Date: 20131219

File: 566-02-5556

Citation: 2013 PSLRB 164

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

DALE MILLER

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Miller v. Treasury Board (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: William H. Kydd, adjudicator

For the Grievor: Giovanni Mancini, counsel

For the Employer: Christine Langill, counsel

Heard at Moncton, New Brunswick,
October 9 and 10, 2012.

I. Individual grievance referred to adjudication

[1] Dale Miller ("the grievor") is a correctional officer who has been employed by the Correctional Service of Canada ("CSC" or "the employer") for over 10 years. On January 10, 2011, he filed a grievance, alleging that the employer had breached its duty to accommodate his problems with his back by failing to provide him with a proper ergonomic chair that he had requested. He alleged that as a result he was reinjured, causing him to lose time from work and expend all his sick leave, and that it caused him pain and suffering and distress. As redress, he claimed a proper ergonomic chair, reinstatement of all his lost pay, and $25 000 for pain and suffering and stress.

[2] The employer's initial response to the grievance was dated March 1, 2011. It stated as follows:

. . .

> *The following was found with regards to your grievance:*
>
> *1. This does not meet the criteria for a grievance as it does not appear to be in conflict with the collective agreement. This would be better served via the complaint process.*
>
> *2. The employee did have access to an ergonomic chair while in the unit and removed the chair to the MCCP area when he changed to that post.*
>
> *3. The employee self-reports that the ergonomic chair, he'd been given, had been broken. Employee to date has not reported any deficiency with the chair. A request cannot be actioned when no request has been made.*
>
> *4. July 6, 2010 statement of confirmation by Bob Wong that all chairs issued to MCCP and the Main entrance are 24hr ergonomic chairs. This was the area you were posted. Information was also supplied to you to request through the Ergonomic Committee and the process to purchase a chair.*
>
> *5. With reguards [sic] to your reinstating your pay, the collective agreement states the earnings of sick leave credits. There is even a provision, if the employee is in need, to have a deficiency of -200 hrs. Once this is exhausted it results in pay recoveries. If you're finding financial difficulties you can apply for hardship through a HR advisor. This grievance is denied at this level.*

[3] The employer's second-level response was dated April 8, 2011. It included a response to the allegation that there was a duty to accommodate and stated as follows:

> *In this Grievance you contended that the Employer failed to provide you with an ergonomic chair according to the regulations surrounding the "Duty to Accommodate". You also allege that this caused your back to be so bad it resulted in your being off work from May 2010 until February 2011 and you had to use all of your sick leave credits and were then placed on Leave without Pay.*
>
> *I have been advised by your former Correctional Manager Kathy Paul that when you worked in her unit you had a twenty four hour ergonomic chair which you left in the unit when you moved to the side roster. I have been further advised by the Supervisor Institutional Services that the chairs in the static posts on the side roster are twenty four hour ergonomic chairs.*
>
> *You indicated that the ergonomic chair you were using in the MCCP had broken but that you had not reported it as a deficiency, the Employer cannot rectify deficiencies when they are not notified of them*
>
> *In the Corrective Action requested you requested a proper ergonomic chair, all your sick leave recredited and a $25,000 payment for pain, suffering and stress. Your request is denied based on the following*
>
> *I believe you had access to a 24 hour ergonomic chair*
>
> *The Collective Agreement states the manner and means for the accumulation of sick leave credits and even provides for the employee to have a deficiency of a negative 200 hours*
>
> *Although your situation is unfortunate it is not my belief that the Employer is responsible to pay you the requested monies.*
>
> *Based on the aforementioned analysis your Grievance is denied.*
>
> [*Sic* throughout]

[4] On June 28, 2011, the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - Confédération des syndicats nationaux (“the union”) filed a “Notice of Reference to Adjudication of an Individual Grievance” on behalf of the grievor. It listed the following provisions as being the subject of the individual grievance: "Articles 37, 41 and all related articles of the collective agreement. Articles 53(2)(*e*) [and] 53(3) of the CHRA [plus] all related articles.” It attached a notice to the Canadian Human Rights Commission describing the following as an issue involving the interpretation or application of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (*CHRA*), and the alleged discriminatory practice or policy: "Failure

and refusal on the part of the employer in the duty to accommodate leading to aggravation of the physical condition. Discrimination based on a physical disability."

[5] The employer's final-level grievance response, dated August 15, 2012, after summarizing the content of the grievance, read as follows:

> *By your own admission, you received an ergonomic chair in August 2008 following an ergonomic assessment. Although you claim this chair was not well made and did not last long, Management has advised you that you did not inform them of any deficiencies with this chair.*
>
> *Furthermore, on April 20, 2011, the Workers Compensation Board of Nova Scotia determined that it was* "unable to accept" *that your back difficulties and associated time loss from work in 2010 are attributable to picking up a pen in May of that year or to improper ergonomics at your workstation. The above being said, on October 11, 2011, you received an ergonomic assessment and on November 29, 2011, you received your new ergonomic chair.*
>
> *Consequently, your grievance and requested corrective action are denied.*

[6] The grievance was set down for a hearing to commence on October 9, 2012. During a pre-hearing conference on September 20, 2012, the employer raised three objections to my jurisdiction, and I directed that the parties should submit their arguments in writing before the commencement of the hearing.

[7] The employer's first objection was that the essence of the grievance was a claim for an alleged work-related injury in 2010 and alleged damages flowing from it. The employer submitted that the issue of whether the grievor suffered an alleged aggravation of a physical condition or a re-injury to his back at work in 2010 due to an alleged lack of an ergonomic chair, and whether he should receive $25 000 in damages for that claimed re-injury, was not a question that he could properly put before the Public Service Labour Relations Board ("the Board"). Instead, questions about work-related injuries and the compensation they may attract fall strictly under provincial workers' compensation schemes, as stipulated by section 4 of the *Government Employees Compensation Act*, R.S.C. 1985, c. G-5 (*GECA*).

[8] The employer's second objection was that the Board had no jurisdiction since the grievor could also have sought remedies under Part II of the *Canada Labour Code*, R.S.C. 1985, c. L-2 ("the *CLC*"). Since an employer has obligations under the *CLC,* Part II,

to ensure that the workplace meets ergonomic standards, if an employee feels the employer is not fulfilling its obligations, the employee is required by legislation to first resolve the matter through a process detailed under subsection 127.1(1) of the *CLC*, being the "Internal Complaint Resolution Process." In the alternative, a health and safety officer from the Human Resources and Skills Development Canada (HRSDC) Labour Program, can be notified to render a decision on the complaint. In addition, if an employee believes that a situation poses a danger, a refusal to work may be made under subsection 128(1) of the *CLC*.

[9] The employer's third objection was that discrimination based on a physical disability was raised for the first time in the grievor's submitted Form 20, "Reference to Adjudication"; and, other than claiming a work-related injury, he failed to provide particulars.

[10] After reviewing the submissions received from the grievor and the employer, I advised that I would reserve my decision on the objections to jurisdiction until after hearing the evidence and arguments on the merits of the grievance.

II. Summary of the evidence

[11] The grievor was the only witness called by the union. The employer called Kathy Paul, Alan Hicks, Tracy Hicks and Shannon Oickle as witnesses. Ms. Paul was the grievor's unit manager when he worked on Unit 50 at the Springhill Institution in Springhill. Nova Scotia. Alan Hicks was the grievor's acting correctional manager during 2010. Tracy Hicks was the roster manager who testified about sick leave and medical documentation pertaining to the grievor. Ms. Oickle was Supervisor of Institutional Services at the Springhill Institution, whose responsibilities included administration and material management.

[12] At the time of the hearing, the grievor had been employed for over 10 years as a correctional officer by the CSC. He commenced his employment with them in British Columbia and in 2007 worked in the CSC's British Columbia Regional Treatment Centre ("the Treatment Centre").

[13] On June 28, 2007, an inmate at the Treatment Centre barricaded himself in his cell and hung himself. The grievor and his partner attempted to save the inmate by breaking down the barricaded door. The grievor used his shoulder, and he also kicked

at the door until it gave way. In the course of trying to break the door down, the grievor bruised his shoulder and injured his knee and back.

[14] The grievor took two days off, but when he returned to work, his knee buckled under him, requiring hospital treatment.

[15] The grievor filed a claim with the Workers' Compensation Board of British Columbia. It accepted his claim, which it later clarified was a claim for a right shoulder sprain and right knee sprain.

[16] The grievor received treatment from a chiropractor and returned to work in September 2007. He testified that at that time, he still had pain in his knee and back, but it was not sufficient to prevent him from working.

[17] The grievor was transferred to work as a correctional officer at the Springhill Institution, commencing in February 2008. He drove across Canada to take up his new position and testified that towards the end of this trip, he was experiencing a lot of back pain. He attributed it to the lengthy drive.

[18] At the Springhill Institution, the grievor started work in Unit 50. It was a new cellblock housing unit but was equipped with used chairs. The grievor testified that all the chairs in the unit were very low and narrow and were mostly in poor condition. He said that the chairs "appeared to be made for 5'4" people whereas I am 6'4" tall and at the time weighed close to 290 lbs." He said that when he sat in one of those chairs, his knees were elevated higher than his hips. He said he could not get into one of the chairs with the belt and equipment that the correctional officers were expected to wear.

[19] The grievor testified that almost from the beginning of his time at the Springhill Institution, he regularly experienced pain in his back. He stated that around the beginning of June 2008, he spoke to his unit manager, Ms. Paul, and asked for a "24-hour chair that could be adjusted." He said that he requested a "24-hour chair" because the correctional officers in the British Columbia institution where he last worked had requested and received that type of chair. In that case, the chairs being replaced were too narrow, and the replacements were called 24-hour ergonomic chairs. They had many adjustments and were supplied to all the correctional officers who worked at control posts in that institution.

[20] The grievor said that he and the other officers who work at control posts spend almost all their time seated in a chair.

[21] Ms. Paul testified that when the grievor approached her about replacing the chairs, she referred him to Robert Wong, who was the purchasing agent, as she did not have a budget for chairs.

[22] Ms. Paul was the grievor's manager at the time and testified she did not "equate" his request for a new chair as a request for accommodation. She said that she was not aware of ever seeing the grievor in pain. She acknowledged that the grievor might have complained about his back but said that it was not unusual for correctional officers to do that. She was not aware he had a medical issue. She said that when the grievor asked for the chair, he stated that his existing chair was too low for him. However, when she sent an email on June 6, 2008, to Mr. Wong supporting the grievor's request, she wrote, "I support this request. Dale is experiencing issues with his back from these chairs and if not corrected that will lead to more issues for him." The grievor's email to the purchasing agent on the same day stated, "Bob, I am requesting to get a 24 hour chair for my post in Unit 50. The chairs we are provided now are too low and are causing me to have back spasms. The 24 hour chair should help."

[23] On June 6, 2008, the grievor also sent a copy of the email to Ms. Oickle, who was the chief of administration and materials management at the Springhill Institution. The grievor said that he copied the email to her because he thought she was part of the ergonomic committee.

[24] Three supervisors reported to Ms. Oickle. They were responsible for administration, fleet and warehouse, and material management, respectively. Mr. Wong was the supervisor of material management, which looked after all the inmates' needs, such as clothing, cleaning and laundry. He was not called as a witness. Ms. Oickle testified that she had nothing to do with the ergonomic committee. She knew that Ms. Paul had referred the grievor's request to Mr. Wong but testified that she understood he was making the request for the benefit of a larger group of correctional officers who all wanted 24-hour chairs. She said that the grievor would have been following the correct process of making such a request to Mr. Wong if the intention was to obtain better chairs for the correctional officers in the control areas. However, she said that if he was requesting a special chair because of a medical condition, such

a request had to go to a manager. She said she was not responsible for accommodation requests unless they came from her own staff.

[25] Ms. Oickle testified that Mr. Wong's reaction to the request was the provision of a number of 24-hour chairs, which were provided to Unit 50. She did not explain why she thought that the grievor was making the request for the benefit of a larger group when the emails of June 6, 2008, which were copied to her, indicated that the request was prompted by the back spasms being experienced by the grievor.

[26] The grievor testified that the chairs that were received were placed in a meeting room for management because chairs had been taken from that room to replace the old chairs then being used by correctional officers. The grievor was advised when the chairs arrived, and he went through them and found one that in his words "raised up the highest." He said that he told Ms. Paul that he was taking that chair until he received a proper chair and that Ms. Paul was agreeable. He said that he used this chair for three to four months but that it was not well made and it broke.

[27] Ms. Paul testified that the grievor had reported to her that he had received the chair, was quite happy and said that everything was fine. Therefore, she felt no need to do anything further. She stated that there were no further requests from the grievor to her for a chair. She never received any work refusals from him; nor did she receive any complaints under the *LC* about ergonomics.

[28] I think that the grievor’s recollection that he was still waiting until “he got a proper chair" most probably describes the conversation with Ms. Paul that he referred to in paragraph 26, of this decision, because the subsequent ergonomic assessment in October 2011 confirmed that the “24-hour chair” was still too small. It had a seat pan width and width between the armpits that was too small for someone of the grievor’s size, and his experience in British Columbia meant that he knew more optimal ones were available. At the same time, I think that it is understandable that Ms. Paul came to the conclusion that he was happy because there is no evidence that he went back to her asking for a different chair in the intervening period leading up to his transfer from Unit 50 to the Main Communication and Control Post (MCCP). It also appears probable that the use of the term "24-hour chair" caused confusion because it was also used to describe the chairs that were obtained by Mr. Wong and placed in the management meeting room. There is no evidence that the grievor ever clearly

explained that the 24-hour chairs in British Columbia were different from the 24-hour chairs obtained by Mr. Wong.

[29] When the grievor transferred from Unit 50 to the MCCP, he said he did not take his chair with him because it was broken and because there were 24-hour chairs in the MCCP, which were the same type as the one that he had broken and had left behind in Unit 50. He said they were higher chairs than the ones that were originally in Unit 50 but that they were not optimal. He said he did not do anything about this because he was "under the misguided assumption that they were getting [him] a new chair." There is no evidence that the grievor told anyone that his chair was broken.

[30] There is no evidence from the grievor that he went back to Ms. Paul to follow up on his assumption, and as stated, her evidence is that she received no subsequent complaints from him. However, the grievor said that he kept asking Mr. Wong and Ms. Oickle if he would ever receive a proper chair.

[31] The grievor testified that he met with Ms. Oickle in her office and told her that he wanted an ergonomic chair because of his back. She told him that he needed a doctor's note in order to receive such a chair. He said that he obtained a doctor’s note and that he submitted it to her. Ms. Oickle testified that she could not recall receiving such a note, and none was found filed with the other doctor’s notes received by the employer from the grievor.

[32] During the grievor's testimony, he stated that the only copy he had of the note was on the hard drive of his computer, which had crashed and was inaccessible. However, when the hearing continued the next morning, the grievor stated that he had managed to obtain technical help and that he had retrieved and printed the note, which was introduced as an exhibit. It was a short memo signed by Dr. Rondeau, the grievor's family physician. It was dated July 23, 2009, and stated, “Dale Miller requires an ergometric *[sic]* chair for his height and weight.”

[33] In any event, at some point it was determined that the grievor was to be given his own unique chair. The grievor said that Mr. Wong asked him to go to the SIS Warehouse that was charged with supplying the institution, where they measured him for a chair. However, time passed, and he still did not receive one.

[34] The grievor testified that he continued to have problems with his back, which caused him to lose time from work. In March 2010, he obtained approval from the employer for an advance on his sick leave. At that time, he indicated that there would probably be a workers' compensation board claim once [he] was able to see [his] specialist.

[35] Clause 31.04 of the agreement between the Treasury Board and the UCCO-SACC-CSN, expiry date of May 31, 2010 ("the collective agreement"), provided that when an employee had insufficient or no sick leave credits to cover an absence, an advance of up to 200 hours of sick leave could be granted to the employee.

[36] The grievor said that on May 24, 2010, while he was at work, he bent down to pick up a pen and felt a tug on his lower back. He said that it produced pain in his back, which rapidly became much worse. Within several hours, he said he was in so much pain that he could not move, and at about 03:00, he was taken by ambulance to a hospital. He was given pain medication and muscle relaxants and was taken home by ambulance later that day. He was initially given a medical certificate indicating an estimated date of return to work of May 31, 2010, but he remained off work until the end of June 2010.

[37] On July 6, 2010, the grievor sent an email to Mr. Wong with copies to the warden and union president. It read as follows:

> *Bob I have been asking for an Ergonomic chair since 2008. I've been passed around from person to person with no results. My back has deteriorated badly to the point I was taken out of work by ambulance and off work for a month. I work the side roster and having a proper chair in Mccp [sic] would help significantly.*

[38] On the same date, Mr. Wong replied to the grievor. He advised that ". . . the last set of chairs issued to the MCCP and at the Main Entrance were all ergonomic chairs." He referred to a specification for a typing chair received from an office supply store, which he attached to the email. He continued as follows:

> . . .
>
> *If your back is anything like mine then the solution is not so much the chair but getting up and walking around every one half hour or so to relieve the pressure on your back.*

> *I have included the name of my Physiotherapist as well as her phone number should you be interested. . . .*
>
> *. . . If it were not for her I would not have been able to return to work at all and I was off for two years due to ergonomic back problems. I even attended a 6 week intensive physiotherapy course put on by Workers Compensation that did not help one iota. . . .*
>
> *. . . Believe me when I say no ergonomic chair will resolve back problems that have not been appropriately addressed. Been there done that and I have met most of the physiotherapists in the Amherst, Springhill and 3 in the Halifax Dartmouth area before being referred to. . . .*
>
> *. . . If you don't wish to take my advice then contact Drew Steeves and request a member of the ergonomic committee identify an ergonomic chair they believe will suit your needs and address your problems.*
>
> *Have them identify model number and SKU Number of the chair, the cost and where it can be purchased.*
>
> *When they have that information I would suggest you go to the store and try one out to determine if you believe it will suit your needs.*
>
> *Once known, provide me with the documentation and I will seek authorization to purchase.*

[39] The grievor testified that he was looking for a chair and that he was not interested in trying out Mr. Wong's physiotherapist, so he contacted Mr. Steeves as suggested. Mr. Steeves told him that he had received training in ergonomics and advised him that it would be easier for the grievor to look at chairs in an office supply store rather than picking out a chair from a catalog.

[40] On July 7, 2010, Mr. Steeves sent an email to the warden and copied the grievor, the deputy warden, the union president and Mr. Wong. The email stated as follows: “Dale did have an Ergonomic Assessment done some time ago. The report was sent to the OSH committee. However, this seems to have been as far as it went.”

[41] The earlier ergonomic assessment referred to was when the grievor had been measured for a chair in the SIS Warehouse.

[42] The grievor testified that, pursuant to Mr. Steeves’ advice, he went to several stores and obtained brochures on different types of chairs. However, the evidence

indicated that this information was obtained by the grievor only on January 11, 2011, the day after he filed his grievance.

[43] At the end of October 2010, the grievor went off work again and remained off until the end of January 2011. During that time, he said he was finally seen by a specialist who gave him three cortisone injections in his spine over a two-month period. There was no doctor's report, note or other medical evidence put in evidence relating to those injections.

[44] In mid-December 2010, the grievor was advised that his pay was being cut off. It remained so until he returned to work in February.

[45] On January 10, 2011, the grievance was filed that is the subject of this adjudication.

[46] On January 11, 2011, the grievor received an email from an office supply store that had attached information that he had requested about an ergonomic chair. He said that he gave this information to the warden, who assured him that the chair would be ordered, but no chair was received by the grievor.

[47] On March 1, 2011, and April 8, 2011, the employer made its first-level and second-level responses to the grievance, which have been referred to earlier.

[48] On April 20, 2011, the Workers' Compensation Board of Nova Scotia rendered a decision on a claim filed by the grievor. The decision found that there was no connection between the grievor's problems with his back and the lack of a suitable ergonomic chair. In the reasons, the decision noted that Mr. Miller was an employee of a federal Crown Corporation and, as such, was subject to the provisions of the *GECA*. It continued as follows at page 6:

. . .

> *The issue to be determined in this matter is whether the Worker suffered an injury by accident arising out of and in the course of his employment as defined by* GECA. *If it is determined that the Worker did suffer an injury by accident arising out of and in the course of his employment, compensation will be payable pursuant to the provisions of the Nova Scotia legislation, the* Workers' Compensation Act, *S.N.S. 1994-95, c. 10, as amended.*

The Nova Scotia Court of Appeal has determined that in determining entitlement for GECA *claims, the standard of proof outlined in Section 187 of the* Workers' Compensation Act *is applicable.*

Section 187 provides that "Where there is doubt on an issue respecting the application and the disputed possibilities are evenly balanced", the worker shall be afforded the benefit of the doubt.

Based on a review of all of the evidence on file, the relevant sections of the Act and Board Policy, I find that there is insufficient evidence to establish that the Worker sustained a personal injury by accident arising out of and in the course of his employment. I find that the evidence most reasonably supports that the Worker has had ongoing difficulties with back pain attributable to the injury he sustained in 2007 in British Columbia. Although the Worker reports having increased pain when he bent down to pick up a pen on May 25, 2010, the Board Medical Advisor has indicated, and I accept her opinion, that the Worker has a condition which by its nature will involve periodic flares of back pain and he would have experienced flare-ups of that pain regardless of whether he was at work or not.

The medical evidence is clear in establishing that the Worker sustained injury to his back while working in British Columbia in July 2007. The Worker stated, in correspondence that appears to be directed at the British Columbia Board, that his pain and symptoms have been present and consistent since his 2007 injury. He indicated his position that his difficulties were due to his 2007 injury. There is evidence on file indicating that the Worker sought periodic chiropractic treatment during the intervening period between his British Columbia injury and May 2010. His Family Physician's chart notes from 2009 also indicate that the Worker experienced flare-ups of low back pain, for which he underwent physiotherapy and chiropractic treatment. The Worker also underwent a CT scan and an MRI of his lumbar spine as well as a pericentral disc herniation on the left at L5-S1, which contacted the existing left S1 nerve root.

The Worker was seen by Neurosurgeon Dr. Casha, who noted the diagnostic imaging findings and provided the opinion that the L5-S1 disc was the offending lesion and the cause of most of the Worker's pain. The evidence is insufficient to support that the Worker's disc herniation resulted from either bending to retrieve his pen or difficulties with his chair.

The Worker also attended the Emergency Department with respect to low back pain in June and November, 2009.

> *I am unable to accept that the Worker's back difficulties resulting in time lost from work in 2010 are attributable to either his reports of bending to pick up with a pen on May 25, 2010 or to improper ergonomics at his workstation. I find that the medical evidence most reasonably supports that the Worker's persistent difficulties with low back pain and associated loss of earnings are attributable to a pre-existing back condition, which the evidence most reasonably supports results from the injury he sustained in British Columbia in 2007. I am unable to find the evidence supports that the Worker's job duties in Nova Scotia either caused, activated, aggravated or accelerated his pre-existing condition such that I would be able to make a finding that the Worker sustained a personal injury by accident arising out of and in the course of his employment. By his own account, the Worker's back difficulties have been present and consistent since the time of his injury in 2007.*

[49] On July 28, 2011, the grievor wrote to the CSC commissioner about the pain he had experienced since the incident in May 2010, when he bent down to get a pen that he had dropped, and noted that the workers' compensation boards of British Columbia and Nova Scotia each denied his claim, stating respectively that the injury was new or that it was a recurrence of the B.C. injury. He stated that money was being deducted from his paycheques to reimburse the employer for advances made to him because he had exhausted his sick leave and that he still had not received a proper ergonomic chair. Shortly after his letter, the grievor was advised that a new ergonomic assessment would be completed at his workplace as quickly as possible to ensure that he received an appropriate chair as required by the assessment. He was assured that should his appeals to either workers' compensation board be successful and should either approve his claim, the employer would reimburse any monies owed him.

[50] On October 11, 2011, an ergonomic assessment was completed at the grievor's workplace. It concluded that the grievor's office chair ". . . was not an optimal fit for Mr. Miller as it lacked adjustability, the seat pan width was too small and the width between the arm rests was too small." About three weeks later, the grievor received a new chair, which he testified "made a world of difference" to him. He said that he could adjust it so well that it was "like sitting on a couch" and that he has had no problems with his back since he received that chair.

[51] On February 22, 2012, the British Columbia Workers' Compensation Appeal Tribunal released a decision, which found that only the grievor's right shoulder sprain and right knee sprain had been adjudicated by that tribunal in 2007 and that,

therefore, it was still open to the tribunal to consider whether Mr. Miller's back symptoms were compensable. It went on to find that they compensable and that they had been caused by the July 28, 2007, incident in British Columbia, which was deemed an "accident" under the *British Columbia Workers Compensation Act*, [RSBC 1998] Chapter 992.

[52] The hearing of this adjudication took place on October 9 and 10, 2012.

[53] Clause 30.16 of the collective agreement is headed, "Injury-on-duty Leave." Its relevant provisions read as follows:

> *30.16 An employee shall be granted injury-on-duty leave with pay for such reasonable period as may be determined by the Employer when a claim has been made pursuant to the* Government Employees' Compensation Act*, and a Workers' Compensation authority has notified the Employer that it has certified that the employee is unable to work because of:*
>
> *(a) personal injury accidentally received in the performance of his or her duties and not caused by the employee's willful misconduct . . . .*
>
> *. . .*
>
> *if the employee agrees to remit to the Receiver General for Canada any amount received by him or her in compensation for loss of pay resulting from or in respect of such injury, . . . providing, however, that such amount does not stem from a personal disability policy for which the employee or the employee's agent has paid the premium.*

[54] On October 3, 2012, the British Columbia Workers' Compensation Appeal Tribunal issued a decision that the grievor was unable to work because of a personal injury accidentally received in the performance of his duties, but as of the date of the hearing of this adjudication, it had not notified the employer that it had made a certification to that effect, as contemplated by clause 30.16(a) of the collective agreement. In that decision, the British Columbia Board found that the L5-S1 disc herniation had arisen as a result of the incident at work in British Columbia on July 28, 2007. It found that after reviewing the medical evidence, that evidence confirmed that the grievor did not "have any radiculopathy resulting from the disc herniation. Your complaints were that of pain. As a result, it is determined that the L5-S1 disc herniation resulted in a chronic pain condition." They therefore accepted his

claim for "L5-S1 disc herniation and resulting low back symptoms diagnosed as mechanical back pain resulting in chronic pain of the low back." The decision did not comment on or contradict the Nova Scotia Board's finding that the pain from the grievor's L5-S1 disc would occur regardless of the chair that the grievor was using.

[55] On October 12, 2012, the employer advised that it had received the decision from the British Columbia Workers' Compensation Appeal Tribunal and requested that the decision be brought to this adjudicator's attention, along with some additional submissions, and that the union should have an opportunity to respond. On November 6, 2012, the union advised that it had no objection to the employer's request.

III. Summary of the arguments

A. The employer's preliminary objections

i. Issues about work-related injuries are outside the Board's jurisdiction as they fall strictly under provincial workers' compensation schemes

a. The employer's position

[56] The essence of the grievance is a claim for an alleged work-related injury in 2010 and alleged damages flowing from it. The issues of whether the grievor suffered an alleged aggravation of a physical condition or a re-injury to his back at work in 2010 due to an alleged lack of an ergonomic chair and of what, if any, compensation he should receive fall strictly under provincial workers' compensation schemes, as clearly stipulated under section 4 of the *GECA*.

[57] Subsection 208(2) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 ("the *Act*"), prohibits any claim, including a grievance, against an employer for a workplace accident, except for claims for compensation made under the *CHRA*.

[58] As confirmed in *Cyr v. Treasury Board (Department of Human Resources and Skills Development)*, 2011 PSLRB 35, at para 58, the Board does not have jurisdiction to determine whether a grievor ". . . became ill because of [his or] her work . . . The question of work-related illnesses and accidents does not fall under an adjudicator's jurisdiction but rather that of the provincial administrations mandated to that effect . . . ."

[59] The Workers' Compensation Board of Nova Scotia found that it did not accept that the grievor's back difficulties, which resulted in time lost from work in 2010, were attributable to either his report of bending to pick up a pen on May 25, 2010, or improper ergonomics at his workstation. It found that the medical evidence most reasonably supported that the grievor's persistent difficulties with lower back pain and associated loss of earnings were attributable to a pre-existing back condition, which the evidence most reasonably supported resulted from the injury the grievor sustained in British Columbia in 2007. It was unable to find that the grievor's job duties in Nova Scotia caused, activated, aggravated or accelerated his pre-existing condition.

[60] The British Columbia Workers' Compensation Appeal Tribunal's decision, dated February 22, 2012, determined that the grievor's back symptoms were compensable under the *British Columbia Workers Compensation Act* due to a continuity of back symptoms stemming from the 2007 workplace accident for which he had previously received compensation for soft-tissue injuries.

[61] Therefore, two administrative tribunals had ruled that the grievor's claimed re-injury was not attributable to either picking up a pen in May 2010 or alleged improper ergonomics but to an incident in 2007 for which the British Columbia Workers' Compensation Appeal Tribunal has already acknowledged his entitlement to compensation. As a result, the grievor's proper recourse is to follow up on those workers' compensation board findings and not to pose the same questions before another administrative tribunal for a different finding.

[62] The attempt to revive the same issues before a different administrative tribunal constitutes a collateral attack, is contrary to the principles of finality, and risks amounting to the "forum shopping" and duplicity of proceedings against which the majority of the Supreme Court of Canada cautioned in *British Columbia (Workers' Compensation Board) v. Figliola,* 2011 SCC 52, at para 26 and 27.

[63] If the grievor is allowed to relitigate the same issue, namely, whether an alleged failure to accommodate resulted in a re-injury to his back, for which he seeks compensation, the result is a multiplicity of proceedings or, even worse, a contradictory decision on the same issue that the workers' compensation boards of Nova Scotia and British Columbia have already determined.

[64] Instead of starting fresh proceedings before a different tribunal in search of a more favorable result or more compensation by posing the same question, which has already been decided, the grievor should pursue the results of the February 22, 2012 British Columbia Workers' Compensation Appeal Tribunal decision by obtaining adjudication of that decision from the British Columbia Workers' Compensation Board and seek the calculation of what that compensation might be, which may then trigger entitlement to clause 30.16 (Injury-on-duty Leave) under the collective agreement.

b. The union's position

[65] Workers' compensation schemes determine if there is an obligation to provide compensation because of a workplace accident. If the injury was not caused by a workplace accident or disease, there is no compensation. However, the duty to accommodate exists independent of the origin of the disability, and damages arise from the failure to accommodate. The present grievance is not a claim against the employer for a workplace accident but for a failure to accommodate.

[66] The grievor suffers from a back condition, which is a disability within the meaning of subsection 3(1) of the *CHRA* and article 37 of the collective agreement.

[67] Even though the grievor's disability originated in a work accident, any disability stemming from that accident imposes on the employer a duty to accommodate him to the point of undue hardship. Payment of compensation for the injury under a workers' compensation scheme does not relieve the employer of its continuing obligation to accommodate that worker's disability to enable the worker to continue his or her work, up to the point of undue hardship.

[68] To deal with the employer's objection to jurisdiction, it is necessary to decide if the fundamental nature of the grievance is the employer's failure of its duty to accommodate the grievor.

ii. The Board has no jurisdiction as the grievor could have sought a remedy under Part II of the *CLC*

a. The employer's position

[69] In addition to compensation, the grievor seeks a proper ergonomic chair. As he has received a chair, the matter is moot.

[70] In any event, there is another administrative procedure for redress provided under Part II of the *CLC*. Since an employer has obligations under Part II to ensure that the workplace meets ergonomic standards, an employee who feels the employer is not fulfilling these obligations is required by that legislation to first resolve the matter through a process detailed under the Internal Complaint Resolution Process in subsection 127.1(1) of the *CLC*. In the alternative, a health and safety officer from the HRSDC Labour Program can be notified to render a decision on the complaint. Additionally, if an employee believes that a situation poses a danger, a refusal to work may be made under subsection 128(1) of the *CLC*.

[71] The employer's first-level grievance response stated that the grievor's allegations did not meet the criteria for a grievance but would be better served via a complaint process.

[72] *Public Service Alliance of Canada v Treasury Board (Department of Human Resources and Skills Development)*, 2012 PSLRB 84, at para 35, 36, 38, 41 and 51, contains a review of Federal Court of Appeal jurisprudence to the effect that if another administrative procedure for redress is available to a grievor, such as Part II of the *CLC*, it must be used if it provides a real remedy. That does not mean it needs to offer an equivalent remedy or one that is identical or better, as long as the remedy deals ". . . meaningfully and effectively with the substance of the employee's grievance." The adjudicator of that case came to the conclusion that when looking at the grievance as a whole, its essence could meaningfully have been remedied by the *CLC* process, and therefore, the Board was without jurisdiction to hear the grievance.

[73] In this case, there already exist meaningful and effective remedies under other administrative procedures for the claims and remedies pursued by the grievor, including the following:

> a) His claim for compensation for a work-related re-injury under section 12 of the *GECA* for which he has already been afforded a remedy under workers' compensation board legislation. The onus is on the grievor to pursue these remedies through the appropriate mechanisms provided in the relevant workers' compensation board scheme and not to seek a different, more favorable answer on the same question from a different tribunal.

b) With respect to the request for an ergonomic chair, it is a moot point since an ergonomic chair was provided to the grievor, but in any event, another administrative procedure for that particular request was also available, being Part II of the *CLC*. The availability of another administrative procedure constitutes a complete bar to Mr. Miller's grievances before the Board.

b. The union's position

[74] If the employer's position were allowed, then all grievances alleging discrimination on the grounds of disability could never be heard by the Board because the employee could not grieve, having to instead initiate the internal complaint resolution process at section 127.1 of the *CLC*.

iii. Discrimination based on a physical disability was raised for the first time in the reference to adjudication

a. The employer's position

[75] Discrimination based on a physical disability was raised for the first time in the reference to adjudication. Raising the discrimination argument amounted to a new allegation, which is not permissible in view of the Federal Court of Appeal's findings in *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109 (C.A.). Only matters dealt with at the final level of the grievance process may be referred to adjudication.

b. The union's position

[76] The employer's responses during the grievance process from the outset demonstrated that it fully understood that the allegation was that there was discrimination based on the grievor's physical disability.

iv. The grievor's claim for damages attributable to the employer's alleged failure to accommodate the disability caused by the injury to his back

a. The grievor's position

[77] The employer has never contested that the grievor suffers from recurring pain in his back. The grievor's testimony established as much, and it was uncontested.

[78] The grievor's testimony that he has had no problems with his back since finally being provided with a proper ergonomic chair was also uncontested. It showed that the damages that the grievor suffered through loss of pay and pain and suffering because of back pain are attributable to the employer's failure to accommodate his disability. The standard required of the employer was accommodation up to the point of undue hardship. It was obviously not an undue hardship to provide the grievor with a proper chair.

b. The employer's position

[79] Even if the medical findings of the two workers' compensation boards are disregarded, there is still not sufficient evidence that the grievor suffered from a disability. The doctor's note dated July 23, 2009, said nothing about a disability, but only that the grievor required ". . .an ergometric *[sic]* chair for his height and weight." Similarly, the finding of the ergonomic assessment of October 11, 2011, referred to the chair the grievor had been using as having a ". . .seat pan [that] was too small . . ." and ". . . the width between the arm rests was [also] too small." There was no medical evidence presented supporting the grievor's claim that he had a disability.

[80] There was also no medical evidence supporting the grievor's claim that the chair was the cause of his back pain. Other evidence pointed to the fact that the grievor had received medical treatment for his back complaints. None of that medical evidence was presented to support the grievor's claim that he had a disability that was caused, activated, aggravated or accelerated by the type of chair that he was using. To the contrary, the medical evidence accepted by the Workers' Compensation Board of Nova Scotia was that the back pain was attributable to a disk pinching a nerve, which would regularly recur regardless of the chair that was being used by the grievor.

B. Decisions

[81] The parties referred me to the following decisions: *Prentice v. Canada,* [2006] 3 F.C.R. 135 (C.A.); *Public Service Alliance of Canada; Doiron v. Treasury Board (Correctional Service of Canada),* 2006 PSLRB 77; *Burchill*; *Shneidman v. Canada (Attorney General),* 2007 FCA 192; *Forster v. Canada Revenue Agency,* 2006 PSLRB 72; *Vaughan v. Canadian Food Inspection Agency,* 2010 PSLRB 74; *Figliola*; *Cyr*; *Gibson v. Treasury Board (Department of Health),* 2008 PSLRB 68; *Juba v. Treasury Board (Department of Citizenship and Immigration),* 2011 PSLRB 71; *Kandola v. Canada*

(Attorney General), 2009 FC 136; *Canada (Attorney General) v. Sketchley,* 2005 FCA 404; and *Zaytoun v. Canadian Food Inspection Agency,* 2010 PSLRB 35.

IV. Reasons

[82] For the reasons that follow, I am dismissing the grievance for lack of jurisdiction. I accept the employer's submission that this case falls under the provincial workers' compensation schemes, which have ruled after considering medical evidence that the grievor's back difficulties were not attributable to improper ergonomics at his workstation.

[83] In particular, the Workers' Compensation Board of Nova Scotia's decision of April 20, 2011, relied on the opinion of a neurosurgeon, Dr. Casha, who stated as follows:

. . .

> *. . . the L5-S1 disc was the offending lesion and the cause of most of the Workers' pain. The evidence is insufficient to support that the Worker's disc herniation resulted from either bending to retrieve his pen or difficulties with his chair.*

. . .

[84] The Nova Scotia decision stated in part as follows:

> *. . . The Board's Medical Advisor has indicated, and I accept her opinion, that the worker has a condition which by its nature will involve periodic flares of back pain and he would have experienced flare-ups of that pain regardless of whether he was at work or not.*

[85] The *GECA* provides that an employee injured by an accident in the course of his or her employment is entitled to receive compensation at the rate provided under the laws of the province where the employee is usually employed. The compensation payable is determined by the applicable provincial workers' compensation board.

[86] Subsection 208(2) of the *Act* prohibits any claim, including a grievance, against an employer for a workplace accident, except for claims for compensation under the *CHRA*.

[87] The union submitted that the foregoing provisions were not a bar in the present case because the grievor was not claiming compensation for a workplace accident but

instead was claiming for something that occurred subsequent to the accident, that is, the employer's continuing obligation to accommodate the disability of an employee. It stated that that obligation exists regardless of whether the cause of the disability was a workplace injury or something completely divorced from the workplace.

[88] Under the *GECA,* the provincial workers' compensation boards are given the jurisdiction to determine what compensation, if any, is payable for injuries from accidents incurred in the course of a worker's employment. They have done so in the present case, ruling that there is compensation payable under the British Columbia legislation because the grievor was suffering from an accident that occurred while he was working in British Columbia and that compensation was not payable in Nova Scotia because the grievor's back problems were not caused by an accident at work in Nova Scotia. The latter conclusion was based on a finding that the grievor's back problems were not the result of the employer's failure to provide him with a proper ergonomic chair.

[89] Although these findings were made in the context of determining the original cause of the grievor's back condition and specifically whether it commenced in the course of his employment in Nova Scotia, the medical diagnosis that supported that finding also resulted in a finding that the grievor would have experienced the same pain regardless of the type of chair that the grievor was using.

[90] Such a determination was within the jurisdiction provided to the Nova Scotia Board by the *GECA*. Having made that determination, subsection 208(2) of the *Act* prevents me from ruling on a grievance that presents the same issue, other than the *CHRA*. In effect, the union is asking that this adjudication overrule or ignore the workers' compensation boards' findings. To do so would result in a duplicity of findings, contrary to the Supreme Court of Canada's caution in *B.C.W.B. v. Figliola*, supra.

[91] Therefore, there is a compelling argument that in this instance, I am without jurisdiction to hear the grievance. As a result, it would not be not necessary for me to rule on the alternate grounds advanced by the employer.

[92] In *Figliola*, the Supreme Court of Canada discussed common law doctrines, such as collateral attack, in the context of statutory mechanisms in human rights legislation (at para 26):

> *As a result, given that multiple tribunals frequently exercise concurrent jurisdiction over the same issues, it is not surprising that the common law doctrines also find expression in the administrative law context through statutory mechanisms such as s. 27(1)(f). A brief review of these doctrines, therefore, can be of assistance in better assessing whether their underlying principles have been respected in this case.*

[93] In the *Act*, section 208 gives expression to this limitation in subsection 2, stating that an employee may not present an individual grievance in respect of which an administrative procedure for redress is otherwise provided, with the exception of the *CHRA*:

> ***208.*** *(1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved*
>
> *(*a*) by the interpretation or application, in respect of the employee, of*
>
> *(i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or*
>
> *(ii) a provision of a collective agreement or an arbitral award; or*
>
> *(*b*) as a result of any occurrence or matter affecting his or her terms and conditions of employment.*
>
> *(2) An employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the* Canadian Human Rights Act.
>
> . . .

[94] Although subsection 208(2) excepts the *CHRA*, and therefore gives an adjudicator under the *Act* "concurrent jurisdiction" it is important to note that section 41 of the *CHRA* also includes such limiting language stating, for example, that the alleged victim "ought to exhaust" grievance or review procedures otherwise reasonably available; or that the complaint is one that could more appropriately be dealt with initially or completely according to another procedure:

> ***41.*** *(1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that*
>
> *(*a*) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;*
>
> *(*b*) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;*
>
> *(*c*) the complaint is beyond the jurisdiction of the Commission;*
>
> *(*d*) the complaint is trivial, frivolous, vexatious or made in bad faith; or*
>
> *(*e*) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.*

[95] Importantly, the Supreme Court of Canada cautioned against an overly formulaic approach to these types of provisions, noting that such provisions are not codifications of the doctrine of collateral attack or abuse of process, but they do reflect the underlying principles of these types of doctrines, supporting the pursuit of finality, fairness, and the integrity of the justice system by preventing unnecessary inconsistency, multiplicity and delay. It is therefore important to be guided by "the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them" (at paras 36).

[96] I also understand, as the grievor submits, that any disability stemming from an accident (and not only an accident that occurs in the course of work) imposes on the employer a duty to accommodate him to the point of undue hardship and that the duty to accommodate is something about which every workplace must be mindful. Section 208(2) also raises an exception from its limiting provision for human rights issues and the collective agreement includes a "no-discrimination" clause. As well, in this instance, the issues may have been covered in the workers' compensation proceedings, but there was no express interpretation of human rights legislation or the issue of accommodation. It might be argued then that there is an additional issue to consider that was not previously addressed. However, as I note above, the evidence

was clear that grievor's back difficulties were not attributable to improper ergonomics at his workstation and that the lack of the ergonomic chair had no effect on allowing the grievor to remain in the workplace.

[97] That having been said, even if I found that I had jurisdiction to hear the grievance as to the failure to provide the grievor with proper ergonomics at his workstation, I would have dismissed it. The evidence clearly shows that there was a willingness to provide the grievor with an ergonomic chair though there were delays in doing so. There were omissions in communications, incorrect assumptions and misunderstandings along the way by both parties, but these do not always mean that the duty to accommodate was not ultimately met. As is often stated, the duty to accommodate is a two way responsibility both for the employer and for the employee and I cannot find that the problems that arose were due to the omissions of the employer only. The grievor did not always communicate clearly what he thought was needed or why. For example, though the grievor may have spoken to some people about the need for the chair, he did not clarify with Ms. Paul that everything was not fine with the chair, when in fact there were problems with it. When the grievor transferred from unit 50 there was no evidence that he told anybody that the chair he had been using was broken. The grievor did submit a doctor's note but it contained limited information with regard to how the need for an ergonomic chair was linked to a disability. In addition, the grievor did eventually receive an ergonomic chair, as he requested.

[98] Although the employer was willing to provide the grievor with an ergonomic chair, this does not foreclose the employer from relying on subsequent medical evidence to show that its delay in providing such a chair did not contribute to the grievor's pain and suffering.

[99] The evidence also shows that the British Columbia Workers Compensation Appeals Tribunal decision, dated February 23, 2012 was to be implemented in relation to wage loss benefits. On the issue of remedy, even if I was to find that this grievance should be substantiated, and I do not, there is a lack of evidence for me to consider as to whether or not the circumstances give rise to damages based on pain and suffering. In his initial grievance, the grievor argued that had the institution followed the duty to accommodate, he may not have been reinjured. There is a lack of evidence linking the pain from the grievor's claimed disability to the failure to a supply him with the type

of ergonomic chair that he eventually received. The only evidence that the grievor provided was testimony that his problems ceased with the arrival of an appropriate ergonomic chair. However, the grievor's back condition was causing him pain during his drive east. His evidence is that the major incident on May 24, 2010, which resulted in his treatment in hospital and absence from work until the end of June, was caused when he bent down to pick up a pen. The medical evidence accepted by the Nova Scotia Workers Compensation Board was that this was not caused by improper ergonomics at his workstation. There was evidence the grievor was too big for his chair and that this caused him discomfort. However, there was also evidence that the correction officers who worked at the control posts spend almost all their time seated in a chair and that it is common for them to complain about uncomfortable chairs. This apparently led to special ergonomic chairs being supplied to all of the correction officers working in control posts in the British Columbia institution where the grievor had worked. While there is evidence that the grievor was too big for the chairs in the Springhill Institution, and that they caused him discomfort, the chairs apparently caused others discomfort as well. The issue is whether it would have affected the grievor's disability to the extent that he should be entitled to compensation for failure to accommodate. In other words, would the use of a non-ergonomic type of chair mechanically or otherwise aggravate the grievor's disc injury or back injury? The only medical evidence, which is what was accepted by the Nova Scotia Board, is that it would not. Medical evidence from the grievor establishing such a link was conspicuously absent. His personal physician was not called to give evidence. As noted earlier in my reasons, the doctor's note which the grievor retrieved from his hard drive does not mention the grievor's back condition or any linkage to it requiring an ergonomic chair. It just states that the grievor requires "an ergonomic chair for his height and weight." No medical evidence was offered, either through evidence or a report, from the specialist who gave the grievor cortisone injections between October 2010 and January 2011. The absence of such medical evidence infers that it would not contradict the medical evidence accepted by the Nova Scotia Workers Compensation Board that improper ergonomics did not cause, actuate, aggravate or accelerate the grievor's back condition.

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

(The Order appears on the next page)

V. Order

[101] The grievance is dismissed.

December 19, 2013.

William H. Kydd,
adjudicator