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

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

BETWEEN

IOULIA GALLINGER

Grievor

and

DEPUTY HEAD
(Canada Border Services Agency)

Respondent

Indexed as
Gallinger v. Deputy Head (Canada Border Services Agency)

In the matter of an individual grievance referred to adjudication

Before: David Orfald, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Justine Lacroix, Professional Institute of the Public Service of Canada

For the Respondent: Kieran Dyer and Karl Chemsi, counsel

Decided on the basis of written submissions, filed June 16, July 14, and August 4, 2021, and following a case management conference, held October 6, 2021.

REASONS FOR DECISION

I. Introduction

[1] This is a follow-up decision with respect to the implementation of an order I made in *Gallinger v. Deputy Head (Canada Border Services Agency)*, 2020 FPSLREB 54, on May 20, 2020.

[2] The case in *Gallinger* concerned an employee (Ioulia Gallinger; "the grievor") whose employment was terminated for medical incapacity after approximately 2.5 years of leave without pay for illness. The termination took place after she failed to provide proof that she was able to return to work within the foreseeable future, in advance of a September 2017 deadline established by the Canada Border Services Agency ("the employer" or "the CBSA").

[3] In *Gallinger*, I found that the employer had discriminated against the grievor on the basis of her disability and that it failed to establish that it had accommodated her to the point of undue hardship. I ordered that the grievor's termination be rescinded, that she be reinstated to a CS-02 (Computer Science group) position, and that she be extended sick leave without pay up to the date of my decision. I ordered that within 30 days of my decision, the employer, the grievor, and her union, the Professional Institute of the Public Service of Canada ("PIPSC"), commence a return-to-work process. I also awarded the grievor damages under ss. 53(2)(e) and 53(3) of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6).

[4] I also made the following order, at paragraph 263: "Ms. Gallinger is to be returned to paid work status or paid leave status effective the date of this decision to the extent supported by the medical information that arises from the accommodation process."

[5] I decided to remain seized of any disputes with respect to the implementation of that part of the order, as set out as follows at paragraph 264: "I will remain seized for a period of 120 days in the event that the parties are not able to reach an agreement on a return to work or on paid leave status."

[6] The parties sought a number of extensions to that 120-day period, which I granted, as they indicated that they were attempting to resolve the order directly. However, following a case management conference held on April 8, 2021, the parties

reported that some issues about the grievor's return to paid status remained in dispute. I set out a timeline for the written submissions upon which these reasons for decision are based.

[7] I take note of the fact that the employer has filed an application for judicial review of my decision in *Gallinger*, which I rendered as a panel of the Federal Public Sector Labour Relations and Employment Board ("the Board"). As of the date of this decision, the Federal Court of Appeal (FCA) has not yet heard the application. Should that review affect my order at paragraph 263, this follow-up decision may be moot or require modification.

II. Issues in dispute

[8] Following the release of my decision in *Gallinger*, the parties began the return-to-work process within 30 days, as ordered. The employer asked the grievor's family physician to make recommendations on a return-to-work plan. The physician then recommended a gradual return to work and other accommodation measures. Discussions about an actual return to work then took place. The accommodation plan was refined. The grievor commenced actual work with the employer on December 2, 2020. Her last day of work for the CBSA was February 5, 2021; after that date, she commenced work for another government department within the core public administration.

[9] The issues in dispute concern the total pay to which the grievor is entitled, as a result of my order, between May 20, 2020 and February 5, 2021. The parties are in dispute about the total number of hours she was medically able to work; they also disagree about whether or not some work performed by the grievor for another employer, during the relevant period, should reduce what the CBSA owes her. The grievor's compensation after February 5, 2021 is not in dispute.

[10] Having considered the parties submissions, I have determined there are two questions I must answer:

- Issue #1: Based on the medical information provided, to what extent was the grievor able to return to work or paid leave status between the date of the decision and her departure from the CBSA?
- Issue #2: Should the grievor's other employment during the relevant period be considered in determining any amounts owed to the grievor?

[11] In their submissions, the parties entered on consent a number of documents relevant to my determination of these issues, including four different medical notes signed by the grievor's family physician, a copy of the grievor's résumé, a report on the grievor's income from another employer, and several letters and emails they exchanged during their implementation discussions.

[12] Following another case management conference held on October 6, 2021, the grievor submitted one additional document, detailing the number of hours she worked for the other employer during the May-September 2020 period. The parties also provided information on the number of hours the grievor worked for the CBSA in the period from December 2, 2020, to February 5, 2021.

III. Issue #1 Based on the medical information provided, to what extent was the grievor able to return to work or paid leave status between the date of the decision and her departure from the CBSA?

A. Summary of the evidence

[13] I will briefly summarize the evidence submitted by the parties relevant to this issue before outlining and considering their arguments.

[14] Following the release of my decision on May 20, 2020, the CBSA initiated the return-to-work process by sending a letter to the grievor's family physician, Dr. Heather Mills, dated June 18, 2020. It asked Dr. Mills to complete a questionnaire about the grievor's limitations and restrictions so that the CBSA could provide her with appropriate accommodation measures.

[15] Dr. Mills completed the form and signed it on August 13, 2020.

[16] The relevant question on the form asked for an "… outline [of] a gradual return to work plan, if required, to bring [the grievor] to full hours." The physician's reply was as follows:

> *As of May 20, 2020, Ms. Gallinger would have been able to work 3-4 half days/week. However, due to the pandemic, she should have been entitled to the same paid leave options/accomodations* [*sic*] *to which others are entitled. She should start with 3 ½ days per week and increase one half/day per week every 2-4 weeks depending on her progress. She will require frequent assessments and potentially adjustments to her schedule. Despite these limitations, she should be provided challenging and meaningful work.*

[17] It is clear from the parties' submissions that where the physician wrote that the grievor "… should start with 3 ½ days …", she meant 3 half-days; i.e., a total of 1.5 days per week, or 11.25 hours.

[18] Although Dr. Mills signed the form on August 13, 2020, it was not presented to the employer until August 24, 2020. The CBSA had sent a reminder to the grievor and PIPSC on August 18, 2020, stating that it was still waiting for the grievor's medical information.

[19] On September 30, 2020, the employer confirmed with PIPSC that an accommodation agreement was being finalized. The parties agreed to meet and discuss the agreement before presenting it to the grievor. About a month later, on October 26, 2020, PIPSC provided the employer with a new medical note authored by the grievor's physician on October 9, 2020. In it, she stated as follows:

…

> *I have received a copy of the proposed return to work schedule. I would suggest changes be made every 4 weeks, rather than every 3 weeks. It would be preferred to schedule* [the grievor's] *hours 9-1. Recognizing that the alternate day schedule is more usual, in this case I would propose the following schedule:*
>
> *weeks 1-4 Monday, Tuesday, Wednesday half days*
>
> *weeks 5-8 Monday full day, Tuesday, Wednesday half days*
>
> *weeks 9-12 Monday, Tuesday full days, Wednesday half day*
>
> *I would like to review her progress after 12 weeks and sooner if necessary.*

…

[20] Following some further discussion, the grievor started work on December 2, 2020. She started with 4 hours work on that day. She then worked a total of 12 hours per week for the next six weeks, mostly on a schedule of 4 hours a day, three days per week. As of January 18, 2021, she worked a total of 16 hours a week, for three weeks, through until February 5, 2021.

[21] Throughout early 2021, the parties continued discussions about the implementation of the Board's award, following which the grievor obtained a March 22, 2021, medical note authored by her physician, which read as follows:

…

> [The grievor] *had a proposed return to work schedule for May 20 2020 which was as follows:*
>
> *week 1 2 half days/ week*
>
> *week 2 3 half days/week*
>
> *week 3, 4 1 full day, 2 half days*
>
> *week 5 2 full days, one half day*
>
> *week 6, 7 3 full days*
>
> *week 8, 9 3 full days, 1 half day*
>
> *week 10, 11 3 full days, 2 half days*
>
> *week 12, 13 4 full days, 1 half day*
>
> *week 14 5 full days*
>
> …

B. The grievor's position

[22] The grievor argued that the medical information provided by Dr. Mills supported a gradual return to work starting on May 20, 2020. While noting that the grievor actually returned to work only on December 2, 2020, and therefore only gradually increased her hours after that date, this was not what the doctor recommended. The accommodation form signed on August 13, 2020, and the medical note dated March 22, 2021, indicated that the grievor could have started her return on May 20, 2020, and gradually increased her hours on a regular basis after that, and the October medical note also recommended a gradual return to work.

[23] Specifically, the grievor argued that the Board should interpret its order on the basis of the final March 22, 2021, medical note. To be clear, the result of this would be a gradual return to work starting with a total of 1.0 day the first week, rising to a total of 4.5 days per week in weeks 12 and 13, and full-time hours starting at week 14 (August 17 to 21, 2020), through the time she left the CBSA on February 5, 2021.

C. The employer's position

[24] The employer argued that the medical information provided by the grievor indicated only that she was medically fit to work three half-days per week from the date of the decision until the day she started work on December 2, 2020. The medical information only supported increases in the hours of work after the return to work began. She should be compensated only for three half-days per week between May 20 and December 2, 2020, it argued. After that day, she should be entitled only to the

compensation she has already received, for actual time worked. The grievor bears the burden of establishing that she could have worked the hours proposed, and the employer should pay the grievor only to the extent supported by the medical information (see *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4 at para. 38, and *Gallinger*, at para. 247).

[25] While the employer recognized that the Board's decision anticipated that the return-to-work process could take time, it pointed out that the grievor was responsible for several of the delays. It noted that its request for medical information was issued on June 18, 2020, and that the grievor did not provide the August 13, 2020, medical information until August 24, 2020, and only after the employer took steps to remind the grievor that it required this information. If a medical professional thought that the grievor could recover more quickly if she returned to work sooner, she would have said so and would not have taken two months to respond to the employer's initial request for information. Furthermore, the August 13, 2020, medical information stated only that the grievor's hours could be increased "depending on her progress."

[26] The employer also argued that the August 13, 2020, medical information was trumped by the October 9, 2020, note, which adjusted the graduated return-to-work schedule. As the October note provided more up-to-date medical information, the Board should rely on it in interpreting its order. The Board should not speculate on the grievor's health had she commenced an earlier return to work; all it can do is rely on the medical evidence provided.

[27] Although the employer argued that the medical information supports compensation only at 3 half-days per week from May 20, 2020, through December 2, 2020, it argued that alternatively, the most the grievor should be entitled to is compensation had she started work on the day she provided the employer with the October 9 medical note, which she did on October 26, 2020. That note provided for compensation at 3 half-days per week (1.5 days total) for the first 4 weeks, which would be October 26, 2020, to November 25, 2020. The employer argued that compensation for the fifth week would be 1 full day for Monday, November 30, and 1 half-day for Tuesday, December 1, 2020, followed by compensation after December 2, 2020, for the actual time the grievor worked.

D. Analysis

[28] My analysis of the parties' arguments involves the application of the order I made at paragraph 263 of *Gallinger*. That order was made in the context of the decision I issued in *Gallinger*, in which I concluded that the employer discriminated against the grievor when it terminated her employment in September of 2017. I concluded that it failed to accommodate her to the point of undue hardship. I concluded that as of the termination, the grievor had medical information supporting a return to work within the foreseeable future (early 2018). She also provided the employer with updated information supporting a return to work commencing in the fall of 2017, both before and during the grievance process. I concluded that on the basis of that information, the employer should have commenced a return-to-work evaluation and process in the fall of 2017.

[29] Had that taken place, the grievor might well have returned to work in late 2017 or early 2018. However, in *Gallinger*, I found that the grievor did not definitely establish what level of work she could have performed between the date of termination and the date of my decision. As summarized at paragraph 242, I concluded as follows that the grievor did not establish when she could have been returned to full-time status:

> *[242] However, as I have determined that Ms. Gallinger has not provided me with the evidence that would be required to demonstrate that she should have been returned to full-time status as of the date of termination, my order does not provide for that result. The medical information that was tendered provided contradictory information as to whether she was able to work full-time for the more than 2.5 years since she left the CBSA.*

[30] Therefore, I did not award the grievor any retroactive compensation. Under the circumstances, I determined that it would be appropriate to order that the parties commence the return-to-work process as of the date of decision and that she be paid on that basis as of the date of that decision.

[31] This conclusion was supported in part by medical evidence in the form of a note from Dr. Mills dated January 20, 2020, supporting a gradual return to work with another employer, (see *Gallinger*, para. 223).

[32] In *Gallinger*, before making my order at paragraph 263, I commented about the return-to-work process at paragraphs 246-248 as follows:

> *[246] Within 30 days of this decision, the employer, the grievor, and her union are directed to* ***start*** *the return-to-work process that should have proceeded on the basis of the October 11, 2017, medical note. This should include any requests the employer might make to Ms. Gallinger's physicians for clarification of her functional limitations and accommodations. It may include a requirement to participate in an FTWE.*
>
> *[247] Ms. Gallinger is to be returned to paid work status or paid leave status* ***effective the date of this decision to the extent supported by the medical information that arises from the accommodation process.*** *In other words, should the medical information indicate that she is capable of working full time as of the date of this decision, she should be paid full-time from that date forward.* ***If it shows that she is capable of being returned on a gradual basis, she should be paid on that basis.***
>
> *[248] I recognize that an actual return to work may be delayed by the COVID-19 situation. In that event, Ms. Gallinger should be provided with the same leave arrangements extended to other employees, until such time that she is able to return to work.*
>
> [Emphasis added and in the original]

[33] The first sentence of paragraph 247 is repeated word-for-word in my order at paragraph 263. The remainder of paragraph 247 spells out clearly what should happen based on the medical information: if the grievor is medically capable of working full-time at the CBSA, she should be paid on that basis as of the date of the decision, and if she is capable of being returned to work on a gradual basis, she should be paid on that basis.

[34] In their written submissions on the implementation of my order, the parties did not dispute the result that the CBSA must compensate the grievor between May 20, 2020, and her actual return to work on December 2, 2020. They disputed only the amount of compensation. The grievor argued that the medical information supports a gradual return to work increasing steadily to full-time hours; the employer maintained that the medical information supports compensation only at the rate of three half-days per week during that period.

[35] There is no doubt in my mind that the medical information about the grievor supports a gradual return to work starting on May 20, 2020. The medical information in the August 13, 2020, report by Dr. Mills clearly stated that the grievor should follow

a gradual return-to-work process starting at three or four half-days per week and increasing every two to four weeks, depending on the progress. A similar pattern was repeated in the October 9, 2020, and the March 22, 2021, notes.

[36] The employer argued that the October 9, 2020, medical note replaced or trumped the report written on August 13, 2020. Because it was written at a later date, it should be interpreted as supporting only a return to work of three half-days until that point, it argued. The note should be read as confirming only a capacity to return to work for three half-days, starting the day it was presented to the employer; i.e., October 26, 2020.

[37] I disagree with the employer's characterization of the October medical note. The content of that note clearly indicates that it was a recommendation on her **actual** return to work in the context of extended discussions between the parties that took place between June and the end of October. I do not accept it as evidence of a change in medical opinion backdated to May 20, 2020.

[38] The distinction between her actual return to work, and a return to paid status to the extent supported by the medical information, is important. In *Gallinger*, I did not order that the grievor be paid in accordance with her actual return to work. I recognized that the grievor's actual return might be delayed while the parties worked out a return-to-work plan and due to the COVID-19 pandemic. I ordered that the grievor should be given paid work or paid leave, to the extent supported by the medical information. While the grievor may have contributed somewhat to the delays in getting back to work, she was not primarily responsible for them. The process took some time, but not an unreasonably long time under the circumstances.

[39] I agree with the employer that it is not my role to speculate on the grievor's ability to return to work. I also recognize that there are some minor differences between the different notes supplied by Dr. Mills. At the same time, this is a case involving human rights in which I found that the employer had failed, in the fall of 2017, to properly accommodate the grievor. I found that it had discriminated against her on the basis of a disability. Had the employer acted appropriately in response to the medical evidence it received in the fall of 2017, the grievor might well have successfully commenced a graduated return to work in November of 2017.

[40] In fact, evidence submitted by the employer in relation to the second issue in dispute (discussed at more length later in this decision) was that the grievor began working for other employers as early as 2018. Ms. Gallinger's résumé reports a period of employment from June 2018 to February 2020 with one employer in a remote computer technical support role and a second (and partially overlapping position) from August 2019 to February 2020 working as a web database developer. The résumé reports a third position, from February 2020 to September 2020, in which she worked as a database developer and data analyst to create an electronic document management system for a dental practice. In short, her actual work history indicates a significant and sustained capacity to work well before my May 20, 2020, decision.

[41] Furthermore, the evidence submitted by the grievor in respect of her other employment in the May-September 2020 period was that she was working 37.5 hours per week; i.e., full-time hours.

[42] If the grievor was already working full-time performing similar duties, one might question why her physician recommended a gradual return to work instead of a full-time return to work. However, even in the light of information that the grievor was already working full-time for another employer, I do not think the gradual return-to-work recommendation is to be unexpected. Given that she had been absent from the CBSA for more than five years (from the start of her leave without pay in February of 2015 through the date of the decision in May 2020), I am not surprised by a recommendation for a gradual return to work at the CBSA, even if she was otherwise capable of working full time.

[43] Between the medical information provided by Dr. Mills and the actual employment information provided by the grievor, I cannot accept the employer's argument that the grievor should be compensated only for three half-days per week between May 20, 2020, and December 2, 2020.

[44] In interpreting my order at paragraph 263, I will rely primarily on the content of the August 13, 2020, medical information. In it, Dr. Mills said that the grievor could recommence work with the CBSA starting at three to four half-days per week. It said that it could be increased by one additional half-day per week, every two to four weeks, depending on her progress. The note also said that her assessment should be monitored and that adjustments should be made, as necessary.

[45] The recommendation in the August 13, 2020, medical information that the grievor's hours start at three or four half days, with an increase of a half-day every 2-4 weeks, was not precise. In choosing from within those range, I am mindful that my order provided for a return to work "to the extent supported by the medical information." This argues for selecting the more conservative of these options, i.e. starting at three half-days per week, with an increase of a half-day every four weeks. That decision is reinforced by the October 9, 2020, medical note, in which the physician recommended half-day increases in hours every four weeks. I note that her actual return to work started with 12 hours a week over the course of 6 weeks, rising to 16 hours per week for the next 3 weeks, through until February 5, 2021. I place little weight in the March 22, 2021, note, as it was written well after the actual return to work took place, and in fact, after the grievor had left the CBSA.

[46] Therefore, having considered the parties' submissions, I order that the grievor be paid by the CBSA in accordance with the following return-to-work schedule, which was supported by the medical information:

- starting May 20, 2020, 1.5 days per week for 4 weeks,
- starting June 17, 2020, 2.0 days per week for 4 weeks,
- starting July 15, 2020, 2.5 days per week for 4 weeks,
- starting August 12, 2020, 3.0 days per week for 4 weeks,
- starting September 9, 2020, 3.5 days per week for 4 weeks,
- starting October 7, 2020, 4.0 days per week for 4 weeks,
- starting November 4, 2020, 4.5 days per week for 4 weeks,
- starting December 2, 2020, and after that, 5 days per week, until her departure from the CBSA on February 5, 2021, minus the days for which she has already been paid by the CBSA.

IV. Issue #2 Should the grievor's other employment during the relevant period be considered in determining any amounts owed to the grievor?

[47] I turn now to the second issue in dispute, which is whether the grievor's other employment during the relevant period should be considered in determining any amounts owed to the grievor. There were two aspects to this issue in the arguments made by the parties. The first is whether the grievor's other employment should be considered in determining the extent to which she was medically fit to work at the CBSA. The second aspect is whether the earnings that the grievor received from the other employer should be deducted from what the CBSA owes her, in accordance with the "mitigation of damages" principle.

[48] Although the parties do not agree on whether the principle of mitigation should apply in this case, they do agree on its definition. In short, it is that a party to a grievance is entitled to recover damages only for losses suffered, and the extent of those losses depends on whether the party has taken reasonable steps to avoid their unreasonable accumulation (see Brown and Beatty, *Canadian Labour Arbitration, 5th Edition*, at 2:1503).

A. The grievor's arguments

[49] The grievor argued that the medical information provided to the CBSA supported the conclusion that she could commence a gradual return to work on May 20, 2020, and that she should be compensated on that basis. She maintained that the medical information provided no reasons for considering her other employment as a factor in determining that compensation.

[50] The grievor argued that the right to be accommodated includes an entitlement to salary and that the number of hours should be paid based on the information given by the doctor. She claimed that the CBSA is trying to free itself from part of its obligation to accommodate her. For this principle, she cited the case of *Emard v. Treasury Board (Correctional Service of Canada)*, 2019 FPSLREB 66 at paras. 85 and 86.

[51] While the grievor recognized that the Board has applied the principle of mitigation in some of its awards, mitigation is not implicit in every decision (see *Nadeau v. Deputy Head (Correctional Service of Canada)*, 2021 FPSLREB 46 at paras. 82 to 89). The Board's order in *Gallinger* said nothing about deductions to be made from her pay; it ordered that the CBSA return her to paid status to the extent supported by the medical information. When the Board has applied the principle of mitigation, it has been only when grievors were retroactively reinstated. Ms. Gallinger was not reinstated retroactively.

[52] Furthermore, the principle of mitigation should be applied only when the employer has raised it at adjudication (see *Nadeau*, at para. 84). In this case, according to the grievor, the employer raised the issue only in January 2021, after months of discussions; it did not raise the issue at adjudication. As the Board did in *Nadeau*, I should decline to apply the principle of mitigation given that it was not raised at adjudication, she argued.

[53] The grievor suffered as a consequence of her termination of employment, and she had to find another source of income. Neither party deliberately delayed the process following the release of the Board's decision. The Board should take into account the struggles, efforts, and particular circumstances of the grievor's situation and direct that the CBSA pay her without considering her other income.

B. The employer's arguments

[54] The employer argued that the question of what hours the grievor was medically capable of working must also consider work being performed for another employer. If, for example, the medical information stated that the grievor could work three half-days per week, and the grievor was already working three half-days per week for another employer, then she would not also have been medically fit to work in any way for the CBSA.

[55] In accordance with the ruling of the Supreme Court of Canada (SCC) in *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43 at paras. 14, 17, and 19, the duty to accommodate does not require paying the grievor's salary when she is not available or fit to work.

[56] The employer rebutted the grievor's arguments with respect to *Emard*. It argued that on judicial review of a similar case, the FCA rejected the Board's conclusion that the duty to accommodate requires the payment of salary in the absence of actual work being performed, as explained at paragraph 21 of *Canada (Attorney General) v. Duval*, 2019 FCA 290, as follows:

> *[21] Here, the Board departed from settled authority governing accommodation in holding that the respondent was entitled to salary and benefits merely because he was able to return to work. The authorities hold precisely the opposite and recognize that the duty to accommodate does not require that an employer pay an employee who is not performing services or create a job assignment as a pure "make-work" project as doing so would cause undue hardship to an employer.*

[57] Given that the grievor was working for another employer, she would not have been fit, or available, to work for CBSA, the employer argued. The grievor bears the burden of demonstrating that she was able to work the number of hours she claims. The Board's order recognized that the return to work may be delayed due to COVID-19,

and it ordered that the grievor be put on paid work or paid leave status and provided "… the same leave arrangements extended to other employees, until such time that she is able to return to work" (*Gallinger*, para. 248). The employer would not grant leave with pay to other employees so they may engage in other employment. The bargaining agent is implicitly asking the Board for an order that the grievor be allowed to double-dip.

[58] The CBSA should only be responsible for the difference between the earnings from the grievor's other employment and what she would have earned if she had worked for it during that period, the employer argued. It took the position that this approach would respect the Board's order and make the grievor whole.

[59] Alternatively, the bargaining agent's argument should not be followed because it is inconsistent with the principle of mitigation, the employer argued.

[60] The employer maintained that the principle of mitigation is well established and that the Board should follow the leading case from the SCC, *Red Deer College v. Michaels*, [1976] 2 SCR 324, which stated that "… [a] defendant cannot be called upon to pay for avoidable losses which would result in an increase in the quantum of damages payable to the plaintiff" (at page 330). The purpose of the principle is to prevent double-dipping, and in *Red Deer College*, the SCC applied it when a person has diminished their losses, even if there was no **duty** on the grievor to act (at page 329).

[61] The employer did raise the issue of mitigation during adjudication and in fact obtained a production order for the grievor's mitigation efforts at the original hearing (see *Gallinger*, at para. 16). It argued that the grievor was well aware of its position, since the date of the decision, which was that it would compensate her only on the basis of the time she was fit to return to work.

[62] As for the grievor's argument that the principle of mitigation has been applied only in cases in which employees were reinstated retroactively, the employer argued that the reason the grievor was not reinstated retroactively was that she did not provide evidence that she was medically fit to return to work before the hearing. The grievor cannot indirectly seek to overcome that failure by arguing against the mitigation of post-decision income. In other words, the grievor should not be allowed to double-dip for the period after the decision to make up for losses in the period before the date of the decision, it said.

C. Analysis

[63] I will first dispense with the mitigation aspect of this issue because I find it has no application in this case.

[64] While the parties argued about whether the employer had properly raised the issue of mitigation at the original hearing, or not, and when it first arose during their post-hearing discussions, my analysis of this question does not depend on reaching a conclusion about those disputed facts.

[65] The case law of this Board and its predecessors has considered and applied the principle of mitigation in certain circumstances, following the SCC in *Red Deer College* (see *Nadeau* and *Haydon v. Deputy Head (Department of Health)*, 2019 FPSLREB 26).

[66] The FCA, in *Bahniuk v. Attorney General of Canada*, 2016 FCA 127 at para. 22, discussed the application of the principle to matters arising under the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2), stating the following:

> *[22] In a typical dismissal case in the unionized context, if the dismissal is set aside, the grievor is reinstated and is compensated for losses from the date of dismissal to the date of reinstatement. Monies earned from alternate employment during this period are set-off from the damages payable by the employer. Damages may also be reduced if the grievor does not take reasonable steps to find alternate work during the period between dismissal and reinstatement:* Brown and Beatty *at 2:1512.*

[67] The scenario discussed in this passage from *Bahniuk* relates to the somewhat typical situation where the adjudicator orders that the grievor who was terminated be reinstated retroactively to the date of termination. In such a case, the principle as described by the court calls for the deduction of any sums earned from alternate employment during the period between the wrongful termination and the reinstatement from the compensation payable for lost income during this period.

[68] The essential point I draw from *Bahniuk* for this case is the recognition that the mitigation principle applies **up to the date of reinstatement.** This approach was also reflected in *Haydon*, at para. 129, where the Board held that the principle applies only up to the date of the decision that reinstated the grievor, as follows: “When her termination grievance was upheld in 2016, the grievor’s duty to mitigate her losses ceased, as she was no longer discharged.”

[69] More recently, in *Attorney General of Canada v. Hanna*, 2021 FCA 219, the FCA reiterated the principle that compensation between the date of termination and the date of reinstatement is subject to mitigation. Citing both *Bahniuk* and *Brown and Beatty*, the FCA said as follows, at paragraph 6: "There is a large arbitral consensus that income otherwise earned from alternate employment from the date of dismissal **to the date of reinstatement** is to be deducted from any back pay amount for which the employer is liable" (emphasis added).

[70] In the present case, we are in a different situation. The grievor was not reinstated retroactively to the termination date. The reinstatement, if only for 1.5 days per week initially, took effect upon the date of the Board's decision. None of the jurisprudence cited by the employer stands for the principle that the mitigation principle extends beyond the date of her reinstatement, which was the date of my decision.

[71] As for the employer's argument that the grievor was not reinstated retroactively because she "… did not provide evidence that she was medically fit to return to work before the hearing", this is not an accurate accounting of my decision in *Gallinger*. In fact, I concluded that she **did** provide evidence of an ability to return to work in the foreseeable future and that the employer should have commenced a return-to-work process in the fall of 2017. However, I also concluded that the grievor did not provide enough medical information to determine when she would have been able to return to full-time work (see *Gallinger*, at para. 242) and on that basis declined to order retroactive compensation.

[72] I ordered her reinstatement on May 20, 2020, to the extent supported by the medical information that arises from the accommodation process. Thus, any requirement that may exist under the mitigation principle for Ms. Gallinger to mitigate her losses ended on that date. Given that retroactive compensation before this date was not ordered, there were no sums against which mitigation could apply.

[73] I turn now to the question of whether the grievor was medically capable of working for another employer while also commencing a return to work with the CBSA.

[74] I do not find the parties' references to *Emard* or *Duval* very helpful to resolving this issue. In their submissions on my order at paragraph 263 of *Gallinger*, the parties both conceded that the order provided that the grievor should be paid from May 20,

2020, onward. The dispute concerns the amount of that compensation. It is an issue which must be analyzed on the basis of the facts.

[75] The form filled out by Dr. Mills and signed August 13, 2020, was clearly framed as a questionnaire in relation to the grievor's employment at the CBSA. The letter asked the doctor about the grievor's return to work **at the CBSA**. It said: "Management requires updated information regarding Ms. Gallinger's limitations and restrictions related to her medical condition in order to provide her with any accommodation measures, if necessary." The form asked the physician to "[p]lease outline a gradual return to work plan, if required, to bring Ms. Gallinger to full hours."

[76] I find that neither the framing of the questions nor Dr. Mills' assessment indicates that her recommendations should be read as being applicable to or inclusive of any other employment.

[77] The fact that the grievor managed to find other employment that enabled her to earn a living while awaiting the implementation of the reinstatement order in *Gallinger* has no bearing on the other fact that she was medically capable of working effective May 20, 2020, irrespective of whether that was initially only for 1.5 days per week.

[78] Given these conclusions, I could conclude that there should be no offset of what CBSA owes the grievor as a result of her other employment. The effect of such a conclusion would ensure the employer does not “benefit” from the delays in compliance with the order.

[79] However, I think it is also important to consider the principles that the grievor “be made whole” and that double-dipping be prevented. In that regard, I think it is important to consider the facts about the grievor’s alternative employment.

[80] The evidence submitted by the parties demonstrates that at the time Dr. Mills completed CBSA’s questionnaire in August 2020, the grievor was already working at a similar job for another employer. The evidence submitted was that she was working under a fee-for-service contract to create an electronic document management system for a dental services company. In a statement from that employer, although it said that its contractors were allowed to work flexible hours and that in practice, some days were more involved than others, the work it expected from her was 7.5 hours per day. Its report of her work indicated 7.5 hours per day, exclusive of weekends, and two

other days that appear to coincide with designated paid holidays, through the entire period of May 20, 2020, through September 30, 2020. In other words, during that period, she was working **full-time** for that other employer.

[81] I also note that although she was compensated on a fee-for-service basis, her other employer did specify her total pay and her total hours worked. Her effective hourly or daily rate of pay at that other employer was at a slightly lower rate of pay than that of a CS-02.

[82] The full-time nature of the grievor's other employment is, in my analysis, a critical factor in applying my order. If CBSA were to compensate Ms. Gallinger without any recognition of that other employment, the effect would be that she would be compensated at more than full-time hours.

[83] In my view, the grievor should not emerge at the end of this process having received more than she would have otherwise been entitled to, or in other words, being made more than whole. At the same time, she should not receive compensation at an amount lower than what she would have received, had she actually commenced her return to work at CBSA on May 20, 2020, and kept working part-time for the other employer.

[84] To achieve this result, the appropriate solution is for the CBSA to pay the grievor the difference between the lesser income that she earned at the other employer and her CS-02 rate of pay for those hours outlined in paragraph 46 of this decision, in the period between May 20, 2020, and September 30, 2020. This respects the medical information provided about her capacity to return to work at the CBSA while allowing her to retain the income from the employment she worked at on her own time outside those hours being compensated by the CBSA.

V. Conclusion

[85] At paragraph 264 of *Gallinger*, I said, "I will remain seized for a period of 120 days in the event that the parties are not able to reach an agreement on a return to work or on paid leave status."

[86] Paragraph 264 was ordered in reference to paragraph 263 of *Gallinger*, which read as follows: "Ms. Gallinger is to be returned to paid work status or paid leave

status effective the date of this decision to the extent supported by the medical information that arises from the accommodation process."

[87] While I am limited to applying that paragraph, I have noted that my order at paragraph 263 was in the context of the overall decision I made. Although the grievor provided evidence supporting a return to work, my decision did not provide for retroactive remuneration. The grievor convinced me that a return to work was possible, and I ordered that the parties cooperate in attempting a return to work for the CBSA on the basis of medical advice and that the employer start paying her for work or paid leave on that basis, effective the date of my decision. This was a solution ordered in the context of finding that the grievor's human rights had been violated by the employer, and that it failed to accommodate her. It was a solution intended to result in the grievor's successful return to work, if that was medically possible.

[88] The evidence put before me about the implementation of my order was that Ms. Gallinger has demonstrated the medical ability to return to work. She commenced working for another employer as early as 2018, and by May 2020, she was working full-time for yet another employer. The medical information provided to the CBSA justified a gradual return to work there, increasing to full-time hours over the course of a few months. When she actually did begin work, her hours did increase, and eventually, she succeeded in making a transfer to another federal government department.

[89] With its arguments, the employer sought to limit compensation to three half-days per week for the period from May 20, 2020, to December 2, 2020. They then sought to reduce those limited earnings by offsetting them by all earnings from another employer during the relevant period. In combined effect, those arguments would have eliminated any compensation to the grievor before December 2, 2020. Those arguments are not consistent with my order.

[90] In applying my order at paragraph 263 in *Gallinger*, I have determined that the CBSA must compensate the grievor for her gradual return to work, in accordance with the medical information provided, from May 20, 2020, forward to February 5, 2021. In recognition of her full-time work for another employer, for those hours between May 20, 2020, and September 30, 2020, the CBSA must compensate her for the difference in hourly wage between her position at the CBSA and the one with the other employer.

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

(The Order appears on the next page)

VI. Order

[92] I order that the grievor be paid by the CBSA in accordance with the following return-to-work schedule:

- starting May 20, 2020, 1.5 days per week for 4 weeks,
- starting June 17, 2020, 2.0 days per week for 4 weeks,
- starting July 15, 2020, 2.5 days per week for 4 weeks,
- starting August 12, 2020, 3.0 days per week for 4 weeks,
- starting September 9, 2020, 3.5 days per week for 4 weeks,
- starting October 7, 2020, 4.0 days per week for 4 weeks,
- starting November 4, 2020, 4.5 days per week for 4 weeks,
- starting December 2, 2020, and after that, 5 days per week, until her departure from the CBSA on February 5, 2021, minus the days for which she has already been paid by the CBSA.

[93] For those days of compensation in the previous paragraph between the dates of May 20, 2020, and September 30, 2020, the compensation to be paid by the CBSA is limited to the **difference** between the grievor's daily CS-02 rate of pay and the lower effective daily rate of pay she earned at her other employment during that period.

[94] This compensation is subject to any required statutory deductions (CPP, EI, tax withholding) and other customary employment deductions (e.g. employee contributions to the pension plan).

[95] I will remain seized of any dispute in the calculation of the total dollar figure resulting from this order for a period of 90 days.

November 18, 2021.

David Orfald,
a panel of the Federal Public Sector
Labour Relations and Employment Board