Federal Court  Cour fédérale

Date: 20241016

Docket: T-20-24

Citation: 2024 FC 1639

Ottawa, Ontario, October 16, 2024

PRESENT: The Honourable Mr. Justice Régimbald

BETWEEN:

AIR CANADA

Applicant

and

ERIK MARCOVECCHIO and THE ATTORNEY GENERAL OF CANADA

Respondents

JUDGMENT AND REASONS

I. Overview

[1] Air Canada [the Applicant] seeks judicial review of a Canadian Human Rights Tribunal [Tribunal] decision, dated December 4, 2023 (*Marcovecchio v Air Canada*, 2023 CHRT 56 [*Marcovecchio*]). This decision concerned two complaints filed by Mr. Erik Marcovecchio [the Respondent] against the Applicant, his former employer, in which he alleged that the Applicant

denied him a position on the basis of a disability, thus engaging in a discriminatory practice contrary to section 7 of the *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA*].

[2] The Tribunal found that the Applicant engaged in a discriminatory practice against the Respondent. In doing so, the Tribunal reached three main conclusions. The first two were related to the discriminatory practice itself: the Respondent's disability was a factor in denying him a position and the Applicant did not establish a legal justification for this denial. The third relates to a question of jurisdiction: although Québec's *Act respecting industrial accidents and occupational diseases*, CQLR c A-3.001 [*ARIAOD*] grants the Commission des normes, de l'équité, de la santé et de la sécurité du travail [CNESST] and the Tribunal administratif du travail [TAT] authority over work-related accommodation issues, the matter remains subject to the *CHRA* and the Tribunal's jurisdiction (*Marcovecchio* at para 92).

[3] For the reasons that follow, the Tribunal's decision is reasonable and the application for judicial review is dismissed. The decision under review, as a whole, is transparent, intelligible, and justified (*Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras 59–60 [*Mason*]; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 15 [*Vavilov*]). The Tribunal carefully considered the evidence before it, rendering a decision "based on an internally coherent and rational chain of analysis [that was] justified in relation to the facts and law that [constrained it]" (*Vavilov* at para 85).

II. Background Facts

[4] The basic facts are not contested and form part of an Agreed Statement of Facts.

[5] The Respondent is a former employee of Air Canada in Montréal, Québec. He was hired as a call centre agent in October 2011. In January 2016, he was injured at work. A loud screeching noise came through his headphones while he was taking a call, causing him pain and leaving his ears with a continuous buzzing, ringing sound. The following day, he submitted a claim with the CNESST. It was refused a month later, and the Respondent appealed the decision to the TAT.

[6] By October 2016, the parties, along with the Respondent's union, agreed that he could not return to his position at the call centre, and that they would be bound by the conclusions rendered by an audiologist who would assess him. The Respondent accordingly withdrew his TAT appeal.

[7] In January 2018, the audiologist concluded that the Respondent possessed certain functional limitations, and could only be employed in a position in which the following conditions were met:

- No use of a headset;
- Minimal telephone use and only on an occasional basis;
- A workplace as quiet as possible or with a constant background noise that does not generally require the wearing of hearing protection. If this constant background noise (e.g., background noise in the airport or in an airplane) becomes too loud and the [Respondent] cannot tolerate it, [the Respondent] can then opt for the use of musician filtered earplugs to enable him to communicate verbally while reducing the intensity of the ambient noise.

[8] Following the audiologist's conclusions, the parties entered into a final Memorandum of Agreement [MoA] in February 2018. This MoA stated that the Respondent's "functional

limitations [would] be the subject of a permanent accommodation," and that the Applicant could accommodate him by providing suitable employment in regard to his injury. The suitable employment agreed upon was that of a full-time service agent at the Montréal airport, a position that he would enter in March 2018.

[9] Pursuant to the MoA, the Respondent worked as a service agent, which included several tasks, some of them being located on the tarmac (*Marcovecchio* at para 13). Nearly a year into his accommodated position, the Respondent suffered a second work injury when he hit his head on an airplane doorframe in February 2019. He was sent to the hospital and diagnosed with a mild traumatic brain injury. The Respondent's CNESST claim was accepted, and he was authorized to return for the following day of work.

[10] The Respondent consulted two other physicians over the following month, feeling that he was still suffering from the injury. The second physician administered injections and referred him for further treatment. The Respondent submitted a second CNESST claim for relapse or aggravation of his injury. This claim was denied in April 2019, and he immediately requested a review of the decision. The CNESST issued its review decision in September 2019, denying the claim and affirming its initial finding. A day later, the Respondent appealed this decision to the TAT. He withdrew that appeal in June 2020.

[11] As these CNESST and TAT processes were following their normal courses, the Respondent applied for a new position with Air Canada. This is the position at issue in this case.

[12] In April 2019, Air Canada was establishing a team to implement a new reservation and control departure system, called the Passenger Service System [PSS], and was recruiting employees for a "security operations specialist position" to assist with the day-to-day security issues that would arise with Air Canada's business units and stakeholders (*Marcovecchio* at para 17). The Respondent heard of a new position in the PSS through his friend Mr. Andrew Hui, who was working on that project. The job description available to the Respondent did not mention the use of a telephone or headset, but described a corporate-style desk position with a higher salary than what he was earning at the time (*Marcovecchio* at para 18). On Mr. Hui's suggestion, the Respondent applied for the new position, making his way through two rounds of interviews (*Marcovecchio* at paras 18–19). Mr. Hui, who testified before the Tribunal that he knew of the Respondent's disability (*Marcovecchio* at para 64), was among the interviewers (*Marcovecchio* at para 18).

[13] On April 29, 2019, a hiring-committee member called and congratulated the Respondent, informing him that he had been offered the new position of PSS Security Operations Specialist.

[14] Within the next two days, Mr. Julien Paradis, Air Canada's disability manager, learned through another employee that the Respondent had been selected for the PSS position. Mr. Paradis testified before the Tribunal that it seemed evident to him that the position would require the use of a telephone, and that it would be an environment similar to the call centre in which the Respondent could no longer work. He understood that the environment would be replete with phones and headsets, in what could be a potentially chaotic environment for a disabled employee (*Marcovecchio* at para 24).

[15] Mr. Paradis acknowledged before the Tribunal that he determined, on his own personal assessment of the Respondent's functional limitations, that the Respondent could not operate in that position. However, he admitted "that he did not assess what the sound level would be at the PSS workplace, how operations were conducted, or whether and to what extent any telephone calling would occur [and that] no decibel readings of the workplace were sought" (*Marcovecchio* at para 58). Instead, relying on the assumptions that he had formed about the PSS position, Mr. Paradis decided that "[h]e had to protect Mr. Marcovecchio from himself and make sure the permanent limitations were respected" (*Marcovecchio* at para 24). He immediately contacted human resources to tell them about the restrictions, and was told that the PSS project was looking to hire people expeditiously. Mr. Paradis therefore decided to call the Respondent and tell him that his candidacy for the PSS position would no longer be pursued, citing its incompatibility with the limitations set out in the MoA (*Marcovecchio* at para 25).

[16] Upon receiving the call from Mr. Paradis, the Respondent was confused. He did not understand how the Applicant could make such a decision without first inquiring as to whether he could actually operate in that position, with or without accommodations (*Marcovecchio* at para 21).

[17] Shortly after this first call, Mr. Paradis called the Respondent again, this time joined by Ms. Veronique Gauthier, a human resources manager for Air Canada. They reiterated that he could not obtain the PSS position due to his functional limitations, citing a longstanding company practice prohibiting employees from being re-assigned while they have a pending claim before the CNESST. The Respondent asked why Air Canada could not consider accommodating

him, for instance, by assigning him to a closed office. In response, the managers told him that such offices were reserved for management (*Marcovecchio* at para 22). They then sent the Respondent an email confirming that further to their conversation, his candidacy would no longer be pursued.

[18] The Respondent, in the meantime, had not returned to his sales agent position. He worked until May 2019 as an international transfer transit agent, when his physician started filing medical reports related to his head injury. These reports stated that he could eventually return to work with certain temporary restrictions, namely office work without any heavy lifting, repeated bends, or prolonged standing. The Applicant was unable to find any position for him that met these restrictions until November 13, 2019, when he was temporarily assigned the position of check-in agent (*Marcovecchio* at para 26).

[19] In June 2020, like a sizeable portion of those working in the Applicant's airport operations, the Respondent was laid off due to the pandemic. The PSS project maintained its operations through the pandemic, with its employees working from home (*Marcovecchio* at para 31).

III. Decision Under Review

[20] On judicial review, the Applicant does not contest the Tribunal's findings regarding *prima facie* discrimination. Applying the test set out by the Supreme Court of Canada [SCC] in *Moore v British Columbia (Education)*, 2012 SCC 61 at paragraph 33 [*Moore*], the Tribunal held that: (1) the Respondent had a physical impairment resulting in a permanent functional limitation

when he applied for the PSS position, a characteristic protected from discrimination under the *CHRA* (*Marcovecchio* at para 48); (2) the rescission of the PSS position constituted an adverse impact for him (*Marcovecchio* at para 50); and (3) the position was rescinded due to his permanent limitations – the protected characteristic was a factor in the adverse impact (*Marcovecchio* at para 50). The Tribunal therefore concluded that the Respondent had established the three elements of *prima facie* discrimination (*Marcovecchio* at para 53).

[21] The *prima facie* case of discrimination established, the Tribunal held that the Applicant was not able to justify that the decision was based on a *bona fide* occupational requirement, including that accommodating the Respondent would impose undue hardship.

[22] The Tribunal first concluded that the Applicant failed to establish a *bona fide* occupational requirement, as required under the standard set out in *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 at paras 54, 64–65 [*Meiorin*] (*Marcovecchio* at paras 56–74). At the outset, according to the testimony offered by Mr. Paradis, management did not conduct any individualized assessment to confirm whether the Respondent needed to be accommodated, nor consider accommodating the Respondent for the position (*Marcovecchio* at para 58). Mr. Paradis simply assumed that the PSS position was beyond the Respondent's capacities, and hastily acted upon that assumption. Based on his own visits to the workplace during interviews, the Respondent believed that he could have occupied the position without accommodation. Further testimony from people working at the PSS project indicated that only some employees used headsets, that telephone calls were fairly rare, and that

the environment was less “customer-facing” and more technical in nature (*Marcovecchio* at paras 59–61).

[23] In light of this evidence, the Tribunal concluded that the PSS work environment was unlike the call centre where the Respondent worked before (*Marcovecchio* at para 62). The Respondent would have been subject to limited telephone use and would not have needed a headset. As for the background noise, it would have been limited, and would certainly have not exceeded the noise he encountered in his accommodated sales agent position at the airport and on the tarmac (*Marcovecchio* at para 63).

[24] The Tribunal also dismissed the Applicant’s jurisdictional argument and concluded that the matter was subject to the *CHRA* (*Marcovecchio* at para 92). The Tribunal determined that the Respondent’s human rights claims were not linked to his prior CNESST claims, and the items related to his workplace hearing injury had been resolved to the satisfaction of all parties involved, as set forth in the MoA (*Marcovecchio* at para 83). In light of the evidence before it, the Tribunal thus concluded that the Respondent’s PSS application was no attempt to revisit the CNESST and TAT processes related to the hearing injury. That matter was resolved, and he was only seeking a position with a higher salary and better working conditions when he followed up on Mr. Hui’s suggestion to apply for the PSS position (*Marcovecchio* at para 84).

[25] In the end, the Tribunal concluded that the Applicant had not rebutted the *prima facie* case of discrimination, and that it had therefore engaged in a discriminatory practice against the Respondent (*Marcovecchio* at para 93).

IV. Issues

[26] The sole question is whether the Tribunal's decision was reasonable. The Applicant raises three issues in this respect:

a) Whether the Tribunal disregarded the "permanent" MoA;

b) Whether the Tribunal created a "unilateral" duty to accommodate;

c) Whether the Tribunal "overstepped" its jurisdiction by intervening while there was an active CNESST claim.

V. Standard of Review

[27] The parties agree that the standard of reasonableness applies in this application for judicial review. The decisions of tribunals under human rights statutes tend to attract considerable deference from reviewing courts, because the legislatures have entrusted such tribunals with the task of evaluating evidence and drawing reasonable conclusions from the facts. Courts accordingly "tread lightly in these areas" (*Stewart v Elk Valley Coal Corp*, 2017 SCC 30 at para 20 [*Stewart*]).

[28] It is the Applicant that bears the onus of demonstrating that the Tribunal's decision was unreasonable. For the reviewing court to intervene, the challenging party must satisfy the reviewing Court that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency," that the alleged shortcomings or flaws "[are] more than merely superficial or peripheral to the merits of the decision" (*Vavilov* at para 100), and that the fundamental flaws cause the reviewing

Court to lose confidence in the outcome reached (*Mason* at paras 66, 69; *Vavilov* at paras 106, 122).

[29] The SCC has provided extensive guidance on how to conduct a reasonableness review of an administrative decision. *Mason*, relying on the precedent set in *Vavilov*, instructs the reviewing court to first look to the reasons of the administrative decision maker in order to assess the justification for the decision, reiterating the need to "develop and strengthen a culture of justification" (*Mason* at paras 8, 58–60, 63; *Vavilov* at paras 14, 81, 84, 86). This is a "reasons first" methodology, one that places the decision maker's reasons as the focal point through which the reasonableness review takes place (*Mason* at paras 8, 60–61; *Vavilov* at para 84).

[30] *Mason* further reiterates how a reviewing court may determine that a decision is unreasonable. The Court must determine whether, by examining the reasoning followed and the result obtained, the decision is based on an internally coherent and rational chain of analysis that can be justified in light of the legal and factual constraints to which the decision maker is subject (*Mason* at paras 8, 58–61, 64; *Vavilov* at paras 12, 15, 24, 81, 84–86). The decision will be unreasonable if it lacks internal logic or if the reviewing court is unable to follow the decision maker's reasoning without "encountering any fatal flaws in its overarching logic" (*Mason* at para 65, citing *Vavilov* at para 102).

[31] The SCC identified a series of factual and legal constraints that the decision maker must examine and justify, depending on the applicable context, in order for the decision to be sufficiently justified within the meaning of *Vavilov*. The burden of justification varies, but the

decision maker must be “aware” of the essential elements, “sensitive to the issue before [them]” and “meaningfully grapple with key issues or central arguments raised by the parties” (*Mason* at paras 74, 97; *Vavilov* at para 128). The decision maker must consider the main arguments and evidence of the parties and give reasons as to why particular evidentiary elements and arguments were accepted or rejected in the decision-making process (*Mason* at paras 73–74; *Vavilov* at paras 126–128).

[32] Accordingly, on judicial review under the standard of reasonableness, the reviewing Court must assess the reasons for the decision “holistically and contextually” in light of the history and context of the proceedings, the evidence adduced, and the main arguments of the parties (*Mason* at para 61; *Vavilov* at paras 91, 94, 97). The Court’s role is not to reweigh the evidence presented to the decision maker, to question their exercise of discretion, or to make its own interpretation of the law. It is up to the decision maker to fulfil these roles. As long as the decision maker’s interpretation of the law is reasonable and the reasons for their decision are justifiable, coherent, and intelligible, the Court must show deference (*Vavilov* at paras 75, 83, 85–86, 115–124).

[33] Finally, in this case, it was up to the Tribunal, and not the Federal Court, to adjudicate the merits of the human rights complaints at issue. The Tribunal, and not the Court, was the merit-decider (*Safe Food Matters Inc v Canada (Attorney General)*, 2022 FCA 19 at para 37 [*Safe Food Matters*]).

VI. Analysis

[34] The Applicant does not contest the finding that the Respondent has established a *prima facie* case of discrimination under the *CHRA* (Respondent's Memorandum at paras 23, 27, 31). The Respondent possessed a protected characteristic under subsection 3(1) of the *CHRA* (disability), he experienced an adverse impact with respect to his employment (the denial of an employment opportunity), and his protected characteristic was a factor in this adverse impact (disability was a factor in the decision to deny him an employment opportunity) (*Moore* at para 33; *Stewart* at paras 24, 69).

[35] On judicial review, the Applicant makes three substantive arguments. First, the Applicant submits that the Tribunal ignored or disregarded a "permanent" MoA between itself, the Respondent, and his union, which "permanently resolved" his accommodation needs. Second, the Applicant argues that in disregarding the MoA, the decision created a "unilateral duty to accommodate," a conclusion that unreasonably bound it to a one-sided agreement that the Respondent could simply ignore. Third, the Applicant argues that the Tribunal unreasonably seized jurisdiction in an accommodation process. The Applicant contends that the ongoing legal process addressing the Respondent's accommodation claims in Québec under the CNESST and TAT precluded the Tribunal from exercising its authority in the present instance, since the Québec authorities had exclusive jurisdiction on the issue.

A. *The Tribunal Did Not Fail to Consider the Permanent MoA*

[36] The Applicant argues that the Tribunal failed to consider the MoA, which established that the PSS position was beyond the Respondent's functional limitations. According to the Applicant, the PSS position required specific occupational functions that the MoA demonstrated were not within the Respondent's capacities, due to his disability.

[37] The Applicant submits that the Tribunal made a factual error in determining that the PSS position did not require the use of a headset, demanded only occasional telephone use and was situated in a relatively quiet environment, in putting too much reliance on the "incomplete evidence" provided by the Respondent, who only attended the workplace for about twenty minutes. In oral argument, the Applicant submitted that the Tribunal should have instead preferred and adduced greater weight on the testimony provided by Mr. Paradis, Air Canada's disability manager and the person tasked with protecting disabled employees, who testified that the PSS position was beyond the Respondent's capacity. Between a disabled employee and a corporate disability manager, the Tribunal was unreasonable in relying on the former instead of the latter.

[38] By ignoring the MoA, the Tribunal is alleged to have disregarded a part of the general factual matrix constraining its decision and fundamentally misapprehended the evidence before it, rendering the Tribunal's decision unreasonable (*Vavilov* at paras 83, 125–128).

[39] The Applicant, despite arguing the contrary, is essentially asking this Court to revisit the Tribunal's factual findings, reweighing and reassessing the evidence before it. The Tribunal was entitled, on the basis of the evidence adduced, to find that the PSS position did not engage the Respondent's disability and that, in any event, the Applicant failed to properly assess the occupational requirements and to examine potential accommodations (*Marcovecchio* at paras 56–74, 91).

[40] Absent exceptional circumstances, which do not arise here, the Court will not interfere with the factual findings of an administrative Tribunal upon judicial review (*Vavilov* at para 125). The Court's role is not to reweigh and reassess the evidence presented before the Tribunal. Parliament has entrusted the Tribunal, and not the Court, as the merit decider (*Safe Food Matters* at para 37).

[41] Of particular importance in this case, the Applicant did not provide a complete record to the Court on judicial review to allow the Court to determine if the Tribunal did fail to consider, and weigh, contradictory evidence presented before it.

[42] The Court does not have the benefit of a complete certified tribunal record, i.e., a certified copy of all of the materials that were in the possession of the Tribunal when it rendered the decision under review. While the Applicant did seek the full record before the Tribunal pursuant to Rule 317 of the *Federal Court Rules*, SOR/98-106, the Registrar of the Tribunal took the position that the Applicant was already in possession of all of the materials and provided a comprehensive list of the materials, inviting the Applicant to request any materials that were not

in its possession. That comprehensive list included the recordings of the Tribunal hearing (Applicant's Record at 376–377). If the Applicant did not in fact possess these recordings, it could have requested them from the Tribunal, and have filed portions of any transcript of oral evidence or the recordings in its application record (see *Canadian Copyright Licensing Agency (Access Copyright) v Alberta*, 2015 FCA 268 at para 18 [*Canadian Copyright Licensing Agency*]).

[43] In the circumstances, and without the benefit of the entire oral evidence presented by the witnesses before the Tribunal, it is impossible for this Court to assess whether the Tribunal unreasonably preferred the Respondent's evidence over that of the Applicant.

[44] The Court can hardly be asked to find unreasonable factual assessments in a decision maker's findings without knowing what exactly was presented before them, especially when the challenged factual findings concern that decision maker's assessments of testimonial evidence: "[i]f the reviewing court does not have evidence of what the administrative decision maker has relied upon, the reviewing court may not be able to detect reviewable error" (*Canadian Copyright Licensing Agency* at para 14).

[45] Taking an accordingly "reasons first" approach to the decision under review, this Court concludes that the Tribunal did not ignore the MoA and made a reasonable assessment of the testimony before it. The MoA was mentioned throughout the decision, often in direct connection with the PSS position at issue. Its terms were clearly set out (*Marcovecchio* at paras 10–12, 83). It was mentioned as the main reason why the Applicant rescinded the position (*Marcovecchio* at

paras 21, 91). It was part of what established the existence of the Respondent's disability in law (*Marcovecchio* at para 48). The Tribunal even acknowledged that Mr. Paradis conducted his analysis based on the MoA's assessment of the Respondent's functional limitations (*Marcovecchio* at para 73), and that the MoA was indeed a full and final resolution of all items related to his situation (*Marcovecchio* at para 83). The reasons therefore demonstrate that the Tribunal was alert to the MoA and sensitive to its implications on the key issues in this case.

[46] The Tribunal determined that the PSS position did not infringe the terms of the MoA and the Respondent's limitations, finding that the position did not require the use of a headset, demanded only occasional telephone use, and was situated in a relatively quiet environment (*Marcovecchio* at para 62).

[47] In my view, these factual findings must attract the deference of this Court.

[48] The Tribunal's findings in this regard relied on the Applicant's witness oral evidence. The Tribunal member noted that on Mr. Paradis' own testimony, "he did not assess what the sound level would be at the PSS workplace, how operations were conducted, or whether and to what extent any telephone calling would occur. No decibel readings of the workplace were sought" (*Marcovecchio* at para 58). Though Mr. Paradis alleged his fellow HR manager agreed with his analysis of the PSS position, "it is not clear whether she had a better, more detailed understanding of the PSS's operations. She did not testify" (*Marcovecchio* at para 58). Absent a full transcript of the hearing, it is impossible for the Court to determine whether the Tribunal unreasonably mischaracterized that evidence.

[49] By contrast, the Tribunal noted that the Respondent formed his opinion on the PSS position through his own personal visits to the workplace (*Marcovecchio* at para 59). Even so, the Tribunal did not make its factual findings on the PSS position and requirements on the sole basis of the Respondent's testimony, in contradiction to that of Mr. Paradis. The Tribunal also cited the testimony of others who worked in the PSS environment, all of whom concurred that it was not akin to that of a call centre, that the use of headsets was limited, and that the position demanded only occasional telephone use (*Marcovecchio* at paras 59–62). Again, absent a full transcript of the hearing, it is impossible for the Court to determine whether the Tribunal was unreasonable in preferring those testimonies over that of Mr. Paradis.

[50] The Tribunal's reasons demonstrate an administrative decision maker doing what it is required to do: make intelligible, transparent, and justified findings of fact in light of the evidence and submissions presented to it (*Vavilov* at paras 105, 125–128). It was perfectly entitled to rely on and make conclusions of fact from the evidence of witnesses who had seen the PSS environment (*Marcovecchio* at paras 59–62), rather than the testimony of Mr. Paradis who, as found by the Tribunal, acknowledged that he made no actual examination of the environment or what the position would entail for someone with the Respondent's functional limitations (*Marcovecchio* at paras 24, 58).

[51] In the end, the Applicant has argued both that the PSS position was beyond the Respondent's functional limitations as set out in the MoA, and that the Tribunal ignored or disregarded the MoA which "permanently resolved" the Respondent's accommodation needs. In my view, the Tribunal properly reviewed the evidence and analyzed the arguments of the parties

in rejecting the notion that the MoA presented functional limitations that encroached on the Respondent's ability to discharge the duties for the PSS position, or that the Applicant was able to demonstrate a *bona fide* occupational requirement.

[52] Moreover, the Applicant mischaracterized the second issue as being one of "accommodation." The PSS position for which the Respondent was applying was not to "accommodate" him for any injury sustained at work. That issue had already been dealt with completely under the MoA (and for which another position had been provided). The PSS position was rather an attempt by the Respondent to find another position that was more beneficial to him, and that in his view did not have any impact on his disability nor require any accommodation.

B. *The Decision Does Not Create a Unilateral Duty to Accommodate*

[53] The Applicant argues that the decision under review was unreasonable because it created a "unilateral duty" to accommodate.

[54] The Applicant relies on *Central Okanagan School District No. 23 v Renaud*, [1992] 2 SCR 970 [*Renaud*] at 994, submitting that employees with disabilities have a duty to facilitate the search for accommodation and that this search is a multi-party endeavour.

[55] The Applicant further argues that employers cannot have an obligation to consider accommodation for employees if the employees themselves do not feel that they must be accommodated (Applicant's Memorandum at para 47). It was therefore incumbent on the

Respondent to disclose his disabilities to his employer during the interview and, moreover, consult it on his potential change of position. As put by the Applicant in its written submissions: "a position change cannot be done unilaterally and covertly, simply because the employee does not subjectively *believe* the position they apply for, a brand-new role in a completely different working environment, requires accommodation" (original emphasis) (Applicant's Memorandum at para 49). The Applicant accordingly submits that it was unreasonable for the Tribunal to "extinguish" the Respondent's accommodation-related obligations while imposing them on the employer (Applicant's Memorandum at para 52).

[56] Addressing the Applicant's arguments require the Court to review the reasonableness of the Tribunal's conclusions on the "duty to accommodate." In doing so, it is useful to clarify the scope and content of the relevant applicable legal principles. Three issues are relevant in this case: (1) the moment at which the duty to accommodate is triggered; (2) who must be involved in the search for accommodation; and (3) the information that an employee seeking an accommodation must disclose to an employer.

(1) The moment when the duty to accommodate is triggered

[57] "Accommodation" is an element required in some circumstances to avoid discrimination; it is a concept that exists under all of Canada's human rights statutes prohibiting discrimination (*British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, 1999 CanLII 646 (SCC), [1999] 3 SCR 868 at para 22 [*Grismer*]; *Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v Caron*, 2018 SCC at paras 22, 29–30 3 [*Caron*]). The duty to accommodate does not arise unless there are barriers adversely

differentiating an employee from another, on the basis of a prohibited ground of discrimination such as disability. The duty to accommodate is inextricably tied to the fact of *prima facie* discrimination itself (*Canada (Attorney General) v Cruden*, 2014 FCA 131 at para 21).

[58] The search for accommodation begins once those involved in the search have at their attention "the facts relating to discrimination" (*Renaud* at 994). This search therefore first requires an employee to face adverse differentiation on the basis of a prohibited ground of discrimination. To the extent that no differentiation exists, and until the issue is raised by an individual, there can be no "discrimination" and therefore, no accommodation is required.

[59] Once differentiation is noted, there is no separate or freestanding duty to accommodate under the *CHRA* when the employer establishes a *bona fide* occupational requirement (*Cruden* at para 16). A *bona fide* occupational requirement is a defence allowing employers to distinguish, exclude, or prefer a potential employee over another according to the aptitudes required for a position (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para 38 [*Bombardier*]). It permits employers to maintain certain standards, purposes, and goals as long as the choice to maintain them is made in good faith, or "legitimately" (*Grismer* at para 21; see also *Caron* at para 27). As put by the SCC in *Grismer* at paragraph 21 "if the policy or practice is reasonably necessary to an appropriate purpose or goal, and accommodation short of undue hardship has been incorporated into the standard, the fact that the standard excludes some classes of people does not amount to discrimination." Discrimination can only arise when an employer fails to demonstrate a *bona fide* occupational requirement justifying exclusion.

[60] Accordingly, it follows that the mere existence of a disabled employee does not trigger the search for accommodation. No additional search for accommodation is required for an employee who does not face adverse differentiation on the basis of disability, or faces such differentiation subject to a *bona fide* occupational requirement.

(2) Who must be involved in the search for accommodation

[61] Once a duty to accommodate has been triggered, "[t]he search for accommodation is a multi-party inquiry […] [the employer, employee, and the union have a duty] to assist in securing an appropriate accommodation" (*Renaud* at 994; see also *Pilarski v Canada*, 2024 FCA 60 at para 8; *Canada (Attorney General) v Duval*, 2019 FCA 290 at para 41; *Seaspan Marine Corporation v Smolik*, 2023 FC 856 at para 67). The roles of each party in the search may, of course, vary. For instance, while a disabled employee is no doubt in the best position to understand their needs, the employer may be "in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business" (*Renaud* at 994). In turn, the employee has a duty to facilitate the implementation of a proposed accommodation if it "is reasonable and would, if implemented, fulfil the duty to accommodate" (*Renaud* at 994–995).

[62] An employer's duty is accordingly discharged when a reasonable proposal is turned down, or when the employee's failure to take reasonable steps to facilitate the accommodation causes the proposal to break down (*Renaud* at 995). It is a multi-lateral, reciprocal process.

(3) The information that an employee seeking an accommodation must disclose to an employer

[63] An employee must "[bring] to the attention of the employer the facts relating to discrimination" (*Renaud* at 994). This principle has been detailed in several decisions of human rights tribunals, which have repeatedly found that "an employee seeking accommodation for a disability is under a duty to disclose sufficient information to [their] employer to enable it to fulfill its duty to accommodate" (emphasis added) (see for example *Matheson v Okanagan Similkameen School District No. 53*, 2009 BCHRT 112 at para 11; *Paneswar v Future Shop and others, (No 2)*, 2013 BCHRT 22 at para 33; *Hopps v Shadow Lines Transportation Group*, 2020 CHRT 14 at para 73; *Sampat v Air Canada*, 2021 CHRT at para 90).

[64] From this baseline principle, the question then becomes what information may be deemed sufficient in the circumstances – what "facts relating to a limitation" must be brought to the employer's attention, and when. This is a fact-specific determination. It will no doubt depend on the employee's experience of their disability, the work environment in which they are operating, the job description, and the specific ways in which the disability can be accommodated. The accommodation process, after all, is of an individualized nature: "[t]he scope of the duty to accommodate varies according to the characteristics of each enterprise, the specific needs of each employee, and the specific circumstances in which the decision is to be made" (*McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4 at para 22 [*MUHC*]).

[65] That said, the need for a fact-specific analysis does not entail the full disclosure of every fact. Disabled employees are under no obligation to provide complete disclosure of medical records beyond what relates to the limitations they are facing at work and what measures would

be sufficient to accommodate them. For example, a person in a wheelchair need not disclose their reduced mobility during a telephone interview for a regular "desk job," a position where standing is (presumably) not an occupational requirement and no accommodation is needed. At a minimum, the employer must have enough information to understand the extent of the employee's disability as it relates to their duties and environment. A passage from the Human Rights Tribunal of Ontario is instructive:

> In order to trigger the duty to accommodate, it is sufficient that an employer be informed of the employee's disability-related needs and effects of the condition and how those needs and effects interact with the workplace duties and environment. As such, an employee does not necessarily have to disclose a detailed diagnosis of the disability in order for an employer to respond to a request for accommodation. […]
>
> (*Simpson v Commissionaires (Great Lakes)*, 2009 HRTO 1362 at para 35; *Baildon (Rural Municipality) v Gronvold*, 2024 SKCA 73 at para 116).

[66] Accordingly, where an employer cannot be aware of any disability-related needs and where the employee does not request an accommodation, the duty to accommodate will not be triggered (*Gardiner v Ministry of Attorney General*, 2003 BCHRT 41 at para 167).

(4) Application of the legal principles to the facts of this case

[67] At the outset, it is worth noting that the Applicant is correct in affirming that in the context of Canadian anti-discrimination law, there is no such thing as a "unilateral duty" to accommodate. The endeavour is indeed multilateral.

[68] However, contrary to the Applicant's arguments, the Tribunal made no such determination. It found instead that there were no accommodation-related obligations on *either* party at the time when the PSS position was offered to the Respondent, because the "the facts of discrimination" had not yet arisen. The Respondent had not identified any barriers that he thought would hinder him on the basis of disability, and the Applicant was under no obligation to accommodate him at that stage (*Marcovecchio* at para 67). The duty to accommodate was inexistent, not unilateral.

[69] The multilateral duty to accommodate arose out of the Applicant's decision to rescind the PSS job offer, which the Applicant could have justified by establishing a *bona fide* occupational requirement. However, the Tribunal found, relying on the evidence before it, that the Applicant did not demonstrate a *bona fide* occupational requirement. On a balance of probabilities, the Applicant did not establish that the Respondent's limitations as noted in the MoA were engaged and therefore the Respondent could not occupy the position. The Applicant also did not establish that rescinding the PSS job offer was done for a purpose or goal rationally connected to the functions being performed, in the good faith belief that they were necessary for the fulfillment of the purpose or goal, or that the Respondent could not be accommodated without incurring undue hardship (paragraph 15(1)(a) of the *CHRA*; *Meiorin* at para 54; *Bombardier* at para 38).

[70] These findings were based on factual determinations made by the Tribunal in light of the testimonies before it, including that of the Respondent who, having attended the workplace and consulted other employees, did not consider that his disabilities would prevent him from discharging his duties and did not believe that any accommodation was required. During the

interview, no question was raised concerning the workplace environment, nor as to whether the Respondent had any disability that would preclude him from being able to occupy the position.

[71] The evidence also included the testimony of Mr. Paradis, who himself acknowledged having made the decision to rescind the PSS job offer on the basis of the Respondent's functional limitations but without having made any assessment as to how these limitations would interact, or not, with the PSS workplace duties and environment (*Marcovecchio* at paras 24, 58, 73), and made no efforts to accommodate the Respondent if such was the case (*Marcovecchio* at paras 67–74). The Applicant had therefore no basis to deny employment.

[72] The Applicant could not make hasty assumptions about the Respondent's disability, presume he could not discharge his duties, with or without accommodation, and anticipate the hardships of proposed accommodations, based on speculative or unsubstantiated concerns of adverse consequences. The duty to accommodate prohibits employers from simply writing off a disabled employee's ability to perform the tasks and duties which are incumbent upon them, without engaging in any type of analysis to this effect (*Grismer* at paras 32, 42–44). This duty is at the heart of Canadian anti-discrimination law: "[t]he goal of preventing discriminatory barriers is inclusion. It is achieved by preventing the exclusion of individuals from opportunities and amenities that are based not on their actual abilities, but on attributed ones. The essence of discrimination is in the arbitrariness of its negative impact, that is, the arbitrariness of the barriers imposed, whether intentionally or unwittingly" (*MUHC* at para 48).

[73] The Tribunal properly interpreted the relevant legal principles with respect to the duty to accommodate, and then applied the law to the facts of the case (*Marcovecchio* at paras 67–74). It did so based on the evidence and submissions presented to it. The Tribunal did not, as the Applicant alleges, create what would be an unreasonable "unilateral duty" to accommodate. The Tribunal simply concluded, having made findings of fact adverse to the Applicant's case, that Air Canada engaged in a discriminatory practice against its employee when it rescinded the PSS job offer and failed to discharge its burden and establish a *bona fide* occupational requirement, including that it could not offer reasonable accommodation short of undue hardship. Indeed, the Applicant did worse than that: it assumed that the Respondent's disability prevented him from occupying the position, without him even seeking accommodation.

C. *The Tribunal Did Not Overstep Its Jurisdiction*

[74] The Applicant argues that the Tribunal overstepped its jurisdiction by intervening in the midst of an active workplace compensation claim. For greater clarity, the active claim was not the one related to the functional limitations noted in the MoA. The active claim related instead to the second injury sustained by the Respondent, which included a mild traumatic brain injury.

[75] The Applicant makes two arguments about the scope of the *ARIAOD*. First, the CNESST and TAT had exclusive jurisdiction under the *ARIAOD* to deal with issues related to reinstatement, suitable employment, and imposing measures on an employer to do whatever is reasonably possible to accommodate a disabled worker's injury and the circumstances that flow from it (*Caron* at para 51). In supporting this claim, the Applicant relies on *Université McGill c McGill University Non Academic Certified Association (MUNACA)*, 2015 QCCA 1943 [*McGill*]

and *Syndicat des travailleuses et des travailleurs municipaux de la Ville de Gaspé (CSN) c Ville de Gaspé*, 2021 QCCA 1448 [*Gaspé*] for the proposition that other administrative tribunals cannot review CNESST or TAT conclusions on the existence of a workplace injury, the employee's capacity to reintegrate their pre-injury position, the employee's functional limitations, or what constitutes suitable employment for the employee in question (*McGill* at paras 56, 74–78; *Gaspé* at para 47). Second, the Applicant submits that the Tribunal's decision is premature because the CNESST had not concluded its final report. According to the Applicant, if the employee had been found to have permanent functional limitations from the head injury, this could have had an impact on his ability to perform the PSS position. It was therefore impossible for the Applicant to know if the PSS position would have met these potential new functional limitations, in addition to not meeting the previously permanent limitations noted in the MoA (Applicant's Memorandum at paras 60–61).

[76] However, the core issue in this case was whether the Applicant engaged in a discriminatory practice against the Respondent from the *CHRA* perspective. In determining that the Applicant had indeed engaged in such a practice, the Tribunal made a finding of fact that the denial of the PSS position was based in part on the Respondent's permanent functional limitations identified in the MoA (*Marcovecchio* at paras 51–53). The hearing issue, by that time, had already been resolved. No claim relating to the limitations identified in the MoA remained alive within the CNESST process.

[77] Contrary to the Applicant's argument, in making that conclusion, the Tribunal did not overstep its jurisdiction, intrude on the CNESST's jurisdiction and reassess the Respondent's

admissibility to a compensation claim, the evolution of the employee's medical condition, the employee's ability to return to work in their pre-injury position or an accommodated position, and the employee's right to vocational rehabilitation.

[78] The Tribunal did not intervene and change the CNESST's decision, nor did the Respondent's human rights complaints request or require it to do so. Rather, the Tribunal took the MoA, and the CNESST's process affirming its content, at face value. The Tribunal was not evaluating whether the PSS position represented proper accommodation in the circumstances. That was not the question before it. Indeed, the PSS position was not sought by the Respondent as an accommodation measure for his disability noted in the MoA. The two processes were distinct and the accommodation issue as required by the MoA was resolved by the time the Respondent applied for the PSS position (*Marcovecchio* at para 89). The issue was therefore not whether the PSS position was a "suitable employment" under the *ARIAOD* from an accommodation perspective. The issue was rather whether, in light of the recognized disability in the MoA, the Applicant's decision to rescind a job offer was discriminatory under the *CHRA*.

[79] After having considered the evidence and ruled that the Applicant could not justify the rescission of the job offer on the basis of a *bona fide* occupational requirement, the Tribunal concluded that the Applicant had engaged in a discriminatory practice pursuant to the *CHRA* (*Marcovecchio* at paras 51–53). As noted above, a MoA existed as to the Respondent's hearing limitations. That issue, by that time, had already been resolved. No claim related to the limitations at issue remained alive within the CNESST process. Rather, the PSS position was a

new position that the Respondent could apply for and that he could occupy without accommodation. No evidence was presented to the Tribunal demonstrating the contrary.

[80] As for the head injury claim still active before the CNESST, the Tribunal made a finding of fact that this injury was *not* the basis upon which the Applicant denied the PSS position. Indeed, the main basis for rescinding the PSS job offer was that the Respondent could not perform the duties because of the permanent functional limitations identified in the MoA (*Marcovecchio* at para 91). This finding of fact attracts deference, the Tribunal having made it in light of the evidence before it, namely the testimony from Mr. Paradis and the email sent to the Respondent informing him of the Applicant's decision.

[81] Moreover, the outcome of the second CNESST claim is not determinative. At the base of the Respondent's claim was a medical opinion that he should be prevented from doing work involving heavy lifting, repeated bends, or prolonged standing – effectively requiring that the Respondent be limited to "office work" (Agreed Statement of Facts at paras 28–30; *Marcovecchio* at paras 26, 91). No allegation or evidence has been presented establishing that the Respondent's second CNESST claim interfered with the PSS position or represented a *bona fide* occupational requirement, including that it could not be accommodated by the Applicant without undue hardship.

[82] The Applicant's argument that the second CNESST claim could result in unknown potential new functional limitations impeding the Respondent from occupying the PSS position is speculative. The Tribunal reasonably found, on the basis of the evidence adduced, that the

limitations alleged to have been caused by the second injury, even if established as genuine limitations by the CNESST, would not have affected the Respondent's ability to perform the tasks required of the PSS position. The new position was essentially "office work" for which the Respondent had no alleged limitations, whether pending or concretely established by the CNESST (*Marcovecchio* at para 91).

[83] In the end, the Tribunal made a factual determination that the Respondent's human rights complaints were not linked nor an attempt to revisit the CNESST and TAT processes relating to his injuries. Instead, the Respondent was simply trying to find a better position. Nothing in the Respondent's human rights complaints therefore related to the MoA or an ongoing CNESST process (*Marcovecchio* at paras 83–85). Far from it, he applied for the PSS position because he understood that he could fulfil those duties without accommodation, in the context of that position. No evidence was adduced to conclusively demonstrate that the Respondent was wrong, negligent, or reckless in that assessment – which was supported by other witnesses.

[84] The Tribunal's ultimate finding that the human rights complaints were not based on the administration of his earlier employment injury claims, and not related to an already-resolved accommodation process (*Marcovecchio* at paras 83–85, 89, 91), is reasonable on the basis of the evidence adduced and the arguments made by the parties. The Tribunal's finding that it could adjudicate on the Respondent's claims, and that they were not within the CNESST's and TAT's exclusive jurisdiction, is reasonable in the circumstances of this case.

VII. Conclusion

[85] The application for judicial review is dismissed, with costs set at the middle of Column III of Tariff B, along with all reasonable and necessary disbursements.

JUDGMENT in T-20-24

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is dismissed.

2. The costs are set at the middle of Column III of Tariff B, along with all reasonable and necessary disbursements.

"Guy Régimbald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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