion to grant or deny it. The employer was still required to consider the leave request, and to exercise its discretion fairly and reasonably.

[251] The grievor presented his leave request more than two months before his employment was terminated. At the hearing, he indicated that he presented the request to buy himself more time. He believed that the employer was required to grant the request. He hoped that, by going on leave without pay for the care of family for a 5-year period, he would be able to maintain his employment relationship and continue to care for his children. He believed that, with time, suitable accommodation could become available.

[252] Ms. MacVicar testified that the grievor had been on sick leave without pay for more than two years and that leave needed to come to an end. When she was asked on cross-examination whether it was her understanding at the time that the grievor, who was fit to return work, was not entitled to convert a sick leave without pay into a leave without pay for the care of family, she responded in the affirmative. She indicated that

she now knows her understanding at the time was erroneous. At the hearing, the employer conceded that, under the terms of the collective agreement, the grievor was entitled to "convert" his sick leave without pay to a leave without pay for the care of family, if he was entitled to the leave without pay for the care of family.

[253] The situation in the present case resembles the one described in *Edwards v. Treasury Board (Canada Border Services Agency)*, 2019 FPSLREB 62. In that case, two CBSA employees who had been on sick leave without pay for two years when they received letters from their employer requiring them to return to work, medically retire or resign. Rather than choosing one of those options, they both requested a one-year leave without pay for personal needs. Their employer denied the requests because the grievors had been on sick leave without pay for two years. It took the position that their sick leave without pay status had to be resolved first, by choosing one of the options set out in the letters. The Board allowed the grievances and held that the employer had discriminated against the grievors on the basis of disability when it denied their leave requests because they were on sick leave without pay. The Board dismissed the employer's argument that the point of undue hardship had been reached because the grievors had been on sick leave without pay for two years and were unable to work for the foreseeable future. The Board also held that the employer had breached the terms of the collective agreement pertaining to personal-needs leave which did not prohibit combining the two types of leave without pay at issue.

[254] Unlike the grievors in *Edwards*, the grievor in the present case was fit to work at the time he made the leave request. He could work and wanted to work. The facts of the present case are unlike those in the cases cited by the parties, that is to say, cases where grievors presented leave requests to postpone a termination in circumstances where they were unable to return to work in the foreseeable future and undue hardship had been established (see *Babb v. Canada Revenue Agency)*, 2020 FPSLREB 42) or they were about to be terminated for unsatisfactory work performance (see *Mazerolle v. Deputy Head (Department of Citizenship and Immigration)*, 2012 PSLRB 6).

[255] It is important to note that, at the hearing, the employer did not contradict or challenge the grievor's testimony to the effect that, at the time that he submitted the leave request, he intended to use that leave to care for his school-age children. The employer also did not contradict the grievor's testimony according to which he did, in

fact, care for his children in the years following his termination, as he had intended to do when he submitted the request.

[256] In light of the evidence as a whole, I conclude that it is more likely than not that Ms. MacVicar's erroneous interpretation of the terms of the collective agreement was one of the reasons for which the grievor's request was denied. The denial of that request was arbitrary and contrary to the terms of the collective agreement that do not prohibit combining a sick leave without pay with a leave without pay for the care of family (see, for example, *Edwards*, at paras. 60 to 62, where the Board drew a similar conclusion with respect to sick leave without pay and personal-needs leave provisions).

[257] I will briefly address the employer's argument according to which the grievor's request for leave without pay was rendered moot by his termination. At the hearing, the employer relied on *Mazerolle.* In *Mazerolle*, the PSLRB dismissed a grievance with respect to a grievor's termination for unsatisfactory performance and held that a leave without pay request presented by the grievor after he was advised of his termination was rendered moot by the grievor's termination. Two important factors distinguish this case from the facts in *Mazerolle*. In the present case, the grievor submitted his leave without pay request several weeks before the termination of his employment. It was not presented to the employer at the time of termination. The employer was required to seriously consider that leave request. More importantly, unlike the conclusion drawn by the PSLRB in *Mazerolle*, I have concluded that the grievance with respect to the grievor's termination is founded. In the circumstances of this case, it cannot be said that the grievor's leave request was rendered moot by his termination.

[258] I will now turn to the grievor's argument according to which the denial of his leave request was discriminatory. Although I have concluded that the employer's decision to deny the leave request was arbitrary and contrary to the terms of the collective agreement, that does not mean that the grievor's disability was a not a factor in the employer's decision to deny the leave request.

[259] Several weeks before the termination of his employment, the grievor submitted a request for leave without pay for the care of family. He did so to maintain his employment relationship and to provide himself with a buffer of several years during which work that met his restrictions could potentially become available. His leave request was denied. The evidence presented at the hearing demonstrates that his leave

request was denied, at least in part, because he had been on leave without pay due to his disability for too long and the employer did not want to further extend the period during which the grievor would be on leave without pay. His disability was a factor in the employer's decision to deny the leave request.

[260] The wording of the termination letter suggests that the employer interpreted the grievor's leave request as a rejection of its second accommodation offer, and not as a new development or a new request worthy of serious consideration. That interpretation is further supported by Ms. MacVicar's testimony at the hearing.

[261] When she was asked about the leave request, she explained that the employer felt that it had followed all the necessary steps to accommodate the grievor. It had exhausted all accommodation options and the grievor had turned those options down. She indicated that the grievor's leave request was a further indication that it would not be possible to collectively identify a solution to the grievor's needs that he would deem acceptable. She testified that the grievor had been on sick leave without pay for more than two years and, given the length of the leave without pay for the care of family being requested, she was not prepared to approve the request. His sick leave without pay had to come to an end.

[262] As was the case in *Edwards*, Ms. MacVicar's testimony demonstrates that the grievor's sick leave without pay status was at least one of the reasons for which his leave request was denied. Denying the request on that basis constituted discrimination on the basis of disability.

[263] I find that the denial of the grievor's request is also relevant to the employer's claim of undue hardship.

[264] There is nothing to suggest or indicate that the employer seriously turned its mind to the request or considered it as a possible means of fulfilling its duty to accommodate. During her cross-examination, Ms. MacVicar indicated that she did not consider granting the request for leave without pay in case a suitable accommodation option would become available in time. She was the ultimate decision-maker. It was incumbent on her to exercise her discretion fairly and reasonably. She did not.

[265] Emails entered into evidence indicate that the employer did not immediately respond to the leave request because the employer's last letter to the grievor had

indicated that the termination of the grievor's employment would be recommended should Health Canada deny the request for medical retirement. The employer had ventured down the path to termination because the grievor had been on leave without pay for more than two years and it felt that that leave had to come to an end. It failed to reassess its duty to accommodate, more specifically its undue hardship analysis, in light of the request for the leave without pay for the care of family. It did not reconsider whether it was still appropriate for it to terminate the grievor's employment.

[266] When the grievor submitted the leave request, a new avenue of possible accommodation opened up. As previously indicated, the employer failed to reassess its duty to accommodate in light of this new development, and it presented no evidence capable of supporting a conclusion according to which allowing the grievor to remain on leave without pay for the care of family for five years would constitute undue hardship.

IV. Conclusion

[267] For the reasons just set out, I conclude that the employer has failed to demonstrate that it conducted a thorough and diligent search for accommodation before it concluded that it had discharged its duty to accommodate and terminated the grievor's employment for non-disciplinary reasons. The evidence that it presented at the hearing was insufficient to allow me to conclude that the employer had met its burden of demonstrating that it had accommodated the grievor to the point of undue hardship.

[268] I also conclude that the grievor's request for leave without pay for the care of family was arbitrarily denied. The decision to deny the request was also tainted by discrimination.

[269] The grievances alleging a breach of the duty to accommodate and challenging the grievor's termination are allowed. The grievance with respect to the grievor's request for leave without pay for the care of family is also allowed.

[270] As indicated earlier, the Board ordered the bifurcation of the proceedings in this matter. Given that the grievances alleging a breach of the duty to accommodate, challenging the denial of the grievor's request for leave without pay for the care of

family and challenging the grievor's termination are allowed, a hearing with respect to remedy will be scheduled in due course, unless the parties reach a settlement before that time.

[271] The parties asked me to provide them with general guidance on the issue of remedies if I were to allow one or more of the grievances at issue. They asked that I do so to assist them in settlement discussions, should such discussions occur. More specifically, they requested that I provide them with general guidance as to whether the evidence that I have heard thus far would lead me to conclude that the grievor should be entitled to damages under the *CHRA*, without expressing an opinion about the amount of damages that the grievor may be entitled to. To assist the parties, I agreed to do so.

[272] At the hearing, the grievor argued that the circumstances of this case justify an award of damages for pain and suffering (see s. 53(2)(e) of the *CHRA*) as well as an award of special compensation (see s. 53(3) of the *CHRA*). The evidence that I have heard thus far is sufficient to justify an award of damages under s. 53(2)(e) of the *CHRA*. However, additional evidence and argument would be required to allow for me to make a definitive determination with respect to the grievor's entitlement to damages under s. 53(3) of the *CHRA*.

[273] If the parties to do not reach a settlement agreement, the damages owing under s. 53(2), and any entitlements under s. 53(3) of the *CHRA*, shall be determined once the Board has heard more fulsome evidence and argument on the issue.

[274] The Board will remain seized of this matter for that time or until such date as remedy is resolved either by an agreement of the parties or by a further Board order. The parties will inform the Board of their desired course of action within 90 days of the date of this decision.

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

(The Order appears on the next page)

V. Order

[276] The grievance in Board file no. 566-02-42041 was withdrawn and that file is ordered closed.

[277] The grievances in Board files 566-02-42042, 566-02-42043 and 566-02-42044 with respect to the grievor's request for accommodation and his subsequent termination are allowed.

[278] The grievance in Board file 566-02-42042, with respect to the employer's denial of the grievor's request for leave without pay for the care of family is allowed.

[279] The Board will remain seized until the matter of remedy is resolved either by an agreement of the parties or by a further Board order. The parties will inform the Board of their desired course of action within 90 days of the date of this decision.

October 22, 2024.

Amélie Lavictoire,
a panel of the Federal Public Sector
Labour Relations and Employment Board