**Date:** 20170217

**File:** 566-34-11967

**Citation: 2017 PSLREB 18**

*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

**EMPLOYEE X**

Grievor

and

**CANADA REVENUE AGENCY**

Employer

Indexed as
*Employee X v. Canada Revenue Agency*

In the matter of an individual grievance referred to adjudication

**Before:** Bryan R. Gray, a panel of the Public Service Labour Relations and Employment Board

**For the Grievor:** Christopher Schulz, Public Service Alliance of Canada

**For the Employer:** Caroline Engmann, counsel

Heard at Ottawa, Ontario,
November 1 to 4, 2016.

## I. Individual grievance referred to adjudication

[1] As requested and consented to by both parties to this matter, the grievor's name has been anonymized as "Employee X", and the grievor's position and medical condition details are not discussed in detail in this decision, in order to protect her privacy. Given the medical evidence presented at the hearing of this matter, a serious risk of injury would be posed to the grievor should her name or any identifying information about her be published. This risk of serious harm to her greatly outweighs any deleterious effect this has upon public access to open and transparent procedures before this Board. The issue of right to a fair hearing of the parties is not at issue in this case.

[2] I consider the anonymization of the grievor in this case to be exceedingly exceptional and to be based upon clear and compelling medical evidence from the grievor's treating physician who gave testimony at this hearing. Having heard the extensive testimony and having read the highly detailed and un-redacted medical charts of the grievor, there is no doubt as to the serious risk posed to her health by the prospect of her name being published in this decision. I have reflected upon the clear direction established by the Supreme Court of Canada in the test set out in *Dagenais v. Canadian Broadcasting Corp.,* [1994] 3 S.C.R. 835, and in *R. v. Mentuck*, 2001 SCC 76, and consider my decision as being consistent with that recently adjudicated issue by Adjudicator Homier-Nehmé who addressed these matters in *A.B. v. Treasury Board (RCMP),* 2016 PSLREB 23 decision. Given the state of health of the grievor in the matter before me, I do not consider any alternative measures to be effective in fully mitigating the risk to her health posed by identifying her. However, by conducting an open hearing and publishing the detailed reasons for this decision, I am satisfied that the principle of open court proceedings remains intact.

## II. Summary

[3] The relevant facts are not in dispute. The grievor was employed with the Canada Revenue Agency ("the employer"). In April 2012, she sustained a brain injury in a car accident that was not related to her work. The grievor was not able to recover, during the chronology of events relevant to this case, to be able to return to work before the employer terminated her employment due to medical incapacity.

[4] The grievor lost her employment due to her inability to work because of disability. Accordingly, a *prima facie* case of discrimination on the basis of disability is made out. The next question to answer then, is whether or not the employer accommodated the grievor to the point of undue hardship.

[5] The employer acknowledged the need to accommodate the grievor's medical condition, carried out extensive efforts to find a position for her, and ultimately offered an appropriate position. The grievor and her doctor both acknowledged that the position fully accommodated her medical needs.

[6] However, the grievor subsequently requested two extensions to her leave, thereby postponing the start date in her new position. The employer agreed to both, however, the employer refused a third request for a further three month extension. The reasons for the request were unclear and the employer's attempt to get clarification from the grievor's doctor was unsuccessful. There was no clear basis for the three month estimate and the doctor stated that the new proposal was only a 'target' start date. The grievor herself clarified that it was only a 'potential' start date.

[7] The employer concluded that it was unlikely that the grievor would be able to return to work at any time in the foreseeable future and decided to terminate the grievor's employment.

[8] For the reasons set out later in this decision, I find that the employer's decision was reasonable and that the employer accommodated the grievor to the point of undue hardship. Therefore, I dismiss the grievance.

## III. Relevant facts

[9] The grievor began working with the employer on August 28, 2006, and enjoyed nearly six years of employment before her injury in April 2012. The grievor exhausted her available sick leave benefits and then began leave without pay in July 2012. The grievor's long-term disability benefits were suspended by her private-sector insurer in April 2014, causing her severe hardship.

[10] The employer terminated the grievor's employment on June 24, 2015. A grievance was filed on July 14, 2015, which alleged that the termination was a discriminatory act on the basis of the grievor's disability contrary to s. 7 of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6).

[11] On January 12, 2016, the grievor's bargaining agent referred the grievance to adjudication, pursuant to s. 209(1)(c) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), after receiving the employer's final-level response. The grievor does not seek reinstatement but rather financial compensation and a declaration that the employer breached its duty to accommodate.

[12] I heard testimony from the grievor's physician ("the doctor") who explained that the symptoms arising from the grievor's injuries were exacerbated by the loss of her long-term disability benefits and the very serious financial hardship that resulted. The doctor's patient notes were produced in evidence, and in her testimony, she gave a detailed and troubling portrayal of the grievor struggling for a time to cope with basic day-to-day activities and being unable return to work. Through all of this, the doctor testified that the grievor clung to the hope of recovering and resuming work with the employer.

[13] Over the approximately 38 months following the injury, during which the grievor was unable to report to work, the employer received numerous notes from the grievor's treating physicians indicating a requirement for medical leave and numerous return-to-work dates starting as early as October 9, 2012.

[14] The employer's representatives gave uncontradicted testimony about the regular contact they maintained with the grievor and her bargaining agent representative during the grievor's leave without pay. The grievor was not able to maintain regular contact for a period of several months, during which the employer corresponded and spoke regularly with the grievor's bargaining agent representative and the doctor.

[15] An employer representative testified that she prepared correspondence for the grievor and the bargaining agent representative on May 1, 2014, which explained that the grievor had been off work for approximately two years and that the employer wished for the grievor to reply with an indication of her ability to return to work, wish to retire for medical reasons, or resignation. The employer requested a reply by July 2014.

[16] After that deadline and an extension expired with no response, the employer received a note from the doctor indicating that the grievor could return to work in nine months, in April 2015. Upon receiving this, the employer sent an occupational fitness

assessment form (OFAF) to the doctor, requesting her reply by October 2014, to confirm a detailed medical opinion of any accommodations required to facilitate the grievor's return to work.

[17] On January 22, 2015, the employer received the OFAF, which indicated that the grievor would be fit to return to work, with limitations, on April 1, 2015. The many accommodations that the doctor set out were onerous, and in at least one instance, contradictory. The employer, the grievor, and her bargaining agent representative remained in regular contact while preparing for the return to work during late winter and early spring 2015. And another extension of the medical leave was sought, which was granted.

[18] The employer's efforts to locate a suitable position for the grievor's accommodations began almost immediately after it received the completed OFAF. The Director General responsible for the grievor's branch emailed all departmental managers requesting their assistance. The grievor's manager then worked through the departmental organizational chart, identified every position at the group and level considered appropriate for the grievor's accommodations, phoned the supervisors of each position, and then asked each one if the position might become vacant and to consider whether it was appropriate for the grievor. Every day, she also scanned departmental job advertisements and had the Human Resources branch call her about every job posting that arose, to discuss each one's suitability for the grievor's accommodation needs.

[19] The employer's diligence was rewarded when a job opportunity, which was closing on March 30, 2015, was identified as appropriate for the grievor's accommodations. A meeting was held to discuss the position, with several employer representatives, the grievor, her bargaining agent representative, and a healthcare caseworker who had been working with the grievor. Everyone agreed that the position was acceptable. Despite the bulk of its duties requiring the use of a computer, the employer agreed to accommodate the grievor's medical requirement that she spend only two hours per day using one. The employer sent a description of the position's duties to the doctor, who replied in writing to confirm her view that the position properly accommodated the grievor's medical limitations.

[20] An employer representative testified about a meeting she held with the grievor and her bargaining agent representative on April 23, 2015, at which they discussed plans for the anticipated return to work. The witness recalled that at that meeting, the grievor told her in that meeting that "she was ready to return to work."

[21] On April 28, 2015, the doctor sent a letter to the employer setting out a detailed and gradual return-to-work plan for the grievor, which was to begin with three hours of work per day, three days per week, commencing on May 11, 2015. The same employer representative gave uncontradicted testimony that on several occasions, she questioned the grievor and her bargaining agent representative to ensure that the grievor understood everything that was taking place to find her a position that would meet her accommodation needs and to set a time frame for her return to work. The witness stated that on every occasion, she received a positive reply that the grievor understood what was being planned.

[22] The manager of the office where the grievor was to return to work ("the office manager") testified that he spoke to the grievor three times in May 2015 to discuss her return to work and the subsequent leave extensions that had been requested. He explained that his original plan had been to fill the vacant position by the end of April, given the fact that the office's workload peaked in the spring and summer months. He provided a detailed explanation of the office's duties and of its strict service standards, which are driven by client needs. He stated that after the grievor was offered the position and accepted it, the doctor requested two further leave extensions, neither one of which contained an explanation.

[23] The office manager stated that after some consideration, he approved both leave extensions as he wanted to be as flexible as reasonably possible to help the grievor. The first such extension was for one week, and the second was for approximately two weeks. Within a brief period, the return-to-work date had moved from May 11 to May 18 and then to June 1, 2015.

[24] Unfortunately, the employer received a letter from the doctor on May 15 requesting that the grievor's return to work be delayed until September 1, 2015. It stated that "some new medical issues have arisen". The employer immediately wrote back to the doctor, asking for details and whether the new issues required further accommodation. The doctor replied in writing on May 27, 2015, and stated that the

previous return-to-work date of June 1 had not been shared with her; that in her professional opinion, the grievor was not and would not be fit to return to work then; and that instead, "… she will be fit to return to work on September 1, 2015"; and that "… at this point in time, there are no new limitations or restrictions". Later in the same letter, the doctor referenced September 1, 2015, as the "target start date".

## IV. Issues

[25] Was it reasonable for the employer to determine that it was unlikely that the grievor would be able to return to work at any time in the foreseeable future, which made any ongoing efforts to accommodate the grievor's condition an undue hardship for the employer? To answer this question, several issues shall be examined that were argued by the parties in the context of whether the employer's ultimate decision was reasonable.

### 1. Could the employer rely upon evidence from the doctor's letter to a third party that it did not have when it decided to terminate the grievor?

[26] The hearing received evidence from the doctor's notes that provided details of a letter she wrote to a government social services agency on behalf of the grievor on January 8, 2015. The employer did not know of that evidence until after it terminated the grievor's employment. The letter states that due to the severity of the grievor's symptoms and as a direct result of her injuries, the grievor will not be able to return to her previous employment. It states that her symptoms are significant barriers to her returning to any type of employment in the future. It then concludes that her symptoms have improved minimally over the past two-and-a-half years and that they are likely to continue in the long term.

[27] The employer suggested that the doctor's letter was the "honest portrayal" of the grievor's condition and that it was improperly withheld from the employer. The grievor replied in argument, stating that the employer might well have been "annoyed" to see this assessment of the grievor's health, which was written at the same time the employer was trying to get the grievor's doctor to submit the OFAF assessment, but that the employer could not rely upon such evidence acquired after the fact to support its termination decision.

[28] The grievor cited both *McCormick v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-26274 (19950918) at para. 25, and *ADGA Group Consultants Inc. v.*

*Lane*, 91 O.R. (3d) 649 at para. 108, as authorities against the use of after-acquired evidence.

[29] While with the benefit of the passage of time, the doctor's January 2015 letter appears to have been a much more accurate portrayal of the grievor's condition, I will not rely upon it as it was not available to the employer when it decided to terminate the grievor's employment.

**2. Were the employer's efforts to find a suitable position for the grievor sufficient to discharge its duty to accommodate to the point of undue hardship?**

[30] I noted earlier that the employer undertook extensive efforts to find a suitable position to offer the grievor to accommodate the required medical issues. It also led evidence that it was unlikely that another suitable position could be found for the grievor, given the very few positions available at the relevant classification and the fact that the grievor required accommodations that would allow performing only a fraction of normal daily duties.

[31] Once a position suitable for the grievor was found, the grievor's physician then requested three further extensions of medical leave. After deliberating, the employer accepted the first two requests but denied the third.

[32] In her testimony, the doctor explained the somewhat contradictory message that she sent upon the final request for a leave extension. Her May 15, 2015 letter stated that a new medical condition had arisen but that no further accommodations were required. She explained that a problem had arisen with the grievor's housing arrangement and that she had wished to allow the grievor time to resolve it, which would have provided greater stability in the grievor's life.

[33] The office manager testified that he was confused by the doctor's May 15, 2015 letter as it simultaneously stated that a new medical condition had arisen but that no further accommodations were required. He testified that he telephoned the doctor to ask for further clarification. He stated that no explanation of the letter was offered, which the doctor later confirmed in her testimony. Rather, the doctor stated that she prefers to protect the privacy of her patients and that she does not provide detailed explanations of her patients' conditions.

[34] In cross-examination, the office manager was asked why the employer did not seek a second medical opinion when it became concerned that the return to work might not occur in the foreseeable future. He replied that given the grievor's state and her history of having been in her family physician's care for quite some time, the employer determined that it might not be in the grievor's best interest to seek an independent medical assessment. Given the extensive record of the doctor's treatment of the grievor and the injuries the grievor suffered in the accident, I find that the employer's decision not to request a second medical evaluation was reasonable.

[35] While the grievor's bargaining agent commended the employer for its efforts to accommodate the grievor, it argued those efforts did not relieve the employer of its ongoing duty to accommodate the grievor. The grievor argued that it would not have been an undue hardship for the employer to launch a second search for a position suitable for the grievor's accommodations simply because it might have been unlikely that one would be found. However, the question of whether further accommodation would constitute under hardship must be answered in the context of the reasonable foreseeability of a future reason to work. I deal with this later in the decision.

**3. Was it reasonable for the employer to determine that the grievor would not be able to return to work in the reasonably foreseeable future?**

[36] The grievor's local shop steward and co-worker testified that she worked for approximately two years to assist the grievor after her injury with her communications with the doctor and the employer in hopes of facilitating a return to work. As noted, a return-to-work date of June 1, 2015, was set at one point with the grievor and the employer. However, again as noted, the doctor explained that she had not been consulted about that date and stated that the grievor was not fit to return on that date.

[37] When asked about this matter, the shop steward confirmed that these discussions occurred and said that she clearly recalled being a party to discussions that took place when the grievor indicated that she would return to work on June 1, 2015. The shop steward also stated that later on, she was surprised (and that the grievor was disappointed) when the doctor wrote to the employer and indicated that in fact the grievor was not fit to return to work on that date.

[38] The shop steward also confirmed that when the doctor wrote to the employer and stated that the grievor required an extension of her medical leave to September 1,

2015, the grievor told the employer that the doctor's letter should have specified a return-to-work date of "potentially September 1, 2015." In redirect examination, the shop steward repeated this testimony, of the grievor telling that to the employer, and also stated that the grievor was "easily confused."

[39] The evidence before me is clear that given the vexing nature of the grievor's injuries, the many extensions of medical leave sought by the grievor's treating physicians were intended to give the grievor more time in hopes that her injuries and symptoms would subside.

[40] In each case, the treating physician provided an estimate of the time required for recuperation, but the evidence clearly establishes that each return-to-work date was simply an optimistic guess, founded on hope. I received no evidence to support a finding that any of the return-to-work dates were grounded by an informed medical opinion that the grievor would actually recover and that she would be fit to return to work on each stated date.

[41] The grievor pointed to the evidence that unlike in 2014, by 2015, she was able to actively participate via email and occasionally in face-to-face meetings in the efforts to identify the necessary disability accommodations and to find a suitable position to allow her to return to work.

[42] The grievor cited *Pepper v. Treasury Board (Department of National Defence)*, 2008 PSLREB 8 at para. 158, for the proposition that the mere provision of sick leave, leave without pay, and disability benefits as part of a compensation package does not mean that an employer has discharged its duty to accommodate a disabled employee. *Pepper* was a case in which the employer had not been diligent in keeping in contact with an employee.

[43] In upholding the grievance, the adjudicator found that the employer should have taken a greater initiative as it did not seek up-to-date medical information about the employee's condition for two years before deciding to terminate the employee's employment. The adjudicator also stated that anticipated hardships based upon speculative concerns of certain adverse consequences are insufficient. She stated further that an employer's reasons for not considering an accommodation must be supported by reliable, objective, and persuasive evidence that its concerns are well founded (see paragraph 153).

[44] I distinguish *Pepper* on its facts as the uncontradicted evidence before me shows the opposite. The employer here went to great lengths throughout the entire period of leave without pay to maintain regular contact with the grievor and her treating physician, including phoning the doctor to obtain clarification of the final medical note. And unlike *Pepper*, the evidence before me shows that after considerable efforts, the employer offered the grievor a position that was suitable and that the grievor and the doctor agreed met all the accommodation needs.

[45] The grievor suggested that the employer should have made at least one more search for another position suitable for the required accommodations. In argument, the grievor's counsel stated that had the employer undertaken a second search for a position, it would have been a lot closer to discharging its duty to accommodate.

[46] The grievor cited *Gourley v. Hamilton Health Sciences*, [2010] O.H.R.T.D. No. 2168 (QL), as authority for the assertion that an employer is obligated to perform a "significant" amount of work in a job search for an employee who requires accommodation.

[47] *Gourley* deals with an unsuccessful human rights complaint that arose from events that unfolded over a lengthy period. The Ontario Human Rights Tribunal found that in two periods at issue, the employer did not have clear information about the accommodations required (see paragraphs 24, 28, and 39). In a third period, which spanned two years, the Tribunal found that the employer considered over 40 job postings within its organization but that it determined that none met either the complainant's qualifications or accommodation requirements. The Tribunal found that the employer met its onus of showing that it had discharged its duty to accommodate the complainant's disability to the point of undue hardship. I do not find *Gourley* applicable to the considerably different facts in the case before me.

[48] With respect to defining "foreseeable future", the grievor cited page 28 of *McCormick*, which finds that that term must be defined in keeping with the circumstances of each case. In that case, the former Public Service Staff Relations Board determined that "… after … two years of absence a six-month period could reasonably constitute the foreseeable future."

[49] In his closing argument, counsel for the grievor suggested that the employer was "happy" to rely upon the doctor's vague statement that the grievor had a new

medical condition in June 2015 that justified the decision to terminate the employment relationship. This assertion was both unfair and contradictory to the evidence. Firstly, no happiness was evident anywhere in the handling of this difficult and extremely unfortunate case. Secondly, contrary to that assertion, the employer acted promptly when it contacted the doctor and sought further details of the report of a new medical condition. It is clear that the employer acted in good faith to seek clarification of this vague medical opinion in case it might have been a relatively minor issue that could be treated.

[50] The employer argued in response that the uncontradicted evidence clearly shows its diligent efforts to remain in regular communication with the grievor and her bargaining agent representative throughout the entire period of her leave. The employer also pointed to the uncontradicted evidence of its efforts to obtain an OFAF from the doctor and its immediate and significant commitment of time and effort to find a position suitable for the grievor's many required accommodations.

[51] A position that fully accommodated the grievor's many medical limitations was identified to, offered to, and accepted by the grievor and the doctor. The employer pointed to the fact the position urgently needed to be filled but that nevertheless, it accepted two extension requests for the grievor to continue her leave while it held the position vacant in anticipation of her return. Only upon the third and final request for an extension of an additional three months of leave, with a vague reference to a new medical condition, did the employer decide to fill the position with another candidate and to terminate the grievor's employment for medical reasons.

[52] The employer conceded that it undertook no further job search efforts to find an accommodation for the grievor after her last request for a leave extension. But it pointed to the mystery surrounding the final leave extension being due to a new medical condition and the fact that it sought, both in writing and via telephone, an explanation of the "possible" or "potential" (the Doctor's and the grievor's word, respectively) September return-to-work date and the fact that the doctor also stated that no further accommodation was required beyond her last OFAF. The employer submitted that given these circumstances, it was reasonable for it to determine that the grievor would not return to work in the foreseeable future.

[53] Counsel for the employer argued that the September return-to-work date was not a real date that neither the grievor or the doctor had reason to firmly believe would, in fact, be the actual return-to-work date. I agree with that argument, given the clear and compelling evidence before me.

[54] The employer noted that it is well established in Canadian jurisprudence that once an employee produces evidence of a disability, the employer has a duty to accommodate that disability. However, this duty does not completely alter the essence of the employment contract, which is the employee's duty to perform work in exchange for pay.

[55] An employer has a duty to accommodate the medical disabilities of an employee up to the point of being able to show undue hardship. The test for undue hardship on an employer is not the employee's total unfitness for work in the foreseeable future. If an employee with an illness remains unable to work for the reasonably foreseeable future, even though the employer has tried to accommodate him or her, the employer will have satisfied the test. The employer's duty to accommodate ends when for the foreseeable future, the employee is no longer able to fulfil the basic obligations associated with the employment relationship (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 paras. 15 to 19). At that point, the test for under hardship will have been satisfied.

[56] The *Hydro-Quebec* decision was applied by Adjudicator Bertrand in *Belisle v. Deputy Head (Department of Aboriginal Affairs and Northern Development)*, 2016 PSLREB 88 at paras. 42 and 47. He finds that under certain circumstances, the Treasury Board guideline of leave without pay may be extended beyond two years. However, the leave should not be extended indeterminately. In dismissing the grievance in that case, the adjudicator finds that it was reasonable for the respondent in that case to "seriously doubt" that the grievor would be able to return to work.

[57] Given the clear and uncontradicted evidence before me of the lack of progress in the grievor's recovery, I find that once faced with yet another request for a lengthy and uncertain extension of medical leave the employer's conclusion was reasonable that the grievor would not be able to return to work in the reasonably foreseeable future.

[58] This situation, in the context of the grievor having been off work for 38 months with nothing more than a string of prognostications based only upon the treating physician's unrequited hope, shows that the employer's decision to terminate the grievor was reasonable in all the unfortunate circumstances.

## V. Sealing order

[59] I received a request on consent of both parties to issue a sealing order for Exhibits BA 21 and 22, which comprise the grievor's highly detailed medical records from the doctor. In light of that highly detailed personal information, I grant this request and order Exhibits BA 21 and 22 sealed.

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

*(The Order appears on the next page)*

## VI. Order

[61] The grievance is dismissed.

February 17, 2017.

**Bryan R. Gray,**
**a panel of the Public Service Labour Relations and Employment Board**