**Date:** 20130801

**Files:** 566-02-5208 and 5209

**Citation: 2013 PSLRB 90**

*Public Service*
*Labour Relations Act*

Before an adjudicator

BETWEEN

**JAMES MUTART**

Grievor

and

**TREASURY BOARD**
**(Department of Public Works and Government Services)**

Employer

Indexed as
*Mutart v. Deputy Head (Department of Public Works and Government Services)*

In the matter of individual grievances referred to adjudication

**REASONS FOR DECISION**

***Before:*** Margaret T.A. Shannon, adjudicator

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

***For the Employer:*** Richard Fader, counsel

Heard at Hamilton, Ontario,
March 5 to 7, 2013.

## I. Individual grievance referred to adjudication

[1] The grievor, James Mutart, alleged that he was forced to take medical retirement when the employer, the Treasury Board, refused to continue his leave without pay while he waited for a kidney transplant. As a result, once he has received a new kidney, he will not have a job to which he can return. This loss of employment is directly attributable to the grievor's temporary disability and amounts to discrimination under the collective agreement and the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (*CHRA*). The collective agreement is between the Treasury Board and the Public Service Alliance of Canada for the Program and Administrative Services Group (expiry date: June 20, 2011; "the collective agreement").

## II. Preliminary matters

[2] The employer raised a preliminary objection to my jurisdiction to hear these matters. As the grievor was terminated on a no-fault basis for incapacity under the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (*PSEA*), the Public Service Labour Relations Board ("the Board") is without jurisdiction under section 209 of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 ("the *Act*"). It was too late at the hearing for the grievor to recast his grievances as matters of contract interpretation in order to have the Board seize jurisdiction under section 209 of the *Act* (see *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109 (C.A.)).

[3] The employer noted that the grievor is exclusively seeking reinstatement to his former position. It also observed that section 211 of the *Act* states that the Board has no jurisdiction to deal with a termination under the *PSEA*. For that reason, the grievances should be dismissed.

[4] In response, the grievor argued that paragraph 226(1)(*g*) of the *Act* grants me jurisdiction to deal with the grievances before me. I have jurisdiction to hear matters alleging a violation of section 7 of the *CHRA* and of a collective agreement. The grievor's termination was discriminatory, and as a result, I have jurisdiction to review it. He submits that the pith and substance of the matter before me is how the termination was carried out, and that he was forced to resign when his health prevented him from returning to work. That was discrimination.

[5] I reserved my decision on the question of jurisdiction.

## III. Summary of the evidence

[6] The parties submitted as Exhibit 1 an agreed statement of facts, which reads as follows:

> *Mr. James Mutart ("Grievor), the Public Service Alliance of Canada ("Union"), and Treasury Board ("Employer") agree to the following facts for the purpose of files # 566-02-5208 & 566-02-5209 referred to adjudication:*
>
> *1. On June 29, 2009, the Union filed a grievance on behalf of Mr. Mutart with respect to the employer's refusal to allow the Grievor to remain on leave without pay as he awaited a kidney transplant (tab 1).*
>
> *2. Attached hereto as tab 2 are portions of the Collective Agreement (PA Group, expiry date June 20, 2011) applicable at the time of the grievance.*
>
> *3. In a letter, dated July 8, 2010, the Employer denied the grievance at the final level (tab 3).*
>
> *4. The grievance was referred to adjudication on March 17, 2011.*
>
> *5. The Grievor worked primarily as an AS-02 Property Facilities Officer at PWGSC from 1981 until his employment ended in 2009. His job involved maintaining federal government buildings and facilities in the National Capital Region, including overseeing renovations and making recommendations for greater energy conservation.*
>
> *6. The Grievor suffers from chronic kidney disease. He had his first successful kidney transplant in 1989. By the spring of 1999, the Grievor's kidneys had begun to fail again.*
>
> *7. In or around September 1999, the Grievor became disabled as his kidney disease progressed and he was unable to continue working. As a result, he went on leave without pay due to his disability and was placed on the transplant list in Ottawa.*
>
> *8. The grievor received disability benefits from Sun Life and maintained his critical medical coverage.*
>
> *9. In a letter, dated December 19, 2003, Director General, Property and Facilities Management, Sue Hum-Hartley, wrote to the Grievor about a realignment of the department's organizational structure (tab 3 (A)).*

*10. From 2005, the Union was in discussions with the Employer regarding a possible accommodation for the Grievor which would allow him to return to work.*

*11. In a letter, dated October 27, 2005, the Employer wrote the Grievor to inquire about his absence from work and to inform him of the voluntary options he could explore: return to duty (subject to medical certification), resignation or retirement on medical grounds (subject to Health Canada approval). The Grievor was advised to contact the Employer by no later than December 16, 2005 to discuss these options (tab 4).*

*12. The deadline was extended until Jan 31, 2006 by e-mail, dated Dec 8, 2005 (tab 5).*

*13. On January 23, 2006, the Grievor wrote to management in response to the Employer's phone call and letter, dated October 27, 2005 (tab 6).*

*14. The Employer wrote to the Grievor on February 22, 2006 (tab 7) and on March 6, 2006 in response to the Grievor's questions about compensation and benefits (tab 8).*

*15. On April 26, 2006, the Employer wrote to the Grievor to follow-up on issues regarding the Grievor's compensation and medical status. (tab 9).*

*16. The Employer wrote to the Grievor on May 16, 2006 regarding Health Canada forms (tab 10) and on June 27, 2006 regarding the Grievor's leave without pay status (tab 11).*

*17. In a letter, dated June 29, 2006, the Employer wrote to the Grievor to follow-up regarding his absence on sick leave without pay. (tab 12).*

*18. In a letter, dated September 14, 2006, Dr. Bell, Nephrologist, wrote a medical note for the Grievor in response to the Employer's questions regarding a possible return to work (tab 13).*

*19. The Grievor wrote an e-mail to the Employer on September 21, 2006 (tab 14).*

*20. On October 2, 2006, the Employer wrote to Dr. Bell requesting additional information in response to his Sept 14th letter. The Employer also wrote to the Grievor in this regard (tab 15).*

*21. The Employer wrote to the Grievor on October 11, 2006 regarding an inquiry from Sun Life (tab 16).*

*22. In a letter, dated December 21, 2006, Dr. Bell responded to the Employer's letter of October 6, 2006 (tab 17).*

*23. In a letter, stamped January 8, 2007, the Employer wrote a letter to the Grievor requesting additional information (tab 18).*

*24. In an e-mail, dated January 24, 2007, the Grievor responded to the Employer's letter of January 8, 2007. The Employer acknowledged receipt of the Grievor's e-mail. (tab 19).*

*25. The parties met on February 22, 2007 to discuss the Grievors's leave without pay status and the options available to him. The Union notes that there is no record of any meeting notes being received by the Union (Note to file tab 20).*

*26. The Employer mailed a letter to the Grievor as a follow-up from the meeting in February 2007 (tab 21). The Union notes that there is no record that indicates when this letter was mailed.*

*27. On March 10, 2008, the Grievor sent an e-mail to the Employer confirming receipt of the Employer's undated letter (tab 22).*

*28. On March 25, 2008, the Grievor wrote an e-mail to the Employer (tab 26 – part of e-mail chain).*

*29. In mid-March, the Employer received a medical note indicating a delay in the Grievor's expected return to work (tab 23).*

*30. In a medical note, dated March 26, 2006, Dr. Knoll noted that the Grievor was not able to work and needed to be reassessed in September 2008 (tab 24). (*NB: At the hearing the date of March 26, 2006 was changed to March 26, 2008.*)*

*31. On March 27, 2008, the Grievor wrote to the Employer (tab 25).*

*32. In an e-mail, dated March 31, 2008 email, Sylvain Legault confirmed that the department would proceed with a Health Canada assessment to facilitate a possible return to work (tab 26).*

*33. On April 8, 2008, the Employer sent a letter to Health Canada requesting a medical assessment of the Grievor (tab 27).*

*34. The Employer wrote to the Grievor on April 18, 2008 (tab 28) and April 23, 2008 (tab 29). The Grievor responded on April 23, 2008 (tab 29).*

*35. In a letter, dated May 2, 2008 Dr. S. Lazaridis from Health Canada wrote to the Employer indicating that further medical information was required and recommendations would be sent once this information was received (tab 30).*

*36. In an assessment letter, dated July 3, 2008 Health Canada wrote a letter to the Employer (tab 31).*

*37. On July 17, 2008, the Grievor sent an e-mail to the Employer stating that his doctor said that he could only return to work in September 2008 (medical note from 26/03/08 and subsequent HC letter dated July 25, 2008 confirms this) – (tab 32).*

*38. In a letter, dated July 25, 2008, Health Canada indicated a lack of consensus from the Griever's medical providers and recommended that the Grievor remain off work (tab 33).*

*39. On August 4, 2008, the Employer wrote an e-mail to the Grievor (tab 34).*

*40. On September 12, 2008 (tabs 35 and 36) and on September 19, 2008 (tab 37), the Grievor wrote to the Employer.*

*41. In a letter, dated Oct 14, 2008, Sylvain Legault wrote to the Grievor in response to the Grievor's e-mails (tab 38).*

*42. On October 23, 2008, Dr. Bell wrote a medical report for the Employer regarding the Grievor's medical status (tab 39).*

*43. On October 27, 2008, Dr. Scott Brimble, Nephrologist, wrote a note in support of the Grievor. The Employer notes that there is no record of this document being received by PWGSC (tab 40).*

*44. In a letter, dated November 7, 2008, the Grievor's Union Representative, Craig Spencer, wrote to Mr. Legault and forwarded Dr. Bell's most recent report to him (tab 41).*

*45. In a letter, received on March 6, 2009, the Employer noted that it would be recommending a termination of*

> *employment for incapacity under the* Financial Administration Act *(tab 42).*
>
> *46. Dr. O'Sullivan completed a medical report regarding the Grievor on March 20, 2009 (tab 43).*
>
> *47. In a letter, dated April 16, 2009, the Employer requested that the Grievor write a letter of resignation stating that his last day of employment would be April 5, 2009 (tab 44).*
>
> *48. The Grievor wrote his letter of resignation to the Employer, dated May 20, 2009. In his letter, the Grievor stated that his resignation was not by personal choice and that he intended to file a grievance to contest the employer's decision "to force me to resign as of my date of forced resignation" (tab 45).*
>
> *49. The Employer accepted the Grievor's resignation in a letter dated June 3, 2009 (tab 46).*
>
> [*Sic* throughout]

[7] Mr. Mutart testified that, until the spring of 1999, he had been an active person despite having already had a kidney transplant. His world changed when his doctor told him that he required dialysis immediately. He continued to work through the summer of 1999 while undergoing dialysis, but in September 1999, he was no longer able to continue. It was at this point that he went on leave without pay, due to his disability and was placed on the transplant list in Ottawa. Everything happened at a point in his career when his relationship with his employer was at its best. He was gaining new experience with Crown-owned facilities management as an acting property manager.

[8] By May 2009, the relationship with his employer hit bottom. He was forced to medically retire. His back was against the wall. The employer threatened to terminate his employment if he did not return to the workplace. Medical retirement was the only option that guaranteed him an income.

[9] The grievor stated that he was devastated when he received the letter from his manager, Bob DeRepentigny (Exhibit 1, Tab 4), in October 2005 in which the employer asked him to select one of three options: return to work, medically retire or resign. If he failed to elect an option, he would be terminated for incapacity.

[10] On the advice of Craig Spencer, his union representative, Mr. Mutart submitted his notice of medical retirement in May 2009 (Exhibit 1, Tab 45). In the letter, he made it clear that he was submitting his notice, that he was doing so under protest and that he intended to challenge it through the grievance process. Mr. Mutart described the employer's treatment of him as lacking respect, diplomacy and consideration. His retirement put an end to the process begun in October 2005 with the letter from Mr. DeRepentigny.

[11] In 2005, the grievor was still under medical treatment for kidney failure. He was undergoing four hours of dialysis three times a week. He had no quality of life. In his words, he lived for dialysis. He could not sleep, was short of breath, had sore legs and was prone to severe skin rashes. Nothing had changed since he went on leave without pay in 1999. Regardless, he held firm to his hope that he would receive a kidney and that he would be able to return to work. Then he received the letter from Mr. DeRepentigny.

[12] When Mr. Mutart received the letter, he contacted Mr. DeRepentigny to discuss his options for a return to work. He proposed working from home and taking on the duty officer function. He asked whether there were projects that he could help with or problems with clients that he could help resolve. The only response he received was to either return to work or retire.

[13] By email on January 23, 2006, the grievor contacted Mr. DeRepentigny and confirmed his interest in returning to work in the Hamilton-Niagara area. The grievor's substantive position was in the National Capital Region (NCR). It was highly unlikely that he would ever be able to find a transplant match in the NCR, so he had moved to Hamilton, where the chances of a match were much better and where he had the support of his family. In Hamilton, he could be followed by one nephrologist rather than a clinic of nephrologists, and access to dialysis was easier. The employer had assets in the Hamilton area, so the grievor anticipated that there was work to be done, which he could do while undergoing dialysis, whether from home, the hospital or on site.

[14] The January date came and went, and no decision was made. In April 2006, Mr. DeRepentigny sent an email to the grievor (Exhibit 1, Tab 9) asking for a medical certificate detailing the grievor's limitations and proposing a return-to-work date.

Mr. DeRepentigny also proposed an assessment by Health Canada. He asked the grievor to sign the consent form attached in PDF and to return it to him by May 26, 2006.

[15] On June 27, 2006, Mr. DeRepentigny again contacted the grievor via email and asked him to select an option. A new deadline was set for August 11, 2006, failing which Mr. DeRepentigny stated that he would have no choice but to recommend the grievor's termination. It was followed up by letter on June 29, 2006 (Exhibit 1, Tab 12). Mr. Mutart felt that he was being forced into taking a position.

[16] Again, the deadline came and went with no response from the grievor. Mr. Mutart obtained a medical certificate dated September 14, 2006 (Exhibit 1, Tab 13), which indicated that, while he waited for a transplant, he could work "... a combination of work from office, home and hospital would be best ... 15 hours per week to start." That arrangement could be reassessed after six months. The grievor knew that he could fit in somewhere based on that clearance.

[17] The employer did not accept the certificate on its face. On October 2, 2006, again by email, the employer asked Mr. Mutart to provide further clarification before it would proceed with a progressive workplace integration (Exhibit 1, Tab 15). Dr. Bell provided the requested clarification on December 21, 2006 (Exhibit 1, Tab 17). In his letter, Dr. Bell stated that Mr. Mutart required five dialysis treatments per week, following which he was able to drive. He also stated that he should able to perform regular work activities within one hour of the completion of his dialysis. Dr. Bell also referred to the specific tasks that the employer listed, noting that the grievor should be able to perform the tasks identified in the October 2, 2006 email without major functional limitations.

[18] Mr. Mutart had no further contact with the employer until the January 8, 2007 letter from Sylvain Legault to whom Mr. DeRepentigny reported. Mr. Legault was prepared to look into accommodating the grievor's medical condition but had to examine the situation in light of the Treasury Board's leave without pay policy. However, the accommodation would have to occur in the NCR. To facilitate it, the employer wanted to know the number of hours the grievor would be available for work at the office each day and the part of his normal duties that he would best be able to

perform. Once again, the grievor was asked whether he was willing to undergo an examination by Health Canada Medical Services.

[19] Mr. Mutart was upset by Mr. Legault's use of the word "fruitful" in describing the lack of success in finding an opportunity within the Hamilton area. The employer had done nothing to identify a position for the grievor that met his medical limitations, including his desire to be in the Hamilton area for his treatment. Mr. Mutart was never provided any information about the nature and number of attempts the employer made on his behalf, even though the employer was aware that, were he located in Hamilton, he stood a better chance of finding a kidney. He testified that the employer could have made things happen for him had it wanted to. It could have waited until he received a new kidney if there was nothing for him to work on. The bottom line was that Mr. Mutart did not want to be out on the street without a job when he received a new kidney.

[20] On February 22, 2007, Mr. Mutart attended a meeting, accompanied by his union representative, to discuss solutions to this quandary. The employer felt that it could not accommodate the grievor based on the medical information it had received to that point. Mr. Mutart asked to return to work on a limited basis but added that, if he had to return to work in Ottawa, he would have to be on dialysis for the rest of his life (Exhibit 1, Tab 20). The employer provided the grievor with more medical forms to be completed by his treating physicians.

[21] The grievor stated that nothing was resolved through these meetings. The employer again wrote to the grievor, asking that he provide the medical information required for his accommodation on February 25, 2008 (Exhibit 1, Tab 21).

[22] Mr. Mutart hoped to return to work by April 1, 2008. He expressed that desire in an email to Mr. Legault on March 10, 2008 (Exhibit 1, Tab 22). It did not come to fruition, as he was hospitalized for a severe infection that required intravenous antibiotic treatments. Any discussions about returning to work had to be delayed until that medical complication was resolved.

[23] In an email to Mr. Legault on March 25, 2008, the grievor set out what he believed to be the realities of the situation (Exhibit 1, Tab 26). At every step of the process, he felt that he was being forthcoming and cooperative by providing medical information. He was always available and was never tardy with his responses. He even

asked Mr. Legault to provide him with a list of federal assets in the Hamilton area to assist him in conducting a job search in Hamilton. (Exhibit 1, Tab 26). As stated in the email, his primary concern was what would happen to him when he got a new kidney if he opted for medical retirement. He wrote that he continued to hope that a kidney would be found and that he would be able to return to his position with the employer.

[24] The grievor did eventually undergo a medical evaluation by Health Canada. The employer was advised of the results by letter dated July 3, 2008 (Exhibit 1, Tab 31). It was determined that, despite his chronic medical condition, which required ongoing care, Mr. Mutart was fit to return to work on a trial basis of four hours, three times a week, which could be increased to a maximum of 15 hours a week, depending on his tolerance and the operational requirements.

[25] Mr. Mutart never did return to work in the summer of 2008. On July 17, 2008, Mr. Legault emailed the grievor to arrange a meeting with him and his new manager to discuss his reintegration. The meeting was to include Mr. Legault, Colombe Charette, the grievor's case manager, and Jack Murphy a representative for the employer (Exhibit 1, Tab 32). Mr. Mutart advised Mr. Legault that his union representative was not available until after August 4, 2008 and that he would like him to attend. Mr. Mutart could not understand the urgency displayed by Mr. Legault in scheduling the meeting for the following week.

[26] Before the meeting could occur, Dr. Lazaridis, Occupational Health Medical Officer, Health Canada, advised the employer that the grievor was to be off work until at least September 2008. On September 19, 2008, Mr. Mutart advised Mr. Legault of problems with accessing his fistula, which was required for ongoing dialysis. He was not fit to return to work and pleaded with the employer to maintain the *status quo*.

[27] Mr. Legault did not agree to maintain the *status quo*. At that point, according to his testimony, Mr. Mutart had been on dialysis and out of the workplace for approximately 10 years. (As of the date of the hearing, Mr. Mutart was still out of the workplace and had been receiving dialysis treatments for approximately 14 years.) On October 14, 2008, he gave Mr. Mutart until October 25, 2008 to make the election first put to him in 2005 (Exhibit 1, Tab 38). If Mr. Mutart did not make a choice, the employer would have no choice but to terminate him.

[28] According to Mr. Mutart's testimony, the employer did have a choice. The employer could have left him as he was, on leave without pay. Once he received a transplant, he would be able to return to work. He had demonstrated as much to the employer in 1989 when he had his first transplant. No one could predict when a kidney would become available, but it was certainly just a matter of time. He had been on dialysis for this entire time. During that time, he had been placed on and off the transplant list for different reasons, but as of April 20, 2012, he had confirmation that he was on the transplant list for the Hamilton area.

[29] On October 23, 2008, Mr. Mutart's physician provided the employer with an updated medical certificate (Exhibit 1, Tab 39). In it, Dr. Bell stated that, once Mr. Mutart received a new kidney, he would be able to return to work. The timing of the transplant was unpredictable. No one could have anticipated that Mr. Mutart would be on dialysis for 14 years while he waited for a transplant.

[30] Mr. Legault again wrote to Mr. Mutart on March 6, 2009. This time, he advised Mr. Mutart that he was recommending his termination for incapacity under the *Financial Administration Act*, R.S.C. 1985, c. F-11 (*FAA)* (Exhibit 1, Tab 42). He also gave the grievor one last opportunity to avail himself of one of the voluntary options. Mr. Mutart was angered by the letter, but he went to his family physician to have her fill out the paperwork for a medical retirement (Exhibit 1, Tab 43). He believed that, if he did not apply for medical retirement, he would have been out on the street, with nothing. Had he been terminated, he would have jumped off a bridge or done himself some other harm.

[31] Craig Spencer is a representative for the Government Services Union with many years' experience. He assisted Mr. Mutart in making the decision to retire under protest, following which he drafted the grievances before me. He described the source of Mr. Mutart's problems in navigating the accommodation quagmire as a lack of a single point of contact with the employer. On a number of occasions during the 14-year period in which he was on leave without pay, Mr. Mutart had asked about alternate work arrangements and part-time work and about a deployment to Hamilton. The employer's disability case management system had not been engaged to assist Mr. Mutart in his request for accommodation.

[32] Mr. Spencer stated that the typical accommodation file puts a positive onus on the employee to participate in identifying accommodation options. An employee cannot depend on the employer to develop solutions. However, in this case, the employer was impatient. On November 7, 2008, Mr. Spencer wrote a letter to Mr. Legault on Mr. Mutart's behalf, setting out the challenges with the file (Exhibit 1, Tab 41). He was trying to get across to the employer that that there was no harm in continuing the grievor's leave without pay until he received his transplant. Once Mr. Mutart had his surgery, he would be ready to resume his career, and the employer would have a trained employee ready to go. When his efforts to intervene on Mr. Mutart's behalf were unsuccessful, he recommended that Mr. Mutart apply for medical retirement and submit his letter of resignation, noting that he was submitting it in protest. After that, he assisted Mr. Mutart in filing his grievances.

[33] Mr. DeRepentigny testified that he initiated contact with the grievor after he was provided a list of employees who had been on leave without pay for longer than two years by the employer's labour relations department in 2003. The Treasury Board's policies requires that, after two years, the employer contact employees on such leave and determine a date on which to terminate their leave. He looked to his labour relations advisor for advice, as he had no training on the duty to accommodate.

[34] The grievor's substantive position was to ensure the proper operation and maintenance of federal buildings and to deliver services to the tenants of those buildings. It required close relationships with clients. The incumbent in the position must deal with landlords, contractors and clients. He or she is rarely at his or her desk. He or she must be on-site to ensure that the work is being done properly. The grievor had not been in the workplace since 1999. Mr. DeRepentigny did not know why no follow up had occurred before 2005.

[35] Mr. DeRepentigny spoke to the grievor on the phone in September 2005 and advised him that a letter was coming and that he would have to pick one of the options listed in it. He stated that this came as a shock to the grievor.

[36] The deadline to respond to the letter was December 16, 2005. It was later extended to January 31, 2006 when the first letter was returned by Canada Post. During that time, Mr. DeRepentigny spoke with Mr. Mutart and advised him that he could not allow Mr. Mutart to work without his doctor's approval. In November 2005,

he provided Mr. Mutart a contact name in the Ontario regional office in Toronto, to assist him in finding a position in the Toronto or Hamilton areas. To assist Mr. Mutart, he made the initial contact with the Toronto office via email in late January 2006 and advised it to expect to be contacted by Mr. Mutart.

[37] According to Mr. DeRepentigny, Mr. Mutart felt that he was in a Catch-22. He could either stay where he had a job but no assurance that dialysis was available or move to where he had no job but dialysis was available. On January 23, 2006, Mr. Mutart contacted Mr. DeRepentigny and reiterated his desire to be transferred to the Hamilton area. Unless he lived in the Hamilton area, he could not be put on the transplant list where he stood the best chance of finding a match and receiving a transplant (Exhibit 1, Tab 6). Toronto was not an option. From the employer's perspective, part-time work was also not an option; nor was working from home doing work for the NCR. Mr. DeRepentigny told Mr. Mutart that there was the possibility of looking outside their sector and branch but that they could not without medical clearance.

[38] Mr. DeRepentigny did not make any further efforts to find out what was available in the Toronto area. He told Mr. Mutart whom to contact in order to explore options.

[39] The grievor commenced a series of email correspondences with the employer's payroll office in an attempt to clarify what his entitlements would be were he to apply for a medical retirement (Exhibit 1, Tabs 7 and 8). The questions were personal to Mr. Mutart and were based on a number of "what-if" scenarios. The compensation advisors involved assured Mr. DeRepentigny that all questions were answered. However, each time an answer was provided, Mr. Mutart had another question. It was not Mr. DeRepentigny's job to provide advice to Mr. Mutart, and he did not feel it appropriate to become involved in that capacity.

[40] Between December 2005 and January 2006, Mr. DeRepentigny communicated with the grievor, emphasizing the need for medical clearance if he intended to return to work. In April 2006, he asked Mr. Mutart to undergo an assessment by Health Canada. Again, the grievor did not respond.

[41] By May 31, 2006, Mr. DeRepentigny concluded that the employer and Mr. Mutart were a long way from formulating a return-to-work plan. He still had no medical

certificate authorizing the grievor's return to work. He had the sense that Mr. Mutart was frustrated by his situation. He was confused and uncertain about what he should do. They spoke two to three times a month since the process was started in 2005, and still, nothing had been resolved. On June 27, 2006, he again presented the options to Mr. Mutart by email and again asked him to commit to one (Exhibit 1, Tab 11). He formalized his request by letter dated June 29, 2006 (Exhibit 1, Tab 12) and followed up again on August 14, 2006.

[42] Mr. Repentigny referred to the fact that Mr. Mutart supplied a medical note on September 14, 2006, stating that he was fit to work part-time (Exhibit 1, Tab 13). He noted that the letter was not sufficient to explain what could be done to accommodate him. Mr. DeRepentigny sought the advice of the employer's labour relations department, which recommended that the employer engage the case management team to ensure that the return to work was done properly and consistent with the medical restrictions. After several requests for clarification, Mr. Mutart submitted another medical certificate dated December 21, 2006 (Exhibit 1, Tab 17), which still did not address the employer's concerns.

[43] Mr. DeRepentigny's involvement in the grievor's file ended in November 2006.

[44] Mr. Legault assumed responsibility for the file from Mr. DeRepentigny. He was organizationally responsible for what were described as the orphan positions in the NCR. He had no authority over what happened in other regions and was not aware of, and could not know of, what work existed in the Ontario Region or the Hamilton Niagara area. He ensured that Mr. DeRepentigny provided a contact to Mr. Mutart to facilitate his exploration of any possible options in those areas.

[45] Mr. Legault did not see Mr. Mutart making any progress in his search. Nor did he see options in the NCR. Telework was not possible. Property facilities managers must be on-site, including at construction sites. The duty officer position identified by Mr. Mutart had been eliminated in 1998 and was being handled from a call centre, which took calls 24 hours a day, 7 days a week. Mr. Legault could not rely on Mr. Mutart's assessment of his own capacity.

[46] Repeatedly between 2005 and July 2008, the employer's efforts to accommodate Mr. Mutart were hindered by a lack of medical information and intervening medical complications, culminating in the September 19, 2008 email from Mr. Mutart pleading

for maintaining the *status quo.* The employer tried for three years to obtain a clear picture of Mr. Mutart's abilities to return to work, and it still had nothing. Based on that fact, Mr. Legault concluded that there was no possibility of Mr. Mutart returning to work in the foreseeable future.

[47] The employer would have incurred no substantial financial hardship were Mr. Mutart allowed to remain on a leave without pay. However, he was receiving benefits from the employer for which he had not worked and was accumulating pensionable service that would ultimately increase his pension entitlement. Allowing Mr. Mutart to obtain a benefit without making contributions was a violation of the *FAA.* Maintaining his leave without pay would not have disrupted employee morale or staffing. Regardless, it was clear that, unless he got a kidney, Mr. Mutart would never return to work. As it is, the employer has waited 14 years. There is no likelihood of Mr. Mutart returning to work ever, let alone in the foreseeable future.

## IV. Summary of the arguments

### A. For the grievor

[48] In answer to the issues raised by the employer as a matter of jurisdiction the argument that the grievor changed the nature of his grievances at the hearing, a closer reading of the grievor's May 20, 2009 letter (Exhibit 1, Tab 45) clearly shows that he was forced to retire for medical reasons. The employer forced him to do so by denying his request to remain on leave without pay until he received a kidney transplant and was able to return to work. His request should have been granted pursuant to the proper application of article 19 of the collective agreement and section 7 of the *CHRA*. Applying for medical retirement was the only way the grievor could ensure that he would receive some income while the issue of the employer's failure to accommodate him was addressed by the Board.

[49] The May 20, 2009 letter clearly shows that the grievor was subject to undue pressure by the employer, which was intent on removing him from its payroll. The grievor argued that the evidence showed that this pressure to make a decision concerning medical retirement or to provide a return to work date was a camouflage of a disguised non-disciplinary termination. Under the circumstances, this matter falls within the adjudicator's jurisdiction under subparagraph 209(1)(*c*)(i) of the *Act*.

[50] The grievor also submitted that the employer's failure to accommodate the grievor's disability by leaving him on leave without pay until his kidney transplant falls under the interpretation and application of the collective agreement and is covered by the *CHRA*. In these circumstances, an adjudicator has jurisdiction under paragraph 209(1)(*a*) of the *Act* to hear the matter.

[51] The grievor reviewed key details of this grievance, noting that he was forced to take leave without pay in 1999 when, due to renal failure, he was required to have dialysis daily. Initially, he remained in the workplace, but, when he was no longer able to continue with dialysis and work in September 1999, he went on leave. From that time until he was forced to medically retire on May 20, 2009, he did not work. During the period of leave without pay, the grievor received long-term disability benefits from Sun Life Financial and was allowed to maintain his critical medical coverage.

[52] Several times, the grievor has discussed the possibility of working from home or working reduced hours to allow him to continue his dialysis treatment. Another accommodation request was a transfer to the Hamilton area, where he has family support and where he had a better chance of finding a transplant match. The employer denied his request and advised him that any accommodation had to be within the NCR. Regardless, the grievor moved to Hamilton to increase his opportunity of receiving a transplant.

[53] In 2008, representatives of the Public Service Alliance of Canada, Government Services Union (the union) initiated discussions with the employer on the grievor's behalf about possible accommodations. The issue of the grievor's ability to withstand the strain of working while continuing dialysis and waiting for a kidney was put to his nephrologist. The physician reported that the grievor's lengthy wait had a significant impact upon his general health and that an attempt to return to work might shorten his life span as he continued his wait for a transplant (Exhibit 1, Tab 41).

[54] Despite that report, the employer sent a letter (Exhibit 1, Tab 43) advising the grievor that termination for incapacity under the *FAA* was being recommended to the deputy head.

[55] There is evidence that, when the grievor was presented with the options and with the final threat of termination for incapacity, he informed the employer of his intent to challenge its failure to accommodate him. There is no evidence that the

employer warned the grievor that, if he accepted medical retirement, he would be precluded from challenging the matter through the adjudication process. For those reasons, the employer's objection to jurisdiction should be dismissed.

[56] The grievor asserted that the employer discriminated against him on the basis of disability, contrary to article 19 of the collective agreement and section 7 of the *CHRA*. The employer forced him to choose between a termination for incapacity and medical retirement. Had the grievor been terminated for incapacity, he would have been limited to Canada Pension Plan disability benefits; had he agreed to medically retire, he would have received approximately $3400 per month as a medical pension, which would have disappeared on his return to work.

[57] The grievor submitted that he has met the burden of proof in establishing that he has and had a disability that the employer did not accommodate. According to the test in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*"), the burden then shifted to the employer to prove that it was impossible to accommodate the grievor without incurring undue hardship.

[58] The grievor referred to a number of cases that discuss the fact that the duty to accommodate requires an individualized approach. In *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, at para 22, the Supreme Court of Canada stated as follows:

> *The importance of the individualized nature of the accommodation process cannot be minimized. The scope of the duty to accommodate varies according to the characteristics of each enterprise, the specific needs of each employee and the specific circumstances in which the decision is to be made. . . .*

[59] The employer was required to prove not that it was impossible to accommodate the grievor but to prove undue hardship, which may take many forms. (*Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, at para 12.) Requests for accommodation are to be treated with common sense and flexibility in the context of the factual situation of each case.

[60] Cases such as *Naccarato v. Costco Wholesale Canada Ltd.*, 2010 ONSC 2651, and *Masonite International Corporation v. United Brotherhood of Carpenters and Joiners of*

*America, Local 1072* (2007), 161 L.A.C. (4th) 426 ("*Masonite*"), both deal with long-term illnesses.

[61] In *Naccarato*, the Ontario Superior Court dealt with a case in which a physician provided no opinion with respect to the possibility of the plaintiff being able to attend work in the reasonably foreseeable future. In applying the test identified in the *Hydro-Québec* case, the Court determined that the defendant's defense had to fail, as there was no medical evidence to support the finding the plaintiff could no longer fulfill the basic obligations of his position for the foreseeable future.

[62] In the *Masonite* case, the arbitrator was faced with a fact situation very similar to Mr. Mutart's case. The grievor in the *Masonite* case, like Mr. Mutart, was waiting for a kidney transplant. He had been suffering from kidney failure for two and one-half years when the employer terminated him for "innocent absenteeism". The evidence showed that the grievor would have been off work in excess of eight years even had he obtained a suitable transplant match and then taken time to recover from the surgery. The evidence was that, with a successful transplant, the grievor would have been able to return to work.

[63] The grievor in *Masonite* was 56 years old with 18 years of seniority. He was completely disabled. At the hearing, no suggestion was made that he could be accommodated in any fashion to perform active employment. During the two years of his absence from work, no attempt was made to return him to work. In determining whether the employer had met its obligation to accommodate the grievor, the arbitrator stated at page 446 that ". . . each and every case is dissimilar and unique and requires individual scrutiny . . . ." Age and seniority are significant factors to consider when determining undue hardship that were not considered in Mr. Mutart's case.

[64] In *Canada (Attorney General) v. Sketchley*, 2005 FCA 404, at para 109, the Federal Court of Appeal held that the Treasury Board's policy that requires terminating an employee after that employee has spent more than two years on leave without pay was *prima facie* discriminatory in the case of disabled employees who could not provide a definite return-to-work date. It is the same policy that the employer used to force Mr. Mutart to retire. The grievor has established a *prima facie* case of discrimination.

[65] The grievor referred to the employer's letter that stated that the grievor would be terminated on the basis of his incapacity because he had not availed himself of voluntary options offered to him. (Exhibit 1, Tab 42) The employer identified the grievor as one of a number of employees on a list provided to Mr. DeRepentigny for follow up by the employer's labour relations department pursuant to the Treasury Board's leave without pay for medical reasons policy, following which the employer began steps to terminate the grievor's employment. Its action was a violation of article 19 of the collective agreement and was discriminatory, contrary to section 7 of the *CHRA*.

[66] The employer is guilty of an ongoing failure to conduct an individualized assessment of the grievor's situation, to search for options, to facilitate a reasonable accommodation and to respond to the grievor's requests for information. Its tone in corresponding with the grievor was adversarial and threatening to a man already under considerable stress. The employer did not conduct any search for alternatives. The burden was put on the grievor to search for work placements in the Hamilton area.

[67] Between 2005 and 2008, the grievor requested accommodation in Hamilton, where he could be supported medically and where he had family. He asked for a list of assets in Hamilton. He asked to telework. He asked about the possibility of performing the duty officer function, which was eliminated in 1998. He stated that other administrative-type positions certainly could have been available, but the employer made no effort to find one. The employer provided the grievor with a contact name and expected him to follow up and find a position that suited his abilities. That nonchalant attitude towards accommodating an employee is contrary to the duty to accommodate, which requires a systematic examination of the alternatives. The employer had sufficient information to carry out an evaluation. The report received from Health Canada in 2008 (Exhibit 1, Tab 31) cleared the grievor to return to his position, yet the employer still did not search for positions in the Hamilton area.

[68] The testimony of the employer's witnesses did not identify any undue hardship. There was no evidence that leaving the grievor on leave without pay would have caused the employer financial hardship, that it would have interfered with another employee's rights, that it would have detrimentally affected employee morale or that it would have been disruptive to the staffing process.

[69] On examining the facts of this case, such as Mr. Mutart's age and years of service, that he felt forced out and that the employer treated him in a disrespectful and unconcerned fashion, it becomes clear that the employer failed to meet its obligations and that it discriminated against Mr. Mutart on the basis of his disability. Given the disrespectful manner in which the employer treated Mr. Mutart and applied the Treasury Board's policy without consideration for his personal situation, damages to the maximum allowed under the *CHRA* should be awarded.

[70] The grievor also referred to the following cases on jurisdiction and hardship: *Central Okanagen School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970; *Audet v. Canadian National Railway*, 2006 CHRT 25; *Desormeaux v. Ottawa-Carleton Regional Transit Commission*, 2003 CHRT 2; *Mellon v. Human Resources Development Canada*, 2006 CHRT 3; *Panacci v. Treasury Board (Canada Border Services Agency)*, 2011 PSLRB 2; *Stringer v. Treasury Board (Department of National Defence)*, 2011 PSLRB 110; *Cyr v. Treasury Board (Department of Human Resources and Skills Development)*, 2011 PSLRB 35; *Pepper v. Deputy Head (Department of National Defence)*, 2008 PSLRB 71; and *Johnstone v. Canada Border Services Agency*, 2010 CHRT 20, confirmed in party by *Canada (Attorney General) v. Johnstone*, 2013 FC 113.

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

[71] In arguing that the grievance is not referable to the Public Service Labour Relations Board, the employer observed that the grievor took medical retirement after a 10-year leave without pay. The grievance forms make no reference to discipline, so the Board has no jurisdiction under paragraph 209(1)(*b*) of the *Act*. The question is whether the reference to article 19 ("No Discrimination") of the collective agreement is sufficient to give the Board jurisdiction over the grievances under paragraph 209(1)(a).

[72] The first step is to examine the intent of the grievances. Paragraph 1 of the grievance form (Exhibit 1, Tab 1) is squarely focused on Mr. Mutart's resignation. No mention is made of a breach of the duty to accommodate. In paragraph 2 of the same exhibit, a clear reference is made to discrimination, which is inextricably tied to the alleged forced resignation. It is not a freestanding claim of discrimination. As corrective action, the grievor seeks only reinstatement. He makes no request for accommodation or for damages under the *CHRA*. He consistently held that position throughout the grievance and adjudication processes.

[73] The employer argues that it was too late at adjudication for the grievor to amend the pith and substance of his grievances by making a claim for damages under the *CHRA*. This is a case where the *Burchill* principles apply:

> *. . . it was not open to the applicant, after losing at the final level of the grievance procedure the only grievance presented, either to refer a new or different grievance to adjudication or to turn the grievance so presented into a grievance complaining of disciplinary action leading to discharge . . . .*

[74] Despite the fact that the grievances identified the no-discrimination article of the collective agreement, the pith and substance of the grievances deal with how the resignation occurred. Citing the collective agreement does not avoid section 211 of the *Act*, which clearly states that the Board has no authority over any termination of employment under the *PSEA*. Section 63 of the *PSEA* deals with the resignation of an employee from the public service. Paragraph 226(1)(*g*) of the *Act* identifies the Board's authority under the *CHRA* but only if the matter was referred to the Board in accordance with section 209 of the *Act*. The grievor did not make such a referral. Therefore, the Board is without jurisdiction.

[75] If the Board determines that it is appropriate to examine the merits of the case, it is a matter of establishing undue hardship. The first two criteria of the *Meiorin* test have been established. That leaves the third, whether the employer reached the point of undue hardship in its attempts to accommodate the grievor. The *McGill* case calls for a common-sense, flexible approach. Accommodation is not a one-way street; both parties have an active part to play. Undue hardship resulting from the grievor's absence from the workplace must be assessed globally, starting at the beginning of the absence. In *McGill*, the employee was terminated after a three-year absence. In Mr. Mutart's case, he was absent for 10 years.

[76] According to the *Meiorin* test, the limit of accommodation occurs when no further accommodation is possible without imposing undue hardship (*Hydro-Québec*, at para 12). The purpose of the duty to accommodate does not completely alter the employment contract. The employee is still under a duty to perform work in exchange for remuneration. If the employer shows that the employee will be unable to resume his or her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and will have established undue hardship (*Hydro-Québec*, at

para 17). Neither the grievor nor the employer may disregard the past in assessing undue hardship (*Hydro-Québec*, at para 21). The unfortunate truth of Mr. Mutart's illness is that he could not return to work in the foreseeable future or provide an indication of when he would receive a transplant. He was on and off the transplant list for 10 years at the time of his resignation and was on it again at the time of the hearing.

[77] Unlike the situation in *Sketchley,* the employer did not rigidly apply the two-year period specified in the Treasury Board's leave without pay policy. When it initiated contact with the grievor, he had been absent for approximately six years. By the time of his resignation, another four years had passed. While an employee may wish to remain on indefinite leave, there is no requirement on the employer to indefinitely retain an employee who may not be able to work for several years (see *Re Scheuneman*, [2000] F.C.J. No. 1997, at para 7).

[78] From 1999 until 2005, the employer accommodated the grievor. It allowed him to be absent from the workplace on leave without pay. He was accruing pensionable service during that time. In 2005, the employer's labour relations department identified a list of employees who had been on extended leave. It directed managers to address each case. From 2005, the employer identified the issues and tried to deal with the grievor's unique situation.

[79] On October 27, 2005 the employer presented the grievor, in a letter, three options: return to work, resign or take medical retirement. That letter also included a package from the compensation department outlining the information required to help him make his decision. The grievor was then given almost two months to make a decision. That was after he had been contacted in person to advise him of his options and that the letter was coming. His union attempted to assist him with the process and intervened with the employer on his behalf.

[80] The employer's witnesses established that the grievor's substantive position required him to be present at different work sites. His job could not be done via telework.

[81] A series of email and letter exchanges continued over the next three-and-a-half years. The employer's representatives answered the grievor's many questions and concerns in writing, over the phone and in person. Multiple medical certificates were

received, and Health Canada consultations occurred. The employer continued to receive conflicting information about the grievor's ability to return to work. Only when it was clear that no progress was being made in resolving the issue did the employer send the grievor a letter advising him that termination for incapacity was being recommended (Exhibit 1, Tab 42).

[82] The grievor testified that, on medical retirement, he receives approximately 70% of his salary. As a result of being on leave without pay for 10 years, he benefitted from extra pensionable service, bringing him to 28 years of pensionable service should he, in the future, be in a situation in which he is required to draw his pension, to which he is now entitled, having reached age 55.

[83] At the time of his resignation, the grievor was unable to work and was not on a waiting list for a new kidney. He was not on the list at all between 2008 and April 20, 2012 (Exhibit 2). When the decision was made to recommend terminating him for incapacity, there was no possibility of an accommodated return to work and no reasonable foreseeability that the grievor would ever be in any better health. Rather than be terminated, the grievor elected to apply for a medical retirement, supported by a medical certificate from his physician, and he submitted his letter of resignation.

[84] Based on well-established law, the employer accommodated the grievor beyond the point of undue hardship. The grievances and the claim for damages should be dismissed.

[85] Other cases referred to by the employer included the following: *Cie minière Québec Cartier v. Quebec (Grievances arbitrator)*, [1995] 2 SCR 1095; *English-Baker v. Treasury Board (Department of Citizenship and Immigration)*, 2008 PSLRB 24; *Gauthier v. Treasury Board (Canadian Forces Grievance Board) and Deputy Head (Canadian Forces Grievance Board)*, 2012 PSLRB 102; *McCormick v. Treasury Board (Transport Canada)*, [1995] C.P.S.S.R.B. No. 92 (QL).

## V. Reasons

[86] The employer argued that I am without jurisdiction to hear this matter based on the nature of the grievances as filed. Essentially, the grievor seeks to rescind his notice of retirement for medical reasons. The two grievances before me were brought under paragraphs 209(1)(*a*) and 209(1)(*c*)(*i*) of the *Act*. On the face of the grievances, they are related to the grievor's medical retirement even though the grievor now submits that

both pertain to a disguised non-disciplinary termination. The grievor argues that the substance of these grievances is related to a forced termination due to the failure of the employer to allow his request for accommodation, which left him with no other choice but to take a medical retirement.

[87] It is clear that, from his grievance forms which initiated these proceedings, he seeks to be reinstated to his position with the employer and to be allowed to continue on leave without pay until he is no longer disabled. The pith and substance of the grievances is the termination of his employment for which he seeks reinstatement to his employment. A notice of retirement is a *de facto* voluntary termination of employment. The grievor left his employment with the employer of his own accord to ensure he had an income. It was his selection of one of the three options put to him by his employer. It is not a request for accommodation, as was argued at the hearing. It was clear at the hearing that the grievor did not agree with the employer's decision to refuse him a continued leave. This however was not the issue grieved; his termination of employment was.

[88] The grievor argued that he was forced to retire for financial reasons. Had the employer proceeded with a no-fault termination, as was recommended to the deputy head, the grievor believed that he would have been without an income. He chose to retire at the recommendation of his union representative, under protest. The effect of his resignation is that he now receives a medical pension, which will continue until he receives his normal pension. Had the employer agreed to accommodate him, as argued at the hearing, the grievor would have remained on the employer's nominal roll as an employee, albeit on an extremely lengthy leave without pay.

[89] *Burchill* requires that I hold the grievor to the grievances that were put to the employer at the final level of the grievance process. In this case, these grievances concern the grievor's unhappiness with the medical retirement option which he selected and which ended his employment with the employer. The grievor cannot now add an additional claim for violation of the *CHRA* in order to ensure that I have jurisdiction. The grievor ". . . grieve[d] that [he] was forced by PWGSC [Department of Public Works and Government Services] to take medical retirement in order to maintain an income while [he] await[ed] a kidney transplant." He also alleged that it would not have been undue hardship for the employer to maintain the *status quo*. As remedy, he sought the following: ". . . [to be] reinstated as a PWGSC employee on LWOP

[leave without pay] until I have received my transplant at which time I will return to my substantive position and resume my duties on behalf of PWGSC."

[90] The grievor's representative argued that the employer clearly knew the nature of the grievances and that the grievor should not be penalized by being held to the strict wording of those grievances. It is clear according to the grievor's representative that the pith and substance of the grievances is the employer's failure to accommodate the grievor, which violated article 19 of the collective agreement and section 7 of the *CHRA*.

[91] I disagree. What is clear is that the grievor seeks to rescind his resignation, which he submitted to his employer. He understood the nature and effect of his actions and put his mind to securing a medical pension to ensure an income until he was eligible to draw his normal pension, further demonstrating his intention to sever his employment.

[92] Essentially, the grievor argued that, but for the fact that the employer intended to terminate him for incapacity, he would not have retired for medical reasons. Retirement is a unilateral severance of the employment relationship initiated by an employee. In my opinion, it is a voluntary termination of employment, envisioned as follows by section 63 of the *PSEA*:

> ***63.*** *An employee may resign from the public service by giving the deputy head notice in writing of his or her intention to resign, and the employee ceases to be an employee on the date specified by the deputy head in writing on accepting the resignation, regardless of the date of acceptance.*

[93] Section 63 makes it clear that the consequence of a resignation is that an employee ceases to be an employee on the date that the deputy head accepts the resignation in writing. Therefore, the consequences of a resignation that is accepted by the deputy head are the same as the consequences of any other termination under the *PSEA*, once the individual ceases to be an employee.

[94] Section 211 of the *Act* specifically denies me jurisdiction over any termination of employment under the *PSEA*. Accepting the grievor's resignation and application for medical retirement was a function of the deputy head's authority under section 63 of the *PSEA*, which is not subject to my review. Both the grievances pertain to the

grievor's medical retirement. Neither was initiated after an alleged failure to accommodate the grievor in his request for a continued leave without pay.

[95] To come within the scope of my jurisdiction, the grievor had to convince me that this matter falls under paragraph 209(1)(*a*) or under subparagraph 209(1)(*c*)(*i*) of the *Act* and not the *PSEA.* As I have found that a medical retirement is a termination that is excluded under section 211 of the *Act,* I have no jurisdiction under subparagraph 209(1)(*c*)(*i*). In addition, I have no jurisdiction in relation to a violation of the collective agreement under paragraph 209(1)(*a*) of the *Act.* The grievances allege that the grievor was forced to retire, and yet, he does not seek any remedy other than reinstatement, in other words that I allow him to retract his resignation. He did not request accommodation or damages under the *CHRA*, both of which were argued at the hearing. It is clear that the alleged discrimination is inextricably linked to the resignation and not the employer's refusal to accommodate him, as the grievor argued. Under the *CHRA*, one can also ask for reinstatement as a remedy. The remedies of the *Act* are also available. This is further indication of the true nature of the grievances before me.

[96] I find it noteworthy that the grievor filed his grievances one month after his resignation and that they were drafted by his union representative, who was an experienced labour relations advisor. It was too late at the hearing to argue that the forced resignation is not the subject of the grievances but rather how the employer treated the grievor in the years leading up to his decision to retire for medical reasons. The grievor could not change the pith and substance of his grievances by arguing that the employer has failed to accommodate him and that he is entitled to damages under the *CHRA* at the hearing. The crux of his grievances is that the grievor terminated his own employment by retiring for medical reasons.

[97] The grievances are focused on the resignation and the grievor's unhappiness with ultimately having to make the decision to medically resign, not on the events that led to it in relation to the allegation that the employer failed to meet its duty to accommodate the grievor. The discussion of these events is secondary to the central focus of the grievances. At the hearing, his representative referred repeatedly to the fact that the grievances are focused on how the resignation occurred. While the grievances identify the issues that led to the grievor asking for medical retirement and the grievor's disappointment that he could no longer be kept on LWOP, this is not

sufficient to alter the nature of his grievances. In addition, as noted above, the grievor had an experienced union representative assisting him, and he could have brought a grievance as to the duty to accommodate on his behalf, but he did not do so. As I have determined that the employer did not terminate the grievor, but rather, the grievor voluntarily severed his employment relationship through medical retirement, the allegations of discrimination are also beyond my jurisdiction as I am statute barred under section 211 of the *Act* from dealing with matters arising under section 63 of the *PSEA*.

[98] The grievor also argued that the employer was in violation of the *CHRA* by going through a list of persons who were on LWOP. Its action was a violation of article 19 of the collective agreement and was discriminatory, contrary to section 7 of the *CHRA*. I disagree. In the letter sent to the grievor on October 27, 2005, Mr. Repentigny did not close the door to further discussions on the possibility that the grievor return to work or the possibility of examining other options. In addition, the situation differs from the situation in *Sketchley.* The facts before me make it clear that the employer did not adopt a mechanical approach here. The employer made several efforts to explore options with the grievor. Furthermore, when the employer initiated its contact with the grievor, the grievor had already been absent for approximately six years and when the grievor submitted his medical resignation, an additional four years had passed.

[99] For all of these reasons, although some of the language in the grievance refers to undue hardship and discrimination, I find that the pith and substance of both of these grievances relates to the grievor's medical retirement and are not within my jurisdiction.

[100] Out of an abundance of caution, although neither party made submissions pertaining to a sham or a camouflage, I find that there was no evidence led which indicated even indirectly that the employer had perpetrated a sham or camouflage on the grievor in order to secure his resignation. For this reason as well, there is no jurisdiction in relation to either of the two grievances before me.

[101] To elaborate, both the grievance under paragraph 209(1)(*a*) of the *Act* and that under subparagraph 209(1)(*c*)(*i*) pertain to decision of the grievor to retire for medical reasons. The grievance under paragraph 209(1)(*a*) is inextricably linked to that of an alleged forced or camouflaged termination under subparagraph 209(1)(*c*)(*i*). In either

case, if there is insufficient evidence to establish that the retirement is a sham or a camouflage, then I have no jurisdiction to hear the grievances.

[102] I heard substantial evidence on the accommodation process from both parties. Those efforts took place over an extended period of time and during that time, the grievor`s LWOP was extended. The grievor has failed to establish that there is a sham or camouflage in the manner in which the accommodation process occurred.

[103] The evidence that was led on behalf of the grievor was focused on the decision-making process that led to his resignation. He and his witness repeatedly stated that he did not want to resign but that he felt compelled to in the circumstances. I find that it was his decision. It was not forced on him, even though the employer believed it to be in his best interests. That appears to have been a reasonable conclusion given the grievor's absence from the workplace for 10 years and the medical information that he submitted that provided no clear indication of his abilities or any anticipated date of return and that declared him completely disabled before and at the time of his resignation.

[104] The employer's determination came after several efforts over several years to explore whether and how the grievor might be able to return to work. A July 25, 2008 Health Canada assessment changed an earlier recommendation for a graduated return to work because the Occupational Health Medical Officer was unable to obtain a consensus from the grievor's health care providers. On September 19, 2008, the grievor indicated that he wanted the *status quo* to continue. A subsequent medical report, dated October 23, 2008, indicated that the grievor's health was "significantly worse than it had been" when the medical doctor had been one of his treating doctors two years prior, that the grievor could not continue full time employment, and that the timing of a transplant was not predictable. The grievor also testified that from 2008 and 2010 he was not on a list for a transplant. I also note that on November 7, 2008, Mr. Spencer referred to the October 23, 2008 report and commented that the grievor's return to employment while awaiting a kidney transplant might undermine the grievor's health and reduce the time he can survive without a transplant; and that he could not recommend a graduated return in any capacity while the grievor awaited a transplant.

[105] Implicit in much of the jurisprudence submitted by the parties on the duty to accommodate is the principle that this duty is neither absolute, nor does it run indefinitely. An employer is entitled to organize its workplace. This includes that the employer be able to forecast its staffing needs, and assign its resources appropriately. A review of these needs is essentially what happened in this case and a decision was made relative to the ongoing employment of Mr. Mutart. Three options were proposed to him, all of which were acceptable to the employer.

[106] It is reasonable for an employer to ask for a prognosis to assist it in evaluating its workplace and resource assignments. As part of that process the employer must look at whether or not it is able to accommodate or continue to accommodate an employee who has been absent for a lengthy period. When the length of the leave becomes untenable is a matter of fact to be decided based on the facts of each case. In the case before me, the employer acted reasonably when faced with dealing with an employee who had been on a leave without pay for 10 years and had been awaiting a kidney transplant for 14 years at the time of the hearing. There were several attempts to accommodate the employee, some that seemed to come quite close to fruition and which considered in large part the individualized needs of the grievor in relation to a gradual return to work. It was the grievor who needed to postpone these possibilities indefinitely. Each postponement presented additional uncertainty as to Mr. Mutart's ability to ever return and if so how much longer the employer would have to wait. At the time of the hearing, there was still no possibility that he could return or any indication of when he might be able.

[107] The grievor referred to *Naccarato* and *Masonite* in support of his arguments on the duty to accommodate. In the Supreme Court of Canada's decision in *Hydro-Quebec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d`Hydro-Québec* section locale (SCFP-FTQ), 2008 SCC, the Court clearly noted that if the characteristics of an illness are such that the proper operation of the business is hampered excessively or an employee with such an illness remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate him or her, the employer will have satisfied the test (at para 18).

[108] In *McGill,* the Supreme Court of Canada canvassed negotiated LWOP clauses. Although the grievor's case is not about negotiated LWOP clauses, some of the observations of the Court bear noting because the issue before the Court was an

automatic termination clause of **only** three year`s duration. After an individualized and contextual examination, that clause was found to be reasonable by all of the Court. The majority decision found that undue hardship resulting from the employee's absence must be assessed globally starting from the beginning of the absence, not from the expiry of the three-year period. Finding that that particular clause constituted a reasonable accommodation, the majority also concluded with an observation that the duty to accommodate is neither absolute nor unlimited. The employee has a role to play in the attempt to arrive at a reasonable compromise. The minority decision found that the clause itself was not discriminatory, and that therefore, an analysis of the duty to accommodate was not necessary. The minority noted that the three year clause did not target individuals unfairly or arbitrarily because they were disabled and that the clause balanced the legitimate expectations of both the employer and the employee. The minority also stated that there is nothing inherently discriminatory in an automatic termination clause of a reasonable length of time, especially if the resulting protection is significantly longer than the applicable employment standards legislation. I find that, in the present case, there is sufficient evidence to support the argument that the delay of 10 years before the employer ultimately required the grievor to choose one of the options was not at all unreasonable.

[109] Given all the testimony and documentary evidence before me, and the argument heard on the preliminary objection, I conclude that I am without jurisdiction, as the grievor's termination of employment falls within the provisions of the *PSEA*, and the grievor offered no argument or evidence that the employer perpetrated a fraud, a sham or camouflage or that it acted in bad faith.

[110] As is the case in many Board hearings, evidence which is led to support the jurisdictional arguments is synonymous with the evidence led on the merits. If the adjudicator determines that he or she has jurisdiction over the matters raised by the grievor, that same evidence is evaluated on the merits of the grievance referred to adjudication. The evidence and argument pertaining to jurisdiction that was advanced by both parties in this case overlaps with the key question on the merits: whether or not the employer satisfied the duty to accommodate the grievor**.** I also find that even if I had jurisdiction over this matter, based on the facts of this case and submissions made on discrimination and the duty to accommodate, the employer had accommodated the grievor to the point of undue hardship.

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

*(The Order appears on the next page)*

## VI. Order

[112] The employer's preliminary objection to jurisdiction is upheld.

[113] The grievances are dismissed.

August 1, 2013.

**Margaret T.A. Shannon,**
**Adjudicator**