

ARBITRATION AWARD

BETWEEN:

CANADIAN POSTMASTERS AND ASSISTANTS ASSOCIATION
(hereinafter called the “Association”)

AND:

CANADA POST CORPORATION
(hereinafter called the “Corporation” or the “Employer”)

GRIEVOR: Anita Roberts

COUNSEL: For the Association
Sean T. McGee

For the Corporation
Twila Reid

ARBITRATOR: James C. Oakley

The Arbitration hearing was held at St. John's on August 31, September 1 and 2, 2010. The parties agreed as follows:

1. The Arbitrator was acceptable.
2. There were no preliminary objections going to jurisdiction to hear the grievance.
3. The grievance procedure was properly followed or any requirements waived.
4. The Arbitrator would remain seized of the matter following publication of the Award in the event there was a question of interpretation or compensation arising from the Award.

The following exhibits were entered at the hearing:

- Consent - 1 Collective Agreement between Canada Post Corporation and Canadian Postmasters and Assistants Association, expiry date December 31, 2009
- Consent - 2 Grievance Form, NL-08-00007, dated June 30, 2008
- Consent - 3 Grievance Form, NL-08-00012, dated December 23, 2008
- Consent - 4 Letter dated June 2, 2008 from Louise Ade to Eleanor Rose
- Consent - 5 Letter dated May 26, 2008 from Eleanor Rose to Anita Roberts
- Consent - 6 Letter dated August 18, 2008 from Eleanor Rose to Anita Roberts
- Consent - 7 Workplace Health, Safety and Compensation Commission (WHSCC) file on Anita Roberts
- Consent - 8 Manulife file on Anita Roberts
- Consent - 9 Letter dated November 6, 2008 from Anita Roberts to David Sturge
- Consent - 10 Letter dated November 7, 2008 from David Sturge, Acting Local Area Superintendent to Anita Roberts
- LA - 1 Consultation minutes dated October 17, 2007 between the Association and the Employer re Port Saunders, NL hour allocation change
- LA - 2 Letter dated December 18, 2007 from Norman Randell to Eleanor Rose

- LA - 3 Letter dated June 28, 2008 from Eleanor Rose to Louise Ade,
- ER - 4 Email dated October 24, 2006 from Eleanor Rose to James McGowan with note
- ER - 2 Email dated October 30, 2006 from James McGowan to Eleanor Rose with note
- ER - 3 Email dated November 1, 2006 from Denise Sullivan to Eleanor Rose
- ER - 4 Letter dated November 13, 2006 from Ian Hutchinson, West Coast Physiotherapy Clinic Ltd. to Deanna Labine, WHSCC
- ER - 5 Letter dated November 23, 2006 from Ian Hutchinson, West Coast Physiotherapy Clinic Ltd. to Dr. Irfan
- ER - 6 List of "Suggestions for Improvement of Processes in Port Saunders"
- ER - 7 Report of Gemma Walsh re Port Saunders
- ER - 8 Letter dated February 1, 2008 from Eleanor Rose to Norman Randell
- ER - 9 Mobility Form
- ER - 10 Email dated April 8, 2008 from Deanna Labine to Eleanor Rose and John Demmings
- ER - 11 Email dated August 21, 2008 from Laurie Stewart to Louise Ade with attached email

Nature of the Grievance

The Grievor was employed as the full time Postmaster in Port Saunders, NL. Following a workplace injury and an absence from her position, she returned to work with medical restrictions. The Union grieves that the Employer failed to meet its duty to accommodate the Grievor. Grievance NL-08-00007 grieves failing to accommodate the Grievor's disability, stopping pay for injury on duty leave, and removing the Grievor from her position and placing her in a lower classification position with reduced hours of work. Grievance NL-08-00012 grieves changes to work schedule and consequences regarding the pension plan. The Employer submits that it complied with its duty to accommodate the Grievor, and that there was no violation of the Collective Agreement.

Collective Agreement

The relevant Articles of the Collective Agreement are as follows:

Article 2 - Definitions

2.01

...

- (s) “transfer” means the appointment, at the request of an employee, to a vacant indeterminate position at their substantive or lower classification level.

Article 5 - Discrimination

5.01 No Discrimination

- (a) The Corporation and the Association agree that there shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or stronger disciplinary action exercised or practised with respect to an employee by reason of age, race, creed, colour, disability, national origin, ethnic origin, political or religious affiliation, sex, sexual orientation, marital status, family status, conviction for which a pardon has been granted, or a membership or activity in the Association.
- (b) The Corporation and the Association shall make every effort to ensure that no employee is subjected to sexual harassment. Sexual harassment shall be defined as but not limited to any incident or series of incidents related to sexuality that may be verbal, physical, deliberate, unsolicited or unwelcomed.

...

Article 11 - Staffing

...

11.03 Assistant - fifteen (15) Hours or more

- (a) An opportunity to fill a vacancy for an Assistant position having fifteen (15) or more regularly scheduled weekly hours will be offered to the Assistant in the Post Office where the opportunity exists whose regularly scheduled hours exceed fifteen (15) per week. . . .
- (c) If the position cannot be filled by application of paragraphs (a) or (b) above, it shall then be offered to employees who are on the applicable transfer list in accordance with Clauses 11.05 (d), (e), (f) and (g).

...

11.05 Transfer

Recognizing that Employees who have demonstrated satisfactory performance in their current position and who are qualified for the position to which they wish to transfer, have the opportunity to transfer within the Corporation, the following is hereby agreed;

- (a) A vacant position will be filled by transfer after all the provisions of Clause 35.10 have been followed and prior to the opening of a competition.
...
- (e) The Corporation shall maintain transfer lists of employees for each office as applicable, indicating date of receipt and classification level of the employee. Transfer applications shall be considered to have been received by the Corporation from the time they are received by the staffing officer in the area of competition where the employee wishes to transfer.
- (f) In the application of the transfer process, the Corporation shall first examine the appropriate transfer list and the position shall be offered to the employee on the appropriate transfer list with the most years of continuous employment within the bargaining unit.

Article 12 Allocation of Hours

...

12.05 Reduction of Hours

- (a) When it is necessary to reduce employee hours in a Grade Office, reductions shall be made, to the extent they are necessary and where operational requirements permit, starting with a vacant position if it exists and then with the employee who works the least number of regularly scheduled hours. . . .

Article 19 Incapacity/Attendance

...

19.02 In the event that an employee has a disability, the Corporation shall make every reasonable effort to accommodate the employee, up to the point of undue hardship. The Corporation, the employee and the Association will cooperate in attempting to find the employee suitable work, beginning with work covered by this collective agreement.

Article 20 Hours of Work

...

Full-Time Employees

20.03 Hours of Work

- (a) The normal hours of work shall be forty (40) per week, eight (8) hours per day, and five (5) days per week.

...

Part-Time Employees

20.07 Hours of Work

- (a) The normal hours of work will be from four (4) to forty (40) hours per week.

...

Article 32 Sick Leave

32.01 Accumulation of Credits - Full Time Employees

An employee shall earn sick leave credits at the rate of one and one-quarter (1 1/4) days for each calendar month for which he is entitled to receive pay for at least ten (10) days.

32.02 Accumulation of Credits - All Other Employees

- (a) An employee shall accumulate sick leave credits at the rate of five (5) hours per month for each month in which he is entitled to receive pay for at least forty (40) regularly scheduled hours of work or provision of postal service. Moreover, he shall accumulate an additional hour of sick leave credit for each additional monthly twenty (20) regularly scheduled hours of work or provision of postal service, paid in excess of the first forty (40) regularly scheduled hours of work or provision of postal service, but such total credit shall not exceed ten (10) hours per month.
- (b) The regularly scheduled hours of a Part-time employee referred to in paragraph (a) can be the employee's own hours and/or the regularly scheduled hours of another employee if he assumes that other employee's regularly scheduled hours in whole or in part. Sick leave credits are not earned in respect of extra hours worked beyond the regularly scheduled hours of an office, or overtime hours paid.

- (c) An employee who is on vacation leave shall continue to earn sick leave credits in accordance with the above.

32.03 Eligibility - All employees

An employee is eligible for sick leave with pay when he is unable to perform his duties or any available work because of illness or injury provided that:

- (a) he satisfies the Corporation of his condition in such manner and at such time as may be determined by the Corporation,
- and
- (b) he has the necessary sick leave credits.

...

Article 33 Injury on Duty Leave

33.01 (a) The Article does not apply to Postmasters in a group office in non Corporation owned/leased premises.

- (b) An employee shall be granted injury-on-duty leave with pay for such period as may be determined by a Provincial Workers' Compensation Board that he is unable to perform his duties or any available work because of :

- (i) personal injury accidentally received in the performance of his duties and not caused by the employee's wilful misconduct
- or
- (ii) sickness resulting from the nature of his employment
- or
- (iii) over-exposure to radioactivity or other hazardous conditions in the course of his employment,

if the employee agrees to pay to the Corporation any amount received by him for loss of wages in settlement of any claim he may have in respect of such injury, sickness or exposure.

Article 61 Canada Post Corporation Pension Plan

61.01 Pursuant to the *Public Sector Pension Investment Board Act*, the Corporation established the Canada Post Registered Pension Plan on October 1, 2000, to replace the pension plan that until then existed under the *Public Service Superannuation Act*.

Evidence

The witnesses called by the Association were Anita Roberts, Grievor and Louise Ade, President of the Newfoundland and Labrador Branch of the Association. The witnesses called by the Employer were Eleanor Rose, Local Area Manager, Chris White, Team Lead at the Workplace Health, Safety and Compensation Commission (“WHSCC”) and John Demmings, Workers’ Compensation Specialist for the Employer. Chris White testified by video conference from Corner Brook by agreement of the parties.

The Grievor, Anita Roberts, was employed as Postmaster in Port Saunders, a Grade 3 Post Office, since 2004. She commenced work for the Employer in 1981. She served as Postmaster in Roddickton and Pools Cove prior to commencing her position in Port Saunders. Port Saunders is a business community and a Government service centre. There were 44 hours per week allocated to the post office, 40 hours for the Postmaster and 4 hours for the part-time Postal Assistant. The post office has 312 mail boxes. The mail includes heavy parcels and bundles of newspapers. Following the Grievor’s return to work from a workplace injury, the Employer reviewed information provided by the WHSCC and others. The Employer placed the Grievor in a 16 hour per week part time position with reduced wage rate and benefits. The Grievor was dissatisfied with this arrangement and retired from employment. In the Award, I will review the evidence with respect to the Grievor’s functional capacity, the workplace at the Port Saunders Post Office, and the events related to the Grievor’s return to work following her workplace injury.

Chris White, Team Lead at WHSCC, testified about the workers’ compensation program in Newfoundland and Labrador. The WHSCC administers Workers’ Compensation claims for Canada Post Corporation employees in the province pursuant to the *Government Employee Compensation Act*, Statutes of Canada. The amount of any Workers’ Compensation benefits paid out by WHSCC to a Corporation employee is recovered from the Corporation together with a 12.5% administration fee. Mr. White stated that the role of the WHSCC case manager is to facilitate the medical management of a claim. The benefits received by the Grievor followed the regular pattern for workers’ compensation claimants. She was paid temporary earnings loss (“TEL”) benefits, followed by rehabilitation benefits while she completed the Early and Safe Return To Work program (“ESRTW”), and then extended earnings loss (“EEL”) benefits. Mr. White stated the WHSCC does not assess EEL benefits until the worker reaches maximum medical recovery, meaning that no further significant functional improvements are expected.

The Grievor was injured on the job in January, 2006. She testified that she had pain in her shoulders, neck and head. She continued working until May, 2006 when she filed a claim with WHSCC. She was off work until January, 2007. At that time she returned to work under the Early and Safe Return To Work program. She worked part time hours and a part time Postal Assistant was assigned to work with her at the same time. This arrangement continued for over one year. She did not work more than 4 hours per day, 4 days per week. She was assessed in April, 2008 for extended earnings loss (“EEL”) benefits by WHSCC. An email dated April 8, 2008 from Deanna Labine, the Grievor’s case manager at WHSCC to Eleanor Rose, Local Area Manager, and John Demmings, the Employer’s Workers Compensation Specialist, requested that the ESRTW forms be completed every week until the Grievor’s permanent accommodation was settled.

The Grievor’s WHSCC case manager, Deanna Labine, sent a letter to the Grievor dated May 12, 2008, stating that her entitlement to EEL benefits was calculated at \$305.63 per week, representing 80% of her net wage loss. The letter stated, in part, as follows:

Dear Ms. Roberts:

This correspondence is in relation to your ongoing entitlement to Workplace Health, Safety and Compensation Commission (WHSCC) lost time benefits and will serve to reiterate our meeting of March 31, 2008, regarding the results of your Labour Market Re-Entry (LMR) Assessment report.

. . . It was determined through your functional testing, which you completed through West Coast Physiotherapy, that you were able to work 4 hours per day in a sedentary to light capacity. Using this information, as well as an analysis of your transferable skills, employment history, education status, etc., four options were identified as suitable means of restoring a portion of your pre-injury earnings. . . .

In this regard, and in accordance with Policy RE-15 the appropriateness of the four identified options were examined by you. Upon review, you determined that of the four options identified the most appropriate would be NOC 122 “Clerical Supervisors”, which is the category that your pre-injury position of Post Master Grade Officer would be found. This is the position which your employer, Canada Post, is currently accommodating you in.

An additional factor in considering your entitlement to future WHSCC benefits is your current employment situation. You are currently being accommodated in your pre-injury position at 16 hours per week with functional restrictions. Your employer

is currently putting together a permanent accommodation package which will require you to work 16 hours per week at an hourly rate of \$23.20 with restrictions. . . .

In reviewing your earnings at the time of your injury, indexed to 2008 (subject to the maximum compensable ceiling of \$49,295.00 per year) wage loss calculations will be based on a gross weekly wage of \$947.98 per week. In offsetting your actual earnings as a Post Master with Canada Post, this provides a weekly entitlement of \$305.63 (see attached). This continuing rate is effective June 17, 2008 and you should be aware that these benefits are potentially payable to age 65 or as long as your wage loss exists. Periodic reviews of your medical status, income situation, etc. will determine future entitlement.

. . .

On June 17, 2008, the Grievor commenced receiving EEL payments from WHSCC based on the assessed earning capacity. The calculation of EEL benefits by WHSCC was based on functional testing that determined that the Grievor was able to work 4 hours per day. The letter from WHSCC referred to a Functional Capacity Evaluation (“FCE”) Report dated September 25, 2007 completed by West Coast Physiotherapy Clinic Ltd. The report referred to reduced right arm/hand function, reduced hand strength and pain with reaching over shoulder level, pain and reduced mobility of shoulders and neck, with reduced range of motion, particularly into extension. The Report referred to the 4 hour per day tolerance as follows:

Workday tolerance appears reduced by the irritability and spasm of her neck and shoulder girdle muscles. In addition to her FCE performance, the evidence of her return to work plan to date suggests that a 4 hour work day is reliable at present. In addition, the IME recommendations, her therapist and family doctor notes suggest prognosis for more than 4 hours in her current work is very guarded.

. . .

The FCE Report reviewed the duties of the Grievor’s position, and noted that no job site analysis had been completed. Chris White testified that the WHSCC does an annual review of extended earnings loss, and if an employee earns more than the estimated earning capacity, then there may be an adjustment of the EEL benefits. Mr. White said he was not aware of any evidence in the file to say there was an increase in the Grievor’s functional capacity subsequent to the letter of May 12, 2008. He said the Employer offered accommodation to the Grievor in a position with 4 hours of work per day, 4 days per week. The position did not exist prior to the workplace injury. He said WHSCC policy did not require an employer to create a position for an injured worker. Mr. White also testified that the Grievor was awarded a permanent functional impairment (“PFI”) lump sum award

of 15.5% of annual salary. He said the PFI award is based on medical evidence and the impact of the workplace injury on total bodily function.

The determination by WHSCC that the Grievor's work capacity was 4 hours per day, was based, in part, on a letter to the case worker from her family physician, Dr. Irfan dated August 9, 2007, which stated as follows:

Dear Ms. Labine:

I am in receipt of your correspondence to me of August 1, 2007 regarding the above patient of mine. In response to your questions:

1. It will be highly unlikely that Mrs. Roberts can increase the number of hours she works each day, 4 hour shifts, 4 days per week seem to be her maximum tolerance. At around 3-3.5 hours of light sorting duties, she begins to experience heaviness, fatigue and tiredness of her upper girdle.
2. Physiotherapy and massage therapy should continue, to maintain status quo. This is the opinion of the therapist himself. It would be extremely beneficial if Canada Post complies with occupational therapist work site modifications.
3. Mrs. Roberts is most definitely not able to increase her duties that she is performing at this time. She is delegated to sorting and light duties, with minimal lifting. Any activity beyond this tends to precipitate a flare up, which takes days to recover from. After one year of extensive physio and massage therapy, it is highly unlikely she will experience any significant improvements. I am also cautioning her, during our visits, not to over exert herself as her limitations could be quite longlasting.

Indeed, we might have to accept that this is the maximum limit of this workers capabilities at this point of time, following this injury.

...

John Demmings, Workers Compensation Specialist, testified that the Employer ensures that a return to work plan is in place so that employees can return to work following a workplace injury. The Employer retains Manulife to manage third party disability claims by employees. The WHSCC decides if there is a workplace injury, and decides issues of temporary loss, medical aid, rehabilitation and extended earnings loss. Following the injury, an employee is placed on injury on duty leave pending the initial decision from the WHSCC with respect to approval of the claim for temporary earnings loss. Mr. Demmings said that injury on duty leave continues until the employee

returns to full time duties, or there is an award of extended earnings loss benefits. He said that an employee is not allowed to be in receipt of both injury on duty leave benefits and extended earnings loss benefits at the same time. The Grievor's injury on duty leave ended effective August 25, 2008. Mr. Demmings referred to a letter from Manulife with respect to the Grievor's work capacity. He did not know if Manulife knew about the possibility of changing the height of the mail boxes to accommodate the Grievor. The letter, dated December 5, 2007, stated as follows:

The Disability Management Team of Manulife Financial has identified a permanent partial disability for Anita Roberts.

The objective medical documentation has been reviewed, and based on the information provided the following permanent restriction(s) have been identified:

- Work day should be limited to 4 hours per day, 4 days per week
- No repetitive bending or twisting of the neck
- Minimal use of right arm/shoulder at all levels
- Sedentary to light degree of work
 - Lifting restriction of 25 lb occasionally
 - Lifting restriction of 10-15 lbs frequently

We have been notified by you that you are unable to accommodate this employee in her present position so we would please ask you to commence a job search. We will look forward to speaking with you about accommodation opportunities for your employee.

Please do not hesitate to contact us should you have any questions or concerns.

Sincerely,
Tanya MacLean
Case Manager

Anita Roberts testified with respect to changes that were made at the Post Office after she returned to work in January, 2007. The level of the mail boxes was raised. Although this allowed her to access the lower mail boxes, the top level was too high for her to reach. She had difficulty sorting the mail because sometimes the delivery driver threw the mail into a pile, with large parcels piled onto small parcels. She raised the issue of mail delivery with Ms. Rose, but did not believe anything was done about it. The Grievor testified that the Employer sent 3 carts at various times, but none of them were suitable. The first one was a huge steel cart that was too heavy. The second one was

a small cart that was too light and was easily broken. The third one was a steel cart that was too long and too difficult to handle. There was a problem with the mail drop door catch and the Grievor eventually arranged for her husband to fix it. The Association requested that the Employer provide a locking stool to allow the Grievor to reach the highest level of mail boxes, but this was not provided. The Grievor acknowledged that the Employer made some changes to accommodate her. These changes included installing sliders for the wooden drawers, supplying anti-fatigue mats, replacing the door, lowering the height of the counter used for the weigh scales and scheduling her work so that she did not have to work early in the morning when the mail arrived. She had been advised by her physiotherapist not to reach up or bend down and to limit the weight that she lifted. It was suggested to her by the Employer that, for the mail boxes she could not reach, that she ask the customers to get the mail from general delivery. However, she was reluctant to direct customers in that manner. The Grievor said the failure to make all the changes that were needed affected her ability to work more hours.

Eleanor Rose testified with respect to modifications made to the Port Saunders Post Office to accommodate the Grievor. In November, 2006 Ms. Rose reviewed recommendations made by West Coast Physiotherapy Clinic for a proposed return to work plan. The recommendations were to use a cart in the drop off area to reduce the need to lift parcels, lower the front counter, install freely moving drawers, install anti-fatigue mats, move up the lower level of mail boxes, review the location of mail drop slot, review the lock on the hatch door, and review the drop off door lock. The report noted that moving the mail boxes would require significant renovations. Ms. Rose referred to her email correspondence with building maintenance and retail support staff. The correspondence indicated that there were no funds available in 2006 for an image upgrade for the post office, and in November, 2006 there was no plan to change the configuration of the mail boxes. Ms. Rose testified that she sent a cart to the Port Saunders Post Office. She heard much later that the cart was not being used. She visited the Port Saunders Post Office in about March, 2007. She believed the Grievor was satisfied with the changes that had been made at that time. Ms. Rose testified that the mail boxes were raised to accommodate the Grievor. She did not know before the arbitration hearing that some of the mail boxes were too high for the Grievor to reach. She did not know that there were problems with all three of the carts supplied by the Employer. Ms. Rose testified that when the Grievor returned to work in 2007, she was told to let the part time employee do the work that required reaching. The Grievor's hours of work were modified so that she started later in the day and did less sorting. The Grievor was advised to restrict her activities. Commencing February 19, 2008, the part time employee no longer worked with the Grievor, and the Grievor started to work on her own 4

hours per day on Tuesdays to Fridays. She continued to work under the “Early and Safe Return To Work” program.

By letter dated May 26, 2008, from Eleanor Rose, Area Manager to the Grievor, the Employer informed the Grievor that it would implement a part time position for her. The letter stated as follows:

This letter is to advise that effective June 17th, in conjunction with recent advisories from Worker’s Compensation, Canada Post will implement a stand alone 16 hour weekly position for you to accommodate your work restrictions.

Through prior discussions and per your input, the schedule will be Tuesday to Friday, 10:30 - 12:30 and 13:15 - 15:15. As well, due to your restrictions, there will be no opportunity for additional hours beyond the 4 hours daily, 4 days weekly.

Due to the implementation of this new schedule, there will be some changes to your benefits which will be addressed by Worker’s Compensation.

The Grievor testified that she did not accept the statement in the letter that there would be no opportunity for additional hours. She felt that she had the potential to work more hours. She asked Ms. Rose for the opportunity to work more hours, but the request was denied. Louise Ade, President of the Newfoundland and Labrador Branch of the Association, testified that, following discussion with the Grievor, she sent the following letter dated June 2, 2008 to Eleanor Rose:

I received a copy of the letter you wrote to Anita Roberts, postmaster Port Saunders regarding her weekly hours of work. I have a number of concerns about this move by Canada Post.

I was reviewing the letters from Ian Hutchinson, PT, West Coast Physiotherapy Clinic dated November 23rd, 2006 and February 25th, 2007. There were several recommendations to improve Ergonomics listed on the letter dated November 23rd, 2006, however not all recommendations were implemented. Letter dated February 25th, 2007 states:

“Considering improvements have been implemented in the Postal Depot to date, particularly in the counter/weight scales, the drawer units, and front counter no longer appears to pose risks during use. Remaining issues include:

. Review of the 312 Mail Boxes design to move the lower level of boxes up from 9" (to avoid the low level reaching and bending or crouching to assess the lower boxes) is unchanged. This is the primary and most time consuming daily task in the Depot. Mail distribution to mailboxes is typically performed ongoing throughout the shift and staff report that at times they work after hours to distribute the mail/and flyers into the mail boxes. The three low tiers require excessive reaching and bend/crouching.

. Use of a low trolley or hand cart in the drop room has been recommended. Currently, a second high trolley is in place. These trolleys require the products be lifted to bring in from the mail room. A cart would allow the parcels and flyers to be placed on the cart by the delivery staff. A second option would be a 2 wheel Dolly which would also reduce the lifting to handle the heavier parcels from the floor. Pictures of these options are attached.

. 2 of the 3 work areas now have anti-fatigue mats at the front counter and one at the 2 mail box frames. An additional 9 ft of mat would allow the remaining mail box frames to have anti-fatigue mat.

. The Mail Drop Door continues to "catch" appearing to drag the bottom of the door box. Effort exceeding 50 lb. was required to open the door which opened most effectively when bumped open with body weight. This would appear to fit issue, and be easily controlled by the contractor who installed the door.

The mail volumes sorted into the mailboxes and the ergonomics of the Mail Box frame continue to be unresolved issues. Ergonomic options to change the lower mailbox heights have not been successful to date. An option to re-organize the existing frame may be feasible:"

A letter dated June 15, 2007 to you from Kent Pottle, Regional Occupational Health Medical Consultant stated that there were no apparent permanent limitations at this time. After Ms. Roberts took part in a Functional Capacity Evaluation on September 25, 2007, the WHSCC wrote a letter dated October 21, 2007 to Mr. Richard Chow asking if the Corporation was able to offer Ms. Roberts a permanent accommodation.

Whether the restrictions were temporary or as in this case indefinite would depend on what cost is expected of the employer. The cost of accommodation may not be great for a worker with temporary restrictions, however, if the restrictions are indefinite as outlined in the latest Doctor's 8/10 dated May 8, 2008, the Corporation is expected to accommodate the workplace for the worker up to the point of undue hardship. Section 89.1(7) of the Workplace Health, Safety and Compensation Act states:

“An employer to whom this section applies shall accommodate the work or the workplace for the worker to the extent that the accommodation does not cause the employer undue hardship”

The employer’s duty to accommodate up to the point of undue hardship is further entrenched in the Human Rights Act.

There have been recommendations to redesign the lockboxes to accommodate Ms. Roberts restrictions and the cost should not be reason enough to refuse this accommodation. I have two questions. Have all recommendations for accommodation been implemented and as well, have all options to accommodate Ms. Roberts in another office been investigated? One should be exhausted before you look at the other options.

Ms. Roberts feels that her injury is as a result of the heavy workload in Port Saunders post office and the refusal by the Corporation to provide extra help as requested. She has notified the Corporation and the Union on numerous occasions over the past several years about the workload being too heavy for one person and requested the part time position’s hours be increased accordingly. A Union officer, Norman Randell, visited Port Saunders post office last October and early November to witness Ms. Roberts work day. As a result he wrote you with a recommendation to increase the part time hours in that post office. This request by the Union and all requests by Ms. Roberts in the past have been denied.

Your letter to Ms. Roberts dated May 26, 2008 indicates that the Corporation is unwilling to further accommodate her. As well you have refused to give her the opportunity to work any additional hours to the hours outlined in this letter. In particular your statement, (“As well, due to your restrictions, there will be no opportunity for additional hours beyond the 4 hour daily, 4 days weekly,”) violates section 89.1(7) of the Workplace Health Safety and Compensation Act, section 9(1)(a) of the Human Rights Code and Article 5 and 33 of the Collective Agreement.

Ms. Roberts is a 40 hour a week postmaster and under the protection of the WHSC Act, Human Rights Code and the Collective Agreement. As such she is entitled to be accommodated into the workplace up to the point of undue hardship. Canada Post has a legal and moral obligation to exhaust all avenues of accommodation and your statement saying that she will not have the opportunity to work additional hours has Canada Post opting out of that responsibility. With further medical intervention, Ms. Roberts functional abilities may improve thus giving her the ability to work longer hours. As well more effective accommodations, without an improvement of functional abilities, may enable her to increase her work hours.

All the recommendations to accommodate the office to Ms. Roberts restrictions should be implemented. As these restrictions are indefinite, cost or inconvenience should not be a barrier to the accommodations needed to enable her to work in her post office. All other avenues of accommodation should be investigated and viable options explored. Also there should be another Functional Capacity Evaluation done for Ms. Roberts as the latest one was over 9 months ago. I fail to see how you can deny Ms. Roberts from increasing her hours when you do not have an updated and current Functional Capacity Evaluation to go by.

Sincerely;
Louise Ade

Ms. Ade testified that when the Grievor's permanent restriction was identified, the Employer had an obligation to pay the cost to make all necessary modifications to the workplace to meet its duty to accommodate the Grievor before considering any change in the Grievor's employment status. She said that the Employer should have had a job site analysis performed to see how the Grievor functioned in the modified workplace, and then obtained an updated FCE Report to see if the Grievor had increased her work tolerance.

By letter dated June 20, 2008, Eleanor Rose replied to Ms. Ade's letter as follows:

I have now reviewed your letter dated June 2, 2008 which references the accommodation of Anita Roberts in Port Saunders NL and I have a few comments.

Canada Post is well aware of the responsibilities an employer has under the accommodation process and I assure you we are and will continue to address the accommodation of Ms. Roberts up to, as you reference, the point of undue hardship.

Many physical changes within the Port Saunders office have been made to meet the needs of Ms. Roberts accommodation, a process we will continue to monitor.

In your letter you make reference to my statement that Ms. Roberts will not be allowed to work any "extra hours" past the four (4) hours per day four (4) days per week limit and how that is violation of section 89.1(7) of the Compensation Act. This limitation was not placed on Ms. Roberts directly by the Corporation but was a condition of her accommodation needs; we are simply complying with that direction.

You also make reference to a need on the part of the corporation to seek alternate employment for Ms. Roberts in another office or location. This was given

consideration and there was not only no opportunity for such accommodation but doing so would have given the similar results as that conducted in her home office of Port Saunders. As a note, at no time did Ms. Roberts indicate to corporation representatives that she was mobile a responsibility which falls to the employee involved.

As well, although the corporation does and will continue to keep as updated information as possible on an employee's accommodation, if there are changes, there is also an equal responsibility on the part of the employee to bring any such changes to the attention of the employer.

Finally, you make reference that cost or convenience factors should not be used as a barrier to limit accommodation and I assure you that, although they are important factors, they are not the deciding factor or used as a barrier to place limitations on the accommodation exercise.

I trust this information sufficiently explains the corporation's position but if not, please do not hesitate contact the undersigned at (709) 643-8352.

Eleanor Rose
Local Area Manager

By letter dated August 18, 2008 the Employer advised the Grievor that she would be permanently accommodated in a part time position. The letter stated, in part, as follows:

Dear Ms. Roberts:

It is my understanding that the Case Management Team of the Workplace Health Safety & Compensation Commission (WHSCC) has reviewed your file in relation to your work related injury of January 9, 2006. Based upon this review the Commission has concluded that a work restriction prevents you from returning to your pre-accident employment.

Canada Post Corporation concurs with this decision and wishes to advise you that effective August 25, 2008 you will be permanently accommodated in a position of 16 hours per week, which reflects the restrictions as outlined by the WHSCC and specifically section 89 of the Workplace Health Safety and Compensation Act.

In light of the above, Canada Post Corporation will amend your employment status from your current full time status of eight hours per day, five days a week, to your new schedule of four hours per day, four days per week. Compensation and benefits will be commensurate with the hours worked in this accommodated position as

outlined in the Collective Agreement. Should you have any concerns regarding the change in your employment status you may wish to contact a Human Resource representative, at 1-902-494-4051.

...

Eleanor Rose
Local Area Manager

The Grievor was on injury on duty leave and was paid her Postmaster salary until she was placed in the part time position on August 25, 2008. She commenced work in the part time position where she performed some of the same duties she had performed as Postmaster. She had reduced hours of work, wages and benefits. Her pay level was changed from Level 4 to Level 2, a difference of \$1.60 per hour. The Grievor testified that she was upset about the Employer's decision to place her in the part time job. The change in pay and status caused a strain on her and her family and she decided to retire. She retired effective January 21, 2009. She testified that she likely would not have retired if she could have continued in the position of Postmaster, with the opportunity to increase her hours of work, and if the Employer had made the required modifications to the workplace. The Grievor was off work for lengthy periods of time from July, 2008 to December, 2008, as a result of personal and family sickness.

Louise Ade testified that the Association had requested an increase in the hours allocated for the Port Saunders Post Office. There was an assessment done in 2005, but there was no change in allocated hours at that time. An assessment was done for the Employer in October, 2007 by Gemma Walsh, a Postmaster at a Grade 5 post office. Ms. Walsh reported on her counts of various work items and her observations of the work flow. She recommended to Eleanor Rose that there be no change in the allocated hours. Norman Randell participated in the assessment in 2007 on behalf of the Association. He recommended that the hours be increased by 4 hours on Monday and 3 hours on Friday. The Employer accepted the recommendation of Gemma Walsh and did not accept the recommendation of Norman Randell. The Employer decided that the allocation of 44 hours was sufficient. The Employer asked the staff at the Port Saunders post office to change their work practices to be more efficient, for example, that employees use the full day to sort the mail and not try to sort all the mail in the morning.

The Grievor did not recall whether or not she discussed with Dr. Irfan, her family physician, the possibility of working more than 16 hours per week. She did not ask Dr. Irfan to write a letter to

approve more hours. She agreed that Dr. Irfan's report, dated August, 2007, stating it was highly unlikely she could work more than 4 hours per day, 4 days per week, was accurate at the time it was written. She testified that she sent Eleanor Rose all of her medical doctor's 8/10 forms that were sent to WHSCC.

Ms. Rose testified that the medical information, and the assessment by Manulife, indicated that the Grievor was permanently restricted to 4 hours per day, 4 days per week. She said the Grievor would need medical documentation to support working more hours. She said the Employer could not accommodate the Grievor in a 40 hour per week Postmaster position when she could only work 16 hours. Her letter to the Grievor stated that there was no opportunity to work additional hours for several reasons, namely, there would be a risk of injury if she worked more hours, the Grievor never requested to work more hours, Ms. Rose was advised by WHSCC and by Manulife that the Grievor was not allowed to work more hours and there was no medical or other documentation to support working more hours.

Association Submission

The Association submitted that the Employer breached Article 33 by removing the Grievor from injury on duty leave in August, 2008 after she started to receive EEL benefits. Any amount paid by WHSCC to the Grievor is reimbursed by the Employer. The Association referred to prior arbitration awards that considered the injury on duty leave article in the Collective Agreement and in the collective agreement between the Corporation and the Canadian Union of Postal Workers. At issue under Article 33 is whether the Grievor continues to be unable to perform "any available work". The question of "available work" cannot be determined until the search for an available position is completed and the Employer has fully complied with its duty to accommodate the Grievor. The Association referred to *Canadian Postmasters and Assistants Association v. Canada Post Corp. (Northcott)* [1993] C.L.A.D. No. 329 (Thistle) (the "Northcott" award). In that case the grievor had been totally disabled and was in receipt of rehabilitation benefits. The arbitrator ruled that the injury on duty leave article did not establish a specific trigger point for the employer to remove an employee from injury on duty leave. The arbitrator stated that even if he was wrong in finding there was no stated trigger point, it would still be necessary to consider whether the Grievor was unable to perform "any available work". He said the phrase "available work" does not indicate whether it means the full duties of any specific position, a position that accommodates the physical limitations of the employee, or a position outside the scope of the bargaining unit. There was no clear evidence

in the *Northcott* case to say that the grievor was able to perform any available work. The arbitrator ruled that commencing to receive rehabilitation benefits did not meet the requirements for termination of injury on duty leave. The award was upheld by the Newfoundland and Labrador Supreme Court, Trial Division in *Canada Post Corp. v. Canadian Postmasters and Assistants Assn.* [1994] N.J. No. 103. The Association submitted that the Employer had not complied with its duty to accommodate the Grievor. According to *Syndicat des Employées de Techniques Professionnelles et de Bureau d'Hydro Québec, Section Locale 2000 v. Hydro Québec* [2008] 2 S.C.R. 561, 174 L.A.C. (4th) 1 (“*Hydro Québec*”), the Employer had to satisfy the Arbitrator that it cannot take any further action to accommodate the Grievor without undue hardship. The Employer’s actions discriminated against the Grievor. The Employer could have continued to provide a part time postal assistant to assist the Grievor, or the Employer could have completed the modifications to the post office that were recommended by the FCE report. The September, 2007 FCE report was based on the physical structure of the post office as it existed at that time. The report identified barriers to the Grievor performing her duties in the post office, including the height of the mail boxes, the lack of a locking stool, and the lack of a proper cart to help the Grievor move the mail. The Employer had raised the mail boxes so that the Grievor would not have to bend down, but the raised level of the boxes made it more difficult to reach the upper boxes. The Employer had not even obtained an estimate of the cost to reconfigure the mail boxes so that all boxes were within the Grievor’s range of motion. The limitation of 4 hours per day, 4 days per week was based on the physical layout of the existing post office without the required modifications. An assessment completed in the spring of 2007 suggested that, with work hardening, the Grievor could work 8 hours per day. To comply with its duty to accommodate, the Employer was required to allow the Grievor to remain in the Postmaster position, complete the modifications required in the post office, and then have the Grievor complete a new FCE. The Employer removed the Grievor from the Postmaster position, reduced her pay from Grade Level 4 to Grade Level 2 and changed her status to part time. As a part time employee her benefits were affected, in particular, holidays (Article 21), vacation (Article 22), accumulation of sick leave credits (Article 32), rate of acting pay (Article 40), pension (Article 61), and right to transfer. The Grievor continued doing the same duties she performed as Postmaster. The Association referred to case authorities on the duty of accommodation, including *Riverdale Hospital and CUPE, Local 79* (1994) 41 L.A.C. (4th) 24 (Knopf), and *Ontario Secondary School Teachers Federation, Local 10 v. Peel Board of Education (Lambert)* (1998) 73 L.A.C. (4th) 183 (Albertyn). The Association requested that the Grievor be allowed to return to her Postmaster position and be awarded compensation in an amount to be determined.

Corporation Submission

The Corporation submitted that the burden is on a party seeking a financial benefit to prove that its interpretation of a collective agreement article, such as the Injury on Duty Leave Article, is the correct interpretation. If the Association's interpretation was correct, then an employee in receipt of any Workers' Compensation benefits, including EEL benefits, would qualify for injury on duty leave. This would be an extraordinary benefit because it would mean an employee could receive full salary and benefits to age 65, regardless of ability to work. Such a benefit would require express language in the Collective Agreement. Injury on duty leave ceases once an employee commences to receive EEL benefits from WHSCC. The arbitrator in the *Northcott* case did not need to interpret the meaning of "any available work", and the facts of the case could be distinguished from the present case. "Available work" must mean a position other than the employee's pre-injury position. The Injury on Duty Leave Article refers to the pre-injury position in its reference to "his duties". The *Hydro Quebec* case established the standard for the duty to accommodate, and stated that it is relevant to look at the entire period of time to assess whether the duty was met. It is not necessary for an employer to go to impossible lengths to accommodate an employee. The accommodation provided was reasonable. There was no evidence that any different accommodation would have resulted in the Grievor working more hours. Port Saunders is allocated 44 hours per week, 40 hours for the full time Postmaster and 4 hours for the part time Assistant. The Employer followed the "Early and Safe Return to Work" program of WHSCC after the Grievor was cleared to return to work. The Employer approved extra hours for the Postal Assistant so that the Grievor would not have to work alone during the ESRTW program. At issue was the extent of the disability. The Grievor was able to work 4 hours per day, 4 days per week with restrictions. The Grievor was not treated differently than any other employee who worked the same number of hours. With respect to the Employer's letter stating that the Grievor would be unable to work more than 16 hours per week, the Grievor had not demonstrated the capability to work more hours, with or without modifications to the workplace. The maximum of 16 hours per week was consistent with the assessments made by medical doctors, the FCE report, and the opinions of WHSCC and Manulife. It was not reasonable to expect the Employer to continue to search for another position for the Grievor. The Employer sent the Grievor a mobility form and she did not return it. The 16 hour per week position was a part time position under Articles 20.03 and 20.07. The pay level assigned to the new position was reasonable. An employee could not have full time status and work less than 40 hours per week. Benefits are based on the number of hours worked. The duty to accommodate

may be met where an employee is placed in a position with reduced hours of work and reduced pay (*Ontario Nurses' Association v. Orillia Soldiers Memorial Hospital* (1999) 42 O.R. (3d) 692 (Ont. C.A.) and *Canada Safeway Ltd. v. R.W.D.S.U., Local 454* 2004 SKQB 102 [2004] S.J. No. 153). There was an obligation on the Grievor to cooperate with the accommodation provided. The Grievor could have requested review of the WHSCC decision or obtained her own FCE report, but she did not do so. The Employer had accommodated the Grievor to the point of undue hardship. There was no violation of the Collective Agreement. The Employer requested that the grievances be denied.

Considerations

The Arbitrator will consider the following issues: (1) Did the Employer violate the Collective Agreement when it terminated the Grievor's injury on duty leave under Article 33.01? and (2) Did the Employer comply with its duty to accommodate the Grievor?

The Employer terminated the Grievor's injury on duty leave effective August 25, 2008. The Employer placed the Grievor in a part time position at 16 hours per week. Article 33.01 (b) states that injury on duty leave with pay shall be granted to an employee "for such period as may be determined by a Provincial Workers' Compensation Board that he is unable to perform his duties or any available work". For employees of the Employer in Newfoundland and Labrador, the applicable "Provincial Workers' Compensation Board" is the Newfoundland and Labrador Workplace Health, Safety and Compensation Commission ("WHSCC"). The amount of compensation paid to employees by WHSCC is recovered from the Employer plus an administration fee.

I have reviewed the evidence relevant to the Grievor's injury on duty leave. The administration of the Grievor's worker's compensation claim followed the usual procedures when claims are administered by the WHSCC. The Grievor reported a workplace injury in May, 2006. Her claim was accepted by WHSCC. She was placed on Temporary Loss Earnings ("TEL") benefits. She returned to work under the Early and Safe Return To Work program in January, 2007. At that time she received rehabilitation benefits and continued on injury on duty leave. The Grievor's medical status was reviewed periodically by WHSCC until such time as it was determined she had reached maximum medical recovery. Functional testing was performed in September, 2007 at West Coast Physiotherapy. According to the Functional Capacity Evaluation ("FCE") report written as a result of the testing, the Grievor was able to work 4 hours per day in a sedentary to light capacity. The

WHSCC determined in May, 2008 that the Grievor was capable of working 4 hours per day and awarded Extended Earnings Loss (“EEL”) benefits. The EEL benefits were approved by WHSCC to commence in June, 2008. The calculation of EEL benefits was based on the Grievor’s pre-injury income less her projected part time earnings.

Having regard to the principles of interpretation of collective agreements, Article 33.01 will be interpreted within the context of the article and the collective agreement as a whole. The contextual approach to collective agreement interpretation has been applied by the Newfoundland and Labrador Supreme Court, Court of Appeal in *Newfoundland and Labrador (Treasury Board) v. N.L.N.U.* (2007) 166 L.A.C. (4th) 23 (NLCA) and *NAPE v. Newfoundland (Treasury Board)* [1997] N.J. No. 76.

Entitlement to injury on duty leave, under Article 33.01, is based on a determination by “a Provincial Workers’ Compensation Board”, which in this province, is the WHSCC. That determination is made under the applicable legislation and policies. Injury on duty leave under Article 33.01 continues for the period the WHSCC determines that an employee is “unable to perform his duties or any available work”. It is necessary to examine the decisions made by the WHSCC and see how those decisions are related to Article 33.01. The decision by the WHSCC as to whether an employee “is unable to perform his duties or any available work” depends on the facts of the case.

The ordinary meaning of “perform his duties”, in the context of Article 33, means performance of the duties of the specific employee in the pre-injury position. The “duties” means the duties of the position prior to the absence on injury on duty leave. The determination that an employee is unable to “perform his duties”, means that the employee is unable to perform the duties of the position. As a result of her functional capacity, the Grievor was unable to perform the full range of duties of the full time Postmaster position for the period when she was in receipt of TEL benefits, rehabilitation benefits and EEL benefits. The decision by WHSCC to award EEL benefits took into account its finding that the Grievor had reached maximum medical recovery and was unable to perform the full range of duties of the full time Postmaster position.

Article 33.01 also refers to the period when an employee is unable to perform “any available work”. To give meaning to the words “any available work”, so that the language is not redundant, the words must refer to something other than “his duties”. As stated, “his duties” refers to the duties performed in the pre-injury position. Article 33.01 states that an employee shall be granted injury on duty leave

for the period determined by WHSCC that the employee is unable to perform any available work. In other words, an employee is no longer eligible for injury on duty leave when the WHSCC determines that the employee is able to perform available work. In this case, the WHSCC determined that the Grievor was able to perform work at 4 hours per day in a sedentary to light capacity, and determined that work was available. That determination was set out in a letter from the WHSCC case manager to the Grievor dated May 12, 2008. The WHSCC determined that the Grievor was able to perform available work. That decision came into effect on the date the Grievor commenced receipt of EEL benefits. At that time, there was no longer a determination by the WHSCC that the Grievor was unable to perform available work. Once that determination by WHSCC came into effect, the Grievor was no longer eligible for injury on duty leave with pay under Article 33.01.

The Association submits that the question of available work under Article 33.01 cannot be determined until the Employer has complied with its duty to accommodate the Grievor without undue hardship. However, the decision by WHSCC is based on the applicable legislation and is a separate issue from the Employer's duty to accommodate. Eligibility for injury on duty leave is based on the determination by WHSCC.

I have reviewed prior arbitration awards and Court decisions with respect to the injury on duty leave article in this and similar collective agreements. While the case authorities provide guidance, each decision is based on its own facts, and is based on the determination of the Workers' Compensation Board in the applicable jurisdiction. I have considered the decision by the Newfoundland and Labrador Supreme Court Trial Division in *Canada Post Corporation v. Canadian Postmasters and Assistants Association* [1994] N.J. No. 103. The Court upheld the award by Arbitrator Thistle in the *Northcott* case. On the facts of that case, the employee continued to be in receipt of rehabilitation benefits and there was no determination by the Workers' Compensation Commission that she was able to perform available work. The arbitration award stated that the injury on duty leave article did not establish a "trigger point" at which injury on duty leave is terminated. However, on the facts of that case, it was unnecessary for the arbitrator to decide the meaning of "any available work". In that case, the grievor was still in receipt of rehabilitation benefits, had not returned to her former job, and her functional capacity to perform work was not yet determined. Therefore, the *Northcott* case is distinguishable on its facts from the present case.

Having considered the facts of this case, the case authorities, and the interpretation of Article 33.01, I find that the Employer did not violate the Collective Agreement when it terminated the Grievor's injury on duty leave.

The next issue to consider is whether the Employer complied with its duty to accommodate the Grievor. Arbitrators have authority to grant a remedy for failure to comply with the duty to accommodate under human rights legislation. The applicable legislation in this case is the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6. In Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, at paragraph 7:6120, the authors state as follows:

It is now recognized that, in reconciling the interests of employers and employees who are afflicted with an illness or disability (or an analogous condition like being pregnant) that inhibits their ability to do their jobs, arbitrators must have regard to those provisions in human rights legislation that prohibit discrimination in employment because of a physical or mental disability. To avoid a finding of discrimination, an employer must show that, prior to terminating an employee whose poor attendance or work performance is caused by an illness or injury that falls within the legislative definition of "disability" or "handicap", it has done everything that could reasonably be expected of it in trying to accommodate that person's needs.

The requirements of the duty to accommodate are set out in decisions of the Supreme Court of Canada. In *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees Union* [1999] 3 S.C.R. 3 ("*Meiorin*"), the Court stated that once a *prima facie* case of discrimination is established by the employee, then the onus shifts to the employer to satisfy that it has met its accommodation duty, which includes accommodating the employee to the point of undue hardship. The standard to be met by the Employer, and the meaning of undue hardship, was discussed by the Supreme Court of Canada in *Syndicat des Employées de Techniques Professionnelles et de Bureau d'Hydro Québec, Section Locale 2000 v. Hydro Québec* [2008] 2 S.C.R. 561, ("*Hydro Quebec*"). The Court stated as follows:

(A) Standard for Proving Undue Hardship

. . .
12 . . . 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. This is clear from the additional comments on undue hardship in *B.C.G.E.U.* (para 63):

For example, dealing with adverse effect discrimination in *Central Alberta Dairy Pool, supra*, at pp. 520-21, Wilson J. addressed the factors that may be considered when assessing an employer's duty to accommodate an employee to the point of undue hardship. Among the relevant factors are the financial costs of the possible method of accommodation, the relative interchangeability of the workforce and facilities, and the prospect of substantial interference with the rights of other employees. See also *Renaud*, [[1992] 2 S.C.R. 970], at p. 984, *per* Sopinka J. The various factors are not entrenched, except to the extent that they are expressly included or excluded by statute. In all cases, as Cory J. noted in *Chambly*, [[1994] 2 S.C.R. 525], at p. 546, such considerations "should be applied with common sense and flexibility in the context of the factual situation presented in each case".

13 As these passages indicate, in the employment context, the duty to accommodate implies that the employer must be flexible in applying its standard if such flexibility enables the employee in question to work and does not cause the employer undue hardship. L'Heureux-Dubé J. accurately described the objective of protecting handicapped persons in this context in *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Montréal (Ville)*, [2001] 1 S.C.R. 665, 2000 SCC 27 (S.C.C.), at para. 36:

The purpose of Canadian human rights legislation is to protect against discrimination and to guarantee rights and freedoms. With respect to employment, its more specific objective is to eliminate exclusion that is arbitrary and based on preconceived ideas concerning personal characteristics which, when the duty to accommodate is taken into account, do not affect a person's ability to do the job.

14 As L'Heureux-Dubé J. stated, the goal of accommodation is to ensure that an employee who is able to work can do so. In practice, this means that the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work. 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.

15 However, the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration. The burden imposed by the Court of Appeal in this case was misstated. The Court of Appeal stated the following:

[Translation] Hydro-Québec did not establish that [the complainant's] assessment revealed that *it was impossible to [accommodate] her characteristics*; in actual fact, certain measures were possible and even recommended by the experts.

[Emphasis added; at para. 100.]

16 The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work

17 Because of the individualized nature of the duty to accommodate and the variety of circumstances that may arise, rigid rules must be avoided. If a business can, without undue hardship, offer the employee a variable work schedule or lighten his or her duties - - or even authorize staff transfers - - to ensure that the employee can do his or her work, it must do so to accommodate the employee. Thus, in *Syndicat des employés de l'Hôpital général de Montréal c. Sexton* [2007] 1 S.C.R. 161, 2007 SCC 4 (S.C.C.), the employer had authorized absences that were not provided for in the collective agreement.

...

The Employer placed the Grievor in a part time position at 4 hours per day, 4 days per week with a reduction in position level, a change from full time to part time status, and a reduction in hourly rate and benefits. The placement was confirmed by the Employer's letter to the Grievor dated August 18, 2008. At that time the Employer had not completed all the workplace modifications recommended in an earlier FCE report. For example, the Employer had not relocated the mail boxes so that the Grievor could reach all the mail boxes within her functional capacity. The Employer also told the Grievor in a letter dated May 26, 2008, that she would be unable to work any more than 4 hours per day, 4 days per week. Having regard to the Employer's actions, did the Employer comply with its duty to accommodate the Grievor under human rights legislation?

The Association objected to the Employer's action to change the Grievor's status from full time to part time. I have considered the case authorities with respect to this issue. The case authorities make a distinction between the obligation to continue full time pay, and the obligation to continue full time status. The duty to accommodate does not include an obligation to pay full time pay for work in a part time position (see *Ontario Nurses' Association v. Orillia Soldiers Memorial Hospital* (1999) 42 O.R. (3d) 692 (Ont. C.A.) and *Canada Safeway Ltd. v. R.W.D.S.U., Local 454* 2004

SKQB 102 [2004] S.J. No. 153). Where full time status is required to access benefits, an employer may be in violation of the duty to accommodate by changing an employee's status from full time to part time, even though the employee is working less than full time hours. (Lynk, *Disability and Work: The Transformation of the Legal Status of Employees with Disabilities in Canada*, in R. Echlin & C. Paliare, eds., *Law Society of Upper Canada Special Lecture 2007: Employment Law* (Toronto: Irwin Law, 2008) at 230 ("Lynk, *Disability and Work*"), *Ontario Secondary School Teachers Federation, Local 10 v. Peel Board of Education (Lambert)* (1998) 73 L.A.C. (4th) 183 (Albertyn)).

The obligation to allow an employee to retain full time status as part of the duty to accommodate is described in Snyder, *Collective Agreement Arbitration in Canada*, 4th ed. ("Snyder") at 366 as follows:

8.161. The principles of the *Orillia Solders' Memorial Hospital* case are also applicable to the status of an accommodated employee. Reduction of hours is a typical and appropriate method of providing accommodation to an employee who is capable of continued, albeit lesser, active employment. The question then arises whether that employee can maintain full-time status. As a general rule, full-time or permanent employees who take sickness absences are entitled to retain their status as full-time employees and they cannot be deprived of that status without their consent or without just cause. The loss of capacity to perform a full day's work may not be sufficient to deprive someone of his or her status as a full-time employee. Reduction of hours is the kind of accommodation of disability which is contemplated under the *Human Rights Code*. It is inarguable that a reduction of hours will result in a reduction in wages that are payable consistent with the hours worked. However, full-time status under a collective agreement brings with it significant benefits over those available to part-time employees, such as preferences in job postings. Therefore, full-time status is much like the acquisition and retention of seniority. A disabled employee who loses seniority benefits on account of absence due to his or her disability, may well be regarded as having been discriminated against and can be awarded the restoration of his or her seniority to the level it would have been, but for the disability. Similarly, the full-time status, as opposed to the wages, of an accommodated employee may be protected and preserved.

I find that the Employer's duty to accommodate includes an obligation to allow the Grievor to retain full time status, even though she does not work full time hours. I have considered that the Collective

Agreement defines a full time employee as one who works 40 hours per week, in Article 20.03 (a). Modification of a collective agreement provision may be required to meet the duty to accommodate. Human rights legislation prevails over the collective agreement (*Snyder* at 327). Therefore, I do not accept the Employer's submission that it can deny the Grievor's request to retain full time status, and claim that it has met its duty to accommodate, on the basis of the Collective Agreement provision in Article 20.03 (a) that the normal hours of work of full time employees are 40 hours per week. The Employer has not proven that it would be an undue hardship to allow the Grievor to retain full time status.

The procedure followed by the Employer to comply with its accommodation duty, was that it reviewed medical and other reports, discussed the situation with the Grievor, and then placed the Grievor in the part time position. There was no prior agreement with the Association with respect to the accommodation arrangements in the part time position.

Arbitrators have recognized that a union may have a contractual or statutory right to participate in the accommodation process. The right to participate also arises where modification of the collective agreement is required as part of the accommodation (*Snyder*, at 344-345, *Central Okanagan School District No. 23 v. Renaud* [1992] SCJ No. 75). In this case, where modification of the Collective Agreement may be required to allow the Grievor to retain full time status when working part time hours, then it is appropriate that the Association participate in settlement of the accommodation arrangements.

With respect to the modifications to the post office, the Employer has not claimed that it would be an undue hardship to complete the modifications. The response by the Employer to the Association's request in June, 2008, that modifications be completed, did not specify what modifications would be completed or when they would be completed. The Employer did not make a commitment to complete the modifications prior to its placement of the Grievor in the part time position. The Association maintains that the Grievor has the potential to work more than 16 hours per week, and that she would be more likely to increase her hours of work once the additional modifications are made at the post office. Until the modifications are completed and the Grievor has an opportunity to work in the modified workplace, the effect of the modifications on the Grievor's work capacity is uncertain. However, whether or not the modifications have the effect of increasing the Grievor's work capacity, it was part of the Employer's accommodation duty to complete them

to “ensure that the employee can work” as the duty is described in *Hydro Quebec*. The duty to accommodate is directed at ensuring the Grievor can work within the limits of her functional capacity.

The Employer should not have removed the Grievor from the position of Postmaster at the time it did, before the modifications were completed. It has not been established by the Employer that allowing the Grievor to remain in the Postmaster position pending completion of the modifications was an undue hardship. It is unnecessary to decide whether or not the duty to accommodate includes allowing the Grievor to continue to retain the status of Postmaster indefinitely while working part time hours.

The Employer did not comply with its duty to accommodate the Grievor without undue hardship, the particulars of which include the failure to complete the recommended modifications to the post office, to permit the Grievor to retain the Postmaster position pending the completion of modifications, and to allow the Grievor to retain full time status.

The Association submits that the Employer did not comply with the duty to accommodate the Grievor for additional reasons, including the failure to continue to provide a second employee to work with the Grievor, to allow the Grievor to work more hours, and to complete another FCE report. Having found that the Employer did not comply with the duty to accommodate on other grounds, it is unnecessary to decide whether or not the duty to accommodate includes these requirements.

The Employer will be directed to reinstate the Grievor’s full time status. The Employer will be directed to make such further accommodation arrangements as are necessary to comply with the duty to accommodate the Grievor without undue hardship, including completing modifications of the post office, reinstating the Grievor in the position of Postmaster pending completion of modifications to the post office and discussing the accommodation arrangements with the Association and the Grievor. As stated above, the termination of the Grievor’s injury on duty leave did not violate the Collective Agreement. There will be no order with respect to compensation at this time.

Decision

The grievances are allowed, in part. The Employer did not violate the Collective Agreement when it terminated the Grievor's injury on duty leave. The Employer did not comply with its duty under human rights legislation to accommodate the Grievor without undue hardship. The Grievor's full time status is reinstated. The Employer shall make such further accommodation arrangements as are necessary to comply with the duty to accommodate, which shall include completing modifications to the post office, reinstating the Grievor in the position of Postmaster pending completion of the modifications, and discussing the accommodation arrangements with the Association and the Grievor. There is no order with respect to compensation at this time. The Arbitrator retains jurisdiction over issues of compensation and interpretation of the Award.

DATED this 17th day of January, 2011.



James C. Oakley
Arbitrator