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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

CHERYL MORROW

Grievor

and

TREASURY BOARD
(Department of Natural Resources)

Employer

Indexed as
Morrow v. Treasury Board (Department of Natural Resources)

In the matter of an individual grievance referred to adjudication

Before: Nathalie Daigle, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: James Craig, Public Service Alliance of Canada

For the Employer: Karen Clifford, counsel

Heard at Ottawa, Ontario,
April 5 and 6 and October 26 to 28, 2016.

I. Introduction

[1] Cheryl Morrow, the grievor, was an employee of Natural Resources Canada ("the Department" or "the employer") from 1990 to 2013. In 1996, she was injured; she suffered a repetitive strain injury to her arms and hands. For years, she was accommodated with respect to her work schedule, and she worked part-time. She was also able to work from home part of the time. She alleges that the employer discriminated against her based on her disability in 2011 and 2012, by restricting her hours of work and by no longer authorizing her to work from home. She also claims that it did not provide her, in a timely fashion, with the appropriate tools and training she required.

[2] The employer denies that it discriminated against the grievor. It states that it accommodated her over the years by allowing her to work part-time and to work from home some of the time, while continuously providing her with the appropriate tools and training she required. In 2012, in an attempt to address her preference to work additional hours, the employer proposed that, with documents showing medical approval, she increase her hours of work up to full-time as long as she worked a set schedule. However, the grievor refused.

[3] The grievance was referred to the Public Service Labour Relations Board on February 14, 2013.

[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 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 continue 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 and to provide for certain other measures* (S.C. 2017, c. 9), received Royal Assent, changing the names of the Public Service Labour Relations and Employment Board, 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* and the *Federal Public Sector Labour Relations Act*.

[6] For ease of reading, the word "Board" will be used in this decision to refer to the Public Service Labour Relations Board and the Federal Public Sector Labour Relations and Employment Board. Further, the abbreviation "*FPSLRA*" will be used to refer to the *Public Service Labour Relations Act* and the *Federal Public Sector Labour Relations Act*.

[7] For the reasons that follow, I find that while the grievor established a *prima facie* case of discrimination, the employer has provided a persuasive answer that it appropriately accommodated her in 2011 and 2012 by allowing her to work part-time and to increase the fixed number of hours she worked on a weekly basis if she was capable of doing so and could provide a medical note certifying her capability. The employer also continuously provided her with the ergonomic tools she required. In addition, she was offered the training she requested. With respect to her previous telework arrangement, the employer established that it was no longer possible, given that there was no medical requirement that she work from home, and that allowing her to could have exacerbated her injuries as her home was not ergonomically set up for teleworking.

II. Background

[8] The grievor started working for the Department in 1990. She was originally a word processing operator. She suffered a repetitive strain injury to her arms and hands in 1996. With the Department's help, she reoriented her career and became an ergonomic assessment officer. In 2002, she came to an agreement with her manager that allowed her to work 18.75 hours per week and, with her manager's prior authorization, to add hours to her schedule when she felt capable of working more and there was work to be done. She also worked part of that time from home. She retained and continued to maintain the benefits of full-time status while working a

part-time schedule.

[9] For years, she followed that agreement. The grievor was also provided with an adjustable workstation and the "Dragon Naturally Speaking" (DNS) software, which allowed her to dictate text. For that reason, she was assigned an enclosed office.

[10] Given the nature of her work, she could not conduct ergonomic assessments or write reports from home. Therefore, there were no tasks she could do via telework. After reviewing the situation in 2011, the employer concluded that her teleworking environment could potentially further aggravate her injuries, so it asked her to stop teleworking the 3.75 hours per week.

[11] In addition, during the 2011 review, the employer discovered that the grievor did not always obtain prior authorization from her manager before working additional hours. Instead, at different times, she had adopted the habit of submitting a set number of hours to be paid to her in addition to her regular salary, after the dates on which the extra work had presumably been performed. Therefore, the employer reminded her that she needed prior authorization before adding hours to her schedule.

[12] Soon after that, the employer informed her that constant last-minute changes to her schedule made it impossible for her manager to appropriately assign responsibilities and to account for both the fixed minimum hours of work as well as the extra hours she had been claiming after they had passed. Thus, the employer asked that they agree to the number of hours she could work each week. The employer was flexible as to her daily hours of work (with respect to start and end times). It was also flexible as to her workdays during the workweek; i.e., they could be Mondays, Wednesdays, and Fridays. In addition, to minimize any possible financial impact that this decision could have on her, it proposed that she increase her hours per week on a fixed schedule. Her fixed schedule could have reflected her regular 18.75 hours plus the set number of hours she had been regularly claiming.

[13] The grievor refused to agree to a set number of hours that she could work each week. She wanted the flexibility to add hours to her schedule when she felt capable of working more as her doctor had recommended that she be allowed that flexibility to determine the work hours and activities she could tolerate each day. She wanted to have the discretion to make last-minute changes to her schedule. She alleges that she lost wages once she was no longer authorized, at her discretion, to add to her regular

schedule of 18.75 hours. She also claims that it was improper for the employer to ask her to stop teleworking 3.75 hours per week. In addition, she maintains that she was not provided, in a timely fashion, with the tools, equipment, and training she required to perform her duties.

[14] The grievor claims that the employer's conduct amounted to discrimination, which is contrary to article 19 of the collective agreement between the Treasury Board and the Public Service Alliance of Canada for the Program and Administrative Services Group (expiry date: June 20, 2014; "the collective agreement") and the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*).

[15] The employer does not dispute that the grievor needed tools and training to do her job effectively. It maintains that her workstation was ergonomically reconfigured to accommodate her needs and that she was provided with DNS and training to help her carry out her duties.

[16] The grievor filed her grievance on March 21, 2012, after being asked to commit to a fixed schedule. Her grievance states that the employer discriminated against her by treating her in an adverse differential manner. In particular, she grieves that the employer "… refuses to accommodate me properly and restricting [*sic*] my hours of work." She also requests the following relief:

- *That the Employer accommodates me properly.*
- *That the Employer abides by the agreement dated back to 2002.*
- *That the Employer stops restricting my hours when I am capable of working and that I be compensated for lost wages.*
- *That the Employer provides me with the proper tools/equipment and training to accommodate me in doing my work.*
- *That the Employer stops discriminating against me and treating me in an adverse differential manner.*
- *To be made whole.*

[17] On March 30, 2012, the grievor received a "Notification of Affected Status" letter, which informed her that the Department's workforce would be reduced and that her services might no longer be required, in accordance with Workforce Adjustment

(WFA) agreements. In other words, she was told that she had been selected for layoff unless she managed to secure another position with the federal public service by the prescribed deadlines.

[18] Ultimately, the grievor was laid off in October 2013.

III. Preliminary matter

[19] The employer states that clause 18.15 of the collective agreement sets a 25-day limit within which an employee can file a grievance once he or she is aware of the event that gave rise to the dispute.

[20] The employer explains that in this case, the grievance was filed on March 21, 2012. Considering clause 18.15 of the collective agreement, to be timely, it had to refer to actions or circumstances for which the grievor was notified or of which she became aware on or after February 25, 2012. Hence, according to the employer, the Board's jurisdiction over addressing the grievance's referral to adjudication is limited to whether the employer discriminated against the grievor on or after February 25, 2012.

[21] The grievor's position is that the grievance is timely and continuing. It is generally recognized in the arbitral jurisprudence that continuing grievances allege repetitive breaches of a collective agreement rather than simply a single or an isolated breach.

[22] In my opinion, this is a continuing grievance about an alleged recurring violation of article 19 of the collective agreement.

[23] However, as was held in *Galarneau v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 1 at para. 22, for a continuing grievance to be adjudicable, the recurring violation must have continued to occur during the grievance filing period. That paragraph reads in part as follows:

> *[22] … given an obligation and a corollary right that continue and that are repeated over time, I am of the view that the grievances were not filed outside the 25-day time limit set out in clause 20.01 of the collective agreement. That said, the grievors must establish in evidence that the alleged violation of their rights under clause 18.01 occurred during the period preceding the date on which their grievances were filed and corresponding to the time limit for filing a grievance, that is, during the 25 days preceding the date on*

which the grievances were filed.

[24] Taking this into consideration, the grievance is adjudicable, but only if the alleged violations were ongoing during the 25-day period immediately preceding its filing at the first level of the grievance process.

IV. Issue

[25] The Board must decide the following issue: Did the employer discriminate against the grievor by doing the following:

a) restricting her hours of work;

b) ending her telework arrangement; and

c) not giving her timely access to appropriate tools and training?

V. Summary of the evidence

[26] The individuals who testified at the hearing were the grievor; Elizabeth Dussault, who at the time the grievance was filed was the team lead both of web publishing and specific projects (she was also in charge of the Technology Accessibility Centre (TAC)); and Katrina Nicholson, who at the time of the grievance was the head of occupational health and safety and environmental protection in the employer's Minerals and Metal Sector.

A. The grievor's disability and prior accommodations

[27] The grievor and the employer filed into evidence a great deal of documents. Although I have reviewed all of them, it is not possible to describe, one by one, all communications the parties had on the accommodations that the grievor requested and received between March 2002 and December 2012. However, I will outline the main events that occurred over the years.

[28] The grievor explained that she sustained a work-related injury in 1996. She pulled her right forearm muscle, also known as a muscle strain, and then worked modified hours. The evidence also shows that she had thoracic outlet syndrome symptoms due to myofascial pain and due to repetitive movements of her upper limbs. In 1997, the WSIB recognized that she had a permanent disability in her right hand, and she was off work until 1999.

[29] A medical note dated April 7, 2000, specified that due to the grievor's medical condition, she was permanently unfit for her substantive position as a word processing operator. A vocational rehabilitation assessment was required.

[30] The note also specified that if she were to use a workstation, an ergonomic assessment would be very important. The grievor testified that when she returned to work after her injury, the employer retained the services of an ergonomist to reduce her work-related symptoms.

[31] The employer also helped her reorient her career and become an ergonomic assessment officer.

[32] In March of 2002, to accommodate the grievor, the employer modified her letter of offer for her new position. The employer first consulted her to determine how many hours she could work each week. The evidence shows that she wanted to work 15 hours per week and that she requested that she take the remaining weekly work hours (22.5 hours) as sick leave without pay. However, she did not want this to affect in any way her indeterminate status, and she wanted to receive the benefits (vacation and sick leave) of a full-time employee while working part-time.

[33] A human resources specialist advised the grievor that if she wanted to receive those benefits, she had to work at least 75 hours per month (18.75 hours per week), instead of 60 hours per month (15 hours per week).

[34] So, the grievor asked to work from 8:45 until 1:45 three times per week (15 hours per week) and to be allowed to work 3.75 hours from home each week, checking her emails and writing reports. It was agreed that if she took a vacation or sick day, it would be recorded as 6.25 hours for that day. As she received the paid vacation hours of a full-time employee, her vacation time was spread over a greater number of weeks.

[35] In 2002, the grievor and her then-supervisor, Philippe Dauphin, discussed her working hours. On April 17, 2002, he approved her request of April 12, 2002, which reads in part as follows:

> *… until my physician and I are in agreement that the hours of work can be increased, I will work 18 ¾ hrs per week with regards to the use of my hands (three days per week, Monday, Wednesday and Friday at five hours per day from 8:45 a.m. – 1:45 p.m. and the remaining 3 ¾ hours will be*

> *spent on checking e-mail/report writing from home throughout the week). The remaining hours of the week (18 ¾ hours) will be taken as sick leave without pay. This will not affect in any way my indeterminate status (re: full pension, death benefits, annual vacation/sick leave, etc.). Furthermore, all statutory holidays will be made up during the week and all medical appointments, when possible, will be scheduled outside working hours.*
>
> *Please note that there are no limitations on standing, talking, reading (without holding the paper) or listening. Therefore, my hours can be increased at my request and was [sic] agreed to by management from time to time, (as has been the case for the past two years) to conduct presentations and training sessions, attend meetings/seminars/training, etc., that do not require repetitive use of the hands.*

[36] Note that based on an email dated March 28, 2012, which a human resources officer sent to the grievor, a sentence in the last paragraph of the April 12 agreement should read as follows: "Therefore, my hours can be increased at my request and as agreed to by management," (emphasis added). The grievor was asked at the hearing if she made a typographical error when she typed the April 12 agreement for her supervisor's signature. She admitted that she did. The word "was" is an error and was supposed to be "as" ("as agreed to by management").

[37] After this agreement was signed, the grievor worked 18.75 hours per week, which consisted of 6.25 hours per day, three times per week. Her hours of work were from 8:45 until 15:00, although it was understood that she would leave at 1:45 each day and would make up the remaining 3.75 hours each week checking her emails and writing reports at home. If she took a vacation or sick day, it was recorded as being for 6.25 hours. Her salary was pro-rated to the hours worked.

[38] For about the next 10 years, the grievor worked additional hours from time to time, varying them from week to week. For example, if she took a course and needed only to sit and listen, she could work a full week. The additional hours were not considered overtime; she was paid for them in addition to her 18.75 hours.

[39] Four emails exchanged between May 3 and July 18, 2002, show that the grievor could change her hours for personal or work-related reasons as long as Mr. Dauphin approved it in advance. An email dated January 30, 2003, also shows that Mr. Dauphin approved the grievor's request to change her hours.

[40] In August 2007, the employer informed the grievor that because of the reclassification of her position, she had been promoted to the AS-02 group and level for an indeterminate period, effective April 1, 2006. The grievor then asked whether she could still increase her hours above 18.75 and was told that by signing her promotion letter, this did not change the agreement that her previous manager had approved. A human resources representative specifically wrote the following to her in an email: "Although your employer may request an update of your accommodation needs in the future and thus re-assessment of your file [*sic*]. For now nothing has changed regarding your status by signing your promotion letter."

[41] The grievor had five other managers after Mr. Dauphin left. They all allowed her to work additional hours from time to time, in addition to her 18.75 hours per week.

[42] The grievor's work arrangement continued until the end of 2011.

[43] On January 11, 2012, the grievor suffered a new injury and filed a WSIB claim. She indicated that she had hurt her left arm and shoulder lifting a suitcase loaded with equipment to the rear of her vehicle. She was diagnosed with epicondylitis. She was off work for a couple of months, taking sick leave and holidays. She came in occasionally, for special events.

[44] On March 20, 2012, the grievor's physician completed a WSIB "Functional Abilities Form" to plan her return to work. Among other things, the physician indicated that the grievor could not maintain static postures; that she needed time to stand, sit, or stretch while in such static postures; and that she could not maintain repetitive movements, such as typing. Therefore, the physician recommended that she be provided with modified hours and sufficient time to complete her duties.

[45] On the next day, March 21, 2012, the grievor filed her grievance, alleging that the employer was restricting her hours and was not providing her with the appropriate tools and training that she required.

[46] After her January 2012 injury, the grievor returned to work on March 23, 2012, to modified duties. She continued working 18.75 hours per week, which were her regular hours. She had restrictions at work. She was not to lift or do repetitive activities with her right upper extremity. She mostly did ergonomic training.

B. <u>The grievor's hours of work</u>

[47] In early 2011, Ms. Nicholson and her supervisor, Magdi Habib, director general, CANMET - Mining and Mineral Sciences Laboratories, of the Minerals and Metals Sector, noticed that the grievor often sought to be paid for precisely an extra 6.25 hours per month. Ms. Nicholson testified that she concluded that the grievor had begun habitually claiming a set number of additional hours of work in addition to receiving her regular salary. In particular, the grievor often claimed 1.25 hours of work after her normal working day. Ms. Nicholson believed that the grievor had adopted the practice of claiming the 1.25 hours systematically as she was of the opinion that it would be easier for the administrative staff to process her requests if her additional hours were always the same. However, Ms. Habib asked Ms. Nicholson to clarify the situation.

[48] This resulted in a meeting that was held on January 12, 2011, between Ms. Nicholson and the grievor. Ms. Nicholson took minutes ("the January 12, 2011, minutes"), which included the following passage:

> *Time Sheets and Work Schedule*
>
> …
>
> *Hours worked above your regularly scheduled hours will be recorded and submitted as exactly as they are worked in the time sheets and no longer the same amount of hours each day as the DG will not approve. Compensation will ensure you are paid for the hours worked.*

[49] The grievor was later informed that starting July 1, 2011, any additional hours she wished to work had to be pre-approved. On July 20, 2011, she wrote back and confirmed that she was aware that she had to ask permission before working extra hours (up to a total of 7.5 per day) beyond her minimum of 6.25 on Mondays, Wednesdays, and Fridays.

[50] This matter was addressed again on July 22, 2011, when Ms. Nicholson confirmed in an email to the grievor that her hours of work needed clarifying. She added that the grievor had to seek her approval if she felt well and able to work more than 6.25 hours on any given workday. The grievor was informed that if she could not reach Ms. Nicholson, she should work only 6.25 hours on those days.

[51] On September 6, 2011, the grievor's WSIB case manager noted that the grievor was very distraught about the reduction to her hours and income.

[52] On September 15, 2011, the grievor's physician provided medical recommendations for her in response to a request for updated information that the employer had made to the grievor in July 2011. He recommended that the grievor continue with her Monday, Wednesday, and Friday schedule but added the following:

> *I recommend that Ms. Morrow be allowed flexibility to determine her work hours and activities as she tolerates on a daily basis. It is not possible to predict strict hours in this situation as it is dependent upon the types of activities she is doing that day as well as how she is tolerating them. She should be allowed the flexibility to work shorter or longer hours in office on a given day as she tolerates with the ability to continue to telework from home as required. There is no medical reason to limit her work hours to 18 and ¾ hours a week if she feels well and is capable to work more.*

[53] The medical note was provided to the employer on November 17, 2011. The grievor testified that the employer did not follow up on it.

[54] The grievor maintains that by then, the employer stopped approving her requests to work additional hours. She filed emails in evidence that showed that she sometimes requested to work additional hours or an extra day; for example, on a Thursday. However, Ms. Nicholson asked her to switch a day instead of working an extra day.

[55] The grievor also explained that between 2002 and 2011, when meetings were scheduled on the days on which she normally did not work, she was paid for attending them and for working additional hours. However, that was not possible as of the end of 2011 as the meetings were rescheduled to days that she was in the office (Monday, Wednesday, and Friday).

[56] The grievor testified that she suffered financially after being denied the chance to work additional hours. She explained that she had been able to work up to 20 additional hours per month before things changed.

[57] The grievor completed time sheets, which captured the additional hours she worked per month. They were submitted in evidence. Her additional hours are shown in the following table (note that for some months, she had no additional hours as she was on holidays or on sick leave):

Month and year	Additional hours submitted for payment
January 2011	28
February 2011	7.75
March 2011	6.25
April 2011	13.25
May 2011	17.25
June 2011	21.75
July 2011	8.75
September 2011	6.25
October 2011	6.25
November 2011	6.25
December 2011	6.25
January 2012	6.25
April 2012	12.50

[58] Ms. Nicholson testified that she was open to the idea of approving additional hours of work for the grievor. She pointed to four emails in October and November 2011 and January and February 2012 that showed that she granted the grievor's request to work on a Thursday, for example, in addition to her regular workdays. In one email, dated November 28, 2011, Ms. Nicholson also informed the grievor that a project was coming that could require her to work extra hours.

[59] Ms. Nicholson testified that the grievor's practice of adding hours to her work schedule at her discretion and at the last minute made it impossible for Ms. Nicholson to plan and manage the operations of her section and made it hard for her to appropriately assign responsibilities. In addition, the grievor continuously changing her hours of work made it impossible for Ms. Nicholson to know when the grievor was working, which thus made it impossible for her to ensure that the grievor was paid only for the hours she had worked. Management was hoping to resolve legitimate concerns it had over improperly paying the grievor for hours she might not have worked.

[60] Therefore, management decided that it would be better if the employer and grievor agreed beforehand on the number of hours she would work weekly. The employer was open to allowing her to choose when she would start and finish her workdays. It was also flexible with respect to her workdays during the workweek; i.e., they could be Mondays, Wednesdays, and Fridays. In addition, to minimize any possible financial impact that this decision could have on her, it proposed that, upon the receipt of a medical certificate, she increase her hours per week. However, it asked that the number of hours she worked be predetermined.

[61] To this end, on February 10, 2012, Ms. Habib confirmed in writing that the fact that the grievor was choosing her hours of work or extending them beyond 18.75 hours at her discretion was problematic for the employer. She provided the following reasons:

> *We have reviewed and considered the latest medical information dated September 15, 2011 and submitted to management on November 17, 2011.*
>
> *…*
>
> *Management has accommodated you over past years with a work schedule of 18 and ¾ hours, has allowed you to choose your hours of work and has extended your hours beyond 18 and ¾ hours if you felt capable to do so and there was work to be completed.*
>
> *In a discussion that took place this past summer (2011), we indicated your arrangement of choosing your hours of work or extending your hours beyond 18 and ¾ was problematic on two fronts. Firstly, it is difficult to manage varying work hours; not knowing when you are reporting to and from work; this does not permit adequate operational planning and assignment of responsibilities. Secondly, working variable hours has financial implications and does not permit for adequate budgetary planning.*
>
> *Management recognizes and respects their duty to accommodate your specific health requirement and continues to support you in your requirements for accommodations. To this end, in addition to the significant accommodations to your work schedule, management has provided you with ergonomic equipment and voice activated software.*
>
> *The constraints related to your work schedule need to be addressed to allow for proper management of your workload and to meet our financial obligations. As such, we support your work schedule of 18 and ¾ hours, however, we are no*

> *longer in a position to accommodate you working a variable schedule that fluctuates from day to day or week to week. Should you wish to increase your work schedule beyond 18 ¾ hours per week, we will consider this option only on a permanent basis provided you supply a medical note certifying your ability to do so.*
>
> *We require that you have set hours of work that you will need to commit to.*
>
> *We will grant you flexibility to choose your hours of work i.e. 8:30 am to 2:45 pm, as long as they fall within the parameters of your collective agreement. Once these hours are set, should you not be able to present yourself to work, you will have to submit a leave form for the prescribed period and ensure you seek approval from your manager.*
>
> *We ask that you choose your hours of work and submit your schedule by March 2, 2012. Once approved, you will begin working on this set schedule starting March 5, 2012.*
>
> *We reiterate our commitment to continue working with your health related needs and accommodate you.*
>
> …
>
> [Emphasis added]

[62] On February 14, 2012, the grievor asked for a clarification of that email. Among other things, she asked why she had to commit to a fixed schedule, given that her medical note recommended that she have a flexible work schedule.

[63] The next day, Ms. Nicholson provided answers. Part of her response reads as follows:

> …
>
> *As the medical note provided <u>recommendations</u> from your physician, we discussed the issues regarding the difficulty managing **varying work hours** and not knowing when you are reporting to and from work; this does not permit adequate **operational planning and assignment of responsibilities**. Secondly, working variable hours has **financial implications** and does not permit for **adequate budgetary planning**.*
>
> *In order to ensure effective planning and carry out operations, management supports a schedule where we allow the **flexibility of work days during the work week i.e. Mon, Wed, Fri**, however, we cannot support a variable schedule of*

> *working varied hours on any given day for the reasons mentioned above.*
>
> *We support you working hours up to 37.5 per week if you are able to do so and can provide supporting documentation from a physician.*
>
> [Emphasis in the original]

[64] Thus, in the 25-day period before she filed her grievance (February 25 to March 21, 2012), the grievor could no longer change her hours at her discretion.

[65] The grievor filed her grievance on March 21, 2012, because she did not want to provide a set number of hours she would work per week.

[66] Evidence was adduced at the hearing to show that the employer had been flexible with the grievor because of her disability, which she recognized was true. For example, sometimes, she left the office early to attend medical appointments. She could also make up time when she took longer lunch breaks.

[67] The employer was also flexible with respect to the grievor's start time. When her start time was 8:30 a.m., she admitted to often arriving after that time because of traffic.

[68] On April 24, 2012, Ms. Nicholson received a call from a WSIB representative, who asked her if she had received a copy of the WSIB Functional Abilities Form that the grievor's physician had completed on March 20, 2012, to prepare her return to work. The form indicated that she had limitations and that she needed to work modified hours. As Ms. Nicholson had not been provided with a copy of the form until that date, she asked the grievor on April 25 about the status of her injuries and whether there was anything she should be aware of with respect to limitations or modifications to ensure that she did not aggravate her condition.

[69] The grievor responded on April 27, stating that her injury had not changed and that her limitations were on the form. Thus, Ms. Nicholson concluded that the grievor was satisfied with her modified schedule (18.75 hours) and duties.

[70] As of May 2012, the grievor no longer performed ergonomic assessments. She used her time at work to look for a new public service job, within the allotted periods, given that she had been selected for layoff.

C. <u>The telework arrangement</u>

[71] No medical evidence stipulating that the grievor should work a maximum of 15 hours in the office was filed at the hearing.

[72] On September 6, 2011, the grievor reported to her WSIB case manager that the employer now expected her to work 6.25 hours, but only in the office. She could no longer work 1.25 hours per day at home. According to the notes, the grievor sometimes had to work through pain, depending on the type of activity she had to do.

[73] On February 14, 2012, the grievor specifically asked why she could not continue to telework.

[74] Ms. Nicholson explained as follows on February 15, 2012, why teleworking was no longer an option:

> *As per our meeting Jan 26th, we discussed that you are not ergonomically set up for teleworking at home as you do not have voice recognition software or proper equipment; management does not want you to work in an environment that would further aggravate any injuries. Given the nature of your work, you are not able to conduct ergonomic assessments from home or write reports, therefore tasks would be very limited.* ***There is no operational requirement for you to telework.***
>
> [Emphasis in the original]

[75] Thus, in the 25-day period before she filed her grievance (February 25 to March 21, 2012), the grievor could no longer work from home.

[76] Ms. Nicholson repeated at the hearing why the employer concluded in 2011 and 2012 that teleworking was not a good solution for the grievor. The reason was that she was not ergonomically set-up for teleworking at home, as she did not have DNS or proper equipment there. Given the nature of her work, she was not able to conduct ergonomic assessments from home or to write reports. Therefore, there were no tasks she could do from home.

[77] The grievor did not contest that she was not ergonomically set-up at home for teleworking or that she did not have DNS or proper equipment there.

D. <u>The tools and training</u>

[78] With respect to the tools and training the grievor required over the years, her position is that the employer could have done more to accommodate her with measures that would not have caused it undue hardship. She explained that she experienced problems in four areas: (1) the DNS version on her computer was not working well, in particular because she did not have an adequate computer; (2) she never received proper training for DNS; (3) her office was not configured adequately from 2010 to 2012; and (4) the employer was too slow providing her the tools she requested.

[79] Firstly, with respect to DNS, on September 6, 2011, the grievor's WSIB case manager specifically noted that her DNS was not working, so she had to use her hands more, which caused her significant pain.

[80] While the grievor admitted to not using DNS often when she had a height-adjustable workstation, she claims that starting in 2010, because her adjustable workstation was not adequate, she needed the software to accomplish her tasks.

[81] On October 14, 2011, the grievor informed Ms. Nicholson that after trying to use the new updated DNS that had been installed on her computer, she had received a message that certain applications had been disabled, so she informed Ms. Nicholson that she needed a faster computer to run DNS. One was provided to her.

[82] The grievor explained that the problems she then encountered with DNS included the following: (1) the new DNS version seemed incompatible with her new computer; (2) DNS could not be linked to her word processing software; (3) her old microphone was not compatible with the new DNS version; and (4) her old sound files were also not compatible with it.

[83] Secondly, with respect to the training the grievor requested, she explained that she needed expert advice to facilitate her use of DNS, and she needed training to fully understand it.

[84] The grievor clarified at the hearing that in her view, the TAC was not in a position to assist her with the specialized training she required. Only Accessibility, Accommodation and Adaptive Computer Technology (AAACT) at Environment Canada

(EC) could help her, which is why Ms. Nicholson retained AAACT's services, to offer this training to the grievor.

[85] After her first contact with AAACT, the grievor wrote to it again on November 28, 2011, to find out how much longer she would have to wait for their first meeting. She wrote to Ms. Nicholson that she had spoken with the program manager at AAACT and that he had said that she first had to request an information session with AAACT to find out her needs and what AAACT could offer.

[86] On December 5, 2011, the grievor wrote to AAACT again and asked how soon it could meet with her, her manager, and an IT representative.

[87] Thirdly, with respect to the grievor's office configuration, based on the evidence provided by both parties, the grievor needed a closed office because of DNS. Concerning the different offices she occupied between 2002 and 2011, she explained that she had liked the first office she occupied. However, for operational reasons, she was asked to move to another office down the hall in 2010, which she found too narrow. She said that her desktops had not been installed properly. However, she was able to work while standing. She asked then to move to a different office. She moved several times after that but claimed that all her offices were not properly configured.

[88] Fourthly, with respect to the time it took for the employer to provide her with the tools she requested, the grievor testified that the employer took too much time, which caused her a lot of pain.

[89] The evidence adduced at the hearing by the employer shows that the employer took measures to address the grievor's request.

[90] Firstly, with respect to DNS, the employer introduced evidence to show that in 2000, an ergonomic assessment was done for the grievor, and she received an ergonomic workstation and DNS, as well as DNS training to help her perform her duties. Over the years, the grievor received upgraded versions of DNS. Correspondence between Ms. Dussault, who was in charge of the TAC, and the grievor shows this. The TAC's mandate is to provide computer technology solutions for persons in the Department with disabilities.

[91] In April 2011, the grievor began having problems using her computer. She could not access the files in some of her Microsoft folders. On April 11, after being informed, Ms. Nicholson immediately took action to resolve the problems. She immediately informed Information Technology (IT) of the problems the grievor was experiencing and asked it to do something as soon as possible.

[92] The grievor's computer had to be reconfigured, and IT had to remove DNS. Then, it could not be reinstalled on her computer because the installation disc had been lost the year before when the grievor had moved to a new office. An IT representative then informed her that she needed either to find the original installation disc or to ask the employer to purchase another one.

[93] Ms. Nicholson and the grievor met on July 13, 2011, to discuss this. Ms. Nicholson purchased another installation disc on July 21, 2011, and immediately arranged with IT to install the new software upon the grievor's return from vacation. When she returned, an IT representative installed it on her computer. According to an IT Service Desk logbook, DNS was successfully installed on September 9, 2011.

[94] Then, on the day on which the grievor informed Ms. Nicholson that she needed a faster computer to run DNS, Ms. Nicholson asked the IT Service Desk for help. An IT representative phoned the grievor on several occasions and left voicemails, but as she worked part-time, it took a few weeks before she was reached. On October 21, 2011, the IT representative noted the following in the IT Service Desk logbook: "Will prepare a brand new pc as client does have a business requirement with 'Speech Recognition Software' upgrade."

[95] The IT representative then made an appointment with the grievor and installed the new computer and DNS on November 8, 2011. The new DNS version was compatible with her new computer. DNS could be linked to her word processing software, and she received a new microphone with the new DNS version. It was also normal that the grievor's old sound files were not compatible with the new software. The AAACT representative and the employer later encouraged the grievor to record new sound files.

[96] Ms. Nicholson testified that the grievor did not type many reports. Over a 2-year period, Ms. Nicholson explained that the grievor typed 5 of a total of approximately 25 reports done internally. The staff typed the rest. The employer also hired external

consultants who conducted approximately another 20 assessments, for which they prepared the reports.

[97] Ms. Nicholson explained that the grievor, in her ergonomist role, mostly met with clients and filled in existing forms by checking boxes and adding handwritten notes. Ms. Nicholson also explained that most of the time, the grievor and the occupational health, safety, and environmental officer performed ergonomic assessments together and that the officer typed the reports. When the grievor carried out assessments by herself, she made notes, and the casual employee in the work unit typed the reports for her. Ms. Nicholson also typed some of her reports on occasions. On one occasion, on April 15, 2011, Ms. Nicholson offered to type some of her reports, but the grievor refused because she had not kept notes in the files. In sum, over the two-year period, the grievor only had to type five reports herself.

[98] Ms. Nicholson also explained that once others had typed the reports, the grievor just had to read them to make sure they reflected her notes. The casual employee also looked after all the related administrative tasks such as printing the requests, preparing files for the grievor, contacting clients, etc. Ms. Nicholson explained that all these measures were put in place to ensure that the grievor did not have to use a computer because of all the difficulties she had using her arms. These measures were taken pursuant to her pre-existing injury and, as will be seen, were maintained after her new injury of January 2012.

[99] Secondly, with respect to the training the grievor requested, the documentation filed shows that she received basic DNS training in the early 2000s and that the employer tried to provide her with additional training. For instance, on October 1, 2008, Ms. Dussault invited the grievor to join her as she had training lined up with a DNS expert for the month of November. However, the grievor did not get back to Ms. Dussault. The grievor admitted to having no interest in receiving training from the TAC, despite the fact that Ms. Dussault had received many hours of specialized training in assistive technology applications. Ms. Dussault specified that providing assistance to employees with a disability was her priority and that she could have met with the grievor in the same week to provide her with DNS training.

[100] Because the grievor had asked for special training for her new DNS version, on November 18, 2011, Ms. Nicholson asked her to directly contact the program manager of AAACT for help. EC had started AAACT to help persons with ergonomic requirements, injuries, and disabilities who require computer access to integrate into the workplace. As DNS had been installed twice on the grievor's computer and it still did not work well, according to the grievor, she was asked to contact AAACT.

[101] On February 10, 2012, Ms. Nicholson reached the program manager, hoping for a response on the employer's agreement with AAACT. She reminded him that her employee could not do much of her work unless DNS functioned properly.

[102] On March 2, 2012, Ms. Dussault wrote to the grievor about her request for assistance with DNS. Ms. Dussault asked her what version of DNS she had ("Premium Standard" or "Professional Standard"), and she offered help to get her started. However, when the grievor returned to work after her injury on March 23, 2012, she did not get back to Ms. Dussault.

[103] Thirdly, with respect to the grievor's office configuration, the January 12, 2011, minutes drafted pursuant to a meeting that Ms. Nicholson and the grievor had held included the following under "Office configuration": "[Grievor to] Provide Katrina [Nicholson] with a quote for the desk tops [*sic*] and supplies required." Ms. Nicholson explained that it made sense for the grievor to specify what she wanted exactly, as she was the ergonomist who was specialized in work postures and improving workstation quality. She would have known what she required to make her gestures more efficient, with limited effort. Ms. Nicholson asked the grievor for those quotes several times, but the grievor did not get back to Ms. Nicholson until much later (i.e., the end of 2011).

[104] The grievor and Ms. Nicholson met on July 13, 2011, to discuss several items, including the grievor's office setup. Concerning the office setup, the meeting minutes indicate that the grievor had mentioned that she needed to have a sit-stand workstation. While she had special desks in her office, they had not been adjusted to her satisfaction, and she believed that additional equipment was needed.

[105] As noted, the grievor had previously been asked to email Ms. Nicholson her requirements, with the associated costs. However, she had not yet provided that information. Therefore, the minutes specified that the grievor was to obtain the quote

with the pricing when she returned from vacation. She was also asked to provide a status update by mid-September. As will be discussed, she never did.

[106] Finally, on December 14, 2011, the grievor informed Ms. Nicholson that she had obtained the quote from the supplier for her height-adjustable workstation and that shortly, she would provide it to Ms. Nicholson.

[107] On December 23, 2011, after taking the initiative of retaining an outside certified ergonomist to help the grievor configure her office, Ms. Nicholson wrote to the grievor to explain to her that her desk could be set-up to be operative. Ms. Nicholson knew that the grievor was not open to this reconfiguration, as she did not want to sit with her back to the door. Nevertheless, Ms. Nicholson asked the grievor to try this option, as follows:

> *As per our discussion regarding your office configuration and work station surfaces, I am suggesting you re-arrange your configuration and work pieces in a way that will enable you to actually use the electric workstations that have been provided to you (that have not been used for a few years now with your current set-up). This will ultimately allow you to freely change positions from sitting to standing.*
>
> *The electric corner piece can be moved to the back right corner, the electric straight surface can moved to the right of the corner piece along the window and the fixed surface can be moved to the left of the corner piece. If you choose not to put Arm rests and a new keyboard tray can be ordered as soon as you return.*
>
> *I acknowledge your preference to not sit with your back to the door, however, this new set-up will finally allow you to work with all 3 pieces more effectively. Often office configurations are set-up with your back to the door way-entrance as this method best optimizes space. I prefer you try this option rather than buying new furniture unnecessarily, or moving to a different location further away from the team. Sitting with your back to the door is not justification for new office equipment or relocation. We at 555 are fortunate enough to occupy closed offices; feel free to read the PWGSC fit up standards on requirements: …*
>
> *I am sensitive to your needs and willing to work with you towards a solution to ensure I can properly accommodate you, therefore, I'd like to try this option of rearranging your work surfaces to the above-mentioned set-up when you return in January and we can re-evaluate after a few months. Can you*

> *please clear your work surfaces when you return and I will arrange for Ron to come move the pieces.*
>
> *Please feel free to see me if you wish to discuss further.*
>
> …
>
> [*Sic* throughout]

[108] However, the grievor refused to try it, despite the fact that she had received no medical recommendation from her physician specifying that she could not sit with her back to the door. She explained that she preferred to work while standing even if her workstation was not plugged in.

[109] Lastly, with respect to the time the employer took to provide the grievor with the tools she requested, the documentation shows that they were promptly provided to her, including a Parrot sound board, a telephone switch, three armrests, a headset, and a keyboard tray. The new version of DNS that she received was made available to her within one week of Ms. Nicholson and the grievor discussing it.

[110] As for her office configuration, the grievor did not provide the status update she undertook to provide to the employer and took approximately a year to submit the quote she had undertaken to provide.

[111] To help the grievor type her reports, Ms. Nicholson also asked her, on December 13, 2011, to find a Dictaphone, which would have allowed her to record her assessments so that another person would be able to type her reports. The grievor responded that that was an inappropriate solution, but she did not explain why.

[112] After January 11, 2012, when the grievor suffered her new injury, to the end of March 2012, she was mostly away from work. In sum, in the 25-day period before she filed her grievance (February 25 to March 21, 2012), she worked only one week.

[113] After that, Ms. Nicholson continued helping the grievor by signing an agreement with AAACT, which agreed to train the grievor. Ms. Nicholson also contacted Ergo Safety (an outside consultant) about the grievor's office configuration. It made several suggestions that could work in her current office space and included photos of keyboard trays, if needed.

VI. Analysis

[114] Article 19 of the collective agreement provides that there shall be no discrimination exercised or practiced with respect to an employee by reason of mental or physical disability, among other grounds. Paragraph 209(1)(a) of the *FPSLRA* provides in turn that an employee may refer to adjudication an individual grievance if it is related to the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award.

[115] According to s. 226(2)(a) of the *FPSLRA*, the Board may, in relation to any matter referred to adjudication, interpret and apply the *CHRA* (other than its provisions relating to equal pay for work of equal value), whether or not there is a conflict between the *CHRA* and the collective agreement, if any.

[116] Section 7 of the *CHRA* provides that it is a discriminatory practice, in the course of employment, to differentiate adversely in relation to an employee on a prohibited ground of discrimination. Disability is a prohibited ground of discrimination (see s. 3(1) of the *CHRA*). Section 25 of the *CHRA* defines "disability" as any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug.

[117] To determine if an employer engaged in a discriminatory practice, a grievor must first establish a *prima facie* case of discrimination, which is one that covers the allegations made and that if the allegations are believed, would be complete and sufficient to justify a finding in the grievor's favour in the absence of an answer from the employer (see *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536 at 558 and 559 ("*O'Malley*")).

[118] An employer faced with a *prima facie* case can avoid an adverse finding by calling evidence to provide a reasonable explanation that shows that its actions were in fact not discriminatory or by establishing a statutory defence that justifies the discrimination (see *A.B. v. Eazy Express Inc.*, 2014 CHRT 35 at para. 13). The explanation cannot be a pretext to conceal discrimination (see *Moffat v. Davey Cartage Co. (1973) Ltd.*, 2015 CHRT 5 at para. 38).

[119] It is not necessary that discriminatory considerations be the sole reason for the actions at issue for the discrimination claim to be substantiated. The grievor need only show that discrimination was one of the factors in the employer's decision (see *Holden v. C.N.R.* (1990), 112 N.R. 395 (C.A.) at para. 7). The standard of proof in discrimination cases is the civil standard of the balance of probabilities (see *Public Service Alliance of Canada v. Canada (Department of National Defence),* [1996] 3 F.C. 789 (C.A.)).

A. Did the grievor establish a *prima facie* case of discrimination?

[120] For the following reasons, I find that the grievor has established a case of discrimination on a *prima facie* basis with respect to all three components of her claim.

[121] The grievor established that she suffers from a disability. She maintains that after being accommodated for years by being allowed to work a flexible schedule, the employer ended that practice. She also maintains that it improperly ended her telework arrangement and that it did not provide her with timely access to the tools and training she needed to perform her job. Thus, she submits that the employer discriminated against her, in violation of article 19 of the collective agreement and the *CHRA*.

[122] Applying the *O'Malley* test, I find that the grievor's evidence, if believed, would be complete and sufficient to justify a finding in her favour in the absence of an answer from the employer.

[123] Her evidence shows that she was disabled within the meaning of article 19 of the collective agreement and s. 25 of the *CHRA*. Due to her disability, she could not work full-time on a regular basis (37.5 hours per week). She could work only a minimum of 18.75 hours plus additional hours when her condition permitted. In 2011 and 2012, the employer stopped pre-approving her requests to work additional hours and asked her to commit to set hours of work. However, the grievor's physician recommended that she be allowed flexibility to determine her daily work hours and activities based on how she tolerated them.

[124] Thus, the grievor's disability prevented her from working a full work week, but her condition enabled her to work a minimum of 18.75 hours and even more, if her health allowed it. The employer's decision to deny her some of the extra hours that she

could otherwise work meant that it failed to enable her to work and to earn an income to the level that her disability allowed. Therefore, she lost wages. As it was not possible for her to commit to a set number of additional hours above her 18.75 per week — since working such hours was dependent upon the types of activities she did on a given day as well as how she tolerated them — she lost the wages. While it is true that she was mostly at home on sick leave in February and March of 2012, when she was at work, she could not change her hours at her discretion, and she lost wages.

[125] Secondly, while for more than a decade, she was allowed to work from home, she was informed in 2011 that she could no longer do it. Thus, in the period preceding her grievance, she was forced to work hours in the office that potentially could have caused her additional pain.

[126] Thirdly, the grievor was not provided with timely access to the tools and training she needed to perform her job. She stated that the DNS version on her computer did not work well and that she never received proper training for it. She also stated that her office was not configured correctly, which caused her significant pain. In particular, when she was in the office, she endured pain due to her disability and the way she was forced to work with inoperative ergonomic equipment. But for her disability, and the absence of sufficient measures to accommodate her, she could have worked without pain and perhaps for more hours.

[127] Accordingly, she has established on a *prima facie* basis that she was adversely differentiated in her employment on the basis of her disability. The onus now shifts to the employer to provide a reasonable non-discriminatory explanation for its actions.

B. Did the employer provide a reasonable non-discriminatory explanation for its actions?

[128] For the employer to rebut the *prima facie* case of discrimination established by the grievor, it must lead sufficient and convincing evidence to demonstrate that the explanation it provided was reasonable and non-discriminatory. See *Canada (Canadian Human Rights Commission) v. Canada (Attorney General),* 2005 FCA 154 (CanLII) at paras. 36-37 (“Morris”).

[129] An employer faced with a *prima facie* case of discrimination can lead evidence to refute the allegation or present a statutory defence, such as the one set out at s. 15 of the *CHRA*. Pursuant to s. 15(1)(a) of the *CHRA*, an alleged discriminatory practice is

not discriminatory if the following is true:

> ***15(1)(a)*** *any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a* bona fide *occupational requirement.*

[130] For any such practice to be considered a *bona fide* occupational requirement, it must be established that accommodating the employee's needs would impose undue hardship on the employer, considering health, safety, and costs (see s. 15(2) of the *CHRA*).

1. <u>The grievor's hours of work</u>

[131] I must determine if working irregular hours was necessary to accommodate the grievor's disability and, if so, whether requiring the employer to make this accommodation would have caused it undue hardship, in which case it would have established that requiring the grievor to work fixed hours was a *bona fide* occupational requirement.

[132] The employer maintains that in 2002, it accepted the grievor's request for accommodation in good faith. From the time she signed the agreement with her supervisor in 2002, it was understood that she would work 15 hours per week in the office and 3.75 hours per week from home. Only with her supervisor's advance approval could she work more than those 18.75 hours. The employer stated that the same general rule applies to all employees with respect to overtime: pre-approval is required before additional hours can be worked.

[133] The evidence adduced at the hearing showed that in addition to regularly claiming the same number of additional hours in 2010, the grievor continuously claimed 6.25 additional hours per month from September 2011 to January 2012.

[134] When it became clear that the grievor's additional hours were not being properly accounted for, the employer advised her that it was no longer in a position to accommodate her working a variable schedule that fluctuated from day to day and week to week. Thus, it asked her to work set hours. It maintains that having to accept that an employee may claim wages for extra hours of work without any pre-approval and without any account of those hours is unacceptable and causes it undue hardship based on cost. No employer should have to accept that someone must be paid for work

that is not accounted for and that was not assigned.

[135] The grievor maintains that she should have had the flexibility to add hours to her schedule when she felt capable of working them. Her doctor had recommended that she be given the flexibility to determine her work hours and activities depending on how she tolerated them each day, which is why she refused to agree to a set number of hours she could work each week. She maintains that it would have been reasonable for the employer to approve her additional work hours after she had worked them.

[136] I agree with the employer that allowing someone to be paid for work that is not accounted for and that has not been assigned is not acceptable and that it would constitute undue hardship for the employer. The employer showed that the grievor's practice of adding hours to her schedule, at the last minute and at her sole discretion, did not allow it to evaluate if work needed to be done. The employer could not pre-authorize those additional hours worked at her discretion or assign her responsibilities. Furthermore, by every day continuously changing the number of hours she alleged that she worked, the employer could not ensure that she had actually worked those hours. Yet, it had to manage her hours of work in accordance with generally accepted standards.

[137] Thus, the employer has demonstrated, in my view that its requirement that the grievor work set hours was a *bona fide* occupational requirement and that any accommodation requiring it to tolerate flexible hours in the manner she requested would cause it undue hardship.

[138] In addition, I note that after the grievor suffered her new injury in January 2012, she was reassessed at the WSIB's request. The medical report prepared then specifically recommended that she maintain her previous schedule of 18.75 hours per week, which is another reason the employer asked her to maintain those 18.75 hours. However, it suggested that she increase her hours beyond 18.75 per week, if she provided a medical note certifying her ability to.

[139] When an employer makes a reasonable proposal that if implemented, would fulfil the duty to accommodate, then the employee has the duty to facilitate implementing that proposal. If the employee fails to take reasonable steps, which

causes the proposal to fail, then the complaint will be dismissed. See *Audet v. Canadian National Railway*, 2006 CHRT 25 at para. 108.

[140] In this case, I find that the grievor received an offer of reasonable accommodation. The employer allowed her flexible work days, i.e., Mondays, Wednesdays, and Fridays. It offered to grant her the flexibility to choose her hours of work, as long as they fell within the parameters of her collective agreement. The employer also supported her working up to 37.5 hours per week if she were able and she provided supporting documentation from a physician. The grievor could have worked a fixed schedule that reflected her 18.75 regular hours plus the set number of additional hours she had been regularly claiming (for example, half an hour per day, three times per week). However, she refused to.

[141] For these reasons, I conclude that the employer has provided a persuasive answer to the grievor's *prima facie* case. Although it had significantly accommodated her through the years by allowing her to claim compensation for extra hours, the continued application of these accommodations would cause it undue hardship.

[142] Therefore, the employer has established a valid defence under s. 15(1) of the *CHRA*, and I conclude that it did not discriminate against the grievor by improperly restricting her hours of work.

2. <u>The telework arrangement</u>

[143] The grievor was authorized to work 3.75 hours from home weekly from 2002 to 2011. However, no medical certificate required her to. Based on the evidence, she wanted to work only 15 hours per week but still wanted to earn all the benefits of a full-time employee. So, in 2002, she started working 3.75 hours from home, to accumulate a total of 18.75 per week. Yet, she never requested the proper equipment to work from home. Thus, it is unclear if she actually accomplished any work during the 3.75 hours at home. In any event, I am satisfied that her working from home had nothing to do with her disability and that it was entirely due to her desire to obtain all the benefits of a full-time employee.

[144] I am satisfied that the employer has demonstrated that because the grievor was not equipped to work from home, it advised her in 2011 that it would no longer be possible for her to work 3.75 hours per week from there. While she had been

authorized to telework in past years to type reports and to consult her emails, in 2011, she clearly could no longer type reports or use a computer to consult her emails from home. For her to work on a computer, her workstation needed to be specifically configured. Her office workstation had been configured to meet her needs. However, at home, she was not equipped to work on a computer. In addition, as there was no medical requirement that she work from home, the employer did not have the duty to provide her with ergonomic equipment for her home.

[145] For these reasons, I find that the requirement that the grievor work the 3.75 hours per week in the office rather than at home was not discriminatory. In fact, I am satisfied that she was not adversely differentiated on account of her disability by being required to work at the office, as there was no disability-related requirement that she work from home. The decision to require her to cease working at home was a valid precaution that was taken to avoid her becoming further injured.

[146] Therefore, I conclude that the employer has provided a persuasive answer to the grievor's *prima facie* case on this point and that it did not discriminate against her by ending her telework arrangement.

3. <u>The tools and training</u>

[147] The grievor's position is that the employer did not reasonably accommodate her and that it could have gone further to accommodate her, with measures that would not have caused it undue hardship. It is based on the following three allegations.

[148] Firstly, the grievor maintains that it was not reasonable for the employer to leave it to her to identify her needs and to advise it of the necessary measures she required, especially because she worked only part-time, had to carry out her tasks, and was often on sick leave. In her view, accommodating her appropriately with the right tools and equipment would not have imposed undue hardship on the employer.

[149] The grievor also maintains that she replied as soon as possible to the employer's requests for information. She had limited computer skills. Nevertheless, she reached out for help, but management left it to her to take care of her accommodation. She was overwhelmed every day by everything she had to accomplish. Still, she replied to the employer's inquiries within reasonable times.

[150] Secondly, the grievor maintains that it took much too long before DNS could be used on her computer. When she had problems with her computer in 2011, IT had to remove the software. She then experienced pain for a while until IT was able to successfully reinstall it. As Ms. Nicholson acknowledged in an email dated February 10, 2012, to the AAACT representative, the grievor "… could not do much of her work without the functionality of DNS."

[151] The grievor's position is that Ms. Nicholson was at fault for not ensuring that the new computer she received would have the capacity to function with the new DNS version that Ms. Nicholson had bought for her. In the grievor's view, it was unreasonable to expect her to understand the difficulties she experienced with her computer. She submits that Ms. Nicholson and IT were not proactive enough to prevent the problems from occurring, which unnecessarily harmed her. Similarly, Ms. Nicholson could have been more proactive to ensure that the grievor received proper DNS training.

[152] Thirdly, the grievor maintains that when she requested other tools, including a new mouse, armrest supports, a keyboard tray, etc., it took months for the employer to buy them. In addition, she claims that the employer assumed that when she received them, including new desktops, the ergonomic keyboard tray, and the armrest supports, she would be able to use them, but her desk had not been set-up properly, so she could not. She also insisted that the employer waited a year before consulting an outside ergonomist for her office set-up. In her view, that delay was unreasonable.

[153] The grievor relies on *Panacci v. Treasury Board (Canada Border Services Agency)*, 2011 PSLRB 2, *Lloyd v. Canada Revenue Agency*, 2009 PSLRB 15, and *Giroux v. Treasury Board (Canada Border Services Agency)*, 2008 PSLRB 102, in support of her position that the employer failed to provide her with timely accommodations.

[154] The grievor highlights that the employer, in the case of *Panacci*, failed to carry out an individualized assessment of the employee. She submits that similarly, in this case, while Ms. Nicholson flagged her computer problems to IT, only in 2012 were her hardware and software problems solved.

[155] In *Lloyd*, the adjudicator concluded that the grievor in the case had certain medical issues and specific accommodation needs, which were definable. The employer in that case failed to meet these defined needs, and as such, it failed to accommodate

the employee. In particular, it was found that the employer caused an undue delay in ordering an ergonomic assessment and in eventually implementing the recommendations. In this case, the grievor insists that it was unreasonable for the employer to leave it to her to search for and gather quotes for the equipment she needed. She should not have been put in charge of looking after her own accommodation.

[156] In *Giroux*, the adjudicator found that the employer in the case had not fulfilled its duty to accommodate its employee. The adjudicator noted at paragraph 152 as follows: "The duty to accommodate was designed to meaningfully incorporate diversity into a workplace and to allow all employees the opportunity to work by eliminating discriminating barriers."

[157] The grievor claims that by not providing her in a timely fashion with the tools and equipment she needed to flourish as an employee in the workplace, she was not permitted to fully participate in the workplace. Yet, the purpose of proper accommodation is to remove such barriers.

[158] The employer maintains that the grievor was provided in a timely fashion with the appropriate tools and training she required over the years. Even though this grievance is limited to events that occurred after February 25, 2012, it maintains that her disability was accommodated in numerous ways between 2000 and 2013. She was given a closed office because of DNS, which she started using in 2002. An ergonomic assessment of her workstation was also conducted then. Pursuant to it, the employer purchased the recommended equipment, including DNS. In the ensuing years, it continued providing the grievor with all the tools and equipment she requested. Her supervisor actioned all her requests in a timely manner. As the grievor was a specialized ergonomist, management believed she also knew what she required to accomplish her work, which is why it granted all her requests.

[159] The employer further submits that any delay that might have occurred in delivering to the grievor what she requested was attributable to her. She often did not get back to management with respect to quotes she was asked to provide and often did not respond to offers of assistance.

[160] In support of its position that the grievor was required to co-operate in the accommodation process, the employer cited *Kandola v. Attorney General of Canada*, 2009 FC 136 at para. 1. The employer also pointed out that an employee is not entitled to expect a preferred or perfect accommodation but rather "is required to accept an accommodation that meets her or his needs", (see *Magee v. Treasury Board (Correctional Service of Canada)*, 2016 PSLREB 1 at para. 257).

[161] Citing *Miller v. Treasury Board (Correctional Service Canada)*, 2013 PSLRB 164 at para. 97, the employer argued that the grievor did not always communicate clearly as to what she thought was needed or why it was needed. In that case, the adjudicator stated the following:

> *[97] … even if I found that I had jurisdiction to hear the grievance as to the failure to provide the grievor with proper ergonomics at his workstation, I would have dismissed it. The evidence clearly shows that there was a willingness to provide the grievor with an ergonomic chair though there were delays in doing so. There were omissions in communications, incorrect assumptions and misunderstandings along the way by both parties, but these do no always mean that the duty to accommodate was not ultimately met. As is often stated, the duty to accommodate is a two way [sic] responsibility both for the employer and for the employee and I cannot find that the problems that arose were due to the omissions of the employer only. The grievor did not always communicate clearly what he thought was needed or why….*
>
> [Emphasis added]

[162] In support of its position that any delay that might have occurred in implementing the accommodation is attributable to the grievor, the employer cited *Taticek v. Treasury Board (Canada Border Services Agency)*, 2015 PSLREB 12 at paras. 107 and 112 to 114 (upheld in 2015 FCA 261).

[163] Therefore, the employer's position is that it reasonably accommodated the grievor. If the accommodation was in some way imperfect, it can be attributed to the grievor for not assisting or even for obstructing the employer's efforts to accommodate her.

[164] I note that the employer and grievor also cited other cases in support of their respective positions. Although I reviewed each case, in the interests of brevity, I chose to cite only those listed earlier, which clearly reflect the jurisprudence on the issue.

[165] The evidence shows that the grievor was provided with ergonomic equipment, including an adjustable workstation, and DNS in the early 2000s, which allowed her to dictate text. For that reason, she was provided with an enclosed office so that her dictations would not disturb others.

[166] The employer offered ample evidence that it took countless measures to accommodate the grievor over the years. However, the evidence shows that she did not always facilitate implementing the accommodations.

[167] I find that *Panacci*, *Lloyd*, *and Giroux*, on which the grievor relied to establish that the employer failed to provide her with timely accommodations, can be distinguished from her case. Contrary to the situation in *Panacci*, the employer did carry out an individualized assessment of the grievor in this case. In addition, contrary to the situation in *Lloyd*, the employer took many measures to meet the grievor's specified needs. And contrary to the situation in *Giroux*, the employer took an important number of measures to meaningfully incorporate her into the workplace.

[168] As mentioned in *Leclair v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 97 at para. 134, employees are not entitled to their preferred accommodations. They are entitled to reasonable accommodations that meet their identified needs.

[169] The grievor's position is that while she was overwhelmed with work, she still responded to the employer's inquiries within a reasonable time. However, the evidence shows that that did not always happen. In particular, it took her close to a year, i.e., from January 12, 2011, to December 14, 2011, to get back to Ms. Nicholson with the quote for her height-adjustable workstation.

[170] In addition, the evidence shows that the grievor did not accept many of the offers of assistance that she received. For example, her position is that after her new injury in January 2012, she could not use DNS because she had not completed training on it. However, on March 2, 2012, Ms. Dussault sent her an email in which she offered to help her with her new DNS version. The email stated as follows: "If you would like assistance in getting started, please let me know so that we can schedule some time." However, the grievor did not respond as she was not interested in receiving assistance from the TAC.

[171] The evidence shows that Ms. Nicholson then arranged for the grievor to receive training from AAACT pursuant to her request for training on the new DNS version. So, the employer retained AAACT's services. However, the grievor used its services only twice. She explained that her office was not configured correctly at that time, which is why she did not ask the AAACT trainer to come there. However, she had been invited to visit AAACT's offices, to receive training there, which she declined.

[172] With respect to the grievor's position that it took much too long before DNS could be used on her new computer, I note that on October 14, 2011, she informed her supervisor that the new DNS version recently installed was not working properly because her computer was outdated. The same day, Ms. Nicholson took action, and within a week of the grievor raising this concern, IT confirmed that she would get a new computer. It was set-up and DNS was reinstalled as soon as the grievor was available, which was November 8, 2011.

[173] The evidence also shows that the employer searched for her old sound files. However, as both Ms. Dussault and the AAACT specialist advised, there was no alternative to creating new sound files as she had received a new version of DNS.

[174] The grievor's position is that when she requested specialized tools, such as new tops for her desks, an ergonomic keyboard tray, and armrest supports, it took months for the employer to buy them. I find that this was not the case. The evidence shows that the employer responded quickly to her requests and that she received the equipment in a timely fashion, quite often in one or two weeks.

[175] The grievor is also of the view that it was unreasonable for the employer to wait until December of 2011 before consulting an outside ergonomist for her office set-up after she moved to a new office in 2010. She states that the employer relied on her to provide her own advice as she was a certified ergonomist, who specialized in work postures and in improving workstation quality. That is not entirely true. In January 2011, Ms. Nicholson was open to taking action to help the grievor with her office setup, but the grievor undertook to provide Ms. Nicholson with the quote for her height-adjustable workstation. However, she provided it only after December 14, 2011, which is why several months passed before Ms. Nicholson took the initiative to consult an outside ergonomist.

[176] In any event, I find that the employer did not leave it to the grievor to assess her needs. It must be noted that an ergonomic assessment of her workstation was conducted in the early 2000s and that the employer purchased all the recommended equipment. While it is true that the grievor also knew what she required to make her gestures more efficient, with limited effort, the employer still took action to accommodate her. It again hired an outside ergonomist to obtain advice on how the grievor's desk could be set up in December of 2011. Then, the grievor refused to reconfigure her desktops in the proposed manner, even though the suggestion was valid and included an offer to re-evaluate the situation after a few months.

[177] In my view, Ms. Nicholson demonstrated that while she was the grievor's supervisor, she made every effort to ensure the grievor was accommodated. Ms. Nicholson processed the grievor's requests for equipment promptly and never refused her requests. Ms. Nicholson went above and beyond what was required to help the grievor, and she put in hours and effort to provide the grievor with what she requested. She inquired into tools and services that could be offered to the grievor. She hired external help to alleviate the grievor's administrative duties, in addition to hiring outside ergonomists. She really did everything possible to provide the grievor with what she requested and to make her work easier.

[178] As in *Leclair*, I find that the employer made the effort to find a reasonable accommodation based on the medical information it had been provided. The grievor delayed the process by not responding to or considering the different options that were put forward.

[179] Therefore, I conclude that the employer has provided a persuasive answer to the grievor's *prima facie* case and that it did not discriminate against her by omitting to provide her with the tools and training she required.

VII. Conclusion

[180] In conclusion, the grievor's allegations that the employer engaged in a discriminatory practice have not been substantiated. The employer has refuted the grievor's *prima facie* case.

[181] Firstly, the employer demonstrated that allowing the grievor to work additional and irregular hours at her discretion amounted to allowing someone to be paid for work that was not accounted for and that had not been assigned, which constituted undue hardship for the employer.

[182] Secondly, the employer established that there was no disability-related requirement that the grievor work from home. Therefore, I am satisfied that she was not adversely differentiated on account of her disability by being required to work at the office.

[183] Finally, with respect to the tools and training the grievor required, the employer established that she was in fact reasonably accommodated. If the accommodation was to any extent less than complete, it was on account of her actions.

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

(The Order appears on the next page)

VIII. Order

[185] The grievance is dismissed.

July 14, 2017.

Nathalie Daigle,
a panel of the Federal Public Sector Labour Relations and Employment Board