Federal Court of Appeal | Cour d'appel fédérale

Date: 20250602

Docket: A-224-23

Citation: 2025 FCA 109

CORAM: **LOCKE J.A.**
MACTAVISH J.A.
HECKMAN J.A.

BETWEEN:

ANDY MATOS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on April 10, 2025.

Judgment delivered at Ottawa, Ontario, on June 2, 2025.

REASONS FOR JUDGMENT BY: MACTAVISH J.A.

CONCURRED IN BY: LOCKE J.A.
HECKMAN J.A.

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REASONS FOR JUDGMENT

MACTAVISH J.A.

[1] Andy Matos worked for many years as a Border Services Officer (BSO) with the Canada Border Services Agency or its predecessors. After failing a medical test, he was relieved of his firearms and of his front-line enforcement duties on the Primary Inspection Line (PIL) at the Ambassador Bridge border crossing, and he was placed in a "non-enforcement, accommodated post".

[2] Mr. Matos grieved the CBSA's actions, alleging that he was being discriminated against and harassed by his employer because of his physical disability, contrary to the "no-discrimination" clause in Article 19.01 of the Collective Agreement governing the terms of his employment. After Mr. Matos' grievance was denied at the first, second, and final levels, it was referred to adjudication before the Federal Public Sector Labour Relations and Employment Board.

[3] In a decision reported as 2023 FPSLREB 77, the Board determined that Mr. Matos had not established a *prima facie* case of discrimination because he had not experienced any adverse impact when the CBSA reassigned him. That said, the Board went on to determine, in the alternative, that the CBSA's justification argument would fail because it had failed to carry out an individualized assessment of Mr. Matos' functional limitations prior to moving him into an accommodated post. Based on its finding that Mr. Matos had experienced little or no harm as a result of his employer's actions, the Board would have awarded $1,000.00 for any pain and suffering that he experienced because of the employer's discriminatory actions, had the grievance been allowed.

[4] Mr. Matos submits that the Board's finding that he had not established a *prima facie* case of discrimination was unreasonable. I agree. Consequently, I would allow his application for judicial review.

I. Background

[5] Mr. Matos worked as a BSO for approximately 35 years. According to his job description, the key activities of his job included conducting inspections, examinations and verifications of travelers, goods and conveyances in order to reach release or entry decisions, and deciding appropriate action where non-compliance was suspected or encountered. BSOs also provide first response capability with powers to arrest and/or detain individuals suspected of having committed offences under various Acts of Parliament.

[6] Because of the intense level of focus required to perform PIL duties, BSOs perform such front-line duties for an hour at a time, following which they spend an hour in the "back office", performing administrative tasks supporting their enforcement role. In other words, half of a BSO's time was taken up with PIL duties and half with administrative tasks.

[7] To enhance border security and better protect BSOs, a decision was made in 2006 to arm BSOs. As part of this initiative, BSOs were required to undergo firearms training. Mr. Matos successfully completed this training, and he continued working as a BSO at the FB-03 level at the Ambassador Bridge Port of Entry, using defensive tools, without incident, until July of 2014.

[8] In 2009, the CBSA introduced a mandatory requirement that employees occupying enforcement positions (including BSOs working on the PIL) undergo medical testing. Mr. Matos underwent such testing several years later, and his doctor determined that he was not fit for Control and Defensive Training and firearms training courses. While his doctor did not find that

Mr. Matos was unfit to work at PIL posts, the CBSA's Directive on Agency Firearms and Defensive Equipment stated that a BSO's defensive tools had to be removed upon the discovery of a medical condition that could negatively influence their ability to possess, wear or use defensive equipment. Consequently, on July 31, 2014, Mr. Matos' supervisor removed his firearms. Mr. Matos was also told that, effective immediately, he was being assigned to perform non-enforcement duties at the border crossing. That is, all of Mr. Matos' time would henceforth be taken up with non-PIL duties.

[9] Mr. Matos was also asked to indicate his preference for an "accommodated post". He responded by requesting an assignment to the UPS and FedEx facility near the border crossing, stating that his tools had just been taken away from him, so he was attempting to make himself useful.

[10] Throughout the ensuing weeks, Mr. Matos made numerous inquiries, attempting to explore options for accommodation and potential avenues by which his firearms and/or front-line enforcement duties might be returned to him. Mr. Matos was ultimately advised that the purpose of the medical test was to establish that BSOs can perform their enforcement-related duties without detriment to their health and safety or that of others. Consequently, it was CBSA policy that a BSO should not remain in their position if they were unable to meet the health requirements of the job, and the accommodation process would then apply.

[11] In October of 2014, Mr. Matos was transferred to the UPS and FedEx facility. His position there did not include any front-line enforcement duties or require the use of defensive tools. Mr. Matos stayed in this position until he retired from the CBSA on August 6, 2016.

II. The Burden of Proof in Human Rights Cases

[12] To put the issues raised by this application into context, it is helpful to start by identifying the burden of proof in cases such as this.

[13] As the Supreme Court of Canada held in *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536, the initial burden is on the complainant or grievor to establish a *prima facie* case of discrimination. A *prima facie* case is "...one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour": at para. 28.

[14] The Supreme Court further affirmed in *Moore v. British Columbia (Education)*, 2012 SCC 61, that to establish a *prima facie* case of discrimination, the complainant or grievor is required to show that they have a characteristic protected from discrimination under the relevant legislation, that they experienced an adverse impact because of the employer's actions, and that the protected characteristic was a factor in the adverse impact: at para. 33. See also *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para. 52.

[15] Once the complainant or grievor has established a *prima facie* case of discrimination, the burden shifts to the respondent to justify their conduct or practice within the framework of the exemptions available under the relevant human rights statute. If the conduct or practice cannot be justified, discrimination will be found to have occurred: *Moore*, above at para. 33.

III. The Board's Decision

[16] The CBSA accepted that Mr. Matos' disability was a characteristic protected from discrimination under subsection 3(1) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, and that his disability was a factor in the decision to take away his defensive tools and to re-assign him to a non-enforcement position. The CBSA submitted, however, that Mr. Matos did not suffer any adverse impact as a result of its actions, as it treated Mr. Matos in a respectful manner at all times and he suffered no financial loss as he remained employed at the same level and the same rate of pay after changing positions.

[17] The Board accepted this argument, finding that Mr. Matos had not established a *prima facie* case of discrimination as he had not experienced any adverse impact when the CBSA removed him from front-line enforcement duties and took away his defensive tools. While accepting that Mr. Matos had suffered stress, frustration and hurt feelings at having his defensive tools and enforcement duties taken away from him and that this situation had led him to seek counselling, this was not enough, in the Board's view, to constitute an adverse impact. In coming to this conclusion, the Board noted that Mr. Matos had remained employed, that he had not

experienced any loss of income and that he had not been otherwise treated negatively by his employer.

[18] Consequently, the Board found that Mr. Matos had failed to establish a *prima facie* case of discrimination, and his grievance was dismissed.

[19] As noted earlier, the Board did go on to consider whether the CBSA had justified its conduct. The Board considered this question in the alternative, in the event that it was mistaken in finding that Mr. Matos had failed to establish a *prima facie* case of discrimination. After finding that the CBSA had failed to properly accommodate Mr. Matos, the Board stated that it would have awarded him $1,000.00 for pain and suffering.

IV. Standard of Review

[20] The issue raised by this application is a question of mixed fact and law: *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 43, *Canada (Director of Investigation and Research) v. Southam Inc*., 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748, at para. 35; *Housen v. Nikolaisen*, 2002 SCC 33, at para. 26. That is, the question here is whether the evidence in this case satisfies the test for an adverse impact in the context of a *prima facie* case of discrimination.

[21] As such, I agree with the parties that the Board's decision is to be reviewed on the standard of reasonableness.

V. The Evidence Regarding the Impact of the CBSA's Actions on Mr. Matos

[22] The facts of this case are largely not in dispute. The Board accepted Mr. Matos' evidence, stating that he "presented at the hearing as a candid and at all times honourable witness". While finding that Mr. Matos likely had "a sincerely held but mistaken belief in his unreasonably optimistic state of health and fitness to work", the Board did not fault him for this, finding that it "was undoubtedly motivated by his sincerely stated dedication to and enjoyment of his work": all quotes from para. 116.

[23] The Board further accepted Mr. Matos' uncontradicted testimony regarding his 33 years of exemplary service as a BSO, noting that he had also testified as to how badly he wanted to return to his enforcement position on the PIL.

[24] Mr. Matos also described the significant emotional toll that the CBSA's actions had on him. Amongst other things, he noted that he had enjoyed his long career as a BSO, working at several CBSA posts in the Windsor area, and that he had performed his duties fully until he was told that he had to give up his defensive tools and was reassigned, against his wishes, no longer being allowed to work in his preferred post.

[25] Mr. Matos described the stress, frustration and hurt feelings that he felt because of being removed from his preferred PIL post, and the injury to his dignity that he had experienced. He testified that his mounting frustration and disconnection from the workplace ultimately led him to seek counselling. He further stated that the entire matter had caused him such frustration and

loss of enjoyment of his career that he felt forced to retire early. Because of this, Mr. Matos sought compensation in the amount of $20,000.00 for pain and suffering and $20,000.00 for the reckless and willful conduct of the CBSA.

VI. The Board's Findings

[26] The Board started its analysis of the adverse impact question by noting that the adverse impact suffered by complainants or grievors in many of what it called "Canada's paradigmatic employment-related human rights cases" included losing or being denied employment as a result of discriminatory actions: citing, by way of example, *Stewart v. Elk Valley Coal Corp*., 2017 SCC 30; *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4; *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.*, 1996 CanLII 20258 (BCCA); and *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43.

[27] The Board further accepted that loss of a job and a means of income "are obvious and terribly adverse impacts": at para. 87.

[28] While accepting that the threshold for establishing a *prima facie* case of discrimination was a low one, the Board noted that in this case, Mr. Matos was moved to a new work post at a location within the same Ambassador Bridge District at the same group, level and position, at the same hourly rate of pay as before. Although Mr. Matos also alleged that he had suffered a loss of

opportunities for overtime, the Board did not accept this claim, and its finding on this question is not in dispute in this appeal.

[29] Although the Board accepted that Mr. Matos had expressed disappointment in having his tools removed and being reassigned to a different position, it noted that there was no suggestion that he was ever shamed or otherwise treated badly by his employer.

[30] The Board further discounted Mr. Matos' claim that the CBSA's actions had caused him to retire early, observing that Mr. Matos' doctor had noted in his 2014 medical report that Mr. Matos "is 57 years old and he states that he has only 2-3 years left to work before he will retire". The Board also noted that in 2014, Mr. Matos had reported being "extremely fatigued" and that this "cast[] doubt on how many more years he would have actually worked had none of the events that were the subject of the hearing come to pass": at para. 194.

[31] The Board concluded that it could not ascribe any significant harm "related to an early retirement […] to an employee who enjoyed a relatively full career spanning the years from 1981 to 2016": at para. 193.

[32] In addition, the Board discounted the significance of the fact that Mr. Matos had to seek counselling, noting that he had not done so until approximately a year and a half after his reassignment, after experiencing difficulties in his new position. It further observed that there was no evidence that suggested Mr. Matos suffered any longer-term maladies, beyond his claim

that he was forced to retire early due to the stress and disappointment that these matters caused him.

[33] The Board also noted that it "regularly closely scrutinizes a grievor proving in evidence a matter of an adverse impact due to differential treatment linked to a prohibited ground of discrimination": at para. 86, citing *Gueye v. Treasury Board (Canada Border Services Agency)*, 2022 FPSLREB 41 at para. 86; *McNeil v. Treasury Board (Department of Fisheries and Oceans)*, 2021 FPSLREB 89 at para. 318; *Cheung v. Treasury Board (Correctional Service of Canada)*, 2014 PSLREB 1; and *Eady v. Treasury Board (Correctional Service of Canada)*, 2019 FPSLREB 71 at para. 10.

[34] According to the Board, the case that is closest to that of Mr. Matos is the Federal Court's decision in *Coupal v. Canada (Attorney General)*, 2006 FC 255, in which a BSO was also assigned to modified duties due to a medical condition. *Coupal* was an application for judicial review of a decision of the Canadian Human Rights Commission dismissing a human rights complaint on the basis that the evidence did not support the allegations of discrimination.

[35] The Board noted the statement in *Coupal* that modifications to a job assignment such as those experienced by Mr. Matos represents a significant change to a Customs Officer's work description. While recognizing that this statement could be read as suggesting that Ms. Coupal (and Mr. Matos) had suffered an adverse impact because of their reassignment, the Board stated that it was "neither bound by nor agree[d] with the opinion of the human rights investigator

noted in *Coupal* who stated that being moved to a new non-frontline enforcement post change[s] significantly a [BSO's] work description": at para. 91.

[36] Given that Mr. Matos suffered no loss of income from being moved from the PIL post, that he had been treated with respect by his employer and that he was not otherwise adversely affected, the Board concluded that he had failed to establish a *prima facie* case of discrimination, and his grievance was dismissed. As noted earlier, the Board did go on to find, in the alternative, that the CBSA had failed to properly accommodate Mr. Matos, but that he had suffered only nominal damages as a result.

VII. The Significance of Work

[37] Before assessing the reasonableness of the Board's finding that Mr. Matos had suffered little or no harm because of losing his PIL duties, it is important to first have regard to what the courts have had to say about the role of work in our lives and the non-monetary benefits that employees derive from their jobs.

[38] Indeed, the importance of this interest cannot be overstated, and Canadian jurisprudence is replete with references to the crucial role that employment plays in the dignity and self-worth of the individual.

[39] By way of example, in *Reference re Public Sector Employee Relations Act (Alberta)* [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161, the Supreme Court stated that "[w]ork is one of the

most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society". The Court went on to observe that "[a] person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being": at para. 91.

[40] Although this quotation comes from Chief Justice Dickson's dissenting judgment, similar sentiments regarding the central role that employment plays in the dignity, self-fulfillment and self-worth of the individual have been expressed in many other judgments of the Supreme Court and other Canadian courts: see, for example, *Evans v. Teamsters Local Union No. 31,* 2008 SCC 20; *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 , 91 D.L.R. (4th) 491, at p.1002; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416, at p. 1054; *Wilson v. British Columbia (Medical Services Commission)* (1988) CanLII 177 (BCCA), 53 D.L.R. (4th) 171; *Assn. of Justices of the Peace of Ontario v. Ontario (Attorney General)* 2008 CanLII 26258 (ONSC), 92 O.R. (3d) 16, at paras. 113–120.

[41] In *Lavoie v. Canada*, 2002 SCC 23, the Supreme Court described work as being "a fundamental aspect of a person's life": at para. 45. In *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, the Supreme Court described work and employment as being crucially important as elements of essential human dignity under subsection 15(1) of the Charter: at para. 104. Similarly, in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, [1990] S.C.J. No. 122, the majority observed that "[i]n a work-oriented society, work is inextricably tied to the individual's self-

identity and self-worth": above at para. 93. Indeed, in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, 152 D.L.R. (4th) 1, the Supreme Court went so far as to describe work as one of the "defining features" of peoples' lives: above at para. 94.

[42] Indeed, the Supreme Court has "been resolute in asserting that employment is a source of personal fulfilment—that brand of human dignity that comes from work": *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26 at para. 7. Similarly, in *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, the Supreme Court referred to "the non-monetary benefit all workers may in fact derive from the performance of their work": at para. 84.

[43] With this understanding of the important role that work plays in the lives of individuals, I will next consider the reasonableness of the Board's findings in this case.

VIII. The Reasonableness of the Board's Findings in This Case

[44] It is not for this Court to ask what decision it would have made in place of that of the Board, but rather whether the decision made by the Board was reasonable: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 83–84, 116.

[45] Reasonableness review is concerned both with the reasoning process and its outcomes. In other words, a reasonable decision must be based on an internally coherent reasoning and be justified in light of the relevant legal and factual constraints: *Vavilov*, above at paras. 85 and 99. Moreover, Board reasons are to be read "holistically and contextually", considering the

evidentiary record, the submissions made and the context of the case, with "due sensitivity to the administrative regime": *Vavilov*, above at paras. 94, 97, 103 and 123.

[46] That said, administrative decision makers will fall short when they "fail to reveal a rational chain of analysis", supply a "flawed basis", or rely on "an unreasonable chain of analysis" such as "logical fallacies", "circular reasoning, false dilemmas, unfounded generalizations or an absurd premise": *Vavilov*, above at paras. 96 and 103–104, as summarized in *Canada (Justice) v. D.V.*, 2022 FCA 181 at para. 17.

[47] In my view, the Board failed to justify the outcome in Mr. Matos' case in light of the applicable legal constraints (including the wording of the relevant statutory provisions, the provisions of the collective agreement and the Supreme Court's comments with respect to the importance of work), and the factual constraints (such as the clear and uncontradicted evidence from Mr. Matos, accepted by the Board, as to the impact that the CBSA's actions had on him).

[48] The provisions of the *Canadian Human Rights Act* operated as a legal constraint on the Board in this case. Section 7 of the Act makes it a discriminatory practice to differentiate adversely in relation to an employee on a prohibited ground of discrimination. Section 10 of the Act makes it a discriminatory practice for an employer to establish or pursue a policy that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination. As far as defences to claims of discrimination are concerned, subsection 15(1) of the Act states that it is not a discriminatory practice if "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" [my emphasis throughout].

[49] Thus, a complainant does not have to establish that they were fired, demoted or lost income because they suffered from a disability to establish a *prima facie* case of discrimination. It is sufficient if they can establish that they were treated in an adverse differential manner, that they were deprived of employment opportunities because of an employer policy, or that they were otherwise excluded from, limited or refused employment opportunities.

[50] This understanding is further reflected in the remedial provisions of the Act. Subsection 53(2) of the Act allows decision makers to make various types of orders—some systemic and others individual. In terms of individual remedies, decision makers can, amongst other things, order employers to compensate the victim for any wages that the victim may have lost because of the discriminatory practice: paragraph 53(2)(c). In addition, a decision maker can order an employer to pay the victim of a discriminatory practice up to $20,000.00 for any pain and suffering that the victim experienced because of the discriminatory practice: paragraph 53(2)(e). It is noteworthy that there is no requirement under paragraph 53(2)(e) that a victim of discrimination first establish a wage loss before they can receive compensation for their pain and suffering. These are independent heads of damage.

[51] Nor is there any requirement that a victim of a discriminatory practice first be able to establish that they were treated in a humiliating or disrespectful manner by their employer before they will be entitled to damages for pain and suffering under paragraph 53(2)(e) of the Act.

Indeed, the Act treats damages meant to sanction the employer's behaviour as an entirely different head of damages, referring to it as "special compensation" in subsection 53(3) of the Act. This provides that an award of special compensation is to be made "in addition to" any award that has been made under subsection 53(2) of the Act, allowing decision makers to order an employer to pay a victim of a discriminatory practice up to $20,000.00 if the decision maker finds that the employer "is engaging or has engaged in the discriminatory practice wilfully or recklessly".

[52] It is clear from a holistic review of the Board's decision that it was of the view that an employee had to establish a loss of a job, a loss of income or humiliating conduct at the hands of his or her employer to establish an "adverse impact" for the purpose of a *prima facie* case. That is simply not the case. There is no requirement in the Act or at common law for an employee to have lost money or been "shamed" or otherwise "treated badly" in order to establish a *prima facie* case of discrimination. While these would, of course, constitute clear examples of adverse impact, they are not necessary to make out a *prima facie* case of discrimination.

[53] Although the Board cited several earlier Board decisions that it says show that the Board regularly scrutinizes a grievor's evidence with respect to an adverse impact closely, a review of these decisions shows each turns largely on its own facts. More importantly, the Board erred in its treatment of binding jurisprudence that further constrained its decision.

[54] That is, after acknowledging that the Federal Court's decision in *Coupal*, above, was closest to that of Mr. Matos, the Board refused to accept that changes to a job assignment

resulting from being moved from PIL duties to a non-front-line enforcement post "change[d] significantly the Customs Officer's work description", amounting to an adverse impact.

[55] The Board's rationale for not accepting this finding was that it did not agree with it and that, in any event, it was a finding of a human rights investigator that was not binding on it: at paragraph 91. However, it is evident from a review of paragraph 37 of the Federal Court's decision in *Coupal*, that the finding was that of the Federal Court itself and not that of a human rights investigator. Not only was it not open to the Board to disregard it, its refusal to accept the Court's statement further confirms that it really did not understand the adverse impact that moving Mr. Matos to a non-front-line enforcement post had on him.

[56] That is, the Board failed to fully appreciate the non-pecuniary harm suffered by Mr. Matos because of the change to his position, and it clearly did not consider the importance of his work to Mr. Matos' dignity, self-worth and self-fulfillment, as it was required to do. It was evident from Mr. Matos' testimony that he loved his job on the PIL and that he was devastated to lose it. As he stated, Mr. Matos "felt normal" when he was carrying out his PIL duties. However, when these duties were taken away from him, he wanted to leave the border post and go to work at the courier facility so that he could continue to "make [him]self useful". Mr. Matos clearly did not feel useful working in the "back office" at the border crossing, which undoubtedly contributed to his sense of disconnection from the workplace.

[57] Finally, the Board faulted counsel for Mr. Matos for paying "scant attention" to his obligation to establish a *prima facie* case of discrimination, stating only that the adverse impact

that the CBSA's conduct had on Mr. Matos "was plain and obvious" given his loss of defensive tools and of his preferred post. What the Board did not seem to appreciate was that the parties had accepted it as self-evident that Mr. Matos had suffered an adverse impact because of the CBSA's conduct throughout the grievance process. Indeed, the employer had never suggested that Mr. Matos had failed to establish a *prima facie* case of discrimination at any point throughout the grievance process until it responded to his submissions before the Board.

IX. The Respondent's Accommodation Argument

[58] As noted, the CBSA also says that Mr. Matos did not suffer any adverse impact because of its actions because he was reasonably accommodated by being provided with a non-enforcement position.

[59] With respect, this argument conflates the test for a *prima facie* case with the burden on the respondent to justify their conduct or practice within the framework of the exemptions available under section 15 of the *Canadian Human Rights Act*, one such exemption being that the complainant or grievor had been reasonably accommodated. Whether a respondent has adequately accommodated an employee does not figure into a determination of whether a *prima facie* case of discrimination has been established: *Lincoln v. Bay Ferries Ltd*., 2004 FCA 204 at para. 22. Moreover, this argument does not assist the CBSA as the Board found that Mr. Matos had not been adequately accommodated.

[60] The respondent further contends that any error in the Board's assessment of the question of adverse impact was immaterial, as it found that, in any event, Mr. Matos had been reasonably accommodated by the CBSA, with the result that there was no discrimination.

[61] With respect, as noted in paragraph 59 of these reasons, this is not what the Board found.

[62] After accepting the CBSA's evidence with respect to the physical requirements of front-line BSO positions in its alternative analysis, the Board noted that the fitness requirement had previously been found to be a *bona fide* occupational requirement for front-line BSO positions, and that it agreed with that finding: at para. 180, citing *Lessard-Gauvin v. Canada (Attorney General)*, 2018 FC 809.

[63] That said, the Board went on to find that the employer's case would nevertheless fail in Mr. Matos' case because the CBSA had "refused to engage in an individualized assessment of the grievor's functional limitations and to seek accommodations for him rather than simply and mechanistically applying policy and moving him into an accommodated post": at para. 183. This is what it was required to do: *Moore*, above at para. 49; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3, 176 D.L.R. (4th) 1 ("*Meiorin*"), at para. 65.

[64] That is, the employer must show "that it could not have done anything else reasonable or practical to avoid the negative impact on the individual": *Meiorin* at para. 38; *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, 72 D.L.R. (4th) 417, at

pp. 518–19; *Council of Canadians with Disabilities v. VIA Rail Canada Inc*., 2007 SCC 15 at para. 130.

[65] This is consistent with subsection 15(2) of the *Canadian Human Rights Act*, which states that for a "refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment" to be a *bona fide* occupational requirement, "it must be established that accommodation of the needs of an individual [..] affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost".

[66] The fact that the Board had found that the CBSA had failed to justify its conduct under section 15 of the Act is further made clear in the Board's discussion of the damages to which Mr. Matos was entitled. At paragraph 195 of the decision, the Board accepted the CBSA's submission that Mr. Matos had experienced little or no harm, stating that "I would, in the alternative, *if I am mistaken in my finding on the matter of a* prima facie *case of discrimination*, award a nominal $1000.00 …" [my emphasis].

[67] The only way that the Board could get to an award of damages after finding that a *prima facie* case of discrimination had been established would be if it was satisfied that the employer had failed to justify its conduct. This is precisely what the Board had found.

[68] This then takes us to the question of remedy.

X. Remedy

[69] Had the Board simply stopped its analysis after finding that Mr. Matos had failed to establish a *prima facie* case of discrimination, it would be necessary to quash the decision and to remit Mr. Matos' grievance to the Board for redetermination as I have found that the Board's finding on this point was unreasonable. It is clear from the facts and the constraining jurisprudence that Mr. Matos had established a *prima facie* case of discrimination based on his disability.

[70] However, the Board went on to carry out an accommodation analysis in case it had erred on the question of a *prima facie* case. The Board concluded that the CBSA had failed to properly accommodate Mr. Matos. This is sufficient to establish liability on the part of the CBSA, and there is thus nothing to be gained by remitting the liability question to the Board for redetermination and I would decline to do so.

[71] An issue arises, however, with respect to the Board's damage assessment. The Attorney General submits that an award of $1,000.00 for Mr. Matos' pain and suffering was reasonable and that it should be allowed to stand. Mr. Matos disagrees, arguing that the Board's failure to appreciate the nature and extent of the harm that he had suffered because of the CBSA's actions tainted its damage assessment.

[72] I agree with Mr. Matos.

[73] As noted earlier, paragraph 53(2)(e) of the *Canadian Human Rights Act* allows the Board to compensate a victim of discrimination "by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice".

[74] In addressing the question of damages for pain and suffering, the Board accepted the CBSA's contention that Mr. Matos "experienced no harm, or at the worst very little harm": at para. 195. The Board went on in the same sentence to say "I would, in the alternative, if I am mistaken in my finding on the matter of a *prima facie* case of discrimination, award a nominal $1000 under s. 53(2)(e) of the *CHRA* for any pain and suffering that he experienced as a result of the discriminatory practice".

[75] It is thus clear that the Board's assessment of the pain and suffering suffered by Mr. Matos was based on its mistaken understanding as to the nature and extent of this harm, and it must be set aside for this reason.

[76] Mr. Matos also asks that he be given an opportunity to reargue his entitlement to special compensation under subsection 53(3) of the *Canadian Human Rights Act*. It will be recalled that this provision allows the Board to order special compensation in an amount not to exceed $20,000.00 if it finds that the respondent "has engaged in the discriminatory practice willfully or recklessly".

[77] The Board refused to make any award to Mr. Matos under this provision, finding that the CBSA had not acted willfully or recklessly. This was a finding that was reasonably open to the

Board on the record before it, based as it was on the Board's appreciation of the nature of the CBSA's conduct, rather than its understanding of the impact that the conduct had on Mr. Matos. Consequently, I would decline to make such an order.

[78] We were advised at the hearing that the Board member who decided Mr. Matos' case has since retired. As a result, I would remit Mr. Matos' case to a different Board member for a reassessment of his entitlement to damages for pain and suffering under paragraph 53(2)(e) of the Act. I would allow the parties to rely on the existing record and/or to lead additional evidence on the damages question, as they see fit.

XI. Proposed Disposition

[79] For these reasons, I would allow Mr. Matos' application for judicial review as it relates to the question of damages for pain and suffering under paragraph 53(2)(e) of the *Canadian Human Rights Act.* I would remit Mr. Matos' case to a different Board member for a reassessment of Mr. Matos' entitlement to damages for pain and suffering under paragraph 53(2)(e) of the *Canadian Human Rights Act.* I would further direct that the Board allow the parties to rely on the existing record and/or to lead additional evidence on the damages question, as they see fit.

[80] In accordance with the agreement between the parties, I would award Mr. Matos his costs in the all-inclusive amount of $3,500.00.

"Anne L. Mactavish"
J.A.

"I agree.
George R. Locke J.A."

"I agree.
Gerald Heckman J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-224-23
STYLE OF CAUSE:	ANDY MATOS v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	APRIL 10, 2025
REASONS FOR JUDGMENT BY:	MACTAVISH J.A.
CONCURRED IN BY:	LOCKE J.A. HECKMAN J.A.
DATED:	JUNE 2, 2025

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