Court of Queen's Bench of Alberta

Citation: Sunshine Village Corporation v Boehnisch, 2020 ABQB 692

Date: 20201110
Docket: 1901 16940
Registry: Calgary

Between:

Sunshine Village Corporation

Applicant

- and -

Michaela Boehnisch and the Alberta Human Rights Commission

Respondents

Reasons for Judgment
of the
Honourable Mr. Justice N.E. Devlin

A. Overview

[1] Michaela 'Mischi' Boehnisch was passionate about skiing for a living. For 17 seasons, between 1991 and the spring of 2013, she worked the slopes at Sunshine Village as a Ski Patroller and Snow Safety Technician. She expected to return in the fall of 2013, and her immediate supervisor wanted her back. Sunshine, however, did not re-hire her. The reasons why lies at the heart of this appeal from the Human Rights Tribunal.

[2] Ms. Boehnisch ["Boehnisch"] claimed that Sunshine Village ["Sunshine"] told her she that she was no longer "a fit" to work as a ski patroller because of her likelihood of being injured, and refused to give her an opportunity to meet the physical requirements of the job. For

its part, Sunshine claimed that they offered Boehnisch the patroller position, contingent on her passing a physical demands analysis ["PDA"], which she refused.

[3] Boehnisch lodged a discrimination complaint with the Alberta Human Rights Commission, alleging discrimination on the basis of age, sex, and perceived physical disability. The matter proceeded to a full hearing before the Alberta Human Rights Tribunal ["the Tribunal"]. In a detailed decision, the Tribunal preferred Boehnisch's evidence and found that Sunshine discriminated against her on the basis of a perceived disability: 2019 AHRC 55. The Tribunal awarded Boehnisch $25,000 in general damages and $54,472 for lost wages, less the amount she earned in mitigation.

[4] Sunshine appeals both the finding of discrimination and the damages award pursuant to the statutory right of appeal provided by section 37 of the *Alberta Human rights Act***,** RSA 2000 c A-25.5 ["*AHRA*"].

[5] For the reasons that follow, the appeal is dismissed in its entirety.

B. Nature of this appeal

[6] This case turned on what happened at two key meetings between Boehnisch and a pair of Sunshine's managers in the fall of 2013. That determination was dispositive of the case. The parties' respective versions were irreconcilable: Boehnisch was steadfast that Sunshine refused her the chance to prove she was fit enough to work as a Ski Patroller: Sunshine's witnesses claimed they made exactly that offer, but Boehnisch refused.

[7] The Tribunal did what triers of fact are asked and entitled to do: it preferred the evidence of one of the parties over the other, found as a fact that her version is what happened, and gave comprehensible reasons for its decision. That outcome was supported by the evidence and easily understandable on a full reading of the record.

[8] Sunshine does not accept this result and has launched a full-frontal assault on the Tribunal's key finding of fact.

C. Facts

[9] The following facts are germane to assessing the Tribunal's reasons.

(i) History of Boehnisch's relationship with Sunshine

[10] Boehnisch commenced employment with Sunshine in 1991. She worked every winter from then, through to 2002, as a ski patroller. This was seasonal work which commenced in the fall and ended with a temporary layoff over the summer.

[11] In 2002, Boehnisch left Sunshine for period of five years while she stayed home with young children. She returned in the fall of 2007 and worked through the spring of 2013, again as a Ski Patroller, as well as for a short period as a Snow Safety Technician.

[12] Boehnisch's formal work record was excellent. She received positive, even glowing, evaluations from her immediate supervisors. Allan Matheson ["Matheson"], the Mountain Operations Manager at Sunshine, and Boehnisch's ultimate boss, acknowledged that she ranked

in the top quartile of skiing ability amongst ski patrollers and that she was fully competent to perform this role, save for his concerns about her physical condition.

[13] Over her career, Boehnisch suffered a number of workplace injuries. These resulted in claims to the Worker's Compensation Board ["WCB"]. Sunshine's case focussed largely on its concern that Boehnisch was injury-prone, had made many WCB claims, and was a danger to injure herself, fellow employees, or the public, if re-hired. The Tribunal noted these concerns.[1]

[14] There was no evidence before the Tribunal as to whether Boehnisch's rate of injury was unusual or elevated in context of other ski patrollers at Sunshine or more broadly across the industry.

(ii) The 2010-2011 season

[15] Boehnisch began the 2010-2011 season as a "Ski Patroller III" ["Patroller III"], the top-level in that occupation, and was promoted to Ski Patrol Assistant Supervisor early in 2011.

(iii) The 2011-2012 season – a promotion, excellent reviews, and a shoulder injury

[16] In 2011-2012, Boehnisch held the position of Snow Safety Technician II. The thrust of the evidence appears to have been that she preferred this more challenging role, but that it entailed higher physical demands and risks. Boehnisch ended the 2011-2012 season with a positive review from her supervisor, who stated that she was "ready to take on the Tech 3 role!".

[17] Toward the end of the 2011-2012 season, Sunshine received a large snowfall event. The Safety Technicians were heavily engaged across the resort in attempts to reduce avalanche risk. In the process of attending to a colleague who was caught in a small avalanche, Boehnisch herself suffered a fall when snow she was standing on gave way. In the process she re-injured one of her shoulders.

(iv) The 2012-2013 season: singled out for fitness-to-work scrutiny

[18] Boehnisch had surgery to repair her shoulder during the 2012 off-season. When she returned to work in October of 2012, Matheson told her he that he did not think she was a good fit for the physically demanding Snow Safety Technician II or III roles. He also told her that she would have to satisfy a PDA before returning to work on skis.

[19] Around this time, Matheson wrote an internal memo to senior management regarding risk assessment and prequalification for work. He began by noting that the frequency and severity of workplace accidents while skiing appeared to be increasing. In this internal communication, he listed eight staff members (identified using their initials) who suffered injuries during the previous season. Of those, Boehnisch's injury was one of the least serious. She was, however,

[1] Decision, paras 143, 168. Sunshine's evidence at trial, and recitation of it on appeal, focused extensively on the nature and history of Boehnisch's injuries. These reasons do not traverse those facts in detail as it was not contested that they could provide Sunshine with a basis for requiring a PDA before rehiring Boehnisch. Rather, the question was whether a chance to do that PDA had been offered.

the only employee listed by name in this email. Indeed, her name, and only her name, appeared in the subject line of the email containing the memo.[2]

[20] This memo stated that Boehnisch should be pre-assessed for work fitness, through a third-party functional assessment. Matheson also expressed his intention to seek a third-party review of her "*entire WCB history*" (original emphasis in his correspondence). There was no evidence that this was done for any other employee who had suffered workplace injuries while skiing.

[21] In cross-examination, Matheson admitted that Boehnisch was "singled out", despite the fact that he had neither looked into the specific circumstances of any of her injuries, nor the recovery times they involved. He was compelled to agree that, had each of her injuries actually resolved within a day, he would not have known that, but nevertheless determined that her physical limitations prevented her from working as a professional ski patroller, based on those unexamined WCB claims.

[22] Despite Matheson's expressed misgivings, Boehnisch received a written offer of employment from Sunshine for the Tech III position for the 2012-2013 season, which she accepted. The Tribunal wrote as follows on this issue:

> [55] Mr. Jeremy Cox, testified that as the Public Safety Supervisor, he oversaw both the Ski Patrol and the Snow Safety Departments supervised respectively by Mr. Martin Papillon and Mr. Martland. He testified that the complainant was very fit, very knowledgeable and worked hard to get the job done. He confirmed that he was involved with her performance appraisal in early 2012. He was supportive of the decision to promote the complainant to Snow Safety Tech 3 at that time. He testified that at the beginning of the 2012-2013 season, Mr. Matheson attended at the Snow Safety office to discuss his concerns with respect to the complainant. Mr. Cox testified that Mr. Matheson was concerned about the complainant's physical ability to do the Tech 3 job and her history of WCB claims. Mr. Cox testified that this was a lengthy discussion. He testified that he did not feel there was any greater risk for her than anyone else and never thought she was a safety hazard to herself or others. […]

[23] Boehnisch initially began the 2012-2013 season on modified duties, as documented in the record, due to her shoulder injury having been aggravated in the off-season.

(v) Boehnisch successfully completes and submits a Physical Demands Analysis

[24] Boehnisch testified that she completed a PDA shortly after her return to work and provided a copy to Matheson. It is undisputed that she returned to her full role as a Tech III in November of 2012.

[25] The 2012 PDA is in evidence as Exhibit 16. It contained a handwritten update on October 30, 2012, from a qualified physiotherapist, stating, *inter alia*, that: "We tested her job demands today and she was able to demonstrate and perform all tasks."

---

[2] Exhibit 12.

[26] Matheson denied ever having received or seen this document. Of note for issues raised on the appeal, Sunshine's counsel asked Matheson whether he was aware of this document being found in Sunshine's records, and he denied that it had. The clear implication of the question was that Boehnisch had not, in fact, provided the PDA to Sunshine.

[27] Matheson was cross-examined on how it was possible that Boehnisch got back on the snow in November 2012, in the full Tech III role, without having given him the completed PDA. He could offer no explanation. In the context of this cross-examination, he also admitted he had not reviewed Boehnisch's personnel file. The full exchange was as follows:

> Q: Okay. You'll agree with me Mischi Boehnisch got back on snow in November 2012, right?
>
> A: That's right.
>
> Q: Okay. So explain to me how that was possible? Given your evidence that there was no way she was going back on snow until she conducted a physical demands analysis. How is that possible?
>
> A: I'm not sure.
>
> Q: Okay. So no doubt here, Mr. Howland [Sunshine's CFO] thinks she's dangerous, right, that's been communicated to?
>
> A: That's in the e-mail, yes.
>
> Q: Right. And it's communicated to you that Mr. Howland thinks it's dangerous that she returned to work, right, he's your boss?
>
> A: Yes.
>
> […]
>
> Q: Yes, you are telling us that you made no inquiries to determine why Mischi Boehnisch was back on snow without a physical demands analysis?
>
> A: That's correct.

[28] Sometime in November, concerns were raised about Boehnisch's skillset fitting the Tech III role. These involved her judgement regarding snow-condition/hazard forecasting, not her physical capacity to do the work. In an email chain on this topic, Matheson wrote the folloswing: "The jungle drums have been beating and people have come to me with their concerns." He explained that the phrase "jungle drums" referred to rumours.

[29] In January 2013, Boehnisch returned to the role of Patroller III, and completed the season in this position. She felt it was a demotion from Tech III, but accepted the decision for the good of her team.

[30] In April of 2013, Boehnisch injured her shoulder again when some rocks gave way and she fell. She did not re-open her WCB claim for the shoulder injury at this time. There is an unresolved factual dispute as to whether one of her supervisors at Sunshine told her she would be better off not making a claim at that time.

[31] When the ski season ended in the spring of 2013, Boehnisch left her ski gear on the mountain at Sunshine, with the full expectation and understanding, confirmed by her supervisor,

that she would be returning that fall in the same role. She continued to pay the full premium of her Sunshine employee benefits over the summer.

[32] Throughout the summer of 2013, Boehnisch engaged in strenuous outdoor physical activities including hiking, water-skiing, wake boarding, rock climbing and a long-distance mountain bike race in North Dakota, which was 106 miles long and involved 12,000 feet of elevation change. The evidence painted a picture of Boehnisch as the quintessential mountain athlete, who thrived on physical activity and challenges.

(vi) Summer 2013: Sunshine formulates a plan to not rehire Boehnisch as a Ski Patroller

[33] On June 19, 2013, Matheson sent an email to Sunshine's Controller of Human Resources Jennifer Cunningham ["Cunningham"] and her boss, Sunshine's Human Resources Manager Orla Allen ["Allen"], raising questions about Boehnisch's WCB status. He queried whether Sunshine had an obligation to rehire her.

[34] In a reply email July 10, 2013, Allen tells Matheson that Boehnisch came into the Banff office and mentioned that her shoulder was bothering her. In that email Allen wrote:

> So with all that said - you really do need to make a decision as to whether you have a suitable, value add role for Mischi. She cannot earn what she earned last season shuffling some papers around, it must be meaningful work. I also understand that you have said in the past that you wish to "accommodate" Mischi – but let's be real here – does Sunshine Village have an appropriate job for her? [emphasis added]

[35] As the Tribunal noted, Matheson testified that this email resulted from him having told Allen that he believed Boehnisch was physically incapable of the Patroller III job. Matheson responded to Allen on the same day.[3] The second sentence of that email reads as follows:

> Going forward we will offer her a two day per week job as the relief dispatcher – that is the only non-paying job I (Mtn Ops) has on the books – other than dispatcher (fulltime). [emphasis added]

[36] Matheson went on to note that this job offer would not be welcomed and "the sparks will fly", but justified his position as being driven by safety, stating "what other choice do I have?" He contemplated whether there were other tasks Boehnisch could do to round out the further three days of the week, and indicated that this option should be further explored.

[37] The email next mentions the idea of having Boehnisch completing a PDA:

> Last year we discussed a needs assessment or task inventory – what we call the physical demands analysis – done through Orion health. This is also something I would like to pursue as it will definitively place her as able or unable to do the physical tasks of the position. This should be initiated through HR. I'm going to ask for that to go ahead.

[3] Exhibit 68.

[38] The email went on to note: "I do not have a good relationship with her now as I have been the 'asshole' forcing this agenda…" There is then a curious reference to the complainant's WCB history:

> The message has been strong from the new people in the department – get her off the "WCB gravy train" and get her to do what is asked of others in the same roles.

[39] The email concluded by stating that safety was the driving concern and that Matheson did not want Boehnisch to injure herself or aggravate one of the "myriad of injuries that she has received."

[40] The words "Ski Patroller" appear nowhere in Matheson's July 10 email. In cross-examination, Matheson admitted that offering Boehnisch a two-day per week job as the relief dispatcher was in fact the "go forward plan".

[41] When cross-examined about this same email, Allen contradicted Matheson somewhat. She insisted that bringing Boehnisch back in the Patroller III job was always Matheson's preferred option. This difference in Matheson and Allen's evidence is notable because Allen's version – namely that it was always Matheson's intention to offer Boehnisch a Patroller III job subject to a PDA – exactly mirrored Sunshine's litigation position, but contradicted Matheson as to what his own email meant and what his plan had been.

[42] In August, Allen emailed Matheson and Cunningham asking what had come of the job in dispatch for Boehnisch. The Tribunal noted that Allen followed the inquiry about the dispatch position with the observation that, "if the decision is not to re-employee her then we all need to be on the same page as to how this is to be handled." This email contained no mention of a PDA or a Patroller III position.

[43] Sunshine did nothing over the summer to extend an offer of employment to Boehnisch. Rather, her line supervisor (Martland) emailed her saying he had been told that she needed to speak with Matheson directly if she wanted to work at Sunshine again in the fall. Boehnisch promptly reached out and a meeting was scheduled for September 27. In an email to Martland, describing her phone conversation setting up the meeting with Matheson, Boehnisch wrote:

> Basically he is concerned about my physical well-being again and wants to make sure that me working up there in a ski patrol role will not permanently damage me. He said the process will be the same as last year. So that means I get to sit down with Jennifer (HR) and Al and convince them I can physically do the job and not get hurt. Do they have any idea what I actually do for fun when I'm not working? It's not exactly knitting and sipping tea!
>
> Not sure what to think of this action! Is it sexism, maybe ageism or is it just an Alism?
>
> But I guess I'll play the game again…

[44] The first meeting between Boehnisch and Matheson took place two days later, on September 27, 2013.

(vii) The September 27 meeting

[45] Three people were at the September meeting: Boehnisch, Matheson and Cunningham.[4] Boehnisch's evidence was that Matheson started the meeting by telling her that he did not see her in the Patroller III role and was not offering her that job. She testified that his exact words were: "Mischi, – you've had a good run, I'm concerned for your physical well being and I want you to be able to play with your kids."

[46] Boehnisch testified that she was shocked and offered to complete a PDA, as she had the year before. She told the Tribunal that Matheson said "no", he was not offering her the Ski Patroller position. Her evidence was that he never mentioned any option of her doing a PDA at Orion Health, a healthcare provider in Banff which did work for the WCB, as a pathway to being considered for the patroller job.

[47] Boehnisch testified that, in lieu of the job she wanted to return to, Matheson instead offered her a dispatch position, at the same rate of $19/hr.

[48] Importantly, Matheson departed the meeting at some point leaving Boehnisch and Cunningham alone. Boehnisch testified that she told Cunningham that she was disappointed and asked her to speak to Matheson to persuade him to let her do the PDA. Cunningham was not called to testify, and the Tribunal ultimately drew an adverse inference against Sunshine on this basis.

[49] For his part, Matheson denied telling Boehnisch that she had "had a good run", but agreed he spoke of wanting her to be able to play with her children. He admitted that he "led" with the dispatch position and told Boehnisch it was the best fit for her. He had rehearsed his words to her before the meeting because he knew she would be upset. He claimed that the dispatch position he was offering Boehnisch was a new 'hybrid' job where she would do dispatch for two days a week and then assist with other duties, some of which might involve being on the hill, to round out the other three days.

[50] Matheson insisted that he had also spoken about Boehnisch applying for the Patroller III job, contingent on her completing a PDA at Orion Health. His evidence was that she categorically refused this option, saying Orion Health's approach was "flawed" and she was bound to fail.

[51] No resolution was reached at the September meeting.

(viii) The October meeting

[52] Boehnisch followed-up on the September meeting with an email to Cunningham a few days later, asking for a further meeting. This was arranged for October 1. Boehnisch testified that the meeting began by her stating that she wanted to return in the Patroller III position, and offering to do a PDA to show she was physically capable of performing the duties required in this role. She said that Allen responded by saying that Sunshine had no obligation to rehire her at all and that she should be grateful that Matheson had offered her a dispatch job. Boehnisch replied that she had no interest in working in an office.

---

[4] Ms. Cunningham was then known as Ms. Mannsberger, and is referred to as such in some of the materials.

[53] Boehnisch said there was then a discussion about a hybrid position, partly in dispatch and partly on skis. She testified that this was proposed by Matheson and encouraged by Cunningham. Boehnisch testified that she was told that, if such a new position were to be created, she would have to do a PDA with Orion Health. Boehnisch testified that she agreed to complete this testing.

[54] In respect of this newly suggested hybrid role, Matheson would have to create a job description, determine the wage, and Orion Health would have to be contacted. According to Boehnisch's evidence, all of this was left for Matheson to do.

[55] Boehnisch's evidence was that she was never offered the Patroller III position, and that Matheson made it very clear that she would not be a ski patroller at Sunshine again.

[56] Matheson also gave his version of the October meeting. He said it began with Allen telling Boehnisch that they were there to try to "align Mischi to a role in mountain operations" and reminding her that Sunshine had no obligation to rehire her. He said that the conversation was then steered towards a role in dispatch and the "fleshing out some more detail of that role." These aspects of his evidence are relatively consistent with Boehnisch's.

[57] However, Matheson then went on to describe a second part of the meeting. He testified that this latter phase centred on the Patroller III position, contingent upon Boehnisch successfully completing PDA testing by Orion Health.

[58] Matheson's evidence in-chief then continued at some length about what the as-of-yet uncreated hybrid dispatch job might entail, and how these might have corresponded to her previous duties as a ski patroller. Matheson testified that this role, whatever it was to be, would not require completion of a PDA.

[59] Matheson testified that Boehnisch did not accept the dispatch job, nor did she accept the Patroller III position contingent on a PDA. He did not believe he had anything further to do based on the outcome of this meeting.

[60] Allen testified that she invited herself to the October meeting, as the head of human resources for Sunshine, as she "really wanted to push the process forward." Her recounting of the October meeting was somewhat different than Matheson's. Allen testified that "[t]he first thing we talked about, we talked about a P3 [Patroller III] role."

[61] She testified that she and Matheson told Boehnisch that this would require a PDA conducted by Orion Health. She was asked what would happen if Boehnisch completed and passed the PDA, and responded it would be: "[A]bsolutely fantastic news, and then come back as a P3 role." [sic]

[62] Allen testified that Boehnisch objected to Orion Health and insisted that the PDA be done by her own physiotherapist. Allen then described Matheson talking about the roles and functions that Boehnisch could play in the alternative hybrid dispatch he had been formulating. She described the meeting as ending with her clearly believing that Boehnisch had no further interest in pursuing the Patroller III job because of how strongly she objected to PDA testing being done by Orion Health. She said she asked Boehnisch to "have a think" about the hybrid dispatch role Matheson was offering her. She said the meeting ended without any agreement having been reached.

[63] As Cunningham was not called, her evidence as to what transpired at the October meeting was not available for the Tribunal.

(ix) Follow-up to the October meeting

[64] The first step any party took following the October meeting was an email from Boehnisch to Cunningham. Sent one week later, it read as follows:

> Good morning, Jennifer!
>
> Just wondering if you've heard anything from either Al or Orion Health? Just trying to get things lined up… Also curious about the wage, that will be a big factor. Any chance you have time to meet briefly in the next couple of days? Even outside the office for cup of tea? [emphasis added]

[65] Two elements of the message are notable. The first is the query about Orion Health, which makes it appear that Boehnisch is expecting something to be happening with Orion, initiated by Sunshine. Second, she inquires about the wage, which suggests she is not referring to her incumbent Patroller III position, since she knew the wage for that position.

[66] In its reasons, the Tribunal notes that Matheson was presented with this email in cross-examination and asked to reconcile Boehnisch's inquiry about Orion Health with his version of their meetings. The exchange referenced in the reasons went as follows:

> Q: Your evidence is that Ms. Boehnisch said unequivocally she is not going to Orion Health because it's flawed, that's your evidence?
>
> A: That's right.
>
> Q: Okay. So do you have any explanation when you read this email as to why Mischi is waiting to hear from you or Orion Health?
>
> A: No, I have no explanation.

[67] This was the second occasion on which Matheson could offer no explanation for the contrast between his testimony and objective, externally verifiable evidence.[5]

[68] By October 8, Cunningham was on leave from her position and Allen responded to Boehnisch's email. She testified that she had understood Boehnisch to be enquiring about the hybrid position and figured she was confused as to whether a PDA was required for that job. Based on her evidence about the October meeting, Allen could offer no explanation for why Boehnisch would be expecting Matheson to be taking steps.

[69] Allen responded to Boehnisch's email as follows:

> I have confirmed with Al that we will not need to go through Orion for any testing for the dispatch position. I've also confirmed that the wages (sic) rate is 18.50 per hour and the position is currently full-time...
>
> With the season fast approaching, we do need a decision by this Friday (October 11th, 2013).

[5] The other being how Boehnisch got back on skis as a full Tech III the previous November if she had failed to give Matheson her completed PDA.

(x) Boehnisch writes directly to the owner and senior managers of Sunshine

[70] The next communication between the parties occurred on October 15, when Boehnisch wrote to the owner and other senior management at Sunshine, copying the message to Allen. In a lengthy letter, she laid out her previous employment with Sunshine, her excellent work history, and her expectation of returning to work as a Patroller III that fall. She then provided a recounting of the September meeting with Matheson and Cunningham and wrote as follows:

> We met on September 27th. During this meeting Mr. Matheson advised me that my Ski Patrol (P3) position was no longer available to me and that he felt it would be in my best interest to change my role as he feared for my physical well being and that I may be hurt on the job. I must admit I was insulted by these comments. I am 45 years old and have called the mountains home for my entire life. I spend my off time skiing, mountain biking, climbing and doing a multitude of activities to stay fit and active.... [emphasis added]

[71] Boehnisch went on to express her passion for the work and her devastation at this turn of events. She declined the "offer of full time dispatcher" – referencing Allen's October 8th email which she appended to this message – and concluded by saying she wished to re-apply for the Patroller III position.

[72] The contents of this email are consistent with her oral evidence about the September and October meetings. It is also clear that she read Allen's October 15th email as an offer of a full-time sedentary dispatch position.

[73] Allen was a direct recipient of the email and Matheson rapidly became aware of it. He professed to be offended by its inaccuracies, in particular her failure to mention that she had in fact been offered the Patroller III position contingent on a PDA. Yet, he wrote no reply, and did nothing to correct the record with his superiors. Matheson also testified that he had no recollection of speaking to Allen about Boehnisch's email.

[74] For her part, Allen testified that she was "saddened" by Boehnisch's email to Sunshine's senior leadership, and felt that it was a significant omission for Boehnisch not have mentioned that offer of the Patroller III position contingent on completion of a PDA, or her supposed refusal to do so. She emailed Howland, the CFO of Sunshine, shortly after receiving Boehnisch's email.

[75] This email, which the Tribunal recited in its entirety, makes no mention of any offer of the Patroller III position, nor any offer for Boehnisch to complete a PDA. It also makes no mention of any inaccuracies in Boehnisch's email.

[76] Rather, Allen's response references her conversations with other involved managers, indicating that they all agree that "we need to support Al here." Notably, she also mentions that the "Full Time Dispatch" position which she offered to Boehnisch in her October 8 email has been subsequently filled by the incumbent.

[77] Neither Matheson nor Allen replied to Boehnisch to correct her supposed misdescription of events. Allen wrote back two weeks later confirming that Boehnisch had declined the dispatcher position and wishing her the best in the future.

(xi) Boehnisch's loss of work and attempts to mitigate

[78] Boehnisch never found work as a ski patroller again. The evidence showed that hiring for seasonal ski positions takes place well before the September/October timeframe of the meetings, and that there would have been no opportunities left to find work as on-hill personnel by this time.

[79] Boehnisch ultimately found a variety of work, as a ski club coach, making snow at Norquay, as a cat ski guide at Fortress, and in a position outside the ski industry. The Tribunal implicitly accepted that these efforts met her obligation to mitigate her loss of income.

[80] By 2016, Boehnisch was no longer looking for skiing work, due to health developments.

D. The Tribunal's decision – Boehnisch's version of events is accepted

[81] The Tribunal preferred Boehnisch's evidence and found as a fact that she had not been offered the Patroller III position for the 2013-2014 season. The following finding of fact was dispositive of the case on discrimination:

> [140] For the reasons below, I find that Sunshine did not offer to re-hire the complainant as a Ski Patroller for the 2013-2014 ski season on the condition that she complete a physical demands assessment at Orion Health. Sunshine led the complainant to believe that she would be re-hired into the Ski Patroller 3 position but unilaterally decided that the complainant was physically unable to perform the duties of her job. Instead of allowing the complainant to provide evidence of fitness, the respondent simply offered to re-hire the complainant into a position that they knew she would not accept. [emphasis added]

[82] Once this finding of fact was made, a finding of discrimination followed as a matter of course. Section 7 of the *AHRA* prohibits employers from discriminating on the basis of physical disability. Pursuant to the Supreme Court's decision in ***Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City)***, 2000 SCC 27, this guarantee of equal treatment extends to discrimination on the basis of perceived disabilities.

[83] In simple terms, an employer cannot decline to hire, or consider hiring, someone they imagine to be unable to meet the physical demands of a job *unless* it is objectively confirmed that this disability prevents the individual from being able to perform the requirements of that position.[6]

[84] The Tribunal found that, while the respondent may have had concerns about Boehnisch injuring herself, it did not take any steps to determine if she was in fact unfit to perform the job. Sunshine's unilateral and subjective decision that Boehnisch was disabled was made in the face of evidence that she had done the job well every year up to that point, had been capable of

---

[6] The scope of *bona fide physical* requirements, and the concomitant duty to accommodate, then comes into play, and is governed by the so-called "***Meiorin*** test", laid out in ***British Columbia (Public Service Employee Relations Commission) v British Columbia government and Services Employees' Union***, [1999] 3 SCR 3.

performing the job as of April 2013 when she left for the season, and that her immediate supervisor wanted and expected her back that fall.

[85] The Tribunal went on to assess damages. It concluded that Sunshine had "an agenda", and actively made plans to ensure that Boehnisch would not return to the position she had held and continued to want. The Tribunal found that the predictable result of Sunshine carrying through with its plan not to hire Boehnisch as a ski patroller was that she was unable to find work in any similar capacity, and lost her earnings for the 2013-2014 season.

[86] The Tribunal also found that Boehnisch was "physically capable of performing strenuous activity during the 2014-2015 ski season" and awarded damages for that year as well. The Tribunal ordered that the award for lost wages be reduced by the amount of income Boehnisch had actually been able to earn from alternate work during those two seasons.

[87] The award for lost income ended as of 2015, as the Tribunal found it uncertain that Boehnisch would be able to continue beyond that, given deterioration in her physical condition around that time.

[88] The Tribunal went on to assess general damages in the amount of $25,000. It found that Sunshine's discriminatory behaviour was "not inadvertent" and had "a profound effect on the complainant", essentially ending her career.

E. Grounds of appeal

[89] Sunshine filed a 70-page brief alleging six grounds of appeal. These included that the Tribunal:

a) breached the rules of procedural fairness and/or exceeded its jurisdiction by failing to state sufficient reasons for its credibility findings:

b) breached the rules of procedural fairness and/or exceeded its jurisdiction by drawing an adverse inference against Sunshine for failing to produce Boehnisch's personnel file;

c) erred in law by drawing an adverse inference against Sunshine for failing to call Ms. Cunningham;

d) failed to perform the required legal analysis to determine whether Sunshine established a *bona fide* occupational requirement;

e) unreasonably concluded that Sunshine did not offer Boehnisch employment as a ski patroller III for the 2013/2014 season on the condition that she complete a PDA at Orion health; and

f) failed to perform the required legal analysis to support its award for general damages and loss of income.

[90] In addressing these grounds, the Court must consider the Tribunal's impugned analysis and findings, after first determining the appropriate standard of review.

F. The standard of review in *Human Rights Act* appeals post-*Vavilov*

[91] The *AHRA* grants a statutory right of appeal from decisions of the Tribunal. Following the Supreme Court's omnibus reconsideration of judicial review principles in ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 at para 37, this proceeding is governed by appellate standards of review. This ousts the presumption of a review for reasonableness and imports the familiar principles and jurisprudence governing conventional appellate review: ***Vavilov*** at paras 36-37. Findings and inferences of fact, and the factually informed dimension of questions of mixed fact and law, are reviewed on the standard of palpable and overriding error: ***Housen v Nikolaisen***, 2002 SCC 33 at paras 10-36. Legal conclusions, and applications of legal principle, are reviewed to a standard of correctness: ***Housen***, paras 8-9.

(i) "Reasonableness" versus "palpable and overriding error"

[92] The change in the standard of review applicable to statutory appeals from administrative tribunals post-***Vavilov*** raises the question of how the appellate approach now differs. For practical purposes, there are two salient distinctions between reasonableness review and examination for palpable and overriding error. First, the appellate standard has proven relatively well-understood and consistent in its application, whereas the concept of "reasonableness" has seen a more variable and subjective approach to the evaluation of the proceeding under review. Second, the standard of palpable and overriding error is at least as deferential as reasonableness in any of its iterations, and offers less leeway for the substitution of the reviewing Court's opinion on the merits of the hearing.

[93] In practice, this means that the body of pre-existing jurisprudence, in which unreasonableness was discerned through a variety of analytical techniques, should be approached with caution, and the work of the tribunal as a finder of fact should be treated with deference and disturbed only when it is clearly wrong: ***HL v Canada (Attorney General)***, 2005 SCC 25 at para 55.

(ii) The meaning of palpable and overriding error

[94] The two components of the phrase 'palpable and overriding error' respectively convey that such an error will be "clear to the mind or plain to see" or "obvious" *and* also must discredit the result at its root. Any mistake will not suffice. The error must be one of "crucial law, fallacy or mistake" that impacts the outcome: ***HL*** at paras 69-70; ***Mahjoub v Canada (Citizenship and Immigration)***, 2017 FCA 157 at para 62.

[95] The nature of this standard was aptly described by Stratas, JA in ***Canada v South Yukon Forest Corporation***, 2012 FCA 165 at para 46, subsequently adopted by the Supreme Court in ***Benhaim v St-Germain***, 2016 SCC 48 at para 38:

> …"Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

[96] This highly deferential approach applies to direct findings of fact, inferences of fact, and findings on the credibility of witnesses: ***R v Paxton***, 2016 ABCA 361 at para 23. As Slatter, JA succinctly stated in ***Gray v McNeill***, 2017 ABCA 376 at para 18:

> …This court does not reweigh evidence. This court does not ordinarily disturb inferences which might reasonably be drawn from proven facts. This court does not ordinarily disturb credibility findings, especially when reasons are given for such findings in circumstances where credibility is attacked.

[97] The proper approach to be taken when an appellant attacks a factual conclusion is defined in ***Housen*** at paras 22-23, where the Supreme Court provided the following guidance:

> …Although we agree that it is open to an appellate court to find that an inference of fact made by the trial judge is clearly wrong, we would add the caution that where evidence exists to support this inference, an appellate court will be hard pressed to find a palpable and overriding error. As stated above, trial courts are in an advantageous position when it comes to assessing and weighing vast quantities of evidence. In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence.
>
> We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts. […] [emphasis added]

[98] This means that a factual conclusion, inference, or credibility finding, must be absolutely unsupported by the evidence, and completely unavailable on the record through logical reasoning, before a trier of fact's decision to reach that conclusion will be wrong. The appellate reviewer is not to re-weigh the evidence anew, even if he or she considers a different conclusion to have been preferable on the evidence.

[99] Finally, given the difficulty in establishing this high level of definitive error, appellants will often attempt to dress up attacks on factual findings as breaches of the duty of procedural fairness, excesses of jurisdiction, a failure to give reasons, or some other species of legal error. Courts fulfilling a statutory appellate function must be watchful for these forms of conceptual sleight-of-hand, and avoid the temptation to interfere where the high threshold of palpable and overriding error is not met.

[100] With these principles in mind, I turn to the appeal at hand.

G. Application to this case

(i) Were the Tribunal's reasons sufficient?

[101] Sunshine's first ground of appeal is that the Tribunal failed to provide sufficient reasons for it preferring Boehnisch's evidence about the crucial meetings. Sunshine supports this position with the body of case law related to the duty to give reasons and the need for sufficient reasons.

a. The guiding principles

[102] In accordance with the functional approach established by the Supreme Court in ***R v Sheppard***, 2002 SCC 26, reasons must allow the losing party to understand why their position was not accepted and permit an appellate court to conduct a review of the findings made at trial: para 24; ***R v REM***, 2008 SCC 51 at para 17. Reasons will be insufficient where the trier of fact's chain of reasoning is neither explicit nor implicitly discernable.

[103] The duty to give reasons is not an invitation to retry the case and ask if the reasons are "right". Reasons also need not be so detailed as to allow the parties to retry the entire case on appeal, nor must they prove that the trier considered every shred of the evidence or expressly answered each and every argument of counsel. Equally, a trial judge or tribunal is not required to mention every controverted fact or divergence in evidence. The requirement is for a discernably logical link between the evidence and the outcome. In simple terms, reasons will be insufficient only where they "fail to disclose an intelligible basis for the verdict": ***R v Dinardo***, 2008 SCC 24 at para 30; ***REM***, 2008 SCC 51 at para 20, 24 and 53.

b. The principles applied

[104] The reasons of the Tribunal in this case are manifestly sufficient. At least eight reasons are articulated for preferring Boehnisch's version of the key meetings. These include the:

(i) inconsistency of the contemporaneous documentary record with Sunshine's position (paras 144-45, 153);

(ii) deviation from Sunshine's standard hiring practices in 2013 – even from the previous year when a PDA was demanded and done (para 145);

(iii) failure of Sunshine's witnesses to review Boehnisch's full personnel file (para 146);

(iv) absence of any relationship or contacts between Sunshine and Orion Health relative to their supposed role in Boehnisch's potential hiring (para 147-48);

(v) quality of Matheson's evidence around the critical issue of the PDA (para 149);

(vi) failure of both Allen and Matheson to correct Boehnisch's version of events with their superiors (paras 151-2);

(vii) comparative consistency of Boehnisch's contemporaneous actions with her evidence (para 153); and

(viii) failure of Sunshine to call Cunningham as a witness (paras 150 and 155-164).

[105] Sunshine understands why it lost. Its real complaint is not that it received no reasons, but rather that those reasons are wrong. That is not a complaint of sufficiency. Even where a trier of fact explains its conclusion on a question of fact, but those conclusions are informed by factual misapprehensions, the reasons do not suffer from insufficiency and are not reviewed on a correctness standard for infringing procedural fairness. Rather, the appellate reviewer must apply the palpable and overriding error test.

[106] Counsel for Sunshine valiantly attempted to perform the familiar appellate alchemy of transforming disagreements over findings of fact and credibility into errors of law. That endeavour does not succeed, for the reason laid out by the Supreme Court in ***Newfoundland and Labrador Nurses Union v Newfoundland and Labrador (Treasury Board)***, 2011 SCC 62 [“***Newfoundland Nurses***”]at paras 21-22:

> It strikes me as an unhelpful elaboration on *Baker* to suggest that alleged deficiencies or flaws in the reasons fall under the category of a breach of the duty of procedural fairness and that they are subject to a correctness review. As Professor Philip Bryden has warned, "courts must be careful not to confuse a finding that a tribunal's reasoning process is inadequately revealed with disagreement over the conclusions reached by the tribunal on the evidence before it" ("Standards of Review and Sufficiency of Reasons: Some Practical Considerations" (2006), 19 *C.J.A.L.P*. 191, at p. 217....
>
> It is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there *are* reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis. [original emphasis]

[107] The reasons are sufficient and this ground of appeal fails.

[108] The factual arguments raised under the rubric of insufficiency, together with the specific errors Sunshine advances as rendering the Tribunal’s reasons unreasonable under Sunshine’s fifth ground of appeal (namely that the Tribunal erred in finding that Sunshine did not offer Boehnisch the Patroller III position contingent on a PDA), are analyzed together, next.

(ii) Is the Tribunal’s key finding of fact a product of palpable and overriding error?

[109] The essence of Sunshine’s appeal is that the Tribunal erred in its primary factual conclusion and the reasoning supporting it. Sunshine repeatedly attempts to show why the Tribunal could or should have reached a different conclusion on who to believe about the September and October meetings. Each of Sunshine’s arguments will be addressed in turn, mindful of this Court’s role as a guardian against palpable and overriding error, not a substitute for the front-line decision maker.

a. The Tribunal's reliance on the lack of contemporaneous documentation corroborating Sunshine's position

[110] The Tribunal rejected Sunshine's evidence in large part because the contemporaneous written record offered it no support. Neither Matheson nor Allen could point to a single document, internal or external, documenting that they intended to, or did, offer Boehnisch a Patroller III position contingent on a PDA. The Tribunal noted that both of these witnesses testified as to the importance of documentation. Indeed, it is more than curious that two HR professionals, who anticipated these meetings would be fraught with difficulty (to the extent that Matheson rehearsed what he would say), could not produce any notes from either meeting.

[111] Counsel for Sunshine argued that the Tribunal's reasoning on this point is wrong because Matheson's July 10th email refers to having Boehnisch complete a PDA. However, the Tribunal expressly referenced this email. Indeed, it did so in the core of its reasoning. Unfortunately for Sunshine, this email begins with Matheson stating that offering Boehnisch a two-day a week job in dispatch was his plan going forward; an intention he confirmed in cross-examination.

[112] The words "ski patroller" never appear anywhere in this email, nor does it contain any language suggesting a contingent job offer will be made. The Tribunal expressly grappled with the meaning to be ascribed to this email in paragraph 147 of its reasons. It understood the record, understood Sunshine's interpretation of it, and did not agree. That was the Tribunal's role and right.

[113] Beyond this one correspondence, the Tribunal was correct that there is not a single communication, internal or external, in which Sunshine reports, records, or conveys its supposed job offer. This extends to the post-meeting correspondence, in which Sunshine never once documented Boehnisch's purported refusal to submit to a PDA, nor her consequent refusal of the Patroller III position, notwithstanding that getting her out of that job was Sunshine's driving purpose in these interactions. From a professionally managed human resources operation, this was a glaring omission.

[114] The Tribunal's characterization of the documentary record, and its conclusion that it undermined Sunshine's position, is supported by the evidence. Indeed, the Tribunal's conclusion on this point is the most obvious, common sense one.

b. Deviation from ordinary practice

[115] The Tribunal next noted that Sunshine's practice in 2013 also deviated from previous years, in which written offers of employment were provided to Boehnisch. This included in 2012, when it is agreed that her return to a skiing-role was contingent on passing a PDA confirming her fitness for physical duty. Sunshine expressly offered Boehnisch work when it wanted to, including when it knew she was injured and unable to work fully. This gives rise to an inference that it neither wanted to, nor did, offer Boehnisch the Patroller III job in 2013. The Tribunal chose to draw this available inference as a basis for its finding of fact. That reasoning reveals no error.

c. Neither Allen nor Matheson reviewed Boehnisch's personnel file

[116] Sunshine raised the Tribunal's treatment of the 'personnel file issue' as a distinct ground of appeal, dealt with below. In substance, Sunshine's argument is that the Tribunal mischaracterized the evidence by proceeding on the basis that the file was 'not produced' when many documents that would have comprised parts of it were entered into evidence. This fact, coupled with Matheson and Allen's review of these materials, is advanced as a basis to find that the Tribunal thus misunderstood the issue.

[117] A close reading reveals that the Tribunal fully understood that a large number of personnel documents were admitted. What it found, however, was that Sunshine failed to adequately examine Boehnisch's full personal circumstances, inferentially demonstrating no genuine effort to have her fitness for duty assessed. Sunshine did what suited their pre-determined outcome. The Tribunal's choice of that interpretation was squarely within its purview as the trier of fact and reveals no error.

d. No enquiries made of Orion Health

[118] The Tribunal also relied on the fact that no one at Sunshine took any steps to inquire into the mechanics of arranging a PDA at Orion Health, either prior or subsequent to their meetings with Boehnisch. Sunshine criticizes this reasoning on appeal, as they say Boehnisch's categorical refusal to attend at Orion Health removed any reason for arrangements to be made. A fair reading of the Tribunal's reasons, however, show that its point was much broader than that.

[119] Sunshine had no working relationship with Orion Health. No one inquired of Orion as to whether Orion even would conduct a PDA for Sunshine, given that its working relationship was with the WCB. The logical problem is obvious: if Sunshine offered Boehnisch the Patroller III job at the meetings, contingent on a PDA being done at Orion Health, it did so without any fore-knowledge of how, or even if, such an assessment could take place. Formulating and presenting that offer in the absence of information that it was even possible, or what its mechanics would be, is not inherently plausible. This could further buttress the Tribunal's conclusion that the documentary record was not consistent with Sunshine's story.

[120] Moreover, no one at Sunshine took any steps *vis-à-vis* Orion Health even after Boehnisch's email of October 8th asking if arrangement with Orion had been made. Nothing about Sunshine's relationship with Orion Health (or lack thereof) made the alleged offer seem real. This factor could give rise to an inference that Sunshine neither intended, nor did, in fact make the contingent offer. The Tribunal was not bound to draw this inference, but it was entitled to.

e. The quality of Matheson's evidence

[121] The Tribunal observed that, on cross-examination, Matheson at one point answered that he "did not recall" if Boehnisch had offered to complete a PDA. Sunshine argues that Matheson's overall evidence as to what Boehnisch said was, ultimately, perfectly clear, and that the Tribunal misapprehended it. This oversimplification of the Tribunal's reasoning misses the mark.

[122] The Tribunal's point was not about what Matheson ultimately said happened (the Tribunal clearly understood his evidence to be that Boehnisch was offered and refused the PDA at Orion Health), but about the quality of his evidence. A reading of the relevant exchange in cross-examination bears out the Tribunal's concern:

> Q: You will agree with me, sir, that Mischi Boehnisch offered to perform a physical demand analysis; do you agree with that?
>
> A: Self-administered?
>
> Q: Any kind?
>
> A: I don't recall, you know. I was again coming into what I knew was going to be a meeting that was going to be difficult. I led with the dispatch position and the P3 with third-party testing, testing by Orion Health was also on the table.
>
> Q: But are you now saying, sir you don't remember some of the things were said in the meeting?
>
> A: I don't recall every detail of the meeting.
>
> Q: Right.
>
> A: I didn't take notes in the meeting.
>
> [emphasis added]

[123] What Boehnisch said about doing a PDA was not "a detail of the meeting". It was the crux of everything. This was also not a question of shades of interpretation. Boehnisch's and Matheson's version were black-and-white. In that context, the nature of Matheson's answers was capable of being interpreted as unreliable. These were the sort of contingent, wish-washy answers, to simple and seminally important questions, that trial judges often harken to as a marker of reluctant dissembling.

[124] Once more, the Tribunal was not obligated or compelled to reach this conclusion, but it was entitled to. The facts were capable of sustaining the interpretation they were given. Palpable and overriding error show not been shown.

[125] The Tribunal was equally entitled to take account of the contradiction between this hesitant language and Matheson's previous description of Boehnisch having used "virtually identical language to refuse the testing" at both meetings. His memory was either clear or it wasn't.

f. Sunshine's actions were not consistent with their evidence

[126] The Tribunal further relied on the sequence of correspondence following the meetings to support its preference for Boehnisch's version of events. Specifically, it noted that Matheson did nothing to answer or correct Boehnisch's direct assertion to his bosses that he had told her the Patroller III job was not available to her. Allen also responded in a manner that was inconsistent with her evidence. She said nothing about Boehnisch's assertion of facts being wrong.

[127] A mainstay in the judicial arsenal of credibility assessment is to compare and contrast a witnesses' words at trial with their actions at the time of a disputed event. The deductive algorithm takes the witness' words on the stand and asks: *if true, then what are they likely to*

have said and done at the time? Common sense strongly suggests that, where an aggrieved former employee is pleading her case directly to the executives and owner of a company, the subordinate managers who are (supposedly) being misrepresented in such a correspondence will rush to correct those allegations.

[128] The fact of Matheson and Allen's silence gives rise to an inference that Boehnisch's description of the meeting was not wrong. The Tribunal was entitled to draw and rely on that inference.

g. Boehnisch's actions were consistent with her evidence

[129] By the same reasoning, Boehnisch's post-meeting conduct was consistent with her version of events. The Tribunal's reasoning on this point is spot-on:

> [154] It is implausible that the complainant would have been asking about Orion Health if she had been so adamantly opposed to doing the testing as alleged by the respondent. Her enquiry with respect to Orion Health was made in the same breath as her enquiry about the wage and this enquiry could only have related to a position other than her position as a Ski Patroller 3. The third part of her enquiry with respect to hearing back from Mr. Matheson, is consistent with her evidence that she believed a new role was being fleshed out and she wanted the final proposal. There was no other evidence with respect to what she could have been waiting for from Mr. Matheson.

[130] Notably, Matheson himself could offer no explanation for Boehnisch's email that was consistent with his version of the meetings. The Tribunal was justified in relying on the consistency between Boehnisch's version of the meeting and her actions following it as a basis to prefer her evidence.

[131] As noted in the facts, Matheson twice could offer no explanation to reconcile facts which were objectively known to have happened (because they were recorded written communications) with his version of the evidence. In a close credibility case, where the word of the witnesses is the main evidence for either side, this sort of logical tension in a witness's testimony can properly make the difference in who is believed.

h. Consistency with contemporaneous actions and record

[132] The reasons also analyse the consistency of Boehnisch's evidence with the contemporaneous record. Boehnisch testified that she had said she was willing to undertake the PDA as necessary, potentially for the "on-mountain duties" of the hybrid job. The reasons note that her evidence about what she said at the meetings tracks closely with the email she wrote on October 8, asking Cunningham if she had heard from Matheson and from Orion Health.

[133] The reasons then connect the rather obvious dots. Specifically, the Tribunal found that Boehnisch would not have asked about performing a PDA at Orion Health if she categorically refused to engage with them, and that she would not have been asking about the wage if this

related to the Patroller III position, inferentially supporting her evidence that all she had been offered was some hybrid dispatch role.[7]

[134] In short, the reasons explain, through evidentially supported facts, why the words and deeds of Sunshine's witnesses at the time do not align with their evidence of what happened at the meetings, whereas Boehnisch's do. This is the antithesis of insufficient reasons, and the epitome of a protected finding of fact that reveals no palpable and overriding error on appeal.

i. Alleged inconsistencies in Boehnisch's testimony

[135] Sunshine criticizes the Tribunal on the basis that Boehnisch suffered inconsistencies in her testimony which were not considered. Of the three alleged inconsistencies raised by Sunshine, two had no relationship to the key material facts surrounding the meetings, and the third one is not an inconsistency unless the accuracy and truthfulness of another of Sunshine's witnesses is presumed.

[136] For instance, Sunshine points to the fact that Boehnisch was wrong about the sequence of two collateral events in late 2012 and early 2013. A close reading of her evidence on the point shows that she was neither combative nor intransigent about the issue when shown her mistake. She simply stated what her memory of the time was.

[137] While the incorrect recollection would have been relevant to the *reliability* of her evidence *about those events and that period of time*, none of this was germane to the central issues. Her manner of testimony on the subject was not such that it would necessarily impact her *credibility* at large. The Tribunal's choice to place no emphasis on this evidence was within its purview.

[138] The second example of Boehnisch's alleged lack of credibility was even more peripheral, relating to her various descriptions of the level of pain in her knees. This included whether she had been misleading by not writing on a WCB form that her pain level "depended on the day". If these issues can even be categorized as inconsistencies, they were on matters far outside the central focus of the hearing, and any decision on whether to place weight on them was reserved to the Tribunal.

[139] The Supreme Court has cautioned, in ***Dinardo*** at para 26, that "[r]arely will the deficiencies in the trial judge's credibility analysis, as expressed in the reasons for judgement, merit intervention on appeal." Not placing weight on these alleged inconsistencies in Boehnisch's evidence was not obviously wrong, and made no palpable difference to the outcome. The high bar for appellate interference is not met.

j. Two witnesses are not better than one

[140] Sunshine goes so far as to argue that the Tribunal erred by accepting the evidence of a single witness on the complainant's side when it put forward two witnesses supporting the contrary version of events. It should go without saying that findings of fact and credibility are not made by tallying the number of witnesses propounding each version of a conflicting story.

---

[7] As stated in paragraph 154 of the Tribunal's decision.

[141] Indeed, in jury trials, jurors may be cautioned to remain cognizant of the fact that evidence presented by a small number of witnesses is not necessarily more reliable than the evidence presented by a large number of witnesses, and to not determine credibility by simply "counting the number of witnesses": ***R v St-Germain***, 2009 QCCA 1474 para 91; leave to appeal to S.C.C. refused [2010] 1 SCR xv, 404 NR 391n.

[142] Moreover, as Boehnisch correctly points out, the evidence of Matheson and Allen as to what job or jobs were offered at the October meeting, and in what order, was itself inconsistent. Both in her testimony about what Matheson's intentions were around the July 10 email, and again in her description of the October meeting, Allen testified that Matheson's intention, and actions, were to lead with Patroller III offer, contingent on a PDA. This contradicted Matheson, who candidly admitted that his priority and focus, both in the emails and the meetings, was to get Boehnisch to accept a dispatch-based position. His recounting of the sequence of discussion in the meetings was consistent with this intention, and largely consistent with Boehnisch's version.

[143] Allen, in particular, was not the objective, neutral witness Sunshine makes her out to be. While not a party to these proceedings, Allen and Matheson stood accused of perpetrating age, gender, and disability-based discrimination in the workplace on behalf of their employer. Their pride and professionalism were at stake. They were not detached or disinterested third party witnesses to the disputed events.

[144] The record simply does not support Sunshine contentions that the Tribunal was obligated to find its witnesses credible. It bears repeating: the fact that the Tribunal *could have* reached the opposite conclusion does not constitute anything approaching palpable and overriding error, or indeed error of any kind.

k. Conclusion on the Tribunal's reasoning

[145] Sunshine's attack on the key finding of fact amounted to an attempt to retry the case and argue for a different outcome. This makes apposite the words of O'Ferrall, JA in ***Rana v Rana***, 2018 ABCA 347 at para 13:

> …The applicant appears to be intending to relitigate the issues in the Court of Appeal. That is not what the Court of Appeal is for. Its role is to correct obvious errors, not to retry the case. The applicant's submission on the merits do nothing more than attempt to reargue the application below and therefore are, by definition, without merit.

[146] A full reading of the transcript makes the Tribunal's findings on credibility, and subsequently on the key facts, readily understandable, and well within the range of conclusions available on the evidence. No palpable and overriding error has been shown.

(iii) Alleged breach of procedural fairness regarding failure to produce Boehnisch's personnel file

[147] Sunshine contends that the Tribunal acted unfairly by drawing an adverse inference against it for failing to produce Boehnisch's personnel file. It characterizes this as a new issue, raised by the Tribunal in its reasons, on which the parties had no notice and no opportunity to respond.

[148] This ground of appeal fails for two reasons. First, no such adverse inference was drawn. Second, the Tribunal's use of the personnel file issue was justified, and the underlying issues fully argued.

a. No misapprehension on what was produced

[149] As an initial point, Sunshine contends that the perceived 'failure' to produce the file is itself a misapprehension of the evidence, as many relevant documents that would have comprised part of the file were, in fact, part of the litigation. The Tribunal did not misapprehend this. It was clearly aware that many personnel documents relating to Boehnisch were produced and entered. Its points regarding the file as a whole were subtler.

b. No independent adverse inference regarding the personnel file

[150] Sunshine's factum appears to suggest that the Tribunal drew an adverse inference from the failure to produce the personnel file *per se*. The record and reasons do not support this contention. Rather, the fact that Sunshine's witnesses never reviewed Boehnisch's file in the course of their dealings with her, and that its contents in full were never produced, were deployed in two discrete ways: (i) as one of the numerous bases for preferring Boehnisch's evidence about the meetings; and, (ii) as a factor supporting an adverse inference based on Sunshine's failure to call Cunningham. Both uses were proper and within the Tribunal's purview as the trier of fact.

c. The personnel file and credibility

[151] The Tribunal lists Matheson and Allen's failure to review Boehnisch's entire personnel file as one of its reasons for preferring Boehnisch's evidence. When viewed in the context of the proceeding as a whole, this was available and factually-supported reasoning.

[152] The personnel file first became an issue when Sunshine's counsel insinuated that Boehnisch was lying about having provided her 2012 PDA to Matheson. While leading Matheson though his evidence about the 2012-2013 season, counsel for Sunshine asked the following questions about the PDA form:

> Q: Did Ms. Boehnisch provide you with a copy of this document?
>
> A: No.
>
> Q: Have you ever seen a copy of this document other than in preparation for today and this hearing?
>
> A: No, I have not.
>
> Q: Okay. <u>To your knowledge has Sunshine Village been able to locate a copy of this document in its records</u>? [emphasis added]
>
> [objection omitted]
>
> Q: So, to your knowledge, Mr. Matheson, are you aware of this document being found in Sunshine Village's records?

A: No.

[153] Sunshine attempted to discredit Boehnisch by leading evidence that a crucial document – namely the 2012 PDA – was not in Sunshine's files regarding her. It was Sunshine who put the personnel file into play. Understandably, Boehnisch's counsel took this point head-on in cross-examination of Matheson:

Q: And just to be fair, yesterday you seemed to suggest that you'd made some inquiries as to whether this document [the PDA] was on Mischi Boehnisch's file, you remember that?

A: M-hm.

Q: But we know from your evidence this morning that you didn't review Ms. Boehnisch's personnel file at the base of the mountain, right?

A: That's correct, yeah.

Q: Okay. So, for all we know, this document is sitting on the file there, right?

[objection omitted]

[154] The issue of whether Matheson reviewed Boehnisch's personnel file was thus squarely in issue. His response reflected poorly on his overall credibility. Indeed, both of Sunshine's witnesses admitted that they never sought out or reviewed Boehnisch's full personnel file. Why this might undermine their credibility is obvious, for two reasons.

[155] First, a failure to fully inform oneself, in the context of making decisions that will have a significant and potentially negative impact on another person's life, undercuts the appearance of good faith. A conscientious individual will be presumed to have sought out, reviewed and considered all of the readily available information on the subject. Sunshine's witnesses did not do that. That failure could have the effect of making the witnesses seem insincere in their professed concern for Boehnisch's well-being and unconcerned about operating on incomplete information. Both of these features are germane to credibility and could properly be used to assess those witnesses negatively.

[156] Second, Matheson was prepared to facilitate the inference that Boehnisch had lied to the Tribunal about providing the 2012 PDA, when in fact his own lack of due diligence foreclosed that insinuation. This may have diminished his overall credibility in the eyes of the Tribunal, as apparent from its reasons.

[157] While the Tribunal did not express these syllogisms at such a granular level, that is not what is demanded of front-line triers of fact. Decision makers are not required to "minutely dissect every piece of evidence" in their reasons: ***Newfoundland Nurses*** para 106. The point, and its merit, are readily enough apparent to anyone reading the reasons, particularly when they are taken alongside the evidence.

d. No personnel file to substitute for Cunningham

[158] The Tribunal's second, discrete use of the personnel file issue was in relation to the adverse inference it was urged to draw from Sunshine's failure to call Cunningham. The logical role played by the absence of the personnel file is seen in the following passage from the Tribunal's reasons on the adverse inference issue:

> 159 ... Ms. Cunningham was not only at the meetings on September 27 and October 1, she had been involved with the file since early 2012. She is the only person, other than the complainant who could have testified as to what happened at the September 27 meeting, after Mr. Matheson left. She is also the one who was allegedly charged with arranging a physical demands analysis for the complainant in 2013. Lastly, as the human resources manager up until October 2013, she presumably would have known about the contents of the complainant's personnel file. [emphasis added]
>
> 160 The respondent did not provide the tribunal with the complainant's personnel file. [emphasis added]
>
> 161 In this case, there is no explanation as to why the respondent did not call Ms. Cunningham to testify. She was a logical party to call given that she was the respondent's human resource manager at all material times. […]

[159] The Tribunal's logic is clear and unimpeachable. Sunshine neither called its human resources manager nor provided the full documentary evidence that may have substituted for her first-hand knowledge. This was an appropriate observation, a factor relevant to the broader adverse inference being drawn in relation to the witness, and did not constitute a "new ground" that should have been raised with the parties.

[160] The relevance of the personnel file was driven by Sunshine's approach to the case and its significance was not overemphasized. Rather, it was properly considered in those facets of the analysis where it had force. This ground of appeal fails.

(iv) The adverse inference from the failure to call Cunningham

[161] The Tribunal drew an adverse inference against Sunshine for failing to call Cunningham. Sunshine alleges that the Tribunal misapplied the applicable legal principles in doing so, as the circumstances did not permit such an inference in this case. Sunshine also alleges that it is unclear what inference the Tribunal actually drew.

a. The inference is that the witness would not support their position

[162] The nature of the inference at issue is not a mystery. Where the Court is asked to place evidentiary weight on the failure to call a witness, the inference is that this witness would not support the position of the party who should logically have called them, on the issues to which their evidence was relevant. This was explained by Rothstein, JA (as he then was) in ***Milliken & Co v Interface Flooring Systems (Canada) Inc***, [2000] FCJ No 129 at para 11:

> ...the failure to call [the witness] ... to testify... indicates, as the most natural inference, that the appellants were afraid to call her and this fear is some evidence that if she were called, she would have exposed facts unfavourable to the appellants.

[163] In this case, there was only one issue: what happened at the disputed meetings. The inference, therefore, is that Cunningham, a senior human resources manager at Sunshine at the time, and someone who was extensively involved with Boehnisch's matter, would not support Sunshine's version of what took place. Indeed, the Tribunal expressly stated, at para 164 that

"…I have drawn an inference that the evidence of Ms. Cunningham would not have supported the respondent's case". Sunshine's complaint that the inference drawn was vague or indeterminate is without merit.

b. The inference made no difference

[164] The Tribunal expressly stated that it would have reached the same finding of fact on the critical central issue irrespective of the adverse inference. While an assertion of that nature does not immunize the impugned reasoning from examination on appeal, in this case I accept that the adverse inference made no difference. Consideration of the adverse inference was driven not by the Tribunal's need for it to reach a decision, but rather because the matter was pressed aggressively by Boehnisch's counsel at the hearing. Moreover, there is an abundance of evidence from which the Tribunal could have otherwise concluded as it did. For these reasons, I am unable to find that the adverse inference would have constituted an "overriding" error, even if wrongly drawn.

c. The adverse inference was available on the facts

[165] When a party fails to call an expected witness in civil litigation, the Court may draw an adverse inference against them. As explained by Wittman, CJ in ***Howard v Sandau***, 2008 ABQB 34 at para 44, the four factors a court must consider when asked to draw such an inference are:

- whether the witness has material evidence to provide
- whether the witness is the only person or the best person who can provide the evidence
- whether there is a legitimate explanation for the failure to call the witness
- whether the witness is within the "exclusive control" of the party, and is not "exclude equally available to both parties."

[166] The principle is similarly described by S.N. Lederman, A.W. Bryant and M.K. Fuerst in *The Law of Evidence in Canada,* 5th ed (Toronto: LexisNexis Canada, 2018) as follows:

> 6.471 In civil cases, an unfavorable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. The inference should only be drawn in circumstances where the evidence of the person who was not called would have been superior to other similar evidence. The failure to call a material witness amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it. [emphasis added]

[167] The Tribunal considered and applied these principles. It correctly noted that Sunshine would logically be expected to call Cunningham, its Human Resources Manager at the time of this human resources problem. She was the person Allen and Matheson said would have been

responsible for setting up the purported PDA testing by Orion Health, and was present at both the September and October meetings.

[168] Indeed, as the Tribunal observed, Cunningham the only person in the room with Boehnisch at the September meeting, after Matheson left the room. Without Cunningham's evidence, Boehnisch's assertion that she entreated her to intercede with Matheson to allow her to complete the PDA and prove herself capable of the Patroller III job went unanswered. Boehnisch's evidence on this point is important to contextualize the adverse inference:

> Q: Right. Tell us about the what you said, how the conversation went, how it ended up.
>
> A: ...And then eventually Mr. Matheson left, and I was left in the office with Jennifer [Cunningham], and I remember saying to her how disappointed and saddened I was that I wasn't able to have the opportunity to show that I could do the ski patrol position, the P3 position. And I appealed to Jennifer to talk to Al to see if she could persuade him to change his mind and to allow me to do a physical demands analysis, because I knew I could do the job.

[169] Cunningham's evidence was plainly material. There was no account for Sunshine's failure to call her.[8] The evidence on this point was that she continues to reside in the Bow Valley and was available. By contrast, Allen testified from Ontario, where she now lives.

[170] The real issue is whether Cunningham was 'equally available' to the parties in a manner that precluded an adverse inference being drawn. Like Allen, she no longer worked for Sunshine. There is no property in a witness. However, Cunningham was also not a neutral third party. As noted in relation to Sunshine's other witnesses, this proceeding was effectively a trial about whether Sunshine, through the agency of its human resources staff, perpetrated prohibited discrimination against Boehnisch. Cunningham and her actions were, by necessity, impugned by Boehnisch's complaint.

[171] Therefore, while Cunningham was not a party to the action personally, she was in substance one of the individuals adverse in interest to Boehnisch at the hearing. For the purposes of evaluating a proposed adverse inference, the concept of a witness being 'unequally available' to the parties extends to individuals whose conduct is *de facto* being put on trial by one side of the action. Such a situation makes a witness "not equally available" because there is, "good reason to believe they are likely to be favourably disposed to the opposing party": A.W. Mewett & Peter J. Sankoff, *Witnesses*, vol. 1 (loose-leaf updated to Rel. 3 - 2016) (Toronto: Thomson Canada Limited, 1991) at p 2-23.

[172] The Tribunal addressed the test prescribed in ***Howard*** on the evidence before it. In turning its attention to the specific question of whether a witness was "equally available to both parties", it relied on this Court's guidance in ***Syncrude Canada Ltd v Saunders***, 2015 ABQB 237 para 75. The Tribunal expressly agreed with the analysis in ***Syncrude*** on this issue: paras 158-163, despite being alive to the factual differences in that case. Its reasons for doing so disclose no reviewable error.

---

[8] Sunshine attempted to introduce fresh evidence on this point through its written submissions, at para 151 of its factum. The facts pled in that submission are not in the evidentiary record and were not before the Tribunal.

[173] I hasten to add that the Tribunal was under no obligation to draw an adverse inference under these conditions. Whether or not to do so is a discretionary decision as, once informed by the proper principles, it is indelibly intertwined with the trier of fact's understanding of how the case has unfolded and the role that the witness in question could reasonably have been expected to play: ***Pfeifer v Westfair Foods Ltd***, 2004 ABCA 422 at para 20.

[174] While it ultimately made no difference to the outcome, an adverse inference was available in this case, and the Tribunal made no error drawing it.

(v) Failure to perform the legal analysis required to determine whether Sunshine established a *bona fide* occupational requirement

[175] Human rights systems acknowledge and incorporate the reality that jobs will sometimes have physical requirements that not all applicants or incumbents are able to meet. In turn, employers who promulgate physical standards as a threshold for employability must be able to show that these standards are: (i) rationally connected to performance of the job; (ii) adopted in a good faith belief that they are needed for the work to be safely and effectively done; and (iii) reasonably necessary, such that someone failing to possess the necessary physical characteristic cannot be accommodated in the job without imposing undue hardship on the employer: ***British Columbia (Public Service Employee Relations Commission) v BCGEU***, [1999] 3 SCR 3 ["***Meiorin***"].

[176] This tripartite analysis, often referred to as the ***Meiorin*** test, determines whether excluding employees from work on the basis of physical characteristics is justifiable, or constitutes prohibited discrimination.

[177] Sunshine contends that the Tribunal should have performed a ***Meiorin*** analysis, notwithstanding its finding of fact that Sunshine refused to permit Boehnisch to pursue her application for the Patroller III job *at all*. The argument appears to be that the dispatch job she was offered constituted reasonable accommodation, somehow meeting Sunshine's obligation not to discriminate.

[178] Sunshine's argument presupposes that Boehnisch did not meet the psychical standards of the Patroller III position and misunderstands the purpose of the ***Meiorin*** analysis. That test would have come into play *after* Boehnisch failed a PDA, *if* she challenged either the substantive physical standards promulgated by Sunshine, or Sunshine's refusal to accommodate her in the Ski Patroller III position *notwithstanding* that she failed the PDA.

[179] Boehnisch neither challenged the legitimacy of Sunshine's physical standards for the job, nor claimed that Sunshine would have had to accommodate her as a patroller if she failed to meet them. Rather, she alleged, and the Tribunal accepted, that Sunshine discriminated against her *by refusing to even let her try to meet the standard* by taking the PDA. ***Meiorin*** has no applicability on these facts.

[180] It is important to note that no one in these proceedings questioned the right of employers to prioritize the safety and long-term well-being of their staff, or control their WCB premium costs, by setting physical fitness standards for work that is physically risky or taxing. This must be done, however, through the objective establishment of justifiable criteria, professionally assessed, not through the impressionistic and discriminatory opinions of individual managers.

[181] This ground of appeal has no merit.

(vi) Ground F: Alleged errors in the award of damages

[182] Sunshine appeals against the Tribunal's damage award on three fronts; that general damages were excessive, the loss of income was over-estimated, and a failure to mitigate should have been found.

a. The standard of review on human rights damages

[183] Damage awards in human rights proceedings have always been entitled to substantial deference: ***Summit Solar Drywall Contractors Inc v Alberta (Human Rights Commission)***, 2017 ABQB 215 at para 45. Applying the appellate standard of review now mandated by ***Vavilov***, this Court cannot interfere with a damage award simply because it would have come to a different conclusion: ***Woelk v Halvorson***, [1980] 2 SCR 430, at p. 435. Interference is only justified where the decision maker: (1) made an error of principle or law; (2) misapprehended the evidence; (3) erred in finding there to be evidence on which to base a conclusion; (4) failed to consider relevant factors, or considered irrelevant factors; or (5) made "a palpably incorrect" or "wholly erroneous" assessment of the damages: ***Naylor Group Inc v Ellis-Don Construction Ltd***, 2001 SCC 58 at para 80: ***Booster Juice Inc v West Edmonton Mall Property Inc***, 2019 ABCA 58 at para 10.

b. Findings of fact informing damages

[184] The Tribunal found that the discrimination in this case was part of a planned and deliberate course of conduct to keep Boehnisch out of the job she loved and had made her career, on the basis of a thinly-imagined physical disability. It found that:

> [169] The respondents had an agenda. Despite the complainant's apparent ability to do her job in April of 2013 and despite the fact that her supervisors, those best in a position to assess her abilities, wanted her to return in the Fall of 2013, the respondents were actively engaged in discussing how to ensure the complainant would not return to her position.

[185] The evidence showed that Matheson had not reviewed her entire WCB history, was ignorant as to her ability to mend, and did no comparative analysis of her injuries to those suffered by other people doing the same job. The Tribunal found that Boehnisch's injuries were in fact mostly minor and resulted in very little lost time.

[186] The Tribunal held that Sunshine's decision to deny Boehnisch to opportunity to meet the physical standards for the job flowed from its own poorly informed subjective assessment of her protected personal characteristics. It also found that Sunshine had not dealt forthrightly with Boehnisch, structuring events and its offers to ensure she could not and would not return to work as a ski patroller. These conclusions were available on the evidence and directly impact the damage award.

[187] The Tribunal also properly considered that Sunshine's actions were driven by a professed desire to get Boehnisch "off the WCB gravy train", when in fact there was no evidence that she

had ever received any largesse for her injuries, much less abused the system of benefits for injured workers. A full reading of the record leaves an ill taste around Sunshine's treatment of this employee.

[188] The Tribunal found that Sunshine's conduct was "not inadvertent and had a profound effect on the complainant." The evidence supported these conclusions. Boehnisch lost her career because of Sunshine's discriminatory and unsubstantiated belief that she had a physical disability.

[189] The Tribunal proceeded on the factual basis that the discrimination in this case was serious, intentional, systematically pursued, and wrought significant emotional suffering. These findings were supported by the evidence and the Tribunal made no error in reaching these conclusions.

c. The applicable law

[190] Damage awards for discrimination are made to compensate rather than punish, but also carry an educational and deterrent component: ***Canada (Treasury Board) v Robihaud***, [1987] 2 SCR 84. Miserly awards minimize the seriousness of discrimination, undermine the core purpose and mandate of the human rights regime, and can themselves perpetuate the discrimination: ***Walsh v Mobil Oil Canada***, 2013 ABCA 238 at para 32.

[191] General damages for discrimination have historically been extremely modest in Alberta: see ***Parker v Vaprex Electronics Ltd***, 2020 AHRC 32. There is little principled analysis to be found underlying these sums. Rather, it appears that the existence of this somewhat arbitrary benchmark, stemming perhaps from statutory caps in other jurisdictions, has self-perpetuated in the human rights jurisprudence. The majority of the Court of Appeal in ***Walsh*** questioned this state of affairs at paras 31-32, 61-64. Specifically, it held at para 61 that:

> Historically, awards for general damages in the human rights context have been low, arguably nominal. Despite the absence of a cap on awards for mental distress in Alberta's legislation, Alberta's human rights tribunals have sometimes used caps established in other provinces to set awards. There have been few awards in Alberta in excess of $10,000. As Ms. Bryant noted, however, this capping practice is not part of the governing statutory framework in this province.

[192] Discrimination can alter lives and its injury to the victim's dignity can leave a lasting psychological legacy: see ***Simpson v Oil City Hospitality Inc*****,** 2012 AHRC 8 at para 61, and the authorities quoted therein. As the Court of Appeal noted in ***Walsh***, nominal damages risk trivializing both the impact and the magnitude of social wrong that has been perpetrated in such cases. In workplace context, discrimination leading to job or career loss, should not be treated simply as wrongful dismissal by another name.

[193] The Tribunal's award reflects no error in principle. Discrimination on the basis of a perceived disability may result in a lasting and negative impact. Here, a person was unjustly singled-out for scrutiny as to their work competence, in a role they loved, took pride in, and had devoted a career to. The Tribunal found that the loss of Boehnisch's career, which was an important part of her life and sense of identity, took a profound psychological toll on her. That finding was available on the evidence, and intuitively justified in the broader context of this case.

[194] The fact that the seasonal nature of their relationship, together with subsequent physical events, limited the long-term scope of their liability and damages for doing this, does not diminish the moral turpitude and human impact of their discriminatory actions.

[195] A larger award for general damages may have been legally and factually justified in this case. A lower amount would have treated Boehnisch's mistreatment and the resulting anguish as virtually meaningless. This Court would do an injustice, and materially misinterpret the letter and spirit of the *AHRA*, if it acceded to this employer's request to reduce the damages in this case to a more minimal sum. The figure the Tribunal settled on was well within the range reasonably available to it. The award of general damages reveals no error.

d. No obligation to mitigate by accepting the discrimination

[196] Sunshine argues that Boehnisch suffered no real loss, as she would have been made financially whole had she taken whatever dispatch job it was they were offering her. Its position is effectively that Boehnisch should have accepted the discrimination, since she would have made just as much money.

[197] This position is troubling and wrong in law. Human rights protections exist to uphold the dignity of individuals, in this case by guaranteeing an equal chance to do work which goes to their identity and sense of self-worth: ***Newfoundland (Treasury Board) v Newfoundland and Labrador Assn of Public and Private Employees (NAPE)***, 2004 SCC 66 at paras 40-41: ***Reference Re Public Service Employee Relations Act (Alberta)***, [1987] 1 SCR 313, at p 368. The 'separate-but-equal' approach implicitly advocated by Sunshine is an anathema to the values animating the *AHRA*.[9]

[198] Moreover, in the context of damages for lost employment, when the employer offers the employee a chance to mitigate damages by returning to work for him or her, the central issue is whether a reasonable person would accept such an opportunity: ***Evans v Teamsters Local Union No 31***, 2008 SCC 20 at para 30. An employee is not obligated to take alternate, 'lesser' work with an employer who has dismissed her in circumstances where staying on would be demeaning and humiliating: ***Evans*** at paras 30-31; ***Vaillancourt v Carter***, 2016 ABQB 492 at para 76. This is especially true where the employee has been the victim of discrimination: ***Galbraith v Acres International Ltd***, [2001] OJ No 1036 (SCJ) at para 29.

[199] Boehnisch expressly stated that working an office job in dispatch, when she had not shown to be unfit to be a ski patroller, would have been personally devastating and demoralizing. The Tribunal was entitled to accept that evidence and did not err by refusing to reduce her damages because she declined the job in dispatch.

[200] Sunshine also criticized Boehnisch's efforts to find other work. The record showed that she industriously pursued work, both related to her field and outside it. There are reasonable limits on what is expected of an employee in terms of mitigation. The yardstick by which an employee's efforts to mitigate will be judged were laid out by our Court of Appeal in ***Christianson v North Hill News,*** 1993 ABCA 232 at para 11:

---

[9] This approach is no different than if a fire department, which denied female applicants the chance to meet the physical standards to be a firefighter on the basis of being female, then argued that those women would be obligated to accept receptionist jobs in fire stations, if offered at the full firefighters' wage, as a matter of mitigation.

> The efforts of the Plaintiff will not be nicely weighed, particularly with hindsight. All that the Plaintiff need do is to make what at the time is an objectively reasonable decision. He or she may not make the best possible decision. In particular, the Courts will not expect when faced with a breach of contract, to take steps which are risky or unsavory. […] In wrongful dismissal cases, the Plaintiff need not mitigate damages by taking a significant demotion, or by going back to the employer who fired him or her. All that is trite law.

[201] Applying these principles in this case, there is no error, much less palpable and overriding error, in the Tribunal's conclusion that Boehnisch's efforts to mitigate were sufficient.

e. Conclusion on damages

[202] The Tribunal's analysis on general damages was based on supported findings of fact, followed the applicable legal principles, and discloses not error.

H. Conclusion

[203] The appeal is dismissed in its entirety. The parties may make written submissions as to costs, not to exceed five pages in length, within 45 days.

Heard on the 14th day of October, 2020.
Dated at the City of Calgary, Alberta this 10th day of November, 2020.

N.E. Devlin
J.C.Q.B.A.

Appearances:

D. Robb Beeman
Allie Laurent
for Michaela Boehnisch

Melissa Luhtanen
for the Alberta Human Rights Commission

L. Frank Molnar, Q.C.
Austin Ward
for Sunshine Village Corporation