IN THE MATTER OF AN ARBITRATION UNDER
THE CANADA *LABOUR CODE*

BETWEEN:

CITY OF OTTAWA

("the Employer")

AND

AMALGAMATED TRANSIT UNION
LOCAL 279

("the Union")

GRIEVANCE RE LIVIU SABOU

AWARD

ARBITRATOR: **BARRY STEPHENS**

EMPLOYER COUNSEL: **IAIN ASPENLIEDER, City of Ottawa**

UNION COUNSEL: **RANDY SLEPCHIK, Jewitt McLuckie & Associates**

HEARINGS HELD IN LOCATION ON JUNE 14, JULY 21 AND 22,
AUGUST 30, DECEMBER 2 AND 21, 2011

A W A R D

Introduction

[1] The grievor worked as a bus operator for the City of Ottawa. In 2004 he suffered a stroke that reduced his functionality on one side of the body. Although he participated in intensive therapy in an attempt to redeem functionality, he was left partially paralyzed on the left side, and was no longer able to continue to work as an operator. The grievor qualified for LTD benefits in 2004. In 2008 the insurance company declared the grievor was capable of performing sedentary work and he was cut off from all LTD benefits. As soon as he became aware of the impending termination of his insurance benefits, the grievor contacted the employer in an attempt to find an accommodated position suitable to his medical restrictions, i.e. sedentary work.

[2] Efforts to find the grievor a new accommodated position were not successful. Although the grievor was placed in three temporary positions, he does not have a permanent position and has not worked since May 2010. The grievance alleges that the employer has failed in its obligation to accommodate the grievor's disability.

Facts

[3] The grievor is married and is 50 years old. He grew up in Romania, and swam across the Danube in 1986 with his wife to start a new life. After his arrival in Canada, he worked for a time as a driving instructor and then operated his own metal fabricating business for a time. He started work with the City in 2002 as a bus operator. In 2004 he experienced the medical problems described above.

[4] The grievor was on STD and then LTD benefits until August 2008 when he was found to be medically capable of sedentary work and cut off from all benefits. Although the insurance carrier found that the grievor could perform sedentary work, he faces significant restrictions, for example his condition prevents him from typing with his left hand, aside from holding down the 'Shift' key. As soon as he received advance notice of the decision to cut him off, he contacted Wayne Robinson, a Human Resources official with the City, who became the grievor's contact for the search for an accommodated position for the following ten months. The grievor met with Robinson in the spring of 2008 and provided detailed information about his abilities and experience. He advised Robinson that he would require a parking spot close to any workplace where he was assigned, and also requested French language training to upgrade his skills.

[5] After the initial interview, it became Robinson's responsibility to engage in a job search within the City for positions suited to the grievor's abilities and restrictions under the Priority Placement Program, or PPP. The manner of the job search was straightforward. Robinson compared the grievor's abilities to existing vacancies. He then contacted the manager responsible for a prospective position by email, provided the manager with the grievor's information, including a summary of the grievor's restrictions, and asked for the manager's assessment of the grievor's suitability for the position. If the manager rejected the suggestion, he or she was asked to provide reasons. If Robinson did not accept the reasons, he had the ability to escalate the matter to the program manager for the area, although he testified he did not do this in

the grievor's case. If he accepted the manager's reasons, he continued his search. In this way, the grievor was considered and rejected for some positions without his ever becoming aware of it, and there was no process to ensure that he would be asked about each specific position. However, the grievor acknowledged that he may have been asked about some positions and has since forgotten.

[6] In those instances where the manager indicated that the grievor might be acceptable, he was invited to engage in an assessment process. In one typical case, with respect to a Filing Clerk position, an ergonomist assessed the job and concluded that some aspects of the job were beyond the grievor's capacity in spite of his eagerness to work and overcome his limitations.

[7] In September 2008, the grievor sent Robinson an email expressing his disappointment with the lack of progress in the job search at the City. Robinson responded that there was nothing suitable available but he would keep looking. The grievor was not aware of any of the job searches conducted by Robinson, aside from those for which he was contacted or assessed. In January 2009, Robinson contacted the grievor and advised him that he was being considered for two positions, the EcoPass Administrative Assistant and the IRIS Data Clerk.

[8] Robinson emailed the grievor a few weeks later to advise him that the IRIS job had been ruled out since it did not meet his physical restrictions. The grievor replied, taking issue with the assertion that the job was beyond his physical capabilities. He did

not receive any further contact with respect to the permanent EcoPass position. The grievor was offered a three-month *temporary* full time position as an EcoPass Administrative Assistant in March 2009. He testified he was subjected to a "very thorough" assessment for the position with respect to the physical requirements. After about 30 days on the job, however, he started to develop a herniated disc in his back, and he was required to go off work for emergency surgery. He remained off work for 35 days. He returned to work at the EcoPass position. The grievor stated that he was not made aware of any issues with respect to his ability to perform the work. The position in question was later posted as a permanent job but it was given to another temporary employee.

[9] The EcoPass term position came to an end in the fall of 2009, and the grievor was offered another three-month position as Receptionist/Clerk for Transit Operations. His time there was extended by two months after a request from the supervisor of the administrative staff who stated that the grievor had been a "great help." The position terminated in March 2009. The grievor was also placed in a position of an Operations Support Clerk for a trial period of two months in March 2010.

[10] With respect to the grievor's performance in the jobs in which he worked, Greg Davis is a Project Manager with the City, and testified about working with the grievor during his stint as the Operations Support Clerk from March to June 2010. She said that she observed that the grievor had a good attitude towards his work and was very pleasant to all of his colleagues in the office. In spite of this, the grievor's work was not

"done to satisfaction" and there were many errors, such as materials in training manuals being assembled in the wrong order. She testified that the grievor took more time than appropriate, and some of the grievor's work had to be reassigned to others to be redone. She concluded that the grievor was not capable of working in such a fast-paced environment, that there was a consistent inability to complete tasks in an organized and thorough fashion, and that he might only be capable of performing a simple repetitive task throughout the day. Davis also confirmed that the grievor had requested the employer provide him with a telephone headset, in order to assist with working on tasks while answering the phone. Davis said she intended to get a headset for the grievor, but that she forgot about the request, and was not aware whether the grievor ever received a headset from anyone else.

[11] Lynn Bazinet also worked with the grievor from October 09 to March 2010 at a time when she was the Acting Supervisor for Administration in Operations. The grievor was taken on in the department to perform general administrative work. She testified that when the grievor was assigned a single task and left to one office to work, he normally did "fine." However, he had problems with the process of saving files on the computer, and the letters he drafted often contained grammatical errors. He was given specific training to address the problems he was having with saving files on the computer, but he continued to experience difficulties after the training. For example, when asked to produce some letters of commendation, he saved over each version of the letter, so that only one file remained, rather than the approximately 30 different versions that were required. Bazinet's overall conclusion was that the grievor had

trouble performing multiple tasks and working on the computer, and that he could only concentrate on one task at a time. She confirmed that, when asked later to consider the grievor for another priority placement position, she declined on the basis of the issues that she had noted. Bazinet testified that the grievor was provided with a headset, which seemed to help.

Union Submissions

[12] The union argued that the grievor has been the victim of discrimination with respect to his employment based on a disability arising from his stroke, that the grievor has been improperly denied employment opportunities, and that the employer has failed to accommodate the grievor to the point of undue hardship.

[13] The grievor has demonstrated that he is determined to find gainful employment with the City. Even prior to the notice from the insurance carrier that he would be cut off, he was making plans to upgrade his computer skills in order to improve his ability to fill a new role. His entry into the PPP was delayed while he took courses to further upgrade his computer skills.

[14] While the union acknowledges that the City "worked hard" to help the grievor, and that he was given three short-term assignments, when the City's effort is viewed in its entirety, the only conclusion to reach is that the grievor was subject to discrimination in a manner that falls short of the standard of undue hardship.

[15] The union asserted that the employer was wrong about the grievor's ability to speak French, and about what the grievor said on that subject during an interview with Robinson in June 2008. The grievor indicated he had some ability in French, but wanted to take a course to improve his ability in the language as it is spoken in Quebec. Any inconsistencies in what was said at this meeting should be resolved in the grievor's favour given the inaccurate dating on the forms and Robinson's inability to clearly recall when he made his notes about the meeting.

[16] The union criticized the adequacy of the Priority Placement Program. As it was described, it was dependent on the reaction of the local manager. The union contested the employer's claim that the PPP exceeds the requirements of undue hardship. Given that the duty to accommodate must be an individualized mechanism, the PPP fails to assess on an individual basis in any meaningful way whether the employee can be placed in the position, or in some modified version of the position, or in some other position created by bundling tasks from several jobs. One of the union's main points was that there is no evidence the employer engaged in a process of trying to find the grievor meaningful work he could perform, other than attempting to see if he could fit into pre-designated jobs.

[17] The union argued that the facts demonstrate that the grievor was denied positions due to misconceptions about his abilities, or mistaken beliefs that he suffers from mental deficiencies. The union further argues that the evidence supports a

conclusion that the employer has failed to fulfill its duty to accommodate the grievor to the point of undue hardship.

[18] The union argued that the employer did not consider the grievor's true incapacities with respect to the jobs he was assigned. With particular emphasis on the EcoPass temporary placement, the union submitted that the ergonomist studies confirmed that the grievor was physically capable of performing the work, yet the temporary placement was terminated, and the grievor was not given the opportunity to fill the permanent position that followed. While the union conceded that there were managers who were critical of the grievor's ability to deal with multiple tasks, the manager who directed his work on EcoPass gave a positive assessment and suggested that some of the grievor's issues were attributable to the equipment provided by the City.

[19] The union submitted, in addition, that the employer failed to properly consider the grievor's true medical restrictions, and instead relied on the summaries provided by Robinson or on their own observations, and that this led directly to discrimination against the grievor on the basis of his disability. Had the appropriate officials reviewed the grievor's actual medical restrictions, it would have been clear that he was capable of working, and he would have been successful in his search for a sedentary job.

[20] The union seeks a declaration of breach of the collective agreement and the *Canadian Human Rights Act*, an order directing the employer to accommodate the grievor, compensation for loss of wages and benefits, and damages.

[21] The union relied on the following authorities: *Calgary District Hospital Group* (1994), 41 L.A.C. (4th) 319 (Ponak); *Essex Police Services Board* (2002) 105 L.A.C. (4th) 193 (Goodfellow); *Canada Safeway* (2000), 89 L.A.C. (4th) 312 (Sims); *Zettel Manufacturing* (2005), 140 L.A.C. (4th) 377 (Reilly); *British Columbia Superintendent of Motor Vehicles*, [1999] 3 S.C.R. 868; *City of Ottawa* (2009), 185 L.A.C. (4th) 227 (Picher); *Department of Defence and Pepper* (2008), 170 L.A.C. (4th) 151 (Pineau); *Attorney General v. Pepper* (2010), 191 L.A.C. (4th) 392 (Fd. Ct); *British Columbia Publish Service Employee Relations Commission*, [1999] 3 S.C.R. 3.

Employer Submissions

[22] The employer argued that the union committed the mistake of confusing the duty to accommodate with discrimination, and argued that a failure to accommodate is not discrimination. The union must first show a *prima face* case of discrimination, which must be based on something other than a failure to accommodate. The employer asserted there is no "free-standing" right to accommodation under the *Human Rights Code*, and a *prima facie* case of discrimination cannot be found on the failure of the duty to accommodate.

[23] The employer submitted that, in line with *McGill University* and other cases, the distinctions about the grievor's ability to perform work cannot form a claim for discrimination unless the distinctions were in and of themselves discriminatory, and the union did not lead any such evidence. In other words, something more than a mere distinction in the treatment of the grievor must be present in order to prove discrimination.

[24] The employer asserted that there is no obligation on the employer to find the grievor work beyond his own position, and that there is no obligation to find the grievor another job. In spite of this, the employer has created the PPP, which generates job searches for disabled employees, and gives them priority over other employees, and is a program the employer asserts goes "beyond its statutory obligations." The grievor was offered temporary contractual positions under the program. He displayed a good attitude in those positions, but there were legitimate concerns about his performance, and he could not complete the required tasks properly.

[25] The employer's position is that, unless the union first demonstrates discrimination, there is no obligation to accommodate an employee to a different job, but that the employer displays its good intentions by instituting the PPP. Applying this analysis to the fact, the employer asserts the grievor had the "advantage" of the PPP, but he was not successful in the jobs he filled. Ultimately, this leads to the conclusion that there is no evidence that the reason why the grievor is not currently employed in a permanent job cannot be attributed to an act or omission on the employer's part based

on preconceptions or stereotypes about his disability. The fact that the grievor fell short of the job requirements is not an attack on his dignity but a simple distinction arising from the deficits caused by his disability. This is a regrettable fact but it does not arise from an arbitrary or stereotypical assessment on the employer's part. There is no obligation in law for the employer to hire or retain employees who are incapable of performing work.

[26] The employer acknowledged that the grievor was "steadfast" in his assertion that he can work but the employer does not have work he can perform, and the union has not identified a position that would meet the grievor's very limited abilities. The grievor claimed at the hearing to speak French, but this was not on his resume. Indeed, the fact that the grievor later asked for French language training provided a reasonable basis for Robinson to conclude that the grievor was not bilingual. It was clear from the evidence of the managers who worked with him on the three term positions that the grievor had difficult multi-tasking or working in a fast-paced environment. While the grievor thought his placements went well, this was clearly not the case. He was well liked where he went, and the managers made efforts to help him, but he did not have the ability to meet the needs of the work he was assigned, either in terms of accuracy or efficiency. Based on this, the grievor's assessment of his ability to perform any posted position is not of much weight, since he is over-optimistic about his abilities, and apparently does not accept that he demonstrated significant shortcomings in the term positions.

[27] The employer rejected the union's critique of the PPP. Robinson sent the grievor's resume to the managers responsible for filling vacancies, and asked for an assessment of the grievor's suitability. The decisions that came back were not arbitrary or stereotypical but were based on a comparison of the work to the grievor's restrictions. Indeed, the evidence of the employer is that the PPP matches disabled employees to available work. Unfortunately, the grievor simply was not suitable to any of the available work. Moreover, Robinson testified that if he were to encounter a manager who appeared to be unreasonable he would elevate the issue to higher management, but that in this instance he had no such concerns with any of the responses.

[28] Ultimately, the employer asserts, there is no evidence consistent with the *McGill University* decision that the City made a decision or omitted to take action in a manner that was arbitrary or based on stereotypical pre-conceptions associated with the grievor's disability. While the medical assessment at the time was that the grievor was capable of sedentary work, he may be able to do so at another workplace, but events have demonstrated that he cannot do such work with the City in any meaningful way. There is no evidence, the employer argued, that the grievor was capable of performing work that was not offered to him prior to the three placements, or since he finished the placements.

[29] The employer's conclusion is that the grievor could not perform meaningful work after he was given three opportunities through the PPP. The assessment of the grievor's

performance provided by the managers was based on actual observations, so could not be arbitrary or stereotypical. As a result, the employer submitted there was no discrimination and no failure to accommodate the grievor, and that the grievance should be dismissed.

[30] The employer relied on the following authorities: *Baber v. York Region District School Board*, [2011] HRTO 213 (Price); *City of Brampton* (1998), 75 L.A.C. (4th) 163 (Barrett); *British Columbia Public Service Agency* (2008), 177 L.A.C. (4th) 193 (B.C.C.A.); *Greyhound Canada Transportation* (2011), 207 l.A.C. (4th) 192 (Levinson); *Health Employers Association of British Columbia* (2006), 264 D.L.R. (4th) 478 (B.C.C.A); *Honda Canada,* [2008] 2 S.C.R. 362; *Lakehead District School Board* (2001), 96 L.A.C. (4th) 315 (Luborsky); *Carter Chevrolet Oldsmobile* (2001), 41 C.H.R.R. D/88 (BCHRT); *McGill University Health Centre*, [2007] 1 S.C.R. 161; *Moore v. Canada Post Corp*., [2007] C.H.R.T. 31; *R. v. Kapp,* [2008] 2 S.C.R. 483; *Xstrata Nickel* (2011), 209 L.A.C. (4th) 206 (Sheehan).

Conclusion

[31] I begin by observing one fact that does not appear to be in dispute, and that was manifest throughout the hearing. The grievor is a very sympathetic character who, by all accounts, has a positive attitude towards work and a strong motivation to contribute to the workplace in a meaningful way. Throughout the hearing the grievor testified about his abilities with respect to specific jobs and tasks associated with those jobs. Understandably, the grievor believed he was capable of performing most of the jobs

that were suggested to him in his evidence. However, it is my conclusion that he tended to overestimate his abilities. The employer witnesses testified to concerns about the grievor's job performance that were not refuted, and that indicated he was not able to fit himself within the positions to which he was assigned as constituted. In particular, the grievor appeared to have difficulty working in a fast-paced environment, when assigned multiple tasks, organizing educational binders, following instructions and training with respect to saving of computer files, and other issues. I do not conclude that a stereotypical or arbitrary misunderstanding of the grievor's restrictions motivated these assessments. On the contrary, all of the employer representatives took measures to assist the grievor, responded positively to his attitude and appeared to be genuinely interested in seeing him succeed. Given this, I found the evidence of the grievor's performance in the jobs to be persuasive, and I did not find the grievor's self-evaluation of his abilities to be as useful.

[32] However, with respect to the positions for which he was considered but rejected, the employer's assessment is that it is unlikely that the grievor would have been able to perform up to acceptable standards in the available vacancies, at least not as they were constituted. In my view, two difficulties are associated with the employer's assessment of the grievor. The first is that there is insufficient evidence that the grievor was given proper consideration for those positions. The second, and more important issue is that there was no indication that the employer gave consideration beyond whether the grievor was able to perform all of the duties of each available position.

[33] To illustrate the problem with respect the jobs for which the grievor was considered but rejected, it is useful to review the exchange with respect to one position, the IRIS Data Clerk. As was typically the case, once Robinson was aware of the position, he communicated the grievor's restrictions to the responsible manager by email as follows:

- unable to perform duties requiring sustained standing, walking or climbing stairs
- unable to perform duties which require an immediate response from the left side of his body
- use of left foot is limited
- unable to perform duties that require the use of his left upper extremity
- functional restrictions with regards to pinching, manipulating and grasping with his left hand
- has learned to write and keyboard with his right hand

[34] The union raised some concerns about the failure of the employer representatives to review the grievor's medical information prior to deciding on his ability to fill vacant positions. In my view, the employer's summary of the grievor's restrictions was reasonable as far as it went, and was sufficient as a working understanding to inform decisions where the grievor's restrictions were obviously inappropriate to a given position. However, the IRIS position, at first glance, appeared to fit the grievor's abilities when reviewed in the context of the observations of the medical assessments that he was capable of filling a sedentary position, such as data entry.

[35] As noted above, Robinson contacted the responsible manager and provided the grievor's restrictions. The manager's response to Robinson raises questions about the depth of the assessment of the grievor's ability against the job:

> "This position requires 1-2 hours of standing and walking; along with the ability to climb, kneel, and or bend/squat to file records inputted on a daily basis. It also requires the ability to lift and carry up to 10 lbs. Based on the restrictions indicated in the message below, this employee would not be suitable for this position." (Emphasis in original)

[36] It is not obvious to me that the grievor should have been disqualified from consideration for the IRIS position for the reasons given. His restrictions, as summarized by Robinson, do not say he cannot perform any standing or walking, simply that these activities cannot be sustained. What is missing is a meaningful assessment of the physical demands against the grievor's actual abilities. It may be that, even as the IRIS job was constituted, the grievor would have had the ability to cope with the physical demands, and it is not clear to me why this should not be the case on a review of the employer's documented decision-making process.

[37] What is also missing from the process related to the IRIS position, and the other positions, is any indication that the employer gave consideration to the ways in which the job could be changed, if necessary, to accommodate the grievor's abilities.

Review of Human Rights Jurisprudence

[38] The employer took the position that, since the grievor could not succeed at the jobs to which he was assigned, the duty to accommodate was more than fulfilled, and

that there was no evidence of discrimination. In this regard, the employer relied on human rights precedent that there is no "free-standing" obligation to accommodate a disabled employee and that the union was unable to demonstrate that the grievor was subject to any "stereotypical or arbitrary" treatment.

[39] The duty to accommodate can be said to not be a "free-standing" right, in the sense that it is not infringed if the disabled employee is incapable of performing the work available to him. However, in assessing this latter issue, the test to be applied is whether the employer has attempted to accommodate the grievor to the point of "undue hardship." (See *Barber v. York Region District School Board,* cited above.)

[40] The duty to accommodate arises with the disability of an employee, as is set out in the *Canadian Human Rights Act*. The definition of "prohibited ground" in s. 3(1) of the *Act* includes a person with a "disability." The grievor was left in a disabled state as a result of his stroke. Moreover, s. 7 of the *Act* stipulates that "discrimination" includes the refusal to "employ or continue to employ" an individual on the basis of a prohibited ground, such as disability. Thus, the *Act* defines discrimination to include refusal of employment based on disability. There is no question that the City determined not to continue to employ the grievor as a result of his disability.

[41] In these circumstances the *Act* provides in s. 15 (1) that it is not discrimination if the refusal to continue to employ the grievor is based on a "*bona fide* occupational requirement." Section 15(2) completes the picture by stating that, in order to establish

the *bona fides* of the occupational requirement, the employer must be able to demonstrate that accommodation of the needs of the individual would impose "undue hardship" on the City.

[42] The jurisprudence supports the view that there is no "free standing" duty to accommodate, and that such duty must be triggered by discrimination (or at least *prima facie* discrimination) under one of the prohibited grounds. For example, in *Baber v. York Region District School Board*, the adjudicator, Sheri Price, was dealing with the case of a teacher who made multiple human rights allegations against her employer. In assessing the merits of the allegations under the Ontario *Human Rights Code*, Adjudicator Price made the observation, at paragraph 88, that the duty to accommodate is not a "free-standing obligation." She went on to cite the decision of the Supreme Court of Canada in *Simpsons-Sears*, in support of the following analysis:

> "As is always the case under the *Code*, the applicant bears the initial onus of establishing a *prima facie* case of discrimination. Only at that point does the inquiry shift to whether the respondent employer fulfilled its duty to accommodate the applicant to the point of undue hardship."

This same point was expressed in *Martin v. Carter Chevrolet Oldsmobile*, a decision of the British Columbia Human Rights Tribunal, where the adjudicator made the following comments, at paragraph 20:

> "Under the *Code*, there is no positive duty to accommodate people with disabilities. That is, proof that a respondent failed to accommodate a person with a disability is not sufficient to establish a contravention of the *Code*. Rather, the duty to accommodate arises as part of a defence to a *prima facie* case of discrimination."

What is significant in these comments is the point that the inquiry into the duty to accommodate is not triggered on a finding of discrimination but by a *prima facie* case of discrimination.

[43] The question of what does not constitute a *prima facie* case is made obvious by Adjudicator Price's various rulings throughout the *York Region* decision. Thus, for example, in dealing with the employee's claim that the employer failed in its duty to accommodate by not exempting her from Teacher Performance Appraisals, the adjudicator dismissed the allegation on the basis that the employee had failed to provide any medical evidence that she had a disability that prevented her from participating in the appraisals, and thus there was no evidence of any adverse impact on her caused by a disability.

[44] In *Martin*, the adjudicator set out a three-part test for a *prima facie* case of discrimination in paragraph 22, stating that the complainant must establish that she had a disability, that her employer refused to continue her employment, and that it is reasonable to infer that her disability was a factor in that refusal of continued employment. Similarly, in *Moore v. Canada Post Corporation*, a decision of the Canadian Human Rights Tribunal, the adjudicator, again citing *Simpsons-Sears*, affirmed the point that there is no "free-standing" right to accommodation, but in doing so made explicit how to assess the *prima facie* case of discrimination being put forward, stating at paragraph 85:

> "In a human rights case before this Tribunal, the complainant must first establish a *prima facie* case of discrimination. A *prima facie* case is one which covers the allegations made and which, if believed, i.e. credible, is complete and sufficient for a decision in the favour of the complainant, in the absence of a reasonable answer from the respondent. The respondent's answer should not figure in the determination of whether the complainant has made a *prima facie* case of discrimination."

Thus, a *prima facie* case requires that there must be sufficient substance to the allegation that, in the absence of a response from the employer, one could reach a finding of discrimination.

[45] The question then becomes, what is the nature of a *prima facie* case? Would any adverse impact be sufficient to ground a *prima facie* case, or is something more required? This issue is addressed by the finding of the Supreme Court of Canada in *McGill University*, at paragraph 48, where, after a review of other Court pronouncements on the subject of discrimination in respect of work, Abella J. made the following observation:

> "At the heart of these definitions is the understanding that a workplace practice, standard, or requirement cannot disadvantage an individual by attributing stereotypical or arbitrary characteristics. The goal of preventing discriminatory barriers is inclusion. It is achieved by preventing the exclusion of individual from opportunities and amenities that are based on their actual abilities, but on attributed ones. The essence of discrimination is in the arbitrariness or its negative impact, that is, the arbitrariness of the barriers imposed, whether intentionally or unwittingly."

[46] The Court affirmed this statement in *Honda*, at paragraph 71. The import of these decisions is that a *prima facie* case cannot be grounded on adverse impact alone,

but must include some element that indicates "stereotypical or arbitrary" treatment related to the disability.

[47] The employer submits that there was discrimination against the grievor as there was no "stereotypical or arbitrary" distinction applied in the treatment of the grievor, and that his inability to find a job opportunity with the City is attributable solely to the limitations imposed on him by his disability, which prevents him from being able to perform at an acceptable level for any available position.

Application of Law to Grievor's Case

[48] Applying the analysis from these cases to the dispute before me, there is no issue about the *bona fides* of the grievor's disability, it is unquestioned that he was cut off from employment with the City, and there is no dispute that he was cut off from employment as a result of his disability.

[49] The employer's method of seeking an accommodated position was the PPP. The issue becomes whether the application of the PPP evidenced some element of "stereotypical or arbitrary" treatment. If not, it would appear there is no basis for a *prima facie* case of discrimination that the employer would be called upon to answer.

[50] After a review of all of the evidence and the submissions of the parties, and a consideration of all of the authorities provided by the parties, I am not persuaded that the PPP satisfied the employer's human rights obligation to the grievor.

[51] Although the City made acknowledged efforts to find the grievor a "position", it restricted that search to the parameters of previously defined jobs for which there were vacancies. Since the grievor was deemed or found unable to perform all of the tasks associated with all pre-existing positions, he was deemed unemployable. However, it was noted by management representatives who worked with the grievor that, while he did not work well in a fast-paced, multi-tasked environment, he might be capable of performing a single, focused task. By extension, it may be that the grievor is capable of performing a series of focused tasks. In spite of the significance of this observation, the PPP did not seem capable of responding. There is insufficient evidence, indeed no evidence, that the employer considered the rearrangement of any of the available work, i.e. the redistribution of work as opposed to a "fit" within a pre-defined position, in such a way as to provide the grievor with a task or series of manageable tasks that would suit his abilities.

[52] The employer is correct that there is no absolute "obligation" to find a disabled employee a job. The obligation on the employer is to accommodate the employee's disability to the point of undue hardship. This means the consideration of a number of different solutions, including making modifications to the employee's pre-disability job, the "bundling" or re-distribution of tasks between the disabled employee and other employees, reassignment to other positions or work, even the reassignment to other positions or work outside the bargaining unit where that is appropriate. All of this is to be assessed against the standard of "undue hardship", i.e. the employer is obligated to

offer the disabled employee gainful employment, and take measures to provide such work up to the point of undue hardship. What will constitute undue hardship will vary depending on the individual circumstances.

[53] While the PPP is a laudable program, there appear to be limitations in the program that can create circumstances in which the City fails to meet its human rights obligations to disabled employees. In making such a finding, I wish to state clearly that the City representatives who testified with respect to their work in the PPP, including Mr. Robinson, in my view worked diligently to find a good fit for the grievor within the workforce and within the limits of the PPP. It is not my finding that these individuals were acting in a manner that evidenced any *personal* stereotypical or arbitrary motivations. Essentially, the PPP process is not structured in such a way as to give meaningful consideration to the possibility of bundling or sharing job duties in a way that would suit the grievor's restrictions. The focus of the job search was to fill existing vacancies or temporary positions. The grievor was assessed against the full range of duties for each specific position, and the decision was made on that basis. This was true with respect to the jobs for which he was considered and rejected, as well as for those that he actually filled. There is no evidence of consideration of modifying the work to suit the grievor, either by redistributing tasks or bundling tasks, let alone evidence of the employer having done so to the point of undue hardship.

[54] I also note a second concern about communication within the PPP process. It is my conclusion that the example of the IRIS position detailed above shows how email

communication might result is a somewhat superficial consideration of the employee's suitability for a position. In addition, given that the grievor was not advised of the jobs being considered or the exchanges with the local managers, he did not have access to the information available to the employer about the jobs for which he was being considered. Keeping the grievor informed about the details of the process would have allowed the employee to make timely interventions in order to provide meaningful feedback on specific jobs before they become closed off. The system failed to provide an opportunity for potentially crucial employee input. The courts and tribunals enforcing human rights law have observed that the disabled employee must cooperate in the accommodation process, but this role is difficult to fulfill when the employee is not provided key information about the opportunities that may be available and the factors that might impede employment.

[55] My review of the PPP leads me to the conclusion that the system was flawed in the grievor's case. It is not a sufficient discharge of the employer's duty to accommodate to try to fit a disabled employee into pre-cast vacancies, and to do so without meaningful input from the employee. In particular, the fact that an employee cannot perform all of the tasks of a vacant position is not sufficient to discount them from continued employment. Due consideration must be given to the possibility of redistributing work and reassigning tasks to accommodate a disabled employee. It is my conclusion that this systemic flaw in the PPP manifests a stereotypical or arbitrary treatment of the grievor as a disabled employee. The proposition that the grievor can

only contribute to the workplace if he can fulfill the predefined tasks of an existing vacancy in my view constitutes stereotypical or arbitrary treatment.

[56] It follows that, in my view, the union has demonstrated a *prima facie* case of discrimination, and the evidence did not disclose a *bona fide* occupational requirement to justify this stereotypical or arbitrary treatment.

[57] I wish to emphasize, again, that the employer representatives at all levels assisting the grievor did not evidence stereotypical or arbitrary attitudes or treatment of the grievor or anyone else, and they are to be commended for the genuine efforts made on the grievor's behalf. My finding is with respect to the structure of the PPP when measured against the legal requirements of the duty to accommodate. If an employee cannot fulfill all of the tasks of a vacancy, the duty to accommodate requires the employer to at least consider the redistribution of tasks in such a way as to assign the employee meaningful work, and if an appropriate task or group of tasks can be found, the employer is required to make such changes to the assignment of work unless to do so would result in undue hardship.

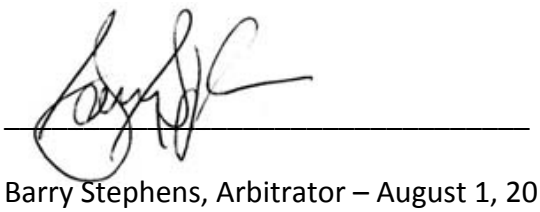
Conclusion and Remedy

[58] The question of whether a bundle of tasks, or even single-task job exists that might represent a meaningful job for the grievor, and whether this can be accomplished without undue hardship to the City, depends on many factors, and calls into play a level of detail that was not captured by the evidence in this hearing. I do not presume to answer this question in advance, and the parties must be given an opportunity to study the possibilities. The employer is directed to review the available work in order to determine if an individual task or group of tasks suitable to the grievor's restrictions and ability can be bundled in such a way as to provide him with employment.

[59] There was one secondary issue that I also wish to address. There was an issue about the grievor's ability to work in jobs requiring French language skills. In my view, this dispute can be settled easily. The City is directed to test the grievor's French language skills to determine if he is sufficiently fluent to be job-ready.

[60] Having made these orders, I am do not compensation at this time. It is not a forgone conclusion that the parties will be successful in the search for suitable work for the grievor. The grievor may have to face the possibility that his medical condition renders him unemployable with the City, or that the conclusions of the insurance carrier are not accurate. He is entitled to be considered for positions that might be created from the bundling of duties of different jobs, and to be given an opportunity to demonstrate his ability to work in French. Questions may arise about whether a "bundled" job could have been found earlier, which may also lead to a dispute about

compensation, including any damages. I retain jurisdiction to resolve any such issues of compensation and any other issues that may arise with respect to the implementation of this award.



Barry Stephens, Arbitrator – August 1, 2012