Court of Appeal for Saskatchewan	**Citation:** ***Baildon (Rural Municipality) v Gronvold*****, 2024 SKCA 73**
Docket: CACV4014	**Date: 2024-07-25**

Between:

The Rural Municipality of Baildon No. 131

Appellant/Respondent by Cross-Appeal (Respondent)

And

Diane Vivian Gronvold and David Arnot, Chief Commissioner of the Saskatchewan Human Rights Commission

Respondent/Appellant by Cross-Appeal (Complainant/Applicant)

Before:	Leurer C.J.S. and Caldwell, Barrington-Foote, Kalmakoff and Drennan JJ.A.
Disposition:	Appeal allowed; cross-appeal dismissed
Written reasons by:	The Honourable Mr. Justice Caldwell
In concurrence:	The Honourable Chief Justice Leurer The Honourable Mr. Justice Barrington-Foote The Honourable Mr. Justice Kalmakoff The Honourable Madam Justice Drennan
On appeal from:	2022 SKQB 99, Regina
Appeal heard:	November 21, 2023
Counsel:	Lauren Wihak for the Appellant Paul Harasen and Adam North for David Arnot, Chief Commissioner of the Saskatchewan Human Rights Commission Brittnee Holliday for Diane Vivian Gronvold (not appearing)

Caldwell J.A.

I. OVERVIEW

[1] Diane Gronvold suffered a concussion in a non-workplace accident that required her to be absent from her employment as administrator of the Rural Municipality of Baildon No. 131 [RM]. She tried twice to return to work on a gradual basis but was unsuccessful. When she had been absent from work for about 17 months, the RM advertised for a full-time administrator. It filled that position around the same time as when Ms. Gronvold advised the RM that she could again try to return to work. Shortly thereafter, Ms. Gronvold came to believe that the RM had failed to accommodate her disability to the point of undue hardship.

[2] Ms. Gronvold filed a discrimination complaint [Complaint] with the Saskatchewan Human Rights Commission [Commission] under s. 16(1) of *The Saskatchewan Human Rights Code*, SS 1979, c S-24.1 [*Code, 1979*], now repealed and replaced by *The Saskatchewan Human Rights Code, 2018*, SS 2018, c S-24.2 [*Code*]. In her Complaint, Ms. Gronvold alleged that the RM had violated the discrimination in employment provision of the *Code, 1979* "starting in November 2015" and that the violation was "ongoing". Identifying herself as disabled, she described how her doctor had recommended a gradual return to work but that the RM had "refused to accommodate this", alleging that it had discriminated against her on the basis of disability by "refusing to accommodate [her] to the point of undue hardship".

[3] When the Chief Commissioner of the Commission applied to the Court of Queen's Bench on August 28, 2019, for an adjudication of the Complaint pursuant to what is now s. 34 of the *Code* [Hearing Application], the principal allegation remained that the RM had failed to "accommodate [Ms. Gronvold's] disability to the point of undue hardship", but the particulars of that breach were described as including the following:

> a. Baildon hastily and repeatedly accused Gronvold of being absent without leave, with knowledge that she had suffered a serious head injury;
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> b. Baildon demanded a medical prognosis without allowing adequate time for Gronvold's physician to prepare one;
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> c. [the Reeve of the RM and one of its councillors] bullied or harassed Gronvold while she attempted to return to the workplace in April of 2015, the particulars of which are set out in paragraph 10 above;

d. Baildon hired a permanent replacement for Gronvold's position without any prior warning to Gronvold;

e. Baildon hired a permanent replacement for Gronvold's position without current information regarding Gronvold's prognosis for a return to work;

f. Baildon hired a permanent replacement for Gronvold's position before it reached the point of undue hardship;

g. Baildon failed to accommodate Gronvold's proposed return to work in July of 2016; [and]

h. Baildon terminated Gronvold's employment based on her disability.

[4] The Court of Queen's Bench Chambers judge who heard the Chief Commissioner's application found that Ms. Gronvold had established a prima facie case of employment discrimination based on disability by reason of the "adverse treatment" she had received from the RM following her initial leave of absence in December of 2014, but specifically during meetings with Ms. Gronvold held on April 22 and May 15, 2015 [2015 Meetings]. The judge concluded that the RM had never intended to allow Ms. Gronvold to return to work on less than a full-time basis and, therefore, that it had not accommodated her disability to the point of undue hardship: *Gronvold v Baildon (Rural Municipality)*, 2022 SKQB 99, 79 CCEL (4th) 134 [*Decision*]. In doing so, she rejected the RM's assertion that it was Ms. Gronvold who had thwarted the accommodation process, leading to the end of the employment relationship, and summarised her conclusions:

> [82] There was no evidence from any witness that would support a conclusion that the RM was willing to develop a return-to-work plan that would ensure the work of the RM was done but at the same time ensuring its statutory duty as an employer was met. While the RM seems to suggest that they did try to accommodate Gronvold, there is no evidence to support this.
>
> [84] In conclusion, I find that Gronvold was discriminated against on the basis of her disability and the RM failed in their duty to accommodate her disability and her return to work.

[5] In my judgment, the *Decision* must be set aside. The agreed record in this matter does not support the finding of a contravention of s. 16(1) of the *Code* under the analysis called for in cases like *British Columbia Human Rights Tribunal v Schrenk*, 2017 SCC 62, [2017] 2 SCR 795 [*Schrenk*], *Stewart v Elk Valley Coal Corp.*, 2017 SCC 30 at paras 23–24, [2017] 1 SCR 591 [*Stewart*], and *Moore v British Columbia (Education)*, 2012 SCC 61 at para 33, [2012] 3 SCR 360 [*Moore*]. Instead, it plainly establishes that the RM had met its burden of justifying the termination of Ms. Gronvold's employment in September of 2016. The agreed statement of facts [Agreed Facts] and evidence adduced in the hearing show that the RM had accommodated Ms. Gronvold's

disability through an extended medical leave of absence and that she had thwarted all reasonable efforts by the RM to accommodate her return to work, thereby ending the RM's obligations to her.

[6] The matter of compensation is moot in the absence of a contravention of the *Code*, and I would therefore dismiss the cross-appeal without making any order as to costs. This conclusion renders it unnecessary for this Court to revisit the basic principles set forth in *Saskatchewan (Human Rights Commission) v Country Leathers Manufacturing Ltd.*, 2004 SKCA 156, [2005] 10 WWR 663, relating to the quantification of special compensation under s. 40 of the *Code*, as the Commission asked.

[7] In the result, I would allow the appeal, set aside the *Decision* and the awards of general and special compensation thereunder, and enter judgment pursuant to s. 38(1) of the *Code* that the human rights complaint is not substantiated. I would order that the Commission pay the RM's costs in this Court and in the Court of King's Bench, assessed in the usual manner.

II. BACKGROUND

A. The relevant law

[8] After Ms. Gronvold filed the Complaint, the *Code, 1979* was repealed and replaced by the *Code*, but the relevant law was unaffected. Once the statutory definitions of *disability* and *prohibited ground* are understood, the *Code* — in straightforward terms — prohibits employers from discriminating against their employees on the basis of disability:

> **Discrimination in employment prohibited**
> **16**(1) No employer shall refuse to employ, refuse to continue to employ or otherwise discriminate against a person or class of persons with respect to employment, or a term or condition of employment, on the basis of a prohibited ground.

[9] Under *The Saskatchewan Employment Act*, SS 2013, c S-15.1 [*SEA*], subject to the reciprocal conditions and obligations it sets forth, employers are also prohibited from discriminating against employees who are absent from the workplace due to illness or injury:

> **Protection of employees for illness or injury**
> **2-40**(1) Subject to subsections (2) to (4.1), except for just cause unrelated to injury or illness, no employer shall take discriminatory action against an employee because of absence:
>
> (a) due to the illness or injury of the employee; or

> (b) due to the illness or injury of a member of the employee's immediate family who is dependent on the employee.

[10] The protection from discrimination under s. 2-40(1) of the *SEA* is qualified by other provisions. These include that it only applies if:

(a) the employee's absence does not exceed "a total of 12 days in a calendar year, in the case of illness or injury that is not serious" (s. 2-40(2)(b)(i)) or "12 weeks in a period of 52 weeks, in the case of serious illness or injury" (s. 2-40(2)(b)(ii)) provided that this latter period must be extended to "26 weeks in a period of 52 weeks if the employee is receiving compensation pursuant to *The Workers' Compensation Act, 1979*, SS 1979, c W-17.1" (s. 2-40(4)); and

(b) if the employee, if so requested in writing by their employer, provides the employer "with a certificate of a duly qualified medical practitioner certifying that the employee was incapable of working due to illness or injury or certifying the illness or injury of the member of the employee's immediate family, as the case may be" (s. 2-40(2)(c)).

[11] Tied to the expiry of the medical-leave protection pursuant s. 2-40(2)(c), the *SEA* imposes an obligation on employees such that, "If an employment leave involves a medical issue and the employer so requires, the employee shall provide written evidence in the form of a certificate from a duly qualified medical practitioner or nurse practitioner as to the reason for the leave or the extension of the leave" (s. 2-47(2)). Notably, s. 2-40 of the *SEA* does not limit or abrogate an employee's rights at common law or pursuant to the *Code* (s. 2-40(5)).

[12] Returning to the *Code*, if a complaint is not resolved by the Commission, the Chief Commissioner may refer it to the Court of King's Bench for an adjudication of its legal merit in a hearing:

> **Application for hearing**
> **34**(1) At any time after a complaint is filed or initiated pursuant to section 29, the Chief Commissioner may apply to the court for a hearing of the complaint at the judicial centre nearest to the place where the subject-matter of the complaint arose.

[13] Where an employee has complained of discrimination, they bear the initial onus in the Court of King's Bench hearing of demonstrating that a prima facie case of discrimination exists.

Under the *Code*, to demonstrate prima facie discrimination by an employer, an employee must establish three facts on a balance of probabilities:

(a) that they have a characteristic that is protected from discrimination under the *Code*;

(b) that they have experienced an adverse impact with respect to employment or a term or condition of employment; and

(c) that the protected characteristic was a factor in the adverse impact.

See *Code*, s. 16; *Moore* and *Stewart*; and, with respect to the onus of proof, see *Code*, s. 48 and *Québec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc. (Bombardier Aerospace Training Centre)*, 2015 SCC 39 at para 56, [2015] 2 SCR 789 [*Bombardier*].

[14] In *Moore*, Abella J. for a unanimous Supreme Court summarised the complaint-hearing proceeding in this way:

> [33] As the [tribunal in that case] properly recognized, to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the [*Human Rights Code*, RSBC 1996, c 210]; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

[15] For the majority in *Stewart*, McLachlin C.J. described the law as tasking the adjudicator "to determine whether the reason for the termination of employment or the impact of [an employment policy] on [the claimant] established a *prima facie* case of discrimination" (at para 40). She later remarked that the "mere existence" of a disability does not establish prima facie discrimination (at para 42). Rather, the third factor under *Moore* — whether there is a connection between a protected characteristic and the adverse impact claimed — requires a fact-specific inquiry on a case-by-case basis and "cannot be assumed and must be based on evidence" (at para 39, citing *Health Employers Assn. of B.C. (Kootenay Boundary Regional Hospital) v B.C. Nurses' Union*, 2006 BCCA 57 at para 41, 264 DLR (4th) 478 [*Health Employers Assn.*]).

[16] If the employee discharges the burden of establishing a prima facie case of discrimination, the onus shifts to the employer to prove that its conduct was not discriminatory:

> **Onus of proof**
> **48**(2) If, in a proceeding pursuant to this Act, it is established that the party complained against, directly or indirectly, alone or with another or by the interposition of another, refused to employ or continue to employ or otherwise discriminated against a person or class of persons with respect to employment or a term, condition or privilege [1] of employment, the onus is on the party against whom the complaint is made to prove on a balance of probabilities that the refusal or discrimination was not because of discrimination against that person or class of persons contrary to this Act or any other Act administered by the commission.

[17] An employer may justify its conduct in a case alleging discrimination based on disability by establishing, for example, that *ability* "is a reasonable and *bona fide* occupational qualification and requirement for the position or employment" (*Code*, s. 16(7)). An employer may refute an allegation of discrimination by establishing that it accommodated the employee's disability or was reasonably unable to do so without undue hardship. Under the *SEA*, when it has been established that an employee has become disabled, the employer is obligated to accommodate that employee:

> **Employer must reassign employee or modify employee's duties**
> **2-41** An employer shall modify an employee's duties or reassign the employee to other duties if:
>
> (a) the employee becomes disabled and the disability would unreasonably interfere with the performance of the employee's duties; and
>
> (b) it is reasonably practicable to do so.

[18] The duty to accommodate arises "when an employer seeks to apply a standard that is prejudicial to an employee on the basis of specific characteristics that are protected by human rights legislation" (*McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4 at para 11, [2007] 1 SCR 161). An employer's duty to accommodate is bounded by the commensurate concepts of "reasonable accommodation" and "undue hardship" (*Quebec (Commission des norms, de l'équité, de la santé et de la sécurité du travail) v Caron*, 2018 SCC 3 at para 25, [2018] 1 SCR 35). An employer will have established undue hardship "when reasonable means of accommodation are exhausted and

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[1] Although not at issue in this matter, I note that s. 16(1) of the *Code* refers to discrimination with respect to "employment, or a term or condition of employment", but s. 48(2) refers to discrimination with respect to "employment or a term, condition *or privilege* of employment" (emphasis added).

only unreasonable or impracticable options for accommodation remain" (*Council of Canadians with Disabilities v VIA Rail Canada Inc.*, 2007 SCC 15 at para 130, [2007] 1 SCR 650 [*VIA Rail*]).

[19] *Reasonable accommodation* does not mean perfect accommodation. An employee is "not entitled to perfect accommodation, but rather to accommodation that is *reasonable* in the circumstances" (*Stewart*, minority reasons at para 56, emphasis in original, citing *Central Okanagan School District No. 23 v Renaud*, [1992] 2 SCR 970 at 994–995 [*Renaud*]; see also: *VIA Rail* at para 130, and *Moore* at para 49). The requirement of *reasonable accommodation* aligns with the *SEA*, which — as noted — states that an employer must modify a disabled employee's duties or reassign them to other duties if the disability would unreasonably interfere with the performance of their duties and "it is *reasonably practicable* to do so" (s. 2-41, emphasis added).

[20] What constitutes *undue hardship* is a question that depends on the circumstances and the legislation governing each case, but the relevant factors may include: financial cost, economic conditions or viability of the employer, workplace safety, quality of service provided, disruption of a collective bargaining agreement, problems with the morale of other employees, interchangeability of work force and facilities, and the size of the employer's operation (see, for example: *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*, [1990] 2 SCR 489 at 520–521; *Canada (Attorney General) v Gallinger*, 2022 FCA 177 at para 47, 474 DLR (4th) 532; *Westfair Foods Ltd. v United Food and Commercial Workers, Local 1400*, 2007 SKCA 22 at para 18, [2007] 6 WWR 59, leave to appeal to SCC refused 31985 [*United Food*]; *VIA Rail* at paras 123–128; and *Renaud* at 984).

[21] If the employer accommodates the employee's disability to the point of undue hardship, then the employee has a corresponding "duty to accommodate the employer or risk the loss of his or her job" (*United Food* at para 17). Short of undue hardship, fulfilment of the employer's duty takes precedence over adversity in accommodating the employee's disability (*Moore* at para 49).

[22] Nonetheless, the common law recognises that there are practical limits to an employer's duty to accommodate. For example, the Supreme Court of Canada stated 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 at para 19, [2008] 2 SCR 561 [*Hydro-Québec*], that "the 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". In those circumstances it is less the employee's disability that "forms the basis for the dismissal than his or her inability to fulfill the fundamental obligations arising from the employment relationship" (*Hydro-Québec* at para 18, quoting *Québec (Procureur général) v Syndicat de professionnelles et professionnels du gouvernement du Québec (SPGQ)*, 2005 QCCA 311 at para 76).

[23] At the end of the day, where a Court of King's Bench judge determines that an employee's complaint is "not substantiated", whether because the employee failed to discharge their burden of establishing a prima facie case of discrimination or the employer justified its actions or refuted the allegation of discrimination, the judge *must* dismiss the complaint (*Code*, s. 38(a)). On the other hand, if the Court of King's Bench judge concludes that the employee discharged their burden and that the employer neither justified its conduct nor refuted the allegation of discrimination, then a contravention of s. 16(1) of the *Code* will be found to have occurred (*Bombardier* at para 64).

[24] A judge who finds that an employer has contravened the *Code* may make corrective and compensatory orders, including for "reinstatement in employment" (s. 39(1)(b)) and for "any or all of the wages and other benefits of which the injured person was deprived and for any expense incurred by the injured person as a result of the contravention" (s. 39(1)(c)). In addition, the judge may, in specific circumstances, award *special compensation* to an employee:

> **Special compensation**
> **40** In addition to any order the court may make pursuant to section 39, the court may order the person who has contravened or is contravening that provision to pay any compensation to the person injured by that contravention that the court may determine, to a maximum of $20,000, if the court finds that:
>
> (a) a person has wilfully and recklessly contravened or is wilfully and recklessly contravening this Act or any other Act administered by the commission; or
>
> (b) the person injured by a contravention of this Act or any other Act administered by the commission has suffered with respect to dignity, feelings or self-respect as a result of the contravention.

B. Agreed Facts and joint exhibits

[25] The parties filed the Agreed Facts for the Court of Queen's Bench hearing in this case; it sets out a comprehensive narrative of the events in question. Copies of correspondence and other documents were appended to the Agreed Facts in exhibition of the statements of fact contained

therein. The parties also filed a joint exhibit book for the hearing, encompassing additional documentation not included in the Agreed Facts. Given how these documents were placed before the court, they must be treated as having been tendered for the truth of their content. In basic terms, the parties agreed that the following factual narrative was true. Except where noted below, the following events are as the parties described them in their Agreed Facts.

[26] The RM hired Ms. Gronvold as its administrator effective October 7, 2013. She suffered a concussion in a non-work-related accident on November 23, 2014. Her physician, Dr. Jan Vermaak, authorised a medical leave of absence from her work beginning on November 25, 2014, continuing until December 4, 2014, but assessed her as "fit to return to work" commencing December 8, 2014.

[27] On December 8, 2014, Ms. Gronvold returned to work, completed a four-hour shift and experienced "what she described as a mild headache". The next day, she worked for a shorter time. Ms. Gronvold was absent from work the following workday, December 10, 2014. Dr. Vermaak provided her with a medical certificate on December 12, 2014, stating that she should be off work until February 18, 2015. This authorisation of a medical leave of absence after December 10, 2014, was not provided to the RM at that time.

[28] A month later, on January 12, 2015, the RM wrote to Ms. Gronvold, "directing her to report to work or provide another medical note before January 26, 2015". In its correspondence, the RM advised that: "The last medical certificate [we have] on file for you is dated 08/12/14 and states that you were fit to return to work on 08/12/14". Importantly, the letter also notified Ms. Gronvold that the RM was "requesting a medical certificate, due to your illness or injury, from a certified medical practitioner stating what day you are expected to return to work and is giving you **two weeks** from the date of this letter to submit one to the RM office or you are to resume work on January 26th, 2015" (emphasis in original). The RM cautioned Ms. Gronvold that "Failure to provide a medical certificate on or before January 26th, 2015 or [to] show up for work on January 26th, 2015 will result in disciplinary action which could include termination". In response, Ms. Gronvold provided the RM with a medical certificate dated February 18, 2015, authorising her absence on "SICK LEAVE" from February 18 until March 18, 2015.

[29] Under a letter dated March 18, 2015, the RM told Ms. Gronvold that, "per clause 2-40(2)(c) of [the *SEA*], … any further requests for medical leave, from this date forward" would require certification by a medical practitioner of specific information about, *inter alia*, her medical situation and her expected return-to-work date. The correspondence also re-cautioned Ms. Gronvold about her failure to comply with these instructions:

> Failure to provide a further detailed medical certificate two weeks from the last documented expected date of return to work in your personnel file, or failure to show up for work two weeks from the last documented expected date of return to work in your personnel file will result in disciplinary action which could include termination.

[30] In response, Ms. Gronvold provided the RM with a "medical note" dated March 18, 2015, which extended her leave of absence by stating: "SICK LEAVE until April 18, 2015". She later provided the RM with another note that stated, effective April 20, 2015: "TO RETURN TO WORK – 3 DAYS PER WEEK – 4 HOURS PER DAY FOR 2 WEEKS – TO BE REASSESSED".

[31] On April 20, 2015, Ms. Gronvold attempted to return to work on a "graduated return to work plan recommended by her physician on a part-time basis". She worked for four hours at the RM's office on that day and for three hours on April 22, 2015. Then, after working for four hours on April 24, 2015, Ms. Gronvold "became unwell at work", "attended medical treatment due to symptoms from her head injury", and "undertook another medical leave".

[32] On May 1, 2015, Ms. Gronvold advised the RM that "The Dr. has taken me off work again until further investigation by a neurologist". She stated that she "wanted to come back to work but it has caused a lot more headaches and I have regressed since doing so" and that the "two week trial period was not successful … I will let you know as further medical investigation takes place". She also provided the RM with another medical certificate, which said: "SICK LEAVE 01-05 – AWAITING NEUROLOGY CONSULT".

[33] On May 15, 2015, Ms. Gronvold attended a meeting with the RM's employee committee that, according to her testimony and that of her spouse, did not go well. The judge summarised the parties' evidence about that meeting in this way:

> [20] Gronvold became increasingly worried that the RM was going to fire her. On May 15, 2015, she was called into the RM office for a meeting with the Employee Committee of the RM's Council. She decided to take her then partner, Greg Kistner (Kistner), to the meeting so she would have a witness. When they arrived for the meeting, Yuke [i.e., the Reeve of the RM] and McLarty [i.e., an RM councillor] were there, along with two

members of the Employee Committee, Richard Swenson (Swenson) and Phil Huntley (Huntley). Yuke repeated some of the things he had said at the February meeting, referring to how her working part-time was difficult for the RM and how much it was costing them financially. Yuke suggested she quit so she could claim Employment Insurance benefits instead of short-term disability benefits. Gronvold tried to explain to them that her benefits were paid by the disability insurance plan provided by SARM. She also tried to explain to them that she was doing everything she could to return to work. At one point toward the end of the meeting, Yuke said they would have to let her go.

[21] In his testimony, Kistner confirmed Gronvold's account of the meeting held on May 15, 2015. He said Yuke did most of the talking and asked Gronvold what she was doing to get better. He said when Gronvold told them she was waiting for the appointment with the neurologist, Yuke, Swenson and McLarty talked about specialists and told Gronvold to "keep on them" to get in sooner.

[22] Kistner said Yuke's mood changed as the conversation progressed; Yuke was getting argumentative, interrupting Gronvold and raising his voice. Yuke told Gronvold that they had an obligation to their ratepayers and that she was costing them money. Kistner recalled "as plain as day" that when Gronvold tried to explain that Dr. Vermaak cleared her to return to work on a graduated basis, Yuke told her "No", that they wanted her to come back at 100%, not two or three days. Kistner said Swenson and McLarty were nodding their heads in agreement with Yuke. He said at this point Yuke suggested she go on "unemployment". He said he found it odd that at the beginning they seemed concerned about how she was doing and now they were talking as if she did not have a job.

[23] Kistner said Gronvold tried to explain that she could not go on Employment Insurance while she was receiving short-term disability benefits through SARM. Yuke began disagreeing with her, again raising his voice. Kistner confirmed that Yuke then told her they would have to let her go. Kistner was shocked by this and told him they "were not going to go down that road". Kistner said Huntley looked embarrassed and Swenson wished Gronvold "good luck". The meeting was then over.

[24] Kistner said Gronvold was visibly shaken and in tears after the meeting. He said not only was she still suffering from the headaches, but the stress from the RM's attitude toward her condition was taking its toll on her. He said someone from the RM would call on weekends and send letters on a long weekend asking for proper documentation for doctors. He said Gronvold's sleep was disrupted as she could only sleep for a few hours at a time.

[25] McLarty testified on behalf of the RM. Although he was on the Employee Committee of the Council in 2015 and 2016, he demonstrated little recall of the events and did not seem to have an intimate knowledge of other matters surrounding Gronvold's situation. He did not recall whether the Council had ever concluded whether it would be an undue hardship to continue Gronvold's employment. As far as he knew, they were waiting for her to return to work.

[26] In relation to the meeting on May 15, 2015, McLarty had no specific recollection of the discussion that occurred. He did say they wanted to get a better understanding of the situation concerning Gronvold's leave. He also said the RM was feeling pressure to have an administrator on the job and they were having difficulty getting someone to fill in for Gronvold on a temporary basis. He did not elaborate on the RM's efforts in this regard.

[27] Swenson testified that the purpose of the May 15 meeting was to ascertain the extent of Gronvold's injuries and determine when she would return to work. They had

> Dr. Vermaak's certificates but they wanted to get to the bottom of Gronvold's situation. He said when they did not get clear answers, the meeting became "edgy". The main issue was that they could not get the right feedback on her medical condition. He could not recall any mention of a layoff or employment benefits. He was emphatic that no one talked about dismissing Gronvold. Yuke did not testify.

[34] Following her attempted return to work in April of 2015 Ms. Gronvold had retained legal counsel who, on May 19, 2015, wrote to the RM about a "threatened layoff". In that correspondence, her counsel cautioned the RM about its obligations under s. 2-40 of the *SEA* and informed it that: "[Ms. Gronvold] is working diligently at her recovery and looks forward to her return to work upon receiving medical clearance from her doctor and the disability insurer". Then, through a series of monthly medical certificates, Dr. Vermaak extended Ms. Gronvold's medical leave until November 21, 2015. None of these certificates stated when Ms. Gronvold might be "fit for full duties", which is an available category on the pre-printed form.

[35] In the meantime, on May 20, 2015, the RM advertised for a temporary full-time administrator, having employed part-time and full-time "relief" administrators up to that point. On August 24, 2015, the RM council appointed a temporary acting-administrator, who served in that capacity until February of 2016.

[36] On January 5, 2016, the RM asked Ms. Gronvold to meet with its employee committee "regarding [her] leave so that they can more efficiently plan for the next months". Through a series of emails, Ms. Gronvold declined to meet with the RM, ultimately stating that it would be premature because, among other things, she was awaiting further information from her physicians and an occupational therapist.

[37] On February 10, 2016, the RM council voted to terminate Ms. Gronvold's employment and to provide her with a three-week severance package, but that resolution was immediately rescinded. Instead, the RM council resolved to engage a private employment specialist and to have RM administration "hand deliver correspondence to Ms. Gronvold's Certified Medical Practitioner inquiring about her prognosis and possible return to work". In carrying out the latter part of that resolution, RM administration provided Ms. Gronvold with a letter dated February 10, 2016, directed to her physicians. It enclosed a two-page, detailed explanation of the functions and

duties of a municipal administrator[2] [Administrator Duties]. The letter sought information from the doctors about Ms. Gronvold's prognosis and her ability to return to work. Ms. Gronvold informed the RM that she had requested a response to the RM's letter from her neurologist because Dr. Vermaak was on vacation until mid-March. She also relayed concerns about satisfying the RM's deadline of February 24, 2016, in these circumstances. Neither physician responded to the RM's request.

[38] On February 24, 2016, the RM council held a special meeting at which it discussed "its request for a prognosis for [Ms.] Gronvold". The minutes of that meeting record the following:

> **Administrator Diane Gronvold Disability Leave**
>
> Council had discussion that the last notice from Ms. Gronvold's Certified Medical Practitioner stated that she would be off work until November 21, 2015. A letter of correspondence was mailed to Ms. Gronvold on February 11th, to forward to her Medical Practitioner requesting a response as to her prognosis by February 24th, 2016. To date no response has been received, as she has been on an unexcused absence from work.

[39] Under a letter dated February 26, 2016, the RM notified Ms. Gronvold that:

> You have been absent from the workplace without an approved leave of absence since November 22, 2015. We have not been provided with any medical information or certificates that would authorize your absence, therefore, you are expected to be at work on Monday February 29th, 2016 at 9:00 a.m. If you choose not to return to work, we will consider that you have refused to work and thus abandoned your position with the R.M. of Baildon No. 131.
>
> We look forward to seeing you on February 29th, 2016.

[40] Three days later, on February 29, 2016, Ms. Gronvold's legal counsel responded, advising the RM, *inter alia*, that Ms. Gronvold's injury had "made it impossible for her to return to her employment", but that she "has not abandoned her position with the R.M. and is medically disabled due to her injury… [and] continues to diligently work at her recovery". Ms. Gronvold's lawyers also put the RM on notice that "Any action taken to dismiss Ms. Gronvold would be considered wrongful termination and subject to a civil action for damages", cautioned the RM that the "manner in which Ms. Gronvold has been treated by the R.M. has been so unreasonable and inappropriate that it is our opinion that she would also be entitled to aggravated and/or punitive damages", and

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[2] The statutory duties of a municipal administrator are enumerated under s. 111 of *The Municipalities Act*, SS 2005, c M-36.1, and the profession is itself governed pursuant to *The Urban Municipal Administrators Act*, SS 1980-81, c U-8.1.

stated that the "R.M.'s conduct in dealing with Ms. Gronvold concerning her disability has been malicious, outrageous, and an egregious display of bad faith".

[41] Between March 17, 2016, and April 27, 2016, under an exchange of correspondence with Ms. Gronvold's counsel, the RM reconfirmed that she had been absent from work without medical authorisation since November 23, 2015; acknowledged that she was disabled but stated that it lacked any information about her disability; asked for information about Ms. Gronvold's disability, her prognosis, her ability to perform the Administrator Duties, and her accommodation needs; and expressed an eagerness "to facilitate her return to work as directed by her caregiver(s) and in compliance of all statutory requirements". For her part, Ms. Gronvold provided the RM with correspondence and a certificate that authorised her absence from work for medical reasons retroactively from November 23, 2015, and extended that absence to May 31, 2016, and advised that it could be extended further.

[42] On May 3, 2016, the RM advertised for the position of administrator. Based on the documentary evidence in the joint exhibit book, the judge found that:

> [36] The advertisement did not stipulate whether it was a permanent or temporary position. Since March 2016, in relation to Gronvold's situation, the RM began consulting with Denis Benoit [Benoit], a former RCMP officer who owned a private consulting firm called Provincial Employment Standards Consulting Inc. In an email to Benoit dated May 5, 2016, [the acting administrator] confirmed that the job posting was for a permanent position. That same day, Benoit responded:
>
> > … I want to have this response to your email recorded in your file stating I was not consulted nor did I have any knowledge of Council's decision to advertise for a permanent Administrator's position until today. …

[43] On May 20, 2016, Ms. Gronvold's lawyers warned the RM that Dr. Vermaak would unlikely "be able to respond to any of [the RM's] questions until the specialist report is received". Observing that the RM had advertised for "a full time administrator position", they asked about the RM's "intentions in this regard and whether this position is a temporary position to fill in for Ms. Gronvold while she is away from work or whether [the RM's] intention is to replace her permanently". The lawyers also stated that, "As you can well imagine, the placing of this advertisement has caused Ms. Gronvold additional stress and concern about how the R.M. is dealing with her from an employment perspective".

[44] Under a letter from her counsel dated May 31, 2016, Ms. Gronvold advised the RM that she would be absent from work until June 30, 2016. On the latter date, Dr. Vermaak replied to the RM's questions. In answer to "What is the nature of Ms. Gronvold's illness (excluding diagnosis)?", the physician wrote: "— Presented with concussion Nov 2014". Responding to "When is it expected that Diane Gronvold will be medically ready to return to work?", Dr. Vermaak wrote: "To return back to work within the next week". He circled "Part time" and scrawled "half days — 2x week — to increase accordingly". In response to the question "Please outline a return to work plan (if applicable)", the doctor wrote: "half days 2x week x 1/12 then reassess". In response to questions about her prognosis, the permanence of restrictions on her return to work, and when she could be expected to "be back up to full time hours", Dr. Vermaak answered with question marks — "?".

[45] On July 5, 2016, counsel for Ms. Gronvold emailed the RM, and followed-up on July 11, 2016, regarding the following request:

> I am contacting you to discuss the return to work of Ms. Diane Gronvold. Due to Ms. Gronvold's continuing symptoms, Ms. Gronvold's physician, Dr. Vermaak, has suggested a return to work plan consisting of two half days per week for one month and then a reassessment. Please have someone contact me to coordinate this return to work so we can ensure a smooth and amicable return to work for Ms. Gronvold.

[46] The RM replied on July 11, 2016, stating that Ms. Gronvold's return to work would be considered at a meeting of the RM council on July 13, 2016. Also effective July 11, 2016, the RM hired Carole Bellefeuille as its administrator, and, on July 13, 2016, the RM council formally appointed her to that position, advising her that it was full-time but that it was not permanent if Ms. Gronvold returned to work.

[47] The next day, on July 14, 2016, the RM wrote to Ms. Gronvold's counsel, asking for clarification "in order to plan for a safe and effective return to work" and for "her doctor [to] make clear indication, by checking, on the attached [Administrator Duties] indicating what she feels capable of at this time". Ms. Gronvold's counsel replied on the same day that "she is not restricted from any of the duties [*sic*] required to complete the duties [*sic*]" but that a "reasonable accommodation that must be made … is a UV protection screen on the computer monitor". They asked the RM to contact them to arrange a start date for Ms. Gronvold's return to work.

[48] On July 19, 2016, the RM council held a special meeting at which it resolved to retain legal counsel to provide it with advice regarding Ms. Gronvold's return to work. On July 21, 2016, the RM's lawyers wrote to Ms. Gronvold's lawyers and, observing that Dr. Vermaak "does not provide any real assistance in identifying the actual limitations and functionalities of Ms. Gronvold", asked whether she would consent to an assessment by an independent "head trauma multidisciplinary team that could provide an evaluation for the purposes of preparing and coordinating a return to work plan".

[49] Through her lawyers on July 21, 2016, Ms. Gronvold rejected the RM's invitation, stating that, since the RM had "delayed over the past number of weeks", she would be "filing a Human Rights complaint". Five days later, she followed up, having her lawyers advise the RM that she was willing to undergo a medical assessment provided that the RM paid her "as if she was on long-term disability" from and after November 15, 2015, otherwise she would be "pursuing a wrongful termination suit".

[50] On August 5, 2016, counsel for the RM responded at length to these warnings, reiterating the RM's view of the circumstances over the previous 20 months of medical leave, observing that the 12-week period of medical leave under s. 2-40(2)(b)(ii) of the *SEA* had been exceeded, and remarking that the RM had accommodated Ms. Gronvold's disability with part-time and temporary administrators throughout her medical leave. The lawyers advised that the RM had "reached the point of undue hardship in so far as keeping the Administrator's position open". Under this correspondence, the RM took the position that, "in fulfilling [its] duty to accommodate, [the RM] is entitled and is obligated to identify the actual limitations and functionalities of the employee who seeks the accommodation". It further stated that Ms. Gronvold "has an obligation to facilitate her accommodation which can include an obligation to cooperate in providing medical, vocational or other information requested by the employer as part of the accommodation". Most relevantly, the RM's lawyers reconfirmed that "the information provided by [Dr. Vermaak] in our view does not begin to identify actual *limitations* and *functionalities*" (emphasis in original).

[51] On September 6, 2016, Ms. Gronvold's counsel wrote back, enclosing some additional information from Dr. Vermaak in the form of a note dated August 18, 2016, which read:

> Diane is a 56 year old patient in my practice that presented with a concussion syndrome after a head injury in November 2014. She had been experiencing memory problems, head

> aches and dizziness that hadn't recovered at that stage. She had a CT scan that was unremarkable following the accident. She was referred to Dr. Reiman [*sic*] the neurologist who did further neuropsychological testing and an MRI. His conclusion was that there was no permanent damage.
>
> I communicated to her employer, although she still had symptoms, the situation has improved and that she was ready to return to work from the 30th of June on a return to work program. The idea was to start her on half days, a couple days a week and to increase accordingly.
>
> At this stage, all the necessary testing was done and she does not need any further investigations.

[52] On September 22, 2016, Ms. Gronvold filed the Complaint with the Commission. It states that, on "June 30, 2016, my doctor recommended a gradual return to work", and the RM "refused to accommodate this and insisted that I could only return when I was able to work full-time". As noted, she alleged in the Complaint that the RM had "discriminated against [her] on the basis of disability by refusing to accommodate her to the point of undue hardship".

[53] After the filing of the Complaint, on September 27, 2016, the RM's legal counsel wrote to Ms. Gronvold's counsel, stating it was the RM's position that Ms. Gronvold's request that she be allowed to return to work two half-days per week would require it to "create a brand new position for Ms. Gronvold and then provide her with *make work* tasks to do while she was at work" (emphasis in original), and that the employer's duty to accommodate did not extend that far.

[54] In March of 2017, the RM issued two different records of employment to Ms. Gronvold, each at her request and each of which identified the reason for her termination as "K", meaning "Other". One noted that March 15, 2017, and the other that December 15, 2014, was the "final pay period ending date".

C. Court of Queen's Bench decision

[55] In the *Decision*, the judge identified four issues to be determined in the hearing under s. 34 of the *Code*. The first was whether the RM had discriminated against Ms. Gronvold on the basis of her disability "when they terminated her employment after advising her that it could not accommodate her returning to work part-time" (at para 47(1)). In answering that question, the judge found that:

(a) the RM decided not to accommodate Ms. Gronvold's return to work on a graduated basis because that would have required it to create a new position and would have resulted in financial hardship (*Decision* at para 46);

(b) Ms. Gronvold had "suffered adverse treatment as a result of the RM's decision" (at para 70);

(c) "[Ms.] Gronvold's disability was a factor in the RM's decision"; it was "the only factor" (at para 71); and

(d) therefore, "[Ms.] Gronvold has established a *prima facie* case of discrimination" (at para 71).

[56] Given her conclusion that Ms. Gronvold had established a prima facie case of discrimination in employment, the second issue was described as whether the RM had "a duty to accommodate [Ms.] Gronvold and, if so, to what extent". The judge easily concluded that the RM had a duty to accommodate its disabled employees. As to the extent of that duty, she held that the evidence was "insufficient to establish that the RM would suffer hardship if it were required to accommodate [Ms.] Gronvold" and, therefore, that "the RM failed in their duty to accommodate her return to work" (at para 79).

[57] Under the third issue, the judge rejected the RM's contention that Ms. Gronvold had "frustrate[d] the accommodation process by declining to participate in an independent assessment", writing:

> [80] In support of its contention that it attempted to accommodate Gronvold but she frustrated the process, the RM relies on its proposal that she undergo an assessment by a BRC consultant who could "prepare and evaluate a return-to-work plan". I see this as a thin "Hail Mary" attempt to comply with the statutory duty to accommodate. The RM had significant information at this point about Gronvold's condition and knew that computer work, in particular, had been a trigger for her headaches in the past. The RM knew Dr. Vermaak's opinion that with a concussion, it was impossible to determine how the employee would fare on the job until they are actually back on the job.
>
> [81] I cannot fault Gronvold for choosing to follow the advice of her medical care providers. She had been through a significant amount of testing and all that was left was for her to get back on the job, conservatively, to "see how it goes". While the RM wanted certainty, Gronvold's injury did not lend itself to that. Importantly, there was very little evidence tendered about BRC and how such an assessment would have provided any better insight into a back-to-work plan.

> [82] In a letter from the RM's lawyer to Gronvold's lawyer on August 5, 2016, it was suggested that Gronvold actually suffered from a traumatic brain injury which "is one of the most difficult disabilities to accommodate". This statement was not supported by any evidence before me. Certainly, none of the doctors in charge of Gronvold's care expressed that opinion. In particular, Gronvold had a CT scan and an MRI, been to the Acquired Brain Injury Clinic for testing, and undergone other neuropsychology testing. She did not have any permanent brain damage and there was no organic brain injury. More to the point, the letter re-affirms the RM's stance, as it had taken from the very beginning, that it was not going to accommodate her.
>
> [83] There was no evidence from any witness that would support a conclusion that the RM was willing to develop a return-to-work plan that would ensure the work of the RM was done but at the same time ensuring its statutory duty as an employer was met. While the RM seems to suggest that they did try to accommodate Gronvold, there is no evidence to support this.
>
> [84] In conclusion, I find that Gronvold was discriminated against on the basis of her disability and the RM failed in their duty to accommodate her disability and her return to work.

[58] The fourth issue was the appropriate remedy if the RM had failed to reasonably accommodate Ms. Gronvold. Here, having found that the RM had failed to accommodate Ms. Gronvold's disability to the point of undue hardship, the judge awarded her approximately $130,000 in general compensation and $10,000 in special compensation under s. 40 of the *Code*.

III. ISSUES AND ANALYSIS

[59] The RM raises several grounds in its notice of appeal but submits in its factum that the appeal requires resolution of only four principal issues. Addressing the first two of those issues, I find (below) that the judge erred in law and made palpable and overriding errors of fact and of mixed fact and law when she concluded that: (a) Ms. Gronvold had discharged her burden of establishing a prima facie case of discrimination in employment; and (b) the RM had failed to accommodate Ms. Gronvold's disability to the point of undue hardship.

[60] In the result, I would overturn the *Decision* and set aside the finding of a contravention of s. 16(1) of the *Code*. This means that the remaining issues in the appeal, i.e., those involving the calculation of awards of compensation under the *Code*, are moot, as are the issues that were raised in the cross-appeal.

A. Framing the issues

[61] As noted, Ms. Gronvold's initial complaint was that the RM had failed to accommodate her disability to the point of undue hardship by terminating her employment without allowing her to return to work on a gradual basis. However, under the Chief Commissioner's application for a s. 34 hearing, Ms. Gronvold's complaint was described in terms of some events that, although relevant to the narrative, were not themselves tied to the adverse impact that Ms. Gronvold identified as the basis for her claimed violation of s. 16(1) of the *Code*. I repeat the allegations here for ease of reference:

> a. Baildon hastily and repeatedly accused Gronvold of being absent without leave, with knowledge that she had suffered a serious head injury;
>
> b. Baildon demanded a medical prognosis without allowing adequate time for Gronvold's physician to prepare one;
>
> c. [the Reeve of the RM and one of its councillors] bullied or harassed Gronvold while she attempted to return to the workplace in April of 2015, the particulars of which are set out in paragraph 10 above;
>
> d. Baildon hired a permanent replacement for Gronvold's position without any prior warning to Gronvold;
>
> e. Baildon hired a permanent replacement for Gronvold's position without current information regarding Gronvold's prognosis for a return to work;
>
> f. Baildon hired a permanent replacement for Gronvold's position before it reached the point of undue hardship;
>
> g. Baildon failed to accommodate Gronvold's proposed return to work in July of 2016; [and]
>
> h. Baildon terminated Gronvold's employment based on her disability.

[62] More specifically, I would reiterate that the only violation of s. 16(1) of the *Code, 1979* that is alleged in the Complaint and in the Hearing Application to have caused Ms. Gronvold an adverse impact is the September 2016 termination of her employment. It was this termination, allegedly based on her disability and associated with the failure by the RM to accommodate her disability to the point of undue hardship, by refusing to allow her to return to work on a part-time basis, that was the foundation of her claim.

[63] As to the other allegations, as I will explain, an employer is legally entitled to seek certification from a medical practitioner authorising the employee's leave of absence from work. Where it is reasonably necessary, an employer may ask for a medical prognosis in anticipation of accommodating a disabled employee's return to work from a medical leave of absence. The hiring

of another person to fulfil the functions of a disabled employee on medical leave is not itself discriminatory, even when the employee is not forewarned of that eventuality or the employer has not yet accommodated the disabled worker to the point of undue hardship. Lastly, rudeness and unpleasantness between employer and employee is not, in and of itself, actionable discrimination – it must be linked to the employee's disability and adversely impact their employment. There is no particular reason to think that any of the foregoing points, as set forth in the Complaint and the Hearing Application, could satisfy the requirements for demonstrating a prima facie case of discrimination by the RM against Ms. Gronvold.

[64] Justice Abella, who wrote for a unanimous Supreme Court in *Moore*, admonished the decision-maker in that case for granting remedies that were so remote from the scope of the human rights complaint being adjudicated as to be patently unreasonable (which was the statutorily mandated standard of review). When commenting on the excess of jurisdiction, Abella J. said that the decision-maker, "with great respect, *is an adjudicator of the particular claim that is before it*, not a Royal Commission" (at para 64, emphasis added). While the judge in this case did not go quite so far as the tribunal did in *Moore*, she committed the same error of improperly stretching the *Code* and the common law to embrace the allegations made in the Hearing Application rather than assessing whether the Agreed Facts and other evidence satisfied the legal requirements of discrimination under the *Code*. In fairness to her, she appears to have been led into that error by the legally questionable expansion of the scope of the s. 34 inquiry beyond the contravention of s. 16(1) of the *Code* initially alleged in the Complaint, which can be traced to the way the "particulars of the formal complaint" were described in the Hearing Application.

[65] In short, the judge was required to adjudicate whether under the *Moore* factors the termination of Ms. Gronvold's employment in September of 2016 was discriminatory and, in that regard, specifically whether the RM had failed to accommodate her disability to the point of undue hardship. However, the framing of the alleged breach of the *Code* in the Hearing Application unfortunately and erroneously seems to have led the judge far astray from that focus.

[66] As noted, under s. 16(1) of the *Code* and the *Moore* factors, to demonstrate prima facie discrimination by an employer, an employee must establish three facts on a balance of probabilities [*Moore* factors]:

(a) that they have a characteristic that is protected from discrimination;

(b) that they have experienced an adverse impact with respect to employment or a term or condition of employment; and

(c) that the protected characteristic was a factor in the adverse impact.

Once the employee has discharged their onus, the burden shifts to the employer to refute the allegation or justify its impugned conduct or practice within the framework of exemptions available under the *Code* (s. 48; *Moore* at para 33, and *Bombardier* at para 64).

B. The first *Moore* factor – a protected characteristic

[67] In this case, the RM conceded that Ms. Gronvold has a disability within the meaning of the *Code*, thereby satisfying the first factor under *Moore*.

C. The second *Moore* factor – adverse impact

[68] The RM says that the judge incorrectly understood what circumstances could constitute an "adverse impact" in employment under the second *Moore* factor, which led her to overlook the third *Moore* factor (i.e., whether the disability was a factor in the adverse impact). It submits that at law an employee must prove all of these facts to properly establish a prima facie case of discrimination in employment. The RM argues that the judge therefore erred in law by misapprehending what the *Moore* factors required her to determine.

1. A misunderstanding of the elements of discrimination in employment

[69] The RM takes specific issue with the judge's finding that it had made a decision early on about not allowing Ms. Gronvold to return to work on less than a full-time basis. It reproaches the judge for finding that Ms. Gronvold had experienced "adverse treatment by reason of the employer's decision" and for concluding that that fact satisfied the onus under the second *Moore* factor (*Decision* at paras 57–58). The RM argues that the judge should have instead determined whether Ms. Gronvold had experienced an "adverse impact" with respect to employment or a term or condition of employment, as is called for under *Moore*. It observes that the judge did not refer

to *Schrenk* and instead relied on the decision in *Rice v Brehon Agrisystems Inc.*, 2012 SKQB 229 at para 52, 397 Sask R 229, which it submits improperly altered the *Moore* factors.

[70] Although the judge does not plainly state in her analysis what she meant by the "employer's decision", I can only infer from her recitation of the facts that she was referring to the decision by the RM that Ms. Gronvold's "request to return to work on a graduated basis would not be accommodated" because "such a plan would require the creation of a new position and result in financial hardship to the RM" (*Decision* at para 46). Put in terms of s. 16(1) of the *Code*, that decision would amount to a "refus[al] to continue to employ" Ms. Gronvold on other than a full-time basis, which, under the Agreed Facts, was made by the RM in or about September of 2016.

[71] Having reviewed the findings in the *Decision*, I agree that the judge erred in her approach to the law, including with respect to the second *Moore* factor, leading her to improperly find that the *treatment* Ms. Gronvold had received from the RM *before* the decision was taken to deny her return to work on a graduated basis in September of 2016 (i.e., the narrative of events and correspondence leading up to the termination of her employment in the Fall of 2016) had *resulted* from the RM's decision not to continue to employ Ms. Gronvold in the Fall of 2016 (*Decision* at para 70). With all due respect, the adverse-impact factor under *Moore* and s. 16 of the *Code* simply required the judge to determine whether Ms. Gronvold had experienced a refusal to employ, a termination of employment, or the harmful effect of an employment term, condition or policy (*Code*, s. 16(1); *Moore* at para 64). On the Agreed Facts and the documentary evidence adduced at the hearing, Ms. Gronvold had experienced just such an event but only when her employment ended in September of 2016.

[72] Notably, to reach her conclusion about adverse treatment, the judge had to effectively backdate the RM's decision not to continue to employ Ms. Gronvold to around December of 2014. With respect, this was improper as it contradicted the common law, statute law and the Agreed Facts.

[73] The common law distinguishes between an employer's decision and its effect. Decisions regarding hiring, employment policies, promotion, discipline and termination may certainly be deemed to be discriminatory (*Schrenk* at para 53), but, in terms of the second *Moore* factor, the

quantifiable outcome of the employer's decision — such as job loss, pain from having to wear a tie as part of a dress code, being surpassed by non-disabled employees on a seniority list, loss of benefits, or an uneven advantage in pursuing opportunities, etc. — is the *adverse impact* experienced by the employee (e.g., *Stewart* at paras 24, 40 and 43; *Health Employers Assn.*; *Lashinski v Regina Cabs*, 2010 CanLII 151250 (Sask HRT) at paras 21 and 34; and *Kivela v C.U.P.E., Local 21 (No. 1)*, 2003 CanLII 74510 (Sask HRT) [*Kivela (No. 1)*]).

[74] In her analysis of the second and third *Moore* factors, the judge strayed far from the established refusal to continue to employ Ms. Gronvold on other than a full-time basis and took a broader assessment of *impact* by improperly pulling in the adverse *treatment* (in the judge's assessment) that Ms. Gronvold had experienced at the 2015 Meetings and under the RM's correspondence to her. In this regard, the judge wrote:

> [60] As to the second criterion, in my view there is also no question she suffered adverse treatment by the RM.
>
> [61] Gronvold points to the aggressive and threatening tone of the letters sent by the RM in January and February of 2015 as indicia of adverse treatment. I understand why she feels this way. She was the administrator in a small, tight-knit office, where everyone worked closely together. Added to this is the fact, which I accept, that Gronvold was in almost daily communication with Breitkreuz [i.e., her co-worker] to attempt to keep the RM updated on her condition. Until the letter was sent, it appears no one from the RM raised concerns with her over the absence of medical certificates.
>
> [62] However, I also accept Breitkreuz's evidence that there was no medical certificate on file authorizing Gronvold's absence after her attempt to return to work in December 2014 and that this precipitated the January 12, 2015 correspondence.
>
> [63] That said, in the face of the evidence she was in constant communication with Gronvold, Breitkreuz did not explain why she did not simply ask her to provide the RM with the medical certificates. It is noteworthy that this was at a time when the RM knew she was approved for short-term disability benefits through SARM and would have had to provide medical certificates in order for that to happen. Rather than take this step to correct what I consider to be an obvious oversight on Gronvold's part, Breitkreuz consulted with Labour Standards to obtain a letter she reproduced "word for word" to send to Gronvold. Although the somewhat aggressive language in the letters would later become consistent with the tone of the subsequent interaction between the RM and Gronvold, I have no reason to doubt that these were standard form letters employers use in such circumstances. Just why the letter was necessary when there was frequent communication by Gronvold was never explained.
>
> [64] I find that at no time did the RM support Gronvold in returning to work on anything less than a full-time basis; nor did it make any attempt to. On April 20, 2015, Gronvold returned to work on a part-time basis in accordance with Dr. Vermaak's authorization. On her second day back at work, Yuke and McLarty came into her office and told her returning to work part-time was not working for the RM and that it was too hard on Breitkreuz. They remained in her office for two hours, hammering her with questions about her efforts to

> obtain better medical advice and treatment. McLarty had little overall recollection of the events, including this impromptu meeting and Yuke did not testify. I accept Gronvold's evidence entirely as to what transpired in her office.
>
> [65] Yuke's attitude and sentiments on a gradual return to work plan did not improve over time. Nor did those of McLarty or anyone else on Council for that matter. The meeting of May 15, 2015 bears this out. I completely accept Gronvold's evidence, which was corroborated by Kistner, that the meeting was not amiable. Yuke did most of the talking and, with the added support and the acquiescence of the others present, it presented quite an aggressive front. The RM's intransigent position that nothing short of full-time would do was clear, with talk of termination and Gronvold going on Employment Insurance. The meeting was disastrous. Gronvold was still suffering the effects of the concussion and although she was still receiving short-term disability benefits, she became fearful of being fired, fuelling her anxiety.
>
> [66] Then there was the advertisement on May 3, 2016 for Gronvold's position that she learned about through a friend. Although the job posting did not indicate whether it was a permanent position, Breitkreuz' email to Benoit confirmed it was.
>
> [67] I think it is fair to say that the RM was willing to give Gronvold time to heal before coming back to work <u>full-time</u>. But the RM was never prepared to give effect to her doctor's directions. Even in the early months of her absence, the RM voiced their unequivocal opposition to any such plan, believing it would be too hard to put in place.
>
> [68] I have difficulty with the RM's stance that the part-time plan would be difficult. It was not until the summer of 2016 that the RM asked Bellefeuille to review the administrator's job description and determine what tasks Gronvold might be able to do. This step was too little, too late. Knowing that her doctors were advocating for a gradual return to full-time, the RM could have undertaken that kind of assessment, in consultation with Gronvold, and determined what duties could be fulfilled by another person. The RM had part-time assistants and an administrator, like Thatcher, and there was no evidence that these persons were approached about job-sharing or increasing their hours. For example, Bellefeuille was hired as a full-time administrator and said she understood if Gronvold returned to work full-time she would be let go. She testified no one had asked her if she was prepared to reduce her hours so Gronvold could return part-time.
>
> [69] The RM argues that it did not treat Gronvold adversely because she was not providing the requested medical information. Gronvold acknowledged that she received letters asking for more information, particularly the letter of March 18, 2015, but she did not explain why she had not responded to that request. To be sure, there were medical certificates authorizing work absences, but these contain little to no information as to her condition, treatment plan or general prognosis. I found Dr. Vermaak's evidence as to the difficulty in assessing the severity of a concussion and prognosis for recovery to be extremely helpful and informative. No doubt the RM would have too, had Gronvold made efforts to obtain that information early on. That said, given the RM's steadfast position on Gronvold returning to work gradually, I have no doubt the outcome would have been the same.
>
> (Emphasis in original)

[75] Following this analysis, the judge had "no difficulty in concluding that [Ms.] Gronvold suffered adverse treatment as a result of the RM's decision" (at para 70), and that there was "also no question that [Ms.] Gronvold's disability was a factor in the RM's decision" (at para 71). These

two findings were the principal bases for her conclusion that Ms. Gronvold had established a prima facie case of discrimination. Importantly, at no point in her analysis did the judge attempt to explain how the matters which she found to constitute mistreatment, i.e., the "aggressive tone of the letters sent by the RM in January and February of 2015", were related to the decision by the RM to deny her request to return to work on other than a full-time basis in September of 2016, which is the only adverse impact that the judge found. Critically, the judge also recognised the legitimate purpose (if not tone) for these letters by accepting the RM's evidence that there was no medical certificate on file authorizing Ms. Gronvold's absence and that this fact had precipitated the correspondence.

[76] As I have already noted, according to Ms. Gronvold's complaint, the Agreed Facts and the evidence adduced at the hearing, the RM made the decision not to accommodate her return to work on other than a full-time basis in September of 2016 — not in December of 2014, when she first attempted to return to work on a gradual basis; nor in April of 2015, the second time she attempted a gradual return to work; nor any time thereafter until September of 2016. Moreover, in their Agreed Facts, the parties effectively told the judge that, at all other times prior to July of 2016, Dr. Vermaak had either proactively or retroactively authorised Ms. Gronvold's absence from the workplace for medical reasons, and she had been unable to return to work on even a part-time basis – e.g., on February 29, 2016, her lawyers told the RM it was "impossible" for her to return to work.

[77] In my judgment, the fundamental flaws in the foregoing legal reasoning of the judge and in the factual findings that underpin that reasoning compel appellate intervention in this matter.

2. A misunderstanding of the objective of the *Code*

[78] It is important to remember that the objective of human rights legislation in the employment context is to "eliminate exclusion that is arbitrary and based on preconceived ideas concerning personal characteristics which, when the duty to accommodate is taken into account, do not affect a person's ability to do a job" (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City)*, 2000 SCC 27 at para 36, [2000] 1 SCR 665).

[79] Ms. Gronvold's testimony about the failure by the RM Reeve to treat her with civility in the 2015 Meetings does not support the conclusion that she had experienced an adverse impact in her employment in the nature of a termination, a refusal to continue to employ her, or discipline. I

do not dispute that, on Ms. Gronvold's evidence, the Reeve had acted very poorly and that that had occurred in the workplace and in association with Ms. Gronvold's employment and, ostensibly, her disability. I accept that Ms. Gronvold perceived herself as having experienced adverse treatment at the hands of the Reeve and others, who — I accept the judge's findings — approached their interactions with her in a disdainful and overly insistent or demanding manner. I understand why Ms. Gronvold would have found the tone of her two meetings with the RM to be "not amiable" where the RM had "presented quite an aggressive front", and that she might have taken the RM's correspondence to her regarding her absence from work as being "aggressive and threatening" (*Decision* at paras 61 and 65).

[80] There are three points to be made about this. The first is that the *Code* does not require people to be polite or nice to each other, even in the employment context. It does not prohibit *general* incivility, discourtesy or disrespect, which is borne (usually) of character flaws but not (usually) actionable ones. The *Code* does not prohibit the termination or discipline of a disabled employee. What the *Code* prohibits, in the context of this case, are actions or omissions by employers (and those for whom employers are responsible) based at least in some part on a prohibited ground where the action or omission would unfairly exclude an individual from employment or adversely affect the individual's employment or a term or condition of employment (s. 16(1)).

[81] Treating someone badly is not, *per se,* actionable discrimination under the *Code*. That said, if the conduct of an employer or others in the workplace amounts to harassment, intimidation, threats or persecution of an employee, then the effect of that conduct could presumably satisfy the adverse-impact factor under *Moore*. If the employee's established disability was shown to have been a factor in that impact, then it would be prima facie discrimination in employment based on disability. As an egregious example of this see *Oliva, Pascoe, and Strong v Gursoy*, 2024 AHRC 45.

[82] With that understanding, adverse treatment of the kind Ms. Gronvold described could have supported, if the factual context had been different, the conclusion that the RM had never intended to let her return to work on other than a full-time basis. In the context established by the Agreed Facts, however, that conclusion is contradicted by the fact that the RM had accommodated her

disability through a medical leave of absence and was prepared to collaborate with her on a return-to-work plan.

[83] In my assessment, it was a palpable and overriding error for the judge to have relied on Ms. Gronvold's evidence of the conduct of the Reeve and others in the 2015 Meetings (along with the associated correspondence) to characterise the RM's much later decision not to continue to employ Ms. Gronvold as discriminatory. Given what the judge found had occurred in the 2015 Meetings and specifically the *effect* that those events had had on Ms. Gronvold, I agree that the employment relationship was adversely affected by the RM's actions taken at that time – Ms. Gronvold plainly distrusted her employer and had strong misgivings about its motivations. However, there is no basis on the record in this case to associate those actions with the RM's decision, 16 months later, to end her employment, particularly when the intervening events in the Agreed Facts contradict that conclusion.

[84] In my judgment, the judge's reasoning discloses a misapprehension of the objective of s. 16(1) of the *Code* that compels appellate intervention in this matter.

3. An overlooking of employers' rights

[85] The misattribution to the RM in *all* its interactions with Ms. Gronvold of the behaviour exhibited by representatives of the RM in the two 2015 Meetings also resulted, in my respectful view, from a failure to understand employer rights and employee obligations under the *SEA*, which in turn led the judge to misapprehend the Agreed Facts and evidence in the hearing.

[86] To explain, I start by observing that the judge found that, through "an obvious oversight on [Ms.] Gronvold's part" (at para 63), Ms. Gronvold had been absent from work without providing the RM with medical authorisation from December 8, 2014, until the RM had formally contacted her about that circumstance under a letter dated January 12, 2015. Although not referred to in the *Decision*, the Agreed Facts state that Ms. Gronvold was also absent from work without medical authorisation for five months between November 23, 2015, and April 15, 2016, during which time the RM inquired about her unauthorised absence under its February 26, 2016, letter. Notably, the judge characterised the RM's correspondence to Ms. Gronvold in this regard as both having been "reproduced 'word for word'" from precedents obtained from a government labour standards office and containing "somewhat aggressive language".

[87] The judge cast much condemnation toward the RM for what she saw as the aggressive tone of its requests for medical authorisation for Ms. Gronvold's continued absence from work in 2014, 2015 and 2016. The judge said that she had "no reason to doubt that these were standard form letters employers use in such circumstances", but she also remarked that the RM had failed to explain "why the letter was necessary when there was frequent communication by [Ms.] Gronvold" (at para 63). I take this to mean that there was no need for the RM to seek what it was entitled to obtain from Ms. Gronvold under ss. 2-40(2) and 2-47 of the *SEA* (i.e., written authorisation of a medical leave from a medical practitioner), since the RM should have known why she was absent from work. If that is so, then there is no legal or factual foundation for that conclusion or the condemnation that followed from it.

[88] With all respect due to the judge, the fact that the RM had in January of 2015 and again in February of 2016 articulated its legal right to require Ms. Gronvold to either return to work or to provide it with medical authorisation for her continued absence from the workplace — especially under standard-form letters that were, according to the evidence, provided by a government source — cannot contribute to a conclusion that Ms. Gronvold had "suffered adverse treatment" at the hands of the RM. Put in terms of *Moore*, this evidence does not begin to suggest that Ms. Gronvold had experienced an adverse impact in her employment that was associated with these communications.

[89] To be clear about this, Ms. Gronvold's leave of absence from the workplace for medical reasons cannot be understood as anything but an accommodation by the RM of her disability. At the points in the narrative when the impugned letters were issued, Ms. Gronvold had been told that she needed to provide authorisation for any further leave of absence and she had been absent from work, first for a month and next for many months, without medical authorisation and without otherwise explaining her continued absence to her employer. Nothing in the record suggests that the RM sent the letters to Ms. Gronvold because she was disabled. They were sent because she had been repeatedly absent from the workplace without authorisation, and she had not said if or when she would or could return (see: *SEA*, ss. 2-40(2)(c) and 2-47).

[90] Given the agreed record, it was not open to the judge to characterise the RM's correspondence to Ms. Gronvold as aggressive or unreasonable when it merely sent formal letters

to advise her that she would be deemed to have resigned if she did not return to work or provide medical authorisation for her continued absence. On the Agreed Facts, it was not Ms. Gronvold's disability that formed the impetus for these letters, it was her seeming inability to fulfill a fundamental legal obligation of employees arising from the employment relationship and the *SEA*.

[91] In the context of this case, the mere statement by an employer of its legal rights and of the legal obligations of the employee cannot be deemed to have had an adverse impact on employment for the purposes of s. 16(1) of the *Code* and the *Moore* factors. The goal of accommodation is "to ensure that an employee who is able to work can do so" (*Hydro-Québec* at para 14). In *Hydro-Québec*, the Supreme Court explained that "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" (at para 14). However, the Court added that, "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" (at para 17). The Supreme Court concluded in *Hydro-Québec* that:

> [19] The duty to accommodate is therefore perfectly compatible with general labour law rules, including both the rule that employers must respect employees' fundamental rights and the rule that employees must do their work. The 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.

[92] I understand that Ms. Gronvold feared that the RM would terminate her. However, in terms of an adverse impact on employment or a term or condition of employment, the possible discipline described in the RM's letters — which was legitimately available on the facts then known to the RM — never occurred. Ms. Gronvold was not deemed by the RM to have resigned her employment in either April or May of 2015. She was also not required to return to the workplace at either of those times. Rather, the RM continued to accommodate her disability by accepting her ongoing *medical* absence from the workplace over the ensuing months. When Ms. Gronvold complied with her then outstanding employee obligations and provided the RM with *retroactive* and ongoing authorisation for her continued medical absence from the workplace, she accepted the RM's accommodation of her disability.

[93] Considering all of this, a claim of discrimination could not be grounded, without something more, in the fact that an employer stood on its legal rights or asserted them with certainty of its position when accommodating an employee's disability.

[94] That being said, I accept that the conduct of the RM Reeve at the 2015 Meetings detrimentally soured the employment relationship through a deterioration of trust between employer and employee (*Schrenk* at para 89; *Janzen v Platy Enterprises Ltd.*, [1989] 1 SCR 1252 at 1284). However, that did not end the employment relationship or have any other *adverse impact* on it within the meaning of *Moore* — Ms. Gronvold remained employed, and her disability was accommodated through a medical leave of absence for a further 17 months.

[95] The second point to be made about this evidence is that the judge seems to have accepted Ms. Gronvold's subjective belief that *every* action by the RM both before and after the "impromptu meeting" in April of 2015, at which Ms. Gronvold was "hammered" with questions, was either a pretext for her dismissal in September of 2016 or evidence that the RM was never prepared to accommodate her disability. Although Ms. Gronvold certainly felt that the RM's correspondence and the conduct of its officials had soured the employment relationship, her subjective belief that the RM had decided late in 2014 that it would *never* accommodate her return to work other than on a full-time basis is simply not supported by her own evidence or otherwise by the record. Unfortunately, the judge interpreted the indecorous conduct of RM officials in the 2015 Meetings either as itself an adverse impact within the meaning of *Moore* or as evidence that the cessation of Ms. Gronvold's employment in September of 2016 was discriminatory.

[96] Perhaps most distinctly in error are the judge's findings that "the RM was never prepared to give effect to her doctor's direction", that "[e]ven in the early months of her absence, the RM voiced their unequivocal opposition to any such plan, believing it would be too hard to put in place" and that the RM had early on outright rejected "a gradual return to full-time" that Ms. Gronvold's doctors were recommending (*Decision* at paras 67 and 68). Those statements are palpably irreconcilable with the facts to which the parties had agreed and the judge's own findings.

[97] The fact that this finding — that the RM would never have allowed Ms. Gronvold to return to work other than on a full-time basis — is palpably in error is evident from the following in the Agreed Facts and others:

(a) On March 18, 2015, the RM told Ms. Gronvold that it required certification by a medical practitioner of information about her medical situation and her expected return-to-work date.

(b) In April of 2015, Ms. Gronvold attempted to return to work on a "graduated return to work plan recommended by her physician on a part-time basis" but became "unwell at work" and "undertook another medical leave".

(c) On May 1, 2015, Ms. Gronvold advised the RM that "The Dr. has taken me off work again until further investigation by a neurologist".

(d) On May 20, 2015, the RM advertised for a temporary full-time administrator and on August 24, 2015, the RM council appointed a temporary acting-administrator, who served in that capacity until February of 2016.

(e) On January 5, 2016, the RM asked to meet with Ms. Gronvold "regarding [her] leave so that [it] can more efficiently plan for the next months".

(f) When the RM's temporary administrator was ending her employment in February of 2016, the RM made multiple attempts to inquire about Ms. Gronvold's circumstances and whether she could return to the position of administrator. This included a letter addressed to her physicians, along with the two-page Administrator Duties, asking about her prognosis and ability to return to that work. When asked about the RM's correspondence at the hearing, Dr. Vermaak testified:

> Q It's a letter. It's directed to physician --
>
> A Yeah.
>
> Q -- in charge, dated February 10, 2016. I don't know if you recall receiving this?
>
> A Yeah. I do. So the rural municipality let me know, you know, that, at this stage, she's been out of work for a certain period of time. The council would like to move forward with future plans for covering the office administration and would be interested knowing if her recovery is a multi-year process or would the -- the projection of her return to work be in the near future.

(g) On February 29, 2016, Ms. Gronvold's legal counsel told the RM that Ms. Gronvold's injury had "made it impossible for her to return to her employment".

(h) Between March 17, 2016, and April 27, 2016, the RM asked for information about Ms. Gronvold's disability, her prognosis, her ability to perform the Administrator Duties, and her accommodation needs; and expressed an eagerness "to facilitate her return to work as directed by her caregiver(s) and in compliance of all statutory requirements".

(i) On May 3, 2016, the RM advertised for the position of administrator but "did not stipulate whether it was a permanent or temporary position" (*Decision* at para 36); however, it told Ms. Bellefeuille that her hiring in July of 2016 was not permanent if Ms. Gronvold returned to work (*Decision* at para 68).

(j) When the RM hired Ms. Bellefeuille as administrator in July of 2016, the RM remained open to Ms. Gronvold returning to work and it had considered which of the tasks in its office could be completed by a part-time employee.

(k) On July 14, 2016, the RM asked for clarification about Dr. Vermaak's June 30, 2016, recommendation "in order to plan for a safe and effective return to work" and for "her doctor [to] make clear indication, by checking, on the attached [Administrator Duties] indicating what she feels capable of at this time".

(l) On July 21, 2016, the RM asked whether Ms. Gronvold would consent to a vocational assessment "for the purposes of preparing and coordinating a return to work plan".

[98] Although it does not appear to have been drawn to the judge's attention in the hearing, under s. 114 of *The Municipalities Act* in effect at the time[3], the appointment by a rural municipality of a person to the position of municipal administrator could be "made, suspended or revoked *only if the majority of the council vote to do so*" (emphasis added), which only occurred

[3] Section 114 of *The Municipalities Act* was repealed and replaced under *The Miscellaneous Municipal Statutes Amendment Act, 2020*, SS 2020, c 30, s 3-26, but the amendment did not alter this requirement.

in February of 2016, and the RM council immediately rescinded that decision. To my knowledge, the RM council never revisited the matter of revoking Ms. Gronvold's appointment as administrator.

[99] The misapprehension of the facts led the judge to discount the probative value of the fact that Ms. Gronvold had never provided the RM with any information about her medical condition and that she had offered no explanation for failing to do so. The judge recognised that Dr. Vermaak's certificates contained "little to no information as to [Ms. Gronvold's] condition, treatment plan or general prognosis" (at para 69). She then stated that the physician's evidence *at the hearing* had helpfully filled in the gaps in that regard. She furthermore had "no doubt" the RM also would have found Dr. Vermaak's testimony "helpful and informative". Yet, even if the RM had known that information, the judge had "no doubt the outcome would have been the same" (at para 69). When this reasoning is examined for its deductive validity, the judge's statements plainly do not hold together as premises – some are palpably in error – and they do not logically support the conclusion she drew from them.

[100] Lastly, I would add that the fact that the RM had advertised to fill Ms. Gronvold's position in May of 2016 is not probative of whether there was discrimination in this case. The judge was wrong to rely on that fact as establishing or contributing to an adverse impact in employment. As has been well settled, barring a few hours, Ms. Gronvold had been on a medical leave of absence from her work (at times, an unauthorised one) from November 25, 2014, until June 30, 2016. The fact that the RM had advertised to fill her position in May of 2016, and that Ms. Gronvold had learned of that through a friend, does not add to the analysis of whether she had experienced an adverse impact in employment. The judge said that the hiring was for a permanent, full-time position, but as noted she also understood that Ms. Bellefeuille had been told that "if [Ms.] Gronvold returned to work full-time she would be let go" (*Decision* at para 68). Moreover, unlike most employers, the RM was statutorily required to, at a minimum, appoint an acting administrator to fill the vacancy created by Ms. Gronvold's absence pursuant to s. 110.1(2) of *The Municipalities Act*, which states:

> If for any reason the administrator is unable to act, a council shall appoint a person within 30 days after the administrator is unable to act to fill the position of administrator of the municipality in an acting capacity.

While it is again unclear whether the foregoing statutory provision was drawn to the judge's attention, it is beyond doubt that the judge took no account of statutory obligations resting on the RM as an elected government body when she assessed its actions in this matter.

[101] In summary, it is an uncontroverted fact that Dr. Vermaak had on three different occasions recommended or approved a gradual return-to-work plan — in December of 2014, in April of 2015, and in July of 2016. It was further agreed that on each of those three occasions the RM had attempted to facilitate Ms. Gronvold's return to work under the proposed plan, whether by giving full effect to her doctor's directions or by seeking to determine the details thereof. The Agreed Facts and the judge's findings were that Ms. Gronvold had for medical reasons quickly abandoned her gradual return to work under the first two plans. As the judge stated, it was "fair to say that the RM was willing to give [Ms.] Gronvold time to heal before coming back to work full-time" (at para 67, emphasis in original). However, the fact was that, at all other times, from November of 2014 until July of 2016, Ms. Gronvold was absent from work on a medical leave *under her doctors' directions*. For these reasons, I conclude that the finding that the RM would never have allowed Ms. Gronvold to return to work other than on a full-time basis is palpably in error.

[102] It is my respectful view that the judge misapprehended the Agreed Facts and the evidence in the hearing, leading her to make a palpable and overriding error about whether Ms. Gronvold had suffered an adverse impact in her employment.

4. Summary regarding adverse impact under *Moore*

[103] While there are several palpable and overriding errors of fact in the *Decision*, the broader error here is one of law — the judge ignored the facts to which the parties had agreed or, having examined them through the wrong legal lens, misapprehended their import.

[104] In my assessment, the judge was led far astray of the requirement in *Moore* of determining whether Ms. Gronvold had established an adverse impact in employment, which had to be based on the Agreed Facts, joint exhibit book and the testimony at the hearing. The judge placed inordinate weight on Ms. Gronvold's and Mr. Kistner's testimony about the Reeve's conduct at the 2015 Meetings, and concluded, based thereon, that the RM had never intended to allow Ms. Gronvold to return to work other than on a full-time basis and, therefore, that Ms. Gronvold had suffered adverse treatment by the RM throughout the period prior to the cessation of her

employment. That conclusion improperly coloured her assessment of the RM's decision in September of 2016 not to continue to employ Ms. Gronvold. Overall, the judge failed to appreciate that the relevant evidence established that the RM had *not* made that decision before early Autumn of 2016 because it had accommodated Ms. Gronvold's disability throughout that time.

[105] Even when considering Ms. Gronvold's and Mr. Kistner's testimony about the 2015 Meetings, I conclude that the Agreed Facts, exhibited correspondence and evidence at the hearing consistently established that at no time before September of 2016 did the RM decide to refuse to continue to employ Ms. Gronvold on other than a full-time basis, request her resignation, force her to return to work full-time, or impose other disciplinary action on her. Put simply, the court record cannot support a conclusion that Ms. Gronvold experienced an adverse impact in employment in the nature of a refusal to continue to employ her until, at the earliest, the fall of 2016.

[106] Moreover, given the overall deterioration or exhaustion of the employment relationship in this case, it is impossible to determine whether, in September of 2016, Ms. Gronvold had abandoned her position or the RM had constructively terminated her employment. Regardless of which of those events transpired, when exactly it occurred is also indiscernible. Ms. Gronvold testified that, in her view, she had remained on staff with the RM and was entitled to benefits until she requested her record of employment in March of 2017. On the bottom line, it is nevertheless easily concluded that the Agreed Facts and evidence at the hearing established that Ms. Gronvold had effectively ceased to be employed by the RM in or around September of 2016. For the purposes of the *Moore* factors, the termination or other cessation of one's employment undoubtedly has an adverse impact on it.

[107] I therefore conclude that, notwithstanding error in the *Decision*, Ms. Gronvold discharged her onus by establishing an adverse impact in her employment when the RM refused to accommodate her return to employment on a part-time basis.

D. The third *Moore* factor – disability and impact

[108] Having found adverse impact under the second *Moore* factor, the question is whether Ms. Gronvold's disability was a factor in the RM's decision not to accommodate her return to work on less than a full-time basis. Here, the judge quickly found that disability "was a factor in

the RM's decision" (at para 71). Because the *Decision* contains no reasoning to justify it, that conclusion is owed no appellate deference. In *Stewart*, McLachlin C.J. reminded triers of fact to be vigilant in their work because the connection between disability and adverse impact "cannot be assumed and must be based on evidence" (at para 39), and she later said that the "mere existence" of a disability does not establish prima facie discrimination (at para 42).

[109] Given the evidence and Agreed Facts, the judge plainly erred when she stated that Ms. Gronvold's disability was "the only factor" at play in the RM's decision not to allow her to return to work on a gradual basis (*Decision* at para 71), but I agree that lack of information about her disability played *some* role in the RM's decision not to continue to accommodate her. Regardless, Ms. Gronvold's disability was neither the principal nor the controlling factor leading to that result. I am confident, from the documentary evidence, that Ms. Gronvold's longstanding and continued absence from work, the uncertainty as to the scope of her return to work part-time (or on a gradual basis), and her seeming inability to provide the RM with information about how her disability would interfere with the performance of her duties or about what modifications to her duties were required to address her disability were the principal and controlling factors that lead to the cessation of her employment. Those considerations are related to or associated with Ms. Gronvold's disability in the sense that they would not have arisen but for the fact that she had become disabled, taken a medical leave of absence, and over a year later not explained how her disability affected her ability to do her job, but it cannot be said on the Agreed Facts and available evidence that her job ended because or *only because* she was disabled.

[110] Nevertheless, while there are legal and factual errors in the *Decision*, I would not interfere with the judge's bottom-line conclusion that Ms. Gronvold had discharged the onus of establishing a prima facie case of discrimination in employment when the RM declined to continue to accommodate her. In technical terms, the violation of s. 16(1) of the *Code* is that the RM "refuse[d] to continue to employ" Ms. Gronvold in September of 2016.

[111] I turn on that basis to examine the RM's justification for its actions.

E. The RM's justification for its actions

[112] As noted, under the *Code*, once an employee has discharged the onus of demonstrating that a prima facie case of discrimination exists, the burden shifts to the employer to refute that allegation or justify its impugned conduct or practice within the framework of exemptions available under the *Code* (s. 48; *Moore* at para 33 and *Bombardier* at para 64). If the employer can neither justify its conduct nor refute the allegation, then a contravention of s. 16(1) of the *Code* will be found to have occurred (*Bombardier* at para 64).

[113] The prima facie discrimination established in this case was the cessation of Ms. Gronvold's employment through the RM's failure to accommodate her return to work on less than a full-time basis in September of 2016. The RM had a common law and statutory duty to accommodate Ms. Gronvold's disability to the point of undue hardship (*Hydro-Québec* at paras 16–17; *Haghir v University Appeal Board*, 2019 SKCA 13 at para 89, 54 Admin LR (6th) 24 [*Haghir*]; *MacDonald v Cornwall Public Library*, 2011 HRTO 1323 at para 42). In the *Decision*, the judge found that "[t]here was no evidence from any witness that would support a conclusion that the RM was willing to develop a return-to-work plan that would ensure the work of the RM was done but at the same time ensuring its statutory duty as an employer was met" (at para 83). The judge also wrote that, "[w]hile the RM seems to suggest that they did try to accommodate Gronvold, there is *no evidence to support this*" (at para 83, emphasis added).

[114] The judge's conclusions in this regard cannot be reconciled — as noted — with the Agreed Facts. Specifically, the judge's stark finding that there was "no evidence" of accommodation or of attempts to accommodate is palpably in error and the erroneous finding overrides her bottom-line conclusion that the RM had contravened s. 16(1) of the *Code* by failing to accommodate Ms. Gronvold to the point of undue hardship. That finding contradicts facts to which the parties had agreed, facts alleged in the Complaint, and facts alleged in the Hearing Application filed by the Chief Commissioner pursuant to s. 34 of the *Code* — as well as the testimony of Ms. Gronvold and of the RM's witnesses — in or from each of which it is agreed, is stated and may be inferred that the RM had granted a 21-month medical leave of absence and had made other attempts to accommodate Ms. Gronvold's disability. The question for the judge should have been whether, recognising the accommodations that it had already made, the RM had justified its refusal to extend

its accommodation of Ms. Gronvold's disability by accommodating her return to work on a part-time basis in September of 2016.

[115] In that regard, an employer's duty to accommodate cannot be fulfilled without some level of cooperation from the employee. Justice Ryan-Froslie called accommodation a "multi-party endeavour" in *Haghir* (at para 88). An employee seeking accommodation is responsible for informing the employer that they have a disability requiring accommodation, for assisting the employer to secure accommodation appropriate to that disability, for taking reasonable steps to facilitate the implementation of the employer's reasonable proposals to accommodate that disability, and for accepting reasonable accommodation when offered by the employer (*Haghir* at paras 88–90; *Renaud* at 994–995). The degree to which the employee's cooperation may be required will vary with the context.

[116] In the circumstances of this matter, Ms. Gronvold's obligations included at minimum providing the RM with the medical information necessary to support her requests for accommodation of her disability. Information of that nature typically triggers the employer's substantive duty to accommodate (*Service Employees International Union - West (Maria Celles, Grievor) v Wynyard Carres Inc.*, 2023 CanLII 13666 (Sask LA) at para 28 [*Celles*], citing *Simpson v Commissionaires (Great Lakes)*, 2009 HRTO 1362 at para 35; see also: *L. v C.F.S. Inc.*, 2011 CanLII 152488 (Sask HRT) at para 35).

[117] The judge found that Ms. Gronvold had communicated her circumstances to the RM through one of its relief administrators. However, the medical certificates she provided contained "little to no information as to her condition, treatment plan or general prognosis" (*Decision* at para 69). Ms. Gronvold and her physicians failed to respond to the RM's requests for additional medical information. On their face, the RM's correspondence to her inquired about her disability, the length and likelihood of recovery, and her prognosis — all of which were reasonable matters for the RM to canvass in an endeavour to accommodate Ms. Gronvold's disability (*Celles* at para 45, citing *Capital Health Authority (Royal Alexandra) v United Nurses of Alberta, Local 33*, 2006 CanLII 80558 (Alta GAA) at para 70).

[118] While Dr. Vermaak eventually responded to the RM on June 30, 2016, he left blank most of the fields on the medical assessment sheet or filled them in with question marks — "?". As the

judge observed, the gaps in the information provided to the RM remained unfilled until Dr. Vermaak testified in the hearing. The only conclusion open on the evidence is that Ms. Gronvold had utterly failed to provide sufficient medical and other information to the RM to support her request for accommodation other than a leave of absence. Because of her failure, the RM had no means of knowing how to otherwise accommodate her disability. Dr. Vermaak's certificates were sufficient to support the leave of absence – which the RM had granted – and nothing else in the way of accommodation. By August of 2016, the RM had accommodated Ms. Gronvold's disability through a 21-month medical leave of absence.

[119] I am left to conclude from the Agreed Facts that the judge's finding – that there was "no doubt the outcome would have been the same" had the RM received a timely and meaningful response to its requests for additional medical information (*Decision* at para 69) – was palpably wrong. Despite reaching out to Ms. Gronvold, her lawyers and Dr. Vermaak on multiple occasions over several months and receiving no or minimal information in return, the RM still attempted to facilitate Ms. Gronvold's return to work on a part-time basis in April of 2015. On each of the two occasions that she attempted to return to work, Ms. Gronvold was only able to do so for a few shortened shifts before resuming her leave for medical reasons. She provided the RM with no additional details about her condition at either time. It was not until April of 2016, approximately 17 months after Ms. Gronvold began her medical leave of absence, that the RM considered hiring a full-time (as opposed to relief) administrator to cover her position. Even then, Ms. Bellefeuille was informed that the position was not permanent if Ms. Gronvold returned to work. These facts establish that the RM remained open to Ms. Gronvold's return and had taken steps to compensate for her inability to immediately return to full-time hours, provided that a measure of clarity could be obtained as to when she would be able to achieve full-time status. In this regard, the September 27, 2016, letter from the RM's lawyers refused to accommodate Ms. Gronvold's part-time return "on the basis requested and within the restrictions identified by her physicians".

[120] As I have reviewed in this judgment, Ms. Gronvold had proposed a loose and open-ended return-to-work plan, with no measure of certainty as to whether or if she could fulfil the functions of a municipal administrator or when or even *if* she would ever be able to return to work on a full-time basis. The evaluation as to whether the RM's actions in September of 2016 were justified at that point must be conducted in the context of this overall background. In that regard, the record

in this case leads to no conclusion other than that the RM had been reasonably patient with Ms. Gronvold and had been proactive throughout the process (for an example of the contrary, see: *Hawman v Battlefords School Div. No. 118*, 2008 CanLII 90184 (Sask HRT) at paras 189–191).

[121] As to the necessity of the employment assessment proposed by the RM in July of 2016, while the judge noted that Dr. Vermaak "was of the view that no further assessment would be needed or even helpful" (at para 44), there is an important distinction to be made between a further medical assessment and a first-time employment assessment. It is clear from the record that Ms. Gronvold had undergone brain scans and neurological investigations. Dr. Vermaak's opinion about the necessity of further medical tests was within his scope of expertise as Ms. Gronvold's family physician. However, the record establishes that Ms. Gronvold had never undergone a vocational evaluation to determine what functions and duties she could perform and that type of assessment does not appear to fall within Dr. Vermaak's area of practice — he entered question marks in answer to those types of questions on the RM's medical assessment sheet, which manifestly invited further inquiry.

[122] Until July of 2016, there is no mention in the record of any specific employment accommodation requirements that were necessitated by Ms. Gronvold's disability. In correspondence from her lawyer that month, "UV protection screen on the computer monitor" is mentioned for the first time. The July 14, 2016, email states more fully:

> The materials [i.e., Dr. Vermaak's June 30, 2016, materials] did not indicate any restrictions other than the monitored return to work beginning with 2 half days per week for one month at which time Ms. Gronvold will be reassessed by her physician. Ms. Gronvold has confirmed that she is not restricted from any of the duties required to complete the duties. A reasonable accommodation that must be made, however, is a UV protection screen on the computer monitor.

[123] The RM's newly engaged lawyers replied to Ms. Gronvold's counsel, observing that Dr. Vermaak had not "provide[d] any real assistance in identifying the actual limitations and functionalities of Ms. Gronvold". Drawing on the limited information that the doctor and Ms. Gronvold had made available and acknowledging the "relatively high degree of cognitive functionality" required of a municipal administrator, the RM's lawyers pointed out that Dr. Vermaak had said in June of 2016 that Ms. Gronvold "still has effects – headaches: memory problems" and experiences "headaches: short memory span: anxiety due to her limitation", which,

in the lawyers' assessment, "would certainly suggest that she is experiencing some actual limitations".

[124] In the circumstances of this matter, the scope of Ms. Gronvold's responsibilities and statutory duties as an administrator warranted her participation in the assessment proposed by the RM to determine her capabilities and to assist the RM in ascertaining suitable accommodation for her disability (*Celles* at para 139; *Kivela (No. 1)* at para 107, citing *Hooper v City of Victoria*, 2001 BCHRT 22, 40 CHRR 136). Without information about Ms. Gronvold's disability and an assessment of how it affected her capability of performing the statutory duties of an administrator, the RM was left in a vacuum. It had received scant assistance from her about how to accommodate her disability when she returned to work or about what a suitable position for her would be in what is a small workforce. Her obligation was, in my view, heightened because she had quickly abandoned her two prior attempts to return to work on a gradual basis for medical reasons and the proposal in July of 2016 was not substantively dissimilar to those earlier proposals. As such, Ms. Gronvold's refusal to participate in the assessment effectively thwarted the accommodation process and ended the RM's duty to accommodate (*Celles* at para 28; *United Food and Commercial Workers Local 1400 v Prairie Pride Natural Foods Ltd.*, 2018 CanLII 11180 (Sask LA) at paras 128, 130–132; *Complex Services Inc. v Ontario Public Service Employees Union, Local 278*, 217 LAC (4th) 1 (Ont LA) at para 88).

[125] Given the lack of medical and other information about Ms. Gronvold's condition and the absence of any information about what duties she was and was not capable of performing, taking into account the RM's repeated requests for that information over the duration of her medical absence, and Ms. Gronvold's previous and wholly unsuccessful attempts to return to work on a gradual basis, it was entirely reasonable for the RM to propose that Ms. Gronvold participate in an employment assessment in July of 2016. On the other hand, it was not reasonable for Ms. Gronvold to decline to assist in the development and implementation of measures to accommodate her disability in the workplace or to place *monetary* conditions on her participation. Ms. Gronvold was not in a position to unilaterally dictate the accommodation that her disability required; accommodation is a "multi-party endeavour" (*Haghir* at para 88). Moreover, Ms. Gronvold failed to give the RM the time and information necessary to assess the suitability of a modified work

program and, without that information, it is difficult to understand how the RM could have accommodated her disability in a return-to-work situation.

[126] In short, the record in this case leads to no other conclusion but that it was reasonable for the RM to take the position that it could not continue to accommodate Ms. Gronvold's disability by allowing a return to work on a part-time basis in the absence of evidence from her as to what work she was capable of performing and some estimate as to when or if she would be able to return to work on a full-time basis. Therefore, I conclude that the cessation of Ms. Gronvold's employment was grounded in her inability to fulfill the fundamental obligations of her position rather than discriminatory action by the RM (*Hydro-Québec* at paras 18–19).

IV. SUMMARY

[127] In the Complaint and in the Hearing Application, Ms. Gronvold alleged that the RM had discriminated against her in or around September of 2016, when the employment relationship seems to have broken down. While there are legal and factual errors in the *Decision*, I would uphold the judge's bottom-line conclusion that Ms. Gronvold had discharged the onus of establishing a prima face case of discrimination in employment when the RM refused to continue to employ her in September of 2016. However, given the facts to which the parties had agreed and other evidence, it was an error for the judge to have concluded that the RM had contravened s. 16(1) of the *Code* by failing to fulfil its obligation to accommodate Ms. Gronvold's disability. The RM established that its refusal to continue to employ Ms. Gronvold was ultimately not discriminatory, thereby refuting the allegation of contravention of s. 16(1) of the *Code*.

[128] Having considered these matters, I conclude that the discrimination complaint — i.e., the termination of employment based on disability — was not substantiated on the agreed record (*Code*, s. 38(a)). The appeal must be allowed.

[129] Because I have found that no contravention of the *Code* occurred, it is unnecessary for me to consider the question of special compensation under s. 40 of the *Code*.

V. CONCLUSION

[130] I would allow the appeal, set aside the *Decision*, as well as the awards of general and special compensation thereunder, and find that the human rights complaint is not substantiated. I would order that the Commission pay the RM's costs in this Court and in the Court of King's Bench, assessed in the usual manner.

[131] I would dismiss the cross-appeal, without making any order as to costs as the issues it raised were fully enfolded by the appeal.

"Caldwell J.A."
Caldwell J.A.

I concur.

"Leurer C.J.S."
Leurer C.J.S.

I concur.

"Barrington-Foote J.A."
Barrington-Foote J.A.

I concur.

"Kalmakoff J.A."
Kalmakoff J.A.

I concur.

"Drennan J.A."
Drennan J.A.