Date: 20100617

File: 566-02-1914

Citation: 2010 PSLRB 80

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

WILLIAM G. KELLY

Grievor

and

TREASURY BOARD
(Department of Transport)

Employer

Indexed as
Kelly v. Treasury Board (Department of Transport)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Joseph W. Potter, adjudicator

For the Grievor: John Haunholter, Public Service Alliance of Canada

For the Employer: Karen Clifford, counsel

Heard at St. John's, Newfoundland,
March 2 to 4, 2010.
(Written submissions filed March 29, April 16 and 23, 2010.)

I. Individual grievance referred to adjudication

[1] William (Bill) Kelly ("the grievor") was, at the time he filed his grievance, an aircraft maintenance engineer (AME) with the Department of Transport ("the employer") in St. John's, Newfoundland. His duties, as seen in his work description (Exhibit G-10) included carrying out scheduled inspections and maintenance on rotary wing aircraft ("helicopters"). The grievor also provided flight crew engineer services on board the employer aircraft on assignment with the Department of Fisheries and Oceans (DFO)/Canadian Coast Guard vessels and other land bases. As can be seen, the grievor's functions were solely related to helicopters. He began as an AME in 1987.

[2] A tragic accident took place in May 2000. The accident is described in a letter to the grievor dated November 7, 2007, from the Workplace Health, Safety and Compensation Commission (Exhibit G-9). The letter describes the incident as follows:

. . .

> *As part of your employment activities you were required to fly by helicopter back/forth to a lighthouse site. This activity had been ongoing for approximately a week. After being landed at the site on May 10, 2000, the pilot proceeded alone leaving you and a coworker at the lighthouse. A tragedy occurred minutes after when there was a fatal helicopter crash and your coworker, the pilot, was killed. Apparently you and the other worker at the light house heard of this tragedy over the cost guard* [*sic*] *radio some 30 minutes later.*

. . .

[3] As a result of this tragedy, the grievor was diagnosed by a psychiatrist, Dr. Anthony Walsh, as having post-traumatic stress disorder (Exhibit G-3). Therefore, the grievor could not return to his AME position.

[4] The employer was faced with a duty-to-accommodate situation and, following a lengthy series of events, which I will attempt to capture, the grievor felt that the employer was not following through with its obligations. Accordingly, on February 16, 2007, the grievor filed a grievance (Exhibit G-8), stating: "I grieve management's refusal to accommodate my disability up to the point of undue hardship."

[5] The requested corrective action detailed in the grievance was revised orally by the grievor's representative at the adjudication hearing. The corrective action requested was amended to ". . . having the used leave reinstated. . ." and to ". . . be paid for pain and suffering." I will explain this request later in this decision.

[6] The relevant portion of the collective agreement signed by the Treasury Board and the Public Service Alliance of Canada on March 14, 2005, is clause 19.01, which reads in part as follows:

> ***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 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]

[7] The parties agreed 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* (*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]

[8] 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.

[9] There was no dispute concerning the grievor's disability or the corresponding duty to accommodate. Counsel for the employer stated that my jurisdiction could not apply to anything before April 1, 2005. This was the date that the current legislation, namely the *Public Service Labour Relations Act* (*PSLRA*), came into force. I was referred to *Lafrance v. Treasury Board (Statistics Canada)*, 2006 PSLRB 56. That situation, like the grievor's, covered a period of time both before and after April 1, 2005. The adjudicator in *Lafrance* determined that he had jurisdiction for the period beginning on April 1, 2005.

[10] The grievor's representative stated that the remedy being sought by the grievor was for the year 2007, the year the grievance was filed. Evidence would be proffered for a time period before April 1, 2005, but only to put the matter in its proper context.

II. Summary of the evidence

[11] In May 2000, as part of his duties as an AME, the grievor was required to fly by helicopter back and forth to a lighthouse site. After being dropped off at the lighthouse site on May 10, 2000, the pilot proceeded alone, leaving the grievor and a co-worker at the lighthouse. Minutes later, there was a fatal helicopter crash and the pilot was killed. The grievor heard of this tragedy over the Canadian Coast Guard radio approximately 30 minutes later (Exhibit G-9).

[12] Counselling was offered to a wide number of employees who may have been impacted by this tragedy. The grievor saw Dr. Walsh and a counsellor, Patricia Rose. The grievor was on injury-on-duty leave for 130 days, followed by Workers' Compensation.

[13] In February 2001, the Regional Director, Aircraft Services, wrote to the grievor saying that the Human Resources (HR) Branch would be making arrangements with Health Canada to conduct an assessment on fitness for work (Exhibit E-2). In July 2001, the HR Branch wrote to Health Canada requesting that it conduct a "Fitness for Work Evaluation" on the grievor (Exhibit G-12).

[14] In September 2001, Health Canada replied that ". . . we feel Mr. Kelly remains unfit for the position of aircraft maintenance engineer. . . ." Another appointment was scheduled to determine ". . . what limitations he may have for alternative work . . ." (Exhibit G-13).

[15] During this time period, the grievor was undergoing extensive psychiatric help from the counsellor. He was told that it was quite possible that he would not return to his substantive position. He realized that he might have to look for alternative work.

[16] Also during the time following the fatality, a number of the grievor's colleagues in another government department, the DFO, contacted him to see how he was doing. The Regional Director at the DFO even offered the grievor an opportunity to meet with its HR personnel since the employer did not have an HR office in St. John's.

[17] The grievor was eager to return to some type of work and his contacts at the DFO had an opportunity that could utilize his expertise on a temporary project.

[18] The DFO sent a letter to the employer outlining the primary duties and stating that the secondment would be for a minimum of one year so that the grievor could work on a fleet staffing project (Exhibit G-14).

[19] The employer contacted Health Canada to inquire if the grievor could carry out the duties (Exhibit G-16).

[20] Health Canada found that the grievor would be fit for this project but stated that the grievor ". . . is unfit for the position of helicopter maintenance engineer and it is possible this could be permanent . . ." (Exhibit G-33).

[21] Accordingly, the grievor was offered the one-year secondment to commence in October 2001 (Exhibit G-19).

[22] It was not in dispute that things were going well with the grievor while on assignment with the Canadian Coast Guard. He was happy to be back at work, and the Canadian Coast Guard was ". . . very pleased with the way things have worked out. . ." (Exhibit G-20). In September 2002, the Regional Director of the Canadian Coast Guard wrote to the Regional Director of the Department of Transport indicating that he wanted to extend the grievor's assignment for another six months, to April 2003 (Exhibit G-20). This was done.

[23] During the secondment, the grievor sought to upgrade his skills and took basic training in mediation as well as public service leadership courses. The total cost of this training was approximately $9,000, and the grievor asked the employer to fund the training. When the grievor was told by the employer that they would only approve $500, the Canadian Coast Guard picked up the remainder of the grievor's training costs.

[24] In April 2003, the grievor went for a medical assessment. Dr. Walsh wrote the following on April 8, 2003 (Exhibit G-2):

. . .

> *This is to advise you that Mr. Kelly has been under medical care. At this time, I have concerns about his suitability to returning* [*sic*] *to his previous occupation in aircraft maintenance.*

. . .

[25] With the grievor's secondment drawing to a close, the Canadian Coast Guard expressed an interest in extending it for another year. A meeting to discuss this possibility was set up for May 2, 2003, between John Butler, Regional Director, Canadian Coast Guard, and Jim Grant, Regional Director, Air Services for the employer. On April 25, 2003, Mr. Grant sent an email to his supervisor asking what the department's position was on cost sharing for the position.

[26] On April 30, 2003, Ron Armstrong, Director General, Aircraft Services, at the Department of Transport, replied by email as follows (Exhibit G-34):

. . .

> *It is up to the Coast Guard as to how they wish him to be paid but we will not use TC money to support his continued secondment. If CCG wishes to take some money from their Newfoundland helicopter budget, as well as from whatever budget that is currently paying him, I have no objection. If CCG can not support his continued secondment exclusively out of their funds, Bill will have to return to us and be reintegrated as a helicopter AME working on both aircraft at the St. John's base. If he refuses to do so or has a medical chit saying that he can not do so, we will have to then follow the proper processes to deal with such an issue.*

. . .

[27] On May 6, 2003, the grievor was informed that the employer would not provide additional funding and that he was expected to return to work. However, before returning to work, another medical assessment by Health Canada would need to be undertaken (Exhibit G-26).

[28] The employer's search for another position for the grievor was hampered by the grievor's personal desire to remain in Newfoundland. As early as September 2001, the grievor indicated a reluctance to move (Exhibit E-8). The employer did not have many positions in St. John's to begin with, so its task of finding alternate employment was, according to Kevin Smith, Regional Manager, Aircraft Maintenance, Atlantic Region, very difficult.

[29] In May 2003, the employer wrote to Health Canada asking for another "Fitness for Work Evaluation" (Exhibit G-27). Health Canada replied in June 2003, saying in part as follows (Exhibit E-1):

. . .

> *I have received Mr. Kelly's fitness for work medical of 27 May/03 and Mr. Kelly is considered permanently unfit for the position of aircraft maintenance engineer.*
>
> *He would be fit for alternative work not involving working on or around runways with various forms of aircraft and noises related to airplanes. Thus, he needs to avoid the airport environment as his place of work.*
>
> *The above limitations are expected to be permanent.*

. . .

[30] At this point in time, the grievor was at home searching for other types of work. He had told the DFO that he would do any type of work, and they had someone from the department assigned to the grievor's case.

[31] Another secondment at the DFO came via the grievor's contacts, and was offered to him. It was for three years, running from July 2003 to July 2006. The assignment needed approval from the employer and, expecting it to be forthcoming, the grievor commenced the secondment on July 16, 2003. Unfortunately, the employer had not signed off by then so the grievor went home and waited for the secondment agreement to be signed. Eventually it was, and the three-year secondment began.

[32] The grievor continued to pursue training in an alternate career, namely conflict resolution, as he had come to realize that he would not be returning to his substantive position as an AME. In February 2004, he wrote to Mr. Armstrong to ask if the employer would fund him for a Masters of Arts in a Conflict Analysis and Management program at Royal Roads University in British Columbia. The cost of the program, with travel included, was estimated at about $26,000 (Exhibit G-31).

[33] Five months later, Mr. Armstrong replied, turning down the grievor's request for funding. This was in part because there were no positions, let alone vacant ones, with the employer for which the training would qualify the grievor (Exhibit G-32). Instead, the grievor was asked for an updated résumé and was asked if he was mobile. Following receipt of this information, the employer said it would commence an active search for a permanent position for the grievor.

[34] The grievor enrolled in the program at Royal Roads University at his own expense and undertook the training, which required a fixed number of weeks attendance as well as correspondence work.

[35] Responding to the inquiry from the employer, the grievor wrote the following (Exhibit E-30): "I am not able to accept a position where relocation is required, due to personal/family responsibilities."

[36] The grievor testified that he was taking care of his aged parents as well as his disabled son, and he was not able to relocate to another position outside of St. John's.

[37] The employer then focussed its efforts to market the grievor in government departments in the St. John's area (Exhibits E-31 and G-35).

[38] In July 2005, Kevin Smith flew to Newfoundland to meet with the grievor. By all accounts, it was a good meeting. They discussed the training that the grievor had undertaken and the grievor put forward an approximate list of his out-of-pocket expenses. Mr. Smith commended him on his initiative and took the details back to see if the employer would cover the costs. His inquiry was sent to Mr. Armstrong.

[39] In September 2005, Mr. Armstrong left the director general position and was replaced by Gerry Toupin, who was a former AME.

[40] From this point in time onward, responses from the employer to the grievor on various issues seemed to be more expeditious. In November 2005, Mr. Toupin wrote to the grievor saying in part that he would be prepared to ". . . support a less conventional accommodation for your workplace injury, in order to increase your chances at securing employment. . ." (Exhibit G-38). Mr. Toupin authorized reimbursement for the personal expenses that the grievor had incurred in obtaining his Master's degree from Royal Roads University. A cheque for more than $25,000 was eventually given to the grievor for this purpose (Exhibit G-40). Vacation leave taken by the grievor to take the course was also reimbursed. In addition, Mr. Toupin committed to "market" the grievor within the federal government in St. John's. All of this was well received by the grievor.

[41] Early in 2006, the grievor was made aware of a vacancy for a position with the employer entitled "Boating Safety Officer." He sent an email to his HR advisor stating the following (Exhibit E-21):

. . .

> *Re boating safety pos., apparently the person occupying the pos. won a competition with CCG and has since moved. However, I am told the position is still there but the funding has been redirected for other use. I am qualified for the position and would seriously consider it if the opportunity is presented to me.*

. . .

[42] In response, HR advised the grievor that a decision had been made in April 2005 to reallocate resources and this would result in a reduction of positions in St. John's (Exhibit E-21). This decision was made in spite of the fact that the manager of the Office of Boating Safety maintained that the workload in St. John's had not diminished (Exhibit E-21). Mr. Toupin stated in cross-examination that he was aware of the Boating Safety Officer position, but a decision had been made at the departmental executive level to reallocate funds. It was out of his control.

[43] A letter from Mr. Toupin was sent to the grievor on April 11, 2006, outlining the continued efforts that the employer was making in assisting the grievor which included extending the job search period, thus giving him extended salary coverage, as well as inquiring with other government departments on possible job opportunities (Exhibit G-41). In addition, Mr. Toupin took the added step of advising the grievor that

he was willing to offer up to six months of the grievor's current salary to an employer who would offer him a permanent placement (Exhibit G-41). The employer also offered to pay for the grievor's training, albeit after initially refusing to do so.

[44] As the grievor's three-year secondment with the DFO was coming to an end in July 2006, Mr. Toupin wrote to the grievor and reiterated his offer of a six-month incentive to a potential employer (Exhibit G-42). Mr. Toupin also extended the grievor's job search period to October 1, 2006, and then subsequently extended it further to January 15, 2007 (Exhibit G-43).

[45] The employer continued its efforts to find suitable work for the grievor, both internally and externally (Exhibit E-22), but nothing was materializing as of October 2006.

[46] In late fall 2006, Mr. Toupin looked at creating a position for the grievor addressing a number of functions in his area that needed to be done in Ottawa. Knowing the grievor's personal desire to remain in St. John's, Mr. Toupin came up with a job that addressed the functions that needed to be done but that could be done in St. John's. Mr. Toupin, together with the Chief, Maintenance Planning Division, developed a job description for a position entitled "Maintenance Analysis and Planning Documentation and Publications Analyst." The position would be located in an office building in St. John's. It was a data entry position, inputting information used in the planning of required maintenance of an aircraft, among other related duties.

[47] Mr. Toupin did not send the job description to Health Canada to obtain its views on the proposed work because, he stated, he felt that he had respected the grievor's known limitations. The job description was sent to the grievor on December 21, 2006, and the letter stated that the position would be available commencing January 22, 2007. As the grievor's job search period was still ongoing, there was no break in service (Exhibit G-44).

[48] When the grievor reviewed the job offer, he was initially elated since there was nothing in it that he could not technically accomplish. He stated that there were some red flags raised in his mind, as it was closely related to some of his previous work insofar as reporting was concerned. The grievor consulted with his bargaining agent representative about the job offer and he was advised that Health Canada needed to review and comment on it.

[49] The grievor's bargaining agent wrote to Mr. Toupin on January 8, 2007, stating that the duties would have to be cleared by Health Canada before the position could be offered to the grievor (Exhibit G-45).

[50] In order to expedite the process, the grievor took a copy of the job description to Dr. Walsh and asked him for his opinion on his ability to perform the duties. Dr. Walsh wrote on January 15, 2007 in part as follows (Exhibit G-3):

. . .

> *I feel this gentleman's anxiety disorder could be vulnerable to decompensation and would recommend medical review with Health Canada for further evaluation prior to initiating the proposed job opportunity for Mr. Kelly.*

. . .

[51] Dr. Walsh's letter was then faxed to Mr. Toupin.

[52] Mr. Toupin wrote to the grievor on January 17, 2007 stating that a referral to Health Canada would be prepared. The grievor was advised to fill out a leave form commencing January 22, 2007. It is this period of leave, which is now the subject of the grievance before me.

[53] The grievor again contacted his bargaining agent representative and he was advised to complete the leave form in order to ensure that he continued to be paid. The grievor complied (Exhibit G-47).

[54] In February 2007, Mr. Toupin wrote to Health Canada and outlined the history of the situation with the grievor and the offer of the current position. Mr. Toupin stated in part as follows (Exhibit G-48): "We believe this position falls well within the restrictions outlined in your recommendation of June 12, 2003. . . ." He asked Health Canada to re-evaluate the grievor and to "[p]lease comment as to whether this position would be considered medically appropriate. . . ."

[55] In April 2007, Health Canada replied to Mr. Toupin stating in part that the grievor ". . . is considered unfit for the position of Maintenance Analysis and Planning Documentation and Publications Analyst . . ." (Exhibit G-51).

[56] From January 2007 onward, the grievor was at home looking for work. In May 2007, the employer sent the grievor an email informing him that the DFO was

posting positions for Regional Advisors, Conflict Resolution, at various locations, one being in the Maritimes (Exhibit E-16). The grievor's own contacts at the DFO had told him about this opportunity and the grievor applied for the competition.

[57] On October 5, 2007, the grievor was offered a position as Regional Advisor, Early Conflict Resolution, with the DFO in St. John's (Exhibit E-18). The grievor accepted the position and began working there on November 5, 2007.

[58] It was not in dispute that the grievor had been required to use 157.7 days of sick leave and 40.2 days of annual leave to carry him up to the time he began his employment with the DFO. That is the period of time that the grievor has sought to have returned to him via his grievance.

III. Summary of the arguments

A. For the grievor

[59] This is a situation that deals with the concept of duty to accommodate. The law is well founded in this area. Where the bargaining agent has put forward a *prima facie* case that accommodation is required, it falls to the employer to show that it has done all that it can to the point of undue hardship. It is a duty that is imposed.

[60] Article 19 of the collective agreement spells out that the employer will not discriminate against an employee based on the employee's mental or physical disability. It is not contested that article 19 applied to the grievor.

[61] The employer placed the grievor on sick leave and made him use his annual leave. These are both earned benefits and there is no support for having the employer do this. The grievor completed the forms because he saw it as the only way to continue to be paid. This is not what accommodation is about, and it is a discriminatory practice.

[62] Accommodation is there to deal with an employee's inability to function at the workplace. The grievor was not an invalid. He was not fit for a particular job, but he was able to work at another function.

[63] The grievor's representative argued that nowhere is there a provision that allows for the taking of leave credits. This is not accommodation.

[64] The evidence did not disclose any position which was approved by Health Canada as being suitable for the grievor.

[65] In this case, it is not possible to say that a diligent effort was made by the employer to find suitable work for the grievor. The question is: Can the employer demonstrate that it was not able to accommodate without undue hardship? There has been no evidence of any hardship, let alone one that is undue.

[66] The Boating Safety Officer position is one that could have been offered to the grievor without hardship. There was no evidence advanced to show why that was not a viable option.

[67] The grievor's representative submitted that there was a violation of article 19 of the collective agreement and an adjudicator is entitled to look at what it takes to address that violation. The grievor's shortfall is his leave.

[68] In addition, a message has to be sent to the employer stating that a violation is a violation. The grievor's representative asked for such a declaration and consideration for damages.

B. <u>For the employer</u>

[69] This is a situation where the employer was looking to accommodate an employee who had spent 20 years working as an AME. Then, all of a sudden, the medical documents indicated that the grievor could no longer do an AME's work. The 2003 Health Canada medical assessment stated that the grievor was permanently unfit for the position of AME. The grievor needed to avoid the airport environment as his place of work (Exhibit E-1). That was the known restriction that the employer was working with and it never changed.

[70] The employer had to determine what it could do for the grievor. What it did was compensate him for his Masters degree, provide him with job skills training, allow him to attend workshops and supported his secondments. The latter certainly helped the grievor with his network of contacts.

[71] There were no positions for the grievor at the employer in Newfoundland. The fact that the employer tried but hit a dead end simply meant there were no positions available.

[72] The grievor had imposed a personal restriction of wanting to remain in St. John's. The evidence indicates that Mr. Toupin might have been able to find another position for the grievor but for this personal restriction, which the employer chose to respect.

[73] The jurisprudence indicates that the employer is not obliged to create a position in an accommodation case. What Mr. Toupin did in this case was at the far limits of accommodation by creating something for the grievor that met his known medical restrictions, as well as his personal desire to remain in St. John's. This was a genuine effort to do something for the grievor.

[74] The issue of sick leave is covered by clause 39.02 of the collective agreement. The clause states that an employee shall use sick leave credits when the employee is unable to perform the functions of his or her position and a medical certificate affirms such a finding. In January 2007, when the grievor went on sick leave, that was the situation facing the employer. The medical evidence indicated that the grievor could not perform the duties of his position. Sick leave was, consequently, entirely appropriate. The same is true of annual leave.

[75] In *Sioui v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 44, a similar situation arose in that the grievor suffered post-traumatic stress disorder and could not return to his position. The grievor retrained, but the department could not find a position for him and his employment was terminated. In dismissing the grievance, the adjudicator wrote as follows:

. . .

> *[75] The application of the obligation to accommodate was interpreted in* British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (BCGSEU)*, [1999] 3 S.C.R. 3 (*Meiorin*), at para 54. To summarize, when an employer applies an employment standard, it must justify that standard by showing that (1) it is rationally connected to job performance, (2) the standard was adopted because it was necessary to fulfill a legitimate work-related purpose and (3) the standard is reasonably necessary for accomplishing that job. The employer must be able to demonstrate that it is impossible to accommodate employees with the same characteristics without suffering undue hardship.*

> *[76] The criteria developed in* Meiorin *have provided a framework for assessing the legitimate purpose of an employment standard and the intent of the employer when the standard was adopted in order to determine its validity. In addition to those criteria, there is a test – reasonableness – used to assess whether the standard was necessary in the context of the job in question. The courts have also ruled 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 546;* Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, at 520-521; and* McGill University Health Centre (Montreal General Hospital)*, at para 15.*
>
> . . .

Further on, the adjudicator wrote as follows:

> . . .
>
> *[87] Based on the previous analysis of court decisions, I must conclude that the obligation to accommodate is not unlimited nor one sided. It requires that the employer examine the possibility of adjusting the occupational requirements of the work to facilitate the employee's return to work or that it make serious efforts to find the employee alternative work. The employer may not refuse to help the employee return to his job unless it can demonstrate that the changes to the occupational requirements would themselves cause undue hardship. For his or her part, the employee must show cooperation and open-mindedness to the efforts by the employer to find a solution to his or her return to work.*
>
> . . .

The adjudicator concluded that the employer fulfilled its obligation to accommodate and the grievance was dismissed.

[76] Having an employee exhaust his or her sick leave credits is not discriminatory. In *Lafrance v. Treasury Board (Statistics Canada)*, 2009 PSLRB 113, there was an agreed statement of facts, which reads in part as follows (page 3, third bullet): ". . . it is acknowledged that Ms. Lafrance used her annual leave and her paid sick leave to cover the period from April 2006 to July 2006."

The adjudicator wrote further, at paragraphs 113 and 114:

> *113 While the main responsibility for finding a reasonable arrangement to help an employee with functional limitations*

> *falls to the employer, that responsibility does not involve creating a position out of bits and pieces without taking operational requirements into consideration. The Supreme Court of Canada, in* Hydro-Québec, *clearly indicated that the criterion is not the impossibility for the employer of accommodating an employee's characteristics. The Supreme Court specified that the employer is not required to fundamentally modify the working conditions but to accommodate, if it does not impose undue hardship, the workstation or tasks to enable the employee to work.*
>
> *114 In this case, the evidence shows that the employer used every necessary and appropriate means to find a reasonable arrangement for Ms. Lafrance during the period covered by these grievances, short of undue hardship. As a result, the employer was able to identify certain telework opportunities at different times. However, the full-time telework requirement presented a significant obstacle to the search for a solution to Ms. Lafrance's situation. The evidence clearly established that full-time telework was not available on a continuous and ongoing basis, even after the tasks of Ms. Lafrance's position were analyzed and after considering adding work from other sectors, as well as extending the search to Statistics Canada's regional offices and to other departments.*

The grievance was dismissed.

[77] In *Ricafort v. Treasury Board (Department of National Defence)*, PSSRB File No. 166-02-17422 (19881129), the gist of the case is that, if an employee is not fit for work, the employer may have to put the employee on sick leave. That is exactly what happened with the grievor.

[78] The grievor must prove that the employer failed to accommodate him. There are no specifics here on how there was any failure to accommodate. Even after the grievance was filed, evidence indicates that the employer was still engaged in its duty to accommodate, as seen by the email advising the grievor of the job posting at the DFO.

[79] The benchmark for pain and suffering has not been reached in this case. Furthermore, the remedial action sought by the grievor is not open to an adjudicator given that the grievor has obtained employment elsewhere. The grievor was not out of pocket.

[80] Shortly after the conclusion of the hearing, counsel for the employer referred me to a recent decision of the Public Service Labour Relations Board ("the Board") in *Zaytoun v. Canadian Food Inspection Agency*, 2010 PSLRB 35. Written submissions were made by both representatives on this case.

IV. Reasons

[81] The issue to be decided in this case is quite straightforward. Should the grievor have been required to utilize his sick leave and annual leave credits from January 2007 onward at a period in time when the employer had a duty to accommodate?

[82] There have been many cases that have dealt with accommodation in the workplace, which is a principle that lies at the heart of human rights law and has been applied by this Board. A number of decisions relate to an employer's refusal to continue to employ an employee and the employee filing a grievance claiming that the termination of employment was a discriminatory practice. This case is somewhat different in that the end result is not a termination of employment. However, the authority to decide this matter is still grounded in the same provisions of the *PSLRA*, namely subsection 208(2) and section 226.

[83] In this case, the factual matters are not materially in dispute. The employer acknowledged that it had a duty to accommodate the grievor as a result of a workplace tragedy that rendered the grievor incapable of performing his duties. Both the grievor and the employer made attempts to find alternate employment, and in the end the grievor was successful in securing employment with another government department.

[84] The undisputed evidence shows that, following the fatality in May 2000, the grievor was off work and was covered by injury-on-duty leave and Workers' Compensation until, through his own contacts, he secured his first secondment with the Canadian Coast Guard, which is part of the DFO.

[85] A list of duties that the grievor would perform was sent to the employer by the Canadian Coast Guard and the employer sent the list to Health Canada and requested a "Fitness to Work Assessment" for the grievor. Health Canada replied that the grievor was fit for the project and he commenced a one-year secondment on October 11, 2001.

[86] The evidence indicates that the employer was trying to find alternate work for the grievor as early as April 2001, but nothing was available (Exhibit E-23).

[87] The one-year secondment was extended for six months, and it expired in April 2003. During that time, the grievor also studied and trained in the field of mediation and enrolled in a leadership training program. The cost of this training was about $9,000 and the grievor's undisputed testimony was that the employer approved $500 for this training and that the Canadian Coast Guard paid the balance.

[88] Discussions took place between the Canadian Coast Guard and the employer about extending the grievor's stay further, subject to discussions about sharing on payments with his training and salary as discussed in an April 25, 2003 email (Exhibit G-34). Mr. Armstrong replied on April 30, 2003 stating that it was up to the Canadian Coast Guard as to how it wanted the grievor to be paid but that the employer would not use its money to support a continued secondment (Exhibit G-34).

[89] As a result, the secondment ended and the employer asked Health Canada to conduct another "Fitness for Work Evaluation" to determine if the grievor ". . . might be able to return to his former duties as an Aircraft Maintenance Engineer . . . " (Exhibit G-27).

[90] In June 2003, Health Canada informed the employer that the grievor was to be considered permanently unfit for his substantive position of AME. The letter further stated that the grievor needed to avoid the airport environment as his place of work.

[91] The grievor continued to market himself and as a result of his efforts, the Canadian Coast Guard offered him a three-year secondment, from 2003 to 2006. A list of duties was sent to the employer for approval in July 2003, and the duties were ultimately approved in October 2003. The grievor started the second secondment in July 2003, anticipating that the employer would sign off immediately. Unfortunately the employer delayed in the signing off and the grievor had to be sent home until the paperwork was completed

[92] While on the second secondment, the grievor continued to pursue his new-found interest in the field of mediation and sought funding from the employer to take a Masters course in Conflict Analysis. It was estimated that the cost was $27,000, and Mr. Armstrong rejected the grievor's request by letter dated July 12, 2004.

[93] The grievor went ahead on his own and enrolled in the Masters program, and ultimately graduated in November 2006.

[94] Throughout the grievor's time on the second secondment, the employer continued its efforts to find alternate work for him. It was not in dispute that a personal restriction the grievor had imposed was a desire to remain in St. John's. The grievor was taking care of his aged parents and his disabled son and made it clear that he was not mobile. This, understandably, led to a restriction on the possible positions the grievor could be accommodated in. Nevertheless, efforts were made by the employer to find alternate work for the grievor.

[95] In September 2005, Mr. Toupin, a former AME, replaced Mr. Armstrong. Mr. Toupin undertook to meet with the grievor in November 2005 to discuss a number of issues, including reconsideration on the issue of reimbursing the grievor for the Masters program. The employer ultimately reimbursed the grievor in excess of $25,000 toward his Masters in Conflict Analysis. Mr. Toupin also offered the grievor a job search skills training course to fine-tune his interviewing skills. In addition, the employer would continue to market the grievor in St. John's. By all accounts, it was a positive meeting.

[96] In early 2006, the grievor became aware of a possible vacant position at the Department of Transport in the marine safety area. The position, Boating Safety Officer, was located in St. John's and the grievor stated that he was qualified for the position and would seriously consider it if the opportunity was there (Exhibit E-21).

[97] Mr. Toupin became aware of the grievor's interest in the position and was told by the employer's HR Branch that resources in that area had been redirected and no position was available (Exhibit E-21). Mr. Toupin testified that the situation was out of his control since the decision to reallocate resources had been made at the most senior level, a level that he was not part of.

[98] There was no dispute that Mr. Toupin continued his efforts to market the grievor. Indeed, in April 2006, Mr. Toupin even took what can fairly be described as an extraordinary step of advising the grievor that the employer was offering any prospective employer up to six months of the grievor's current salary for a permanent placement offer. Unfortunately, the job searches were not panning out.

[99] In July 2006, the three-year secondment came to an end and no suitable alternate work had been found for the grievor. From the time the grievor was unable to perform the duties of his AME position in 2000, up to July 2006 when the three-year

secondment at the Canadian Cost Guard ended, the employer had not offered the grievor any work. The work that the grievor had done was with another government department, the assignments were for a finite period of time and were the fruits of the grievor's own efforts at finding alternate employment. Mr. Toupin extended the grievor's job search period, firstly to October 2006 and then to January 2007. The effect of this was to continue the grievor's salary without the need to have him utilize his leave credits.

[100] Mr. Toupin continued his efforts to find the grievor work and was able to, what can best be described as, cobble together pieces of work that needed to be done and an indeterminate position was identified for the grievor. Mr. Toupin stated that the work was initially going to be done in Ottawa, but was changed to St. John's to assist in accommodating the grievor's desire to remain there. A job description was sent to the grievor on December 21, 2006 and he was offered the position.

[101] There was no dispute that Mr. Toupin did not send the job description to Health Canada before offering it to the grievor. Mr. Toupin testified that he felt that the job contents respected the grievor's Health Canada workplace assessment.

[102] The grievor's bargaining agent representative advised both the grievor and the employer that the job description should have been vetted by Health Canada to see if the grievor could do the work without an adverse impact on his health. When this was done, Health Canada advised that the grievor could not, in fact, do this work for health reasons. The grievor was subsequently put on sick leave and annual leave while the job search continued. Fortunately, it ended positively for the grievor, as he was ultimately employed in November 2007 as Regional Advisor, Early Conflict Resolution, at the DFO.

[103] Was there a failure to accommodate in requiring the grievor to utilize his sick leave and annual leave credits in 2007?

[104] The adjudicator found as follows in *Sioui*:

. . .

> *[81] Moreover, the Ontario Divisional Court decided in* ADGA Group Consultants Inc. v. Lane et al.*, (2008), 91 O.R. (3d) 649 (see also* Lane v. ADGA Group Consultants Inc.*, 2007 HRTO 34 (CanLII), that the employer has the burden to*

> *demonstrate both objectively and subjectively that it was impossible to accommodate an employee. . . .*
>
> . . .

[105] The primary responsibility for accommodating the grievor falls to his home department, the Department of Transport. While the grievor has a role to play in such cases, the primary responsibility falls to the employer. What action did they take in this regard, and was it sufficient? A review of the evidence reveals that the grievor himself arranged for the secondments at the DFO through his contacts. It was the grievor who took and paid for his own courses, and marketed himself to the Canadian Cost Guard. In fact, from the evidence, it was the grievor who was mainly responsible for his own accommodation. The employer did have one position, the duties of which could have been performed by the grievor, and that was the BSO position. However, the evidence indicated that the funding from this position was removed by the department, but there was no evidence that the impact on the grievor was considered when this funding decision was made. In my view, the efforts undertaken by the employer to market the grievor fall short of what is required in their duty to accommodate, which is accommodation to the point of undue hardship.

[106] I also note that Mr. Toupin made what can best be described as a very generous offer of providing a future employer with up to six months of the grievor's then-current salary to offset costs associated with a job offer. This information was communicated to the grievor but no evidence exists that the employer informed other employers about this offer. Perhaps if the DFO or any other employer in St. John's had known about this, an offer would have been forthcoming. More effort could have been made by the employer to market the grievor before having him utilize his leave. Regardless of whether or not something might have resulted from such action, the employer nonetheless had a duty to market the grievor and its failure to advertise this offer of salary to potential employers means that it failed to accommodate the grievor. Having said that, there is no question in my mind that honest efforts were made to find the grievor a position, particularly by Mr. Toupin. However, although these efforts were made honestly, they did not go far enough.

[107] The job that Mr. Toupin offered to the grievor in December 2006 was one that the grievor could not medically do, according to Health Canada. While I believe that Mr. Toupin made the offer in good faith, the fact remains that it should have been vetted by Health Canada before being offered to the grievor. Had that been done,

Mr. Toupin would have found out that it was not a position that he could offer to the grievor and it would have avoided the ultimate disappointment that both Mr. Toupin and the grievor felt over this result. Also, had this been done at the outset, time might have been saved and efforts could have been directed at finding the grievor a job that he could perform. In the end, however, I do not find any bad faith on Mr. Toupin's part in offering this job without first checking with Health Canada. In my view, he genuinely believed the offer fell within the grievor's limitations. Unfortunately, it did not. It did, however, result in the department requiring the grievor to utilize his leave credits. Had Mr. Toupin sent the work description for the proposed position to Health Canada for evaluation in the fall of 2006, the response would have been received earlier and the grievor may not have been forced to utilize his leave credits. I find this, in these very specific circumstances, to be a failure to accommodate on the employer's part.

[108] While the employer did provide the grievor with counselling, conducted assessments on the work that he could perform, made efforts to market him and belatedly paid for the training expenses that the grievor himself occurred despite his employer's refusal of support, the employer did not accommodate him to the point of undue hardship. Indeed, as I stated above, it was the grievor who was largely responsible for his own accommodation.

[109] The employer lead some evidence which indicated that, aware that the grievor's secondment with the Canadian Cost Guard would end in little over a year, it began to consider what process it would undertake in order to search for another position for the grievor to occupy. However, while the evidence does contain reference by the employer to what should be done during this period of time, aside from the evidence regarding the BSO position, there was no evidence to indicate who, if anyone, outside the Department of Transport was contacted and when, or even which departments were considered or contacted and what the form of these contacts was. The evidence regarding the efforts made by the employer during 2005 and 2006 was lacking and I find that the employer has fallen short of proving, in this particular case, that it discharged its responsibility and made efforts, to the point of undue hardship, to find him alternate work.

[110] The employer's actions were even, at times, inimical to the employer's duty to accommodate. At first, it declined to support the grievor's efforts at retraining. It refused, at first, to pay any of the grievor's salary during his secondment at the

Canadian Cost Guard, delayed in signing a secondment agreement and failed to produce any evidence to the effect that it had advised potential employers of its commitment to pay a portion of the grievor's salary.

[111] If I am wrong in reaching this conclusion based on the evidence, I would also find that, in spite of the efforts by the grievor and the employer, it appears both sides hit a wall, so to speak, in terms of finding alternate employment. The question then becomes who best to bear the cost of hitting the wall. The employer, having decided that it had not reached the point of undue hardship (otherwise it would have, as it first warned him, dismissed him for disability) and being willing to continue the search, should also bear the cost of his being at home without work. In this instance, this could be a form of accommodation.

[112] Counsel for the employer argued that this case was similar to *Sioui* and that I should reach the same conclusion. With respect, I disagree. At paragraph 95 of *Sioui*, the adjudicator wrote as follows:

> *[95] The grievor apparently did not take the opportunity seriously. In March 2007, he said that he was available for work outside the Québec region but told Ms. Houle and Ms. de Lottinville that what he really wanted was reinstatement in his correctional officer position. He refused all assistance from Ms. de Lottinville. Between the time of his reinstatement on April 19, 2007 and his final dismissal on October 4, 2007, there is no evidence that Mr. Sioui made any serious job search effort within the CSC or in any other department of the federal public service. Once again, he failed to attend a crucial meeting to update his file and did not respond to the letter from the warden of the penitentiary asking him to make his intentions known.*

[113] That case is, in my view, far removed from the grievor's case. The grievor never sought reinstatement to his AME position. He accepted all assistance offered by the employer and he made serious job searches. The two cases are not, I believe, similar.

[114] In *Lafrance*, the adjudicator found that he had jurisdiction from April 1, 2005 onward. There is no issue here with respect to any earlier time period and I accept that I have jurisdiction for the period of April 1, 2005 onward.

[115] The second *Lafrance* case was another case referenced by counsel for the employer. In that case, the grievor, through her director, indicated that she was available for telework only. The adjudicator found that full-time telework represented

an undue hardship for the employer and dismissed the grievance. In Mr. Kelly's case, the medical assessment of April 19, 2007 found that he was fit for alternate work that did not involve duties with a technical or maintenance component in the aviation industry. That left a wide range of possibilities, whereas Ms. Lafrance had one, and only one, possibility.

[116] Counsel for the employer also advanced *Ricafort* as standing for the proposition that an employee could be forced to utilize sick leave credits (and by extension annual leave credits). Again, with respect, I do not view this case as applicable to the circumstances of the grievor. *Ricafort* did not involve a duty to accommodate. That, in my view, makes it a very different situation. In addition, in *Ricafort*, the employer questioned a medical certificate that Mr. Ricafort had supplied and had him assessed by Health Canada. The assessment was that he was fit to return to work, and this was to his substantive position. In this case, the grievor was never fit to return to work to his substantive position, or in the one offered to him by Mr. Toupin in December 2006. In my view, these two cases are entirely different.

[117] Counsel for the employer referred me to *Zaytoun*. Again, with respect, I do not feel that it is helpful in deciding this case. Dr. Zaytoun went on sick leave because he was sick. There was no position that he could be accommodated in at that time. In this case, the grievor was never sick, although he was not fit to perform the duties of his substantive position.

[118] Under these circumstances, I conclude that the employer failed in its duty to accommodate the grievor by not taking sufficient steps to find him alternate employment, thereby forcing him utilize both sick leave and annual leave credits. However, I do not feel there was any bad faith on the employer's part in its actions and I do not feel that the awarding of damages is appropriate in the circumstances.

[119] On a sidebar note, the grievor is now solidified in his job as a mediator. The witnesses wished him well in his new endeavour and their wishes were genuine. I too would like to wish him well. For those that have a long memory in the area of mediation, the name Bill Kelly stands out as one of Canada's prominent practitioners. If this Bill Kelly (the grievor) provides the same level of success at the DFO as the other Bill Kelly did in his cases, the department will be well served by their employee. As the grievor said in his email of September 6, 2005, ". . . not bad for a grease monkey, aye."

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

(*The Order appears on the next page)*

IV. Order

[121] The grievance is allowed in part. The grievor is to be reimbursed the sick leave and annual leave credits that he was required to use from January 2007 onward until the time he left the Department of Transport and began his new position on November 5, 2007.

June 17, 2010.

Joseph W. Potter,
adjudicator