Date: 20141211

File: 566-02-2964

Citation: **2014 PSLREB 03**

Public Service
Labour Relations Act

BETWEEN

DOUG NICOL

Grievor

and

TREASURY BOARD
(Service Canada)

Employer

Indexed as
Nicol v. Treasury Board (Service Canada))

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Deborah M. Howes, adjudicator

For the Grievor: John Haunholter and Kelly Minucci (née Drennar)

For the Employer: Martin Desmeules and Sebastian Chouinard, counsel

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Heard at Edmonton, Alberta,
April 16 and 17, June 12 to 14, June 26 to 28, August 22 and 23,
October 16 and November 28, 2012.

I. Introduction

[1] This is a case about an employee who tried to return to work from sick leave and whom the employer did not accommodate. The story ended sadly almost four years later when the employee chose medical retirement rather than continuing to wait for accommodation. Neither party raised objections to my appointment or jurisdiction to hear the case.

[2] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365, SI/2014-84) was proclaimed into force, creating the Public Service Labour Relations and Employment Board ("the new Board") to replace the former Public Service Labour Relations Board ("the former Board") and the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 396 of the *Economic Action Plan 2013 Act, No. 2*, an adjudicator seized of a grievance before that day continues to exercise the powers set out in the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) as that Act read immediately before that day.

II. Individual grievance referred to adjudication

[3] The grievance alleges violations of the collective agreement between the Treasury Board ("the employer") and the Public Service Alliance of Canada ("the bargaining agent") for the Program and Administrative Services Group (expiry date: June 20, 2011; "the collective agreement"), statutes and employer policies. I have referred to the pertinent policies at the time in square brackets, but otherwise, the grievance reads as follows:

> *I grieve that my employer has denied me accommodation measures in the workplace as per the Treasury Board's duty to accommodate policy thus causing me serious financial, physical and psychological damages.*
>
> *I grieve that because of my disability my employer has discriminated against me in an ongoing manner thus the employer has violated the Canadian Human Rights Act* [R.S.C., 1985, c. H-6], *as well as article 19 and all other related articles of our collective agreement.*
>
> *I grieve that the employer has contravened the Treasury Board of Canada's policy on the prevention and resolution of harassment in the workplace* [Policy on Prevention and

> Resolution of Harassment in the Workplace dated April 16, 2012] *by failing to provide a harassment-free workplace.*
>
> *I grieve that the employer has contravened Treasury Board Secretariat's Values and Ethics Code for the Public Service* [Values and Ethics Code for the Public Service dated April 16, 2012] *by failing to adhere to the application of the Code.*

[4] The redress sought is lengthy. However, with the passage of time due to the grievance processing, the bargaining agent amended some of the redress requests at the hearing. The amendments are noted in brackets, and numbering has been added for ease of reference. The redress sought, in the grievor's words, is as follows:

> *1) That management put in accommodation measures immediately as per my outlined medical condition. [No longer sought as the grievor has medically retired.]*
>
> *2) That I be compensated for all losses including pay and benefits. As well to include any lost wages and additional expenses that may result from this situation. [Claimed from June 1, 2008.]*
>
> *3) That I am compensated by the employer in the amount of $20,000.00 for pain and suffering, psychological and physical damages I have suffered and will continue to suffer in an ongoing manger due to my employer's neglect. [Claim active for upper end damages.]*
>
> *4) That I am compensated by the employer in the amount of $20,000.00 for the reckless and willful discrimination I suffered. [Claim active for upper end damages.]*
>
> *5) I demand a written apology from the department. [Claim active but prefer employer express its regret voluntarily.]*
>
> *6) I demand that my employer take corrective action towards the person responsible for this harassment to ensure that this behaviour does not occur again. [Claim discontinued.]*
>
> *7) I demand an investigation into this matter. [The adjudication hearing is meeting this request.]*
>
> *8) I demand and [sic] immediate change in my reporting relationship until this matter is resolved. [No longer sought as the grievor has medically retired.]*
>
> *9) I demand that my employer foster a respectful workplace through the prevention and prompt resolution of harassment and provide appropriate training for staff and management. [Claim active.]*
>
> *10)I expect and demand that the filing of this grievance will*

> *not prejudice me in any future dealings with my employer. [No longer sought as the grievor has medically retired.]*
>
> *I demand that any tax implications resulting from this grievance be the responsibility of the employer. [Claim active linked to compensation.]*
>
> *11) I demand that this grievance be heard at the final level of the process to avoid aggravating my disability. [The adjudication hearing is meeting this request.]*
>
> *12) I reserve the right to put forth other corrective measures at the grievance hearing. [None requested.]*

III. Sequence of events

[5] Doug Nicol ("the grievor"), his father, various doctors (Dr. Janet Berezowsky, Clinical Psychologist; Dr. Gillanders, General Practitioner; Dr. War, Psychiatrist; and Dr. Douglas Ginter, Consultant in Psychiatry), Kelly Minucci (née Drennar), National Union Representative, Canada Employment and Immigration Union, Jodi Casper, National Labour Relations Officer, and Kelvin Mathuik, Executive Manager, Integrity Services, Operations, testified at length about the events involved in the grievor's request for accommodation.

[6] The following timeline summarizes the sequence of events from 2005. The activities between 2005 and spring 2008 provide context. The events covered by the grievance began in early 2008.

1) 2005 - The grievor's substantive position was as a service delivery representative (classified CR-05), which required production quotas, significant computer work, client interaction and significant regular overtime. He requested accommodation for a physical condition. The employer accommodated him through approved sick leave, breaks at work and an ergonomic chair. He used all his sick leave and used the ergonomic chair intermittently. However, his condition deteriorated, prompting him to seek accommodation through a different work activity.

2) January to March 2006 - The grievor was seconded to a job in the "New Horizons Program" with no clients and less stress but with more computer work and a similar work intensity. He felt the job was not what been described to him; therefore, the accommodation was not appropriate. He sought another change in work.

3) March 2006 - Dr. Berezowsky said that the grievor was unfit to work due to a lack of accommodation.

4) Spring 2006 - The grievor's secondment was extended. He was not allowed to return to his substantive position unless he was able to do the complete job. The employer determined it was unable to repackage the substantive duties (as part of an accommodation to select specific duties from the substantive position) while providing the grievor with sufficient work.

5) May 2, 2006 - The grievor applied and was approved for disability leave.

6) July 2006 - The employer notified the grievor that effective September 1, 2006, his position would be reclassified from CR-05 to PM-01 as part of the new Service Management Structural Model (SMSM) organization, a department wide reclassification (Exhibit 43). The employer did not notify him of any conditions that would affect implementing the reclassification.

7) January 2008 - The bargaining agent contacted the employer to discuss the grievor's pending return to work because his disability benefits were to expire in six months.

8) Spring 2008 - The grievor's disability benefits were nearing their end. He was advised to return to work by June 30, 2008.

9) March 14, 2008 - A physical therapist diagnosed the grievor with ". . . osteoarthritis of cervical spine and secondary postural dysfunction." and recommended an ergonomic assessment of the grievor's workstation before he returned to work (Exhibit 19 YY).

10) April 2008 - The bargaining agent and the employer discussed the grievor's return to work. The employer required him to undergo a fitness-to-work evaluation by Dr. Ginter.

11) May 5, 2008 - Dr. Ginter met with the grievor and then issued a report (Exhibit 61). He determined that the grievor was fit to return to work and provided written recommendations for accommodation, including a vocational rehab assessment and program (identified seven times), a functional assessment (identified at least twice), retraining, pushing the

grievor to consider other positions, a less-demanding position for him, adapting him to less stringent duties and performance, and a gradual return to work for him.

12) June 23, 2008 - The grievor's grievance was filed. The employer and the bargaining agent had different views of the accommodation required.

13) June 25, 2008 - A notice was sent to the employer, stating that the grievor was not able to return to work (Exhibit 29) without accommodation.

14) June 26, 2008 - Ms. Casper gave Ms. Miller, the employer's representative, an extensive list of accommodations required by the grievor (Exhibit 60-11). The accommodations addressed medically documented physical and mental disabilities.

15) June 30, 2008 - The grievor's disability benefits ceased.

16) July 17, 2008 - The grievor, his bargaining agent and the employer met about his return to work and accommodation. The employer offered him three options for his return to work, which were to return to his substantive position or to accept one of two demotions. The employer provided job descriptions for the three positions.

17) July 31, 2008 - The employer emailed the bargaining agent, requesting the grievor's response about his return to work by August 8, 2008.

18) August 2008 - The grievor became fit to return to work, with accommodation.

19) August 5, 2008 - The bargaining agent emailed the employer about the grievor's return to work and the modifications required.

20) August 11, 2008 - The employer sent a letter (Exhibit 32) to the grievor, offering him three possible positions, which were his substantive role and two demotions, one of which was for six months. The employer confirmed it would conduct an ergonomic assessment once the grievor's return-to-work location was determined. The letter also stated the grievor could resign by August 18 or be terminated for a reason other than a breach of discipline or misconduct and gave him one week to respond. Finally, the employer

advised him that if he did not respond by August 18, 2008, it would terminate him. Although copied on the letter, the bargaining agent did not receive it until August 15. In its reply, the bargaining agent obliged the employer to deal with the bargaining agent and included written authorization from the grievor.

21) August 22, 2008 - Dr. Berezowsky requested an update on the plan to return the grievor to work (Exhibit 19 ZZ). She supported his "prompt return to work" and expressed concerns as follows:

> *. . . the longer he remains off, the more difficult it is likely to before [sic] him to make the transition back to the workplace. Since he has already made at least two rather short-lived attempts to return, it is questionable whether a more favourable outcome can be expected on yet another try. It is therefore essential that the deck be stacked in his favour before such a course is embarked upon.*

She opined the grievor was fit for a graduated return to work with modified duties on a rehabilitation basis. She summarized the modifications that she, Dr. Gillanders and a Dr. Gendemann recommended as follows:

> - *physical* – [that the grievor] *not sit at computer screen for extended periods; alternate activities with computer work, walking, standing, and other types of physical activities.*
> - *psychological* – [he is] *not suited to work involving intense and/or continuous dealings with clients or coworkers. Increasing demands to perform cause him anxiety.* [She recommended] *the services of the long term disability carrier be utilized to aide [sic] in finding suitable positions to meet the modifications required.*
> - *fresh start in a new position – to overcome the skepticism caused by the previous attempts to return to work.*

22) September 4, 2008 - The bargaining agent requested a return-to-work plan for the grievor (Exhibit 34).

23) September 24, 2008 - The employer sent a second notice letter to the grievor's home. One of the three positions originally offered was no longer available. The letter required him to notify the employer of his selection of

the offered positions and notified him that his other choices were to resign or to take no action, which would require the employer to terminate him.

24) October 16, 2008 - The employer sent a final notice (a third) letter to the grievor's home. The letter required him to notify the employer of his selection of the positions still being offered, which were his substantive position and a demotion. The employer confirmed an ergonomic assessment would occur once his work location was determined and confirmed he would be provided with a work plan that would outline clear expectations in a supportive environment and appropriate training. Again, the grievor was told that his other choices were to resign or to take no action, which would require the employer to terminate him. No additional positions were offered. The grievor's mental health began to deteriorate.

25) October 24, 2008 - The grievor responded (as part of the bargaining agent's response). He did not accept the demotion due to the different work location, the additional driving that would be required and the lack of modification of duties to meet his accommodation request. He indicated his unwillingness to be bullied into accepting a demotion given that he had not been accommodated at his substantive level. He indicated he would retain his substantive position until accommodation was provided.

26) October 29, 2008 - The bargaining agent wrote to the employer to revisit and resolve the return-to-work with accommodation issue. The bargaining agent sought an assessment of ergonomic needs and that equipment be ordered before the grievor returned to work. It also suggested rebundling duties in the grievor's substantive role rather than offering him a demotion as the first accommodation step.

27) October 2008 - The grievor requested personal leave without pay for one year, which Mr. Mathuik denied.

28) November 12, 2008 - Dr. Berezowsky said the grievor was unfit to return to work, for an unspecified period.

29) November 24, 2008 - Mr. Mathuik wrote to the grievor about his sick leave without pay status (Exhibit 58). In this letter, Mr. Mathuik relied on a Treasury Board policy on leave without pay as well as his recent letters. He

informed the grievor that the offers in his previous letters were no longer possible in the circumstances. He informed the grievor as follows: "I regret that we must now prepare for your separation from the Public Service. The options for you to consider are [three options — apply for medical retirement, resign or be terminated]," and he went on to write that if the grievor did not select an option by January 9, 2009, the employer would terminate his employment.

30) January 2009 - The employer placed the grievor on leave with pay for 6.5 months, pending mediation. No mediation occurred.

31) January 28, 2009 - The employer notified the grievor that his position was reclassified to that of a payment service officer, PM-01, effective September 15, 2008, as part of the implementation of the new "Service Management Structural Model" organization in Service Canada. No conditions were identified, except his signature. The grievor signed, indicating his acceptance, on June 16, 2009.

32) June 11, 2009 - The employer wrote to the grievor to confirm his substantive position had been reclassified (Exhibit 43). Mr. Mathuik refused to implement the reclassification until the grievor returned to his substantive position and underwent an evaluation of his competencies for the higher classification. The grievor was one of three employees who were not reclassified for similar reasons.

33) June 2009 - The bargaining agent requested a meeting with the employer to plan for the grievor's return to work. Again, the bargaining agent requested that the employer give the grievor access to the Government of Canada's priority entitlement placement list.

34) June 29, 2009- Mr. Mathuik ended the grievor's leave with pay because of the grievor's lack of respect by failing to inform the employer about his medical status and job choice.

35) February 2010 – The employer issued a record of employment.

36) March 2, 2010 - Mr. Mathuik was aware that the employer issued a record of employment to the grievor, with the grounds of separation being illness or

injury. At that time, Mr. Mathuik was also aware of ongoing discussions about a return-to-work strategy for the grievor.

37) July 26, 2010 – The employer had placed the grievor on the priority entitlement placement list (in the "Priority Information Management System"). Mr. Mathuik determined that he would not refer the grievor to other departments until his own department received updated medical information.

38) February 11, 2011 – The bargaining agent and employer met to discuss the grievor's medical retirement.

39) July 13, 2011 - Mr. Mathuik wrote to the grievor (Exhibit 62) about his desire to medically retire, yet he informed the grievor that he had been on unauthorized leave since April 1, 2011, and that he had to contact the employer before August 12, 2011, or additional administrative action would occur.

40) On July 22, 2011 - The grievor applied for medical retirement. His retirement was accepted in December 2011.

41) June 1, 2008, to December 2011 - The grievor never returned to work. He asked the employer to assist with transferring him to another department, but the employer did not action that request. The grievor applied for positions in other departments but was not successful.

[7] The evidence shows the grievor did not return to work after May 5, 2008.

IV. <u>Positions of the parties</u>

[8] The parties provided extensive arguments and case law to support their positions. Their respective positions are set out as follows, and the case law list is attached as an appendix.

A. <u>For the grievor</u>

[9] The grievance is about a breach of article 19 of the collective agreement that constituted the grievor being discriminated against and harassed in his attempts to have the employer accommodate his medical condition so that he could continue to work. It is a duty-to-accommodate grievance that invites me to view the duty-to-

accommodate process and whether or not the parties fulfilled their respective obligations in that process. The grievance, filed on June 23, 2008, also includes the employer's *Policy on the Duty to Accommodate Persons with Disabilities in the Federal Public Service* ("the Accommodation Policy") and the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; "*CHRA*"). The grievance asserts the commonly accepted and cherished view that there is a duty to accommodate any employee who cannot perform all or any part of his or her job and who asks his or her employer to make a way for him or her to continue employment. The grievor asserted that he was not accommodated to the point of undue hardship.

[10] The bargaining agent argued that before incurring poor health, he had over 20 years of service as a very hardworking and dedicated employee who had no disciplinary record and had never grieved. He was beset with health issues that affected his ability to work, in the same manner or to the same level, as he had before they arrived.

[11] The health issues did not severely affect the grievor's dedication until 2011, when his physical and mental health deteriorated to the point that he became unfit to work in any capacity and he retired on medical grounds. It was a tragic outcome for him, because he had spent his life planning for a normal retirement.

[12] The evidence in the case covers events dating to 2004. Both the grievor and the bargaining agent are aware of the limitation to adjudication that the redress cannot extend to further than 25 days before the date of the grievance. Therefore, in this case, June 1, 2008, is the effective date for the redress. However, the grievor argued that it is essential that the redress cover from that date until he had no employment status, which occurred on his retirement in December 2011.

[13] It said that the events from 2004 to 2008 are salient because the employer's actions in how it dealt with the grievor's previous requests for accommodation showed patterns of interest, intentions, actions and spirit that are very important to this case.

[14] The bargaining agent asserted the case law has established that there is a tripartite process in accommodation between the employer, bargaining agent and employee. The law, simply stated, states the following:

- The onus is on the employee who presents with medical conditions, such that it affects his or her ability to work, to advise the employer of
  - the medical condition affecting his or her ability to do the duties, coupled with a request for accommodation, and
  - The medical information to support the request, including a medical assessment, a recommendation for accommodation and the restrictions present on the work activities.
- Then the employee, through his or her actions and the bargaining agent, has to demonstrate a willingness to engage and cooperate in what should be an accommodation process.

[15] When the employee meets his or her obligations, the employer, to the point of undue hardship, must do the following:

- investigate;
- assess;
- engage;
- propose alternative work duties or processes; and
- effect efforts and results directed to making an accommodation happen.

[16] The grievor sought a finding that the employer failed to adhere to the Accommodation Policy, the law and the collective agreement. Under the Accommodation Policy (Exhibit 7), the deputy head has obligations and is responsible for implementing the policy within the department. In addition to the list of general obligations, the deputy head and the delegates must do the following (Accommodation Policy, page 4):

> - *after general barriers have been removed and general accommodation measures have been put in place, proceed with individual accommodation requests of persons with disabilities by:*
>   - *consulting with the employee to identify the nature of the accommodation,*

- *if necessary, consulting appropriate medical and rehabilitation advisors and others, with the employee's consent, to determine the accommodation appropriate to that person and*

- *accommodating the employee . . . .*

[17] In this case, any consulting of medical advisors was done minimally or not at all.

[18] Under the Accommodation Policy, the deputy head and delegates must also do the following (Accommodation policy, page 5):

. . .

> *. . . consult and collaborate with bargaining agents and other employee representatives where accommodation affects other employees or where the employee being accommodated requests that the bargaining agents or other employee representatives be consulted . . . .*

. . .

[19] Ms. Casper was an emphatic oral and written representative for the grievor, but Mr. Mathuik did not honour the policy. Ms. Minucci experienced frustrations along with delays from the employer's actions, and its lack of interest.

[20] The bargaining agent stated there is a tripartite process in accommodation, its role is important and it tries to exercise that role. However, when the employer does not allow it to be a full participant in the accommodation process, that has a significant impact on what can be done or what is done. Irrefutably, it is clear in this case that two bargaining agent representatives wanted to participate in the grievor's accommodation process and to try to resolve the issues.

[21] The grievor completed all those obligations.

[22] The employer did not meet its obligations. Although it had the medical assessment and recommendations for accommodation, it did not engage in the accommodation. In this case, the grievor experienced his own form of undue hardship, so the standard for the employer promotes a common ground for resolution. This employer, the Treasury Board, needs to model that process.

[23] The intent of the Accommodation Policy is that no one should lose income, the ability to contribute or employment because of a medical disability. This employer is

large, with a multiplicity of functions and duties within the department and the Government of Canada. The grievor urged a common-sense view that would make it difficult for this employer to state that, “There are no accomodatable [sic] positions available.”

[24] The bargaining agent and the grievor asked me to consider what the employer knew about the grievor’s abilities and disabilities and then to look at what was done or not done. The evidence shows a lack of initiative by the employer. The employer’s response to the accommodation request was akin to putting a “square peg in a round hole” and when that did not work, becoming frustrated and saying, “We tried.” But the employer’s medical evidence shows that other steps should have been taken.

[25] It submitted that the grievor’s case is clearly legitimate, and the employer recognized its legitimacy. Thus, the question is whether the employer’s efforts and what it did were appropriate and whether it was done to the point of undue hardship.

[26] The evidence shows the employer’s efforts delayed the process, were obstructionist, excluded the bargaining agent, were not reasonable and did not remotely approach the threshold of undue hardship. The employer had to demonstrate that it accepted its duty and that it acted on its duty, according to the law and policy.

[27] The grievor urged that I hear and view the employer’s evidence about its conduct through his evidence and that of the bargaining agent and the medical practitioners as to

- when advice was offered;
- what advice was offered;
- how it was monitored;
- what was involved;
- how circumspect the employer was in its efforts;
- how open the employer was to innovation;
- how caring the employer was to the grievor; and
- whether the employer made sufficient efforts in the accommodation process.

[28] On the last point, the bargaining agent submitted that I should note that the employer's only witness to its efforts was a detached manager who did not know what "agoraphobia" meant, yet believed that a front-end (direct client contact) position was the best option for the grievor. This one witness did not know the grievor's duties. That same manager expressed regrets yet sent letters to the grievor containing termination, resignation and retirement options. That same manager excused the actions or inactions of persons who did not testify but who needed to testify.

[29] The bargaining agent also argued that the employer had to take pains to establish the actions it took to accommodate the grievor, and that the evidence on point before me was hearsay and conjecture. The employer could not rely on Mr. Mathuik's evidence of what others said, did or felt. The absence of employer witnesses commands attention, and I should draw an adverse inference.

[30] The absence of evidence is a further indication of the lack of importance the employer put on the grievor's case. It was not acceptable for Mr. Mathuik to defer to others as being responsible when they were not at the hearing to testify; that was passing the buck, yet he gave the grievor three notices that included threats of termination if he did not return to his substantive position or accept one of the limited offers of demotion (Exhibits 32, 35 and 36). This implies that things happened for which no explanations were provided.

1. Accommodation

[31] Relying on the evidence, the bargaining agent put forward many examples of the grievor informing the employer of his need for accommodation of his medical condition. The bargaining agent argued the onus shifted to the employer to explain why it did what it did and whether that was sufficient to meet its obligation.

a. Employer's conduct after being informed of the accommodation need and the grievor's cooperation.

[32] The following paragraphs were provided by the grievor as examples of the evidence of the employer's conduct or response after it was informed of the need for accommodation and of the grievor's cooperation.

i) Mr. Mathuik contacted the grievor's doctor without consent, which both the grievor and his doctor confirmed took place.

ii) In March 2006, the grievor was informed (Exhibit 19 O) that the employer would arrange an independent medical assessment and that he was required to remain in the secondment position until that was completed, but then it never contracted or scheduled the assessment. This again triggered the grievor's medical condition, resulting in him leaving work once more (Exhibits 19 P and Q).

iii) The employer offered the grievor a front-end position when the medical advice clearly stated he should have a less-public position with few deadlines and less demands as a permanent change.

iv) Mr. Mathuik stated that the service delivery representative position, which was the grievor's substantive position, had changed over time but adduced no evidence that the position's work description had ever changed.

v) The employer ignored or refused the assistance of medical professionals when invited to, such as Dr. Berezowsky's multiple offers from November 2005 onwards.

vi) As early as October 2007 (Exhibit 19 EE), the employer began to give the grievor ultimatums about his future employment.

vii) In January 2008, Ms. Casper advised that medical recommendations would include that the grievor ". . . have no further contact with Mr. Mathuik or anyone else who previously supervised him." She requested a meeting with Mr. Mathiuk's superior to discuss a return-to-work plan, but Mr. Mathuik (the grievor's executive manager) attended the meeting.

viii) The employer allocated the bargaining agent representative to only an observer role as early as June 2008 (Exhibit 19 NN) or failed to involve it in meetings or correspondence from spring 2008 (Exhibit 19 TT).

ix) The employer cancelled or did not show up for meetings with the bargaining agent to discuss the grievor's return to work or grievance (Exhibits 13, 20 and 21, and Ms. Minucci's evidence).

x) The employer continued to expect that the grievor would return to his substantive position, which included extensive daily computer work, and continued to offer that position as one of the accommodation options, contrary to the medical advice and accommodation request.

xi) The employer refused, was reluctant and dragged its feet with respect to placing the grievor on the priority entitlement placement list so that, in the end, he lost the first 18 months of a possible 2 years of access to referrals and, as a result, lost opportunities for jobs with Service Canada and elsewhere that could have met his accommodation needs.

xii) The employer failed to get a handle on the medical information and coordinate one return-to-work plan using all the information. See Exhibit 19 PP for contradictory information in the employer's hands as of June 13, 2008.

xiii) The employer failed to accurately convey to others involved in the file the contents of Dr. Ginter's independent medical assessment and recommendations (Exhibit 19 PP, the email at the bottom). Although the employer was aware that the grievor's scheduled return-to-work date was June 30, 2008 (Exhibit 19 QQ), and although it possessed the fitness-to-work evaluation report, a meeting to deal with the return-to-work plan did not occur until July 15, 2008. In addition, the employer took no steps between June 20 and June 30, 2008, to schedule a meeting before June 30 (Exhibit 19 QQ), although the bargaining agent tried to arrange a meeting. On June 20, the bargaining agent requested a meeting before June 30, but the employer did not even respond to the bargaining agent's communication until after June 23. On June 25, the bargaining agent communicated with the employer again to prompt a response.

b. <u>The bargaining agent's examples of the employer's conduct</u>

[33] The following paragraphs provide examples of the evidence the bargaining agent asserted shows the employer was told of the need for accommodation and of the grievor's cooperation.

i) On December 30, 2004, the employer received the first medical note, which stated that the grievor required a change of work duties "due to medical reasons" (Exhibit 19 B).

ii) In January 2005, Mr. Mathuik contacted the grievor's doctor by phone and, in his notes, recorded that "the doctor recommended a position that includes less interaction with the public – less demanding – not filled with deadlines."

The doctor recommended "... a permanent change as a temporary one will result in his medical issues surfacing." When asked if a front-end position (with direct client contact) was a possibility, the doctor indicated that "... this would not be a suitable position due to the high degree of client interaction . . . [the grievor] needs a position with far less interaction with the public." Marlene Duncan, the grievor's direct supervisor, confirmed this information with him in a letter in February 2005 (Exhibit 19 F).

iii) The employer asked the grievor to answer questions about the duties and limitations of two positions, the service delivery representative position (his substantive position) and a service delivery agent, income security programs position, to help it respond.

iv) Dr. Gillanders responded on February 5, 2005, stating the grievor could return to work on February 7, 2005, with a reduced workload and that after six to eight weeks, he should change to the service delivery agent position in an in-person capacity.

v) In November 2005, Dr. Gillanders (Exhibit 19 M) updated the employer and recommended the grievor move to another government department with a less-stressful environment. He also advised he was unable to provide further specific recommendations due to the complexity of the duties in the grievor's work.

vi) In November 2005, Dr. Berezowsky (Exhibit 19 N) wrote the employer for the purposes of helping it accommodate the grievor's workplace needs. She identified his physical and psychological condition and the treatment plan. She cautioned that direct or continuous dealings with clients were outside his comfort zone. Increased workload and client interaction would increase his neck pain and headaches (which resulted from a motor vehicle accident). She stated the following:

> *. . . the longer the situation persists, the greater the personal stress and the more severe his physical symptoms are likely to become. For this reason, I recommend assigning him to a mentally challenging job in which the requirement for direct client interaction is significantly reduced. The expectation that he work overtime may need to be revisited since long*

> *hours spent at a computer may also aggravate his neck problems.*

vii) A July 2006 call notation and an August 2006 fax from Sharon Slaney, Sun Life Abilities Case Manager, sought all medical information the employer possessed from doctors, the status of the independent medical assessment and a description of modifications to the grievor's work (Exhibits 19 S and T).

viii) On September 15, 2006, the bargaining agent representative followed up on the grievor's long-term disability insurance (LTDI) claim, which was delayed by the employer's lateness responding to Sun Life (Exhibit 19 X).

ix) In August 2006, Dr. Berezowsky wrote (Exhibit 19 V) to Sun Life, recommending the following, which was also communicated to the employer:

> *. . . that the amount of time [the grievor]spent hunched over his computer be reduced, the expectation of overtime hours be removed, and the amount of time spent dealing directly with clients and coworkers be reduced.*

x) In September 2006, Dr. Gillanders (Exhibit 19 Z) wrote to the employer, stating that the grievor had been unable to work in his former position since July 1, 2006, and would be for the foreseeable future.

xi) In December 2007, Sun Life Financial wrote to the grievor and copied the employer's compensation advisor, stating that his doctor was supportive of a rehabilitation plan to assist with his reintegration into the workforce but recommending against his return to his previous work environment. It also advised that the LTDI benefits for the first 24 months of his occupational disability would expire on June 29, 2008, but it did not expect the grievor to qualify for benefits past that date.

xii) In January 2008, Ms. Casper informed the employer that she was assisting the grievor with his return to work and that likely a duty to accommodate issue would arise, which specifically would be a recommendation that the grievor return to a different work location and position. She inquired as to whether the employer required a fitness-to-work evaluation. She also advised that medical recommendations would include that the grievor ". . . have no further contact with Mr. Mathuik or anyone else who previously supervised

him." Yet Mr. Mathuik and supervisor, Leigh-Ann Gardner continued to be the main employer representatives on this file, and they had the most contact with the grievor until his retirement.

xiii) In May 2008, Dr. Ginter, in an independent medical assessment report (Exhibit 19 QQ), made recommendations as the employer's contracted medical specialist.

xiv) Mr. Mathuik did not dispute any of the findings or recommendations in this report but did not implement the recommendations; indeed, he even ignored or frustrated those recommendations via his actions.

xv) While the employer knew that the grievor's scheduled return-to-work date was June 30, 2008, and it possessed the fitness-to-work evaluation report, a meeting to deal with the return-to-work plan did not occur until July 15, 2008.

xvi) In June 2008, Ms. Casper reconfirmed her representation of the grievor and the joint responsibility of the employer and the bargaining agent to work together on facilitating an accommodation for him (Exhibit 19 TT).

xvii) In August 2008, Dr. Berezowsky (Exhibit 19 ZZ) wrote to the employer to facilitate the grievor's return to work to modified duties (he had been cleared to return in May 2008). She raised the urgency of the matter; confirmed the modifications that she and Dr. Gendemann had defined, which were that the grievor not sit at a computer screen for extended periods and that he have no intense or continuous dealings with clients or coworkers; and urged using the LTDI rehabilitation services (which she explained and illustrated) to facilitate the accommodation process.

2. <u>Discrimination</u>

[34] On the matter of discrimination, the bargaining agent said the CHRA and the collective agreement (article 19) do not tolerate discrimination based on a disability. Examples of the discrimination against the grievor were clear in the following areas: reclassification, work description options presented by the employer, breach of the Values and Ethics Code for the Public Service, harassment, and lack of respect.

a. Reclassification

[35] The grievor was notified in January and June 2009 that effective September 15, 2008, his position had been reclassified from CR-05 to PM-01 as part of a department wide service reorganization and reclassification (Exhibit 43).

[36] Yet Mr. Mathuik and Ms. Gardner withheld the grievor's reclassification as they had been unable to assess his competency in the PM-01 role because he was on disability leave. At the same time, the employer was unable to provide any credible evidence that they were following an employer policy rather than personally choosing to impact the grievor.

[37] The employer's notice of reclassification (Exhibit 74) did not refer to a requirement to re-evaluate each incumbent in a position that is being reclassified as a result of a national reclassification effort. Nor did any requirement prohibit an evaluation based on an employee's last known performance of those duties.

[38] It would be intolerable if his absence alone barred the grievor's reclassification because the reclassification occurred to the position, not to the person occupying the position. There is no evidence that, at that time, the employer had performance issues with the grievor; no written or verbal record exists of any performance issues. Mr. Mathuik described the grievor as hardworking and high-performing.

[39] There is no evidence to support or justify the employer's actions on this matter, which then leads to an inference of discrimination.

b. Work description options presented by the employer (Exhibits 15, 16 and 17)

[40] These positions required extensive sitting, keyboarding and interfacing with the public. They were put to the grievor as options to accommodate his stated medical needs but were contrary to the medical reports and information available to the employer and the grievor at the time.

[41] For the employer to put these positions to the grievor as choices for accommodation speaks to the employer as (a), not being mindful of the medical information provided, and (b), demonstrating an attitude that it did not care or was blind to and disregarding of the disability. It is a discriminatory practice to act as if a person does not have a disability in the face of medical information and knowledge

that the person does have a disability.

c. <u>Breach of the *Values and Ethics Code for the Public Service*</u>

[42] Under the heading "People Values," the *Values and Ethics Code for the Public Service* ("the Code"; Exhibit 8) states that respect for human dignity and the value of every person should inspire the exercise of authority and responsibility.

[43] Under the heading "Deputy Heads," it states that deputy heads have the obligation to ensure that the personal information in confidential reports is secured and treated in confidence.

[44] Under the heading "Measures to Prevent Conflict of Interest," it states that public servants have specific duties to not knowingly take advantage of, or benefit from, information that is obtained in the course of their official duties and that is not generally available to the public.

[45] Mr. Mathuik breached the Code twice, first in his call to Dr. Gillanders without the grievor's consent, and second in gathering and passing on information that was contained only in the grievor's Employment Insurance Benefit application file. Mr. Mathuik, as executive manager of the program, had access to the file. While he said he obtained the information in a letter he received from Dr. Berezowsky, such a letter does not exist, and if it does, it was not adduced at the hearing.

[46] Mr. Mathuik abused his authority under the Code, to the grievor's detriment.

d. <u>Harassment</u>

[47] On the matter of harassment, the bargaining agent argued that the employer's *Policy on Prevention and Resolution of Harassment in the Workplace* ("the Harassment Policy") states that all persons working for the public service are to be treated with respect and dignity. Harassment is not tolerated. It begins with the *CHRA* prohibition of harassment based on disability and extends the Harassment Policy to other types of workplace harassment. It defines harassment. It outlines an expectation that managers will lead by example and act respectfully in dealings with employees.

[48] Mr. Mathuik continued to be involved in the case after the employer received medical advice that the grievor should deal with different managers.

e. Lack of respect

[49] The grievor was not treated with respect by the employer or his managers. The employer continued to send communications to the grievor even after the bargaining agent had sent a notice that it would be involved and would represent him. The employer ought to have known that this would offend and harm the grievor and that he would see the employer's actions as intimidating and offensive to him. The employer stalled scheduling the grievor's third-level grievance meeting. By its actions, it demonstrated that it did not consider the grievance significant enough to warrant a third-level response. The employer is obligated by the collective agreement and by good faith to respond to grievances. By failing to, it hindered the grievance process, which is used to resolve employee grievances, and impeded the implementation of the requested accommodation.

[50] The grievor relied upon the following cases: *Alberta (Human Rights and Citizenship Commission) v. Federated Co-operatives*, [2005] A.J. No. 1023; *Boehringer Ingelheim (Canada) Ltd. v. Kerr*, [2010] B.C.J. No. 583; *Brewer's Distributor Ltd. v. Brewery Winery and Distillery Workers' Union, Local 300 (Peebles Grievance)*, [2011] B.C.C.A.A.A. No. 49; *Canada Safeway v. United Food and Commercial Workers, Local* , [2000]A.G.A.A. No. 43; *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 (*Renaud)*; *Coca-Cola Bottling v. CAW, Local 385*, [2011] O.L.A.A. No. 447; *Cyr v. Treasury Board (Department of Human Resources and Skills Development*, 2011 PSLRB 35, *Cyr v. Treasury Board (Department of Human Resources and Skills Development,* [2011] C.P.S.L.R.B. 34, *Delage v. Treasury Board (Department of Fisheries and Oceans)*, 2009 PSLRB 43, *Fidler v. Sun Life Assurance Company of Canada*, [2006] S.C.J. No. 30; *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d`Hydro-Québec, section locale 2000 (SCFP-FTQ)*, [2008] S.C.J. No. 44; *Lloyd v. Canada Revenue Agency,* 2009 PSLRB 15; *British Columbia (Public Service Employee Relations Commission) v. British Columbia and Service Employees' Union*, [1999]S.C.J. No. 46 *(Meiorin); Boardman Nnagbo v. Treasury Board (Public Works and Government Services Canada*, [2001] C.P.S.S.R.B. No. 1, (File 166-02-30045); *Panacci v. Treasury Board (Canada Border Services Agency,* 2011 PSLRB 2*; Panacci v. Treasury Board (Canada Boarder Services Agency,* 2011 PSLRB 72; and *Stringer v. Treasury Board (Department of National Defence) and Deputy Head (Department of National Defence),* 2011 PSLRB 110.

B. For the employer

[51] The employer stated it understands and recognizes the duty to accommodate. However, in the Accommodation Policy, the burden is not really clear. The employer's argument has two parts: (1) jurisdiction, and (2) accommodation.

1. Jurisdiction

[52] Under this argument the employer addressed six topics: interest, disability claim, ongoing counselling costs, employer policies, reclassification and effective date.

a. Interest

[53] The employer argued paragraph 226(1)(*i*) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; "*PSLRA*") applies only in a case of a termination, demotion, suspension or financial penalty. This grievance is about an interpretation of the collective agreement, not discrimination. Therefore, I have no authority to award interest because the authority to give relief is found under subsections 53(2) and (3) of the *CHRA*, not subsection 53(4).

b. Disability claim

[54] The employer stated that it was not aware of any precedent cases on this and any remedy would be against Sun Life, not the employer.

c. Ongoing counselling costs

[55] The employer submitted that there was no authority under which the employer can be ordered to provide a former employee any benefits. If the grievor were an employee and on LTDI, then there would be provision for those benefits. Ordering the employer to pay for counselling is equal to ordering it to keep an employee on benefit status. Termination is not in itself discrimination.

d. Employer policies

[56] Here the employer argued that a breach of a policy is not grievable. It may be evidence of discrimination (e.g., a failure to follow policy), but it must tie to the collective agreement.

e. Reclassification

[57] The employer asserted that if I find the reclassification notice (Exhibit 43) is a notice of the grievor's appointment to a PM-01 position, then *Delage v. Treasury Board (Department of Fisheries and Oceans)*, 2009 PSLRB 43, applies, to September 15, 2008. If the issue is discrimination for not placing the grievor in a PM-01 position), the proper recourse is the staffing process.

[58] On the reclassification issue, the evidence does not firmly establish the grievor was appointed to a PM-01 position (see Exhibit 60-32, Tabs 19, 22 and 23, Exhibit 19-Y, Exhibit 74-D, Exhibit 60-32,

[59] Going to the heart of the matter, reclassification alone is not evidence of an appointment or discrimination or bad faith because the grievor was away and could not attest to his competencies, and it does not impact the suggestions made or attempts to accommodate him.

f. Effective date of remedy

[60] The employer stated that I cannot go back more than the time specified in the collective agreement, being 25 days before the grievance, which the parties did not dispute.

2. Accommodation

[61] The employer's arguments here dealt with ten items: the 2004 – 2006 historical accommodation, the duty to accommodate, the grievor's on-going status, the employee's duty to facilitate accommodation, the grievor's obligation to return to work in a reasonable time, the extent of the obligation to accommodate, who assess the reasonableness of offers, undue hardship, when the employee's obligation begins, and the limit on the employer's duty. Each is summarized in the following paragraphs.

a. 2004 to 2006

[62] The grievor indicated accommodation requirements to the employer. The employer modified his duties and then sent him to the seconded position, which did not work out.

[63] The evidence is not clear, but according to the grievor, too much computer work

was involved and he wanted to return to his old job.

[64] In March 2006, the grievor saw Dr. Berezowsky and then was off work. At the time, the employer and the grievor both wanted a Health Canada assessment, but it did not occur because he was off work for two years.

b. Duty to accommodate

[65] This is a duty to accommodate case. The employer did not deny its duty to accommodate an employee with a disability and special needs. However, an important corollary is that the employee and the bargaining agent have a duty to participate and to collaborate in the accommodation process.

[66] The employer asked me to dismiss the grievance because, on the evidence and on the balance of probabilities, the grievor did not return to work for only one reason — not because the employer did not accommodate him but because he failed to actually try the suggested accommodation.

c. The grievor's on-going status

[67] The employer said the grievor's employment was not terminated, even though it issued a record of employment. The employer kept trying to help him and was open to him returning to work until he provided information that he was permanently unable to return to work. His employment terminated when he retired.

d. Employee must facilitate accommodation

[68] The employer submitted that an employee has to facilitate an accommodation in two ways. First, an employee must inform the employer. In this case, a large amount of medical information is on file and clearly, the employer was aware that the grievor required some accommodation. Secondly, an employee must restore his or her health and employment and accept a reasonable proposal of accommodation.

[69] In this case, the employer made a reasonable proposal in light of the medical information; it is not right to expect perfection. The grievor said he might have wanted to work at Parks Canada or as a driver as better accommodation but that does not make the employer's proposal any less reasonable.

[70] The employer asked me to consider the facts of the employer's proposal. At the

July 2008 meeting, it proposed three positions, which it submitted were all reasonable. Arguably, the employer can always do more, but the question is whether it did enough. The employer made its proposal based on the medical information it had available. It offered three possible starting points from which to build. The grievor and the bargaining agent also had an obligation to identify positions.

[71] The employer put three positions on offer but received no response about alternatives or what was wrong with the three offers. Neither the grievor nor the bargaining agent presented any alternatives. The accommodation need not be perfect.

[72] On the evidence, the grievor and the bargaining agent assumed that the offer would not work; unfortunately, that was fatal to his case.

e. The grievor had to return to work in a reasonable time

[73] The employer asserted the grievor had to be able to return to work within a reasonable time. The employer did not have to keep him on leave without pay if the focus was on his return to work.

[74] The employer refused the grievor's request for leave without pay for legitimate reasons. In addition, for six months, the employer put him back on full pay status while it was still trying to find a solution to bring him back to work. Yet the employer did not receive a response or decision from him on the three alternate positions; nor did he suggest any other alternatives to consider.

f. Obligation to accommodate

[75] The employer is obliged to accommodate but not to create new jobs, so the focus should be on what was offered rather than what could have been offered.

[76] The employer's three proposed positions were active steps. The grievor just had to choose a location. Once that was done, the employer could have dealt with the physical setup and his exposure to the public and co-workers.

[77] Once a position and location were identified, then the position description, the duties and the manager are known, so duties, hours and accommodation can be discussed as an ongoing process.

[78] In the employer's submission, it was fatal to the grievor's case once he did not

at least choose an option and try it. Three positions were a reasonable opportunity for him to return to work.

[79] Just criticizing the employer does not meet the participation obligation in the duty to accommodate.

g. Assessing reasonableness of offers

[80] Who assesses the reasonableness of employer offers? The employer said it is the adjudicator, in light of all the circumstances of the case.

h. Undue hardship

[81] When is the point of undue hardship reached? The employer submitted it is hypothetical to determine if the grievor would have been able to successfully handle the accommodation because he did not return to work. The employer did not terminate him; that would have been undue hardship.

[82] The employer is entitled to some level of production from an employee. The employer did not claim undue hardship. It said it was only in the process of accommodating the grievor and did not assert the point of undue hardship had been reached.

[83] The employer argued the accommodation was not successful because the grievor did not participate in it. If the employee is not responsive to the employer's proposal, the employer cannot force the employee to return to work.

i. When the employee's obligation begins

[84] When does the employee obligation to participate kick in? What are the tests? The employer said accommodation is an ongoing multi-party process, so there must be ongoing discussions.

[85] The offer of the three positions was intended to create a starting point in an ongoing process with multi-party input.

[86] The grievor had neck and back issues, agoraphobia and stress issues, and pressure to perform exacerbated the neck and back pain. He could not sit at a computer for an extended time, yet his exposure to the public, to clients and to

co-workers was also limited. Thus, the employer, in a vacuum, had to accommodate all that.

[87] The employer argued the evidence shows the employer made efforts, through the March 2008 multi-party meeting, the fitness-to-work evaluation, the July 2008 meeting where accommodation was offered, and the August 11, 2008 email confirming the offer of accommodation. It acknowledged it did not achieve perfect communications.

j. Limit of employer duty

[88] On this point, the employer argued the accommodation grievance was filed on June 23, 2008, which is an important consideration to determining whether the employer met its duty to accommodate.

[89] By June 23, 2008, the grievor had been off for two years and had undergone a fitness-to-work evaluation, of which he had a copy. However, he and the bargaining agent did not like the assessment, so they filed a grievance. At June 2008, the employer could not have done more than send him to a fitness-to-work evaluation.

[90] The respondent relied upon the following cases: *Pepper v. Treasury Board (Department of National Defence)*, 2008 PSLRB 8; Kane v. Attorney General of Canada (Attorney General), [2011] F.C.J. No. 79; *Brown v. Canada (Attorney General),* [2011] F.C.J. 1483; *Brown v. Treasury Board (Correctional Service of Canada),* 2009 PSLRB 127; *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 (*Renaud*); *Scheuneman v. Canada (Attorney General)*, [2000] F.C.J. No. 1997; *Canada (Attorney General)* v. *Tipple*, 2012 F.C.A. 158; *Gentek Building Products Ltd. v. U.S.W.A. Loc. 1105 (Batko) (Re);* [2003] O.L.A.A. No. 806; *United Food and Commercial Workers, Local 1288P v . Maple Leaf Consumer Foods Moncton Ltd. (Nugent Grievance)*, [2008] N.B.L.A.A. No. 1; *English-Baker v. Treasury Board (Department of Citizenship)*, 2008 PSLRB 24; Lindsay v. Deputy Head (Canada Border Services Agency), 2009 PSLRB 62; and *Sioui v. Deputy Head (Correctional Service of Canada,* 2009 PSLRB 44.

V. Reasons

[91] Article 19 of the collective agreement prohibits the employer from discriminating against an employee by reason of mental or physical disability. The

parties agreed that this prohibition is extensive. Article 19 states as follows:

> *19.01 There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced [sic] with respect to an employee by reason of . . . mental or physical disability . . . .*

[92] The collective agreement incorporates similar principles and prohibitions to the *CHRA*, specifically in sections 2, 3, 7, 10, 14, 15, 25 and 39 of the *CHRA*, which imposes significant obligations on an employer. Those sections read as follows:

> ***2****. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.*
>
> *3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.*
>
> . . .
>
> ***7****. It is a discriminatory practice, directly or indirectly,*
>
> *(*a*) to refuse to employ or continue to employ any individual, or*
>
> *(*b*) in the course of employment, to differentiate adversely in relation to an employee,*
>
> *on a prohibited ground of discrimination.*
>
> . . .
>
> ***10****. It is a discriminatory practice for an employer, employee organization or employer organization*

(a) *to establish or pursue a policy or practice, or*

(b) *to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,*

that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

. . .

14. (1) It is a discriminatory practice,

(a) in the provision of goods, services, facilities or accommodation customarily available to the general public,

(b) in the provision of commercial premises or residential accommodation, or

(c) in matters related to employment,

to harass an individual on a prohibited ground of discrimination.

***15.** (1) It is not a discriminatory practice if*

(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;*

. . .

(e) *an individual is discriminated against on a prohibited ground of discrimination in a manner that is prescribed by guidelines, issued by the Canadian Human Rights Commission pursuant to subsection 27(2), to be reasonable; …*

(2) For any practice mentioned in paragraph (1)(a) *to be considered to be based on a* bona fide *occupational requirement and for any practice mentioned in paragraph (1)*(g) *to be considered to have a* bona fide *justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.*

. . .

> ***25.*** *In this Act,*

. . .

> *"disability"* « déficience »
>
> *"disability" means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug;*

. . .

> *"employment"* « emploi »
>
> *"employment" includes a contractual relationship with an individual for the provision of services personally by the individual;*

. . .

> ***39.*** *For the purposes of this Part, a "discriminatory practice" means any practice that is a discriminatory practice within the meaning of sections 5 to 14.1.*

[93] Under the Accommodation Policy, dated October 1, 2009 (Exhibit 7), a department head has obligations and is responsible for implementing the policy within the department. In addition to the list of general obligations, the department head and delegates must do the following:

. . .

- *after general barriers have been removed and general accommodation measures have been put in place, proceed with individual accommodation requests of persons with disabilities by:*
  - *consulting with the employee to identify the nature of the accommodation,*
  - *if necessary, consulting appropriate medical and rehabilitation advisors and others, with the employee's consent, to determine the accommodation appropriate to that person and*
  - *accommodating the employee . . . .*

. . .

[94] Under the Accommodation Policy, the department head and delegates must also do the following:

. . .

> *. . . consult and collaborate with bargaining agents and other employee representatives where accommodation affects other employees or where the employee being accommodated requests that the bargaining agents or other employee representatives be consulted . . . .*

. . .

A. <u>Accommodation</u>

[95] At paragraph 45 of *Cyr v. Treasury Board (Department of Human Resources and Skills Development)*, 2011 PSLRB 35, the adjudicator succinctly summarized the employer's obligations with respect to the duty to accommodate. I agree with his summary and apply the same duty in this case. That paragraph reads as follows:

> *[45] The Supreme Court established in* Simpsons-Sears *that employers have a duty to take reasonable steps to accommodate employees' functional limitations, provided that the steps do not cause it undue hardship. The Supreme Court also specified in* Meiorin *that employers must make sustained and prolonged efforts to find a solution that enables employees to remain at work in spite of their medical constraints. . . .*

[96] There is no doubt that the grievor had medically supported physical and mental disabilities that required him to seek accommodation. The medical evidence from 2004 to 2010 is overwhelming.

[97] There is also no doubt that the employer was aware of the grievor's physical and mental disabilities through the medical diagnosis, because it received extensive medical reports and letters. Those letters and reports set out both the grievor's work restrictions and his requested accommodation.

[98] The employer also sought an independent medical assessment in May 2008. The resulting report from Dr. Ginter then became the employer's primary tool for determining what accommodation the grievor required.

[99] The employer acknowledged that the grievor requested accommodation, that it knew it had a duty to accommodate him, and that it was in the process of trying to accommodate him. I find that there is ample evidence before me that the grievor's disabilities fell within the definition of disability under the *Canadian Human*

Rights Act.

[100] The real issues between the parties, other than remedy, are whether the employer made a reasonable offer of accommodation and whether the grievor failed to meet his duty to cooperate in the accommodation efforts. I must find in favour of the grievor on both matters.

[101] Mr. Mathuik was the sole employer witness who could speak to the employer's decisions and actions during the period at issue. He knew the grievor and spoke highly of his skills, dedication and high production levels before the grievor began to seek accommodation.

[102] Mr. Mathuik described the process the employer used in 2008 to decide whether to accommodate an employee. It started with a discussion with the employee and other interested parties. It was an open, transparent process; it included getting help or information from doctors and others who could help. The decision rested with the delegated manager of the day, which in this case would have included him. If the decision to accommodate was made, there would be conversations, reviews of job descriptions, encouragement to have doctors review job descriptions, sharing of reports of any functional assessments, and ongoing dialogue until the employee supported the resolution.

[103] The evidence overwhelmingly shows that this is the type of process and dialogue the bargaining agent tried to initiate on the grievor's behalf. The bargaining agent also tried to be involved in the process as part of meeting its obligations. However, what actually occurred fell far short of the process Mr. Mathuik described.

[104] Mr. Mathuik said the employer had no information "that really articulated what was really needed to accommodate" the grievor except the recommendation for an ergonomic assessment once the work location was determined. He said, "Other than that, we did not get a well-scribed list," and stated that the employer relied on doctors to provide that information. Relying on Dr. Ginter's report, he understood there were "no limitations on the grievor to return to work."

[105] The extensive documentary evidence from the doctors and Ms. Casper contradicts Mr. Mathuik's assertion that the employer was not provided sufficient information about the grievor's restrictions or required accommodation. Ms. Casper,

Dr. Ginter and Dr. Berezowsky provided significant information about both the grievor's restrictions and the recommended accommodation requirements. Dr. Ginter recommended specific steps for the employer to take, which it did not do. Repeatedly, in the employer's internal email communications, it focused on the ergonomic assessment recommended by Dr. Ginter but ignored the other recommendations.

[106] Mr. Mathuik never requested a functional assessment by an occupational specialist and was not aware of anyone else from the employer who had done so. He did not request an ergonomic assessment for the grievor but expected one to be done only after the grievor had selected a job and work location.

[107] While Mr. Mathuik was aware of a requirement in the accommodation protocol to involve the bargaining agent, he did not invite it into the accommodation discussions but said the grievor was welcome to bring someone in if he wished to.

[108] The evidence shows that Mr. Mathuik continually averted the request by the grievor and bargaining agent. He continued to deal with the bargaining agent rather than dealing directly with the grievor.

[109] Repeatedly, Mr. Mathuik sent letters directly to the grievor's home and insisted that he respond directly to him. Later in this decision, I will comment further on the other consequences of those letters.

[110] The employer made only one attempt to accommodate the grievor after May 2008, although it repeated its offer more than once. The attempt to accommodate resulted from the meeting in August 2008, at which the employer offered the grievor three possible positions in which it could accommodate him. The three positions were his substantive position and two demotions.

[111] I find that none of the three positions was a reasonable offer of accommodation in the circumstances, given the information available to the employer at the time.

[112] The employer failed to follow the recommendations identified by its independent medical assessor. Dr. Ginter recommended the employer conduct a vocational rehab assessment and program (identified seven times), conduct a functional assessment (identified at least twice), initiate retraining, push the grievor to consider other positions (possibly a less-demanding position), and implement an adaptation to less stringent duties and performance standards and a gradual return

to work.

[113] The employer took no steps to complete a vocational rehab assessment and refused to discuss how to restructure any of the jobs to meet the recommendations for less demands on the grievor or less stringent duties and performance standards.

1. <u>The grievor's substantive position</u>

[114] On the grievor's substantive position, Mr. Mathuik's evidence was not consistent about the offer and about what could have been done to accommodate the grievor in his substantive position. He offered the position to the grievor with the only stated accommodation being an ergonomic assessment.

[115] Mr. Mathuik said bundling duties was not really an option because a CR-05 position has limited duties, which if picked apart would not provide a meaningful job that could be sustainable on a long-term basis. He saw it as being very difficult to derive a job out of the then-current substantive job description.

[116] While Mr. Mathuik had the authority to rebundle duties to an extent, reconstructing a job was beyond his authority and any job would have had to fit within the employer's established classification and job description system. The employer had done some rebundling in 2005 but could not maintain it and did no rebundling of duties from 2008 onwards. Mr. Mathuik did not provide specifics of what rebundling had been examined in 2008 or beyond, or of how such a rebundling would have made the job unsustainable.

[117] Without specifics, I am not prepared to accept the employer's assessment that the rebundled duties would not have provided a meaningful job or would have been unsustainable.

[118] The grievor understood that Mr. Mathuik had earlier told him that he could return to the substantive position only if he could perform 100% of the duties. Mr. Mathiuk disputed this information. I find it more likely that the employer did communicate this expectation to the grievor. The grievor's understanding is consistent with the actions of the employer to not return the grievor to his substantive position and the employer's evidence that the substantive position could not be rebundled as a sustainable position.

[119] The employer's reluctance to discuss rebundling the duties of the substantive position demonstrated that it was not reasonably prepared to remove barriers from the grievor's substantive position or a position at a similar level to accommodate the identified restrictions arising from his disabilities.

[120] In this case, the employer's actions resulted in an unreasonable offer to return the grievor to the substantive position without accommodating for the restrictions, other than for the ergonomic restrictions.

[121] The duty to accommodate requires the employer to first reasonably accommodate the employee at his or her substantive level before considering lower-level positions. The employer should have made other attempts to accommodate the grievor at his own substantive level before offering positions at a lower classification and pay level. However, the employer made no such efforts, despite the requests from the grievor and the bargaining agent. The only step the employer took was to encourage the grievor to make his own efforts to find another position at his substantive level.

[122] Mr. Mathuik said that he did not look outside the department for any positions in which to accommodate the grievor. Nor did he ask anyone else to. He was not aware of any document that required the employer to accommodate an employee by looking at positions outside the department. He saw any such responsibility as resting with the employee, and he would have supported such an initiative.

[123] Mr. Mathuik was aware that the grievor had sought jobs in other departments and encouraged him to use the website tools available to employees, although he acknowledged the grievor would not have had access to internal postings if he were not at work. He was aware that accommodation was possible after 2008 at the CR-05 level, but the employer did not offer the grievor any such positions because there were no vacancies.

[124] By July 2010, Mr. Mathuik was aware that the labour relations consultants had placed the grievor on the priority entitlement placement list (in the Priority Information Management System). The bargaining agent had been lobbying for this priority status for over a year.

[125] However, the employer again frustrated the accommodation process by

requiring updated medical information before it would refer the grievor to other departments. The grievor was not able to access the additional resources through the priority status because of the employer's delay and its need for renewed medical information. Another opportunity was lost.

2. The two demotions

[126] Turning to the offer of the two demotions, I also find the two lower-classification positions offered to the grievor were not reasonable offers in the circumstances. One position was of a short term nature and the other was a long term position.

[127] For each position, the employer offered only ergonomic accommodation and again did not inquire into, discuss or evaluate the extent to which it would require adjusting duties to accommodate the other medically identified restrictions. In each case, the employer was not prepared to discuss salary protection options.

[128] In Mr. Mathuik's view, the best position offered to the grievor to meet his restrictions for his accommodation was the short-term front-end position, although it was a demotion. He believed this position would be compatible with the recommendations in Dr. Ginter's independent assessment report, as the client work could be distributed to other employees. The offer for this short term position was also contrary to the medical advice that the grievor be placed in a stable position to facilitate a successful return to work.

[129] Mr. Mathuik said this job was flexible in that it was unstructured, with no production quotas. However, the job required core hours of 08:00 to 16:30 daily, five days per week. The hours could possibly have been modified as long as he was satisfied that in his words he had the "right resources on the ground to meet client services [*sic*] needs." He was unable, when questioned, to explain how the job or work environment would respond to some of the grievor's other needs. This job offer was later withdrawn because the required training time exceeded the term nature of the job. As a result, the employer's 'best offer' was not available for long and the other position did not meet the recommended medical accommodation.

3. The grievor's duty to cooperate

[130] Did the grievor fail to cooperate in the accommodation process when he failed

to accept one of the three offered positions? I find that he did not.

[131] From early 2008, the grievor and the bargaining agent made substantial efforts to engage the employer in a collaborative process to create a successful return-to-work plan for the grievor. He was medically fit and willing to return to work at the end of June 2008.

[132] The employer did not meet with the bargaining agent and grievor or offer any accommodation until two weeks after the grievor's disability benefits had expired. The grievor was without income and continued to be in that state for most of the following years.

[133] It is important that an individual seeking accommodation cooperate in the process and not simply, for example, insist on one option. (*Renaud, Meiorin*). The evidence shows that the grievor and the bargaining agent operated in good faith throughout this process. On the employer's request, the grievor went to an independent medical doctor who provided guidance to the employer on the approach to accommodation. The grievor fulfilled his duty, on a number of occasions in 2006 and 2008, to cooperate fully in the accommodation process. The grievor was also open to a number of possibilities, but these needed to be real possibilities, that took into account the medical restrictions that he had shared with the employer.

[134] The employer failed to make the appropriate assessments of the accommodation needed and, as a result, failed to give the grievor the information he required to reasonably assess the accommodation offered in the three jobs. It did not provide the grievor with the necessary information about how the duties would meet his medical restrictions. The employer kept insisting that an ergonomic assessment was the only information required and such an assessment would be done after the grievor selected a job to go to. As a result, the grievor was reasonably unable to assess or select any of the positions offered.

[135] The grievor remained open to various possibilities but legitimately asked the employer to accommodate him at his own substantive level first before exploring demotions. He made attempts to look for work in other departments. He asked the employer to help him, but the employer did not.

[136] I find the grievor met his obligations under the duty to accommodate.

4. Undue hardship

[137] Finally, I will address the concept of undue hardship. The employer did not claim that it suffered undue hardship.

[138] I do not see that the concept can apply in this case because I have found that the employer did not make a reasonable offer of accommodation.

[139] There is also no evidence to support a finding that the employer's actions went far enough to raise the spectre of undue hardship. There is no evidence of any hardship experienced by the employer in this case.

[140] It is true that the employer kept the grievor on leave without pay from July 1, 2008, to December 2011, except for the 6.5 months when he was on leave with pay. During this time, the employer stated it was patient and it kept trying to get the grievor to indicate a choice from the list of six stated options, which were to choose one of three positions offered, resign, medically retire or be terminated. Waiting does not constitute undue hardship. The employer took no accommodation action that placed any hardship on it.

[141] In summary, I conclude that the employer denied the grievor accommodation measures in the workplace as required by its own policy and its legal obligation to accommodate him.

B. Allegation of discrimination

[142] I will turn now to the discrimination alleged by the grievor. Because of my findings on the employer's failure to accommodate, I conclude that it also discriminated against the grievor in relation to his physical and medical disabilities, contrary to the collective agreement and the *CHRA*. The employer failed or refused to give the grievor opportunity for continued employment and it did so based solely on his medical disabilities because the employer did not want to take the steps to properly accommodate him.

[143] I also find that the following additional actions of the employer, established by the evidence and detailed in the following paragraphs, displayed discriminatory conduct against the grievor. I infer, from the evidence of the employer's actions on the accommodation request that this discrimination arose because of the grievor's medical

disabilities. These include the employer's reckless approach to the accommodation process; Mr. Mathuik's letters to the grievor in 2008; placing the grievor on leave without pay only to remove it without notice; the issuance of the record of employment; Mr. Mathuik's continued involvement in the case, though there was a medical recommendation that he not be involved; the decision not to reclassify the grievor; and the failure to look outside the department for positions in the accommodation process;

> i) The employer maintained a reckless approach of ignoring that the positions it offered to the grievor were not even consistent with its own independent medical opinion. The employer chose to do what it did in the face of the employer's own independent medical specialist's recommendation about what the grievor could and could not do.
>
> ii) Mr. Mathuik's repeated letters in the Fall 2008 threatened the termination of the grievor's employment while purporting to offer him accommodation. These three letters were sent to the grievor rather that the bargaining agent, as he had expressly requested. Mr. Mathuik's reason for doing so was that he wanted a response and he did not realize the bargaining agent had a recognized role in the process. By ignoring the grievor's request to deal with his bargaining agent, the employer was further able to isolate him. The letters were sent at a time when he had no income and he was becoming increasingly desperate for funds for basic necessities. The grievor's medical condition was becoming more fragile with each letter issued by the employer. Each letter presented an option to resign or be terminated. Each letter contained a very short response date and a stated termination date if he did not respond. Each letter was more forceful in its content and tone, for example, by being titled "Second Notice" or "Final Notice". Mr. Mathuik said that policy required him to offer the grievor's resignation or to take steps to terminate him. I cannot accept Mr. Mathuik's explanation for repeatedly sending these letters in 2008. His actions (sending the threatening letter and then retreating from the threat only to make it again) did not align with his information about the steps the policy required him to take. I infer Mr. Mathuik did not execute the policy as stated in 2008 because he knew the employer had an overarching obligation to accommodate the grievor. I find the letters were written and delivered in such a way to frustrate the grievor and prompt him to take a desperate action, like quitting.

iii) Mr. Mathuik made the decision to place the grievor on leave with pay, only to rescind it without notice. Mr. Mathuik said he rescinded it because the grievor was being unresponsive, but he failed to acknowledge or respond to the replies given by the bargaining agent or grievor because they did not accord with the replies I infer he wanted to receive. I see this as one more step to force the grievor to accept a demotion without proper accommodation or to quit.

iv) The employer issued a record of employment to the grievor. Such a document signals an end to an employment relationship, yet the employer argued it never terminated the grievor. Again, Mr. Mathuik was aware this document was being sent. He did nothing to stop it. There is no evidence the grievor was forewarned or given an explanation for this action. The employer engaged in a discriminatory practice, directly or indirectly, by expressing its refusal to continue to employ (through the accommodation process) the grievor on the grounds of his physical and mental disabilities. This action reinforces my view that the employer wanted to end the relationship with the grievor and not have him return to work. It was another form of threat.

Once again, the grievor was financially desperate. His medical condition was becoming more fragile with each threat issued by the employer. This threat forced him to apply for medical retirement. He was unable to apply for disability benefits because the employer had not allowed him to return to work since 2008. He was unable to return to work and potentially continue until he reached his normal retirement age.

Instead, the grievor was cornered (by the employer's pressure and its passive resistance to his return to work and his lack of income, which resulted in his desperation) into applying for medical retirement as the only way he could see to obtain some income.

v) Mr. Mathuik continued his personal involvement in the grievor's case, despite medical recommendations that another manager take control of the process. By 2009 and later, Mr. Mathuik said his involvement declined, except to prepare for scheduled mediation and adjudication dates. The evidence shows the contrary, that Mr. Mathuik continued to be the key decision-maker concerning the grievor's employment up to and including his medical retirement in 2011.

vi) Mr. Mathuik and the employer decided to not reclassify the grievor's substantive position even though all similar positions were reclassified as a result of the wider reclassification of CR-05's to PM-01. The grievor was one of three or four employees in similar situations who were not reclassified. The evidence shows that there was no change to the duties of the grievor's substantive position, only a reclassification of level and pay. The broad reclassification was to take effect six weeks after the grievor was scheduled to return to work in 2008. The reclassification was to his position, not him personally. The employer's own "Questions and Answers for Managers about the CR-05 Reclassification" (Exhibit 74C) provides no conditions or criteria for reclassifying any CR-05 position in the service delivery representative job. Instead, more than once it repeats the message that all service delivery representatives would be reclassified regardless of where they work. The grievor was a service delivery representative at the time. However, Mr. Mathuik was not prepared to consider the reclassification until the grievor returned to work and could be assessed for his skills and capabilities at the PM-01 level. Mr. Mathuik had direct knowledge of and spoke very highly of the grievor's skills and abilities in his role before the request for accommodation. During the same time, Mr. Mathuik continued to offer the grievor a return to his substantive position.

Mr. Mathuik said he had an obligation to consider whether the grievor's known abilities would meet the higher classification. I find there is no evidence that the reclassification required him to do so. There is no evidence that any other employee in that group was appointed to a PM -01 position to effect the reclassification as the employer asserts was required. In addition, I infer Mr. Mathuik made that assessment of the grievor's abilities when he offered the grievor a return to his substantive position (which was by then at the PM-01 group and level) in September 2008. There is no evidence that supports the employer's stated position that it was required by policy to reassess the grievor's abilities to perform the same work (now reclassified at a higher level) he had previously done for years. The evidence shows that the job duties did not change while the grievor was away. The new information at the time was the grievor's medical and psychological condition. I also infer that one of the reasons for not reclassifying the grievor was that he had known mental and

physical disabilities.

I find the employer differentiated the grievor from other similar employees when it refused to implement the reclassification, and it did so on grounds arising from his disabilities.

This decision by the employer impacted the grievor in that he was denied the higher-level pay for at least the time that he was placed on leave with pay by Mr. Mathuik. This would also have impacted the calculation of his medical retirement income, which is tied to his pre-retirement income.

vii) Mr. Mathuik and the employer failed to look outside Mr. Mathuik's area of managerial responsibility or the department for positions to accommodate the grievor in. The duty to accommodate requires an employer to look first at the employee's current job, then at other jobs at the same substantive level, then to widen the circles of consideration to look outside the immediate managerial scope to the department, and then to other departments within the employer's (the Treasury Board in this case) organization, and finally to examine lower-level jobs within the employer's organization. The employer skipped all the steps which would take the grievor outside Mr. Mathuik's circle of influence.

[144] In summary, the employer pursued and relied on policies and practices that deprived or tended to deprive the grievor of employment opportunities as a result of his disabilities.

[145] I find the employer engaged in discriminatory practices wilfully and recklessly. It refused and failed to create an accommodation plan for the grievor that took into account the restrictions related to his disabilities. There was a paucity of evidence before me as to why the employer failed to proceed in a more transparent way. The employer proceeded this way in the context of having received specific options on a number of occasions, one from an independent medical advisor (IMA) that it had requested. It failed to establish in any way that it could not accommodate the grievor in his substantive position short of undue hardship in a variety of ways that I have already discussed in this decision. For example, it considered only limited aspects of the independent medical opinion, its evidence failed to establish in any specific way why rebundling or repackaging the grievor's job would not be possible, it did not consider other assessment tools noted by the IMA which may have led to other

possibilities, and it was not attentive to the grievor's obvious challenges in looking for work when he could not access the internal website. The employer's slow response also meant that real possibilities, that would be equivalent to his substantive position, would become lost possibilities. The positions offered that would constitute a demotion were also not consistent with the medically identified restrictions and under these circumstances, it is not possible to consider the grievor as having failed to co-operate. Quite the opposite, the grievor conducted himself in good faith and kept engaging in the process.

[146] The delay frustrated his return to work, exacerbated his situation, and resulted in his health deteriorating while he worried about a return to work and his increasingly desperate financial circumstances. He was unable to maintain consistent medical support because he could not afford to pay for professional services. Without the regular support of his medical professionals and without a supportive employment environment, the grievor's condition deteriorated.

[147] Instead, the grievor was cornered by the employer's pressure and its passive resistance to his return to work and by his lack of income, which resulted in his desperation and the need to apply for medical retirement as the only way he could see to obtain some income. As a result, he also lost the benefit and security of the collective agreement and employment; he has suffered a real and tangible loss.

C. <u>Remedy</u>

[148] I turn now to the matter of remedy.

[149] Under the *PSLRA*, an adjudicator has relatively wide powers to remedy a proven grievance. The remedial powers include some of the same powers available to the Canadian Human Rights Commission. The relevant sections read as follows:

. . .

> ***226.*** *(1) An adjudicator may, in relation to any matter referred to adjudication,*
>
> . . .
>
> *(g) interpret and apply the* Canadian Human Rights Act *and any other Act of Parliament relating to employment matters, other than the provisions of* the Canadian Human Rights Act *related to the right to equal pay for*

> *work of equal value, whether or not there is a conflict between the Act being interpreted and applied and the collective agreement, if any;*
>
> *(*h*) give relief in accordance with paragraph 53(2)(*e*) or subsection 53(3) of the* Canadian Human Rights Act;
>
> *(*i*) award interest in the case of grievances involving termination, demotion, suspension or financial penalty at a rate and for a period that the adjudicator considers appropriate; and*
>
> *(*j*) summarily dismiss grievances that in the opinion of the adjudicator are frivolous or vexatious.*
>
> . . .
>
> ***228.*** *(2) After considering the grievance, the adjudicator must render a decision and make the order that he or she considers appropriate in the circumstances. . . .*
>
> . . .

[150] The *CHRA* provides the following remedial powers:

> . . .
>
> ***53.*** *(1) At the conclusion of an inquiry, the member or panel conducting the inquiry shall dismiss the complaint if the member or panel finds that the complaint is not substantiated.*
>
> *(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to* section 54*, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:*
>
> *(*a*) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including*
>
> *(i) the adoption of a special program, plan or arrangement referred to in* subsection 16(1)*, or*
>
> *(ii) making an application for approval and implementing a plan under* section 17*;*
>
> *(*b*) that the person make available to the victim of the*

discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;

(c) *that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;*

(d) *that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and*

(e) *that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.*

(3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

(4) Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.

Limitation

54. *No order that is made under subsection 53(2) may contain a term*

(a) *requiring the removal of an individual from a position if that individual accepted employment in that position in good faith; or*

(b) *requiring the expulsion of an occupant from any premises or accommodation, if that occupant obtained those premises or accommodation in good faith.*

. . .

[Emphasis added]

[151] Had the employer followed the recommendations in Dr. Ginter's independent medical report, the grievor would probably have returned to productive work as early as June 1, 2008.

1. Pay and Benefits

[152] The grievor lost the opportunity to receive the benefit of his regular pay, vacation entitlements, benefits and pension contributions from June 1, 2008. He should be compensated for those items, less the pay and benefits he received while on leave with pay. I direct that the employer shall compensate the grievor for all lost pay, vacation entitlements, benefits and pension contributions from June 1, 2008, to the effective date of his medical retirement. The parties should jointly work out the amount owed to the grievor and must do so within 90 calendar days. When making the calculations, the following factors must also be applied:

1) The calculations are about compensation, not the human resources pay system category or terminology the employer must use to process the compensation.

2) From June 1, 2008, to September 15, 2008, the payment must be calculated at the CR-05 level with adjustments for the grievor's years of service and normal progression through the pay band.

3) From September 15, 2008, to the date of the grievor's medical retirement, the payment must be calculated at the PM-01 level as compensation for the loss arising from the refusal to reclassify him on discriminatory grounds.

4) Any negotiated increases in the pay and benefits from June 1, 2008, must be included.

5) Pension contributions applicable from June 1, 2008, should be applied to the grievor's pension account, and his retirement pension should be recalculated accordingly.

6) Any tax consequences to the grievor should be calculated in such a way as to minimize the tax impact on him.

2. Damages for pain and suffering

[153] As for paragraph 53(2)(*e*) of the *CHRA*, the case law relied on by the parties shows that the evidence in each case leads to a range of monetary awards. Each case differs on the amounts awarded because of a given complainant's ability to move on, but this grievor lost that opportunity due to his medical retirement. He should receive

the maximum monetary award because of the long-term impact on him. The circumstances make it impossible to remedy the situation other than through money.

[154] Throughout the years, doctors said that continuing to delay accommodating the grievor would increase his illness's severity, which increased to the point of post-traumatic distress disorder. Had the employer allowed him to return to work with an accommodation, he might have had access to long-term disability plan benefits, which are higher than medical retirement benefits. He might have continued as a productive employee for many years as the evidence suggests. Instead, he spent almost four years, without income or support, trying to get his employer to remove workplace barriers so he could return to work. The evidence from the grievor, his father and his doctors shows that he suffered significantly during this time. His medical condition worsened to include post-traumatic stress disorder. His financial situation could only be described as desperate; he borrowed from family, extended his credit card debt and borrowed against his house. He contemplated suicide. He became more and more dysfunctional in a social environment.

[155] I award a sum of $20 000.00 for pain and suffering, attributable to the discrimination and to the psychological and physical damages the grievor suffered and will continue to suffer due to the employer's neglect and inability to correct the situation during what should have been his normal pre-retirement years.

3. <u>Special damages</u>

[156] I find this is an appropriate case in which to award special damages under subsection 53(3) of the *CHRA*. This is not an academic exercise; nor is it about enriching the grievor. It is about acknowledging the employer's actions and the redress that flows from those actions.

[157] I found that the employer engaged in discriminatory practices in this case. In my view, the conduct was repeated, sustained and calculated to ensure the grievor would not return to work. It lasted almost four years.

[158] The effect of that conduct should attract near the upper end of damages for the discrimination.

[159] I award near the upper end of damages, in this case $18,000.00.

4. <u>Interest, employer practices, and apology</u>

[160] On the matter of interest, I am bound by the *Public Service Labour Relations Act* and its requirements to consider para 226(1)(h) of the PSLRA to "give relief in accordance with paragraphs 53(2) or subsection 53(3) of the CHRA". As a result, I find I have no authority to award interest in this case.

[161] The *CHRA* prohibits me from making any orders about the employer's ongoing practices.

[162] While the grievor would like an apology, I see little value in ordering the employer to apologize in these circumstances.

5. <u>Sealing of Exhibits</u>

[163] The parties requested that I seal the exhibits due to the extensive medical information about the grievor.

[164] The Board has published its policy on the open court principle and privacy on the former Public Service Labour Relations Board website and the Public Service Labour Relations and Employment Board site. This policy acknowledges that the open court principle is significant in our legal system and that, in accordance with that constitutional principle, the Board conducts its oral hearings in public, save for exceptional circumstances. Because of its mandate and the nature of its proceedings, the Board maintains an open justice policy to foster transparency in its processes, accountability and fairness in in its proceedings.

[165] The Supreme Court of Canada has clarified that the party seeking a sealing order bears the onus of justifying its issuance based on sufficient evidence- a general assertion of potential harm is insufficient. The *Dagenais/ Mentuck* test (*Dagenais v. Canadian Broadcasting Corporation,* [1994] 3 S.C.R. 835 and *R. v. Mentuck,* 2001 SCC 76) has the following two parts:

> a) Is the order necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk? And

b) Do the salutary effects of the order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[166] In the circumstances of this case, I find that the potential harm to the grievor overrides the open court principle. I do not order a sealing of all of the exhibits in this case. However, while I appreciate that this is a case concerning the duty to accommodate, I am concerned that some of the exhibits have highly comprehensive and very detailed information about the grievor . Given their joint consent to a sealing order, the parties have obviously not raised any issue that would indicate that an order would impede the fairness of the process in this matter. The publication of this information is not necessary for a transparent understanding of the issues and the sealing of these particular exhibits, and not all of the exhibits, is an alternative measure which will prevent the risk of disclosure of the amount of detail these documents contain. I do order the following exhibits or parts of exhibits to be sealed:

i. Exhibit 19 – "I"
ii. Exhibit 19 – "N"
iii. Exhibit 19 – "V" pages 1 & 2
iv. Exhibit 19 – "W"
v. Exhibit 19 – "Z"
vi. Exhibit 19 – "NN" and attachment
vii. Exhibit 19 – "OO" pages 1 - 11
viii. Exhibit 19 – "WW" page 4
ix. Exhibit 19 – "XX" page 3 & 4
x. Exhibit 19 – "YY"
xi. Exhibit 19 – "ZZ"
xii. Exhibit 31 – page 3 & 4
xiii. Exhibit 37 – page 2
xiv. Exhibit 38 – page 3
xv. Exhibit 45
xvi. Exhibit 48
xvii. Exhibit 49
xviii. Exhibit 50
xix. Exhibit 53 – page 1
xx. Exhibit 54
xxi. Exhibit 55
xxii. Exhibit 56
xxiii. Exhibit 59
xxiv. Exhibit 60 – tab 2
xxv. Exhibit 61
xxvi. Exhibit 64
xxvii. Exhibit 65
xxviii. Exhibit 66

xxix. Exhibit 67
xxx. Exhibit 68
xxxi. Exhibit 69 (with attachments)
xxxii. Exhibit 71.

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

(The Order appears on the next page)

VI. <u>Order</u>

[168] In conclusion, I uphold the grievance.

[169] The employer is directed to pay the grievor, within 90 days of the date of this decision compensation for all lost pay, vacation entitlements, benefits and pension contributions from June 1, 2008, to the effective date of his medical retirement. The parties should jointly work out the amount owed to the grievor and must do so within 90 calendar days. When making the calculations, the following factors must also be applied:

i) The calculations are about compensation, not the human resources pay system category or terminology the employer must use to process the compensation.

ii) From June 1, 2008, to September 15, 2008, the payment must be calculated at the CR-05 level with adjustments for the grievor's years of service and normal progression through the pay band.

iii) From September 15, 2008, to the date of the grievor's medical retirement, the payment must be calculated at the PM-01 level as compensation for the loss arising from the refusal to reclassify him on discriminatory grounds.

iv) Any negotiated increases in the pay and benefits from June 1, 2008, must be included.

v) Pension contributions applicable from June 1, 2008, should be applied to the grievor's pension account, and his retirement pension should be recalculated accordingly.

vi) Any tax consequences to the grievor should be calculated in such a way as to minimize the tax impact on him.

[170] The employer is directed to pay the grievor, within 90 days of the date of this decision, $20,000 for pain and suffering under paragraph 53(2)(*e*) of the *CHRA.*

[171] The employer is directed to pay the grievor, within 90 days of the date of this decision, $18, 0000 for special damages under paragraph 53(3) of the *CHRA.*

[172] The following exhibits or parts of exhibits will be sealed:

i. Exhibit 19 – “I”
ii. Exhibit 19 – “N”
iii. Exhibit 19 – “V” pages 1 & 2
iv. Exhibit 19 – “W”
v. Exhibit 19 – “Z”
vi. Exhibit 19 – “NN” and attachment
vii. Exhibit 19 – “OO” pages 1 - 11
viii. Exhibit 19 – “WW” page 4
ix. Exhibit 19 – “XX” page 3 & 4
x. Exhibit 19 – “YY”
xi. Exhibit 19 – “ZZ”
xii. Exhibit 31 – page 3 & 4
xiii. Exhibit 37 – page 2
xiv. Exhibit 38 – page 3
xv. Exhibit 45
xvi. Exhibit 48
xvii. Exhibit 49
xviii. Exhibit 50
xix. Exhibit 53 – page 1
xx. Exhibit 54
xxi. Exhibit 55
xxii. Exhibit 56
xxiii. Exhibit 59
xxiv. Exhibit 60 – tab 2
xxv. Exhibit 61
xxvi. Exhibit 64
xxvii. Exhibit 65
xxviii. Exhibit 66
xxix. Exhibit 67
xxx. Exhibit 68
xxxi. Exhibit 69 (with attachments)
xxxii. Exhibit 71.

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

December 11, 2014.

Deborah M. Howes,
adjudicator