Date: 20251219

File: 566-02-44029

Citation: 2025 FPSLREB 175

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

LOC PHAM

Grievor

and

TREASURY BOARD
(Department of Foreign Affairs, Trade and Development)

Employer

Indexed as
Pham v. Treasury Board (Department of Foreign Affairs, Trade and Development)

In the matter of an individual grievance referred to adjudication

Before: John G. Jaworski, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Marie-Pier Dupont and Morgan Rowe, counsel

For the Employer: Lauren Benoit, counsel

Heard by videoconference,
October 8 and 9, 2024,
and on the basis of written submissions,
filed November 6 and December 5 and 23, 2024.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] At the material times, Loc Pham ("the grievor") was employed by the Treasury Board (TB or "the employer") with Global Affairs Canada (GAC), classified in the Foreign Service group at the FS-03 group and level.

[2] On May 7, 2021, the grievor filed a grievance that stated as follows:

> …
>
> *Grievance details …*
>
> *I hereby grieve my Employer's decision of May 4, 2021, to cancel my assignment to Nairobi which was scheduled to commence on August 18, 2021. I consider my Employer's decision to be in direct violation of Article 43 of the FS collective agreement and Section 7, 8, 10 and 11 of the Canadian Human Rights Act, as the decision to cancel my assignment was based on two prohibited grounds, i.e.: my* [child]*'s disability and my family status.*
>
> *Corrective action requested …*
>
> *I hereby request that my Employer cease all discriminatory actions against me and allow me to be posted to Nairobi as originally scheduled. I request that any lost wages and benefits, including by* [*sic*] *not limited to FSDs, be reimbursed and fully compensated. I also request a financial compensation in the amount of $20 000 for pain and suffering as per Section 52(2) e) of the Canadian Human Rights Act and a financial compensation in the amount of $20 000 as special compensation as per Section 52(3) of the said Act.*
>
> …

[3] The grievance was originally scheduled to be heard in person; however, as the grievor was posted overseas, at the request of the parties, the hearing was converted to a videoconference. Each of the grievor and employer called two witnesses over two days, and at the completion of the evidence, on consent, the parties agreed to make arguments by way of written submissions.

II. Summary of the evidence

A. The collective agreement and the *Foreign Service Directives*

[4] At the relevant time, the grievor's terms and conditions of employment were partially governed by a collective agreement between the TB and the Professional Association of Foreign Service Officers ("the union") for the Foreign Service (FS) group

that was signed on August 1, 2019, and that expired on June 30, 2022 ("the collective agreement").

[5] Relevant to the issues in this grievance are the following articles of the collective agreement:

…	[…]
Article 1: preamble	***Article 1 : préambule***
…	[…]
1.03 *The Employer will retain all the functions, rights, powers and authority not specifically abridged or modified by this agreement.*	***1.03*** *L'employeur conserve la totalité des fonctions, des droits, des pouvoirs et des attributions qui ne sont pas expressément diminués ou modifiés par la présente convention.*
…	[…]
Article 2: interpretation and definitions	***Article 2 : interprétation et définitions***
2.01 *For the purpose of this agreement:*	***2.01*** *Aux fins de l'application de la présente convention :*
…	[…]
"employee" *means a person who is a member of the bargaining unit (fonctionnaire) ….*	***« fonctionnaire »*** *désigne le fonctionnaire qui fait partie de l'unité de négociation (employee),*
…	[…]
Article 42: Foreign Service Directives and National Joint Council agreements	***Article 42 : directives sur le service extérieur et ententes du Conseil national mixte***
42.01 *The terms and conditions of employment of an employee who is subject to the Foreign Service Directives are those contained in this agreement, unless they are less favourable to the employee than those contained in the Foreign Service Directives in which case the latter applies.*	***42.01*** *Les conditions d'emploi d'une fonctionnaire assujettie aux Directives sur le service extérieur sont celles que renferme la présente convention, à moins qu'elles soient moins avantageuses pour la fonctionnaire que celles que comportent les Directives sur le service extérieur, en un tel cas ces dernières s'appliquent.*
…	[…]

Article 43: no discrimination	***Article 43 : élimination de la discrimination***
43.01 *There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practised with respect to an employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, gender identity and expression, family status, marital status, mental or physical disability, conviction for which a pardon has been granted or membership or activity in the Association.*	***43.01*** *Il n'y aura aucune discrimination, ingérence, restriction, coercition, harcèlement, intimidation, ni aucune mesure disciplinaire d'exercée ou d'appliquée à l'égard d'une fonctionnaire du fait de son âge, sa race, ses croyances, sa couleur, son origine ethnique ou nationale, sa confession religieuse, son sexe, son orientation sexuelle, son identité sexuelle et l'expression de celle-ci, sa situation familiale, son état matrimonial, son incapacité mentale ou physique, une condamnation pour laquelle la fonctionnaire a été graciée ou son adhésion à l'Association ou son activité dans celle-ci.*
…	[…]

[6] Unique to the FS group is the fact that as a part of their work, a foreign service officer (FSO) will, from time to time, be posted at Canadian missions abroad in foreign countries. How this process takes place is set out in several policies, guidelines, and directives, a series of which are identified as the *Foreign Service Directives* (FSDs). The FSDs are co-developed by participating bargaining agents and public service employers at the National Joint Council of the Public Service of Canada ("the NJC").

[7] The general provisions of the FSDs state that the FSDs are designed to provide a system of allowances, benefits, and conditions of employment that in combination with salary, will enable departments and agencies to recruit, retain, and deploy qualified employees in support of federal government programs outside Canada. The FSDs form part of the collective agreements between parties to the NJC. The collective agreement in issue incorporates the FSDs.

[8] FSD 2 sets out the definitions for the FSDs. Relevant to the issues in this grievance are the following definitions:

> ***Dependant*** *(*personne à charge*) means:*
> *(a) …*

> *(b) a biological child … who:*
>
> *(i) resides with the employee at the post; and*
>
> *(ii) is unmarried; and*
>
> *(iii) is either under 21 years of age and continues to be in a dependent relationship with the employee (or with the employee's spouse or common-law partner), or is 21 or more years of age, and is dependent upon the employee (or upon the employee's spouse or common-law partner) by reason of mental or physical disability ….*
>
> …
>
> ***Employee*** *(*fonctionnaire*) means a person to whom the Foreign Service Directives apply in accordance with FSD 3 – Application.*
>
> …
>
> ***Family configuration*** *(*taille de la famille*) means the employee who is at post and the number of dependants who are normally residing with the employee at the post for at least eight months of any consecutive 12 month period as follows:*
>
> *(a)* ***Unaccompanied*** *(*non-accompagné*) refers to an employee who is not accompanied by a dependant;*
>
> *(b)* ***Accompanied by one dependant*** *(*accompagné d'une personne à charge*) means that one dependant is residing with the employee at the post ….*
>
> …
>
> ***Mission*** *(*mission*) means an office of a department outside Canada.*
>
> …
>
> ***Post*** *(*poste*) means a city, community, or other geographic locality in which a "mission" is situated.*
>
> …
>
> [Emphasis in the original]

[9] FSD 9 is entitled "Medical and Dental Examinations". The relevant provisions of it are as follows:

> *Scope*
>
> *Introduction*
>
> *The employer wishes to ensure through preventive services that employees and their dependants are medically fit for service abroad and are medically fit upon return from service abroad. Examinations for this purpose will normally be provided by the medical service provider. Where the medical service provider is not in a position to conduct the examinations and the deputy head authorizes use of a private facility, the employer will pay the costs*

of related expenses for examinations conducted at a private facility. Health Canada has been delegated authority to amend the Appendix to this directive as and when required.

Directive

9.1 Application

9.1.1 Prior to each posting, including cross-posting, an employee and each dependant who is either to reside with the employee at a post, or is to be in full-time attendance at an educational institution outside of Canada, shall have the right to a medical examination, or may as a condition of posting or cross-posting be required to undergo a dental and/or a medical examination which shall include specialist services, psychological assessments, x-rays and immunization against diseases as required.…

…

9.1.4 The dental examination, medical examination and related hospitalization and any special examination required shall be administered in the manner prescribed by Health Canada at a Canadian government facility. In special circumstances, the deputy head may authorize the use of a private facility only where the medical service provider is not in a position to conduct such examinations, or the deputy head considers a private facility to be more appropriate.

…

9.3 Fitness for Duty Assessment

9.3.1 An assessment as to fitness for duty prepared by the medical service provider shall be submitted to the deputy head with respect to any medical examination administered pursuant to this directive.

…

9.3.3 Whenever medical matters are at issue, employees shall have the right to have their personal physician submit a written medical opinion to the medical service provider who shall review such opinion and submit another assessment as to fitness for duty to the deputy head, taking into consideration the medical opinion of the employee's physician.

9.3.4 On behalf of the employer, an independent written medical opinion which shall be taken into consideration in the assessment as to fitness for duty may be requested:

(a) by the deputy head when the deputy head is not satisfied with the fitness for duty assessment provided in subsection 9.3.1 and a second written medical opinion has not been provided under subsection 9.3.3; or

(b) by the medical service provider when it determines there is a significant variance between the written medical opinions provided in subsections 9.3.1 and 9.3.3.

> *9.3.5 In arriving at a decision concerning the assignment of an employee, the deputy head shall give consideration to the medical and dental assessments submitted pursuant to subsections 9.3.1, 9.3.2, 9.3.3 and 9.3.4.*
>
> …

[10] FSD 58 is titled "Post Differential Allowance". Its purpose is to set out allowances for employees in recognition of undesirable conditions existing at posts. In short, some places that FSOs are assigned to work in have living conditions that are not as good as in Canada. As such, those posts, depending on a rating level assigned to them, provide additional money (an allowance) to the FSO. The less desirable the post, the more money is paid as an allowance. The posts throughout the world are ranked, by number, from one to five, one being those countries that are closest to desirability to being in Canada, such that the amount of the allowance is the lowest paid to the employee compared to the other four levels. Posts ranked at two have a higher allowance than those at one but less than those at three. Posts rated at five bring in the highest post differential allowance.

[11] For the time in issue in this grievance, the difference in the post differential allowance between a post that was ranked at one and one that was ranked at five, for an FSO who was accompanied by three dependants, was a few dollars higher than $20 000.

B. The *Canadian Human Rights Act*

[12] The grievor stated in his grievance that the employer's actions violated the following sections of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*):

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

on a prohibited ground of discrimination.	
***8** It is a discriminatory practice*	***8** Constitue un acte discriminatoire, quand y sont exprimées ou suggérées des restrictions, conditions ou préférences fondées sur un motif de distinction illicite :*
***(a)** to use or circulate any form of application for employment, or*	***a)** l'utilisation ou la diffusion d'un formulaire de demande d'emploi;*
***(b)** in connection with employment or prospective employment, to publish any advertisement or to make any written or oral inquiry*	***b)** la publication d'une annonce ou la tenue d'une enquête, oralement ou par écrit, au sujet d'un emploi présent ou éventuel.*
that expresses or implies any limitation, specification or preference based on a prohibited ground of discrimination.	
…	[…]
***10** It is a discriminatory practice for an employer, employee organization or employer organization*	***10** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite et s'il est susceptible d'annihiler les chances d'emploi ou d'avancement d'un individu ou d'une catégorie d'individus, le fait, pour l'employeur, l'association patronale ou l'organisation syndicale :*
***(a)** to establish or pursue a policy or practice, or*	***a)** de fixer ou d'appliquer des lignes de conduite;*
***(b)** to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,*	***b)** de conclure des ententes touchant le recrutement, les mises en rapport, l'engagement, les promotions, la formation, l'apprentissage, les mutations ou tout autre aspect d'un emploi présent ou éventuel.*
that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.	
***11 (1)** It is a discriminatory practice for an employer to establish or*	***11 (1)** Constitue un acte discriminatoire le fait pour*

maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value.

l'employeur d'instaurer ou de pratiquer la disparité salariale entre les hommes et les femmes qui exécutent, dans le même établissement, des fonctions équivalentes.

***(2)** In assessing the value of work performed by employees employed in the same establishment, the criterion to be applied is the composite of the skill, effort and responsibility required in the performance of the work and the conditions under which the work is performed.*

***(2)** Le critère permettant d'établir l'équivalence des fonctions exécutées par des salariés dans le même établissement est le dosage de qualifications, d'efforts et de responsabilités nécessaire pour leur exécution, compte tenu des conditions de travail.*

***(3)** Separate establishments established or maintained by an employer solely or principally for the purpose of establishing or maintaining differences in wages between male and female employees shall be deemed for the purposes of this section to be the same establishment.*

***(3)** Les établissements distincts qu'un employeur aménage ou maintient dans le but principal de justifier une disparité salariale entre hommes et femmes sont réputés, pour l'application du présent article, ne constituer qu'un seul et même établissement.*

***(4)** Notwithstanding subsection (1), it is not a discriminatory practice to pay to male and female employees different wages if the difference is based on a factor prescribed by guidelines, issued by the Canadian Human Rights Commission pursuant to subsection 27(2), to be a reasonable factor that justifies the difference.*

***(4)** Ne constitue pas un acte discriminatoire au sens du paragraphe (1) la disparité salariale entre hommes et femmes fondée sur un facteur reconnu comme raisonnable par une ordonnance de la Commission canadienne des droits de la personne en vertu du paragraphe 27(2).*

***(5)** For greater certainty, sex does not constitute a reasonable factor justifying a difference in wages.*

***(5)** Des considérations fondées sur le sexe ne sauraient motiver la disparité salariale.*

***(6)** An employer shall not reduce wages in order to eliminate a discriminatory practice described in this section.*

***(6)** Il est interdit à l'employeur de procéder à des diminutions salariales pour mettre fin aux actes discriminatoires visés au présent article.*

***(7)** For the purposes of this section,* **wages** *means any form of remuneration payable for work*

***(7)** Pour l'application du présent article,* **salaire** *s'entend de toute forme de rémunération payable à*

performed by an individual and includes	*un individu en contrepartie de son travail et, notamment :*
***(a)** salaries, commissions, vacation pay, dismissal wages and bonuses;*	***a)** des traitements, commissions, indemnités de vacances ou de licenciement et des primes;*
***(b)** reasonable value for board, rent, housing and lodging;*	***b)** de la juste valeur des prestations en repas, loyers, logement et hébergement;*
***(c)** payments in kind;*	***c)** des rétributions en nature;*
***(d)** employer contributions to pension funds or plans, long-term disability plans and all forms of health insurance plans; and*	***d)** des cotisations de l'employeur aux caisses ou régimes de pension, aux régimes d'assurance contre l'invalidité prolongée et aux régimes d'assurance-maladie de toute nature;*
***(e)** any other advantage received directly or indirectly from the individual's employer.*	***e)** des autres avantages reçus directement ou indirectement de l'employeur.*
…	[…]

[Emphasis in the original]

C. The assignment-for-posting process

[13] At the time of the matters relevant to the grievance, Jean-Paul Lemieux was the executive director of GAC's Assignments and Pool Management Division. He was in that position from the end of August 2020 to April 3, 2023. He testified that his duties and responsibilities were largely twofold, as follows:

1) to administer assignment cycles, annual cycles for rotational employees abroad, and employees returning to headquarters (the National Capital Region); and

2) to administer the selection processes for all recruitment into the workforce of employees at the non-executive level, which included FSOs.

[14] Mr. Lemieux testified that in any given year, there are a number of assignments for FSOs abroad in missions. He stated that there is no set specific number of assignments abroad that the FSOs are expected to carry out; however, he said that an FSO typically would rotate out of Canada for about 50% of their career.

[15] Every year or so, a process is carried out within the federal government, to determine its needs throughout its posts in the world, and a list is created. The list is then broadcast to the FSOs; it indicates that an assignment cycle will launch and invites them to a series of information sessions. Mr. Lemieux said that normally, in any given cycle, there are between 450 and 500 positions. During the 2021 cycle, the first post-COVID-19 cycle, there were more, about 600, positions available.

[16] Mr. Lemieux said that usually, GAC caps the number of positions (posts) that an FSO can apply to at eight but that only three of those positions can be acting positions. In short, they can apply for eight positions, five at their group and level and three at a position above it, where they would be in an acting position. There is no rule as to the minimum number of positions that they can apply for.

[17] The applications are made through an online system, and as part of the application process, the employees are asked to rank the positions in the order of their preference. Different posts can and do have some different requirements. The post managers are made aware of the applications and have the opportunity to review the applications, and they rank the employees who applied.

[18] He further stated that there is a committee that goes through the position opportunities, applications, and rankings (both employees and managers). Decisions are made not just on what the employees and managers want but on what is needed. Certain posts may require employees with a certain specific skill set or experience. In the end, the delegated authority determines who gets to go where.

[19] Mr. Lemieux and his committee provide a list of proposed postings to the Assignment Advisory Committee (AAC), which is chaired by the director general of the Assignment and Executive Management Bureau (for some unknown reason, it is called the "HFD" for short). A number of meetings take place, and the AAC tries to work through different configurations and tries to find compromises and solutions to match the employees and the posting opportunities. Eventually, determinations are made, and employees receive a nomination message. This is not a finalization of the posting.

[20] The finalization of the posting comes after all administrative issues are dealt with, which includes health clearances.

[21] The posting cycle in issue relating to matters at issue in this grievance was for the 2021 posting cycle. Entered into evidence was a document titled, *Guidelines for the 2021 Cycle of Assignments Abroad and Across Canada* ("the Guidelines"), which was identified as being updated in October of 2020. The relevant portions of the Guidelines are as follows:

> …
>
> ***2. Guiding Principles***
>
> *These Guidelines set out the structure under which employees express their interest in positions, managers nominate the employee who has the required competencies and experience, and the final assignment decision is made. It also sets out an extensive list of issues related to being posted abroad that employees should read carefully and reflect on as they consider their applications for positions. The Guidelines should be read as a whole, with applicants taking care to ensure they review fully all aspects and considerations.*
>
> *The Assignment Guidelines are prepared to provide clarity on the assignment process, and set the parameters within which departmental managers exercise their sub-delegated authority to assign employees to pool positions. While every effort is made to ensure the guidelines are respected, operational requirements may require that adjustments be made. It is the responsibility of employees to fully research the conditions at posts prior to applying, ensuring that they understand and accept circumstances as they apply to themselves and their dependants.*
>
> …
>
> *Rotational employees are required to apply for and accept assignments in Canada and abroad as per the operational requirements of the department. This is a term and condition of employment of rotational employees. Their inability, reluctance or refusal to take an assignment can mean that they do not meet this term and condition of employment. Employees should plan to be posted abroad for approximately half of their careers, but this may vary according to the employee.*
>
> …
>
> ***3. Meeting the Terms and Conditions of employment in a pool managed system***
>
> *Rotational employees must understand and accept that the Assignments and Pool Management Division (HFP) and the Executive Services and Talent Management Division (HFR), in consultation with the Assignment Advisory Committee (AAC) and its subcommittees, manage the process to identify assignments for rotational employees to both HQ and abroad positions in order to meet the business needs of the department. An employee's assignment preferences are important considerations, but*

> *departmental needs are the dominant factors in assignment decisions. Employee preferences may not be able to be accommodated. This is the contractual obligation of a pool-managed employee.*
>
> *The delegated authority to confirm all pool managed assignments for GAC is the Director General, Assignments and Executive Management (HFD). A rotational employee's inability, refusal or reluctance to proceed with a confirmed assignment will be noted in their assignment file and that employee will have a mandatory meeting with the Executive Director of HFP or HFR, as appropriate, to discuss his/her rotational status.*
>
> …
>
> ***5. Preparing to Apply***
>
> …
>
> ***C) Medical Clearance***
>
> *A medical clearance from Health Canada for the employee and all dependants is required before a PCF will be issued.…*
>
> …

[22] Mr. Lemieux testified that the process of filling the assignment posts is carried out through a series of different rounds. The assignment cycle process involves a series of rounds of applications and assessments and then committee meetings and determinations. If an FSO does not get a position or, for that matter, a post does not get filled by someone for the position (or positions) that needed to be filled, there is a second and then a third round of applications.

[23] At the time of the hearing, and since September of 2022, Arika Nairne was the acting regional manager for Health Canada's (HC) Public Service Occupational Health Program (PSOHP) for its Central Zone, which she stated includes the National Capital Region. She described her duties and responsibilities as managing the services that carry out the pre-posting medical clearances.

[24] Ms. Nairne testified that she had carried out pre-posting medical assessments in the past, between 2014 and 2017. In 2017, she moved to a clinical management role; in 2019, she moved to the National program; and in 2020, she shifted to the senior nursing advisor for COVID-19 position, which she held until she moved into her current position.

[25] Ms. Nairne explained the pre-posting medical clearance assessment process. She stated that the employee is contacted to schedule one or more appointments, which

will either be with a doctor or a nurse practitioner and an occupational health nurse (referred to in the evidence as a "clinician"). Before the appointment is made, a questionnaire is sent to the employee for them to complete; sometimes, it is specific to the particular posting, and sometimes, it is completed before the appointment but sometimes at the appointment.

[26] When the FSO or family member arrives for the appointment, whether it is with a doctor or nurse practitioner, a medical history is taken, and a physical examination is done. Depending on the posting, questions related specifically to health issues specific to the posting location could be asked. After the health history and exam are done, if the examiner decides that further information is required, it will be asked for. It is up to the FSO to provide the additional information. Once all the information is provided, it is reviewed, and a decision is made. The result could be one of fit to travel to the post (medically cleared), not fit (not medically cleared), or fit with conditions (medically cleared, with conditions).

[27] If the decision is either not fit or fit with conditions, the clinician will contact the FSO, to explain the not fit result or the limitations or conditions if it is fit with conditions. This allows the employee to provide more information. Once this is done, and a decision is made, they make a recommendation to the employer and the FSO.

[28] When asked what she meant by limitations, Ms. Nairne stated that this is usually related to the specifics of a destination, due to medical care at the destination. This could be a medical condition that a person has that could be exacerbated by something at the post, or the condition might not be stable or could fluctuate, or the healthcare needs might not be able to be met. HC does not make recommendations on accommodations; it sets out limitations.

[29] Ms. Nairne stated that the PSOHP uses the Public Health Agency of Canada (PHAC), which provides information on health risks, issues, and vaccinations in destinations around the world, as well as Shoreland Travax, an organization that she described as similar to the PHAC, which provides information on medical risks, vaccine recommendations, and medical care in different regions around the world; for example, whether there are ambulances and whether medical services would have to be paid by credit card.

[30] She also testified that the medical team members consult one another, as well as the senior medical advisor. When asked about employees' treating physicians, she said that an employee can reach out to their treating physician, to provide information, and the employer can reach out to them for further information.

[31] With respect to information from a treating physician, she stated that the clinician or the HC team takes that information into account, and as a treating physician, is able to provide a fair amount of information. She also stated that a treating physician is an advocate for their patient, while HC is a third party. HC looks at the health situation of an employee from a travel-medicine expertise perspective.

[32] Ms. Nairne stated that all results are provided to the FSO in an encrypted email. If it is not a fit recommendation, a call takes place. It could be a meeting in person, but usually, it is done by phone. When asked if the FSO can ask for a review of a decision, she stated that they can, and they often do. A clinician can give the file to another clinician, and if necessary, it can be reviewed by a senior medical advisor.

[33] Ms. Nairne said that no medical information is shared with GAC, just the recommendation.

[34] When asked about COVID-19, Ms. Nairne stated that it affected the speed at which assessments were carried out but that the disease itself was looked at like any other transmissible disease. The questions asked were about medical care, and the situation in some destinations was better than others, depending on the specific time frame in issue.

[35] When asked if the PSOHP provides GAC with pre-guidance on matching a posting location with a medical clearance, she said that this was not their role.

[36] In cross-examination, she said that she did not have any direct role in the grievor's family's file. When asked if the individual clinicians had qualifications in specific medical conditions, Ms. Nairne stated that she could not say. She stated that they are all licensed and that they all follow continuing professional development paths. When asked if it was fair to say that they were not experts in rare diseases, she could not say. She also could not say if a clinician would seek expert advice with respect to rare diseases. When asked if the clinicians use the guidelines of the Centers

for Disease Control in the United States of America as a source of information, she stated that they do use them, as a resource.

[37] When asked about the treating physician in cross-examination, she agreed that they advocate for the patient and that they provide their best care and treatment for a patient.

D. Facts specific to the grievance

[38] The grievor joined GAC in 2008 as an FSO at the FS-01 group and level.

[39] The grievor is married; his spouse, Suong Nguyen Tyet Le, also testified. She is also employed in the federal public service, as a financial officer.

[40] As of the time of the hearing, they had two children; their first was born in 2015, and their second in 2018.

[41] As of the time of the hearing, the grievor was posted in Abu Dhabi. He was accompanied by both his spouse and two children. Before the posting to Abu Dhabi, he had been posted to Turkey, from 2010 to 2013, and to Myanmar, between 2016 and 2018. According to the evidence, when he was posted to Myanmar, his spouse and first child accompanied him, but they later returned to Canada, and he completed the posting unaccompanied. In cross-examination, the grievor testified that until November of 2016, his spouse was on maternity leave with their first child, and that after that November, she returned to work.

[42] Many of the facts relevant to the issue in the grievance involve the health and medical issues of their second child. From here on, any reference to the second child will be simply stated as “the child”.

[43] At the time relevant to the facts of the grievance, the grievor and his spouse had a full-time live-in nanny; she is Ms. Le’s aunt. According to the evidence, she was with them until August of 2021, when she subsequently went to Vancouver, British Columbia, to visit other family.

[44] The application period for the 2021 posting cycle was from sometime in the fall of 2020 into the winter and spring of 2021.

[45] At that time, the child would have been around two or three years of age (an exact date of birth was not provided). The child was born with a rare condition, which caused difficulties with eating and digesting as well as with their growth. According to the evidence of the grievor, the condition is often misdiagnosed, and only a few doctors are familiar with it. He stated that when the child was diagnosed at one year old, no one at the Children's Hospital of Eastern Ontario (CHEO), in Ottawa, Ontario, was familiar with it. I am not going to set out the specifics and details of the medical condition except to state that a feeding tube was in use, as were treatments that involved injections.

[46] In the fall of 2020, the grievor applied for a posting to Nairobi, Kenya. The position was for an acting assignment as a senior trade commissioner at the FS-04 group and level ("the Nairobi post"). It was scheduled to start August 18, 2021, and to end on August 17, 2023. In FSD 58, Nairobi is ranked as a four on the hardship rating scale.

[47] Both the grievor and Ms. Le testified as to why the grievor applied to Nairobi as one of the postings he sought. The evidence disclosed that the reasons included the fact that it was an FS-04 and so an acting position (a level above his substantive one), that it had a higher post differential allowance (a four rating), and that he thought that the work there would be challenging for him and good for his prospects for a future promotion. Additionally, they believed that there were good prospects for Ms. Le to secure employment while posted there.

[48] On December 22, 2020, the grievor was advised by email that his nomination to the position at the Nairobi post was recommended to the AAC. In advising the grievor of this, it confirmed that all assignments were subject to the security concurrence and medical clearance processes, and the grievor was directed to initiate these processes, to avoid any delays. The grievor contacted HC to begin the medical clearance process for him and his dependants.

[49] In his testimony, the grievor confirmed that he did have concerns about obtaining the medical clearance for the child, due to the medical issues.

[50] A medical assessment was carried out by HC.

[51] Included in the correspondence between the grievor and HC and in response to a request for information from HC, in an email dated February 23, 2021, the grievor advised HC that the child was being seen and followed by three doctors, all at CHEO in Ottawa, including Dr. Marc Zucker. According to the email, the most recent consult notes of two of the doctors were attached.

[52] The correspondence between HC and the grievor was entered into evidence. GAC was not privy to this correspondence at the relevant time (2021). The consult notes of the doctors were not provided as part of the evidence to the hearing. Nor were any clinical notes or records or any test results.

[53] As a part of the HC assessment process, a letter dated March 10, 2021, was sent to HC by Dr. Zucker under the cover of the letterhead of CHEO. I will not set out the specifics of the child's conditions or treatments; however, the letter did provide the following information:

- the child is being followed by CHEO for their complex pediatric medical needs;
- the specifics of the child's ongoing ailments and treatments;
- the child is safe to travel to Kenya and live there while their parents work there; and
- he did not see any risks to the child's health or well-being (save and except those with respect to COVID-19).

[54] From the evidence provided, it was suggested that there was a team of six physicians and three nurse practitioners at HC who reviewed the child's situation.

[55] None of the child's doctors testified; nor did any of the HC healthcare professionals who were involved with the child's assessment.

[56] I was not provided with any evidence of the training or experience of any of the doctors or other healthcare professionals. Other than what may appear in the correspondence entered into evidence at the hearing, I do not know the identities of all the healthcare professionals from HC or in what they specialized.

[57] On March 26, 2021, Michelle Lahey, a nurse practitioner at HC, wrote to GAC and advised that the child had "… medical requirements for which appropriate care may not be available in Nairobi. For this reason, Health Canada cannot provide medical

clearance for a posting to Nairobi." The letter further stated that "[a]s with any posting medical, the decision made at Health Canada is a recommendation only. The final decision for posting approval rests, as always, with the department."

[58] Also on March 26, 2021, Ms. Lahey wrote to the grievor and advised him that HC was not able to provide medical clearance for the child for a posting to Nairobi. The letter set out the factors with respect to the decision, including these:

- the details of the medical condition;
- that the medical needs might not be available or regularly available at the post, leading to potential risks to the child's health; and
- that certain common illnesses, which were identified in the letter and that relate to or could cause difficulties with the child's condition, are prevalent in Kenya and could have a detrimental impact on the child due to the condition.

[59] Upon being advised of HC's decision, the grievor immediately contacted Mr. Lemieux, who in turn put him in touch with Dr. Jeffrey Chernin, the GAC overseas medical advisor. The grievor contacted Dr. Chernin and provided him with information. Dr. Chernin in turn advised the grievor to provide this information to the HC assessment personnel.

[60] After contacting Dr. Chernin, the grievor contacted a healthcare facility in Nairobi, to clarify if it had a doctor with certain specialities. Correspondence from the facility was received that stated that it did.

[61] Dr. Zucker wrote a further letter, dated March 31, 2021 ("the March 31 letter"), the relevant portions of which provided as follows:

- the letter was written to provide some clarification and opinions on the child's medical situation, in light of the plan to go to Nairobi;
- it again set out the specifics of the child's ongoing ailments and treatments;
- the family confirmed that pharmacies in Nairobi carried the necessary treatment measures for the child; and
- the family (assuming that it was the mother and grievor) investigated the private healthcare system in Nairobi and felt that it was more than adequate to meet the needs of the child, and the doctor agreed with that opinion.

[62] In cross-examination, the grievor did confirm that he did not know what, if any, information that Dr. Zucker possessed with respect to the healthcare system in Kenya, the facilities there, or the health risks in that country.

[63] There is no documentary evidence that discloses the state of the healthcare system in Kenya and specifically Nairobi at the time in question or the specifics of the level of training or expertise of the doctors and other healthcare professionals in Nairobi, at the hospitals in general, or specifically, the healthcare facility that the grievor contacted.

[64] On April 9, 2021, Ms. Lahey wrote to the grievor about the child and the medical clearance. The letter stated as follows:

> …
>
> [The child]*'s file was forwarded to me by Dr. Chernin, our overseas medical advisor. I have reviewed the information that you emailed to him. I understand that the decision of Health Canada not to provide medical clearance for* [the child] *has greatly impacted your family's plans… I would like to emphasize that this decision was not made lightly and that all factors were considered. There was extensive discussion with the medical team, including Dr. Chernin, our overseas medical advisor, and as* [*sic*] *our senior medical advisor.*
>
> …

[65] On April 13, 2021, Ms. Lahey emailed the grievor and thanked the grievor for an email that he had sent on April 12, 2021, including the March 31 letter from Dr. Zucker. She advised him that she would bring this information to the HC medical team for further discussion, that the meeting would be held within the next two weeks, and they would get back to him once they reviewed the further information that was sent.

[66] On April 23, 2021, Ms. Lahey wrote to the grievor. The relevant portions of the letter state as follows:

> …
>
> *Thank you for the supplemental information you provided in your emails dated April 12 and April 13, 2021. I have forwarded this information to our medical team, including the overseas medical advisor and one of the senior medical advisors. Based on the information available to us and for the reasons previously noted in my letter dated March 26, 2021, for medical reasons we cannot recommend a posting to Nairobi for* [the child] *at this time.*

> *In addition to the reasons previously noted, the Centre* [*sic*] *for Disease Control and Prevention (CDC) has since added the following underlying medical conditions as potential risk factors for severe Covid* [*sic*] *illness in children:*
>
> - *Medical complexity*
> - *Genetic, neurologic, metabolic or congenital heart disease*
>
> *Additionally, current pandemic conditions are making emergency travel arrangements difficult should required medical care not be available at post.*
>
> …

[67] Also on April 23, the grievor, upon receipt of the April 23, 2021, letter from HC not recommending medical clearance for the child, emailed Mr. Lemieux. In that email, he advised Mr. Lemieux that HC had denied the medical clearance and stated that he believed that the decision by HC was "… biased and based on a complete lack of understanding of [the child's] certified disability." He further stated that as parents of a child with the particular condition, he and his spouse had been warned by the community of "like-minded parents" that they would be facing "… this kind of discrimination from health professionals, let alone from employers." The grievor urged Mr. Lemieux that GAC, in making a decision on his posting, put more weight on the letter from Dr. Zucker. He asked GAC to make a decision on his posting such that he might consider his next course of action.

[68] By email on April 26, 2021, Mr. Lemieux responded to the grievor, stating as follows:

> …
>
> *… I have had a chance to review and can confirm that on the basis of the medical advice provided to the Department, HFP would not be in a position to support* [the child] *accompanying you on assignment in Nairobi. I am sure you can appreciate that in reviewing the medical clearances of employees, the Department relies on the expertise of the medical staff at Health Canada in providing recommendations to us given we are not experts in this field. I recognize that this news must be very disappointing for you and your family and assume that on the basis of the advice below that you would like to withdraw from this posting. I would ask that you please confirm back to me as soon as possible recognizing the time sensitivities regarding schooling and other personal decisions that you have indicated you would like to follow-up on.*
>
> …

[69] By email dated April 27, 2021, the grievor responded to Mr. Lemieux. In that email, he indicated that he failed to understand how HC and the employer did not accept the medical recommendations from his child's medical expert and stated further that HC stated that GAC had the final say over the posting and thus had the ability to accept Dr. Zucker's recommendation over that of HC. He went on to repeat much of what was already set out in Dr. Zucker's correspondence and then stated as follows:

> …
>
> *… I genuinely wonder what is the reasonable and bona fide reason to question the adequacy and reliability of the recommendations and opinions provided by my* [the child]*'s pediatrician? The only member of the Health Canada team who spent any time with* [the child] *was a nurse practitioner who conducted a basic examination on March 12, which lasted 5-7 minutes in total. Health Canada itself has put a framework in place during COVID whereby the medical evaluation can be conducted by the employee's own physician. What is the purpose of that framework if HC can overrule the opinions of the employee's doctor based on a basic examination by a nurse?… The requirements and standards for meeting the medical requirements are not clear if the detailed recommendations of a specialist doctor cannot satisfy them. Such unclear rules clearly have the effect of disadvantaging people like me who have significant caregiving responsibilities (i.e., my* [the child] *has a treatable but chronic disability). They impose an unfair burden that is not placed on others and limit access to professional opportunities. I am not asking for special privileges but rather for accommodation of* [the child]*'s disability.*
>
> *For all those reasons and out of principle, we are not withdrawing from this posting and I hope that you are not coercing me to do so.…*
>
> …

[70] Also on April 27, Mr. Lemieux responded to the grievor by email, again reiterating that GAC relies on the advice provided by experts when assessing the suitability of employees and their dependants for overseas assignments. He further stated that his request that the grievor confirm his intentions was to verify whether the grievor would proceed on the assignment unaccompanied, as this was something that GAC would consider if the grievor was prepared to.

[71] By email dated May 3, 2021, the grievor indicated that he was not willing to again take an unaccompanied foreign assignment. In cross-examination, the grievor

was asked if when preparing to go to Nairobi, he looked for a nanny to accompany the family, he said, “No, it was not an option.”

[72] The evidence disclosed that at the time the grievor had decided that he would not proceed to Nairobi unaccompanied, the 2021 assignment cycle was still ongoing, there were still assignments and posts available, and GAC had not completed the process. Indeed, round 3 of the assignment cycle was still available for the grievor to participate in.

[73] It was put to the grievor in cross-examination that the correspondence between him and HC was not provided to GAC, which was not privy to the information shared between them. He said that some was shared with GAC. Counsel for the employer then went through the correspondence with the grievor, tab by tab, and out of the 12 tabs, he said that GAC was made aware of only 1. He agreed with counsel for the employer that without having the correspondence, GAC did not have the full picture of the situation. He replied that he agreed that there was a wall with respect to the flow of information between him and HC. He further confirmed that GAC had told him that it was not a medical expert.

[74] In cross-examination, the grievor was asked if he was asking for an accommodation of the child’s disability. He answered that he was. He was then asked if the accommodation was for GAC to override HC’s recommendation to not clear the child as fit, to which he answered, “Yes.” He was then asked if he was asking GAC to look again at the process, to which he answered, “Yes.” When it was suggested to him that what he was really asking it to do was take Dr. Zucker’s opinion and let the child go, he said that he was not and that he thought that the process was flawed. He then said, “My [the child] has a disability, can you have a second look at this.”

[75] Ms. Le was asked if she and the grievor discussed him being posted to Nairobi without the family, and she said that it was never a discussion. She stated that she would not have been able to care for the children on her own. The older child attended a French school in Ottawa, and she does not speak French, but the grievor does. Additionally, she stated that the child had medical appointments. When asked about daycare, Ms. Le stated that she had issues with respect to trust. She did not elaborate.

[76] The hardship rating for Myanmar is five. The rating for Abu Dhabi is two.

III. Summary of the arguments

A. For the grievor

[77] The grievor referred me to the *CHRA*; *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 SCR 536; *Moore v. British Columbia (Education)*, 2012 SCC 61; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39; *Maillet v. Canada (Attorney General)*, 2005 CHRT 48; *Fraser v. Canada (Attorney General)*, 2020 SCC 28; *First Nations Child and Family Caring Society of Canada v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2; *CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114; *Vriend v. Alberta*, [1998] 1 SCR 493; *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75; *Canada (Attorney General) v. Johnstone*, 2014 FCA 110; *Gill v. Ministry of Health*, 2001 BCHRT 34; *Canada (Attorney General) v. McKenna (C.A.)*, [1999] 1 FC 401; *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC); *Davis v. Canada (Royal Canadian Mounted Police)*, 2024 FCA 115; *Smolik v. Seaspan Marine Corporation*, 2021 CHRT 11; *Singh (Re) (C.A.)*, [1989] 1 FC 430; *Menghani v. Canada (Employment and Immigration Commission)*, 1992 CanLII 313 (CHRT); *McIlvenna v. Bank of Nova Scotia*, 2021 CHRT 42; the Ontario *Human Rights Code* (R.S.O. 1990, c. H-19; "the Ontario *HRC*"), *Giguere v. Popeye Restaurant*, 2008 HRTO 2; *Khanom v. Idealogic PDS Inc.*, 2024 ONSC 5131 ("*Idealogic*"); *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC) ("*Meiorin*"); *Chopra v. Canada (Attorney General)*, 2006 FC 9; *Chopra v. Canada (Attorney General)*, 2007 FCA 268; *Kirby v. Treasury Board (Correctional Service of Canada)*, 2015 PSLREB 41; *Brown v. Canada (Royal Canadian Mounted Police)*, 2004 CHRT 5; and *Panacci v. Treasury Board (Canada Border Services Agency)*, 2011 PSLRB 72.

1. *Johnstone* does not apply

[78] The grievor submits that *Johnstone* does not apply.

[79] The grievor submits that the standard three-part *prima facie* test is the proper test to be applied when the central allegation of discrimination on the basis of family status is not one of childcare obligations.

[80] In this case, the allegation of discrimination is the application by the employer of a standard by which it relies on HC to make a decision even when those decisions

are based on inaccurate and stereotypical presumptions about people with disabilities without considering the actual needs and circumstances of some groups, including its employees with disabilities, or in this case, its employees with dependants with disabilities.

[81] In this case, the discrimination is based solely on the grievor's status as a father of a child with a disability rather than any issues related to the intersection of work duties and childcare needs.

[82] *Johnstone* does not apply when there is differential treatment or adverse treatment solely based on family status. If an employee was terminated just because they got married or became a parent, *Johnstone* would have no application.

[83] The grievor referred me to *Brown*, a case involving two married RCMP officers. According to the decision, Cpl. Brown alleged that she was passed over for promotion due to the transfer costs associated with finding a position for her husband in certain smaller detachments. The grievor submits that the Canadian Human Rights Tribunal (CHRT) concluded that the employer discriminated against Cpl. Brown based on her marital status, that it gave a lot of weight to the employer's discretion in awarding promotions, and that some factors could validly explain that she was passed over for her chosen promotions.

[84] The grievor also referred me to *Gill*, in which the British Columbia Human Rights Tribunal found that same-sex parents were discriminated against on the basis of family status when the provincial vital statistics department denied them the right to have the parents named on birth certificates.

[85] In *McKenna*, the Federal Court of Appeal upheld a decision of a *prima facie* case of discrimination based on family status when children adopted abroad by Canadians were required to go through the naturalization process to acquire Canadian citizenship, while the biological children of Canadians born abroad acquired citizenship as a right.

[86] The grievor submits that he has met the *prima facie* test. He is the father of the child, who has a disability, and therefore is part of a protected group. There is little doubt that he suffered an adverse impact, as the employer refused to allow the child to travel to Nairobi and as a result cancelled the grievor's posting. This required him to

reorganize the family's plans, and the grievor lost the work opportunity and financial benefits associated with it. Further is the grievor's career sufferance due to the cancelation of the promotional opportunity.

[87] The central question is whether the grievor's family status had a connection with or was a factor in the adverse impact. The grievor could not go on the assigned posting to Nairobi because the employer refused to clear the child.

[88] The employer is tasked under subsection 9.3.5 of FSD 9 with deciding as to pre-posting medical clearance. All the evidence is consistent in one respect, which is that the medical provider, HC, makes a recommendation to the employer, but it is GAC's responsibility to make a decision.

[89] FSD 9 forms part of the NJC FSDs, and the FSDs are incorporated into the collective agreement under article 42. When the FSD refers to the medical service provider, this should be understood to mean HC.

[90] Despite the clear wording of the FSD, the employer has created a rule by which it relies entirely on the recommendation of HC to make decisions as to pre-posting medical clearance. In essence, the employer is fettering the discretion given to it by agreement between it and the union.

[91] The decision by the employer to fetter its discretion may be neutral and may not affect most employees; however, it has a disproportionate impact on employees with disabilities or with dependants with disabilities, for which the HC team doing the assessment may not have any specific or requisite knowledge.

[92] Ms. Nairne testified that the team doing the assessments are specialists in travel medicine and not in specific or rare conditions. The team's focus is on the medical situation at the posting location.

[93] The grievor's other child was cleared. This suggests that it was not the medical situation at the location but the medical situation specific to the person, in this case the child who has health issues.

[94] As the HC assessment team is not made up of experts in specific medical conditions, an employee or dependant will need to provide information and possibly

an opinion from a medical practitioner that is a specialist in the specific medical condition at play.

[95] It is clear that HC does not put any weight on such information and opinions from a personal physician or a specialist. The multiple letters from HC do not in any way, shape, or form explain why it disregarded the opinion of Dr. Zucker. The HC letters do not in any way refer to his opinion. One could not know from reading the HC letters denying the medical clearance that another physician had provided an opinion. This is especially problematic when there is a stark contrast between HC's assessment and that of Dr. Zucker.

[96] Ms. Nairne confirmed that the HC team would not in its normal process contact the doctor to discuss any concerns it may have, and the evidence of the grievor supports that HC did not reach out to Dr. Zucker before recommending that the child not be medically cleared.

[97] Therefore, the employer decided that it would not take into account an opinion from another medical practitioner, despite the clear wording of subsection 9.3.5 of FSD 9. This creates an unfair treatment for persons outside the HC team's expertise. As in the child's case, such individuals are more likely to be negatively affected by the lack of in-house knowledge within HC of their conditions and by HC's apparent disregard for external specialists' opinions. As in the present case, persons with disabilities are more likely to be negatively impacted by common stereotypical presumptions about people with disabilities, such as that they are infirm, incapable, or need to be paternalistically excluded from participation in mainstream society, for their own protection.

[98] The decision to refuse the medical clearance for the child was plainly unfair and discriminatory. Dr. Zucker's evidence was unequivocally in favour of the child travelling to Nairobi, and the HC team, in making its assessment, used a specific measurement tool that was inappropriate for a person like the child with their health issues. It is sufficient to substantiate the allegations of discrimination.

[99] The employer does not deny that the posting was cancelled because the child could not travel to Nairobi and that the grievor would not travel without the child. No explanation was provided by the employer to explain the refusal to consider Dr. Zucker's opinion in its decision, other than insisting on relying on its flawed process.

There is nothing in the evidence that would legally justify the insistence of the employer on blindly relying on HC's recommendation. This alone is all the grievor needs to establish a *prima facie* case of discrimination.

[100] The employer adopted a rule of relying solely on the recommendation from HC as a final decision, even when the evidence shows that HC's presumption and assumptions about a person are inaccurate and in contravention of FSD 9, at subsection 9.3.5. The rule ignoring the opinion of the child's specialist is more likely to negatively affect a person with a disability and their family.

[101] The employer cannot meet its burden of establishing a defence to the *prima facie* case of discrimination. Once the *prima facie* case has been established, the burden then shifts to the employer, to establish that it attempted to accommodate the grievor and that the offered accommodation alleviated the adverse impact or that further accommodation would have resulted in undue hardship.

[102] The grievor maintains that the employer cannot show that its decision was reasonably necessary to a legitimate work-related purpose, let alone show any accommodation efforts or undue hardship.

[103] While the employer vaguely refers to risk and the duty of care, there is no evidence that particularizes risk or how medically clearing the child would have engaged the duty of care.

[104] The grievor also argued that the employer discriminated against the grievor on the basis of his association with a person with a disability; namely, the child.

[105] The grievor referred me to jurisprudence on the issue of discrimination by association, in that a victim of discrimination will not necessarily be the only person who may be the object of the discrimination. In this respect, the grievor referred me to *Singh*, as well as *Menghani*, which stand for the proposition that human rights legislation does not so much look at the intent of the discriminatory practice but its effect. The grievor submitted that this is in line with the legislation in Ontario in s. 12 of the Ontario *HRC*, which specifically prohibits discrimination because of a relationship, association, or dealing with a person or persons identified by a prohibited ground of discrimination. In this respect, the grievor also referred me to *Idealogic*.

[106] The grievor submits that although the *CHRA* does not have the same express provision as the Ontario *HRC*, the same principle can be read into it.

2. Remedy

[107] The grievor seeks to be placed in the position that he would have been in had the employer not discriminated against him. This includes lost wages and benefits, as well as allowances under the FSDs.

[108] The grievor seeks the following relief:

- a declaration that the employer discriminated against the grievor;
- a direction that the employer must respect the wording of FSD subsection 9.3.5, take the assessments of other physicians into consideration, and ensure that the assessments of employees and their dependants are not discriminatory;
- the payment of the sum of $51 839, representing the loss of wages;
- the payment of the sum of $68 639.16, representing lost benefits;
- damages in the sum of $12 000 under s. 53(2)(e) of the *CHRA*; and
- damages in the sum of $5000 under s. 53(3) of the *CHRA*.

[109] The grievor set out the basis for how he calculated the damages in his written submissions.

B. For the employer

[110] The employer also referred me to the *CHRA*; the Ontario *HRC*; *Johnstone*; *Moore*; *Meiorin*; *Idealogic*; *Giguere*; *Singh*; *Menghani*; *McIlvenna*; *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.); *Lee v. Deputy Head (Canadian Food Inspection Agency)*, 2008 PSLRB 5; *Miller v. Treasury Board (Correctional Service of Canada)*, 2022 FPSLREB 10; *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 ("*Grismer*"); *Mohr v. National Hockey League*, 2022 FCA 145; *Matos v. Treasury Board (Canada Border Services Agency)*, 2023 FPSLREB 77; *Gueye v. Treasury Board (Canada Border Services Agency)*, 2022 FPSLREB 41; *McNeil v. Treasury Board (Department of Fisheries and Oceans)*, 2021 FPSLREB 89; *Cheung v. Treasury Board (Correctional Service of Canada)*, 2014 PSLREB 1; *Eady v. Treasury Board (Correctional Service of Canada)*, 2019 FPSLREB 71; *Tarek-Kaminker v. Canada (Attorney General)*, 2023 FCA 135; *Milinkovich v. Treasury Board (Department*

of Transport), 2024 FPSLREB 50; *Flatt v. Treasury Board (Department of Industry)*, 2014 PSLREB 2 (upheld in 2015 FCA 250); *Board of Education of Regina School Division No. 4 of Saskatchewan v. Canadian Union of Public Employees, Local 3766*, 2018 CanLII 122658 (SK LA); *Canadian Staff Union v. CUPE*, [2006] C.L.A.D. No. 452 (QL); *Stockless v. Treasury Board (Correctional Service of Canada)*, 2013 PSLRB 62; and *Tate v. West Telemarketing*, 2005 BCHRT 530.

1. The *Burchill* objection

[111] The employer submits that the grievor has attempted to expand the scope of the grievance, contrary to the rule in *Burchill*. The employer states that the grievor has raised, during the adjudication, allegations that were not in the original grievance form or raised during the grievance presentations.

[112] The rule in *Burchill* is clear that the employer is entitled to know the specifics of the grievor's grievance, so that it may properly address the issues raised. When a grievance is recast or has new elements raised after the procedure has ended, the purpose of the process can be undermined. In this respect, the employer referred me to *Lee*.

[113] In his grievance form, the grievor alleges a breach of article 43 of the collective agreement as well as ss. 7, 8, 10, and 11 of the *CHRA* when the employer cancelled his assignment to Nairobi. The alleged protected characteristics are the child's disability and family status. The employer states that in the hearing, the grievor attempted to expand his grievance by raising a breach of subsection 9.3.5 of FSD 9 by not assessing the letters provided by the child's treating physician and by solely relying on the recommendations from HC, even when those recommendations were allegedly based on discriminatory considerations. The allegations of a breach of subsection 9.3.5 by the failure to assess the letters provided by the child's physician and by solely relying on the recommendations of HC were an expansion of the original grievance.

[114] The employer further submits that FSD 9 does not contain any provisions that require GAC to consider a written medical assessment from an employee's (or their dependant's) personal physician. Under subsection 9.3.3 of FSD 9, the medical service provider reviews such assessments, not GAC. Therefore, the employer did not contravene any section of FSD 9.

2. The merits of the grievance

[115] A human-rights inquiry under the *CHRA* is a two-step analysis. First, the complainant must establish a *prima facie* case of discrimination. If they are successful in doing so, then the onus shifts to the respondent, to justify the conduct or practice within the exemptions available under the legislation.

[116] The three-part test to establish *prima facie* discrimination was set out by the Supreme Court of Canada in *Moore*. It states that the complainant is to show that they have a characteristic protected from discrimination, that they have experienced an adverse impact with respect to their employment, and that the protected characteristic was a factor in the adverse impact. The *Moore* test applies whether or not the employee alleges direct or adverse-effect discrimination.

[117] The first part of the *Moore* test requires the grievor to establish that they have a characteristic protected from discrimination. The grievor does not have a disability; as such, he does not have that characteristic protected from discrimination. The grievor alleges that the discrimination of the employer was due to his association with a person with a disability; namely, his child. The concept of discrimination by association does not exist in the federal jurisdiction. The jurisprudence cited by the grievor in this respect comes from Ontario, where the legislation explicitly recognizes the concept. The Ontario *HRC*, at s. 12, specifically sets out this form of discrimination.

[118] The grievor argues that although the *CHRA* does not contain the same provision, the same principle can be read into it. The rules of statutory interpretation do not operate in this manner; in fact, the opposite is true. The principle of implied exclusion states that the legislature's failure to mention something is grounds for inferring that it was deliberately excluded (see *Mohr*). The absence of discrimination by association in the *CHRA* allows inferring that it was Parliament's intention to exclude it.

[119] Additionally, s. 7 of the *CHRA* confirms that discrimination by association was not intended to apply. Section 7 states that it is a discriminatory practice in the course of employment to "… differentiate adversely in relation to an employee …". The wording "in relation to an employee" is different from other jurisdictions. The employer referred to the wording in the Ontario and British Columbia legislation.

[120] In addition, this is a grievance alleging a breach of the collective agreement, which is a contract between the employer and the union that contains terms and conditions of employment for a specific group of employees. Article 43 specifically refers to preventing discriminatory actions "with respect to an employee".

[121] The grievor refers to cases of the Federal Court of Appeal and the CHRT that use the term "victim". These cases arose in the context of immigration and are specific to the scheme and purposes set out in the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27). A similar analysis was applied in *Menghani*, when the CHRT stated that given the interests and purposes of the *Immigration Act*, the complainant (a sponsor for a family member abroad) could be considered a "victim" as well. There are no analogous circumstances in the present case.

[122] The grievor also cited *McIlvenna*, but that case involved a preliminary motion for dismissal due to a lack of jurisdiction. While the motion was dismissed, the CHRT stated that it required more information to make a finding. Therefore, the grievor is unable to establish the first part of the *Moore* test, and therefore, there is no need to consider the second and third parts.

[123] If the Federal Public Sector Labour Relations and Employment Board ("the Board") finds that the grievor in fact can rely on disability as a protected characteristic, he must still establish that he suffered an adverse impact. The grievor has not suffered an adverse impact. GAC did not prohibit the grievor from going to Nairobi; it supported him going, unaccompanied. The grievor had done an unaccompanied posting before; however, he was unwilling to this time. This was his decision. Further, the grievor never lost the Nairobi post, as it was never assigned to him.

[124] After the grievor withdrew from the Nairobi post, he remained in the same position that he previously had in Ottawa, receiving the same salary and benefits and performing the same work. He was not prevented from applying to other postings in subsequent rounds of the posting selection process. The fact that the grievor was unhappy about the Nairobi post is insufficient to establish an adverse impact.

[125] If the Board finds that the grievor has a protected characteristic and that he suffered an adverse impact, then the grievor must establish that the adverse impact was connected to the protected characteristic. To do this, he must establish that the

child's disability was a factor in the adverse impact. If there was an adverse impact, there is no connection between it and the location at issue; namely, Nairobi.

[126] As of the hearing, the grievor was currently in Abu Dhabi, and the child was medically cleared by HC to travel to this posting. As such, it was not the disability that resulted in the adverse impact but rather the destination of the posting. The reason for the not-fit finding was not the disability of the child but the location. The disability remained the same; what changed was the location.

[127] *Johnstone* sets the applicable legal framework for family status discrimination.

[128] *Johnstone* is not distinct from *Moore*; it merely provides guidance on how to apply *Moore* in the context of family status cases. This was confirmed by *Miller*. The Board has confirmed that *Johnstone* is the definitive case for discrimination addressing family status.

[129] While the grievor argues that this is not a case about childcare obligations, the facts show otherwise that it is in fact such a case. The reason that the grievor took issue with the findings of HC and the denial of the medical clearance was the caregiving responsibilities that he has for the child. HC's recommendation put him in a position about how he would provide care for his child. This is confirmed in the grievor's correspondence to the employer, in which he wrote this: "Such unclear rules clearly have the effect of disadvantaging people like me who have significant caregiving responsibilities …", and this: "As a father with caregiving responsibilities, let me be unequivocal that I will not leave a disabled child behind with [their] mother and brother."

[130] The grievor's situation is different from those cited by the grievor in his submissions. In *Gill* and *McKenna*, the alleged discriminatory actions did not directly affect the childcare obligations of the parent. *Gill* involved the right to have same-sex parents named on birth certificates, and *McKenna* involved the naturalization process to obtain Canadian citizenship. This matter involves caregiving responsibilities that were affected by the decision to deny medical clearance to the grievor's child. This decision put the grievor in a position to have to make choices about how to provide care for the child.

[131] *Brown* is also distinct from the present circumstances. It did not involve children. It conflated marital status with family status and is more properly assessed under discrimination due to marital status.

[132] All the cases cited by the grievor were decided before *Johnstone*.

[133] The circumstances in this case do not require a departure from *Johnstone*. Given the elements of personal choice involved in this matter, it is evident why the grievor would seek a departure from *Johnstone*.

[134] The grievor cannot satisfy the *Johnstone* criteria. Under that criteria, the grievor must satisfy the Board of the following:

1) a child or children was or were under his care and supervision;

2) the childcare obligation at issue engaged the grievor's legal responsibility for the child or children, as opposed to a personal choice;

3) the grievor made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and no such alternative solution was reasonably accessible; and

4) the impugned workplace rule interfered in a manner that was more than trivial or insubstantial with fulfilling the childcare obligation.

[135] The grievor is unable to satisfy the second and third criteria of *Johnstone*. With respect to the second criterion, the evidence discloses that the childcare obligation at issue did not engage his legal responsibility as opposed to being a personal choice. The child did not require specific care from him. While it is the grievor's legal obligation to ensure that the child is cared for, there are several ways that that obligation can be fulfilled. When the grievor resided in Ottawa, childcare was provided by a live-in full-time nanny.

[136] In *Flatt*, the Board denied a grievance alleging discrimination on the basis of family status that involved a request to work from home to breastfeed the grievor's child. The Board, in denying the grievance, stated that a parent's legal responsibility is to nourish their child and that how a parent fulfils that responsibility is a question of choice; breastfeeding is one choice but it is not the only one. Sometimes, the range of choices shrinks to one, at which point it becomes no longer a choice but simply a legal responsibility.

[137] In this case, the grievor's legal responsibility is to provide care for his child. There are a number of ways to do that, and the child travelling to Nairobi was only one of them. The grievor chose to go to his previous posting unaccompanied. In this respect, the employer also referred me to *Board of Education of Regina School Division No. 4 of Saskatchewan*.

[138] There was no evidence, medical or otherwise, in this case that the grievor's child had to be cared for by him. The grievor acknowledged in cross-examination that others provided care to the child and that there were no specific needs for which he was required to provide care. The grievor and his spouse presented their subjective assessment of what was best for the child and their preference, but that does not equate to a legal responsibility.

[139] The grievor also cannot establish the third criterion of *Johnstone*, which is that he made reasonable efforts to meet his childcare responsibilities through reasonable alternative solutions or that no such alternative solution was reasonably accessible.

[140] The grievor's evidence confirmed that the element of choice is prevalent in the posting selection process. The grievor, like all FSOs who are vying for postings, can decide what is important to him and make his selections based on those factors. The grievor made his choices and made his selections on that basis. The employer is simply stating that they are choices. The grievor had alternative options for meeting the childcare obligations, none of which he explored. He could have chosen a different posting location; as he stated, postings are not imposed on him. He could apply for up to eight postings, five at-level and three above. The grievor explained the basis of his selection.

[141] The grievor suggested that he would not be considered for promotion unless he completed high-hardship postings. Mr. Lemieux testified that this was not the case, stating that as far as he knew, no one had been removed from a promotional process because they did not have sufficient high-hardship-posting experience.

[142] The grievor further submitted that it would be financially difficult to accept a lower-hardship posting because of the costs associated with a particular treatment medication (which he claims are partially covered by the hardship payment, which increases as the hardship level increases). There was no evidence that a lower-hardship

posting would be financially prohibitive for the grievor. Lower-hardship-rating posts could also be at a higher classification level.

[143] The grievor could also have participated in the subsequent round of the posting cycle after withdrawing from the Nairobi post. The grievor stated that he did not apply and that he was not interested in doing the homework for another posting.

[144] The grievor could have gone to Nairobi unaccompanied. He had done this before. The grievor said that he could do it. With respect to childcare options for the child in Ottawa, both the grievor and his spouse stated that they did not make any attempts to look for childcare options. The grievor's spouse said that she did not make any attempts to replace the full-time nanny because she was uncomfortable with having someone else in her home. While this was their decision to make, it does not mean that the alternative to go to Nairobi unaccompanied was unreasonable.

[145] The employer also referred me to *Canadian Staff Union*, in which the grievor sought a position in Halifax despite living in St. John's; he wanted to do the Halifax job from St. John's because his two sons and aging mother lived in St. John's. In finding that the grievor did not establish a *prima facie* case of discrimination, the arbitrator stated that despite the "wrenching … choices faced" by the grievor, and that although the "… Grievor's sons undoubtedly benefit greatly from his regular presence in St. John's …", "… they required no special care from him, and he could have arranged for their maintenance in his absence." Additionally, the arbitrator stated that "… countless couples live apart for prolonged periods because of job requirements."

[146] Families are faced with many choices in the context of caring for their children and meeting their work obligations. This case is full of choices and reasonable alternative options. While some of the choices might have been wrenching, they were still choices, and the law is clear that only legal obligations, not choices, are protected by human rights legislation.

a. The grievor cannot satisfy the *Moore* test

[147] Even without applying the *Johnstone* framework, the grievor cannot satisfy the *Moore* test. Specifically, he cannot satisfy the second and third criteria of that test; namely, he suffered an adverse impact, and the adverse impact was connected to the ground of discrimination.

[148] The grievor has not suffered an adverse impact, as he chose not to go to Nairobi unaccompanied, which thus triggered the cancellation of the posting. The employer did not make this decision. Also, the grievor did not lose the posting, as it was never officially his. His nomination to the posting would not have been confirmed until he received approval from the AAC and all the administrative requirements were satisfied. They were not.

[149] The grievor cannot make the connection between the adverse impact and the ground of discrimination because it is the location of the posting and not the grievor's child's disability or his obligation to care for the child that is connected to the adverse impact. The fact that the child was medically cleared to go to Abu Dhabi confirms this point.

b. The requirement to be medically assessed in accordance with FSD 9 is a bona fide occupational requirement (BFOR)

[150] If the Board finds that the grievor has established a *prima facie* case of discrimination, the employer submits that the requirement to be medically assessed in accordance with FSD 9 is a BFOR. Section 15(2) of the *CHRA* sets out the BFOR defence, which is that the accommodation needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety, and cost.

[151] The determination of a BFOR was provided the Supreme Court of Canada in *Meiorin*, and it requires that an employer establish the following:

> 1) that it adopted the standard for a purpose rationally connected to the performance of the job;
>
> 2) that it adopted the particular standard in an honest and good-faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
>
> 3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate the individual employees sharing the characteristics of the grievor without imposing undue hardship upon the employer.

[152] The grievor submits that GAC should have acted contrary to the assessment process set out in FSD 9, specifically by reviewing and assessing Dr. Zucker's opinion,

as opposed to relying on the medical service provider to review and assess this opinion.

[153] With respect to the first BFOR element, which is that the standard was adopted for a purpose that was rationally connected to the job, the requirement for the medical service provider to review the opinions of personal physicians as opposed to GAC reviewing these opinions was adopted for the purpose of ensuring accurate and comprehensive assessments of medical fitness to live and work abroad. It was also adopted to ensure that the privacy of an employee's medical information is maintained, as GAC does not have access to the medical information that employees provide to the medical service provider. Unlike GAC, the medical service provider can assess the personal physician's opinion in the context of its own information about the employee's or dependant's medical situation and the circumstances in the posting location, to prepare a comprehensive assessment. Ms. Nairne testified that this is what it does. The purpose is rationally connected to the performance of the job, as accurate and comprehensive assessments are critical to ensuring that FSOs will be able to complete their postings abroad safely.

[154] The second BFOR element is also satisfied. There is no evidence of any improper or bad-faith intentions with respect to FSD 9 or specifically FSD 9.3.3. The grievor has not suggested that it was introduced in bad faith in an attempt to prevent employees with disabilities (or employees with dependants with disabilities) from obtaining postings (or travelling on postings, as the case may be). The medical service provider has access to information that most personal physicians do not have, including information about the safety and security of medical services in the post location.

[155] The third BFOR element is also satisfied; subsection 9.3.3 is reasonably necessary to ensure that employees (and their dependants) are fit for service abroad. For the reasons already set out, namely, having access to information of a global reach and applying that to an employee's medical information that GAC does not have access to, relying on the medical service provider to review opinions provided by the employee's personal physician is reasonably necessary to ensure that the comprehensive assessments are made with respect to the medical fitness to live and work abroad.

[156] As for accommodation, GAC would not be able to accommodate the grievor without undue hardship. In cross-examination, the grievor stated what he sought was for GAC to follow the process; yet, this is exactly what GAC did. It followed the process. Instead, what the grievor asked was for GAC to not follow the process, act contrary to FSD 9, subsection 9.3.3, review the medical opinion of Dr. Zucker, and accept that opinion over the opinion of the medical service provider.

[157] The grievor in essence asked GAC to conduct the assessment of the child with an incomplete picture of the medical information. GAC was not privy to the correspondence from HC; nor did it have all the information from Dr. Zucker. This would have resulted in undue hardship, as it would have created significant health-and-safety risks for the child.

[158] HC made a finding that the location of the posting was not safe for the child. It upheld that decision after further information was provided by the grievor, including a further letter from Dr. Zucker.

[159] Even had GAC acted contrary to FSD 9 and conducted its own review of Dr. Zucker's recommendation and ultimately followed that recommendation, it did not have sufficient information to accommodate the child going to Nairobi. Without being presented with any identified limitations, GAC did not have any information to consider what accommodation was involved in the child going to Nairobi. Employers cannot guess at an appropriate accommodation. They require information about the individual's medical limitations to make that assessment. No one provided that information.

c. The grievor is not entitled to the remedy that he seeks

[160] The grievor seeks damages in three categories: lost wages, the post differential allowance, and other benefits flowing from the FSDs. All the damages are speculative, as there was no guarantee that the grievor would have been posted.

[161] The grievor argues that he had to accept a lower-paying posting at the FS-03 level in Abu Dhabi. That is incorrect; the grievor did not have to accept any posting. GAC does not require FSOs to accept postings. It was also the grievor's choice to apply for the posting in Abu Dhabi rather than an acting post at the FS-04 group and level elsewhere.

[162] If the Board finds that the grievor is entitled to lost wages, the posting was not for three years but only for two years. The employer set out in its written submissions the difference in salary amounts between the two postings for the years 2021 through 2023.

[163] Post differential allowances are payments made in recognition of undesirable conditions at certain posts. They are not comparable to salary or bonuses. This is reflected in *Stockless*. These payments are compensation for the discomfort of living there. They are not salary or benefits. As the grievor did not actually live in Nairobi, he is not entitled to be compensated for the discomfort.

[164] If the Board finds that the grievor is entitled to compensation in the form of the post allowance for Nairobi, the amount claimed in incorrect, as the posting in Nairobi was only for two years. The employer set out in its written submissions the difference in post allowances between the two postings for the years 2021 through 2023.

[165] The grievor also claims benefits under other benefits flowing from the FSDs, including FSDs 55, 56, and 56.11, without any explanation as to why he is entitled to these amounts or how they were calculated.

[166] The grievor claims $12 000 and states that this amount is justified because he will experience slower career advancement because of losing the Nairobi post and because of how upset he was over the alleged discrimination. The evidence did not show that the grievor would be passed over for career advancement because he did not get posted to Nairobi. A more appropriate amount of damages would be $2500, as set out in *Tate*.

[167] The employer requests that the grievance be denied.

C. The grievor's reply

1. The *Burchill* objection

[168] The employer's objection is a misinterpretation of the grievor's argument and a misapplication of the *Burchill* principle.

[169] The grievor is not attempting to raise a new issue; it is not that the employer breached subsection 9.3.5 of FSD 9 but that the interpretation and application of subsection 9.3.5 illustrates the employer's discriminatory approach as well as its

failure to engage in any form of accommodation effort. The employer failed to consider the child's individualized circumstances or the evidence of their treating physician, contrary to the obligation to consider this information in subsection 9.3.5 and the requirements of human rights law.

[170] *Burchill* prevents the expansion of the scope of a grievance through the addition of new allegations; it does not limit the arguments that can be advanced in support of the subject matter already raised in the grievance. The arguments relating to subsection 9.3.5 of FSD 9 are not freestanding and new subject matters but were advanced to further and illustrate the core discrimination argument.

2. Statutory interpretation principles support claims of discrimination by association

[171] Section 7 of the *CHRA* provides that it is discriminatory to "… directly or indirectly … in the course of employment … differentiate adversely in relation to an employee, on a prohibited ground of discrimination." Therefore, s. 7 captures not only direct adverse differentiation against an employee but also indirect differentiation in relation to an employee. The language is flexible enough to include circumstances in which an employee experiences adverse differentiation indirectly due to their association with a member of a protected group. The use of the word "indirectly" must be interpreted in a way that ensures that the adverse differentiation is related in some way to an employee but in no way restricts the scope of discriminatory activity to cases in which the employee is a member of the protected group, as long as a protected group is engaged in some way in the differentiation.

[172] The grievor referred me to *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62.

[173] As set out in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445, human rights legislation must be given broad and purposive interpretations.

[174] The submission that the collective agreement limits discrimination considerations only to those grounds directly and personally affecting an employee and that it prohibits consideration of discrimination by association is flawed for the same reasons already set out.

[175] Human rights legislation is inherently incorporated into collective agreements. In this respect, the grievor referred me to *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42.

[176] The employer is also asserting a formalistic approach to the third stage of the *Moore* test in both the disability and the family status contexts. It is clear that but for the child's disability, they would have been medically cleared for the Nairobi post, and the grievor would not have been denied the opportunity to travel with his family to this post. The argument is that the adverse impact that the grievor experienced is not just connected to the posting locale but to the disability of the child.

3. Discrimination on family status grounds has been clearly established

[177] The employer's reliance on *Johnstone* fundamentally misunderstands the nature of the grievance. The grievor reiterates that the *Johnstone* framework does not apply to this case. It is applicable to workplace accommodations for childcare obligations. It does not apply to situations in which the family status discrimination arose from distinctions drawn on family status and when no request for accommodation has been engaged.

[178] The law relied on by the employer on family status has no application, as all the cases relied on involve requests for workplace accommodation in which the status quo working arrangement of work duties was alleged to have prevented an employee from fulfilling their childcare obligations.

4. The employer did not meet its burden to establish a defence to the discrimination

[179] At the third stage of the test, the employer bears the onus to show that accommodating the grievor would cause it undue hardship. This must be met by leading objective direct and quantifiable evidence. Anecdotal or impressionistic assertions will not suffice.

[180] The employer's submissions with respect to justification are misplaced, as they do not attempt to justify the discriminatory standard or rule at issue and instead attempt to examine separate issues like the process for the HC recommendation, which might have contributed to the discrimination.

[181] When the analysis is focused on the correct considerations, which are the standards applied to deny the child's clearance, then there is no doubt that the employer has not made out the third part of the *Meiorin* test. The employer, in these circumstances, cannot rely on the HC recommendation as a *bona fide* justification.

[182] The employer's assertion that it could not overrule HC because it did not have sufficient information about the child's condition does not excuse it from the obligation to accommodate; they point to the employer's failure to accommodate. The employer's obligation to engage in the accommodation process is contemplated in FSD 9, at subsection 9.3.5.

[183] The employer has also asserted that undue hardship would be experienced by the child, in the manner of health-and-safety risks. However, no evidence of health-and-safety risks was presented into evidence. As set out in *Grismer*, health-and-safety risks cannot simply be asserted but must be proven.

[184] The grievor also referred me to *Anderson v. Treasury Board (Canada Border Services Agency)*, 2023 FPSLREB 75; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445; *Casper v. Treasury Board (Department of Citizenship and Immigration)*, 2023 FPSLREB 36; *Chin v. Treasury Board (Canada Border Services Agency)*, 2022 FPSLREB 53; *Delage v. Treasury Board (Department of Fisheries and Oceans)*, 2008 PSLRB 56; *Mellon v. Human Resources Development Canada*, 2006 CHRT 3; *Mohawk Council of Akwesasne v. Ahkwesahsne Police Assn.*, 2003 CanLII 89493 (CA LA); *Parry Sound (District) Social Services Administration Board*; and *Sears v. Honda of Canada Mfg.*, 2014 HRTO 45.

IV. Reasons

A. The child's medical condition

[185] From the information provided, the child, at the time of the matters relevant to the denial of the medical clearance, was between two and three years of age. Some evidence was proffered with respect to the medical condition of the child by the grievor and Ms. Le, who provided evidence of their understanding of the child's medical condition. Neither the grievor nor Ms. Le is a medical or healthcare professional.

[186] The Board saw some limited medical information provided by Dr. Zucker in the two letters that he wrote. However, the Board did not see any clinical notes or records of the child; nor did it see any of the assessments or notes of the two other specialist physicians, shown in the documents as being from CHEO, who were referred to and were involved in the child's care. Their consult notes were forwarded to HC in February of 2021 as part of the medical assessment process.

[187] Additionally, the Board did not see any detailed reasoning from the HC healthcare professionals as to their assessment of the child's medical condition or their analysis of how they reached their decision that they would not medically clear the child to accompany the grievor on the posting to Nairobi.

[188] None of the medical professionals who were either treating the child or assessing the child testified at the hearing.

[189] In the documentary evidence, once HC made its recommendation not to clear the child, the grievor, in writing to Mr. Lemieux, exhorts him to accept the opinion of Dr. Zucker over the decision of HC. He also suggests this in his written submissions, further commenting on the use of certain assessment tools considered by HC as not appropriate and stating that there were other, more appropriate tools that should have been considered. I heard no evidence from a healthcare professional about the appropriateness of one tool over the other, only the grievor's opinion.

[190] Dr. Zucker commented in his March 10 letter that the child had, at that time, "complex pediatric medical needs." From the information provided to the hearing, without the context of the totality of the clinical notes and records and other assessments carried out by at least two other specialist physicians at CHEO and a team of at least six doctors at HC, and perhaps expert testimony, what the Board can gather from what it was provided is just exactly what Dr. Zucker stated: the child had complex pediatric medical needs. As such, I have not set out the specifics of the condition as it was described or how this specific condition affects the child; nor have I set out the prognosis or treatment, as it was described to me by the grievor and Ms. Le or in Dr. Zucker's correspondence.

B. Nairobi

[191] It is trite to state that all things are not equal across the world. Some countries are considered rich and are often called “developed”, while others are considered poor and are often called “underdeveloped”. Additionally, standards of living, healthcare, and safety can and are vastly different across the world; again, some being more advanced while others are less so. There are countries that are considered by the federal government to be “unsafe”, and the federal government issues advisories to not travel to these countries.

[192] GAC has established a rating system for the posts or missions on a scale of one to five. It is a hardship rating. The system provides additional monetary payments (allowances) to FSOs based on the hardship level of the post. The number one signifies those countries where the hardship is the least, while the number five signifies those posts with the most hardships. Kenya is a four. I was not provided with any specifics as to how the hardship rating of a particular post is determined.

[193] I did not hear any evidence about the healthcare system in Kenya generally, specifically, or otherwise. I did not hear about what it was like in Nairobi. What I did hear was that the grievor made some limited inquiries and received email correspondence to him from a facility in Nairobi that told him that the facility could carry out certain treatments or therapy that he had inquired about, referencing the child. To what extent this is accurate, the Board has no idea.

[194] Finally, at the time in question, the world was still very much in the middle of the COVID-19 pandemic. From information that is common knowledge, the first vaccinations in Canada began in late 2020. This was the first round of many further vaccinations, some given in two parts. It is trite to state that much more is known about COVID-19 now than was known back in 2020 and 2021, as the disease was spreading.

[195] It is in this context that the alleged discrimination occurred.

C. The *Burchill* objection

[196] In *Stewart v. Treasury Board (Correctional Service of Canada)*, 2024 FPSLREB 48 at para. 116, I explained the rule in *Burchill*, as follows:

> *[116] In simple terms, the rule in* Burchill *provides that once a party brings forward a process and makes certain allegations in that process that form the basis for the relief they seek against the other party or parties, they cannot later, during the course of those proceedings, change those allegations to something different. The rule is there to prevent a party from changing the reasoning behind or the nature of a complaint or grievance, such that the other party would have to address different allegations and perhaps a different legal test.*

[197] This grievance is clearly about the grievor's allegation of discrimination based on the failure to clear the child to travel to the posting in Nairobi, Kenya.

[198] As set out in the facts portion of this decision, the grievance alleges that the discrimination was with respect to the process involving the medical clearance. The fact that the grievor does not specifically name FSD 9 and the specifics of subsections 9.3.3 or 9.3.5 of that FSD is insufficient to satisfy the test in *Burchill*. The essence of the grievance has not changed. The purpose of the *Burchill* rule is such that the party responding knows the case that it has to meet. In this case, there is no issue that the employer knew the case that it had to meet and knew what the grievance is about.

[199] While it is helpful to both the parties involved as well as the Board to have as much detail as possible, the provision of more detailed information during the course of the hearing that is still within the breadth of the allegation, despite a lack of detail in the grievance itself, does not satisfy the rule in *Burchill* and does not change the essence of the grievance. Indeed, the very fact that medical clearance is at the heart of the grievance brings FSD 9 squarely into issue and makes it part of the grievance.

D. The merits of the grievance

1. Is the *Johnstone* test applicable?

[200] The test set out in *Johnstone*, which has been applied by the Board and by me in several decisions, sets out the criteria for determining discrimination based on the protected characteristic of family status when addressing an allegation of a failure to accommodate on the basis of childcare obligations. It is a test that addresses those situations in which an employee has childcare obligations and a work rule is interfering with the ability to deliver on those obligations.

[201] In this case, the situation is different. The issue is not the childcare obligations of the grievor, although one cannot escape that childcare is certainly very much part of the context; however, it is not the issue.

[202] Like in *Moniz v. Treasury Board (Department of Foreign Affairs, Trade and Development)*, 2023 FPSLREB 79, another decision involving family status and the application of FSDs, the issue in this case is the alleged denial of an employment opportunity and related benefits equal to those offered to other employees. The child of the grievor in question has a condition that meets the definition of "disability" for the purposes of the collective agreement and *CHRA*. If it were not for that condition, the child would likely have received medical clearance for travel, the grievor would have been posted to Nairobi, his family would have accompanied him, and we would not have had this grievance.

[203] The grievor is an FSO. While I did not receive a copy of the FS-03 or FS-04 work description, I am well-acquainted with the work of the FS group. FSOs come from a whole host of different backgrounds and carry out many different tasks. If they were not employed at GAC as FSOs but in another department of the core administration, they would not be classified FS but would be in one of any number of differently classified positions and in a different bargaining unit. The uniqueness of an FSO is that a large part of their job is the requirement that from time to time, they are posted outside Canada for a period, usually years. They work and support the federal government in all the countries of the world.

[204] These FSOs often have spouses and families, and part and parcel of the job includes not only the FSOs being posted for a period outside the country but also their spouses and as well their families accompanying them. Indeed, as part of the collective agreement, there are the FSDs, which have been negotiated between the employer and the unions, and they set forth the rules that apply to postings abroad, which include provisions for the accompaniment of family members.

[205] A good example of this is FSD 58, which sets out the Post Differential Allowance that is based on hardship ratings for different posts. Not only does it differentiate between ratings allowances between posts based on how hard the post is relative to others (the one through five rating) but also, the allowances are based on whether the FSO is travelling to the post alone or whether they are being accompanied by their

family. For example, Nairobi was identified as a four on the hardship rating. If the grievor went to that post unaccompanied, his allowance would have been $12 917; if his spouse and both children accompanied him, the payment would have been $20 022.

[206] What the grievor grieved is that his ability to be posted to Nairobi was compromised because of discrimination due to the condition that the child had. Family status is not just about childcare obligations; although many of the cases seen by the Board are of that nature. I am satisfied that its meaning is much broader and that it can also involve discrimination based on family circumstances more expansively, like eldercare, along with the particular identity of one's family members or the type of family status one has (see *Grant v. Treasury Board (Canada Border Services Agency)*, 2021 FPSLREB 84 at paras. 97-103; *Hicks v. Human Resources and Skills Development Canada*, 2013 CHRT 20 at para. 41; upheld in *Canada (Attorney General) v. Hicks*, 2015 FC 599; and *B. v. Ontario (Human Rights Commission)*, 2002 SCC 66 at paras. 39-41, and 57).

[207] While neither the collective agreement nor the *CHRA* refers to the distinction with respect to "association" in the manner that is referred to in the Ontario *HRC* or the cases submitted by the grievor in support of that principle, the words themselves impute as much. The term used in the *CHRA* and in the collective agreement is "family status". It is not "childcare obligations". If family status was to mean only childcare obligations, then those words would have been used. They were not. The term "family" is fluid and can have a far-reaching meaning. Indeed, the definition of what is a family in today's terms is much broader than it was 50 years ago, although there is no doubt that in its most simple and basic traditional form, it is viewed as parents and children who are in some manner related.

[208] The grievor and the child clearly fall into this very traditional and simple definition of being part of a family. In this case, the grievor's family status is characterized by him being a parent, but also the parent of a child who has a disability. In this regard, I note that s. 3.1 of the *CHRA* provides that "… a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds." As such, family status discrimination can be a form of discrimination by association, and it is specifically set out in both the collective agreement and *CHRA*.

[209] As the grievance is about the alleged denial of an employment opportunity and related benefits because of the characteristics of the grievor's family and had nothing to do with his childcare obligations, the *Johnstone* test does not apply.

2. Was the grievor discriminated against?

[210] The initial burden of proof was on the grievor. In this case, the grievor alleged that he was discriminated against by the employer based on family status and disability, in violation of the no-discrimination article in the collective agreement and in violation of the *CHRA*.

[211] In *Diks v. Treasury Board (Correctional Service of Canada)*, 2019 FPSLREB 3, the Board stated that the test in workplace discrimination cases is as follows:

> …
>
> ***76*** *In order to demonstrate that an employer engaged in a discriminatory practice, a grievor must first establish a* prima facie *case of discrimination. A* prima facie *case is one that covers the allegations made and which, if the allegations are believed, would be complete and sufficient to justify a finding in the grievor's favour in the absence of an answer from the respondent (*Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536 at para. 28 ("*O'Malley*")).*
>
> ***77*** *An employer faced with a* prima facie case *can avoid an adverse finding by calling evidence to provide a reasonable explanation that shows its actions were in fact not discriminatory; or, by establishing a statutory defence that justifies the discrimination (*A. B. v. Eazy Express Inc.*, 2014 CHRT 35 at para. 13).*
>
> …

[212] As set out in *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30, to make a case of *prima facie* discrimination, a complainant (or grievor, as the case may be) is required to show that he or she has a characteristic protected from discrimination, that he or she experienced an adverse impact of some type, and that the protected characteristic was a factor in the adverse impact. Discriminatory intent is not required to demonstrate *prima facie* discrimination. At paragraph 45, the Supreme Court of Canada rejected a suggestion that a fourth element be added, requiring a finding of stereotypical or arbitrary decision making. It stated as follows:

> *[45] … The goal of protecting people from arbitrary or stereotypical treatment or treatment that creates disadvantage by*

> *perpetuating prejudice is accomplished by ensuring that there is a link or connection between the protected ground and adverse treatment. The existence of arbitrariness or stereotyping is not a stand-alone requirement for proving* prima facie *discrimination. Requiring otherwise would improperly focus on "whether a discriminatory* attitude *exists, not a discriminatory impact", the focus of the discrimination inquiry ….*

[213] The grievor is an FSO who, as a job requirement, from time to time, is required to be posted abroad. A process exists for the determination of how posts are assigned. This has been set out earlier in these reasons. As also set out in these reasons, FSOs are posted for periods of years, as opposed to weeks or months. The FSDs that form part of the collective agreement consider that FSOs bring their spouses, and maybe dependant family members, with them. Indeed, as part of payments made to FSOs for being abroad at a posting, they receive a hardship allowance, and the amount of it is dependent on two factors: how difficult or hard the post is considered to be (relative to residing in Canada), and whether the FSO is attending that post alone or is bringing members of their family with them. The more dependants they bring, the higher the allowance amount.

[214] As part of the posting process, all FSOs who are to be posted abroad are required to undergo a medical assessment and to be cleared as medically fit for their posting location. If they are bringing anyone with them, like a spouse and dependants, they too must be medically cleared for the posting location. All FSOs and all members of their families must go through the medical assessment process. The process is carried out by the medical service provider, HC.

[215] The grievance arose out of the requirement for the grievor and his dependants to undergo the medical fitness assessment and specifically the assessment of the child, whom HC found was not fit to go to the specific post in issue, Nairobi, Kenya.

[216] The first step in establishing a *prima facie* case of discrimination is showing that the employee is someone who possesses a protected characteristic. This is simple, as most of the protected characteristics contained in both the collective agreement and the *CHRA* apply to most people, if not every person, in some respect.

[217] In this case, the grievor is the father of the child. The child at the time lived with the grievor and his spouse, Ms. Le, and an older sibling. There is no doubt that this was a family unit and that the grievor was someone possessing the protected characteristic

of family status. Again, the grievor's family status is also characterized by him being the parent of a child with a disability. As such, I find that the grievor possesses a combination of protected characteristics, family status and disability. Thus, the first step of the *prima facie* case is established.

[218] The second step is showing that the grievor experienced an adverse impact of some type and that the protected characteristic was a factor in the adverse impact.

[219] The evidence disclosed that the way the process for postings took place is that a series of posting rounds took place; in the 2021 cycle, there appeared to be three rounds. The process involves the FSOs applying for a number of postings, some at-level and some at a level above, and a matching process is engaged with the different missions that are looking for FSOs. Not all the FSOs and posts are matched and filled after the process begins. What happens is that a series of matches eventually are made, and then, there are a number of committee meetings that take place (the details of which are irrelevant to the determination in this matter), and some of the FSOs are matched with a post and are in turn advised that they are the presumptive FSO for the position at the post. Not all the posts are filled; as such, another round of the process takes place. Mr. Lemieux said that there are two or three rounds before all the posts are filled.

[220] In short, what happens at the committee meetings is that decisions are made on what FSOs and posts are a good match, and if the post agrees, the FSO will be told that they are the selected FSO for the posting, as long as they are security cleared and medically cleared. In short, they are told that they have the position, as long as they clear the security and health hurdles.

[221] In the present case, the grievor was told that he was the presumptive FSO for the Nairobi post. Indeed, the position was his for the taking; despite that in the end it was not officially taken by him or that the posting documentation was not filled out, there was no question that he was going to get this position, despite what eventually happened, because during the time frame in issue, the grievor was offered by the employer to go to Nairobi unaccompanied.

[222] The Nairobi post was an FS-04 position, and the grievor was classified FS-03; therefore, he would have been in an acting position. The post was for a two-year period. Therefore, the grievor would have been in an acting position for two years.

Additionally, the post was at the hardship four level. The grievor and his spouse testified about the reasons for him choosing this post as one that he wanted. It was an acting post, and therefore, it was at a higher level; he thought that the work at this post would be challenging; and there were opportunities for his spouse to be employed.

[223] When HC recommended that the child not be medically cleared to travel to the post, the grievor said that he would not accept the post on an unaccompanied basis. He also said that he would not withdraw. In short, he said to the employer that he felt that the process was not fair and forced the employer to make a decision. It did.

[224] I find that there was an adverse impact on the grievor. He was denied an acting position for two years with a salary increase from the FS-03 group and level to the FS-04 group and level, along with the benefit of being accompanied on that posting by his family.

[225] The final step in establishing the *prima facie* case is determining if the protected characteristic was a factor in the adverse impact. There is no doubt that it was. The reason that the grievor did not go to Nairobi was that the child was not medically cleared by HC. Setting aside for a moment whether the grievor or the employer made that decision, the failure of the grievor to be posted was as a direct result of the determination by HC that the child should not travel there. Therefore, the combination of the protected characteristics of family status and disability were a factor in the adverse impact.

[226] As the grievor has established a *prima facie* case of discrimination, the burden shifts to the employer to establish their claim that their actions were based on a BFOR.

[227] The determination of a BFOR, as set out in *Meiorin*, requires the employer to establish the following:

1) that it adopted the standard for a purpose rationally connected to the performance of the job;

2) that it adopted the particular standard in an honest and good-faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and

3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably

> necessary, it must be demonstrated that accommodating individual employees sharing the characteristics of the grievor would impose undue hardship upon the employer.

[228] The employer and grievor look at the rule somewhat differently.

[229] The employer views the rule in issue as that the employee and those dependants who will accompany them on a posting be required to be assessed as medically fit under FSD 9.

[230] FSD 9 sets out the following provisions that in part, created the rule that is in issue:

> …
>
> *9.1.1 Prior to each posting, including cross-posting, an employee and each dependant who is either to reside with the employee at a post, or is to be in full-time attendance at an educational institution outside of Canada, shall have the right to a medical examination, or may as a condition of posting or cross-posting be required to undergo a dental and/or a medical examination which shall include specialist services, psychological assessments, x-rays and immunization against diseases as required.…*
>
> …
>
> *9.3.1 An assessment as to fitness for duty prepared by the medical service provider shall be submitted to the deputy head with respect to any medical examination administered pursuant to this directive.*
>
> …
>
> *9.3.3 Whenever medical matters are at issue, employees shall have the right to have their personal physician submit a written medical opinion to the medical service provider who shall review such opinion and submit another assessment as to fitness for duty to the deputy head, taking into consideration the medical opinion of the employee's physician.*
>
> *9.3.4 On behalf of the employer, an independent written medical opinion which shall be taken into consideration in the assessment as to fitness for duty may be requested:*
>
> *(a) by the deputy head when the deputy head is not satisfied with the fitness for duty assessment provided in subsection 9.3.1 and a second written medical opinion has not been provided under subsection 9.3.3; or*
>
> *(b) by the medical service provider when it determines there is a significant variance between the written medical opinions provided in subsections 9.3.1 and 9.3.3.*

> *9.3.5 In arriving at a decision concerning the assignment of an employee, the deputy head shall give consideration to the medical and dental assessments submitted pursuant to subsections 9.3.1, 9.3.2, 9.3.3 and 9.3.4.*
>
> …

[231] The grievor sees the rule as having an additional criterion, which is that the employer has adopted the position that it accepts the decision of the medical provider (HC in this case) as binding upon it.

[232] I have no difficulty accepting that the employer has satisfied the first and second parts of the test enunciated in *Meiorin* based on the standard that the employer has enunciated. The standard appears to have been adopted for a purpose rationally connected to the job and for a legitimate work-related purpose. Ensuring that an employee is medically fit to do a job in a foreign country is rationally connected to sending employees overseas to other countries, where the health situations and healthcare standards and facilities are different and may not be the same as in Canada and where there may be untoward health risks that cannot be adequately dealt with and that could put either the employee or their family member at risk of serious illness or death. There is no evidence that the employer adopted this standard for anything other than the legitimate work-related purpose.

[233] This brings us to the third part of the *Meiorin* test, which I find that the employer did not satisfy.

[234] Nowhere in FSD 9 does it state that the employer, GAC, or the delegated authority at GAC is required to accept the decision of the medical provider (HC). What FSD 9 states, in a nutshell, is that employees and the dependants who will accompany them on a posting have the right to a medical assessment (FSD 9.1.1). This is a right afforded to the employee and not a requirement of the employer. However, FSD 9.1.1 also states that the employer may require as a condition of posting the employee to undergo a medical (or dental, as the case may be) examination.

[235] What FSD 9.3.1 states is that the assessment as to fitness for duty prepared by the medical service provider (HC) shall be submitted to the deputy head. FSD 9.3.3 then provides that an employee is entitled to have a personal physician submit a written medical opinion to the medical service provider, which shall review it, take it into consideration, and provide an assessment to the deputy head.

[236] At FSD 9.3.4, the employer and the medical service provider have the option to retain a provider other than HC to carry out an independent medical opinion.

[237] Finally, FSD 9.3.5 states that the deputy head, in arriving at a decision concerning the assignment of the employee, shall give consideration to the medical assessments submitted, which include those from the medical service provider, the personal physician or the independent medical opinion.

[238] Mr. Lemieux testified that GAC accepted the decision or recommendation of HC, as it was the medical service provider. This position, or "rule", for want of a better term, comes from the Guidelines, which state under section 5(C) that: "[a] medical clearance from Health Canada for the employee and all dependants is required …".

[239] The decision concerning the assignment of an employee, as set out in FSD 9.3.5, lies with the deputy head. I was provided with no evidence that the deputy head had delegated this authority to HC. Indeed, FSD 9, specifically FSD 9.3.4, provides for how the assessment process could proceed if there is a dispute between the medical services provider (HC) and an opinion provided by a personal physician (in this case, Dr. Zucker). It allows for the option to seek a further opinion.

[240] Clearly, there is a dispute between HC and what Dr. Zucker set out in his two letters. I do not know whether HC is correct in its assessment of the child, and whether they should have been assessed as not fit to travel, or whether Dr. Zucker may be correct. There are many variables involved in assessing the situation, including but not limited to these ones:

- understanding the exact nature of the child's condition, as explained by a healthcare professional specializing in the condition;
- understanding the exact nature of the risk to the child due to the condition;
- understanding the exact nature of the risk to the child due to the underlying health or medical conditions prevalent in Kenya in 2021; and
- understanding the exact nature of the state of the healthcare situation in Kenya at the time, including what facilities it had or did not have that might have contributed to the finding by HC that the child was not fit.

[241] I do not accept the grievor's suggestion that the deputy head should have accepted the opinion of Dr. Zucker over that of HC. As I set out in the facts section of this decision, I heard from no healthcare professionals, saw no clinical notes or

records of the child, and saw only the two letters from Dr. Zucker. While I did hear from the parents of the child, and from what I can gather from Dr. Zucker's letters and their testimony, the child has a rare condition, and it appeared to have been handled or managed medically just fine here in Canada. In the end, I cannot say that HC was correct or that Dr. Zucker was in determining whether the child should have been considered medically cleared to travel to Nairobi.

[242] A key element of the third part of the *Meiorin* test is that it must be demonstrated that accommodating the individual employees sharing the characteristics of the employee would impose undue hardship upon the employer. This has not been established.

[243] FSD 9, which is incorporated into the collective agreement, actually provides for the accommodation of employees who share the same characteristics as the grievor, which means someone who has a family and has to undergo a medical assessment to be posted and whose dependants also have to be assessed. The situation could simply have been referred to an independent medical assessor, as set out in FSD 9.3.4 and 9.3.5. As this is clearly set out in the FSDs and incorporated into the collective agreement and obviously contemplated as an option, it can hardly be suggested that it is imposing an undue hardship on the employer. I neither heard nor saw any evidence of why an independent healthcare professional could not have been retained to determine the issue.

[244] The employer also argues that it did not have sufficient information to accommodate the child to go to Nairobi. Without being presented with any identified limitations, it did not have any information to consider an accommodation. According to the employer, no one (including the grievor and Dr. Zucker) provided it with such information.

[245] With this argument, the employer seemingly attempts to put the onus on the grievor for its own responsibility to assess the issue of accommodation. In evaluating undue hardship, the Supreme Court of Canada has said that it may be useful to consider the procedure adopted to assess the issue of accommodation, the substantive content of either a more accommodating standard or the employer's reasons for not offering any such standard (see *Meiorin* at para. 66). There is certainly no question that the grievor was an active participant in the medical evaluation process and provided

the information requested by the employer. If the employer was of the view that it required more information to consider the issue of accommodation it has not explained why it did not further engage with the grievor or, again, sought the opinion of an independent health care professional.

[246] Finally, the employer submits that overruling HC's assessment would have created significant health and safety risks for the child. There was no requirement on the employer to overrule HC's assessment. Rather, the requirement was to ensure that it fully considered the issue of accommodation in making its decision concerning the assignment of an employee, as provided for in FSD 9.3.5. The employer has not established that it considered the issue of accommodation beyond HC's assessment, let alone that doing so would have resulted in undue hardship.

[247] As the employer has not established the third part of the *Meiorin* test, it has failed to establish a BFOR, and as such, it has not established a defence to the *prima facie* case of discrimination.

[248] As such, I find that the employer discriminated against the grievor based on a combination of the protected characteristics of family status and disability.

E. Remedy

[249] As remedy, the grievor requested the following:

- a declaration that the employer breached the collective agreement;
- compensation for loss of salary for the difference between the FS-04 acting position that he would have received had he gone to Nairobi and the FS-03 salary that he earned by staying in Canada for the period from August 2021 through August 2022 and then continuing with his posting to Abu Dhabi, which was also at the FS-03 level;
- compensation for the loss of the post hardship allowance, based on the following:
    - the difference between Nairobi and Abu Dhabi, the former being rated at a hardship level four and the latter only at level two, and
    - the post differential bonus of 50%, given that the grievor had been posted to Myanmar and that had he been posted to Nairobi, the time between the postings would have been less than the 42 months set out in FSD 58 and would have increased the post differential allowance;
- the other benefits as set out in the FSDs, which arise from postings abroad;

- damages in the amount of $12 000 under s. 53(2)(e) of the *CHRA* for pain and suffering; and
- damages in the amount of $5000 under s. 53(3) of the *CHRA* for wilful and reckless behaviour.

1. Loss of income, the post allowance, and other FSD benefits

[250] The basis upon which these losses were claimed is that the grievor should be placed in the position that he would have been in but for the discrimination.

[251] The difficulty is that the evidence before me, while it discloses that discrimination did take place, does not satisfy me that the child would have been cleared to go to Nairobi. As set out earlier in these reasons, while Dr. Zucker believed that the child could travel, I neither heard nor saw any evidence that Dr. Zucker had any knowledge of the health or medical situation as it existed in Nairobi or Kenya or of the state of the healthcare facilities.

[252] As I stated, I did not hear from any healthcare professional; nor did I see the entirety of the medical records of the child, including but not limited to clinical notes and records, and any test results. I also did not hear from any of the HC healthcare professionals, who would have had a hand in assessing and making the recommendation about the child.

[253] Had such evidence been brought forward, or had expert evidence been adduced to assist the Board in deciding in this respect, perhaps a determination could have been reached as to whether the recommendation of the HC team was appropriate; however, without that information, it certainly was not a foregone conclusion that the child would have been cleared medically to travel. At the same time, I cannot discount the possibility that the child may have been medically cleared to travel.

[254] In the end, had the proper steps been taken, a clearer picture would have emerged as to the health and risk of the travel to the child. While that did not happen, it was open to the parties to present more fulsome evidence to the Board, which would have given the Board a more accurate account of the child's health situation in the context of travelling to and living in Nairobi in the period in issue. As none was forthcoming, both sides share in the responsibility.

[255] As such, I find that an appropriate award is to compensate the grievor for half (50%) of the loss of salary between his FS-03 and the acting FS-04 position for the period of the Nairobi posting. There appears to be some confusion between the parties as to the length of what the posting was to be. According to the Posting Health Assessment Form, filed as a part of the joint book of documents, the duration was shown as two years.

[256] The grievor is therefore entitled to be paid half (50%) the difference between his FS-03 and the acting FS-04 salary he would have earned for the two years of the Nairobi posting. As the grievor would have received a salary increase in his second year of posting in Nairobi, the calculation shall take into account that increase as well.

[257] With respect to the post allowance, FSD 58 provides that it is an allowance "…in recognition of undesirable conditions existing at certain posts". The grievor did not go and did not endure these undesirable conditions, nor did his family. As that hardship was not endured by him or his family, I am not prepared to make an order that he receive it. Similarly, I find that the grievor's claim for compensation under other FSDs is not justified. While the grievor referenced FSDs 55, 56 and 56.11, there was no explanation provided as to their applicability or his related entitlement to compensation.

2. Damages under the *CHRA*

[258] The evidence disclosed that the grievor was discriminated against due to family status and disability. The purpose of damages for pain and suffering under s. 53(2)(e) of the *CHRA* includes "…providing a remedy to vindicate a claimant's dignity and personal autonomy and to recognize the humiliating and degrading nature of discrimination practices" (*Jane Doe v. Canada (Attorney General)*, 2018 FCA 183 at para. 28). In deciding the damages to award for pain and suffering, it is useful to evaluate the objective seriousness of the conduct and its effect on the grievor (see *Christoforou v. John Grant Haulage Ltd.*, 2021 CHRT 15 at para. 105).

[259] In this respect, the grievor suggested that in part, his chances for promotion have been affected and that his career development has been slowed. I have only the grievor's surmising that this will be the case. There is actually no evidence of this; it is speculation on his part. While the grievor was posted in 2022 to Abu Dhabi, and while it was a posting only at the FS-03 level as opposed to the FS-04 level, I was not

provided any evidence of what other postings were available during that cycle and what ones he applied for.

[260] The grievor and his family did have to reorganize themselves; however, this is again part of the process with FSOs and foreign postings. There is considerable upheaval.

[261] It is difficult to assess an amount for pain and suffering, as it is a very subjective element. In *Slivinski v. Treasury Board (Statistics Canada)*, 2021 FPSLREB 35, I awarded the grievor in that matter $15 000 for damages under s. 53(2)(e) of the *CHRA*. A review of that decision discloses a terribly toxic work relationship that resulted in the grievor being on sick leave and having been given a sham performance-expectations letter that I determined was done by the grievor's superiors to undermine, discredit, punish, and get back at the grievor. The situation in this case is clearly not at that level; however, nor is it insignificant.

[262] The grievor's frustration, anger, disappointment, and hurt were clear in the emails that he sent at the time of the determination by GAC that the child was not medically cleared to travel. Similarly, the grievor testified about how upset the discrimination made him feel, especially in terms of how the employer perceived the child

[263] I also heard about the application process. There is clearly a significant amount of effort expended by FSOs in planning and applying for the positions. I have no doubt that not being assigned to Nairobi, after all the work that he did, was a key factor in him choosing not to go through the process again during the third round, given the understanding that during the first round, he might have applied to up to eight potential postings. This would clearly have contributed to the frustration and disappointment as well as to seeing the process as potentially being tainted and biased against him.

[264] The grievor submitted *Idealogic* as a comparable case, where the Ontario Superior Court of Justice ordered the payment of $15 000 to a plaintiff for hurt feelings, loss of dignity and self-respect when she was terminated because she wished to work from home due to her husband's disability. At the other end, the employer submits *Tate*, where the British Columbia Human Rights Tribunal awarded $2500 for injury to dignity to an individual it determined was discriminated against based on

age. More recently, other comparable decisions from the Canadian Human Rights Tribunal where discrimination based on family status resulted in an award for pain and suffering, include *Lock et al. v. Peters First Nation*, 2023 CHRT 55 ($12 500), *Ka-Nowpasikow v. Poundmaker Cree Nation*, 2023 CHRT 38 ($10 000) and *O'Bomsawin v. Abenakis of Odanak Council*, 2017 CHRT 4 ($10 000).

[265] In this case, the conduct was less serious than in *Idealogic* where the individual lost their employment. Compared to the significant emotional pain, stress, shame, anxiety and sadness in *Lock*, the effect on the grievor was also not as extensive, although more significant than the "insulting conduct" in *Tate.* In all the circumstances, I determine that an award in the amount of $10 000 under s. 53(2)(e) of the *CHRA* is appropriate.

[266] The grievor has also requested damages in the sum of $5000 under s. 53(3) of the *CHRA*. This subsection provides for an order of up to $20 000 if I find that the employer engaged in the discriminatory practice wilfully or recklessly. It is a punitive provision intended to provide a deterrent and discourage those who deliberately discriminate. In *Canada (Attorney General) v. Douglas*, 2021 FCA 89 at para. 8, the Federal Court of Appeal affirmed the approach set out in *Canada (Attorney General) v. Johnstone*, 2013 FC 113 at para. 155, that wilfulness requires intention, while recklessness means behaving in a way that shows carelessness or an indifference to the possible consequences of actions.

[267] In *Slivinski*, I awarded the grievor the sum of $10 000 for wilful and reckless behaviour. In that case, it was clear that the grievor's immediate supervisor and the supervisor above that supervisor created a toxic work environment and concocted stories to discredit and punish the grievor. It was clearly reckless and wilful. In *Ka-Nowpasikow* and *O'Bomsawin*, the Canadian Human Rights Tribunal awarded $5000 and $7500, respectively, for reckless discrimination based on family status.

[268] In this case, the answer to the problem of the different medical advice being brought forward was available to the employer in FSD 9. The employer's position was maintained despite a clear ability to resolve the problem and to resolve it in a relatively simple manner. While it might not have been wilful, the employer was certainly reckless in relying solely on HC to fulfil its duty to accommodate and disregarding its obligation to explore all avenues of accommodation short of undue hardship. While it

certainly was not at the level that I saw in *Slivinski*, it certainly warrants the payment of some compensation, and as such, I award the sum of $5000 as requested by the grievor under s. 53(3) of the *CHRA*.

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

(The Order appears on the next page)

V. Order

[270] The grievance is allowed.

[271] The employer breached clause 43.01 of the collective agreement.

[272] The employer shall pay the grievor half (50%) of the difference between his FS-03 and the acting FS-04 salary he would have earned for the two years of the Nairobi posting. The salary calculation shall take into account the salary increase that the grievor would have received in his second year of the posting.

[273] The employer shall pay the grievor $10 000 in compensation for pain and suffering under s. 53(2)(e) of the *CHRA*.

[274] The employer shall pay the grievor $5000 in special compensation under s. 53(3) of the *CHRA*.

December 19, 2025.

John G. Jaworski,
a panel of the Federal Public Sector
Labour Relations and Employment Board