Date: 20090707

File: 566-02-396

Citation: 2009 PSLRB 84

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

CONRAD NEILSON McNEIL

Grievor

and

TREASURY BOARD
(Department of National Defence)

Employer

Indexed as
McNeil v. Treasury Board (Department of National Defence)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: George Filliter, adjudicator

For the Grievor: Jacek Janczur, Public Service Alliance of Canada

For the Employer: Karen Clifford, counsel

Heard at Toronto, Ontario,
September 9 to 10 and 22 to 24, 2008 and April 22 to 24, 2009.

I. Individual grievance referred to adjudication

[1] Conrad Neilson McNeil ("the grievor") is a cook for the Department of National Defence. At all relevant times to this grievance he worked at CFB Borden in Ontario. He suffered an injury to his back while on duty on November 11, 2001 ("the injury on duty"). A claim was submitted to the Workplace Safety Insurance Board of Ontario ("the workers' compensation board"), which was successful. Because of his injury on duty, the grievor missed time from work. Over the next two years, various attempts were made to reintroduce him into the workforce, and he suffered four recurrences of his injury on duty.

[2] This matter involves a lengthy history that will be discussed throughout this decision. In any event, the grievor filed a grievance on May 27, 2005, in which he claimed that the employer had discriminated against him and had failed to accommodate his physical restrictions.

[3] The claim of discrimination stems from an incident that occurred on October 6, 2003, when the grievor wanted to return to work as a cook, and the employer allegedly did not accommodate his stated desire. The grievor's position is that this failure to accommodate him continued until he filed his grievance, and indeed beyond that point.

[4] The only relevant provision of the collective agreement signed by the Treasury Board and the Public Service Alliance of Canada on March 22, 2005, for the Operational Services Group bargaining unit ("the collective agreement"), is article 19, which states, in part, as follows:

> ***ARTICLE 19***
>
> ***NO DISCRIMINATION***
>
> ***19.01*** *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, mental or physical disability, membership or activity in the Alliance, marital status or a conviction for which a pardon has been granted.*
>
> . . .

[Emphasis added]

[5] The parties agree that article 19 of the collective agreement should be read in light of subsection 3(1) and section 7 of the *Canadian Human Rights Act* ("the *CHRA*"), R.S.C., 1985, c. H-6, which state as follows:

> ***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.*
>
> ***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]

[6] The grievor gave notice to the Canadian Human Rights Commission (CHRC) that he was raising, at adjudication, an issue involving the interpretation or application of the *CHRA*. The CHRC chose not to make submissions on the issue raised by the grievor.

[7] During much of the original hearing dates scheduled in this case, the parties addressed preliminary matters and with the consent of both parties the hearing was adjourned at the end of the day on September 10, 2008. During the second set of dates scheduled for hearing the parties only used three days as counsel for the grievor requested and was granted an adjournment due to his illness. The earliest available dates for the resumption of the hearing were April 21 to 24, 2009.

[8] The grievor's disability and the need to accommodate him are not at issue. The parties agree that the grievor has a permanent impairment arising from his injury on duty and that that permanent impairment requires accommodation in the workplace. The issue before me is therefore to determine, assuming that I have jurisdiction to do so, if the employer failed to accommodate the grievor's impairment.

II. Preliminary matter

[9] On August 8, 2008, a pre-hearing teleconference was conducted at the grievor's request. The grievor moved that he be allowed to proceed without the necessity of calling any evidence, as his disability and the obligation of the employer to accommodate him were acknowledged.

[10] The employer took the position that the grievor had the obligation to prove a *prima facie* case of discrimination. Essentially, the employer submitted evidence establishing that it had accommodated the grievor's needs.

[11] After considering the positions of both parties, I ordered that the grievor, to establish a *prima facie* case, had to link his disability to his claim of discrimination. To do otherwise, in my view, would have denied the employer the right to natural justice.

[12] This approach is in accordance with the decision in *Pepper v. Treasury Board (Department of National Defence)*, 2008 PSLRB 8, where an adjudicator considered the application of *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536, with respect to what a grievor is required to establish when an allegation of discrimination based on disability is made. At paragraph 141 of *Pepper*, 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.)

III. Hearing

[13] At the start of the hearing, the parties submitted a short statement of facts, a portion of which sates as follows:

> . . .
>
> *3. The employer agrees that the grievor required accommodation in the workplace as a result his injury.*
>
> *4. The employer agrees that the grievor has a permanent impairment arising from his injury.*
>
> . . .

[14] As mentioned earlier, the grievor was required to adduce evidence to support his contention that he had met a *prima facie* case of discrimination. However, the

employer objected to my jurisdiction to consider any matter that occurred before April 1, 2005, the date on which the *Public Service Labour Relations Act* (*PSLRA*), enacted by section 2 of the *Public Service Modernization Act* (*PSMA*), S.C. 2003, c. 22, came into force.

A. Position of the grievor

[15] The grievor submitted that many of the basic facts are not in dispute. For instance, there is no disagreement that the grievor suffered an injury on duty on November 11, 2001 and that it was compensable under the prevailing provincial statute, the Ontario *Workplace Safety and Insurance Act, 1997*, enacted as Schedule A to the *Workers' Compensation Reform Act, 1997*, S.O. 1997, c. 16, administered by the workers' compensation board.

[16] Furthermore, the parties agree that, up to October 2003, the grievor made four attempts to return to work under the workers' compensation board's oversight. The attempts were part of various work-hardening programs that saw the grievor returning to work to perform specified and limited portions of his overall duties as a cook, sometimes referred to as modified work assignments. On January 7, 2003, a letter was issued by the employer that listed a number of duties that the grievor would be allowed to perform (Exhibit 11).

[17] After the fourth recurrence of his injury on duty, in July 2003, the grievor began a training program following a mediated settlement with the workers' compensation board. There is no dispute that, despite this program, in October 2003, the grievor expressed his desire to return to work as a cook. The parties do not dispute that the grievor provided a doctor's note to support his request (Exhibit 12). In the grievor's view, he had been successful in establishing that the employer had made no efforts to reintegrate him into the workforce and that it had therefore failed to accommodate him.

[18] The grievor submitted that the accommodation could have been accomplished by modifying either his work plan or the workplace. At the very least, the grievor submitted that the employer should have referred him for an independent medical review, such as a fitness-to-work assessment by Health Canada.

[19] In the grievor's view, from that point on, the employer failed to accommodate his needs. Thus, he alleges that he was the subject of discrimination because his stated

desire to return to work as a cook was supported by his physician. The grievor's submission is that, once he expressed his desire to return to work as a cook in October 2003, the employer had a duty to accommodate him to the point of "undue hardship." The grievor referred me to *Pepper*, which refers to the oft-cited *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*").

[20] The grievor submitted that the employer provided no evidence of "undue hardship." Therefore, it did not satisfy its burden of proof.

[21] The grievor submitted that the employer relied solely on the workers' compensation board to determine if he could or should return to work, which, according to the grievor, is contrary to the prevailing case law. In support of that contention, the grievor referred me to the following three cases: *Pharma Plus Drugmart Ltd. v. U.F.C.W.*, [1993] O.L.A.A. No. 34 (QL); *Canadian Pacific Ltd. v. Brotherhood of Maintenance of Way* Employees (1996), 57 L.A.C. (4th) 129; and *Air Canada v. International Association of Machinists and Aerospace Workers* (1998), 74 L.A.C. (4th) 233.

[22] The grievor also referred me to *Giroux v. Treasury Board (Canada Border Services Agency)*, 2008 PSLRB 102, which, he submitted, is very much on point to the situation in this case.

[23] In response to the employer's objection that I have no jurisdiction to deal with any matters that occurred before April 1, 2005, the grievor submitted that his grievance is of a recurring nature that began in October 2003 and continued to exist in April 2005. Therefore, I should not conclude that I lack jurisdiction.

B. <u>Position of the employer</u>

[24] The employer submitted that, until April 1, 2005, an adjudicator appointed under the *Public Service Staff Relations Act* (*PSSRA*), R.S.C., 1985, c. P-35, would have had jurisdiction to deal with an allegation of discrimination under the *CHRA* only if the CHRC had referred the employee to the grievance process. That would have occurred only if the CHRC, under paragraphs 41(1)(*a*) or 44(2)(*a*) of the *CHRA*, had explicitly found that the employee ought to exhaust the grievance process. In support of that contention, the employer referred me to *Canada (Attorney General) v. Boutilier*, [2000] 3 F.C. 27 (C.A.).

[25] The employer submitted that, under the *PSSRA*, an adjudicator had no original jurisdiction to deal with grievances relating to human rights issues. The employer referred me to the following cases to support this contention: *Chopra v. Canada (Treasury Board)*, [1995] 3 F.C. 445 (T.D.); *Mohammed v. Canada (Treasury Board)*, [1998] F.C.J. No. 845 (T.D.) (QL); and *O'Hagan v. Canada (Attorney General)*, [1999] F.C.J. No. 32 (T.D.) (QL).

[26] The employer advised me that, on April 1, 2005, the *PSRLA* came into force. The *PSLRA* provides adjudicators with the specific authority to delve into human rights issues. The employer noted that adjudicators have determined that they have no jurisdiction under the *PSRLA* to deal with human rights issues that have arisen before April 1, 2005 without the invocation of either sections 41 or 44 of the *CHRA* by the CHRC. The employer referred me to *Lafrance v. Treasury Board (Statistics Canada)*, 2006 PSLRB 56, in support of that submission.

[27] Additionally, the employer referred me to the limitations found in clause 18.10 of the collective agreement. That provision, according to the employer, requires that an employee file a grievance within 25 days ". . . after the date on which he or she is notified orally or in writing or on which he or she first becomes aware of the action or circumstances giving rise to the grievance." The employer submitted that, because of that clause, my jurisdiction is further limited by the date on which the grievance was filed, i.e. to the 25 days preceding May 27, 2005.

[28] While maintaining the argument with respect to my jurisdiction, the employer also maintained that it did not discriminate against the grievor. The employer contended that, on May 27, 2005, the day on which the grievor filed the grievance, he was enrolled in a program referred to as a labour market re-entry program (Exhibit 10, tab W). Specifically, he was attending school full-time. This was funded by the employer and the grievor continued to receive his pay. In addition, in July 2004, an independent assessment of the grievor's ability to continue to perform work was released (Exhibit 24). The report shed no new light on the grievor's condition.

[29] Furthermore, the employer submitted that it can rely on the workers' compensation board, which is an independent body, as an integral part of the accommodation process. In support of that contention the employer referred me to the following cases: *Wikwemikong Tribal Police Services Board v. Corbiere*, 2007 FCA 97;

Snow v. Honda of Canada Manufacturing, 2007 HRTO 45; and *Price v. Fredericton (City)*, [2004] N.B.H.R.B.I.D. No. 1 (QL) (upheld in 2004 NBQB 319 and 2005 NBCA 45).

[30] Although the employer took issue with my jurisdiction to deal with anything that happened before April 1, 2005, it was agreed by the employer that these facts could be examined to put the grievance into context. In that respect, the employer submitted that, on October 6, 2003, the grievor was in the process of beginning the agreed-on labour market re-entry program as a result of a mediation by the workers' compensation board. The employer's position is that the labour market re-entry program was part of the accommodation process; it was designed to train the grievor to qualify him for other public service positions.

IV. Analysis

A. *Prima facie* case of discrimination

[31] In the agreed statement of facts, both parties acknowledged that the grievor has a disability and that he is entitled to accommodation. This acknowledgement establishes the first portion of the *prima facie* case that the grievor must meet. In accordance with the preliminary matter decided above, it was the grievor's obligation to prove that, as a result of the disability, he has been treated adversely in the workplace, at which time the onus shifts to the employer to establish that it has accommodated the grievor to the point of undue hardship.

[32] I accept that the evidence establishes that, unless answered, the grievor had, at least in his eyes, been treated adversely because of his disability. Therefore, I will examine the issue of whether the employer accommodated him to the point of undue hardship.

B. Jurisdiction over events that occurred prior to April 1, 2005 and timelines

[33] As noted, on April 1, 2005, the *PSLRA* was proclaimed into force.

[34] There is no contention that under the *PSSRA* the only way that an adjudicator could assume jurisdiction to hear human rights issues was if the CHRC determined under either section 41 or section 44 of the *CHRA* that the employee ought to exhaust the grievance process. In this case, there was no such determination. In other words, the CHRC at no time required that the grievor exhaust the grievance procedure. In fact,

there was no evidence that the grievor had filed a complaint with the CHRC or had filed a grievance at anytime.

[35] Under the *PSLRA*, the jurisdiction of an adjudicator to interpret and apply the provisions of the *CHRA* is clearly set out in paragraph 226(1)(*g*). In my view, the *PSLRA* cannot be given retroactive effect, unless there is clear and unequivocal statutory language to the contrary (see *Sullivan and Driedger on the Construction of Statutes*, 4th ed., at page 546). Section 64 of the *PSMA* provides for limited retroactive effect in specific cases, but not here.

[36] The issue of the jurisdiction of an adjudicator to deal with the merits of a grievance filed after April 1, 2005, where the grievance raises an issue involving the interpretation or application of the *CHRA* that occurred before April 1, 2005, has been considered in *Lafrance*. In that case, an adjudicator was faced with an argument similar to the one raised in this case. He concluded that he did not have jurisdiction to deal with a grievance alleging facts that occurred before April 1, 2005 and claiming a violation of the *CHRA*. I see no reason to depart from that finding; in fact, I agree with the conclusion and, therefore, apply the same test.

[37] Therefore, I find that I have no jurisdiction to decide on the allegations of discrimination relating to events that occurred before April 1, 2005. However, as in *Lafrance* and in *Lafrance v. Treasury Board (Statistics Canada)*, 2007 PSLRB 31, I can review the facts of this situation for the purposes of context and history.

[38] Moreover, the grievor argued that the discrimination to him was of a recurring nature. The adjudicator in *Lafrance* (2006 PSLRB 56) addressed a similar argument. At paragraph 31, he acknowledged that, because of the recurring nature of the discrimination, he had the jurisdiction to hear the grievance, but only beginning on April 1, 2005. Again, I agree with that conclusion and am of the view that it should be applied in this case.

[39] At the hearing, the employer raised an objection to the timeliness of the grievance, on the basis of clause 18.10 of the collective agreement, which states the following:

> ***18.10*** *An employee may present a grievance to the First (1st) Level of the procedure in the manner prescribed in clause 18.05 not later than the twenty-fifth (25th) day after the date*

> *on which he or she is notified orally or in writing or on which he or she first becomes aware of the action or circumstances giving rise to the grievance.*

[40] The grievor filed his grievance on May 27, 2005. The employer has invited me to adopt a strict interpretation of this clause, which could arguably create a further impediment to the grievor. However, once again, in *Lafrance* (2006 PSLRB 56), the adjudicator was faced with a similarly worded article. In paragraphs 22 and 23, he reviewed the *Public Service Labour Relations Board Regulations*, SOR/2005-79. I concur with his conclusion that, to raise issues of timeliness, strict procedures must be followed. I am of the view that sections 63 and 95 of those regulations are not ambiguous. At none of the levels within the grievance process was the grievance rejected on the issue of time limits. The employer is therefore not entitled to raise such an issue at adjudication.

[41] Therefore, I conclude that my jurisdiction is in no way barred by the wording of clause 18.10 of the collective agreement.

C. <u>Events leading up to October 6, 2003</u>

[42] Although I have decided that I have no jurisdiction to delve into matters before April 1, 2005, it is important to put the issues that are properly before me into context. A history of the events that led to what the grievor claims is the crucial date is, in my view, both helpful and important.

[43] As noted, the grievor suffered an injury on duty on November 11, 2001, resulting in him receiving compensation through the workers' compensation board. He attempted to return to work on four occasions, and during each return to work, he was reinjured (December 17, 2001 to June 9, 2002; August 22 to 23, 2002; January 7 to 27, 2003; and February 3 to July 14, 2003).

[44] On January 7, 2003, the start of the grievor's third return to work, the employer provided him with a list of duties and restrictions (Exhibits 11 and 48). The duties were developed after a physiotherapist assessed the grievor. The physiotherapist had completed an occupational fitness assessment form (Exhibit 18) on November 28, 2002.

[45] During the grievor's last return to work he was assigned modified duties. Furthermore, his own doctor, on May 1, 2003, provided a functional abilities form

(Exhibit 10, tab L) for a timely return to work outlining various restrictions that were consistent with those outlined in the list of duties supplied to the grievor. Additionally, a similar form from his doctor, dated March 27, 2003, was introduced into evidence (Exhibit 10, tab O), which is further confirmation of the accommodation offered to the grievor. Finally, on April 29, 2003, an ergonomist signed a report (Exhibit 10, tab N) that, in essence, confirmed that the list of duties supplied to the grievor were appropriate for his needs.

[46] The grievor submitted that, up to October 6, 2003, although he was given a list of duties, he was only cutting vegetables, which was one of the identified duties. During his testimony, he made a point that while cutting the vegetables his knife was dull and that, in fact, he worked for three months with a dull knife. That evidence was used to suggest that he reinjured himself because of the repetitive motion caused by using a dull knife. I find that evidence difficult to believe. First, Chief Warrant Officer Michael Beaulieu, who in 2005 was in charge of the four dining rooms at CFB Borden and who was also trained as a cook, much like the grievor, stated that no one would be required to use a dull knife. Chief Warrant Officer Beaulieu also indicated that the first thing a cook learns to do is sharpen a knife and that there were many sharpening devices at each of the kitchens where the grievor worked. When asked in cross-examination why he did not try to sharpen his knife, the grievor gave no adequate explanation.

[47] After the grievor was reinjured on July 14, 2003, the workers' compensation board conducted a mediation session that resulted in an agreement on August 22, 2003, which was confirmed by letter dated August 25, 2003 (Exhibit 10, tab Q). As a result of the process, the employer, the workers' compensation board and the grievor, agreed that he had a permanent impairment for ". . . discogenic neck and symptomatic radicular pain . . ." and that he was to ". . . avoid heavy lifting, above the shoulder level activities, extended reaching and prolonged static or extreme neck positioning." Furthermore, the employer, the workers' compensation board and the grievor agreed that he might be able to work either as a stores person, a driver, a car wash attendant or a cashier and that he could perform clerical work.

[48] Then, on October 6, 2003, the grievor went to the employer's offices and indicated that he wanted to return to work as a cook. In support of his request, he provided a note from his doctor, which in handwriting simply stated that the grievor

". . . is fit for modified duties from October 7/03 to as per [the workers' compensation board] . . ." (Exhibit 12).

[49] The employer was confused by the doctor's note and attempted to contact the grievor's doctor. She was unavailable until November 27, 2003, at which time Annette Lightheart, a human resources generalist with the employer, was able to speak with her. At that time, the only thing that Ms. Lightheart confirmed was that the grievor's doctor was referring to the same workers' compensation board restrictions that had been implemented by the employer in January 2003 in an attempt to accommodate the grievor (Exhibit 11).

[50] According to Ms. Lightheart's uncontested evidence, the employer at that juncture was ". . . continuing to look for alternative work, not as a cook, because each time the grievor had returned to work he had a recurrence of his injury."

D. Events that occurred from October 6, 2003 up to May 27, 2005

[51] I reconfirm my conclusion that I have no jurisdiction to delve into whether the grievor had been discriminated against by the employer before April 1, 2005. That said, the grievor takes the position that, as of October 6, 2003, the employer was obliged to accommodate his request to return to work as a cook to the point of undue hardship. As noted, on that day the grievor presented the employer with a note from his doctor (Exhibit 12). The grievor states that the employer's alleged continued refusal to allow him to work as a cook, up to the time of the grievance, forms the basis of the dispute before me. For that reason, the events that occurred from October 6, 2003 up to May 27, 2005 are important to analyze as they are at the heart of the grievance.

[52] Although Captain R.L. Richards was not called as a witness, her email of October 6, 2003, is quite telling about the employer's attitude (Exhibit 32). The email was sent after the employer received the note from the grievor's doctor (Exhibit 12). In the email, Captain Richards describes the doctor's note as ". . . a dubious statement in, and of itself . . ." and further confirms that the employer ". . . does not have a duty in which to employ him." In making those comments, Captain Richards was referring to the agreement of August 22, 2003 and the possible alternate job opportunities that may have been available to the grievor. On August 22, 2003, the grievor had agreed to a number of suitable alternate positions.

[53] I conclude that the employer, as of October 6, 2003, was frustrated with the grievor's insistence to work as a cook. This conclusion was also confirmed by the overall evidence of Ms. Lightheart. The employer's position was that attempts had been made, four to be exact, to return the grievor to his substantive position as a cook, with the very restrictions that his doctor was again suggesting would allow him to return to the workforce. On each previous occasion, the grievor had reinjured himself. The employer had no new medical documents that would have suggested that the grievor was now able to return to work as a cook. Furthermore, as a result of the agreement of August 22, 2003, the employer had embarked on a new direction. Consequently, the employer took the position that it would not allow the grievor to return to his substantive position.

[54] In support of its decision, the employer relied on the workers' compensation board's advice and the medical and quasi-medical reports that had been generated over the two-year period that had elapsed since the grievor's injury on duty.

[55] Having reviewed the submitted case law, I am of the view that an employer can rely on the advice and direction of a workers' compensation board when an employee is injured on duty and is required to take time off work (see *Price* (N.B.H.R.B.), *Wikwemikong Tribal Police Services Board* and *Snow*). However, the right to rely on that advice and accept the workers' compensation board's opinion does not necessarily continue forever. It will cease to exist when the stated desire of the employee, supported by appropriate medical evidence, contravenes the recommended advice of the worker's compensation board. At this stage the employer must look at alternate options available to accommodate the requirements of the employee.

[56] So, was the grievor's expressed desire to return to work as a cook supported by appropriate medical evidence?

[57] In this case, the workers' compensation board had attempted to return the grievor to work, without success. In August 2003, the grievor had agreed, along with the employer, to a course of action that included retraining. However, on October 6, 2003, the grievor presented his employer with a note from his doctor (Exhibit 12) that suggested that he was capable of returning to work, subject to the same restrictions imposed earlier by the workers' compensation board.

[58] The note from the grievor's doctor, in itself, was not helpful. For instance, there was nothing in it that suggested a change in the grievor's medical status. On that basis, I conclude that the grievor failed to provide appropriate medical evidence to support his return to the workforce.

[59] The employer was correct in deciding to contact the grievor's doctor, but it was unable to contact her before the end of November 2003. The only question asked to the grievor's doctor was to clarify the restrictions to which she referred in her note. Clearly, the note was deemed suspect by the employer. Perhaps the employer could have determined why the grievor's doctor had provided the note and then determined, possibly with the assistance of an independent review and always under the oversight of the workers' compensation board, whether it was safe to reintroduce the grievor to the workforce and what, if any, accommodations would have been necessary. But, it did not.

[60] That said, I cannot conclude that the medical note provided by the grievor's physician was enough to require the employer to deal with him in a different manner than it did.

[61] I also cannot ignore the grievor's evidence. He testified that, despite providing the note from his doctor to his employer, he still agreed to embark on the recommended upgrading courses with a view to enabling himself to apply for positions identified in the August 22, 2003, agreement reached with the help of the workers' compensation board. However, his evidence was that he always maintained his desire to return to work as a cook. The last document that he supplied to the employer to support his desire was the October 6, 2003 note from his doctor.

[62] The employer maintained that possible alternate employment opportunities had been identified and had been agreed to by the grievor. Those opportunities made up the course of action that was to be followed. The employer realized that the grievor needed training to acquire new skills, which eventually began on September 13, 2004. Leading up to the training courses, the employer had held various meetings and had communicated with the grievor to discuss the training requirements. On December 10, 2003, a meeting was held (Exhibit 22), and at least one piece of correspondence entered as evidence, dated February 25, 2004 (Exhibit 23), confirms that the employer was attempting to find appropriate training for the grievor.

[63] On December 10, 2003, the employer and the grievor discussed the priority employment list and the necessity for the grievor to develop new skills to qualify for any of the possible positions. The grievor took the position at the meeting that he still wanted to be a cook, but the employer advised him that there was no medical information that would support his wish. The result of the meeting was that the grievor agreed, albeit reluctantly, to participate in training classes.

[64] Ms. Lightheart followed up the meeting with a letter to the grievor dated December 10, 2003 (Exhibit 33). The letter, among other things, explained the priority employment list and asked that the grievor supply a resume by January 2004 to Martha Barr, the manager of the learning and career centre located at CFB Borden. Ms. Barr testified that she met with the grievor in December 2003 but that he was reluctant to supply a resume, stating that it was her job to prepare one. The grievor maintained his position despite Ms. Barr explaining that the information necessary to complete a resume must come from him, as only he was aware of the facts necessary to complete it. In any event, the grievor eventually did supply a very rough handwritten draft on December 16, 2003 (Exhibit 55).

[65] Ms. Barr used the information provided by the grievor to complete the initial draft of a resume for the grievor's review (Exhibit 54). The initial draft was provided to the grievor with a request for him to provide further information. It should be noted that the grievor did not provide the requested input and clarification.

[66] In February 2004, the grievor became aware of a cook supervisor position, and he indicated to Ms. Lightheart his wish to be employed in that position. The employer responded by email dated February 25, 2004 (Exhibit 23) indicating first that those positions were not open to civilian employees and second that the physical requirements of the position would be no different from those of a cook. In the email, Ms. Lightheart rejected the grievor's application by saying that "[u]nfortunately based on the permanent restrictions provided by your doctor there is a very real impact on your ability to perform . . . such a position . . . ." She added that he needed further training to qualify for any of the positions that she had identified as suiting his needs. She also confirmed that the grievor had been placed on the priority employment list.

[67] On May 12, 2004, the grievor arrived at CFB Borden and began working in the kitchen. He was asked to leave because he had not been medically cleared to return to work. Although the incident was described as somewhat confrontational, I place very

little weight on the alleged incident. In any event, a meeting took place that day, and the grievor agreed to meet with Ms. Lightheart on May 14, 2004 (Exhibits 35 and 52).

[68] Ms. Lightheart's evidence, which the grievor did not challenge, was that, at the meeting of May 14, 2004, the employer suggested that the grievor undergo a labour market re-entry assessment and a work hardening program. The grievor did not agree since he apparently had a note from his doctor (which was not introduced into evidence) that he had stress-related issues and that he was overseeing the building of a home and therefore did not have time. With respect to the latter point, I wish to note that the evidence with respect to the home was not that the grievor was actually building a home but rather that he was overseeing the construction of a home.

[69] Eventually, the grievor's opinion changed when he began his work hardening program on June 28, 2004, which was completed on July 29, 2004. At the end of the program, a report dated July 29, 2004 was completed and sent to the workers' compensation board (Exhibit 24). The report concluded with the following: "It is not defined as to when Mr. McNeil will return to work at the present time." That conclusion, in my opinion, confirms that the employer's concern with respect to the grievor's return to work as a cook were well founded.

[70] The grievor started the upgrading course on September 13, 2004 and continued until March 11, 2005. The evidence was that the grievor did very well in his classes (Exhibits 13 and 14). During that period, on October 6, 2004, the workers' compensation board approved the grievor's training for an administrative clerical position. The cost of this training was about $43,000, which apparently the employer was to pay (Exhibit 10, tab W).

[71] Evidence was adduced that, on January 13, 2005, the grievor intimidated Ms. Lightheart in her office, which resulted in his presence at CFB Borden being restricted (Exhibit 53). Again, I attach very little weight to that event, so there is no necessity to examine it further.

[72] On February 22, 2005, as a result of the grievor's complaint of continued back pain, an ergonomic assessment report was completed, suggesting the use of a specific back rest and a copy holder (Exhibit 28). The employer provided both items to the grievor so that he could continue his upgrading course.

[73] The grievor continued his labour market re-entry program course work until he chose to withdraw in August 2005. Although it is not relevant to the issues of this grievance, I was advised that the grievor has subsequently returned to work for the employer as a cook at CFB Borden.

E. Accommodation of the grievor's physical restrictions as of May 27, 2005

[74] In this case, I find that all the attempts to have the grievor either return to work as a cook or be trained for alternate work were under the workers' compensation board's supervision. The grievor submitted that that supervision was inappropriate, and he referred me to the following cases: *Pharma Plus Drugmart Ltd., Canadian Pacific Ltd.* and *Air Canada*.

[75] However, it should be noted there is jurisprudence to suggest that, in certain circumstances, it is appropriate for an employer to use the services of the provincial worker's compensation board to assist it in accommodating the employee: see *Wikwemikong Tribal Police Services Board, Snow* and *Price* (N.B.H.R.B.).

[76] The Supreme Court of Canada has considered the test to be applied in matters concerning allegations of discrimination in an employment setting. Particularly, it established a three-part test: see *Meiorin*. In summary, when an employer applies a condition or standard of employment to an employee, it must justify that application by showing first that it is rationally connected to the performance of the job, second that it was established to address a legitimate work related purpose and third, that it is necessary for accomplishing the job.

[77] The aforementioned criteria provide a framework for assessing the validity of the standard by considering its legitimate purpose and the employer's intent. A line of cases suggests that the criteria must be applied with common sense and flexibility: *Meiorin*, at paragraph 63; *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525, at paragraph 546; *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, at paragraphs 520 and 521; and *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal)*, 2007 SCC 4, at paragraph 15.

[78] I accept the approach of the Federal Court of Appeal in determining whether the employer, in this case, should have used the workers' compensation board's services,

at least for determining the nature of the accommodation owed to the grievor: see *Wikwemikong Tribal Police Services Board*. Here, as in *Wikwemikong Tribal Police Services Board*, there is a rational connection between the standard imposed by the employer that the grievor be capable of performing the job, even in a modified form, and the job requirements.

[79] In my opinion, there are certain physical requirements to be a cook, even in a modified form, which are intrinsically linked to the ability to perform the job. In this case, once the employer had acknowledged that the grievor had a disability it, in conjunction with the workers' compensation board, set out to define the extent of the disability. With the approval of the grievor's own physician a list of restrictions was developed. Eventually the grievor and his doctor were provided a set of duties that would be assigned to him. These duties were never disputed.

[80] The employer in deciding to accommodate the physical needs of the grievor could expect that the grievor would be able to perform the duties identified through the workers' compensation board and approved by his very own doctor. I conclude that these expectations or standards have a legitimate work-related purpose.

[81] The grievor would have me believe that the employer, as of October 6, 2003, should have sought an independent medical examination for him that would have been above and beyond that of the many such assessments conducted through the workers' compensation board's offices. In my view, that approach is inflexible and lacks common sense. The fact that the grievor was indeed returned to the work force on four occasions in the first two years after the injury on duty, that he underwent upgrading courses and that he was enrolled in an labour market re-entry program are important. All those efforts are, in my view, an indication that the employer acted honestly and in good faith throughout this situation: see *Wikwemikong Tribal Police Services Board*.

[82] Finally, the evidence was clear that, throughout the entire period in question, the grievor was assessed by various independent experts on many occasions. The fact that he returned to work with modified duties, all of which were under the workers' compensation board's observation, satisfies me that the standards of returning to the work force were reasonably necessary. What is also clear in this case is that the evidence establishes to my satisfaction that the employer was cooperating with the grievor, encouraging him to perform limited duties and ultimately assisting him in

upgrading and studying for other opportunities: see *Wikwemikong Tribal Police Services Board.*

[83] Throughout the four times that the grievor attempted to return to work, the employer offered him an accommodated work program by adjusting his duties to fall in line with the list of duties provided by medical experts, which included his own physician. Furthermore, the employer offered reduced work hours and provided flexibility within those hours so that the grievor could take necessary breaks when required. The evidence was that the employer even allowed the grievor to rest in an easy chair or sofa when he felt that it was needed. Throughout the relevant period, the employer was open to suggestions from the workers' compensation board and accepted any and all of the many proposals from the numerous assessments that the workers' compensation board conducted in an attempt to allow the grievor to return to work as a cook.

[84] The accommodations continued until August 22, 2003 when, as a result of a mediation session, in which the grievor was a full participant, a new direction was put into place. With the grievor's agreement, the employer started the process of retraining him to enable him to apply for other potential jobs.

[85] It is important to note that the grievor, despite his agreement to participate in this new direction, was not cooperative. I draw that conclusion from the evidence that the grievor was not willing to assist Ms. Barr in drafting his resume. His unwillingness was apparent from the original meeting he had with Ms. Barr, where he would not supply even the most basic information, to his refusal to do a first draft and, finally, to his failure to provide feedback to the draft that Ms. Barr completed and forwarded to the grievor with the specific request that he edit it. The grievor's unwillingness to participate in this new direction was further displayed when he refused to participate in the first stages of the labour market re-entry program, indicating that he had no time to be trained as he had a "home to build" and that he had a note from his doctor stating that he could not participate due to stress.

[86] Despite the grievor's apparent lack of cooperation, the employer continued to work with the workers' compensation board and the grievor in an attempt to have him start and complete his upgrading courses. In addition, the employer agreed to fund the training program chosen by the grievor even though less-expensive options were available. The employer also placed the grievor on a priority employment list, which

was explained to me as a process that would allow the grievor priority in obtaining employment anywhere throughout the public service.

[87] In my view, the employer's efforts, in conjunction with the workers' compensation board's, fell within the parameters of any definition of reasonableness of which I am aware.

[88] As noted by the Supreme Court of Canada, 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, at paragraphs 43 and 44. Although the Court was 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 not as cooperative as he should have been and that his unwillingness to help himself impeded the employer's attempts to accommodate him.

[89] In point of fact, I am of the view that it would be unreasonable in the circumstances of this case to place the onus on the employer to unilaterally determine the nature of the accommodation without some input from the employee: see *Price* (N.B.H.R.B.). That input was quite frankly not present.

[90] As for the grievor's stated desire to return to work as a cook, as demonstrated by his actions on October 6, 2003 and May 12, 2004, I conclude that, given the history of the events, it was not enough to simply come to work and say: "I want to be a cook." The grievor, in my opinion, is required to be reasonable. At the very least, he had the responsibility to indicate to the employer that there had been a change in his medical status that allowed him to be employed as a cook. That he did not do.

[91] The grievor would have me conclude that the employer could have done more to assist him and that, therefore, it failed to accommodate him to the point of undue hardship. While he may be correct that other things could have been done, I am not convinced that my role is to consider what, if anything, the employer could have done differently.

[92] My conclusion is that, in the circumstances of this case, the employer did accommodate the needs of the grievor to the point that the grievor would allow. To place a further burden upon the employer to accommodate the needs of an employee who is not cooperative is, in my opinion, placing an undue hardship upon the employer: *Central Okanagan School District No. 23*.

[93] In his submission, the grievor referred me to the recent decision in *Giroux*. I have reviewed that case and I am not convinced that it is helpful, as the facts in that case are far different from the one before me. I do note that the adjudicator discussed the *PSLRA* and, at paragraph 141, raised the issue of bundling duties. The grievor also raised the issue of bundling duties, but in my opinion, it has no bearing on the facts before me.

[94] I realize that the parties did not have the opportunity to review and comment on the most recent decision rendered under the *PSLRA* on the issue of accommodation: *Sioui v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 44. However, I did find that case somewhat helpful.

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

(The Order appears on the next page)

V. Order

[96] The grievance is dismissed.

July 7, 2009.

George Filliter,
adjudicator