Date: 20150529

File: 566-02-8294

Citation: 2015 PSLREB 50

Public Service Labour Relations Act Before an adjudicator

BETWEEN

HEATHER TIMMONS

Grievor

and

TREASURY BOARD
(Department of Citizenship and Immigration)

Employer

Indexed as
Timmons v. Treasury Board (Department of Citizenship and Immigration)

In the matter of an individual grievance referred to adjudication

Before: Augustus Richardson, adjudicator

For the Grievor: Douglas Hill, Public Service Alliance of Canada

For the Employer: Pierre-Marc Champagne, counsel

Heard at Sydney, Nova Scotia,
March 10, 2015.

I. Introduction

[1] The issue raised in this matter is whether the employer's failure to extend a time-limited acting position to an employee who is not available to perform the duties of that position because he or she is on sick leave constitutes discrimination on the basis of disability.

[2] I heard the matter in Sydney, Nova Scotia, on March 10, 2015. I heard the testimony of Heather Timmons ("the grievor"). I also heard the testimony of Beth Keough, who for most of the material time was Manager, Operations, in the Sydney office of Citizenship and Immigration Canada ("the employer"), on behalf of the employer. Each party also entered a number of exhibits into evidence.

[3] There was no real dispute on the facts. The central issue was based on inferences or legal conclusions based on those facts. For that reason, I will simply present the facts as I found them to be based on that evidence.

[4] The grievor was represented by the Public Service Alliance of Canada (PSAC). The PSAC and the Treasury Board are parties to a collective agreement (for the Program and Administrative Services Group - all employees) with an expiry date of June 20, 2014 ("the collective agreement").

[5] On March 6, 2013 PSAC gave notice to the Canadian Human Rights Commission (CHRC) of what it said was the employer's failure to accommodate the grievor's temporary disability by refusing to continue her in the acting position. By way of remedy PSAC sought a declaration that there had been discrimination as alleged, and an order that the grievor be reimbursed for the loss of salary and other benefits, as well as any pain and suffering suffered as a result. The CHRC advised on March 20, 2013 that it did not intend on making submissions in the matter, but asked for notice of its outcome.

[6] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the new Board") to replace the former Public Service Labour Relations Board ("the former Board") as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section

396 of the *Economic Action Plan 2013 Act, No. 2*, an adjudicator seized of a grievance before November 1, 2014, continues to exercise the powers set out in the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) as that Act read immediately before that day.

II. The facts

[7] By way of background, the grievor became an indeterminate employee of the employer in or about 2000. At all material times, she held an indeterminate position at the CR-03 group and level in the employer's Sydney office. She testified that a CR-03's duties included emptying mail carts, pushing them (while full) from one area to another to deliver mail, distributing mail from team to team, putting files on and off shelves, and scanning different documents.

[8] On November 30, 2010, the grievor was offered an acting CR-05 position in the Sydney office, effective November 30, 2010, to March 31, 2011 (Exhibit G1). The offer noted that despite the period stated, her ". . . appointment may be for a shorter period depending on operational requirements." The staffing (later called "appointment") process number for the acting position offer was 10-IMC-IA-SYD-006. The grievor accepted the position on December 3, 2010 (Exhibit G1 and Exhibit E9, Tab 1).

[9] The grievor testified that the work of a CR-05 was basically the same as that of a CR-03 but that it included more data entry and some contact with clients.

[10] At this time, the grievor was experiencing — and had been experiencing for some time — increasing difficulties with her hips. She was beginning to experience pain, particularly with prolonged walking or heavy lifting. At some point, she was placed on a hospital's waiting list for surgery for both hips.

[11] In January 2011, the grievor's family doctor signed a letter ("the January 2011 letter") asking that ". . . special accommodation be made for Heather Timmons in view of her debilitating hip pain from arthritis in order that she may continue to work with her disability" (Exhibit E9, Tab 14). The accommodation included the ability to work part of the day at home and an ergonomic chair. The employer instituted a telework arrangement that allowed the grievor to work from home each afternoon (Exhibit E9, Tab 14).

[12] I note that the grievor testified that before the letter was written, she had discussed her situation and the proposed alternative work arrangement with her doctor. He had approved the proposal and had asked her to draft a letter to that effect. He had then signed the result — the January 2011 letter.

[13] As requested by the grievor's physician, the employer also conducted an ergonomic assessment of the grievor's work situation. A report, dated January 26, 2011, noted the issues the grievor was having with her hips and right thigh and the impact those issues were having on her ability to work (Exhibit E9, Tab 16). At that time, she was working five hours a day at work and was completing the balance of her workday at home. A number of recommendations were made, which the grievor testified the employer implemented.

[14] On February 10, 2011, the grievor's family doctor signed another letter ("the February 10 letter") stating that the grievor was still having difficulty with her current work schedule and arrangements and recommending an alternative work arrangement (Exhibit E9, Tab 15). The recommendation included working part of the week from home, which ". . . would provide for less travel and less transporting of her briefcase, which aggravates her condition." He added that the proposed work arrangement would be ". . . temporary and will last until surgery is done to replace her hip or until it becomes too difficult for Heather to continue" (Exhibit E9, Tab 15).

[15] As with the January 2011 letter, the grievor first discussed the contents of the February 10 letter with her family doctor. Then she drafted it, and he signed it.

[16] As a result of this request, the employer amended the telework arrangement (Exhibit E9, Tab 15). (While I am on this point, I note that the grievor admitted and agreed that the employer always granted every accommodation she or her doctor had suggested or requested. She had no complaint with respect to anything the employer had done with respect to any accommodation that she had requested or been provided at any time).

[17] At some point during this period, the grievor was advised that she would have the first of her hip surgeries in April 2011. She was also advised that it would take upwards of nine months to a year for her to recover. She told her team supervisor, Janet Harvey, of both the surgery and the fact that she would be off work for an extended period.

[18] The grievor filled out the first two of a series of "Leave Application and Absence Reports," both of which were dated March 11, 2011 (Exhibit E9, Tabs 5 to 11). The first of the two reports noted that the grievor would be "sick certified" (that is, on sick leave with pay) for the period from April 4 to 20, 2011. The second indicated that she would be on sick leave without pay from April 20 until June 30, 2011 (Exhibit E9, Tabs 5 and 6).

[19] The start date of her certified sick leave — April 4, 2011 — was the result of her scheduled surgery for hip replacement on April 1, 2011.

[20] However, what is not clear is when these two reports were submitted to — or at least seen by — the employer. As already noted, the grievor dated both reports as March 24. She testified that she brought the information to someone in the employer's Human Resources department. However, the reports were not shown as being recorded by the employer until April 11, 2011. Moreover, Ms. Harvey, who was then the acting manager of operations, did not approve and sign the Leave Application and Absence Reports as the "authorized officer" until April 20, 2011 (Exhibit E9, Tabs 5 and 6). Both reports noted that a physician's certificate was "to follow."

[21] The question of when the employer became aware that the grievor was in fact on sick leave is of some importance. The employer's position throughout this case has always been that acting positions are offered only to employees who are available for work — that is, ready, willing and able to perform the functions specified in the acting position. However, on March 28, 2011, the employer offered the grievor ". . . an extension of [her] acting appointment to begin on April 1, 2011 and to end on June 30, 2011" (Exhibit E9, Tab 2). The offer noted that all the terms and conditions of the original offer of November 30 continued to apply and that despite the specified period, her appointment could be for a shorter period, depending on operational requirements (Exhibit E9, Tab 2). The offer was signed by Rose Anne Poirier, who was at the time the acting director in the Sydney office. The letter noted that any questions about the offer should be directed to Ms. Keough, Manager of Operations. The grievor accepted the offer of an extension on March 28.

[22] In any event, the grievor did go off work as of April 4, 2011 (Exhibit G5 and Exhibit E9, Tab 5). She put in a claim with the employer's long-term disability (LTD) carrier, Sun Life Financial. She testified that there was a 13-week waiting period before

her claim could be finalized and accepted, during which time she was off work and collecting Employment Insurance.

[23] On July 5, 2011, the grievor's orthopaedic surgeon signed a letter stating that the grievor was as follows: ". . . under my care and is required to be off work indefinitely" (Exhibit G3). The employer's Human Resources department received the letter at some point between July 5 and 20 (Exhibit E9, Tab 7). The notation that the report was received was made on the third Leave Application and Absence Report submitted by the grievor, which she signed on March 24, but it was not recorded in the employer's system until sometime after that (the date of recording is illegible). However, it is clear that Ms. Keough authorized the leave application on July 20 (Exhibit E9, Tab 7).

[24] The conflict between theory and reality (insofar as the employer's position is concerned) becomes more pronounced when one considers that on July 6, 2011, the employer again offered the grievor an extension of the acting position. Ms. Poirier, who at the time was Acting Director in the Sydney office, signed an offer to extend the grievor's acting appointment to begin on July 1, 2011, and to end on March 30, 2012 (Exhibit G4). The grievor accepted this offer on July 12, 2011 (Exhibit G4). The offer was to begin on July 1, 2011, and end on March 30, 2012, although, again, it could have been for a shorter period depending on operational requirements (Exhibit E9, Tab 3).

[25] It is this conflict between the employer's position with respect to the grievance and what it did in practice that is central to the grievance. In short, the employer offered the grievor two extensions of her acting CR-05 position despite that she was off work, recovering from hip surgery. Both offers were made at a time when at least someone in the employer's management structure knew that she was off work — and that, arguably, she would be off work for some indeterminate period. If, as the employer later argued, it made offers only to employees who were available to do the work in question, the question then arises as to why it made offers to someone it knew would probably not be able to work during the periods referenced in the offers.

[26] The employer's basic position was that the person authorized to offer or to extend acting positions did not "know" that the grievor was not in fact available to perform the work required of someone in the acting position. The employer's answer to this question was based in large part on Ms. Keough's testimony both as to that and as to how offers for acting positions were determined.

[27] Ms. Keough testified that her budget dictated staffing levels. The managers of the different departments (including her own) in the office would be provided with a budget at the beginning of each fiscal year, as well as with a level of deliverables that the office had to provide. Based on that requirement and that budget, the managers would determine the human resources needed to achieve those deliverables within that budget. The required human resources could be supplied by way of casual or acting positions, including acting CR-05 positions.

[28] Once the managers agreed upon the mix of human resources required, they would obtain their director's approval. After the approval was obtained, the managers would advise the Human Resources department how many positions — and what types — would be required. The Human Resources department would then apply the appropriate selection criteria to the pool of suitable employees available to fill those positions. The managers would vet the list of suitable employees before the offer letters were sent out. The director, who had the delegated authority, would then sign the letters.

[29] All such offers were for periods that ended no later than March 31 of each year — the end of the fiscal year. They were sometimes made for periods of less than the fiscal year end, particularly when there was uncertainty as to whether projected funding or operational requirements would actually materialize. They all indicated that the positions could end up being for periods shorter than those specified in the letters because changes to funding or operational requirements could eliminate the need for the positions sooner than March 31.

[30] With respect to the grievor's case, Ms. Keough testified that when the original offer was sent to the grievor in November 2010, the grievor was working in the office. Ms. Keough was aware that the grievor was having some medical issues but did not know when her hip surgery would happen. In cross-examination, she pointed out that there are roughly 300 employees in the office, with many off sick at any given point, so while managers might be aware that some employees are off work at any given time, they do not necessarily know the nature of the sick leave or how long it might extend.

[31] Ms. Keough also testified that when the second offer of an extension went out on March 28, 2011, she was not aware that the grievor was scheduled to be off work due to hip surgery on April 1. Ms. Keough testified that her lack of awareness might have been due in part to the fact that she took some vacation in the spring or early

summer of 2011. She admitted to having a vague awareness that the grievor was "potentially absent for some short-term period," but she did not know that the grievor was scheduled to be off work for an indefinite period when the next extension offer letter was sent out on July 6, 2011. She testified that it was not until July 20, 2011, when she signed the grievor's Leave Application and Absence Report that she knew that to be the case. She also said in cross-examination that the July 6 offer was made by Ms. Poirier, who was then working in an acting capacity, and that, in effect, it was a mistake. As she said: "If the grievor was not available for work, she should not have been offered the acting position."

[32] Ms. Keough testified that her concern was always that there be someone available to perform the duties of the position, in order to meet her department's operational requirements. An employee's absence of a week or two would not have had much of an impact on those requirements, but absences longer than that would have resulted in the work building up with no one to do it. As she said:

> *. . . [I]f an employee is not here to do the work, why would I offer him or her an acting assignment. Regardless of whether they are sick or not, they are not available to do the work necessary. It's the same for any employee regardless of the reason they are not available. My question is, are they there for the work that I need them to do?*

[33] Returning to the chronology, on July 19, 2011, the grievor's LTD carrier (Sun Life Financial) advised her that it had accepted her LTD claim, effective July 1, 2011 (Exhibit G5).

[34] Ms. Keough also signed the grievor's Leave Application and Absence Report on September 14, 2011. On December 21, 2011, the grievor signed another Leave Application and Absence Report, which indicated that she would be off work on sick leave without pay for the period from January 2 to March 31, 2012. On the report, someone (Ms. Keogh thought it was possibly someone in the Human Resources department) added the following handwritten notation: "medical form submitted (indefinite)" (Exhibit E9, Tab 9). Ms. Keough signed the report as the authorized officer on December 28, 2011 (Exhibit E9, Tab 9).

[35] Given the date of the leave application, I take it that the phrase "medical form submitted (indefinite)" refers to the orthopaedic surgeon's report dated July 5, 2011.

[36] The grievor testified that she met with her supervisor, Ms. Harvey, on March 28, 2012. The grievor told Ms. Harvey that she would be having her second hip surgery soon and that she "could possibly return to work in June." Ms. Harvey asked her whether she had obtained a doctor's note confirming that information.

[37] Ms. Harvey also told the grievor at that time that her acting appointment as a CR-05 (which expired March 30) could not be extended because she was not available for work. The grievor testified that she thought that decision was unfair because it was "not [her] fault" that she was not available to work as of April 1, 2012.

[38] The grievor testified that she went to her doctor's office and obtained a note, which she handed to the employer the next day. The note, dated March 29, was signed by the grievor's orthopaedic surgeon. It stated the following about the grievor: ". . . [she] is under my care [and] will be unable to work until after the end of May 2012. At that time she will be reviewed again" (Exhibit G6).

[39] I note that on March 28, 2012, the grievor had also signed another Leave Application and Absence Report. Someone (presumably in human resources) added the following notation: "Dr's [*sic*] slip seen in HR to cover above period (March 29th to end of May)." The period of sick leave without pay was noted as being from April 1 to May 31, 2012. The authorized officer (signature illegible) signed the form on April 13, 2012 (Exhibit E9, Tab 10).

[40] The grievor had her second hip surgery in February 2012. She testified that she had been told — and that she had expected — the recovery period from the second surgery to be somewhat shorter than that for the first.

[41] When asked about the employer's decision not to extend the grievor's acting position in March 2010, Ms. Keough testified that there were two salient points. First, the grievor was not available for work until, at the very least, sometime after the end of May 2012. Second, there was "no guarantee that she would come back to work at that time," just that her condition would be reviewed. That being the case, she was of the view that the grievor's acting position could not be renewed as of April 1 "because she was not available and would not be in the work place [*sic*] to do the work [Ms. Keough] needed her to do." She agreed that she knew at this time that the grievor was off work on sick leave and that she was on LTD. She was also aware that the reason the grievor was off work was that she had had hip surgery.

[42] As a result of her concern that the employer's decision not to renew her acting position was unfair, the grievor submitted a grievance on April 24, 2012. She grieved that the employer's failure to extend or reinstate her acting CR-05 position constituted discrimination on the basis of disability (Exhibit E9, Tab 21).

[43] On May 16, 2012, the grievor's orthopaedic surgeon filled out a form stating that the grievor could work "modified duties/hours," adding that she could "ease back" to work as of June 7, 2012 (Exhibit G7). The grievor testified that by "ease back," her doctor and Sun Life thought that she could return to a modified work schedule in June.

[44] On May 16, 2012, the grievor also submitted a Leave Application and Absence Report. Someone (presumably in human resources) added the notation, "(ease back June 4)." The period of sick leave without pay was noted as being from June 1, 2012, at 7:00 a.m., to 3:00 p.m. on June 1, 2012. The authorized officer (signature illegible) signed the form on May 16, 2012 (Exhibit E9, Tab 11).

[45] The employer introduced into evidence an undated "Gradual Return to Work" plan that Sun Life Financial, the LTD carrier, had prepared. The plan listed Ms. Keough as the employer contact. It stated that the grievor's "anticipated return to work start date" would be June 4, 2012. As of that date, it was expected that she would work 4-hour shifts for 3 days during the first week, 6-hour shifts for 3 days during the second week and 7.5-hour shifts for 3 days during the third week. After that, the number of days would be gradually increased until she was back to work full-time as of July 9, 2012 (Exhibit E9, Tab 20).

[46] The grievor did return to work on the recommended modified schedule as set out in the Sun Life Financial plan. She returned to perform the duties of her regular indeterminate position as a CR-03. She gradually worked up to full-time duties, and on September 6, 2012, she was offered a new acting appointment, again to a CR-05 position (Exhibit G8). The offer bore a new staffing process number, different from the one that had been assigned to the November 30, 2010 offer (Exhibits G8 and G1). She accepted it.

III. Summary of the submissions

A. For the grievor

[47] The grievor's representative submitted that the issue in this case was simply one of discrimination and a failure to accommodate. The discrimination laid in the employer's failure to extend the grievor's acting CR-05 position in March 2012. The employer failed to offer her an extension because she was not available for work, to its knowledge because she was recovering from hip surgery. Hence, the employer's refusal to extend her acting position was the result of discrimination on the basis of a physical disability.

[48] The grievor's representative submitted that the employer's position that it did not extend her acting position because she was not available for work could not be credited. It had twice chosen to extend the same acting position even though it knew — or could be considered to have known — that she was off work for an indeterminate time because of her hip surgeries. Since the employer had extended the grievor's acting position on those occasions — when it knew she was not available for work — it could not suddenly change its position or conduct.

[49] The grievor's representative also submitted that if physical disability was the reason the grievor could not make herself available for work, then the employer could not have refused to renew her acting position. Doing so would mean it refused a position to an employee because of a disability and hence that it discriminated against her on the grounds of disability, which is a prohibited ground under both the collective agreement and the *Canada Human Rights Act* (R.S.C. 1985, c. H-6).

[50] Accordingly, the representative submitted that an employee who held an acting position but became disabled from performing the duties of that position could never be denied an extension of that acting position. A refusal to renew in such circumstances could be taken only as a refusal based on physical disability and hence would be discriminatory.

[51] The grievor's representative submitted in the alternative that as of March 28, 2012, the employer knew that the grievor could be coming back to work as of the end of May 2012. That being the case, the employer ought to have considered making available to her an accommodated acting position as of that date.

[52] Even if the employer's failure to extend the acting position for the period after March 2012 could be justified by the grievor's lack of availability, that justification ceased to have any effect in respect of the period during which she could have been available. The employer had a medical certificate indicating that the grievor could be considered for a return to work after May 2012. That being the case, the employer ought to have offered her an extension of the acting position as of that date.

[53] The grievor's representative submitted that under either argument, the employer's refusal to extend the grievor's acting position was discriminatory on the basis of physical disability. The onus of proving a bona fide occupational requirement justifying such discrimination then shifted to the employer, and no such evidence was offered in this case. That being the case, the grievance ought to be allowed.

[54] In making his submissions, the grievor's representative relied upon the decisions in *English-Baker v. Treasury Board (Department of Citizenship and Immigration)*, 2008 PSLRB 24; *Desormeaux v. Ottawa-Carleton Regional Transit*, 2003 CHRT 2; and *Coast Mountain Bus Company Ltd. v. National Automobile, Aerospace, Transportation and General Workers of Canada (CAW-Canada), Local 111*, 2010 BCCA 447.

[55] By way of remedy, the grievor's representative submitted that the grievor ought to be awarded lost pay based on the difference between her CR-03 income and the income she would have made had her CR-05 position been extended on April 1, 2012, or, in the alternative, as of June 4, 2012, when she returned to work full-time. The cut-off point in either event would be September 10, 2012, when her acting position was eventually renewed.

B. For the employer

[56] Counsel for the employer submitted that the authorities and submissions made on behalf of the grievor were based on facts and issues stemming from the terminations of employees suffering from mental or physical disabilities. This case does not involve a termination. Rather, it involves the issue of whether an employee was entitled under the collective agreement to be paid for performing in an acting capacity. Clause 64.07(a) of article 64 (Pay Administration) provides as follows:

> *64.07(a) When an employee is required by the Employer to substantially perform the duties of a higher*

> *classification level in an acting capacity and performs those duties for at least three (3) consecutive working days or shifts, the employee shall be paid acting pay calculated from the date on which he or she commenced to act as if he or she had been appointed to that higher classification level for the period in which he or she acts.*

[57] Counsel for the employer submitted that clause 64.07(a) of the collective agreement means that there is no substantive right to being paid in an acting capacity. It means only that if an employee actually performs the duties of a higher position, he or she is entitled to increased pay for that work. He went on to submit that there is no substantive right to being offered an acting position. Nor is there any guarantee that any such position will be renewed.

[58] Counsel for the employer acknowledged that if an employee requires an accommodation in order to perform an acting position, then the employer is obligated to provide such accommodation. But the duty to accommodate is the duty to accommodate the ability to work; it does not arise if an employee is not available for work.

[59] Counsel for the employer submitted that the failure to offer to renew or extend the acting position was not the result of discrimination based on a disability. If the grievor was not available to work — whether accommodated or not — then the employer was under no obligation to make such an offer. The employer needs people to do the work necessary for it to achieve its operational requirements. It would make no sense for it to offer the position to employees who are not, under any circumstance, available to perform that work.

[60] Counsel for the employer also submitted that the evidence did not go as far as the grievor's representative suggested. In March 2012, the employer had information that (a) the grievor would not be ready for work before the end of May, and (b) that her ability to return to work after that date would be evaluated. There was no guarantee that she would be able to return to work — only that her capacity to return to work would be evaluated. Nothing in that information amounted to an assurance that the grievor would be available for work at any point — certainly not as of the end of May 2012.

[61] Counsel for the employer submitted that, on the facts, there was no evidence of any failure to accommodate the grievor. The evidence was clear — and the grievor had admitted — that the employer had never refused a request for accommodation of her physical difficulties. The real issue, then, was not accommodation, but pay. Counsel for the employer submitted that in effect the grievor was arguing that she should be paid while on sick leave at an acting CR-05 group and level rather than at her CR-03 group and level.

[62] First, counsel for the employer pointed out that such an accommodation had never been requested. But even had the grievor asked for it, she would not have been entitled to it as an accommodation. The duty to accommodate is the duty to assist an employee who has a mental or physical disability to work; see *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 14, 15, 18 and 19. It is not to pay employees a higher scale for not working at all.

[63] With respect to the alternative submission of the grievor's representative — that there was a duty to accommodate the grievor by returning her to a CR-05 position in June 2012 as opposed to a CR-03 position — counsel noted that there was no evidence that any such request had ever been made to the employer. Nor was there any evidence that the tasks associated with the acting CR-05 position were easier to perform than those associated with her indeterminate CR-03 position. Hence, nothing ought to have suggested to the employer that the easing back to work that commenced in June 2012 could have been at the CR-05 as opposed to the CR-03 group and level.

[64] Counsel for the employer submitted that the mere fact that the grievor was a member of a protected group — persons with a disability — did not establish a *prima facie* case of discrimination; see *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, at para 49. Merely alleging discrimination is not enough; see *Togola v. Treasury Board (Department of Employment and Social Development)*, 2014 PSLRB 1, at para 101 and 106; *Teti v. Deputy Head (Department of Human Resources and Skills Development)*, 2013 PSLRB 112, at para 115; and *Taticek v. Treasury Board (Canada Border Services Agency)*, 2015 PSLREB 12. The fact that the grievor's acting position was renewed in the past did not in and of itself entitle her to another renewal; see *Dauphinais v. Treasury Board (Correctional Service of Canada)*, 2011 PSLRB 96, at para 22.

[65] Finally, counsel for the employer submitted that the remedy sought by the grievor — to be paid as if she had been an acting CR-05 — in effect would be a staffing decision. Adjudicators have no jurisdiction to directly award positions to employees and thus cannot do so indirectly by making an award as if a grievor held such a position. Accordingly, counsel sought an order dismissing the grievance.

C. Grievor's reply

[66] The grievor's representative submitted that the evidence was clear that by March 2012, the employer knew that the grievor was disabled from work due to the need to recover from her hip surgery. In other words, the employer knew that her inability to be available for work as of the beginning of April was the result of a disability. That being the case, the employer had a duty to accommodate her, which it failed to do.

III. Analysis and decision

[67] I will commence with the observation that I was not convinced that clause 64.07(a) of the collective agreement had any application to the issues in this case. On plain reading, it deals with situations in which the employer requires an employee to do the work of someone in a higher classification and, moreover, is triggered only when the employee actually performs the work in question. The issue before me, on the other hand, involves an offer of work in an acting position, not a requirement that it be performed. Nor on the facts does it involve actually performing the work of the position in question.

[68] It was clear to me on the evidence that in ordinary course, the grievor would have been offered an extension of her acting CR-05 position in March 2012 had she been available to start work in that position as of April 1, 2012. She had the necessary qualifications and experience to perform the work comprised within that position. She had been offered the position on that basis in the very beginning. The satisfactory nature of her work in that acting position is evinced not only by the employer's offers to extend the appointment but also by its decision to make a new offer to her in September 2012.

[69] On these facts, it is also clear to me that the only reason the grievor was not offered an extension of her acting position in March 2012 was that she was not

available for work as of April 1, 2012, and because there was no certainty as to the date on which she might become available for work after that.

[70] With respect to the latter point, I was not persuaded by the argument that the employer knew in March 2012 that the grievor would be able to start work at the end of May 2012. That was not the evidence. What the employer knew was that the grievor had had hip surgery, that she was unavailable for work as of March 2012 because she was recovering from that surgery, that she would not be available for work until at least the end of May 2012, and that her ability to work — and, presumably, under what limitations, if any — would be assessed after the end of May 2012. Nothing in that evidence speaks to an assurance that she would be able to return to work in any capacity as of any particular date. The first notice that the employer had that the grievor would be easing back to work as of a definite date (being June 4) did not come until the Leave Application and Absence Report she signed on May 16, 2012, which was well after the employer had made its decisions with respect to offers of acting positions.

[71] In my view, this finding is fatal to the grievor's claim. The purpose of the duty to accommodate is to remove barriers to work based on several prohibited grounds. To put it with more particularity, the purpose of the duty to accommodate a physical disability is to enable the person suffering from that disability to be able to work despite that disability. That purpose does not extend to requiring an employer to compensate an employee for not working at all. As the Supreme Court of Canada noted in *Hydro-Québec*, at paragraph 19:

> *The duty to accommodate is therefore perfectly compatible with general labour law rules, including both the rule that employers must respect employees' fundamental rights and the rule that employees must do their work. The employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future.*

[72] The result might have been different if, first, the employer had known in March 2012 that the grievor would be able to return to work on a definite date within the term of the acting position; or if, second, it had been faced with a request by the grievor to accommodate her in her return to work in the acting position on that definite date. In either instance evidence that the grievor was going to be able to return to work within the term of the acting position would have triggered the duty to

accommodate, because it would have signalled that she was prepared to fulfill her part of the employment relationship.

[73] With respect to the first point, I am prepared to accept for the sake of argument that an employer might be required to alter the start date of a job (when that start date is a condition of employment) in order to accommodate an applicant who wants to apply for that position but whose ability to start on that date is hindered by a disability. But that, as I say, was not so in this case. Neither the employer, nor for that matter the grievor, had any knowledge in March 2012 as to when she would be able to return to work.

[74] With respect to the second point, I acknowledge that an overt request for accommodation is not always necessary. This is particularly true when it is or ought to be apparent to an employer that some form of accommodation is necessary to enable an employee to perform his or her duties. But in this case, the grievor was not working at all. Nor did she or her care providers give any indication as to the date on which she would be able to return to work or when she did return, what kind of accommodation she might require. Accordingly, there was nothing in the evidence to justify a finding that the employer ought to have considered the possibility of accommodating her return to work by putting her in an acting CR-05 position as opposed to her actual CR-03 position.

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

(The Order appears on the next page)

IV. Order

[76] The grievance is dismissed.

May 29, 2015.

Augustus Richardson,
adjudicator