

Date: 20130527

File: 566-34-2124

Citation: 2013 PSLRB 60



*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

NASIRUDDIN AHMAD

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Ahmad v. Canada Revenue Agency

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Augustus Richardson, adjudicator

For the Grievor: Steve Eadie, Professional Institute of the Public Service of Canada

For the Employer: Victoria Yankou and Rachel Doran, counsel

Heard at Toronto, Ontario,
August 21 and 22, 2012 and January 24 and 25, 2013.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] In 2005, Nasiruddin Ahmad (“the grievor”) was an employee of the Canada Customs and Revenue Agency (“the Agency” or “the employer”) in its Toronto, Ontario, office. On October 31, 2005, the grievor filed a grievance complaining that “. . . management failed to accommodate [his] disability, as required by Article 43 of the Collective Agreement, during [his] acting assignment as an AU-1.” He grieved that he “. . . was forced to leave [his] AU-1 acting position because of management’s failure to offer [him] appropriate accommodation.” He sought by way of remedy to be returned to the AU-1 position and to be compensated for his losses. He also wanted to be “. . . offered appropriate accommodation for [his] physical restrictions [and] any other appropriate remedy which would make [him] whole.”

[2] The grievance was referred to the Public Service Labour Relations Board on June 18, 2008. The Canadian Human Rights Commission was given notice of it on or about July 23, 2008. The notice filed on behalf of the grievor described the issue as “. . . failure to accommodate - prohibited grounds - disability - The employer failed to accommodate Mr. Ahmad, consequently he was forced to give up his AU-1 [position] and return to a PM position.”

[3] At the hearing, I heard the evidence of the grievor on his own behalf.

[4] On behalf of the employer, I heard the evidence of the following witnesses:

- a. Kevin McKinley, who in fall 2003 was an acting team leader of the grievor in audit;
- b. Laura Palermo, who in 2004 was the local labour relations advisor responsible for the grievor’s department;
- c. Mary Baldassini, who in August 2005 became an acting team leader in audit, and who was the grievor’s team leader at the material time; and
- d. James McNamara, who since 1999 has been a manager in audit in the Toronto office.

[5] All the witnesses worked in the Agency’s Toronto office.

[6] A number of exhibits were also put into evidence. There was unfortunately a large amount of duplication. Most if not all the documents put in as individual exhibits

on behalf of the grievor were also part of the employer's "Book of Documents" (Exhibit E61). It would have been far easier for all concerned had the parties been able to coordinate the documentation beforehand. In any event, because of the duplication, for ease of reference I will generally refer to Exhibit E61 unless a particular document does not appear in that book.

II. The facts

[7] The grievor's position was that, to understand his 2005 grievance, it was necessary to go back to 2003.

[8] At all material times, the grievor held the position of a PM-01 Collections Contact Officer with the Agency. The PM-01 position is an entry-level position for the collections contact officer job. A collections contact officer does no fieldwork. He or she sits at a workstation in an Agency office. He or she deals with taxpayers who have been assessed and who owe taxes. Most of the contact with taxpayers is done over the phone, although officers will sometimes meet taxpayers at the Agency office.

[9] The grievor's hope was to move up and eventually become a manager in the audit division of the Agency. There are two streams in audit at the Agency. The SP stream deals with individual returns. Once a person moves up the SP classification he or she can move to the AU classification. The AU stream deals with corporate returns. An entry-level AU-01 is at least four levels higher than a PM-01 in salary and position.

[10] The grievor transferred from Calgary, Alberta, to the Toronto office in the spring of 2001. By 2002, he found that working at his desk and being on the phone for much of the time caused pain in his neck. He had difficulty typing on the right side. He eventually went on leave without pay in late July 2002 and returned to his normal duties in December 2002. In February 2003, he presented a doctor's note requesting that he be placed on half-time for four weeks; see Exhibit E61, Tab 2.

[11] On February 26, 2003 the employer wrote to Dr. Chernin, who was the occupational health medical officer at the Occupational Health and Safety Agency of the Agency, requesting a fitness-to-work evaluation (FTWE) of the grievor; see Exhibit E61, Tab 2. The employer advised Dr. Chernin that Mr. Ahmad was a PM-01 collections contact officer with the Agency and enclosed a copy of his current work description. The employer asked Dr. Chernin whether the grievor could return to work

full-time or part-time, what medical restrictions might exist, and what accommodations, if any, would assist him in returning to work.

[12] On May 15, 2003, Dr. Chernin replied. He advised that the grievor could work full-time, but that "...ergonomic accommodations [should] be made to his workstation to accommodate his ongoing medical condition." They included the use of a telephone headset. He also recommended that, before any ergonomic changes were made, "...an ergonomic assessment be made of his workstation"; see Exhibit E61, Tab 3.

[13] The grievor was provided with a headset upon his return to work full-time in May 2003. At some point, he was also provided with an ergonomic workstation.

[14] At some point in 2003, a selection process for entry-level AU-01 positions was held. The grievor applied. On September 4, 2003, the grievor was advised that he had been appointed to the position of Tax Auditor, classified AU-01, on an acting basis, effective September 2, 2003 to August 27, 2004; see Exhibit E61, Tab 4. As set out in the work description (Exhibit E61, Tab 48, page 4), the position required the following physical demands:

Physical effort is required to perform the work encountered in a typical office environment.

The work requires carrying security approved cases containing sensitive documents and/or a laptop computer while travelling to the taxpayer's location.

Prolonged focussing of eyes on written material and the use of a personal computer/laptop and mainframe terminal for extended periods of time may result in eye strain and repetitive stress injuries.

[15] AU-01 field officers do roughly 50% of their work in the field. They review corporate tax returns that are to be audited. They visit a taxpayer's office and review the taxpayer's materials and documents. They carry a secure audit bag, in shape and size much like those lawyers are wont to carry. They also carry a laptop, into which they enter information collected while performing the audit. Sometimes they need to take taxpayer documents or files from the taxpayer's office back to the Agency office.

[16] The grievor testified that he performed a few field audits but that he found it difficult to carry the regulation audit bag and laptop. They were too heavy for him. As he testified at the hearing, “I had an issue with carrying the audit bag . . . it’s like a lawyer’s bag . . . I had an issue with lifting it, it was almost 30 pounds, and because of my pinched [neck] nerve I had an issue taking the bag.”

[17] The grievor obtained a note from this family physician, Dr. Mary Chacko. The note, dated October 10, 2003, stated that the grievor “. . . has cervical disc disease and needs to be assessed by an occupational therapist as his present job involves pulling a bag of about 30 lbs”; see Exhibit U6. (There was no evidence as to the source of Dr. Chacko’s information concerning the weight of the bag; I assume it was the grievor.)

[18] At that time, the grievor’s team leader was Mr. McKinley. He testified that the grievor had come to him and had stated that “his back was bothering him.” Mr. McKinley stated that he told him not to go on any more field audits if the bag was causing him pain. The grievor testified that he discussed his problem with Mr. McKinley. He testified that Mr. McKinley did not appear overly sympathetic. Mr. McKinley told him that roughly 50% of the work had to be done in the field and asked him, according to the grievor, “why did I apply for the position if I had this problem,” and told him that he “should have surgery first and then apply for the audit position.”

[19] Despite any lack of sympathy, nevertheless, Mr. McKinley emailed Sue Barwick, Staff Relations Consultant, on October 14, 2003. He noted that part of the grievor’s job entailed audits at taxpayers’ places of business. However, he noted that the grievor had said that carrying an audit bag and laptop “. . . causes him discomfort and an existing back problem is preventing him from doing the work.” That being the case Mr. McKinley asked for a Health Canada assessment “. . . on the limitations for Mr. Ahmed [*sic*] in performing his duties.” Pending that assessment, Mr. McKinley proposed to move the grievor to “. . . a more office-centred job that would not require the carrying of the audit bag and laptop”; see Exhibit E61, Tab 5.

[20] On October 16, Ms. Barwick wrote to Dr. Chernin. She requested an assessment “. . . to determine what accommodations may be required or recommended to assist Mr. Ahmad in performing his duties”; see Exhibit E61, Tab 6.

[21] On October 23, 2003, the grievor obtained a note from his physiotherapist. She noted that, at that time, he was visiting her clinic for physiotherapy. She recommended as follows (Exhibit U7):

... he avoid any lifting overhead with his shoulders, avoid any pushing or lifting activities, and be able to exercise every 1 hour during work period (i.e. a few minutes break to do stretches & exercises). This will enable him to work efficiently and with more controlled symptoms of pain, parathesia [sic], weakness of upper extremity.

[22] I note that the physiotherapist did not expressly rule out the grievor working as a field auditor. She did not explain what she had in mind by way of “lifting activities.” Moreover, she appeared to state that the grievor could work, provided he were permitted a few minutes each hour to stretch and exercise.

[23] Despite that the employer was awaiting an assessment from Dr. Chernin, the grievor decided to stop working in the AU-01 position and to return to collections. On October 28, the grievor wrote to Mr. McKinley as follows (Exhibit E61, Tab 7):

I really appreciate the offer of acting AU-01 position in September. Since joining in September 2003, I had to carry a heavy bag for 3 audits and as a result I suffered injury to my neck, shoulder and back. Thinking about future career in audit I was made aware by you that I had to use the bag in future audits. Due to my previous condition [illegible] neck injury [illegible] I don't think I can use the heavy bag in future audits as it will effect my neck and shoulder.

Given the circumstances, and also being made aware by you about no other options, I will appreciate an early return to collections (non filer).

[Sic throughout]

[24] Given the grievor's return to his previous position, on October 29, the employer cancelled the request for an assessment that it had earlier made to Dr. Chernin. In doing so, it noted that an ergonomic assessment of the grievor's workstation in collections had already been carried out and that accommodations to that workstation had been made; see Exhibit E61, Tab 8.

[25] The grievor was provided with an “Employee Performance Management Report” in December 2003. It was prepared by Mr. McKinley. His overall evaluation of the

grievor was that he “did not meet” the requirements of the position of an AU-01 field auditor; see Exhibit U8.

[26] The grievor testified that he had complained about that evaluation on a number of grounds. He said that he had not been given proper or sufficient training. In addition, because of his physical limitations, he had not been able to complete the six-month assignment, which meant that there had not been enough time to conduct a fair evaluation of his performance as a field auditor.

[27] The grievor’s concerns were discussed in a number of meetings within management. The upshot was that a decision was made to give the grievor a second try at the AU-01 field audit position and to accommodate him in that attempt. He was advised of that decision in a meeting on April 14, 2004. His response, as recorded in notes made at that time, was that returning to audit “. . . was his second option, his first option would be to go to Appeals.” He explained that he “. . . doesn’t know how audit can accommodate him because he can’t carry the bags, he can’t pull files from the cabinet, etc.”; see Exhibit E61, Tab 9. The employer’s representatives at the meeting were recorded as attempting to assure the grievor “. . . that with a FTWE, management in audit would attempt to accommodate him based on his medical condition”; see Exhibit E61, Tab 9. The grievor stated that he “did not feel it was possible”; see Exhibit E61, Tab 9.

[28] On May 11, 2004, Ms. Palermo, Staff Relations Consultant, wrote to Dr. Jeffries, Medical Officer with the Workplace Health and Public Safety Programme of Health Canada. She advised that the grievor had been selected for an AU-01 tax auditor position. She noted that the position required audits at taxpayers’ offices, which in turn required the auditor to carry “. . . security-approved cases containing sensitive documents and a laptop computer.” She requested an FTWE “. . . in order to determine what accommodations may be required or recommended to assist Mr. Ahmad in performing his duties as a Tax Auditor”; see Exhibit E61, Tab 10.

[29] Dr. Jeffries responded on May 14, 2004. He noted that the grievor had already been treated by “a highly skilled specialist [Dr. Tator].” Accordingly, he recommended that the employer forward a copy of the grievor’s job description to Dr. Tator “. . . for his opinion as to the appropriate limitations,” adding that, if Dr. Tator believed “. . . that Mr. Ahmad cannot perform field audits then he would not be suitable for that substantive position.” Dr. Jeffries’ letter was copied to the grievor; see Exhibit E61,

Tab 11. On May 21, the employer decided to proceed with requesting a report from Dr. Tator; see Exhibit E61, Tab 13.

[30] On May 25, Ms. Palermo wrote to Dr. Tator. She enclosed a copy of the job description for the field auditor position. She stated as follows (Exhibit E61, Tab 14):

The employee has communicated to management that he cannot perform some of the duties for this position of Field Auditor because of his medical condition. More specifically, he cannot carry the Government issued secured briefcase, lift heavy files and has difficulty typing and leafing through files. Management is requesting that you review the job description and advise us on his limitations. If addition, it would be beneficial if you can provide us with any recommendations on how we could accommodate this employee in this position, if at all possible.

[31] Dr. Tator responded on June 23. He pointed out that the grievor was scheduled for cervical fusion surgery on July 2, 2004. Dr. Tator advised that he would not be able to comment until three to six months after the operation; see Exhibit E61, Tab 15.

[32] On September 29, Dr. Tator advised as follows that the grievor "... should be capable of returning to work on October 18, and I would suggest that he return half time for about 4 weeks"; see Exhibit E61, Tab 16.

[33] The grievor agreed in September 2004 to a further assessment; see Exhibit E61, Tab 17. He returned to work in collections on October 18 with a doctor's note saying that he "should" be fit for duty as a PM-01 collections officer for half-days for a month. On October 21, Ms. Palermo, being concerned that the note did not actually say that the grievor "was" fit to return, requested medical certification that he "is currently fit to work" from Dr. Chernin; see Exhibit E61, Tab 18. However, the position the employer wanted Dr. Chernin to assess him for was that of an AU-01 field auditor. It noted as follows (Exhibit E61, Tab 18):

Mr. Ahmad was successful in a selection process one year ago. When he was placed in the position, his pre-existing condition was aggravated due to the duties of the AU-01 position. He requested a transfer back to his substantive position in Revenue Collections. However, since then management has decided that they would like to give him another opportunity to work in Audit, if he is fit to do so.

[34] Ms. Palermo concluded by asking Dr. Chernin if the grievor “. . . is currently fit to perform the full range of duties of an AU-01, Field Auditor? If so, are there any special accommodations we need to consider?”; see Exhibit E61, Tab 18.

[35] On November 3, Dr. Chernin wrote to Ms. Palermo. He noted that he was having difficulty getting information from the grievor’s treating clinician, and if that information was not forthcoming, he would arrange for an independent assessment; see Exhibit E61, Tab 19.

[36] On November 5 Dr. Tator signed a note addressed “To whom it may concern” to confirm that the grievor was “. . . capable of returning to work”; see Exhibit E61, Tab 20.

[37] On December 15, 2004, Dr. Chernin wrote to Ms. Palermo. He noted that he had contacted Dr. Tator. Based on the information he had obtained from Ms. Palermo and Dr. Tator, he stated that he could make the following “comments and recommendation” (Exhibit E61, Tab 21):

Mr. Ahmad should be considered fit to return to the duties of his substantive position. In his return he should return half time for the first four weeks, after which he should be able to return to full time hours. His limitations recommended would be for him to avoid heavy lifting and avoidance of repetitive neck motion. He should try to work with his neck in a neutral position. Limitations on heavy lifting would be that he should not lift objects more than 20 kilograms [i.e. 44 lbs.] and not repetitive. Should he be required to transport objects, he should use a wheeled carry-all.

[38] In his testimony, the grievor questioned Dr. Chernin’s opinion that he could lift up to 20 kilograms, despite that it might have been based on discussions with Dr. Tator. He complained that Dr. Tator was a neurosurgeon, not a physiotherapist, and accordingly, he “. . . doesn’t know what my body can do.”

[39] On December 21, Ms. Palermo sought clarification from Dr. Chernin with respect to his letter of December 15. She asked, taking his recommendations into account, whether he thought that the grievor was “. . . capable of carrying out the AU-01 duties if he avoids the activities you outlined in the letter”; see Exhibit E61, Tab 22. Dr. Chernin called her on the same day to advise that he would review the file and get back to her in a few days; see Exhibit E61, Tab 22.

[40] On December 24, Dr. Chernin wrote to Ms. Palermo. He advised her that the grievor should be able to carry out “most” of the duties of the AU-01 audit position if he followed the recommendations set out in the December 15 letter. However, he noted the following (Exhibit E61, Tab 23):

...

The one concern that we do have would be off site audits which we recommend that he avoid for the first three months and, only then, commence on a limited basis, for the next two months. At the end of two months, in which he carries out off site audits, on a limited basis, I would recommend that he be referred back to my office for reassessment.

When he does off site audits, he should be provided with a wheeled carry all, so that he could avoid heavy lifting and repetitive motions, that would allow him to transport files and a computer. Please note my letter of December 15, 2004 in which I stated limitations on heavy lifting in which he should not lift objects of more than 20 kg and not repetitively.

[41] The grievor had returned to work full-time in collections in mid-November 2004 but had not yet started in audit. Because of that fact, Ms. Palermo was somewhat uncertain about what Dr. Chernin was recommending. On January 11, 2005, she wrote to him to ask the following about the three-month period he had referred to (Exhibit E61, Tab 24):

... [whether it] included the period in which he should avoid offsite audits. In other words, would the three months of no offsite audits begin effective October 18, 2004 [when he returned to work on a graduated basis] and therefore end on January 18, 2005? Or, would it be effective the day the employee begins work in Audit as a Field Auditor, an effective date which has yet to be determined at this time?

[42] On January 19, Dr. Chernin answered Ms. Palermo’s query by recommending that the three-month period in which the grievor should avoid off-site audits should commence “from the day in [sic] which he commenced full-time return to work with Revenue Canada”; see Exhibit E61, Tab 26.

[43] In the meantime, the employer had concluded that the grievor’s “does not meet” performance evaluation of December 2003 should be changed to “unable to assess”; see Exhibit E61, Tab 9. It had also decided on the basis of its information that the

grievor was fit to do limited offsite audits effective February 18, 2005. It decided to propose starting him in the AU-01 position effective February 21 for six months. His performance would determine whether the assignment were extended, whether he were offered a permanent appointment or whether he were returned to his former position in collections. His workstation in the audit department was also to be configured as per the ergonomic assessment that had been conducted with respect to his collections workstation; see Exhibit E61, Tab 25.

[44] On February 23, the grievor was advised that his acting appointment to the position of an AU-01 Field Auditor had been approved. His appointment was effective April 1 and would run through September 30, 2005; see Exhibit E61, Tab 27. His new workstation was to be ergonomically arranged, and he was to be provided with a headset; see Exhibit E61, Tab 28.

[45] As it turned out, the grievor was not able to start on April 1. On April 7, the employer advised him that it was revising the dates in its letter of February 23 so that his acting appointment would run from September 6, 2005 to March 3, 2006; see Exhibit E61, Tab 29.

[46] The grievor started his acting position as an AU-01 field auditor on September 6. On September 8, he requested a meeting with his team leader, Ms. Baldassini, to discuss “. . . a few issues that he wanted to clear up before he started auditing”; see Exhibit E61, Tab 30. As she recorded in her notes to file, he stated the following (Exhibit E61, Tab 30):

. . . his doctor advised him that he is unable to lift certain weight and that this could affect his neck, back and shoulder. In addition, he requested an occupational assessment to be done to determine how much he can lift.

[47] The grievor then forwarded his concerns to Ms. Baldassini in an email. He advised her as follows:

. . . [I] would like an occupational therapist assessment on how much weight I can carry. My doctor advised me suggested to do an occupational assessment in terms of maximum weight I can carry. The current weight of audit bag is 11 lbs and weight of laptop is 6 lbs = 17 lbs. If the weight of other papers/documents for file is added probably it can go to anywhere between 20-25 lbs. On top of this if I have to carry a 20-25 lb bag on subway stairs (if the stairs

have no current) then it may effect my physical condition. Currently, I do not feel very much comfortable in carrying a 20-25 lb bag. Though I have my surgery in C5-C6 the doctor has advised me of gradual degeneration in T1-T3 area which is not serious now but I think it may become serious depending on how much weight I am carrying. In addition, I have to do freehand exercises every hour for five-ten minutes to have circulation in my shoulder and neck (muscles around neck and shoulder get stiff if I continuously sit and type). In addition, the doctor has also advised me not to bend my neck to a certain degree as it hurts.

[Sic throughout]

[48] The grievor went on as follows (Exhibit E61, Tabs 30 and 31):

Previously I requested through collections (verbally) to do a complete occupational therapist assessment and though an ergonomics assessment was done occupational assessment was not done as my previous job description did not entail carrying weights or field work. I am interested in the current position and I need some accommodation to alleviate my present health condition.

[49] At the hearing, the grievor explained why he had written the email at that time. He said that he was “scared about my future health if I carried weight . . . I didn’t know how much I could carry . . . I was waiting for things to happen, for an assessment, before I went on a field audit.” He went on to explain that he was worried because sometimes the electricity would go out in a building, or an escalator on the subway (which he travelled on to visit taxpayers’ offices) or an elevator in a taxpayer’s building might be out of service. He thought that, if that happened, he would have to carry the audit bag and laptop up a flight of stairs, and he was worried that, because he did not know how much he could carry, he might not be able to do it. He also suggested that the employer ought to be able to determine whether a taxpayer’s building has an elevator by calling the client. As he said, “The team leader could check to see if the client had an office in a building with an elevator, or she could check with other auditors who had done audits there before.” Without such a check by the employer, the grievor was concerned that he might arrive at a site to find that it lacked a working elevator, in which case he might not be able to get to the taxpayer’s office.

[50] On September 9, Ms. Baldassini and Charles Thompson, Acting Section Manager, Verification and Enforcement Division, met with the grievor to discuss his concerns. The grievor said that he wanted an occupational assessment done to determine how

much weight he could carry. Mr. Thompson responded by suggesting that he had understood that the grievor was fit to do the duties of a field auditor without accommodation. He suggested that the grievor ought to have resolved his health issues before taking the acting position. He said that he would consult with the Agency's Human Resources branch to determine what steps should be taken; see Exhibit E61, Tab 30.

[51] Not surprisingly, given Mr. Thompson's negative comments, the grievor decided to meet with Ms. Baldassini later that same day. He told her that he thought that the employer ought to be able to accommodate him and that he had the names of two laptops that were lighter than the regulation one. Ms. Baldassini, who had already initiated her own investigation to find lighter laptops, said that she would look into it. The grievor also told her that he could not use the lower cabinet drawer at his workstation because bending down to put his briefcase in it caused him back spasms. She told him to stop using that drawer; see Exhibit E61, Tab 30.

[52] A few days later, on September 12, Ms. Baldassini found that the grievor was still using the lower drawer. When asked about it, he said that, since he was being provided with a lighter laptop, he would continue to use the drawer, despite his earlier concerns; see Exhibit E62, page 2.

[53] Ms. Baldassini met with Mr. Thompson and Ms. Barwick on September 14. They reviewed the Health Canada assessments (of Dr. Chernin) and concluded that the grievor "was ready to audit"; see Exhibit E61, Tab 32. They decided that, among other things, the grievor would be told that he would not receive an occupational assessment, that he would be expected to perform offsite audits with a light-security approved audit bag and laptop, and that, if he had to carry large files back to the office, he could make arrangements with his team leader to take a taxi, although he should make every effort to review documents at taxpayers' offices. He would also be allowed an extra 75 hours of training; see Exhibit E61, Tab 32.

[54] On September 16, Ms. Baldassini picked up a new, secure audit bag for the grievor. It was wheeled. She arranged for the grievor to receive it; see Exhibit E61, Tab 30.

[55] On September 19, Ms. Baldassini met with the grievor. As she recorded in her notes of the meeting, she told him that an occupational assessment would not be

performed. She told him that he would be allowed an additional 75 hours of training. He was told to set up an initial taxpayer meeting for October 3. At that time, the grievor advised her that he had gone to a doctor the previous week, and she noted that “they want to test his heart—he may now have problems with his heart.” He told her that he would be wearing a heart monitor for the next few weeks and, in addition, she noted “that he is having problems with his right knee and thigh—he will be going for testing for this”; see Exhibit E61, Tab 30.

[56] On September 20, Ms. Baldassini met with the grievor again. She told him that the desk in front of her was ergonomically fit and that he should use it and the ergonomic chair associated with it. The grievor did not want to. Instead, he wanted to sit at a smaller, non-ergonomic desk because he wanted to get used to what he might experience in the field. She (and later Mr. Thompson) told him that, given his health concerns and condition, he had to use the desk, which he finally agreed to; see Exhibit E61, Tab 30. Ms. Baldassini also told him that he should use the headset that had been provided to him, again for the same reason. In cross-examination the grievor admitted that he had been given a headset but stated that he did not have to use it because he received few calls at the office.

[57] On Wednesday, September 21, Ms. Baldassini made arrangements for the grievor to have a “buddy” for two days in October to assist him with his field audits that were scheduled to start the week of Monday, October 3; see Exhibit E61, Tab 30. The buddy was to act as a technical advisor. He was not to assist the grievor in the actual audit or to carry anything for him. The grievor was advised that he would have this technical assistance for his first field visit that week; see Exhibit E61, Tab 30.

[58] In direct examination, the grievor testified that, at that time, he knew that there was an elevator in the building of the taxpayer he was going to audit the next week. So, he conducted an experiment. He took home the new laptop and bag he had been provided with on Thursday, September 23, and took the next day off as a vacation day. He wanted to see, in his words, “if I could carry it home and back to the office without any adverse effect to my health.” He testified that he took the bus and subway home. He later explained that the subway station escalator was not working so he had to take the stairs. By the time he got home, he stated that he was “almost exhausted, and had real pain in my shoulder.” He asked his son to weigh the bag in the basement. His son

reported to him that it weighed 15 pounds, although the grievor thought that it was closer to 20 pounds; see Exhibit E61, Tab 33.

[59] On Monday, September 26, Ms. Baldassini emailed the grievor with the identity of the technical advisor who would be assisting him in the field on Monday, October 3. On the same day, the grievor called in sick. He called in sick again the next day.

[60] On Wednesday, September 28, the grievor came in to the office and met with Ms. Baldassini. She recorded in her notes that he told her that he had had a difficult and painful two days. He explained his experiment to her and that he had had the bag weighed by a friend. When she asked him if his friend had used a scale, he told her “No,” but that his friend was a weight lifter and so ought to know how much 15 pounds weighed. The grievor went on to say that he did not feel comfortable with the idea of starting the field audit the next week because of this development. Ms. Baldassini thought that he could still do light work in the field, but the grievor told her that he did not want to and that he would cancel the appointment; see Exhibit E61, Tab 30.

[61] The grievor put all that information in an email that he sent to Ms. Baldassini on September 28, after the meeting. He explained that the office he was to visit for the audit had no elevator and that he did not know, in his words, “. . . how I will carry the audit bag up 3 flights of stairs given the recent painful experience.” He asked for her advice “. . . as to how [he] can be accommodated.” He added that he had already applied for a position in SRED (research and development) starting in October. He stated that the other alternative position “. . . I was thinking is to try for an acting position in [taxpayer] appeals or any other section where I can use my skills without field work [*sic*]”; see Exhibit E61, Tab 33.

[62] In cross-examination, the grievor denied that he had cancelled the field audit he was to perform. He explained that he had spoken to another auditor who had told him that there was no elevator in the building, only stairs. Because of that, he did his trial run when he took the bag home for the weekend. I interpreted that evidence to mean that the grievor preferred to try to do the work not by actually doing it but by coming up with an experiment to mimic what he thought he might experience, despite that he had no way of knowing whether the experiment accurately mirrored what he would actually have found, had he gone on a field audit.

[63] Mr. Thompson received a copy of the grievor's email. He was clearly not happy with it. He told Ms. Baldassini and Ms. Barwick that, in his opinion, the grievor had "... no intention of carrying out the duties of an AU-01 auditor," that it had been made clear to the grievor that he had to do field work [*sic*], but that the grievor did not want to do it, and that, if he continued to refuse to do field work [*sic*], he "... has in fact broken the agreement to work as an AU-01 and should be sent back to Collections"; see Exhibit E61, Tab 33.

[64] At the hearing, Ms. Baldassini was asked about Mr. Thompson's opinion and what impact, if any, it had on her. She testified in cross-examination that, while she had no particular training in the employer's accommodation policies, she understood that there was a duty to accommodate. As far as Mr. Thompson's involvement was concerned, she acknowledged that he was the ultimate decision maker but that she, as acting team leader, was driving the process and that her goal was always to enable employees to succeed.

[65] Ms. Baldassini prepared detailed minutes for Ms. Barwick of a management meeting that had been held to discuss the grievor's email of September 28, 2005 on the same day; see Exhibit E62. The gist of the response was as follows:

- a. that the position of AU-01 Field Auditor required carrying an audit bag and laptop;
- b. that management had accommodated the grievor by providing him with a lighter audit bag and a lighter laptop, as well as with an ergonomic workstation and chair, providing him with a headset that he did not use, and approving the use of a taxi to ferry taxpayer documents, if necessary; and
- c. that the grievor was not qualified by training or experience for the other positions he had expressed an interest in being accommodated into; see Exhibit E6.

[66] She noted as follows in her minutes by way of conclusion:

... [the grievor] has stated that he does not want fieldwork due to his health issues and has expressed concerns about going out in the field, as he is unable to lift the audit bag. In this regard and based upon the above analysis, he is unable to perform the duties required of an AU-01 tax auditor.

[67] On Thursday, September 29, the grievor advised Ms. Baldassini that he had gone to his doctor the previous night and that he had a note specifying that he had neck strain, needed physiotherapy and should be given light work for two weeks. She told him that the note was not particularly helpful since it did not tell her what he could or could not lift or do by way of light duties, but she said that she would look into the situation for him; see Exhibit E61, Tab 30.

[68] Later that day, the grievor met with Ms. Baldassini and Mr. Thompson. The discussion centred on the grievor's email of September 28. The grievor said that he wanted to do the job but that he could not do the fieldwork given what had happened the previous weekend. He did want to go back to his former position in collections, and he asked Mr. Thompson whether he could make a recommendation for him with respect to the SRED because it would involve no fieldwork. Mr. Thompson refused because he had nothing to base an assessment on and suggested that the grievor seek the recommendation from collections; see Exhibit E61, Tab 30.

[69] The next day, Friday, September 30, Ms. Baldassini met with the grievor and another field auditor. The plan was to have the grievor pair up with the field auditor the following Monday to watch how the work was performed in the field. The same day Ms. Baldassini met with Ms. Barwick and Mr. Thompson to discuss the grievor's situation. The upshot was a decision that a second Health Canada assessment be requested "as he [the grievor] is bringing up all these health issues again:" Exhibit E60, Tab 30.

[70] The grievor and Ms. Baldassini met towards the end of the day on Friday, September 30. They discussed whether he should go out on the following Monday with the field auditor, as had been discussed, because of the grievor's medical note stating that he should perform only light work. That issue was left unresolved, although the grievor indicated that his preference was to go out. He also said that he no longer wanted to use the lighter roller audit bag that had been provided to him. He said that pulling it or lifting it hurt his shoulder. Instead, he wanted a lighter bag that would carry only the laptop; see Exhibit E61, Tab 30.

[71] The events of the next week are a little unclear. Ms. Baldassini testified that, to the best of her recollection, the grievor did not go out with the field auditor that Monday, October 3, but she could not remember for sure. To her recollection, he spent that week working in the office on some files that the employer found that could be

worked on. She also spent some time that week organizing the request for an assessment. At the end of that week, Friday, October 7, she prepared a recommendation for Ms. Barwick that the grievor be sent to Health Canada for an FTWE; see Exhibit E61, Tab 34.

[72] Monday, October 10 was a holiday. The grievor came into work the next day. Ms. Baldassini saw him and asked him how his weekend had been. He replied, "Not good," and explained to her that he was cutting his grass at home and that he hurt his neck. He added that he now had problems moving his back. He told her that he would send her an email, and several minutes later, he did; see Exhibit E61, Tab 30. In it, he stated that, "[a]fter due consideration to my physical stress/health condition in this position I decided to leave this position as of today's date effective October 11, 2005. I apologize for any inconvenience I may have caused you as a result of this decision"; see Exhibit E61, Tab 35.

[73] The grievor then met with Ms. Baldassini. He told her that, after the weekend incident of mowing the lawn, he had concluded that he could no longer do the job. She recorded that she told him that she was still prepared to work with him to find work in the office that required minimal fieldwork. But, according to her, he longer wanted the job and asked to be sent back to his substantive position in collections; see Exhibit E61, Tab 30.

[74] A number of meetings were held in the days that followed. I am satisfied that, based on the evidence of the grievor and Ms. Baldassini, as well as the exhibits, the upshot of the meetings was the following:

- a. the grievor refused to carry an audit bag and laptop for fear that he might hurt himself;
- b. the grievor wanted an occupational assessment done to test how much he could lift or carry;
- c. there were no other AU-01 positions that did not involve some fieldwork at some point; and
- d. the grievor did not have the qualifications for the other positions into which he wanted to be placed instead of the field audit position; see Exhibit E61, Tabs 34, 37 and 38.

[75] Insofar as trying to perform an actual field audit (which the grievor had yet to do in 2005), the grievor's position, as set out in an email dated October 12, was the following (Exhibit E61, Tab 37):

... [i]t is of no use of experimenting with different bags which is a waste of time in that it lacked direction. From day 1 this was my position and unfortunate as it may seem management refused to agree on this issue. Health Canada assessment was based on my 2004 assessment which was a general assessment. Since then I had been getting other physical suffering which was after my neck surgery. The only way to accurately measure these stresses was to have an occupational assessment which was not done.

[76] The grievor filed this grievance on October 31, 2005. The first-level reply, dated December 23, 2005, was prepared by Mr. McNamara, who was the manager of the audit division. He had been brought in because he was an excluded manager; that is, he was not a member of a union. Mr. Thompson, on the other hand, was, and because of the grievance, he could no longer be involved in dealing with the grievor.

[77] Mr. McNamara denied the grievance because on the information available to him, which was that the audit bag weighed 6.5 pounds and the laptop 10 pounds, which was well within what he understood to be the grievor's limitations of 20 kilograms. The grievor's suggestion that he not take a laptop, that he make all his notes at the taxpayer's office by hand and that he then type those notes into the office computer system back at his workstation did not make operational sense to Mr. McNamara. By that time, everything was being done on computers.

[78] At the hearing, Mr. McNamara testified that the grievance was heard at the second level by the director, Bruce Allen. At that level, it was decided that, by way of corrective action, the grievor should be sent for a "Functional Capacity Evaluation" (FCE), which was what the grievor had been requesting. Accordingly, on March 6, 2006, the employer wrote to Total Rehabilitation Management Inc. ("Total Rehab") to request an FCE of the grievor. It set out the expectations of the position of a field auditor and included the position description.

[79] On March 28, 2006, Susan Scott and James MacDonald, occupational therapists with Total Rehab, reported on the results of the FCE that had been conducted on the grievor; see Exhibit E61, Tab 41. Relevant to the issues in this matter are the following observations (Exhibit E61, Tab 41, pages 3 to 5):

- a. the grievor was able to descend a flight of 9 stairs while carrying a wheeled bag and contents weighing a total of 15.5 lbs.
- b. He was able to descend and ascend 2 flights of 9 stairs while carrying a leather bag loaded in the same fashion, with a total weight of 12 lbs.
- c. He demonstrated “variable effort” during the evaluation, so much so that the authors concluded that “[t]he data and clinical observations made during static strength testing are representative of a self-limited or varied effort level.”
- d. He demonstrated “. . . the ability to pull and lift a secured wheeled briefcase containing 8 lbs of cargo (total weight 15 lbs), as well as to carry the case down stairs.”
- e. He was able “. . . to lift and carry a shoulder bag (total weight of bag plus computer, 12 lbs) for all the required work simulations.”

[80] The authors noted that a rolling briefcase “. . . is typically used as a much easier method of transporting a laptop computer, files, and needed work materials. However, Mr. Ahmad voices a strong preference for an over-the-shoulder bag, due to the decreased weight of such a bag”; see Exhibit E61, Tab 41, page 7.

[81] The authors of the report concluded as follows (Exhibit E61, Tab 41, page 5):

Mr. Ahmad demonstrated abilities in the Sedentary to Light work categories. He was successful in simulating work tasks with an over-the-shoulder bag; however, he declined to climb up stairs while carrying a wheeled bag (a situation that may occur while taking the subway or in buildings without operational elevators).

Data and clinical observations indicate that a varied effort level was put forth. Thus, it is possible that pain, or anticipated pain, prevented the client from putting forth a maximal effort, and his true abilities may be greater than those demonstrated today.

Based on the results of the FCE Mr. Ahmad has the functional abilities needed to complete the job of a Tax Auditor, implementing the modifications outlined above.
[Emphasis in the original]

[82] By “modifications,” the authors meant that the grievor “. . . could conduct audits in the field if he is provided with a means of transporting his equipment that may be slightly lighter than the typical wheeled case”; see Exhibit E61, Tab 41, page 5.

[83] The other *caveat* expressed by the authors stemmed from the concerns expressed by the grievor after lifting and carrying very light loads. He said that he experienced pain after such lifts and that he felt out of breath after climbing a flight of stairs. In view of those subjective complaints, the authors suggested that it would be prudent to receive medical clearances from an orthopaedic surgeon or a neurosurgeon, as well as an “. . . appropriate medical professional with access to the client’s medical records . . . to ensure there are no cardiovascular restrictions related to the rare stair-climbing requirement”; see Exhibit E61, Tab 41, page 7.

[84] A copy of the FCE report was provided to the grievor. On June 2, 2006, Mr. McNamara emailed the grievor to arrange a meeting to discuss the report “. . . and purchase the required items bags locks and arrange a lap top [sic] and any training that will assist [him] in performing the duties of a field auditor at the AU 1 level”; see Exhibit E61, Tab 42.

[85] The grievor advised Mr. McNamara that he was ready to meet on June 8: Exhibit E61, Tab 43. At the meeting, Mr. McNamara discussed his view of the report, which indicated to him that the grievor could perform the functions of an AU-01 field auditor with the suggested modifications. He testified that his one *caveat* or concern was the reference to possible cardiovascular restrictions on stair climbing. His recollection was that the meeting was very amicable and that everyone present, including the grievor and his union representative, thought that it was a good idea to wait for the additional medical assessments that the grievor advised he had scheduled.

[86] On July 13, 2006, the grievor advised Ms. Barwick that he had appointments set up with several doctors with respect to his neck, hip and cardiovascular condition. The last such appointment was set for October 2. He added as follows: “There may be more than one appointments [sic] for hip, neck bone or chest depending upon initial assessment. I will let you know about the developments”; see Exhibit E61, Tab 44.

[87] The employer awaited the outcome of the appointments the grievor had set up. Nothing arrived. On February 14, 2007, Mr. McNamara wrote to the grievor, noting that management had not received anything from his doctors “. . . indicating that [the

grievor was] medically cleared to pursue the acting AU-01 assignment in Audit.” He added that he was providing the grievor “. . . with one final opportunity for [him] to demonstrate [his] medical fitness to perform the acting AU-01 assignment in Audit.” He went on to advise that, if he did not receive anything from the grievor’s doctors, “. . . [he] will conclude that [the grievor is] no longer interested and/or medically able to take on the acting AU-01 acting assignment and will consider this matter closed as of March 30, 2007”; see Exhibit E61, Tab 45.

[88] Mr. McNamara testified that no response came from the grievor. Accordingly, he closed his file.

[89] At the hearing, the parties agreed that the additional medical assessments were eventually provided to the employer on June 28, 2010. Those documents were entered collectively as Exhibit U27. The exhibit contained the following:

- a. A report dated July 26, 2006 from Dr. Tator to Dr. Chacko, advising that the grievor had told him that his recent workplace assessment had indicated that he could not lift more “than about 12 pounds” and advising that, on neurological examination, Dr. Tator “found no definite deficits in strength.”
- b. An orthopaedic report from a Dr. Syed dated September 11, 2007 noting a good range of motion in the grievor’s right hip with some tenderness over the great trochanter (part of hip bone) and some IT band tightness on the right side, for which he recommended physiotherapy.
- c. An unexceptional report dated February 6, 2007 from Dr. Janmohamed, a cardiologist, which did not suggest that the grievor would have any issues with climbing stairs.
- d. An X-ray report dated April 10, 2007 noting some degenerative spurring in the grievor’s lumbar spine and no disc narrowing but “otherwise normal examination.”
- e. A note dated November 1, 2007 from a Dr. Albert stating that the grievor “. . . should avoid sitting for prolonged periods because of some problems with his back. He should get up and move around/stretch/exercise for 5 minutes every hour at the computer.”

III. Summary of the submissions

A. For the grievor

[90] The grievor's representative commenced his submissions with the observation that cases involving the duty to accommodate were always fact specific. The first question to be addressed was whether the grievor had a disability. The answer to that question was, he said, "Yes." The grievor had sustained an injury to his neck, which meant that he could not lift more than 15 pounds at best. The employer never disputed that his disability existed. In fact, the employer had agreed that the grievor's condition was such that he could not perform the duties of a field auditor. The employer's representative pointed to the minutes prepared by Ms. Baldassini and entered as Exhibit 62 as conclusive on that point.

[91] The grievor's representative submitted that there was no evidence that it was or would have been impossible for the employer to accommodate the grievor's disability. He submitted that the real problem was that the employer did not know how to deal with the situation. It had nothing in place in 2003 to address its duty to accommodate, so when the same thing happened in 2005, it simply tried to do what it had done before.

[92] The grievor's representative submitted that the employer had a formal accommodation policy in place since 2004. Yet, Ms. Baldassini had no training in it. In any event, even if management was aware of the policy, it failed to follow it. It failed to communicate to the grievor the accommodation that it contemplated. For example, the suggestion that he might take a taxi rather than public transit was never communicated to him. Since the evidence was clear that management had recognized that the duty to accommodate had been engaged, "they had a duty to do it right."

[93] When questioned about the exact nature of the grievor's disability, his representative submitted that there was "plenty of evidence" that the grievor had a disability regardless of the fact that it might not "have a name." The grievor clearly had "health issues" that constituted a "physical disability" within the meaning of article 43 of the collective agreement. He submitted that back pain can be a disability. The grievor could not perform the functions of his job, and the employer knew and recognized that accommodation was necessary.

[94] The grievor's representative submitted that the grievor could not be faulted for returning to his old position when he did. The representative acknowledged that the employer had made some steps towards accommodation, but from the grievor's perspective, the duty to accommodate was not unfolding as it should have. He had received a bad performance appraisal from Mr. McKinley in 2003. In 2005, the grievor sought to be accommodated before starting as a field auditor precisely because of what had happened in 2003 but to no avail.

[95] The grievor's representative submitted that the grievor's request for an FCE was not frivolous. It would have answered the question of what he could and could not do.

[96] The grievor's representative acknowledged that, with the exception (according to him) of Mr. Thompson, no one in management acted in bad faith. Everyone attempted to comply with the duty to accommodate. The representative stated that the problem was that they "just didn't know what to do." Nor was it the grievor's obligation to know what to do - it was management's duty. It was not his duty to determine what he could and could not do.

[97] Turning to the second issue, which is whether the accommodation was suitable, the grievor's representative submitted that, in the grievor's view, management's efforts were not adequate. It did not involve the grievor in their discussions about what to do or how to accommodate his disability. The process was not transparent. Moreover, whatever efforts the employer made to accommodate the grievor were "far less than perfect." Hence, the employer's failure to accommodate was discrimination under both the collective agreement and the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

[98] The grievor's representative submitted that there was no evidence that the grievor had failed to cooperate with management in coming up with a suitable accommodation for his disability. Moreover, the grievor had a reasonable fear of reinjuring himself or of exacerbating his injury. He was also ignorant of the fact that the employer was considering a health assessment, despite that it had refused his request for an FCE. Had he known of that in late September 2005, he might have remained in his acting position. But, he did not know of it. In the grievor's view, there was very little happening. So, he went back to his former position. The irony was that, when the assessment was performed in 2006, "his concerns were in fact borne out."

[99] The grievor's representative submitted that the FCE of March 2006 was "a pretty clear statement" that confirmed the grievor's disability and consequent limitations. Once the report was delivered, the employer knew not only what the grievor's restrictions were but also how they could be addressed. The fact that the FCE recommended a cardio assessment did not mean that the employer had to wait. The employer could have proceeded to develop and implement a suitable *interim* accommodation while awaiting the results of further testing. The other point was that the grievor was then in a kind of "Catch-22"; he could not obtain a medical clearance without knowing what exactly he would do on the job, which in turn required a knowledge of what the accommodations would be and what impact they would have on his ability to perform the duties of his position.

[100] The grievor's representative submitted that Mr. McNamara was the wrong person to review and consider the FCE report. He was in a conflict of interest. Since he had already issued a first-level denial of the grievance, he ought not to have been expected to review the FCE report with an objective eye. To expect Mr. McNamara to be able to review the report objectively was unrealistic on the employer's part and represented a lack of due diligence. It was reasonable conduct on the employer's part to have someone review the FCE report who was involved in the grievance process and who had already expressed an adverse view of the grievor's position.

[101] With respect to an employee's obligation to cooperate in any accommodation, the grievor's representative submitted that the grievor had been cooperative. Indeed, he had alerted the employer to the possibility that he would need accommodation even before he started his new position. The grievor was involved in the process, but owing to his limited knowledge or understanding of the process (due to the employer's failure to keep him fully advised of its steps), he became frustrated and lost confidence when the employer initially refused his request for an FCE.

[102] Turning to the FCE, the grievor's representative observed that it was prepared six months after the grievor had asked for it and five months after he returned to his former position. And yet, the result was a recommendation for more testing. It was no wonder that he was frustrated with the process.

[103] The grievor's representative submitted that, in both 2003 and 2005, the employer's process had shown an absence of transparency. The grievor was not copied on reports. Nor was he kept fully apprised of the employer's thoughts with respect to

accommodation. Instead, the employer appeared to approach the matter as if the grievor were asking for a favour and as if he should have been grateful that the employer was doing anything.

[104] The grievor's representative submitted that the issue was not a lack of information necessary to enable the employer to formulate an accommodation for the grievor. Instead, the issue was why the FCE was not sufficient to enable the employer to at least consider a temporary, *interim* accommodation pending the final report on the grievor's cardiac condition. The employer could have implemented the physical accommodations outlined in the FCE report while it awaited the cardiac assessment. Moreover, the FCE report provided clearance to the grievor for carrying out other tasks. He could have worked at an AU1 level in some capacity other than doing outside audits. He could have done transitional work or worked at light duties, all of which were alternatives to shutting down the process of accommodation by instead asking for more information. Nor was any analysis made of the essential duties of his position to determine whether he could perform them while awaiting the final report on his cardiac condition. In short, the employer made no effort to revise his job description, to accommodate his condition. The employer, contrary to the mandate in its accommodation policy, did not institute an "Individual Accommodation Plan."

[105] By way of remedy, the grievor's representative sought an order specifying as follows:

- a. that the grievor receive damages in the amount of 64 weeks' pay at the AU-01 pay scale (minus what he earned during that period);
- b. that he receive general damages; and
- c. that he be permitted to write the test or assessment again for AU-01 position.

B. For the employer

[106] The employer's representative commenced her submissions by observing that the employer had made efforts to respond to the grievor's requests for accommodation in both 2003 and 2005. However, on both occasions, the grievor, on his own volition, had returned to his old position within weeks. On neither occasion did he give the employer time or a chance to understand his condition and to

determine whether accommodation was necessary and, if so, to come up with a suitable accommodation.

[107] The employer's representative submitted that the first question to be addressed was whether a disability existed and, if so, its nature. There was no medical information from either before or during the time the grievor was in the AU-01 position concerning the existence of any disability that would have limited his ability to perform his duties.

[108] Despite the absence of such independent medical information, the employer exhibited its good faith by taking the grievor at his word and by making efforts to accommodate him. For example, in 2003, when the grievor said that he could not carry an audit bag, he was told not to go into the field. On the same day, his team leader, Mr. McKinley, asked for a Health Canada assessment and, during the *interim*, had the grievor work in the office on fairness files. Yet, before any assessment could be carried out, the grievor chose to return to his old position.

[109] With respect to the 2003 performance appraisal, the grievor could have grieved the "does not meet" assessment, but he did not. Nevertheless, management wanted to give him a fresh start, and it gave him a new team leader and a second chance at the position. Yet, he left that time as well. Moreover, in October 2003, the employer requested an assessment in response to the grievor's concerns, but the assessment was rendered pointless when, on his own, the grievor decided to return to his position in collections.

[110] The assessment that the grievor could lift up to 20 kilograms (roughly 44 pounds) came from Dr. Tator, who had reviewed the grievor's job description. That being the case, it was reasonable for the employer to conclude that the grievor was ready to start fieldwork in September 2005.

[111] When the grievor started in September 2005, he did so under a team leader (Ms. Baldassini) whose philosophy was "to set the employee up for success." She provided accommodation in response to the grievor's concerns by obtaining a lighter laptop and a lighter case for him. Insofar as the shoulder bag is concerned, the grievor had never raised the issue with her. The first time it came up was in the FCE report.

[112] With respect to Mr. Thompson's negative comments about the grievor's case in the fall of 2005, any such comments were irrelevant. They had no impact on what management actually did. Ms. Baldassini was driving the response to the grievor's concerns. Her efforts to find an accommodation were not countermanded by Mr. Thompson in any way, and there is no evidence that she altered her efforts to respond to the grievor's requests for accommodation in any way as a result of Mr. Thompson's views.

[113] Whether the employer kept the grievor fully apprised of what it was considering with respect to accommodation was also irrelevant. An employer considering whether an accommodation is necessary and, if so, to what degree, has to be permitted some time to gather and consider relevant information. The grievor in effect denied the employer that opportunity by failing to employ the accommodations that were offered and by then abandoning the field audit position so quickly.

[114] The employer's representative conceded that the grievor had a limitation, but the question always was how much of a limitation it was. The medical evidence the employer obtained from both Dr. Chernin and Dr. Tator was that the grievor could lift up to 20 kilograms. Nothing suggested that he could not lift, carry or pull lighter bags and laptops.

[115] The employer's representative cited a large number of cases and authorities. She submitted that they showed that accommodation is a responsibility shared among an employee, the employer and the employee's union. The first step of the process, in which the employee must cooperate, is gathering all relevant information. Moreover, the efforts of an employer to accommodate an employee must be judged on the basis of the information available to the employer at that time. In this case, the employer had responded to the grievor's concerns and had come up with accommodations based on the information it had, but the grievor had walked away.

[116] With respect to remedy, the employer's representative submitted that damages were not appropriate inasmuch as the employer had never denied its duty to accommodate and had made efforts to accommodate the grievor. Accordingly, she submitted that the grievance be dismissed.

C. Reply of the grievor

[117] The grievor's representative repeated the basic points of his initial submissions. He went through the authorities cited by the employer's representative. He submitted that the employer had never analyzed the essential components of the job of a field auditor and had never made an effort to assess what the grievor could or could not lift and carry. It was no wonder then that the grievor grew frustrated and that he returned to his position in Collections.

IV. Analysis and decision

[118] In my opinion, this case is simple in law but somewhat complex on the facts. Accordingly, I do not consider it necessary to repeat the case law and authorities presented to me by the representatives of the parties.

[119] To establish a failure to accommodate on the part of the employer (and leaving to one side the issue of undue hardship), the grievor had to establish the following:

- a. that he had a disability that prevented him from performing one or more of the essential duties of his occupation;
- b. that he made the employer aware of the disability; and
- c. that the employer failed to implement the necessary accommodation.

[120] It is also clear that an employee who seeks accommodation for a disability is obligated to cooperate with the employer in the search for a suitable accommodation.

[121] Those three points are intertwined in this case and will be dealt with together.

A. Disability and its impact on the grievor's ability to perform the essential tasks of a field auditor

[122] The grievor's first step was establishing that he had a disability. I accept on the evidence that he had pain on occasion. I also accept that, at times, certain physical activities - depending on their vigour and number - might cause him pain or an increase in pain.

[123] But that simple fact is not enough, in itself, to establish the existence of a disability. A disability arises only when a particular physical or mental condition

prevents an employee from performing an important part of his or her job. So, for example, the loss of a little finger constitutes a disability for a harpist but not for a labourer.

[124] The fact that someone suffers pain on certain occasions is not enough to establish a disability. The experience of pain is subjective and variable. Pain is, to some extent, a factor in the lives of many people without necessarily amounting to a disability. It is often said that we live in a vale of tears. Television is replete with ads for different types of pain relievers. Every local pharmacy has rows of pills designed to alleviate different types of pain brought on by different activities. That is all testament to the truism that suffering from pain in and of itself does not establish that one is disabled. The existence of pain is a first step, so to speak, in establishing the existence of a disability but it is not conclusive. The person claiming to be disabled because of pain must also establish on a balance of probabilities that the pain is severe enough that it would be unreasonable to expect that person to perform the tasks that bring it on.

[125] In such an exercise, the credibility of the employee - at least with respect to the nature and extent of the pain and what brings it on - necessarily becomes an issue. Pain is subjective. There are no truly objective tests external to an employee to evaluate his or her experience of pain. Objective observations made of the employee while performing tasks may provide some evidence, but even those depend, for the most part, on the employee's report.

[126] The fact that the employer appears to have accepted that the grievor's condition was such as to require accommodation is also not enough to relieve the grievor of establishing the existence of a disability. An adjudicator is not bound to reach the same conclusions that the parties have during the course of their dispute. Parties make their decisions based on information that may be incomplete. They may make decisions for reasons other than fact. So, for example, an employer may elect to give an employee's claim the benefit of doubt or to accept the claim for reasons of employee morale or good labour relations. But once a matter moves into the realm of final adjudication, a grievor is required to prove all the elements necessary to establish his or her grievance - unless, of course, there has been a formal admission. And there was no such admission in this case.

[127] I return then to the threshold question: Was the grievor as a matter of fact disabled by his pain or physical condition or both from carrying out the duties of an AU-01 field auditor? The grievor maintained that he was. In my opinion, the grievor failed to establish that he was disabled from carrying out those duties, at the very least when accommodated with the use of a lighter (or wheeled) audit bag and lighter laptop.

[128] There is the basic point that, in 2005, the grievor never actually performed a field audit with the lighter audit bag and laptop that were provided to him. Had he done so, there would have been at least some objective evidence going to the issue of whether his condition - his pain or his physical limitations - interfered materially with his ability to perform the tasks required of him as a field auditor.

[129] The grievor sought to fill the gap created by the absence of direct evidence by relying instead on his testimony that he had performed a private experiment. As noted earlier, he stated that he took the audit bag and laptop home and carried them up and down some stairs. He stated that the resulting pain indicated that he could not perform the tasks of a field audit.

[130] The difficulty is that all that this proves at best is that he could not do the task he set himself, not that he could not do the task expected of him by his position. I acknowledge that the two tasks might have been similar, but there was no evidence that they were identical.

[131] The problem is compounded by the fact that I have only the grievor's word that he did what he said he did. And I must say that I did not find the grievor credible when it came to the nature and extent of his physical limitations, for several reasons.

[132] First, there is the fact that the grievor chose to conduct an experiment instead of doing or trying to do the actual audit. His explanation for that choice, which was that he was afraid that he would not be able to carry the bag to the taxpayer's office and back, did not make sense. According to him, the experiment was designed to mimic the tasks that would be expected of him by a field audit. In other words, he was trying to do at home what he might be expected to do at work. But if that was the intent, why did he not do the field audit?

[133] Second, and flowing from the first, there was the grievor's peculiar insistence throughout the hearing that he could not be expected to perform or even try to perform a field audit in the absence of an FCE. Surely, the best judge of what the grievor could or could not lift was the grievor himself, and surely, the best test of whether a task was possible was actually performing that task. But, throughout the relevant period, the grievor did everything except try to perform a field audit with the modified equipment provided to him.

[134] Third, and turning to the FCE, it cannot escape one's notice that, despite the poor effort made by the grievor, his lifting and carrying tolerances were nevertheless found to be within the range of what he might be expected to experience while performing a field audit. The only objective evidence I have, other than the grievor's hearsay evidence concerning the opinion of his weight-lifting friend, is that the combined weight of the audit bag and laptop were in the range of 15 pounds at the most. The FCE report established that the grievor, even given his half-hearted efforts, could lift and carry that weight up and down flights of stairs.

[135] The FCE report also suggested that the grievor's efforts during the testing were "... representative of a self-limited or varied effort level." In other words, the grievor did not work as hard as the objective tests suggested he could have. It stated that it could have been "... possible that pain, or anticipated pain, prevented the client from putting forth a maximal effort. ..." But his self-limiting behaviour meant that it was also possible that "... his true abilities may be greater than those demonstrated [the day of the examination]."

[136] Fourth, I was not impressed with the grievor's odd focus on unlikely scenarios as support for his argument that he could not have been expected to even try to perform the duties of a field auditor. The grievor throughout the hearing sought to justify his refusal to try the tasks expected of him by coming up with possible but unlikely events that might have made it difficult for him to carry the audit bag and computer to a taxpayer's office on a given day. The grievor mentioned a number of times that he might have had to carry the bag up one or more flights of stairs because a subway escalator or an office building elevator might be out of service. It is true that subway escalators are sometimes out of service. But they are in service more often than not. Buildings big enough to have elevators are usually big enough to have two, one of which is generally in service when the other is not. And, even if the building had

only one elevator, why commence with the assumption that the elevator would be out of service before actually starting out? Why not go and, in the unlikely event that an elevator was not available, determine what to do about it then? Or, why not call ahead to find out if there is a problem and then, perhaps, visit another tax payer's office that day? Or, in the worst possible case, why not find something in the office that day that needed doing, given that only 50% of a field auditor's work required outside trips to taxpayers' offices?

[137] In other words, the fact that the grievor might have been barred from attending a particular taxpayer's office on one day does not establish that he could not perform the tasks of a field auditor on other or indeed on most days. The grievor's insistence that it did was misconceived and unconvincing.

[138] Fifth, there is the fact that, whenever the employer attempted to find a solution to his professed limitations, the grievor either refused to accept it, came up with another issue or, in both 2003 and 2005, simply gave up without trying and returned to his former position. For example, when the grievor expressed concerns in September 2005 about his ability to lift and carry the standard audit bag and computer, the employer obtained lighter ones. But the grievor did not try using them on an actual field audit. Both Dr. Chernin and the authors of the FCE report recommended the use of a wheeled audit bag. The employer followed that recommendation, but the grievor, after his experiment, refused to use one. When he was provided with an ergonomic workstation, he resisted using it. When he was provided with a headset, he failed to use it. And, when he finally obtained the FCE that he had insisted upon from the very start, he failed to make a reasonable effort, and then came up with other concerns that have made it impossible for him to perform the duties of the position.

[139] After taking all those factors into account, I am not persuaded by the grievor's claim that he could not perform the fieldwork expected of an AU-01 field auditor with the light audit bag and laptop that had been offered to him by the employer. That being the case, I am not persuaded that he was disabled within the context of the accommodation that had been offered to him. Since the grievor did not establish on a balance of probabilities that his condition (pain) prevented him from performing his job as a field auditor, all the more so, did he fail to establish that his employer failed

to accommodate him. All he established was that he failed to cooperate in the accommodations process that had been initiated by the employer.

[140] This brings me to the submission made by the grievor's representative that, once the FCE report was issued, the employer ought to have instituted some form of *interim* accommodation pending the delivery of medical clearances for the grievor's cardiac issues. I do not agree, because that flies in the face of the evidence. The employer had offered *interim* accommodation from the very start, which the grievor refused to accept. To suggest that the grievor should have been transferred into other positions ignores the fact that the position he had applied for - and the position for which the accommodation was necessary (if the grievor's claim was accepted) - was that of an AU-01 field auditor. If the grievor could have performed the task with the use of an accommodation, then that is the only position he was entitled to occupy (assuming he met its other performance requirements). Until the grievor established that he could not perform that position as modified, he was not entitled to be considered for any other position. And, as already noted, the grievor failed to establish that fundamental fact.

[141] While I am on this point, I acknowledge that some of the responses of some upper levels of management were not particularly supportive of the duty to accommodate. For example, the suggestion that the grievor ought not to have applied for the position of an AU-01 field auditor if he had physical limitations that made that task difficult to perform was clearly incorrect. Limitations are not a bar to promotion or to movement up the ranks. They become an issue only if they are impossible to accommodate without undue hardship. But I was also satisfied that despite such comments the employer, as an organization, responded to the grievor's claims of a physical limitation. The employer made a good-faith effort both to understand the nature of the grievor's limitations and to accommodate them. The real failure was the grievor's refusal to participate in the accommodation process or to give it a chance to succeed.

[142] All of this supports a further conclusion. I was satisfied on the totality of the evidence that the grievor had no interest in being accommodated into the position of field auditor. He tried to use the employer's duty to accommodate to leverage himself into a different position. But an employee, even if disabled, is not entitled to dictate the employer's choice of an accommodated position if more than one is possible. Since

the grievor made no effort to cooperate in the process to determine whether he could be accommodated in the field audit position, he had no right to ask to be put into any other position.

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

(The Order appears on the next page)

V. Order

[144] The grievance is dismissed.

May 27, 2013.

**Augustus Richardson,
adjudicator**