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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

FRANK RODRIGUES

Grievor

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

Indexed as
Rodrigues v. Treasury Board (Canada Border Services Agency)

In the matter of individual grievances referred to adjudication

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

For the Grievor: Douglas Hill, representative

For the Employer: Jean-Charles Gendron, counsel

Heard via videoconference,
October 11 to 13, 2023.

REASONS FOR DECISION

I. Summary

[1] Frank Rodrigues ("the grievor") worked at Toronto Pearson Airport (YYZ) as a border services officer (BSO), classified FB-03, and grieved the fact that the Canada Border Services Agency ("the employer") repeatedly sought more information about and finally refused his request for an accommodation for a knee injury. He alleged that these requests for more information constituted harassment.

[2] The grievor requested that he work longer hours, to have a compressed schedule, and that contrary to the rotating shift schedule negotiated with the Public Service Alliance of Canada ("the bargaining agent"), his schedule assign him work only on the Wednesday-to-Saturday shift.

[3] In essence, he claimed that solely due to his injured knee, he could never work on a Sunday.

[4] The grievor relied upon medical documents requesting that specific weekly schedule as an accommodation. He alleged there were shortcomings in the employer's accommodation process. Over 10 years after the events at issue, and at the hearing, he continued to seek his preferred weekly work schedule along with financial compensation under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*).

[5] Given the grievor's assertion that for medical reasons related to his injured knee, he could work a longer shift on Saturday but never a shift on Sunday, the employer was eminently reasonable when it repeatedly sought more information on the functional limitations of his knee. It denied his preferred shift schedule when he and his doctors failed to provide the necessary information about his workplace functional limitations upon which such an accommodation could be justified.

[6] The only evidence at the hearing that could possibly justify the requested accommodation of no work on Sunday was the grievor's admission that he could not work Sundays due to family responsibilities. Yet, the evidence clearly established that when the employer asked him if he wished to pursue a family related accommodation, curiously, he declined.

[7] Given this evidentiary finding, I conclude that the grievor failed to establish a *prima facie* case of discrimination as the evidence did not establish any link whatsoever between his knee injury and his requested accommodation.

[8] I conclude that the employer's accommodation process was not deficient. And finally, the evidence does not establish that the employer harassed the grievor in seeking information about his workplace functional limitations.

II. Issues

[9] This matter considers two grievances dated January 10, 2013. The first alleges a violation of the no-discrimination, no harassment clause (clause 19.01) of the collective agreement between the Treasury Board and the Public Service Alliance of Canada for the Border Services group that expired on June 20, 2014, along with an alleged violation of the *CHRA*. The second alleges that the employer violated its duty-to-accommodate policy. These grievances rely upon the same acts and alleged omissions, were addressed jointly at the hearing, and will be treated jointly in this decision.

A. The injured knee, and the requested accommodation

[10] The grievor was adamant that his need for his preferred work schedule was documented and justified by many letters from his doctor. He alleged that the employer harassed him by asking for clarification of his medical notes. The employer replied that despite several requests, none of the medical documents that he tendered provided information about his functional limitations. It stated that it required that information to prepare a proper accommodation plan for him. When the employer pressed the doctor for more information to explain the grievor's functional limitations, the doctor said that the accommodation request was for "personal medical reasons".

[11] The grievor relied upon a note from specialist, Dr. D.J. Ogilvie-Harris, titled "DISABILITY CERTIFICATE". The doctor hand-wrote this: "I agree with Dr. Peck/June 25th [and] 30 2012 and feel he needs work accommodation for medical reasons."

[12] The grievor testified to suffering injuries dating back to 2007 that left him with chronic knee pain and swelling. The injury to and problems with his knee were not contested. The originating grievance document for this accommodation grievance cited "5 separate medical reports" as grounds for the employer's alleged failure to accommodate him.

[13] The grievor testified to the series of medical notes that he provided to the employer to support his preferred accommodation. On June 25, 2012, the grievor presented a letter from his family physician, Dr. Jonathan Peck, which stated the following:

> …
>
> *As a result of ongoing medical problems related to chronic right knee pain and swelling, as well as frequent difficulties sleeping, it is my recommendation that Frank Rodrigues work a compressed work week of 37.5 hours in 4 consecutive days.*
>
> *Frank is allowed to work overtime, however this will depend on how he personally feels on any particular day.*
>
> *Frank can only sit for a maximum of 20-30 minutes at a time, due to his chronic right knee pain and swelling. He will also require the ability to take short walks on an occasional basis.*
>
> ***Also, given his previous positive experience with his schedule, and considering his health problems, I would also recommend again that Frank work only afternoon/evening shifts, on a one week rotation, as historically since July 2007, these seemed to work best for him**.*
>
> …
>
> [Emphasis added]

[14] And then, on June 30, 2012, Dr. Peck wrote as follows:

> …
>
> *On June 25, 2012, I provided a report in support of Frank's health conditions, and his requirement of medical accommodation for his return to work at the Pearson Airport international traveller stream.*
>
> *After further consultation with my patient, I hereby confirm all the points in my aforementioned letter, and I am also providing further clarification on my medical requirements for his work schedule.*
>
> *It is my understanding that up to the time when Frank last worked at Pearson Airport in May 2010, he was working the days and shift hours as stated in the attached Accommodation Request document, which he signed on June 25, 2012.*
>
> *Considering Franks* [*sic*] *various other health concerns, aside from his right knee issues, he is medically required to work these same days and hours again, as stated in the Accommodation Request document.*
>
> *I have reviewed the Passenger Operations schedule document, noting the 4-3 pattern mentioned therein. These shifts are not*

> *acceptable from a medical perspective, and Frank must be scheduled for his regular work shifts for the days and hours, as listed on the accommodation document, subject to my further review in* [*sic*] *future.*
>
> …

[15] Attached to the letter was an accommodation request that the grievor had filled out. It stated that he has a physical disability. In the part of the request form titled, "Description of accommodation needs, restrictions and/or functional limitations", the grievor wrote, "Medical restrictions as per the attached report of Dr. Peck."

[16] And in the part entitled, "Description of accommodation sought", the grievor wrote as follows:

> *My request is to be put back on the exact same shifts (weekly rotation) and schedule as I had worked from July 2007 until I came over to Matheson in May 2010: 3x10 hr shifts + 1 x 9.5 hr shift*
>
> …
>
> *Days of work – Wednesday, Thursday, Friday and Saturday as my mandatory weekend day Off on DRs – Sunday, Monday, Tuesday*
>
> *Medical restrictions as per the attached report of Dr. Peck.*
>
> …

[17] The form stated that the accommodation is permanent, and that supporting documentation was attached with information from the medical practitioner.

[18] On July 3, 2012, the employer wrote the following letter to Dr. Peck. It sought details of the grievor's functional limitations related to his working conditions and specifically stated that sharing a medical diagnosis was "NOT required". Dr. Peck replied (in bold font) directly below each question, as follows:

> …
>
> *Dr. Peck,*
>
> *Further to your letter dated, June 30th, 2012, Senior Management has again requested that Frank provide you with this letter in order to establish specific details surrounding the conditions under which he may work and on any limitations that result from the existence of his medical condition. Please note that a medical diagnosis is NOT required.*
>
> *Mr. Rodrigues will be returning to work at Passenger Operations; a branch of the Canada Border Services Agency that provides*

passenger and goods processing services at Pearson International Airport 24 hours a day, 7 days a week. For your reference, please find attached a document which summarizes our Agency's scheduling options and sets out the various start and finish times available under each schedule.

In consideration of the above, we would appreciate your medical opinion on the following points:

1. *Prior to Mr. Rodrigues return to Passenger Operations, he was working 5 days per week (Monday - Friday dayshift at 7.5 hours/day), can you advise why he is medically no longer able to work 5 days/week?*

   The airport is a very different work environment from the office.

   - greater fluctuations in work volumes and stress levels

   - the airport has more varying temperatures depending on the duties and volumes of travellers

   - there are different clothing and footwear requirements which affect comfort

   - there are more and different physical requirements

   - more time is personally needed to rest and recover physically from work at the airport.

2. *You have indicated that the 4/3 schedule best suits Mr. Rodigues' needs. You further concurred with his request to work Wednesday - Saturday only. As outlined in the attachment, we have a schedule a 4/3 schedule between Thursday - Sunday or Friday - Monday. In order to address this 4/3 restriction, we have placed him on a Friday - Monday schedule. Can you advise why he is medically precluded from working the Sunday or Monday shifts? How do these days exacerbate his medical condition?*

   Only Wednesday to Saturday are acceptable days of work for regular shifts. Other days exacerbate him due to various personal medical reasons. Also see Paragraphs 4 and 5 of report dated June 30, 2012 and paragraph 4 of report dated June 25, 2012.

3. *Of the specific start times outlined, which shifts can he not work for medical reasons? Please specify the reasons why?*

   Due to various personal medical reasons, no start times earlier than 11:00 am and no start times later than 3:00 pm for regular shifts. Also see paragraphs 4 and 5 of report dated June 30, 2012 and paragraph 4 of report dated June 25, 2012.

4. *Is he able to work any additional overtime hours? If so, please confirm how many additional hours of overtime he can work per day? Please also advise as to the frequency of the overtime hours, (i.e. daily, every 2 days, etc.)*

> ***Yes, see paragraph 2 of report dated June 25, 2012.***
>
> *5. Should a need for training arise, would he be able to work Monday to Friday dayshift for a short period of time (i.e. one week or less)?*
>
> ***Yes, see paragraph 5 of report dated June 25, 2012.***
>
> *6. Does his medical condition place any restrictions on his ability to perform certain work related tasks?*
>
> ***Yes, as stated in paragraph 3 of report dated June 25, 2012.***
>
> *7. What is the anticipated duration of his need for a medical accommodation?*
>
> ***Permanent, and see paragraph 5 of report dated June 30, 2012.***
>
> …
>
> [Emphasis in the original]
>
> [*Sic* throughout]

[19] When asked what he told his employer when it asked for more information about his functional limitations that would justify his requested Wednesday-to-Saturday schedule, the grievor replied that Dr. Peck told the employer that this accommodation was "required for personal medical reasons".

[20] The grievor repeated that assertion from Dr. Peck when he testified about a letter the employer sent to Dr. Peck on November 20, 2012, asking for more information about how working Sundays would exacerbate his condition. He noted that his doctor replied in writing on November 26, 2012, and stated this: "I am not able to answer this without providing a diagnosis, which is personal and confidential …".

[21] Finally, the grievor noted the December 19, 2012, letter from Tammy Dineen, Superintendent of Passenger Operations at YYZ, which stated as follows:

> …
>
> *However, upon further review of your proposed schedule, it is noted that the shift/hours you have requested, and your physician has recommended, are shifts with higher passenger volumes, when other available shifts have lesser passenger volumes. The hours of work per day you are requesting, and your doctor is recommending, is a 9.5 hour work day, when a 7.5 hour work day is available. In addition, you have requested a 4 days on and 3 days off schedule, which your physician has recommended, when a schedule is available which allows for 4 days off, providing you with additional time to rest and recover. Given this, management*

> *could not grant the schedule you are seeking based on the current medical documentation available.*
>
> *In addition, you have not provided sufficient information to support your need to work Wednesdays to Saturdays only and how working other days of the week could exacerbate your medical condition.*
>
> …

[22] Ms. Dineen testified about aspects of the grievor's accommodation and the employer's efforts to respond to his request to work only the Wednesday-to-Saturday shift rotation. She stated that the employer had addressed many accommodations for him and his leg injuries positively. She noted that his request to not be assigned to primary inspection, to wear a special lightweight ballistic safety vest that was cooler for him, and a static shift and delayed defence training were all approved.

[23] However, she explained that his insistence upon working only Wednesday to Saturday was a problem for the employer. She spoke of the fact that the employer's YYZ operation was huge and that it ran 24 hours a day and 7 days a week, with many staff and travellers. She said that it would become unwieldy for the employer to keep all operations functional if staff were able to pick and choose their shift days. She testified that as a result, the employer and bargaining agent had negotiated the "Variable Shift Scheduling Agreement" (VSSA), which did not provide for BSOs to pick their own days of work or to always work the same shift.

[24] Ms. Dineen also testified to the apparently counter-intuitive nature of the grievor's request to be accommodated for a knee injury in a manner that would require him to work longer hours on days of higher passenger and work volumes at YYZ. She explained that that seemed to make no sense in the review of his accommodation request and that it was partly why the employer repeatedly sought clarification about his functional limitations. She also noted that the same issue was stated in the December 19, 2012, letter to the grievor that declined his requested accommodation.

B. Alleged accommodation process deficiencies

[25] The grievor argued that the employer improperly asked repeatedly for more information about his functional limitations. He also argued that the employer failed the procedural aspect of its duty to accommodate by not asking him, during the times at issue, to attend to a Health Canada (HC) referral for an opinion about his functional

limitations. He asserted that the employer improperly sought information about his diagnosis and that the five-month process to consider this matter was untimely.

[26] And finally, he noted that a file summary letter dated December 19, 2012, and a disposition document had been made that omitted the medical information that Dr. Peck provided on June 30, 2012, which requested the accommodation of the grievor not working on Sundays. Put together, the grievor submitted that it all demonstrated that the employer failed to meaningfully engage in the accommodation process.

[27] However, when addressing this matter in her testimony, Ruby Singh, the employer's superintendent of accommodations, testified that without exception, all file contents and all physician letters are always put before the Senior Management Accommodations Committee, which would most certainly have been done with the grievor's file. As such, she said that the June 30, 2012, letter would definitely have been before the committee and that it was simply an administrative error that it was not listed in the December 19, 2012, letter to the grievor.

[28] In his allegation that the employer harassed him by repeatedly asking for more information, he noted that on June 18, 2012, Ms. Dineen wrote the following:

> …
>
> *As per our phone conversation today regarding your return to Passenger Operations, we will need documentation completed by your physician in order to establish specific details surrounding the conditions under which you may return and on any limitations that result from the existence of your medical condition. Attached is the letter for your physician, a list of the VSSA scheduling options and a Functional Abilities Report. Kindly print the attachments for your doctor's completion and return to my attention as soon as possible.*
>
> …

[29] On June 27, 2012, Ms. Dineen wrote as follows:

> …
>
> *We understand that you are upset and we are trying to work with you to resolve your medical requirements; however the schedule being offered meets the requirements of the letter submitted by you from Dr. Peck, dated June 25, 2012. As you are aware the VSSA contains the schedules negotiated with the union. Since your medical requests a compressed work week of 37.5 hours in 4 consecutive days, the DCT options of Thursday to Sunday or*

> *Friday to Monday meets* [*sic*] *your medical needs. In order to choose another scheduling option, we will require an updated letter from your physician. Please have your physician complete the letter provided by us as it addresses additional information required by management. I have also attached the scheduling options to provide to your physician. For your convenience I have attached a link to the VSSA, so you can explore the various scheduling options.*
>
> …

[30] The grievor relied in his submissions on the fact that in 2007, his employer had approved the same accommodated work schedule that he now seeks. An August 10, 2007, employer email confirmed that his desired work schedule was allowed. In a foreshadowing statement, the email states, "Notwithstanding the merits of the current medical documentation we have on file, there is some additional information that we will need to better address your accommodation."

[31] Dr. Peck wrote at that time (July 23, 2007) as follows:

> …
>
> *As a result of ongoing medical problems related to right knee pain and swelling, as well as frequent difficulties sleeping, it is my recommendation that Frank Rodrigues work a compressed work week of 37.5 hours in 4 consecutive days.*
>
> *Frank is allowed to work overtime, however this will depend on how he feels on any particular day.*
>
> *Also, given his previous positive experience with his schedule, and considering his health problems, I would also recommend again that Frank work rotating afternoon/evening shifts, as historically, these seemed to work best for him.*
>
> …

C. The grievor's previous accommodation in 2007, and his referral to HC

[32] The grievor testified that he suffered leg injuries in 2007 that resulted in him requesting and being allowed an accommodated shift schedule of working solely his preferred Wednesday-to-Saturday shift. In his examination-in-chief, he described the accommodated shift schedule as a conditional agreement and an interim accommodation. He added that the employer asked him to sign the consent forms required for him to attend to an HC assessment.

[33] As confirmed in Ms. Singh's cross-examination and in her email to the grievor dated June 23, 2008, she informed him that having reviewed the information from Dr. Peck dated April 7, 2008, his preferred medical accommodation would be continued but that further information was required with respect to the conditions under which he could continue to work. She stated that it appeared that his accommodations were long-term in nature, and so, the employer requested a referral to HC. The email stated that in the absence of a reply or if the signed consent forms were not received, the employer would proceed to make a decision on continuing the grievor's accommodation based upon the information available to it.

[34] I also note that that email explained the purpose behind the referral to HC and that it assured the confidentiality of his medical information. It assured him that HC would only share information related to the conditions under which he could continue to work and related work restrictions that were a direct result of a medical condition. It also assured him that HC would only communicate with him or his physician about matters related to the accommodation. It also stated that no information related to a medical diagnosis would be shared with the employer.

[35] The grievor replied to this communication four days later, on June 27, 2008, and stated that he would "NOT" sign the consent to release medical information and that he would not consent to undergo a fitness-to-work evaluation until he had received the written reasons specifying the detailed description of the nature of management's concerns about his medical fitness to work as well as the written reasons for which he was to undergo that evaluation. He added that once he received all that written information, and if it was all agreeable, he would then sign the forms. He also wrote that he understood that the reason the employer wanted to send him for a fitness-to-work evaluation was due to his schedule and that it was for no other purpose.

[36] In cross-examining Ms. Singh on the issue of a referral to HC, the grievor challenged her by asking whether he was entitled to know why the employer asked him to attend to a visit with an HC physician about the functional limitations that arose from his injury. Ms. Singh replied by saying that he was so entitled and that the June 23, 2008, letter explained it to and provided that information to him.

[37] The grievor argued that the employer failed its accommodation policy by not trying to refer him for a HC medical assessment. He challenged Ms. Singh in her cross-

examination by asking why the employer would have tried to refer him to HC in 2008 but failed to in 2012. He also drew attention to the statement in the employer's *Policy on the Duty to Accommodate* at Appendix A, entitled, "Process for Duty to Accommodate Requests" (page 13), which in the "Notes" section states as follows:

> *Medical information should be provided by the employee's medical practitioner, where applicable, and should include a description of the employee's functional limitations and/or restrictions as they relate to their duties as well as whether it is likely to be a permanent or temporary situation. Supervisors and managers cannot request specific information on diagnosis or treatment details.*
>
> *Where an employee's own medical practitioner is not able to determine the information required on the medical certificate, or clarification of functional limitations is needed, it may be necessary to refer the employee to Health Canada or other expert advisors for an evaluation.*
>
> …

[38] After he asked Ms. Singh to read that passage from the employer's accommodation policy about HC referrals, the grievor asked her why in 2012 no further attempt was made to refer him to HC, as had been attempted in 2008. Ms. Singh replied that a long time had passed since those events (11 years) and that it might have been discussed with the grievor in a meeting or phone call, but she could not remember. When challenged again on that same point, Ms. Singh stated that in hindsight, the employer should have again referred him to HC, in 2012.

[39] When challenged in her cross-examination as to why in 2008, the grievor was allowed his choice of days of work as an accommodation for his knee injury, Ms. Singh explained that it was only an interim accommodation, that it required further documentation to justify that shift, based upon his functional limitations, and that any accommodation must be based upon needs related to the physical limitation and not just the employee's wants. She acknowledged that the previous interim accommodation allowed days of work that were contrary to the VSSA but that it was only an interim matter that required further medical information to clearly set out the related functional limitations.

D. The grievor's admission against interest about his family needs on Sundays

[40] Ms. Dineen, who was the grievor's superintendent at YYZ, testified that during conversations with him about the employer's refusal to grant his preferred workweek, he told her that he had to have Sundays off due to his family obligations. That testimony was not challenged in the grievor's cross-examination of Ms. Dineen.

[41] An email from the grievor corroborated that testimony. Ms. Dineen explained the background to the email stating that he left her an extremely agitated and upset voicemail on her work phone after he was informed that his preferred accommodation was being denied for lack of supporting medical information.

[42] When challenged in cross-examination about her memory of this matter years later, she said that she has a very clear memory of it as it involved the most extreme emotions in a voicemail that she had ever received in her career. She explained that for about two minutes, the message contained the grievor yelling angrily at her about not being allowed to work his preferred schedule, Wednesday to Saturday, and that he told her to stop asking questions about more information on his functional limitations. She added that on about that same date, the grievor sent an email (June 26, 2012, at 6:07 p.m.) to her that included the following:

> …
>
> *Also, I would like to know in writing, why I am being denied Wednesday to Saturday shifts, even prior to the review of my file by the Regional Management Accommodations Committee? I view this as a violation by CBSA management of their responsibilities under the CBSA's Duty to Accommodate policy, by not accommodating me in the short term, until such a time as the Accommodations Committee makes a decision, whether or not to grant my accommodation request.*
>
> *As I advised you by phone,* ***I feel that by denying my request for Wednesday to Saturday shifts, CBSA is discriminated*** [*sic*] ***against me based on my family status, given my various family obligations, including my terminally ill mother****, which I view as a violation* [*sic*] *my rights under article 19.01 of the Collective Agreement ….*
>
> …
>
> [Emphasis added]

[43] Ms. Dineen also noted that around that same time, and in response to the grievor's stated need for a family accommodation so as to not work Sundays, she wrote to him in the previously noted June 27, 2012, email and stated this:

…

> *During our phone conversation yesterday and again in your attached e-mail, you have mentioned your family obligations. In order to request an accommodation based on Family Status, we will require the completion of a Family Status Information Form as well as an Accommodation Request Form, attached, providing as much detail and supporting documentation as possible in order to present your request to the Accommodations Committee. You must clearly demonstrate the other options you have explored to assist with your family obligations. We would ask that* [*sic*] *forward to us electronically, in order to prepare your file for presentation. Before completing the forms, feel free to call us to discuss the information that would be helpful to include in your request.*

…

[44] When asked if the grievor ever replied to her email and indicated an interest in pursuing a family accommodation as she had suggested, she replied that he did not.

III. Submissions

[45] Both parties provided competent submissions on the well-established jurisprudence related to human rights and the duty to accommodate.

[46] The grievor framed his case by stating that it turned upon finding that the employer did not accommodate him to the point of undue hardship and that it did not engage meaningfully in the accommodation process.

[47] In support of his submissions, the grievor relied upon my decision in *Cwikowski v. Treasury Board (Canada Border Services Agency)*, 2021 FPSLREB 7, in which I cited both *Herbert v. Deputy Head (Parole Board of Canada)*, 2018 FPSLREB 76, and in turn, *Central Okanagan School District No. 23 v. Renaud*, 1992 CanLII 81 (SCC)("*Central Okanagan*"), which discuss the need for the accommodation process to be a multi-party effort, with a duty upon the employer for meaningful engagement.

[48] The grievor drew attention to the following passage in *Cwikowski*:

…

> *[320] While the passage cited in that decision from* Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 (*"Central Okanagan"*) discusses the need for employees to do their part and take reasonable steps, the same responsibility is true of the employer.*
>
> *[321] The evidence before me clearly established a lack of meaningful engagement by the employer to deal with the limitations identified by the grievor's physician.*
>
> *[322] Superintendent Cacchioni repeatedly asserted in his sworn testimony that he waited weeks to seek clarification from a medical doctor as to what "overnight" meant and whether it would rule out the grievor working an 08:00-16:00 shift.*
>
> *[323] This was not reasonable and did not discharge the duty upon the employer to take an active role in seeking to implement necessary accommodations for an employee to facilitate a return to work.*
>
> *[324] I reject the employer's assertion that it required clarification as to whether an 08:00-16:00 shift would have been contrary to the doctor's assessment since she wrote that the grievor should not work overnight shifts. This is completely absurd.*
>
> *[325] While the employer's desire to seek clarification about the limitations related to loud noises was not absurd, nevertheless, it was waiting to be solved by a simple proposal that the grievor be required to wear the hearing protection readily available to all BSOs in the workplace.*
>
> *[326] On the facts of this matter, immediately upon receipt of the physician's functional limitations letter, it was open for the employer to reply to her and ask if the 08:00 shift and hearing protection would be sufficient accommodations for the grievor. Both he and his union showed themselves ready and prompt to try to act upon every one of the employer's requests for more information.*
>
> *[327] Such a meaningful response by the employer would have been consistent with its duty to participate in the accommodation effort as identified by the Supreme Court in* Central Okanagan*. The failure to was a violation of the duty to accommodate. Keeping the grievor needlessly off work without pay was wrong.*
>
> …

[49] The grievor noted the reference to the requirement that the employer engage meaningfully in the accommodation process and argued that as was the case in *Cwikowski*, the evidence in this case supports the same conclusion. He noted the employer's repeated attempts to seek clarification about the doctor notes and its failure to request a second time that he attend to an HC medical referral. He noted during his testimony that he did not refuse the earlier request that he attend to an HC

referral but rather that he sought clarification as to why the employer made that request of him. He noted that the employer failed to make such a request again during its consideration of his medical certificates, which were ultimately rejected as part of his search for his preferred medical accommodation.

[50] The grievor also relied upon the Federal Public Sector Labour Relations and Employment Board's ("the Board", which in this decision refers to the current Board and any of its predecessors) decision in *Grover v. National Research Council of Canada*, 2005 PSLRB 150. Mr. Grover was placed on unpaid leave after refusing a medical assessment and argued before the Board that he had a right to refuse an invasion of his privacy without reasonable justification (at paragraph 4). *Grover* also found that a request for an independent medical examination to determine an employee's fitness to work should be considered only in exceptional circumstances and that the justification should be fully disclosed to the employee (at paragraph 142).

[51] The grievor referred to his testimony that he did not refuse the employer's earlier request to attend to an HC referral and said that he merely asked why that request was made. He submitted that that demonstrated the employer's lack of meaningful engagement in the accommodation process. He also noted the admission in Ms. Singh's cross-examination that in hindsight, the employer should have again requested that he attend to an HC referral before his accommodation request was denied. He also pointed to the fact noted in *Grover* that the employer's witnesses who testified in this case had no medical training or expertise yet offered opinions on the adequacy of the medical notes that he provided from his physician and specialist.

[52] The grievor further argued that the employer must exhaust all options to the point of undue hardship to seek accommodation for a grievor, that the employer should have asked the grievor's specialist a second time for more information, and finally, that the employer should have requested again that the grievor attend an HC referral. He pointed to *Grover*, at paras. 92 to 94, to support this submission. Those passages state as follows:

> *[92] Furthermore, the grievor submitted that an important distinction exists whether the employer is challenging a medical certificate tendered by the employee or whether it is questioning the fitness to work in the future of the same employee. Doing both appears to be a contradiction. In each case, the rules are different*

> *and the onus is on the employer in the case of establishing fitness to return to work.*
>
> *[93] This distinction was made by the Court in* Monarch Fine Foods Co. Ltd. v. Milk and Bread Drivers, Dairy Employees, Catering and Allied Employees, Local 647 *(1978), 20 L.A.C. (2d) 419:*
>
> > There is an obvious difference between requiring a medical examination for the purpose of establishing fitness to work and requiring a medical examination to substantiate the truth of an employee's assertion, supported by his own medical certificates, that his absences were the results of some illness or injury. A company which has reasonable and probable grounds to doubt the validity of medical certificates tendered by an employee may request further medical documentation from a physician of the employee's choosing or from a physician chosen by agreement of the company and the employee.
>
> *[94] The Board determined that in the case of a medical examination for the purpose strictly to test the truth of a medical certificate and asserted illness or injury, there is no basis for this implied management right. It is submitted that where the employer finds reasonable and probable grounds to doubt the validity of a medical certificate tendered by an employee, its course of action is to request more information from the employee and his physician or to come to an agreement on the choice of a third-party physician.*

[53] Further to those same arguments, the grievor cited the decision in *Panacci v. Treasury Board (Canada Border Services Agency)*, 2011 PSLRB 2, in which the Board found fault with the employer for failing to conduct an "individualized assessment" of the accommodation needs in that case (at paragraph 100). The grievor's limitations had arisen from workplace fatigue triggered only in the mailroom, where the grievor was assigned to work. *Panacci* involved contradictory medical evidence from the grievor's physician and an HC assessment that was more skeptical of her reported symptoms.

[54] The grievor argued that similar to *Panacci*, the employer failed to follow the advice of his physician and failed to carry out an individualized assessment.

[55] And finally, the grievor cited the decision in *Giroux v. Treasury Board (Canada Border Services Agency)*, 2008 PSLRB 102, which addressed the matter of accommodation to the point of undue hardship. I do not find that relevant to this case, for the reasons that follow.

[56] The employer replied by noting the completely different evidence at bar compared to *Cwikowski*. The employer argued that contrary to *Cwikowski*, there was no information whatsoever from the grievor's doctors as to his functional limitations. Given this evidentiary reality, it argued that he failed to set out any link between his injured knee and his requested accommodation of not working Sundays. As such, it said that no *prima facie* case of discrimination was made out.

[57] In rebuttal to the allegation that it did not engage meaningfully in the accommodation process, the employer pointed to its request to the grievor to have his physician complete the functional abilities form that was adduced as evidence before the hearing and also his comment in cross-examination confirming that he and his doctor decided not to complete that form. The employer argued that the grievor failed to participate meaningfully in the accommodation process.

[58] The employer also drew attention to the Board's finding in *Taticek v. Treasury Board (Canada Border Services Agency)*, 2015 PSLREB 12, which in turn relied upon the Supreme Court of Canada and stated as follows:

> …
>
> *114 As the Supreme Court of Canada noted in* Renaud *at para. 43, employees seeking accommodation have a duty to cooperate with their employer by providing information as to the nature and extent of the alleged disability that will enable the employer to determine the necessary accommodation. The grievor failed to properly fulfill this duty.*
>
> …

[59] The employer argued that the many requests it made in writing, as documented previously and as the grievor confirmed in his testimony, demonstrate a failure and in fact a refusal on his part to provide the information necessary for the employer to conduct a proper assessment of his workplace functional limitations and to find an appropriate accommodation for him.

[60] The employer also noted the Board's decision in *Leclair v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 97, and suggested that the situation in that case was precisely that of the grievor in this case, quoting as follows:

> …

> ***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.*
>
> …

IV. Conclusion

[61] The grievor's effort to obtain a preferred days-of-work schedule outside the VSSA shift schedule due to a knee injury was a sham and camouflage. The grievor admitted to his superintendent and then confirmed in writing to her that he required Sundays off due to family reasons. For reasons that were not shared at the hearing, he refused her advice to seek a family accommodation and instead pursued these accommodation and harassment grievances.

[62] No evidence was presented that linked the grievor's knee injury to a functional limitation that would justify him never working on Sundays. The many medical notes provided to the employer were nothing more than an exercise in obfuscation.

[63] The defining comment from Dr. Peck that the requested accommodation was due to "personal medical reasons" captures the apparent desire of the grievor to avoid exposing the obvious lack of any connection between his injured knee and his desire to avoid working on Sundays. As such, the evidence (including the many medical notes) did not establish that his disability was related in any way to his request and the refusal to provide his preferred accommodation of no work on Sundays.

[64] While the grievor relied upon the passages in *Cwikowski* that addressed the need for the employer to participate meaningfully in the accommodation process, I find that the following passage at paragraph 319 of *Cwikowski*, quoting from the Board's then-recent decision in *Herbert*, better addresses the true issue before me:

> *[319]* …
>
> …

> 353 As set out in *Central Okanagan*, the accommodation process does not mean that an employer is required to put into place what a doctor states is required or what an employee wants. Many factors and variables must be taken into account when an employee's illness or disability intersects with his or her work environment, which then can lead to other potential issues.

[65] As noted in the quotation of *Herbert* in *Cwikowski*, the accommodation process does not simply allow a grievor to dictate his or her preferred accommodation.

[66] Despite the many written communications from the grievor's doctors, no information was provided to explain the functional limitations of how the grievor could work a longer shift on Saturday but could never work on a Sunday. If information could ever be provided to justify that seemingly impossible medical situation, none was ever provided to the employer, despite its repeated requests.

[67] The evidence is very clear, cogent, and compelling that the grievor's requested accommodation was not supported by any information linking it to his medical condition. As such, he failed to establish a *prima facie* case of discrimination as set out in *Moore v. British Columbia (Education)*, 2012 SCC 61, which requires that the grievor establishes, on a balance of probabilities, that he has a characteristic protected from discrimination, that he experienced an adverse impact, and that the protected characteristic was a factor in the adverse impact.

[68] For greater certainty, I find that the employer's actions throughout the events related to these grievances were reasonable in all respects and that it fully discharged its duty to participate meaningfully in the accommodation process as noted in *Central Okanagan* and more recently in *Cwikowski*. Its repeated requests for more information related to the grievor's workplace functional limitations were eminently reasonable as it was entitled to obtain information about the grievor's functional limitations.

[69] Given this finding, I conclude that the grievor has failed in his burden to establish clear and cogent evidence upon which a finding of a violation of the no discrimination clause of the agreement can be sustained.

[70] The evidence was clear that the employer provided a detailed rationale justifying its earlier suggestion that the grievor attend to an HC referral, to have his injured knee examined. I do not accept the grievor's claim that he refused the

employer's request for a HC referral due to their lack of providing a rationale for this. The written communication quoted earlier provides a very clear explanation for seeking medical assessment for the grievor's functional limitations. It strains the grievor's credibility as a witness for him to state that he did not have sufficient explanation of why his employer sought the HC referral.

[71] And finally, the evidence clearly established that the issue of the failure to refer him to HC was nothing more than a red herring and diversionary tactic on his part as his request for his preferred accommodation was not linked to his knee injuries. Given this fact, it is clear that nothing would have changed had he attended to such a referral, therefore the alleged failing to refer him to HC a second time is moot.

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

(The Order appears on the next page)

V. Order

[73] The grievances are dismissed.

May 30, 2024.

Bryan R. Gray,
a panel of the Federal Public Sector
Labour Relations and Employment Board