Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

**Citation:** 2023 CHRT 56
**Date:** December 4, 2023
**File Nos.:** HR-DP-2802-22 and HR-DP-2932-22

**Between:**

**Erik Marcovecchio**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Air Canada**

**Respondent**

**Decision**

**Member:** Athanasios Hadjis

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## I. OVERVIEW

[1] Erik Marcovecchio, the Complainant, was employed by Air Canada, the Respondent, at its call centre. He was injured at work and developed certain permanent limitations. As an accommodation, Air Canada assigned him to a different job, which was at the airport. About one year later, he applied for a promotional position and was told he would be appointed to it. However, Air Canada quickly decided not to follow up on the offer because the manager of its disability management department believed that the new position exceeded Mr. Marcovecchio's permanent limitations.

[2] Mr. Marcovecchio claims that this denial of employment was discriminatory on the basis of disability because Air Canada made its decision without any medical evidence or any other assessment of his ability to do this particular job. He filed two human rights complaints. The first is based on the denial of the promotion itself. The second relates to the consequences of the denial. Mr. Marcovecchio was laid off from his accommodated position at the airport during the COVID-19 pandemic. He claims that had he been appointed to the new promotional position, he would have been able to continue working. Mr. Marcovecchio is claiming lost wages and compensation for his pain and suffering and for Air Canada's alleged wilful or reckless discriminatory practices.

[3] Air Canada's defence is two-fold. It contends that appointing him to the position would have clearly been in breach of his permanent limitations. Moreover, it points out that Mr. Marcovecchio had a second employment injury claim that was still pending. The accommodation of that injury was subject to the exclusive jurisdiction of the applicable workers' compensation scheme. Air Canada could not appoint Mr. Marcovecchio to another position pending the outcome of this injury claim. Mr. Marcovecchio should have filed any complaints he had about how his claims were being treated with the workers' compensation authority.

## II. DECISION

[4] I find that the complaints are substantiated. Mr. Marcovecchio's disability was a factor in the decision not to promote him to the job, and Air Canada did not establish a legal

justification for its decision. Furthermore, Air Canada did not establish that Quebec's workers' compensation scheme's exclusive authority over employment-related injuries prevented Air Canada from assigning him to the new promotional position.

[5] Most of the background facts outlined below were set out in the parties' agreed statement of facts. A portion of the evidence dealt with matters that were ultimately irrelevant to the issues of the case, such as grievances filed in relation to errors in wages and the designation of leave that Mr. Marcovecchio had taken. In this decision, I only refer to the evidence that is relevant to the case's issues.

## III. BACKGROUND

[6] The job offer at issue in this case was made in April 2019. However, to understand the context that led to Air Canada's decision to rescind the offer, I need to set out the following background facts about Mr. Marcovecchio's career at Air Canada, particularly about his two employment-related injury claims, the latter of which was made shortly before he applied for the new promotional position.

[7] He was hired by Air Canada in 2011, and his initial position was as a call centre agent in Montreal, Quebec. In January 2016, Mr. Marcovecchio was injured at work while taking a call. A loud screech and static sound came through his headphones causing him pain. The ringing and buzzing in his ear went on continuously.

[8] He filed a claim with the workers' compensation authority for Quebec, the Commission des normes, de l'équité, de la santé et de la sécurité du travail (CNESST).

[9] The claim was initially refused, and Mr. Marcovecchio appealed the decision to the appellate authority, the Tribunal administratif du travail (TAT). The parties eventually mediated the matter, and a memorandum of agreement (MOA) was signed on October 31, 2016. They agreed that he could not return to his call-centre position and that they would be bound by the conclusions of the audiologist who would assess him. He withdrew his appeal to the TAT.

[10] On January 18, 2018, the audiologist concluded that Mr. Marcovecchio could be employed in a position where the following functional limitations are respected:

- No use of headset;
- Minimal telephone use and on an occasional basis;
- 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 subject cannot tolerate it, we can then opt for the use of musician filtered earplugs to enable him to communicate verbally while reducing the intensity of the ambient noise.

[11] After discussions among Mr. Marcovecchio, his union, the audiologist, and Air Canada, the parties concluded that he could be accommodated (i.e., be provided suitable employment (*un emploi convenable*)) by being employed as a customer sales and service specialist ("service agent") at the Montreal airport.

[12] Accordingly, a second MOA was signed on February 28, 2018. It states that Mr. Marcovecchio accepts a full-time service agent position at the Montreal airport, effective March 18, 2018. The parties agreed that the MOA was a complete and final resolution of all items related to this situation and that he and his union would not file any grievance, appeal or other procedure before any arbitrator, judge, adjudicator, commission, or court regarding any item in relation to it.

[13] Mr. Marcovecchio explained that the service agent position had multiple tasks. It included working at the check-in and boarding gates counters, pushing disabled passengers' wheelchairs to the gates and aircraft, and going to the aircraft, which included walking on the tarmac.

[14] After working for nearly a year in this accommodated position, Mr. Marcovecchio suffered his second injury while at work on February 27, 2019. He hit his head on the door frame of an airplane while entering it from the jetway. He was sent to the hospital and diagnosed with a mild traumatic brain injury. Mr. Marcovecchio submitted a claim with the CNESST, which was accepted. His treating physician concluded that his injury was

consolidated without any restrictions, and he was authorized to return to work on February 28, 2019.

[15] Mr. Marcovecchio felt he was still suffering from the injury and consulted two other physicians on March 7 and March 29, 2019. The second physician administered injections and referred him to physiotherapy. Following this consultation, Mr. Marcovecchio submitted a claim for relapse or aggravation of his condition to the CNESST. The CNESST denied the claim on April 10, 2019. Mr. Marcovecchio asked for a review of the decision.

[16] On September 26, 2019, the CNESST issued its decision on the review application. It affirmed the initial finding, denying the claim. Mr. Marcovecchio appealed this decision to the TAT on September 30, 2019. He withdrew the appeal on June 6, 2020.

[17] In the meantime, Mr. Marcovecchio applied for the job at issue in this case. In April 2019, a former call centre colleague and friend of Mr. Marcovecchio, Andrew Hui, told him about a position that had opened up on a project where he was now working known as the Passenger Service System (PSS). Air Canada had established a team to implement this new reservation and departure control system. The project was recruiting employees for a security operations specialist position to help with the day-to-day security operations requests that would come from Air Canada's business units and stakeholders.

[18] Mr. Marcovecchio followed up on Mr. Hui's suggestion and applied. He testified that the job was appealing and a lot better than his service agent position. It had a higher salary range and was a corporate-style desk job with regular 9 to 5 hours and no "crazy weekend" shifts. As a bonus, Mr. Marcovecchio would be working with his friend, Mr. Hui.

[19] On April 11, 2019, a three-member committee, which included Mr. Hui, interviewed Mr. Marcovecchio. He felt it went well. One week later, another committee member, Dimitra Dampolias, invited him to a second interview, which was conducted by the senior director of cyber security. Mr. Marcovecchio felt the second interview went well also.

[20] On April 29, 2019, Ms. Dampolias called and congratulated him. She said that he got the job. Mr. Marcovecchio shared by internal text the news with Mr. Hui, who congratulated him as well.

[21] However, within the next day or two, he received two other calls with a decidedly different tone. The first was from Air Canada's manager of disability management (*chef de service en readaptation*), Julien Paradis. He told Mr. Marcovecchio that he could not have the job because it did not meet the limitations set out in the second MOA. Mr. Marcovecchio testified that he was surprised that Mr. Paradis even knew of the PSS job offer since he had nothing to do with the management of that unit. Furthermore, he could not understand how Air Canada could be saying that to him without having first explored whether he could do the job, with or without any accommodation.

[22] On the second call, Mr. Paradis was also joined by Veronique Gauthier, manager of Air Canada's human resources. They reiterated that he could not have the job because of his permanent limitations and also because of a policy at Air Canada that no one can be assigned to another job if they have a pending claim before the CNESST. Mr. Marcovecchio asked again why they could not consider accommodating him, if his disability was a problem, by assigning him to a closed office, for instance. He was told in response that closed offices were only for managers. Mr. Paradis and Ms. Gauthier maintained that he could not take that job given his permanent limitations.

[23] On May 1, 2019, Ms. Gauthier sent an email to Mr. Marcovecchio confirming that further to their earlier telephone conversation, his candidacy for the PSS position was no longer being pursued because the job was "against" his permanent limitations and because he had a pending CNESST claim. The email reads as follows:

> Hi Erik,
>
> Further to our recent phone discussion, this is to confirm that we will not be pursuing with your candidacy for the position of PSS Security Operations Specialist due to the followings:
>
> -- As per our Company's practice, employees with ongoing claims with CNESST should not be considered for internal transfer in other roles- until final closing of their claim
>
> -The position of PSS Security Operations Specialist requires use of telephone and headset by its support function nature- which is against the permanent restrictions

> Based on the above, each of the two prevents us in moving forward with your application to the PSS Management opportunity.
>
> We thank you for your time and wish you the best.
>
> Regards,
> Veronique

[24] In his testimony, Mr. Paradis explained why he got involved. He learned through a casual conversation with another employee that Mr. Marcovecchio had been selected for the position. It was evident to Mr. Paradis that the job would require the use of a telephone, though he acknowledged that he did not know what the sound level would be at the PSS workplace as it was new and not fully set up yet. He did not know what problems the new system would generate, or the types of calls Mr. Marcovecchio would get. Mr. Paradis just understood that the setup at PSS would be similar to the call centre where Mr. Marcovecchio could no longer work. It seemed obvious to him that everyone working around Mr. Marcovecchio would be on the phone and using headsets, in what could potentially be a chaotic environment given the newness of the online system being implemented. For Mr. Paradis, employee security was paramount. He had to protect Mr. Marcovecchio from himself and make sure the permanent limitations were respected.

[25] Therefore, Mr. Paradis immediately contacted human resources to tell them about the restrictions. He was told that the PSS project was looking to hire people right away. Consequently, the decision was made to advise Mr. Marcovecchio that his candidacy for the PSS position would no longer be pursued.

[26] In the meantime, Mr. Marcovecchio had not returned to his sales agent position. He worked until May 6, 2019, as an international transfer transit agent. Beginning May 6, 2019, his physician filed medical reports relating to his head injury stating that initially he could return to work for a couple of weeks and eventually, starting on June 11, 2019, he could work with certain temporary restrictions (i.e., office work without any heavy lifting, repeated bends, or prolonged standing). Mr. Marcovecchio testified that Air Canada was unable to find any positions for him that met these restrictions until November 13, 2019, when he was given a temporary work assignment as a check-in agent.

[27] Mr. Marcovecchio was employed in this position until March 20, 2020, which was in the week after the COVID-19 virus was declared a pandemic. He testified that he lives at home with someone who has a health condition and was concerned about bringing home the virus to them. So, Mr. Marcovecchio initially was absent from work by using some banked overtime, and, starting on April 1, 2020, Air Canada granted his request to go on voluntary leave of absence (or "inactive status") until June 6, 2020.

[28] From June 8 to 20, 2020, Mr. Marcovecchio was on vacation leave and returned to his position from June 24 to 28, 2020.

[29] On June 29, 2020, Mr. Marcovecchio was laid off as part of Air Canada's response to the pandemic. It laid off nearly half of its workforce, particularly in airport operations. His position was at the Montreal airport, and he did not have enough seniority to be retained. Persons employed at the call centre were not laid off, but employing him there was not possible due to his permanent limitations. Mr. Marcovecchio was able to continue receiving wages under the Canada Emergency Wage Subsidy (CEWS) program set up by the federal government.

[30] The CEWS benefits ended on August 29, 2020, but he continued to remain on lay-off status. He was told that he would need to apply for employment insurance benefits.

[31] Mr. Marcovecchio claims that in contrast to Air Canada's airport operations, the PSS project kept on operating, and staff were not laid off. Mr. Hui confirmed in his testimony that he continued working at his PSS job from home throughout the pandemic. In his team of six people, one contractor's contract was terminated, and one other employee was let go, but he was not sure if he was first "furloughed," in Mr. Hui's words. He added that another employee was furloughed for a time but was brought back. Pritesh Ghandi, who was senior director of digital platforms and e-commerce and whose responsibilities included the PSS project when it was launched, testified that no one worked on site during the pandemic. Like "most of the world," people worked from home.

[32] Mr. Marcovecchio remained on lay-off from Air Canada through the end of 2020. In January 2021, he was hired as a customer service representative by an online investment company. It provided him with a laptop computer, and Mr. Marcovecchio worked from home.

Most of his communications were done using chat or email, and voice communications were mostly through the laptop's speaker.

[33] In April 2021, Air Canada sent a letter to Mr. Marcovecchio offering to recall him to work. He did not follow up on the recall notice, and, consequently, his employment with Air Canada ended. He explained in his testimony that he did not return because he was earning more money at his new job, and, after all that had transpired, he felt betrayed by Air Canada.

[34] Mr. Marcovecchio is currently employed as a regional coordinator at a major bank branch in downtown Montreal.

[35] Mr. Marcovecchio filed his first complaint on July 28, 2019, and the second one on November 30, 2020.

## IV. ISSUES

[36] The issues centre on Air Canada's decision not to follow through with Mr. Marcovecchio's appointment to the PSS position. Air Canada said the job was "against" his permanent limitations. He alleges that his disability was thus a factor in the decision not to promote him, which is a prohibited ground of discrimination under s. 3 of the *Canadian Human Rights Act*, R.S.C. c. H-6 (CHRA).

[37] Section 7(a) of the CHRA says that it is a discriminatory practice, directly or indirectly, to refuse to employ an individual on a prohibited ground of discrimination. Section 7(b) says that it is a discriminatory practice to differentiate adversely on a prohibited ground of discrimination, in relation to an employee in the course of their employment.

[38] Mr. Marcovecchio must prove that the alleged discriminatory practice was, on its face, discriminatory, which is more formally referred to as establishing a *prima facie* case of discrimination.

[39] To establish a *prima facie* case, in accordance with the test described in *Moore v. British Columbia (Education)*, 2012 SCC 61, at para. 33, Mr. Marcovecchio must show that it is more likely than not (i.e., on a balance of probabilities) that:

1) he has a characteristic protected under the CHRA (i.e., a prohibited ground of discrimination);

2) he experienced an adverse impact with respect to his employment (i.e., denied employment or adversely differentiated); and

3) the prohibited ground of discrimination was a factor in the adverse impact.

[40] Mr. Marcovecchio is not required to prove that Air Canada intended to discriminate against him (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Centre)*, 2015 SCC 39 ("*Bombardier*") at paras. 40-41). It is the result, or the adverse impact or effect, that is significant (*Ont. Human Rights Commission v. Simpsons-Sears*, [1985] 2 SCR 536, 1985 CanLII 18 at paras. 12, 14).

[41] The protected characteristic need not be the only factor in the adverse treatment, and a causal connection is not required (*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, at para. 25).

[42] To determine if discrimination occurred, the Tribunal considers the evidence of all parties. If the complainant proves the three *prima facie* elements of discrimination on a balance of probabilities, then the burden shifts to the respondent to justify the discrimination. In employment cases, the commonly claimed justification is that there is a *bona fide* occupational requirement, meaning a genuine or real occupational requirement, that justifies the discrimination (*Bombardier*, at paras. 36-38). If the respondent does not establish a justification, the complaint is substantiated (*Bombardier,* at para. 64).

[43] In addition, Air Canada claims that the facts of this case all relate to the administration of the workers' injury compensation scheme in Quebec and that, consequently, the CHRA does not apply to this matter.

[44] Accordingly, the issues to be determined with respect to Mr. Marcovecchio's allegation of discriminatory denial of an employment opportunity are:

1) Has Mr. Marcovecchio established a *prima facie* case of discrimination? That is,

   a. Does Mr. Marcovecchio have a characteristic protected under the CHRA?

   b. Did Mr. Marcovecchio experience an adverse impact with respect to employment (i.e., denied employment or adversely differentiated)?

   c) Was Mr. Marcovecchio's protected characteristic a factor in the adverse impact?

2) If Mr. Marcovecchio established a *prima facie* case of discrimination, did Air Canada establish a valid justification for the discriminatory practice, and particularly a *bona fide* occupational requirement?

3) Does the matter relate exclusively to the workers' compensation scheme such that the Tribunal has no authority to deal with it under the CHRA?

[45] Although it may appear unconventional to address the jurisdictional issue last, I find that dealing with the substantive issues first assists in the overall analysis.

## V. ANALYSIS

### A. Issue 1: Mr. Marcovecchio has established a *prima facie* case of discrimination

#### (i) Mr. Marcovecchio has a protected characteristic under the CHRA – disability

[46] The first element needed to establish a *prima facie* case of discrimination is to determine whether the complainant has a protected characteristic under the CHRA, namely a disability. Section 3 of the CHRA includes disability as a prohibited ground of discrimination. Section 25 defines disability as any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug.

[47] The Federal Court of Appeal, in *Desormeaux v. Ottawa (City)*, 2005 FCA 311 at para. 15 ("*Desormeaux*"), elaborated on this definition by stating that disability in a legal sense

consists of a physical or mental impairment, which results in a functional limitation or is associated with a perception of impairment.

[48] There is no question that Mr. Marcovecchio had a physical impairment resulting in a permanent functional limitation when he applied for the PSS position. All the parties to the second MOA had agreed that he had the functional limitations as defined by the audiologist, which were incorporated into the second MOA. He therefore had a disability.

### (ii) Mr. Marcovecchio experienced an adverse impact – the PSS employment opportunity was rescinded

[49] There is also no question that Mr. Marcovecchio experienced an adverse impact in the course of his employment with Air Canada. After participating in two interviews, which Mr. Marcovecchio felt went well, Ms. Dampolias called and told him that he had been selected for the job, which would have been a promotion for him, with more favourable working conditions.

[50] However, within days, Air Canada informed him that it would no longer move forward with his application for the PSS employment opportunity. Basically, the job offer was rescinded, which constituted an adverse impact for him.

### (iii) Mr. Marcovecchio's disability was a factor in the decision to rescind the employment opportunity

[51] Mr. Marcovecchio was told both verbally and in writing that one of the reasons Air Canada would no longer move forward with his PSS job opportunity was because it was against his permanent limitations, i.e., his disability.

[52] Thus, his disability was a factor in the decision to deny him the job opportunity.

[53] Mr. Marcovecchio has therefore established the three elements of a *prima facie* case of discrimination.

## B. Issue 2: Air Canada's defences

[54] Air Canada's defences are essentially two-fold. To begin with, it contends that Mr. Marcovecchio could not do the PSS job without exceeding his functional limitations. His needs could not be accommodated, and employing him there would certainly have imposed undue hardship based on his health. Air Canada had no option but to prevent Mr. Marcovecchio from taking that job.

[55] Perhaps more significantly, Air Canada also contends that under the legislation for the Quebec workers' compensation scheme, the *Act respecting industrial accidents and occupational diseases*, CQLR c. A-3.001 (AIAOD), the CNESST and the TAT have exclusive jurisdiction to deal with issues of accommodation where the injury is work-related. It maintains that Mr. Marcovecchio's claim falls under this authority and that the Tribunal should decline to deal with his complaint.

### (i) Air Canada did not establish a *bona fide* occupational requirement defence

[56] According to ss. 15(1)(a) and 15(2) of the CHRA, an employer's "refusal" in relation to employment is not a discriminatory practice if it is based on a *bona fide* occupational requirement (BFOR). Employers can only demonstrate the practice is based on a BFOR if they prove, on a balance of probabilities, that accommodating the needs of the individual affected would impose undue hardship on them, based on health, safety, and cost.

[57] As the Supreme Court of Canada held in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3 at paras. 64-65, courts and tribunals should be sensitive to the various ways in which individual capabilities may be accommodated. Apart from individual testing to determine whether the person has the necessary aptitude or qualification to perform the work, the possibility that there may be different ways to perform the job should be considered. The skills, capabilities, and potential contributions of the individual claimant must be respected as much as possible.

[58] In Mr. Marcovecchio's case, Air Canada did not even consider accommodating him to perform the job, let alone do any individualized testing or assessment to explore whether

he could or even needed to be accommodated. Mr. Paradis determined on his own, based on his personal assessment of Mr. Marcovecchio's functional limitations, that he could not do the job. He made this determination even though he acknowledged 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. No decibel readings of the workplace were sought. Mr. Paradis said that Ms. Gauthier agreed with him, though it is not clear whether she had a better, more detailed understanding of the PSS's operations. She did not testify.

[59] Mr. Marcovecchio believes that he could have done the job without any accommodation, based on his observations of the workplace environment when he visited it twice for his interviews. Mr. Hui testified that although the PSS workplace consisted of a sprawling single floor in an industrial park building and that employees worked in cubicles, their work was technical in nature, not "customer-facing," in contrast to the call centre where he and Mr. Marcovecchio used to work.

[60] For instance, Air Canada employees who encountered problems using the new system did not contact PSS staff directly. They would first contact an internal help desk to deal with those matters. Only escalated cases were referred to the PSS staff. Mr. Hui said that the most frequent way to receive these requests was via email or simple "taps on the shoulder" during business hours. The PSS staff would typically only get telephone calls after business hours by some user groups regarding urgent matters. Other users would continue to use email even after hours. He added that only "some" of the 100 or more people who worked on the floor used headsets.

[61] Mr. Ghandi testified that users knew that emails would not be monitored after 5 p.m., so if they wanted a matter to be dealt with immediately, they would telephone. Employees who might still be at the office after hours would deal with the call. He also mentioned that, on occasion, staff had to call the software supplier by telephone to better understand the system. Mr. Ghandi confirmed that the job in question was a technical position, as Mr. Hui had also said.

[62] In light of this evidence, I am not persuaded that the work environment was just like the call centre where Mr. Marcovecchio used to work, as Mr. Paradis assumed. Furthermore, Air Canada's statement in the letter rescinding the job offer that the position would require the use of a headset was clearly inaccurate based on the observations of someone who actually worked there, Mr. Hui, who said only some of the employees used headsets.

[63] Mr. Marcovecchio submits that the limited telephone calling that the position entailed would not have violated his restrictions. He would not have needed to use a headset, and the anticipated phone use would comply with the second restriction (minimal telephone use and on an occasional basis). As for the background noise, it would hardly require the wearing of hearing protection. It would likely not exceed the noise Mr. Marcovecchio encountered in his accommodated sales agent position at the airport and on the tarmac.

[64] Air Canada takes issue with the fact that Mr. Marcovecchio did not disclose his limitations to the interviewers for the PSS job. Had they known, they would not have offered him the job. Mr. Hui testified that he knew that Mr. Marcovecchio had a disability that prevented him from working at the call centre, but he did not know any details about it. Air Canada argues that Mr. Marcovecchio had a duty to facilitate the search for accommodation, which he failed to meet. As the Supreme Court of Canada held in *Central Okanagan School District No. 23 v. Renaud*, 1992 CanLII 81, [1992] 2 S.C.R. 970 at 994 ("*Renaud*"), the search for accommodation is a multi-party inquiry. There is a duty on complainants to assist in securing an appropriate accommodation.

[65] Air Canada contends that Mr. Marcovecchio failed in this duty by not disclosing his permanent limitations. As a result, the PSS interviewers had no knowledge of his disability.

[66] However, Mr. Marcovecchio was convinced that he did not require any accommodation to do this work. The job was suitable in his view and did not trigger any such duty on his part.

[67] Besides, as *Renaud* states, the employee's duty is to bring to the attention of the employer the facts relating to *discrimination* and to facilitate the search for accommodation. Mr. Marcovecchio saw no issue with the job and felt he could do it without any

accommodation. It was only when Air Canada denied him the right to be considered for the PSS job that the question of discrimination arose. The withdrawal of the job offer is the alleged discrimination. Therefore, it was only then that Mr. Marcovecchio would have had a "duty of notification and facilitation" (see *Desormeaux* at para. 19).

[68] Moreover, it ultimately does not matter whether Mr. Marcovecchio was correct in his assessment of whether the PSS job was consistent with his functional limitations and whether he should have raised the issue, despite his own assessment of the workplace. The fact is that Air Canada decided entirely on its own initiative to hastily deny him the job without even verifying whether he could do it or not and, more importantly, without even consulting him.

[69] As the Federal Court noted in *Canada (Attorney General) v. Cruden*, 2013 FC 520 at paras. 69-70, aff'd in *Canada (Attorney General) v. Cruden*, 2014 FCA 131, although there is no separate procedural duty to accommodate under the CHRA, in practical terms, if an employer has not engaged in any accommodation analysis or attempts at accommodation when an employee makes a request, it is likely very difficult to satisfy a tribunal that it could not have accommodated the employee to the point of undue hardship.

[70] In the present instance, Mr. Marcovecchio had not even made an accommodation request yet, but, even if he had, Air Canada did not engage in any meaningful accommodation analysis before deciding to block Mr. Marcovecchio's promotion. When he was given the news that the job opportunity was rescinded, his request to explore accommodation options at that point was summarily turned down. Mr. Paradis decided unilaterally that he had to protect Mr. Marcovecchio from doing harm to himself.

[71] As the Tribunal observed in *Christoforou v. John Grant Haulage Ltd*, 2020 CHRT 33 at para. 113 ("*Christoforou 2020*"), an employer's anticipated hardships about proposed accommodations cannot be based on speculative or unsubstantiated concerns of adverse consequences. Mr. Paradis's conclusions were indeed at best speculative. No real assessment of the workplace was done.

[72] To be meaningful, the right to reasonable accommodation must allow for some measure of individual assessment rather than simply allowing for an employer to write off

the ability of an individual to do anything at all, without engaging in any type of process or analysis (*Christoforou 2020*, at para. 124).

[73] Mr. Paradis claims to have done an analysis based on the second MOA's list of functional limitations, but it was not a meaningful one. He made his determination hurriedly; there was no actual examination of what the job's work entailed and no consultation whatsoever with the employee.

[74] Air Canada has therefore not demonstrated that Mr. Marcovecchio could not be accommodated without undue hardship. The BFOR defence has not been established.

### (ii) The matter is subject to the CHRA and, by extension, the Tribunal can deal with the complaints

[75] Air Canada maintains that the CNESST and the TAT have exclusive authority under the AIAOD to deal with issues of accommodation where the injury is work-related. The purpose of the AIAOD is to provide compensation for employment injuries and the consequences they entail for beneficiaries.

[76] The CNESST is solely responsible for the administration of the AIAOD, including vocation rehabilitation, under ss. 169 and following of the AIAOD. The CNESST is called upon to render written decisions regarding the admissibility of a workers' compensation claim, the evolution of the worker's medical condition, the workers' ability to return to work in their pre-injury position or an accommodated position, and the worker's right to vocational rehabilitation. These decisions can be contested by interested parties to the CNESST's Review Committee, which in turn can be appealed to the TAT (ss. 358 and 359 of the AIAOD).

[77] Air Canada points out that the AIAOD is a law of public order, which specifically provides that the CNESST "has exclusive jurisdiction to examine and decide any question contemplated in [the AIAOD] unless a special provision gives the jurisdiction to another person or agency" (s. 349).

[78] In addition, s. 438 of the AIAOD provides that: “no worker who has suffered an employment injury may institute a civil liability action against his employer by reason of his employment injury.” Section 438 grants employers an immunity in respect of actions brought by a worker “by reason of his employment injury.”

[79] As the Supreme Court of Canada noted in *Quebec (Commission des normes, de l’équité, de la santé et de la sécurité du travail) v. Caron*, 2018 SCC 3, at para. 51 (“*Caron*”), the CNESST and the TAT have the exclusive remedial authority in dealing with reinstatement, equivalent or suitable employment, and to impose measures on the employer to do whatever is reasonably possible to accommodate a disabled worker’s injury and the circumstances that flow from it.

[80] Air Canada, in making this argument, relied extensively on a decision by Quebec’s human rights tribunal, the Tribunal des droits de la personne du Québec (the “QCTDP”), in *Ortega v. Lallemand Solutions Santé inc.*, 2022 QCTDP 7, a case involving a human rights claim that had been filed by an employee against his employer, based on a disability allegedly arising from a workplace injury. The QCTDP observed, at para. 42, that when the situation is likely to be covered by the AIAOD, the authorities under this act (i.e., the CNESST and the TAT) have the exclusive power to deal with the fundamental human rights at issue and the consequences of the employer’s alleged failure to respect them, not the QCTDP.

[81] Air Canada argues that the facts behind Mr. Marcovecchio’s human rights complaints are similarly linked to his CNESST claims. The discriminatory practices occurred while he was being accommodated under the AIAOD and while his claim before the CNESST for a relapse or aggravation was still being contested. The CNESST and the TAT therefore have exclusive jurisdiction to receive and resolve any complaints related to Mr. Marcovecchio’s claims, not the Tribunal.

[82] I do not agree. To begin with, the circumstances in *Ortega* are not the same as in Mr. Marcovecchio’s case. The plaintiff in *Ortega* had filed a claim with the CNESST relating to his shoulder pain. He claimed the pain was work-related, but the CNESST found that it was not due to an employment injury. The CNESST and the TAT denied his claim. In the

meantime, he filed his human rights complaint in which he alleged that his employer had failed to accommodate the same injury that was at issue before the CNESST and the TAT. He basically was attempting to revisit the CNESST's findings. As the QCTDP concluded at para. 44 of its decision, Mr. Ortega's claim arose from his shoulder injuries, which occurred as a result or in the course of employment. Having reached the end of his process within the AIAOD authorities, he turned to the QCTDP. The law does not permit this, according to the QCTDP.

[83] These are not the facts in Mr. Marcovecchio's case. His human rights complaints are not linked to a CNESST claim. His workplace hearing injury had been resolved to the parties' mutual satisfaction. They had signed the second MOA in which they agreed that it was in full and final resolution of all items related to his situation. He would not file any other procedure relating to it. Thus, in contrast to Mr. Ortega, Mr. Marcovecchio's application to get the PSS job was not an attempt to revisit the CNESST and TAT process relating to his hearing injury. That matter was settled. He had accepted his accommodated position as a sales agent, even if he was not necessarily happy with it.

[84] I am satisfied that Mr. Marcovecchio was just trying to get a better job with improved working conditions and a higher salary when he followed up on Mr. Hui's suggestion and applied for the PSS job. This had nothing to do with the workers' compensation process relating to his workplace injury.

[85] The fact that he has permanent functional limitations is something with which he must live indefinitely. Whether applying for a job then or ten years later, within Air Canada or outside it, he is a person who lives with a disability. And if the disability would prevent him from finding other employment, the possibility of his being able to perform its tasks with some form of accommodation would need to be explored, whether the employer is Air Canada or another organization. Just because he acquired the disability while at work does not mean that he is prevented from seeking other employment, whether or not it requires some accommodation measures.

[86] Air Canada referred to s. 32 of the AIAOD, which provides a recourse for workers who claim that employers have discriminated against them. Air Canada contends Mr.

Marcovecchio could have filed a complaint or grievance under this section. The provision read as follows in May 2019 when the PSS job offer was rescinded:

> 32 ’employeur ne peut congédier, suspendre ou déplacer un travailleur, exercer à son endroit des mesures discriminatoires ou de représailles ou lui imposer toute autre sanction parce qu’il a été victime d’une lésion professionnelle ou à cause de l’exercice d’un droit que lui confère la présente loi.
>
> Le travailleur qui croit avoir été l’objet d’une sanction ou d’une mesure visée dans le premier alinéa peut, à son choix, recourir à la procédure de griefs prévue par la convention collective qui lui est applicable ou soumettre une plainte à la Commission conformément à l’article 253.
>
> 32. No employer may dismiss, suspend or transfer a worker or practice discrimination or take reprisals against him, or impose any other sanction upon him because he has suffered an employment injury or exercised his rights under this Act.
>
> A worker who believes that he has been the victim of a sanction or action described in the first paragraph may, as he elects, resort to the grievance procedure set down in the collective agreement applicable to him or submit a complaint to the Commission in accordance with section 253.

[87] It is somewhat surprising that Air Canada made this submission since, as the TAT reiterated recently in *Smith and Compagnie de chemin de fer Canadian Pacifique ltéé*, 2023 QCTAT 3893, at para 41, it has been settled case law for over two decades that s. 32 of the AIAOD does not apply to federal undertakings (see *Purolator Courrier ltée c. Hamelin*, [2002] R.J.Q. 310 (C.A.), 2002 CanLII 41093 (QC CA) (“*Purolator*”).

[88] Besides, it is evident that this provision was intended to only deal with sanctions that an employer is not allowed to impose on a worker because of an injury or the exercise of a right under the AIAOD (see *Purolator* at para. 55, citing *Marin c. Société canadienne des métaux Reynolds ltée*, 1996 CanLII 6533 (QC CA)). This is not a provision that a worker would call upon if he felt he has not been accommodated by the employer regarding a workplace injury. As the Supreme Court of Canada stated in *Caron*, at para. 51, an injured worker’s rights and entitlements under the AIAOD are interpreted and implemented in accordance with the employer’s duty to reasonably accommodate an employee disabled by an employment injury, under the prevailing human rights law. This is effected through the administration provisions of the AIAOD (ss. 169 and following), not s. 32’s provisions addressing sanctions.

[89] However, most importantly, as I already noted, the accommodation issue was already resolved with respect to his hearing injury. Mr. Marcovecchio's human rights complaints are not based on the administration of this employment injury claim. That issue had been closed.

[90] Air Canada counters that there was indeed a pending workers' compensation claim, namely the second injury, involving the hit to his head. The matter was still under review at the CNESST when he applied for the PSS job. Air Canada could not allow him to take another position before the issue was resolved in the AIAOD process. Although the CNESST had ruled that his injury was consolidated and no further accommodation measures were needed, his review before the CNESST, or ultimately an appeal to the TAT, could have yielded a different order regarding Mr. Marcovecchio's functional limitations, and the PSS job may have been in breach of them. Air Canada therefore could not take the chance and put his health potentially at risk. This is why Air Canada has a "practice" of not allowing job transfers while a workers' compensation claim is pending, as it noted in its conversations with Mr. Marcovecchio and its follow-up letter.

[91] This argument is not persuasive for at least two reasons. First, Mr. Marcovecchio's pending relapse claim was based on his physician's medical opinion, which said that the limitations relating to his head injury did not prevent him from doing "office work" provided it did not involve any heavy lifting, repeated bending, or prolonged standing. The PSS job was clearly office work, and there is no indication that it would have involved any of those prohibited activities. Secondly, it is clear from the letter and Mr. Paradis's evidence that the basis for denying him the employment opportunity was the obvious breach, in his opinion, of the functional limitations set out in the second MOA, that is, the hearing disability. That was the core issue. Not the possibility that CNESST would change its finding on the relapse of the head injury, which would realistically result at most in his being restricted to office work if the appeal was successful.

[92] For all these reasons, I conclude that Air Canada's defence based on the AIAOD's alleged exclusive application over this matter is unfounded.

[93] The *prima facie* case of discrimination has not been rebutted. Air Canada engaged in a discriminatory practice against Mr. Marcovecchio.

## VI. REMEDIES

[94] Mr. Marcovecchio's human rights complaints have been substantiated, which means that the Tribunal can order one or more of the remedies set out in s. 53 of the CHRA.

[95] As the Tribunal noted in *Christoforou v. John Grant Haulage Ltd.*, 2021 CHRT 15 (*Christoforou 2021*) at paras. 37-39, aff'd 2022 FCA 182, the purpose of these remedial provisions is to make a victim of discrimination whole and to put them back in the position they would have been in had the discrimination not occurred. In an employment context, this can include reinstating the victim and compensating for losses that flow from the discriminatory conduct, including lost wages (ss. 53(2)(b) and (c) of the CHRA). The calculation of the loss is determined by assessing the circumstances of each case. There must be a causal link between the discrimination and the loss claimed. The onus is on the complainant to establish that it is more likely than not that this causal connection exists.

[96] *Christoforou 2021* also observed, at paras. 52-54, that the Tribunal must exercise its discretion to award lost wages on a principled basis. The amount of the loss is determined by the circumstances of each case, and the Tribunal can impose a limit to losses caused by the discriminatory practice suffered. One of these principles is the rule against double recovery. A complainant cannot recover more than what was sufficient to compensate the losses flowing from the discriminatory conduct (*Hughes v. Canada (Attorney General)*, 2019 FC 1026, at para. 46).

[97] The victim may also claim up to $20,000 for any pain and suffering they experienced as a result of the discriminatory practice (s. 53(2)(e)). In addition, the respondent may be ordered to compensate the victim up to $20,000 if the Tribunal finds that it engaged in the discriminatory practice wilfully or recklessly (s. 53(3)).

[98] Mr. Marcovecchio seeks compensation for his lost wages and his pain and suffering (s. 53(2)(e) as well as the special compensation set out in s. 53(3)). He had mentioned

several other remedies in his pre-hearing Statement of Particulars but did not request them in his final submissions.

### A. Lost wages

[99] Mr. Marcovecchio asked for the difference between the income that he would have earned had he been employed at the PSS position effective May 1, 2019, and what he actually earned, until January 2021, when he found a job with a different employer.

[100] The evidence adduced with respect to Mr. Marcovecchio's income in the relevant periods was, to say the least, confusing. Certain calculations provided by him were not particularly helpful. Furthermore, no evidence was presented about the income he would have earned at the PSS job other than the poster for the position, which said that the salary would range between $35,000 and $65,000.

[101] He argued, through counsel, that I should base my calculations on the midpoint of this range ($50,000). He pointed out that his candidacy was rescinded before the opportunity to discuss wages had occurred. He submitted that given the fact that he had been employed by Air Canada for eight years at that point, he would not have started at an entry-level pay rate. He also filed a detailed written calculation of the wage loss, after final oral arguments, which claimed that the difference in hourly wages between his airport job and the PSS position was $3.54/hour. No explanation or source for this figure was given, and I could not find any mention of it in the evidence. Moreover, although several Air Canada witnesses testified, none was asked what the actual salaries for PSS employees were.

[102] The only lost wages evidence I am therefore left with is the indicated salary range on the job poster. There is no basis for me to assume that Mr. Marcovecchio would have received anything more than the minimum salary in his first year on the job.

[103] Consequently, I base my calculations on the sum of $35,000 per year. Assuming Mr. Marcovecchio began working at the start of May 2019, when the job offer was rescinded, he would have been working through the rest of the year (i.e., the remaining eight months) at that salary, which would amount to $23,333 ($35,000 x 8/12).

[104] Mr. Marcovecchio produced his T4 income slip for 2019. It showed that he actually earned $21,241 in employment income that year. A breakdown of his pay slips indicates that $8,418 of his income was earned in the period until May 4, 2019. Roughly speaking then, his actual income from May onwards was $12,822 ($21,241 - $8,418).

[105] Accordingly, the difference in income from what he would have earned in the PSS job from May to December 2019 would have been $10,511 ($23,333 - $12,822).

[106] Turning to 2020, Mr. Marcovecchio's T4 slip shows that he earned $30,039. Although he was laid off from June to December, he kept earning employment income in the form of CEWS benefits. As a result, the difference between what Mr. Marcovecchio would have earned at the PSS job and what he actually earned in that year is $4,961 ($35,000 - $30,039).

[107] Thus, the total loss in wages between the date when the PSS job offer was rescinded and the date when he began working at his new job in January 2021 is $15,472 ($10,511 + $4,961).

[108] With respect to the wage loss claim, Air Canada maintained a position similar to its defence on the merits of the complaints. It argued that Air Canada could not have assigned Mr. Marcovecchio to the PSS position at the time since his CNESST claim was still pending and his permanent limitations prevented him from doing the job. Air Canada also contended that, in any event, Mr. Marcovecchio hindered his assignment to this position by failing for several months after his head injury to have his physician fill out and file the form required under s. 179 of the AIAOD, setting out the list of his temporary medical limitations. According to this provision, an employer cannot temporarily assign work to a worker if their health professional has not recorded a favourable opinion on the form.

[109] These submissions are irrelevant to the issue at hand. As I found in my decision on the complaints' merits, the PSS job was not a "temporary assignment" to accommodate his employment-related head injury. It was simply an effort by Mr. Marcovecchio to get himself a promotion within Air Canada.

[110] Consequently, Air Canada's submissions regarding wage loss have no bearing on the issue.

[111] In sum, Mr. Marcovecchio is therefore entitled to $15,472 in compensation for his wage loss. It was noted at the hearing that, when he receives this compensation, he may need to make certain reimbursements relating to employment insurance and other benefits he may have received in the relevant periods. It is up to him to address these matters. They have no impact on the Tribunal's wage loss award.

[112] Mr. Marcovecchio also requested that Air Canada provide and file Canada Revenue Agency form #T1198 (Statement of Qualifying Retroactive Lump Sum Payment). This is a function of the applicable tax law provisions and does not require an order from the Tribunal.

### B. Pain and Suffering

[113] The Tribunal can order up to $20,000 for any pain and suffering that Mr. Marcovecchio experienced because of Air Canada's discriminatory practice (s.53(2)(e) of the CHRA). As observed in *Christoforou 2021*, at para. 98, the Tribunal tends to reserve the maximum amount of $20,000 for the very worst cases or the most egregious of circumstances.

[114] Mr. Marcovecchio spoke about the disappointment he felt when the PSS job offer was rescinded. It was a sought-after position that offered regular business hours in a pleasant work environment, working with a friend like Mr. Hui. Instead, this was all taken away from him without justification. He felt betrayed by the company to which he had, up to that point, dedicated eight years of his life.

[115] Had he started in the job, he would not have had to endure many of the inconveniences that came to him over the next two years. These included the ongoing exchanges and filings relating to his CNESST claim regarding his other position, which presumably would have ceased if he had obtained the PSS position. Then, with the arrival of COVID-19, Mr. Marcovecchio had to suffer the employment uncertainties that eventually led to his being laid off and then being unable to return due to the absence of any position that satisfied his permanent limitations. He had to deal with government programs and

employment insurance to secure an income through this period. Had Mr. Marcovecchio instead been hired to the PSS job, he would have avoided this angst and uncertainty by just continuing to work from home, like Mr. Hui, Mr. Ghandi, and the other employees at that unit.

[116] Mr. Marcovecchio said that he felt like a lost soul throughout this time, waiting to go back to work, and wondering whether he should just abandon this employer and seek employment elsewhere, which is what he ultimately chose to do.

[117] Mr. Marcovecchio requested the maximum amount of $20,000 in compensation. I do not think his circumstances amounted to the very worst or most egregious of cases. Although he experienced significant inconvenience, uncertainty, and an overall sense of being wronged, a maximum amount of compensation would not be justified in this case.

[118] I find accordingly that an award in the mid-range of the scale is warranted, in the amount of $10,000.

### C. Special Compensation (s. 53(3))

[119] The Tribunal can order up to a maximum of $20,000 in special compensation if it finds that the respondent has engaged in the discriminatory practice wilfully or recklessly (s. 53(3) of the CHRA). This is "a punitive provision intended to provide a deterrent and discourage those who deliberately discriminate" (*Canada (Attorney General) v. Gallinger*, 2022 FCA 177 at para. 66, citing *Canada (Attorney General) v. Johnstone*, 2013 FC 113).

[120] As noted in *Christoforou 2021*, at paras. 106-111, a finding of wilfulness requires an intention to discriminate and to infringe a person's rights under the CHRA. Recklessness usually denotes acts that disregard or show indifference to the consequences, such that the conduct is done wantonly or needlessly. A finding of recklessness does not require proof of intention to discriminate. In determining the appropriate award under this section, the Tribunal must focus on the respondent's conduct and not on the effect that the conduct has had on the complainants.

[121] Mr. Marcovecchio asks that the Tribunal award the maximum allowable amount of $20,000.

[122] There is no evidence that Air Canada intended to discriminate against him. However, I am satisfied that its actions showed disregard to their consequences and were done heedlessly. As soon as Mr. Paradis learned of the job offer, he began the process to block it based solely on his own interpretation of Mr. Marcovecchio's limitations and his ability to do the job, even though Mr. Paradis was not even involved in the PSS selection process, was not on the selection committee, and did not have detailed knowledge of how the workplace would operate, other than assume from appearances that it would function like a call centre. There is no evidence that Ms. Gauthier had any better knowledge. Mr. Paradis and Ms. Gauthier acted without even once consulting Mr. Marcovecchio—they presented their decision to him as a fait accompli.

[123] Mr. Paradis may have been well intentioned. He felt that he was looking out for Mr. Marcovecchio's best interests and appeared to sincerely, if mistakenly, believe that his hands were tied due to the pending CNESST claim on the second injury, which can be considered mitigating factors in the analysis.

[124] However, Air Canada's approach of denying employment based solely on management's perception of an employee's disability and capacity to perform a job's tasks without engaging in a basic analysis or conversation with the employee is a clear breach of what human rights law and jurisprudence requires of employers. As manager of Air Canada's disability management unit, Mr. Paradis should have known better. The employer demonstrated an indifference to the consequences of these actions.

[125] Taking these factors into account, I find that a sum of $5,000 in special compensation is justified.

### D. Interest

[126] Mr. Marcovecchio has asked for interest on the sums awarded.

[127] The Tribunal can make an award of interest on an order to pay compensation (s.53(4) of the CHRA). Rule 46 of the *Canadian Human Rights Tribunal Rules of Procedure, 2021*, SOR/2021-137 (the "Rules") provides that interest awarded under s. 53(4) must be simple interest that is equivalent to the bank rate established by the Bank of Canada and must accrue from the day on which the discriminatory practice occurred until the day on which the compensation is paid.

[128] I order an award of interest on all the compensation ordered in this case. With respect to the compensation under ss. 53(2)(a) and 53(3) of the CHRA, the interest will accrue from the date when the PSS job offer was rescinded, May 1, 2019.

[129] With respect to the lost wages, as Mr. Marcovecchio requested in his final submissions, the interest will start to run from May 1, 2019, and be calculated as the wages would have become payable to him.

## VII. ORDER

[130] Within 30 days of this decision, Air Canada is ordered to pay the following to Mr. Marcovecchio:

a. $15,472 in compensation for lost wages, subject to any withholdings for any applicable deductions;

b. $10,000 for pain and suffering experienced as a result of the discriminatory practices (s. 53(2)(e));

c. $5,000 in special compensation (s. 53(3)).

[131] Simple interest will accrue beginning May 1, 2019, on all payable compensation at a rate equivalent to the bank rate established by the Bank of Canada. With respect to the lost wages, the interest will be calculated as the wages would have become payable to Mr. Marcovecchio.

*Signed by*

Athanasios Hadjis
Tribunal Member

Ottawa, Ontario
December 4, 2023

**Canadian Human Rights Tribunal**

**Parties of Record**

**File Nos.:** HR-DP-2802-22 and HR-DP-2932-22

**Style of Cause:** Erik Marcovecchio v. Air Canada

**Decision of the Tribunal Dated:** December 4, 2023

**Date and Place of Hearing:** March 13-16, 2023

Ottawa, Ontario

**Appearances:**

Geneviève Grey and Emily Lapointe-Carpenter, for the Complainant

Eric Beaulieu, for the Respondent