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Citation: 2016 PSLREB 101

Public Service Labour Relations and Employment Board Act and *Public Service Labour Relations Act*

Before a panel of the Public Service Labour Relations and Employment Board

BETWEEN

LANCE ROGERS

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Rogers v. Canada Revenue Agency

In the matter of an individual grievance referred to adjudication

Before: Marie-Claire Perrault, a panel of the Public Service Labour Relations and Employment Board

For the Grievor: Harinder Mahil and Dulce Amba Cuenca, employment relations officers, Professional Institute of the Public Service of Canada

For the Employer: Marc Séguin, counsel

Heard at Vancouver, British Columbia,
July 12 to 14, 2016.

I. Individual grievance referred to adjudication

[1] Lance Rogers ("the grievor") was terminated from his employment as an auditor with the Canada Revenue Agency ("the employer") on April 1, 2015. He had been on leave without pay since July 2012. The employer decided to terminate his employment because it saw no prospect of him returning to work. He claims that his termination was discriminatory on the basis of disability and, thus, contrary to the terms of the collective agreement signed between his bargaining agent, the Professional Institute of the Public Service of Canada (PIPSC), and the employer that expired on December 21, 2014 ("the collective agreement").

[2] For the reasons that follow, I find that the employer engaged in a discriminatory practice when it terminated the grievor. The grievor is to be reinstated into his position.

II. Summary of the evidence

[3] The employer called three witnesses: Danny Leung, the grievor's supervisor; Joanna Ralla, the manager to whom Mr. Leung reported; and Michael Quebec, director, who had the delegated authority to sign the termination letter. The grievor testified and called Jason Brown, who was both a colleague and PIPSC representative.

[4] On the whole, there were no discrepancies in the testimonies, and the written documentation was helpful for confirming the witnesses' statements. Therefore, I will summarize the evidence without referring in detail to each witness's testimony.

[5] However, for one incident, I received two conflicting versions, one from Ms. Ralla, the other from the grievor. The parties agreed that I would need to make a finding of credibility on this matter, and I will as I recount the evidence.

[6] The grievor has worked for the employer and its predecessors since 1977. He began as an assessing clerk, classified at the CR-4 group and level, and gradually ascended the ranks. In 1979, he became a payroll auditor, classified PM-2, and then moved to a PM-3 position. In the 1980s, for some three-and-a-half years, he was in special investigations, classified at the AU-1 group and level. In 1995, he was appointed to an AU-2 position, preparing files for audit. In 1998, he was promoted to AU-3 and became a senior technical advisor. In that position, he was called upon to advise auditors on specific issues in complex and difficult business files.

[7] In July 2010, the grievor went on medical leave. He returned to work in December 2011. I heard no evidence and received no document about this leave. In the termination letter, no mention is made of that leave, only of a further leave that started on July 3, 2012. Yet, it seems this first leave was important in the employer's mind, as it often referred to it when corresponding with the grievor, along with the grievor's "… unsuccessful attempt at a return to work".

[8] When the grievor returned to work in December 2011, it was to his substantive position as a technical advisor. He returned without any limitations, restrictions, accommodation, decrease in duties, or shortened work schedule. According to Mr. Leung, he fulfilled his duties satisfactorily.

[9] On June 27, 2012, the grievor was called to Ms. Ralla's office at 9:30 in the morning. They both agreed on that fact and agreed on the letter (G-2) that she then handed to him on behalf of the Assistant Commissioner for the Pacific Region, Maureen Phelan.

[10] The letter states that as part of the "Cost Containment Plan", the "Technical Advisor Program" has been discontinued, effective the same day. The letter also states that the grievor is "… declared an affected employee effective June 27, 2012 due to the discontinuance of a function". The letter goes on to state that the grievor is guaranteed a reasonable job offer, but no date is given for this future event.

[11] The letter further states as follows: "In accordance with the WFA [Workforce Adjustment] provisions of your collective agreement, you are now a surplus employee from this date on". In her letter, Ms. Phelan encourages the grievor to get in touch with the employer's WFA counsellor and states that services are available, including the Employee Assistance Program (EAP).

[12] The grievor testified that he was completely taken aback by this announcement. He had had no warning; he had been called suddenly into Ms. Ralla's office and did not have time to call the PIPSC to have a representative present. He testified that he was told his position was eliminated and that he was instructed to return to his desk to wait for further instructions.

[13] The grievor understood that the conversation and letter meant that his duties had come to a halt. He called his contacts at the technical service in Ottawa, to report

what had happened. They knew about the Cost Containment Plan and told the grievor they were sorry, and offered him their condolences for the loss of his job.

[14] The grievor recounted sitting at his desk all that day, Wednesday, June 27, all day the next day, Thursday, and the whole morning on the Friday, waiting for further instructions, with nothing to do and no duties to fulfil. Finally, on the Friday afternoon, he called his family doctor for an appointment; he was at a breaking point. His medical leave started the following working day, July 3, 2012.

[15] Ms. Ralla's version of the meeting was very different. She testified that she had carried out a number of "affected letters" meetings, and they always proceeded the same way. A bargaining agent representative would always be present. The affected employee would always be told that he was to continue to carry out his duties until further notice, even though his position had been eliminated.

[16] This testimony directly contradicted the grievor's, so Ms. Ralla was cross-examined rather attentively on it. When a decision maker is confronted with two contradictory testimonies, the decision in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, is generally raised. That case stands for the proposition that when two testimonies are contradictory, the decision maker must look to the surrounding facts to determine which version is more plausible. In this case, I have no trouble finding the grievor's version more plausible.

[17] When Ms. Ralla testified about the meeting, she could not recall the name of the bargaining agent representative who had allegedly attended. When the grievor's representative asked her repeatedly if she was certain that a union representative had attended, given the grievor's clear testimony that none had, she reiterated several times that there would have been one since one always attended — it was part of the process. I asked her directly if she had told the grievor to carry on with his technical advisor duties, despite the letter telling him they had ended, and she answered that she would have told him, as that was always done.

[18] Not once, in that part of her testimony, did Ms. Ralla use the affirmative tense, as in, "Yes, someone was there. Yes, I told him". She systematically used the subjunctive mood, as in: "someone would have been there", or "I would have told him". I find the grievor's direct answers to the questions on what happened that morning more convincing because he used the affirmative tense, because the matter concerned

him directly, and because they corresponded more closely to the text of the letter he was given — which stated that his duties were ended as of that day.

[19] I also have trouble believing that the grievor was told to carry on his duties for the time being and that he chose to sit at his desk and do nothing. From his testimony, from that of his supervisor, Mr. Leung, and from that of his colleague, Mr. Brown, I get the impression he is someone eager to work and to be busy. Had he been told to work, he would have done so. I believe the grievor when he stated that he was left in a void, in limbo, not knowing what to do or what would happen next, and when.

[20] The grievor had returned successfully from his previous leave. However, the elimination of his job, without support, without an explanation, and without duties to continue to fulfil, was a difficult blow.

[21] On October 1, 2012, Mr. Quebec sent the grievor a reasonable job offer as a tax auditor classified at the AU-3 group and level. A refusal of a reasonable job offer means that the employer, having discharged its duty to offer an alternate job under the WFA provisions, has no further obligation, and the employee is subject to lay-off. The grievor signed the offer on October 23, 2012; it included a sentence that read as follows: "Your acceptance of this offer, and your signature, certify that you have reviewed the *Code of Ethics and Conduct* and the *Conflict of Interest Policy* [Internet addresses were provided] and that you agree to abide by them." Below his signature, the grievor wrote as follows: "Please note that I do not have a functioning computer at home and have not reviewed the Code of Ethics and Conduct and the Conflict of Interest Policy."

[22] In a June 18, 2013, letter, a Sun Life Financial case manager informed the grievor and the employer that the grievor satisfied the definition of "total disability" and that benefit payments were approved retroactively to July 3, 2012.

[23] On October 15, 2013, Mr. Leung wrote a letter to the grievor that stated in part as follows:

> *The purpose of this letter is to outline the options you have under the Canada Revenue Agency's policy on leave without pay for illness or injury. Our records indicate that you have been on leave without pay due to illness or injury from July 15, 2010 to December 19, 2011, followed by an unsuccessful attempt at a return to work, resulting in your returning on*

> *sick leave without pay since July 3, 2012.*
>
> [The letter then states elements of the policy.]
>
> *As you now have been on leave without pay for thirty one months cumulatively, and the employer has been advised of your total disability, your situation must be resolved through one of the following options.*
>
> *1. Retirement, or*
>
> 2. *Resignation.*
>
> …

[24] Returning to work was not one of the options offered. The grievor reacted by writing to Mr. Leung to express his dismay at not being offered the possibility of returning to work, something he very much wanted to do. He added a note from his medical practioner, Dr. Hyrman, who had written to his family physician. The note is non-committal but does state that resignation or retirement should be postponed and does not exclude the possibility of the grievor returning to work. In his letter, the grievor told Mr. Leung to get in touch with Dr. Hyrman if he had any concerns.

[25] Mr. Leung granted a further extension of leave without pay in February 2014 and asked for an update in May 2014.

[26] On May 14, 2014, Mr. Leung sent Dr. Hyrman a form and a letter. The form was an "Occupational Fitness Assessment Form" (OFAF) for Dr. Hyrman to fill out. The letter explained that the OFAF was designed to determine any limitations, restrictions, or accommodation that would be necessary to ensure a successful return to work for the grievor. The letter further explained that the grievor had been offered a job as a basic files auditor at the AU-3 level and that the OFAF took into consideration the various requirements of the job. A job description was also attached to the letter.

[27] Dr. Hyrman completed and returned the OFAF, dated June 17, 2014. In it, he responded to all the queries by stating that there were no limitations or restrictions, and no need for accommodation, given the physical, mental, and emotional demands of the job detailed in the OFAF. He stated that the grievor could return to work full-time. He also indicated that he consented to being contacted if further information were required. He proposed June 27, 2014, as the grievor's return date.

[28] Despite the clear message conveyed by the OFAF, Mr. Leung had concerns. As he

explained at the hearing, there was a gap between the total disability that Sun Life had recognized in 2013 and Dr. Hyrman's confirmation in 2014 that the grievor could return to work.

[29] On June 27, 2014, the grievor did not return to work. Rather, he received a letter from Mr. Leung, requesting his consent to a fitness-to-work evaluation that would be carried out by an employer contractor, Workplace Health and Cost Solutions (WHCS).

[30] The grievor was rather unhappy with this turn of events. He wrote a letter in response, dated July 8, 2014, in which he manifests his bewilderment at having the employer request an evaluation by professionals who did not know him, when the employer had in hand his medical practitioner's recommendation. The grievor noted that both Sun Life's 2013 evaluation and the OFAF were directly attributable to Dr. Hyrman; surely then, according to the grievor, it should have been sufficient to show that the gap that Mr. Leung had identified was in fact due to his rehabilitation.

[31] Mr. Leung replied with a letter dated July 11, 2014, with the subject line "Clarification on return to work", which unfortunately made the situation even less clear to the grievor. In his letter, Mr. Leung explained that the OFAF was not sufficient to understand what type of accommodation would be necessary given that "… the substantive position you held prior to going on leave no longer exists in the organizational structure and a new position is to be offered to you". Mr. Leung also stated in this letter that he had spoken to Dr. Hyrman the same day (July 11) to explain that the grievor would change jobs and would perform auditing work, something he had not done since 1998, when he had become a technical advisor. In the course of that conversation, Dr. Hyrman said that perhaps it would be preferable for the grievor to have a gradual return to work, starting with two days or fifteen hours per week.

[32] The grievor was struck by the phrase, "… a new position is to be offered to you", since he had signed the reasonable job offer in October 2012. He followed up on July 21, 2014, with a letter requesting an explanation from senior management and Human Resources as to their position on the reasonable job offer he had already accepted.

[33] At this point, Mr. Leung's involvement came to an end, and Ms. Ralla took over the file. It took a number of exchanges (until November 2014) to sort out the fact that the letter of offer had indeed been signed, the stumbling block being that he had yet to sign off that he had reviewed the *Code of Ethics and Conduct*. The grievor explained at

the hearing that the review of the *Code of Ethics and Conduct*, a rather hefty document, was an annual exercise for the employer's auditors. It took some time and was done during working hours. Therefore, he expected to have to do it once he was back at work, on paid time.

[34] On November 26, 2014, the grievor wrote a letter to Ms. Ralla that details his misgivings in the way the return to work was developing. He alluded to being made to feel "less than welcome". This theme pervades the correspondence from the grievor to the employer, and the employer never responds to it. It refers not only to the difficulty of organizing the grievor's return to work but also to events that were not helpful in smoothing the transition from sick leave to work.

[35] In both 2013 and 2014, the grievor requested permission to attend the Christmas Eve festivities at his office. This was a special event for him, one in which he had participated actively in the past by encouraging singing Christmas carols. In 2013, Mr. Brown communicated to the grievor that Ms. Ralla had denied him permission. In 2014, Mr. Brown was on leave during this period, and apparently, no one bothered to answer the grievor's request. Ms. Ralla testified that when an employee is away on extended sick leave, he or she is not allowed in the workplace. She did not explain why permission had been granted in 2010, during the grievor's first extended sick leave. The employer did not contradict the grievor's evidence that his attendance in 2010 had taken place without any problem.

[36] I had before me documents (emails and letters) related to the Christmas festivities attendance, as well as the testimonies of Ms. Ralla, Mr. Brown, and the grievor. A second event, which was less documented, also hurt the grievor's feelings. It was related to a colleague's retirement lunch that he was not allowed to attend, despite the fact that the lunch was held outside work premises. The retiree called him to advise him that it was preferable if he did not come, as some individuals might be made uncomfortable by his presence.

[37] The grievor testified that he felt senior management had played a role in this refusal. The employer (through the testimony of its witnesses and the submissions of its counsel) professed having nothing to do with it. Given the grievor's forthright testimony about his warm relationship with the retiree and the employer's lack of

cooperation organizing the return to work, I prefer his version. The event is not determinative, but it does add to the general feeling of animosity the grievor perceived.

[38] The other theme in the exchanges is an insistence that Dr. Hyrman provide clear directions for the grievor's return to work. Deadlines are set by the employer, and then negotiated by the grievor and his representative, Mr. Brown. In a letter dated January 22, 2015, Ms. Ralla told the grievor that he had to return by February 16, 2015, or risk dismissal. The exact text is as follows:

> *Based on your latest correspondence, you have indicated that you are not ready to return to work and have provided no timeframe as to when CRA management can expect to receive the medical documentation required to ensure that your return to work is conducted in a safe and appropriate manner. The only conclusion that we are able to draw from this is that you are currently not fit to return to work and will not be for the foreseeable future. While I appreciate that you have expressed a desire to return to work at some point, your leave without pay cannot be extended indefinitely. Therefore, if you are unable to return to work by February 16, 2015, a recommendation will be made to the delegated authority to sever your employment relationship with the CRA for reasons of incapacity under section 51(1)(g) of the Canada Revenue Agency Act.*

[39] The grievor understood from this letter that he had to return to work on February 16, 2015. He wrote to Ms. Ralla on January 29, 2015, explaining that it was too short a delay to be able to respond properly and to organize his return to work in consultation with Dr. Hyrman, whom he was meeting for the first time in 2015 on February 2, 2015. There appears to have been no response to that letter, so on February 11, 2015, Mr. Brown sent an email to Ms. Ralla, informing her that the grievor would report to work on February 16, 2015.

[40] Ms. Ralla responded promptly to that email. In a letter dated February 12, 2015, she wrote the following to the grievor:

> *Your PIPSC representative, Jason Brown has communicated to me on February 11, 2015, your intention to report to work on Monday, February 16, 2015.*
>
> *As I had indicated in my letter of January 22, 2015, the employer has been waiting for, and has still not received, the required updated documentation from your attending physician to ensure that you are ready to return to work and*

> *that your re-integration into the workplace is conducted in safe* [sic] *and appropriate manner. The medical documentation must indicate that you are fit to return to work and specify any restrictions or limitations you may have that will need to be accommodated such as a gradual return to work schedule. We have been awaiting this information since July of 2014.*
>
> *This information must be provided to me before you will be allowed back into the workplace. I trust this clarifies the situation.*

[41] Mr. Brown responded in writing the same day, stating that the message in the January 2015 letter was unclear — medical information was required, but the grievor had to report to work. Ms. Ralla responded as follows on February 13, 2015:

> *Thank you for your feedback. My letter of January 22, 2015, could not have been more clear, as has my previous correspondence to Lance regarding the requirement to provide medical documentation from his attending physician to enable his safe return to work. As you are fully aware, we have been regularly communicating with Lance since July in an effort to obtain information and to ensure that he understood our expectations. I'm not sure how the requirement could have been made any clearer. Before Lance can return to work, he must provide written medical information from his doctor indicating that he is fit for work along with any restrictions or limitations he may have. I don't see any need to revise the letter.*

[42] The grievor testified that he had consulted both his EAP counsellor and Dr. Hyrman and that they had agreed that he could return to work on February 16, 2015.

[43] The employer agreed to wait until the grievor met with Dr. Hyrman on February 26, 2015, after which Dr. Hyrman was to provide a detailed proposal for the return to work. On March 26, 2015, the employer received the following note (dated February 25, 2015) from Dr. Hyrman, addressed to Ms. Ralla:

> *As you know, Mr. Rogers is my patient and he has been seeing me for almost 5 years for* [psychiatric condition]. *During that time, he has attempted to go back to work full time, but at the present time he is again not working. His* [condition] *has subsided to such an extent that he could return back to work, providing that this is done in a gradual manner. I understand that he has some reservations about being wanted back to work and he could use some reassurance in that respect. I would suggest that he returns to work on a very gradual basis starting with half a day a*

> *week and that should be re-evaluated as the time progresses. Should you require any further information I would be happy to discuss it with you at greater length.*
>
> [Emphasis added]

[44] On April 1, 2015, the employer sent the grievor the termination letter, which reads in part as follows:

> *You have been on leave without pay since July 3, 2012. In the letter dated October 15, 2013, you were advised of your options to resolve your leave without pay situation under the Canada Revenue Agency's policy on leave without pay for injury and illness.*
>
> *Upon receipt of this letter, you advised the employer of your intent to return to work. Based on a recommendation from your attending physician, Dr. Hyrman, with respect to the timeframe for your return to work, the Employer agreed to extend your leave without pay.*
>
> …
>
> *On March 26, 2015, the Employer received Dr. Hyrman's letter dated February 25, 2015. In his letter Dr. Hyrman recommends a gradual return to work of a half day per week which would be re-evaluated "as the time progresses". No recommended return to work plan was provided that would allow for a gradual increase in hours nor was there any information to indicate when or if your hours of work could be increased to a meaningful level.*
>
> *Based on the information provided, it is evident that you continue to be unfit for work. As you have not resolved the situation through resignation or retirement, I am terminating your employment from the Canada Revenue Agency effective April 1, 2015 for reasons other than breaches of discipline or misconduct. This action is taken under the authority delegated to me under Section 51(1)(g) of the Canada Revenue Agency Act.*

[45] Mr. Quebec testified that he signed the termination letter based on a recommendation that Ms. Ralla had prepared. He had no comment on the short time span between receiving Dr. Hyrman's final note on March 26 and issuing the letter on April 1, less than a week later. Mr. Quebec also stated that it was obvious to him that returning a half-day per week was simply not feasible for the employer. It would have been impossible to find productive work for the grievor to do with him having so little presence at the office.

[46] The grievor testified that he was stunned by his termination. He had attended the meeting with Dr. Hyrman, and he was expecting that the requested letter (about a schedule for returning to work) would be sent. Instead of an arrangement being concluded, he received the letter of termination.

[47] The grievor introduced a letter from Dr. Hyrman, dated July 5, 2016. The employer objected, as the letter is from well beyond the termination date. In it, Dr. Hyrman explains why his note of February 25, 2015, gave so few details — he was expecting a full return to work, but it needed to be gradual; therefore, he could not have been more precise than proposing a very modest start.

[48] I have given this letter no weight since what is germane here is what the employer knew or ought to have known at the time of the termination. The February 25, 2015, note was sufficient to show Dr. Hyrman's prudent approach, his awareness of the grievor's fears of not being welcome, and his openness to being contacted were further information required. I note that the employer chose not to take him up on that offer.

A. <u>The employer's "leave without pay for illness or injury policy"</u>

[49] Both Mr. Leung's October 2013 letter addressed to the grievor asking him to choose between retirement and resignation and the termination letter of April 2015 refer to "CRA's [the employer's] policy on leave without pay for illness or injury". Ms. Ralla testified that she had reviewed "the policies" attentively before recommending terminating the grievor.

[50] In fact, two policies apply in this case. One is the employer's *Injury and Illness Policy*, and the other is the Treasury Board's *Leave without Pay Policy*. This latter policy was rescinded by the Treasury Board on April 1, 2009, but counsel for the employer confirmed at the hearing that it still applied at the CRA, pending the adoption of another policy to replace it. The bargaining agent agreed that it still applied.

[51] The emphasis in the two policies is very different. Whereas the *Injury and Illness Policy* emphasizes facilitating the return to work, the *Leave without Pay Policy*, although stating the right of employees to such a measure, also sets limits. Its Appendix A provides for "Standards for Leave without Pay Situations" and has a section on "Illness and Injury", which includes the following text:

> *When employees are unable to work due to illness or injury and have exhausted their sick leave credits or injury on duty leave, managers must consider granting leave without pay.*
>
> *Where it is clear that the employee will not be able to return to duty within the foreseeable future, managers must consider granting such leave without pay, for a period sufficient to enable the employee to make the necessary adjustments and preparations for separation from the Public Service on medical grounds.*
>
> *Where management is satisfied that there is a good chance the employee will be able to return to duty within a reasonable period of time (the length of which will vary according to the circumstances of the case), leave without pay provides an option to bridge the employment gap. Management must regularly re-examine all such cases to ensure that continuation of leave without pay is warranted by current medical evidence.*
>
> *Management must resolve such leave without pay situations within two years of the leave's commencement, although they can, in some circumstances, be extended to accommodate exceptional cases.*
>
> *The period of such leave without pay must be flexible enough to allow managers to accommodate the needs of employees with special recovery problems, including their retraining.*
>
> [Emphasis added]

[52] It was clear from Mr. Leung's testimony, and even more from Ms. Ralla's, that the two-year mark was an important consideration when determining the future course with the grievor.

[53] In contrast, the *Injury and Illness Policy* focuses on how to help an injured or ill employee return to work. It also discusses the type of medical advice that should be obtained to facilitate that return.

[54] The *Injury and Illness Policy* includes Appendix B, entitled "Enabling an Employee to Remain at Work or Return to Work". It discusses the medical assessment that will be necessary for an employee to undergo before returning from an extended period of absence following injury or illness.

[55] At page 18, in answer to the question, "Who will do the medical assessment?", the following text appears:

> *The employee's own medical practitioner should be the primary source of this information. Where this is not possible (e.g. the employee does not have a medical practitioner or attempt(s) to gain enough information from the employee's medical practitioner have not been successful), the manager will request a medical assessment (in the form of a fitness to work evaluation) through the CRA's health services provider – Workplace Health and Cost Solutions (WHCS).*

[56] At page 20, in answer to the question, "What information will the medical practitioner provide to my manager?", the answer reads in part as follows:

> …
>
> *After your assessment, the medical practitioner will complete the OFAF, which will indicate your fitness to work as one of the following:*
>
> - *fit to work and capable of all your duties;*
> - *fit to work with limitations/restrictions, and capable of modified or alternate duties/hours of work; or*
> - *unfit to work and capable of no duties at the current time.*

[57] Again on page 20, the next question is, "What happens after the medical assessment?" The answer, in part, is as follows:

> *If the assessment is completed by your medical practitioner, you must give your manager a copy of your medical practitioner's report (i.e. the completed OFAF and any accompanying explanatory letter) … Once the report is received, your manager will contact you to discuss the contents and the next steps. If clarifying information is required, your manager may have to contact the medical practitioner to obtain this information, and will let you know prior to doing so.*
>
> *The limitations/restrictions identified on the OFAF will be used to support you in remaining at work or returning to work, through the implementation of workplace accommodations, which includes providing a healthy, safe, and supportive work environment. You (and your union representative, if applicable) will be involved in the development and implementation of the accommodation plan.*

[58] The *Injury and Illness Policy* also mentions, at page14, that it is the manager's responsibility to "… meet with the injured or ill employee and the employee's union

representative, if applicable, to assess medical restrictions and identify the nature of the required accommodation". Mr. Brown and the grievor testified that no such meeting was ever organized following the employer's receipt of the OFAF completed by Dr. Hyrman.

III. Summary of the arguments

A. For the employer

[59] The crux of the employer's argument is that at the time of the termination, there was no reasonable prospect of the grievor returning to work after more than two years of leave of absence without pay. The employer acted under the authority of s. 51(1)(g) of the *Canada Revenue Agency Act*, S.C. 1999, c. 17, which reads as follows:

> ***51 (1)*** *The Agency may, in the exercise of its responsibilities in relation to human resources management,*
>
> …
>
> ***(g)*** *provide for the termination of employment or the demotion to a position at a lower maximum rate of pay, for reasons other than breaches of discipline or misconduct, of persons employed by the Agency and establish the circumstances and manner in which and the authority by which or by whom those measures may be taken or may be varied or rescinded in whole or in part ….*

[60] The grievor was terminated for incapacity. The termination was justified, as he was incapable of returning to work on a realistic and productive basis, according to his medical practitioner. Since the basic requirement of the employment relationship could not be fulfilled, the employer had no choice but to end that relationship. Dismissal for frustration of contract is not discrimination. In the event the dismissal were to be considered based on disability, and thus *prima facie* discriminatory, the employer stated that it had attempted numerous times to draw up an accommodation plan, but this had proved to be impossible. Therefore, there was no discrimination.

[61] Once the OFAF was completed, Mr. Leung had contacted Dr. Hyrman as he was puzzled by the recommendation to return to work full-time and without restrictions, while a year earlier, the grievor had been declared totally disabled. Dr. Hyrman had then recommended a gradual return, starting with two days per week. No further details were ever provided, although the employer had repeatedly asked the grievor to

have his doctor provide them.

[62] By February 2015, Dr. Hyrman was recommending a very gradual return for the grievor, starting with a half-day per week. After requesting accommodation details and affording numerous extensions, the employer was still no further ahead in understanding how to facilitate the grievor's return to work. By then, the leave without pay period had exceeded two-and-a-half years.

B. For the grievor

[63] The grievor's position is that the employer discriminated against him and that it did not fulfil its duty to accommodate him to the point of undue hardship.

[64] It is clear that the grievor suffered adverse treatment because of his disability; he has thus established a prima facie case of discrimination. The employer did not present any evidence to show that the return to work recommended by Dr. Hyrman would have caused it undue hardship. There are a great number of auditors working in the grievor's section, and work was carried out in his absence. Surely, the employer could have absorbed a gradual return to work. Moreover, the employer failed in its duty to accommodate the grievor by not inquiring further after receiving Dr. Hyrman's final note on March 26, 2015.

[65] The employment relationship was not frustrated as the employer has argued. At the time of the termination, the grievor had a favourable prognosis from Dr. Hyrman on his capacity to return to work, albeit gradually.

IV. Reasons

[66] Both the employer and the grievor submitted a number of authorities to support their respective positions. A number of precepts can be drawn from these authorities and are summarized in the following paragraphs.

[67] In *Scheuneman v. Canada (Attorney General)*, 2000 CanLII 16701 (FCA), the Federal Court of Appeal concluded that the inability to work frustrates the employment contract, and thus, termination when there is no reasonable possibility of a return to work in the foreseeable future is not discrimination based on disability. In that case, Mr. Scheuneman had been absent from work eight years, and the medical evidence was that he was unable to work and was unlikely to return to work in the

foreseeable future.

[68] In *English-Baker v. Treasury Board (Department of Citizenship and Immigration)*, 2008 PSLRB 24, the adjudicator ruled that terminating an employee on the basis of disability was *prima facie* discriminatory. The analysis then had to turn on whether the employer had a *bona fide* reason to terminate. An essential component of analyzing the *bona fide* requirement is the question of whether the employer has properly accommodated the employee, to the point of undue hardship.

[69] This line of jurisprudence, in which a termination for medical incapacity is at issue and is considered *prima facie* discriminatory, was further confirmed by the Supreme Court of Canada in both *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4 ("*McGill*"), and *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 ("*Hydro-Québec*").

[70] In *McGill*, the employee was terminated after a three-year absence from work because of disability, the period provided for in the relevant collective agreement. The issue was whether the employer had to assess the accommodation on an individualized basis or whether it could simply apply the term of the collective agreement. The Supreme Court of Canada ruled that the parties to a collective agreement had the right to negotiate the requirements of an employee's attendance, with a three-year limit to disability leave. Still, an assessment had to be made for any reasonable prospect of a return to work, even after the three-year period. The employee had been declared disabled and unable to work by her physician for an indeterminate period. The employer had made earlier attempts at accommodation. At the time of the termination, there was no reasonable prospect of a return to work within the foreseeable future, and consequently, the termination was justified.

[71] In *McGill*, the dissenting opinion found that terminating the employee was not *prima facie* discriminatory, as there was no reasonable prospect of fulfilling the employment contract. The majority opinion starts its analysis with the duty to accommodate, presumably having found that there was *prima facie* discrimination. Both analyses lead to the same result, which was that the termination was not discriminatory.

[72] In *Hydro-Québec*, the employee had missed 960 days of work in a seven-year period, and was on medical leave at the time of the termination. Her treating physicians foresaw no possibility of a return to work without the same degree of absenteeism. Over the years, the employer had adjusted her working conditions to take into account her limitations, to no avail. In that case, the issue was whether the employer had to establish that it was impossible to accommodate the employee. The Supreme Court of Canada ruled that undue hardship did not mean impossibility but rather an unreasonable demand on the employer's resources. Again, the starting point of the Supreme Court was the duty to accommodate a sick employee, with no analysis of *prima facie* discrimination.

[73] The case law is clear that accommodation is not solely the employer's responsibility. The employee requiring accommodation must also cooperate in this endeavour, as well as his union, if the employee is part of a bargaining unit (see *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 ("*Renaud*")).

[74] The issue in this case is whether the grievor's termination was discriminatory. If so, then it was contrary to both article 42 of the collective agreement and ss. 3 and 7 of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*), which respectively read as follows:

> [Article 42:]
>
> *42.01 There shall be no discrimination, interference, restriction, coercion, harassment, intimidation or any disciplinary action exercised or practised with respect to an employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, family status, marital status, mental or physical disability, conviction for which a pardon has been granted, or membership or activity in the Institute.*
>
> …
>
> [*CHRA*:]
>
> ***3 (1)*** *For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.*
>
> …

> ***7*** *It is a discriminatory practice, directly or indirectly,*
>
> ***(a)*** *to refuse to employ or continue to employ any individual, or*
>
> ***(b)*** *in the course of employment, to differentiate adversely in relation to an employee,*
>
> *on a prohibited ground of discrimination.*

[75] I find the grievor's termination discriminatory. I find there was *prima facie* discrimination, and that the employer did not fulfill its duty to accommodate that flowed from its obligations under the *CHRA*.

[76] A *prima facie* case of discrimination is one in which if the allegations are believed, they would be sufficient to justify a finding in the grievor's favour in the absence of an answer from the respondent (see *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536 ("*O'Malley*"), at para 28).

[77] To establish a *prima facie* case of discrimination in employment, the grievor must show the following: that he had a disability; that he experienced an adverse impact with respect to his employment; and, that his disability was a factor in that adverse impact (see *Moore v. British Columbia (Education)*, 2012 SCC 61 at para 33).

[78] Has the grievor established his disability as defined by s. 25 of the *CHRA*? Section 25 of the *CHRA* defines disability as including "any previous or existing mental or physical disability." The documentary evidence presented at the hearing corroborated the grievor's disability. Moreover, neither in its evidence nor in its submissions did the employer challenge that the grievor had a disability. The grievor has established his disability.

[79] Did the grievor experience an adverse impact in his employment? Unquestionably, he was terminated.

[80] Was the grievor's disability a factor in that adverse treatment? The grounds for termination were medical incapacity. The employer was well aware of the grievor's disability.

[81] I find there was *prima facie* discrimination by applying the *O'Malley* test; the grievor's allegations, if believed, would be complete and sufficient to justify a finding in his favour in the absence of an answer from the employer. His evidence shows that

he had a disability as defined in the *CHRA*, that he was adversely differentiated in his employment, and that his disability was a factor in this adverse impact. Accordingly, I find that the grievor has met his onus of establishing a *prima facie* case of discrimination.

[82] Once a case of *prima facie* discrimination is made, the onus is on the employer to show that its decision was justified, which includes demonstrating that it fulfilled its duty to accommodate. Section 15 of the *CHRA* sets out a defence for the employer: it is not discriminatory in an employment situation to impose a restriction or limitation that creates an adverse effect for an individual if it can be justified by a *bona fide* occupational requirement. For this requirement to be considered, as stated in subs. 15(2) of the *CHRA*,

> *…it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.*

[83] In this case, the employer did not fulfill its duty to accommodate to the point of undue hardship.

[84] When, in June 2014, Dr. Hyrman completed the OFAF and confirmed that the grievor was fit to work (capable of all duties) with no restrictions or limitations, the employer had no reason not to return him to work. Mr. Leung had doubts because of Sun Life's earlier notice of the grievor's total disability and because the grievor's duties were going to change. Mr. Leung called Dr. Hyrman to discuss his concerns. Dr. Hyrman, in turn, suggested a gradual return, starting with two days per week.

[85] The employer's *Injury and Illness Policy*, as quoted earlier in this decision, provides for the manager to discuss the employee's return to work with the employee and his union representative. This was not done.

[86] With the assessment in hand, with Dr. Hyrman's recommendation, and with the employer's own policy that states that the employee's medical practitioner is to be preferred to WHCS, the employer should have invited the grievor back to work, starting with a two day per week schedule. Instead, it insisted on the fitness-to-work

evaluation and then a detailed schedule from Dr. Hyrman, who had already answered all the questions. At the hearing, the employer's witnesses testified that they did not have enough details, for example, about the days and hours the grievor would work. That is precisely what the meeting in the *Injury and Illness Policy* is designed for — once medical advice is given, the logistics are left to the parties to implement the return to work – the employee and his manager, with the help of the union, if need be.

[87] The employer asked me to draw a negative inference from the fact that Dr. Hyrman was not called as a witness. I decline to do so. The employer cited *Topping v. Deputy Head (Department of Public Works and Government Services)*, 2014 PSLRB 74, to make its point that a negative inference should be drawn from the absence of any medical expertise. In that case, one of the issues was the grievor's alleged mental illness, which cast doubt on his consent to a settlement. Obviously, expert medical evidence was needed.

[88] In the present case, the employer never questioned the letters and forms Dr. Hyrman signed. The mental health issues that motivated the leave of absence were never questioned. The fact that Dr. Hyrman declared the grievor fit to work on June 27, 2014, was never questioned; nor was the fact that he suggested at that time, in the face of Mr. Leung's misgivings, a gradual return to work, starting with two days per week. I do not see what his testimony would have added to the facts I have before me.

[89] The employer failed to follow its own policy of returning employees to work after an injury or an illness. There was no medical reason not to have the grievor return to work on June 27, 2014. There was no reason for the manager not to use the OFAF and call in the grievor and his bargaining agent representative for a discussion on the logistics of the return to work, as per the employer's policy.

[90] By the time Dr. Hyrman sent his last note, in February 2015, he understood "that [the grievor] has some reservations about being wanted back at work and he could use some reassurance in that respect". After seven months, the two days had become a half-day to reintegrate him even more gradually.

[91] As illustrated in *McGill* and *Hydro-Québec*, if an employee's return to work cannot be achieved in the foreseeable future, after the employer has made reasonable attempts to accommodate that return, then the dismissal is justified. In other words, the employer has the onus to show that it sought to accommodate the grievor to the

point of undue hardship.

[92] I am satisfied from the evidence presented at the hearing that the grievor was in fact capable of returning to work in June 2014. Therefore, this is not a case, as in *McGill* or *Hydro-Québec*, where the employer was justified terminating the employee because there was no reasonable prospect of a return to work.

[93] In the authorities the employer provided, such as *English-Baker* and *Gauthier v. Treasury Board (Canadian Forces Grievance Board)*, 2012 PSLRB 102, the employer in those cases had made genuine efforts to have the employees return to work and thus had met the duty to accommodate to the point of undue hardship. The situations were simply not livable. In *Scheuneman*, the grievor had been on medical leave for eight years, and his physician had stated that there was no possibility of return to work in the foreseeable future.

[94] In *Calabretta v. Treasury Board (Department of Public Safety and Emergency Preparedness)*, 2015 PSLREB 85, the employer met with the employee and her bargaining agent representative on several occasions to try to set conditions that would facilitate her return to work. In that case too, the employer had made real efforts, and the accommodation process had truly reached the point of undue hardship, since despite those efforts, the employee could not return to work in the foreseeable future.

[95] In this case, although the employer claims that it did its part to reasonably accommodate the grievor, I saw no evidence of reasonable accommodation.

[96] The employer did extend the grievor's leave without pay, while continuing to insist that it needed more information from Dr. Hyrman. As stated earlier, at no time did any manager attempt to discuss concrete measures for a return to work with the grievor and his bargaining agent. In other words, reasonable accommodation was never discussed. The employer insisted that it needed details from the treating doctor, yet it already had in hand the OFAF, which was precisely designed to allow the medical practitioner to specify any restriction, limitations, or accommodation. The important aspect, which the employer simply refused to acknowledge, was that Dr. Hyrman had stated in June 2014 that the grievor was fit to return to work. The reasonable accommodation process should have started at that point, as a collaborative effort between the employer, the grievor, and the bargaining agent. No such attempt

was made.

[97] At the time of the termination, the employer argues that there was no reasonable prospect of the grievor returning to work, since Dr. Hyrman was recommending he return for a half-day per week. This too could have been discussed with the grievor and his bargaining agent representative, in consultation with Dr. Hyrman. The employer never acknowledged, much less addressed, the insecurity that it had fostered by hindering the return to work, as Dr. Hyrman mentioned in his note of February 25, 2015.

[98] The employer made no effort to accommodate and return the grievor to his tax auditor duties, yet there was no reason to believe he could not successfully return to work. He had no hesitation stating that performing auditor duties would not be difficult for him — when he was a technical advisor, he had worked alongside auditors, helping them with their work. He knew the nature of the work, had worked as an auditor, and knew the requirements. Were it necessary to apply new tools, he would learn, like anyone else. Nothing in the grievor's work profile makes me doubt that statement. Contrary to what the employer stated a number of times, his previous return to work had been successful but had been cut short by an announcement that the employer did not manage properly and that caused a relapse.

[99] The evidence is that the grievor could have returned to work and that the employer did not fulfil its duty to help him do so. The employer countered that as stated in *Renaud*, accommodation goes both ways, and the grievor simply did not provide enough information to allow it to accommodate him. In fact, the grievor had provided a completed OFAF in June 2014, and a follow-up by Mr. Leung had shown that a graduated return starting with two days per week, or fifteen hours, would have been a reasonable measure, according to the treating physician. At that point, the onus was on the employer, not the grievor, to consult the grievor and his bargaining agent as to the exact days and times he would work. This was not done, contrary to the employer's own policy. The employer made no attempt to accommodate him. Rather, starting with the request for a fitness-to-work evaluation, when his treating physician had stated that he was fully capable of returning to work, the employer used delaying tactics until the termination.

[100] The employer discriminated against the grievor by not allowing him to return to

work and by not actively seeking reasonable accommodation measures, including at the time of the termination. The employer has not met its onus of establishing that it fulfilled its duty to accommodate the grievor to the point of undue hardship.

V. Remedies

[101] The grievor has asked for the following remedies: reinstatement with full salary and benefits as of the termination date, compensation for pain and suffering under s. 53(2)(e) of the *CHRA* of $20 000, and special compensation for $20 000 under s. 53(3) because the employer engaged in the discriminatory conduct wilfully or recklessly.

[102] The grievor is to be reinstated with full salary and benefits as of the termination date. From the evidence heard at the hearing and the OFAF completed by Dr. Hyrman, I think that had the grievor returned to work on June 27, 2014, it is probable that by April 2015, he would have been working full-time.

[103] Paragraph 226(2)(b) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2), grants the Board the power to give relief in accordance with paragraph 53(2)(e) and subsection 53(3 of the *CHRA*, which read as follows:

> ***53 (2)*** *If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:*
>
> …
>
> ***(e)*** *that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.*
>
> ***(3)*** *In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice willfully or recklessly.*

[104] Compensation for pain and suffering under s. 53(2)(e) and special compensation under s. 53(3) of the *CHRA* have varied greatly, in cases before both the Canadian

Human Rights Tribunal (CHRT) and this Board and its predecessor, the Public Service Labour Relations Board ("the former Board").

[105] In *Stringer v. Treasury Board (Department of National Defence)*, 2011 PSLRB 110, the adjudicator reviews a number of decisions from both the former Board and the CHRT and comes to the following conclusion at paragraph 36:

> ***36*** *When analyzing the eight decisions referred to by the parties (disregarding* Hughes*), it became apparent that most of them do not include a detailed analysis of the rational [sic] used by the Tribunal or the adjudicator to arrive at the specific amount ordered for pain and suffering and for special compensation, if applicable. However, it is clear that the seriousness of the psychological impacts that discrimination or the failure to accommodate had on the complainants or the grievors is the main factor that justified each decision. It is also clear that recklessness rather than wilfulness was the principal ground used to grant special compensation to the grievors or the complainants.*

[106] In *Kirby v. Treasury Board (Correctional Service of Canada)*, 2015 PSLREB 41, the employer did not fulfil its duty to accommodate. The adjudicator awarded $10 000 for pain and suffering and $2500 for special compensation. The second amount was at the lower end of the scale, as some effort to accommodate had been made.

[107] In *Lloyd v. Canada Revenue Agency*, 2009 PSLRB 15, the adjudicator found that the employer's lack of inquiry had resulted in insufficient accommodation; the employee was awarded $6000 for pain and suffering. In *Lloyd v. Canada Revenue Agency*, 2015 PSLREB 67, the same employee was again awarded compensation under the *CHRA*, this time in the amount of $7000, because the employer had subjected her to a permanent lateral move that was later reversed. The Board found that the action was not reckless but that it was discriminatory, since it subjected the employee to adverse treatment without taking into account her needs as the action was taken with insufficient input from her physician.

[108] In this case, the grievor asked for the maximum amount under both compensation for pain and suffering and special compensation for reckless or wilful conduct. The employer did not make any representations on remedy.

[109] Having considered all the evidence, I have come to the conclusion that the employer discriminated against the grievor by not attempting sincerely to get him back

to work after Dr. Hyrman had given his approval in June 2014. From July 2014 until the time of the termination, the employer showed no willingness to discuss the return to work with the grievor and his bargaining agent, contrary to the employer's own policy. It showed callous disregard for the grievor's concerns about his letter of offer being valid (from July 2014 to November 2014), made no attempt to ease him back into the workplace or to allow him to interact with his colleagues, and generally insisted on further details from Dr. Hyrman without directly seeking his advice, despite the fact that he had informed the employer that he was available to answer its questions from the start, with the grievor's consent.

[110] After over thirty-five years of service, the grievor was treated like an unwanted person. I have no doubt that, and this was borne out by his testimony at the hearing, the injury to his dignity and self-esteem was tremendous and devastating. I also find that completely neglecting the terms of the *Injury and Illness Policy* and, specifically, the section on enabling the ill or injured employee to return to work constituted recklessness on the part of the employer. This was compounded by the abrupt termination, following the last note from Dr. Hyrman, without any further consultation.

[111] Although the facts differ, I find it useful to refer to *Nicol v. Treasury Board (Service Canada)*, 2014 PSLREB 3. In that case, the adjudicator concluded that the employer had deliberately delayed the employee's return to work, to the point that he was forced to take his medical retirement. There are a number of similarities between the present case and that case, notably, the employer's apparent reluctance to effectively put the employee back to work. In that case, the adjudicator awarded $20 000 in compensation for pain and suffering, after receiving evidence as to the considerable distress and financial difficulties that finally led the employee to take medical retirement against his will and to his financial detriment. The adjudicator also awarded $18 000 for special compensation because, in her words, she found (at paragraph 157) that "… the conduct was repeated, sustained and calculated to ensure the grievor would not return to work. It lasted almost four years."

[112] The employer's discriminatory conduct in this case was not as egregious, although it did cause the grievor considerable distress, and the employer was reckless by not taking into account the employer's own policy. Accordingly, I award $15 000 to the grievor in compensation for pain and suffering and $10 000 in special

compensation for the employer's reckless conduct.

[113] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

VI. Order

[114] The grievance is allowed.

[115] The grievor is to be reinstated with full salary and benefits as of April 1, 2015.

[116] The employer is directed to pay the grievor $15 000 in compensation for pain and suffering under paragraph 53(2)(e) of the *Canadian Human Rights Act* within 90 days of the date of this decision.

[117] The employer will pay Mr. Rogers $10 000 in special compensation under s. 53(3) of the *Canadian Human Rights Act* within 90 days of the date of this decision.

[118] I will remain seized of this grievance for 90 days from the date of this order to resolve any issues arising from its implementation.

September 30, 2016.

Marie-Claire Perrault,
a panel of the Public Service Labour Relations and Employment Board