Date: 20070323

Files: 566-02-04, 566-02-373
and 566-02-374

Citation: 2007 PSLRB 31

Public Service Labour Relations Act

Before an adjudicator

BETWEEN

LOUISE LAFRANCE

Grievor

and

TREASURY BOARD
(Statistics Canada)

Employer

Indexed as
Lafrance v. Treasury Board (Statistics Canada)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Georges Nadeau, adjudicator

For the Grievor: Bertrand Myre, Canadian Association of Professional Employees

For the Employer: Simon Kamel, Counsel

Heard at Ottawa, Ontario,
July 17 to 21, 2006.
(P.S.L.R.B. Translation)

Individual grievances referred to adjudication

[1] Louise Lafrance ("the grievor") is employed at Statistics Canada, Statistical Survey Operations Division ("the employer"). On May 10, 2005, she filed a grievance alleging that her employer had refused to accept her doctor's recommendations and to grant her the accommodations that her health required, in violation of article 16 of her collective agreement. The grievance was referred to adjudication on July 18, 2005.

[2] In accordance with the provisions of the *Public Service Labour Relations Act* (*PSLRA*), the grievor also gave notice to the Canadian Human Rights Commission (CHRC) of the referral of this grievance to adjudication, given that the grievance pertains to a question relating to the interpretation or application of the *Canadian Human Rights Act* (*CHRA*).

[3] On May 16, 2006, I rendered a decision (2006 PSLRB 56) on a preliminary objection by the employer in which I stated that I had jurisdiction to hear the grievance regarding the period beginning April 1, 2005.

[4] On May 23, 2006, the grievor referred to adjudication two other grievances, both dated April 3, 2006, asking that they be heard at the same time as the May 10, 2005 grievance. The employer objected, indicating that one of the witnesses was not available on the dates selected to hear the case. Since these files were assigned to me as grievance adjudicator, after speaking with the parties I indicated that we would proceed with file 566-02-04 and that the grievor's testimony would be placed in the file for grievances 566-02-373 and 374 so that she would not have to repeat testimony at a later date. During the hearing of those grievances the grievor would have the opportunity to add to her testimony and the employer would have the opportunity to cross-examine her. I am thus rendering a decision in case 566-02-04 and retain jurisdiction in cases 566-02-373 and 566-02-374 that will be the subject of a later decision.

Summary of the evidence

[5] On May 18, 2004, the grievor filed a complaint with the CHRC alleging that she was the victim of discrimination, essentially because of the employer's refusal to allow her to telework as of January 2004.

[6] Following mediation, the employer and Ms. Lafrance signed a memorandum of understanding resolving the complaint on November 10, 2004 that set out dispute resolution mechanisms in the event that a disagreement arose over its implementation. The memorandum of understanding was approved on November 29, 2004 by the CHRC.

[7] The memorandum of understanding stipulated that the grievor would return to work once the assessment by her attending physician was completed. However, the grievor claims that, despite the assessment by her physician, the employer did not reinstate her by refusing to allow her to telework, contrary to what her physician recommended on December 17, 2004.

[8] The grievor stated that she had been employed at Statistics Canada, at the Regional Operations Division, for 25 years. At the time of the incidents that concern us, she held the position of Senior Project Officer at the SI-02 group and level.

[9] The grievor's work as senior project officer consisted of preparing survey documents for interviewers, preparing training guides based on information provided by clients and ensuring that surveys were going well in the field. In her opinion, her managers were satisfied with her work.

[10] Over the past 15 years, the grievor has had four long periods of absence because of illness. The most recent period started in December 2000 and lasted seven months. At an appointment that she said had taken place in 2000 or 2001, her doctor suggested that telework would help her health. The grievor stated that at that point she contacted Brian Williams, Director, Regional Operations Division, to inform him of her doctor's recommendation. She was asked to submit to an assessment by Health Canada.

[11] The grievor stated that her health problem was a sleep disorder that has a negative impact on her other medical problems and her family life. In terms of her professional activities, she indicated that she experienced memory and concentration problems in addition to always being tired.

[12] The grievor indicated that she met with the physicians designated by Health Canada: Dr. John Given and Dr. Richard Spees. Dr. Given filed a report for the employer dated May 31, 2001 (Exhibit G-4), in which he recommended that she be

absent from work until July 2001 and that she would be able to return to work via telework. Dr. Given's letter stipulated that working from home would enable her to improve her performance and that it was unlikely that she would be able to return to working full-time at the office in less than six months. She was to return to work from her home gradually over a three-month period. During the two-and-a-half years that followed, the grievor worked mainly at home, going to the office twice a week. The grievor stated that the type of work she was given at the beginning was quite varied. She was asked to convert documents from WordPerfect into Word format, revise translations and prepare the specifications for surveys and training guides for interviewers. She also indicated that she had prepared a report in Excel format. The grievor adduced in evidence a document reporting on the work that she performed from March 2002 to November 2003 (Exhibit G-5). In 2003, Mr. Nieman, her immediate supervisor, told her that some of her co-workers were envious of her situation because she was working at home.

[13] On January 13, 2004, the grievor stopped receiving work that she could do at home. On January 20, she received an email from her new immediate supervisor, Joanne Batchelor, expressing her dissatisfaction with the grievor's most recent assignment and confirming that she did not have any work that could be completed in a telework situation (Exhibit G-6).

[14] The grievor also testified that she had undergone another Health Canada assessment and submitted Dr. Spees' report dated December 12, 2003 (Exhibit G-8), which was sent to Dr. Given. She also adduced the recommendation submitted by Dr. Given (Exhibit G-9) in response to Dr. Spees' report that stipulated that her state of health prevented her from resuming her duties at the workplace but that she was able to telework full-time. Despite the fact that she was not being given any work at home, the employer continued to pay the grievor.

[15] The grievor stated that in January 2004 the employer asked Dr. Given for a review of the medical assessment (Exhibit G-10). The grievor met with Dr. Given for the third time in May 2004 and an appointment was scheduled with psychologist André Dessaulles, PhD CPsych. The assessment was completed and sent to Dr. Given, who advised the employer (Exhibit G-12) that, as of May 14, 2004, the grievor was unable to perform any kind of work whatsoever, and that the situation would need to be reassessed in six months. The grievor added that, on June 4, 2004, Nicole Gauthier,

Section Chief, Survey Operations Division, Statistics Canada, had informed her by letter (Exhibit G-13) that once her sick leave had been exhausted she would be considered to be on sick leave without pay and that her situation would be reassessed in six months. The grievor then filed a grievance against the employer's decision that, in her opinion, prevented her from performing her duties and forced her to use up her sick leave (Exhibit G-14). In May 2004, the grievor also filed a complaint with the CHRC.

[16] The grievor testified that the complaint had given rise to a mediation session that resulted in a settlement. She was compensated for pain and suffering and received a letter expressing sincere regret for the difficulties, stress and anxiety she experienced because of the incidents referred to in her complaint. The settlement indicated that the employer recognized the competence of the grievor's attending physician and that the latter was to indicate the date on which she would be able to return to work.

[17] The grievor stated that Dr. Janet Seale, MD, CCFP, declared her fit to return to work on December 17, 2004 and that a copy of the medical certificate (Exhibit G-17) had been given to the employer. She added that a meeting had taken place regarding this certificate and that the employer wanted further clarification from the attending physician. A letter was prepared to that effect (Exhibit G-18). The grievor adduced Dr. Seale's letter dated January 14, 2005 (Exhibit G-19). Dr. Seale had indicated that, in her opinion, the grievor was fit to perform telework and that she had recommended to her that she not return to work at the office.

[18] The grievor testified that during that period she had not asked for leave and that the employer had not given her any work. She also indicated that she subsequently had a telephone conversation with Jean-François Carbonneau, who had been employed at Statistics Canada for 25 years and had been Assistant Director of the Survey Operations Division since 2004. He indicated to her that her employer had contacted Sun Life and that she was entitled to disability insurance. The grievor testified that she told Mr. Carbonneau that she did not see why she would need insurance since she was fit to work. Mr. Carbonneau suggested that she apply for employment insurance. She refused for the same reason.

[19] The grievor continued by introducing into evidence the exchange of correspondence that took place between her employer and her physician between March and August 2005 (Exhibits G-21 to 24 inclusive). The employer was no longer

paying her since it considered her to be on sick leave without pay until July 2005. In July 2005, she was sent some work to perform at home. It consisted of approximately 75 hours of work divided between three specific projects that she performed during July, August and September 2005.

[20] The grievor also stated that a conference call had taken place in October 2005. During that discussion the employer informed her that now that this work was completed it had nothing else to offer her for the moment and that it would let her know if something came up. The grievor also related the other points raised that are set out in the account of the discussion filed in evidence (Exhibit G-25). The discussion covered a temporary assignment in translation and additional information that she was being asked to obtain from her physician with respect to the frequency and duration of meetings that she would be able to attend, the distance she would be able to travel and whether her limitations were permanent.

[21] The grievor testified that she subsequently obtained a temporary assignment during which she was to revise texts and perform translation and terminological research. This assignment started on October 24, 2005 and was to end on April 21, 2006. However, it ended on March 31, 2006, three weeks early. She was informed that she did not meet the official language standards.

[22] The grievor also maintained that the employer had told her that it would continue looking for a position for her and asked her to update her resumé so that it could be distributed to Statistics Canada directors. The grievor added that she later learned that this had never actually happened. The directors had been sent a memo but not her resumé. She also adduced in evidence a letter dated June 30, 2006 that had been sent to her by Gary Cantin, Director, Survey Operations Division, Statistics Canada, summarizing the situation from the employer's point of view (Exhibit G-29).

[23] The grievor testified concerning the impact of the situation on her personal life. To support her family, she had to borrow money from family members and take out a second mortgage. She had difficulty obtaining reimbursement for the costs of her medication and had to put off purchasing orthotics for her son. She added that during this entire time she wanted to work, especially since she was the breadwinner for her family. She felt humiliated to be looking for work at age 50. She trusted in her employer who, in her opinion, let her down.

[24] In cross-examination, the grievor acknowledged that she could have used annual leave from August 2 to 12, 2005 as well as from September 26 to October 21, 2005. She was subsequently assigned to the Methodology Section until March 2006 and was on annual leave from April 3 to 14, 2006. She confirmed that she had used her sick leave to cover the period from April 20 to June 22, 2006 and had received an advance on her annual leave that had enabled her to be paid until July 27, 2006.

[25] When questioned about the Sun Life insurance company, the grievor indicated that she did not understand why she should be deprived of 30 percent of her salary because the employer did not want to help her. She considered herself fit to work and did not see how she could go to her doctor to ask her for a certificate indicating that she was unable to work.

[26] The grievor acknowledged that she had gone to the workplace to obtain documents and instructions for the three projects she had been assigned in July 2005.

[27] The grievor testified that she did not think the workplace nurse or access to a lounge where she could rest would be of much use to her. She indicated that she might be able to go to the workplace a few days a week and that she would be able to go to the office to get work. She acknowledged that she had spent close to three hours at the office for the interview and the tests associated with the translation assignment. When asked about her ability to get around and to go to work, the grievor indicated that she had followed her doctor's recommendations.

[28] The employer's representative called Mary Ledoux, Acting Chief, Data Access and Control, Data Access and Control Division, Statistics Canada, to testify. Ms. Ledoux had held this position for two years and had been working at the Division for 21 years.

[29] The division is responsible for developing policies relating to confidentiality, privacy and security to support the legislative framework for Statistics Canada's operations. In this capacity, Ms. Ledoux's role is to give advice relating to confidentiality, privacy and security. She is also responsible for access to information.

[30] Ms. Ledoux explained in her testimony that, under the *Statistics Act*, Statistics Canada's mandate is to serve as a national statistics bureau. Under this mandate, the bureau collects, compiles, analyzes and publishes statistical information on a wide variety of subjects.

[31] She continued by indicating that the bureau conducts 300 to 400 surveys and that some of them are mandatory. Statistics Canada has broad powers to obtain information for statistical purposes. Provisions ensuring the secrecy and confidentiality of the provided information counterbalance those powers. Confidentiality is the cornerstone of Statistics Canada's operations.

[32] Ms. Ledoux drew my attention to the provisions of section 17 of the *Statistics Act*, which deals with privacy. She indicated that this provision is the foundation of the relationship of trust that the public must have with Statistics Canada.

[33] Ms. Ledoux adduced in evidence the guide to the *Statistics Act* (Exhibit E-15) that was developed for employees to facilitate understanding of that *Act*. She also adduced copies of the *EDP Security Policy* and the *Policy on Security of Sensitive Statistical Information* (Exhibits E-15 and E-16). She noted that two separate electronic networks, "A" and "B," were created to ensure the confidentiality of the information held by Statistics Canada, and that there is no external connection with network "A," where compiled information is kept. Statistics Canada policies provide that confidential information is not to be kept outside the workplace, in either written or electronic format.

[34] In cross-examination, Ms. Ledoux acknowledged that not all employees work with confidential data and that the on-site interviewers occasionally work at home. They use laptops provided by Statistics Canada that are connected to network "B" for the transmission of data.

[35] The employer also called George Kriger, who has been Chief, Infrastructure, IT Security Services, Statistics Canada, since 1988 and has been employed by Statistics Canada since 1980. His role is to advise management on the technical protection measures needed to meet Statistics Canada's security needs.

[36] Mr. Kriger testified that Statistics Canada protects compiled information by ensuring that data are not accessible externally, which explains why there are two networks, "A" and "B." Network "A" contains confidential data while network "B" is connected to the outside world. This approach has been in place for over 20 years. The majority of employees work on network "A."

[37] Mr. Kriger filed in evidence the *Operational Security Standard on Physical Security* (Exhibit E-17), a compliance checklist for security at regional offices, as well as other security-related documents. He explained the modifications that would be needed to provide an individual's home with sufficient protection to connect to network "A." Although possible, those modifications would be extremely complex and costly. He added that it was not very realistic and that it would be difficult for an employee to work without having access to network "A." The documentation centre is accessible only through network "A," as is the time management system.

[38] Mr. Kriger indicated that the interviewers had very limited duties and that their laptops were configured in such a way as to render inoperative a number of the functions used to input information. Data collected for Statistics Canada is encrypted during transmission to ensure security and is transmitted on dedicated lines in accordance with a specific protocol.

[39] Commenting on the possibility of working at home, Mr. Kriger indicated that, even if the network were accessible from the house, the possibility of other family members being able to see the information posed a security problem. He added that the public might be more reluctant to cooperate with Statistics Canada if it learned that information was circulating in employees' homes.

[40] When cross-examined about the fact that information that has been collected is found on the laptops used at interviewers' homes, Mr. Kriger indicated that these computers were configured to protect the collected data. He acknowledged that there was also a risk, given that the information is kept at home.

[41] Mr. Kriger was also questioned about the Treasury Board *Telework Policy* and acknowledged that telework was possible but that it depended on the employee's duties and required that the employee not work with confidential information.

[42] When questioned about the time management system, Mr. Kriger acknowledged that leave applications could be made through an employee who has access to the network. He also acknowledged that it would be possible to email notices published on network "B" that did not contain confidential information to an employee who does not have access to network "A."

[43] Mr. Williams was the next witness; he was called by the employer. Now retired, he held the position of Director, Survey Operations from early 1997 to early 2005. His entire career was at Statistics Canada. As director, he supervised about 140 employees. During his last years as director Mr. Williams was absent due to illness.

[44] He was responsible for managing the Survey Operations Division's human and financial resources. The environment is complex and extremely busy and over 110 surveys are conducted each year. The employees in this section work in teams and with colleagues from other survey development sections until the client leaves with its results.

[45] Mr. Williams gave an overview of a project officer's position at the SI-02 group and level, as held by the grievor. A person who holds such a position is the Survey Operations Division's main representative within the team responsible for a survey. This person must work closely with the client and other team members. Mr. Williams indicated that it was necessary from the outset to acquire knowledge concerning the reasons behind the formulation of the questions. To that end, the employee must participate in the discussions that take place during team meetings. The team must also test the questionnaire developed on a computer and prepare the training guides and manuals needed to conduct the survey. Project officers must also provide the required training for survey purposes. They must monitor the survey's implementation and in a way they become the experts responsible for the various surveys, finding solutions to problems. Once the data has been compiled, a retrospective review is carried out and a report is prepared to ensure that any mistakes made are not repeated. Meetings take place two or three times a week and last roughly a half-day, depending on the survey's complexity.

[46] Mr. Williams added that it is the team responsible for a project that develops the questionnaire, and that this entails a process in which all team members participate. He also noted that some parts of the work are performed on an individual basis, such as the writing of manuals and guides. However, the team revises those documents. He added that, to ensure confidentiality, data are returned to Statistics Canada through network "A," which is not accessible externally.

[47] Mr. Williams testified that the grievor had been on extended sick leave in December 2000. In March she wrote to him, asking for his help (Exhibit E-24). She asked if she could work three days from home. The grievor talked about her severe

sleep apnea. Mr. Williams indicated that he had tried at that time to find an assignment for the grievor but that unfortunately none was available. When he received the letter, he also consulted with Human Resources, which brought a referral to the Employee Assistance Program (EAP). Mr. Williams discussed the problem with the nurse. He learned that other Statistics Canada employees had similar problems. The nurse had a lounge where employees could hook up their respiratory support equipment and recuperate. He believed that this option had been presented to the grievor through the EAP.

[48] Another consequence of this letter was that the grievor's case was referred to Health Canada so that her ability to work could be assessed. Mr. Williams indicated that the outcome of the assessment indicated that the grievor was to return to work gradually starting in July. On the understanding that there would be a period of transition towards a return to full-time work, the telework request was authorized. He added that full-time telework had never been an option and referred to Dr. Given's letter of May 31, 2001 (Exhibit G-4).

[49] Concerning telework possibilities, Mr. Williams indicated that some parts of the work, such as writing manuals, could take place in a telework situation, but that attendance at team meetings was essential for understanding the survey and preparing the manuals. The Project Officer must be able to communicate with the interviewers concerning the guides and manuals. Testing of the questionnaires must be carried out at the workplace. With the exception of two questionnaires out of the hundred or so on which the division works, questionnaires are administered through computer programs. Testing of the questionnaires is a crucial step in a project officer's work. Mr. Williams estimated that, at most, 25 to 30 percent of a project officer's work could take place outside the workplace.

[50] Mr. Williams testified that he had no objection to telework in principle as long as the work was conducive to it. A project officer cannot work full-time from home.

[51] Mr. Williams testified that in February 2004 he received an email from the grievor (Exhibit E-25) that he interpreted as a request to work in another sector. He indicated that he had never pressured her to leave her job and added that he had a general understanding of the duty to accommodate an employee. In his opinion, Statistics Canada probably went too far in the grievor's case by giving her work that was not at an SI-02 level in the belief that this was a temporary situation.

[52] In cross-examination, Mr. Williams confirmed that the employer used generic work descriptions, thus making it easier to move employees from one position to another. He acknowledged that the use of conference calls had not been considered to facilitate the telework. Based on the work description (Exhibit G-3), Mr. Williams indicated that certain duties could be performed at home but that others had to be performed at the workplace. Mr. Williams indicated that he had considered vacant positions within his division before looking for positions elsewhere.

[53] In response to the questions asked by the grievor's representative, Mr. Williams confirmed that he had agreed to take measures to help the grievor before obtaining confirmation of her state of health. He indicated that this was the appropriate thing to do at the time and that it was a temporary measure. He added that a large part of the duties assigned to the grievor were of an administrative nature. The situation continued without much attention being paid to it, largely because both he and the grievor's immediate supervisor were sick and had been off work for several months. Mr. Williams acknowledged that from June 2001 to January 2004 the grievor had been allowed to work at home full-time. However, in his opinion this was not a good use of financial resources, and the employer attempted to rectify the situation.

[54] Mr. Williams confirmed that there was another person who was performing telework on a part-time basis. He also confirmed that an office with a separate ventilation system had had to be built for this person. He indicated that in that case, the employee's duties and the options considered as accommodations were compatible. He noted that the employee in question worked part of the time at the workplace. Mr. Williams indicated that Statistics Canada was in the habit of trying to help its employees. He indicated that he was afraid that in future the managers who succeeded him would be less willing to try to come up with options in similar situations.

[55] On redirect, Mr. Williams confirmed to the employer's counsel that the obstacle was full-time telework, which in his opinion was not a viable option. If the grievor had been willing to accept a part-time telework arrangement, the employer could have looked at appropriate options.

[56] Gary Catlin, Director, Survey Operations Division, Statistics Canada, was summoned to appear by the employer's counsel. He had been Director for a little over a year and had been working at Statistics Canada for 28 years. He supervised

approximately 90 employees who participated in the collection of data from about 70 surveys. His employees were part of multidisciplinary project teams that benefited from their expertise in the collection of data for surveys. They prepared manuals and training for interviewers and participated in the training of regional employees from across the country. They were also responsible for testing the automated data collection programs. They oversaw the data collection on a daily basis.

[57] Mr. Catlin stated that he was aware of the grievor's grievance. In April 2005, during the first week at his new duties, he attended her grievance hearing, at which her representative, Bertrand Myre, accompanied her. A Human Resources representative also accompanied Mr. Catlin. He indicated that the key elements of the letter of May 24, 2005 in reply to her grievance were that full-time telework was not a viable option for the grievor's position and that he was seeking information to clarify the situation. Specifically, he was looking for information on her functional limitations and on a plan for returning to work. The grievor had already been advised that the employer had to determine her functional limitations or it could be accused of negligence.

[58] Mr. Catlin commented on the letter of June 30, 2005 (Exhibit E-26) that he sent to the grievor and that was intended to take stock of the situation. He reiterated that full-time telework was not a viable option and informed the grievor that efforts were being made to come up with solutions in other sectors of Statistics Canada. He also suggested that she contact Human Resources for help in her job search and informed her that three short projects that could be carried out at home had been found. Mr. Catlin asked the grievor again to clarify her functional limitations. Mr. Catlin indicated that he had accepted help from Gérald Roy, a CHRC mediator, in obtaining the necessary information from the grievor's physician. He also noted that he had been considering asking Health Canada for another assessment if these efforts were unsuccessful. In this letter he proposed a meeting to discuss the three short projects. Mr. Catlin recommended the EAP's services again to the grievor and noted that Statistics Canada was considering all of the options in order to come up with work that was appropriate to her state of health.

[59] Mr. Catlin went on to testify that telework was an arrangement that was being promoted in the public service. It offers more flexibility for achieving work-life balance. When properly administered and used, it has advantages for both employees

and the employer. The intention was that it be used when its negative impacts are at a minimum, in terms of both costs and productivity. Mr. Catlin added that, for telework to be successful, from an operational standpoint the quantity and quality of the work had to be at least equal to what is found in a normal workplace. It is up to management to decide whether this type of arrangement should be made, and it may be appropriate for certain sectors of the public service. Mr. Catlin filed a checklist of details (Exhibit E-27, Annex 7) for a telework agreement and added that he was in favour of such agreements. When both parties accept the terms and conditions, they enable employees to contribute more to their work by balancing family and work needs.

[60] When questioned more specifically about his response to a request from the grievor concerning greater flexibility, Mr. Catlin answered that he would invite her to discuss the degree of flexibility required and try to come up with an arrangement that would suit the operational requirements as well as her state of health. He added that he would consult with EAP representatives, the nurse and Human Resources and that he was not closed to the idea of work being performed at home. Full-time telework is not a viable option in her situation but part-time telework could certainly be possible. He noted that the department already had employees who were taking advantage of such arrangements.

[61] Mr. Catlin testified about the employer's efforts to come up with a position suited to the grievor's needs and filed two emails to that effect dated May 2005 (Exhibits E-28 and 29). He also filed an email dated June 16, 2005 (Exhibit E-30) and indicated that it was a follow-up on the same subject with Mel Jones, a director at Statistics Canada.

[62] Mr. Catlin testified that the employer had asked a CHRC mediator for help in trying to convince Mr. Myre and the grievor to obtain the cooperation of the attending physician (Exhibit E-31). Mr. Catlin added that all the employer knew at that point was that telework was the only possibility for the grievor. He also filed another email regarding the employer's efforts to find a position for the grievor (Exhibit E-32).

[63] Since the grievor had indicated that she was interested in doing translation, steps were taken in that regard (Exhibit E-33) and her translation ability was assessed. The conclusion of the assessment was that she would not be able to translate at the level the department required.

[64] Mr. Catlin also testified about the Resourcing and Corporate Assignments Division's efforts to find an assignment for the grievor that were communicated to him in an email dated July 29, 2005 (Exhibit E-34). Mr. Catlin filed emails pertaining to this matter that were sent in August 2005 (Exhibit E-35). He indicated that his division was willing to cover the costs associated with the grievor's salary for a certain number of months in order to facilitate her assignment to a position in another sector.

[65] Mr. Catlin also testified about the fruitless efforts made in early September 2005 to find work that could be performed part-time at home and adduced in evidence an email to that effect (Exhibit E-36). He testified that in mid-September he had asked for an update of the grievor's situation and spoke of the reply he had received from Susan Carry, Program Manager, Recruit Development/Corporate Assignments, Statistics Canada (Exhibit E-37). He added that he had contacted Ms. Carry again on the same subject in mid-October (Exhibit E-38).

[66] Mr. Catlin commented on October 20, 2005 (Exhibit G-25) letter that he signed and that is an account of a discussion that took place on October 7, 2005. He testified that he had reiterated in the letter that full-time telework was not possible and that a six-month assignment would start in October. He also noted in his letter that the search for other assignments was continuing and asked the grievor for her suggestions. He indicated that the letter also referred to differences between the grievor's statements and those of her physician, Dr. Seale, and referred to the request made to the grievor to clarify the situation and to obtain further details from her doctor concerning her functional limitations. The letter also referred to the request made to the grievor to undergo another assessment by Health Canada. Mr. Catlin noted in his testimony that the information from Dr. Seale was so limiting that it would rule out most of the positions within the department, making the search for another position very difficult. Mr. Catlin added that the letter suggested again to the grievor that she use the EAP's services.

[67] Mr. Catlin stated that it had to be understood that the notation in Exhibit G-25 that full-time or part-time telework was not possible on a regular basis meant that it was not possible to create a full-time or part-time position that would entail telework exclusively.

[68] Mr. Catlin testified that he was trying to obtain information from the department's informatics services by email concerning what was available by remote

access. His email and the reply to it were adduced in evidence (Exhibit E-39). Mr. Catlin indicated that during this period Mr. Carbonneau was designated as the person responsible for communications with the grievor. Mr. Catlin added that the department had not received any information from the grievor's attending physician since August 2005. Mr. Catlin adduced in evidence an email dated March 2006 (Exhibit E-40) that attested to the department's ongoing efforts to find an assignment for the grievor. He added that a reminder had been sent out regarding this search for an assignment, as affirmed in the email dated June 8, 2006 (Exhibit G-30).

[69] Mr. Catlin filed the letter that he sent to the grievor in June 2006 (Exhibit G-29). He indicated that the letter contained the most recent information as of that date. The employer wanted to confirm the request to have all of its communications with the grievor in writing and also asked whether this instruction applied to professional employees from the Corporate Assignments Program. The employer was still looking for information concerning the grievor's functional limitations. A draft of a letter that the employer wanted to send to her physician to obtain this information was attached, as well as a disclosure authorization form to be signed by the grievor. The letter also indicated that the employer undertook to continue communicating with her by email to inform her of its efforts to find her work and asked the grievor to keep the department abreast of her own efforts to find employment. The letter also noted that the grievor was not entitled to priority status granted by the Public Service Commission because she was not receiving disability benefits.

[70] Mr. Catlin testified that the department was unable to find a position (her own or another position) that would allow for full-time telework. He added that the information pertaining to the doctor's recommendation of full-time telework only was insufficient for the department to understand the situation and noted that the physician had not proposed a plan for returning the grievor to work. In his opinion, there was not even any information on the possible duration of this problem. Was this a permanent situation or should it be reassessed later? Mr. Catlin noted that it was difficult to reconcile the department's capacity to offer flexible work arrangements with the information available on the grievor's limitations.

[71] In cross-examination, Mr. Catlin confirmed that it was not possible for the grievor to telework 100 percent of the time on either a full-time or a part-time basis.

Her substantive position required that she be present at the employer's premises for part of the time.

[72] Mr. Catlin asserted that there was no contradiction between the previous statement and the fact that the employer had found three projects for the grievor to carry out at home. He explained that these projects represented only a small part of the responsibilities of a person holding a position at the SI-02 group and level. He asserted that this work was precisely the kind of work that can be done at home. The grievor had to summarize accounts of interviewers' debriefings.

[73] When questioned about the fact that only three small projects had been identified in the eight-month period from December 2004 to July 2005, Mr. Catlin explained that the role of a person who holds an SI-02 position is to participate in work teams responsible for surveys coordinated by Statistics Canada. Specifically, it is by participating in team meetings during which questions relating to survey design are discussed that the person acquires the information needed to develop instructional materials. Without having taken part in the team meetings, the person would be unable to develop the appropriate documents.

[74] Mr. Catlin acknowledged that it would be possible for some of the work to take place through videoconferencing. However, he was unable to state to what extent precisely, given that each survey is different. He gave a general estimate that roughly 20 to 50 percent of the work could take place through telework. However, he noted that there was not much equipment available for videoconferencing and that this equipment was in great demand. Mr. Catlin noted that, according to the information available, the grievor was insisting that she telework only.

[75] When questioned about the refusal to reinstate the grievor without a description of her functional limitations, Mr. Catlin indicated that the employer's attempts to obtain such information in order to establish a plan for returning to work had proven unsuccessful. Any employee who has been off work for a long period should have such a plan. Mr. Catlin testified that he felt justified in requiring such information and that in his opinion it would have been irresponsible to attempt to deal with the grievor's situation without it. There was a contradiction between what the grievor and the physician were telling them about her attendance at meetings. He confirmed that he had asked the grievor to clarify this matter with her physician.

[76] Mr. Catlin added that the employer hoped that the grievor would obtain the information from her attending physician. The employer had tried a number of times and had even asked Mr. Roy for help, to no avail. However, Mr. Catlin noted that the employer had never stopped trying to find work suited to the grievor's situation. He indicated that, in his opinion, the employer's policy did not require it to fabricate a job that would be suited to a particular employee's situation. He asserted that, in light of the grievor's abilities, training and skills, there was no SI-02 position that could be performed exclusively on a telework basis. He added that the employer made a continual and repeated effort to find such a position throughout the entire organization, offering to cover the costs of her salary. The only work identified that could have been done on a telework basis exclusively was translation. Even though she failed the exam, she had the opportunity to do the work for six months. Unfortunately, the quality of her work proved to be insufficient.

[77] Mr. Catlin acknowledged that another employee who had not been allowed to telework was ultimately granted a reassessment of his situation. In that case it was possible to send him the non-confidential information needed to perform his work. He confirmed that in this case the employer provided the employee with the tools needed to perform his duties from Saskatchewan — a computer, a printer and a telephone line. Mr. Catlin indicated that, in Ms. Lafrance's case, the employer gave her a computer for the work she performed at home. However, the problem was finding appropriate work that she could do at home.

[78] The last witness called by the employer was Mr. Carbonneau. He was responsible for the development of the survey applications used by the regional offices to collect data from respondents. His immediate supervisor is Mr. Catlin.

[79] Mr. Carbonneau stated that his role in the grievor's case began with the CHRC hearings in 2004, when he represented Statistics Canada along with Connie Graziadei, Manager, Management Services, Statistics Canada. He had hoped that the hearings would lead to a suitable arrangement being identified in the grievor's case.

[80] Mr. Carbonneau indicated that the Survey Operations Division was responsible for the development of survey applications for approximately 100 surveys during the course of a year. Some surveys are repeated monthly while others are new and must be developed entirely from square one. This involves the preparation of guides and manuals to be used by managers and interviewers as well as training. Survey findings

are submitted and analyzed on a daily basis for the findings themselves, for the performance of the tools made available to interviewers and for the appropriateness of budgets and personnel resources. In addition, a retrospective review is conducted after the collection period in order to learn from past experience.

[81] Mr. Carbonneau indicated that following the mediation session the parties agreed to establish communication channels between them. At a meeting that he had attended with Ms. Graziadei, Mr. Myre and the grievor, they also agreed on the information to be communicated to the grievor's physician, Dr. Seale. This led to the letter of December 23, 2004 (Exhibit G-18) that summarizes the situation and explains the employer's requests for information.

[82] Mr. Carbonneau indicated that the doctor's response to this letter (Exhibit G-19) did not address the employer's questions. While the employer was trying to determine the grievor's functional limitations, the doctor proposed full-time telework without a return to the workplace. Mr. Carbonneau nonetheless noted that the doctor had been advised in the letter of December 23 that such an arrangement could not be considered.

[83] Mr. Carbonneau stated that the employer had sent Dr. Seale a second letter (Exhibit G-20) in February 2005 that reiterated the points made in the December letter and that set out the questions that needed to be answered. It was sent to gain a better understanding of the consequences of the grievor's state of health, again with a view to arriving at a satisfactory arrangement for her to return to work.

[84] Mr. Carbonneau indicated that the doctor's reply (Exhibit G-21), sent in early March 2005, was not satisfactory. The doctor did not seem to have clearly understood the information sent to her in the previous letters. In Mr. Carbonneau's opinion, the doctor kept returning to her recommendation of full-time telework without providing sufficient details concerning the functional limitations for a suitable work arrangement to be made.

[85] Mr. Carbonneau went on to indicate that the employer had continued its quest for information by writing to the doctor again on March 15, 2005 to ask her to contact Annie Grenier, Senior Labour Relations Advisor, Human Resources Operations Division, Statistics Canada (Exhibit G-22). Copies of all of these letters were forwarded to the grievor and to Mr. Myre. Once again, the focus was on the need to obtain information

concerning the grievor's functional limitations. In her reply dated March 16 (Exhibit E-42), the doctor indicated that she was not willing to contact Ms. Grenier directly, because the latter preferred that communication take place in writing. Mr. Carbonneau filed the letter received from the grievor's physician dated April 7, 2005 (Exhibit E-43). The letter does not answer the employer's questions.

[86] Mr. Carbonneau indicated that, since the situation was dragging on, the employer had taken measures to evaluate job opportunities outside the Survey Operations Division, with the intention of being proactive. Although the information concerning the grievor's functional limitations was not available, in Mr. Carbonneau's view it was appropriate to try to find out what job opportunities were available in other divisions. He adduced in evidence the exchange of emails to that effect (Exhibit E-44).

[87] Mr. Carbonneau also testified about the employer's efforts to break down the work of an SI-02 to determine if any of it could be done through telework. He adduced in evidence the emails pertaining to these efforts (Exhibit E-45). He noted in particular that it is necessary to have a clear understanding of what a survey entails to be able to go through the steps involved in developing it. The aim of this exercise was to have a clear idea of the possibilities, considering the grievor's own limitations.

[88] Mr. Carbonneau indicated that in June 2005 the employer contacted the CHRC representative (Exhibit E-46), Mr. Roy, to inform him of the difficulty in obtaining the necessary information in this case. Mr. Roy sent Dr. Seale (Exhibit E-47) a letter dated July 11, 2005 along with the employer's letter of the same date (Exhibit G-24), which once again requested the doctor's cooperation in determining the grievor's functional limitations. Mr. Roy also sent a subsequent letter (Exhibit E-48) reiterating the importance, in the grievor's interests, of advising the employer of her functional limitations. Mr. Carbonneau noted that the employer's letter to the doctor (Exhibit G-24) explained the reasons for the request for information and specifically indicated the information that was being requested.

[89] Mr. Carbonneau noted that Dr. Seale's reply (Exhibit G-23) to this latest request contained some information about the grievor's functional limitations. However, this information seemed to contradict that obtained in the past, and once again the doctor did not provide sufficient detail for a detailed plan to be developed.

[90] Mr. Carbonneau added that, in response to this last letter, the employer asked the grievor to obtain the information from her doctor. The search for an appropriate position also continued. On October 20, 2005, a letter was sent to the grievor summarizing the situation (Exhibit G-25) and proposing, among other things, that Health Canada be asked for an assessment, with her consent.

[91] Mr. Carbonneau stated that the three projects (Exhibit E-49) assigned to the grievor in summer 2005 had been found after the grievor's work description had been broken down. Mr. Carbonneau also attested to the efforts made through the Corporate Assignments Division. He filed the exchange of emails (Exhibits E-50 to E-53 inclusive) leading to the assignment in translation and revision of texts at the Methodology Branch from October 2005 to April 2006.

[92] Mr. Carbonneau noted that Mr. Myre indicated that the grievor had objected to the assessment by Health Canada as referred to earlier, and he filed a November 2006 email confirming her objections (Exhibit E-54). He filed the agenda for the meeting that took place in February 2006 concerning the grievor's situation (Exhibit E-55) as well as a copy of the emails (Exhibit E-56) sent by the Corporate Assignments Division to other departments to find a job for the grievor.

[93] In cross-examination, Mr. Carbonneau confirmed that the employer had given the grievor $8,000 in compensation for the way that her case was managed from 2001 to 2004 and the fact that all of her sick leave was used during this period. He added that since the agreement had been reached a great deal of time had been spent on trying to determine the grievor's functional limitations, forcing her to use up her leave. He added that the agreement constituted a new beginning based on ongoing communication, specific requests and proactive management aimed at coming up with solutions.

[94] Mr. Carbonneau indicated that, in his opinion, the employer had complied with the commitment it had made to consult with the grievor's physician. The difficulty stemmed from the fact that the latter had been unable to provide the basic information needed to implement an appropriate arrangement for a return to work.

[95] When asked whether he was questioning Dr. Seale's competence, Mr. Carbonneau replied that all of the parties had agreed on the questions to be put to the doctor and had been consulted. He added that the attending physician had a duty to

provide the information in a form understood by all to facilitate the return to work. It was common practice to analyze the work description to identify the necessary accommodations. He also noted that it was the grievor who had chosen to use her family physician. Mr. Carbonneau indicated that it was clear from reading the doctor's letters that she did not understand what telework actually entails.

[96] When asked whether it was up to the physician to identify the tasks that the grievor should perform, Mr. Carbonneau replied that the standard practice with Health Canada is to send a work description in order to identify the duties that an employee is to perform in light of his or her health. He reiterated that he was seeking the doctor's professional opinion in order to gain a clear understanding of the grievor's state of health. He added essentially that the employer had a great deal of flexibility in coming up with a solution geared to the grievor's situation, but that full-time telework is not an option. He noted that the employer has been taking proactive steps in this case since late April 2005, despite the lack of information. He added that these efforts had borne fruit, since the department had been able to come up with contracts and an assignment. When asked about the fact that the contracts represented only 75 hours of work, Mr. Carbonneau replied that this was the only work at the SI-02 level that could be identified after the grievor's work description had been broken down.

Summary of the arguments

[97] The grievor's representative felt that, in light of the powers conferred by the *PSLRA*, a grievance adjudicator now has jurisdiction to deal with discriminatory acts and to impose appropriate corrective measures, including compensation or damages for pain and suffering.

[98] He noted that a grievance adjudicator must rely on the evidence in deciding whether the employer has implemented the accommodations recommended by the various physicians without undue hardship being imposed.

[99] In his opinion, the grievor's case is simple. According to the grievor's representative, the employer is refusing to make the necessary accommodations to respect the recommendations made by the Health Canada physicians and by the grievor's attending physician.

[100] He noted that the *CHRA* was amended in 1998 and that since that time employers have had an obligation to make accommodations to take employees' special

needs into account, unless doing so would cause undue hardship. In this case, the grievance adjudicator must determine whether the reasons the employer has given for refusing to make accommodations constitute undue hardship. The grievor's representative began by acknowledging that the grievor also has obligations and must abide by the process so that an acceptable compromise can be reached. The representative felt that, beyond the shadow of a doubt, the evidence shows that the grievor met her obligations in full. He maintained that she fully and voluntarily agreed to undergo all of the medical assessments the employer requested. As well, she fully cooperated with the CHRC mediation process. She never contested any of the employer's requests for clarification from the attending physician. He noted that Mr. Williams' testimony revealed that she had asked twice to be transferred to another division, given that the employer refused to give her work. She also agreed to perform the duties associated with the projects that the employer offered her. She accepted a corporate assignment in October 2005, despite the fact that she did not meet the requirements and that she did not feel comfortable with the duties she was asked to perform.

[101] The grievor's representative found that the employer had given a number of reasons to explain why the grievor could not telework. With respect to the duties to be performed, the employer alleged that the work had to be done as part of a team and that the grievor had to attend meetings. The representative felt that Mr. Williams' testimony to that effect was interesting. In his opinion, this testimony revealed that simply setting up a conference call or videoconferencing system would allow the grievor to perform all of the duties of her work description other than the testing. It would therefore be absurd to claim that the simple fact of setting up a conference call system, for example, would constitute undue hardship.

[102] With respect to the confidentiality aspect of the grievor's work, the representative alleged that, although the employer attached great importance to the informatics protection system and the security system for Statistics Canada's buildings, it was never able to specify the confidential data to which the grievor would have had access or even the confidential nature of her work. The representative added that Mr. Catlin had used the pretext of confidentiality on a past occasion to deny a telework request but that his supervisor had overturned that decision. The employee in question had been transferred to Saskatchewan and was teleworking full-time with all of the necessary equipment and the expenses paid. In the representative's opinion,

it was proven that the confidential nature of the grievor's work was not associated with undue hardship.

[103] The representative continued his argument by indicating that the employer claimed that full-time telework was not a viable option and that periodic part-time work was the only possibility. However, the evidence showed in a number of instances that the employer's position was contradictory. In fact, in Exhibits E-26 and G-25, the employer clearly indicated that telework was impossible on either a full-time or a part-time basis.

[104] The representative argued that the evidence had clearly shown that full-time telework was possible. He noted that the grievor had accepted a corporate assignment from October 25, 2005 to March 31, 2006 and that she had accepted any work offered to her. In his opinion, the evidence shows that full-time telework was possible and did not constitute undue hardship.

[105] The grievor's representative indicated that the employer claimed that it could not allow the grievor to telework full-time given that it needed clarification regarding her functional limitations. He noted that he had concluded from Mr. Carbonneau's testimony that the employer claimed that the attending physician was the person responsible for the situation because she had not replied to the questions asked. The representative alleged that the evidence clearly shows that no clarification was necessary and that this was a strategy on the employer's part intended to alter the attending physician's recommendation. He added that the employer's objective was not to obtain medical clarification but to ensure that the grievor returned to work. He felt that the employer had used this same strategy with the Health Canada doctors. In November 2003, after the grievor had just undergone a medical assessment and it had been recommended that she would be able to telework, the employer wrote back to Health Canada a month later to ask them to amend their recommendation. He noted that, further to this new assessment, the grievor was declared unable to return to work. This is a problem, because the attending physician did not change her recommendation.

[106] The representative went on to state that it was not until it realized that the attending physician would not change her mind that the employer indicated that, although clarification was needed, the intention was now to have the grievor return to work. He also noted that in October 2005, while the employer was still seeking

clarification from the attending physician, the grievor was appointed to a full-time corporate assignment. If it was absolutely necessary to obtain medical clarification to allow the grievor to telework, how could she have obtained this corporate assignment when the employer was still seeking clarification? The representative asked why, if medical clarification was needed in order to make appropriate accommodations, nine months had to elapse before the employer provided a draft of the proposed letter to the attending physician. In the representative's opinion, the evidence shows clearly that clarification of functional limitations does not constitute undue hardship.

[107] In support of his arguments, the grievor's representative noted that the Supreme Court of Canada set out the parameters of what undue hardship represents in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970. There is undue hardship if the proposed solution will create a problem with employee morale, have an impact on the collective agreement or will endanger health and safety. It is also necessary to take into account the costs, the size of the organization and the interchangeability of the work force. In that decision, the Supreme Court of Canada also refers to fear of the effects on other employees. More than minor inconvenience must be shown to be able to deny an employee's right to accommodation. The employer must show that adopting accommodating measures will interfere with the rights of other employees. The measures sought in the grievor's case will not actually interfere with the rights of other employees. There will be no impact on the collective agreement. The fact that the grievor is teleworking would not entail any risk to the health and safety of employees or the public. Such measures do not involve any costs that could imperil the federal public service. The representative noted that there are over 471 SI-02 positions at Statistics Canada, that most of them have generic work descriptions and that most are located in the National Capital Region. There are over 1,255 incumbents of SI-02 positions in the National Capital Region.

[108] The representative added that, in terms of size, Statistics Canada is by far the employer of choice for an incumbent of an SI-02 position. At Statistics Canada, almost all positions at the SI-02 group and level are generic positions and all have similar duties. In the representative's opinion, the accommodations do not present any problem because all incumbents of SI-02 positions are interchangeable. Ultimately, helping the grievor would not represent undue hardship, and the onus is on the employer to show such hardship based on the tests set out in *Central Okanagan School District*. If the employer is unable to establish undue hardship, it has the

obligation to implement the doctor's recommendations to the grievor and to provide her with work that she can perform in a telework situation.

[109] The representative closed by indicating that, in his opinion, I have no choice but to allow the grievance and to grant the grievor the corrective measures required under section 53 of the *CHRA*. He left me the discretion to choose the corrective measures to be taken in the circumstances.

[110] The employer's representative began his arguments by commenting on the arguments made by the grievor's representative. He noted that, even if there were only one duty that the grievor could not perform in a telework situation, this would be sufficient to conclude that full-time telework would not be possible. With respect to conference calls, this would entail that everyone had access to them. He added that Mr. Catlin and Mr. Carbonneau had explained what was meant by full-time and part-time telework. With respect to the corporate assignment, the employer's representative noted that, in his opinion, the employer had made every effort, going so far as to devise a position in order to help the grievor. In terms of the agreement reached further to the CHRC mediation, he argued that it addressed a situation that had occurred while the manager in charge was on sick leave and that the grievor's case may not have received all the attention it deserved.

[111] The employer's representative argued that this case gives the Public Service Labour Relations Board a unique opportunity to establish case law concerning the parties' obligations with respect to the employer's duty to accommodate. However, in his opinion, the case law clearly indicates that there are some points to be resolved before accommodation can even be discussed.

[112] He went on to state that this case is not complex and that it rose from the lack of information on the grievor's functional limitations. He alleged that the union has asked me to determine a question of discrimination, but that this is premature because it is impossible to determine whether the accommodations are adequate when the information on the functional limitations is fragmentary at best.

[113] The representative noted that the case law allows us to see that the attending physician's suggestion of full-time telework for an indeterminate period is only a recommendation. It is up to the employer to determine the work arrangements. The grievor has an obligation to provide sufficient information for the employer to be able

to implement appropriate accommodations. There is nothing to prevent the employer from obtaining the clarification needed to be able to make an informed decision. He added that, even if the grievor provides clear and sufficient information, she also has the obligation to prove that there is discrimination. If there is in fact discrimination, the employer's representative suggested to me that there are professional requirements that would justify refusing full-time telework.

[114] The employer's representative invited me to consult the agreement reached in November 2004 (Exhibit E-4). He indicated that it was agreed in this document that the employer would be able to ask the attending physician for clarification and that it was clearly stipulated that the grievor's return to work would not take place until her assessment was completed. In his opinion this included the functional limitations. The employer simply applied this clause in the months that followed. The grievor's signature and that of Mr. Myre indicate that this provision of the agreement was accepted.

[115] The employer's representative indicated that this case gave him the impression that it was a continuation of the problems arising from the agreement. He noted that the grievor had complained during cross-examination that no time limit had been imposed on the employer for obtaining clarification. On this subject, the representative referred me to the Supreme Court of Canada's ruling in *Alexis Nihon Cie Ltd. v. Dupuis*, [1960] S.C.R. 53. He asserted that the employer could have stayed with a strict interpretation of the agreement and refused to provide her with any kind of work. That is not what the employer did. It offered the grievor three projects in summer 2005 as well as a corporate assignment from October 2005 to March 2006. This corporate assignment at the Methodology Division was in fact the only full-time telework assignment.

[116] Returning to the requests for clarification made to the attending physician, the employer's representative indicated that, according to Mr. Carbonneau's testimony, the first letter sent to the doctor had been written in conjunction with the grievor's union representative and had clearly indicated the information for which the doctor was being asked. This letter marked the beginning of a long quest for clarification. Unfortunately, the correspondence proved unsuccessful.

[117] The representative indicated that Mr. Catlin had also testified about the insufficiency of the information on the grievor's functional limitations and noted the

difficulty in implementing accommodations when the only criterion was full-time telework for an indeterminate period. Both Mr. Williams and Mr. Catlin noted that they were or would be willing to make the necessary changes to the workplace to suit the grievor's state of health. The representative noted that Statistics Canada knows about sleep apnea and that other employees who suffer from this problem were able to make arrangements at the workplace.

[118] The employer's representative noted that the grievor also has an obligation to help come up with a suitable compromise and cited *Central Okanagan School District*. He noted that the grievor insisted on her doctor's recommendation of full-time telework. Because of this insistence, it became difficult to initiate a discussion to come up with an acceptable compromise. However, the doctor was simply recommending an arrangement. This recommendation does not help the employer determine how the grievor's situation can be dealt with.

[119] The employer's representative drew my attention to *Bruce Tweten v. Canadian Human Rights Commission and RTL Robinson Enterprises Ltd.*, 2005 CHRT 8, a decision that notes that employees have an obligation to facilitate the search for accommodation. He also referred to *Butler v. Nenqayni Treatment Centre Society* (28 October 2002) CHRT T.D. 12/02, which notes that, when an employee fails to provide the employer with the medical information requested regarding the employee's physical limitations, this constitutes a breach of the latter's duty to facilitate the search for accommodation. He also relied on an article published by William Pentney on discrimination and the law that notes that an employer can only speculate on an employee's abilities if it does not know specifically what kind of work the employee is capable of doing.

[120] The employer's representative noted that in the letter dated August 18, 2005 (Exhibit G-23) the physician indicated that the grievor was unable to attend meetings or drive long distances but that she could occasionally go to the workplace to pick up documents when absolutely necessary. He noted that on September 12, 2005 the grievor had indicated during a meeting with the employer that she was able to attend meetings and preferred that they take place in the morning (Exhibit G-25). The employer's representative noted as well that in her letter of August 2005 (Exhibit G-23) the physician still did not answer the questions put to her in the letter of December

23, 2004 (Exhibit G-18). He noted as well that the grievor did not seem to have any difficulty appearing at the adjudication hearing for her grievance.

[121] The employer's representative filed an article by Michael Lynk entitled "Disability and the Duty to Accommodate: An Arbitrator's Perspective" from *Labour Arbitration Yearbook 2001-2002*, Volume I. The article refers to *Guibord v. Canada* (1996), 123 FTR 212, in which it was held that an employer has the right to reject an accommodation suggested by an employee and the employee's doctor if such an accommodation would not be consistent with the employer's operational requirements.

[122] Citing extracts from *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, *Canada (Human Rights Commission) v. M.N.R.*, 2003 FC 1280, *Desormeaux v. Ottawa-Carleton Regional Transit Commission,* 2004 FC 1778, and *Guibord*, the employer's representative argued that the onus is on the grievor to show that she was the victim of discrimination and at the very least that she was subject to unjust measures based on her physical disability. Relying on paragraph 69 of *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3, (S.C.C.), he noted that, in contrast with the situation described, the grievor had not presented any evidence that would establish that the employer treated her differently from other employees.

[123] He went on to argue that an employer might be entitled to claim a bona fide occupational requirement once a situation of discrimination has been established. He referred to the analysis proposed by the Supreme Court of Canada in *British Columbia* and concluded that in this case, the occupational requirement that the work not be performed in a telework situation is related to the duties themselves. In his opinion, the evidence showed that the employer acted in good faith. He added that imposing telework would mean imposing undue hardship on the employer. The employer has shown the extent to which confidentiality is important and asserted that even the Canadian Security Intelligence Service did not have access to Statistics Canada's data.

[124] The employer's representative closed by noting that the employer had shown openness and flexibility in attempting to come up with a satisfactory solution.

[125] In reply, the grievor's representative objected to the fact that the employer's representative was using the grievor's presence in the adjudication of her grievance to

suggest that she might be able to go to work. He added that her integrity had never been called into question in these proceedings.

Reasons

[126] While the work environment is designed for and geared to the abilities of workers in good health, it is obvious that there is also an obligation to adapt it to persons with functional limitations caused by factors such as health problems. To do otherwise would be unfair, discriminatory and contrary to the *CHRA*. At the same time, the courts have agreed that the obligation to make accommodations is not limitless and that an employer should not have to suffer undue hardship.

[127] It is important to note that the grievor, who has functional limitations, has shown that she suffered discriminatory treatment, contrary to what the employer's representative suggested. She did so by establishing that, in requiring that she come in to the office, the employer deprived her of her ability to earn a living because of her health problem. Given her functional limitations, she is therefore experiencing a discriminatory effect caused by the employer's requirement. The obligation to identify reasonable accommodations thus takes shape.

[128] Obviously, the employee cannot ask the employer to fulfill its duty without also doing what is required of her and cooperating with her employer's efforts to come up with a solution to the problem.

[129] At the same time, the employer cannot refuse to help an employee unless it has been shown, based on a bona fide occupational requirement, that the accommodation being sought would impose undue hardship.

[130] This is the essence of the case law in this area as reflected in the decisions brought to my attention by the parties. These principles must be borne in mind when the grievor's situation is being considered. The evidence clearly showed that the grievor has functional limitations arising from a health problem that prevents her from being present at her workplace. In the opinion of the grievor's physician, she is capable of working 37.5 hours per week as long as the schedule is flexible and she can perform her work at her home. In her correspondence with the employer, the physician indicated that the grievor is unable to attend meetings, travel long distances or in heavy traffic, or use public transit. However, the physician noted that the grievor is able to pick up work at her office when absolutely necessary. It would thus be

necessary for the grievor to continue teleworking full-time to be able to perform duties for which she would be paid.

[131] The employer essentially argues that it is impossible to allow the grievor to telework full-time in the context of her position as senior project officer. The evidence showed unequivocally that the duties of her SI-02 position require her presence at meetings held at the workplace and that it is not possible to access the data essential to the performance of the duties outside the workplace.

[132] In my opinion, this obligation for an employee holding a senior project officer position to be present at the workplace constitutes a bona fide occupational requirement. It is this obligation that led the employer to seek clarification from the attending physician regarding the grievor's functional limitations, in hopes of coming up with a solution that would be acceptable to both parties. However, the physician's response was unequivocal: full-time telework only.

[133] The grievor seems to be of the opinion that applying for disability insurance would mean admitting that she is unable to work, which she sees as contrary to her request for work that she can do at home and contrary to her physician's assertion that she is able to work. Furthermore, she would then be forced to accept 60% of her salary. In my opinion, the acceptance of disability insurance benefits in no way diminishes the obligation to help an employee with health problems. If her disability does not allow her to perform the duties of her position, she should be entitled to the benefits provided by the insurance plan in such circumstances.

[134] The grievor alleged that the employer had not shown that telework was impossible. Her representative noted that the installation of a videoconferencing system would be sufficient to enable her to participate in work meetings. He added that the employer had not established that she has access to confidential data and did not specify the confidential nature of her work. I disagree with his assessment of the evidence. The *Statistics Act* guarantees citizens that the information they entrust with Statistics Canada will be kept confidential and so imposes on the organization extremely stringent constraints with respect to the management of that information. The employer has established that the development of surveys by the teams responsible for this work at Statistics Canada requires analysis of the data from previous surveys, and conducting surveys requires analysis of the problems encountered in the application of questionnaires along the way. The evidence showed

that the security measures that would be needed to connect the grievor's home to network "A," on which the data essential to her work are located, are clearly prohibitive. In this context, the implementation of a system that would allow the grievor to work at home would constitute undue hardship. A videoconferencing system would not be sufficient.

[135] The grievor's representative also alleged that it is incorrect to claim that the employer cannot make the necessary accommodations because it did so in the past, specifically from October 2005 to March 2006. I also disagree with this argument. The evidence showed that the grievor was able to telework from July 2001 to January 2004 and from October 2005 to March 2006. In the first instance, the evidence revealed that during this period the grievor did not actually perform SI-02 duties. As for the second period, this was a corporate assignment intended to determine whether she was able to perform translation for another unit. This trial proved unsuccessful. I would add that the evidence also showed that, despite the lack of detail provide by the grievor's physician, the employer made a tireless effort to find a satisfactory position that could be filled through full-time telework. As shown by the emails adduced in evidence (Exhibits E-28 to E-30), these efforts extended not only to SI-02 positions, but also to positions and work at a lower level. They proved to be fruitless. The fact that work was available in the past does not necessarily mean that it will be available now.

[136] I am obliged to conclude that the employer did not fail in its duty to try to come up with a reasonable arrangement that would enable the grievor to continue working. I nonetheless note, as I did in the preliminary decision in this case, that the grievor's situation is a recurring one. The duty to identify a reasonable arrangement does not cease with this decision.

[137] For all of the above reasons, I make the following order:

(The Order appears on the following page.)

Order

[138] The grievance is denied.

March 23, 2007.
P.S.L.R.B. Translation

Georges Nadeau,
adjudicator