SUPREME COURT OF NOVA SCOTIA
Citation: *Canada Post Corporation v. Canadian Union of Postal Workers*, 2024 NSSC 14

Date: 20240116
Docket: 524200
Registry: Halifax

2024 NSSC 14 (CanLII)

Between:

Canada Post Corporation

Applicant

v.

Canadian Union of Postal Workers

Respondent

Decision

Judge: The Honourable Justice Denise Boudreau

Heard: November 2, 2023, in Halifax, Nova Scotia

Counsel: Geoffrey Breen, for the Applicant
David J. Roberts and Mary B. Rolf, for the Respondent

By the Court:

[1] The matter before the Court is a judicial review filed by the applicant in relation to a decision ("the Decision") of Arbitrator Susan Ashley ("the Arbitrator") dated April 21, 2023, which granted compensation to employee/grievor Mary Jayne Sauson.

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[2] Ms. Sauson was an employee of the applicant who was injured while at work in February 2010. She commenced receiving Workers' Compensation benefits from the Workers' Compensation Board ("WCB") in April 2011. She applied for and obtained a different position within Canada Post (within a different bargaining unit) in December 2014.

[3] The grievance before the Arbitrator alleged that the applicant had breached its duty to accommodate Ms. Sauson during the interim period, in violation of the collective agreement between the parties. In her Decision, the Arbitrator agreed and provided compensation to Ms. Sauson in the form of loss of wages, as well as damages pursuant to the *Canadian Human Rights Act* ("the *CHRA*").

[4] The applicant seeks judicial review of the Decision.

Facts

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[5] The material facts are essentially not in dispute. In February 2010, Ms. Sauson was an employee of the applicant as a mail carrier in the RSMC (Rural and Suburban Mail Carriers) Unit. The respondent is the certified bargaining agent for that group.

[6] On or around February 22, 2010, Ms. Sauson lifted a large parcel from her vehicle and suffered a shoulder injury. She reported the injury to the applicant on June 21, 2010, who reported it to the WCB. Ms. Sauson continued to work until April 8, 2011, at which time she went off on disability. After this time, she commenced receiving WCB benefits. In January 2012, Ms. Sauson's doctor confirmed that she could not return to work at her previous position.

[7] Following the involvement of the WCB, Ms. Sauson would receive regular correspondence/updates from WCB indicating, for example, the periodic approval of claims, or the approval for payment of medications. Periodically the applicant would also receive updates about Ms. Sauson's file from WCB; these would typically note that Ms. Sauson was continuing to receive temporary earnings replacement benefits, that she was capable of sedentary work, and requesting that the applicant advise WCB of any accommodation(s) available for Ms. Sauson at Canada Post based on her circumstances.

[8] On February 28, 2013, Ms. Sauson "formally" requested to be accommodated by the applicant; in other words, that another position be found for her which accommodated her physical and practical limitations.

[9] In March 2013, a representative of the applicant asked Ms. Sauson if she would consider relocating to Halifax from her home in Windsor for employment. Ms. Sauson responded "not at this time". In August 2013, Ms. Sauson indicated to the applicant that she would be prepared to accept a position up to 100 kms from her home.

[10] The applicant submits that once it became aware that Ms. Sauson would not be able to return to her previous position, it was engaged in a continual assessment of any and all vacant positions, to see if they might be suitable for Ms. Sauson, in an effort to accommodate her. The applicant notes that it was engaged in this search even before her request for formal accommodation. The applicant points to, for example, the Decision (at p. 7) which notes: "A CPC (Canada Post Corporation) document in evidence from the Operations Manager (NS) indicates that the job search began on May 3, 2012".

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[11] The applicant further notes that its efforts to accommodate Ms. Sauson's physical limitations was done by "working closely" with the WCB and following its direction(s) on physical restrictions and accommodation requirements.

[12] No appropriate position was identified by the applicant for Ms. Sauson during the relevant times. In late 2014, Ms. Sauson (of her own initiative) applied for a new position at Canada Post, outside her bargaining unit. She was successful in that competition and commenced that employment on December 10, 2014.

[13] I should also make note of another event which occurred in July 2012. During that month, Ms. Sauson suffered a new injury, to her back, on an occasion when she was raising herself from a reclined position to a standing position. The material in the Record notes that Ms. Sauson was of the view that this new injury had been caused by her physical limitations relating to her previous shoulder injury. This new injury was the subject of renewed assessment by the WCB.

[14] In October 2014, Ms. Sauson's WCB Case worker decided that the new back injury was not "compensable" as a WCB claim. This decision was appealed by Ms. Sauson to the provincial Worker's Compensation Appeals Tribunal, who allowed the appeal on August 14, 2015. Essentially, the Appeals tribunal agreed

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that the back injury was "secondary" to her compensable shoulder injury and was therefore also compensable.

The Grievance

[15] On May 22, 2013, the respondent filed the grievance (the "Grievance") which eventually resulted in the Decision. The Grievance alleged the following:

> The Union grieves on behalf of M. Sauson that the employer has violated Articles 5, 13, 17, 19, 20, 24, 37, the *Canadian Labour Code* [sic], the *Canadian Human Rights Act* and all other related provisions of the collective agreement. The employer failed to provide an accommodation of the grievor while there were modified duties available and forced the grievor to take leave, contrary to the provisions outlined in the collective agreement.

[16] The Grievance was not heard until January 2023 (the reason for the delay was not made clear to me). At the hearing, and in support of their position that the applicant had failed in its duty to accommodate Ms. Sauson, the respondent identified a specific position within Canada Post (referenced as the "YB position"). That position had been open/filled in either 2012 or 2013 but had not been offered to Ms. Sauson at that time. She was unaware of that position, and in fact did not became aware of it until 2016.

[17] The respondent argued before the Arbitrator that the YB position would have been suitable for Ms. Sauson and her physical limitations and, therefore, should have been offered to her in 2012/2013; but it was not. According to the

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respondent, this was evidence that the applicant had not been diligently pursuing other opportunities for Ms. Sauson and had failed in its duty to accommodate her.

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[18] In her Decision, the Arbitrator agreed:

> 10. I am not satisfied that all appropriate positions were identified to the Grievor/the Union during the accommodation process. Looking at the YB position – while the Grievor did not learn the circumstances of this position until 2016, it does suggest that it/other positions may have been suitable for her abilities and limitations, but were not made available to her, for one reason or another. Several positions were identified to her, for which she was 'screened out', with no further explanation. One of these was a position taken up by a person who was central to her job search.

[19] The Decision goes on to say:

> 14. Having found that the Grievor was not accommodated, one must determine a date from which damages are payable. The Grievor/Union has identified the YB position as one that she could have done. There is no doubt in my mind that she could have fit into this position; however, it was not posted, and there is no certainty as to when the incumbent was appointed, in 2012 or 2013. I choose a random date of Jully (sic) 1 2012. As noted earlier, the fact that this position was 'out there', and was within the Grievor's limitations, strongly suggests that there would have been other such positions in other bargaining units with CPC. …

[20] As a result of this conclusion, the Arbitrator went on to award compensation to Ms. Sauson based on the rate of the YB position, including pension and benefit arrears, lost vacation, personal days, and interest. In doing so (and as quoted above), the Arbitrator randomly chose July 1, 2012, as a start date for compensation, going to the date of Ms. Sauson's new position in December 2014.

[21] The Arbitrator also awarded damages pursuant to subsections 53(2) and 53(3) of the *CHRA*; and finally ordered that the applicant make Ms. Sauson "whole" on any income tax obligations or repayments required by Workers' Compensation.

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The present judicial review application

[22] The applicant seeks judicial review of the Decision. It has identified four areas where, in its view, the Arbitrator erred:

1. By assuming jurisdiction over the issue of accommodation. It is the view of the applicant that the provincial workers compensation legislation represents a "complete code" for the arbitration of workplace injuries and related compensation/compensation disputes, including issues of accommodation. As such, an Arbitrator would hold no jurisdiction over such issues.

2. In the alternative, that the Arbitrator erred in determining that the applicant had failed in its duty to accommodate Ms. Sauson.

3. In the further alternative, that the Arbitrator erred in determining that Ms. Sauson should have been placed in the YB position on July 1, 2012, or at any other time.

4. In the further alternative, that the Arbitrator erred by failing to identify particulars in its award to Ms. Sauson of $12,000 in damages under s. 53(2) of the *CHRA*.

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Standard of review

[23] In the leading case of *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the Supreme Court confirmed that questions relating to jurisdictional boundaries between decision-makers are to be assessed pursuant to a standard of correctness:

> 63 Finally, the rule of law requires that the correctness standard be applied in order to resolve questions regarding the jurisdictional boundaries between two or more administrative bodies: *Dunsmuir*, at para. 61. …

[24] That is therefore the standard of review to be applied to the first ground of review, as it alleges that the decision maker made an error in assuming jurisdiction over a subject matter.

[25] The other three grounds/issues identified by the applicant would attract a reasonableness standard of review.

Error in assuming jurisdiction

[26] The issue of jurisdiction was raised by the applicant with the Arbitrator, during the hearing. In the Decision, the Arbitrator noted as follows:

> 5. The Employer has raised various arguments suggesting that I lack jurisdiction to hear this grievance. I do not accept those arguments. The fact that the Grievor was in the workers' compensation process does not usurp the grievance process or the ability to file a complaint of breach of the duty to accommodate under the **Canadian Human Rights Act**. To suggest that the Workers' Compensation Board has exclusive jurisdiction over issues of accommodation in all circumstances is contrary to the collective agreement, the Employer's own practices and policies, and jurisprudence under the **CHRA**.

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[27] The Supreme Court of Canada in *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, discussed the question of a labour arbitrator's jurisdiction over disputes, in circumstances where a statutorily created option exists:

> [32] That said, it remains necessary to consider whether the competing statutory scheme demonstrates an intention to displace the arbitrator's exclusive jurisdiction. In some cases, it may enact a "complete code" that confers exclusive jurisdiction over certain kinds of disputes on a competing tribunal, as it did in *Regina Police* … In other cases, the legislation may endow a competing tribunal with concurrent jurisdiction over disputes that would otherwise fall solely to the labour arbitrator for decision. And where the legislature so provides, courts must respect that intention.

[28] That, therefore, is the essential question to be answered here. Does the statutory scheme contained in the Nova Scotia *Workers Compensation Act* (the "*WCA*") constitute a "complete code" in relation to accommodation of injured employees receiving WCB benefits, thereby providing exclusive jurisdiction to the WCB in those areas? Or, in the alternative, is there concurrent jurisdiction to both the WCB and an arbitrator appointed pursuant to a collective agreement?

[29] As noted by the applicant, one example of concurrent jurisdiction was recently identified by our Court of Appeal in *Nova Scotia (Human Rights Commission) v. Nova Scotia (Attorney General)*, 2023 NSCA 66. It was held therein that, given the legislation in Nova Scotia, both labour arbitrators and the Human Rights Commission enjoyed jurisdiction over human rights disputes in this province.

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[30] In referencing the *Horrocks, supra,* case, the Nova Scotia Court of Appeal provided the following useful summary:

> [21] ... The following principles are extracted from Justice Brown's reasons:
>
> - Where labour legislation provides for the final settlement of disputes arising from a collective agreement, the jurisdiction of the arbitrator (or other decision-maker empowered by the legislation) is exclusive. This applies irrespective of the nature of the competing forum (paras. 15 and 30);
>
> - The exclusive jurisdiction of the arbitrator extends only to disputes which arise expressly or inferentially from the collective agreement. Not all workplace disputes fall within the scope (para. 22);
>
> - It is "beyond dispute" that labour arbitrators may apply human rights legislation to disputes arising from a collective agreement (para. 13);
>
> - Labour arbitration is the forum for enforcement of human rights in unionized workplaces (para. 22);
>
> - The exclusive jurisdiction enjoyed by labour arbitrators is subject to clearly expressed legislative intent to the contrary (paras. 15, 32 and 33);
>
> - The mere existence of a competing tribunal is insufficient to displace labour arbitration as the sole forum for disputes arising from a collective agreement (para. 33);
>
> - To displace a labour arbitrator's sole jurisdiction, some positive expression of the legislature's will is required. This may be by an explicit

> statement in a competing tribunal's enabling statute that it enjoys concurrent jurisdiction (para. 33);
>
> - Explicit language granting concurrent jurisdiction to a competing tribunal is not necessary to displace a labour arbitrator's exclusive jurisdiction. A consideration of the statutory scheme may disclose a legislative intent for concurrent jurisdiction (para. 33);
>
> - Legislative intent for concurrent jurisdiction can also be found in the legislative history of the competing tribunal's enabling statute (para. 33).
>
> (*Nova Scotia (Human Rights Commission) v. Nova Scotia (Attorney General)*, *supra*)

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[31] In other cases, of course, courts have found that the legislation in question did provide a "complete code" in relation to certain issues; and as a result, have concluded that the legislation did displace the jurisdiction of a labour arbitrator over those issues (see, for example, *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, in relation to police disciplinary issues, in the province of Manitoba).

[32] In the case at bar, it is the view of the applicant that the *WCA* represents a complete code over all matters relating to workplace injuries in those workplaces within its scope. Therefore, in their submission, only the WCB has jurisdiction over all such matters.

[33] The respondent disagrees, and argues that the Arbitrator had clear jurisdiction, due to the existing collective agreement, over this applicant

employer's duty of accommodation in relation to Ms. Sauson. Such was properly the subject of the hearing, decision and award(s).

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[34] I will start by noting a few of the applicable legislative provisions. The applicant (Canada Post) is an agent of the federal government. As such, its employees are covered by the *Government Employees Compensation Act* (R.S.C., 1985, c. G-5) (the "*GECA*"). That *Act* contains the following sections:

> **4(1)** Subject to this Act, compensation shall be paid to
>
> > **(a)** an employee who
> >
> > > **(i)** is caused personal injury by an accident arising out of and in the course of his employment, ...
> >
> > …
>
> **(2)** The employee or the dependents referred to in subsection (1) are, notwithstanding the nature or class of the employment, entitled to receive compensation at the same rate and under the same conditions as are provided under the law of the province where the employee is usually employed respecting compensation for workmen and the dependents of deceased workmen, employed by persons other than Her Majesty, who
>
> > **(a)** are caused personal injuries in that province by accidents arising out of and in the course of their employment; ...
> >
> > …
>
> **(3)** Compensation under subsection (1) shall be determined by
>
> > **(a)** the same board, officers or authority as is or are established by the law of the province for determining compensation for workmen and dependents of deceased workmen by persons other than Her Majesty; ...
>
> …

[35] As a result, in Nova Scotia, the *WCA* is incorporated into the application of the *GECA*. The *GECA* also provides the following prohibition:

> **12** Where an accident happens to an employee in the course of his employment under such circumstances as entitle him or his dependants to compensation under this Act, neither the employee nor any dependant of the employee has any claim against Her Majesty, or any officer, servant or agent of Her Majesty, other than for compensation under this Act. (Emphasis added.)

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[36] The word "claim" as it appears in s. 12 of the *GECA* is not defined within that *Act*.

[37] The *WCA* provides as follows:

> **10 (1)** Where, in an industry to which this Part applies, personal injury by accident arising out of and in the course of employment is caused to a worker, the Board shall pay compensation to the worker as provided by this Part.
>
> ...
>
> **28 (1)** The rights provided by this Part are in lieu of all rights and rights of action to which a worker, a worker's dependant or a worker's employer are or may be entitled against
>
> (a) the worker's employer or that employer servants or agents; and
>
> (b) any other employer subject to this Part, or any of that employer's servants or agents, as a result of any personal injury by accident
>
> (c) in respect of which compensation is payable pursuant to this Part; or
>
> (d) arising out of and in the course of the worker's employment in an industry to which this Part applies.

[38] It is the submission of the applicant that s. 12 of the *GECA* and s. 28 of the *WCA* entirely prohibit access to other remedies in cases where the *GECA/WCA* have jurisdiction. Those sections note that persons to whom the legislation applies are barred from other "claims", "rights", or "rights of action".

[39] The applicant has provided a number of cases that purport to interpret these sections. However, all cases that I have seen, make reference to a prohibition from

civil claims against an employer: *Connolly v. Canada Post Corp.*, 2005 NSCA 55; *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 SCR 890. The caselaw makes reference to what is referred to as the "historic trade off" that is implicit in the workers' compensation scheme: that is, while an injured person loses their civil cause of action, in exchange they receive quicker and easier compensation. The Court in *Pasiechnyk* also makes the point that it would be unfair for an employer to, in good faith, contribute to the workers' compensation scheme, but then still face civil actions brought by the employee.

[40] I have not been provided with any caselaw which suggests that grievances pursuant to a collective agreement (or, for that matter, human rights claims) are encompassed by the legislative prohibitions on "claims" or "rights of action" by persons involved in the workers' compensation scheme. Nor do I have any case which suggests that the reasoning behind the prohibition (i.e., the "historic trade off") would be applicable to prohibit not only civil claims, but grievances as well.

[41] My review of the caselaw makes it clear that the prohibitions contained at s. 12 of the *GECA* and s. 28 of the *WCA* would bar a civil claim by Ms. Sauson, against the applicant, for her injuries. However, I am unconvinced that those same provisions would automatically bar the filing of a grievance under a collective agreement.

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[42] In relation to the issue of accommodation of injured employees, the *WCA* at s. 91 provides:

> **Duty to accommodate**
>
> **91 (1)** The employer shall, in order to fulfil the employer's obligations pursuant to Sections 89 to 101, accommodate the work or the workplace to the needs of a worker who requires accommodation as a result of the injury to the extent that the accommodation does not cause the employer undue hardship.
>
> **(2)** The Board may determine whether the employer has fulfilled the employer's obligations pursuant to subsection (1).

[43] This must be read in conjunction with s. 100 of the *WCA*:

> **Effect of Sections 89 to 101**
>
> **100 (1)** Where
>
> (a) Sections 89 to 101 conflict with the collective agreement that is binding on the employer; and
>
> (b) the obligations of the employer pursuant to this Section afford a worker better re-employment terms than the terms available to the worker pursuant to the collective agreement;
>
> Sections 89 to 101 prevail over the collective agreement, with the exception of any seniority provisions.
>
> **(2)** Sections 89 to 101 do not prevail over any established rule or practice respecting hiring and placement of the worker's trade or occupation if, in the opinion of the Board, the rule or practice is reasonable.

[44] In this case, as previously indicated, the WCB did send periodic correspondence to the applicant, providing information about Ms. Sauson's circumstances, and asking whether the applicant had been able to identify an alternative position for her. However, the WCB does not seem to have formally addressed the issue, for example, by making a finding pursuant to s. 91(1).

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[45] It would appear that the Arbitrator was the first entity to formally address the complaints of Ms. Sauson/the respondent as to accommodation issues. These issues therefore could not be described as *res judicata*, or estopped, as they had never been litigated or formally addressed by any administrative body. Furthermore, the Decision could not be seen as a collateral attack on any decision or process of the WCB, as they had not had occasion to pronounce on the issue of accommodation.

[46] Section 100 of the *WCA* is, in my view, a significant section for my purposes. It notes that, in cases of conflict, and where the terms of reemployment under the *WCA* would be superior to the terms under a collective agreement, the terms under the *WCA* would prevail. This would, of necessity, mean that the opposite is also the case; where terms of the collective agreement are superior, they would prevail. This provision suggests to me that, even within the *WCA* itself, there is acknowledgement that its provisions does not address the issue of accommodation completely and exclusively.

[47] The collective agreement that was in place between these parties also provides provisions in relation to injuries while on duty, and accommodation of injured workers:

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> 20.01 **Injury-On-Duty**
>
> An employee who suffers personal injury caused by an accident arising out of or in the course of his or her employment, or who is disabled by reason of an industrial disease caused by the nature of the employment, shall be entitled to unpaid injury-on-duty leave for the period of time approved by a provincial workers' compensation board.
>
> While on injury-on-duty leave, the employee shall not receive his or her regular remuneration from the Corporation. The employee shall receive compensation as determined and paid by the provincial workers' compensation board.

[48] The issue of "Accommodation" is specifically provided for in Appendix "G" to the collective agreement:

> The parties recognize that the Corporation, its employees, the Union, and the employee who is permanently-disabled or temporarily disabled must work together to attain the objectives set out in the *Canadian Human Rights Act* on accommodation.
>
> In the event that an employee has a disability as recognized by the *Canadian Human Rights Act*, the Corporation shall make every reasonable effort, up to the point of undue hardship, to accommodate the employee in accordance with the Corporation's policy on accommodation. In this regard, the Corporation, the Union and the employee will co-operate in attempting to determine the appropriate accommodation. This shall include local consultation when appropriate. The Union reserves the right to file a grievance.

[49] Lastly, as to policy, I have been provided with the Canada Post "Duty to Accommodate Policy – Last Updated: April 11, 2018". That document is fairly comprehensive. It provides, *inter alia*, a number of definitions of terms, as well as a listing of fundamental principles, and an outline of the roles and responsibilities of each of the entities involved. It also sets out the limitations on the duty to accommodate, the meaning of "undue hardship", and confidentiality provisions.

[50] Under the heading "9. Complaints and Appeals Process", the policy notes:

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> Where an employee believes that his/her request for accommodation has not been handled in accordance with this Policy or the accompanying practice, or is not satisfied with the type of accommodation offered, the individual may raise their concerns to their Regional Human Rights Representative.
>
> Nothing in this Policy prevents an employee from seeking recourse under any applicable complaint or grievance process. …

[51] The policy document also has a section entitled "12. Regulatory Impact". Under that heading appear a number of pieces of legislation, including the *Employment Equity Act; Canadian Human Rights Act; Privacy Act; Access to Information Act;* and the *Canada Labour Code*. Notably, the *WCA* is not included on that list. There is no mention in the policy document of issues arising from a workers' compensation claim within the context of a request for accommodation.

[52] Having reviewed all of this material, I remain unconvinced that the *WCA* can be said to represent a "complete code" in relation to issues of accommodation or re-employment of injured workers who are involved in the WCB process and receiving WCB benefits. To use the language of our Court of Appeal, in my view the *WCA* does not express any positive or explicit intention on the part of the legislature to entirely displace a labour arbitrator's jurisdiction in those particular areas. To the contrary, in my view, certain parts of the WCA appear to disclose "a legislative intent for concurrent jurisdiction" in the areas of accommodation/employment of injured/disabled employees with the labour arbitration process.

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[53] I therefore find there to be concurrent jurisdiction in those areas. I reject the applicant's argument that the arbitrator lacked jurisdiction to hear this grievance.

[54] I move on to the arguments relating to the decision itself.

Error in determining that the applicant had failed in its duty to accommodate Ms. Sauson

Error in determining that Ms. Sauson should have been placed in the YB position on July 1, 2012, or at any other time

[55] I will deal with these two issues together. The Decision as to these particular issues is to be reviewed on a standard of reasonableness.

[56] The decision in *Vavilov, supra,* confirmed that the standard of "reasonableness" means that a reviewing court must adopt an attitude of deference in reviewing the decision of the administrative decision maker. A reviewing court is not to ask itself what answer it would have given to the question at hand, but rather whether the answer given by the administrative decision maker was a reasonable one.

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[57] *Vavilov* also confirmed that a reviewing court must carefully assess not only the decision, but also the path that led to the decision. The following paragraphs of *Vavilov* are helpful and instructive:

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> 83 It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, <u>including both the decision maker's reasoning process and the outcome.</u> ...
>
> 84 As explained above, where the administrative decision maker has provided written reasons, those reasons are the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first. A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with "respectful attention" and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion: see *Dunsmuir*, at para. 48, ...
>
> 85 Developing an understanding of the reasoning that led to the administrative decision enables a reviewing court to assess whether the decision as a whole is reasonable. As we will explain in greater detail below, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision.
>
> …
>
> 99 A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness - justification, transparency and intelligibility - and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Dunsmuir*, at paras. 47 and 74; *Catalyst*, at para. 13.
>
> 100 The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied

> that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.
>
> 101 What makes a decision unreasonable? We find it conceptually useful here to consider two types of fundamental flaws. The first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. ...
>
> (Emphasis added.)

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[58] Having said all of that, the Court in *Vavilov* also confirmed that a reviewing court's function is not a "line-by-line treasure hunt for error" (para. 102), and that judicial restraint remains appropriate in reviews of administrative decisions:

> 13 Reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision-makers. ...

[59] The Court also noted the importance of assessing decisions in their proper context:

> 92 Administrative decision makers cannot always be expected to deploy the same array of legal techniques that might be expected of a lawyer or judge - nor will it always be necessary or even useful for them to do so. Instead, the concepts and language employed by administrative decision makers will often be highly specific to their fields of experience and expertise, and this may impact both the form and content of their reasons. These differences are not necessarily a sign of an unreasonable decision - indeed, they may be indicative of a decision maker's strength within its particular and specialized domain. "Administrative justice" will not always look like "judicial justice", and reviewing courts must remain acutely aware of that fact.

[60] Lastly, it should be noted that any alleged error or omission in an administrative decision must be shown to be material, in the context of the decision

as a whole. A reviewing court is to use a flexible approach, and may supplement elements found to be missing in the decision itself:

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> 301 Review of the decision as a whole is especially vital when an applicant alleges that an administrative decision contains material omissions. Significantly, and as this Court has frequently emphasized, administrative decision-makers are not required to consider and comment upon every issue raised by the parties in their reasons … . Further, a reviewing court is not restricted to the four corners of the written reasons delivered by the decision-maker and should, if faced with a gap in the reasons, look to the record to see if it sheds light on the decision … .
>
> …
>
> 303 Some materials that may help bridge gaps in a reviewing court's understanding of an administrative decision include: the record of any formal proceedings as well as the materials before the decision-maker, past decisions of the administrative body, and policies or guidelines developed to guide the type of decision under review (see Matthew Lewans, "Renovating Judicial Review" (2017), 68 *U.N.B.L.J.* 109, at pp. 137-38). Reviewing these materials may assist a court in understanding, "by inference", why an administrative decision-maker reached a particular outcome … .

[61] In *Alexion Pharmaceuticals Inc. v. Canada (Attorney General)*, 2021 FCA 157:

> 12 *Vavilov* tells us that a reasoned explanation has two related components:
>
> *Adequacy*. The reviewing court must be able to discern an "internally coherent and rational chain of analysis" that the "reviewing court must be able to trace" and must be able to understand. Here, an administrator falls short when there is a "fundamental gap" in reasoning, a "fail[ure] to reveal a rational chain of analysis"or it is "[im]possible to understand the decision maker's reasoning on a critical point" such that there isn't really any reasoning at all: *Vavilov*, at paragraphs 85, 96, 102 and 103-104.
>
> *Logic, coherence and rationality*. The reasoning given must be "rational and logical" without "fatal flaws in its overarching logic": *Vavilov* at paragraph 102. Here, the reasoning given by an administrator falls short when it "fail[s] to reveal a rational chain of analysis", has a "flawed basis", "is based on an unreasonable chain of analysis" or "an irrational chain of analysis", or contains "clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise": *Vavilov*, at paragraphs 96 and 103-104.

13 These shortcomings must be evident on "critical point[s]": *Vavilov*, at paragraphs 102-103. The "critical point[s]" are shaped, in part, by "the central issues and concerns raised by the parties": *Vavilov*, at paragraphs 127-128. They are also points that are "sufficiently central or significant" such that they point to "sufficiently serious shortcomings in the decision": *Vavilov*, at paragraph 100. They must be "more than merely superficial or peripheral to the merits of the decision": *Vavilov*, at paragraph 100.

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[62] In the case at bar, the Arbitrator found that the applicant had failed in its duty of accommodation towards Ms. Sauson. The Decision provides this explanation for that finding:

> 6. The first question to be determined is whether the Employer had breached section 7 of the ***CHRA***; I must then determine whether it failed in its duty to accommodate the Grievor, to the point of undue hardship. (No undue hardship argument was raised.) Following the analysis in the cases cited, I find there has been a breach, and that the Employer has not met its burden of proving that it made reasonable attempts to accommodate the Grievor to the point of undue hardship. On the contrary, the Grievor took the PSAC position in December 2014 at her own initiative, and the Employer acknowledges that it was not an accommodated position.
>
> 7. The Grievor was off work from April 2011 to December 2014. In January 2012 her doctor advised that she could no longer fulfill the duties of an RSMC. A CPC document in evidence from the Operations Manager (NS) indicates that the job search began on May 3, 2012. In my view, the duty to accommodate had been triggered by that point, prior to her formal request in February 2013. The evidence does not support that the Grievor was able to work prior to January 2012, but does support that she received benefits to which she was entitled.
>
> 8. Prior to going off work, the Grievor lived and worked in the Windsor area. Initially the Employer was looking for an accommodated position in that area. She was asked in March 2013 if she would “relocate” to Halifax, and she said ‘not at this time’. In August 2013, she indicated that she would accept a position up to 100 kms from her current home address. It is not entirely clear whether she thought she was being asked to relocate, i.e. move, from her home area, or to accept a position in a broader geographical area. In any event, I do not find her answer in March of much significance in the overall scheme of things. It is significant that in December 2014 she applied for, and accepted, the PSAC position in Halifax, and that WCB applies a 100 km. area in its attempts to identify appropriate positions.

> 9. The Grievor became aware in 2016 of a PSAC position that had been awarded around 2012. It was not posted, and was filled by YB. She believed it was a position she could have been accommodated into at the time, had she/the Union known about it. The Union argues that this position should be the bench mark for the compensation settlement, as the Grievor could have done this position, and it was available.
>
> 10. I am not satisfied that all appropriate positions were identified to the Grievor/ the Union during the accommodation process. Looking at the YB position – while the Grievor did not learn the circumstances of this position until 2016, it does suggest that it/other positions may have been suitable for her abilities and limitations, but were not made available to her, for one reason or another. Several positions were identified to her, for which she was 'screened out', with no further explanation. One of those was a position taken up by a person who was central to her job search.
>
> …
>
> 12. I accept that the Grievor did everything she could – to the point of finding her own job outside of the RSMC bargaining unit – to facilitate the accommodation process. The Union, too, made significant and reasonable efforts on the Grievor's behalf to activate and push ahead the accommodation process, with no success. I cannot reach the same conclusion about the Employer.

[63] The applicant disputes that finding. First, it notes that Ms. Sauson was prevented from continuing in the position she occupied at the time of her injury, due to her physical limitations. As to other positions, the applicant notes that there is no duty on an employer to "create" a new position that an employee would be able to perform with his/her limitations (*Re: Nestle Purina Petcare and CEP, Local 41-0 (Willis)*, Re, [2012] OLAA No. 539).

[64] The applicant further submits that the Record before the arbitrator reflected "the ongoing efforts of Canada Post to identify vacant positions that would be appropriate for Ms. Sauson and her physical limitations". In the view of the applicant, the Arbitrator failed to take that evidence into appropriate consideration.

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They note, for example, that Ms. Sauson refused a relocation to Halifax in March 2013, but in August 2013 indicated that she would then accept a relocation up to 100 kms from her home. The applicant suggests that this evidence supports the inference that an appropriate Halifax position had been identified by the applicant in March 2013, and that Ms. Sauson's delay in accepting cost her that position.

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[65] I have reviewed the Record that was before the Arbitrator. While it does provide a number of references to the applicant having looked for suitable positions for Ms. Sauson, many of those references are generic, without detail. As noted in the Decision, there is at least one document showing a list of positions for which Ms. Sauson was "screened out" by the applicant, again without much further detail.

[66] The notes of Ms. Sauson headed "Job Search Planner", dated March 8, 2013, state:

> Employer: Canada Post Corp.
> Contact Person: Graham Mackenzie
> He called in reference to my letter dated Feb 28/13 requesting job accommodation. He will look for a position within 40 km of Windsor. He will get in touch when he has more info.
> - asked if I was willing to relocate to Halifax. I said not at this time.
>
> (Judicial Review Record, Tab L, page 38)

[67] I would strongly question whether it would be reasonable to infer, on the basis of those notes, that an actual Halifax position had been identified for Ms. Sauson. That question might have been nothing more that a casual inquiry.

[68] It does appear that the Arbitrator based her decision, at least in part, on her finding that there was at least one position within Canada Post (the YB position) that should have been offered to Ms. Sauson in 2012 or 2013, and it was not. On that basis the Arbitrator inferred that, therefore, there would likely have been *other positions* that existed that would also have been appropriate for Ms. Sauson but were simply never identified by the applicant. The Arbitrator then went on to conclude that the applicant did not make appropriate efforts to accommodate Ms. Sauson. These findings also formed the basis for the amount of damages that were eventually granted to Ms. Sauson.

[69] The applicant submits that the Arbitrator's finding that Ms. Sauson should have been offered the YB position in 2012/2013 was unreasonable because it entirely failed to take into account contrary and important evidence; that is, that Ms. Sauson had experienced a new injury, to her back, in early July 2012.

[70] The Arbitrator's Decision makes no mention of this July 2012 injury/disability at all. In particular, it is not mentioned in relation to the suitability

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of the YB position in 2012/2013, nor is it mentioned in the Arbitrator's arbitrary start date (for damages) of July 1, 2012. Furthermore, the applicant notes that the decision to use July 1, 2012, as a date when Ms. Sauson should have been given the YB position, is in contradiction with the evidence as to Ms. Sauson's actual health condition in July 2012. In the view of the applicant, these are omissions/contradictions in the Decision that cannot be overlooked or supplemented by a reviewing court.

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[71] In my review of the Record, I can see that evidence relating to Ms. Sauson's 2012 injury is very clearly included, in detail, in multiple areas. For example, it is included and discussed in the physiatry report of Dr. Heitzner dated June 23, 2014, and again in the Functional Assessment Report dated October 7, 2013. Ms. Sauson testified and gave evidence about this 2012 injury at the Workers' Compensation Appeals Tribunal hearing on July 9, 2015 (starting at p. 19 of the transcript):

> **Q.** Okay. Now the first issue that we're going to explore in your evidence is the injury to your back. When did this injury occur?
>
> **A.** It was on or about July 16th that I know … the 16th stays in my head. I thought the injury had happened on that day but I think I went to the doctor that day. It was on or about that day 2012. Yeah, 2012, July 16th.
>
> **Q.** And what were the circumstances leading up to the injury? What happened and how did this injury occur and … tell us what you can.
>
> **A.** The only thing I noticed was I got up one morning out of bed. And because I sleep with about eight pillows, I just basically roll out of bed. I don't lean on my shoulders or arms. And when I got up and made the twisting motion, I had a sharp pain in my lower back. And within a few hours I had sciatic pain

running right from the back of my neck all the way down the back of my buttocks area right down to almost the ankle.

…

Q. … Would you have seen Dr. Taylor after you have this injury to your lower back?

A. I saw her right … like, within two days of this happening. I spent, I think, the first two days in bed curled in a fetal position.

Q. And why was that? Why were you in bed for two days?

A. From the sciatic pain. I wished at that point that someone would just put me out of my misery, it was that bad. I tried taking muscle relaxants following my visit with Dr. Taylor. She suggested taking Robaxacet.

…

Q. And did the Robaxacet give you any relief for your back symptom?

A. Not at all. Not at all.

…

Q. When you saw Dr. Alexander on April 13, 2013, how would you compare the symptoms in your back at that time to when you first, say, injured your back? Were they the same, were they worse, were they better?

A. It had improved. I got to the point where I could walk around without a lot of pain. A few weeks after the sciatic pain, I was trying to go downstairs, and I noticed I had a lot of weakness in the left leg. And I actually … I fell a couple of steps. I banged my knee on the hardwood floor because the leg gave out. And this happened a couple of times.

And I mentioned to Dr. Taylor that, you know, I was worried about going on stairs because I was afraid of falling. And so by the time I saw Dr. Alexander, there was a lot of numbness and weakness in the leg and that had come a couple of weeks … like I say, a couple of weeks after the sciatic nerve pain.

Q. So the sciatic nerve pain is the first symptom after your injury, is it?

A. There was a sharp pain in my back and then the sciatic pain, yeah. I was in bed for … oh, it was at least seven days I was in bed, not able to get out except to go to the bathroom with help, so yeah. It was, you know, the type of pain to be in bed. That’s for sure.

The injury is thereafter reported and discussed in the resulting decision of the Appeals Tribunal (August 24, 2015).

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[72] The point I am making is evidence of Ms. Sauson's 2012 injury was not obscure or hidden in the Record; it was apparent. It could not possibly have been missed in the Arbitrator's review of the evidence. In my view, there is no question that the Arbitrator was aware of it, both in her assessment of the case and in making her Decision. Does her failure to specifically mention it cause her Decision to be lacking in reasonableness?

[73] I remind myself of the general principles that apply in assessing an administrative decision maker's decision, using a reasonableness standard. The caselaw tells us that such a decision does not have to meet the standard that might be expected of a Court decision. The caselaw is also clear that such decisions do not need to mention or address every possible issue, or piece of evidence, that was considered by the decision maker.

[74] I acknowledge that the Arbitrator did not specifically mention the July 2012 injury in her Decision. Having considered this at length, I further acknowledge that it might perhaps have been preferable for the Arbitrator to have provided some reference or detail as to this evidence in her Decision. However, in the final analysis, I do not think this omission renders the Decision "unreasonable" as that term was defined in *Vavilov*.

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[75] I accept that all of the evidence before the Arbitrator, including the evidence relating to Ms. Sauson's 2012 injury, factored into her assessment of the case as a whole. All of it would have been considered by the Arbitrator in reaching her conclusion that the YB position would have been appropriate for Ms. Sauson in 2012/2013. By not mentioning the July 2012 back injury, I understand the Arbitrator to be saying that it was immaterial to her ultimate findings and conclusions.

[76] This would include the evidence about Ms. Sauson being "off her feet" for some number of days in July 2012, as well as the evidence of her new physical ailments after that time. Again, I understand the Arbitrator's decision to have considered that evidence, and that it had no effect on her ultimate conclusion that the YB position would have been appropriate for Ms. Sauson in the summer of 2012.

[77] In my review of the Decision (and Record) as a whole, I cannot agree that the portions of the Decision relating to (a) the conclusion that the applicant had failed in its duty to accommodate Ms. Sauson; or (b) the conclusion that Ms. Sauson should have been placed in the YB position on July 1, 2012, or at any other time; were unreasonable as that term is defined in *Vavilov*.

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Error in failing to identify the particulars in its award to Ms. Sauson of $12,000 in damages under subsection 53(2) of the CHRA

[78] The Decision at page 7 provides, *inter alia*, the following remedy:

> Damages are warranted under section 53(2) of the ***CHRA*** of $12,000, …

[79] The applicant points out that s. 53(2) of the *CHRA* provides a list of possible reasons for the granting of damages; the Decision did not specify which of those reasons formed the basis for these particular s. 53(2) damages. As a result, submits the applicant, the Decision does not provide sufficient reasons for that damage award and it should be quashed.

[80] Section 53(2) of the *CHRA* provides (in part) as follows:

> **(2)** If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:
>
> …
>
> > **(c)** that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;
> >
> > **(d)** that the person compensate the victim for any or all additional costs of obtaining alternate goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and

> **(e)** that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.

[81] Again, I approach this issue by keeping in mind all of the principles relating to a reasonableness assessment of an administrative decision maker's decision, as I have outlined them at various points in this decision. It seems to me that, in light of the decision as a whole, the basis for this award can fairly be inferred as being pursuant to s. 53(2)(e).

[82] First, the award is expressed as a lump sum, which suggests a "general damage" or "pain and suffering" type of award, as described in subsection (e).

[83] Section 53(2)(c), by contrast, provides compensation for "wages" and/or "expenses". I note that, by this point in the Decision, the Arbitrator has already granted lost wages to Ms. Sauson at the YB position rate. Further, if the $12,000 s. 53(2) award was for (additional) lost wages or expenses, it seems obvious that the Decision would have provided some accounting for how the $12,000 was arrived at.

[84] In relation to the other alternative (s. 53(2)(d)), I see nothing in the Decision that suggests a finding that Ms. Sauson incurred any "additional costs of obtaining alternate goods, services, facilities or accommodation and for any expenses" as noted by that subsection. And once again, if s. (d) was the basis for the award, it

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seems obvious that the Arbitrator would have indicated what those costs were, and/or how the $12,000 figure was arrived at.

[85] In light of the entire context of the Decision, in my view, the basis for the s. 53(2) award can only be s. 53(2)(e). I acknowledge that an explicit notation to that effect in the Decision might have been preferable, but I do not see the Arbitrator's failure to so specify as fatal to that award.

[86] It is an applicant's burden, on the civil standard, to show that a decision is unreasonable. To so find, as stated in *Vavilov, supra,* I must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency". I am not so satisfied. I dismiss the application for Judicial Review.

[87] If the parties cannot agree on costs, please provide written submissions within 30 days of this decision.

Boudreau, J.

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