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File: 566-34-484

Citation: 2009 PSLRB 15

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

MARY ALICE LLOYD

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Lloyd v. Canada Revenue Agency

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before:	George Filliter, adjudicator
For the Grievor:	Steve Eadie, Professional Institute of the Public Service of Canada
For the Employer:	Shelley C. Quinn, counsel

Heard at Toronto, Ontario,
September 15 to 17, October 27 and 29 to 31 and December 8, 2008.

I. Introduction

[1] Mary Alice Lloyd ("the grievor") began her employment with the predecessor of the Canada Revenue Agency ("the employer") in Nova Scotia in 1997. She completed a Bachelor of Business Administration degree from Acadia University in 1994 and began course work towards acquiring a designation as a Certified Management Accountant, which she eventually obtained in 1999. The employer promoted the grievor to various positions, and eventually, in 2004, she assumed the position of AU-03 (Auditor 03) in the Criminal Investigation division in Toronto.

[2] In June 2005, the grievor was diagnosed with fibromyalgia after having suffered for a lengthy period from what she described as chronic body pain and from having had jaw surgery in February 2004. In any event, through a series of circumstances, the particulars of which will be discussed in this decision, the grievor felt that her employer failed to provide her with adequate and timely accommodation. As a result, she filed a grievance on February 6, 2006. That grievance is the subject matter of this decision.

[3] On July 27, 2006, the grievor gave notice to the Canadian Human Rights Commission ("the Commission") that she was raising, at adjudication, an issue involving the interpretation or application of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 ("the *CHRA*"). On December 8, 2006, the Commission notified the Registry of the Public Service Labour Relations Board ("the Board") that it did not intend to make submissions regarding the issue raised by the grievor.

II. Issues to be decided

[4] Normally, the first issue to be decided in cases such as these is whether the grievor suffered from a disability. However, during the hearing, the employer acknowledged the fact that the grievor suffered from fibromyalgia, which they concurred was a disability. The Board is of the view that the issues to be decided are as follows:

i. The grievance refers to three articles of the collective agreement, including referring to one article to allege that the employer had intimidated the grievor. Is this matter properly before the Board, and if so, has the grievor adduced evidence to support her allegation?

ii. Has the grievor established that her disability required that the employer put in place a plan of accommodation?

iii. If so, did the employer provide and implement a plan of accommodation? As a corollary, was the plan, if any, appropriate, reasonable and timely?

iv. Did the employer discriminate against the grievor?

v. If so, what is the appropriate remedy that should be ordered in this situation?

A. The grievance refers to three articles of the collective agreement, including referring to one article to allege that the employer had intimidated the grievor. Is this matter properly before the Board, and if so, has the grievor adduced evidence to support her allegation?

[5] The relevant collective agreement was introduced with the consent of the parties and is entitled "Agreement between the Canada Customs and Revenue Agency and the Professional Institute of the Public Service of Canada – Group: Audit, Financial and Scientific (all employees) – (expiry date: December 21, 2007) ("the collective agreement")". In her grievance, the grievor made specific reference to article 24 (Safety and Health), clause 34.20 (Grievance Procedure) and article 43 (No Discrimination). In argument, the grievor's representative withdrew the reference to article 24. However, he submitted that both clause 34.20 and article 43 were relevant to the issues before the Board. Counsel for the employer did not object to the withdrawal of the reference to article 24; however, she took issue with the reference to article 34.20, submitting that because the facts of this matter revolved around an allegation of discrimination, the only relevant provision was article 43.

[6] Clearly, the parties are *ad idem* (of the same mind) with respect to the suggestion that article 43 of the collective agreement is relevant for the purposes of this grievance, but they are not in agreement with respect to clause 34.20, which states as follows:

> *No person shall seek by intimidation, by threat of dismissal or by any other kind of threat to cause an employee to abandon a grievance or refrain from exercising the right to present a grievance, as provided in this Collective Agreement.*

[7] It is the view of the Board that only in certain limited circumstances should an adjudicator make a ruling that has the effect of limiting the allegations of the grievor. Despite the able argument of counsel for the employer, I am of the view that this situation is not such a circumstance. Having said that, after a review of the evidence and the documents marked as exhibits, I conclude that there was no oral testimony or documentary evidence adduced to support the claim that clause 34.20 of the collective agreement was in any way violated. As a consequence, without the evidentiary basis to support this allegation, I hereby dismiss the part of the grievance alleging that clause 34.20 had been violated.

[8] As a result, the only provision of the collective agreement before the Board is article 43, which states as follows:

> *43.01 There shall be no discrimination, interference, restriction, coercion, harassment, intimidation or any disciplinary action exercised or practised with respect to an employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, family status, marital status,* ***mental or physical disability****, conviction for which a pardon has been granted, or membership or activity in the Institute.*
>
> [Emphasis added]

Of course, that article must be read in conjunction with subsection 3(1) and section 7 of the *CHRA*, which state:

> *3.(1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status,* ***disability*** *and conviction for which a pardon has been granted.*
>
> [Emphasis added]
>
> . . .
>
> ***7.*** *It is a discriminatory practice, directly or indirectly,*
>
> (a) *to refuse to employ or continue to employ any individual, or*
>
> (b) *in the course of employment,* ***to differentiate adversely in relation to an employee****, on a prohibited ground of discrimination.*

[Emphasis added].

B. Has the grievor established that her disability required that the employer put in place a plan of accommodation?

[9] The grievor was diagnosed with fibromyalgia in June 2005. Although more detail will be provided on that matter later in this decision, the diagnosis occurred after a long history of what the grievor referred to as "chronic body pain." Dr. Jan Carstoniu, a physician specializing in the management of chronic pain, treated the grievor and was a witness in this proceeding. He confirmed both the grievor's diagnosis and history.

[10] Dr. Carstoniu has an impressive résumé. He is both a licensed psychologist in the province of Quebec, where he commenced his practice, and a family practitioner in Ontario, where he now resides. In 1995, he created the Headache and Pain Management Clinic ("HPMC"), where he now works full-time. With the consent of counsel for the employer, Dr. Carstoniu was qualified as an expert in "Multi Disciplinary Pain Management and Cognitive Behavioural Therapy." In that capacity, Dr. Carstoniu testified that fibromyalgia is really a "clinical diagnosis of exclusion." In other words, the diagnosis comes as a result of ruling out other possible ailments. In the grievor's case, this meant that conditions such as lupus and multiple sclerosis were ruled out.

[11] Dr. Carstoniu also testified that the impact of this disease varies from person to person and that for each individual, the impact varies from day to day. In his experience, Dr. Carstoniu has found that one must treat the condition through a variety of differing approaches that may include psychological intervention, pharmaceutical intervention, life style intervention and behavioural adjustments. However, his approach generally concentrates on the individual's acceptance of the disease and how best to cope with it.

[12] Dr. Carstoniu testified that the grievor has been his patient since July 2004, when she was referred to him by her family physician some four months after jaw surgery. The grievor continues to be his patient, and Dr. Carstoniu described her as an individual who does not "catastrophize" and who is very willing to work diligently since she "wants to improve." However, he described the grievor's prognosis as "abysmal to poor with respect to complete recovery" and stated that she needs now, and needed in the relevant time frame, support to be as "functionally autonomous" as possible.

[13] The uncontradicted evidence of both the grievor and Dr. Carstoniu was that the grievor found initial relief with the use of pharmaceutical intervention, although she is now taking much smaller amounts of medication. Furthermore, she has been an active participant in both private sessions and in the weekly group sessions offered by Dr. Carstoniu at the HPMC. She testified that she is able to find some relief through participation in regular low-impact exercise such as cycling. My observation was that the grievor was certainly not a malingerer, and in fact, this was not alleged by the employer.

[14] It is clear to me that the grievor has established, at least upon a balance of probabilities, that she is in need of a flexible plan of accommodation so that she might continue to be the valuable employee the employer admitted that she was. In fact, the employer, by its very position, acknowledged the need for accommodation by purporting to alter the grievor's job requirements and conducting an ergonomic assessment of her workplace. So, the question to be decided is whether the alterations to the grievor's work requirements amounted to a plan of accommodation and, if so, whether they were adequate under the circumstances.

C. If so, did the employer provide and implement a plan of accommodation? As a corollary, was the plan, if any, appropriate, reasonable and timely?

[15] I am of the view that, to properly consider this issue, one has to delve into the grievor's history. She testified that before her jaw surgery in February 2004, she had suffered from what she described as "chronic body pain," mostly in her back. In fact, the employer did not take issue with her testimony that when she approached Al Horbatiuk, her immediate supervisor, to make arrangements concerning the anticipated four to six weeks of leave that she needed for her jaw surgery, it was because she had very little sick leave available despite having been an employee for about seven years. She also testified that although Mr. Horbatiuk told her "not to worry," at no time did he approach her to discuss the back pain from which she suffered.

[16] Of course, in February 2004, the grievor had jaw surgery, and she did not recover well. In fact, the evidence was that she was prescribed pain medication that did not work well, and eventually, some four months later, she began seeing Dr. Carstoniu. Throughout that period, she participated in the group sessions offered at the HPMC, continued to take medication as prescribed and missed a fair amount of time from

work. During that period, she was on a "compressed work week schedule" that, among other things, allowed her to attend the weekly group sessions overseen by Dr. Carstoniu.

[17] In the early part of 2005, she testified that she was unable to move. In fact, from that time onwards, she was having great difficulty arriving at work on time and was on occasion questioned by Mr. Horbatiuk. In fact, the grievor went to see Roy Prince, Mr. Horbatiuk's immediate supervisor, about the situation. The grievor's uncontradicted evidence was that Mr. Prince told her that he would deal with the situation, since Mr. Horbatiuk was "old school." In any event, during that period, the grievor was undergoing many tests, and eventually, in June 2005, she was diagnosed with fibromyalgia.

[18] The grievor testified that she was visibly in pain, and yet none of her supervisors showed any concern. To corroborate her testimony, the grievor called as a witness a fellow worker, Hans Nielson, who confirmed that he had observed the grievor arriving late to work on occasion, having difficulty staying awake in the afternoons, showing signs of pain, which he described as "pretty obvious to anyone", and being frustrated. To take issue with the grievor's visible signs of pain, the employer called as a witness Barb Lovie, but even she acknowledged in her testimony that she had observed the grievor walking stiffly, that the grievor had spoken to her about fibromyalgia, and that at one point the grievor was unable to type because of tingling in her hand. In addition, Mr. Horbatiuk himself testified that Ms. Lovie had come to him and told him about the tingling in the grievor's hands. Also, he had noted that the grievor at one point no longer joined the staff when they went to their weekly lunches, that the grievor was stiff on occasion, and that she was often late for work. Given this testimony, I conclude that the grievor did show obvious and visible signs of pain that should have been noted by her supervisors.

[19] During that period, leading to the end of June 2005, there was no formal or indeed informal plan of accommodation, but with the diagnosis of fibromyalgia, the grievor felt that such a plan should have been put into place. At the very least, she expected her employer to act in a manner that would suit her needs. To that end, on June 30, 2005 (Exhibit 6), she sent an email to Mr. Prince in which she "cut and pasted" a relatively succinct description of the effects of fibromyalgia. Her testimony was that by providing this information to her employer she expected that an ergonomic

assessment would be done so that she would continue to be a valuable employee. In fairness, the grievor did indicate that, at that point, even though she was not aware of the true nature of an ergonomic assessment, she was trying to obtain assistance from her employer.

[20] The email was the subject of much controversy in these proceedings since Mr. Prince testified that he did not receive it. Had his testimony stopped at that point, there really would have been nothing more to say. However, he stated in cross-examination that not only had he not received it, he "did not know if it had been sent." That allegation, coupled with the cross-examination of the grievor by counsel for the employer, raised the spectre of the grievor's credibility.

[21] Indeed, the employer called Neil O'Brien, who with the consent of the grievor's representative, was declared an expert in the Canada Revenue Agency's computer systems. Mr. O'Brien testified that, based upon his examination of the computer records, he concluded that the grievor had sent the email in question and that Mr. Prince had not received it. In direct examination, a document was introduced that Mr. O'Brien stated confirmed with absolute certainty that Mr. Prince had not received the email in question. The document (Exhibit 53) showed that there was no "Message ID Number" that the system would have generated had the email been delivered. On cross-examination, Mr. O'Brien was shown a similar document (Exhibit 54) by the grievor's representative that showed a "Message ID Number" associated with the same email. Mr. O'Brien concluded that if the second document had not been tampered with, then it indicated that the email in question was in fact received by Mr. Prince. However, he said that to be certain, he would have to verify the validity of the new document. I found Mr. O'Brien's testimony to be fair and balanced, and as a consequence, I conclude that he was credible.

[22] When asked what he needed to verify the validity of the new document generated by the grievor, Mr. O'Brien testified that he would need to have access to the grievor's computer. The grievor agreed to allow Mr. O'Brien that access, but counsel for the employer declined the offer. In my view, Mr. O'Brien's evidence and the grievor's willingness to make her computer available to Mr. O'Brien for the purposes of verifying the validity of the document that her representative presented in cross-examination support a conclusion that the grievor was indeed credible.

[23] On the other hand, it was my observation that Mr. Prince was vague and unresponsive, even to simple questions. He often was unable to remember specifics. His demeanour was condescending, and he often answered questions with questions. In addition, when asked to explain delays, his answer was "What else could I do?" For all of these reasons, where the grievor's testimony varies from that of Mr. Prince, I prefer the evidence of the grievor. She was forthright and, in my view, very credible.

[24] There is no doubt in my mind that the grievor did send the email to Mr. Prince on June 30, 2005. I am not as certain that he received it. However, as testified by the grievor, the email was sent after a discussion she had with Mr. Prince. In fact, the beginning of the email states as follows:

. . .

> *This gives a good overview of what I discussed with you the other day. I am still not able to discuss this with Al.*
>
> *Do you require anything further from me in regards to my request for an ergonomic assessment for my workplace?*

. . .

Mr. Prince denies having that discussion with the grievor, but I am of the view that the grievor's evidence is preferable. Therefore, I conclude that by the end of June 2005 Mr. Prince was aware that the grievor was requesting an ergonomic assessment because of her recent diagnosis of fibromyalgia. I draw this conclusion whether or not Mr. Prince received the email of June 30, 2005.

[25] It is uncontested that an ergonomic assessment is only the first step in a case such the grievor's developing an adequate plan of accommodation, so it is understandable that the grievor was frustrated by the fact that despite making her request in June 2005, nothing was being done. As a result, the grievor followed up on her request by speaking again with Mr. Prince in August 2005. At his request, she obtained a letter from Dr. Carstoniu dated August 8, 2005 (Exhibit 7), and delivered it to Mr. Prince. The letter supported the grievor's earlier request for an ergonomic assessment. Mr. Prince agreed to speak with another employee about such an assessment, but no action was taken, and the ergonomic assessment requested by the grievor was not ordered..

[26] By September 1, 2005, there had still not been an ergonomic assessment conducted or even requested by the employer. The grievor, on her own initiative, sent an email (Exhibit 12) to Mr. Horbatiuk on September 1, 2005, providing him with the appropriate forms to complete the request for an ergonomic assessment. The grievor testified that at this juncture, she was extremely frustrated and had approached Ann Elizabeth Wisdom, who testified on behalf of the grievor. Ms. Wisdom is a trained employee equity coordinator for the employer. As such, she is aware of requests for such things as ergonomic assessments. In fact, she assisted the grievor starting in August 2005 by providing her with advice.

[27] In any event, despite the email of September 1, 2005, Mr. Horbatiuk did not complete the request for an ergonomic assessment until September 14, 2005 (Exhibit 13). When asked, Mr. Horbatiuk, in a written statement to his employer, which was introduced into evidence (Exhibit 60), initially took responsibility for the two-week delay. However, during his testimony, he recanted that acknowledgement. Frankly, I find Mr. Horbatiuk's change of heart to be extraordinary, especially considering his simple response when asked why he was taking this position: "I did not have the exhibits with me when I wrote my response." Even when cross-examined on this point, Mr. Horbatiuk offered nothing further than that statement. I am of the view that his change in position is simply inexplicable, and I conclude that the two-week delay is the direct responsibility of Mr. Horbatiuk.

[28] Regardless, once Mr. Harbatiuk eventually made the request on September 14, 2005, some two-and-a-half months after the grievor initially made the request with Mr. Prince, things began to happen quickly. The very next day Mr. Horbatiuk received a response, which was copied to the grievor, requesting "medical precautions" (Exhibit 14). The grievor supplied a handwritten note from her doctor dated September 27, 2005 (Exhibit 15), which the employer eventually determined to be inadequate. On September 28, 2005, Mr. Prince sent the grievor a letter, requesting that she have her doctor complete a "Functional Abilities Assessment Form" (Exhibit 16). The grievor took that form to her doctor, who completed it on October 3, 2005 (Exhibit 17), and an assessment was conducted on October 15, 2005. The assessment resulted in a report with recommendations dated November 3, 2005 (Exhibit 18), which was received by the employer.

[29] The implementation of the recommendations of the ergonomic assessment report dated November 3, 2005, took longer than the grievor had hoped. Although there is some dispute as to how many of the recommendations had been implemented by early December 2005, I am of the view that at least some had not been implemented. As a result, the grievor initiated a series of emails in early December 2005. Both Mr. Prince and Mr. Horbatiuk described the emails as an example of the grievor interfering in the process and ultimately slowing it down. I am simply unable to draw the same conclusion. Clearly, the grievor was frustrated with what she felt was a delay in the implementation of several recommendations, the most significant of which was the recommended chair. Even though the grievor requested that her supervisor come with her to check out the chair, he did not. In fact, Mr. Horbatiuk did not give her permission to check the appropriateness of available chairs, and the grievor made the decision to go anyway. In any event, the chair that the grievor felt was best suited to her needs was upholstered in leather, which went against purchasing policies. The fact is that the cost of the leather-covered chair was only minimally more than chairs with approved fabrics. In any event, the chair was not delivered until late January 2006, and by that time, the grievor was on leave.

[30] Unfortunately, throughout the period from June 30 to November 3, 2005 and even beyond, neither Mr. Prince nor Mr. Horbatiuk consulted the grievor to see what could be done to assist her. In fact, the evidence of these two individuals is very telling. Mr. Prince was clear that he was relying entirely upon Mr. Horbatiuk, in whom he had the utmost trust and whom he described as very experienced in these matters. This was of course despite the fact that at least on June 30, 2005, he was aware that the grievor was unable to deal with Mr. Horbatiuk. Also, Mr. Prince acknowledged that at times Mr. Horbatiuk was frustrated with the grievor.

[31] As for Mr. Horbatiuk, he professed to have a good knowledge of the policies that applied and felt that he had done everything to hasten a resolution to this matter. Yet during his examination, he curiously stated that he thought that the grievor's problems were related to her jaw surgery. It appears to me that a simple discussion with the grievor would have resolved a number of issues and misunderstandings and would probably have resulted in this grievance never being filed.

[32] However, such a consultative process did not occur, and in fact, Mr. Horbatiuk unilaterally imposed certain conditions on the grievor. He testified that there was no

use speaking with the grievor until he received the results of a Health Canada "Fitness to Work" assessment, which was requested only in early December 2005. In fairness, Mr. Horbatiuk was most likely of the opinion that he was helping, but the truth of the matter was that the grievor found his unilateral approach to be adverse in nature. More detail will follow later in this decision; but it will suffice to say that at this point, Mr. Horbatiuk unilaterally excluded the grievor from participating in searches that were carried on by investigators like the grievor because he observed her limping after one; he did not allow her to work on a compressed work week, so that she would not have to work long hours each day, but of course that did not allow her to participate in the HPMC group sessions without taking time off; he suggested that she not participate in extra work and that she concentrate on the core functions of her position; and he told her not to assist colleagues. In fact, the employer states that these measures were its plan of accommodation.

[33] As previously indicated, in early January 2006 the grievor once again had to take an extended leave from work. Her evidence was that this leave was due to what she felt was the impact of her condition, exacerbated by the inaction of her employer to implement the recommendations found in the ergonomic assessment report, particularly by the fact that the chair had still not arrived. In fact, the chair apparently arrived at the end of January. In any event, although not much turns on this as it happened after the grievance was filed, I was impressed by the fact that when the grievor did return to work, many of the recommendations were of assistance and the grievor was able to once again operate in a productive manner.

[34] So the question becomes, was there a plan of accommodation put in place by the employer? And if so, was this plan adequate under the circumstances?

[35] I need not make a ruling on whether or not a plan of accommodation was put in place as I accept the testimony of Messrs. Prince and Horbatiuk and the submissions of counsel for the employer that the alterations to the working requirements of the grievor, as outlined in paragraph #32 of this decision, was the plan of accommodation. Thus, the real question is whether or not the plan was adequate.

[36] As noted above, Mr. Horbatiuk imposed the alterations on the grievor without consulting her or indeed anyone else, such as a medical practitioner. This was despite the fact that Mr. Horbatiuk did not understand the fullness of the "medical precautions" outlined by Dr. David Saul (Exhibit 17). Specifically, Mr. Horbatiuk

testified that he did not know the meaning of the word "sedentary" and that he had to look it up in the dictionary. So, despite his lack of understanding of the restrictions, Mr. Horbatiuk took it upon himself to unilaterally impose changes to the grievor's work requirements.

[37] The Supreme Court of Canada has indicated that the ". . . search for accommodation is a multi-party inquiry." The Court concluded that there is a duty on the ". . . complainant to assist in securing an appropriate accommodation": *Central Okanagan School District No. 23 v. Renaud,* [1992] 2 S.C.R. 970, para 43 and 44. Although the Court is quick to point out that the employer is in the best position ". . . to determine how the complainant can be accommodated without undue interference in the operation of the employer's business," it is clear from that case that the employee must do his or her part. I am of the view that, in this case, the grievor was very cooperative.

[38] In point of fact, I am of the view that it would be an unreasonable responsibility to place the onus on the employer to unilaterally determine the nature of the accommodation without some input from the employee: *Price v. Fredericton (City),* [2004] N.B.H.R.B.I.D. No. 1 (QL) (upheld by *Price v. Fredericton (City)*, 2004 NBQB 319), and *New Brunswick (Human Rights Commission) v. Fredericton (City)*, 2005 NBCA 45.

[39] I am of the view that Mr. Horbatiuk's actions in imposing alterations to the grievor's work requirements fly in the face of the admonishment of the Supreme Court of Canada that a search for accommodation by its very nature is a "multi-party inquiry." At the very least, Mr. Horbatiuk should have consulted the grievor. In fact, it is my view that this lack of consultation is in reality at the heart of this entire grievance. I do not believe that Mr. Horbatiuk was acting with any malicious intent, even though Mr. Prince testified that Mr. Horbatiuk was frustrated. However, Mr. Horbatiuk's unilateral actions had an air of autocracy that was not helpful.

[40] For that reason alone, I would conclude that the plan of accommodation that the employer submits as having been put in place was inadequate. However, in addition, I am of the view that the alterations had a negative impact on the grievor. For instance, her removal from working a compressed work week had the effect of requiring her to take paid leave to attend the pain management seminars at the HPMC. Furthermore, there were no specific discussions or provisions for the grievor to stretch as recommended in the ergonomic assessment report. All in all, the employer's response

was highly inadequate and indicative of an employer who simply was frustrated and unwilling to cooperatively address the real issues that were affecting the grievor's life and more particularly her ability to work as a productive member of the investigative team with which she was associated. And all of this was under the guise that Mr. Horbatiuk was waiting for the receipt of a Health Canada "Fitness to Work" assessment.

[41] Finally, on the issue raised by the grievor that the employer delayed in providing any form of accommodation, counsel for the employer acknowledged that there was very little case law on that point. She referred me to one case that she suggested outlined the following guiding principles:

- the nature of the job being performed by the grievor at the onset of her disability;
- the nature of the disability;
- the availability of information concerning work restrictions;
- the cooperativeness of the injured worker;
- the nature of the employer's business;
- the size of the employer's business;
- the sophistication of the employer in dealing with accommodation issues;
- the availability of suitable accommodation; and
- the extent of accommodation required.

(See *Toronto (City) v. Canadian Union of Public Employees, Local 79*, [2001] O.L.A.A. No. 668 (QL).

[42] In concluding that the employer caused an undue delay in arranging for the first step in the grievor's accommodation, that being ordering an ergonomic assessment and eventually implementing the recommendations, I am assisted by many of the principles noted above. Messrs. Prince and Horbatiuk held themselves out to be knowledgeable of accommodation issues, and they referred to the availability of advice

from the Human Resources department in cases beyond their capacity. Ms. Wisdom testified that there were people, including herself, available to assist in the delivery of services to accommodate employees. Therefore, it is not a stretch to conclude that the employer can be considered sophisticated. As for the grievor, she was clearly cooperative and willing to obtain anything asked of her to assist her employer in providing a workplace that would allow her to remain a productive member of the investigative team. Her disability was diagnosed in late June 2005, and as noted above, the employer was made aware of that diagnosis at least on June 30, 2005. Although the impact of this disease can be very severe, the extent of the accommodation, at least at the early stages, was not overly onerous. All the grievor requested was that an ergonomic assessment be completed and that the recommendations be implemented. It is my view that there was no reasonable or credible explanation for the delay of more than six months.

D. Did the employer discriminate against the grievor?

[43] Having found that the employer's actions in its approach to this situation were inadequate and not timely, the next question to be addressed is whether the grievor was treated adversely to the point of discrimination.

[44] The Supreme Court of Canada has considered the test to be applied in matters concerning allegations of discrimination in an employment setting. Particularly, it has determined a three-part test that eliminates the distinction between direct and adverse-effect discrimination: *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3, *(Meiorin case)*. However, although often overlooked, but clearly pointed out by the Federal Court of Appeal, one of the overarching principles of the *Meiorin* case is that the onus lies on the complainant to prove a *prima facie* case of discrimination: *Canada (Attorney General) v. Sketchley,* 2005 FCA 404, para 86.

[45] In *Pepper v. Treasury Board (Department of National Defence),* 2008 PSLRB 8, the adjudicator considered the application of *Ontario Human Rights Commission v. Simpsons-Sears,* [1985] 2 S.C.R. 536, para 28, with respect to what a grievor is required to establish when an allegation of discrimination on the basis of disability is alleged. At paragraph 141 of the *Pepper* case, the adjudicator determined that a grievor must establish that ". . . he has a disability captured by the *Canadian Human Rights Act*, that he suffered adverse treatment in the workplace and that this disability was a factor in

the adverse treatment he received." (See also *Gibson v. Treasury Board (Department of Health)*, 2008 PSLRB 68.)

[46] The Supreme Court of Canada has further confirmed that the standard of proof in a matter involving an allegation of discrimination is the ordinary civil standard of a balance of probabilities: *Ontario Human Rights Commission v. Etobicoke*, [1982] 1 S.C.R. 202. In applying that standard, tribunals have recognized that the evidence is often circumstantial.

[47] It is also well-accepted law that the grievor bears the onus of establishing that a *prima facie* case of discrimination has occurred. In other words, the grievor must prove the allegations, which if they are believed, then would be sufficient to justify a decision in favour of the grievor (see *Ontario Human Rights Commission v. Simpson Sear*s, at para 28).

[48] It is my view that, despite the assertions of the employer to the contrary, the grievor has made out a *prima facie* case of being treated in an adverse manner based on her disability. There is no doubt that the grievor was being treated differently than fellow employees in the investigative branch with which she was associated. For instance, her removal from conducting search and seizures had the impact of singling her out without giving her the courtesy of discussing it with her. Furthermore, the unwarranted delay in ordering the ergonomic assessment had clear and unequivocal negative ramifications on the grievor. And of course the delay in implementing and consulting with the grievor about the ergonomic assessment caused her anxiety and angst, which, according to Dr. Carstoniu, is not helpful for someone suffering from fibromyalgia.

[49] Messrs. Prince and Horbatiuk asked, several times, "What more could we do?" It is not for me to answer the question, but it is hoped that the analysis above might give some guidelines to these individuals and at the very least be instructive of the need to manage in a consultative rather than an autocratic manner, especially when it comes to issues of accommodation.

E. If so, what is the appropriate remedy that should be ordered in this situation?

[50] In the grievance, the grievor requests a number of remedial orders. It is my view that the most efficient way to handle these requests is by analyzing them individually.

- **To be accommodated forthwith in accordance the PIPSC AFS Collective Agreement, CRA Guideline On Accommodation for Designated Group Members, the Federal Government's Policy on the Duty to Accommodate Persons with Disabilities in the Federal Public Service, the Employment Equity Act, the Canadian Human Rights Act and the Charter of Rights and Freedoms.**

  I find that the employer in this case did not offer an adequate or timely plan of accommodation, as it should have and that within the parameters of the policies and acts referred to, the employer is to provide an adequate plan of accommodation to the grievor.

- **That the time the grievor took in sick leave be restored to her.**

  It is my view that this claim for relief must fail. Although I am sympathetic to the claim, on a review of the evidence it is apparent that the grievor did not call any medical evidence or indeed any other evidence to support her contention that her taking "Sick Leave With Pay" was directly related to the failure on the employer's part to provide an adequate or timely plan of accommodation. In other words, as submitted by the employer, the "Sick Leave With Pay" used by the grievor may have been due to her disability and not to the failure to provide the plan of accommodation. Furthermore, even if there were evidence to support the nature of the claim, the grievor did not call evidence on the issue of the specific extent of the claim. Based upon the evidence adduced, I am unable to determine how many days of sick leave the grievor may have used for reasons other than her disability. It is my view that at the very least, the specifics of the claim ought to have been proven, and it is not an excuse to suggest that the employer would have access to the particulars, especially when there was no cross-examination of the witnesses called by the employer on this issue.

- **That her time lost because of Sick Leave Without Pay be restored to her forthwith together with accrued interest (as damages).**

  For the same reasons as outlined in the claim for "Sick Leave With Pay," this claim must be dismissed for want of proof.

- **That her vacation time taken as a consequence be restored to her forthwith.**

  For the same reasons as outlined in the claim for "Sick Leave With Pay," this claim must be dismissed for want of proof.

- **That any documentation, whatsoever situated, that suggests or implies any past, present or planned disciplinary action against her as it, in any way, relates to her accommodation be destroyed in her presence.**

  The grievor acknowledged that there appears to be no such documentation. If the existence of such documentation had been proven, I would have had no hesitation in ordering it to be expunged. Without such documentation, no such order will be made.

- **That she be compensated for pain and suffering, and undue expense on her part.**

  This claim has, in reality, two components. Paragraphs 226(1)*(g)* and *(h)* of the *Public Service Labour Relations Act* (*PSLRA*) grant adjudicators the power to interpret and apply, as well as order relief, pursuant to the *CHRA*. Specifically, paragraph 226(1)*(h)* of the *PSLRA* grants authority to an adjudicator to order relief pursuant to paragraph 53(2)*(e)* and subsection 53(3) of the *CHRA*. In this case, I conclude that there was no evidence that the employer ". . . engaged in the discriminatory practice wilfully or recklessly," so I am not prepared to make an order pursuant to subsection 53(3) of the *CHRA*A. However, it is quite apparent that the grievor was impacted significantly by her employer's failure to provide an adequate plan of accommodation or indeed to even act on her request for an ergonomic assessment in a timely manner. In a recent case, an adjudicator of the Board set forth helpful guidelines when the learned adjudicator stated the following:

  > *In determining an appropriate amount of compensation, the CHRA sets out the following guidelines that I consider relevant: the nature of the circumstances, extent and wilfulness or intent of the person who engaged in the discriminatory practice, any prior discriminatory practices that the person has engaged in.*

  (See *Pepper v. Deputy Head (Department of National Defence)* 2008 PSLRB 71, at para 30). Although not much turns on it in this case, I may take issue with the

suggestion that there need be any element of wilfulness with respect to an award for compensation pursuant to paragraph 53(2)(*e*) of the *CHRA.* I otherwise accept the general guidelines.

In this case, I am of the view that despite the fact that the employer had knowledge of the nature of the disability suffered by the grievor, her supervisors did not even speak to her to determine what the type of accommodation she would require might be. Rather, they unilaterally imposed changes to her work requirements without knowledge of the particulars of the "work precautions" set out in her doctor's report. On that basis, I determine that the grievor's pain and suffering was not as great as in the *Pepper* (2008 PSLRB 71) case, but it was significant. Consequently, I order the employer to pay to the grievor an amount of $6000.00.

- **That she be awarded such further remedies and relief, as deemed appropriate and reasonable.**

  In argument, the grievor's representative indicated that this claim was with respect to subsection 53(3) of the *CHRA*. I have concluded that the grievor has failed to establish that the employer ". . . engaged in the discriminatory practice wilfully or recklessly," so I am not prepared to make the requested order.

- **That Mr. Roy Prince be removed as Assistant Director of Investigations in order to allow her, upon her return, a workplace free of recrimination and harassment.**

  The grievor made this request as a result of the frustration she felt. Without ruling on whether I have the jurisdiction to make such an order, it is my view that such an order would only be granted if the grievor made out a case of egregious conduct on the part of her supervisor. Although the actions of Mr. Prince were lacking, I am unable to conclude that they were egregious. Therefore, in this case I would not be prepared to make the requested order, even if I were persuaded that I have the jurisdiction to do so.

- **That Mr. Bruce Allen be ordered to arrange comprehensive workshops on Accommodation for all staff at Toronto Centre TSO.**

Given my findings in this matter, I am of the view that Messrs Prince and Horbatiuk should take comprehensive training in the area of disability and accommodation. Accordingly, I hereby order that the Canada Revenue Agency, in consultation with the bargaining agent, organize appropriate training for Messrs. Prince and Horbatiuk.

- **The CRA immediately resource a staff person solely designated to pursuing and following up on "accommodation" files.**

  I am not prepared to make such an order, as there is no authority to allow me to do so.

III. Conclusion

[51] For all of the reasons stated above, I conclude that the grievor has proven her case, and therefore the grievance is upheld. The employer is ordered to pay the grievor $6000.00 in general damages.

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

(The Order appears on the next page)

IV. Order

[53] The grievance is allowed, and the employer is ordered to pay the grievor an amount of $6000.00 for pain and suffering.

[54] Furthermore, Canada Revenue Agency, in consultation with the bargaining agent, is hereby ordered to organize appropriate training for Messrs. Prince and Horbatiuk, to be provided in the area of disability and accommodation.

[55] Finally, Canada Revenue Agency is to provide an adequate plan of accommodation to the grievor.

[56] I will remain seized of the matter for 90 days in case the parties are unable to implement this order.

February 6, 2009

George Filliter,
adjudicator