Federal Court Cour fédérale

Date: 20210928

Docket: T-1069-19

Citation: 2021 FC 1008

[ENGLISH TRANSLATION]

Ottawa, Ontario, September 28, 2021

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

MARTIN DUCHARME

Applicant

and

AIR TRANSAT A.T. INC.

Respondent

JUDGMENT AND REASONS

[1] Mr. Martin Ducharme, the applicant, is seeking judicial review of the decision of the Canadian Human Rights Commission [CHRC], which did not deal with Mr. Ducharme's complaint because it found the complaint to be ineligible under paragraph 41(1)(d) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA]. The application for judicial review was made pursuant to the *Federal Courts Act*, RSC 1985, c F-7, section 18.1.

I. Introduction

[2] Under the CHRA, certain practices are prohibited and are considered discriminatory. The discriminatory practice must be based on one of the prohibited grounds of discrimination set out in the Act. In this case, the applicant filed a complaint with the CHRC on October 6, 2014, against what he considered to be a discriminatory practice against him by his employer, Air Transat A.T. Inc. (the respondent). He was terminated and he claims that it was because of disability. The applicant has cited "disability" as a prohibited ground of discrimination. This is one of the grounds found in the CHRA:

Prohibited grounds of discrimination	**Motifs de distinction illicite**
3 (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, <u>disability</u> and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.	**3 (1)** Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'identité ou l'expression de genre, l'état matrimonial, la situation de famille, les caractéristiques génétiques, l'état de personne graciée ou la <u>déficience</u>.

[Emphasis added.]

The discriminatory practice was allegedly what is described in section 7 of the CHRA. Mr. Ducharme alleged that Air Transat refused to continue to employ him, and that this refusal was based on a disability:

Employment	**Emploi**

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

[3] In the narrative of his complaint, the applicant alleged that he was unable to return to his job with the respondent, where he had 21 years of seniority, as a result of [TRANSLATION] “a period of <u>short-term</u> disability for <u>anxiety and depression</u>” (emphasis in the complaint dated October 6, 2014). According to the applicant, the period of disability lasted from May 28, 2013, to December 31, 2013 (the Court noted that the applicant allegedly returned to work on June 13–26, 2013). The applicant alleged that he was unable to return to work as a flight director after this period. The respondent is an airline and, following certain twists and turns over a period of one year, it terminated the applicant’s employment on May 14, 2014.

[4] Mr. Ducharme had initiated other proceedings relating to the same facts. He filed his grievances against his employer that were dismissed before the arbitrator. No application for judicial review was made against the arbitrator’s decision. He also filed a complaint against Air Transat with the Canada Industrial Relations Board (the Board). Two of the complaints were against his employer and related to unfair labour practices (subsection 97(1) of the *Canada Labour Code*, RSC 1985, c L-2). The complaints were dismissed (2017 CIRB LD 3915 and 2018 CIRB LD 3954). I note that, as with the complaints under the CHRA, complaints had also been

filed with the Board regarding the Canadian Union of Public Employees (CUPE).The complaint before the Board related to an alleged breach of the duty of fair representation (section 37 of the *Canada Labour Code*). On judicial review of the Board's decisions before the Federal Court of Appeal, all three applications for judicial review were dismissed, with costs in favour of Air Transat (*Ducharme v Air Transat A.T. Inc.*, 2021 FCA 34). As for the allegations against two CUPE members before the CHRC, the application for judicial review of the CHRC's refusal to deal with the complaint against the union was also recently dismissed (2021 FC 847). Since these allegations are not part of the Air Transat complaints, there is little point in going into detail. This leaves only the CHRC complaint about the alleged conduct of Air Transat. I therefore turn to the review of the application for judicial review of the CHRC's Air Transat decision.

II. Facts

[5] The complaint before the CHRC, the one that concerns us at this stage, essentially alleges that the applicant was dismissed because of his disability, which he does not define in any way other than as [TRANSLATION] "anxiety and depression". In fact, very little is known about this alleged disability. He states that his employer took far-reaching measures, requesting inordinate medical expertise, which he described as [TRANSLATION] "abusive and discriminatory procedures" (October 6, 2014 complaint, para B.6). He wrote in paragraph B.3 that his employer acted [TRANSLATION] "in a discriminatory manner regarding my past disability by proceeding with all sorts of requests such as access to my medical file prior to and having nothing to do with my <u>short-term</u> disability (Date: October 25, 2013 to May 14, 2014)". Understandably, the applicant had a problem with his employer's requests for information and repeated requests for

medical evaluations. Many of these evaluations were to be done by the Centre d'évaluation pour alcoolique et toxicomane [assessment centre for alcoholics and addicts] (CEPAT).

[6] In *Ducharme*, the Federal Court of Appeal stated the following about complaints against Board decisions:

> [TRANSLATION]
>
> [4] The applicant was hired by Air Transat in 1993 as a flight attendant. During his last six years with the company, the applicant also acted as a flight director; in this capacity, he was responsible for supervising the flight attendants during flights and acting as a link between the cockpit and the passenger section. He maintained a clean disciplinary record over the years and was active in his union.
>
> [5] From May 28 to June 13, 2013, the applicant went on disability leave on the grounds that he was dealing with an anxiety disorder. He returned to work from June 14, 2013 to December 31, 2013, but was once again placed on medical leave from June 26 to December 21, 2013. Prior to his return to work, his employer informed him on September 23, 2013 that it suspected a pattern of substance use. This was followed by numerous requests for medical expertise, drug testing and disclosure of his medical records, to which the applicant objected, on the grounds that these requests had nothing to do with his last medical leave and his work.
>
> [6] The applicant finally agreed to submit to testing on March 21, 2014. However, he refused to answer any questions regarding his medical history at two subsequent medical examinations on April 1 and 28, 2014. On May 14, 2014, the employer terminated the applicant's employment, citing his lack of cooperation and the inability to validate his fitness for duty and to determine whether he has a pattern of substance use.
>
> [7] From January to May 2014, the union submitted four grievances on behalf of the applicant related to the employer's actions. These grievances, alleging abuse of right and wrongful termination, were all denied by the arbitrator in April 2017.

[7] As the FCA noted, the applicant filed four grievances, which resulted in a 74-page award in which the arbitrator provides a detailed analysis of the facts that has not been shown to be either incomplete or incorrect. Attached to this judgment is paragraph 392 of the April 5, 2017 award. This provides an excellent summary of the various twists and turns during the period from March 13, 2013 to May 14, 2014. In order to fully grasp what this was about, it is necessary to know the substance of the grievances. I have reproduced relevant portions of it:

> [TRANSLATION]
> 1. TS-YUL-14-08
> January 23, 2014
>
> I/We affirm that: Contrary to the collective agreement and the laws in force, since on or about January 1, 2014, the employer has refused to allow Martin Ducharme to return to work after his sick leave.
>
> I/We demand that the employer agree to the immediate reinstatement of Mr. Ducharme in his position as flight director, full reimbursement of any monetary loss and restoration of all rights, benefits and privileges. We are also claiming moral damages. We also claim monetary compensation for any resulting negative tax consequences, the whole with the interest and indemnity provided for in the *Canada Labour Code* and without prejudice to any other recourse we may have.
>
> 2. TS-YUL-14-31
> March 11, 2014
>
> I/We affirm that: Contrary to the collective agreement and applicable laws, on or about February 27, 2014, the employer provided Martin Ducharme with a letter titled “request for medical information” whose content is unfair and illegal.
>
> I/We demand that the employer respect and enforce the collective agreement, remove this letter from Mr. Ducharme’s file, reimburse him for any monetary loss and restore all of his rights, benefits and privileges. We are also claiming moral damages. We also claim monetary compensation for any resulting negative tax consequences, the whole with the interest and indemnity provided for in the *Canada Labour Code* and without prejudice to any other recourse we may have.

3. TS-YUL-14-46
May 1, 2014

Contrary to the collective agreement and applicable laws, and notwithstanding the union's interventions, the employer violated the worker's rights by requiring him to submit to tests, samples and medical evaluations of such magnitude as to constitute an abuse of right, an invasion of privacy, and interference with the dignity and integrity of the person.

We demand that the employer cease this practice and respect the collective agreement and applicable laws. We demand the immediate reinstatement of the worker without any further constraints or conditions. We also demand that the employer reimburse any monetary loss and restore all of Mr. Ducharme's rights, benefits and privileges retroactively to the date on which he should have been reinstated at work. We also claim financial compensation for moral, punitive and exemplary damages, and for infringement of the worker's fundamental rights, which compensation is to be established at the hearing. Finally, we claim monetary compensation for any resulting negative tax consequences, the whole with the interest and indemnity provided for in the *Canada Labour Code*.

4. TS-YUL-14-57
May 14, 2014

I/We, the undersigned, affirm that the company is in violation of the collective agreement, specifically but not limited to articles 2.02.08 and 29.01, in dismissing Mr. Martin Ducharme without good and sufficient cause, by letter on May 14, 2014.

We therefore request that the company comply with the collective agreement, cancel the letter of dismissal, reinstate Mr. Martin Ducharme as a unionized employee at Air Transat, correct any breach of Mr. Martin Ducharme's remuneration with interest as provided for in the labour code and amend his file in order to reflect the correction. We also recommend that the company officially inform all departments concerned as soon as possible, without prejudice to any rights and privileges that may have been granted.

Furthermore, we claim financial compensation for moral, punitive and exemplary damages, and for infringement of the worker's fundamental rights, which compensation is to be established at the hearing. Finally, we claim monetary compensation for any negative tax consequences resulting from

> this, the whole with the interest and indemnity provided for in the *Canada Labour Code*.
>
> [Emphasis added.]

[8] All four grievances were dismissed after a six-day hearing. The reasons seeking to justify the dismissal of the grievances are found at paragraphs 394 to 410 of the award.

[9] Over a period of just over six months, the arbitrator counted five occasions on which the respondent expected the applicant to consent to testing and therefore agree to a full health check-up. Mr. Ducharme changed his mind at the last minute, which stopped it from happening. Paragraph 395 of the award reads:

> [TRANSLATION]
>
> [395] On five occasions during this period and while the employer expected, at each of Mr. "X"'s visits, that Mr. "X" would finally consent to the screening tests and agree to a complete health check-up, there was an obstacle or a last-minute change of heart on Mr. "X"'s part that prevented the expert's report from being prepared.

The applicant's objection regarding the confidentiality of the results of the tests, which was one of the reasons given by the applicant, was no longer valid once the respondent unequivocally confirmed to the union and the applicant that the medical information resulting from the testing would only be communicated to the doctor designated by the respondent. The employer also gave a formal undertaking that it would not terminate the applicant's employment if he cooperated in the evaluation of his case.

[10] The arbitrator noted that the respondent attempted to resolve the issues raised by the applicant. While the respondent requested Mr. Ducharme's medical records, this request was abandoned in order to reach an agreement on the screening and the complete medical check-up only. At that point, the applicant gave the doctor who was to conduct the tests on the morning of the tests a letter aimed at significantly limiting the scope of the expert's report (letter from the applicant to Dr. Chiasson, April 28, 2014). The report was not to be completed as the applicant was to refuse to answer certain questions. These are the arbitrator's findings of fact. The findings are final as no judicial review of this decision was undertaken. The arbitrator stated in paragraph 405 of his decision:

> [TRANSLATION]
>
> [405] How can we reconcile Mr. "X"'s testimony that he was aware that his job was at stake with the employer's commitment at the time not to terminate his employment if he complied with the conditions? And, on that basis, why not balance his belief in his principles against the safety imperatives imposed on the employer?

[11] This led the arbitrator to say that the exchanges and negotiations had gone nowhere; Mr. Ducharme had chosen to stick to his positions and [TRANSLATION] "[h]e must accept the consequences" (para 406).

[12] After commenting briefly on the existence of rumours in his workplace that Mr. Ducharme may have been [TRANSLATION] "using", rumours that Mr. Ducharme allegedly fueled through his behaviour, the arbitrator concluded as follows:

> [TRANSLATION]
>
> [409] The employer, Air Transat, is a public airline. Mr. "X" was employed as a flight director, which is considered a job requiring a high level of safety. The employer having demonstrated that it had

> serious and reasonable grounds to suspect that Mr. “X” was a substance user, it was justified in requiring him to undergo screening tests and a medical examination in order to establish a complete health check-up and to verify whether he had a pattern of substance use.
>
> [410] In view of Mr. “X”’s repeated refusals to comply, I am of the opinion that the employer has demonstrated the existence of good and sufficient cause to proceed with his dismissal.

III. CHRC decision

[13] The decision under review concluded that the complaint submitted on October 6, 2014, should not be disposed of. It was released on May 29, 2019.

[14] On June 18, 2015, the CHRC had asked the applicant to use an alternative complaint or grievance procedure, as specifically provided for in paragraph 41(1)(a) of the CHRA. On December 29, 2017, the applicant took advantage of the opportunity to reactivate his complaint. If the applicant uses such an opportunity, the Board cautions the parties that paragraph 41(1)(d) may apply. This could be the case [TRANSLATION] “if the human rights issues have been addressed by the other process”.

[15] The applicant was invited to offer submissions on February 15, 2019 in relation to a section 40/41 report prepared by a Human Rights Officer. It is dated February 14, 2019. This report is to be provided to the CHRC for the purpose of deciding, or declining to decide, the complaint under paragraph 41(1)(d) of the CHRA. This detailed report recommends not to pursue the submitted and reactivated complaint. This is because the allegations of discrimination before the CHRC were dealt with in the grievances the arbitrator disposed of.

[16] The applicant's submissions on the issue of the use of four grievance decisions were received as of March 26, 2018. The section 40/41 report provided to the CHRC explains the reasons for its recommendation. As was unfortunately the case throughout the proceedings that the applicant has initiated, the human rights officer noted that the applicant was paying attention to what he considered the merits of his complaint, rather than what is the subject of the issue at hand, namely whether further consideration of the complaint is vexatious given the findings of the arbitrator.

[17] The officer noted that the applicant generally stated that human rights issues were not addressed by the arbitrator as he did not rule on the substance of the dispute, which involves several rights guaranteed by the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, [TRANSLATION] "basic workers' rights" and the CHRA. The applicant also alleges that it was the union that sought to keep the dispute narrow and it was the union that refused to undertake judicial review of the arbitration award.

[18] The human rights officer did not see this as a previous decision. [TRANSLATION] "Rather, it is a question of determining whether another redress procedure has addressed the complainant's allegations of discrimination as set out in paragraph 1 of this report" (section 40/41 report, para 31). For the officer, the substance of the complaint considered by the arbitrator, in the form of grievances, was the same as before the Board, in the form of a complaint. The applicant has alleged that errors of fact and law were made, but he has never specified what they consist of. No irregularities were even raised.

[19] However, the officer stated that the issue decided by the arbitrator [TRANSLATION] "is essentially the same as that raised in the complaint" (section 40/41 report, para 35). A complaint is vexatious when it [TRANSLATION] "seeks to re-litigate issues that have already been decided" (section 40/41, para 36). In considering the merits of the grievances, the arbitrator looked at human rights issues. Paragraph 41(1)(d) of the CHRA may therefore apply. The report was forwarded to the CHRC.

[20] The CHRC's decision came on May 29, 2019. The legal syllogism is set out there. The CHRC was satisfied that the allegations raised in the complaint were also raised in the four grievances before the arbitrator. According to the CHRC (CHRC decision, para 3), the allegations made by the applicant before the arbitrator seek compensation for infringements of rights protected by the CHRA: [TRANSLATION] "for infringement of the worker's fundamental rights", "infringement of his privacy", "infringement of his dignity" and "infringement of the integrity of his person".

[21] The burden of proof on the person seeking to rely on the CHRA is to show that the alleged harm is related to the prohibited grounds of discrimination. Here, the ground relied upon is "disability". The employer may also provide a reasonable explanation that is not a pretext, and the employer will have to satisfy the CHRC that the alleged harm resulted from an incident unrelated to the individual's disability.

[22] Since the grievances were dismissed and the arbitrator found that the dismissal was the result of the applicant's refusal to undergo a medical assessment, it was not because of an alleged

disability that the dismissal occurred: the respondent's explanation was not a pretext according to the arbitrator's findings since the grievances dealing with different aspects were dismissed.

[23] Having decided essentially the same issues by considering the same allegations as set out in the complaint before the CHRC, the CHRC was [TRANSLATION] "satisfied that the issues decided by the arbitration tribunal were essentially the same as in the present complaint and that the complainant had the opportunity to know the case against him and to rebut it. The Board is therefore of the view that all of the issues in this complaint have been appropriately addressed and that in the circumstances it is not justified to expend public resources to relitigate what is essentially the same dispute" (CHRC decision, p 2).

[24] This is the decision for which judicial review is sought.

IV. Arguments and analysis

[25] What has given rise to the tangle of proceedings is the termination of the applicant's employment. It was in a letter dated May 14, 2014, that it was announced by the respondent in these terms:

> [TRANSLATION]
>
> Dear Mr. Ducharme,
>
> On October 25th, Julie Bélanger, Senior Director of Human Resources, informed you of our reasonable doubts that lead us to believe that you have a pattern of substance abuse. She explained that given the nature of your high-risk job in terms of safety, this information is essential in order to authorize your return to work.
>
> The human resources department has repeatedly asked you to provide access to your past medical records and to return an

> authorization form to be completed by each physician you have seen in the past year. To date, the human resources department has informed me that they have not obtained all of the information requested.
>
> You were then scheduled for an evaluation at a specialized centre on April 1, 2014 with the purpose of determining if you were suffering from a substance use problem in order to provide you with the necessary support and help if needed. Once you arrived at the clinic, you refused to sign the consent form, and this had the effect of ending your medical appointment. After several exchanges with your union representative in order to reassure you that your medical information would be kept confidential, we called you again for an expert opinion on April 28. The expert doctor confirmed that you categorically refused to collaborate and answer his questions, making it impossible for him to proceed with your evaluation.
>
> Considering all of the above, we believe that we have done everything necessary to give you the opportunity to respond to our requests. Faced with your refusal to cooperate, we have no choice but to terminate your employment as of today.

[26] In the previous section, a detailed review of the CHRC's decision was made, including the legal syllogism that the applicant lost his job for a reason other than his alleged disability. It follows that if the loss of employment is not due to disability, there is no longer a prohibited ground of discrimination that could give rise to a discriminatory practice under section 7 of the CHRA (the text of which is reproduced in paragraph 2 of these reasons).

[27] The first issue to be addressed is the determination of the standard of review to be applied. This is an important issue because the standard of review governs a reviewing court's ability to act.

[28] Not only does the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] recognize a presumption that the applicable standard is that of reasonableness (para 23), but the other two decisions involving the applicant have both found that the standard is indeed that of reasonableness (2021 FC 847; 2021 FCA 34).

[29] There are consequences to applying the standard of reasonableness rather than the alternative, the standard of correctness. Under the standard of correctness, the reviewing court may substitute its decision for that of the administrative tribunal because no deference is owed to the administrative tribunal. This is not the case where the standard of reasonableness applies.

[30] The leading decision in this area is *Vavilov*. The role of the reviewing court is one of judicial restraint that "demonstrates a respect for the distinct role of administrative decision makers" (para 13). Courts recognize "the legitimacy and authority of administrative decision makers" (para 14) and therefore adopt an attitude of respect; one does not reject the decision of an administrative tribunal on the basis that the court of justice might have reached a different conclusion. Moreover, the Supreme Court speaks in terms of establishing a culture of justification among administrative tribunals. Their decisions must be justified.

[31] Deference, judicial restraint, and an attitude of respect are manifested in the method of applying the standard of reasonableness. As the Supreme Court expressly stated, "[a] court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the 'range' of possible conclusions

that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the 'correct' solution to the problem" (para 83). It considers only the reasonableness of the decision, which includes the chain of analysis and the outcome.

[32] The reviewing court therefore begins by looking at the reasons for decision with respectful attention, to understand the chain of analysis leading to the outcome. Is the decision internally coherent and rational; is it justified in relation to the factual and legal constraints?

[33] The characteristics of a reasonable decision are said to be justification, transparency and intelligibility in light of the relevant factual and legal constraints (para 97). The burden of proving that an administrative decision is unreasonable is on the applicant. We are not looking for superficial or incidental deficiencies or inadequacies. There must be serious deficiencies, not a line-by-line treasure hunt for error. Two categories of serious or fundamental deficiencies are listed: those that lack internal logic in the reasoning (e.g., tautological reasoning, false dilemmas, unfounded generalizations, absurd premises), and those that simply cannot be justified in law or on the relevant facts (arguments may be made about the applicable statutory scheme, applicable statutory or common law principles, principles of statutory interpretation, evidence, submissions of the parties, past practices and decisions, potential impact of the decision on the person who is the subject of the decision).

[34] What is the situation in this case? The applicant does not have the benefit of counsel, so the only issue that mattered was largely sidestepped by his attempt to show that his dismissal was unjust. That was not the issue. Rather, the question was whether the CHRC acted reasonably in

refusing to rule on the complaint submitted by the applicant because it is vexatious within the meaning of paragraph 41(1)(d) of the CHRA. In my opinion, there was a lack of evidence or argument. Therefore, the most basic burden of proof was not met, which was to demonstrate, not that a better solution would cause this Court to intervene, but that the CHRC's decision was unreasonable. "The burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, para 100). This effectively disposes of the application for judicial review since the applicant did not address this sole issue before the Court. In fact, his argument at the four-hour hearing lasted only 15 minutes.

[35] In any event, let me add that the CHRC's decision appears to me to have all the hallmarks of a reasonable decision. It is transparent and intelligible and, by virtue of the reasons given, justifies the conclusion reached by the CHRC. There must be a link between the prohibited ground of discrimination and the prohibited discriminatory practice, otherwise the CHRA does not provide jurisdiction to intervene. Did the applicant lose his job because of his alleged disability, or was it because of his failure to cooperate with his employer in the face of what were seen as legitimate concerns? The termination letter is unequivocal about the reasons given by the employer for an employee in a high safety risk position in an industry where safety is paramount.

[36] The arbitrator was dealing with four grievances:

- Challenge to the refusal to allow a return to work
- Challenge to the respondent's requests for access to the applicant's medical records
- Challenge to requests for medical evaluation and testing of such magnitude that they constitute abuse of right, invasion of privacy and interference with the dignity and integrity of persons; the applicant claims that this constitutes an infringement of fundamental workers' rights

- Challenge to the dismissal by letter of May 14, 2014, which is said to be without good and sufficient cause.

[37] The applicant would have had to show that it was unreasonable for the CHRC to conclude that the arbitrator decided what were essentially the same issues that the applicant presented to the CHRC. However, the arbitrator found that the dismissal was justified on the basis of Air Transat’s legitimate concerns about airline safety and the applicant’s repeated refusal to submit to testing. The alleged discriminatory practice (loss of employment) was not based on a prohibited ground of discrimination (disability) since the cause of the dismissal was the applicant’s repeated refusal to submit to medical testing and allow an expert opinion to be produced. In dismissing all four grievances, including the third in particular, the applicant’s task would not have been easy. If he lost his job because he did not submit to the protocol requested by the employer, it was not because he had an alleged disability, but for some other reason that does not constitute a prohibited ground of discrimination under section 3 of the CHRA. To submit, as the applicant did, that he should not have lost his job does not answer the question before the CHRC: does the refusal to continue to employ the applicant constitute prohibited discrimination because of his alleged disability? Once the arbitrator explicitly finds that it is not, but rather that it is the repeated refusal to cooperate that is the cause of the dismissal, there is nothing left for the CHRA to decide. The arbitrator’s findings exclude the connection between a discriminatory practice, namely refusing to employ, and one of the prohibited grounds of discrimination, the disability alleged by the applicant. His dismissal did not result from a disability.

V. Conclusion

[38] Accordingly, the application for judicial review can only be dismissed. The parties have both requested costs. The respondent has set them at a lump sum of $2,000. In the circumstances of this case, I believe that costs should be awarded. I would assess them at the nominal amount of $1,500, including disbursements and taxes payable.

JUDGMENT in T-1069-19

THE COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. Costs of $1,500.00, including disbursements and taxes, are awarded to the respondent.

"Yvan Roy"
Judge

Certified true translation
Michael Palles, Reviser

APPENDIX

[TRANSLATION]

[392] Since the evidence has been fairly extensively reported, I will confine myself to a chronological enumeration of the various steps that have been taken:

March 2013	Ms. Bélanger observed strange behaviour in Mr. "X" during a hotels committee meeting;
May 24, 2012	Meeting with Mr. "X", Mr. Dominic Levasseur, president of the union, and Ms. Dominique Jalbert and Ms. Caroline Ainsley, representatives of the employer's human resources department, to discuss Mr. "X"'s attendance at work;
May 28, 2013	Departure of Mr. "X" on disability leave due to anxiety and distress;
June 13 to 26, 2013	Return to work;
June 26, 2013	Overworked, on disability;
September 23, 2013	Telephone communication from Ms. Julie Bélanger to Mr. "X", informing him of her doubts about his substance use and informing him of the employer's intention to ask him to submit to a medical expertise in order to determine whether or not he presents a pattern of substance abuse;
September 24, 2013	Letter from Ms. Julie Bélanger summoning Mr. "X" to submit to an examination by Dr. Martin Tremblay, psychiatrist, on October 7, 2013 (held on October 8, 2013) for the purpose of producing an expert opinion;

October 10, 2013	Expert report by Dr. Tremblay stating that Mr. “X” is not fit to return to work; Declaration of his inability to issue an opinion on the existence of a [TRANSLATION] “pattern of substance abuse ” given the refusal of Mr. “X” to allow samples to be taken and to authorize access to his previous medical records;
October 25, 2013	Letter from Ms. Julie Bélanger to Mr. “X”. Confirmation of the employer’s doubts on his pattern of substance use, requesting again the authorization to access his previous medical files, including the one held by the emergency room of Jean-Talon Hospital; Confirmation of Mr. “X”’s refusal to undergo a screening test and refusal to give access to his medical file at Jean-Talon Hospital’s emergency room; Consultation of Mr. “X” with his union representatives – advice to give authorization to consult his file only with regard to his disability having started in May 2013; Form authorizing his attending physician to transmit to the physician designated by the employer information concerning his disability. Form returned to the union by Mr. “X”. Never returned to the employer;
December 2, 2013	Medical certificate from Normand Roux, attending psychiatrist, recommending a gradual return to work for Mr. “X”, as of January 1, 2014;

December 6, 2013	Letter from Ms. Julie Bélanger addressed to Ms. Chantal Bourgeois, union consultant, maintaining the employer's requirements to authorize a return to work. Copy sent to Mr. "X"; Suggestion from Ms. Bourgeois to Mr. "X" to work with the employer;
December 13, 2014	Mr. "X" states that he has sent authorization to consult his previous medical file related to the present disability;
January 29, 2014	Letter from Ms. Bélanger reiterating her request to sign the form authorizing access to his medical file following the consultation at Jean-Talon Hospital's emergency room;
January 30, 2017	Telephone communication from Mr. "X" stating his consent to undergo screening tests. Does not return the authorization to consult his medical file kept at the Jean-Talon Hospital;
February 27, 2014	Letter from Ms. Julie to Mr. "X", reminding him that he has still not followed up on the October 25, 2013 letter, particularly regarding the authorization to access his file kept at Jean-Talon Hospital; Reminder of the key elements discussed with Ms. Bourgeois, union representative, on February 13, 2014. Development of five revised conditions; Requirement for a health assessment to evaluate his condition (elimination of the requirement for authorization to access the medical record kept by Jean-Talon Hospital); Commitment of the employer not to dismiss Mr. "X" if he respects the stated requirements (points 2 and 3); Open for discussion if the complainant feels it is necessary;

	Mr. “X” states that he is a bit confused, he undertakes further consultations and numerous email exchanges with his union representatives;
March 12, 2014	Email from Ms. Julie Bélanger to Ms. Karine Rainville confirming the revised conditions to be respected so that Mr. “X” can consider returning to work. Copy sent to Mr. “X”;
March 19, 2014	Email addressed to Mr. “X” by Ms. Karine Rainville explaining how Air Transat’s revised conditions are quite close to the desired union position;
March 21, 2014	Mr. “X” agrees to be tested. Refuses to undergo a health check-up ;
April 1, 2014	Mr. “X” is tested. Mr. “X” finally signs the forms, but does not meet the doctor and leaves the clinic; He says he is hurt and no longer trusts the clinic; Mr. “X” fears the non-confidentiality of the results that would follow a health check-up;

April 22, 2014	Continued discussions between Mr. Rainville and Mr. Jalbert. Email from Ms. Rainville to Mr. “X” assuring him of the relevance of the required tests and the confidentiality of the results;
April 28, 2014	Second appointment with the CEPAT clinic. Copy of the request for an expert opinion sent to Mr. “X”; Meeting with Dr. Chiasson and physical examination; Delivery of a letter from Mr. “X” to Dr. Chiasson, aiming to significantly reduce the scope of his expert opinion; Mr. “X” refuses to answer Dr. Chiasson’s questions (medical history); Termination of Dr. Chiasson’s expert opinion;
May 1, 2014	Report from Dr. Chiasson. Unfinished medical expert opinion;
May 14, 2014	Letter from Ms. Caroline Ainsley confirming the dismissal of Mr. “X”.

[393] What does this sequence of interactions between the parties and the principal person concerned reveal?

[394] Between Mr. “X”’s first visit to the office of Dr. Tremblay, psychiatrist, on October 8, 2013, and his second visit to Dr. Chiasson of the CEPAT clinic on April 28, 2014, exactly six and a half months had passed.

[395] On five occasions during this period and while the employer expected, at each of Mr. “X”’s visits, that Mr. “X” would finally consent to the screening tests and agree to a complete health check-up, there was an obstacle or a last-minute change of heart on Mr. “X”’s part that prevented the expert opinion from being carried out.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1069-19
STYLE OF CAUSE:	MARTIN DUCHARME v AIR TRANSAT A.T. INC.
PLACE OF HEARING:	VIA VIDEOCONFERENCE BETWEEN OTTAWA, ONTARIO AND MONTRÉAL, QUEBEC
DATE OF HEARING:	SEPTEMBER 9, 2021
JUDGMENT AND REASONS:	ROY J.
DATED:	SEPTEMBER 28, 2021

APPEARANCES:

Martin Ducharme	FOR THE APPLICANT (ON HIS OWN BEHALF)
Marc-Alexandre Girard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

None	FOR THE APPLICANT (ON HIS OWN BEHALF)
Dunton Rainville LLP Montréal, Quebec	FOR THE RESPONDENT