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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

SOPHIE NADEAU

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Nadeau v. Canada Revenue Agency

In the matter of an individual grievance referred to adjudication

Before: Stephan J. Bertrand, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Marie-Hélène Tougas, Professional Institute of the Public Service of Canada

For the Employer: Pierre-Marc Champagne, Treasury Board

Heard at Québec, Quebec,
December 6 and 7, 2016, and May 16 and 18, 2017.
(FPSLREB Translation)

I. Individual grievance referred to adjudication

[1] At the relevant time, Sophie Nadeau ("the grievor") worked at the Canada Revenue Agency's (CRA or "the employer") Eastern Quebec Tax Services Office (TSO) as an auditor classified at the AU-03 group and level. She was covered by the collective agreement between the employer and the Professional Institute of the Public Service of Canada ("the Institute") for the Audit, Financial and Scientific Group, which expired on December 21, 2014 ("the collective agreement").

[2] On June 25, 2014, the grievor filed a grievance in which she alleged that the employer had breached its duty to accommodate and that it had discriminated against her by changing her employment status, contrary to the *Canadian Human Rights Act* (R.S.C. 1985, c. H-6; *CHRA*) and article 42 of the collective agreement.

[3] The grievance was referred to adjudication, and notice was given to the Canadian Human Rights Commission (CHRC). The notice pointed out that the grievor was planning to raise a question about interpreting and applying the *CHRA*. The CHRC decided not to make submissions on the questions she raised.

[4] 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 to replace the Public Service Labour Relations 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 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) before November 1, 2014, is to be taken up and continued without under and in conformity with the *Public Service Labour Relations Act* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[5] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations and Employment Board Act*, the *Public Service Labour Relations Act*, and the *Public Service Labour Relations Regulations* to, respectively, the

Federal Public Sector Labour Relations and Employment Board, the *Federal Public Sector Labour Relations and Employment Board Act*, the *Federal Public Sector Labour Relations Act*, and the *Federal Public Sector Labour Relations Regulations*.

II. Summary of the evidence

A. The grievor

[6] The grievor began working for the employer in September 2001. At that time, she held an auditor position classified at the AU-01 group and level. Between 2001 and 2014, she held positions in several of the employer's divisions. In particular, she held an investigator position classified at the AU-03 group and level in the enforcement division between August 2003 and June 2013. After that division was reorganized, she was offered a tax auditor position classified at the AU-03 group and level with the audit division. According to her, her managers have never questioned her work performance.

[7] From February 2010 to February 2011, the grievor was on sick leave and was receiving disability insurance benefits from Sun Life Financial. She returned to work gradually, but she was diagnosed with cancer and once again had to apply for disability insurance benefits from Sun Life Financial. Between June 14, 2011, and November 28, 2014, she worked two-and-a-half days per week and received disability insurance benefits from Sun Life Financial for up to 70% of her salary. She worked her hours on a flexible schedule that allowed her to attend her many medical appointments and to rest between her workdays.

[8] In 2013, after the reorganization of the enforcement division, the grievor's new manager informed her that she would no longer be able to work flexible hours in her new auditor position. He clarified that a fixed work schedule would be implemented following a medical assessment. He also recommended that she reduce her hours and even quit her job so that she could look after her health. She interpreted those suggestions as an expression of the employer's desire to remove her from the workplace and as a lack of confidence in her.

[9] In October 2013, the employer asked the grievor's oncologist to carry out a medical assessment to determine whether reasonable accommodation measures should be put in place. It gave the oncologist its 12-page medical assessment form as well as a 3-page questionnaire. The oncologist explained to the grievor that the

resources allocated to the Oncology Department at Hôtel-Dieu-de-Lévis did not allow for treating doctors to complete such assessments and that they should instead focus on treating patients. Still, he agreed to provide her with a medical note dated October 28, 2013, which indicated that although she had a chronic blood disease that caused fatigue, she was able to work part-time, two-and-a-half days per week, to a maximum of seven-and-a-half hours a day, preferably non-consecutively.

[10] On November 25, 2013, the employer provided the grievor with an accommodation plan that provided the following:

> [Translation]
>
> *Proposed terms for Sophie Nadeau's individual accommodation plan*
>
> *(Further to the receipt of the latest medical certificate, dated October 28, 2013, and to comments that Sophie Nadeau and her union representative, Sylvain Laflamme, made at the November 25, 2013, meeting).*
>
> *- A fixed schedule of 18.75 hours per week shall be implemented. This schedule includes several leave types as provided under the collective agreement. To that end, and as mentioned, all employees have the right to take leave, regardless of a part-time schedule.*
>
> *- Workdays will be split over three days (Mondays, Wednesdays, and Fridays) to avoid working consecutive days. The basic schedule for each day will be discussed with the team leader.*
>
> *- The flexible schedule will be maintained within a schedule of 18.75 hours per week, taking into account on one hand that the hours worked may not exceed 7.50 hours in a day and on the other hand that any absence or arrangement or change to the basic schedule must be authorized by the team leader, regardless of the fact that an accommodation plan is in place.*
>
> *- The on-site audit files that will be assigned will be limited to files located within an area of 16 km either from the assigned worksite or the residence via the most direct, safe, and practical road. This is to avoid long travel times and to maximize on-site audit times.*
>
> *Both sides are encouraged to provide ongoing feedback on the accommodation measures. The measures may be reviewed as required during periodic meetings with the team*

> *leader. The manager will also be available for discussions or meetings if desired.*
>
> *As discussed, it is understood that a medical certificate specifying the nature of the limitations (temporary or permanent) will be submitted a few months from now, after the next medical appointment.*

[11] On February 10, 2014, the employer was furnished with a second medical note from the grievor's oncologist. In it, the oncologist confirmed the grievor's medical condition and the resulting fatigue and pointed out that in her opinion, it was laudable that the grievor was willing to continue working part-time. She added that the future was unpredictable since cancer treatments could eventually be necessary and that the grievor's response to those treatments and her post-treatment status were unknown at that point.

[12] According to the grievor, from that point on, her manager began speaking to her informally about changing her employment status from full-time to part-time. At that time, she was completely unfamiliar with the concept. Based on the insinuations, it was unfair that she benefitted from the same vacation leave as full-time employees even though she worked only part-time. Confused, she consulted her union representative for advice about changing her employment status.

[13] On February 19, 2014, the grievor's representative wrote to Guillaume Donati, director of the Eastern Quebec TSO, to raise several matters, including the issue of changing the employment status. He warned Mr. Donati that changing the grievor's employment status while she was gradually returning to work would be considered a discriminatory measure likely to cause serious harm. He added that he would vigorously challenge any such change.

[14] On March 12, 2014, Mr. Donati replied to the grievor's representative. In a letter, he confirmed that since 2011, the employer had implemented accommodation measures for the grievor that enabled her to reduce her work schedule to 18.75 hours per week and to keep a flexible work schedule. With respect to the employer's intention to change the grievor's employment status, Mr. Donati indicated that because her situation had not changed for three years, the proposed change was a normal administrative measure made on a determination that a situation will not change in the near future. Mr. Donati also expressed his wish for the grievor to undergo a medical assessment by an employer-designated doctor because he was not satisfied with the

medical certificates that her oncologist had provided.

[15] However, the grievor was never referred to a doctor designated by the employer or to Health Canada. In her view, that confirmed that there was no real need to proceed with another medical assessment at that time.

[16] In April 2014, in an email to the Assistant Director of Workplace Relations, the grievor raised several concerns about the possible change to her employment status, including the impact on her leave, disability insurance benefits, drug and dental benefits, and death benefits, as well as on her pension plan and years of service. The employer provided her with very few answers, preferring instead to direct her to several third parties. According to the information those parties obtained, changes to the grievor's employment status would have serious financial consequences.

[17] In an email dated May 21, 2014, Mr. Donati confirmed that the change to the grievor's employment status would take effect on June 2, 2014. He also confirmed in the email that the change in question was in no way based on a CRA policy or directive but instead on normal practice in the public service and the CRA under which employees working less than 30 hours per week had to have part-time employment status (emphasis added). However, the change to the grievor's employment status took effect only on July 28, 2014, as noted in a letter from the employer on that subject dated June 25, 2014. The letter does not refer to the employer relying on any CRA directive, policy, or practice at that time. However, the "Reply to Grievance" refers to ss. 30(1)(a) and 51(1)(a) of the *Canada Revenue Agency Act*, which stipulate the following:

> ***30 (1)*** *The Agency has authority over all matters relating to*
>
> ***(a)*** *general administrative policy in the Agency …*
>
> …
>
> ***51 (1)*** *The Agency may, in the exercise of its responsibilities in relation to human resources management,*
>
> ***(a)*** *determine its requirements with respect to human resources and provide for the allocation and effective utilization of human resources …*
>
> …

[18] The grievor indicated that her struggle with her employer to maintain her

employment status caused her a great deal of stress and fatigue and prevented her from putting all her energies into improving her health.

[19] From November 28, 2014, to December 7, 2015, the grievor was on sick leave, and she received disability insurance benefits from Sun Life Financial. Starting on December 9, 2015, she made a gradual return to work, and since February 15, 2016, she has maintained a four-day per week work schedule. Since she now receives 80% of her salary, she is no longer eligible for Sun Life Financial benefits. However, the employer still maintains her part-time employment status.

B. Guillaume Donati

[20] Mr. Donati has been the director of the CRA's Eastern Quebec TSO since November 2006. He has 33 years of service with the public service.

[21] On more than one occasion in his testimony, Mr. Donati described the grievor's accommodation file as delicate. His involvement in it began in 2013 and mainly involved obtaining up-to-date medical information.

[22] Mr. Donati was unable to comment on the grievor's situation before 2013 on the grounds that he was unfamiliar with her or with the accommodation measures then in place. Essentially, he understood that the main accommodation measure involved allowing her to work 18.75 hours per week instead of 37.5.

[23] He said that he began addressing the question of the grievor's employment status in early 2014. In his view, the medical information that her oncologist provided was unsatisfactory and did not make it possible to conclude that the grievor could work full-time in the foreseeable future. However, in cross-examination, he recognized that the letter and forms submitted to the oncologist did not clearly address that issue. He also acknowledged that no one had asked the grievor to address that issue with her oncologist and that she had never been referred to a doctor designated by her employer or Health Canada to review the issue. He filed no documentary evidence suggesting the contrary.

[24] When questioned about his decision to change the grievor's employment status, Mr. Donati was unable to provide a detailed response. He simply indicated that the employment status change was nothing more than an administrative action that involved applying clause 38.01 of the collective agreement, which states that

employees with a normal work schedule of less than 37.5 hours per week are designated part-time. In his view, it was an administrative action that sought to normalize a situation that had gone on too long. He reiterated that the grievor had been working 18.75 hours per week for over 3 years while maintaining full-time employee status.

[25] When asked whether the decision to change the grievor's employment status was motivated by the fact that the employer had reached the undue hardship threshold, Mr. Donati was unable to provide an answer. He did not file any documentary evidence about undue hardship.

[26] With respect to the potential impacts of such a change on the grievor, Mr. Donati acknowledged that he had not considered them when he decided to change her employment status. He added that his decision was in no way based on a CRA directive or policy. In his view, the grievor benefitted from reasonable accommodation measures both before and after her employment status changed.

[27] When the employer's representative asked him about the grievor's work performance, Mr. Donati confirmed that she was a good employee who had always performed well and had demonstrated exceptional resilience. He described as admirable her drive to take pride in her work despite her health problems.

[28] Finally, Mr. Donati confirmed that although the grievor had moved from a work schedule of 18.75 hours per week to one of 30 hours, he did not intend to reactivate her full-time status because she was still unable to work a normal 37.5-hour workweek. However, he emphasized on more than one occasion that he had told her that her full-time status would be reactivated as soon as she was able.

C. Élise Boudreau

[29] Ms. Boudreau has been a labour relations consultant at the CRA's Eastern Quebec TSO since 2010. Her involvement in this case has been limited to advising and supporting the grievor's immediate manager on obtaining medical information and on changing the grievor's employment status between October 2013 and January 2014.

[30] Ms. Boudreau confirmed that if necessary, the CRA may designate a doctor of its choice to conduct a medical assessment of an employee or even refer an employee to Health Canada for that purpose. She added that the CRA did not do that in this case. In

her opinion, management never questioned the validity of the medical certificates that the grievor's oncologist provided.

[31] She indicated that the grievor's accommodation plan from November 25, 2013, was a continuation of the accommodation measures that had already been put in place. However, she was unable to elaborate on the nature of the accommodation measures implemented before 2013 or on the grievor's work performance at that time.

[32] During her testimony, Ms. Boudreau referred me to the CRA's "Injury and Illness Policy" (Exhibit E-6) as well as the "Managing Injury and Illness Process" tool (Exhibit E-7). However, she did not refer me to the relevant provisions of these documents, with the exception of page 73 of Exhibit E-7, which suggests that under certain circumstances, a status change from full-time to part-time may constitute an appropriate accommodation measure. However, she clarified that she neither advised Mr. Donati on this issue nor made any related recommendations and that she had never referred him to those documents.

D. Marc Bellavance

[33] Since 2002, Mr. Bellavance has held the assistant director position in the Workplace Relations Centre of Expertise at the Montreal TSO's Regional Quebec Office of the CRA. In 2013, Ms. Boudreau and Mr. Donati consulted him. He advised them on changes to the grievor's employment status. In his view, it was a delicate file that merited close attention, given the accommodation period in question.

[34] Mr. Bellavance explained that because the grievor's situation had persisted for over three years and that is was unreasonable to believe that any change would come in the foreseeable future, it had become necessary to align her situation with her terms and conditions of employment by changing her employment status from full-time to part-time. He added that it was an administrative measure unrelated to any internal policy or directive but instead to a CRA practice. He also made sure to point out that there was no question of undue hardship in this case and that keeping the grievor's employment status at full-time before July 28, 2014, in no way constituted an accommodation measure put in place by the CRA.

[35] According to Mr. Bellavance, allowing the grievor to work a reduced schedule, compared to the one that she would normally have had to follow, represented a

reasonable accommodation measure. The change to her employment status was a consequence of this reality and did not detract from the accommodation measure put in place by the CRA in any way, despite that her benefits could have been affected by the change.

[36] In cross-examination, Mr. Bellavance agreed that the CRA did not see fit to rely on Health Canada's expertise to determine whether the grievor's situation was permanent. He simply reiterated that her situation had not really progressed over the previous three years and that the available medical information did not allow him to envisage a change in the foreseeable future. In his view, once an employer is satisfied that such a situation will not change in the foreseeable future, it must normalize the situation and change the employment status of employees who are no longer able to work full-time.

III. Summary of the arguments

A. For the grievor

[37] The grievor maintained that by changing her employment status from full-time to part-time, the employer failed to fulfil its duty to accommodate her. She also pointed out that it had not complied with its own guidelines by failing to apply the criteria set out on page 73 of its Managing Injury and Illness Process tool (Exhibit E-7) before changing her employment status.

[38] The grievor emphasized that before changing her employment status and the accommodation measures put in place for her, the employer was obligated to determine if and when she would be able to work full-time, based on objective medical information.

[39] The grievor maintained that she had never been asked to specify if and when she would be able to work full-time. She added that her treating doctor had never been asked a similar question and that no related referral had ever been made to Health Canada.

[40] The grievor encouraged me to accept her position, which was that although the available medical evidence noted a medical condition that could change and that it was not known whether additional medical treatment would be necessary and, if it was, how she would react to it, it was unreasonable to conclude that she would be unable to

work full-time in the foreseeable future. In her view, the employer had a duty to ensure that she was no longer able to perform work due to permanent limitations and to obtain objective medical information before unilaterally changing the accommodation measures in place and adversely affecting her.

[41] The grievor also pointed out that the employer had acknowledged that it was not a question of undue hardship and that it had instead proceeded based on customary practices and procedures to regularize her employment status.

[42] The grievor relied on the following case law: *Rogers v. Canada Revenue Agency*, 2016 PSLREB 101; *Kirby v. Treasury Board (Correctional Service of Canada)*, 2015 PSLREB 41; *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; *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4; *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970; *Ont. Human Rights Comm. v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; and *Ontario Human Rights Commission v. Etobicoke*, [1982] 1 S.C.R. 202.

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

[43] The employer maintained that the change to the grievor's employment status did not amount to discrimination on the basis of disability. It added that maintaining her employment status or compensation did not constitute an accommodation measure based on its obligation to implement such measures. On that point, it referred me to paragraph 14 of *Hydro-Québec*, at which Judge Deschamps stated the following:

> *As L'Heureux-Dubé J. stated, the goal of accommodation is to ensure that an employee who is able to work can do so. In practice, this means that the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work. The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.*

[44] The employer pointed out that although it had a duty to arrange the grievor's workstation and to adjust her duties and schedule to allow her to carry out her work, it was in no way obligated to maintain her salary, benefits, or employment status. To substantiate that, it referred me to *Canada Safeway Ltd. v. Retail, Wholesale and*

Department Store Union, Local 454, 2004 SKQB 102 (a decision of the Saskatchewan Court of Queen's Bench); *Crossroads Regional Health Authority v. Alberta Union of Provincial Employees*, [2002] A.G.A.A. No. 11 (QL), 105 L.A.C. (4th) 78 (an Alberta arbitration decision); *Ontario Public Service Employees Union v. Ontario (Liquor Control Board of Ontario)*, [2009] O.G.S.B.A. No. 50 (QL), 182 L.A.C. (4th) 116 (an Ontario Grievance Settlement Board decision); and *SaskPower v. Unifor, Local 649*, [2015] S.L.A.A. No. 21 (QL) (a Saskatchewan arbitration decision). The employer added that no other changes to the grievor's work conditions or workplace could have allowed her to work more hours.

[45] The employer also asked me to conduct the same type of analysis as in *Timmons v. Treasury Board (Department of Citizenship and Immigration)*, 2015 PSLREB 50. In that case, the Board found that the employer was not required to consider the obligation to implement accommodation measures by offering an employee an acting CR-05 position instead of her CR-03 substantive position when she returned to work, since she was not working when the decision was made, and there was no certainty as to when she would return to work. And, after she returned to work, the grievor did not specify what kind of accommodation measures she would need.

[46] According to the employer, it had a valid reason to change the grievor's employment status because at that time, it had been impossible to conclude that she would be able to work full-time in the foreseeable future.

[47] The employer reminded me that under the collective agreement, employees who do not work 37.5 hours per week cannot benefit from full-time status and are instead considered part-time employees. In its view, considering the grievor a part-time employee constituted an appropriate accommodation measure given her inability to work full-time. However, the employer was not required to compensate her or give her the same benefits as a full-time employee.

[48] Finally, the employer maintained that the grievor did not establish the nature or scope of the damages she claimed under s. 53 of the *CHRA* and that it is not accountable for such damages under the circumstances.

IV. Reasons

[49] In human-rights-complaint cases, the complainant has the burden of proving

prima facie (on its face) discrimination. Such evidence "… covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer" (see *Ont. Human Rights Comm.*, at para. 28).

[50] Specifically, to establish *prima facie* discrimination, complainants must establish these three points: (1) that they have a characteristic protected by the *CHRA* against discrimination (the disability); (2) that they have suffered employment-related detrimental effects under s. 7 of the *CHRA*; and (3) that the protected characteristic (the disability) was a factor in the detrimental effect (see *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33).

[51] The protected characteristic does not have to be the only factor in the detrimental effect; it can be just one of them (see *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at paras. 48 to 52).

[52] In response to discrimination complaints, for their part, respondents may submit evidence to show that their actions were not discriminatory or establish a legislative exception that justifies the discrimination (s. 15 of the *CHRA*). If respondents rely on a legislative exception, they then have the burden of justifying the conduct or practice under the *CHRA*.

[53] In this case, the employer did not dispute that the grievor has a characteristic protected by the *CHRA*. It is reasonable to conclude that she experienced an employment-related detrimental effect. The collective agreement provides different, even better, wages and benefits for full-time employees than for part-time employees. It is also reasonable to conclude that the grievor's disability played a role in the detrimental effect. The issue to be determined in this case is whether the employer breached its duty to put accommodation measures in place and if it discriminated against her by changing her employment status, contrary to the *CHRA* and article 42 of the collective agreement.

[54] The relevant provisions of the collective agreement provide for the following:

…

> ***8.04*** *Except as provided for in clauses 8.05, 8.06 and 8.07,*
>
> …
>
> *c. the scheduled work week shall be thirty-seven decimal five (37.5) hours …*
>
> …
>
> ***38.01 Definition***
>
> *"Part-time employee" means a person whose normal scheduled hours of work are less than thirty-seven decimal five (37.5) hours per week, but not less than those prescribed in the* Public Service Labour Relations Act.
>
> ***38.02 General***
>
> *Part-time employees shall be entitled to the benefits provided under this Agreement in the same proportion as their normal scheduled weekly hours of work compared with the normal weekly hours of work of full-time employees, unless otherwise specified in this Agreement.*
>
> …
>
> ***42.01*** *There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced 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.*
>
> …

[55] The relevant provisions of the *CHRA* provide for the following:

> …
>
> ***3 (1)*** *For all purposes of this Act, the prohibited grounds of discrimination are … disability ….*
>
> …
>
> ***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.*
>
> …

[56] The evidence established the following relevant facts:

- The normal work hours for full-time employees covered by the collective agreement are 37.5 per week.
- The grievor started working for the employer in September 2001 as a full-time employee.
- Between June 14, 2011, and June 25, 2014, the date on which her grievance was filed, the grievor worked 18.75 hours per week due to a physical disability, which the employer did not challenge.
- On July 28, 2014, the employer changed the grievor's employment status from full-time to part-time.
- Since that date, she has been entitled to the same salary and benefits as other part-time employees.

[57] A collective agreement is the result of negotiation between two parties. The employer usually agrees to hire full-time employees at 37.5 hours per week and to provide them with a compensation plan that includes certain wages and benefits. In return, it is reasonable to deduce that the employee has agreed to work an ongoing 37.5 hours per week. Beginning in June 2011, the grievor was no longer able to fulfil that work schedule due to her medical condition.

[58] The employer has never challenged the validity of the grievor's medical condition, and it implemented the following accommodation measures:

> 1) It allowed the grievor to work a lightened schedule of 18.75 hours per week.
>
> 2) The workdays were split over three days, Mondays, Wednesdays, and Fridays, to avoid consecutive workdays.

> 3) The flexible work schedule was maintained and reflected the requirement that her workdays could not exceed 7.5 hours.
>
> 4) Audit files assigned to her that involved travel to taxpayers were limited to distances under 16 km from the assigned workplace or her residence to avoid long trips and maximize on-site audit time.

[59] Those accommodation measures appear reasonable to me, and the grievor did not challenge them. As the Supreme Court mentioned in *Hydro-Québec*, the main purpose of accommodation measures is to provide the necessary tools to employees so that they are able to work despite their physical disabilities.

[60] It is also important to note that maintaining the grievor's full-time employment status before July 28, 2014, in no way constituted an accommodation measure implemented by the employer.

[61] The unchallenged factual basis of the case before me is that when the employer changed the grievor's employment status, she could not work more than 18.75 hours per week and that no other changes to her terms and conditions of employment or workplace could have made it possible for her to work longer hours. Under those circumstances, one of the factual premises on which my decision must be based is that in June 2014, the employer could not have put in place any further accommodation measures to allow the grievor to work 37.5 hours per week. I agree with the employer's argument that maintaining her employment status would not have allowed her to work more hours at that time. Thus, I am convinced that the employer did not breach its duty to implement accommodation measures.

[62] To determine whether the employer discriminated against the grievor by changing her employment status, the factual framework in this case has many similarities with *Canada Safeway Ltd.* Based on her oncologist's medical advice, the grievor chose to work 18.75 hours per week, and the employer accommodated her that way. Her employment was not terminated, but her employment status shifted from full-time to part-time due to her reduced hours. She received the same benefits as other CRA employees working the same number of hours as she was. In this case, she seeks a settlement similar to the one awarded in *Canada Safeway Ltd.*; namely, she wants to continue working less than 37.5 hours a week while continuing to receive the same benefits as full-time employees. However, the Saskatchewan Court of Queen's

Bench did not endorse that approach. In his decision, Judge Kovach drew several convincing conclusions; namely, he concluded that some benefits are available only to full-time employees because they work longer hours. In his view, under the circumstances of the case, full-time employment status necessarily includes an obligation to regularly work 37 hours per week. He also concluded that benefits have the same character as salaries; namely, they are compensation for work performed. He added that it is important to distinguish between on one hand accommodating the specific needs of workers affected by physical disabilities to help them participate in the workplace and on the other hand compensating them.

[63] Similar findings were made in *Crossroads Regional Health Authority*, *Ontario Public Service Employees Union*, and *SaskPower*. The principles and findings from those cases are valid and relevant to the determination that I must make. The benefits provided in a collective agreement, like wages, are a form of compensation for work performed. The duty to accommodate does not require the employer to offer more favourable benefits and wages to an employee dealing with a physical or mental disability than to an employee without a disability who works the same number of hours. In my opinion, the employer fully met its duty to accommodate the grievor by among other things allowing her to work 18.75 hours per week and by compensating her in the same way as other employees who work the same number of hours.

[64] As suggested in *Canada Safeway Ltd.*, my opinion is that distinguishing between employees based on whether work was performed and, if so, to what extent, does not violate the principles of equality provided for under the *CHRA*. Consequently, I am satisfied that in this case, the employer did not discriminate against the grievor and that it had no duty to provide additional accommodation measures, particularly by providing her additional benefits. In my view, providing employees with only the benefits to which they are entitled under the collective agreement, based on the number of hours actually worked, does not amount to discrimination or a violation of the collective agreement.

[65] I am not indifferent to the grievor's situation or to her argument that under the circumstances, the employer should allow her to continue working less than 37.5 hours per week and to receive all the benefits available to full-time employees. However, if I endorse the argument that she should be granted all the benefits that she would have received were it not for her disability, then she would have had to have

been paid her regular wages for the period during which she was unable to work due to that disability. Consequently, she would be fully compensated for work that she never performed. That argument would require paying the benefits in question to the grievor based on the hours that she would have worked were it not for her physical disability and would require paying normal wages for the period in which she was unable to work as a result of the physical disability such that she would in fact receive full compensation for work that she was unable to perform.

[66] Under the circumstances, I find that compensating the grievor on the same basis as the other part-time employees and granting her only the benefits to which she was entitled under the collective agreement based on the number of hours worked did not amount to discrimination. In this case, the distinction between full-time and part-time status did not constitute discrimination arising from a physical or mental disability but rather from the work she performed. Therefore, I am satisfied that the employer established that its decision to change her employment status was not discriminatory.

[67] I also note that the employer repeatedly reiterated its intention to restore the grievor's status to full-time as soon as she was able to work 37.5 hours per week.

[68] With respect to the criteria set out in the Managing Injury and Illness Process tool (Exhibit E-7), I agree that it is always desirable for employers to strictly and consistently apply their guidelines and management tools. However, the fact remains that failing to act does not necessarily amount to discrimination or a violation of a collective agreement. I agree with the grievor's argument that under its guidelines (see page 73 of Exhibit E-7), the employer had a duty to obtain objective and specific medical information on the possibility that she would be able to resume her full-time duties in the foreseeable future, which it failed to do. However, given the circumstances, its failure constitutes neither a discriminatory act nor a violation of the collective agreement. It is important to take account of the fact that the management tool in question is not part of the collective agreement and that it represents nothing more than a tool that the employer unilaterally adopted to guide its managers.

[69] It is also important to bear in mind that maintaining the grievor's employment status at full-time before July 28, 2014, in no way constituted an accommodation measure and could not have because such a thing would not have enabled her to work more hours.

[70] I note that the need to determine the possibility of an employee being able to resume full-time duties in the foreseeable future before changing employment status can easily lead to confusion, since the concept of "foreseeable future" is normally associated with the standard to be met to establish undue hardship, which is not at issue in this case.

[71] Finally, I would be remiss were I not to emphasize the grievor's extremely gripping battle to maintain her health. The fact that her grievance cannot be allowed for legal reasons should in no way overshadow her resilience and strength of character over the last seven years, which have been acknowledged by her treating doctor, her employer, and the undersigned.

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

(The Order appears on the next page)

V. Order

[73] The grievance is dismissed. I order the file closed.

September 26, 2017.

FPSLREB Translation

Stephan J. Bertrand,
a panel of the Federal Public Sector Labour Relations and Employment Board