Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2024 CHRT 102
Date: September 17, 2024
File No.: T2517/7420

Between:

Giuseppe Clemente

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Air Canada

Respondent

Decision

Member: Marie Langlois

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I. OVERVIEW

[1] Mr. Giuseppe Clemente, the Complainant, has been employed by Air Canada, the Respondent, since 2001. Air Canada has recognized his service seniority for another airline company, Canadian Airlines, since 1984 when the two companies merged in 2001.

[2] Mr. Clemente was injured at work on January 17, 2005, while working as a ramp attendant in the baggage department at the Toronto Pearson International Airport. He suffered a severe lower back injury and psycho-traumatic disability, which permanently prohibited him from performing the regular duties of a ramp attendant. Between December 2006 and December 2014, he went on a long-term disability leave approved by the Workplace Safety and Insurance Board of Ontario (WSIB). He received replacement income from the WSIB during that period.

[3] In January 2015, Mr. Clemente gradually returned to work with permanent restrictions and limitations. He was first assigned to the Radio Room, then continued in the Pillow Room, returned to the Radio Room, and eventually went back to the Pillow Room before finally taking his disability retirement on December 1, 2016. Air Canada had informed him that there was no longer a position available for him and that he could face administrative discharge without pay if he did not take the disability retirement.

[4] Mr. Clemente alleges that Air Canada forced him into disability retirement because of his disability and that it failed to provide him with reasonable accommodation to continue his employment. He claims that Air Canada could have continued to accommodate him in either the Radio Room or the Pillow Room, and he would have continued working.

[5] Air Canada disputes the discrimination claim and contends that it did accommodate all of Mr. Clemente's work restrictions and limitations to the point of undue hardship and that he chose to take his disability retirement.

[6] Early in the case management of the file, Mr. Clemente filed a motion relating to the scope of the complaint. The Tribunal granted Mr. Clemente's motion in a ruling in August 2021. It was convened at the time that more ample reasons would follow in the final decision. The Tribunal now issues those reasons in the following preliminary question section, which precedes its final decision.

II. PRELIMINARY QUESTION

[7] On June 25, 2021, Mr. Clemente filed a motion to clarify the scope of the complaint. He requested that the Tribunal explore three factual determinations within the scope of the complaint: the bidding process connected to the Radio Room, the determination of whether the Radio Room was a supernumerary position and an incident involving Bonnie Hanson in the Pillow Room.

[8] On July 12, 2021, Air Canada filed its submissions on the motion. It argues that, firstly, the Tribunal lacks jurisdiction to adjudicate the incidents at issue and that, secondly, it would be inappropriate and prejudicial to the Respondent for the Tribunal to expand the scope of its mandate. Air Canada asked the Tribunal to dismiss the motion.

[9] On July 19, 2021, the Canadian Human Rights Commission (the "Commission") informed the Tribunal and the parties that it was not making submissions on the Complainant's motion.

[10] For the reasons that follow, on August 4, 2021, the Tribunal granted the Complainant's motion. The bidding process connected to the Radio Room, the determination of whether the Radio Room was a supernumerary position and the incident involving Ms. Hanson in the Pillow Room were found to be within the scope of the complaint and part of the Tribunal's inquiry.

[11] The Complainant asked the Tribunal to clarify the scope of the complaint. The case law is clear on the subject: the Tribunal has the jurisdiction to amend, clarify or determine the scope of the original discrimination complaint provided that no prejudice is caused to the other parties (see *Casler v. Canadian National Railway*, 2017 CHRT 6; *Connors v. Canadian Armed Forces*, 2019 CHRT 6 (CanLII); *Torraville v. Jazz Aviation* LP, 2020 CHRT 40;

Canada (Human Rights Commission) v. Canadian Telephone Employees Assn., 2002 FCT 776). In the present case, no evidence was provided by Air Canada to support the argument that a prejudice would result by the decision on the scope of the complaint.

[12] Mr. Clemente filed a discrimination complaint, which the Commission received on October 4, 2017.

[13] On the "Summary of the Complaint" form completed by the Commission, the alleged discrimination is noted to have occurred between March and December 1, 2016.

[14] On the "Your Complaint" form, in response to the question, "When did the alleged discrimination take place?", the start date is listed as January 17, 2005, and the last date as December 1, 2016. In the original complaint form, Mr. Clemente lists allegations of discrimination beginning in 2005.

[15] The Commission's November 28, 2019, report recommends that the complaint be referred to the Tribunal for a hearing. An excerpt of the report states the following:

> In the complaint form, the complainant lists allegations of discrimination beginning in 2005. It should be noted that the "date of discrimination" listed in the complaint summary is from March 2016 to December 2016. Therefore, only allegations from within the aforementioned timeframe will be addressed. Any allegations from before that time frame will only be considered as historical context, if necessary.

[16] Thus, for its report, the Commission indicated that it investigated only allegations of discrimination from March to December 2016.

[17] The Commission decided to refer the complaint to the Tribunal for further inquiry as it was satisfied that, considering all the circumstances of the complaint, a Tribunal inquiry was warranted under section 44 of the *Canadian Human Rights Act*, R.S.C. c. H-6 (the CHRA). On April 21, 2020, the Commission sent a letter to the Tribunal's Chairperson requesting an inquiry into the complaint. The referral letter did not limit the timeframe as did the report.

[18] The Respondent submits that the events described in the complaint date more than one year before the complaint was filed and should be dismissed on that ground, given the reading of section 41(1) of the CHRA.

[19] Section 41(1)e) of the CHRA reads as follows:

41(1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that	41(1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :
(…)	(…)
(e) the complaint is based on acts or omissions the last of which occurred more that one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint	e) la plainte a été déposée après l'expiration d'un délai d'un an après le dernier des faits sur lesquels elle est fondée, ou de tout délai supérieur que la Commission estime indiqué dans les circonstances.

[20] It is the Commission's prerogative to determine whether it will deal with a complaint. It is the Commission's responsibility to establish whether the complaint is filed within one year of the last act or omission on which the complaint is based. It is the Commission's discretion to extend the delay if it considers it appropriate in the circumstances.

[21] In *Dumont v Transport Jeannot Gagnon*, 2001 CanLII 38314 (CHRT), the Tribunal observed that:

> [7] The Canadian Human Rights Tribunal does not have the power to review the way in which the Canadian Human Rights Commission chooses to exercise its discretion pursuant to Section 41 (1) e) of the Act. This is a matter within the exclusive purview of the Federal Court.

[22] In *Torraville v. Jazz Aviation LP*, 2020 CHRT 40, the Tribunal confirmed the distinct roles of the Commission and the Tribunal, emphasizing that the Tribunal does not have jurisdiction over the Commission's statutory discretionary powers. It states:

> [32] The Tribunal acquires its jurisdiction over human rights complaints when the Commission asks the Tribunal's Chairperson to institute an inquiry into a complaint pursuant to subsection 49(1) of the Act. Once the Commission has made this request, the role of the Tribunal is not to review the Commission's decision-making process, but rather to adjudicate the complaint:
>
> > [T]he Tribunal has no jurisdiction over the exercise of the Commission's discretion under CHRA s 44(3) (rejecting or referring a complaint) … The proper way to challenge a Commission decision in respect of such matters is through judicial review by the Federal Court (*Canada (Canadian Human Rights Commission c. Warman,* 2012 FC 1162 (CanLII)

[23] The above-noted cases imply that the correct way to contest a Commission decision under section 41(1) of the CHRA is by seeking judicial review at the Federal Court. In this case, there is no document on record that suggests an application for judicial review by the Federal Court was filed. Therefore, the Commission has properly asked the Tribunal to institute an inquiry into the complaint under section 49(1) of the CHRA. Upon receipt of the Commission's request, the Chairperson of the Tribunal must institute an inquiry into the complaint (section 49(2) of the CHRA).

[24] The Tribunal has the duty to inquire into the complaint itself, without limiting its scope to the Commission's report or the period the Commission investigated. As explained in *Mohamed v. Royal Bank of Canada*, 2023 CHRT 20, at para. 24: "It is settled law that the Commission need not investigate every allegation to determine whether an inquiry by the Tribunal is appropriate." It is important to add that the Tribunal has the duty to investigate the complaint in its entirety.

[25] Considering that the Tribunal must investigate the complaint itself, it has to decide the scope of Mr. Clemente's complaint.

[26] Three incidents are raised in Mr. Clemente's motion: the bidding process connected to the Radio Room, the determination of whether the Radio Room was a supernumerary position and the incident involving Ms. Hanson.

[27] Mr. Clemente's original complaint includes references to the Radio Room and the alleged lack of accommodation for his permanent return to work. The bidding process and the qualification of a position as supernumerary are directly linked to the alleged lack of accommodation in the Radio Room. The Tribunal agrees with the Complainant; these factual determinations relate to the issues that constitute the essence of the accommodation that was sought by Mr. Clemente. Therefore, they must be included.

[28] In addition, in his original complaint, Mr. Clemente refers directly to the incidents involving his former manager, Ms. Hanson, in the Pillow Room.

[29] Considering that the original complaint refers to the three elements mentioned in Mr. Clemente's motion regarding scope, the Tribunal is satisfied that the inquiry instituted by the Tribunal must include factual determinations on these issues.

[30] For these reasons, the Tribunal granted Mr. Clemente's motion.

III. DECISION

[31] The Tribunal finds that Mr. Clemente's complaint is substantiated. Air Canada differentiated adversely in the course of Mr. Clemente's employment on the ground of disability by denying him accommodation and denying him a job opportunity after December 1, 2016, thereby forcing him into disability retirement contrary to section 7 of the CHRA. Moreover, Air Canada did not establish that it would have been impossible to accommodate Mr. Clemente without suffering undue hardship and did not justify its decision with a *bona fide* occupational requirement (BFOR) based on health, safety or cost under section 15 of the CHRA.

[32] Mr. Clemente is entitled to remedies. However, the Tribunal strongly urges the parties to attempt to settle the remedies portion through mediation prior to pursuing the claim with the Tribunal's assistance.

IV. ISSUES

[33] Paragraph 7(b) of the CHRA states 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.

[34] In paragraph 3(1) of the CHRA, “disability” is specifically listed as a prohibited ground of discrimination.

[35] Paragraph 15(1) of the CHRA says that it is not a discriminatory practice if any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to employment is based on a BFOR.

[36] The issues are as follows:

A) Has Mr. Clemente established a *prima facie* case of discrimination?

(i). Does Mr. Clemente have a protected characteristic under the CHRA?

(ii). Did Mr. Clemente experience an adverse impact with respect to employment?

(iii). Was Mr. Clemente’s protected characteristic a factor in the adverse impact?

B) If Mr. Clemente established a *prima facie* case of discrimination, did Air Canada establish a valid justification for the discriminatory practice (i.e., a BFOR) under section 15 of the CHRA?

V. LEGAL FRAMEWORK

[37] Mr. Clemente alleges that he was discriminated against during the course of his employment based on his disability within the meaning of section 7 of the CHRA.

[38] Disability is one of the prohibited grounds of discrimination enumerated in section 3 of the CHRA. It is defined in section 25 of the CHRA as follows:

> Disability means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug.

[39] Paragraph 7(b) of the CHRA provides, among other things, that it is a discriminatory practice to differentiate adversely in the course of employment if the decision is based on a prohibited ground of discrimination under section 3 of the CHRA.

[40] The complainant has the burden of proving that the practice to which they were subjected was, *on its face*, discriminatory (what is known as a *prima facie* case). A *prima facie* case of discrimination is one that "covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer" (*Ont. Human Rights Commission v. Simpsons-Sears*, [1985] 2 SCR 536 at para 28 [*Simpsons-Sears*]).

[41] Specifically, a *prima facie* case is one where the complainant must prove, on a balance of probabilities, the required elements of their claim before the respondent presents evidence to refute an allegation of *prima facie* discrimination or puts forward a defence under section 15 of the CHRA or both (*Christoforou v. John Grant Haulage Ltd*., 2020 CHRT 33, at para 65 (*Christoforou*).

[42] The case law recognizes the difficulty in proving allegations of discrimination by direct evidence, given that discrimination is not a practice which one would expect to see displayed directly or overtly. The Tribunal's role is therefore to consider all of the circumstances and to determine on a balance of probabilities whether there is discrimination or whether there is, as described in *Basi* (*Basi v. Canadian National Railway*, 1988 CanLII 108 (CHRT)), the "subtle scent of discrimination." In short, the Tribunal can draw an inference of *prima facie* discrimination when the evidence before it renders such an inference more probable than the other possible inferences or hypotheses (Beatrice Vizkelety, *Proving Discrimination in Canada* (Toronto: Carswell, 1987) at 142). See also *Khiamal v. Canada (Human Rights Commission),* 2009 FC 495 at para 60).

[43] Moreover, to discharge his burden, the complainant has to show, on a balance of probabilities (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Centre)*, 2015 SCC 39, at para 67 [*Bombardier])* that they have a characteristic protected under the CHRA, that they experienced an adverse impact with respect to their employment and that the protected characteristic (referred to as a "prohibited ground of discrimination" by the CHRA) was a factor in the adverse impact (*Moore v. British Columbia (Education)*, 2012 SCC 61 at para 33).

[44] In making his case, the complainant is not required to prove that the respondent intended to discriminate against them, given that, as the Supreme Court of Canada noted in *Bombardier*, some discriminatory conduct involves multiple factors or is unconscious (*Bombardier* at paras 40, 41). Thus, the intent to discriminate should not be a governing factor. It is the result, namely, the adverse effect, which is significant (*Simpsons-Sears* at paras 12, 14).

[45] In addition, the connection between the prohibited ground of discrimination and the impugned decision does not have to be an exclusive or a causal one. It is sufficient if the prohibited ground played a role in the decision or conduct being complained of. In short, the evidence must establish that the prohibited ground of discrimination was a factor in the impugned decision (*Bombardier* at paras 45-52).

[46] Further, it is sufficient that Mr. Clemente's disability was one factor in Air Canada's decision to determine that there was no other available position to which he could be assigned that would respect his restrictions and limitations (*A.B. v. Eazy Express Inc*., 2014 CHRT 35 (CanLII) at para 16).

[47] In that case, once proof of *prima facie* discrimination is established, the burden of proof shifts to the Respondent (*Peel Law Association v Pieters*, 2013 ONCA 396 (CanLII) at para 67). Air Canada could justify its decision by showing, also on a balance of probabilities, that it flowed from a *bona fide* operational requirement under section 15 of the CHRA.

[48] Sections 15(1) and 15 (2) of the CHRA read as follows:

15(1) It is not discriminatory practice if

(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement.

15(2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a *bona fide* occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a *bona fide* justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs considering health, safety and cost.

15(1) Ne constituent pas des actes discriminatoires :

a) Les refus, exclusions, suspensions, restrictions, conditions ou préférences de l'employeur qui démontre qu'ils découlent d'exigences professionnelles justifiées

15(2) Les faits prévus à l'alinéa (1)a) sont des exigences professionnelles justifiées ou un motif justifiable, au sens de l'alinéa (1)g), s'il est démontré que les mesures destinées à répondre aux besoins d'une personne ou d'une catégorie de personnes visées constituent, pour la personne qui doit les prendre, une contrainte excessive en matière de coûts, de santé et de sécurité.

[49] The Supreme Court of Canada developed a three-step test to determine whether there is a BFOR under sections 15(1) and 15(2) of the CHRA. The test is set out in *Meiorin* (*British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3), at para 54, as follows:

> 54 Having considered the various alternatives, I propose the following three-step test for determining whether a prima facie discriminatory standard is a BFOR. An employer may justify the impugned standard by establishing on the balance of probabilities:
>
> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and

> (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

[50] This case turns on the third branch of the *Meiorin* test; therefore, the focus of the decision is on whether Air Canada has properly shown that it could not accommodate Mr. Clemente's need short of undue hardship.

[51] As stated in *Air Canada Pilots Association* v *Kelly*, 2011 FC 120, at para 356 to 358 [*Kelly*]:

> [356] The first and second steps of the Meiorin test require an assessment of the legitimacy of the standard's general purpose, and the employer's intent in adopting it. This is to ensure that, when viewed both objectively and subjectively, the standard does not have a discriminatory foundation. The third element of the Meiorin test involves the determination of whether the standard is required to accomplish a legitimate purpose, and whether the employer can accommodate the complainant without suffering undue hardship: *McGill University Health Centre v. Syndicat des employé-e-s de l'Hôpital général de Montréal*, 2000 (SCFP-FTQ) 2007 SCC 4, 1 S.C.R 161, at para.14.
>
> [357] As the Supreme Court of Canada observed in *Hydro-Québec v Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec*, section locale 2000 (SCFP –FTQ), 2007 SCC 43, [2008] 2 S.C.R. 561, the use of the word "impossible" in connection with the third element of the Meiorin test had led to a certain amount of confusion. The Court clarified that what is required is "not proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship, which can take as many forms as there are circumstances": at para.12.
>
> [358] As to the scope of the duty to accommodate, the Supreme Court stated that "The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work": *Hydro Quebec*, at para. 16."

[52] Further, in commenting on subsection 15(2) of the CHRA, the Federal Court in *Kelly* stated that subsection 15(2) should be interpreted as limiting the factors to be considered in an accommodation analysis to health, safety and cost.

[53] The Supreme Court of Canada added in Québec (*Commission des normes, de l'équité, de la santé et de la sécurité du travail) v. Caron*, 2018 SCC 3 at paras 25, 26, 27) (*Caron*) that the concept of accommodation until undue hardship "implies that there may necessarily be some hardship in accommodating someone's disability, but unless that hardship imposes an undue or unreasonable burden, it yields to the need to accommodate". It adds that "[w]hat is really required is not proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship, which can take as many forms as there are *circumstances*." The Supreme Court of Canada summarizes the concept as follows:

> In short, the duty to accommodate requires accommodation to the point that an employer is able to demonstrate that it could not have done anything else reasonable or practical to avoid the negative impact on the individual.

[54] At para 29 of *Caron*, the Supreme Court of Canada endorses Justice Gascon's summary of the principles underlying the undue hardship threshold, as described in *Stewart v. Elk Valley Coal Corp*., [2017] 1 S.C.R. 591 (S.C.C.):

> "[…] summarized the operative principles: an employer is not required to establish that it is "impossible… to accommodate", only that nothing else reasonable or practical could be offered; an individual analysis is require; the duty to accommodate includes both procedural and substantive duties; and the undue hardship thresholds means an employer will always bear some sort of hardship."

[55] The Tribunal agrees that this is the correct interpretation: accommodating an employee requires substantive effort, which is the employer's duty. In addition, as the Supreme Court of Canada stated in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, "[t]he search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation."

[56] Lastly, under sections 15(1)(a) and 15(2) of the CHRA, an employer's decision to refuse employment is not considered discriminatory if it is based on a BFOR. To show that their practice is justified as a valid BFOR, employers must prove, on a balance of probabilities, that accommodating the individual's needs would result in undue hardship, taking into account health, safety and costs as factors.

VI. ANALYSIS

A. Has Mr. Clemente established a *prima facie* case of discrimination?

i. Does Mr. Clemente have a characteristic protected under the CHRA?

[57] Yes. The Tribunal finds that there is no doubt that Mr. Clemente has a disability within the meaning of section 3 of the CHRA.

[58] The Federal Court of Appeal, in *Desormeaux v. Ottawa (City)*, 2005 FCA 311 at para 15, elaborated on the notion of disability 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."

[59] In the present case, the evidence shows that Mr. Clemente suffered a work-related accident in 2005 that caused a severe back injury and a psychological trauma that left him with permanent work restrictions and limitations. Nobody disputes that Mr. Clemente has a disability as defined in the CHRA.

ii. Did Mr. Clemente experience an adverse impact with respect to employment?

[60] Yes. The Tribunal finds that Mr. Clemente experienced an adverse impact with respect to his employment, as Air Canada did not provide a suitable job, which led to Mr. Clemente taking a disability retirement with an important decrease in pay against his will.

[61] Mr. Clemente testified that the amount for the disability pension is approximately 30% of his previous salary, which is not enough to support his family.

[62] The Tribunal considers that the adverse impact on Mr. Clemente's employment includes a shorter career, which had repercussions on many aspects of his life, including a substantial financial impact that will affect the rest of his life.

[63] Even if the Tribunal does not analyze the exact financial impacts and does not address remedies in this decision, as mentioned previously, the Tribunal concludes that there is a financial adverse impact with respect to his employment.

iii. Was Mr. Clemente's protected characteristic a factor in the adverse impact?

[64] Yes. There is no dispute that Mr. Clemente's disability was a factor in the decisions taken by Air Canada not to allow him to continue his work in the Radio Room, the Pillow Room or elsewhere after December 1, 2016.

[65] As stated previously, Mr. Clemente suffered a work-related accident on January 7, 2005, that caused a severe back injury and psychological trauma that left him with permanent work restrictions and limitations. Mr. Clemente went on long-term disability leave approved by the WSIB between December 2006 and December 2014.

[66] On January 12, 2015, Mr. Clemente returned to modified duties, which required accommodations on a progressive return-to-work plan in the Radio Room at the Toronto Pearson International Airport.

[67] Mr. Clemente stopped working for another long-term medical absence related to his work injury from June to December 2015.

[68] On January 6, 2016, he returned to work this time in the Pillow Room at the Toronto Pearson International Airport. A gradual return to work agreement was provided.

[69] The management notes state that, on February 16, 2016, Mr. Clemente expressed his interest in working full hours in the Radio Room.

[70] In April 2016, Air Canada proposed three options that did not include a position in the Pillow Room, the Radio Room or elsewhere. He was offered a labour market re-entry program through the WSIB, a disability retirement or his pension through the Canadian Pension Plan (CPP). Mr. Clemente wished to continue working for Air Canada as he had been for over 30 years, but continued employment was not offered by Air Canada. Instead, all three options presented to him included severing his employment with Air Canada.

[71] Mr. Clemente was not interested in the market re-entry program through the WSIB. He could take his disability retirement as of December 1, 2016, when he would satisfy the requirements. Financially, it was neither advantageous nor likely feasible to take a CPP retirement, as he was born on September 1962 and was only 54 years old in December 2016. He finally opted for disability retirement as of December 1, 2016.

[72] Air Canada's options resulted from Mr. Clemente's medical restrictions caused by his disability. Given this, Mr. Clemente's disability was a factor in the decision to deny him a job opportunity after December 1, 2016.

[73] Mr. Clemente has established all three elements of a *prima facie* case of discrimination based on his disability. Air Canada made an admission to that effect.

B. Did Air Canada establish a valid justification for its discriminatory practice, and particularly a *bona fide* occupational requirement under section 15 of the CHRA based on health, safety or cost?

[74] No. Air Canada did not establish a valid justification for its discriminatory practice under section 15 of the CHRA.

[75] As stated before, the burden of proof shifts to Air Canada because a *prima facie* case of discrimination has been substantiated.

[76] Air Canada had to prove, on the balance of probabilities, that continuing to accommodate Mr. Clemente beyond December 1, 2016, would have caused undue hardship based on health, safety or cost.

[77] Air Canada argued that Mr. Clemente was accommodated as a supernumerary, that is to say, in a role for which a worker was not actually required, to assist his return to work after being absent for almost 10 years. In December 2016, no permanent positions were available that Mr. Clemente could perform given his medical restrictions, limitations and qualifications. Air Canada argues that continuing to employ him in a supernumerary role would have constituted undue hardship.

[78] Mr. Clemente disputes these arguments from Air Canada.

[79] The Tribunal finds that Air Canada has not proven that it accommodated Mr. Clemente to the point of undue hardship based on health, safety and costs. First, health and safety were not truly at issue since proper accommodations had been made successfully in this regard. Second, Air Canada has argued that keeping unproductive positions (i.e., supernumerary positions) indefinitely constitutes undue hardship. However, the evidence has not borne out that only supernumerary positions were available for Mr. Clemente within the entirety of Air Canada, beyond the branch level. In fact, no efforts were made to accommodate Mr. Clemente beyond the Pillow Room and Radio Room, and insufficient efforts were made to secure a position for him in those two rooms. Lastly, Air Canada failed to prove, tangibly, how costs were at issue. Further reasons are explained below.

i. The Facts 2014

[80] After being absent from work since January 2005, at the time of Mr. Clemente's return to work in 2014, the WSIB had identified work restrictions and limitations. Mr. Clemente had to self-pace and take microbreaks as needed. Permanent impairment included heavy lifting, bending, standing and sitting. His tolerances were sitting up to 30 minutes at a time, standing up to 60 minutes at a time, walking up to 10 minutes at a time, no lifting and climbing stairs up to 12 steps with the use of a rail. He was to start with 2 non-consecutive days of 3 hours per day for 4 weeks.

[81] Based on these restrictions, Air Canada offered Mr. Clemente a gradual return to work plan with modified duties in the Radio Room. The Radio Room services Air Canada's employees such as ramp attendants, stewards or land employees and others with radios and other equipment. The employees would go to the Radio Room to get their equipment and return it at the end of their shift for the batteries to be recharged and prepared for the next need.

[82] On June 4, 2014, Domenica Geraghty, Case Manager-Disability Management for Air Canada, wrote to Ms. Heslop, Branch Rehabilitation Manager, concerning the case management update on Mr. Clemente's case. She says: "In cases where an employee requires permanent accommodation, Air Canada is legally obligated to identify a suitable

placement up to the point of undue hardship on the company. As such, you must contact your assigned HR Advisor to explore all suitable and available opportunities beyond the branch level and throughout the company."

[83] On June 25, 2014, Mr. Clemente attempted a first return to work in the Radio Room as offered by Air Canada. He performed roughly one shift but could not continue because of his condition. He went off work again.

[84] On November 27, 2014, Mr. Clemente, his union representative, Air Canada's representative and the WSIB's representative attended a meeting. The WSIB's representative identified the following restrictions and limitations:

A) Sedentary type work

B) Avoid repetitive bending and twisting of lower back

C) Avoid repetitive lifting

D) Avoid sustained flexions and awkward positions of low back

E) Micro breaks and positional changes as needed

F) All material handling should be self-paced

G) Moderate permanent psychological impairment (avoid situations of conflict and stress)

H) Lifting floor to waist up to 10 lbs occasionally, up to 25 minutes at a time for up to 2.75 hours total throughout the shift

I) Lifting waist to crown up to 5 lbs occasionally, up to 25 minutes at a time for up to 2.75 hours total throughout the shift

J) Lifting overhead occasionally at his own discretion

K) Carrying 10 lbs rarely for less than 25 minutes in total

L) Sitting up to 2.75 hours at a time and up to a total of 5.5 hours throughout the shift

M) Walking less than 25 minutes total at one time

N) Crouching for up to 2.75 hours at a time and up to a total of 5.5 hours throughout the shift

O) Stairs for up to 25 minutes at a time and up to a total of 2.75 hours throughout the shift

P) Forward bending and standing occasionally at his own discretion

Q) Pushing approximately 15 lbs; pulling approximately 21 lbs.

[85] Based on these new restrictions, Air Canada determined that the Radio Room position was still suitable.

[86] In a letter dated November 28, 2014, Heather Chorley-Gordon, Customer Service-Rehabilitation Manager at Air Canada, advised Mr. Clemente that his position in the Radio Room was supernumerary, meaning his position was not required, as it was above the normal complement of employees required for work. It was an accommodation measure.

[87] The WSIB, Air Canada, Mr. Clemente and his union agreed to a gradual return-to-work plan for the period between December 2, 2014, and January 29, 2015. Under this plan, he was to start working 2 days per week for 4-hour shifts.

[88] On December 2, 2014, Mr. Clemente started his second gradual return to work according to this plan. After a number of shifts, he asked for a bed to lie down in at work. Air Canada then contacted the WSIB to verify if this was an accommodation approved by the WSIB.

ii. The Facts 2015

[89] On January 5, 2015, a kinesiologist for the WSIB named Brandon Yim conducted a worksite visit. After his evaluation, he identified the need for further discussions regarding modifications to the physical workplace to provide Mr. Clemente a dedicated area for stretching and rest breaks. Mr. Yim believed that the duties associated with the Radio Room position were appropriate, but Mr. Clemente needed pain management strategies. Air Canada could adapt the work environment. It was adjusted accordingly.

[90] After Mr. Yim’s visit, Air Canada met with the WSIB, Mr. Clemente and his union representative. It was confirmed then that the position in the Radio Room was still suitable. A new gradual return-to-work plan started on January 12, 2015.

[91] Mr. Yim made two more visits on January 12 and 19, 2015. The modified workspace was deemed suitable, and a chair with back support was to be chosen by Mr. Clemente.

[92] On January 12, 2015, a revised gradual return-to-work plan was implemented, adjusting the shifts to 3 hours per day, 2 days per week, until February 20, 2015. Again, the position was supernumerary.

[93] Air Canada extended the gradual return-to-work plan until March 31, 2015. In a letter dated February 17, 2015, Air Canada confirmed that the position was still supernumerary.

[94] Mr. Clemente progressively worked more hours, and he was able to work on a 4 x 2 shift pattern (4 days on, 2 days off) with full 8-hour days by June 2015 in the Radio Room.

[95] Meanwhile, in April 2015, a bidding process was held to staff positions in different jobs, including the positions in the Radio Room. Ms. Chorley-Gordon explained at the hearing that the bidding process happens six months before the opening of the positions themselves. For example, the bidding process in April is to fill jobs in the following month of October. In October, the process is for jobs that would become available in the following month of April.

[96] In April 2015, Mr. Clement was not allowed to bid for his position in the Radio Room on the 4 x 2 shift pattern when the bidding process to staff positions was opened as the shifts offered were 6 x 3. Mr. Clemente could not work 6 days in a row as his condition did not permit him to do so. He needed a rest after 4 days of work. He tried the 6 x 3 shift without success. Therefore, he had to stay supernumerary.

[97] Mr. Clemente testified that he was getting increasingly stronger and could perform his duties in the Radio Room. He intended to do full hours when his condition would permit.

[98] In May 2015, the WSIB informed Air Canada that Mr. Clemente could work 4 hours per shift, 3 days per week.

[99] On May 15, 2015, Ms. Geraghty wrote in her management notes that she met with Air Canada and the WSIB representatives as well as Mr. Clemente and his union representative. She asked Mr. Clemente and his union representative to leave the

conference room for a few minutes. They did so. During that time, she raised the question of disability pension: “Catherine D expressed concern at EEs request for info on Disability Pension; WSIB stated they were not aware of this, EE did not mention it; CPP offset based on criteria – Kasha suggested not to bring up topic with EE at this time.” The term EE refers to “employee”. Based on this conversation, the question of disability pension was not mentioned during the meeting when Mr. Clemente and his union representative returned.

[100] At the hearing, Mr. Clemente testified that he had inquired about disability pensions and wanted to know the criteria and the amount of money he would receive for a disability pension. It was only a request for information. The disability management notes for June 12, 2015, read that Ms. Geraghty was to provide him with a disability pension form.

[101] On June 23, 2015, Mr. Clemente had to stop working and went on another long-term disability leave related to his work injury covered by the WSIB until January 2016.

[102] During his attempt at gradual return to work between December 2014 and June 2015, Mr. Clemente worked 56 shifts in the Radio Room in a supernumerary position according to Ms. Chorley-Gordon’s testimony.

[103] On October 2, 2015, in anticipation of Mr. Clemente’s upcoming return to work, the WSIB notified Air Canada of the following permanent restrictions:

A) Psychological:

- Mr. Clemente has Class 3 Moderate Impairment; he is considered to be partially impaired.
- There is no specific psychological restriction (e.g. Fear of heights, machinery caused by accident). The worker is impaired cognitively with attention, concentration and memory, specifically related to the Supply Room (pillow room) job description, the only precaution would involve using the computerized program. Mr. Clemente would need extra time to get acquainted and trained in the use of the software program.

B) Physical: Low back:

- Sedentary demand level;
- Avoid repetitive bending and twisting of the low back and avoid repetitive lifting;
- Avoid sustained flexion and awkward positions of low back;

- Required micro break and positional changes as needed; and
- All material handling should be self-paced.

[104] Mr. Clemente's request to lie down made in December 2014 was addressed by Justin Voyce, a case manager at the WSIB, in a letter to Air Canada dated October 2, 2015. The letter stated that having something to lie down on was not a requirement forming part of his medical restrictions. However, Mr. Voyce did recommend that Mr. Clemente be accommodated to cope with periodic back spasms that occur at the worksite. The same message is repeated in a communication dated February 9, 2016.

[105] On November 2, 2015, Ms. Geraghty writes in her management notes that there was a meeting with Air Canada and the WSIB representatives as well as Mr. Clemente and his union representative. The disability pension was discussed, and Mr. Clemente was informed that a request for a disability pension had to be sent. Mr. Clemente also wanted information about the CPP. He would explore his possibilities.

[106] On November 24, 2015, Mr. Clemente and his union representative attended another meeting with Air Canada and the WSIB representatives. One of the WSIB representatives mentioned that they have to give Mr. Clemente time to review the different options, namely the CPP, early pension and the open labour market options. Mr. Clemente wanted to know how much money each option represented, including the disability pension. Air Canada's representative advised him that he must first apply for the pension group to calculate the eligible pension amount. The amount will be reduced by 6% per year because he only has 31 years of service. Mr. Clemente considered this a subpar option given the 6% penalty per year. He didn't quite grasp the difference between a retirement pension and a disability pension. He was then directed by Ms. Chorley-Gordon to verify online on a site called HR Connect. For more information on the disability pension, she told him that he must contact the Human Resources Department. She advised him that, once approved, he cannot retract his application for a disability pension.

[107] On December 11, 2015, after a worksite meeting with a work transition specialist from the WSIB, Air Canada and Mr. Clemente, a new gradual return-to-work plan was made for a return to work in the Pillow Room.

[108] The duties performed in the Pillow Room include stuffing individual bags with toiletries, folding blankets, changing pillowcases, inserting magazines in plastic sleeves, etc. Ms. Chorley-Gordon testified that the employees working in the Pillow Room were all employees that needed accommodation due to restrictions and limitations. The Pillow Room is situated in a warehouse on the premises of the Toronto Pearson International Airport but not in the Airport building itself.

[109] In the disability management notes dated December 14, 2015, we can read that the Radio Room position should still be an option. Mr. Clemente is not back to full hours. A disability management representative, Gilda Iammatteo, asks, “Do we need to carry him to next bid?” Ms. Geraghty answers no, that he needs to meet the full hours goal. She adds “This is the last kick of the can” as there is no other option available other than the pension, as discussed previously. A WSIB representative, Syeda Abedi, writes that the expectations are for Mr. Clemente to start on January 11, 2016, with a 4 hour per day, 5 days per week schedule and a gradual increase for a period of 12 weeks and a full 40 hours per week by March 14, 2016.

[110] On December 14, 2015, Ms. Geraghty, wrote a letter to Ms. Abedi, case manager at the WSIB, that includes a paragraph that reads:

> “And Second, this notation, as discussed, this was the concern of Gilda’s and it was agreed upon by all that this attempt is the last kick at the can as we have been doing this for many years now. Any alteration/ modification/ extension will only be to progress the plan as we are not looking to prolong the mod duties beyond April 2016 timeline to full duties. Yourself and Patricia were made aware that there is no more wiggle room than what we have already provided. Giuseppe must make a concerted effort to work towards the goals set out. I am not going to accept any new barriers that will only ping pong us back and forth again. We have gone above and beyond our obligation and unfortunately we are nearing the end (…) ”

[111] Contrary to the content of the letter, at the hearing, Ms. Geraghty testified that she did not see other options but was still open to solutions. She added that if there were new barriers to deal with, they would have to be substantiated.

[112] Ms. Geraghty testified as a long-term employee of Air Canada with a respected record. She testified clearly and calmly, and her testimony was helpful on many points.

However, on this statement, the documentary record and Mr. Clemente's experience contradict her testimony. The Tribunal found her to be less credible on this one point.

[113] As such, the Tribunal does not accept Ms. Geraghty's testimony on that subject, preferring the written letter sent on December 14, 2015, that is compatible with the disability management notes.

[114] At a meeting that occurred on December 14, 2015, Mr. Clemente was advised that a disability pension form should be sent. Mr. Clemente says that he wanted a chance to discuss how much money he would get for a disability pension and the CPP with a specialist. He needed to know what these options meant financially. Ms. Geraghty said that she would get the numbers required for Mr. Clemente. He testified that he did not get the exact numbers but was invited again to check online on HR Connect. He added at the hearing that he did not want to commit to any decision until he knew how much money he was going to get.

[115] Mr. Clemente testified that, in December 2015, he did not know that Air Canada had decided not to accommodate him after April 2016 if he was not back to full duties.

[116] At that time, he could do shifts of 4 days on and 2 days off, but working 6 days on and 3 days off was too difficult for his condition. He said that, at the end of the year, the two different shifts would amount to the same number of annual hours: 1900. His goal was to continue working.

[117] The new plan made by the WSIB was sent to Air Canada on December 24, 2015. The plan says that the position in the Pillow Room "is staffed above complement." It also mentions that the "Worker is not eligible for medical pension until Dec 16, 2016: this allows for some modified work for Mr. Clemente to reach the eligibility date."

iii. The Facts 2016

[118] On January 6, 2016, Air Canada presented the gradual return-to-work plan in the Pillow Room to Mr. Clemente. This new gradual return to work was to start January 11 and end on March 31, 2016. The goal during that period was for Mr. Clemente to achieve 8 hours

per day from Monday to Friday as of March 14, continuing until March 31, 2016. The plan does not specify that the position is supernumerary, but an email dated January 6, 2016, from Dina Hawari, Employee Reliability & Customer Service Manager for Air Canada, specifies that “He is an extra in the pillow room.”

[119] The January 7, 2016, disability management notes state that an increase of work hours was planned until full hours were reached, at which time, Mr. Clemente could bid in the Radio Room in April 2016.

[120] While working in the Pillow Room, he reported to Ms. Hanson. Mr. Clemente complained that she had expectations that exceeded his medical restrictions and limitations.

[121] At the hearing, Ms. Hanson mentioned that she did not know what the restrictions and limitations were, and it was Mr. Clemente’s responsibility to inform her if the work did not respect his restrictions and limitations. An email was sent to Ms. Hanson by her manager on February 16, 2016, saying that the union advised her that two employees (Mr. Clemente and another one) working in the Pillow Room were being asked to work beyond their restrictions. Ms. Hanson answered that she did not ask these employees to work beyond their restrictions and that she always reminds all employees to work within their restrictions.

[122] Mr. Clemente testified that he felt she was laughing at him when following him in the corridor because he was walking slowly with a cane. Ms. Hanson accused him of taking coffee and smoke breaks that were too long. Mr. Clemente said that she would stand at the lunchroom and tell him that he should start walking after 25 minutes to ensure that he was back at his position before the 30 minutes for lunch were over. He felt that she was making him wear his disability on his sleeve. Mr. Clemente felt that she did not treat him like she was treating his colleagues because of his disability. At the hearing, Ms. Hanson denied following him or making detrimental comments about his disability. She denied any hostility towards Mr. Clemente and feels sorry he felt that way.

[123] Mr. Clemente and Ms. Hanson do not share the same perception. However, the context of the accommodation in the Pillow Room where Mr. Clemente performed his duties is important, not his perception of Ms. Hanson’s demeanour.

[124] On February 18, 2016, Mr. Clemente met with Ms. Hawari to review his performance since he started in the Pillow Room in January. They discussed Mr. Clemente's attendance, the grooming guidelines, the protocols for breaks and the employee self-service tools.

[125] On February 19, 2016, Ms. Hawari writes to Mr. Clemente, "You are coming up to 6 hrs per day as of Monday Feb 22nd and looking over the past 6 weeks, I am happy to see how well you are doing."

[126] On February 24, 2016, Ms. Hanson testified that she observed Mr. Clemente at his station with his feet up on the worktable leaning back with his eyes closed. She accused him of sleeping on the job. Mr. Clemente denied this vehemently and suggested to look at the videotapes as there was a camera in the room to prove it. He claimed to be having a spasm and was stretching with his feet up. A confrontation ensued. Ms. Hanson testified that he yelled at her.

[127] The same day, there was a meeting attended by Mr. Clemente, his union representative, Ms. Hanson and Ms. Hawari. Mr. Clemente was advised that he could continue to take microbreaks, in accordance with his restrictions and limitations, but was not allowed to put his feet on the table. Mr. Clemente apologized to Ms. Hanson for yelling. Everyone accepted to strive for more respectful communications. Air Canada's grooming standards and the expectations for smoke breaks were discussed. The outcome of the meeting was positive, and Mr. Clemente could move forward with his work with a better understanding of Air Canada's expectations.

[128] On March 9, 2016, Ms. Hawari writes to Ms. Geraghty that Mr. Clemente would like to go back to the Radio Room when he reaches his full hours of work, that is, 8 hours per day, on March 14, 2016. Ms. Hawari told Mr. Clemente that it would not be a problem. He would transition to the Radio Room as an extra as of March 14, 2016.

[129] Ms. Hawari also told him that, should the Radio Room bid be on a 6 x 3 or a 4 x 2 shift pattern, she would adjust "his shift cycling to match the shift pattern for the new bid so that he can get used to the rotation change /ensure his stamina is up to par." She adds, "Joe seems motivated and on the right path so hopefully all this work will pay off for all of us!".

[130] Ms. Hawari writes to Mr. Clemente on the same day. In this communication, and on the new plan signed by Ms. Hawari, there is no mention that the position in the Radio Room is extra or supernumerary. At the hearing, she confirmed that the 6 x 3 shift pattern or the 4 x 2 shift pattern end up with the same number of hours after a period of six months. It evens out. Ms. Geraghty confirmed that the two shift patterns are equivalent in their number of hours. She mentioned that if the 4 x 2 shift pattern option was available in the Radio Room, Mr. Clemente would have been on full duties and could participate in the next bid.

[131] On March 14, 2016, Mr. Clemente was transferred back to the Radio Room and started the 6 x 3 shift pattern. He was willing to try it but by the fifth day, March 17, 2016, he was getting spasms. He was then absent from work for a period of five working days, returning to work on March 25 to resume 8-hour shifts. He was also absent April 2, 6 and 7, 2016.

[132] On April 5, 2016, Ms. Hawari wrote to Ms. Geraghty about Mr. Clemente's absenteeism related to his back and about how he struggled to do more than 6 hours per day. She adds, "This is going to be an issue come the new bid as I don't think it's going to work out." At the hearing, she specified that the duties in the Radio Room were suitable; it was the 6 x 3 schedule that made it difficult for him.

[133] On April 15, 2016, Mr. Clemente provided a new functional abilities assessment signed by his doctor that identified he could only work for up to 6 hours per day for a maximum of 4 days per week. The previous plan made on March 11, 2016, allowed him to work 8 hours per day on the 6 x 3 shift pattern. Therefore, the Radio Room assessment was not suitable anymore considering the shift pattern.

[134] On April 15, 2016, Mr. Clemente participated in a meeting, accompanied by his union representative. The WSIB, Air Canada's Disability Management and Employee Reliability Management departments representatives were present. Air Canada indicated that there was no position available within Air Canada that would respect his restrictions, limitations and qualifications. The only suitable position was in the Pillow Room, but it was unavailable because all those positions had been given to other employees who needed accommodations.

[135] At that meeting, Air Canada's representative told Mr. Clemente that, considering his restrictions, there was no job available within Air Canada (see the letter sent to Mr. Clemente on November 16, 2016). Air Canada gave him three options that did not include a position in the Pillow Room, the Radio Room or elsewhere within Air Canada. He was offered three options: a labour market re-entry program through the WSIB where he would retrain for a position outside Air Canada, a disability pension from Air Canada, which he would be eligible for as of December 1, 2016, or, if denied the disability pension, he could retire from Air Canada and apply for the CPP.

[136] Despite his wishes, Mr. Clemente was not given the opportunity to continue working for Air Canada as he had for more than 30 years. All three options included severing his employment with Air Canada.

[137] Ms. Hawari testified at the hearing that, in April 2016, Air Canada did not know what positions would be available the following December but added that Air Canada could not carry supernumerary employees indefinitely.

[138] Mr. Clemente was not interested in the market re-entry program through the WSIB. He could take his disability retirement as of December 1, 2016, as he would satisfy the requirements. Financially, it was not advantageous to retire, as he was going to be 54 years old in December 2016, and the penalties would have been too significant. He finally opted for disability retirement as of December 1, 2016.

[139] In the meantime, Mr. Clemente returned to work in the Pillow Room on April 27, 2016, to bridge him to his disability pension on December 1, 2016. Air Canada says that this new assignment was not a supernumerary position but a temporary one created specifically for Mr. Clemente to cover vacations, time off, etc.

[140] On April 20, 2016, Ms. Geraghty organized a conference call with different representatives of Air Canada, including people from the Labour Relations Department. The conference was called "Inability to accommodate FINAL". It says in the email that Mr. Clemente started a "Final" return-to-work plan in January 2016. The plan initially placed Mr. Clemente in the Pillow Room and then transitioned him to the Radio Room, where the full permanent bid was to take place on April 26, 2016. For, Mr. Clemente, it was a "last kick at

the can." The plan was supposed to progress without repeating the same shift patterns as in prior years, where multiple return-to-work plans had failed. Mr. Clemente then requested a 4 x 2 shift pattern, with a 6-hour day starting at 6 a.m. Ms. Geraghty writes that there does not appear to be a suitable area to accommodate the employee's requested hours and requested area, stating that "we cannot create a special position/role/schedule just to accommodate him."

[141] Ms. Geraghty adds that Air Canada had gone above and beyond to assist Mr. Clemente and made every effort to accommodate him. She writes, "As advised in an earlier conversation the calculation to pay the EE out until age 65 if there are no suitable jobs for him to work at outside of Air Canada is approximately $639 522.00 so as they say, it would be in AC's best interest to find a job for him to at least Dec 2016 at which time the EE has indicated he would retire." She adds later, "Do we keep him as an extra and create a shift for him, at the hours requested so that he can finish his time until retirement; or do we just pay the $600k they advised would cost the company to pay him out until retirement." It is also written that "J. Clemente accepted the offer!".

[142] Ms. Geraghty testified that Mr. Clemente had accepted the disability retirement offer. Mr. Clemente testified otherwise, stating that he did not want to opt for the disability retirement until he knew how much it would amount to. And when he became aware, he refused it but then felt obliged to accept it because Air Canada had threatened to discharge him completely if he refused.

[143] At the hearing, the question of the payment of $639 522 was discussed. Ms. Hawari was not sure where it came from or what it represented. She thought that it could have been a calculation from the Pension and Benefit Department as a lump sum to bridge Mr. Clemente until he reached the age of 65. Ms. Geraghty was under the impression that the amount was calculated by the WSIB as the cost to Air Canada if Mr. Clemente did not work until the age of 65. She thought it included more than just his loss of earnings; she believed that it also included administration fees related to Air Canada's rate of classification within the WSIB Fund. Ms. Chorley-Gordon assumed that the amount represented the cost to Air Canada for the labour market re-entry program, but she could not confirm this.

[144] Ms. Hawari, Ms. Chorley-Gordon and Ms. Geraghty don't have the same understanding of what the amount of $639 522 represents.

[145] Mr. Clemente had never heard of the $639 522 payment.

[146] On the same day, April 20, 2016, Mr. Voyce from the WSIB wrote a letter to Mr. Clemente stating that, based on their new review of the case, the position in the Radio Room was not suitable as the schedule did not align with the 6 hours per day, 4 days per week recommended by his doctor in his most recent "Functional Ability" form.

[147] Mr. Clemente testified that the main issue was the schedule and not the duties themselves. He added that no one told him that there was no wiggle room left, nor was he told that it was "the last kick at the can" or that Air Canada would refuse new barriers that would only ping pong them back and forth again.

[148] At the hearing, Ms. Chorley-Gordon testified that in April 2016 the 4 x 2 shift pattern did not exist in the Radio Room, that the existing shift pattern was 6 x 3, but that it could have been arranged. She indicated that, in 2019, there was a 4 x 2 shift pattern in the Radio Room. Ms. Chorley-Gordon says that the shift pattern was not a problem. The problem was the duties themselves caused issues, as the position did not allow self-pacing. Employees who require their equipment need to be served quickly, and they would become impatient when the service took too long. The job would be incompatible with his restrictions and limitations. She explained that, as a supernumerary, he could avoid certain duties, such as answering at the counter, and focus on recharging devices, allowing him to self-pace. She added that if a position became available after December 1, 2016, she assumed its suitability would be assessed at that time. For example, had someone retired, this could have created an opening for Mr. Clemente.

[149] On April 22, 2016, Ms. Geraghty wrote to Ms. Abedi and Mr. Voyce from the WSIB informing them of the new return-to-work plan starting in April 2016 in the Pillow Room. She writes that the branch will endeavour to ensure that Mr. Clemente does not work more than a 4-day shift pattern at a schedule of 6 hours; "however, as Giuseppe has demonstrated a capacity to work 5 days at 6 hrs, we feel that there is a potential to increase the days as well as the hours, possibly to 8 hrs per day." She specifies that this role is not an extra.

[150] On April 26, 2016, at the time of the bidding process, Mr. Clemente was then doing full 8-hour days on a 4 x 2 shift pattern, as shown in his work calendar. But, he was not allowed to bid for this position in the Pillow Room or the Radio Room during the bidding process because only three options were offered to him: the labour market re-entry program, a disability pension and pension with the CPP.

[151] In the disability management notes, Ms. Geraghty writes on July 7, 2016, that she received a phone call advising her that the union representative stated that Mr. Clemente has decided not to retire on December 1, 2016, as outlined in the last return-to-work plan. Ms. Geraghty adds that he is supernumerary.

[152] In September 2016, Ms. Michelle Hiebert, an Employee Reliability Manager with Air Canada, got involved in Mr. Clemente's file as a replacement for Ms. Hawari. At the hearing, she mentioned that Air Canada would do its due diligence to continue trying to find a suitable position once it was informed that Mr. Clemente did not want to take his disability retirement.

[153] In the disability management notes, we can read that, on October 13, 2016, Mr. Clemente does not want to retire. At the hearing, he mentioned that he was working successfully in the Pillow Room at the time and did not want to retire.

[154] On October 13, 2016, Air Canada writes in a letter to Mr. Clemente that Mr. Clemente must submit his retirement paperwork and that a failure to do so would result in him being sent home as no further workplace accommodation was available. Mr. Clemente testified that he felt an enormous pressure to sign the papers requesting his disability pension. He was reluctant to do so as he wanted to continue working, and he was under the impression that the income from the disability pension would not be enough.

[155] On October 17, 2016, Ms. Geraghty wrote to the Manager-Disability Management, Ms. Pleasance, that the WSIB was no longer involved. Since Mr. Clemente's return to the Pillow Room, there have not been any major issues, and his condition has not deteriorated to the point of requiring a review.

[156] In the disability management notes, we can read that, on October 28, 2016, if Mr. Clemente did not take his disability retirement, his employment would be terminated, and he would be placed on an unauthorized leave with zero payment.

[157] On the same day, Ms. Geraghty writes to Ms. Iammatteo and Ms. Pleasance requesting a conference call to discuss Mr. Clemente's modified duty offer. She asked whether the union should be invited to the call in addition to the Labour Relations and Human Resources departments. Ms. Iammatteo answers that the union should not be invited "because the union is stating that he does not have to retire, and we should be accommodating at CEQ (area where the Pillow Room is situated) even if super nummery (sic)." Ms. Pleasance writes back to Ms. Iammatteo and Ms. Geraghty saying the following: "What we have to do is fulfill our Duty to Accommodate by confirming whether he can be accommodated anywhere in Airport YYZ [Toronto]; if not, then anywhere/any branch in YYZ then any Airports base across Canada and at last resort, any branch across Canada."

[158] At the hearing, Ms. Geraghty testified that the branch determined that there was no availability after December 1, 2016.

[159] Ms. Hiebert explained that, during the bidding process, they would know how many employees they have and how many jobs are available, but they could not accurately predict the movement of personnel or the number of employees who might not bid for one reason or another. Therefore, in April during the bidding process, Air Canada would not know how many positions would be available six months later (the following October), when the positions would be filled according to the bid. The same applies to the October bidding process, where the number of positions for the following April could not be determined in advance.

[160] She testified that, in November 2016, there were nine positions in the Radio Room that were—at that time—filled by nine employees with a DTA. In the Pillow Room, there was 10.5 positions, and they had 11 DTA employees. There were no jobs available for Mr. Clemente, and he could not bid for those positions and use his seniority as there was no bumping process for positions for DTA employees. He could only obtain a position if someone left their current DTA position. No other positions would meet Mr. Clemente's

restrictions and limitations according to Ms. Hiebert. At the time, he could only be bridged as a supernumerary, until his disability retirement in December 2016.

[161] On November 7, 2016, Ms. Geraghty wrote in an email that the WSIB had closed the file around May 2016, “as there was no changes to the plan, no regression in condition, the job remains suitable and the claim has surpassed the 72mth lock in therefore WSIB will no longer be involved and Air Canada has met our obligation under the claim.”

[162] In November 2016, Mr. Clemente was allowed to take some holidays as he had reached full hours since March 2016.

[163] On November 16, 2016, Ms. Hiebert sent another letter to Mr. Clemente reminding him that his temporary accommodation would come to an end on December 1, 2016, specifying that “Failure to apply for the above pension may result in action up to and including an administrative discharge of your employment.”

[164] At the hearing, Ms. Hiebert said that that phrase is a standard phrase added to those kinds of letters. She also stated that she was still open to finding him a position if something was available. Although Ms. Hiebert was a generally believable witness, the Tribunal, in hindsight, does not consider this openness expressed at the hearing on this point to be credible as it conflicts with the language of the letter written on November 16, 2016. While her overall testimony was reliable, given the contradictory evidence, I discount her statement on this particular detail.

[165] Mr. Clemente was also informed that the WSIB would not support his case pass December 1, 2016.

[166] On November 29, 2016, Mr. Clemente finally submitted his Request for Disability Retirement form.

[167] The documents prove that Mr. Clemente was working full time in the Radio Room between March 14 and December 2016.

[168] At the hearing, Ms. Chorley-Gordon admitted that it was premature to decide in April 2016 that there would not be any accommodation available after December 2016.

[169] A request for disability retirement could take up to one month to process before an employee would begin receiving a pension. Therefore, since Mr. Clemente submitted his request late in the process, he was placed on a personal leave of absence to bridge the gap between the end of his work assignment and the commencement of his disability pension. It ultimately commenced on February 1, 2017.

iv. Conclusion

[170] Air Canada's explanation and justification for removing Mr. Clemente from the Radio Room and the Pillow Room positions was not based on his inability to perform the duties. Air Canada justifies its decision by explaining that the positions in the Radio Room and Pillow Room were supernumerary, that there was no other suitable role and that the bidding process met the threshold of undue hardship. It argued that it could not continue to keep him in a supernumerary position indefinitely.

[171] Air Canada's position is that it has no obligation to accept unproductive work and that there was no safe and productive work available. It cites *Croteau v. Canadian National Railway*, 2014 CHRT 16 [*Croteau*)]:

> "An employer does not have a "make-work" obligation of unproductive work of no value and doesn't have to change the working conditions in a fundamental way. However, it "does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work."

[172] Air Canada adds that the concept of undue hardship does not amount to an impossibility, as stated in *Caron*.

[173] Air Canada refers to an arbitration decision rendered in British Columbia (re *Vancouver Island Health Authority and BCNU* (2004), 129 LAC (4th) 161 (BC arb. Bd) [*Vancouver Island Health Authority*] where the arbitrator, in referencing *Calgary Herald v. Calgary Printing Trades Union*, *Local 1* (1995), 52 L.A.C. (4th) 393 (Alta. Arb.) (D.G. Tettensor, Q. C.), says: "I accept the proposition that the duty to accommodate does not require an employer to create a new job or *one that is not productive* or one that has the core duties removed."

[174] The Tribunal acknowledges that over the course of a two-year period, Air Canada accommodated Mr. Clemente in his return to work in the Radio Room and the Pillow Room between January 2015 and December 1, 2016. Air Canada complied with the recommendations of the kinesiologist from the WSIB by implementing workplace modifications, including providing Mr. Clemente with a dedicated area for stretching and rest breaks. There is no dispute that the physical accommodations accepted by Air Canada satisfied Mr. Clemente's needs.

[175] Nevertheless, Ms. Geraghty wrote in her management notes in June 2014 that Air Canada is "legally obligated to identify a suitable placement up to undue hardship on the company." Air Canada must explore "all suitable and available opportunities beyond the branch level and throughout the company." The evidence does not establish that Air Canada explored those possibilities outside the branch or across the whole company. Besides articulating its obligation to seek viable options, Air Canada did not perform any action to sustain it. Nor did Air Canada present evidence that research was conducted outside the branch, at any other airports or anywhere else within the company to find reasonable work alternatives for Mr. Clemente. At the hearing, alternative jobs were discussed (Car 54, Escort, Station Attendant, Lost and Found Runner, etc.) that Mr. Clemente could not perform considering his restrictions and limitations, but these were all at the Toronto Pearson International Airport. Air Canada exerted no effort to find something suitable outside the branch. Consequently, Air Canada has not fulfilled its legal obligation on that point. But there is more.

[176] The main question is whether Air Canada accommodated Mr. Clemente's disability-related restrictions up to the point of undue hardship. In the Tribunal's view, the evidence presented did not substantiate that continuing to accommodate Mr. Clement would have caused undue hardship after December 2016. Overall, the Tribunal was left perplexed as to why accommodations were not pursued. Was it a question of health, safety or cost?

[177] Air Canada did not justify its actions based on health or safety concerns. Were the costs involved in maintaining Mr. Clemente at work up to the point of undue hardship?

[178] In the Tribunal's view, Air Canada did not prove that what Mr. Clemente had been doing prior to December 1, 2016, could not be continued because of costs or any other reason that would amount to undue hardship for the company.

[179] Why was it decided as early as December 2015, when he returned to work after a 6-month leave because of his work injury, that his new return-to-work plan was "the last kick at the can", that there was "no more wiggle room" and that Air Canada "would not accept any new barriers"? This all-or-nothing attitude does not suggest an openness to the accommodation process and finding a suitable position in the branch, outside the branch or anywhere else in the company. Even accepting that the Toronto Pearson International Airport is the most important in Canada, there is no evidence that light duties were not available elsewhere. The possibility was not explored seriously. After carefully reviewing the evidence, the Tribunal finds that the efforts that Air Canada made after April 2016 were minimal and do not amount to undue hardship.

[180] Air Canada only focused on two positions to accommodate Mr. Clemente: one in the Radio Room and another in the Pillow Room. Mr. Clemente was doing productive work in those positions. It was not "make-work" or unproductive work of no value as mentioned in *Croteau.* He was fulfilling the duties that other employees were also doing for the benefit of Air Canada's employees or its clients. The duties themselves in the Radio Room were useful, as he was taking care of the equipment needed by various employees. Similarly, his duties in the Pillow Room were valuable, as he was stuffing pillows, preparing toiletries and magazines, etc. for the clients onboard of aircrafts.

[181] Air Canada claims that the Radio Room position was not suitable because, at that time, the schedule followed a 6 x 3 shift pattern and not a 4 x 2 shift pattern, which was recommended by Mr. Clemente's doctor. Additionally, Air Canada argues that it was not obligated to create a job for Mr. Clemente as proposed in *Vancouver Island health Authority*. However, the evidence shows that Air Canada could have altered the shift pattern to accommodate Mr. Clemente's needs, as Ms. Chorley-Gordon said in her testimony. Air Canada did not have to create a special job but could adjust the shift pattern.

[182] In fact, Ms. Hawari testified that the shift pattern could be adjusted to 4 x 2 and that he could participate in the new bid to secure a position (non-supernumerary) in the Radio Room as soon as he would be back to full hours (i.e., 8 hours per day). Evidence suggests Mr. Clemente was gradually transitioning to full days. That was Ms. Hawari's position on March 9, 2016. Her opinion changed after Mr. Clemente went on sick leave because of his work injury for five days on March 18, 2016.

[183] Ms. Chorley-Gordon also testified that, in April 2016, the 4 x 2 shift pattern did not exist in the Radio Room but could have been a viable option to accommodate this change.

[184] The Tribunal is left wondering why this change was not carried out to accommodate Mr. Clemente when he returned to full hours after his 5-day absence. Air Canada did not present sufficient evidence to support the claim that accommodating a shift pattern change would cause undue hardship. The evidence supports an opposite conclusion.

[185] This ultimately begs the question, on April 15, 2016, after Mr. Clemente had been working meaningfully and successfully in the Pillow Room, why was he presented with three options that would consequently sever his employment with Air Canada?

[186] Air Canada has sought to justify its decision to impose the three options severing his employment because it could not keep him as a supernumerary indefinitely. In closing submissions, it relied notably on *Byers Transport Ltd v Teamsters*, Local 217 (2002), 68 CLAS 316 to argue that the duty to accommodate does not extend so far as to require a company to continue on a permanent basis a position that is not necessary for the efficient operation of the business; this constitutes undue hardship for a company. However, the issue here is that non-supernumerary jobs were never explored beyond those found the Radio Room and the Pillow Room. Even if productive positions, such as those in the Pillow Room, had become available, the evidence suggests that Air Canada adopted an uncompromising attitude towards accommodation starting as early as December 2015. The language used in discussions about Mr. Clemente's case strongly suggests a sense of finality. The Tribunal finds that severing employment was a foregone conclusion for Air Canada.

[187] Why did Air Canada force the severing of Mr. Clemente's employment. The evidence does not show that maintaining Mr. Clemente's employment beyond December 2026 would cause undue hardship.

[188] In the Pillow Room, all employees are individuals with a duty to accommodate. There are 10.5 jobs available, and there were 11 employees in November 2016.

[189] The evidence is contradictory on the fact that the position in the Pillow Room starting in April 2016 was supernumerary or non-supernumerary. Some documents show that it was supernumerary, while some others identify the position starting in April 2016 as a temporary one created for Mr. Clemente to cover vacations, time off, etc. Why would this position not continue after December 1, 2016? What is the justification?

[190] Air Canada argued that there were no available roles for Mr. Clemente in the Pillow Room in November 2016, as these roles were already occupied by other employees within Air Canada who were being accommodated. The evidence, however, demonstrated that the idea of phasing out Mr. Clemente had matured well before a lack of availability in the Pillow Room was the main factor at issue. Lastly, there is no evidence supporting the allegation that striving to keep Mr. Clemente in the Pillow Room would have constituted undue hardship for Air Canada.

[191] Ultimately, Air Canada wanted Mr. Clemente to take his disability retirement. It indirectly forced him to do so. In fact, Air Canada knew as early as May 2015 that Mr. Clemente had inquired about it, yet it chose not to discuss the matter with him at the time.

[192] Mr. Clemente was clearly forced into taking his disability retirement. The letter sent by Ms. Hiebert on November 16, 2016, combined with the notes in the disability management notes of October 28, 2016, are telling. If Mr. Clemente refused to take his disability retirement, he would be placed on an "unauthorized leave with zero payment."

[193] There is no evidence that keeping Mr. Clemente in their ranks would have imposed an undue cost on after December 2016.

[194] The evidence is unclear as to what the amount of $639 252 represents. Without a clear and credible explanation, Air Canada cannot justify its decision to sever Mr. Clemente's employment in December 2016 because of costs based on the calculation of $639 652.

[195] As the Tribunal observed in *Christoforou* at para. 113 an employer's anticipated hardships about proposed accommodations cannot be based on speculative or unsubstantiated concerns of adverse consequences. Evidence is needed, which is absent in the present case.

[196] Given the absence of evidence, it is impossible for the Tribunal to conclude that keeping Mr. Clemente's employed after December 1, 2016, would have caused Air Canada undue hardship. Mr. Clemente could have been accommodated without undue hardship.

[197] Air Canada did not establish a valid justification for its decision to refuse to continue with Mr. Clemente's employment with a BFOR based on health, safety or cost under section 15 of the CHRA. The *prima facie* case of discrimination established by Mr. Clemente has not been justified by Air Canada under section 15 of the CHRA.

VII. ORDER

- Mr. Clemente's complaint is substantiated.
- The parties are directed to notify the Registry Office by November 1, 2024, whether they are prepared to mediate the remedies with the assistance of the Tribunal or on their own.
- If mediation is attempted and unsuccessful, the Registry Office will contact the parties to schedule a new hearing on the remedies.

Signed by

Marie Langlois
Tribunal Member(s)

Ottawa, Ontario
September 17, 2024

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2517/7420

Style of Cause: Giuseppe Clemente v. Air Canada

Decision of the Tribunal Dated: September 17, 2024

Date and Place of Hearing: July 5-6, 2023, January 16-17, and March 19-21, 2024

Ottawa, Ontario

Appearances:

Matthew Langer, for the Complainant

Jackie VanDerMeulen, for the Respondent