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Files: 166-02-35120 and 37176

Citation: 2008 PSLRB 102

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

MARCELLE GIROUX

Grievor

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

Indexed as
Giroux v. Treasury Board (Canada Border Services Agency)

In the matter of grievances referred to adjudication pursuant to section 92 of the *Public Service Staff Relations Act*

REASONS FOR DECISION

Before: Barry Done, adjudicator

For the Grievor: Krista Devine, Public Service Alliance of Canada

For the Employer: Caroline Engmann, counsel

Heard at Toronto, Ontario,
April 24 and 25, October 11 and 12 and 16 and 17, November 16 and 19, and December 19, 2007.
(Written submissions filed December 21 and 27, 2007, and January 4, 2008.)

I. Grievances referred to adjudication

[1] This decision concerns two separate but, in many ways, related references to adjudication by Marcelle Giroux ("the grievor"). The first grievance, presented to the Canada Customs and Revenue Agency (part of which became the Canada Border Services Agency) ("the employer") on May 14, 2002 (PSSRB File No. 166-02-35120), alleges discrimination based on physical disability: "I grieve that the employer has violated my rights contrary to article 19." The second grievance, presented to the employer more than two years later, on September 16, 2004 (PSSRB File No. 166-02-37176), grieves her termination for incapacity: "I grieve the termination of my employment for reasons of incapacity."

[2] In both grievances, the grievor requests that she be reinstated to her position and that she be made whole.

[3] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, these references to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35.

[4] The hearing of these references to adjudication began in April 2007 and concluded with the final receipt of the parties' written submissions on January 4, 2008. The protracted hearing dates were necessary because the grievor was only able to attend the hearing for no more than two consecutive days as well as her representative's illness, which required several postponements of scheduled hearing dates. At the hearing, 9 witnesses were called to testify, and 219 exhibits were entered. The majority of the evidence applies to both references to adjudication.

II. Summary of the evidence

A. Background

[5] By letter dated August 30, 2004 (Exhibit E-1), Reinhard Mantzel, Regional Director General, Canada Border Services Agency (CBSA), notified the grievor that her employment was terminated as of August 30, 2004. The reason for the termination was her alleged incapacity to perform the duties of a customs inspector despite several years of attempts by the CBSA to accommodate the grievor's medical situation.

[6] The vast majority of the evidence relating to the grievor's medical situation is not in dispute. Nor is the fact that the CBSA went to some considerable effort to accommodate that situation. What is in dispute, and what I now must determine, is whether those efforts satisfy the onus on an employer, under its duty to accommodate, to do all it can to continue a disabled employee's employment, short of efforts that would constitute undue hardship.

[7] The grievor was a long-serving public servant. Moreover, in her nearly 33 years in the federal government, 31 of those with the CBSA or its predecessors, to the grievor's credit she was never formally disciplined, and her performance assessments showed her to be a highly satisfactory performer (Exhibits G-25, G-53 and G-54), as reflected by the opening remarks of counsel for the employer confirming that the grievor was a valued employee.

[8] What has been referred to as the grievor's medical situation began with a workplace injury in November 1999. Her feet became entangled in some plastic strapping causing her to fall and injure her hands and wrists (Exhibit G-55, Superintendent Peter Harris' email). At the time of that accident the grievor, whose substantive position was as a PM-02 customs inspector, was acting in a PM-03 level program support position.

[9] For the next eight months, the grievor was off work on injury-on-duty leave and was being treated by Dr. Anthony Galea for injuries not only to her hands and wrists but also to her neck, back and rotator cuffs. The grievor participated in many conversations and meetings throughout her eight-month absence concerning developing a back-to-work protocol. She returned to work in August 2000 — neither to the PM-03 acting position nor to her substantive PM-02 customs inspector position but to modified duties in an area called "settlers' effects." Due to a complaint from a company from which the grievor collected tax money, she was moved to the speed desk where the work primarily comprised data entry.

[10] For the next 20 months, the grievor worked under various return-to-work plans, phasing in greater productivity or "rounds" over varying periods of time and gradually increasing the number of hours worked as well as the number of days worked each week.

[11] In the spring of 2002 the grievor was placed on leave with pay, which continued until June 2003, when she returned to work. This leave was a result of the grievor's doctor (Dr. Galea) advising the CBSA that she was suffering from stress, which aggravated her physical symptoms.

[12] The grievor's return necessitated another series of return-to-work plans, which had as their goal a gradual return to full-time hours and a resumption of the full scope of duties of a customs inspector. Again, there was an expectation that the grievor's productivity would increase. To that end, a form of performance monitoring was put in place and a series of meetings were held to discuss her performance by comparing the actual results she had achieved.

[13] In the short term, the grievor was able to meet her performance goals, but overall she was not.

[14] The grievor had another two accidents at the workplace in the summer of 2003 involving falling and further injuring her back, neck, shoulders and hands. A further workplace injury was reported by her in the spring of 2004. That injury was to her right hand and wrist from repeated movement required to separate copies required for the paper release of goods.

[15] Ultimately, management was not prepared to accept the grievor's low productivity, and feeling that it had done all it could to accommodate her, to no avail, it terminated her employment effective August 30, 2004.

B. Employer's evidence

[16] Mr. Mantzel was the author of the termination letter (Exhibit E-1). Prior to signing it, he had consulted Marie Lau of Human Resources. He was satisfied that the modified job duties assigned to the grievor represented only a very small fraction of a customs inspector's duties and were the least physically demanding of all those duties. His conclusion was that if the grievor could not perform the modified duties and was not physically able to perform any of the alternate jobs considered for her, then she was unable to make a satisfactory contribution, and "she could not do her job!"

[17] In cross-examination, Mr. Mantzel said that he did not recall requesting current medical evidence prior to deciding on termination. Nor did he become involved in the search for alternate jobs, and does not know where those jobs were located. However,

he reasoned that the modified duties "were so sedentary, it would be hard to come up with something simpler than that."

[18] Mr. Mantzel had not spoken to either Dr. Jeffrey M. Chernin, from Health Canada, nor the grievor's doctor but had read the medical evidence in the file prior to his decision to terminate.

[19] Gerry Roussel was, in August 2002, Director of Commercial Operations for the CBSA. He had seen Exhibit E-2A, Dr. Chernin's letter to Ms. Lau dated September 4, 2002, stating that the grievor "would appear to be unfit" and sought a brief overview of the grievor's background from Ernest Spraggett, who had acted in his position. Mr. Roussel had never spoken directly to Dr. Chernin nor did he have much experience in accommodating a workplace injury. Nevertheless, at a meeting with the grievor and her representative in November 2002, he presented the grievor with two options —retirement or termination — and provided her with two weeks to consider those two options, options which Mr. Roussel said that he "was very comfortable with" as he had no doubt in his mind that there was not any position that would satisfy the grievor's needs.

[20] Mr. Roussel, together with Ms. Lau, considered nine different PM-01-level jobs in Revenue Canada, Taxation (Exhibits E-9 to E-17). The tax side of the organization was considered the most appropriate choice of alternate positions since customs work was more physical than work on the tax side. Mr. Roussel did not seek advice on whether the grievor could perform those nine jobs from Dr. Chernin. Nor did he seek advice from Dr. Galea, the grievor's doctor.

[21] However, Mr. Roussel did see Exhibit E-2(C), a letter dated April 2, 2003, from Dr. E. Callary, Dr. Chernin's supervisor, stating that the grievor was fit to return to work with recommended accommodations.

[22] As the grievor "had to be of some value," a quota was expected from her, reflecting 70 percent of the production of an employee with no disabling condition. That quota was 150 electronic releases per day. After eight weeks, Mr. Roussel wrote to the grievor on October 3, 2003, confirming that she had met the expectations of her current return-to-work plan (Exhibit E-20).

[23] Following that date, the grievor's output varied, due primarily to many incidences of sickness and resulting absences from work. In fact, she now only met her expected production quota in 3 of 22 weeks. Mr. Roussel concluded that she had not met management's expectations and that she could not do the work. He arranged to meet with the grievor to discuss her options on August 25, 2004, but the grievor was absent on certified sick leave that day, and was to return on August 30, 2004.

[24] In a letter (Exhibit E-23) dated August 26, 2004, Mr. Roussel returned to the two options of November 2002: retire or be terminated. Mr. Roussel refused the grievor's written request to delay the termination while she pondered the options, and Mr. Mantzel's termination letter (Exhibit E-1) was delivered.

[25] In cross-examination, Mr. Roussel said that Ms. Lau chose the alternate jobs that would be considered based on criteria such as "lifting, stress level, repetitive movements, demands, working conditions and the environment." He did not ask the grievor's doctor about what level of stress each job would entail nor did he provide the job descriptions for those jobs to the grievor's union representative for his input. Mr. Roussel said that he did not look at what portions of each job that the grievor could do, nor did he consider combining tasks of different jobs to create a job that the grievor would be able to do. As well, he did not identify how any of these jobs could be modified to meet her physical capabilities.

[26] Since Mr. Roussel had to examine the options and determine the best timing, the grievor's return to work was delayed more than two months after Dr. Callary concluded that she was fit to return in April 2003. Finally, Mr. Roussel said that he did not do or request a second and current review of available positions as was last done in November 2002.

[27] Mr. Spraggett, who reports to Mr. Roussel, is Chief of Operations, Commercial District, Truck Terminal. The grievor was on loan to him throughout 2003-2004. Following a letter that he had received (Exhibit E-29) from Dr. Galea about stress that the grievor was experiencing at work, Mr. Spraggett wrote (Exhibit E-30) to Dr. Chernin, requesting that the grievor be reassessed and she was given leave with pay beginning April 26, 2002, pending her reassessment. On her return to work in June 2003, the grievor was given a quota of 150 electronic releases per day, based on 70 percent of the normal expectation. That quota was not often met. Mr. Spraggett estimates that there remained approximately 500 000 electronic releases to be processed across the

country. Some are more complex than others and require more time, and the number of electronic releases available to process fluctuates depending on the time of year.

[28] Mr. Spraggett conceded that the grievor's production "was getting better and better" initially and that she had not requested leave on April 26, 2002, when she was placed on leave until June 2003.

[29] Mr. Spraggett was involved in meetings and discussions in January 2004 whose focus was developing an action plan to terminate the grievor (Exhibit G-5).

[30] Dr. Galea, the grievor's doctor, testified out of order to accommodate his schedule. Dr. Galea's background is in kinesiology, and his practice is in sports medicine, treating both professional athletes and Olympians. He began treating the grievor in 1995. Following the grievor's fall at work in 1999, Dr. Galea physically examined her and saw her frequently, initially as many as one to three times per month. He was involved in all return-to-work plans, including modifications and extensions to those plans.

[31] Dr. Galea is quite familiar with the grievor's job description. Even with torn rotator cuff muscles, it is his opinion that, with accommodation, she can perform her customs inspector duties. In fact, he stated that 90 percent of people can function quite well with torn rotator cuffs. The grievor's restrictions on over-the-shoulder mobility are permanent, but she can continue to interrogate travelers, search bags, do paperwork, conduct interviews, etc., as long as she can get up and move around.

[32] Dr. Galea emphasized that, contrary to Dr. Chernin's advice, the grievor need not be restricted to only sedentary duties as there were "a lot of activities she could do." Dr. Galea never met Dr. Chernin.

[33] By late fall of 2000 Dr. Galea had grown frustrated with the grievor's employer. He said that "it was like pulling teeth to get a desk, chair and first aid station," "of all the companies I have dealt with in accommodating injuries, the federal government was giving me the hardest time," "it seemed that the employer was punishing her for her injury on duty," and "my recommendations on increasing hours of work were a waste of time, and I might as well not have bothered writing them down."

[34] One particular and ongoing source of frustration was the failure to provide a hydraulic desk. By August 2001 there had been no contrary medical opinion that a hydraulic desk would not help to accommodate the grievor. Dr. Galea could n ot understand why it was not provided. The worst possible thing for the grievor, considering her torn rotator cuffs, was to expect her to manually crank a desk, "as this would set her back months." Yet a desk with a manual crank was provided. This had not changed by January 2002, and a hydraulic desk, in his opinion, was "akin to needing a leg brace." In March 2002 Dr. Galea had already explained numerous times the necessity for a hydraulic desk, and stated: "I was again asked to explain my rationale."

[35] On April 9, 2002, Dr. Galea wrote the employer (Exhibit E-29) concerning stress in the workplace and the impact on the grievor. Concerning the letters, Dr. Galea said: "I was getting stressed in my dealings with her employer and I don't even work there." Dr. Galea specifically referenced Chief Hussein's treatment of the grievor and the reference to the grievor by Ms. Lau in an email as "you know who." It is Dr. Galea's opinion that stress increases pain and fatigue and that "any person in that situation would feel stressed; it would be abnormal not to."

[36] Dr. Chernin advised the employer that the grievor could only do duties of a marked sedentary nature. Yet Dr. Chernin had never examined the grievor. Dr. Galea had examined the grievor, and his opinion was opposite to that of Dr. Chernin. Dr. Galea said that he was never consulted by Dr. Chernin before the sedentary restriction was imposed. Had he been, his opinion would have been that sedentary work could only worsen the grievor's condition while he had always encouraged walking and frequently standing.

[37] Dr. Galea said that he was not consulted on whether the grievor could do any of the alternate jobs considered by Mr. Spraggett and Ms. Lau. It was and is his medical opinion that the grievor "could do any available job with proper accommodation" such as frequent breaks, walking, standing and stretching as necessary and a proper desk and chair. The grievor can deal with the public without limitation and can work in a high-volume area.

[38] In summary, the grievor is fit to return to work, as she was in August 2004, with the same restrictions and is fully capable of working full time.

[39] In cross-examination, Dr. Galea said that both the occupational therapist and Dr. Chernin agreed with his recommendation for a hydraulic desk. His references to an ergonomic station in documents such as Exhibit G-10 included a hydraulic desk, which took the employer two years to eventually provide.

[40] Superintendent Harris has been a customs superintendent for 16 years. He first supervised the grievor in 1999. He attended when she fell at work that year and wrote an incident report.

[41] When the grievor returned to work in August 2000, Superintendent Harris was her supervisor. He said that he had a very good working relationship with her. He left his role as the grievor's supervisor for 18 months, returning in April 2003 when she was on extended leave. Superintendent Harris, on learning of the grievor's return to work that was scheduled for June 2003, made arrangements for her orientation to the new worksite at Dixie Road, including a tour, introductions, etc. (Exhibit E-42).

[42] Superintendent Harris said that he was asked to monitor the grievor's production. Exhibit E-45 shows that the grievor was performing well up to July 17, 2003, that he was satisfied with her efforts and that she "was performing at a level one would anticipate for any person returning to work." However, she failed to meet the expected standards subsequently. Five months later, on January 19, 2004, a meeting was held to discuss the grievor's performance, which had significantly deteriorated over a period of 22 weeks. Of these, the grievor had met her expected production quota of 150 electronic releases per day in only 3 weeks. Exhibit E-46, which summarizes the meeting, states that: "It was recognized by all in attendance that . . Inspector Giroux was very capable of achieving [the production quota]." A further meeting was scheduled for March 1, 2004. At that meeting (Exhibit E-48), about five weeks later, it was noted, as in Exhibit E-45, that "Marcelle reached and exceeded the minimum threshold goal of 150 processed entries. Congratulations were extended."

[43] On April 23, 2004, the grievor emailed Superintendent Harris concerning pain and stiffness in her right hand, and, as requested, he completed a Workplace Safety and Insurance Board (WSIB) form for her.

[44] The next in the series of production/performance meetings was held on July 20, 2004 (Exhibit E-51). This time the review period was February 16 to July 2, 2004, approximately 19 weeks. Of these 19 weeks, the grievor met her

production quota in only 4 of the 19 weeks. For 9 full weeks, the grievor was absent on sick leave, and several other weeks showed absences on various types of leave for a portion of the week. It was pointed out by management that of the previous 47 weeks, only 1 week passed without some form of leave being taken. ". . . Management stated that by not being at work consistently Marcelle puts herself at a disadvantage by not being available on the days or the times that work is accessible. . . ."

[45] It was agreed that those in attendance would try to meet within the next 8 to 10 weeks. However, the grievor was terminated before that meeting could take place.

[46] In cross-examination, Superintendent Harris acknowledged writing a performance appraisal dated August 8, 2001, concerning the grievor (Exhibit E-25). It was very positive and used such terms as "competent, professional, conscientious, strong commitment," etc. Beginning June 16, 2003, and continuing until April 23, 2004, a period of more than 10 months, Superintendent Harris kept daily notes on the grievor (Exhibit E-26), recording her arrival and departure times, daily production, doctor appointments, complaints on several occasions that there was no work to do, time spent with an ergonomist, ongoing problems with some of her peers and their negative attitudes toward her, complaints by peers against her, etc.

[47] Superintendent Harris explained that because the grievor was performing only a single task in a multi-task office, it was causing low morale (Exhibit G-27). His explanations to four of her peers "did not console the Inspector staff." Earlier, in April 2002, he had emailed his overview of his 13 months supervising the grievor (August 2000 to October 2001), characterizing her as, at times, "confrontational, self-absorbed, and rude." Superintendent Harris stated that Chief Hussein requested that email.

[48] Superintendent Harris said that, when the grievor returned to work in June 2003, Mr. Spraggett and Mr. Roussel wanted her to complete 150 electronic releases per day. Superintendent Harris gave the grievor's actual production statistics to management so that it could monitor them, and said, "I didn't monitor all employees like I did Marcelle. This was the first time I'd been asked to do as extensive an audit as that." He characterized the 150 releases per day as a "target" and not a quota. He confided that "there was talk of the possibility that Marcelle may be terminated as far back as July 2004."

[49] Ms. Lau is a labour relations advisor who has been assigned the duty-to-accommodate portfolio. She became involved with the grievor in her original return-to-work plan in August 2000. As there were differences of medical opinion concerning what medical restrictions were to apply, Ms. Lau sought the advice of Dr. Chernin, an occupational health medical officer. As well, extensions and modifications to the original return-to-work plan were made following a meeting with the grievor's bargaining agent. Such extensions and modifications included increasing the phase-in period from the initial 6 weeks ultimately to 8 months, increasing both the hours and days worked and increasing the amount of work expected to be completed from 25 to 100 percent.

[50] Both Dr. Chernin and Lidia Darolfi, an occupational therapist, visited the workplace and recommended measures for a successful reintegration to the workplace (Exhibits E-2W and E-2X).

[51] Following the receipt of Dr. Galea's letter of April 9, 2002 (Exhibit E-29), the grievor was placed on leave (Exhibit E-32). Reacting to Dr. Chernin's suggestion that the grievor could return to work as early as the second week of July 2002 (Exhibit E-2(C)(I)), Ms. Lau sent Dr. Chernin (Exhibit E-73) a letter dated July 30, 2002, expressing her concerns with his suggestion and including the grievor's production statistics over a 15-week period (January 6 to April 20, 2002). Ms. Lau concluded by stating that ". . . [T]here is no indication that returning her to work at this point will meet with any success. . . ." and asking for further direction. This further direction (Exhibit E-2A), dated September 4, 2002, stated the following: ". . . Ms. Giroux would appear to be unfit to carry out the duties of her substantive position. Consideration should be given to seeing if there were an alternative, more sedentary position in the agency, or in other government departments. . . . "

[52] Ms. Lau sent a letter dated February 11, 2003, with an attachment, to Dr. Callary, Dr. Chernin's supervisor (Exhibit E-79), suggesting that if the grievor could not do the modified work, there was little hope of finding anything else for her in the organization and asking ". . . to put closure to this file over the next month as it would be unfair to both the employee and the Agency to allow this to continue beyond a reasonable sunset date."

[53] However, Dr. Callary concluded on April 2, 2003, that the grievor was fit to return with accommodations (Exhibit E-2(c)).

[54] The grievor did return to work and met the department's performance expectations, which was confirmed at a meeting on September 9, 2003. However, subsequently, her absenteeism increased and her production decreased again.

[55] In cross-examination, Ms. Lau said that she considered positions only "of a marked sedentary nature" once she received Dr. Chernin's letter. No consideration was given to either part-time work or to alternating schedules. "Ms. Giroux was already so limited in movement and alternate work had to be even less than that."

[56] No further prognosis was sought after Dr. Callary's opinion in the spring of 2003 (Exhibit E-26).

[57] Ms. Lau did not receive information that it would be impossible to accommodate the grievor, but she could not be assigned work that required more movement than she was currently assigned. Also, the grievor "was not entitled to a labour market re-entry under WSIB so there was no reason to either retrain her or to look outside the department for alternate work. No further requests for a medical opinion were made of Dr. Galea, as we were relying on advice from Dr. Chernin and Dr. Callary in the spring of 2003."

[58] Ms. Lau was involved in developing the departmental interim medical guidelines concerning accommodation (Exhibit E-32), and "sometimes we worked outside it."

C. Grievor's evidence

[59] The grievor began as a customs inspector in 1973 at Pearson International Airport. Following her accident at work on November 22, 1999, she began to see Dr. Galea initially weekly, then every other week. She still consults Dr. Galea as required. Dr. Galea gave her a physical exam and monitored her ability to move.

[60] The grievor believes that most of Dr. Galea's recommendations were not complied with; some not immediately, some not at all. She was told by Chief Hussein that the provision of recommended tools and an appropriate desk would have to be delayed until after the move from the Cargo "B" worksite to the infield.

[61] Dr. Chernin never gave the grievor a physical exam. She saw him only once, accompanied by her union representative, concerning computer duties. When Dr. Chernin came to the workplace, he did not meet with her.

[62] At a meeting with Superintendent Harris, the grievor identified her job preferences, focusing on work that did not involve a lot of sitting, but rather required a lot of movement and walking. She experienced a lot of pain sitting, which was less when standing, walking or bending. She stated: "Following a complaint letter concerning my having collected unnecessary taxes, I attended a meeting with Chief Hussein and was told that I was incompetent and a disgrace to the department. I felt unsafe and would not continue the meeting."

[63] The grievor was given a desk that required using a crank to adjust its height. She stated that "this was bad for my shoulder," and she was not permitted to take her old hydraulic desk with her.

[64] Dr. Galea, in a letter dated July 26, 2001, requested that a hydraulic desk be provided.

[65] As required as a precondition to being provided a hydraulic desk, the grievor signed a "Consent to release information" form on February 11, 2002 (Exhibit G-62). No such desk was provided that year.

[66] An email (Exhibit E-37) dated March 12, 2002, confirms a direction made on February 28, 2002, to the grievor to complete full rounds — the same production expected of an employee without a disabling condition — which was contrary to her doctor's advice. As detailed in Exhibit G-10, Dr. Galea's opinion was that a premature return to full production would not provide her sufficient time to recover.

[67] Following Dr. Galea's letter to the department about the stress that the grievor was experiencing and the causes of and impact of that stress, she was called in to see Mr. Spraggett. She stated: "There was no discussion of the cause of issues nor was there any offer of help. Despite my doctor, Dr. Chernin and the psychiatrist saying that I was fit, I was told to go home until the department got back to me." The grievor protested and asked that the causes of the stress be dealt with instead — to no avail. However, she was not allowed to return until June 2003 — 14 months later.

[68] Dr. Chernin had said on June 27, 2002, that the grievor was fit to return to work (Exhibit E-2(0)(I)). The grievor became further stressed to learn that only 11 weeks later, without seeing or speaking with her, Dr. Chernin now came full circle and expressed

his medical opinion that she "would appear unfit to carry out the duties of her substantive position."

[69] This latter position led to the November 12, 2002 meeting (Exhibit E-74), during which the grievor was given two options: retirement or termination.

[70] The grievor's next step was to write her deputy minister for help on November 26, 2002, while on leave (Exhibit G-66). Her representative copied the letter to the Deputy Minister of Health, which got Dr. Callary involved and resulted in her April 2, 2003 (Exhibit E-2(C)), letter declaring the grievor fit to return to work on a trial basis. The grievor met the expected production level by the end of the eight-week reintegration period (Exhibit E-20). Prior to that, a meeting was held on July 17, 2003, to discuss the results of a review of her first four weeks (Exhibit E-45). All results were quite positive.

[71] The grievor explained that some factors that contributed to her low production numbers were that she was having trouble learning the new computer program (Pegasus); she was handling only those of type "496" entries until shown how to do others; she had problems with colleagues (they had met with Superintendent Harris in an effort to get rid of her in favour of someone who could do the full range of customs inspector duties); and she had increased pain as a result of three additional falls at work (Exhibits G-74, G-76 and G-77) between July and December 2003.

[72] On January 19, 2004, a meeting was held to discuss the grievor's production numbers (Exhibit E-46), which were unacceptably low in 19 of the 22 weeks reviewed.

[73] However, by the next scheduled meeting on March 1, 2004, the grievor "reached and exceeded the minimum threshold goal of 150 processed entries."

[74] A further injury occurred unrelated to a fall. As a result of repetitive keying duties, the grievor was "experiencing aching, stiffness and pain in her right hand" (Exhibit E-50).

[75] By the next performance review meeting, on July 20, 2004, the grievor had once again fallen below the expected goal. Moreover, her attendance was also raised as being unacceptable. A decision was reached to meet again 8 to 10 weeks later.

[76] Approximately five weeks before the termination, the length of time the grievor was taking to do her stretching became an issue. A series of emails involving the grievor, her superintendent, Julie Bennett, and Superintendent Harris from July 23 to August 6, 2004 (Exhibit G-82), chronicles this most recent issue concerning the accommodation effort and the return-to-work plan.

[77] In cross-examination, the grievor said that she had attended a meeting on July 24, 2000, before she returned to work, to discuss her return (Exhibit G-50). She emphasized that sitting was uncomfortable and that stretching was required to relieve spasms. She was told that "permanent accommodation will not occur."

[78] It was acknowledged that the employer had delayed implementing some required ergonomic accommodations due to the relocation from Cargo B to the infield "to avoid paying twice." From August 2000 to March 2001, the grievor worked at Cargo B. From June 2001 to April 2002, when she was placed on leave, the grievor worked at the infield location. Following her return to work in June 2003, she said that the move to Interport was a problem as the staff did not want her working there. On the other hand, despite some problems with the staff, work at infield was preferable, since it was a new building (with automatic doors, an elevator, ramps and a first-aid room where she could stretch privately), it had parking nearby and it was a bilingual area where she could use her native language.

[79] The grievor, on being shown Dr. Callary's letter inviting her comments on accommodations that were not made (Exhibit G-72), said that "all physical accommodations had been made." As well, she was of the opinion that her medical condition "will not improve significantly."

III. Summary of the arguments

A. For the employer

[80] The duties of a customs inspector are outlined in Exhibits E-85 and E-86. In addition, the physical demands of the job are found in Exhibit E-78. However, when the original accident occurred in 1999, the grievor was acting in a PM-03-level program support position.

[81] In good faith, the employer made many attempts to bring the grievor back, including:

- modified duties;
- modified hours;
- work tolerance reviews;
- ergonomic assessment;
- implementation of all recommendations;
- training aids;
- repeated return-to-work plans;
- 14 months leave with pay;
- regular interaction with the grievor to inform her about their requirements, observed performance gaps and the consequences of not meeting their requirements; and
- counseling on medical retirement.

[82] A combination of the medical evidence and the grievor's actual performance shows that she is unable to maintain the performance expectations agreed to by Health Canada and her own doctor.

[83] Counsel for the employer relied on a number of cases, which, in order, were *Hutchinson v. Canada (Minister of the Environment)* (2003), FCA 133; *Scheuneman v. Canada (Attorney General)* (2000), 266 N.R. 154 (F.C.A.); *McCormick v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-26274 (19950918); *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (Meiorin Grievance)*, [1999] 3 S.C.R.; *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, [2007] S.C.J. No. 4; *Central Okanagan School District No. 23 v. Renaud*, [1992] S.C.J. No. 75; *Ontario Public Service Employees Union (Kerna) v. The Crown in Right of Ontario (Ontario Human Rights Commission)*, 2005 CanL 11 55151; *Re Canada Post Corp. v. Canadian Union of Postal Workers (Godbout)* (1993), 32 L.A.C. (4th) 289; *Corbiere v. Wikwemikong Tribal Police Services Board*, 2007 FCA 97; *Kerr-Alich v. Treasury Board (Department of Social Development)*, 2007 PSLRB 33; and *Joss v. Treasury Board (Agriculture & Agri-Food Canada)*, 2001 PSSRB 27.

[84] The employer had cause to terminate and fulfilled its duty to accommodate. The grievor agreed with the performance expectations.

[85] The modified duties are a fraction of her substantive or normal customs inspector duties. The grievor's excuses for her unacceptably low production were refuted by management witnesses. The only excuse that is left is that constant pain prevented her from achieving the expected results. Even after all accommodations were provided by the employer, the grievor said that she could only handle 70 to 80 percent of the normal workload. On July 10, 2001, the grievor wrote her superintendent (Exhibit E-41) that she was experiencing ". . . an excruciating sharp stabbing pain . . . so intense that I was unable to continue working." In Exhibit E-51, she was quoted as saying that "she experienced pain which prevented her from doing her work at times." This was three years after Exhibit E-41. The pain continued in April 2004 (Exhibit E-49), when the grievor had Superintendent Harris write an email stating that she had pain in her right hand "at work and at rest."

[86] According to *Meiorin*, a factor to be considered is one's occupational health. In the grievor's case, she had repeated falls (Exhibits G-76 and G-77) plus a wrist injury (Exhibit E-50) in the spring of 2004. The employer is obliged to consider whether there is further risk to the grievor.

[87] The grievor's attendance record (Exhibits G-55 and G-59), in conjunction with producing very little and experiencing pain while doing it, combine to demonstrate her incapacity.

[88] The grievor said that harassment was a factor in her low productivity. However, when she was moved from the harassment situation at the infield and placed at Interport, there was no improvement.

[89] On the issue of the provision of a hydraulic desk, the employer did not say no — it only questioned why it was necessary. The grievor's delay in providing a signed release of information form contributed to the delay in obtaining the desk.

[90] In the return-to-work plan (Exhibit E-65), full rounds and full production were required by February 2002. When the grievor protested, the employer dropped that demand and reduced its expectation to only three quarters of a round.

[91] Then came Dr. Galea's letter (Exhibit E-29) dated April 9, 2002, concerning stress in the workplace. The department reacted by allowing leave with pay for 14 months until June 2003. Faced with the grievor's return, in November 2002 the department met with her and offered her medical retirement or termination.

[92] When Dr. Callary concluded that the grievor was fit to return with accommodation on a trial basis (Exhibit E-2(c)), all recommendations were implemented. Monitoring was not done negatively but in a positive fashion, with suggestions. In short, the employer did all it was asked to do.

[93] Counsel for the employer briefly commented on the case law that was provided. I will deal with some of these comments in the reasons for my decision.

B. For the grievor

[94] The grievor's representative presented written submissions. Rather than present arguments separately on the two grievances, the arguments are grouped, since "both grievances relate to the same series of events and to a pattern of discrimination."

[95] The grievor had been a customs inspector for over 31 years. Moreover, her appraisals were highly satisfactory. She suffered an injury while at work — a permanent injury. On August 30, 2004, when the employer terminated the grievor, it had failed to accommodate her to the point of undue hardship.

[96] In reaching its decision to terminate, the employer elected to rely on the medical opinion of a doctor who had seen the grievor only once and who had never examined her. Instead, the employer ought to have relied on the medical opinion of the grievor's doctor, since he had examined her and had seen her regularly. It was and is Dr. Galea's opinion that if properly accommodated, the grievor could perform customs inspections or any other type of work.

[97] At the time of the termination, the grievor's employer was the Treasury Board, which had been the case since the transfer by Order-in-Council of December 12, 2003, of employees from the Canada Customs and Revenue Agency to the CBSA when the CBSA was created.

[98] The test that must be applied to the duty to accommodate is the test as set out in *Meiorin* and not the former approach of attempting to fit the disabled employee into the existing workplace. Much more is required of an employer than, as in the grievor's case, assigning her partial duties and, based on problems with those duties, concluding, as they did, that if she was unable to do those duties, she was unable to do anything.

[99] The employer failed to fairly consider all the reasons for the grievor not meeting the production goal set for her, such as ongoing difficulties with her peers and the stress that resulted from deteriorating relationships at work with both management and her peers.

[100] The employer wrongly focused, to the exclusion of all else, on production quotas and statistics. As well, there was no evidence to conclude, as the termination letter did, ". . . that you are also unfit to perform any other jobs in our organization. . . ."

[101] Rather than deal with the causes of stress, the employer reacted to Dr. Galea's letter by removing the grievor from the workplace (which she protested) and arranging for her to see a psychiatrist.

[102] As the grievor's injury was permanent, the employer was obliged to look for a long-term solution rather than reducing performance quotas expected of her in comparison to the able bodied.

[103] In assigning the grievor only one aspect of one job as opposed to performing a real examination of alternate jobs that may have been available or even bundling job duties that she could perform, the employer created an inevitable morale problem in the workplace and the perception that the grievor was not pulling her weight.

[104] Adding to the grievor's stress level was the scrutiny by Superintendent Harris, who said that he had never before so closely monitored anyone.

[105] The employer's evidence does not establish that production within given time frames is a *bona fide* occupational requirement. Nor is there evidence of the production statistics of other employees so as to ascertain the norm, the lows and highs, and the normal fluctuations. More fundamentally, when others performed the

function that the grievor was performing, it was only one aspect of their job and was not performed on a consistent basis, which prevents any real comparison.

[106] Production quotas were not the only concern. Evidence establishes that the grievor's absences were not just a concern, but a major concern.

[107] After September 2002 Dr. Chernin issued no further medical opinion. It was unreasonable to continue to rely on his earlier opinion that the grievor could perform duties only of a "marked sedentary nature" in August 2004. The employer should have sought and considered current medical information and current job availability. The employer failed to analyze alternate jobs to determine those functions tha t were essential and those that were non-essential. As well, the employer failed to consider part-time or reduced hours of work, let alone jobs outside the CBSA in the larger federal public service.

[108] Had the employer consulted Dr. Galea on alternate work being considered, Dr. Chernin, the grievor or her bargaining agent, it would have learned what the grievor could and could not do, but it consulted none of those sources. There was a difference in medical opinion within Health Canada. Dr. Chernin wrote the employer that it seemed that the grievor was not fit to work while his supervisor, Dr. Callary, concluded that she was fit to return on a trial basis.

[109] The evidence supports the argument that the grievor can not only meet but also exceed her performance statistics, at least some of the time. This is not a case where the employee is out of the workplace with no foreseeable return date set. On the contrary, the employer congratulated the grievor for her good work in the summer of 2003 and again in the spring of 2004.

[110] The employer, most importantly, has failed to establish undue hardship or that no other alternatives existed that would not have caused undue hardship. The limited two-year-old consideration of only 10 PM-01 level jobs in taxation and rejection of all those without medical support fails to meet its onus, even without considering the whole public service. There is no evidence that supports the contention that to accommodate the grievor further would have represented undue hardship in terms of health, safety or cost. The latter is especially true given the breadth, scope and financial resources of the federal government.

[111] The grievor's representative also relied on a number of decisions, which she urged me to consider: *Canada (Attorney General) v. Boutilier*, [2000] 3 F.C 27 (C.A.); *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union Local 324*, [2003] 2 S.C.R. 157; *Meiorin*; *Desormeaux v. Ottawa-Carleton Regional Transit Commission*, 2005 FCA 311; *Vancouver (Greater) v. Greater Vancouver Regional District Employees' Union (Dove Grievance)*, [2007] B.C.C.A.A.A. No 12 (QL); *Parisien v. Ottawa-Carleton Regional Transit Commission*, 2003 CHRT 10; *Coupal v. Canada (Attorney General)*, 2006 FC 255; *Sketchley v. Canada*, 2004 FC 1151; *Alberta v. Alberta Union of Provincial Employees*, [2005] A.G.A.A. No. 60; *Zhang v. Treasury Board (Privy Council Office)*, 2005 PSLRB 173; and *Dhaliwal v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 109.

IV. Reasons

[112] To begin, some facts are not in dispute.

[113] The grievor had, at the time of her termination, more than 31 years of service as a customs inspector; her performance appraisals were consistently in the highly satisfactory range, she was a valued employee, and she had never been disciplined.

[114] In addition, the grievor became injured while at work. The employer accepts that it has a duty to accommodate and, to its credit, went to considerable lengths to fulfill that duty.

[115] Did the employer fulfill its duty to accommodate to the point of undue hardship? That is, and must be, the focus of my decision.

A. Burden of proof

[116] The employer bears the burden of proving that the answer to the question above is in the affirmative: that it has discharged its onus of accommodating up to the point of undue hardship. If it fails to establish this, then the termination cannot be valid.

B. Duty to accommodate

[117] As stated in the letter of termination (Exhibit E-1), the employer must prove that the grievor is not physically or medically capable of performing her duties as a customs inspector. Beyond that, as part of the accommodation effort, it must also prove that she is ". . . also unfit to perform any other jobs in our organization. . . ." as also stated in the termination letter.

[118] Let me stop here, as these considerations are not only germane but central to my deliberations.

[119] In considering the grounds for termination as set out in the termination letter, I must begin with the duties of a customs inspector, which are described in Exhibits E-85 and E-86 and somewhat expanded in Exhibit E-78.

[120] There is no doubt that a customs inspector's job is not one dimensional. Far from it. One need only examine the key activities, listed at page 2 of Exhibit E-85, effective September 26, 2002, to see that there are 10, not 1, aspects to the job. To be specific, Key Activity number 3 is included: "Analyses information (paper or electronic) to effect the release of goods, to determine compliance with various legislative and program requirements, and to assess risk of non-compliance."

[121] The evidence of the grievor's performance of this one aspect is both abundant and clear. She can meet and exceed the performance goal, albeit reduced as a result of accommodation, some of the time. Indeed, on several occasions at meetings whose sole agenda was to discuss the actual results that she achieved, she was congratulated for her efforts. However, her performance of this one aspect was not consistent. There were highs and lows, peaks and valleys.

[122] Without closely examining the reasons for those weeks that fell short of the expected quota, what about the other nine key activities? What evidence have I to determine that the grievor cannot perform those activities? None whatsoever.

[123] I have not been given any evidence of the percentage of time spent on each duty nor how important each duty was in accomplishing the overall goal of the organization, as set out under *Client-Service Results.* However, I do have several positive performance evaluations, which are completed on the whole job rather than on just "a fraction of the duties." In addition, the grievor, at the time of her 1999

injury, was acting in a more senior position, at the PM-03 level, which further confirms management's confidence in her abilities.

[124] The absence of evidence on whether or not the grievor could perform the other 9 aspects, which could represent as much as 90 percent of a customs inspector's duties, is troubling, considering the grounds for termination set out in the termination letter (Exhibit E-1).

[125] Of course, from her return to duty until her termination some four years later, the grievor was never given an opportunity to attempt to perform the duties that constitute the bulk of her job. I have some difficulty, then, in understanding how Mr. Mantzel could reach the conclusion that not only can the grievor not perform her substantive job, that of a PM-02 level customs inspector, but also that she cannot perform ". . . any other jobs in our organization. . . ."

[126] How could he, as he stated, be comfortable with the decision to terminate a 31-year career without any current medical evidence on her functional abilities to perform that or other jobs and without revisiting job availability since it was last done in 2002?

[127] Can an employer definitively conclude that an employee who can only meet production quotas some of the time on 1 of 10 duties conclude, as Mr. Mantzel did, that if the grievor could not perform the reduced duties of one tenth of the job, she could not do the other nine tenths? The other nine include such tasks as:

1) *Conducts primary examinations of persons and/or conveyances, goods. . . . Refers for secondary examination . . . identifying inadmissible persons . . . goods or conveyances that are suspect.*

2) *. . . arrest and detain individuals. . . .*

3) *Assesses, collects, . . . federal/provincial duties, taxes . . . and ensures compliance with import/export regulations.*

4) *Conducts secondary examinations, and warehouse audit. . . .*

5) *Provides information to the travelling . . . public . . . and to respond to enquiries, concerns, and service complaints.*

6) *Gathers information . . . inputting data into databases. . . .*

7) *Consults with peers . . . researches and analyses various databases. . . .*

8) *Provides guidance and on-the-job training. . . .*

9) *Serves as a member of a working team and shares information with colleagues, provides training. . . .*

[128] Simply put, Mr. Mantzel cannot, and that is the rub.

[129] One cannot help but wonder what the grievor's fate might have been had any of the other nine tasks been assigned to her. Another question is why, when it was noted that the grievor had difficulty in consistently reaching the production quota of the one task assigned, was she not assigned different tasks, particularly those that did not require a production quota, or required a service standard?

[130] It seems reasonable that a valued employee with 31 years' experience would have been a valuable asset to many of the other tasks, particularly Key Activities 6, 8, 9 and 10 (Exhibit E-85). These activities might benefit from mentoring, based on long experience, to new, temporary or student employees, as provided under *Leadership of Human Resources* at page 4 of the job description (Exhibit E-85).

[131] The employer's evidence goes solely to the one task assigned, a task that it says is only a very small fraction of the duties of a customs inspector. Even then, the employer's own evidence is that the grievor, some of the time, met and exceeded what was expected of her. I have no evidence that her quality of that work was unacceptable.

[132] Ms. Lau said that the medical opinions relied on in arriving at the decision to terminate were those of Dr. Chernin and Dr. Callary. Dr. Callary's most recent medical opinion was communicated to Ms. Lau by letter dated April 2, 2003 (Exhibit E-2(C)). In that letter Dr. Callary states that "Ms. Giroux has been examined by a medical specialist consultant." Based on that physical examination by a specialist, Dr. Callary recommends, contrary to and subsequent to Dr. Chernin's last medical opinion, that "Ms. Giroux is fit to return to work on a trial basis. . . ." No further medical opinion was requested.

[133] Thus far the employer has not proven that the grievor cannot perform the substantive duties of a customs inspector. Nor has the employer proven that she is medically incapable of reporting for work. On the contrary, the doctor from whom the

employer last received a medical opinion is unequivocal in his opinion that the grievor is fit to return to work. That opinion is consistent with Dr. Galea's opinion.

[134] What about the duty to accommodate? As mentioned at the outset, the employer went to considerable lengths to accommodate the grievor. The evidence, at least in the main, is not contradicted that, despite some delays and arm-twisting efforts by Dr. Galea, the overwhelming majority of recommendations were implemented. Dr. Galea, on the other hand, had harsh words indeed for the employer's commitment: "It was like pulling teeth to get a desk, chair and first aid station," "of all the companies I have dealt with in accommodating injuries, the federal government was giving me the hardest time," and "my recommendations on increasing hours of work were a waste of time, and I might as well not have bothered writing them down."

[135] The unnecessarily long delay in providing a hydraulic desk, made worse by providing a manually cranked desk, is instructive.

[136] Counsel for the employer said that regarding the desk, it had not said "no" but had only asked "why." Dr. Galea, more positively on the other hand, asked "Why not?" Regardless, it took years to provide one. The employer argued that at least some of the delay was attributable to the grievor's delay in signing the "Consent to release information" form. However, the evidence is that even once signed, another year slipped by before the desk was provided.

[137] Dr. Callary's final recommendation (Exhibit E-2(C)) was that: "If there are difficulties with the work reintegration it may be helpful to retain the services of a return to work facilitator." Clearly, there were difficulties, but no facilitator was provided.

[138] The duty to accommodate and the *Canadian Human Rights Act* are neither new nor unknown in the federal public service. Nor is the duty to accommodate a stagnant concept; it is dynamic and evolving, a concept with which Ms. Lau, who had the portfolio, was well familiar. That being said, what would explain such glaring missteps as not obtaining a current medical prognosis, not performing a current job availability study prior to termination and choosing to use information that was two years old?

[139] I am mindful that it was Ms. Lau herself who objected to Dr. Chernin's opinion that the grievor could return to work as early as July 2002 and who expressed in writing to Dr. Callary her opinion that it was unlikely that any alternate work would be found for the grievor. Indeed, in that same communication, Ms. Lau urged Dr. Callary to take urgent action so as not to allow the status quo to continue beyond a reasonable sunset date. This was done more than one year prior to the termination.

[140] Why did the department limit their search for alternate work to only 10 positions, those in taxation at a more junior level, and then discard all of those without seeking a medical opinion on the grievor's ability to perform the various jobs?

[141] The employer chose not to look at part-time work and not to consider bundling duties. No mention was made of why the grievor was not considered for more senior-level acting opportunities such as she was performing at the time of the 1999 injury.

[142] I hesitate to characterize the employer's search for alternate work as only lip service but, to put it in the most positive light, it was less than Herculean. It was a great deal less than the kind of exhaustive search that would have been necessary to begin to support a sweeping statement, such as was made in the letter of termination, that the grievor cannot do any job in the organization. Or for Mr. Roussel to state in evidence that he "had no doubts in his mind that there was not any position that would satisfy Ms. Giroux's needs."

[143] In agreeing with Ms. Lau that the 10 jobs that they jointly considered were beyond the grievor's medical capabilities, Mr. Roussel did not attempt to identify how or if any of the jobs could have been modified to meet her physical capabilities.

[144] Given these limitations, it is puzzling why Dr. Chernin's suggestion of September 4, 2002 (Exhibit E-2(a)) — ". . . Consideration should be given to seeing if there were an alternative, more sedentary position in the agency, or in other government departments. . . . [emphasis added]" was not pursued.

[145] Perhaps the answer can be found in Ms. Lau's comment in evidence that since the grievor "was not entitled to a market re-entry under WSIB there was no reason to either retrain her or to look outside the department for alternate work." In fulfilling its duty to accommodate up to the point of undue hardship, I believe that the employer

should have done a search for alternate work along the lines contemplated in *Zhang*. In that case, the Treasury Board, as the employer, was required to conduct a diligent search. "Termination of employment should be the option of last resort [emphasis added]." [*Zhang*, at para. 61, quoting from the federal court decision *Singh v. Canada (Public Works and Government Services)*, 2001 FCT 577]

[146] While *Zhang* involves different facts and the application of the *Personnel Security Standard*, which this case does not, nevertheless, the grievor is in a no-less-unfortunate position than Ms. Zhang. The grievor is being deprived of a valued 31-year career for reasons equally beyond her control — her physical limitations as a result of a workplace injury. The employer's 2-year-old and limited consideration of 10 jobs in taxation was no less perfunctory than that described in *Singh*, and cannot be allowed to suffice if the duty to accommodate is to have any meaning.

[147] This negative approach to accommodation, combined with the earlier conclusion on February 11, 2003, in a letter to Dr. Callary (Exhibit E-79) that: ". . . It is our belief that if an employee is unable to perform duties that would require such limited movement that there would appear to be very little latitude for anything else in our organization. . . ." proved fatal to any more meaningful accommodation.

[148] There were two other roadblocks preventing the department from more actively pursuing accommodation efforts: (a) their complete reliance on what appears to me to be at least questionable advice from Dr. Chernin that the grievor could perform only sedentary duties and (b) the insistence on what may be an arbitrary choice of a 70 percent production quota.

(a) Dr. Chernin's opinion

[149] In the first place, Dr. Chernin's advice to restrict the grievor to sedentary duties is in stark contrast to the grievor's information prior to her return to work in August 2000. The grievor said that sitting was painful and that she needed to stand, move and stretch to relieve spasms of pain in her back. It is also in stark contrast to Dr. Galea's medical opinion that sedentary work would only worsen the grievor's medical situation. Considering that Dr. Chernin had spoken only once to the grievor and had never examined her, the preference of his opinion over those of the grievor and Dr. Galea is unreasonable at best, and perhaps self-serving.

(b) 70 percent requirement

[150] The employer somehow determined that this was a reasonable expectation. It was not explained why the number 70 was chosen, as opposed to any other figure, nor that that particular rate of production was a *bona fide* occupational requirement. However, Mr. Roussel testified that "Ms. Giroux had to be of some value [emphasis added]." Customs work is not a factory environment but rather a service-oriented workplace. Yet at the end of the day, it was the grievor's failure to consistently meet the production quota that sealed her fate. It was not shown that it would represent undue hardship to the employer to either excuse her from that task or to delegate it to another inspector, perhaps in exchange for some other duty that did not carry with it a service standard requiring a quota. Mr. Spraggett testified that "there remained approximately 500 000 electronic releases yet to do across the country." This sheds some light on the time required to do the releases and the relative importance of this task — if fully half a million releases were not done, how high a priority were they?

[151] Another troubling aspect of this form of number crunching is that it fails to take into account the evidence that some releases were more complex than others and took longer to do. I have seen no evidence that either this or the fluctuation in available releases during the review period was considered in the performance monitoring.

[152] The duty to accommodate was designed to meaningfully incorporate diversity into a workplace and to allow all employees the opportunity to work by eliminating discriminating barriers. Of course, if the employer can demonstrate by persuasive, compelling evidence that, according to the *Canadian Human Rights Act*, to accommodate the grievor would create an undue hardship for reasons of cost, health or safety, it has fulfilled its duty. I have not seen such evidence. Indeed, in considering cost, usually the most difficult to prove, the size of the organization and its financial ability to absorb the accommodation are relevant factors. After the Order-in-Council of December 12, 2003, which created the CBSA fully eight months prior to the termination, the organization became part of the federal government, with all its financial resources. The psychiatrist chosen by the employer found that the grievor posed no risk to herself or to her colleagues in terms of safety. That leaves health and, again, the evidence must be compelling that risk to health if an accommodation is implemented is probable, not possible. Indeed, looking at the job description

(Exhibit E-85), risk exists for all customs inspectors. Looking at *Psychological/Emotional Effect* at page 10, *Work Environment* at page 11 and *Risk to Health* at page 12, it seems clear that risk is a part of the job and is virtually impossible to eliminate, and yet the work goes on.

[153] I have no evidence that would excuse the employer from its duty to accommodate in this case. Much is required of an employer to satisfy that duty and in this case, much more than was done for the grievor. An employer is obliged to exhaust all reasonable avenues to accommodate, and that was not done.

[154] It is the employer's evidence that in two of the three worksites the grievor was assigned to work, there were problems with staff and low morale. In fact, Superintendent Harris testified that he met with four of the grievor's peers, who sought to have her removed from their midst. Beyond that there were multiple complaints lodged against the grievor. Superintendent Harris was clear that the grievor being assigned only one task in a multi-task office was a major cause of low morale and that his explanations did little to alleviate the morale problem.

[155] The grievor said that she found that situation stressful, and I believe her.

[156] The evidence is also clear that as early as November 2002 the employer made it clear that it wanted the employment relationship to end. Again, the grievor said that that was stressful, and again I believe her.

[157] The grievor said further stress was caused by delays in implementing recommended changes and by aggressive management tactics, such as obliging her to remain away from work for 14 months and delaying her return for more than 2 months after Dr. Callary said that she was fit to return.

[158] Again, I believe the grievor. However, it was not the stress alone that affected her production. Dr. Galea's unchallenged evidence was that stress increased the symptoms from which she was already suffering. He added that anyone in her situation would feel stressed and that it would be abnormal not to. Even Dr. Galea felt the stress in dealing with problems associated with accommodation efforts and, as he said, he did not even work there.

[159] Yet the department reacted to Dr. Galea's letter concerning stress by ordering the grievor to remain at home indefinitely "until you hear from us" and by requiring her to see a psychiatrist of their choosing.

[160] Even in the most generous view, that is hardly in keeping with the spirit, let alone the letter, of accommodation.

[161] The employer did not live up to its obligation to accommodate the grievor's disability, and as noted in the reasons set out above, has not met the burden of proving that the termination was valid. It must fail in this grievance.

C. The discrimination grievance (PSLRB File No. 166-02-35120)

[162] The grievor grieved a "violation of my rights under article 19" of the collective agreement, which reads as follows:

> *ARTICLE 19*
>
> *NO DISCRIMINATION*
>
> ***19.01*** *There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national origin, religious affiliation, sex, sexual orientation, family status, mental or physical disability, membership or activity in the Alliance, marital status or a conviction for which a pardon has been granted.*
>
> . . .

[163] While the Canadian Human Rights Commission has jurisdiction to hear and decide grievances contesting a breach of article 19 of the collective agreement, what is commonly referred to as a "bounce back order" has been issued under section 41 of the *Canadian Human Rights Act*, sending this grievance back to be resolved through the grievance procedure, which includes the reference of an unsatisfied grievance to adjudication.

[164] In the above decision concerning the grievor's termination, I made a number of findings of fact that relate to the discrimination grievance:

1) the grievor was injured while at work;

2) the injury left the grievor with some degree of disability;

3) the employer owed a duty to the grievor to accommodate that disability;

4) the employer failed in that duty; and

5) having failed to accommodate the grievor's disability, the employer terminated her employment for her failure to consistently meet its expected production quota.

[165] These related facts, taken on their own, are sufficient to decide the discrimination grievance.

[166] Terminating an employee who has become disabled without first exhausting the duty to accommodate is a discriminatory act. It is an act of omission.

[167] Having already determined above that the grievor was discriminated against, I need not, at any great length, go into the issues of commission that were cited by her representative. However, certain examples of a lack of good faith need, at least, to be commented on, as follows:

1) Superintendent Harris said that he was directed to monitor the grievor very closely. Moreover, he said that he had never before performed such close monitoring. Notes from his daily diary go beyond reflecting on her performance. As well, he wrote a very positive appraisal of the grievor covering a certain review period. Yet he testified that, at Chief Hussein's direction, he wrote very negative comments about the grievor covering the same period. The former and official version of the grievor's performance was for her eyes while the latter was not. This tactic does not speak well of management's approach to accommodation.

2) Chief Hussein, at a meeting in Janet Gover's presence, raised her voice to the grievor, characterizing her as a disgrace to her uniform. In her testimony, Chief Hussein was not at all apologetic but dismissed her unprofessional outburst by saying that she was not having a good day at the time.

3) Manager Margaret Fiske, ignoring the medical opinion of the grievor's doctor on increasing her daily production, insisted that the grievor begin doing full rounds prematurely. It was only when the grievor protested that the department retracted.

4) As early as November 2002, Mr. Spraggett and Ms. Lau coerced the grievor to "voluntarily" end her employment by choosing to retire. The coercion was that if she did not, she would be terminated. Again, in January 2004, management developed an "action plan" with the aim of terminating the grievor. Finally, and for the third time, management wrote to her of the "retire or be terminated" option just four days before the termination letter was written.

5) While some attempts were made (to no avail) by Superintendent Harris to quell the concerns of the grievor's colleagues about her not handling her fair share of the workload, management failed to provide the grievor a harassment-free workplace.

6) Rather than deal with the grievor's stress in the workplace and its causes, management took the path of least resistance by placing her on involuntary and indefinite paid leave for what turned out to be 14 months. During that time, the grievor was obliged to consult a psychiatrist. Once again, this was an overreaction, to be sure, but more than that it seems to dovetail nicely with Dr. Galea's testimony that the employer "seemed to be punishing her for being injured."

[168] Given sections 7 and 14 of the *Canadian Human Rights Act* as to what constitutes a discriminatory practice in the course of employment, I have no hesitation in finding that the grievor was discriminated against, harassed and coerced on a prohibited ground of discrimination, her physical disability.

D. Conclusion

[169] Given my finding that the employer did not fulfill its duty to accommodate, the appropriate remedy, applying *Gannon v. Canada (Treasury Board)*, 2004 FCA 417 decision, is reinstatement.

[170] However, the terms of reinstatement are more complex. Before I can award a full remedy, I would need to consider submissions from the parties on mitigation of damages, as there is insufficient evidence on wages earned since the termination. Separate matters that I must also consider are: the number of days or percentage of time the grievor would have been absent and not available for work; and, any pension monies received during the retroactive period. To order a reinstatement effective at the date of termination without fairly considering these factors could result in unjust enrichment to the grievor and could be unfair to the employer.

[171] I invite the parties, within the next 30 days, to provide their submissions (perhaps including a formula based on leave used in the last year of employment) on the appropriate date of reinstatement.

[172] In the alternative, the parties may wish, given my findings, to negotiate their own resolution, which does not involve a reinstatement.

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

(The Order appears on the next page)

V. Order

[174] Both grievances are allowed.

[175] The parties have 30 days to provide submissions on the appropriate date of reinstatement.

[176] I remain seized for a period of 60 days from the release of my decision solely for the purpose of awarding a remedy unless the parties choose one of their own making.

December 3, 2008.

Barry Done,
adjudicator