Federal Court of Appeal | Cour d'appel fédérale

Date: 20221018

Docket: A-152-20

Citation: 2022 FCA 177

CORAM: **WEBB J.A.**
LASKIN J.A.
MONAGHAN J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

IOULIA GALLINGER

Respondent

Heard at Ottawa, Ontario, on December 7, 2021.

Judgment delivered at Ottawa, Ontario, on October 18, 2022.

REASONS FOR JUDGMENT BY: MONAGHAN J.A.

CONCURRED IN BY: LASKIN J.A.
DISSENTING REASONS BY: WEBB J.A.

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REASONS FOR JUDGMENT

MONAGHAN J.A.

[1] In this application for judicial review, the applicant, Attorney General of Canada, seeks to set aside the decision of the Federal Public Sector Labour Relations and Employment Board (the Board) in *Gallinger v. Deputy Head (Canada Border Services Agency)*, 2020 FPSLREB 54. That decision found that the respondent's employer discriminated against her on the basis of disability by terminating her employment while she was on sick leave without pay (sick LWOP).

[2] The Board ordered the respondent reinstated, her sick LWOP extended while the employer, the respondent and her union completed a return-to-work process, and the respondent returned to paid status effective the date of the Board's decision to the extent that the medical information supported it. The Board also awarded the respondent $15,000 in damages for pain and suffering under paragraph 53(2)(e), and $7,500 in special compensation under subsection 53(3), of the *Canada Human Rights Act*, R.S.C. 1985, c. H-6 (CHRA).

[3] The Board's jurisdiction over termination arises under section 209(1)(c)(i) of the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s. 2 (the Act). Its jurisdiction to interpret and apply the CHRA in relation to any matter referred to adjudication arises under section 226(2)(a) of the Act.

[4] The reasonableness standard of review applies to the Board's decision: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*]; *Gulia v. Canada (Attorney General)*, 2021 FCA 106, at para. 8; *Canada (Attorney General) v. Alexis*, 2021 FCA 216, at para. 5. To be reasonable, the Board's decision that the termination was discriminatory must fall within a range of possible acceptable outcomes, defensible given the facts and law: *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 47 [*Dunsmuir*]. This Court cannot ask itself what decision it would have made, but rather must consider only whether the Board's decision "—including both the rationale for the decision and the outcome to which it led—was unreasonable": *Vavilov*, at para. 83. The onus is on the applicant to show that the decision is unreasonable: *Vavilov*, at para. 100.

[5] The applicant asserts that the Board's conclusion that the employer did not accommodate the respondent to the point of undue hardship was unreasonable because the Board never determined whether, at the time she was terminated, the respondent could return to work in the foreseeable future, despite the evidence before the Board demonstrating that she could not. Alternatively, says the applicant, the award of special compensation under the CHRA was unreasonable because the Board both based the award on irrelevant considerations and departed from the "well-established jurisprudence" which requires intentional discrimination or wanton or heedless conduct to warrant an award of special compensation.

[6] For the reasons that follow, I have concluded that the Board's determination that the termination was discriminatory is reasonable, but that the decision to award special compensation under the CHRA is not.

I. Background

[7] The respondent, Ioulia Gallinger, was an employee of the Canada Border Services Agency (the employer). Following a maternity leave that ended in February 2015, she was unable to return to work because of illness and so commenced sick LWOP. Between January 2015 and February 2017, the respondent provided her employer with nine notes from physicians advising that she was unable to return to work but that her progress would be reassessed. The last of these notes, dated February 22, 2017, followed the employer's request for a return to work date or a "status of [the respondent's] leave" and, if she was not returning, a medical certificate. This medical note indicated the respondent would be reassessed in June.

[8] On March 15, 2017, following two years of sick LWOP and in accordance with Treasury Board policy, the employer sent the respondent an options letter outlining three options: (i) return to active duty, (ii) take steps to medically retire, or (iii) resign from the public service. That letter sought a decision from the respondent by April 24, 2017 and, if she chose to return to work, a medical certificate specifying her expected return date and any accommodations she might need. The letter advised her that without that information the employer might request a fitness to work evaluation (FTWE). The letter warned her the employer might consider termination if it did not hear from her by the deadline, and invited her to contact the employer with any questions.

[9] The respondent did not contact her employer with questions but provided it with a medical note dated April 19, 2017, advising that she had an appointment with a specialist and that her doctor hoped to provide an update no later than July 1, 2017 with the information the employer requested in its March 15th letter.

[10] On May 18, 2017, the employer sent a second options letter to the respondent acknowledging receipt of the April medical note. That letter stated "[u]nfortunately, no possible return to work date has been indicated" and the employer had thus concluded "regrettably, your medical condition does not allow you to return to work within the foreseeable future". This second options letter provided the respondent with only two options—medical retirement or resignation; the option to return to work was removed. The letter set June 2, 2017 as the deadline for response.

[11] The May options letter prompted the respondent to contact her union for assistance. In late May, the union sought an extension from June 2, 2017 to the first week of July for the respondent to "exercise one of the three options referred to in the March 15 letter". The employer agreed to extend the deadline to July 10, 2017.

[12] On July 4, 2017, the respondent asked her employer for three months of leave without pay for the care of a family member as permitted by the collective agreement, and submitted that this would suspend the effect of the options letter. Her employer responded immediately to deny the request, stating the respondent had to resolve her sick LWOP before seeking another type of leave. On July 7, 2017, the employer issued a third options letter confirming denial of the leave request, repeating only the two options from its May options letter, and setting a deadline of July 14 for the respondent to decide.

[13] On July 10, 2017, the employer sent an email to the respondent advising her that, as she was "unable to return to work in the foreseeable future, [she] cannot transition from sick leave to another type of leave, as this does not resolve our [sic] sick leave status". The respondent grieved the denial of her leave application. That grievance is not in issue here.

[14] On July 14, 2017, the deadline set for response to the third (i.e., July 7, 2017) options letter, the respondent wrote to her employer advising she was still waiting for information from a specialist and needed an extension "to make an informed decision about when I will be able to return to work". The employer asked her how long an extension she sought. On July 20, 2017,

she replied that her best guess was 8 to 10 weeks longer but she also stated she was dealing with constraints beyond her control.

[15] In its fourth options letter, dated July 31, 2017, the employer approved an extension until September 15, 2017 “to make an informed decision of the options that were sent to you on July 7” (i.e., take steps to medically retire or resign from the public service). This letter repeated the warning that if the employer did not hear from the respondent by September 15, 2017 it would consider termination.

[16] At an August 3, 2017 meeting between the employer and the respondent’s union representative to discuss the respondent’s grievance of the denied leave, the respondent’s employment situation and her challenges in obtaining medical information were discussed. Following that meeting, the union advised the respondent that it had warned the employer that a termination would lead to a grievance and a complaint to the Canadian Human Rights Commission, but cautioned her that the employer would not extend the deadline beyond September 15, 2017, and that it was “imperative” that she try to meet that deadline for providing the medical information.

[17] Although the respondent received a medical note from her family doctor on September 13, 2017, she did not send it to her employer. It appears she believed her union was seeking an extension to the September 15, 2017 deadline and that she was to send the note to her union for forwarding to the employer. She did not send the note to her union until September 22, 2017, testifying she had challenges in doing so. The family doctor’s note stated that the respondent was

unable to return to work at that time, but that following treatment over the fall, she would be able to better predict her return to work. The note suggested a gradual return to work in the early months of 2018 might be possible if the respondent's treatment went well.

[18] September 15, 2017 passed without the respondent or her union contacting the employer. The employer did not follow up with the respondent or her union but terminated the respondent for medical incapacity effective September 22, 2017. The termination letter, received by the respondent on September 26, 2017, described three options offered to the respondent, "return to duty with relevant medical certification, resignation or medical retirement subject to Health Canada approval". It referenced the three extensions she had been given, her failure to confirm her decision within the prescribed time limit, and the lack of medical information requested by the employer beyond the April 19, 2017 note.

[19] On October 3, 2017, the respondent wrote to her employer stating that she had been trying to obtain the information required to return to work, that she thought her union had obtained an extension to the September 15 deadline, and that she had been terminated because her union representatives made mistakes. She asked the employer to reconsider the termination and to give her the opportunity to provide the medical documentation. On October 4, 2017, the union also asked for an extension to the September 15 deadline.

[20] On October 11, 2017, the respondent received another medical note from her family doctor suggesting that, although the respondent had not fully recovered, she felt able to return to work on a very gradual basis commencing October 30, 2017. The family doctor expressed an

expectation that the return to work would need to occur over several months, commencing with two half-days a week, and outlined several restrictions and proposed accommodations.

[21] The union met with the employer on October 16, 2017 and provided it with the September 13 and October 11 medical notes, advising the employer to contact the respondent's doctor if it needed more information. On October 30, 2017, the respondent grieved the employer's decision to terminate her arguing it, and the contents of the termination letter, were contrary to her collective agreement and discriminatory on the basis of disability. Before the Board, the employer representative testified that, because the medical notes would be addressed in the grievance process, the employer did not respond to the request to reconsider termination in light of the information received in the October 16, 2017 meeting.

[22] The grievance was heard in November 2017 and, on March 20, 2018, the internal final level grievance process upheld the decision to terminate the respondent because "at the date of her termination her sick leave without pay had been ongoing for more than two years and she had not demonstrated that she would be able to work in the foreseeable future".

[23] This led to the referral of the grievance to the Board for adjudication.

II. Board's Decision Regarding Termination of Employment as Discriminatory

[24] The Board stated that the respondent had the initial onus to establish a *prima facie* case of discrimination and, if she did, the onus shifted to the employer to justify the termination by establishing that accommodating the respondent would impose undue hardship, citing *Ontario*

Human Rights Commission and O'Malley v. Simpsons-Sears, [1985] 2 S.C.R. 536, (1985), 23 DLR (4th) 321. See also section 15 of the CHRA.

[25] The Board was satisfied that the respondent made out a *prima facie* case of discrimination. However, it determined that the employer did not demonstrate that it had accommodated the respondent's needs to the point of undue hardship. Accordingly, the Board concluded that the employer's termination of the respondent was discriminatory based on disability.

[26] The applicant does not dispute that the Board identified the correct legal test. Moreover, the applicant does not dispute that the respondent met her burden.

[27] Rather, says the applicant, the Board erred because it failed to answer a threshold question: whether, at the time the respondent was terminated, she was able to return to work in the foreseeable future—a question the Board neither answered nor was able to answer, as the Board itself admitted. Not only did the respondent fail to provide her employer with any evidence before she was terminated that she would be able to return to work in the foreseeable future, says the applicant, but the post-termination evidence before the Board "overwhelmingly established" she would not. The applicant submits it was unreasonable for the Board to fail to consider that evidence when it undertook its undue hardship analysis.

[28] Moreover, the applicant asserts that undue hardship is established where the employee is unable to return to work in the foreseeable future. While conceding that what constitutes the

foreseeable future depends on the circumstances, the applicant submits that, following a two-year absence, a six-month period to provide medical information could reasonably constitute the foreseeable future.

[29] Finally, says the applicant, the Board's determination that the termination was discriminatory was primarily based on the employer's failure to contact the respondent or her union after the September 15 deadline was missed. However, the Board's conclusion the employer should have initiated contact was unreasonable because it imposes a procedural duty to accommodate on the employer, notwithstanding that there is no separate procedural duty to accommodate.

A. *Did the Board err in its application of the undue hardship test by failing to ask whether the respondent could return to work at the time she was terminated?*

[30] Once the respondent established a *prima facie* case of discrimination, the Board had to determine whether the employer met the test for undue hardship. As the Board noted, the applicable principles are set out in *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43. In that case, the Supreme Court said, at paragraph 17, "if the employer shows that, despite measures taken to accommodate the employee, the employee will be unable to resume his or her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship".

[31] Here, the Board found that the employer did not discharge its burden because it did not establish "that accommodating [the respondent] by waiting for further medical information would have constituted undue hardship" (Reasons at para. 136). The employer had the April 19, 2017 note, which "was not a clear, positive statement of [the respondent's] inability to return to work in the foreseeable future" and "did not speculate about a possible return to work at some point in the distant future. It simply said that she was waiting to see a specialist" (Reasons at para. 130).

[32] While acknowledging that the April 19, 2017 note fell short of what the employer was looking for, in the Board's view, that note did not justify the employer's "**conclusion** that [the respondent] could not return to work in the foreseeable future" (Reasons at para. 131, Board's emphasis), a conclusion that led the employer to remove the option of returning to work in the second (May 18, 2017) options letter, and ultimately to terminate the respondent.

[33] The Board contrasted the cases cited by the applicant, describing them as ones in which the "employers in question had in hand clear statements from medical professionals that the grievors' returns to work were 'indefinite', 'only a possibility', perhaps two years away or '…not…in the foreseeable future…'" (Reasons at para. 129). The Board expressly stated that it was "**not** saying that an employer is obliged to extend sick LWOP indefinitely in the face of uncertain medical information" (Reasons at para. 136, Board's emphasis). However, it observed that in the cases the employer cited the "clear evidence" the employees would not return to work in the foreseeable future was "combined with employers who had already provided sick LWOP of a greater duration than the [employer] offered [the respondent]" (Reasons at para. 137).

[34] In light of its knowledge about the respondent's difficulty in obtaining medical information, the Board determined that the employer should have followed up after the respondent failed to meet the September 15 deadline; the employer "had other reasonable options" (including requesting a FWTE) that "would not have represented undue hardship" but rather "would have fulfilled only the employer's share in the multi-party effort" to address the respondent's situation (Reasons at para. 161). Thus, the Board concluded the employer had not met its onus to establish "that it would have experienced undue hardship if it had not terminated her employment" (Reasons at para. 162).

[35] Contrary to the applicant's submission, the Board did not fail to ask a question it was required to ask—whether, at the date she was terminated, the respondent could return to work in the foreseeable future. The applicant concedes that once the respondent met her initial onus, the employer had the onus to establish that accommodating the respondent further would impose undue hardship. In trying to meet that onus, the employer pointed only to the respondent's failure to establish she was able to return to work in the foreseeable future. However, the Board concluded that the employer terminated the respondent without knowing whether she could return to work in the foreseeable future, and that the employer did not establish that it had accommodated her to the point of undue hardship, because it had further options. Given those conclusions, the Board did not consider that question relevant. In my view, given the Board's factual findings, it was not unreasonable for the Board to draw these conclusions in the circumstances of this case.

B. *Did the Board err in failing to take into account the post-termination evidence in undertaking its undue hardship analysis?*

[36] The post-termination evidence in question consisted of information from February 2018 to January 2020, including physician's notes, the respondent's applications for medical retirement and a disability pension under the *Canada Pension Plan*, R.S.C. 1985, c. C-8, and information the respondent provided to and received from Sun Life, the provider of disability benefits. This evidence suggested that the respondent continued to be unable to work for an extended period of time following her termination.

[37] The Board considered that evidence irrelevant to the question to be answered by it: whether the employer established that, at the time the decision to terminate was made, it could not accommodate the respondent beyond the point of undue hardship. The applicant, citing *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, at paras. 49-50 [*McGill*], *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2014 FCA 131 [*Cruden*], and *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 SCR 487, 144 DLR (4th) 385 [*Toronto Board of Education*], asserts the Board should have considered this evidence.

[38] These cases do not assist the applicant. *Cruden* addressed whether a finding that accommodating the employee's needs would result in undue hardship precluded an award under the CHRA based on a separate procedural duty to accommodate. This Court agreed that once an employer establishes a discriminatory standard is an occupational requirement, even if it is based on after-acquired evidence, there is no discriminatory practice. Contrary to the applicant's submission, this Court did not require post-termination evidence to be considered.

[39] In *McGill*, the employee made several failed attempts to return to work; at the date of her termination, her return to work was undetermined according to medical reports. The arbitrator considered facts subsequent to the termination because they were consistent with pre-termination facts that demonstrated the employee was totally incapable of performing her usual duties or those of a comparable position for medical reasons.

[40] In *Toronto Board of Education*, the Supreme Court said the Board could not ignore subsequent-event evidence of continuing objectionable behaviour and set aside a termination decision found to be reasonable because of that behaviour, where there was no evidence that the behaviour was temporary. The post-termination evidence in this case differs from that in *Toronto Board of Education*. In that case, the initial decision to terminate the employee was considered justified based on the information the employer had at the time of termination. The Board here found the termination was not justified based on the information the employer had when it terminated the respondent.

[41] In *Cie minière Québec Cartier v. Quebec (Grievances arbitrator)*, [1995] 2 SCR 1095, 125 DLR (4th) 577 [*Cartier*], the Supreme Court concluded that subsequent-event evidence of successful completion of an alcoholism treatment program could not be used to overturn a decision that was reasonable at the time it was made.

[42] The question the Board had to address is whether the decision to terminate the respondent was discriminatory at the time it was made. The Board found it was.

[43] *Cartier* and *Toronto Board of Education* teach that subsequent-event evidence cannot be used to change a decision that was justified when made into one that should be overturned. Here the employer sought to use subsequent-event evidence to support a decision that the Board found unreasonable and discriminatory at the time it was made. Consistent with *Cartier* and *Toronto Board of Education*, the Board concluded that the subsequent-event evidence which, with hindsight, suggests that the employer's decision to terminate might have been reasonable at the time it was made, could not be used to change an unjustified decision into one that was justified.

[44] The Board considered the applicant's position on the post-termination evidence, but did not agree with it for reasons that are discernable when the decision is read holistically. I see no error in the Board's approach to the significance of the post-termination evidence to its finding that the termination decision was discriminatory.

C. *Did the Board err by imposing a procedural duty to accommodate on the employer?*

[45] The applicant submits that, by concluding the employer should have contacted the respondent or her union on or after September 15, 2017 and before making the decision to terminate, the Board imposed a procedural duty on the employer. Yet, says the applicant, this Court has recognized there is no separate procedural duty to accommodate under the CHRA, citing *Cruden* and *Canada (Attorney General) v. Duval*, 2019 FCA 290 [*Duval*]. The applicant submits that the Board's analysis should have ended when it concluded that it could not determine if and when the respondent was able to return to work.

[46] *Cruden* and *Duval* do not assist the applicant. In *Cruden*, at paragraph 21, this Court concluded there is no procedural right to accommodate where doing so would result in undue hardship. The employer in that case established that it could not accommodate the employee without undue hardship. Having done so, it needed to do no more. Here the Board found that the employer did not establish that it could not accommodate the employee without undue hardship: the employer had not demonstrated why waiting longer, following up with the respondent or her union after September 15, 2017, or taking other reasonable steps, such as seeking an FTWE, would constitute undue hardship.

[47] In *Duval*, the adjudicator had determined that the procedure the employer adopted to reinstate the employee was itself a failure to accommodate. On appeal, this Court said that while "there is no separate procedural right to accommodation that imposes any particular procedure that an employer must follow in seeking to accommodate an employee", it emphasized that "in each case, it will be a question of fact as to whether the employer has established that it has accommodated the complainant to the point of undue hardship": *Duval*, at para 25.

[48] Here the Board was not imposing a particular procedure on the employer. Rather, in the circumstances of this case—the employer knew the respondent was having difficulty obtaining the medical information, the employer provided "insufficient extensions to the deadlines" it set in the options letters (Reasons at para. 143), and the employer failed to seek a FTWE having said it might if it did not receive the requested medical information—the employer did not establish that it had accommodated the respondent to the point of undue hardship. The Board found that the employer acted without information and failed to take a reasonable step "that would not have

represented undue hardship" (Reasons at para. 161) before deciding whether to terminate the respondent.

D. *Conclusion on whether the Board's decision that the termination of employment was discriminatory was reasonable*

[49] In my view, the Board's decision that the termination was discriminatory and that the employer did not establish that it could not accommodate the respondent without undue hardship falls within the range of acceptable outcomes that are defensible given the facts and law: *Dunsmuir*, at para. 47. The Board identified the correct legal test, reviewed the evidence in significant detail and made findings of fact based on that evidence and on inferences it drew from that evidence. The Board described the parties' positions, and analyzed the authorities they cited, drawing distinctions the Board considered appropriate for reasons it explained.

[50] Accordingly, in my view, that decision meets the requirements of justification, transparency, and intelligibility, and I see no grounds to interfere.

[51] I have read the reasons of my colleague Webb J.A. An employer must make an effort to accommodate an employee throughout the employment relationship where failure to do so would be discriminatory: *McGill*, at para 22. Once it has arisen, the duty to accommodate ends only at the point of undue hardship—in the context of this case, where the employee is no longer able to work in the foreseeable future: *Hydro-Quebec*, at para. 19. That is the basis on which the employer terminated the respondent, and it is in this context that the Board framed the "key

question" before it as "whether the employer established that it could not accommodate the [respondent's] needs without imposing undue hardship on itself" (Reasons at para. 6).

[52] Before the Board, the applicant did not argue that employer did not have a duty to accommodate the respondent or that the duty to accommodate had not arisen at the time she was terminated. The reasonableness of an administrative decision cannot normally be impugned on the basis of an issue not put to the administrative decision maker: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, at paras. 22-29, [*Alberta Teachers*]; and *Gordillo v. Canada (Attorney General)*, 2022 FCA 23, at para. 99. Here, the Board is the decision maker who decides the merits and this Court's role is restricted to reviewing that decision for reasonableness: *Vavilov*, at para. 84.

[53] Before this Court, the applicant conceded that the respondent had met the initial onus to establish her termination was discriminatory. Before us the issue, as framed by the applicant, was whether the Board's decision was unreasonable because the Board did not properly apply the test for undue hardship—a test that is relevant where a duty to accommodate has arisen. While it is open to an appellate court to raise a new issue (assuming the *Alberta Teachers* concern is not present), it may do so only when failing to do so would risk an injustice. Moreover, where it chooses to do so, procedural fairness requires that the parties be given notice and an opportunity to make informed submissions: *R. v. Mian*, 2014 SCC 54, at paras. 41 and 54; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, at para. 26; and *Adamson v. Canada (Human Rights Commission)*, 2015 FCA 153, at para. 89. No notice was given here.

[54] While it is therefore unnecessary for me to further address the issues raised by my colleague, my decision not to do so should not be interpreted as suggesting I agree with his conclusions.

III. *Internal Grievance Process*

[55] Having concluded the termination of the respondent was discriminatory, the Board observed that its "analysis could end there" (Reasons at para. 162). Nonetheless, the Board went on to consider the informal resolution process (i.e., the respondent's request that the termination decision be reconsidered and the union's meeting with the employer on October 16, 2017) and the internal grievance process that followed the filing of the grievance on October 30, 2017.

[56] The Board concluded that having received the September 13 and October 11, 2017 medical notes after the termination, "the reasonable step for the employer would have been to use its discretion to seek additional information" from the respondent's doctor or send her for a FTWE. Because the employer did not do so, it "failed to demonstrate that it could no longer accommodate her without undue hardship" (Reasons at para 183).

[57] The applicant submits that the Board should have limited its analysis to the termination itself because the employer's post-termination decision to not reinstate the respondent and the internal grievance process are not relevant to the question of whether the employer had cause to terminate the respondent at the time it did. The applicant argues that the Board did not have jurisdiction to review the internal grievance process and the decision to not reinstate the respondent.

[58] The Board's adjudication of the respondent's grievance constitutes a *de novo* hearing, not a review of the internal grievance process *per se: Patanguli v. Canada (Citizenship and Immigration)*, 2015 FCA 291. Moreover, a grievor cannot change the nature of the grievance before the adjudicator*: Burchill v. Attorney General of Canada*, (1980), [1981] 1 F.C. 109, 37 N.R. 530 (F.C.A.); *Schofield v. Canada (Attorney General*) 2004 FC 622; *Shneidman v. Attorney General of Canada*, 2007 FCA 192 [*Shneidman*], at para. 26.

[59] This limitation is also expressed in subsection 209(1) of the Act: "[a]n employee…may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction…". The reason is "the rules of procedural fairness dictate that employer should not be required to defend…against a substantially different characterization of the issue than it encountered during the grievance procedure": *Boudreau v. Canada (Attorney General)* 2011 FC 868, at para. 19; *Shneidman*, at paras. 26-28.

[60] I agree that the employer's post-termination response and internal grievance process are not relevant to whether the termination of the respondent on September 22, 2017 was discriminatory. However, the Board's comments regarding the employer's post-termination response do not form the basis for the Board's conclusion that the termination itself was discriminatory. Rather, the Board views the post-termination response as supportive of its conclusion that in "act[ing] unreasonably in the time leading to the termination and in not following up with her to find out if the additional medical information would be forthcoming"

the employer did “not establish that it would have experienced undue hardship if it had not terminated her employment” (Reasons at para. 162).

[61] While the Board determined that the employer’s decisions to not assess the medical notes it received shortly after the termination, to not seek additional information, and to not reconsider its termination decision were “part and parcel of the grievance” before it, the Board explained its reasons for doing so.

[62] The jurisprudence supports the Board’s rationale. The question to be asked is whether the allegations made at the adjudication stage “so altered [the] original grievance as to change its nature and make it a new grievance”: *Canada v. Rinaldi* 127 FTR 60, [1997] FCJ No. 225, at para. 26, and *Price v. Canada (Attorney General)* 2016 FC 1408, at para. 77.

[63] Here, very shortly after receiving the termination letter, and before the grievance was filed, the respondent asked the employer for time to provide the medical information and for the termination to be reconsidered. The employer received the September 13 and October 11, 2017 medical notes in mid-October, before the grievance was filed; they were presented to the employer again at the final-level grievance hearing, along with a request that the termination be rescinded and the respondent be accommodated and returned to work effective October 30, 2017.

[64] Thus, in my view, the Board could reasonably conclude that the post-termination issues had been addressed in the internal grievance process and so were properly before it.

IV. Special Compensation under the CHRA

[65] The CHRA permits an award of damages for pain and suffering experienced as a result of a discriminatory practice, and the Board made an award to the respondent for pain and suffering. Although the applicant has not challenged that award, it is clear it could not be upheld had the applicant succeeded in establishing that the Board's decision that the termination was discriminatory was unreasonable: *Cruden*, at para. 16.

[66] Special compensation is an additional amount that may be awarded under subsection 53(3) of the CHRA if the Board "finds that the person [in this case the employer] is engaging or has engaged in the discriminatory practice wilfully or recklessly." It is "a punitive provision intended to provide a deterrent and discourage those who deliberately discriminate": *Canada (Attorney General) v. Johnstone*, 2013 FC 113, [*Johnstone* (FC)], appeal allowed on unrelated grounds, 2014 FCA 110, at para. 154.

[67] The applicant submits that the Board took into account irrelevant considerations in making the special compensation award, most notably medical information the employer did not have when it terminated the respondent. The applicant points not only to the September 13 and October 11, 2017 medical notes, but to other material (post-grievance evidence) from the October 2018 to January 2020 period, including medical notes and material concerning benefits the respondent sought in that period.

[68] I disagree. While the Board states the post-grievance evidence is relevant to the remedy, nothing suggests that evidence influenced the Board's decision on special compensation under the CHRA. Rather, faced with that evidence, the Board decided it could not "reliably conclude at what point [the respondent] might have been able to resume full-time work" (Reasons at para. 224). This precluded the Board from reinstating the respondent retroactively. To that extent the post-grievance evidence was relevant to the remedy, but nowhere in the discussion of awards under the CHRA does the Board reference the post-grievance evidence.

[69] The applicant submits that the Board's award of special compensation "departs from well-established jurisprudence" that "requires the offending party to have acted intentionally, or for its actions to show indifference for their consequences": Applicant's Memorandum at para. 41, citing *Johnstone* (FC). The respondent disagrees, arguing the award is reasonable in light of the law and facts.

[70] *Vavilov* explains that where an administrative decision maker provides reasons they "are the means by which the decision maker communicates the rationale for its decision" (para. 84). The reviewing court must pay close attention to the written reasons, reading them holistically and contextually to understand the basis on which the decision was made. Do the Board's reasons, read holistically and contextually, communicate the rationale for awarding special compensation given the law that constrains the decision maker—in this case the CHRA—and the factual context? In my view they do not.

[71] The relevant discriminatory practice for purposes of the CHRA in this case was "to refuse to employ or continue to employ" the respondent: section 7(a) of the CHRA. To support a special compensation award, the employer must have engaged in that practice wilfully or recklessly. There is no finding that the employer acted wilfully and nothing in the record that would support a finding that it did.

[72] In *Attorney General of Canada v. Douglas*, 2021 FCA 89, this Court endorsed the following description of recklessness from *Johnstone* (FC) at para 155:

> Recklessness usually denotes acts that disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly.

[73] The Board made its special compensation award against the employer because "the employer acted recklessly by removing the option to return to work from Options Letters #2 to 4, by failing to reach out to the [respondent] or her union when the September 15, 2017 deadline was not met, and by not properly reconsidering its decision during the grievance process" (Reasons at para. 258).

[74] The third reason cited by the Board concerned the post-termination period. In my view, while actions of an employer following a termination may be relevant to a special compensation award, the failure of the internal grievance process to result in a reinstatement cannot be the basis of a special compensation award absent some finding that the process itself was biased or otherwise conducted improperly. Nothing on the record suggests that was the case here.

[75] Moreover, the Board's reasons do not adequately analyze how or why these actions are reckless, as that term has been interpreted for this purpose. The Board does little more than state they are reckless and that the "recklessness is less overt or deliberate than what appears to be the case" in *Rogers v. Canada Revenue Agency*, 2016 PSLREB 101 [*Rogers*] or *Nicol v. Treasury Board (Service Canada)*, 2014 PSLREB 3 [*Nicol*] (Reasons at para. 258).

[76] In *Nicol* the employer's conduct was characterized as "repeated, sustained and calculated to ensure the grievor would not return to work. It lasted almost four years" (at para. 157). In *Rogers*, the employer "showed no willingness to discuss the return to work with the grievor and his bargaining agent, contrary to the employer's own policy". In *Rogers* the employer had information from a physician that the employee could return to work but "showed callous disregard for the grievor's concerns", treated the grievor "like an unwanted person", "made no attempt to ease him back into the workplace", and "completely neglect[ed] the terms of the Injury and Illness Policy and specifically the section on enabling the ill or injured employee to return to work" (at paras. 109 and 110).

[77] By contrast, the employer here granted the respondent three extensions of time for submission of medical information regarding her ability to return to work. While the Board found the employer acted unreasonably, and engaged in a discriminatory act by terminating the respondent when it did, that alone does not equate to recklessness.

[78] Other recent cases awarding special compensation have found the employer acted "in bad faith" (*Santawirya v Treasury Board (Canada Border Services Agency*) 2018 FPSLREB 58, 294

L.A.C. (4th) 223, application for judicial review allowed on other grounds 2019 FCA 248) or that the employer's actions were "egregious" (*Hare v. Treasury Board (Department of Indian Affairs and Northern Development)* 2019 FPSLREB 59). I see no similar findings in the Board's reasons—and no finding of deliberate discrimination per *Johnstone* (FC).

[79] While the question to be asked is whether the employer was reckless—not whether the respondent or her union was—in in my view, the assessment of whether the employer's conduct is reckless should be made on a case by case basis with regard to the particular context. That context includes how other parties acted or failed to act, particularly where those actions or failures may have influenced the employer's actions or inactions.

[80] In this case, the Board correctly recognizes that accommodating employees with a disability requires a multi-party effort and finds "each of the three parties—the employer, [the respondent,] and her union—demonstrated failures to act at crucial moments when they could and should have" (Reasons at para. 6).

[81] The Board describes the respondent's failure to meet the September 15, 2017 deadline following two extensions of earlier deadlines as "one of the most troubling aspects of this case" given that her union and the employer "informed her that failing to exercise an option by that deadline could result in her termination" and that "her union had informed her that the employer would not grant an extension" (Reasons at para. 154).

[82] The respondent met with her doctor on September 13, 2017 and obtained a medical note but did not provide it to the employer, and only provided it to her union more than a week later. The Board found she "struggled with the right course of action" given her physician's advice, her sense the union wanted her to work through it, and the caution from her union to consider the impact on her disability insurance benefits (Reasons at para. 155). The Board also states that while "the employer moved directly to termination when it had other reasonable options", the Board "must hold [the Respondent] primarily responsible for not meeting the September 15 deadline" (Reasons at para. 161).

[83] The Board also found that the respondent's "failure to call medical evidence significantly undermined her argument that she was ready and able to return to work in the fall of 2017" (Reasons at para. 240) such that it could not "reliably conclude at what point [the respondent] might have been able to resume full-time work" (Reasons at para. 224).

[84] Given these findings, in my view, the Board's decision that the employer was reckless does not meet the requirements of justification, transparency and intelligibility. The Board failed to point to any particular wanton or heedless acts and to explain why, in the context of so many failures by all the all parties, the employer's actions or inactions were reckless.

[85] Accordingly, I would set aside the award of special compensation under the CHRA and refer the matter back to the Board for reconsideration.

V. Conclusion

[86] For these reasons, I would allow the application for judicial review, without costs, set aside the Board's decision awarding special compensation under subsection 53(3) of the CHRA, and remit the matter back to the Board for reconsideration, based on the existing record, in light of these reasons.

"K.A. Siobhan Monaghan"
J.A.

"I agree
J.B. Laskin J.A."

WEBB J.A. (Dissenting Reasons)

[87] The Board found that the employer discriminated against the respondent in terminating her employment on the basis that it would not have caused the employer undue hardship to make further enquiries when the respondent missed the September 15, 2017 deadline for notifying the employer of the option that the respondent wanted to choose. While my colleagues have found that this decision of the Board was reasonable, I reach a different conclusion with respect to this decision of the Board.

[88] In my view, the duty to accommodate the needs of the respondent to the point of undue hardship was not triggered. As a result, there was no requirement on the employer to accommodate the respondent to the point of undue hardship in this case. The Board did not address whether the employer had a duty to act fairly and in good faith in dismissing the respondent and, if so, whether the employer breached this duty.

I. Background and Findings of Fact Made by the Board

[89] The facts are set out in detail in the reasons of my colleagues. Only a few facts will be highlighted.

[90] The respondent had been off work on sick leave without pay since February 3, 2015. After the expiration of two years, the employer started sending letters to the respondent to determine whether she would be returning to work. The first letter sent to the respondent

included three options (a return to duty, medical retirement, or a resignation) but the subsequent letters only included the last two options.

[91] The only medical note provided by the respondent (prior to the termination of her employment) was a brief note dated April 19, 2017 that was set out in paragraph 36 of the Board's reasons:

> I am writing in reply to your letter to Ms. Gallinger dated March 15 2017. She has finally received an appointment with a specialist in the next few weeks. I believe that specialist's opinion will provide further advice on diagnosis and management and would propose that I update you no later than July 1 2017 with the information you have requested in your letter.

[92] The final letter from the employer imposed a deadline of September 15, 2017 for the respondent to identify which option she would be choosing. Prior to this deadline, the respondent received a note from her physician dated September 13, 2017. The content of this note is set out in paragraph 56 of the Board's reasons:

> Please be advised I have seen Ioulia in the office today. She will be unable to return to work at this time. Ioulia will be having a course of treatment over the fall and then will be more able to predict her return to work. I anticipate she will definitely require gradual return to work. If her treatment goes well, this will be in the early months of 2018.

[93] The respondent did not send this note to the employer before her employment was terminated on September 22, 2017.

[94] This note only indicated a possible return to work in early 2018 ("if her treatment goes well"). A subsequent note dated October 11, 2017 "proposed a graduated return to work commencing at the end of that month" (reasons of the Board, paragraph 238). However, this note still did not persuade the Board that the respondent had established if and when she could return to work:

> [217] I agree with the employer that the lack of detailed medical evidence and testimony in a case such as this significantly limits my ability to reach conclusions about **if** and when the grievor was able to return to work. She had the opportunity to tender that evidence during the hearing, but did not. The grievor has therefore not presented the medical evidence required to establish that she was able to work as of October 30, 2017 and should be reinstated retroactively to that date, which is the remedy she was seeking when her grievance was presented.
>
> [emphasis added]

II. Decision of the Board

[95] At the beginning of its reasons, the Board identified what it considered to be the key issue:

> [6] … the key issue before me is whether the employer established that it could not accommodate Ms. Gallinger's needs without imposing undue hardship on itself.

[96] The Board's conclusion that it would not impose undue hardship on the employer to make further enquires after the respondent missed the September 15, 2017 deadline, is set out in paragraph 161 of its reasons:

> [161] I must hold Ms. Gallinger primarily responsible for not meeting the September 15 deadline. However, I find that the employer opted to move directly to termination when it had other reasonable options, i.e., a phone call or an email to either the grievor or her union representative to check if any further information might be forthcoming. In my view, such steps would **not** have represented undue hardship. They would have fulfilled only the employer's share in the multi-party effort to consider Ms. Gallinger's situation.
>
> [emphasis added by the Board]

[97] Although in paragraph 162 of its reasons the Board referred to its finding that the employer had acted unreasonably, in the same paragraph the Board reiterated that the employer did not establish that it would have caused the employer undue hardship if it had not terminated the respondent's employment:

> [162] Having concluded that the employer acted unreasonably in the time leading to the termination and in not following up with her to find out if the additional medical information would be forthcoming, my analysis could end here. The employer has not established that it would have experienced undue hardship if it had not terminated her employment.

[98] The Board was relying on its finding that the employer had not established that it would suffer undue hardship if it would have made further enquiries rather than terminate the employment of the respondent following the failure of the respondent to notify the employer of her chosen option by the September 15, 2017 deadline.

III. Undue Hardship

[99] As the Board noted in paragraph 111 of its reasons, the duty to accommodate the needs of a person to the point of undue hardship arises under subsection 15(2) of the *Canadian Human*

Rights Act, R.S.C. 1985, c. H-6 (CHRA). This subsection provides that an employer can establish that a particular practice set out in paragraph 15(1)(*a*) of the CHRA is a *bona fide* occupational requirement (and therefore not a discriminatory practice) if "accommodation of the needs of [the employee] affected would impose undue hardship on the [employer], considering health, safety and cost". Subsections 15(1) and (2) of the CHRA provide, in part, that:

15 (1) It is not a discriminatory practice if	15 (1) Ne constituent pas des actes discriminatoires :
(*a*) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement;	*a*) les refus, exclusions, expulsions, suspensions, restrictions, conditions ou préférences de l'employeur qui démontre qu'ils découlent d'exigences professionnelles justifiées;
…	[…]
(2) For any practice mentioned in paragraph (1)(*a*) to be considered to be based on a *bona fide* occupational requirement and for any practice mentioned in paragraph (1)(*g*) to be considered to have a *bona fide* justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.	(2) Les faits prévus à l'alinéa (1)*a*) sont des exigences professionnelles justifiées ou un motif justifiable, au sens de l'alinéa (1)*g*), s'il est démontré que les mesures destinées à répondre aux besoins d'une personne ou d'une catégorie de personnes visées constituent, pour la personne qui doit les prendre, une contrainte excessive en matière de coûts, de santé et de sécurité.

[100] The issue of whether an employer has established that accommodating the needs of a particular person would impose undue hardship will only arise if this subsection 15(2) statutory duty to accommodate the needs of an employee to the point of undue hardship is triggered.

IV. When is the Duty to Accommodate Triggered?

[101] An employer's duty to accommodate the needs of an employee who is not working as a result of a disability is only triggered once an employee provides evidence that they can return to work and identifies the particular needs that will have to be accommodated by the employer. This precondition to the duty to accommodate was set out in *Katz et al. v. Clarke*, 2019 ONSC 2188 (*Katz*) (Ontario Superior Court of Justice (Divisional Court)):

> [28] The motion judge held, however, that there was a "genuine issue for trial" on the basis that the Respondent's stated desire to return to work without more was sufficient to create the possibility of an issue of the employer's duty to accommodate notwithstanding the state of the documentation before the Respondent. However, the law is clear that an employer's duty to accommodate is only triggered when an employee informs an employer not only of his wish to return to work but also provides evidence of his or her ability to return to work including any disability-related needs that would allow him or her to do so: see *Lemesani* at para. 187. As was succinctly put by Fregeau J. in *Nason v. Thunder Bay Orthopaedic Inc.*, 2015 ONSC 8097 (Ont. S.C.J.) at para. 144, "the employee must communicate the ability, not just the desire, to return to work". In this case, the Respondent never provided any such information to the Appellant.
>
> [emphasis added]

[102] The principle that the duty to accommodate is only triggered when an employee provides evidence of his or her ability to return to work, including any disability-related needs, was affirmed by this Court in *Babb v. Canada*, 2022 FCA 55 (*Babb*):

> [60] An employer's duty to accommodate is only triggered when an employee informs an employer of his wish to return to work and provides evidence of his ability to return to work, including any specific needs that would allow him to do so (*Katz et al. v. Clarke*, 2019 ONSC 2188, 2019 CarswellOnt 6703 at para. 28). However, as stated earlier, in this case, the applicant never provided any such information to the employer. It was reasonable for the Board to find that the

> employer was not required to do anything further, given the length of time the applicant was absent from work and the medical evidence that he was unable to return to work in the foreseeable future.

[103] The Board, in the case that is before this Court, applied the duty to accommodate to the point of undue hardship before the respondent had established that she could return to work and without any identification of what needs would have to be accommodated by the employer to allow her to return to work.

[104] How can an employer be found to be in breach of the duty to accommodate the needs of a disabled person if the employer does not know what accommodations will be required to enable that person to resume work? If the employer does not know what accommodations will be required to enable a person to return to work, the duty to accommodate is not triggered. The related question of whether any particular action would impose undue hardship on the employer does not arise.

[105] This principle that the duty to accommodate only arises once the employee provides evidence that such employee is able to return to work and identifies the particular needs that must be accommodated in order for that employee to return to work, is not inconsistent with the decision of the Supreme Court of Canada in *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ),* 2008 SCC 43 (*Hydro-Québec*). In that case, the Supreme Court of Canada described the goal and the purpose of the duty to accommodate:

[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 by Justice Deschamps; 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 *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, [2007] 1 S.C.R. 161, 2007 SCC 4, the employer had authorized absences that were not provided for in the collective agreement. Likewise, in the case at bar, Hydro-Québec tried for a number of years to adjust the complainant's working conditions: modification of her workstation, part-time work, assignment to a new position, etc. However, in a case involving chronic absenteeism, if the employer shows that, despite measures taken to accommodate the employee, the employee will be unable to resume his or her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship.

[emphasis added to paragraph 14]

[106] As noted by the Supreme Court, the purpose of the duty to accommodate is to ensure that an employee who is able to work can do so, provided that any accommodation that is required can be implemented without imposing undue hardship on the employer. Although rigid rules concerning what accommodations would be acceptable are to be avoided, it should be noted that the examples provided by the Supreme Court all relate to working conditions or the workplace. They contemplate what would be required to allow a person to work.

[107] In *Hydro-Québec* the employer had been advised of the particular accommodations that would be required for the person to continue working:

> [5] The arbitrator who heard the case dismissed the grievance. He was of the opinion [TRANSLATION] "that, in principle, the [e]mployer could terminate its contract of employment with the complainant if it could prove that, at the time it made that administrative decision, the complainant was unable, for the reasonably foreseeable future, to work steadily and regularly as provided for in the contract". The arbitrator stated that, according to the employer's experts, no medication can effectively treat a condition such as a personality disorder, and that psychotherapy can at most alleviate the symptoms very slightly. Those experts estimated the risk of depressive relapse at more than 90 percent. In their words, [TRANSLATION] "the future will mirror the past". On the other hand, the arbitrator noted that the expert for the Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ) ("Union"), which represents the complainant and is the respondent in this Court, was of the opinion that the complainant could
>
> > [TRANSLATION] work in a satisfactory manner provided that it is possible to eliminate the stressors -- both those related to her work and those arising out of her relationship with her immediate family -- that affect her and make her unable to work. He suggests a complete change in the complainant's work environment.
>
> [6] The arbitrator concluded that, given the specific characteristics of the complainant's illness, if the suggestion of the Union's expert were accepted, [TRANSLATION] "the [e]mployer would have to periodically, on a recurring basis, provide the complainant with a new work environment, a new immediate supervisor and new co-workers to keep pace with the evolution of the 'love-hate'

> cycle of her relationships with supervisors and co-workers". The arbitrator added that some of the factors that contributed to the complainant's condition were beyond the employer's control and that the employer would not be able to eliminate stressors related to the complainant's family environment, as the suggestion of the Union's expert would require. The arbitrator found that the conditions suggested by the Union's expert would constitute undue hardship. In his view, the employer had acted properly -- with patience and even tolerance -- toward the complainant. He dismissed the grievance. The Union then applied for judicial review of the arbitrator's decision.

[108] As a result, the duty to accommodate was triggered in *Hydro-Québec*.

[109] In the case that is before us, the Board did not apply the principle as set out in *Katz* nor did the Board provide any rationale to explain why this principle did not apply. The Board imposed a duty on the employer to make further enquiries on the basis that it would not impose undue hardship on the employer in the absence of any finding that the respondent could return to work and without any indication of what accommodations would be required to allow the respondent to return to work.

[110] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the Supreme Court noted:

> [111] It is evident that both statutory and common law will impose constraints on how and what an administrative decision maker can lawfully decide: see *Dunsmuir*, at paras. 47 and 74. …
>
> [112] Any precedents on the issue before the administrative decision maker or on a similar issue will act as a constraint on what the decision maker can reasonably decide. An administrative body's decision may be unreasonable on the basis that the body failed to explain or justify a departure from a binding precedent in which the same provision had been interpreted. Where, for example, there is a relevant case in which a court considered a statutory provision, it would be unreasonable for an administrative decision maker to interpret or apply the

> provision without regard to that precedent. The decision maker would have to be able to explain why a different interpretation is preferable by, for example, explaining why the court's interpretation does not work in the administrative context: M. Biddulph, "Rethinking the Ramification of Reasonableness Review: *Stare Decisis* and Reasonableness Review on Questions of Law" (2018), 56 Alta. L.R. 119, at p. 146. There may be circumstances in which it is quite simply unreasonable for an administrative decision maker to fail to apply or interpret a statutory provision in accordance with a binding precedent. For instance, where an immigration tribunal is required to determine whether an applicant's act would constitute a criminal offence under Canadian law (see, e.g., *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 35-37), it would clearly not be reasonable for the tribunal to adopt an interpretation of a criminal law provision that is inconsistent with how Canadian criminal courts have interpreted it.

[111] In the matter that is before us, the Board applied the duty to accommodate to the point of undue hardship before the respondent provided evidence that she could return to work and before she identified what accommodations would be required to allow her to do so. This is contrary to the legal principle set out in *Katz* (and subsequently affirmed in *Babb*). It is also inconsistent with the goal of the duty to accommodate as identified by the Supreme Court in *Hydro-Québec*—to ensure that an employee who is able to work can do so. The absence of any explanation for the departure of the Board from this legal principle or how requiring the employer to make further enquiries would satisfy its duty to accommodate the needs of the respondent that would allow her to return to work (which needs were not identified) renders its decision unreasonable.

V. Duty to Act Fairly and in Good Faith

[112] The Supreme Court in *Wallace v. United Grain Growers Ltd. (c.o.b. Public Press)*, [1997] 3 S.C.R. 701 noted that an employer has a duty to act in good faith and fairly in dismissing an employee:

> [95] … In my opinion, to ensure that employees receive adequate protection, employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal …
>
> …
>
> [98] The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive. …

[113] This duty to act fairly when dismissing an employee was also noted in *Dwyer v. Advanis Inc.*, 2009 CanLII 23869, [2009] O.J. No. 1956:

> [50] When dismissing employees, employers are under a duty to act fairly. They are required to be candid, reasonable, honest and forthright. If they act otherwise they may be responsible in damages, though the onus is on the employee to establish that the employer engaged in bad faith conduct or unfair dealing in the course of dismissal.

[114] The Board did not consider whether this duty to act fairly and in good faith applied if an employer, before the duty to accommodate is triggered, dismisses an employee who is disabled *i.e.* before the employee provides evidence that such employee is able to return to work and identifies what accommodations will be required.

[115] While the duty to act fairly and in good faith may well impose obligations on an employer to take actions that would not impose an undue hardship on the employer, an employer may also be found to have acted fairly and in good faith even though it did not take a particular action that would not impose an undue hardship on it. The question for the Board would not be

whether making further enquiries would impose an undue hardship on the employer, but rather whether the employer had satisfied its duty to act fairly and in good faith based on the circumstances of the case and the actions that the employer had taken.

VI. Is the Triggering of the Duty to Accommodate a New Issue?

[116] In *R v Mian*, 2014 SCC 54, the Supreme Court set out the test to determine if an appellate court has raised a new issue:

> [35] In summary, an appellate court will be found to have raised a new issue when the issue was not raised by the parties, cannot reasonably be said to stem from the issues as framed by the parties, and therefore would require that the parties be given notice of the issue in order to make informed submissions.

[117] In the application before us, the applicant did not specifically identify, as an issue, whether the duty to accommodate was triggered. However, in paragraph 19 the applicant argued:

> … the Board failed to answer a threshold question: whether the Respondent was actually able to return to work in the foreseeable future. As established by the Supreme Court of Canada [*Hydro-Québec*, at para. 19], "[t]he employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future."

[118] The applicant then reviewed some of the evidence indicating that the respondent would not be able to return to work. In this part of its submissions, the applicant did not identify any action taken by the employer.

[119] The applicant then submitted:

> 24. Having disregarded the evidence, the Board failed to answer the threshold question posed by the Supreme Court of Canada in *Hydro-Québec*: whether the Respondent was able to return to work in the foreseeable future at the time of the termination. Without considering the evidence on this point, the Board could not reasonably find that CBSA did not accommodate her to the point of undue hardship. The onus is on the employee to provide evidence on the basis of which the Board can find that she was able to return to work in the foreseeable future. The Board itself held that the Respondent had the opportunity to provide this evidence, but did not.

[120] The applicant argued that the onus was on the respondent to provide evidence to establish that she could return to work. The applicant also argued that failing to establish that the respondent could return to work resulted in the duty to accommodate ending or that it was not reasonable to find that the employer did not accommodate her to the point of undue hardship. The applicant does not refer to any action or steps taken by the employer in this part of its argument. Therefore, the argument that the duty to accommodate ended (or no finding could be made that the employer did not accommodate her) is premised on the employer not being required to do anything in relation to this duty to accommodate, in the absence of a finding that she could return to work.

[121] In the application before this Court, the respondent did not argue that the issue of whether the threshold question that the Board had to address was whether the respondent was able to return to work or whether the argument that absent this finding, “the Board could not reasonably find that CBSA did not accommodate her to the point of undue hardship” were issues that had not been raised before the Board. The respondent did not argue that the applicant could not raise these issues in its application to this Court.

[122] The applicant also included the decision of the Federal Public Sector Labour Relations and Employment Board in *Babb v. Canada Revenue Agency*, 2020 FPSLREB 42, in the applicant's record. In this decision, the Board found that "the employer's conclusion that [Mr. Babb] was incapable of returning to work in the foreseeable future was reasonable". The Board then found that "the employer's duty to accommodate was at an end" (paragraph 279 of the Board's decision).

[123] On the application for judicial review to this Court, the issues in *Babb* were described as follows:

> [33] The issues that must be addressed by this Court are as follows:
>
> a) Was it reasonable for the Board to conclude that the employer had not discriminated against the employee because it met its duty to accommodate, having made out its BFOR [*bona fide* occupational requirement] defence set out in subsection 15(2) of the CHRA?
>
> b) Was it reasonable for the Board to conclude that the employer acted in good faith when it terminated the applicant for reasons of incapacity?

[124] In analysing the issue of whether the Board's decision in *Babb* in relation to the duty to accommodate was reasonable, this Court stated:

> [59] In my view, it was reasonable for the Board to be satisfied that the employer's duty to accommodate was at an end (Decision at para. 279).
>
> [60] An employer's duty to accommodate is only triggered when an employee informs an employer of his wish to return to work and provides evidence of his ability to return to work, including any specific needs that would allow him to do so …

[125] By referring to both the duty to accommodate ending and, in the immediately following paragraph, to the duty to accommodate not being triggered, this Court was not identifying the triggering of the duty to accommodate as a new issue but rather as support for its finding that it was reasonable for the Board to be satisfied that the employer's duty to accommodate was at an end.

[126] Referring to the triggering of the duty to accommodate as support for a finding that this duty had ended can be rationalized on the basis of what the duty to accommodate requires an employer to do. As noted by the Supreme Court in *Hydro-Québec*, "the goal of accommodation is to ensure that an employee who is able to work can do so". The employer's duty to accommodate is to accommodate to the point of undue hardship (considering health, safety and cost) the needs of an individual that would allow that person to work. Without knowing what particular needs the employer will be required to accommodate to allow the person to work, the duty to accommodate is a hollow duty – there is no particular need to be accommodated until the need is identified. The duty to accommodate a particular need will only require the employer to accommodate that need, to the point of undue hardship, once the need is identified.

[127] Whether the matter is viewed as a duty to accommodate that has ended without any particular need being identified or whether the duty to accommodate is not triggered until the particular needs that would allow a person to work are known, the result is the same. There are no identified needs to be accommodated by the employer.

[128] As a result, in my view, the issue of whether the duty to accommodate has been triggered reasonably stems from the issues as raised by the applicant.

VII. Conclusion

[129] As a result, in my view, the decision of the Board that the employer had not established that it would impose undue hardship on the employer to make further enquiries of the respondent and therefore that the employer discriminated against the respondent in terminating her employment, is not reasonable. It would necessarily follow that the award of damages under the CHRA is also unreasonable. In my view, the application for judicial review should be allowed, the decision of the Board should be set aside and the matter should be remitted back to the Board for redetermination.

"Wyman W. Webb"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A DECISION OF THE FEDERAL PUBLIC SECTOR LABOUR RELATIONS AND EMPLOYMENT BOARD DATED MAY 20, 2020, NO. 2020 FPSLREB 54

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PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 7, 2021
REASONS FOR JUDGMENT BY:	MONAGHAN J.A.
CONCURRED IN BY:	LASKIN J.A.
DISSENTING REASONS BY:	WEBB J.A.
DATED:	OCTOBER 18, 2022

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