CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3479

Heard in Montreal Tuesday, 12 April 2005

concerning

VIA RAIL CANADA INC.

and

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)

EX PARTE

DISPUTE:

Accommodation of a medical disability of Senior Service Attendant Christopher Thomas.

UNION'S STATEMENT OF ISSUE:

In March 2003, the grievor, on account of a physical disability, became unable to pursue the usual functions of his on-board position. His request to be provided with modified duties was declined on March 21, 2003, by Yves Noël, *Chef des services à la clientèle*, with the explanation that "*il ne nous ai [sic] pas possible de vous allouer des travaux légers*". His application for accommodation under either agreement no. 2 or agreement no. 1, filed with the office of Leila Heller, Human Resources, received no written response. As a result, the grievor went off work on short-term disability insurance.

Following corrective surgery in August and September, the grievor was cleared for modified duties by his physician on November 17, 2003, and applied for accommodation the following day. This request was also denied. The grievor elected to continue working without accommodation and overcoming his pain.

The Union contends that the Corporation failed utterly to exercise the required effort to find an accommodation for the grievor, thus violating both Appendix 7 of agreement no. 2 as well as the prohibitions against discrimination on the grounds of disability contained in the *Canadian Human Rights Act*. The Union claims that as a result of this improper discrimination, the grievor incurred loss of salary equal to the difference between his regular pay and his

remuneration while on disability insurance. The Union further contends that the Corporation's actions contributed to the grievor's personal insolvency. The Union requests declarations to the above effect, that the grievor be made whole in all necessary respects, and that the Corporation be ordered to pay punitive and exemplary damages in respect of its actions.

The Corporation denies that it has a legal duty to accommodate employees suffering from disabilities of a temporary nature and otherwise denies the contentions and claims of the Union.

FOR THE UNION:

(SGD.) A. ROSNER
NATIONAL REPRESENTATIVE

There appeared on behalf of the Corporation:

L. Laplante	– Sr. Officer, Labour Relations, Montreal
Y. Noël	– Manager, Field Operations,
E. Houlihan	– Sr. Manager, Labour Relations, Montreal
D. Stroka	– Officer, Labour Relations, Montreal
L. Heller	– Sr. Advisor, Human Resources, Montreal

And on behalf of the Union:

A. Rosner	– National Representative, Montreal
R. Massé	– Regional Representative, Montreal
C. Thomas	– Grievor

AWARD OF THE ARBITRATOR

This arbitration raises the issue of whether a temporary physical condition constitutes a disability within the meaning of the **Canadian Human Rights Act** R.S.C. 1985 c. H-6. The Union alleges that the Corporation did have a duty of accommodation and it failed to make every reasonable effort to accommodate the disability of the grievor, Mr. Christopher Thomas, to the point of undue hardship.

Mr. Thomas is a senior service attendant in on-board services. His employment in the railway industry dates to 1972 when he was first hired by the Canadian National

Railway. He transferred to the service of VIA Rail at the time of its creation in or about 1978. Although he took a separation package in the radical cut-back in VIA service in 1990, he was re-hired in 1992 and has since worked both as a ticket agent and, since 1994, as an employee in on-board services.

On February 5, 2003, Mr. Thomas was diagnosed as having severe bilateral osteoarthritis of the hips, a condition which required surgery for the replacement of both of his hips. A note from his doctor dated February 5, 2003 indicates to the Corporation that Mr. Thomas should be assigned light duties pending his evaluation by an orthopaedic surgeon. His supervisor, Mr. Yves Noël, advised him that no accommodation was possible. Shortly thereafter, on March 3, 2003 the grievor could no longer work because of the pain he was enduring. He then commenced a medical leave of absence during which he received weekly indemnity benefits from the Great West Life Company, representing 70% of his salary, for a period of forty-one weeks.

The grievor did not wish to be off work collecting indemnity benefits, but would have preferred to have worked in an accommodated position, for example as a ticket agent, a job which he had previously performed. On March 17, 2003 he obtained a note from his orthopaedic specialist, Doctor Alain Roy, who approved him for hip surgery. That note indicated that he could be placed at work doing light sedentary tasks. When the grievor gave the note to Mr. Noël he indicated to him that he was prepared to do platform duties in the preparation of trains. Nor does it appear disputed that Mr. Noël was aware of the grievor's prior experience as a ticket agent.

In substance, the replies of the Corporation to the entreaties of Mr. Thomas are essentially to the effect that it did not consider that he was owed any duty of accommodation in the circumstances. A note provided by Mr. Noël on March 21, 2003 and subsequent communications from management, including Ms. Leila Heller, reveal that the Corporation took the position that the grievor, being on sick leave indemnity benefits, and being incapacitated by a temporary condition which was correctable by surgery, could not claim to have a disability within the meaning of the **Canadian Human Rights Act** and that, consequently, no duty of accommodation was owed to him. In the result, on May 15, 2003, the grievor filed a complaint with the Canadian Human Rights Commission. He did not, however, file a grievance until considerably later.

Mr. Thomas underwent hip replacement surgery for one hip on August 21 and for the second hip on September 24, 2003. After a period of convalescence, on November 14, 2003 Dr. Roy provided a medical note which authorized his return to light duties for a period of two months. The Corporation's own physician, Dr. Marcel Pigeon agreed with the assessment of Dr. Roy, as reflected in a letter dated November 25, 2003. Notwithstanding those medical opinions, however, the Corporation did not allow Mr. Thomas to return on the terms suggested by the physicians. Rather, it required him to sign an agreement for his return to work on light duties, a condition of which was the surrender of his human rights complaint. On December 5, 2003 Mr. Thomas was presented with a form, the preamble of which was to cite the parties' wish to resolve the grievor's human rights complaint of May 15, 2003. The grievor took the position that he

would agree to no such surrender of his rights and refused to sign the document. In the result, although the draft “settlement” contained a graduated plan for his return to work over four separate periods, the Corporation flatly refused to reinstate the grievor or to provide him any accommodation whatsoever at that time. In the face of the Corporation’s intransigence, the grievor returned to Dr. Roy who, after entreaties from Mr. Thomas, provided him with a note allowing him to return to unrestricted work, without any accommodation, effective December 18, 2003.

The Union filed the instant grievance on December 15, 2003. It states that it is greatly disturbed by what it characterizes as the egregious violation of the duty of accommodation exhibited by the Corporation, knowingly and consistently over a period of many months, to the distress of the grievor who, it appears, was compelled to declare personal bankruptcy during the period in question. In addition to a general make whole order, the Union seeks $20,000 in punitive and exemplary damages against the Corporation.

The first issue to be addressed is whether the Corporation did owe the grievor a duty of accommodation. The Union maintains that that duty arises both under Appendix 7 of the collective agreement as well as under the **Canadian Human Rights Act**. The Arbitrator finds it unnecessary to deal with the meaning and application of Appendix 7 of the collective agreement. A document executed under the auspices of CN and CP Rail on March 5, 1982, it addresses the circumstances of “… an employee who becomes physically disabled during the course of his employment”. In other words, it expresses

the intent of the parties at the time to endeavour to make all reasonable efforts to continue the employment of persons who suffer work-related injuries. That document was more than overtaken by the provisions concerning the duty of accommodation now found in the **Canadian Human Rights Act**, and the interpretation to be given to such provisions as reflected in the decisions of the Supreme Court of Canada in **Central Okanogan School District No. 23 v. Renaud** (1992), 95 D.L.R. (4th) 577; [1992] 2 S.C.R. 970, and in **Central Alberta Dairy Pool v. Alberta (Human Rights Commission)** [1990] 2 S.C.R. 489. The evolution and scope of the duty of accommodation as it pertains to an employer, a trade union and the disabled employee has been extensively commented upon in the decisions of this Office (see, e.g., **CROA 1586, 2710, 2745, 2768, 3060, 3036, 3063, 3173, 3198, 3219, 3222, 3262, 3267, 3269, 3346, 3354**).

The purpose of the **Canadian Human Rights Act** is stated as follows in section 2 of the statute:

Purpose of Act

> **2. Purpose** – The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discrimination or practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

Article 3(1) of the **Act** lists the prohibited grounds of discrimination and includes within those grounds “disability”. Section 7 of the statute then states:

> **7. Employment** – It is a discriminatory practice, directly or indirectly,
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> > **(a)** to refuse to employ or continue to employ any individual, or
> >
> > **(b)** in the course of employment, to differentiate adversely in relation to an employee,
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> on a prohibited ground of discrimination.

Section 15(1) of the **Act** lists certain exceptions which do not constitute a discriminatory practice, as for example where it can be shown that freedom from a particular disability constitutes a *bona fide* occupational requirement. The issue of accommodation is then addressed in section 15(2) in the following terms:

> **(2) Accommodation of needs** – For a 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.

Finally, section 25 of the **Act** provides the following definition of "disability":

> **"disability"** means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug.

It appears to the Arbitrator that the decision of Parliament to use the word "disability" reflects the intention of the legislators to provide the broadest possible protection. The current federal statute does not, for example, use the word "handicap", as it once did during the 1980s.

The Ontario **Human Rights Code** has also adopted the word “disability”. It further provides the following elaboration of the concept of “disability” in section 10(1) of the statute:

> … “disability” means for the reason that the person has or has had, or is believed to have or have had,
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> (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, including diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal, or on a wheelchair or other remedial appliance or device.
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> (b) a condition of mental retardation or a developmental disability,
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> (c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language.
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> (d) a mental disorder, or
>
> (e) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act*, 1977.
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> …

At one time, in the mid-1980s, section 39 of the **Canadian Human Rights Act** provided a definition of “physical handicap” which, with only minor differences, was word for word identical to the provisions of section 10(1) of the **Ontario Human Rights Code**, reproduced above. In the Arbitrator’s view it would appear that the move from the phrase “physical handicap” to the word “disability” and the elimination of the list of example conditions previously found in the **Act** are motivated by more than political correctness in avoiding the word “handicap”. In my view the amendments to the **Act**

reflect a deliberate intention to broaden the protections against discrimination on the basis of disability provided by the federal statute.

From the earliest days following the introduction of the human rights codes, tribunals administering the codes were called upon to consider what might or might not constitute a handicap or a disability. One of the earliest reported decisions dealing with the issue is **Neilson v. Sandman Four Ltd.** (1986), 7 C.H.R.R. D/3329 (B.C.C.H.R.). In that case the complainant brought a claim under the **Human Rights Act** of British Columbia, S.B.C. 1984, c. 22. It appears that she slipped on a patch of ice in the parking lot of the employer which resulted in her suffering a physical condition described as “sciatica” over an eleven day period. She was terminated because of her related absenteeism. In dismissing the complaint, Adjudicator E.D. Powell found that at most the complainant had experienced a temporary injury which prevented her from attending work. In his view that condition did not constitute a “physical disability” within the meaning of the **Act**. It is on the basis of that decision that subsequent tribunals have commented, generally in *obiter dicta*, that to be protected under human rights legislation a person’s condition or illness must have some degree of permanence. Comments to that effect, not essential to the decision, were made in **Norman G. Brimacombe v. Northland Road Services Ltd.** (1998), 30 C.H.R.R. D/53 (B.C.C.H.R.) and in **Re Belleville General Hospital and Services Employees’ Union, Local 183** (1993), 37 L.A.C. (4th) 375 (Thorne). The two foregoing cases are the only authority relied upon by the Corporation to support its view that an employee’s temporary illness or injury does not trigger the statutory duty of accommodation for an employer.

A close examination of the cases, however, leaves the Corporation's position in substantial doubt. What the authorities do confirm is that certain short term minor ailments or injuries may not, of themselves, be sufficient to qualify as a full-blown disability for the purposes of protection under human rights legislation. With respect to physical disabilities, human rights legislation has generally been taken to assume that a person must have a relatively substantial limiting physical condition to invoke the statutory protection against discrimination. That is clearly reflected in the enumerated examples of handicap or disability which were to be found in the earlier version of the **Canadian Human Rights Act** and in the **Ontario Human Rights Code**. Early American legislation was similarly oriented. For example, in the **Rehabilitation Act of 1973** (29 U.S.C.A. §§ 706(7)(B), 794a.) the term "handicapped individual" was defined as "… any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment or (iii) is regarded as having such impairment."

The reported human rights tribunal case in Canada which dealt perhaps most directly with the issue of the scope of the term "disability" or "handicap" is the decision of Professor D.J. Baum in **Ouimet v. Lily Cups Ltd.** (1990), 12 C.H.R.R. D/19 (Ont. Bd. Inq.). Ms. Ouimet was a probationary employee discharged because she exceeded the company's standard of absenteeism for probationary employees, having missed work on three separate days during her first twenty-nine working days. She claimed that on one day she was absent because she had an asthmatic reaction to aspirin and that on

two other consecutive days she was absent because she had the flu. Professor Baum found that the plaintiff knew that she was at risk of external asthma symptoms because of her allergy to aspirin, yet negligently caused her own reaction by taking that medication without due caution. He further found that a two-day bout of the flu could not be seen as constituting a handicap or disability within the meaning of the **Ontario Human Rights Code**. In that regard he commented:

> C. THE FLU (GASTROENTERITIS) AS AN ILLNESS
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> Again, citing s.9(b)(i) the Commission argued that the flu, something that its expert, Dr. Caulford, said affects all of us, even with a certain amount of regularity, is a handicap quite simply because it is an illness. The fact that it does affect everyone, and that it is of short duration, in the Commission's presentation of the complaint did not take away from the sickness being classed as a handicap within the meaning of the *Code*.
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> Counsel for the Commission could cite no precedent in support of her position. It was in this context that she termed the complaint a *test case*. To accept the Commission's argument would be to denigrate the important purposes of the *Code*, and more particularly, the provision prohibiting discrimination on the basis of handicap.
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> To state the obvious initially, it is difficult to identify the group for whom protection is sought. The Commission would include in that group all those who are subject to flu, even though literally everyone would be encompassed as the potentially handicapped. (See, *Romano v. North York (City)* (1987), 8 C.H.R.R. D/4347, appeal dismissed, Supreme Court of Ontario, Divisional Court, Nov. 24, 1988.)
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> There is, however, an even more significant consideration: the transitory nature of flu. It lasts but a few days and then it is over. Can such an illness be defined as a handicap? Professor Cumming in *Cameron v. Nel-Gor Castle Nursing Home, supra*, implied that a handicap should be construed to mean something which affects, or is perceived to affect an individual in carrying out life's important functions: "*Having a handicap means not being able to do one or more important things that most people can do.*" (Id. at D/2180).
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> Certainly, s.9(b)(i) of the *Code* is amenable to such a construction. Consider the examples given of diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a dog guide or on a wheelchair or other remedial appliance or device. The entire list relates to substantial ongoing limits to one's activities.

> This is not to deny an episodic event, such as a heart attack, which an employer might construe as limiting an individual's ability to do a job, as also being included in the classification of handicap. But, even here, the denial is based on a perception that the event, the heart attack, will be an ongoing material source of impairment. (See *Anderson v. Atlantic Pilotage Authority* (1982) 3 C.H.R.R. D/966, cited by Professor Cumming at D/2181.
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> …
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> In my view, it would be wrong to attempt to stretch the meaning of *illness* under s.9(b)(i) of the *Code* to include the flu. It would be wrong to do so, in part, because of the effect of such a construction on the high purpose otherwise achieved by the interpretation provision in protecting those who are actually or perceived to be materially impaired through illness. Where the *Code* calls for defined groups to be protected, the Commission would include literally everyone suffering from a few days' illness. I cannot accept that the intent of s.9(b)(i) is to embrace such kinds of discrimination.
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> [*emphasis in the original*]

The complaint was dismissed with costs against the Human Rights Commission.

A more recent arbitration award might arguably be at odds with the approach reflected in the **Lily Cups** case. In **Canadian Waste Services Inc. and Christian Labour Association of Canada** (2000), 91 L.A.C. (4th) 320 (Lynk) the arbitrator took a different view. In that case an employee who had had previous absenteeism problems was made the subject of a last chance agreement. The last chance agreement stipulated the standard of days of absence which the grievor must meet, failing which he would be terminated. Specifically, he was not to be absent from work for more than two working days in any four week period. As it happens, when he had already had two days of absence, while handling discarded wooden boards at home he punctured his wrists by contact with a nail. Two days later the resulting wound became infected and caused substantial swelling in his arm, as a result of which he was absent for one

further day, an absence confirmed by a note from his doctor who provided him with a tetanus shot and medication for his infection.

In those circumstances Arbitrator Lynk concluded that the last chance agreement could not take precedence over the **Human Rights Code** protections enjoyed by the grievor. Upon an examination of the provisions of the **Ontario Human Rights Code**, Professor Lynk concluded that the wrist injury which occasioned the one day absence from work did constitute a handicap within the meaning of the **Code**. At pp. 330-32 he reasoned as follows:

> Did Mr. McGee's injury amount to a handicap? The Ontario *Human Rights Code* guarantees, in s.5(1), that every person has the right to equal treatment in employment without discrimination on a number of enumerated grounds, including handicap. The term "because of handicap" is defined in s.10(1) of the *Code* as:
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> > … the reason that a person has or has had, or is believed to have or have had:
> >
> > (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness …
>
> Within the boundaries of its purpose, the definition of "handicap" has been given a liberal meaning by the human rights tribunals and the courts. This is consistent both with the quasi-constitutional status of human rights legislation in Canadian law, and with the broad language – "any degree of physical disability … caused by bodily injury" – provided for in the *Code*. A significant decision involving the definition of "handicap" is *Entrop v. Imperial Oil Ltd.* (1995), 23 C.H.R.R. D/196 (Ont. Bd. Inq.), where the term was defined as an illness, injury or disease that creates a physical disability or mental impairment and thereby interferes with a person's physical, psychological and social functioning. This definition was accepted by the Ontario Court of Appeal on review: [2000] O.J. No. 2689 (QL), at para. 89 [reported 189 D.L.R. (4th) 14].
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> Applying the statutory definition to the facts of this case, I accept that Mr. McGee's injury to his left wrist caused an impairment, to the extent that he suffered damage to his arm. As a result of the impairment, he was disabled, because the injury to his arm substantially restricted his functional ability to use

the arm on the day in question. Consequently, Mr. McGee was handicapped because he could not fulfil his employment duties as a direct result of the functional restrictions imposed by the disabling impairment to his arm (e.g., he could not drive his truck). In the language of the statute, Mr. McGee suffered a bodily injury that caused a very transient but sufficiently substantial degree of physical disability that directly resulted in his inability to work for the one day in question.

While the *Code's* definition of "handicap" appears to otherwise apply to Mr. McGee in these circumstances, it is fair to ask whether the definition is pertinent in a situation such as this where the injury was temporary. There was a time where the case law stated that, to qualify as a handicap under human rights legislation, the disability had to have both a significant and an indefinite nature. A disability that was temporary or transient was found to lie beyond the protection of the applicable human rights statute: *Ouimette v. Lily Cups Ltd.* (1990), 12 C.H.R.R. D/19 (Ont. Bd. Inq.). However, that case law no longer appears to be current: *Entrop, supra; Willems-Wilson v. Allbright Drycleaners Ltd.* (1997), 32 C.H.R.R. D/71 (B/C/H/R/C/); *Morrison v. O'Leary Associates* (1990), 15 C.H.R.R. D/237 (N.S. Bd. Inq.). In a recent British Columbia labour arbitration award involving disability – *Cominco Ltd. v. United Steelworkers of America, Local 9705*, [2000] B.C.C.A.A.A. No. 62 (QL) [summarized 59 C.L.A.S. 318] – Arbitrator Larson reasoned that resolving the question of whether an employee fits within the definition of "handicap" or "disability" turns not on the duration of disablement, but on the level of impairment. At para. 181, he stated:

> Quite apart from the evidence, it seems to me that it is inappropriate to determine whether a person may be disabled by reference to whether the condition is temporary or permanent. As a pure matter of principle, a person can be disabled for even a relatively short period of time and then fully recover. Subject to issues of substance, the issue should turn, not on whether the disablement is temporary or permanent, but the degree to which normal function is impaired. …

This approach appears to me to be consistent with the broadly stated definition of "handicap" in the *Code*. The term "any degree of physical disability" strongly suggests that handicap is properly assessed as a matter of impairment and disability, and not as a matter of duration. As employee who is totally but temporarily incapacitated by a condition that otherwise qualifies as a "physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness" would have a "handicap", as per s.10 of the *Code*, and be entitled to the protection of the legislation.

Where the outer boundary of the definition of "handicap" lies need not be decided in this case. The issue was not properly expressly argued before me, and it is better left to future cases on different facts to draw these lines. Certainly, determining the breadth of the definition of "handicap" in the unionized workplace must be shaped by keeping in mind the purpose of both human rights legislation (ensuring human dignity, and providing for equal rights and opportunities without discrimination) and labour legislation (establishing an appropriate balance between the requirements of workplace production and workplace justice).

> For the purpose of this case, it is sufficient to find that Mr. McGee's wrist injury on 19 July resulted in a physical disability, which directly led to his subsequent absence from work on 21 July. Thus, the circumstances of these events involving Mr. McGee fell within the definition of "handicap", as per the *Human Rights Code*. He is entitled to the protection of the *Code*, which supersedes the provisions of the LCA [last chance agreement] that triggered his termination.

It is not clear whether the preponderance of labour arbitrators or human rights adjudicators will agree with the concept of "handicap" on the basis of a one day absence adopted by the arbitrator in the **Canadian Waste Services** case. It would appear to be relatively difficult to distinguish between a one day loss of work by reason of a relatively minor infection, as in the **Canadian Waste Services** case, and a two day absence by reason of the flu, as in the **Lily Cups** decision, where such a condition was not found to constitute a handicap for the purposes of the human rights legislation. It is questionable whether the approach is **Canadian Waste Services** would leave any scope for agreements fashioned to deal with chronic absenteeism where absences are occasioned by illness of any kind, unless last chance agreements are themselves deemed to be a form of accommodation.

As regards the issue to be determined in the instant case, however, the authorities would not appear to be at any substantial odds. The jurisprudence supports the proposition that whether a given injury or illness constitutes a handicap or disability is a question to be determined on the facts of the particular case. Clearly the preponderance of the jurisprudence recognizes that a temporary or curable injury, illness or physical condition can qualify as a handicap or disability within the meaning of a provincial human rights statute or the **Canadian Human Rights Act**. Under the

current state of the law it would be unthinkable to exclude from the protections of human rights legislation persons whose illness or disabilities might, for example, include a debilitating but treatable form of cancer, a heart condition or extensive treatable physical injuries caused by a motor vehicle accident.

Case notes cannot be read as statute law. To extrapolate from the flu case dealt with in the **Lily Cups** decision, or the minor sciatica ailment in **Neilson v. Sandman Four Ltd.** to assert, as the Corporation does, that any “temporary” condition cannot qualify as a disability under the **Canadian Human Rights Act** does a disservice to the cases and is simply not supportable in law. Nor indeed is it supportable from a common sense standpoint given the obvious purpose of human rights legislation in Canada. The policy of the Corporation, as it was applied to the request of Mr. Thomas to be accommodated for the period between March and December of 2003, is therefore in violation of the **Canadian Human Rights Act**. The failure of the Corporation to even consider the means by which Mr. Thomas might be accommodated short of undue hardship can understandably be characterized, as the Union would have it, as an egregious violation of the **Act**.

Alternatively, if it were necessary to so find, there is a basis upon which to conclude that the physical condition of Mr. Thomas is not temporary. As the Union’s representative stresses, osteoarthritis is not a curable condition. Resort to prosthetic surgery, while it may provide a mitigating effect, much like crutches or a wheelchair, does not put an end to the consequences of the condition or somehow make it

temporary. However, I do not consider it necessary to rest this award on that basis, as I am satisfied that the **Canadian Human Rights Act** would protect the grievor's condition even if it were fully curable by medication or some other treatment. Adopting the terms of Arbitrator Thorne in the **Belleville General Hospital** case, the grievor's condition was one of "long duration". More significantly, for the point of principle made by Arbitrator Larson, it was of a limiting nature sufficient to qualify as a disability within the meaning of the **Act**. Nor can the Arbitrator ascribe any significance or pertinence to the fact that the grievor had the benefit of a sick leave indemnity during the period of his absence from work. The fact is that he wanted to work in modified duties and the Corporation simply refused to consider the possibility.

Is this a case for punitive damages? That issue has been the subject of considerable academic comment as well as extensive consideration by some arbitrators and the courts. A recent brief decision of the Ontario Divisional Court, purportedly following the decision of the Supreme Court of Canada in **Weber v. Ontario Hydro** (1995), 125 D.L.R. (4th), 583, would appear to suggest that arbitrators have that authority, notwithstanding the absence of any supporting provision within the collective agreement or within any enabling statute (see **Ontario Public Service Employees Union and Seneca College of Applied Arts and Technology**, a decision of the Ontario Divisional court released on November 1, 2004.)

In the case at hand, apart from the jurisprudence, at a minimum, it would appear that the Arbitrator has the authority, under the provisions of the **Canada Labour Code**,

to apply such sanctions as might be available under the remedial provisions of the **Canadian Human Rights Act**. In that regard it is notable that section 53(3) of the **Act** empowers the Canadian Human Rights Tribunal, upon a finding of a violation of the **Act**, to make an order not exceeding $20,000 in favour of the victim of discrimination if the tribunal is satisfied that the respondent "… is engaging or has engaged in the discriminatory practice wilfully or recklessly." It should be noted, however, that that jurisdiction is discretionary. There can be no doubt that the provisions of the **Canada Labour Code**, including section 60(1)(a.1) which expressly gives a board of arbitration "… the power to interpret, apply and give relief in accordance with a statute relating to employment matters, whether or not there is a conflict between the statute and the collective agreement …" are sufficiently broad to give this Office the jurisdiction to make the kind of punitive and exemplary award being sought by the Union in the case at hand.

I accept that that jurisdiction resides in this Office by the operation of statute. However, the Arbitrator is reluctant to assess punitive damages in this case even assuming, without finding, that the Corporation did act in reckless disregard of the law. In approaching the extraordinary jurisdiction to award punitive damages a tribunal must exercise considerable caution, particularly in the context of an ongoing collective bargaining relationship. In this case, I consider it significant that the grievor and his Union, for reasons they best appreciate, made no attempt to file a grievance against the Corporation's refusal to consider accommodation for Mr. Thomas for the entire period between March 2003, when he became incapacitated, and November of the same year,

when he finally recovered from his corrective surgery. Indeed, the initial grievance and the Union's position at step 1 of the grievance procedure was to claim lost wages and benefits on behalf of Mr. Thomas for the period between November 18 and December 17, 2003. It is only at step 2 of the grievance procedure, on May 20, 2004, that the Union sought to extend its claim to cover lost wages and benefits back to February 3, 2003, when the first refusal of light duties was made. Indeed, the Corporation advances a preliminary objection as to timeliness based on the delay in making the claim.

The Arbitrator is not impressed with the Corporation's submission on timeliness. It is clear that at all material times, from March onwards, the Union did communicate to the Corporation that it felt that it owed a duty of accommodation to Mr. Thomas. Additionally, the grievor himself asserted the seriousness of his concern by filing his complaint under the **Canadian Human Rights Act** in May of 2003. In these circumstances it cannot fairly be asserted that the Union acquiesced in the treatment of the grievor by the Corporation or waived its ability to grieve on his behalf. Nor am I satisfied that it would be unduly prejudicial to the Corporation if I should exercise my discretion under the **Canada Labour Code** to extend the time limits, if it were necessary to do so, to encompass the entire period of the claim for the purposes of normal compensation for wages and benefits lost. I am satisfied that it is appropriate to do so. On that basis the preliminary objection of the Corporation with respect to the timeliness of the grievance must be rejected.

The fact remains, however, that the silence of the Union for many months with respect to the scope of the claim that it eventually made on behalf of Mr. Thomas is a factor to be weighed in considering whether this is an appropriate circumstance for the awarding of punitive damages. As noted above, I am satisfied that I do have the jurisdiction to make such an award by virtue of the provisions of section 60 of the **Canada Labour Code**. Given the factor of delay, however, I am satisfied that this is not an appropriate case to do so.

For all of the foregoing reasons the grievance is allowed. The Arbitrator finds and declares that in the period between February and December of 2003 the Corporation violated the provisions of the **Canadian Human Rights Act** by refusing to consider any accommodation whatsoever for the grievor who, I am satisfied, suffered from a disability within the meaning of the **Canadian Human Rights Act** by reason of his condition of osteoarthritis, necessitating the replacement of both hips by prosthetic surgery. The grievor shall be compensated for the difference in wages and benefits lost over and above the insurance benefits received for the entire period, save for such reasonable time as would have been necessitated by his hospitalization and post-operative rehabilitation, to the point at which he was cleared by his physician to return to work on modified duties.

The matter is therefore remitted to the parties to determine the quantum of compensation. Should they be unable to do so the matter may be spoken to.

April 22, 2005

(signed) MICHEL G. PICHER
ARBITRATOR