**Date:** 20110120

**File:** 166-02-37533

**Citation: 2011 PSLRB 2**

*Public Service Staff Relations Act*

Before an adjudicator

BETWEEN

**TERESA PANACCI**

Grievor

and

**TREASURY BOARD**
**(Canada Border Services Agency)**

Employer

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

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

**REASONS FOR DECISION**

***Before:*** Ian R. Mackenzie, adjudicator

***For the Grievor:*** Patricia Harewood, Public Service Alliance of Canada

***For the Employer:*** Michel Girard, counsel

Heard at Mississauga, Ontario,
November 23 and 24, 2010.

## I. Grievance referred to adjudication

[1] In 2004, Teresa Panacci ("the grievor") filed a complaint with the Canadian Human Rights Commission (CHRC) against an alleged failure of the Canada Border Services Agency (CBSA or "the employer") to accommodate her disability. On June 1, 2005, the CHRC declined to deal with her complaint until she had exhausted the grievance procedure. The grievor filed a grievance on June 17, 2005, alleging a breach of article 19 of the collective agreement between the Treasury Board and the Public Service Alliance of Canada for the Program and Administrative Services Group; expiry date June 20, 2003 (Exhibit G-1). The decision at the final level of the grievance process was issued on March 13, 2007. The employer dismissed the grievance on the basis of timeliness (although it also addressed the merits of the grievance). The grievance was referred to adjudication on April 19, 2007. In a letter to the Public Service Labour Relations Board on May 16, 2007, the employer withdrew its objection to the timeliness of the grievance.

[2] Since the events that led to the grievance occurred before April 1, 2005, section 61 of the *Public Service Modernization Act*, S.C. 2003, c. 22, requires that this reference to adjudication be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35.

[3] Two witnesses testified for the grievor, and she also testified. Two witnesses testified for the employer. To accommodate a witness, the hearing location was moved to Mississauga, Ontario, from the normal location of Toronto, Ontario.

[4] The grievor's physician, Dr. Faiz Malam, was qualified as an expert in family medicine, on the consent of the employer.

## II. Summary of the evidence

[5] The grievor has been employed with the CBSA for approximately 22 years. She is currently working as a senior officer in its Compliance Verification and Services (CVS) section, and has been since April 1, 2005. She is currently being appropriately accommodated. The issues in this grievance deal with events from April 2004 to the end of March 2005.

[6] The grievor's substantive position was at the International Mail Processing Centre (IMPC) in Mississauga. She was a customs officer, classified at the PM-02 group

and level. The IMPC is a warehouse facility attached to the Mississauga Gateway Postal Plant, where international mail is processed. It contains a series of desks a alongside conveyor belts. Customs officers remove selected envelopes and parcels from the conveyor belt to confirm the payment of duty and to check for the importation of contraband material. The job was described by the director of the IMPC, Robert Burfield, as "light industrial."

[7] Mr. Burfield wrote to Health Canada, requesting a fitness to work evaluation in March 2000. In particular, he requested an assessment of the grievor's abilities to perform her duties, along with a prognosis (Exhibit G-15). In the letter, he noted that the CBSA had received a medical note from the grievor stating that she was being treated for chronic fatigue syndrome (CFS). He also noted that the CBSA was accommodating her by assigning her to another work location. From 2000 to 2004, she was on an assignment at the CBSA's CVS section, working in the client services area. The position involved no lifting and provided steady daytime hours.

[8] Dr. Malam testified that CFS is a "diagnosis of exclusion." Only after ruling out reversible medical conditions such as depression and thyroid issues can a doctor diagnose CFS. He testified that the most recent medical guidelines describe CFS as an onset of difficulties performing tasks that the patient was normally able to do, for a prolonged period. Some of the symptoms of CFS include persistent low-grade fever, odd joint and muscle pain, not feeling refreshed after a lengthy sleep, fatigue persisting 24 hours after performing tasks, and difficulties with memory.

[9] In February 2004, Mr. Burfield wrote to the director of CVS inquiring about a possible extension of the grievor's assignment (Exhibit E-4). Mr. Burfield wrote that, if the grievor was "OK" with the assignment, he could continue with the arrangement. He also asked the director if the grievor could be appointed to the position that she was occupying. The Program Services Coordinator replied on behalf of the director that the assignment would not be extended and that there was no available PM-02 position for her to be appointed to in CVS. The grievor testified that she was told by the director that he could not keep her in her position. Mr. Burfield testified that the CVS section was to run a competition for the position that the grievor was occupying on an acting basis. The position was to be classified at a higher level, and Mr. Burfield testified that there was a concern that, if she stayed in the position during the competitive process,

there might be allegations of favouritism. Susan Scuglia, a labour relations officer with the CBSA, testified that the grievor was unsuccessful in that competition.

[10] Mr. Burfield testified that he was satisfied that the grievor was able to return to her substantive position. She was working every day, and the time for accommodation had passed. He believed that she was "fit and ready to come back to work." He also testified that, without any negative information before him, he "hoped that things had settled down." He testified that he relied on the original medical information from 2000 that had set time limits for the accommodation. That documentation was not tendered as an exhibit.

[11] The grievor returned to her substantive position at the beginning of April 2004. She provided a note from her chiropractor, dated April 2, 2004 (Exhibits E-1, tab 3, and G-2). The note stated that she was being treated for a chronic lower back condition. The chiropractor wrote that, due to the nature and severity of the condition, she had the following limitations: no prolonged sitting, minimized lifting duties to a maximum of approximately 10 pounds, and no irregular shift work. The grievor was placed on a day shift and was put on a secondary line where she was not required to lift parcels over 10 pounds. Mr. Burfield testified that she was allowed to stand or sit as required and to take breaks as necessary.

[12] The grievor testified that on her return to work she was initially fine but that within a short time her CFS symptoms began to return. She had flu-like symptoms, headaches, poor concentration and memory, and low-grade fevers. A colleague of the grievor, Rose Di Matteo, testified that the grievor was not as energetic when she returned to work as she had been in the past.

[13] The grievor spoke with her manager, Teresa Swanek, in early April 2004 about the possibilities of other work or assignments. She wrote an email to Ms. Swanek on April 14, 2004 (Exhibit G-3) following up on her conversation and including a list of areas in which she was interested in working. She wrote that the list was not exhaustive and that she would be willing to discuss further. She testified that she did not hear back from her supervisor.

[14] The grievor met with Mr. Burfield on April 30, 2004. At that meeting, she raised concerns about her ability to meet the requirements of her position. She testified that she told Mr. Burfield that she was not feeling well and that she asked him if she could

be placed somewhere else. She identified some possible options. She testified that he told her that he could not move her and that he had to give opportunities to others. Mr. Burfield testified that he did not refer to giving opportunities to others. At the meeting, the grievor telephoned Dr. Malam to clarify what she was requesting. Dr. Malam agreed with Mr. Burfield that an assessment of the grievor's fitness to work by Health Canada would be useful for the employer.

[15] At a subsequent meeting with the grievor on May 3, 2004, Mr. Burfield asked her if she could identify anything that might be causing her problems. Mr. Burfield testified that the grievor told him that she felt less tired at the end of the day when she completed seizure reports. The reports are required when an officer seizes contraband. He testified that it was not enough work for one officer and that it was preferable that the officer who discovered the contraband filled out the report. Mr. Burfield prepared a note to file on May 3, 2004 (Exhibit E-3) writing, "We have followed the recommendations of previous health care workers however this did not seem to help. . . ." He noted in his memo that the work that the grievor was performing left her generally tired and weak. She also told him that a recent blood test showed some deterioration in her health. Mr. Burfield told her that until the assessment was completed there was nothing else that the CBSA could offer her, as she had been placed "[i]n the least demanding position we had given the limitations expressed by treating health workers" (Exhibit E-3). In his memo, Mr. Burfield also noted that she had been assigned to alternate work for approximately four years; "[h]owever changes in that operational area dictated she return to this operation" (Exhibit E-3).

[16] Mr. Burfield requested a fitness to work evaluation from Health Canada on May 3, 2004 (Exhibit E-1, tab 3). The note from the chiropractor was attached to the request. Mr. Burfield requested an "[u]p-to-date, very detailed and specific assessment" of her ability to perform her duties at the IMPC, as well as details of restrictions, a prognosis and an estimate of the date on which she could return to the full range of duties of the position. Ms. Scuglia wrote the cover letter for the request to Health Canada. In her letter to Dr. Eric Jeffries at Health Canada (Exhibit E-1, tab 3), she noted that the grievor had told her manager that she was having difficulty with her assigned work, "which she finds physically tiring." She asked that Dr. Jeffries consult with the grievor's doctor and also that he conduct an independent evaluation, if warranted. She included with her letter copies of the job description and the Physical Demands Analysis (PDA) for the position.

[17] The grievor was examined by Dr. John Goldsand on May 25, 2004. Dr. Goldsand provided a three-page report to Dr. Jeffries. In his report (Exhibits G-6 and E-1, tab 2) dated June 1, 2004, Dr. Goldsand reached the following conclusion:

. . .

> *Ms. Panacci was managing quite well in the client services position. . . She managed at this position full-time without significant physical symptoms for approximately one year. Immediately upon being transferred back to the postal department, her symptoms of chronic fatigue have returned. These are manifested by muscle pains, new headaches, unrefreshing sleep and post-exertional malaise. This is assuming that her other laboratory tests . . . are well within normal limits.*
>
> . . .
>
> *If all her laboratory tests are normal, then she does appear to meet the criteria for chronic fatigue. It is interesting that her chronic fatigue symptoms seem to be more pronounced in the Mail Department and not in other locations. Regular shift work may help with the fatigue and allow her to better manage her day. She reports feeling much healthier outside of the Postal Office and might benefit from a transfer to another department in order to find more job satisfaction and less pain. . . .*

[18] Dr. Goldsand's report was not shared with the CBSA at that time. (The grievor provided a copy to Ms. Scuglia on or about July 30, 2004.) Dr. Jeffries wrote to Ms. Scuglia on June 25, 2004, as follows about his assessment of the grievor's fitness to work (Exhibit E-1, tab 5):

. . .

> *Although there was some evidence of discomfort on physical examination there is nothing exceptional reported. The findings were not those of low back pain as indicated by the chiropractor and the findings do not give substantial support to recommending that the employee be placed on a fixed shift.*
>
> *The doctor noted that while Ms. Panacci was doing presentations and some teaching she was managing quite well at work, missing little time. However, "immediately upon being transferred back to the postal department" her symptoms returned. The doctor commented that "it is interesting that this [condition] only occurs while she is in the mail department and not in other locations". Based on the*

> *physical findings, I do not see why Ms. Panacci cannot perform light to medium classified work.*
>
> *I interpret the report to imply that there is a matter of motivation and job satisfaction involved more than a medical condition. Since the doctor also adds "she reports feeling much healthier outside of the Postal Department" it might be best if the employee were to apply for work that was more satisfying. This is a deployment and not a medical accommodation. There might even be a job that she could deploy to with non-shift expectations, ending a tendency to medicalize such issues.*

[19] The grievor testified that Dr. Jeffries did not examine her. Neither Dr. Jeffries nor Dr. Goldsand were called to testify. Dr. Jeffries did not consult with the grievor's physician, as requested by Ms. Scuglia. Mr. Burfield testified that he expected and received professional advice from Health Canada and that he accepted its advice. The grievor testified that she was motivated to work and that she always wanted to work at a job that met her limitations.

[20] The grievor was on certified sick leave in May 2004 for seven days (Exhibit G-4). In June 2004, she was on certified sick leave for most of the month (21 days). Ms. Scuglia testified that, normally, but not always, a medical certificate is provided for certified sick leave.

[21] Mr. Burfield wrote as follows to the grievor on June 29, 2004 (Exhibits E-1, tab 18, and G-7) about the fitness to work evaluation:

. . .

> *The evidence we have received from Health Canada indicates you are able to return to work and perform light to medium classified work, tasks consistent with work available in the operations in plant.*
>
> *As a result of these findings I must advise you there is an expectation you will return to work as soon as possible. You will be expected to resume shifts assigned, as the findings do not support, medically, any recommendation of fixed shifts.*
>
> *I expect you will return to work on or before July 7th, 2004. After that date medical leave will not be continued based on the information at hand.*
>
> *Further I note the reviewing physician has expressed concern for motivation and job satisfaction as issues affecting your work rather than a medical condition. The only advice I can*

> *offer in the face of that observation is that you seek other positions through the competitive process or deployment. Additionally you may wish to seek the assistance of the EAP program to help with these issues.*
>
> *In the interim and after July 7th any additional medical leave application must be supported by an attending physician's medical form (blue slip) upon your return to work as you are currently carrying a negative sick leave balance. Additional leave may be granted to you to the extent of the provisions of the collective agreement and entitlements available.*
>
> *Please ensure you return to work as directed as failure to respond will place you in a position of being on unauthorized leave without pay a situation that may result in disciplinary measures.*
>
> [*Sic* throughout]

[22] The grievor testified that she telephoned her manager to tell her that the request to return to work contradicted her physician's recommendations. Dr. Malam provided the grievor with a medical note on June 30, 2004 (Exhibit G-8) stating that she was unable to attend work from June 30 to July 14, 2004. The grievor testified that she tried to present the note to the CBSA but that it was not accepted. She testified that she was told that the CBSA had to follow Health Canada's recommendations. Mr. Burfield testified that he did not see the note. He also testified that, had he accepted it, the grievor would have been placed on leave without pay, as she had exhausted all her sick leave credits.

[23] Dr. Malam wrote to Dr. Jeffries on June 30, 2004 (Exhibit G-5) after reviewing Dr. Jeffries' letter of June 25, 2004 and Dr. Goldsand's report of June 1, 2004. In the letter, he addressed as follows Dr. Jeffries' statement that the grievor might have motivational issues:

> *. . . It is my medical opinion that she does not suffer from any difficulty in motivation . . . but rather she genuinely has a difficult time with her current working conditions. Never have I had any suggestion of malingering or any factitious* [*sic*] *disorders. Although she does not display any significant physical symptoms, as Dr Goldsand mentioned in his report . . . she more than likely suffers from chronic fatigue type of symptoms. It is my professional opinion that she would benefit from a change in her job placement in order to evaluate how well she does in her new work environment. For a physician to suggest there is a lack of motivation and desire displayed by Miss Panacci without even meeting the*

> *patient is of concern. Therefore having examined Miss Panacci it is my medical opinion that she does indeed suffer from some chronic fatigue and I think it would be prudent to see how well she copes in a different working environment within your organization.*

[24] Dr. Malam testified that stressors such as a change in work environment can exacerbate CFS symptoms. He testified that the grievor's return to her substantive position might have exacerbated some of the CFS symptoms. Dr. Malam testified that he recommended a different work environment because the grievor had done reasonably well in her previous assignment and was able to be more productive in that setting. He also testified that he saw no evidence of malingering by the grievor. The grievor testified that her return to her substantive position had exacerbated her CFS. She testified that she had been doing well in her assignment and that the symptoms returned when she went back to her substantive position at the IMPC.

[25] Dr. Jeffries wrote to Ms. Scuglia on July 6, 2004 after receiving the letter from Dr. Malam (Exhibit E-1, tab 6). He did not provide a copy of Dr. Malam's letter to Ms. Scuglia. In his letter, Dr. Jeffries stated the following:

. . .

> *The doctor disagrees with my suggestion that she lacks motivation. My letter also mentioned job satisfaction. The World Health Organization divides medical problems into "impairment" which can be measured and disability, which includes the limitations but in a context of psycho social and cultural context, where availability of alternative jobs, disability insurance and other factors play a part.*
>
> *The doctor concludes that Ms. Panacci does suffer from "some" underlying conditions and feels it would be prudent to see how well she copes in a different working environment.*
>
> *I really do not think this contradicts my recommendation – I just believe that it is a matter of choosing deployment rather than treating it as a medical duty to accommodate, as I have previously stated. I cannot be more explicit since I am constrained from giving any confidential medical information away, but I do believe that my advice is consistent with that given by the American College of Occupational and Environmental Medicine on a group of conditions that include Ms. Panacci's underlying condition.*
>
> [*Sic* throughout]

[26] The grievor called Dr. Jeffries' office on July 6, 2004. In a letter to Ms. Scuglia sent the next day, Dr. Jeffries stated that he usually did not speak to employees, instead "[p]referring a paper trail for future reference" (Exhibit E-1, tab 7). Dr. Jeffries noted that the grievor was not working and stated that there was no reason she could not perform "appropriate work." He continued as follows:

> *. . . I gather . . . that Ms. Panacci did not understand why I would not either fully accept or incorporate her doctor's recommendations into my letters. Put simply, I am doing my job. Family doctors are rarely trained in occupational health and rely in* [*sic*] *the descriptions of patients. Our expertise is to take the limitations provided by doctors and suggest appropriate jobs. In my particular case, I have practised the specialty of Occupational Medicine for 25 years, in a variety of public and private settings, and in addition I hold a PhD in Clinical Psychology. With respect to her doctor, I evaluated his letter, using that experience and expertise and still believe that it is in the best interest of Ms. Panacci and the employer to follow the recommendations previously forwarded.*
>
> . . .

[27] In the letter, Dr. Jeffries also noted that, although Dr. Malam identified an underlying medical problem that could affect the grievor's condition, she was not on any prescribed medication. He wrote, "In a duty to accommodate, the employee has a role to play – especially being compliant with medical treatments that will optimise [*sic*] their health."

[28] The grievor returned to work on July 7, 2004. She testified that she felt that she had no choice but to return based on the letter that she had received from Mr. Burfield. On July 12, 2004, she experienced dizziness, headaches and shaking. She collapsed at work and was taken to the hospital. She did not return to work at the IMPC. The grievor testified that she also suffered from vertigo. Dr. Malam testified that vertigo is not usually associated with CFS.

[29] In his letter of July 6, 2004 to Ms. Scuglia, Dr. Jeffries wrote that he would forward the file to his colleagues in Ottawa for a further evaluation. The grievor also forwarded some information to the Ottawa office. On July 16, 2004, Dr. Jeffries wrote to Ms. Scuglia (Exhibit E-1, tab 8) to advise her of the status of the review and to relay the preliminary recommendation of Dr. Callary (of the Ottawa clinic) on the following limitations: shifts with regular hours between 7 a.m. and 8 p.m.; lifting and carrying less than 15 kilograms; and work that allows for the regular change of position. In a

further letter, dated July 20, 2004, Dr. Jeffries clarified that the restrictions would be applicable "for the longer term" (Exhibit E-1, tab 9). He noted that "few tasks" within the IMPC would result in "jeopardy" to an employee under those limitations. He also stated that he was familiar with the practical aspects of the duties of postal workers and customs employees based on his experience working at the Vancouver mail processing plant.

[30] In his letter, Dr. Jeffries stated as follows that Dr. Goldsand had spoken to him and had told him that the grievor had expressed concerns about the job demands:

> *. . . He felt that there would need to have been a substantial difference in physical demands between other tasks and the Mail Department to make her unable to cope. However, since that conversation the doctors at the Ottawa Clinic have made the more helpful suggestions as to actual restrictions/limitations.*

[31] He concluded the letter by stating that the employer could place the grievor in a position that did not exceed the specified restrictions.

[32] During the week of July 30, 2004, the grievor spoke to Ms. Scuglia on several occasions, expressing concern about the recommendations from Health Canada. The grievor provided a medical note, dated July 26, 2004, to Ms. Scuglia (Exhibit E-1, tab 1). The note was from Dr. G. Bajwa. It stated that she was required to take medical leave for 10 days and that the ". . . current condition is unrelated to her other chronic condition." Ms. Scuglia prepared a note to file of the conversations (Exhibit E-1, tab 10). Ms. Scuglia told the grievor that, based on the information available to the CBSA, she was expected to be at work and that she should be communicating with her manager to arrange for her return to work. Ms. Scuglia noted that the grievor was off work "[d]ue to a non-related medical reason." Ms. Scuglia testified that the grievor did not elaborate about that reason. Ms. Scuglia also noted in her note to file that the grievor had sent her copies of medical reports from Dr. Goldsand. She wrote that she had advised the grievor that she was not in a position to review or interpret that information. She also told the grievor that she should not have sent her the report as it would have been reviewed by Dr. Jeffries.

[33] Mr. Burfield testified that he did not really want to know about the "unrelated illness" referred to in the medical note provided by the grievor to the employer, dated

July 26, 2004. Ms. Scuglia stated that the original assessment done by Dr. Jeffries did not include that unrelated medical illness or condition.

[34] On August 9, 2004, the grievor wrote to the Minister of Health to complain about Health Canada's handling of her file (Exhibit E-2). Her correspondence was copied to Ms. Scuglia and others. In the letter, the grievor stated that, contrary to the statement of Dr. Jeffries in his July 7, 2004 letter, she was on prescribed medication, and she enclosed a copy of the prescription. She also stated that she felt that she had suffered a relapse of CFS along with other medical problems, including vertigo.

[35] On August 16, 2004, Ms. Scuglia wrote to Dr. Jeffrey Chernin of Health Canada (Dr. Jeffries had been replacing him). In the letter, she noted that the grievor was absent from the workplace due to a medical condition unrelated to her other chronic condition. She also stated that the grievor was seeking clarification of the following statement, made by Dr. Jeffries in his letter of July 20, 2004: ". . . [Dr. Goldsand] felt there would need to have been a substantial difference in physical demands between other tasks and the Mail Department to make her unable to cope." Ms. Scuglia continued as follows:

. . .

> *Ms. Panacci interprets this to mean that as her previous tasks (while on assignment in client services) consisted of desk jobs, and there is a substantial difference between the physical demands between those previous tasks compared to the duties at the International Mail Processing Centre, it appears to her that she would not be capable of working at IMPC. Your assistance with this would be greatly appreciated in order to aid me in providing clarification to Ms. Panacci.*

. . .

[36] Dr. Chernin wrote to Ms. Scuglia on August 27, 2004 (Exhibit E-1, tab 12) to advise her that the grievor's file had been forwarded to the Program Medical Advisory Committee for review. He noted that the committee would not meet until the following October and stated that "[c]onsideration should be given to allowing her to return to her previous, temporary assignment pending results of our review." Ms. Scuglia responded to the letter on September 13, 2004 (Exhibit E-1, tab 14). She wrote that, based on the most recent medical notes provided by the grievor, "[s]he is currently off work due to a medical condition unrelated to her other chronic condition, which was the basis for the evaluation performed by Dr. Jeffries. . . ." She wrote that, until the

CBSA received medical clearance from her physician that she was capable of returning to work and that set out any restrictions for the new medical condition, "[w]e would not be in a position to consider an assignment elsewhere." The grievor was copied.

[37] Ms. Scuglia testified that she made efforts to look for alternate employment for the grievor. On September 8, 2004, a CBSA staffing officer sent an email to a manager about a vacant administrative assistant position outlining options for staffing, including considering the grievor for an assignment (Exhibit E-1, tab 13).

[38] The Program Medical Advisory Committee performed its review on October 13, 2004. Dr. Chernin communicated the recommendation of the Committee in a letter received by the CBSA on November 10, 2004 (Exhibit E-1, tab 15). Dr. Chernin wrote that he concurred with the opinion of the Committee that the grievor was unfit for the duties of her substantive position but that she would be fit for a "less physically demanding position" with regular hours. He wrote that an example of such a position was her previous assignment, "[w]hich appeared to meet this criteria." He suggested that the CBSA work with the grievor to find a suitable position. Ms. Scuglia testified that she was absent from the office on sick leave when Dr. Chernin's letter arrived, and it was not dealt with in her absence. She reviewed the letter on or about December 29, 2004. She spoke to Dr. Chernin on January 13, 2005. She wrote a note of her conversation (Exhibit E-1, tab 16). She sought clarification on the duration of the grievor's limitations. She wrote that Dr. Chernin told her that the grievor's condition was permanent. He also told her that other medical information was on file that led to the Committee's finding. Ms. Scuglia testified that she understood that he was referring to information on the grievor's unrelated condition or illness. The grievor testified that the medical information that had not been provided to Dr. Goldsand in her initial assessment was her vertigo symptoms.

[39] Ms. Scuglia wrote to the grievor on January 18, 2005 (Exhibit E-1, tab 17). In the letter, she noted that the grievor was involved in a competitive process for a PM-03 position in the CVS division. She wrote that, in the meantime, "[m]anagement will continue to explore other employment options, which may be suitable for you." She asked the grievor to forward an updated resume. The grievor did not provide one. Ms. Scuglia testified that, in January 2005, she started to look for available positions outside the CBSA, which she described as a "general look."

[40] The grievor applied for disability insurance in fall 2004. In a letter to the disability insurer dated December 29, 2004 (Exhibit G-13), Dr. Malam stated that, after the completion of a range of tests, "[w]e can clearly declare her symptoms as a product of chronic fatigue syndrome." He stated in the letter that the grievor's symptoms of nausea and vertigo impeded her ability to perform "each and every duty" of her regular occupation. He also concluded that rehabilitative employment or alternate employment was not feasible "at this time."

[41] The grievor testified that she sought out jobs at the CBSA that were better suited to her medical condition. She testified that she received no assistance from the CBSA in her search but that she was assisted by a former manager.

[42] The grievor was ultimately successful in a competition for a position in the CVS section of the CBSA. On March 23, 2005, Dr. Malam wrote as follows to the CBSA (Exhibit G-14):

> *. . . As I am sure you are aware, Teresa suffers from chronic fatigue syndrome, which I believe was exacerbated by her transfer from her position as a client services officer to customs officer. . . Although Teresa has yet to fully recover from chronic fatigue syndrome, she feels strongly that an opportunity to work in a setting that is conducive to her medical condition will significantly improve her health. . . [I]t is my medical opinion that Teresa is medically fit to pursue graduated work hours in an attempt to fully rehabilitate from her chronic fatigue. . . .*

[43] The grievor commenced working graduated hours on April 1, 2005. She testified that it took her four years to return to full-time hours.

[44] The grievor testified that her job performance was excellent. Mr. Burfield agreed that she was a good employee. Ms. Di Matteo testified that the grievor was a conscientious and dedicated employee.

[45] Ms. Di Matteo testified that accommodation at the IMPC was focused on the short term and that longer-term accommodation was not accepted by management. Mr. Burfield did not agreed with that testimony.

[46] The grievor testified that it was a battle to receive disability insurance and that her eventual coverage did not cover her full salary. She had to cash in a guaranteed investment certificate to meet her mortgage payments. She testified that her time off

work was stressful and emotionally difficult. For some of it, she was unable to function and needed assistance for everything related to day-to-day living. In cross-examination, she testified that at the beginning of her absence from work (in July 2004) she was not fit to return to work in any capacity. However, she testified that she improved during that absence.

[47] The grievor filed a complaint with the CHRC against the Treasury Board, Health Canada and the CBSA. The complaint against the CBSA has been held in abeyance pending the outcome of this reference to adjudication. The complaints against the Treasury Board and Health Canada were reviewed by the CHRC and dismissed. The complaint against Health Canada was dismissed because the evidence did not show that the practices and policies for fitness to work evaluations were discriminatory. The complaint against the Treasury Board was dismissed because the CHRC determined that the Treasury Board was not responsible for the alleged discriminatory acts, and the evidence did not support a conclusion that its policies discriminated against persons with disabilities. The CHRC's decisions were the subject of the judicial review application in *Panacci v. Attorney General of Canada*, 2010 FC 114.The judicial review application about the decision on the complaint against Health Canada was dismissed. The judicial review application about the decision on the complaint against the Treasury Board was allowed. The court quashed the CHRC's decision and ordered a new investigation to be conducted after the completion of this grievance process.

## III. Summary of the arguments

### A. For the grievor

[48] The grievor submitted that the employer failed to accommodate her disability to the point of undue hardship, contrary to the no-discrimination clause in her collective agreement and to sections 7 and 10 of the *Canadian Human Rights Act*.

[49] The discriminatory actions of the employer were its failure to consider the advice from the grievor's physician, its failure to accept the recommendation of Dr. Goldsand and its forcing her back to work on the threat of discipline (as set out in Mr. Burfield's letter (Exhibit E-1, tab 18)).

[50] The grievor was an excellent employee with 15 years of service (as of 2005). She had been successfully accommodated from 2000 to 2004. The employer insisted on her return to the IMPC in 2004 without the benefit of a fitness to work evaluation and

based on medical information from 2000. Shortly after returning to work, she fell ill and requested accommodation. She discussed her need for accommodation with her supervisor. She followed up with an email on April 14, 2004 (Exhibit G-3) and received no reply. She spoke to Mr. Burfield, and nothing was done to accommodate her.

[51] The grievor was a forthright witness, and her evidence carries a great deal of weight. She was motivated to work, and Dr. Malam testified that she was not malingering.

[52] After receiving an assessment from Health Canada that failed to take into account the recommendation of Dr. Goldsand (Exhibit G-6), Mr. Burfield directed the grievor to return to work or face disciplinary action. He also testified that, even had she provided him with a medical note, she would have been placed on leave without pay.

[53] The grievor testified that it took her four years to return to full-time employment. Her CFS was exacerbated by the employer's refusal to continue to accommodate her in 2004.

[54] Dr. Malam testified about his serious concerns about Dr. Jeffries assessing an individual without seeing that person. In terms of the medical assessment of the need for accommodation, the testimony of Dr. Malam should be preferred to the evidence of the recommendation of Dr. Jeffries.

[55] The employer is required to accommodate an employee to the point of undue hardship; see *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*"), at para 60 to 66. There is no dispute that the grievor had a medical condition that needed accommodation.

[56] The employer discriminated against the grievor by failing to seek an updated fitness to work evaluation before requiring her to return to the IMPC and by relying on outdated medical information. The employer also discriminated against the grievor by failing to listen to her when she raised concerns with her supervisor and manager. The employer also discriminated against the grievor when it made no effort to accommodate her between April and July 2004. The employer did not proactively search for accommodation solutions. Additionally, the employer took six months (from

May to November 2004) to obtain a realistic evaluation of the grievor's accommodation needs. That is a long time for someone who is ill.

[57] In *Giroux v. Treasury Board (Canada Border Services Agency)*, 2008 PSLRB 102, the Health Canada physician had spoken only once to the grievor and had not examined her. The adjudicator preferred to rely on the evidence of the grievor and her physician rather than relying on the assessment of Health Canada (paragraph 149). In this case, the evidence of Dr. Malam should be preferred over the assessment of Dr. Jeffries.

[58] The adjudicator in *Giroux* also noted the long delay in accommodating the grievor, a factor present in this case as well. The employer in that case also failed to consider the bundling of work duties to accommodate the grievor. The employer in that case also relied on outdated medical information.

[59] In *Pepper v. Treasury Board (Department of National Defence)*, 2008 PSLRB 8, the efforts made by the employer to accommodate the employee were found limited and inadequate. The employer is required to diligently examine all the possibilities of adapting the workplace to enable the employee to work. "A mere statement without supporting evidence or a generalized view that finding such employment is not possible does not meet the standard of undue hardship" (paragraph 147).

[60] This has been a difficult ordeal for the grievor as she has attempted to be heard since 2005. It was not an easy decision to file a complaint and grievance.

[61] As corrective action, the grievor is seeking compensation for all financial losses suffered as a result of the failure to accommodate her, including leave entitlements and lost salary. She seeks the reimbursement of all sick leave and vacation leave taken and the reimbursement of pension plan contributions, including for time on graduated hours, and that she be made whole.

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

[62] The employer submitted that it made reasonable efforts to accommodate the grievor and that it did not fail in its search for a reasonable arrangement short of undue hardship.

[63] The employer relied on *Dawson v. Canada Post Corporation*, 2008 CHRT 41, for the submission that a belief of discrimination is not sufficient in law to give rise to an inference of discrimination or to establish a *prima facie* case of discrimination (paragraph 69).

[64] The purpose of the duty to accommodate is to ensure that an employee otherwise fit to work is not unfairly excluded where working conditions can be adjusted without undue hardship (*Hydro-Quebec v. Syndicat des employé-e-s de techniques professionelles et de bureau d'Hydro Quebec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, at para 14). However, the duty to accommodate does not mean that the employer must completely alter the essence of the contract of employment (*Hydro-Quebec*, at para 15).

[65] In *Kandola v. Attorney General of Canada*, 2009 FC 136, at para 1, the court held that an employee requiring accommodation must inform his or her employer of the fact of the disability and then cooperate in the accommodation process. When a disability has not been disclosed and a request for accommodation has not been made, the employee cannot ask that the employer's assessment, ". . . made in ignorance of the disability. . .," be set aside or ask that the employer retrospectively assess what the appropriate accommodation might have been. In this case, the grievor's health was good, and she was not missing any work. The employer based on the information at hand, concluded she was healthy. It is the responsibility of the employee to inform the employer of any limitations. She provided a medical note from her chiropractor on April 2, 2004, and the employer accommodated her based on that note.

[66] In *Lafrance v. Treasury Board (Statistics Canada)*, 2009 PSLRB 113, the adjudicator held that there is no obligation on an employer to create a position out of "bits and pieces" to accommodate an employee (paragraph 113).

[67] The situation outlined in *Zaytoun v. Canadian Food Inspection Agency*, 2010 PSLRB 35, is similar to the situation in this grievance. The adjudicator in that case held that the employer did not have the duty to completely change working conditions to accommodate an employee (paragraph 36). In this grievance, the grievor had to return to her substantive position in April 2004 because her assignment ended. Mr. Burfield made efforts to extend her assignment. The grievor provided a medical note outlining her functional limitations. She was accommodated within the limitations set out in the note. The employer then requested an evaluation from Health Canada, as is its right. A

medical professional interpreted the findings of Dr. Goldsand and made a recommendation to the employer. In his letter to the grievor dated June 29, 2004 (Exhibit E-1, tab 18), Mr. Burfield advised the grievor of the need for a medical note to support any further leave. At no time was the employer provided with a note from Dr. Malam. In his letter, it is clear that Mr. Burfield wanted the grievor to return to work but that he had not closed his mind to any further absence for a valid medical reason.

[68] The employer considers Dr. Jeffries an expert, as outlined in his summary of his qualifications in his letter of July 7, 2004 to Ms. Scuglia (Exhibit E-1, tab 7). Dr. Jeffries concluded that the situation was not one of accommodation but a request for a deployment. His conclusion did not contradict the recommendation of Dr. Goldsand. Differing medical interpretations do not amount to discrimination. Dr. Goldsand did not state in his report of May 25, 2004 (Exhibits G-6 and E-1, tab 2) that the grievor could not perform the duties of her substantive position.

[69] The grievor's situation was reassessed by Health Canada, which led to a revised recommendation within six months. It was clear that the review committee would not meet until October 2004. The time it took to complete the review was not the fault of the employer.

[70] As of July 12, 2004, the grievor was unable to work and was too sick to be accommodated. In his letter of December 29, 2004 to the disability insurer, Dr. Malam stated that she was totally disabled (Exhibit G-13). Nevertheless, the employer made efforts to find some other position for the grievor, including emails and phone calls to other government departments and employers. As noted in *Zaytoun* (paragraph 43), the employer is not obligated to accommodate an employee when the employee is on sick leave and not available for work.

[71] The grievor's new medical information (her vertigo) was not assessed originally by Dr. Goldsand and was not assessed by Dr. Malam. Her new condition appears to be the cause of her illness on July 12, 2004. Vertigo is not a symptom of CFS. Health Canada made its final determination based on that new medical information. In other words, her medical condition changed. The allegation of the failure to accommodate must be assessed in light of the information available to the employer and the grievor at the time (*Besner v. Attorney General of Canada*, 2007 FC 1076).

[72] The duty of accommodation does not require instant or perfect accommodation; see *Callan v. Suncor Inc.*, 2006 ABCA 15 (CanLII), at para 21. The employer is not required to accept the grievor's subjective assessment of her need for accommodation. Dr. Malam is not an expert in occupational medicine. He based his assessment of the grievor on her description of her job tasks. He did not visit the IMPC, and he did not have the PDA. That information was available to Drs. Jeffries and Goldsand. Dr. Malam testified that it takes a long time to diagnose CFS because it is a diagnosis of exclusion. He had not reached a final diagnosis by April 22, 2004 or when he wrote his letter of June 30, 2004. The employer can prefer the assessment of Health Canada to that of Dr. Malam.

[73] The employer submitted that as an adjudicator my expertise is in labour relations and not in medicine. An adjudicator exceeds his or her jurisdiction if he or she concludes that one medical report is better than another. I was referred to *Attorney General of Canada v. Demers*, 2008 FC 873, at para 34).

[74] In the Federal Court decision in *Panacci*, the CHRC's decision that the two differing medical assessments did not amount to discrimination was found reasonable (paragraphs 59 and 60). If the Federal Court determined that the CHRC was reasonable in finding no discrimination in the conduct of Health Canada's assessment, it follows that the CBSA is not discriminating relying on Health Canada's findings.

[75] In the alternative, the employer submitted that, should I find that there was a breach of the duty to accommodate, the evidence shows that the grievor was incapable of working during the time that she was off work. Any remedy based on a theory that the employer caused the disability should be dismissed. An adjudicator cannot fault the employer for the grievor's illness and her failure to work between July 2004 and April 2005. The employer did not force her to return to work.

**C. <u>Rebuttal of the grievor</u>**

[76] The grievor submitted that she did submit the note from Dr. Malam to her employer (Exhibit G-8). The grievor also received certified sick leave in May, June and July 2004 (Exhibit G-4), and Ms. Scuglia testified that medical notes are usually provided for certified sick leave.

[77] It is not a question of allowing the employee to dictate an accommodation but of examining her subjective feelings in addition to the medical information to come to a determination of accommodation.

[78] It is important to note that it was not through the employer's efforts that the grievor found a position appropriate for her disability.

[79] The employer has alluded to new medical information but has not produced for this hearing any evidence of that new medical information.

[80] The employer led no evidence that it suffered any financial hardship by accommodating the grievor.

[81] In *Panacci*, the Federal Court did not have information about all the actions of the employer.

[82] Dr. Malam testified that the grievor's CFS symptoms were exacerbated by her return to the IMPC. In addition, most of her sick leave was taken as a result of CFS.

**IV. Reasons**

[83] The decision of the Federal Court in *Panacci* is not relevant to this proceeding. The court was conducting a judicial review of a CHRC decision. The decision of the CHRC is not binding on an adjudicator, and a judicial review of a CHRC decision is also not binding on this proceeding.

[84] There is no dispute that the grievor had a medical condition that imposed some limitations on her ability to perform the regular duties of her substantive position. The employer accepted that the grievor had functional limitations. The grievor has established a *prima facie* case of discrimination. The dispute in this grievance relates to whether the employer has met its duty to accommodate the grievor.

[85] The duty to accommodate has both procedural and substantive aspects (see *ADGA Group Consultants Inc. v. Lane*, 2008 CanLII 39605 (Ont. S.C.D.C.)). The procedural aspect requires the employer to seriously consider how it can accommodate the grievor. The substantive aspect of the duty to accommodate requires the employer to show that it could not have accommodated the grievor's disability without undue hardship.

[86] The procedural aspect of the duty to accommodate requires the employer to obtain all relevant information about the grievor's disability. This could include obtaining information about the grievor's current medical condition, the prognosis for recovery, the ability of the grievor to perform the duties of her substantive position and her capabilities for alternate work. A failure to give any thought or consideration to the issue of accommodation is a failure to satisfy the duty to accommodate (*ADGA*, at para 106). In assessing whether the employer has met the procedural requirements of the duty of accommodation, its efforts must be assessed at the time of the alleged discrimination and not on the basis of "after-acquired" evidence (*ADGA*, at para 107).

[87] The duty to accommodate requires an individualized assessment of the limitations of an employee and the requirements for an appropriate accommodation (*Hydro-Quebec*). The grievor was accommodated in an assignment from 2000 to 2004. She was accommodated because of her disability, and the employer was aware of the accommodation. Mr. Burfield testified that she seemed to be doing fine in her assignment and that her health had improved. However, the employer provided no evidence to support its contention. In addition, the employer did not conduct an individualized assessment of the grievor to determine if she was able to return to her substantive position. Only after her return to her substantive position and when she had obvious difficulties with the work did the employer request an evaluation by Health Canada.

[88] The employer led no direct evidence as to the reasons for ending the grievor's accommodation in the assignment. It was suggested that there was a competition for the position she was occupying and that she was an unsuccessful candidate. However, the employer provided no evidence that continuing with the accommodation in the assignment was an undue hardship. Impressionistic evidence is not sufficient to demonstrate undue hardship; *Meiorin*, at para 79.

[89] The substantive aspects of the duty to accommodate require the employer to demonstrate that it could not have accommodated the grievor's disability short of undue hardship. The purpose of the duty to accommodate is to ensure that an employee otherwise fit to work is not excluded from working where working conditions can be adjusted without undue hardship to the employer (*Hydro-Quebec*, at para 14). The duty to accommodate does not require the employer to change working conditions "in a fundamental way" that would change the "essence" of the employment

relationship (*Hydro-Quebec*, at para 15 and 16). The Supreme Court of Canada has recognized that rigid accommodation rules are not possible, given the individualized nature of the duty to accommodate and the variety of circumstances at play. However, the Supreme Court also recognized that, if an employer can, without undue hardship, provide a variable work schedule, lighten duties or "even authorize staff transfers" to ensure that an employee can do his or her work, it must do so to accommodate the employee (*Hydro-Quebec*, at para 17).

[90] The employer argued that I did not have the jurisdiction to make a finding about which medical assessment was to be preferred (Dr. Malam's or Dr. Jeffries') because it was outside my expertise and relied on *Demers* for its conclusion. The conclusion of the court in *Demers* is not relevant here. The court stated that, ". . . unless she refers to the opinion of either a physician or a psychologist in determining that a certain event caused psychological distress to Mr. Demers, she is clearly exceeding her powers." That simply means that an adjudicator is not qualified to make a medical diagnosis. Assessing contradictory medical evidence is often at the heart of the adjudicator's task in determining cases involving the duty to accommodate.

[91] The employer submitted that Dr. Jeffries was an expert in occupational medicine and that his opinion should be preferred to that of Dr. Malam. The grievor did not consent to Dr. Jeffries being considered an expert. The employer based its assertion of expertise on the contents of the doctor's letter to Ms. Scuglia of July 7, 2004 (Exhibit E-1, tab 7), in which he outlined his background. It is not appropriate to qualify a medical practitioner as an expert without the other party being given an opportunity to cross-examine the witness as to his or her qualifications.

[92] The employer argued that it was bound by the recommendations of Dr. Jeffries and that it was not free to make its own assessment. Health Canada is an agent of the employer in the assessment of the duty to accommodate, and the employer cannot escape the consequences of the failure of its agent to properly evaluate the medical evidence; see *Marois and Hubert v. Treasury Board (Correctional Service of Canada)*, 2004 PSSRB 150, at para 59.

[93] The employer submitted that the letter from Dr. Goldsand (Exhibits G-6 and E-1, tab 2) should not be relied on for the truth of its contents, presumably because Dr. Goldsand was not called as a witness. I reserved on this objection. I accept the

evidence contained in the letter as information that was in the knowledge of the employer (through its agent, Health Canada, until July 2004, and then in its direct knowledge when the grievor shared it with Ms. Scuglia). I note that the employer relied on the correspondence from Dr. Jeffries for the truth of its contents, even though Dr. Jeffries did not testify.

[94] The designated examining doctor (Dr. Goldsand) concluded as follows that the grievor had chronic fatigue syndrome and that she had significant restrictions (Exhibits G-6 and E-1, tab 2):

. . .

> *. . . It is interesting that her chronic fatigue symptoms seem to be more pronounced in the Mail Department and not in other locations. Regular shift work may help with the fatigue and allow her to better manage her day. She reports feeling much healthier outside of the Postal Office and might benefit from a transfer to another department in order to find more job satisfaction and less pain. . . .*

[95] Dr. Jeffries reviewed Dr. Goldsand's report. Dr. Jeffries concluded that it was his impression that the grievor had a motivational problem and that a change of employment, rather than medical accommodation, was required (Exhibit E-1, tab 5). Dr. Jeffries was not called to testify as to how he had reached his opinion. His conclusion that the grievor was not motivated to work and that she had no functional limitations is not supported by the evidence before me (the evidence of Dr. Malam and Dr. Goldsand). I have the direct evidence of Dr. Malam on the issue of motivational issues as well as the direct evidence of the grievor that she was willing to work. Her evidence was not shaken on cross-examination. Subsequent evidence demonstrated that she did not have motivational issues, since she was able to find an alternative position with the CBSA on her own initiative. In addition, Dr. Goldsand's medical opinion did not refer to concerns about the grievor's motivation.

[96] The evaluation by Health Canada was eventually changed, after a review process. Although there was hearsay evidence that the evaluation changed after the consideration of new medical evidence, it is not clear what new medical evidence was relied on. Given that the original evaluation by the designated doctor came to a similar conclusion as to the limitations faced by the grievor, it is not clear that the new medical information had a significant impact on the change to the assessment of the appropriate accommodation for the grievor by Health Canada.

[97] Health Canada sent its revised evaluation to the employer on November 10, 2004. At that point, the employer had a clear understanding that the grievor had not been appropriately accommodated in her substantive position and required an alternative position. The employer did not follow up on Health Canada's new evaluation for over two months. Although Ms. Scuglia was absent from the workplace, I find that her absence was not a sufficient reason for the employer's delay in exploring accommodation measures for the grievor. The grievor should not have to suffer the consequences of the employer's failure to properly manage workload during a prolonged illness.

[98] The evidence of the employer's efforts to find alternate work for the grievor that would meet the duty to accommodate was largely impressionistic. There was no evidence of a systematic examination of options. The employer appeared to rely on the failure of the grievor to provide an updated resume as a reason for not being able to properly market her. However, there was no evidence that it was impossible or even difficult to find alternate positions based on the information that the employer already possessed.

[99] In conclusion, I find that the employer did not meet its duty to accommodate the grievor. The employer failed to conduct a timely, individualized assessment of the grievor's functional limitations before ending her assignment and requiring her to return to her substantive position. The employer did not meet its burden of demonstrating that accommodating the grievor in her assignment or a similar position was an undue hardship.

[100] Had the employer completed an individualized assessment before deciding to require the grievor to return to her substantive position, she would have remained in her assignment or would have been assigned to similar duties, pending the result of the Health Canada assessment. That assessment process was not completed until fall 2004. In fall 2004, the grievor applied for disability insurance. Dr. Malam testified that her return to her substantive position exacerbated her medical condition. The employer maintained that the grievor was totally disabled and that she was not available for work in fall 2004. That opinion was based on information obtained by the employer after the fact (Dr. Malam's letter of December 29, 2004). At that time, the employer made no effort to determine if the grievor could return to work if she were properly accommodated.

[101] An appropriate remedy for this breach of the duty of accommodation is to put the grievor back in the position she was in before April 2, 2004. The grievor should be put in the position that she would have been in had the employer continued her assignment in CVS. She was working full-time in her assignment before the employer ended her accommodation. Therefore, she is entitled to a reinstatement of all sick leave credits used after her return to her substantive position on April 2, 2004. She is also entitled to compensation at the full-time rate of pay that she would have received for all unpaid leave taken from April 2, 2004 to her return to work in March 2005. I did not receive any evidence of the difference in income between the full-time salary that she would have received and her income from Employment Insurance and disability insurance. The grievor is entitled to that difference in income, if any. The grievor was on graduated hours when she returned to work in March 2005. She is entitled to any difference in income between her graduated hours and what she would have received had she worked full-time, up to the date on which she resumed full-time work. The grievor is also entitled to all benefits that she would have received as a full-time employee between April 2, 2004 and the date on which she returned to full-time employment.

[102] I will retain jurisdiction in the event of any difficulties in the implementation of this award for a period of 90 days from the date of this decision.

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

*(The Order appears on the next page)*

## V. Order

[104] The grievance is allowed.

[105] The grievor is to be compensated for any losses in income and benefits for the period from April 2, 2004 to the date on which she commenced full-time hours after her return to work in the Compliance Verification and Services section in March 2005.

[106] I will remain seized for a period of 90 days from the date of this decision.

January 20, 2011.

**Ian R. Mackenzie,**
**adjudicator**