

*Crown Employees*  
**Grievance Settlement  
Board**

Suite 600  
180 Dundas St. West  
Toronto, Ontario M5G 1Z8  
Tel. (416) 326-1388  
Fax (416) 326-1396

**Commission de  
règlement des griefs**  
*des employés de la  
Couronne*

Bureau 600  
180, rue Dundas Ouest  
Toronto (Ontario) M5G 1Z8  
Tél. : (416) 326-1388  
Télééc. : (416) 326-1396



GSB#0944/02  
UNION#02B576

**IN THE MATTER OF AN ARBITRATION**

**Under**

**THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT**

**Before**

**THE GRIEVANCE SETTLEMENT BOARD**

**BETWEEN**

Ontario Public Service Employees Union  
(Kerna)

**Grievor**

**- and -**

The Crown in Right of Ontario  
(Ontario Human Rights Commission)

**Employer**

**BEFORE**

Felicity Briggs

**Vice-Chair**

**FOR THE UNION**

Gavin Leeb  
Barrister and Solicitor

**FOR THE EMPLOYER**

Meredith Brown  
Counsel  
Management Board Secretariat

**HEARING**

March 14, 2003.

## DECISION

The grievor, Gloria Kerna, has been an employee of the Human Rights Commission for 23 years. She began as a Clerk 2 and received various promotions over the years. Her most recent position is Investigations Officer. In early June of 2002, she filed two grievances. One alleged that the Employer denied her request for accommodation in her home position. The second asserts that she has been discriminated against as the result of her prior involvement in certain union matters.

At our first day of hearing the parties agreed to argue a preliminary matter. It was the Union's position that the Employer should proceed first in this matter and requests the Board to so order. The Employer strongly disagreed with this motion and urged the Board to deny the Union's request.

For the purposes of this preliminary matter the relevant facts were not contested. The grievor had been experiencing medical problems and in January of 2002 she requested and was accommodated by the Employer retroactive to May of 2001. It is important to note that in the recent past, notwithstanding Union objections, the Employer has instituted a performance expectation plan for Investigation Officers. It is now expected that Investigation Officers will close between 36 to 40 files per year. The accommodation provided that the grievor would be required to close forty per cent less files than other Investigation Officers, that is 21 to 24 files per year.

In a letter dated May 23, 2002, the grievor was officially notified that her arrangement would end as of June 3, 2002. Ms. Kerna was told that the Commission had "decided to accommodate (you) in the position of Intake Officer in the Inquiry and Intake Office". It is this change of position that the Union asserts is a violation of various provisions of the collective agreement as well as the *Ontario Human Rights Code*. While there is a

salary differential between Intake Officer and Investigations Officer, the Employer did not alter the grievor's compensation. She continues to be paid at the rate of an Investigations Officer. However, the Union asserted that the change in position caused the grievor anguish, frustration and embarrassment in the workplace to the point where she considered herself penalized by the assignment.

Mr. Leeb, for the Union, explained that the central issue at hand in this matter is that the grievor has been discriminated against when the Employer elected to remove her from her home position of Investigation Officer and re-assigned her to the position of Intake Officer. The Employer must establish that it will suffer undue hardship before it can move the grievor out of her home position and assign her to another position. It is the long accepted jurisprudence that the burden is on the Employer to prove such to this Board. Only the Employer knows why it chose to abandon the agreed upon accommodation and why it unilaterally decided to transfer the grievor to a lesser position. It is because that knowledge is known only to the Employer that this Board must declare it has the procedural onus.

The Union conceded that discrimination can be legal or illegal. In order for the Board to find that the re-assignment of Ms. Kerna which constituted discrimination was acceptable, the Employer must establish that a continuation of the previously agreed upon accommodation would have caused it undue hardship.

The Union relied upon **Re Unilever HPC NA and Teamsters, Chemical Energy and Allied Workers, Local 132** (2002), 106 L.A.C. (4<sup>th</sup>) 360 (Springate); **Re Board of Governors of Riverdale Hospital and Canadian Union of Public Employees, Local 79** (1994), 41 L.A.C. (4<sup>th</sup>) 24 (Knopf); **Re Air Canada and Canadian Auto Workers, Local 2213** (2001), 101 L.A.C. (4<sup>th</sup>) 311 (Dissanayake); **Re Ontario Human Rights Commission et al. and Simpsons-Sears Ltd.** (1985), 23 D.L.R. (4<sup>th</sup>) 321 (S.C.C.); **Re**

**British Columbia Government and Service Employees Union v. Public Service Employee Relations Commission; British Columbia Human Rights Commission et al, Interveners** (1999) 176 D.L.R. (4<sup>th</sup>) 1 (S.C.C.); **Re Ontario Public Service Employees Union v. Ontario (Ministry of Community and Social Services)**, [1996] O.J. 608 (Div.Ct.); and **Re Quesnel v. London Educational Centre** (1995), 28 C.H.R.R. D/474 (Ont. Bd. Of Inq.).

It was contended by the Employer that the Union is arguing the wrong point at this time. Ms. Brown asserted that the issue of undue hardship is a “red herring”. The question of whether an employer has properly accommodated an employee involves a two-part analysis. The first aspect is whether the employer has provided the appropriate accommodation. It is not until that determination has been made that an evaluation of undue hardship should be undertaken. In the instant matter, the Employer has provided the grievor with the most appropriate accommodation based on the criteria established by the Human Rights Commission. It is stated at paragraph 3.3 of the Commission’s *Policy and Guidelines on Disability and the Duty to Accommodate*:

The duty to accommodate requires that the most appropriate accommodation be determined and then be undertaken, short of undue hardship. The most appropriate accommodation is one that most respects the dignity of the individual with a disability, meets individual needs, best promotes integration and full participation and ensures confidentiality.

....

Accommodation will be considered appropriate if it will result in equal opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges experienced by others or if it is proposed or adopted for the purpose of achieving equal opportunity, and meets the individual’s disability-related needs. If the accommodation meets the individual’s need and does so in a way that most respects dignity, then a determination can be made as to whether or not this “most appropriate” accommodation would result in undue hardship.

It was submitted by the Employer that it provided the grievor with the most appropriate accommodation. The matter at issue does not turn on the issue of undue hardship but

rather on what is the appropriate accommodation. In arriving at its decision the Board should take into account alternative work and whether it was possible to continue the grievor in her pre-disability position.

Ms. Brown asserted that whether an accommodation is appropriate is distinct from whether there is undue hardship. The Union has alleged that the accommodation provided by the Employer is a violation of the collective agreement and the *Human Rights Code* and it is incumbent upon the Union to prove that assertion. Simply put, he who asserts must prove the assertion and it is not incumbent on the other party to disprove the assertion.

The Employer suggested that the jurisprudence provided by the Union is not helpful to this Board. Many of the cases involved Employers who failed to make any attempt at accommodation. In the matter at hand the Employer has provided an accommodation that the Union and the grievor simply do not like. The Employer relied upon **Re Crown in Right of Ontario and OPSEU – GSB#524/94** (November 6, 1997), wherein Vice Chair Mikus had before her a grievance that alleged the Employer failed to accommodate. In that decision it is evident that the Union proceeded first with its case and that is what should occur in the present case.

In the alternative, it was submitted that if the Board orders the Employer to proceed with its evidence first, there should be a clear indication that a broad right of reply will be granted to the Employer.

## **DECISION**

It goes without saying that the body of jurisprudence regarding an employer's obligation to accommodate an employee is relatively recent and is evolving. Having

said that, it was surprising to me that this Board has not yet been asked to determine the issue of which party should proceed first in such cases.

It was clear after the submissions regarding this preliminary matter that the dispute between the parties is viewed quite differently. The Employer asserted that the issue at hand is whether the accommodation given to Ms. Kerna was appropriate. On the other hand the Union contended that I will ultimately have to determine if the Employer discriminated against the grievor when it altered the accommodation and reassigned her to a lower position. It was the Union's view that assessment will, of necessity, require an examination of whether the Employer had to discontinue the original accommodation because of undue hardship.

In my view, this difference is the very issue that I will have to address at the conclusion of the case and does not materially affect the determination of onus and order of proceeding. However, it is helpful to keep these disparate views in mind while considering this preliminary matter. Irrespective of whether the right test to apply is appropriate accommodation or undue hardship there will have to be an analysis of the work, the Employer's workplace and, given the grievor's medical restrictions, whether the accommodation violated the provisions of the collective agreement and the *Human Rights Code*.

In **Re Air Canada (supra)** Arbitrator Dissanayake reviewed comments made by Arbitrator Michel Picher in an unreported decision **Re Canadian Pacific Railway Co.** dated February 26, 1999. In that decision Mr. Picher said at page 3:

I am satisfied that the position advanced by the Brotherhood is more precise, and is to be preferred. It is well settled in Canadian arbitral and judicial jurisprudence that it is the employer which bears the burden of establishing that it has made reasonable efforts to accommodate the disability of an employee, to the threshold of undue hardship. The rationale for the arbitral and judicial reasoning is not difficult to understand. It is the employer which has the fullest knowledge of its

operations both inside and outside a given bargaining unit, or a given location. It is possessed of the fullest knowledge with respect to job vacancies or the existence of jobs which could be performed by the disabled employee with a reasonable degree of adjustment. As these matters reside within the employer's knowledge, just as in the case of discipline or discharge, the employer is best placed to adduce the evidence relating to efforts at reasonable accommodation, and to demonstrate why an employee's illness or disability cannot be reasonably accommodated.

Later at page 6 it was stated:

In the instant case there is no dispute as to the threshold issues of the grievor's employment, and the fact that he was discriminated against on the basis of medical disability in being held out of work. Therefore, it does fall to the Company to establish, on the balance of probabilities, facts to demonstrate that it made every reasonable attempt to accommodate his disability short of undue hardship. As there is nothing for the Brotherhood to prove, the Company must proceed first, and bear the ultimate burden of establishing that it did not improperly fail to accommodate the grievor in respect of his physical disabilities.

On page 315 of his decision Arbitrator Dissanayake said:

In the present case, the Employer did not take issue with any of the threshold facts which shifts the burden to the employer to prove that it complied with the duty to accommodate. There was no dispute that the grievor was in the employer's employ, that she was disabled, that she sought accommodation by seeking to return to modified work, and that she was denied work because of her disability. The remaining issue is whether she was thereby discriminated against unlawfully, which turns on whether the employer complied with its duty to accommodate.

I agree with arbitrator Picher's reasoning that it is the employer that has knowledge of issues relating to accommodation. The employer has information as to what medical information was available to it from the various medical professionals and what cooperation and information, if any, was provided by the grievor and/or the union. It is the employer that has exclusive knowledge of its operational requirements, and what positions within and outside the bargaining unit were available for consideration in accommodating the grievor. It alone would be aware of what modifications may be possible in those positions, and what hardships would result from those modifications. In summary, it is the employer who is in the best position to demonstrate, considering all of the above, why the grievor's disability could not be accommodated at the time. Therefore, it

is appropriate that it proceed first and bear the onus of proving that it did not improperly fail to accommodate the grievor.

During the course of their submissions the parties entered a number of exhibits on consent. It was apparent from those documents and the facts as addressed by counsel in their opening statements and preliminary arguments that there was no dispute that the grievor had medical restrictions leading to a request for an accommodation. There was an accommodation that was acceptable to both parties and that arrangement became the *status quo*. However, in the spring of 2002, the Employer informed the grievor that it would no longer continue that arrangement and, further, that it had “decided to accommodate (you) in the position of Intake Officer in the Inquiry and Intake Office” commencing on June 3, 2002. That change to the *status quo* is what the Union contests in this grievance. The Employer decided, for reasons principally known only to itself, to change the accommodation. The evidentiary onus therefore lies with the Employer to explain the reasons for the change. Further, by changing the accommodation the Employer was, by its actions, asserting that it could no longer accommodate the grievor in the fashion that had been the *status quo*. It is that assertion that must be proven. The facts in this matter shift the burden to the Employer to prove that it complied with its duty to accommodate.

The Employer distinguished the above decisions because there was no effort to accommodate taken by the employers. It was suggested that the present matter is not at all similar because the grievor has been accommodated, albeit not to her liking. In my view, for the purposes of this preliminary matter, that distinction is neither relevant nor determinative. The matter before arbitrators Picher and Dissanayake was whether the employer illegally discriminated against an employee by failing to accommodate their disability. Whether that failure was a refusal to have the employee present in the workplace in any capacity or performing work which is alleged to be inappropriate is

merely a matter of degree and not substance and certainly does not affect the matter of onus.

I agree with the arbitral comments above. In the instant matter, the grievor and the Union are not in a position to know how the Employer arrived at its decision to alter the accommodation. The Union cannot know, and therefore cannot be expected to prove, what operational considerations the Employer took into account when it decided to accommodate the grievor in the position of Intake Officer in the Inquiry and Intake Office. The Union cannot know what analysis the Employer adopted in comparing the grievor's medical needs to the various positions throughout the workplace. All of that information is held uniquely by the Employer.

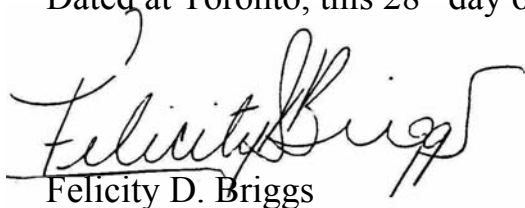
As stated earlier, the parties have different views of what test this Board should apply in rendering its ultimate decision. Irrespective of which of those tests is correct, it is the Employer alone who possesses the facts and reasons for its actions when it denied the grievor's request for a continuation of the earlier agreed to accommodation. If the proper test to be applied is one of appropriateness, obviously the Employer is uniquely aware of why the Intake Position is more appropriate. If the Union is right and the Employer must show that the test to be applied is that of undue hardship it is equally obvious that the only the Employer knows what will and what will not constitute undue hardship for it in these circumstances.

It is to be remembered that there are two grievances in this case. One alleged that the grievor was not properly accommodated and the second alleged that the grievor was discriminated against on the basis of her prior involvement with Union matters. The Union has the onus to prove the second grievance.

At the commencement of our next day of hearing, if requested to do so, I will address with counsel the Employer's alternative submission regarding a request for a liberal right of reply.

As a result of this decision it is necessary to adjourn the hearing days scheduled for April 17 and 25, 2003. Further dates shall be scheduled.

Dated at Toronto, this 28<sup>th</sup> day of March, 2003.

A handwritten signature in cursive script that reads "Felicity Briggs". The signature is written in black ink and is positioned above the printed name.

Felicity D. Briggs

Vice-Chair