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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

CLAYTON REECE

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Reece v. Canada Revenue Agency

In the matter of an individual grievance referred to adjudication

Before: James R. Knopp, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Dave E. Lewis, employment relations officer

For the Employer: Elizabeth Matheson, counsel, Treasury Board of Canada Secretariat

Heard via videoconference,
March 29 and 30 and October 17 to 21, 2022.

REASONS FOR DECISION

I. Introduction, and background to the grievance

[1] Clayton Reece ("the grievor") is an employee of the Canada Revenue Agency (CRA or "the employer"). From December 4, 2003, to February 5, 2016, he worked as an international tax auditor classified at the AU-03 group and level in the CRA's Tax Services Office (Prairie Region) in Winnipeg, Manitoba. As of 2016 until the last hearing day, he still works with the CRA but in Business Intelligence Quality Assurance (BIQA) at the same AU-03 group and level.

[2] The work of an international tax auditor is rigorous and demanding, and the grievor was good at it. He received favourable performance evaluations and occasionally acted in an AU-04 position. Unfortunately, he became ill in 2010. His illness was so severe that he was placed on extended medical leave for a long period. He began a return-to-work program in late 2012 while still recovering and while still in treatment.

[3] As of his return to work, the grievor's medical practitioner was in contact with the employer about the necessary accommodations, which changed as the grievor's health waxed and waned. The baseline accommodations consisted of a 20-hour workweek comprising four 5-hour days, telework when possible, and as little travel as possible.

[4] The grievor longed for a return to his former duties as an international tax auditor. Since those duties involved frequent travel and long working hours, the employer was prevented from returning him to them due to the accommodation measures imposed by his doctor. The employer was able to find some files for him that contained elements of international work.

[5] A doctor's note dated June 2014 opened the possibility of the grievor making a partial return to his former duties because it made allowances for some limited form of travel. Attempts were made to assign him to an international-tax-related audit, but no suitable case was identified, so he continued to work on his existing files.

[6] A subsequent doctor's note, dated October 13, 2015, imposed restrictions that removed any possibility of a return to the grievor's former duties in International

Audit. He continued to work on his existing files throughout the fall of 2015, by which time management was actively seeking a different position for him.

[7] On February 5, 2016, the employer moved the grievor into an AU-03 income tax business intelligence and quality assurance (BIQA) position. He has been in that position ever since.

[8] The grievor alleged that the employer violated article 42 of the collective agreement which expired on December 21, 2014. The grievor alleged that the employer has not accommodated him. He claimed that he was the victim of discrimination on the basis of his disability. He filed a grievance to this effect on August 4, 2016. Notice was provided to the Canadian Human Rights Commission on March 15, 2015.

[9] The matter was referred to adjudication before the Federal Public Sector Labour Relations and Employment Board ("the Board") and was heard by way of the Zoom videoconference platform. The Board was in Ottawa, Ontario, as was counsel for the employer. The grievor's representative was in Toronto, Ontario. The grievor was in Winnipeg, as were all the witnesses.

[10] For the reasons that will follow, the grievance is dismissed. The employer was diligent in following the accommodation restrictions imposed by the grievor's doctor and found him meaningful work at the same group and level in its Winnipeg Tax Services Office. The grievor was fully accommodated.

II. The witnesses' testimonies, and the documentary evidence

[11] The grievor went on a period of extended sick leave from April 1, 2011, to October 15, 2012. Dr. Nadine Lecuyer, his doctor, considered a gradual return-to-work plan in a letter dated August 23, 2012, which reads, in part, as follows:

> …
>
> *I have reviewed the attached work description and discussed work duties with Mr. Reece. At this point Mr. Reece is unable to perform many of the duties required for his own occupation … Mr. Reece would not be able to handle this type of work in a timely or effective manner. He would not be an effective representative for Canada Revenue Agency or the Department of Justice. He would also have difficulty managing the requirements of providing testimony in court.*
>
> *The gradual return to work plan proposed by Banyan is inappropriate for Mr. Reece's situation and I believe it should be*

> *discarded as Mr. Reece continues to be under active treatment for his condition.*
>
> *Mr. Reece does feel he could do other types of work in an attempt to re-enter the workplace in some capacity. Specifically, her reports prior to going on medical leave, her was involved in preparing property sale wavers. He described this a being easier to handle as a case can be investigated and managed over a timeline of days to weeks rather than over many years in the case of international tax audits. He has indicated that his employer has been very supportive in understanding his needs. I feel strongly that Mr. Reece could work with his audit department manager (David Wiwierski) to identify smaller projects and cases such as property sale wavers where he could work in a productive fashion. He may require supervision initially to determine if he is making auditing errors. If this type of accommodation is possible, then Mr. Reece could begin working 4 hours per day 5 days per week (maximum). This restriction will remain in place for a period of no less than 3 months at which point, Mr. Reece's fitness to work will be reassessed.*
>
> …
>
> [*Sic* throughout]

[12] The grievor returned to work in October of 2012, under the conditions prescribed by Dr. Lecuyer. He testified to being set up to review files left behind by a retiree. He also issued compliance certificates pertaining to property sales by non-residents.

[13] On January 4, 2013, Dr. Lecuyer updated the grievor's situation in a letter to the employer that reads, in part, as follows:

> …
>
> *At this time, I believe Mr. Reece is ready to return to full time work in his previous occupation. Although he still experiences fatigue, Mr. Reece has indicated his usual occupation provides the flexibility of working from home for part of the week if necessary.*
>
> *Mr. Reece is currently working 20 hours per week. He will meet with his supervisor/manager to establish the best approach to increasing his hours and responsibility in order to be back to usual duties by February 1, 2013.*
>
> …

[14] Following the doctor's recommendation, the employer and the grievor, in concert with a representative of Sun Life, his insurer, agreed to gradually augment the number of hours he worked each day. They planned to do so week-by-week throughout

the month of January 2013, with the goal of having the grievor return to a full-time schedule by mid-February 2013.

[15] On April 3, 2013, David Wery, the grievor's supervisor at the time, created a communication plan and an individual accommodation plan, which documented his discussions with the grievor about the grievor's workload.

[16] The files under the grievor's stewardship contained sensitive information, including the taxpayers' personal and private details and financial activities. Telework was conditional on strict security protocols, such as a secure telephone, secure remote access for the computer, a lockable room from which to work, and a locking file cabinet.

[17] The employer enlisted the services of technical and security experts to ensure that these protocols were met. The grievor testified to his impression that the telework arrangement was characterized by a lack of structure. Bruce Bergman, the acting manager of the division in which the grievor was working, agreed that the teleworking setup was done on a piecemeal basis rather than all at once because some of the specialized equipment had to be ordered, and the worksite [i.e., the grievor's residence] had to be inspected once the installation was complete.

[18] The grievor and Mr. Wery, as well as Mr. Bergman, all testified to the telework arrangement as having been somewhat informal at the start. The grievor characterized the teleworking as ad hoc, which he found unsatisfying. Ultimately, according to Mr. Bergman, the grievor was fully set up for teleworking by late March 2013.

[19] The grievor still attended the office on a regular basis, usually once per week, for meetings and to complete some of his work. Mr. Bergman testified to a relatively complex reporting structure that was initially in place upon the grievor's return to work from medical leave. At that point, and before he worked with Mr. Wery, the grievor received his workload from Ms. White, a different team leader, but he did not report to her. In fact, he reported to several different individuals for either administrative or operational purposes. Mr. Bergman testified to consolidating this on March 6, 2013, so that the grievor would report to a single team leader who would in turn report to Mr. Bergman.

[20] From January to April 22, 2013, Mr. Wery was the grievor's team leader, to whom the grievor reported. In Mr. Wery's absence, Karran Bayney (who did not testify at the hearing) took over as the acting team leader. On April 22, 2013, Mr. Wery left for another department within the CRA and was no longer involved with the grievor. Kim Anderson became the grievor's team leader shortly after that and remained in that capacity until the grievor's departure for another division within the CRA in early February of 2016.

[21] Ms. Anderson testified to meeting every two weeks with the grievor, usually on Tuesdays, at which time she would review his workload and the work he had done. She would then outline the next steps to be taken on each file.

[22] The grievor wanted to return to the work he had done as an international tax auditor and was not happy about what were then his present set of circumstances, which he characterized as unstructured. He introduced emails into evidence dated February 28, 2013 reflecting this. Dave Wiwierski, an audit department manager (who did not testify at the hearing) wrote, in part: "As for workload my impression is that International is having trouble finding work for people now." On that same date, Mr. Bergman wrote, in part:

> …
>
> *… Clayton would like other International workload. Karran* [Bayney, Acting Team Leader] *has some hesitation on this as there is currently not much International workload available. In addition, Karran does not know what the status of Clayton is in regards to what work can be given to him.*
>
> …

[23] The gradual return to work in January of 2013 did not go well. The grievor experienced significant fatigue, and on April 12, 2013, his physician wrote an updated letter on accommodation requirements:

> …
>
> *Currently, Mr. Reece has attempted to return to work full time. Unfortunately, this has not been successful ….*
>
> *At this time, I believe Mr. Reece is only able to safely work 20 hours per week in his current occupation and he must do most of his work from home. Mr. Reece will be available to attend meetings at the workplace once a week and will pick up documents for work on*

> *this same day. We will reassess his fitness for work in 3 months [sic] time.*
>
> *I do not anticipate that Mr. Reece will be able to return to full time work. Should you require additional information during the transition, do not hesitate to contact me.*
>
> …

[24] On April 23, 2013, Mr. Bergman wrote a detailed letter to Dr. Lecuyer, seeking clarification on the grievor's work restrictions and limitations. In this letter, Mr. Bergman summarized the essential duties of an AU-03 international tax auditor (the grievor's current position). Mr. Bergman posed a series of questions to Dr. Lecuyer, who answered them in handwriting (the text not in italics in the following quote), which she signed and dated as June 4, 2013. Mr. Bergman's questions and Dr. Lecuyer's answers are as follows:

> …
>
> *You have indicated that at this time, Mr. Reece is only able to safely work 20 hours/week in his current occupation. Please identify the maximum hours he is capable of working per day along with any restrictions related to time of the day. Furthermore, is it necessary for Mr. Reece to take rest periods throughout the day and for how long? Please note that our hours of operation are Monday to Friday from 7:00 a.m. to 6:00 p.m.*
>
> Mr. Reece can work a max of 20 hrs per week. He may need rest periods. I would like for him to have the flexibility to either work 8 hrs days (2 on one week, 3 the next) or 4 hrs days (5 days per week). Times of day to be determined by his period of most energy (likely mornings)
>
> *Your letter also suggests that Mr. Reece should conduct most of his work from home (telework). Please provide details on the limitations and restrictions of Mr. Reece's condition that require him to work at home. Are these limitations permanent or temporary in nature?*
>
> [In the answer, the word "temporary" was circled.] Currently the stress of travel to and from his home during morning and evening rush plus the time lost during the travel is adding to Mr. Reece's stress levels by remaining home he would regain 1.5 - 2 hrs of useful time to rest and attend to medical needs
>
> *Under a telework arrangement, there is still a requirement to respect hours of work, i.e. start and stop times, breaks and meal periods. Is the employee able to meet these requirements or is any accommodation required? Furthermore is this employee able to work independently and self-motivate under a telework arrangement?*

> This client is able to respect the requirements of a standard tele … arrangement. He is able to work independently and remain self-motivated
>
> *Are there any limitations with respect to travelling and or operating a motor vehicle? Are these restrictions permanent or temporary?*
>
> [The word "temporary" was circled.] Mr. Reece should limit his travel time as much as possible. For meetings he must attend at work or when he needs to travel to office to pick up or drop off documents this should not take place during morning or evening rush i.e. avoid travel 8 am - 930 am and 430 pm - 6 pm
>
> *What is the frequency and duration of meetings that this employee would be able to attend at the taxpayer's place of business? Are these restrictions permanent or temporary?*
>
> [The word "temporary" was circled.] This client can attend meetings one to twice per week at the place of business so long as he does not need to travel during morning or evening rush. Maximum duration of meeting 4 hrs.
>
> *Mr. Reece may be required to attend the workplace for extended periods to obtain coaching and/or formal training. Travel outside of the Winnipeg area may be required to attend training. Are there any limitations with respect to traveling to the workplace or alternate location to attend training sessions? Are these restrictions permanent or temporary?*
>
> [The word "temporary" was circled.] If Mr. Reece must attend the workplace for training I would recommend it be for maximum 6 hours per day so he can use the remaining 2 hours to manage his travel in order to prevent exhaustion.
>
> *Are there any other medical limitations or restrictions related to Mr. Reece's job duties and the physical and non-physical capacities of the job and workplace? If so what recommendations would you suggest to enable Mr. Reece to safely meet his job expectations?*
>
> N/A
>
> I hope that most of these restrictions indicated above will be temporary. But I would like these restrictions to be in place for a minimum of 4 months before reassessing fitness to work.
>
> …
>
> [*Sic* throughout]

[25] Ms. Anderson testified to the grievor's 20-hour workweeks and to his arrival every second Tuesday for meetings about his workload and to review his work and set up the next steps. The meetings were timed to avoid Winnipeg's rush hours.

[26] In a progress report to Mr. Bergman dated October 17, 2013, Ms. Anderson included the following observation:

…

> *I also suggested to Clayton that it is coming to a point where we should look at workload (ie Calgary files) and determine if International is the place that is best suited to his needs. He agreed and said that he understands that maybe another area might be better suited to him.*

…

[27] Ms. Anderson explained her reference to Calgary, Alberta, in the context of international files. Nation-wide centralization and regionalization exercises in the CRA had important implications for the grievor, who wished to continue his work as an international tax auditor. These audits were now taking place almost exclusively in Calgary, which meant frequent travel from Winnipeg. The work was being done by a team of auditors over a one-week period, and their workdays could be long. Given the medical restrictions that were in place, Ms. Anderson and Mr. Bergman both testified to the international audits as being difficult, if not impossible, for the grievor to perform.

[28] Throughout the fall and winter of 2013 and the spring of 2014, the grievor continued to work on his files in Winnipeg, mostly by way of telework, with biweekly trips into the office to meet with Ms. Anderson.

[29] Ms. Anderson and Mr. Bergman testified to management's desire to move the grievor out of International Audit to a different area within the CRA in its Winnipeg Tax Services Office. They were also concerned about not having received recent updates from the grievor's doctor on his restrictions and limitations, so they held meetings with the grievor to this effect, one of which took place on June 23, 2014. Ms. Anderson's notes of the meeting read as follows, in part:

…

> *This meeting was held to discuss Clayton's potential move to another area within CRA and to discuss the draft letter and consent form for his doctor.*
>
> *We explained to Clayton that due to changes in the workload in International audit, we are looking at a potential move to another area of CRA. Clayton stated a number of times that he did not understand why we were considering a move out of the area. He requested these reasons in writing. The following are the reasons for the potential move:*
>
> - *The workload in International has been regionalized, with the vast majority of audits located in Calgary. Our workload consists of very few local audits.*

> *- The workload involves auditing taxpayers in Calgary area and requires travel to that area for approximately 1 week at a time.*
>
> *- We are required to audit in a team approach. The team is comprised [sic] of the Large File Case Manager, LF auditors, ATP* [Aggressive Tax Planning] *auditor and the International auditor.*
>
> *…*
>
> *- Clayton works 20 hours per week (4 – 5 hour days with Wednesdays being his day off). This is not conducive to travelling to Calgary and working on large audits. The taxpayers often bring representatives in to meet with the auditors. The auditors work full days and travel together to the taxpayer's location. If a car is necessary, the protocol is one rental car for the group.*
>
> *- The local workload we have is comprised [sic] of a few AU-04 range files. Clayton is an AU-03 and we have AU-04 auditors in International that require this workload.*
>
> *- We no longer have T2062 workload, non-resident referrals, self-generated audits or SME referrals. This also contributes to the lack of local work available for Clayton.*
>
> *…*

[30] At the June 23, 2014, meeting, Mr. Bergman and Ms. Anderson explained why they wanted an updated letter from Dr. Lecuyer. This is documented in the meeting notes in the following manner:

> *…*
>
> *We explained to Clayton that we felt it was necessary to have an updated letter from the doctor so that we know if any of the limitations had changed, for example, 20 hours / week, restricted meeting times, restricted driving to and from work during rush hour etc before we made a decision on whether or not Clayton should stay in International or move to another area.*
>
> *Clayton disagreed with us as he felt that it is not necessary to send a letter to his doctor. We explained that the original letter was from a year ago and the doctor had stated the limitations may be temporary but they may also be permanent. Clayton said that he would talk to his doctor and provide the information verbally to us. We stated that this was not the avenue we would take. We wanted the updated medical information from the doctor so that we have all the information necessary to determine the best work location for Clayton, be that in International or another area. We could not reach a consensus on this issue so we agreed to disagree on this point.*
>
> *…*

[31] Entered into evidence was a draft letter from Mr. Bergman to Dr. Lecuyer, dated June 16, 2014. It was not sent because the grievor objected to it. He, Ms. Anderson, and Mr. Bergman all testified to the aspects of the letter with which he took issue. The dialogue continued, and eventually, an agreement was reached on the wording of a request for updated medical information. The letter dated August 21, 2014, was sent to Dr. Carla Silver and reads, in part, as follows:

> …
>
> *This letter is to provide you with an update, to inform you of possible upcoming changes in Clayton Reece's assigned tasks, and to seek your input on how the Canada Revenue Agency (CRA) can continue to accommodate Mr. Reece in the workplace.*
>
> *Per previous advice from Dr. N. Lecuyer, Mr. Reece has been working 20 hours a week, 5 hours a day with the exception of Wednesday and the weekends. This schedule has been working relatively well, with the occasional need for modifications and with minimal absences. He has been working primarily from home and traveling into the office once or twice a month. …*
>
> *Over the last 12 months Mr. Reece has been assigned International Audit files similar to what he was working prior to the onset of his illness. However, management is limited in assigning Mr. Reece additional International Audit files as they all require some travel outside of Winnipeg with limited flexibility in adjusting his schedule. As a result, management has discussed with Mr. Reece a proposed reassignment to a different workflow in Basic Files Audit. The move to Basic Files would require training on the computer systems used and to familiarize himself with the work. To this end, management anticipates that Mr. Reece would need to come into the office regularly for a minimum of two to three months or until the team leader determines he is capable of working more independently in this new role.*
>
> *Both and AU-03 International Auditor and an AU-03 Basic File Auditor are required to be able to communicate by phone and in person with taxpayers and their representatives, accountants, lawyers, etc. In many instances the conversations are technical, contentious, and frequently involve strong differences of opinion. The auditor must sometimes visit and work at the taxpayer's place of business and complete the audit in inadequate spaces or open office area with distractions. Time constraints and the pressure to complete audit work in a limited period of time would still exist with this type of work. Travel may be necessary in the Basic Audit workflow however it is generally within the province as opposed to out of province for the International workflow.*
>
> *The duties of Clayton's current position (International Auditor) are detailed in our April 23, 2013 letter to Dr. N. Lecuyer. The duties of*

> *a Basic File Auditor are as follows (a detailed work description is included) ….*
>
> …

[32] Mr. Bergman's letter went on to describe in detail the duties and work requirements of an AU-03 basic auditor.

[33] As he did in the previous letter, Mr. Bergman posed several questions to the doctor, leaving space for answers (the doctor's comments are not in italics in the following quotes). The questions posed in the August 21, 2014, letter to Dr. Silver, along with the handwritten answers that Dr. Silver provided on August 26, 2014, are as follows:

> …
>
> *1. Please identify any limitations and restrictions with respect to working hours and rest periods, commenting on the maximum hours of work per day, and per week that are suitable for Mr. Reece. Please note that our hours of operation are Monday to Friday, from 7:00 a.m. to 6:00 p.m.*
>
> His current limitations should be continued while in Winnipeg ie 20 hour work week with as much telework as possible.
>
> *2. Previous medical recommendations suggested that Mr. Reece should conduct most of his work from home (telework). As noted above, it may be necessary to Mr. Reece to come into the office for training purposes. Please provide details on the limitations and restrictions of Mr. Reece's condition that may impact his ability to report to the office. Are these limitations permanent or temporary in nature?*
>
> His main limitation is fatigue and low endurance due to his condition and the treatment he is undergoing. These limitations are likely permanent but may fluctuate (occasionally worse, occasionally less severe). He should be able to attend training sessions in general.
>
> *3. What is the frequency and duration of meetings that Mr. Reece would be able to attend at the taxpayer's place of business? Are these restrictions permanent or temporary?*
>
> Depending on his acute condition at the time, as long as his meeting lasts [less than] 8 hours and overall work week is still [approximately] 20 hours he should have no more restrictions than any other employee.
>
> *4. Travel outside of the Winnipeg area may be required on occasion to meet with clients and/or to attend training. This could mean a* ***full week*** *of meetings with multiple parties extending long hours (*[approximately] *8 hours a day) and under a rigid schedule.*

> *Are there any limitations with respect to traveling out of province via air and/or motor vehicle? If not already addressed above, please also comment on the duration of the work week. If noted, are these restrictions permanent or temporary?*
>
> As long as the frequency of travel is [less than or equal to] 1 week/month and there can be accommodation for recovery period the following week (fewer hours or more telework), an occasional heavier work week should be tolerable.
>
> *5. Given Mr. Reece's comments on concentration, are there any limitation with regards to meeting deadlines and adhering to time restraints? Are these restrictions permanent or temporary?*
>
> Only the same as any other employee, as long as the work load takes his overall health into consideration.
>
> *6. Are there any other medical limitations or restrictions related to Mr. Reece's job duties and the physical and non-physical capacities of the job and workplace? If so what recommendations would you suggest to enable Mr. Reece to safely meet his job expectations?*
>
> No change since last assessment.
>
> …
>
> [Emphasis in the original]

[34] Mr. Bergman and Ms. Anderson testified to feeling encouraged by the more positive tone of the latest doctor's note. In a meeting on September 29, 2014, with the grievor, Ms. Anderson agreed to review the upcoming Calgary audits with a view to finding one that could be assigned to him.

[35] One of the challenges for Ms. Anderson was the absence of local (i.e., Winnipeg-based) audits of an international nature. Mr. Bergman and Ms. Anderson both testified to some of the implications of the CRA's restructuring and regionalization of that work. In what they described as a "risk-based" approach to the prioritization of International Audit files, the "highest-risk" files meant the files with the highest potential for tax recovery, which were almost exclusively located in Calgary.

[36] Ms. Anderson testified to the challenges she faced finding suitable International Audit work for the grievor, given the restrictions of a 20-hour workweek and as much telework as possible. She testified that those restrictions made it impossible to assign him to the large-scale team audits in Calgary. She did eventually find a Calgary audit that she felt might be a possibility, but when she discussed the details of the file with the grievor, ultimately, he said that it was not suitable for him.

[37] Ms. Anderson testified to exploring whether some of the work in International Audit could be restructured. Given the absence of single-audit international files, she considered whether she could pull a portion out of a larger audit and have the grievor work on it but was unable to find a situation in which that approach might succeed. She also described other work that international tax auditors carry out as "filler" work between large audits. Historically, this work would involve what she called "Dispositions", but it had also been subject to a regionalization exercise and was being done in Edmonton, Alberta, exclusively and at a lower level than the grievor's AU-03 group and level.

[38] The grievor maintained his existing workload and continued to work his 20-hour workweeks under the same circumstances as before, per Dr. Silver's latest recommendations.

[39] Then, on October 13, 2015, Dr. Lecuyer provided an updated medical note that reads, in part, as follows:

> …
>
> *Mr. Reece met with me today to discuss work-related problems he is experiencing with fatigue and endurance.*
>
> …
>
> *As I had noted when Mr. Reece first attempted a return to work in 2012, he will be able to meet expectations only if a suitable accommodation is initiated and there is agreement on measurable, objective performance expectations that allow for his limitations. Mr. Reece's functional abilities and fitness to work have not changed since 2012.*
>
> *At times there are smaller subtasks within larger audits that Mr. Reece may be able to manage. The effective execution of large audits, over longer periods of time however, requires persistent capabilities that he presently does not possess. Given the nature of the current workload, he will not be able to achieve the expected objectives for an International Auditor over the course of a year. Accommodation will be necessary for him to continue with his career at CRA.*
>
> *Mr. Reece wishes to continue working in some capacity. I do not think he is capable of working effectively on large audits, either in International or elsewhere. Mr. Reece has indicated that the work he occasionally performs (reviewing more complex compliance certificate requests for non-resident waivers and dispositions) is manageable because of the shorter timeframes, greater taxpayer co-operation and generally reduced need to persist with any one task for hours at a time during the work week; he notes also that*

> *objective performance indicators can more readily be defined for this type of work.*
>
> *I realize that non-resident waivers and dispositions have generally formed only part of the International Audit workload, however, I recommend that the Agency consider "re-bundling" this work, regionally or nationally, if necessary to allow Mr. Reece to perform this activity exclusively. I think that this form of work is more suitable for Mr. Reece's current abilities and would be a good starting point for a reasonable accommodation. I am recommending that the Agency consider such an accommodation for Mr. Reece, at this time. If the CRA is able to arrange an accommodation, I expect that Mr. Reece will continue as a productive and responsible employee.*
>
> …

[40] The arrival of the latest doctor's note, according to Mr. Bergman and Ms. Anderson, changed the accommodation landscape significantly as it specified that the grievor was not able to carry out large-scale audits either in International Audit or elsewhere. They said that it was significant to them that Dr. Lecuyer stated that the grievor's "… functional abilities and fitness to work have not changed since 2012."

[41] Amanda Van Solkema, at the time, was the assistant director of audits. In terms of the reporting structure, Ms. Anderson, as the team leader, reported to Mr. Bergman, the manager of audits on an acting basis. Mr. Bergman reported to Ms. Van Solkema, who was made aware of the October 13, 2015, doctor's note. She met with Mr. Bergman, Ms. Anderson, and representatives of the CRA's Human Resources and Labour Relations units to discuss the grievor's situation.

[42] Ms. Van Solkema testified to her conviction that the doctor's most recent accommodation recommendations made it impossible for the grievor to continue as an international auditor. She began a search within the CRA for a suitable location to which he could be transferred. She only explored possibilities at his current group and level at the time, AU-03, in the Winnipeg Tax Services Office.

[43] On November 23, 2015, Ms. Van Solkema met with the grievor. She felt that the best possible fit for him was a position at his same group and level, AU-03, in BIQA, as an audit quality reviewer. She testified to explaining to him at the meeting that working on non-resident waivers and dispositions was no longer possible due to legislative and restructuring changes, which meant that he could not do that work in his present position.

[44] Ms. Van Solkema testified to the grievor's acceptance of this possibility, but he requested notification in writing about the BIQA proposal, why working on non-resident waivers and dispositions would not work, and an assurance that current performance assessments and action plans would not carry forward to his new position. He wanted a clean slate.

[45] Ms. Van Solkema provided the grievor's requested written offers, explanations, and assurances.

[46] In an email dated January 15, 2016, the grievor, assisted by a representative of the bargaining agent, asked for an explanation of the *bona fide* occupational requirements (BFOR) pertaining to his current substantive position in International Audit and of how he might be accommodated in that position. They also asked Ms. Van Solkema to explain her rationale for not allowing him to remain in his current position.

[47] Ms. Van Solkema conducted a more in-depth examination of all the AU-03 positions to which the grievor could conceivably be transferred in the Winnipeg Tax Services Office. She prepared a spreadsheet summarizing the essential duties of the positions, the relevant standards and limitations, and the degree to which each position complied with Dr. Lecuyer's accommodation requirements as articulated on October 13, 2015.

[48] Ms. Van Solkema, the grievor, and the grievor's representative met on January 20, 2016, to discuss the more in-depth analysis she had conducted. She provided a copy of the spreadsheet she had prepared of the available AU-03 positions and explained her findings. She reiterated that the BIQA position was the only viable option, and that he would be transferred there.

[49] The grievor did not go quietly. In accepting the move to the BIQA position, he complained in emails dated January 29, 2016, and February 4, 2016, about not having been offered an accommodation in International Audit.

[50] The grievor was formally transferred to BIQA on February 6, 2016 and has remained in this position ever since.

III. Arguments of the parties

A. The grievor's arguments

[51] The crux of the matter, according to the grievor, is the employer's failure to find a way to accommodate him in his International Audit position.

[52] To prove a *prima facie* case of discrimination on the prohibited ground of disability, the grievor had to establish that on the balance of probabilities, he had a disability, that he suffered an adverse impact with respect to his employment, and that his disability was a factor in the adverse impact.

[53] The grievor's disability is uncontested, he argued, and the employer has fully acknowledged it. He submitted that a *prima facie* case has been made and that the burden should shift to the employer to prove that it accommodated him to the point of undue hardship, which he submitted the employer has not done.

[54] The grievor provided the case of *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 ("*Central Okanagan*"). On page 12 of the Supreme Court of Canada's decision, Justice Sopinka held as follows:

> *… More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term "undue" infers that some hardship is acceptable; it is only "undue" hardship that satisfies this test. The extent to which the discriminator must go to accommodate is limited by the words "reasonable" and "short of undue hardship". These are not independent criteria but are alternate ways of expressing the same concept. What constitutes reasonable measures is a question of fact and will vary with the circumstances of the case.…*

[55] The Supreme Court further clarified the nature and extent of the duty to accommodate 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 paragraph 12, the Court stated, "What is really required is not proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship, which can take as many forms as there are circumstances."

[56] The Court stated at paragraph 14: "The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship."

[57] The grievor also submitted the case of *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 at para. 41, which highlights this important point: "… one must be wary of putting too low a value on accommodating the disabled. It is all too easy to cite increased cost as a reason for refusing to accord the disabled equal treatment."

[58] The grievor argued that the employer must do more than simply satisfy itself that an employee cannot perform the essential duties of any of the jobs in the workplace as they are constituted currently. Rather, as articulated as follows in *Calgary District Hospital Group v. United Nurses of Alberta, Local 121-R* (1994), 41 L.A.C. (4th) 319 at page 10:

> *It is the Board's conclusion, however, that the duty to accommodate requires more than determining that an employee cannot perform* existing *jobs. In determining that the Grievor could not be returned to work at the Hospital, the Employer appears to have asked itself whether the Grievor was capable of performing jobs as they currently were constituted (i.e., existing jobs). Having determined that the Grievor was not capable of performing an existing nursing job as it currently was constituted (a determination with which the Board finds no fault), the Employer took the position that it had done what was necessary and that nothing more need be done. In the Employer's view, it had fulfilled its obligations to attempt to accommodate the Grievor. If the Grievor could not be returned to the workplace, she was entitled to whatever benefits the contract provided until those benefits expired.*
>
> *With respect, the Board disagrees that the Employer had fulfilled its obligations to accommodate the Grievor. The duty to accommodate goes beyond investigating whether an employee can perform an existing job — it involves investigating whether something can be done to existing jobs to enable the employee to perform a job. Having determined that the Grievor could not perform any existing job, the Employer was obligated to turn its attention to whether, and in what manner, existing nursing jobs could have been adjusted, modified or adapted — short of undue hardship to the Hospital — in order to enable the Grievor to return to work despite her limitations….*

[59] The grievor submitted that the employer gave little or no consideration to how he could have resumed his international auditor work. The employer simply looked at the restrictions imposed by the medical note, saw that they did not permit him to continue as an international auditor, and stopped the inquiry at that point. It did not

consider how the existing international auditor job could have been adjusted, modified, or adapted to enable the grievor to continue working in it.

[60] The grievor added that in addition to the substantive aspect, there is a procedural aspect to the duty to accommodate. That there is a process as well as an outcome was discussed in the case of *Ontario Public Service Employees Union v. Ontario (Human Rights Commission)*, [2005] O.G.S.B.A. No. 30 (QL) at para. 94. The Ontario Grievance Settlement Board outlined these four steps to the process:

> *… The jurisprudence has established that employers are required to undertake a four-step process with respect to accommodation efforts. First, it is to determine whether the disabled employee can perform her job as it exists. If that is not possible then the Employer is to assess whether the employee's existing job can be modified in such a way so as to be suitable. If that is still not achievable the Employer is to then determine whether another job within the workplace is suitable. Finally, if the disabled employee cannot perform the essential duties and responsibilities of a different existing position, can that different job be modified? In each of these steps the Employer's efforts must be genuine and not perfunctory.*

[61] The grievor submitted that the employer did not seriously consider Dr. Lecuyer's recommendation to consider bundling roles nationally.

[62] The grievor submitted two authorities for the proposition that a doctor's recommendation must be seriously considered. In *Ottawa (City) v. Civic Institute of Professional Personnel* (2009), 185 L.A.C. (4th) 227 at para. 89, the arbitration board held as follows:

> *… that the City breached its duty under the collective agreement to accommodate Ms. Ghadaksaz by failing to carry out the recommendation of Dr. Kraag in his Report dated February 1, 2006 that she be transferred to another position within the organization ….*

[63] In *Emond v. Treasury Board (Parole Board of Canada)*, 2016 PSLREB 4, the Board's predecessor found a breach of the duty to accommodate because the employer did not consider moving the grievor. In that case, the grievor was unable for medical reasons to work at her current location, and the Board found that a move to a different location within Ottawa could have been considered.

[64] Process is important, argued the grievor. In *Catholic District School Board of Eastern Ontario v. Ontario English Catholic Teachers' Association*, (2008), 176 L.A.C. (4th) 193 at 29, the arbitrator found in favour of the grievor in that case, given that the grievor's employer failed to show "… at least some evidence of a serious-minded inquiry into the request for human rights protection."

[65] The chaotic and unstructured environment into which the grievor was placed when he returned to work from the lengthy period of medical leave, he argued, was an indication of the employer's lack of attention. Reporting to multiple individuals, he was more or less left to fend for himself. Despite repeated requests for an explanation as to the manner in which allowing him to remain in International Audit constituted an undue hardship and as to the BFORs, which prevented him from remaining in his substantive position, he was ignored. The job description, he argued, was not a BFOR. Finally, he argued that it is unbelievable that Ms. Van Solkema could not find a single position within the CRA, an organization with national scope, which would have allowed him to remain as an international auditor.

[66] For these reasons, concluded the grievor, the employer discriminated against him on the basis of his disability, and significant awards under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*) should apply.

B. The employer's arguments

[67] The employer opened its submissions with a succinct observation that the real issue in this case is not the failure to accommodate the grievor because he was, in fact, accommodated. The issue is the failure to provide him with his perfect and preferred accommodation, which it was not obliged to do.

[68] The employee seeking accommodation may certainly make suggestions and requests, but the employer is best placed to determine the best placement. This is reinforced as follows in *Central Okanagan*, at paras. 26 and 27:

> *To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.*

> *This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfill the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre in* O'Malley*. The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.*

[69] The employer added that an employer's decision is not to be second-guessed, as stated as follows in *McMullin v. Treasury Board (Correctional Service of Canada)*, 2021 FPSLREB 55 at para. 90:

> *[90] It may well be that the employer* ***could*** *have accommodated the grievor in the way she proposed. But an employer's decision is not to be second-guessed as to what best fits its operational needs when it comes to accommodation. The question, in other words, is not whether there were other reasonable forms of accommodation that the employee might have preferred but instead whether the accommodation that was offered was reasonable in the circumstances. If so, then the enquiry stops. The employee must accept it. Otherwise, the employer's duty is discharged ….*
>
> [Emphasis in the original]

[70] This is what happened in the present case, argued the employer. Best efforts were made to keep the grievor in his international auditor position, which was his preferred accommodation. However, regionalization within the CRA, as well as the strict limitations imposed by the grievor's doctor, made it impossible, so considerable effort was expended to find a suitable position at the same group and level. The grievor accepted the transfer into the BIQA position in February of 2016.

[71] When this happens, argued the employer, one need not consider BFORs because the employer has already discharged its duty to accommodate. From *McCarthy v. Treasury Board (Correctional Service of Canada)*, 2020 FPSLREB 45 (*McCarthy*) at para. 98: "The employer made serious attempts to find other work for the grievor, within the limits of his restriction, and in fact, it did find him a position, in January 2016."

[72] Every time a new doctor's note was presented, the employer reasonably accommodated the grievor based on his identified needs. *Leclair v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 97 at paras. 133 and 134, states as follows:

> *[133] The employer has a duty to find a reasonable accommodation. It knows its needs, its workplace, and its resources (see* Renaud *at 994-95). Doctors may suggest what type of accommodation is needed, such as the SMO position in this case, but it is not their role to decide if an employee can be accommodated or direct that an employee be accommodated in a certain position. A physician's role is to provide a professional opinion and not to act as an advocate for their patient in the employer employee relationship. Their opinion cannot circumvent the employer's workplace organizational needs. The doctor's role is to identify their patients' needs and limitations, and based on that, the employer must determine how best to accommodate those needs and limitations in the workplace.*
>
> *[134] Many employees, like the grievor, think that finding an accommodation is carte blanche to be given the position of their choice because of the employer's duty to accommodate them to the point of undue hardship. This is a misconception; employees are not entitled to their preferred accommodations. They are entitled to reasonable accommodations that meet their identified needs. The employer in this case made the effort to find a reasonable accommodation based on the medical information it had been provided. The grievor was not willing to consider the options being put forward, and he delayed the process.*

[73] The first doctor's note, in January of 2013, said that the grievor was ready to work his way back up to full-time hours but that he might need some flexibility with respect to working from home. The employer met those recommendations; it slowly increased his hours per the mutually agreed-upon timeline and set him up for telework. When it appeared to Mr. Wery that the grievor was having trouble with his work, Mr. Wery set up a plan to help him and to find work that he was capable of doing during the early stages of his return to work.

[74] When the second doctor's note, in April of 2013, signalled a need to reduce the grievor's hours to 20 per week because of increased fatigue, the employer immediately responded. It also requested additional information from the doctor, which resulted in the third doctor's note. That note confirmed the grievor's 20-hour workweek and his need to work from home as much as possible and that when travel was required, to avoid the rush hours. The employer met all these recommendations.

[75] The fourth doctor's note shone a ray of hope, indicating that the grievor could potentially travel outside Winnipeg. Mr. Bergman and Ms. Anderson met to figure out the details, but despite their best efforts, they were not able to find an International Audit file for him to work on. Ms. Anderson testified to having found one, but the grievor said that it was not suitable for him.

[76] The fifth doctor's note, in October of 2015, was definitive in its rejection of the possibility of the grievor working on large audits, in International Audit or elsewhere. Ms. Anderson and Mr. Bergman both testified about the workload in International Audit, which involves large audits that for operational reasons take place in Calgary. That involves travel and intense periods of activity, usually for a week at a time over an extended period.

[77] The screening work in BIQA, testified Ms. Van Solkema, involved tasks that lasted between one to eight hours for any given file. This type of work was preferable, given the doctor's observation that "[t]he effective execution of large audits, over longer periods of time however, requires persistent capabilities that he presently does not possess."

[78] The employer noted that Ms. Van Solkema took the grievor's suggestions into account with respect to non-resident waivers and dispositions. She, as well as Mr. Bergman and Ms. Anderson, were clear in their testimonies that employees at a level below the grievor's AU-03 group and level performed that work elsewhere. The employer submitted that its efforts satisfied the need for a multi-party inquiry into accommodation options, as suggested by *Central Okanagan*.

[79] With respect to the grievor's complaint of a lack of structure or formality, the employer referred to *Canada (Attorney General) v. Duval*, 2019 FCA 290 at para. 25, as follows:

> *[25] Similarly, the FPSLREB's finding that the procedure adopted by CSC to reinstate the respondent, in and of itself, constituted a failure to accommodate is unreasonable. In* Canada (Human Rights Commission) v. Canada (Attorney General), *2014 FCA 131, [2015] 3 F.C.R. 103 (F.C.A.), this Court held that there is no separate procedural right to accommodation that imposes any particular procedure that an employer must follow in seeking to accommodate an employee. Rather, in each case, it will be a question of fact as to whether the employer has established that it accommodated a complainant to the point of undue hardship.*

[80] The employer not only followed the doctor's recommendations on restrictions and limitations but also helped the grievor succeed in his work. Mr. Wery set up a formal plan to help the grievor over a three-week period at the outset of his return to work so that he could see what further assistance might be necessary. Ms. Anderson met regularly with the grievor to plan his work and to keep track of what had been done. These were formalized plans. The employer also sought additional information from the grievor's doctor.

[81] The employer submitted that an accommodation does not have to be perfect to be reasonable. As *Lavoie v. Deputy Head (Department of National Defence)*, 2019 FPSLREB 1 at para. 179, states:

> ***179*** *The employer is not bound to create a position to accommodate an employee (*Kerr-Alich*). In this case, it could not continue to employ the grievor as a dental assistant because she could not perform her duties. It was not required to create a tailor-made position that did not correspond to its needs or its budget.*

[82] The work suggested in the fifth doctor's note (non-resident waivers and dispositions) did not have to be done by an AU-03 international auditor; therefore, bundling the work would not have met the CRA's needs. As *Spooner v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 60 at para. 141, states:

> *[141] … although an employer is required to make vigorous efforts to identify options for accommodating an employee, the obligation is not infinite, and it permits an employer to select options that will serve its purposes as well as the employee's. The employer is entitled to expect that the work performed by the employee will make a meaningful contribution to the enterprise.…*

[83] The grievor was given work that was meaningful to both the employer and the employee. The fact that there might have been other forms of accommodation is not the issue. Once the CRA enabled him to work productively, the duty to accommodate was fulfilled.

[84] For all these reasons, submitted the employer, this grievance should be dismissed.

IV. Decision and reasons

[85] I have read the cases submitted by both the grievor and the employer. In dismissing this grievance, I will refer only to those that support my reasoning.

[86] In his grievance, the grievor referred to the *CHRA*. According to s. 226(2)(a) of the *FPSLRA*, the Board may, in relation to any matter referred to adjudication, interpret and apply the *CHRA*. Section 7 of the *CHRA* provides that it is a discriminatory practice, in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination. Subsection 3(1) of the *CHRA* provides that disability is a prohibited ground of discrimination.

[87] Although the parties did not explicitly argue the analytical framework, they did reference it obliquely in their final arguments. Their Books of Authorities include *Moore v. British Columbia (Education)*, 2012 SCC 61 and *McCarthy*. *McCarthy*, at para. 83, states this:

> *[83] The case law on discrimination is well established. A finding of discrimination proceeds in two steps. First, the person making the discrimination allegation must establish* prima facie *discrimination; that is, evidence that in the absence of a response from the person alleged to have discriminated would be sufficient to conclude that discrimination occurred.* Prima facie *discrimination in the context of employment has these three components: 1) the person has a characteristic protected from discrimination 2) the person has suffered an adverse impact in his or her employment, and 3) the protected characteristic is a factor (it need not be the only one) in the adverse impact.*

[88] The first issue for me to determine is whether the grievor made out a *prima facie* case of discrimination. The grievor's disability is obvious and was not at issue in this hearing. This is a characteristic protected from discrimination under the *CHRA*. Although neither party argued this point explicitly, I find that there is no question that the grievor experienced an adverse impact in his employment. When he returned from medical leave, he did not resume his international auditor duties. The heart and soul of his case is the adverse impact of this situation. The grievor longed to return to his substantive position as an International Tax Auditor and was (and perhaps continues to be) very upset he cannot. The third component is whether the protected characteristic was a factor in the adverse impact, and it is obvious that it was. The only reason the employer did not put him back in his substantive position was that it

simply could not do so due to the continuing effects of his illness. I find that the grievor established a *prima facie* case of discrimination.

[89] The burden then shifts to the employer to show that it had a BFOR and that accommodating the grievor's needs would have imposed undue hardship on the employer, as per *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 (*Meiorin*) at para. 54.

[90] Section 15 of the *CHRA* provides the following:

15 (1) *It is not a discriminatory practice if*	***15 (1)*** *Ne constituent pas des actes discriminatoires :*
(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*	***a)*** *les refus, exclusions, expulsions, suspensions, restrictions, conditions ou préférences de l'employeur qui démontre qu'ils découlent d'exigences professionnelles justifiées;*
…	[…]
(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.*	***(2)*** *Les faits prévus à l'alinéa (1)a) sont des exigences professionnelles justifiées ou un motif justifiable, au sens de l'alinéa (1)g), s'il est démontré que les mesures destinées à répondre aux besoins d'une personne ou d'une catégorie de personnes visées constituent, pour la personne qui doit les prendre, une contrainte excessive en matière de coûts, de santé et de sécurité.*

[91] In *Meiorin*, the Supreme Court of Canada elaborated the test with respect to BFORs: (1) is the occupational requirement rationally connected to performing the job, (2) was it adopted in the sincere belief that it was necessary to fulfil the objectives of

the position, and (3) is it reasonably necessary, in the sense that the individual cannot be accommodated without the respondent suffering undue hardship.

[92] The employer's witnesses as well as the grievor clearly described the occupational requirements of the work of an International Tax Auditor. In any form of audit, the auditor is required to attend the place of business of the entity being audited. Here, the nature of the classification and restructuring exercise within the CRA resulted in International Tax work being done almost exclusively in Calgary, a fair distance from the Winnipeg Tax Services Office.

[93] I accept the testimonies of all of the witnesses, including the grievor, with respect to the working conditions in International Audit. The auditors work in a team of at least four who would travel together by car from Winnipeg to Calgary. Having driven across the entire Canadian prairie, they would then work long hours every day for the entire week, then drive back to Winnipeg. They would do this at least once per month until the audit was complete, which could take up to a year or longer. These are the occupational requirements, and I find they are rationally connected to performing the job.

[94] The second part of the test is also satisfied: these occupational requirements are clearly necessary to fulfil the objectives of the position. Travel and working long hours in a team environment are the means by which International Tax audits are completed.

[95] I disagree with the grievor's contention that the employer did not make any effort to reconfigure the work of an international auditor to suit his needs. I accept the evidence of Ms. Anderson, who testified to having given this element of the accommodation plan quite careful consideration. The doctor's restrictions regarding travel and a 20-hour workweek were formidable challenges. Everyone agrees that some discussion took place about finding International Audit work for the grievor following receipt of the August 26, 2014, doctor's note, which seemed to open the door somewhat to travel and to flexible working conditions. Could he perhaps work intensively over a week-long period and then use the following week to recover? This question remained unanswered, at least until the definitive doctor's note of October 13, 2015.

[96] Ms. Anderson searched but could not find a suitable audit for the grievor. She did find one she felt might work, but the grievor told her he did not find it suitable.

[97] The grievor submitted that one cannot simply "wave the printout of a job description around" (to paraphrase the grievor) and call this a BFOR. I agree, but the employer did much more than that. The spreadsheet produced by Ms. Van Solkema might be Spartan in its appearance, but Ms. Van Solkema testified in detail about the efforts she made to research the various possibilities and to compare and contrast the elements of all of the positions, in an effort to find the best possible compromise. I find the evidence on this third aspect of the test to be conclusive in that the employer could not possibly provide the grievor with his preferred accommodation, so considerable effort was expended in finding the best possible means to accommodate him. The grievor's ideal and preferred accommodation would amount to undue hardship.

[98] The evidence is very clear that every time a doctor's letter appeared, the recommendations it contained were immediately followed. I find that the employer paid scrupulous attention to the recommendations about the hours of work (especially during the grievor's gradual return to full-time duties), the number of workdays per week, the need to permit telework to occur, and the restrictions on traveling during the rush hour to avoid stress and to permit the grievor to attend to his medical needs. The employer accommodated him at every turn.

[99] I find that the requirement for a multi-party inquiry, as articulated in *Central Okanagan*, was met. The meeting notes of June 23, 2014, are instructive in this respect, as follows:

> …
>
> *Clayton also stated that he thinks that larger files that require coordination with other auditors are going to remain a challenge as he cannot determine how he will feel on a day to day basis. The way Clayton feels can change from day to day. He explained it with the analogy that he only has so much stamina/ good health in his bank and once it is used up, it's gone. It will take time for him to recharge. He may be able to give it his all for a week and then he may potentially be sick/ down for the next week or so.*
>
> …

[100] The grievor was aware fairly early in his return-to-work program that he simply might not be cut out for a full-scale return to International Audit. At least initially, he seems to have accepted his fate. However, he did not maintain this flexibility, and toward the end of his tenure in International Audit, he became increasingly strident in his objections to being moved.

[101] The Board's findings in *Leclair* and *Lavoie* resonate with me. The proposed accommodation does not have to be perfect or tailor-made, it has to be reasonable.

[102] I find that given the restrictions imposed by Dr. Lecuyer and Dr. Silver, it was simply impossible for the employer to return the grievor to his position as an international auditor. I accept the testimonies of the employer's witnesses on the issues of centralization and regionalization and the risk-based approach to the assignment of international audits that saw the work being done almost exclusively in Calgary. This aspect of their testimony was uncontested.

[103] This type of work is entirely inconsistent with the doctors' recommendations, and it was unrealistic of the grievor to insist on being returned this environment.

[104] This is not to say that I am unsympathetic to the frustration the grievor must have felt. He was cut down in his prime by a debilitating illness, which not only robbed him of the work he truly loved but also robbed the CRA of an international auditor who, by all accounts, was very good at his job.

[105] I accept the employer's reference to *Leclair* on the issue of the doctor's role in the accommodation process. At paragraph 133:

> *[133] … A physician's role is to provide a professional opinion and not to act as an advocate for their patient in the employer employee relationship. Their opinion cannot circumvent the employer's workplace organizational needs. The doctors' role is to identify their patients' needs and limitations, and based on that, the employer must determine how best to accommodate those needs and limitations in the workplace.*

[106] The grievor seems not to have been satisfied with the employer's explanation of the BFORs, and he repeatedly demanded to know how returning him to his position amounted to undue hardship. As I have indicated, I sympathize with the grievor's

feelings of frustration, but it was not incumbent upon the employer to prove its case to the grievor to his satisfaction or to justify its position to him.

[107] I am not sure how Ms. Anderson, Ms. Van Solkema, or Mr. Bergman could have made things any clearer. The workload of an international auditor was described many times. These were the occupational requirements, and they were *bona fide*. Finding a way for the grievor to remain in his current position would have amounted to more than just an undue hardship, it would have been an outright impossibility. The grievor's functional limitations prevented him from returning to his international tax auditor duties, and this was the case from the moment he sought to return to the workplace in 2012.

[108] On October 13, 2015, Dr. Lecuyer wrote that the grievor's "… functional abilities and fitness to work have not changed since 2012." It is highly instructive, then, to review exactly what she said those limitations were in 2012:

> …
>
> *I have reviewed the attached work description and discussed work duties with Mr. Reece. At this point, Mr Reece is unable to perform many of the duties required for his own occupation….*
>
> *… Mr Reece would not be able to handle this type of work in a timely or effective manner. He would not be an effective representative for Canada Revenue Agency or the Department of Justice. He would also have difficulty managing the requirements of providing testimony in court.*
>
> …

[109] Therefore, although there were brief moments of optimism from the doctors, the functional limitations noted on August 23, 2012, **never changed**. This is significant. According to Dr. Lecuyer, the grievor was **never** able to resume his international auditor duties.

[110] I find that Ms. Van Solkema expended considerable effort evaluating the different employment possibilities for the grievor. She studied the several AU-03 positions that might have possibly worked out. She prepared a spreadsheet comparing the relative strengths and weakness of each position. She discussed her findings with the grievor and sought his input. She relied on all this as well as her experience in different CRA positions (as a manager and otherwise) in arriving at a solution that fit the needs of both the employee and the employer to the greatest extent possible. A

position in BIQA was identified and it was offered to the grievor. He accepted. He was accommodated.

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

(The Order appears on the next page)

V. Order

[112] The grievance is denied.

February 15, 2023.

James R. Knopp,
a panel of the Federal Public Sector
Labour Relations and Employment Board