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Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

YOLANDE MONGEON

Grievor

and

TREASURY BOARD
(Department of Public Works and Government Services)

Employer

Indexed as
Mongeon v. Treasury Board (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: Amarkai Laryea, Public Service Alliance of Canada

For the Employer: Magdalena Persoiu, counsel

Heard at Moncton, New Brunswick,
March 13 and 14, 2014.

I. Individual grievances referred to adjudication

[1] Yolande Mongeon ("the grievor") was employed by Public Works and Government Services Canada (PWGSC or "the employer") as a CR-03 at its offices in Shediac, New Brunswick. The grievor grieved the employer's denial of her request for injury-on-duty leave with pay, contrary to articles 19 and 37 of the collective agreement between the Treasury Board and the Public Service Alliance of Canada ("the bargaining agent") for the Program and Administrative Services Group (All Employees); expiry date, June 20, 2011 ("the collective agreement"). As a result of the employer's violation of the collective agreement, the grievor alleged she was forced to retire. She alleged that her forced retirement constituted discrimination based on age, contrary to the *Canadian Human Rights Act* (R.S.C. 1985, c. H-6; "*CHRA*").

II. Summary of the evidence

[2] According to the grievor, the main issue is whether the employer's denial of her request for leave under article 37 of the collective agreement was reasonable. While initially intending to pursue an allegation that the employer violated article 19 ("No Discrimination"), the grievor's representative advised the Public Service Labour Relations Board ("the Board") at the hearing that that grievance was dropped, as was any argument related to article 19 in the remaining grievance.

[3] On the other hand, the employer raised two preliminary objections to my jurisdiction, the first being that the matter was *res judicata* (already decided) as the Canadian Human Rights Commission (CHRC) had already dealt with the allegation of discrimination and dismissed it. A judicial review of the CHRC's decision was unsuccessful. The employer stated that this adjudication was a collateral attack to raise the same issues before another tribunal. The second basis of the employer's preliminary objection was that the grievor has retired pursuant to the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "*PSEA*"). This Board has no jurisdiction over matters arising out of the *PSEA,* pursuant to section 211 of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*").

[4] The parties submitted an agreed upon statement of facts at the outset of the hearing (Exhibit 6), which reads as follows:

> 1. *The grievor, Ms. Yolande Mongeon worked for Public Works and Government Services Canada in Shediac, New*

Brunswick. Her position title was Operational Support Clerk and her classification group and level was CR-03.

2. *Ms. Mongeon occupied the position since February 3, 2003 on term contracts and became an indeterminate employee effective February 3, 2006. Her work description as of December 6, 2004 is provided. (exhibit 8 and exhibit 9)*

3. *The parties are bound by the terms and conditions of the collective agreement between the Public Service Alliance of Canada and Treasury Board (Program and Administrative Services) – expiring June 20, 2011.*

4. *On June 20, 2006, Ms. Mongeon was injured in the workplace and uses this date for her claim number 1210592 to the Workplace Health, Safety and Compensation Commission of New Brunswick (WHSCC). The initial injury occurred on or about May 29, 2006. (exhibit 10)*

5. *Claim number 1210592 is accepted on February 20, 2008 by WHSCC. The claim is accepted based on the May 29, 2006 injury. The period covered by the claim is October 2, 2006 to January 2, 2007. The WHSCC asserts that no loss of earnings benefits will be issued because the Employer states that Ms. Mongeon has continued to receive her regular salary. (exhibit 11)*

6. *Ms. Mongeon is off work for periods between October 2, 2006 and January 2, 2007. The Employer converts all sick leaves taken by Ms. Mongeon during this period to injury on duty leave. (exhibit 7 tab 27 and exhibit 8)*

7. *On October 26, 2007, Ms. Suzanne Auffrey (HR Consultant from PWGSC) sends a letter to Health Canada requesting a fitness to work evaluation for Ms. Mongeon. (exhibit 12)*

8. *In December 2007 Ms. Mongeon is sent to Health Canada. (exhibit 7 tab 3)*

9. *On January 14, 2008, Dr. Karen MacDonald sends a letter to Ms. Suzanne Auffrey regarding interim limitations for Ms. Mongeon while she is waiting for a functional capacity evaluation (FCE). (Exhibit 7 tab 1)*

10. *January 15, 2008 is the established reoccurrence date for Ms. Mongeon's injury. Her claim for compensation benefits is accepted by WHSCC effective from this date. (exhibit 7 tab 4)*

11. *On February 27, 2008, Dr. Karen MacDonald sends a letter to Ms. Suzanne Auffrey outlining the functional limitations for Ms. Mongeon following a FCE. (exhibit 7 tab 2)*

12. *From April 23, 2008, Ms. Mongeon is off work again and does not return to her full duties. She provides the Employer medical notes justifying her absences. (exhibit 7 tab 26)*

13. *On July 9, 2008 Ms. Suzanne Auffrey sends a letter to Health Canada requesting another fitness to work evaluation given that Ms. Mongeon has been off since April 23, 2008. (exhibit 7 tab 3)*

14. *On October 21, 2008 there is a mediated settlement between Ms. Mongeon and the Employer.*

15. *On September 8, 2008, Ms. Ginette Léger-Murray confirms in an email to Lynn Hebert that Ms. Mongeon will receive injury-on-duty leave from January 15, 2008 to August 19, 2008. (exhibit 13)*

16. *On October 2, 2008, Dr. Karen MacDonald sends a letter to Ms. Suzanne Auffrey informing her that Ms. Mongeon's limitations remain unchanged from February 27, 2008 and that the resolution of the workplace conflict should be undertaken before Ms. Mongeon returns to work. (exhibit 7 tab 5)*

17. *On January 20, 2009, Ms. Mongeon is advised by Worksafe New Brunswick that her eligibility for regular loss of earning benefits will cease on January 15, 2010. (exhibit 7 tab 6)*

18. *On August 24, 2009, Ms. Mongeon sends a letter to the Manager of Human Resources at PWGSG requesting her entitlement under the provisions of the collective agreement. (exhibit 14)*

19. *On September 3, 2009 Ms. Ginette Couturier, Human Resource Manager (Shediac) sends a letter answering Ms. Mongeon's request of August 24, 2009. Ms. Couturier states in her response that "Management feels that they have granted you a reasonable amount of injury-on-duty leave, which is why you are receiving benefits directly from WHSCC. No further injury on duty leave will be provided to you." (exhibit 7 tab 7)*

20. *On January 14, 2010, Worksafe NB sends a letter to Ms. Mongeon confirming that her benefits will cease on January 15, 2010. (exhibit 7 tab 8)*

21. *On January 15, 2010 benefits from Worksafe NB cease for Ms. Mongeon.*

22. *On January 25, 2010, Worksafe NB informs the Employer that Ms. Mongeon's claim will be finalled effective January 15, 2010. (exhibit 15).*

23. *On January 28, 2010, Jennifer Touhey (Senior Labour Relations Consultant) sends an email to Matt Doherty regarding Ms. Mongeon's injury on duty leave request. (exhibit 7 tab 9).*

24. *On January 29, 2010, Ginette Léger-Murray (Compensation Team Leader) sends a letter to Ms. Mongeon informing her of remaining vacation and sick leave credits and her ability to apply for EI sick benefits. (exhibit 7 tab 10).*

25. *From January 18, 2010 to March 31, 2010, Ms. Mongeon uses a combination of vacation leave and sick leave. However, once the WHSCC accepted her appeal and found that she is entitled to WHSCC benefits from January 15, 2010 to August 19, 2010, the employer credited Ms. Mongeon the vacation leave and sick leave taken for that period. (see #28 below) (exhibit 8 and exhibit 16).*

26. *On March 19, 2010 Ginette Léger-Murray (Compensation Team Leader) sends a letter to Ms. Mongeon following news of Ms. Mongeon going on sick leave without pay effective April 1, 2010. (exhibit 7 tab 11).*

27. *On March 30, 2010 Worksafe NB sends a letter informing Mr. Doherty that the January 15, 2010 date to cease benefits for Ms. Mongeon is the correct date. (exhibit 7 tab 12).*

28. *Ms. Mongeon appeals this decision and her appeal is accepted and Ms. Mongeon is granted further WHSCC benefits from January 15, 2010 to August 19, 2010 (exhibit 7 tab 23).*

29. *From April 1, 2010 to July 15, 2010, Ms. Mongeon goes on EI sickness benefits. Following the appeal before WHSCC she was granted WHSCC benefits for that period (see #28 above).*

30. *On June 2, 2010, Ms. Mongeon files grievance ATL-02-008.*

31. *From July 15, 2010, Ms. Mongeon is on sick leave without pay. However, once the WHSCC appeal is granted,*

Ms. Mongeon was in receipt of WHSCC benefits from January 15, 2010 to August 19, 2010.

32. *On October 12, 2010, the Canadian Human Rights Commission (CHRC) receives a complaint from Ms. Mongeon. (exhibit 7 tab 18).*

33. *On October 26, 2010, Ms. Mongeon sends a letter to Rona Ambrose and copies Director General, David Stevens, explaining her reasons for retiring. (exhibit 7 tab 13).*

34. *On October 29, 2010 Ms. Mongeon files grievance ATL-10-023.*

35. *Ms. Mongeon's resignation is effective on Oct 30, 2010.*

36. *On November 29, 2010, Worksafe NB provides a letter to Ms. Mongeon and the Employer stating that there is no evidence of permanent physical impairment. (exhibit 17).*

37. *December 3, 2010 Renée Jolicoeur sends a letter to Ms. Mongeon requesting confirmation of her intention to resign. (exhibit 7 tab 16).*

38. *On December 16, 2010, David Stevens accepts Ms. Mongeon's resignation. (exhibit 7 tab 17).*

39. *On June 23, 2011 the Commission issues their investigation report. (exhibit 7 tab 20).*

40. *On October 6, 2011 Ms. Mongeon receives notice that her CHRC complaint is dismissed and the file is closed.*

41. *On February 1, 2012, the Ms. Renée Jolicoeur issues the final level response denying grievances ATL-02-008 and ATL-02-023.*

[*Sic* throughout]

[5] The grievor was born in 1944. While employed by the PWGSC, she suffered from musculo-skeletal sprains of the back, a bone in her lower left leg twisted inward and three discs in her spine bulged. On August 22, 2007, she was diagnosed with scoliosis, a locked pelvis and impinged nerves in her lower back due to the repetitive work she performed pushing carts weighing more than 122 pounds over carpet. She received workers' compensation benefits (WCBs) for these injuries. On January 10, 2010, Worksafe New Brunswick (WHSCC) advised her that her benefits would end on January 15, 2010 (Exhibit 15). This date was later revised to August 15, 2010. According to their rules and given her age at the time of the claim, she was entitled to 24 months of benefits.

[6] Ms. Mongeon feared for her ongoing income once her claim was finalized and began exploring options for her financial well-being in the event that she were not able to return to work. After her WCBs were terminated prematurely, Ms. Mongeon was required to use all her accumulated sick leave and vacation, following which she claimed employment insurance benefits and went on leave without pay. She was financially destitute. She appealed the WHSCC's decision concerning her entitlements and was successful in challenging the date upon which her WCBs ceased. However, it only delayed the inevitable termination of her benefits.

[7] From January 2010 to March 2010, Ms. Mongeon used a combination of accumulated vacation and paid sick leave. She then went on employment insurance, followed, on July 15, 2010, by leave without pay, which continued to her retirement on October 30, 2010. In December 2011, Ms. Mongeon's WCBs appeal was allowed, and she was forced to repay the amount she had received from employment insurance. In response to Ms. Mongeon's successful appeal, the employer reimbursed her the amount of vacation and sick leave she had been required to use. This resulted in no extra payment to Ms. Mongeon as the credited vacation and sick leave were subsequently deducted to cover a period of advanced credits.

[8] In October 2010, Ms. Mongeon had seven years of pensionable service with the employer. She was entitled to $367 per month gross from her public service superannuation pension. Her only other sources of income at the time were her Canada Pension Plan benefits, her Old Age Security benefit and a small pension entitlement from United States Social Security as a result of having worked in the United States in the airline industry.

[9] Ms. Mongeon never intended to retire in October 2010. Her plan was to advise her employer on September 30, 2009, of her intention to take advantage of a program that allowed her to reduce her hours to part-time while contributing full-time to her pension plan ("pre-retirement leave"). Following this plan, she would have retired on September 30, 2011. Management knew well of her intentions as she had posted a calendar on the wall in the photocopy room at her workplace with September 30, 2011, marked as her retirement date. In response to an email from her employer asking when employees intended to retire, she provided notice of her intention to retire on November 30, 2011. However, given her dire financial straits, she had no alternative but to retire in October 2010. On cross-examination, Ms. Mongeon testified that she

advised her employer in 2007 of her intent to take pre-retirement leave in September 2009 and to retire in September 2011 (Exhibit 18).

[10] In order to bridge the period from the elimination of her WCB benefits to her anticipated retirement in September 2011, Ms. Mongeon requested injury-on-duty leave under article 37 of the collective agreement. The employer denied her request and proposed two options: retirement or a return to work. She submitted her letter of resignation to the Minister of the PWGSC on October 26, 2010, to take effect immediately (Exhibit 7, tab 13). She then met with employer representatives at her home to discuss her options. They helped her fill out the appropriate forms.

[11] The grievor received two letters from the employer affirming that she was not required to retire. Returning to work was still an option if she submitted medical clearance from her physician (Exhibit 7, tabs 14 and 15). In reality, returning to work was not an option for her unless certain conditions were met, including that she be provided with an up-to-date job description, that she undergo a fitness-to-work evaluation and that she be provided alternate work that met her restrictions. Had those conditions been met, she would have been able to return to work by November 30, 2011, although that possibility was not communicated to the employer. In the absence of these conditions being met, her doctor continued to place her on sick leave.

[12] The grievor testified that everything she encountered in dealing with her employer concerning these matters exacerbated her condition. She had received 160 days of injury-on-duty leave between 2006 and 2010. According to her, the employer knew the situation that she faced when she applied for injury-on-duty leave in January 2010: she was unable to return to work and was in destitute financial constraints. The employer was heartless and unreasonable by denying her request.

[13] Jennifer Touhey testified on behalf of the employer. She has been a senior labour relations advisor with the PWGSC since 2004 at its headquarters offices. Her career in labour relations began in 2000. Her role is to provide management with guidance on collective agreement interpretations and employee entitlements and to assist management with the grievance process and complaints. Somewhere around January 2007, Ms. Touhey became involved with the grievor's file. She provided support to the regional labour relations representative on the employer's duty to accommodate. Once the case became complicated, she assumed the lead advisory role.

[14] On January 14, 2008, Health Canada advised the employer that the grievor would be considered fit to return to work pending a specialist's assessment and a functional capacity evaluation (Exhibit 7, tab 1). On February 28, 2008, the employer was advised of the results of the functional capacity evaluation (Exhibit 7, tab 2). At this point, the grievor was working full-time. At Health Canada's recommendation, her workweek was shortened to four days.

[15] Exhibit 8 is a history of the grievor's time with the employer in its Shediac office. In June 2006, the grievor filed a workers' compensation claim. Between June and December 2006, the grievor used sick leave and vacation leave to cover the days she was unable to work due to her injury. Once the WCBs claim was accepted, all lost time related to the injury was converted to injury-on-duty leave, and the vacation and sick leave that was used was refunded. Throughout the history of her injury, the grievor has used injury-on-duty leave at various times.

[16] In July 2008, the employer sought Health Canada's assistance to have a fitness-to-work evaluation (Exhibit 7, tab 3) completed to assess the grievor's abilities. She had been off work at that point for quite some time, and the employer needed information about what accommodation would be required when she returned to the workplace. Health Canada's response (Exhibit 7, tab 5) was that the limitations had not changed and that they should be considered permanent.

[17] In January 2008, the grievor suffered a reoccurrence of her 2006 injury, for which she used her accumulated sick leave as well as sick leave without pay. Her claim was accepted in August 2008 (Exhibit 7, tab 4), and she was refunded all the paid leave she had used. The employer changed the recorded 130 days of leave to injury on-duty leave.

[18] In August 2009, the grievor, through her representative, Matt Doherty, contacted the employer (Exhibit 14) and asked about her eligibility for certain benefits. At the time, the grievor was 65 and was facing an end to her WCBs in December 2009. In particular, Mr. Doherty asked about the grievor's entitlement to injury-on-duty leave in the event that she were unable to return to work in January 2010. In response to this query, Ms. Mongeon was advised that her request for injury-on-duty leave was denied as she had already used up her entitlement to it (Exhibit 7, tab 7). The employer was of the opinion that she had been granted a reasonable amount of injury-on-duty leave,

approximately 160 days, when the Treasury Board policy guideline (Exhibit 7, tab 28) allowed for 130 days.

[19] Since her WCBs ended and she had already maxed out her injury-on-duty leave, the only thing left for Ms. Mongeon to use was sick leave, vacation and compensatory leave. Ms. Touhey responded to Mr. Doherty to this effect via email on January 28, 2010 (Exhibit 7, tab 9).

[20] The Treasury Board *Injury-on-Duty Leave* policy ("the policy") establishes a 130-day limit on advancing such leave, which has the purpose of ensuring that no salary interruption occurs while the WHSCC decides whether to accept a WCBs claim. After 130 days, the Disability Management Group must review the case. If the employee is likely to return in the foreseeable future, more injury-on-duty leave is granted. This leave is paid at 100% of the employee's salary. Additional injury-on-duty leave is not extended after the WCBs claim is closed. The policy is applied to all employees, regardless of age. The factors considered in determining if any additional injury-on-duty leave is advanced include the collective agreement language and the number of days used to date and whether the WHSCC has closed the claim.

[21] According to Ms. Touhey, Ms. Mongeon wanted to use injury-on-duty leave to cover the period between the closing of her WCBs claim and her desired retirement date. Since her claim was closed, there was no mechanism through which to advance her additional injury-on-duty leave. Injury-on-duty leave was never intended to provide an employee with indefinite paid leave. Her WCBs claim was not closed because she was fit to return to work. It was closed because she had reached the maximum entitlement due her under the WCBs legislation. Ms. Mongeon was 63 when she filed her claim, which meant she was entitled to 24 months of WCBs.

[22] The employer did not consider the reason for the cessation of the grievor's WCBs in making its decision. Rather, it looked at the intent of injury-on-duty leave, which is not to be used to give an employee paid leave for an extended period. Article 37 of the collective agreement does not place a cap on the amount of injury-on-duty leave available to an employee. When Ms. Mongeon was exploring options to continue her employment income, a letter was sent to her outlining her options, which did not include injury-on-duty leave (Exhibit 7, tab 10).

[23] Ms. Mongeon followed her resignation with this grievance. A bargaining agent representative contacted Ms. Touhey on November 2, 2010, indicating that Ms. Mongeon was fit to return to work and that she had been forced to retire in order to secure funds on which to live. Ms. Touhey indicated to the representative that Ms. Mongeon voluntarily undertook steps to determine her entitlements if she retired and then submitted her letter of resignation. At no time did she indicate that she was fit to return to work (Exhibit 7, tab 14). Regardless, the employer was open to meeting with the grievor and reviewing the options available. The employer was willing to maintain her on unpaid sick leave while waiting for the fitness-to-work evaluation to be completed, which would have maintained her employee status. She was not interested; she was looking for paid leave.

[24] The employer contacted Ms. Mongeon in December 2010 to verify her true intention concerning retirement (Exhibit 7, tab 16). On December 14, 2010, the grievor emailed the employer, indicating the she was reigning under protest and that her grievance had been referred to adjudication. She also indicated that she had filed two complaints with the CHRC, alleging violations of sections 7 and 10 of the *CHRA* (Exhibit 7, tab 17).

[25] David Stevens has been Director General of the Public Service Pension Centre in Shediac since July 2009. He provides the overall direction to its 700 employees. He responded to the grievor's grievance at the third level. Prior to July 2009, he was Director of Pension Operations in Shediac. In this role, he approved 176 days of injury-on-duty leave for the grievor.

[26] When the grievor submitted her request for additional injury-on-duty leave, she had already passed the 130-day threshold for review. Mr. Stevens consulted the employer's labour relations branch and its workers' compensation consultants in Halifax and the Office of Conflict Management. Mr. Stevens was advised that Mr. Mongeon's WCBs claim had been closed.

[27] The purpose of injury-on-duty leave is to bridge an employee from the time of the injury to his or her receipt of WCBs. The grievor had already received more injury on-duty leave than the standard amount provided to employees across the public service. Nothing indicated that she would be able to return to work in the foreseeable future. Had there been an indication that she was fit to work, she would have been welcomed back to the workplace. Leave without pay and retirement were the

options offered to her in response to her request for injury-on-duty leave. Ms. Mongeon did not view leave without pay as an option, given her financial situation. She indicated that she felt forced to retire, but retirement was only one of the options that the employer put to her. The employer suggested she meet with its compensation specialists to ensure that she had all the relevant information before making a decision (Exhibit 7, tab 14). Once Ms. Mongeon submitted her resignation, Mr. Stevens consulted with the labour relations advisor to ensure that Ms. Mongeon had been fully counselled on her options and was fully aware of what she was doing (Exhibit 7, tab 17).

[28] Mr. Stevens accepted the grievor's resignation on December 16, 2010. He had the delegated authority to accept resignations and was comfortable that the decision was just and fair and that it took into account all the circumstances, the intent of article 37 of the collective agreement and the treatment of other employees.

III. Summary of the arguments

A. For the grievor

[29] The grievor was injured at work on May 29, 2006. Her WCBs claim (Exhibit 10) was eventually accepted on February 20, 2008 (Exhibit 11). The period from October 2006 to January 2007 was accepted as part of the claim. However, she received no WCBs for that period as she had received injury-on-duty leave for it. Any sick leave she had used for the period during which she awaited the approval of her claim was converted to injury-on-duty leave as well. In 2007, the grievor returned to work. In late 2007 or early 2008, she was sent for a functional capacity evaluation, which resulted in the WHSCC accepting her claim for WCBs retroactive to January 15, 2008. Again, no benefits were paid as the sick leave used was converted to injury-on-duty leave (Exhibit 8). Between February 2008 and April 23, 2008, the grievor missed many days of work due to her injury, for which she used sick leave. April 23, 2008, is a key date since after that, the grievor never returned to the workplace. She began receiving WCBs payments directly on August 20, 2008. All the sick leave she used between June 20, 2006, and August 19, 2008, was converted to injury-on-duty leave.

[30] On January 20, 2009, the grievor was advised that her WCBs entitlement would end on January 15, 2010, because she was over age 63 when her claim was accepted. Employees who are 63 or older at the time their WCBs claims are accepted are entitled

to WCBs for only 24 months after they begin to receive them. Ms. Mongeon wanted to know what would happen if she were still unable to work due to her workplace injury in 2010, so she wrote a letter to her employer on August 24, 2009, asking what her options were (Exhibit 14). That was the first time she officially asked whether she was entitled to injury-on-duty leave after her WCBs expired. It is important to note that her WCBs expired and that it was not because she was no longer injured.

[31] In September 2009, the employer responded that injury-on-duty leave would not be granted as Ms. Mongeon had already received it and was receiving direct payments from the WHSCC. In January 2010 (Exhibit 7, tab 9), the grievor again asked about her entitlement to injury-on-duty leave at the expiry of her WCBs entitlements. Again, she was denied. However, this time, the denial was based on the amount she had already used and on the lack of expectation that she would return to work in the foreseeable future, despite the fact that the employer was aware that she would be off work until November 2010 (Exhibit 7, tab 26). The employer's decision focused on the amount of injury-on-duty leave already advanced and not on whether she would be able to return to work.

[32] Ms. Mongeon's only income without her WCBs and without injury-on-duty leave was approximately $1060 gross per month or $12 720 per year, as compared to her CR-03 yearly salary of $38 000 to $40 000. From this income, she had to pay her rent, her utilities and her food. She sought out scenarios by which she could continue to be paid (Exhibit 7, tab 10). Given her financial situation, she followed the employer's suggestion that she use her sick leave and vacation, following which she would go on leave without pay before applying for employment insurance benefits. While on leave without pay, Ms. Mongeon resigned (Exhibit 7, tab 13). She applied for medical retirement due to her financial hardship. It is important to note that she did not retire with a full pension. She had only seven years of pensionable service, and the meager pension she would receive would be better than no income.

[33] Article 37 of the collective agreement and the policy both require a valid claim under the *Government Employees Compensation Act* (R.S.C. 1985, c. G-5). The payment of the benefits under article 37 is mandatory, as follows:

INJURY-ON-DUTY LEAVE

> *37.01 An employee* ***shall be granted*** *injury-on-duty leave with pay for such period as may be reasonably determined by the Employer when a claim has been made pursuant to the* Government Employees Compensation Act *and a Workers' Compensation authority has notified the Employer that it has certified that the employee is unable to work because of:*
>
> *(a) personal injury accidentally received in the performance of his or her duties and not caused by the employee's willful misconduct,*
>
> *or*
>
> *(b) an industrial illness or a disease arising out of and in the course of the employee's employment,*
>
> *if the employee agrees to remit to the Receiver General for Canada any amount received by him or her in compensation for loss of pay resulting from or in respect of such injury, illness or disease, provided, however, that such amount does not stem from a personal disability policy for which the employee or the employee's agent has paid the premium.*
>
> [Emphasis added]

[34] If the intention of article 37 of the collective agreement is as Mr. Stevens testified, which is to bridge an employee until the WCBs payments start, then the article would have been worded differently. It could have been drafted to specifically limit its application to just the type of use he described. Rather, the bargaining agent submitted that its purpose is to provide some kind of income security to injured workers. The policy supports that interpretation of the article and not that of Mr. Stevens. The 130 days mentioned in the policy is not a cap but, rather, a trigger. It triggers a review of the employee's file. Nothing in the policy prevents the employer from advancing further injury-on-duty leave. The policy requires the employer to ask itself the question of whether there are reasons to continue paying injury-on-duty leave to an employee. The purpose is not solely to bridge an employee to the first WCBs payment; it is to provide income security to an injured worker, whether WCBs or paid leave.

[35] The employer's decision was communicated to the grievor on September 3, 2009, and again on January 28, 2010 (Exhibit 7, tabs 7 and 9). The responses to the grievance (Exhibit 4) reiterate the same conclusion. The response to

the grievor's request for additional injury-on-duty leave is consistent in that it states that she had already received a sufficient amount, regardless of her financial situation. Ms. Touhey testified that the grievor had reached her threshold; therefore, the employer could do nothing more for her.

[36] In coming to this conclusion, Ms. Touhey reviewed the amount of injury-on-duty leave the grievor had already received and consulted the collective agreement. She did not take into account whether the grievor's claim was closed or why it was closed. It is clear that the grievor's disability continued beyond the termination of her WCBs. The grievor's benefits ceased because of her age. The employer knew she was still an injured worker. This should have been considered when determining whether to advance her further injury-on-duty leave. The employer should have asked itself whether the situation warranted paying additional injury-on-duty leave.

[37] The collective agreement and the case law do not support the employer's position. According to the decision in *Vaughn v. Canadian Food Inspection Agency*, 2010 PSLRB 74, an adjudicator must focus on how the employer made its determination and on whether it failed to consider a significant factor. In the exercise of the employer's discretion to determine whether to advance more injury-on-duty leave, the process for making the decision cannot be arbitrary. An important aspect of exercising the employer's discretion is that it must take into account the circumstances in which the application for leave was made. It must consider all the factors relevant to the employee, and the decision must be reasonable in that context (*King v. Canadian Food Inspection Agency,* 2006 PSLRB 37, and *Sabiston v. Treasury Board (Department of National Defence)*, PSSRB File No. 166-02-10395 (19820105)).

[38] One of the factors that the employer should have considered was the grievor's access to other income (see *Labadie v. Treasury Board (Correctional Service of Canada),* 2006 PSLRB 90). Unlike in *Colyer v. Treasury Board (National Defence)*, PSSRB File No. 166-02-16309 (19871105), the grievor in this case had no alternate source of income, which was a significant factor that the employer should have considered.

[39] The employer could have approved injury-on-duty leave for a period that was reasonable, in its opinion (*Demers v. Treasury Board (Solicitor General Canada)*, PSSRB File No. 166-02-15161 (19860616), and *Juteau v. Treasury Board (Solicitor General of Canada)*, PSSRB File No. 166-02-15113 (19851206)). Taking into account the

circumstances of this case, a decision based on the fact that Ms. Mongeon had already been awarded a period of injury-on-duty leave was not reasonable. In the decision-making process, significant emphasis was placed on the amount of injury on-duty leave she had already received. One significant factor that was not considered was why the WCBs entitlement ended.

[40] The purpose of article 37 of the collective agreement and the policy is to provide an injured worker income support, whether through the collective agreement or workers' compensation legislation. Mr. Stevens' view that injury-on-duty leave was meant to bridge employees until they receive WCBs had a significant influence on the decision-making process with respect to Ms. Mongeon's request. The employer did not consider the particular factors of Ms. Mongeon's case and give them appropriate weight in reaching its decision, which was an unreasonable use of its discretion.

[41] The system in place does not adequately address the realities of older workers in the workplace who suffer a workplace injury. However, article 37 of the collective agreement can help. When given its full and purposeful interpretation, article 37 would help employees avoid circumstances such as those faced by Ms. Mongeon. There was no evidence that the employer would have suffered undue hardship, financial or otherwise, had Ms. Mongeon been paid until her anticipated retirement date in 2011.

[42] According to *King*, the adjudicator can either determine the reasonable period of injury-on-duty leave to be advanced in the circumstances or remit the matter to the employer for a determination of the appropriate amount of time to advance the grievor. In this case, the first is preferable. The grievor submitted that an appropriate period of injury-on-duty leave would be equivalent to the amount of vacation leave she used immediately before her retirement, which amounted to 75 hours.

[43] The employer bore the burden of proof. Ms. Mongeon had medical notes that supported her leave from the workplace for specified periods. There was no evidence that she would not return to work. The employer's responses were predominantly based on the fact that in its opinion, she had already received enough injury-on-duty leave.

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

[44] The Board has no jurisdiction, since the grievor retired pursuant to the *PSEA*. Section 211 of the *Act* specifically denies the Board jurisdiction over matters covered by the *PSEA*. The Board considered its jurisdiction over retirement for medical reasons in *Mutart v. Deputy Head (Department of Public Works and Government Services)*, 2013 PSLRB 90, and at paragraph 87 held that "(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." Ms. Mongeon submitted her resignation on October 26, 2010. It was not accepted until December 16, 2010. During the intervening two-month period, Ms. Mongeon made no effort to retract her resignation. The employer took steps to ensure that she had all the necessary information she required before ceasing her employment. She had the benefit of her bargaining agent's advice as well as that of the employer's labour relations branch and her compensation analyst. She was given the option of leave without pay, but she insisted on her intention to retire. Therefore, the Board has no jurisdiction over the grievance in PSLRB File No. 566-02-6885.

[45] The allegations of discrimination in the grievances in PSLRB File Nos. 566-02-6884 and 6885 were also the subject of a complaint before the CHRC. Tabs 18 and 19 of Exhibit 7 are a clear acknowledgement that the issues in the grievances are the same as those that had been before the CHRC. The CHRC's report (Exhibit 7, tab 20) gave the parties the opportunity to comment on the report before the CHRC's decision was rendered (Exhibit 7, tabs 21 and 22). Subsequently, the CHRC considered additional information and issued a supplemental decision (Exhibit 7, tab 25). The grievor sought judicial review of the CHRC's decision without success (Exhibit 22). The two references to adjudication are a duplication of the complaints that were before the CHRC. No further consideration should be given as the matters are *res judicata* (see *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, and *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44).

[46] The grievor in the current case requested paid leave for an extended period. In 2009, she indicated her intention to retire in 2011. That is far longer than the 75 hours that the grievor's representative suggested would be reasonable in these circumstances. The employer was reasonable in its decision to deny the grievor's

request. Injury-on-duty leave is paid leave, and maintaining it for another year would have frustrated the essence of the employment contract. This accommodation constitutes undue hardship (*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).

[47] Article 37 of the collective agreement is clear and unambiguous. Two conditions must be met: the employee must be receiving WCBs, and the employer may determine what is appropriate and reasonable. To interpret this article broadly, as suggested by the grievor, would render it absurd. The grievor argued that once an employee ceases to qualify for WCBs, the employer should pay him or her for an extended period until he or she secures other income. In other words, the employer should pay the employee for not working. It is clearly the intent of the collective agreement and the policy to bridge employees until they begin to receive WCBs.

[48] The fact that the grievor had already received 160 days of injury-on-duty leave was only one factor considered. The other was that she could not return to work in the foreseeable future, which was discussed with the grievor and her representatives many times before November 2010. The employer demonstrated good faith by granting some leave under the article at issue, which is not intended to bridge an employee to retirement. The grievor received more than the 130 days mentioned in the policy to bridge her until she began to receive her WCBs. She received everything she was entitled to under the collective agreement. In fact, she received more than other injured workers. The employer met its duty to accommodate the grievor. There was no obligation to continue to pay her when there was no foreseeable likelihood of her returning to the workplace. She was offered leave without pay, which she refused. The employer did not terminate the employment relationship; she did. She had another option to secure an income, retirement, which she chose.

[49] There is no evidence that the employer's decision should be revisited. It was based on all the information available to it at the time. It was reasonable, given the circumstances.

IV. Reasons

[50] Since the grievor withdrew at the outset of argument the claim of discrimination, I am not required to deal with the preliminary objection based on the

res judicata argument. Although a portion of the CHRC report dealt with the refusal of injury-on-duty leave, it did so from a human rights perspective and not from the collective agreement leave provision perspective which the bargaining agent argued before me.

[51] However, the question of my jurisdiction based on the *PSEA* and the *Act* must be addressed. The employer referred me to the decision in *Mutart*. Unlike the case in *Mutart*, the grievor does not seek to rescind her resignation and did not cast her grievances in that fashion.

[52] The grievor alleged that the employer refused to grant her injury-on-duty leave, and as a result, she retired prematurely. Mr. Mutart was faced with two options: a no-fault termination of his employment, or a medical retirement. Either one would have resulted in the termination of his employment for reasons that might or might not have been beyond the Board's jurisdiction. On the other hand, a request for paid leave pursuant to an article of a collective agreement, as is the basis of Ms. Mongeon's grievances, is clearly within my jurisdiction. Therefore, I will deal with the question of whether the employer acted reasonably in refusing the request for additional leave under article 37 of the collective agreement.

[53] To be entitled to the benefit in article 37 of the collective agreement, an employee must have been certified as unable to work due to a workplace injury.

ARTICLE 37

INJURY-ON-DUTY LEAVE

> *37.01 An employee shall be granted injury-on-duty leave with pay for such period as may be reasonably determined by the Employer when a claim has been made pursuant to the Government Employees Compensation Act and a Workers' Compensation authority has notified the Employer that it has certified that the employee is unable to work because of:*
>
> *(a) personal injury accidentally received in the performance of his or her duties and not caused by the employee's willful misconduct,*
>
> *or*
>
> *(b) an industrial illness or a disease arising out of and in the course of the employee's employment,*

> *if the employee agrees to remit to the Receiver General for Canada any amount received by him or her in compensation for loss of pay resulting from or in respect of such injury, illness or disease, provided, however, that such amount does not stem from a personal disability policy for which the employee or the employee's agent has paid the premium.*
>
> (Emphasis added)

Until the time of the termination of her claim, Ms. Mongeon was a certified injured worker.

[54] In New Brunswick, wage loss benefits from the WHSCC cease when a worker turns 65. If the worker is 63 or older when his or her loss of earnings begins, the worker is entitled to receive benefits for a maximum of two years, as long as the worker is restricted by his or her injury from performing pre-accident work. At the completion of the two-year period, the worker is no longer a certified injured worker entitled to benefits under the New Brunswick provincial workers' compensation scheme, and the claim is closed. Contrary to the arguments put forward by the bargaining agent, the grievor was no longer certified as an injured worker within the province where she was employed. Consequently, she did not meet the prerequisites for entitlement to injury-on-duty leave as set out in article 37 of the collective agreement, and her grievance must fail on this point alone.

[55] However, I will continue with my analysis of the reasonableness of the employer's decision to deny the grievor additional injury-on-duty leave. Pursuant to *Sabiston*, in order to determine whether a period of injury-on duty leave was reasonable, an adjudicator must look at the factors considered by the employer in making that decision (at page 7). Many Board decisions have followed this approach. In *Vaughan*, at para 94, the adjudicator addressed what evidence was required to prove that the employer had not considered all significant factors and determined as follows:

> *94. . . . Were there evidence that the employer refused to consider information provided by the grievor at that meeting, before it or in its wake, then perhaps a case might have been made that the employer failed to consider some "significant factor." As it is, the grievor's suggestions that the employer did not consider his pension and benefits losses, the impact of taxation or the history of his transaction with Sun Life is entirely speculative. To prove that the employer acted unreasonably by ignoring those or other "significant factors" requires a factual foundation that the grievor provided that information to the employer or that it was otherwise*

> *available to the employer and that it was ignored or inappropriately discounted. . . .*

[56] The grievor in this case failed to prove on the balance of probabilities that the employer failed to consider some significant factor in deciding to deny her further injury-on-duty leave, thereby rendering its decision unreasonable. It is clear from the evidence that the employer took into consideration all the circumstances, including the impact on her pension, and that it did not take the decision to deny her the leave lightly.

[57] At the time that it was requested and throughout the grievance procedure, the grievor's request was not, as portrayed by the grievor's representative in argument, a request for an additional two weeks of leave. The request for leave that was considered by the employer was for a much longer period of approximately a year in order to bridge the grievor to her preferred retirement date. From Ms. Mongeon's testimony, she sought injury-on-duty leave to bridge her until her planned retirement date, a purpose for which the leave is not intended, as is evidenced by the collective agreement requirement that it is payable only to a worker who has a valid workers' compensation claim and has been certified as unable to work due to a workplace injury. Also, it appears that the bargaining agent's argument in favour of only 75 hours of leave runs counter to its claim that the clause in question provides a benefit designed to bridge employees to retirement.

[58] The grievor argued that the employer failed to take into account the financial hardship she faced as a result of the expiry of her WCBs claim. The employer has convinced me that due consideration was given to this matter as is evidenced by the delay in accepting the grievor's resignation and the additional effort made to ensure that she was aware of the consequences of her action of retiring rather than accepting leave without pay until her planned retirement date. The employer also made it clear that a position was available to her to which to return to work. However, the medical clearance to do so was not forthcoming.

[59] The grievor argued that her dire financial consequences warranted the additional leave if properly considered by the employer, similar to the case in *Labadie* (at para 24). The employer has discharged its burden of proof that all significant factors were considered. To be successful, the grievor had to prove that the employer did not consider this and other significant factors in denying her request. She did not.

The employer's evidence demonstrated that it conducted a thorough analysis of the situation surrounding the request and that it consulted several people before making its decision. Many factors were considered including, among other things, the far-reaching impact on the organization, the likelihood of the grievor's return in the near future and her status as an injured worker, the amount of injury-on-duty leave granted to her in the past, the length of the leave requested, and the purpose of article 37 of the collective agreement.

[60] The mere fact that the grievor disagreed with the decision to deny her further leave did not make the employer's decision unreasonable or arbitrary. Had there been medical evidence that the grievor would return to the workplace in the foreseeable future, perhaps it might have been made the employer's decision unreasonable, but that is speculation.

[61] I have not dealt with the question of accommodation as the issue only arises in the context of human rights and disability issues which issues were specifically withdrawn by the grievor's representative and furthermore no support was submitted for the contention that accommodation can mean leave without pay rather than modification of duties.

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

(The Order appears on the next page)

V. Order

[63] Grievance number 566-02-6885 is denied.

June 20, 2014.

Margaret T.A. Shannon,
adjudicator