Date: 20100518

File: 566-02-1499

Citation: 2010 PSLRB 65

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

VALÉRY LABRANCHE

Grievor

and

TREASURY BOARD
(Department of Foreign Affairs and International Trade)

Employer

Indexed as
LaBranche v. Treasury Board (Department of Foreign Affairs and International Trade)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Michele A. Pineau, adjudicator

For the Grievor: Lionel Saurette, labour relations officer

For the Employer: Sean F. Kelly, counsel

Heard at Ottawa, Ontario,
April 29 to May 1, October 13 to 15, 20 to 22 and 27 and 28, 2009.

I. Individual grievance referred to adjudication

[1] The grievor, Valéry LaBranche was, when she filed her grievance, a senior international policy analyst (acting ES-05) for the International Program Division at Passport Canada ("the employer" or "the agency" depending on the context). Passport Canada is an agency of the Department of Foreign Affairs and International Trade (DFAIT).

[2] The grievor filed a grievance on January 23, 2007, which reads as follows:

> *I grieve the Employer violated Article 16 of the collective agreement. I grieve the Employer violated the Canadian Human Rights Act. I grieve the Employer violated its duty to accommodate me which is a violation of the Canadian Human Rights Act and Article 16 of the collective agreement.*

[3] The grievor seeks the following remedy:

. . .

> *That I receive :*
> *- a declaration that article 16 of the collective agreement was violated;*
> *- a declaration that the Canadian Human Rights Act was violated;*
> *- a declaration that the Employer failed to accommodate me contrary to sections 7 and 15 of the Act and the collective agreement;*
> *- approval of my plan for meeting my needs arising from a disability;*
> *- make-whole compensation for all losses in wages, benefits (including reinstatement in benefit plans), costs and expenses incurred by me as a result of the Employer's violation together with interest thereon pursuant to section 53 of the Act;*
> *- damages for pain and suffering experienced by me as a result of the Employer's violation pursuant to subsections 53(2) and (3) of the Act; and*
> *- any further compensation and corrective measures that the Public Service Labour Relations Board may deem appropriate.*

. . .

[4] The grievance was dismissed by the employer at the final level of the grievance process on October 18, 2007.

II. Summary of the evidence

A. Testimony of Valéry LaBranche

[5] The grievor was seconded from the DFAIT to Passport Canada on October 31, 2005. The grievor reported to Leslie Crone, Director of International Programs for the Western Hemisphere. The secondment was initially for one year, to end on October 31, 2006. The grievor was assigned the policy lead on a high-profile project concerning passport requirements for Canadians travelling to the United States as well as on a security and prosperity partnership initiative with the United States and Mexico concerning standard and secure documents.

[6] The grievor converted to Judaism in 1997 and is an observant Jew in that she follows Judaism's laws, observes its calendar and dresses modestly. In her testimony, the grievor described her religious observances, which include among others the necessity to observe Shabbat every week, a day of rest and spiritual enrichment. Shabbat is the most important ritual observance in Judaism. On Friday afternoons, at varying times according to the season, observant Jews leave their offices before sundown to begin Shabbat preparations.

[7] At the outset of her secondment, the grievor requested accommodation to fulfill her religious obligations. Ms. Crone agreed without undue formality. Thus, the grievor left early Friday afternoons and was absent for religious holidays. Although the collective agreement provides that the time required for religious observances must be made up within six months, the grievor usually accumulated compensatory time in advance of taking time off. Ms. Crone never questioned the grievor's absences or the method by which she accounted for them. Gary McDonald, the director general of policy and planning and Ms. Crone's superior had also approved this informal arrangement.

[8] Religious observance is governed by article 50 of the collective agreement between the Treasury Board of Canada and the Canadian Association of Professional Employees – Economics and Social Science Services (expiry, June 21, 2007), which was in effect at the time that the grievance was filed:

> ***ARTICLE 50***
> ***RELIGIOUS OBSERVANCE***
>
> ***50.01*** *The Employer shall make every reasonable effort to accommodate an employee who requests time off to fulfill his or her religious obligations.*
>
> ***50.02*** *Employees may, in accordance with the provisions of the Agreement, request annual leave, compensatory leave, leave without pay for other reasons or a shift exchange (in the case of a shift worker) in order to fulfill their religious obligations.*
>
> ***50.03*** *Notwithstanding 50.02, at the request of the employee and at the discretion of the Employer, time off with pay may be granted to the employee in order to fulfill his or her religious obligations. The number of hours with pay so granted must be made up hour for hour within a period of six (6) months, at time agreed to by the Employer. Hours worked as a result of time off granted under this article shall not be compensated nor should they result in any additional payments by the Employer.*
>
> ***50.04*** *An employee who intends to request leave or time off under this article must give notice to the Employer as far in advance as possible but no later than four (4) weeks before the requested period of absence.*

[9] In December 2005, Renée Lévesque became the administrative assistant to Ms. Crone and two other directors, including Lisa Pezzack. Part of Ms. Lévesque's job was to monitor leave and absences supervised by the directors. According to the grievor, Ms. Lévesque questioned what she saw as the grievor's privilege of leaving early on Friday and being absent on religious holidays. Ms. Lévesque insisted that the grievor complete leave forms when she took religious leave and that she complete overtime forms when she accumulated compensatory time. Neither leave form provided for time off for religious leave or for hour-for-hour compensation for such leave (as opposed to overtime, which is accumulated at time and one-half or double time). This manner of record keeping was very different from the grievor's previous informal arrangement with Ms. Crone.

[10] The grievor testified that she felt humiliated at having to justify legitimate absences to a subordinate when she already had a working arrangement with Ms. Crone. As a result of this frustration, the grievor sent several emails to Ms. Crone with a copy to Ms. Lévesque formally requesting time off for religious leave and reminding Ms. Crone of their arrangement of time off for religious observances. On

March 31, 2006, the grievor emailed Ms. Crone an account of their discussions on this subject. The grievor testified that it was her way of putting Ms. Crone on notice that there was a problem at having to report her leave in detail since Ms. Lévesque's arrival.

[11] In late spring, two employees, who asked to remain anonymous, complained to Ms. Crone about the grievor's work ethic with respect to her observance of Jewish holidays, about the way she expressed herself and about her body language. Ms. Crone met with the grievor to convey the criticisms. After the meeting, the grievor apologized about her shortcomings to anyone she thought she may have offended.

[12] During late spring or early summer, Ms. Levesque pointed out to the grievor that she was isolating herself by not participating in "dress-down" Fridays and outings to restaurants. The grievor's explanation at the hearing was that, as an observant Jew, she did not own clothing in keeping with dress-down Fridays and that her dietary restrictions did not allow her to eat at the popular restaurants chosen by her colleagues. The grievor explained that one of the values of Judaism is not to wrong another in speech, and therefore, she did not speak up about how she was being treated. This is why she sent emails instead of making a complaint, as she hoped that Ms. Crone would soon realize how Ms. Lévesque was treating her.

[13] The grievor testified that, to reduce complaints, Ms. Crone asked her to address her work group at one of their meetings and to explain the meaning of her Jewish observances. The grievor complied, but felt deeply humiliated at having to bring attention to herself and explain how she differed from other employees.

[14] In June 2006, the grievor was assigned the responsibility for Public Service Week activities. Mses. Pezzack and Lévesque complained to Ms. Crone about the grievor's singular lack of enthusiasm for this assignment. Some time later, Ms. Pezzack communicated her disapproval of the grievor's choice to not dress down on Fridays like everybody else.

[15] On August 31, 2006, the grievor notified Ms. Crone by email of her intention of taking October 2, 2006, as a religious holy day. On the same day, the grievor consulted her family physician about her anxiety concerning her ability to cope with certain people at work.

[16] On September 21, 2006, the grievor's secondment was extended until April 30, 2007.

[17] In November 2006, at Ms. Crone's request, the grievor attended an international conference in Paris as a representative of Passport Canada. Her participation and the expenses associated with the trip were approved in advance by Gérald Cossette, the chief executive officer (CEO). Since the end of the conference coincided with the beginning of Shabbat, the grievor was authorized to return to Canada from Paris on Sunday instead of leaving immediately after the conference. The grievor's husband accompanied the grievor on this trip at her expense. Ms. Lévesque came back from extended sick leave just as the grievor returned from Paris. Ms. Lévesque took exception to the grievor's "weekend in Paris" as being a violation of the employer's travel policy and asked the grievor to reimburse the employer for the expenses associated with staying over until the Sunday. The grievor took this issue up with Ms. Crone. The grievor felt humiliated at having to provide an explanation to Ms. Lévesque for her expenses and believed that Ms. Crone had made light of a serious situation.

[18] On November 21, 2006, Ms. Crone discussed with the grievor comments made by a person who remained anonymous that Aaron Akitt, a temporary employee reporting to the grievor, was leaving because he disliked her supervision and because the grievor had read his correspondence and rifled through his cubicle. The grievor denied the accusations and provided an explanation of her supervision of Mr. Akitt. The grievor was upset with the false accusations. On December 13, 2006, Ms. Crone told to the grievor that Ms. Lévesque had made the comments.

[19] On December 1, 2006, Ms. Crone and Mr. McDonald separately received a threatening letter worded as follows:

> ***Be aware of Mrs. LaBranche. She is a Mossad agent.***
>
> [Emphasis in the original]

[20] On December 8, 2006, the grievor met with Ms. Crone about her concern that certain people at Passport Canada did not like Jews. Ms. Crone did not mention the December 1, 2006, letter. Ms. Crone invoked Passport Canada's zero-tolerance policy for discrimination and invited the grievor to file a formal complaint if necessary. The

grievor testified that she did not file a complaint immediately because her evidence of anti-Semitism at that time was circumstantial.

[21] A second letter arrived in the morning of December 14, 2006, worded as follows:

> *THE JEW SUCKS YOUR BLOOD: DON'T FALL INTO HER TRAP. YOU WILL MAKE HER GO SWIFTLY OR WE WILL MAKE HER GO SLOWLY AND PAINFULLY!*

[22] In the afternoon of December 14, 2006, Mr. McDonald and Ms. Crone met with the grievor to inform her of the anonymous correspondence. The grievor was very upset about the threats. She saw them as compromising her employment and her personal security, and she wanted Passport Canada to do something about them. The employer had no plan to deal with the threats other than to contact its security branch. The next day, the grievor came to work. She once more voiced her concerns in an email to Mr. McDonald and Ms. Crone.

[23] At 13:26 on December 15, 2006, an anonymous email was sent to Ms. Crone through the New York Post website, apparently by Mr. McDonald. The email summarized in unflattering terms the work difficulties that the grievor had experienced over the previous few months. The email was worded as follows:. . .

> *NEW YORK POST*
>
> ***gary** thought you would find this story from NYPOST.COM interesting:*
>
> *Dear Leslie, I need talking about Valerie, however can't do it openly since she pulls the strings. I fear her wrath and influence. The work climate is unsustainable because of her conduct that is insulting everybody at work. Her lack of warmth, her disrespectful and aggressive body language (speaking and threatening repercussions, talking in gibberish, standing too close, moving objects forcefully, crossing her arms in front of us) insults all the colleagues and me and prevents us from functioning properly. In fact, she has a selfish, asocial and antisocial personality. She rarely socializes with us, never joins private events, looks and behaves snobby and haughty (boasting with exclusive garments and seemingly expensive jewelry – why would she need to work anyway?) and disgraces her colleagues with pushy comments. She speaks mostly English (why would a born Quebecker deny his roots?) and slanders people who seem to be less educated. She comes often late, leaves early*

> *(on Fridays as early as 2pm for her Jewish Sabath and other Jewish holidays that seem to occur suspiciously often). She stayed over the weekend (Nov. 11-12) in Paris (apparently with her husband) at the expenses of our government rather than flying back the same day that her duty ended. She is involved in conduct that is unprofessional and unbecoming of someone who is working for the Canadian government. She looks at and opens mail that doesn't belong to her (A. denies it now out of fear) and N. wants to leave as well (She won't admit it of course!) Please, we respect you very much (I personally think that you are an excellent manager!) However you need to open your eyes and look at the true gloomy nature of V. We can't continue working with a social wrack that affects our work environment to an extent that it becomes itself dysfunctional. Please act and do something that helps us reestablish a healthy work environment.*
>
> . . .
>
> [Emphasis in the original]
>
> [*Sic* throughout]

[24] The grievor was shown the email on that afternoon at a meeting with Jody Thomas, Director General of security, a human resources officer, Ms. Crone and Mr. McDonald. To the grievor, the content of the email was clearly anti-Semitic, and the sender was obviously one of a small group of people within Passport Canada who had intimate knowledge of the personal information it contained. The grievor asked for protection from these threats. The employer asked the grievor to file a complaint with the Gatineau police. The grievor was sent home on administrative leave after the meeting with the assurance that her absence would not prejudice her secondment or her sick leave credits. The grievor consulted a psychologist as a result of these events.

[25] On December 20, 2006, the grievor received a call from Nadine Larcher-Auger, the director of labour relations and Daniel Champagne, a labour relations officer, inquiring about the status of her police complaint. The grievor was told that, if she did not report the threats to the police by the next day, she would be required to report to work, and the agency would not pursue the matter any further. The grievor was advised not to make a frivolous or vexatious complaint. The grievor was left with the impression that the agency was more concerned with protecting its reputation than with her well-being. The grievor filed her complaint with the Gatineau police on December 21, 2006. On the same day, she advised her union representative that she wished to limit her contacts to persons immediately involved in the investigation and

that she was emotionally incapable of participating in an investigation at that time. The grievor requested to be kept abreast of any activities and developments concerning the incidents.

[26] On December 22, 2006, Ms. Larcher-Auger requested a medical certificate from the grievor to justify her continued absence from work after December 21, 2006. Ms. Larcher-Auger specified that the employer would not provide her with legal representation. If she wished to pursue a complaint before the Canadian Human Rights Commission or make a workplace harassment complaint, she should consult her union officer. On December 23, 2006, the grievor advised Ms. Larcher-Auger that she had obtained a medical certificate and inquired whether an administrative investigation would precede a criminal investigation. She also inquired about her outstanding sick leave credits.

[27] On December 27, 2006, the grievor emailed the Deputy Minister and others at Passport Canada, voicing her concerns about the anonymous correspondence, and including a chronology of incidents of anti-Semitism that she had experienced in her employment at Passport Canada. She stated that she was unable to work as a result of the incidents. She asked that the employer address the incidents and provide her with a safe workplace.

[28] On December 29, 2006, Ms. Larcher-Auger asked the grievor to confirm her ability to participate in a preliminary investigation into her current work environment, given the state of her health. Ms. Larcher-Auger specified that a preliminary investigation was a separate process from a criminal investigation and that a formal investigation might follow the preliminary investigation.

[29] On January 3, 2007, the grievor's physician confirmed that she was fit to cooperate with an investigation into work-related issues. The grievor forwarded this information to Mses. Larcher-Auger and Crone and her union representative on January 4, 2007. On January 15, 2007, the grievor was advised that she had been an unsuccessful candidate in the ES-05 competition.

[30] On January 19, 2007, the grievor's physician provided her with a medical certificate stating that she was still incapable of resuming her normal occupation. On January 23, 2007, the grievor filed the grievance that is the subject of this adjudication. The grievance was countersigned by Ms. Larcher-Auger on behalf of the

employer on the same day. On January 24, 2007, the grievor was advised in an email from Ms. Crone that her secondment agreement would be terminated on February 7, 2007.

[31] On February 2, 2007, the grievor's physician provided a further medical certificate postponing the grievor's return to work until February 19, 2007. On February 1, 2007, the grievor was advised in writing that the Canadian Human Rights Commission would not consider the complaint she had filed on December 27, 2006, until the grievance process had been exhausted. The employer was copied on this letter. On February 20, 2007, the grievor began a short secondment with the Canada Border Services Agency that accommodated a progressive return to work. On April 16, 2007, the grievor accepted a deployment with Citizenship and Immigration Canada in an acting ES-05 position, where she continues to work.

[32] On February 28, 2007, Mr. Cossette wrote to the grievor to inform her that the preliminary investigation had been unable to establish the source of the anonymous letters and emails and that there would be no other investigation unless new facts arose. Mr. Cossette informed the grievor that he had met all the employees of the Policy and Planning Bureau to emphasize Passport Canada's zero-tolerance policy towards harassment in the workplace.

[33] The grievor testified that she regarded being ordered to return to work on December 21, 2006, and then being asked to justify her continuing absence with a medical certificate as a complete disregard for the trauma caused by the anonymous correspondence. In her view, the administrative investigation was launched solely to protect the interests of Passport Canada and to avoid any disapproval, rather than out of true concern for her well-being. No one asked her how she was coping; the employer's preoccupation appeared to be to have her file a police report so that it could start a fact finding investigation.

[34] The grievor testified that, although she had been asked to provide a certificate of her fitness to participate in an investigation, no one communicated with her until she was informed in writing on February 28, 2007 that the results of the investigation were inconclusive. Other than preparing a chronology of the facts that was included in a police complaint, the grievor did not participate in the investigation. She was not given access to the statements of persons interviewed by the agency's security services; nor was she allowed to respond to those statements. The grievor testified that

she felt abandoned and powerless and that no effort was made to accommodate her return to the workplace. Instead, her secondment was terminated. To add insult to injury, she was closely supervised when she returned to the workplace to retrieve her personal effects. Although this was not part of her grievance, the grievor added that she was impacted financially by the early termination of her secondment because, while working at Passport Canada, the grievor was acting in an ES-05 position instead of her ES-04 substantive position. At the end of her secondment with Passport Canada, the grievor had to prematurely look for other work while in a vulnerable position.

[35] The grievor acknowledged that the secondment agreement with Passport Canada provided for a two-week notice period and that the secondment had been extended on October 30, 2006 because her projects were not finished and the permanent staffing process had not been completed. The grievor noted that her second secondment was cut short even though she had not completed her projects and that Passport Canada had been unable to fill all vacant ES-05 positions through the staffing process. She was advised on January 15, 2007 that she was an unsuccessful candidate in the ES-05 competition.

[36] The grievor was interviewed by the Royal Canadian Mounted Police (RCMP), but she was not informed about the conclusions of its investigation until this hearing. The grievor was advised of the conclusions of the information technology (IT) report in late December 2006. The origin of the New York Post email could not be established. The grievor was made aware of the conclusions of the administrative investigation through an access-to-information request that she made in preparation for the hearing. The grievor was particularly distressed because her previous employers had been contacted without her approval to determine whether similar incidents had occurred in those workplaces that would help explain the incidents at Passport Canada.

B. Testimony of René Gervais

[37] At the time of the incidents giving rise to the grievance, René Gervais was a senior labour relations advisor for Passport Canada. He became the acting director of labour relations in April 2007 and was later promoted to the director of labour relations. He reported to Ms. Larcher-Auger, the director of labour relations, who in turn reported to Danielle Marquis, the director general of human resources.

[38] Mr. Gervais was made aware of the anonymous correspondence in January 2007 when Ms. Larcher-Auger asked him to participate in the administrative investigation as a replacement for Mr. Champagne, the previously assigned labour relations officer. The object of the investigation was to collect information about three incidents of anonymous correspondence. No precise rules governed such inquiries. Mr. Gervais was also assigned to handle the grievance filed January 23, 2007, and to brief the CEO weekly about the matter.

[39] The administrative investigation was initiated through the director general of security and the director general of human resources. The interviews were completed on February 15, 2007. The grievor was not interviewed, but the interviewers took her chronology of events into account. Mr. Gervais was aware that the grievor had provided a medical certificate stating that she was fit to participate in the investigation, but he did not wish to disturb her at home while she was on sick leave. Ms. Marquis had not asked that the grievor be interviewed, and the grievor was not suspected of having sent the anonymous correspondence. Mses. Crone and Pezzack provided their own chronologies of events. The following persons were interviewed: Carol Bowers (Director, Foreign Operations), Lucie Moniz (Administrative Assistant), Johanne Séguin (Administrative and Finance Officer), Ms. Lévesque (Administrative Assistant), Ms. Crone (Director International Programs), Mr. McDonald (Director General, Policy and Planning Bureau), Mr. Akitt (no position given) and Ms. Pezzack (Director, Strategic Policy). Each person had the opportunity to review and initial his or her answers, and Mr. Gervais provided his notes of the interviews to the chief investigator, Sylvain Cormier.

[40] On February 16, 2007, Mr. Gervais told Ms. Marquis that the findings were inconclusive. Mr. Gervais later found out that the RCMP's investigation had also been inconclusive. The grievor was advised of the findings of the preliminary investigation on February 28, 2007. The final report was issued on May 11, 2007.

[41] Mr. Gervais confirmed that the grievor's chronology was used as the basis for an administrative investigation into the anonymous correspondence and not as a harassment complaint. Without knowing the originators of the correspondence, there was no way to determine that workplace harassment had occurred. According to Mr. Gervais, the workplace harassment policy applies to complaints of harassment from within the agency and not to persons or threats from outside.

C. Testimony of Malcolm Eales

[42] Malcolm Eales is the director of enforcement and anti-fraud for Passport Canada. During the investigation of the anonymous correspondence, he was the director of internal security. As such, he was responsible for corporate security, investigations and document integrity (investigation of passport fraud). Mr. Eales reported to Ms. Thomas, the director general of security.

[43] Mr. Eales was made aware of the anonymous letters shortly after December 15, 2006. He reviewed the letters in light of their effect on corporate security. A copy of the letters was forwarded to the Canadian Security Intelligence Service (CSIS) for their information as well as to the RCMP. The CSIS did not communicate any findings, and the RCMP sent a letter to Mr. Cossette on July 7, 2008, informing him that its investigation was inconclusive.

[44] Mr. Eales was tasked with determining how the organization should respond to security threats and with providing the New York Post email to the IT security group so that it could determine whether it had been sent from an internal computer.

[45] Mr. Eales pressed the grievor into reporting the matter to the police quickly while the evidence was fresh and before the news spread across the organization. On December 15 and 18, 2006, the grievor raised the fact that she was receiving inappropriate emails on her Blackberry. There were two internal investigations. The first was conducted by the IT section to investigate whether activity on the agency's servers could be linked to the New York Post email or to emails on the grievor's Blackberry. The investigation was inconclusive. This report was shared with Ms. Larcher-Auger and was added to the police investigation file.

[46] The second investigation focused on the facts reported in the grievor's chronology. It was also inconclusive. Mr. Eales was unaware that the grievor had been declared medically fit to participate in the investigation as Ms. Larcher-Auger had told him that the grievor was unable to be interviewed. All the information in the report came from the grievor's chronology.

[47] After a discussion with Gatineau police, Mr. Eales concluded that there were no further steps to take to adequately protect Passport Canada employees from such incidents in the future, given strict access controls to the building and closed-circuit

monitoring by commissionaires. Mr. Eales determined that there was sufficient response capacity in case of a breach-of-security incident.

D. Testimony of Danielle Marquis

[48] Ms. Marquis was the director general of human resources for Passport Canada, and she reported to the CEO. She was made aware of the anonymous correspondence shortly after it was received. At a meeting with Ms. Thomas and Messrs. McDonald and Cossette on December 15, 2006, a decision was made to conduct an investigation, in accordance with Passport Canada's and the Treasury Board's harassment prevention policies. Ms. Marquis' main concern was to identify the perpetrator of the anonymous correspondence. Ms. Marquis asked Ms. Larcher-Auger to assign a labour relations officer to the investigation, while Ms. Thomas assigned an investigator from her unit. No written mandate defined the terms of the investigation other than the grievor's written chronology would be its basis. The grievance was not considered as part of the investigation. Ms. Marquis never considered the grievor's chronology to be a formal harassment complaint. Ms. Marquis was satisfied that every precaution had been taken to protect the grievor from harm. The grievor had been given taxi chits to go home, she was accompanied by an agency representative when she filed her complaint with the Gatineau police and Passport Canada had asked the RCMP to conduct a criminal investigation.

E. Testimony of Nadine Larcher-Auger

[49] Ms. Larcher-Auger was the director of labour relations, reporting to Ms. Marquis, when the anonymous correspondence was received. She checked with the DFAIT and the Department of National Defence to determine whether any similar incidents had occurred when the grievor worked in those departments. She was also present at a meeting with the grievor and others on December 15, 2006. The grievor was told that her former department had been informed of the incidents and that she was being placed on administrative leave with pay. Taxi chits were provided for her personal transportation during the investigation. The Department of Justice was to assist her. The grievor was asked to prepare a chronology of events with respect to the threat and any other related events and to file a formal complaint with the Gatineau police. After the IT investigation revealed that the threat did not originate within Passport Canada, the grievor was asked to return to work. The grievor said that she was too troubled to return to work and that she was under medical care. In a teleconference held on

December 21, 2006, Ms. Larcher-Auger and Mr. Champagne told the grievor that if she wished to file a complaint, she had to go through her union representative. Ms. Larcher-Auger explained the agency's harassment policy to the grievor in broad terms. Since she could not return to work, the grievor was asked to provide a medical certificate to support her absence and to certify her fitness to participate in an internal investigation.

[50] Ms. Larcher-Auger composed the interview questions and prepared a list of persons to interview who were chosen from those named in the grievor's chronology. Ms. Larcher-Auger received the medical certificate stating that the grievor was fit to participate in the internal investigation. However, she left Passport Canada before the investigation commenced and could not say to whom the information had been given. Ms. Larcher-Auger denied that she told Mr. Eales that the grievor was not fit to participate in the internal investigation. The grievor was offered psychological counselling through the Employee Assistance Program (EAP), which was deemed an appropriate response. Ms. Larcher-Auger also met with the grievor's union representative on December 15, 2006. Ms. Larcher-Auger changed her mind about allowing the grievor to remain on administrative leave after speaking to Claude House at the DFAIT and being reassured that there was no life-threatening situation that merited the grievor staying at home.

[51] In cross-examination, Ms. Larcher-Auger admitted that the administrative investigation was a fact-finding process that allowed the employer to question persons in the workplace and to study the grievor's allegations but that it did not require meeting with her. The medical certificate was merely a precaution had it become necessary to meet with her. Ms. Larcher-Auger admitted that the grievor's chronology could have been construed as a formal complaint that required the employer to act. Ms. Larcher-Auger believed that, had the grievor wished to file a complaint, it had to be done through the bargaining agent. Ms. Larcher-Auger's principal role was to set up an investigation team to examine the grievor's allegations.

F. Testimony of Renée Lévesque

[52] Ms. Lévesque has been an administrative assistant to the three directors of international programs since November 28, 2005, including Ms. Crone, the grievor's supervisor, and Ms. Pezzack. Ms. Lévesque was responsible for preparing budgets, reviewing invoices, updating human resources information and for performing other

administrative duties. Ms. Lévesque testified that she had two disagreements with the grievor. The first concerned a meeting to organize activities for National Public Service Week in June 2006. Ms. Lévesque reported to Ms. Crone that the grievor had been disrespectful of other employees as a result of being forced to take on this assignment. Ms. Lévesque did not want to be associated with the grievor's apparent disdain for the activities of that week. The second incident concerned the grievor's travel claim for a trip to Paris for an international conference in November 2006. After the grievor told Ms. Lévesque that she had obtained the necessary authorization for a layover because of Shabbat, Ms. Lévesque apologized and told Ms. Crone about the incident. Ms. Lévesque stated that she was unaware of the previous authorization because she had just returned from an extended sick leave period. Ms. Lévesque denied that these conflicts were associated with the grievor's Jewish faith. She stated that she ignored the details of the grievor's religious observances.

[53] Ms. Lévesque testified that, when the grievor took religious leave, she had to record those hours and make up for them. Ms. Lévesque did not understand why she was being copied on the exchange of emails between Ms. Crone and the grievor about taking religious leave, and she did not pay much attention to it. Ms. Lévesque stated that she did not follow the grievor's religious schedule and the compensatory time in lieu very closely because the grievor often had meetings outside the office. Ms. Lévesque denied requesting that the grievor complete leave forms associated with taking religious leave. The only leave forms requested were for annual or sick leave.

[54] Ms. Lévesque was interviewed by Mr. Gervais and two others during the internal investigation and also by the RCMP. Ms. Lévesque testified that she never saw copies of the anonymous correspondence until this hearing. She never received instructions from Ms. Crone about recording or following up on the grievor's religious leave. Ms. Lévesque did not recollect what she told the investigators and was never made aware of the final report. Ms. Lévesque admitted that she told Ms. Crone that it was not a good idea that the grievor be given an acting assignment in the director's position while the ES-05 competition was ongoing because the grievor would be privy to confidential competition-related information. Ms. Lévesque reported all incidents about the grievor to Ms. Crone, including what she had heard about Mr. Akitt. She did not speak about these incidents to anyone else.

G. Testimony of Lisa Pezzack

[55] Ms. Pezzack was the director of strategic policy in 2006-2007, and she reported to Mr. McDonald. The grievor worked with members of her staff. Ms. Pezzack reviewed reports that the grievor prepared for the Minister. The grievor worked hard, but often ignored Ms. Pezzack's suggestions to improve her writing skills. The first complaint about the grievor arose when Ms. Lévesque reported to Ms. Pezzack that she had been offended by the grievor's behaviour during a meeting to organize National Public Service Week. Ms. Lévesque was the only person to complain. Ms. Pezzack spoke of these concerns with Ms. Crone. Ms. Pezzack did not know that the grievor was Jewish until the anonymous correspondence arrived. Ms. Pezzack admitted making two comments about the grievor's style of dress. The first was during a blizzard, when she met the grievor on the street. The grievor was wearing a skirt. Ms. Pezzak commented that she should dress warmer. The second was about her conservative style of dress on dress-down Fridays. Ms. Pezzack stated that, had she known the circumstances of the grievor's faith at that time, she would never have made those comments.

[56] Ms. Pezzack was a member of the staffing board for the ES-05 competition. The preliminary notification to those considered for appointment was prepared on January 15, 2007. Some mistakes occurred in the staffing process — the scoring process first used was too generous, and several candidates who should have been disqualified early in the process were not until references were asked for. There were 15 or more candidates for 7 positions. Five candidates were successful. Reference checks were used to verify personal suitability. The grievor was one of the unsuccessful candidates. Ms. Pezzack did not receive a complaint from the grievor about the staffing process. The staffing process took six months and was delayed because of the time required for reference checking.

[57] The anonymous correspondence arrived while Ms. Pezzack was the acting director general in Mr. McDonald's absence. She and Ms. Crone agreed that the correspondence should be reported to the security section and to labour relations. During the administrative investigation, she provided a chronology of events and answered the interviewers' questions. She completed a questionnaire for the RCMP investigation and spoke with the lead investigator.

H. Testimony of Leslie Crone

[58] Ms. Crone was the director of international programs for the western hemisphere at Passport Canada from April 2005 to July 2009. Ms. Crone reported to Mr. McDonald. Among other programs, she was charged as part of a G-8 countries working group with developing a passport policy for civil aviation. In fall 2005, Ms. Crone hired the grievor, Nicoletta Bowman and others on secondments to work on several projects because the positions in her new organization were not yet classified. Once classified, they were to be filled through a competitive process. Secondees were given the opportunity to compete for the positions.

[59] Ms. Crone hired the grievor after meeting her while she was working at the DFAIT. Ms. Crone was impressed with her and sent her a note asking her to consider career opportunities at Passport Canada. The grievor followed up on this expression of interest by sending Ms. Crone her curriculum vitae. A meeting was arranged. Ms. Crone offered her a secondment at the ES-05 group and level starting on October 31, 2005. The secondment agreement provided a two-week notice provision for either party to end it. Ms. Crone was satisfied with the grievor's work and provided a justification for the extension of the grievor's secondment from October 31, 2006 to April 30, 2007.

[60] The interview and reference-checking process for the ES-04 and ES-05 competitions was completed in early December 2006, but the candidates were not advised of the results until January 15, 2007 to allow human resources staff to complete its files. As neither the grievor nor Ms. Bowman was a successful candidate, they were given notice on January 24, 2007 that their secondments would end on February 7, 2007. Even though the staffing process did not deliver a sufficient number of successful candidates to fill all the vacant positions, no budget was allocated to allow unsuccessful seconded employees to complete their terms, which is why the grievor and Ms. Bowman were given two-weeks' notice. Ms. Bowman found other employment at Passport Canada shortly after that.

[61] Ms. Crone testified that she was aware of Jewish religious practices because members of her family were Jewish. At the grievor's request for religious accommodation, Ms. Crone agreed to an informal arrangement in which the grievor worked extra hours and took religious leave for those hours on a one-for-one basis. The grievor kept Ms. Crone informed of her hours and holidays by email. Ms. Crone never questioned or refused the grievor's request for religious leave.

[62] Ms. Crone could not recall any employee complaining about the grievor's absence on religious holidays or her leaving early on Fridays. The grievor never complained about how leave was being administered. Ms. Crone understood that Ms. Lévesque was copied on the emails exchanged between the grievor and herself because Ms. Lévesque was required to maintain a calendar of who was in or out of the office. Ms. Lévesque was also required to monitor monthly attendance and to ensure that leave slips were completed. Ms. Crone stated that she was surprised by an email from the grievor on March 22, 2006, referring to their discussion of the previous day as there had never been any issue over the grievor taking religious leave. Ms. Crone had no objection to the leave proposed by the grievor. Ms. Crone did not observe any discrimination in her dealings with the grievor since the grievor was granted religious leave as requested.

[63] The requirement to submit requests for outstanding leave for the fiscal year ending March 31, 2006, was a yearly routine to ensure that all leave slips had been completed, and it was not directed specifically at the grievor. The grievor could not submit her leave requests electronically because she was not a permanent employee of Passport Canada. Therefore, her leave had to be recorded in writing and the forms sent to the DFAIT so that they could update her personnel file.

[64] During the grievor's secondment, Ms. Crone observed that she had strong analytical skills but that her interpersonal skills required some improvement. Staff members complained about this as did some persons outside the agency with whom the grievor interacted as part of interdepartmental meetings. Ms. Crone communicated these complaints to the grievor, coached her and offered her some training, which the grievor accepted. Improvement in the area of interpersonal skills was discussed as part of the grievor's 2006 performance assessment but was not recorded in writing because Ms. Crone believed in first putting the grievor on notice and giving her the opportunity to improve before including such comments in a performance assessment. The grievor was offered training on interview skills in preparation for the ES-05 competition.

[65] Ms. Crone testified that the grievor's physical appearance could be intimidating to employees in support positions because she was good looking, always professionally dressed and very articulate. That, in Ms. Crone's view, could be perceived as an abuse of power by someone who was in a position to request services. Ms. Crone discussed those perceptions with the grievor. Ms. Crone did not recall a

meeting where the grievor was required to explain her religious beliefs and stated that it would not be her style to make such a request from an employee, especially in the case of the grievor, who had asked that her religious beliefs be kept private.

[66] With respect to the grievor's trip to Paris, Ms. Crone testified that the special travel arrangements had been pre-authorized by Mr. Cossette. However, Ms. Lévesque's actions could be explained because she had been absent on sick leave and may not have been aware of the special arrangements. Ms. Lévesque was charged with reviewing all travel claims within the unit to ensure that the rules were followed. The grievor was very upset that Ms. Lévesque had questioned her claim.

[67] On November 21, 2006, the grievor called Ms. Crone to tell her that she had the feeling that there was anti-Semitism in the workplace and that someone was out to get her. Ms. Crone told her that Passport Canada had a zero-tolerance policy and asked her for details. The grievor did not volunteer any further information. The next day, Ms. Crone met with the grievor to discuss the issue and suggested that she file a complaint. The grievor asked that the issue of discrimination be the subject of a staff discussion, but she did not want to file a formal complaint. Ms. Crone reported her concerns to staff relations and security.

[68] Identical copies of the first anonymous correspondence were sent to Ms. Crone and Mr. McDonald in separate envelopes and were received on December 1, 2006. Ms. Crone immediately advised Ms. Larcher-Auger and Ms. Thomas, who told her to contact Mr. Eales. Ms. Crone was advised not to show the letter to the grievor immediately because security services wanted to examine it further. The second anonymous correspondence was sent only to Ms. Crone and arrived on December 13, 2006. Ms. Crone advised Mr. McDonald, Ms. Larcher-Auger and security services. The grievor was advised of the letters on December 14, 2006. The second letter was considered more serious because it contained a death threat. The CEO was advised of the letters. At 13:20 on December 15, 2006, Ms. Crone received an email, allegedly from Mr. McDonald, with further threats. However, Ms. Crone recognized that the email address was not Mr. McDonald's because it did not conform to the agency protocol of truncating email addresses. Ms. Crone and others met with the grievor that afternoon to reassure her that her safety was paramount. The grievor was sent home. She took the bus, even though she was offered taxi chits.

[69] The grievor's working hours were noted in Ms. Crone's calendar. That calendar was accessible to Ms. Lévesque and to those who replaced Ms. Crone on occasion, such as Mses. Pezzack and Bowman or the grievor. No one outside Passport Canada had access to that calendar. Ms. Crone admitted that the New York Post email contained information accessible only to someone within Passport Canada. The content of the anonymous correspondence was very serious. Ms. Crone admitted that it was not necessary for a formal complaint to be made for the harassment policy to apply. The grievor had no concrete facts about her allegations of anti-Semitism. However, Ms. Crone communicated those concerns to the labour relations department and security services. She also contacted human resources about future training on values and ethics and met with her staff after the grievor left. Ms. Crone did not consider the grievor's chronology of events as a complaint but a summary of the facts and of how the grievor interpreted them.

[70] Ms. Crone testified that, during the internal investigation, she was asked if she knew who might have sent the anonymous correspondence. Ms. Crone answered that it could have been Ms. Lévesque because she was one of very few people aware of all the facts in the New York Post email. After speaking to the RCMP about how they would profile the case, Ms. Crone decided that her answer was speculative and discussed it with Mr. Girard. Mr. Girard told her that she should not have speculated and that she should review her answer. Accordingly, Ms. Crone asked Mr. Gervais to change her answer. A new answer indicating that she did not know who had sent the anonymous correspondence was substituted for her previous answer, and it was recorded as an integral part of her interview answers.

[71] Ms. Crone testified that the grievor was unsuccessful in the staffing process because she failed one of the essential questions and two aspects of personal suitability. Ms. Crone stated that, even if the anonymous correspondence was designed to affect the grievor's chances of being successful in the competition, it came too late, since the outcome of the competition had already been decided even though the results had not yet been communicated to the candidates. The single part of the process left outstanding was checking the candidates' references. Only Mses. Crone, Pezzack and Lévesque and an outside consultant knew where the process stood. Ms. Crone was of the view that the email did not reflect Ms. Lévesque's level of English, although she admitted that, unless the information had been shared with an outside

party, only she and two others had access to the information revealed in the New York Times email.

I. Testimony of Gérald Cossette

[72] Mr. Cossette was the CEO of Passport Canada when the anonymous correspondence was received. Before these incidents, Mr. Cossette had met the grievor in the course of briefings and had found her pleasant and well versed in the subject matter of her files.

[73] On December 15, 2006, Mr. Cossette attended a meeting to discuss the first two items of anonymous correspondence and decided that it was necessary to notify the RCMP because the letters were in the nature of a hate crime and to notify the DFAIT because it was a larger organization with better resources to deal with such a matter. Mr. Cossette agreed that the grievor should be removed from the workplace and that she should not take public transit while an investigation took place. A security investigation was unable to identify the source of the email.

[74] Mr. Cossette advised the grievor and the union of the results of the internal investigation on February 28, 2007. While the final report did not come out until May 2007, Mr. Cossette was of the view that it was important to advise the grievor that the results were inconclusive.

[75] Mr. Cossette's office received a fourth anonymous letter on January 30, 2007, which was not sent to the grievor but was given to the investigators on the internal investigation team. As with the other letters, the author could not be determined. Mr. Cossette admitted that at the end of December 2006, he considered ending the grievor's secondment because the relationship between the grievor and her supervisors had become strained as a result of the anonymous correspondence incidents, and he did not see an improved future relationship ensuing from the situation. Ending the secondment appeared the most acceptable option at that time. It had nothing to do with the grievor's religion. Mr. Cossette admitted that incidents of anonymous correspondence were unusual and that their seriousness had been communicated to Minister Peter MacKay. In his view, the investigation was about identifying who had sent the anonymous correspondence, and it did not require the grievor to defend herself against the accusations contained in those letters.

J. Testimony of Gary McDonald

[76] Mr. McDonald was the director general of policy and planning for Passport Canada, reporting to Mr. Cossette, when the anonymous correspondence was received. Mr. McDonald was aware that the grievor was an observant Jew because Ms. Crone had told him that she was accommodating the grievor's requests for religious leave. Mr. McDonald was very satisfied with the grievor's work, and he was aware that she worked extra hours to compensate for time off for religious observances. The grievor never complained of religious discrimination to him.

[77] The anonymous correspondence arrived while Mr. McDonald was away on a business trip. Mr. Crone informed him of it on his return. She briefed him on the steps that she had taken in his absence. A meeting was held with the grievor on the next day. When Ms. Crone received the New York Post email, allegedly from him, he advised Mr. Cossette and human resources. As Mr. McDonald was now involved because of the New York Post email, he removed himself from the investigation, although he was interviewed by the investigators. He filed a complaint with the police about the New York Post email. He participated in the RCMP's investigation by completing a questionnaire, but he was not interviewed.

III. Summary of the arguments

A. For the grievor

[78] The grievor argues that the remedies put into place to address the anonymous correspondence were for the benefit of the organization but were of no benefit to her. This grievance seeks remedies specifically for the grievor. The grievor alleges that the employer violated the provisions of the *Canadian Human Rights Act* (*CHRA*) because it failed to intervene when religious discrimination was brought to its attention, it did not investigate the grievor's complaints, and it did not accommodate the grievor in the workplace once the discrimination affected her health and her personal dignity.

[79] The grievor also argues that the employer aggravated the violation of her rights by reneging on its decision to grant her administrative leave during the conduct of the internal investigation, by forcing the grievor to use her sick leave and by denying her the opportunity to be heard during the investigative process.

[80] The grievor alleges that her secondment was ended prematurely as a result of the administrative investigation because the employer misunderstood the trauma caused to her and because the employer was reluctant to deal with the issue of religious discrimination in the workplace. The grievor alleges that the closing of the staffing process was but a convenient excuse to end her secondment before its term, since the grievor's projects were incomplete and the staffing process had not produced the desired number of successful candidates to fill the permanent positions being staffed.

[81] The grievor points out that the anonymous correspondence coincided with her complaints to Ms. Crone, the staffing process, her removal from the workplace and her sick leave. Consequently, I should draw an inference that these incidents were related to the termination of her secondment. The grievor submits that the administrative investigation report served only to propagate false impressions and rumours without giving her the opportunity to express her point of view and how she could be accommodated. The grievor maintains that she continues to suffer from the psychological effects of the discrimination.

[82] The grievor argues that the early termination of her secondment iilustrates a continuing lack of compassion for the trauma she had just endured but also a continuing failure to accommodate her physical and mental well-being.

[83] The grievor argues that the employer had a harassment policy that it did not apply; instead, it conducted another type of process, unknown to her or her representatives, which did not allow her to participate or to have a representative present. Mr. Gervais' excuse for not interviewing her because he did not want to bother her at home is not convincing, since the grievor had been specifically asked to provide a medical certificate that she was fit to participate in the administrative investigation and indeed provided the requested certificate.

[84] The grievor opines that the employer completely misunderstood what constitutes a harassment and discrimination complaint. There is no requirement to find a culpable person for a complaint to be founded, as long as the discrimination and harassment are related to the workplace. The grievor contends that the employer turned a blind eye to the obvious evidence that the anonymous correspondence came from within the organization. The details referenced in the email dated December 15, 2006, and the anonymous letter received by Mr. Cossette on

January 30, 2007, contain personal information that only a person within her work unit would know. Mr. Eales admitted in his testimony that the content of the correspondence was employment related.

[85] The grievor asserts that, after she filed a grievance, her complaint of harassment and discrimination was not taken seriously. Meeting with employees after the grievor's departure from the workplace is not an adequate response from the employer. Furthermore, the employer publicized the grievor's complaint by forwarding it to the RCMP, the CSIS and the others without her knowledge or consent.

[86] The grievor submits that Ms. Lévesque's testimony was not credible and that it was contradicted by the testimony of her supervisors. For example, Ms. Lévesque stated that she was unaware of the grievor's religious background even though she was copied on many emails on the subject, she managed the forms related to the grievor's attendance at work and she had access to Ms. Crone's calendar, where the grievor's attendance was recorded. Ms. Lévesque denied knowing anything about the status of the grievor's standing in the appointment process, and when documents to the contrary were produced, she had no recollection. Ms. Lévesque testified that she had spoken only to Ms. Crone about the Paris trip and the reason for Mr. Akitt's departure. These details support the probability that the anonymous correspondence originated from a small group of people within the agency, and most likely with Ms. Lévesque.

[87] Mses. Pezzack's and Crone's chronologies refer directly to the grievor's personal characteristics. The fact that Ms. Bowman and the grievor were notified of the termination of their secondments on the same day is not a defence against acts of discrimination perpetuated on the grievor as they were not in the same situation. The grievor suffered a disproportionate blame for incidents that were not of her making.

[88] Ms. Pezzack's comments about the grievor's style of dress, Ms. Crone's comments about how the grievor's style of dress and demeanour could prove intimidating, Ms. Lévesque's insistence that the grievor complete leave forms to justify religious leave, and Ms. Lévesque's questioning of the grievor's travel expenses are all evidence of discrimination based on personal characteristics, in this case, characteristics associated with the Jewish faith. The fact that there was nothing to be gained from anonymous correspondence, as set forth by the employer, does not exonerate the employer from taking action. The administrative investigation was superficial and amounted to no investigation at all.

[89] The grievor requests the following remedies: compensation for pain and suffering to the maximum amount of $20 000; the implementation of a special plan or arrangement to accommodate her; wages equivalent to the loss of acting pay to end of the secondment; out-of-pocket expenses related to a psychologist, massages and administrative expenses; return of benefits and sick leave credits; remedy for the breach of the collective agreement; compensation for breaches of procedural fairness and the collective agreement; and any other remedy that the adjudicator may deem appropriate.

[90] The grievor cited the following cases in support of her arguments: *Charlton v. Ontario (Ministry of Community Safety and Correctional Services)*, 2007 CanLII 24192 (ON P.S.G.B.); *Lamarche v. Marceau*, 2007 PSLRB 18; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Moore v. Canada (Attorney General)*, 2005 FC 13; *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears*, [1985] 2 S.C.R. 536 (*O'Malley*); *Hinds v. Canada (Employment and Immigration Commission)*, 1988 CanLII 109 (C.H.R.T.); *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Adga Group Consultants Inc. v. Lane* (2008), 295 D.L.R. (4th) 425 (Ont. S.C.D.C.); and *Uzoaba v. Canada (Correctional Service)*, 1994 CanLII 1636 (C.H.R.T.).

B. <u>For the employer</u>

[91] The employer argues that the grievance raises two issues. The first is whether the grievor was subjected to discrimination or harassment based on her religion, contrary to article 16 of the collective agreement. If the answer is in the affirmative, the second issue is whether the employer is liable.

[92] The employer contends that the alleged incidents did not occur. In the alternative, if the incidents did occur, they did not constitute discrimination or harassment as legally defined in the *CHRA*. Should I find that the incidents did indeed occur, the employer is not liable for them because it was unaware of them. The employer cannot be responsible for the actions of unknown perpetrators. It did not consent to the alleged incidents. The employer submits that it exercised due diligence to prevent such actions and that it mitigated the effects.

[93] The employer submits that the grievor failed to meet the burden of proof that the alleged incidents occurred since the grievor's version of the incidents is contradicted by the employer's witnesses. The employer submits that it made every attempt to determine the author of the anonymous correspondence, but without success. Furthermore, it made weekly reports to the CEO, filed two police reports, conducted two investigations, provided the grievor with management leave, suggested EAP support and gave her taxi chits to go home.

[94] The employer argues that the termination of the grievor's secondment was not discriminatory because other employees who were unsuccessful in the competition process also had their secondments terminated on the same date. It had nothing to do with the Jewish faith, and the recourse for an improper staffing action is a complaint with the Public Service Staffing Tribunal. As well, the two-week notice period ending the secondment was part of its terms and conditions and was well known to the grievor. It is unfortunate that the termination of the grievor's secondment coincided with her grievance, but the staffing process was complete in December 2006, before the receipt of the anonymous correspondence. The fact that the results of the competition were communicated to the participants in January 2007 does not imply that the anonymous letters affected the results of the competition. Nor was the fact that the grievor had performed well in the job a guarantee that she would compete successfully for the position.

[95] The employer denies having any responsibility to accommodate the grievor because of a disability inasmuch as the grievor never told the employer that she was disabled and because there is no evidence of her symptoms. Her doctor's notes are but hearsay, as no medical evidence was tendered. The employer was unable to test her disability. The grievor was not disciplined for her disability. The sick leave provisions of the collective agreement take precedence over other types of paid leave when an employee is ill.

[96] When she was asked to return to work on December 21, 2006, the grievor said that she was too sick to work. She obtained several medical certificates to cover her absences until mid-February 2007. It is not discriminatory for the employer to require a medical certificate for a medical-related absence. In any event, the grievor could not immediately resume her duties full-time and could work only three days per week in another position.

[97] The employer submits that the incidents reported by the grievor either did not occur or did not constitute harassment. While a single act can constitute harassment, there is usually a pattern of persistent behaviour. Upsets and workplace tension do not constitute harassment. The grievor's workplace conflicts came from sources other than the grievor's religion. Conflicts occur in all workplaces and do not automatically constitute harassment.

[98] Ms. Crone received complaints from within and from outside the agency about the grievor. Ms. Crone discussed these issues with the grievor, provided her with training and tried to help her succeed. The employer argues that the number of complaints demonstrates that there had to be some truth to them. The grievor's supervisors were asked to provide chronologies of events because the grievor's accusations were serious and could have potentially ruined their careers.

[99] The employer was never able to discover the author of the anonymous correspondence. The grievor did not complain or make it known that comments about her style of dress were unwelcome. Such comments do not constitute harassment. The grievor's allegation of having to explain her Jewish beliefs at a staff meeting was not corroborated by any of the witnesses.

[100] It is not harassment for an employer to require an employee to complete leave forms in order to control attendance. Ms. Lévesque had no recollection of requesting that the grievor complete leave forms except the usual vacation and sick leave forms. All employees on secondment have to complete paper forms because electronic leave-request forms are available only to permanent agency employees. The paper form also serves to advise the originating department of the leave being taken by its employee. The grievor did not complain about having to complete leave forms in her several emails; Ms. Lévesque was only copied on emails to Ms. Crone for her information. It was Ms. Lévesque's job to verify travel claims, which is exactly what she did for the grievor's trip to Paris to attend a conference. Ms. Lévesque apologized for her mistake. While Ms. Lévesque's reaction was unfortunate, it did not constitute harassment. Procedural flaws in the day-to-day administration of a work unit do not constitute discrimination.

[101] If there was no harassment, it is of little consequence what the employer did during the investigation. The employer argues that the evidence at the hearing did not differ from what the investigators heard during their investigation. Other than her

chronology, the grievor had no further information to add that would have served to identify the perpetrator of the anonymous correspondence. Even if there were procedural flaws in the investigation, there is no evidence that the investigators would have uncovered something different.

[102] A procedural flaw is discriminatory if it was motivated by a discriminatory intention. While the anonymous correspondence is reprehensible and unacceptable, the employer is not liable for such actions. Human rights law requires the employer to take action but not to maintain a pristine work environment. The employer cannot be responsible or intervene and stop what it is ignorant of occurring. While there was considerable personal information in the anonymous email of December 15, 2006, the employer was unable to establish that it came from within the workplace.

[103] An employee is obliged to inform his or her employer of any harassment. The grievor's views on the practice of Judaism did not excuse her from not informing the employer of what was happening in the workplace in a timely manner. The grievor never filed a formal complaint. There is no evidence that the employer consented to the reprehensible acts. The grievor was advised of the results of each investigation shortly after each was completed. Both were inconclusive. On February 28, 2007, the grievor was asked by the CEO if she had anything to add to the conclusions of the investigation. The grievor did not respond to this letter. The employer asks that I dismiss the grievance.

[104] The employer submits that, notwithstanding its arguments that the grievance should be dismissed, I should consider that the harassment policy does not form part of the collective agreement. Therefore, the grievance does not concern the interpretation or application of the collective agreement as provided in paragraph 209(1)(*a*) of the *PSLRA* and is outside the jurisdiction of an adjudicator.

[105] The employer cited the following cases in support of its arguments: *Durrer v. Canadian Imperial Bank of Commerce*, 2007 CHRT 6; *Dawson v. Canada Post Corporation*, 2008 CHRT 41; *Faryna v. Chorny*, [1952] 2 D.L.R. 354; *F.H. v. McDougall*, 2008 SCC 53; *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4; *Brown v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 127; *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; *Gibson v. Treasury Board (Department of Health),*

2008 PSLRB 68; *Canada (Attorney General) v. Demers*, 2008 FC 873; *Calgary District Hospital Group v. United Nurses of Alberta* (1992), 28 C.L.A.S. 86; *Sysco Foodservices of Toronto v. Teamsters, Local 419*, [2009] O.L.A.A. No. 320 (QL); *Honda Canada Inc. v. Keays*, 2008 SCC 39; *Lévesque v. Canada Customs and Revenue Agency*, 2005 PSLRB 154; *Bencharski v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 75; *Ryan v. Canada (Attorney General)*, 2005 FC 65; *Canada (Canadian Human Rights Commission) v. Canada (Canadian Armed Forces)*, [1999] 3 F.C. 653 (T.D.); *Joss v. Treasury Board (Agriculture & Agri-Food Canada)*, 2001 PSSRB 27; *Zehrs Markets Inc., a Division of Zehrmart Ltd. v. United Food and Commercial Workers International Union, Local 175*, [2007] O.L.A.A. No. 43 (QL); *Spooner v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 60; *Richmond v. Canada (Attorney General)*, [1997] 2 F.C. 946 (C.A.); *Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 (C.A.) (QL); *Canada (Attorney General) v. Lâm*, 2008 FC 874; *Hinds v. Canada (Employment and Immigration Commission)*, [1988] C.H.R.D. No. 13 (QL); *Warman v. Lemire*, 2009 CHRT 26; *François v. Canadian Pacific Ltd.*, 1988 CanLII 113 (C.H.R.T.); *Hill v. Air Canada*, 2003 CHRT 9; and *Fleet Industries v. International Association of Machinists and Aerospace Workers, Local 171*, [1997] O.L.A.A. No. 791 (QL).

C. The grievor's reply

[106] The grievor responds that anything the employer did after the grievance was filed goes to mitigation and does not excuse its actions. Contrary to what the employer has alleged, the grievor spoke up several times in the spring 2006, on November 21 and on December 8 and 27, 2006. Her complaints were not taken seriously. The employer sent the grievor home on December 15, 2006; it was not her decision. She never returned to the workplace after that. After her secondment was ended, the grievor was humiliated by requiring close supervision when retrieving her personal effects, as if she were a culprit. The grievor's medical information was never challenged, and it is too late to do so at adjudication.

IV. Reasons

A. The applicable law

[107] This grievance arises from a series of workplace incidents that the grievor alleges constitute discrimination, in violation of article 16 of the collective agreement and of the provisions of the *CHRA*, and that the employer failed to address.

[108] Clause 16.01 of the collective agreement reads as follows:. . .

> ***16.01*** *There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national origin, religious affiliation, sex, sexual orientation, family status, mental or physical disability, membership or activity in the union, marital status or a conviction for which a pardon has been granted.*

[109] Similarly, the *CHRA* describes its purpose as follows:. . .

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

. . .

[110] Religion is one of the enumerated prohibited grounds of discrimination in subsection 3(1) of the *CHRA* as follows:

> ***3.****(1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.*

[111] In the course of employment, paragraph 7(*b*) of the *CHRA* prohibits adverse differentiation of an employee on a prohibited ground of discrimination as follows:

> ***7.*** *It is a discriminatory practice, directly or indirectly,*
>
> …
>
> *(*b*) in the course of employment, to differentiate adversely in relation to an employee,*
>
> *on a prohibited ground of discrimination.*

[112] The *CHRA* does not define "discrimination." However, the following citation from *Andrews* remains the seminal point of reference:

. . .

> *. . . I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or, disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. . . .*
>
> . . .
>
> [Emphasis added]

[113] In broad terms, a complainant (here, the grievor) who alleges a violation of human rights, bears the burden of proving his or her allegations on a balance of probabilities (*O'Malley)*. Once the grievor has established a *prima facie* or apparent case of discrimination, the burden of proof then shifts to the respondent, in this case the employer, to provide a reasonable explanation that the reason for treating the grievor as it did was not motivated by a prohibited ground of discrimination. This means that, if the allegations are to be believed and the employer cannot satisfactorily explain its actions, the grievance will succeed.

[114] Establishing a *prima facie* case means that the grievor must put forward more than mere allegations or a personal belief that the conduct was discriminatory. On the other hand, human rights tribunals have recognized that direct evidence of discrimination may be difficult to prove since discriminatory conduct is not usually overt. However, circumstantial evidence may be sufficient where it tends to prove that the allegation of discrimination is more probable than other possible hypotheses. (See *Brooks v. Attorney General*, 2006 FC 1244.)

[115] *Marinaki v. Canada (Human Resources Development)*, 2000 CanLII 11403 (C.H.R.T.) established the principle that, for a complaint to succeed, it is not necessary that the discriminatory behaviour be the sole reason for the actions taken by the respondent, since the intent to discriminate is irrelevant to the determination of discrimination. (See also *Nova Scotia (Human Rights Commission) v. Play it Again Sports Ltd.*, 2004 NSCA 132.)

[116] What constitutes harassment is also not defined in the *CHRA*. In *Hill*, it was stated that the most serious part of an accusation of harassment is the creation of a hostile work environment, which violates the personal dignity of the complainant.

B. <u>The employer's objection concerning the adjudicability of the grievance</u>

[117] Before dealing with the merits of the grievor's complaint, it is necessary to address the employer's objection raised for the first time in argument, that its harassment policy has not been incorporated into the collective agreement and, therefore, the grievance is not adjudicable.

[118] An employee's right to refer a grievance to adjudication results from the legislation and not from the collective agreement. Section 209 of the *Public Service Labour Relations Act (PSLRA)* narrowly defines matters that can be referred to adjudication. As a rule, a human rights complaint on its own is not adjudicable unless it relates to one of paragraphs 209(1)(*a*), (*b*), (*c*) or (*d*). This case concerns the application or interpretation of a collective agreement as defined in paragraph 209(1)(*a*). Article 16 of the collective agreement provides that every employee has the right to equal treatment and to not be subject to discrimination with a corresponding duty on the employer to manage its employees equally and without discrimination. Such an article must be interpreted as granting a substantive right to employees, and it provides a basis for a grievance.

[119] Paragraphs 226(1)(*g*) and (*h*) of the *PSLRA* provide that an adjudicator may "interpret and apply the *Canadian Human Rights Act* . . ." and "give relief in accordance with paragraph 53(2)(*e*) or subsection 53(3) of the *Canadian Human Rights Act*."

[120] I share the view expressed in *Souaker v. Canadian Nuclear Safety Commission,* 2009 PSLRB 145, that, where an employee alleges that a change in his or her conditions of employment was motivated by discriminatory considerations and the collective agreement provides for the absence of all discrimination in the workplace, such a grievance involves the application of the collective agreement within the meaning of paragraph 209(1)(*a*) of the *PSLRA.* In such circumstances, an allegation of discrimination is an adjudicable grievance. Consequently, a grievance referred to adjudication under paragraph 209(1)(*a*) of the *PSLRA* is well within the jurisdiction of an adjudicator.

[121] In addition, clause 50 of the collective agreement grants a substantive right to employees by imposing a specific obligation on the employer to make every reasonable effort to accommodate an employee who requests time off to fulfill his or her religious obligations.

[122] Accordingly, I dismiss the employer's objection that an adjudicator does not have jurisdiction to decide this grievance.

C. Did the incidents alleged by the grievor occur? If so, did they constitute discrimination?

[123] The employer's argument is that the grievor failed to meet the burden of proof because the incidents of discrimination she alleged either did not occur or were contradicted by the employer's witnesses.

[124] The grievor responds that there were numerous instances of discrimination that were brought to the employer's attention.

[125] The first instance cited by the grievor is that Ms. Lévesque acted in a discriminatory manner by interfering with her approved arrangements for taking religious leave by requiring the grievor to report her hours and complete leave and overtime forms, even though Ms. Crone had cleared with her superior, Mr. McDonald, the grievor's authorization to take religious leave under an informal process.

[126] Ms. Crone was the supervisor of both the grievor and Ms. Lévesque. Ms. Crone had the manifest authority to enter into a secondment arrangement with the grievor, to evaluate her performance, to grant her leave, to authorize that she act in Ms. Crone's position during her absence and to end the secondment. Given Ms. Crone's authority over the grievor and the fact that the grievor voiced her concerns to Ms. Crone on several occasions, I find that the employer was made aware of Ms. Lévesque's interference and failed to intervene. By condoning Ms. Lévesque's actions, the employer acted in a discriminatory manner towards the grievor on the basis of her religious affiliation.

[127] The employer's suggestion that the events did not occur is contrary to the evidence and the testimonies. I did not find Ms. Lévesque's testimony to be credible on the point that she had no knowledge of the grievor's religious affiliation until late fall 2006, because she did not pay attention to the emails that she was being copied

on. Her testimony does not tally with Ms. Crone's testimony that Ms. Lévesque is a meticulous person who oversaw the administrative details of the work unit and who knew all the rules and policies of the organization. Furthermore, according to Ms. Crone, Ms. Lévesque had the responsibility to maintain the office calendar. To do so, Ms. Lévesque would necessarily have had to monitor the grievor's comings and goings. The email from the grievor to Ms. Lévesque dated March 21, 2006, concerning the recording of overtime hours contradicts her testimony of not knowing about the grievor's religious affiliation. Furthermore, it was not a one-time occurrence; there were repeated instances of the grievor raising the issue of leaving work at different times and changing schedules because of religious obligations. I find that the grievor was the subject of discrimination by the employer on the basis of her religious affiliation.

[128] A second instance cited by the grievor is that her observance of Shabbat was challenged by Ms. Lévesque when the grievor returned from an international trip, even though the travel arrangements had been pre authorized by Mr. Cossette. The chronology of Ms. Crone dated December 30, 2006, is useful in this instance (Exhibit E-96):

. . .

> ***Dec. 13, 200****6 . . . Valery has a meeting with me apparently to discuss creating an ES 1 position . . . She also mentions at this meeting that Renee Levesque is difficult to be around and that it gave her pains in the stomach when she has to talk to her. This the first time I recall Valery ever singling out Renee as a problem. She mentions that Renee has questioned her travel claim asking why she has stayed overnight Friday in Paris. Valery says she has explained that the CEO has signed-off on the approval for the trip and there was no reason for Renee now to question this. I offer to speak to Renee to question why she is asking the question as it is clearly in the justification for the travel but perhaps Renee has not seen this. Valery adamantly insist that I she does not want me to go over this Renee. I agree I will not for the moment.*
>
> . . .
>
> [*Sic* throughout]

[129] This incident is not a figment of the grievor's imagination; it is recorded in Ms. Crone's chronology of events. Ms. Lévesque testified that she questioned the

grievor's expenses for her trip to the Paris conference because she had been away on extended sick leave and did not know of the special arrangements. She apologized to the grievor once the grievor made her discontent known. In her testimony, Ms. Crone corroborated the testimony of Ms. Lévesque that she may not have been aware that the expenses had been authorized in advance by the CEO because she had been away on sick leave. I do not find this explanation for Ms. Lévesque's remarks plausible. When a travel authority is prepared to justify a business trip, it is signed in advance by the authorizing manager. It then becomes the record against which the travel claim is justified on the return of the traveller. Extraordinary expenses or arrangements are noted. In this case, the fact that the grievor was to take a later flight for purposes of religious accommodation would have been noted to justify her staying over the weekend. When Ms. Lévesque was called on to review the grievor's travel claim, she would have been aware that the grievor's travel authority had been signed and justified not by Ms. Crone, not by Mr. McDonald, but by Mr. Cossette, the CEO. Ms. Lévesque's explanation for querying Mr. Cossette's authority to extend the grievor's travel and for requesting that the grievor reimburse the employer is ill conceived. Therefore, I find that this incident is evidence of discrimination towards the grievor.

[130] A third instance cited by the grievor is that Ms. Lévesque commented that the grievor was isolating herself by not participating in dress-down Fridays and in restaurant outings with other employees. Ms. Lévesque denied making such remarks to the grievor. There is no extraneous evidence to corroborate Ms. Lévesque's remarks. Had these remarks been unique, I would not have attached much importance to them. However, Mses. Pezzack and Crone both admitted making remarks about the grievor's style of dress, thus making this allegation part of a pattern of behaviour.

[131] A fourth instance cited by the grievor are Ms. Pezzack's remarks about her style of dress, which is related to the grievor's religious practices. In her testimony, Ms. Pezzack admitted making remarks about the grievor's style of dress on two occasions: once that the grievor was inappropriately wearing a skirt during a snowstorm and another that the grievor did not dress down on Fridays like other employees. Ms. Pezzack stated that, had she known the grievor's religious observances, she would not have made those remarks.

[132] Even though Ms. Pezzack may not have had any ill intentions when she made these remarks, she made them nonetheless. The intent to discriminate is irrelevant to

the determination of discrimination. These remarks were discriminatory towards the grievor.

[133] A fifth instance cited by the grievor is that Ms. Crone made remarks about the effect of the grievor's appearance and demeanour that were related to her religious practices. The following documents are relevant to this allegation:

- Chronology of Ms. Crone, dated December 30, 2006, pages 2-3 (Exhibit E-96):

> . . .
>
> *I tell her that she must be sensitive to the fact that she might be intimidating to people as she is smart, well dressed, good-looking and very confident. I explain that particularly opposite more junior staff where there is an imbalance of power you must be sensitive.*
>
> . . .

- Chronology of Ms. Crone dated December 30, 2006, page 4 (Exhibit E-96):

> . . .
>
> ***July 2006*** *. . . She (the grievor) explains that she is going to take a new approach. She is not wearing make-up as she would normally and is more casually dressed than her usual style. She explains I believe that her husband has suggested she take a low-key approach. The idea I understood is that she was not to stand out so much.*
>
> . . .

[134] Ms. Crone admitted to these comments in her testimony. Ms. Crone's remarks touch on the personal characteristics of the grievor, especially since Ms. Crone admitted knowing of Jewish religious observances. Just like Ms. Pezzack, Ms. Crone may not have intended to discriminate against the grievor, but her intention is not a factor in finding that her remarks were discriminatory in nature. The grievor should not have had to change her style of dress to please her supervisor. I find that Ms. Crone's remarks contributed to the creation of a discriminatory work environment.

[135] A sixth instance cited by the grievor concerns the incident where Ms. Lévesque falsely reported to Ms. Crone concerns about the quality of the grievor's supervision of Mr. Akitt, a student who reported to the grievor. Mr. Akitt denied Ms. Lévesque's concerns on more than one occasion. Yet Mses. Crone and Pezzack used that incident

to evaluate the grievor's personal suitability for appointment to an ES-05 position. This incident was also brought up in the context of the administrative investigation into the anonymous correspondence. Here are a few references to this incident in the written evidence:

- Ms. Pezzack's answers to the second and seventh questions asked by the investigators during the internal investigation (Exhibit E-91): "Aaron was leaving because of Val. Aaron denied that." [Emphasis added]

- Chronology of Ms. Crone dated December 30, 2006, at page 5 (Exhibit E-96):

> . . .
>
> *Renée came to my office to report a discussion she overheard in the office. She reports overhearing that Aaron Akitt (who reports directly to Valery) is not very happy working for Valery and indeed this is why he was leaving for a new job . . . According to the story . . .*
>
> . . .
>
> [Emphasis added]

- Chronology of Ms. Crone dated December 30, 2006, at page 5 (Exhibit E-96):

> . . .
>
> ***Nov. 4 to Nov. 11, 2007*** [*sic*] *. . . I met with Aaron this week to conduct an informal exit interview . . . He says he has no issues with Valéry and that he is leaving PPTC only because he has found a good opportunity working at DFAIT.*
>
> . . .
>
> [Emphasis added]

- Chronology of Ms. Crone dated December 30, 2006, at page 6 (Exhibit E-96):

> . . .
>
> ***Nov. 21, 2006*** *. . . I meet with Valery to discuss the information I had been given about Aaron and his letter and my subsequent meeting with Aaron. At that time I do not tell her who had given me the information about her only that someone has anonymously told me. Later on December 13 I mention that it is Renee. . . .*
>
> . . .

[Emphasis added]

- Chronology of Ms. Crone dated December 30, 2006, at page 6 (Exhibit E-96):

> . . .
>
> *After hearing Renee's story and speaking to Aaron I speak to Gary McDonald to inform him of the events. Gary tells me that someone else has already spoken to him about Aaron and Valery and that he understands that Aaron is leaving PPTC because of Valery. I reply that I have had this discussion with Aaron and that is not what he has told me. We also discuss the ongoing selection process as Valery is a candidate in the process and personal suitability is an important element in the process.*
>
> . . .
>
> [Emphasis added]

- Administrative Investigation Report dated May 11, 2007, at page 5 (Exhibit E-50): "Aaron went to Gary and confirmed there were no conflicts with Valéry . . ." and at page 7: "When Aaron became aware of the letters, he went to Gary McDonald and told him he liked working for Valéry and that he would work for her again."

  [Emphasis added]

[136] While this allegation does not strictly concern religious beliefs, it demonstrates a pattern of unwarranted interference by Ms. Lévesque to discredit the grievor. What Ms. Lévesque reports is unfounded hearsay, yet most of the witnesses referred to this so-called incident as one of the grievor's shortcomings that affected her "suitability" rating in the staffing competition. It was not explained why, given Mr. Akitt's consistent denial of Ms. Lévesque's claim, this incident was taken seriously. I find that Ms. Lévesque's interference with respect to this incident together with other incidents of religious discrimination contributed to the creation of a hostile work environment for the grievor.

[137] The employer argued that the grievor had to have been the cause of workplace conflicts reported by Mses. Crone and Pezzack because there had been other complaints against the grievor not related to her religious faith. As well, the need to improve her interpersonal skills was discussed with the grievor. I will quickly dismiss this argument. The employer cannot use the complaints against the grievor or her

alleged lack of interpersonal skills to excuse it from not paying attention to workplace discrimination or as a foil to avoid its responsibility. Furthermore, the employer's evidence about these complaints was hearsay. It is egregious for the employer to suggest that the grievor's complaints were merely "workplace upsets" or "workplace tension."

[138] The seventh instance of discrimination cited by the grievor concerns a meeting of her colleagues where she was asked to explain her religious beliefs. The only evidence of this allegation is the grievor's testimony. No evidence was tendered as to when this meeting took place or who was present. No other corroborative evidence was adduced. No other witness could recall the meeting. While I do not have any reason to disbelieve the grievor on this allegation, she does not meet the burden of proof on a balance of probabilities.

D. Did the grievor communicate a complaint of workplace discrimination and harassment?

[139] The employer argues that the anonymous correspondence constituted the extent of the workplace discrimination and that it investigated those incidents. The grievor was advised of the results of each of two investigations in a timely manner. Both investigations were inconclusive, as the employer was unable to identify the perpetrator(s). Otherwise, the grievor did not inform the employer of actions of discrimination; nor did she file a formal complaint. On February 28, 2007, the grievor was asked by the CEO if she had anything to add to the conclusions of the administrative investigation. The grievor did not respond to this letter.

[140] The grievor responds that the employer did not take her initial concerns of religious discrimination seriously, in particular the issues with Ms. Lévesque, and that it did not investigate the written complaint that was her chronology. The grievor submits that the employer acted without consideration for her well-being and without seeking to accommodate the medical condition created by the workplace harassment.

[141] The grievor firstly alleges that she was not immediately informed of the anonymous correspondence even though she had made Ms. Crone aware on several occasions of her concerns of anti-Semitism in the workplace.

[142] In their testimonies, Ms. Crone and Mr. Cossette both admitted that the anonymous correspondence referenced the grievor's religious beliefs and that it was

threatening. Their explanation for not informing the grievor of the first two items of anonymous correspondence was that the employer wished to investigate the incidents before informing her because it considered the anonymous correspondence to be mainly security threats. The email was shared with the grievor the day it was received. There is no explanation as to why the fourth letter was not communicated to the grievor.

[143] The grievor expressed her concerns about workplace anti-Semitism as early as November 21, 2006. The first anonymous letter arrived December 1, 2006 and the second one on December 14, 2006. At first blush, the employer's reason to delay the communication of this correspondence to the grievor was that it wished to conduct an internal investigation seems reasonable. However, upon closer scrutiny, I am of the view that the employer unnecessarily put the grievor's mental and physical security unnecessarily at risk, given that the anonymous correspondence confirmed what the grievor suspected, and that there was an element of physical harm in the threats that had been received. I find that the delay to inform the grievor of the anonymous correspondence, constituted discrimination contrary to article 16 of the collective agreement.

[144] The grievor secondly alleges that the employer did not act on her direct complaint of religious discrimination and harassment. The employer's response is that it engaged every means at its disposal to identify the perpetrator of the anonymous correspondence and that this constituted the extent of its obligation.

[145] According to Mr. Gervais, the object of the administrative investigation was to collect information concerning three incidents of anonymous correspondence, and it was not intended as a response to a complaint under the harassment policy. Mr. Eales testified that the internal investigation was to review the grievor's chronology to allow the persons named in it to provide their versions of events. Ms. Marquis testified that the investigation was to be conducted in accordance with Passport Canada's and the Treasury Board's harassment prevention policies, with a view to identifying the perpetrator of the anonymous correspondence. Ms. Larcher-Auger testified that the administrative investigation was a fact-finding process that allowed the employer to question persons in the workplace and to study the grievor's allegations. Ms. Larcher-Auger believed that the employer could not investigate workplace discrimination and harassment without a formal written complaint through the

bargaining agent and that there was no such complaint in this case. Mr. Cossette testified that the internal investigation was about identifying who had sent the anonymous correspondence and that it did not require the grievor to defend herself against the accusations it contained.

[146] The grievor testified that her complaints of workplace discrimination and harassment were consigned in writing in her chronology entitled "A Chronology of Hatred at Passport Canada." The grievor's chronology concludes with the following statement:

. . .

> *Over several months, I have been a victim of a slowly progressing, planned and especially vicious form of harassment, in view* [*sic*] *to destroy my reputation and hurt my career opportunities at Passport Canada. This situation has unfortunately been a cancer which has been let loose, uncontained, even facilitated.*

. . .

[147] The grievor submitted that, if her verbal complaints were not enough for the employer to take action, her chronology was clearly a complaint that went well beyond the anonymous correspondence, and it should have been addressed by the employer.

[148] In light of the evidence, I find that the testimony of the employer's witnesses and the documents filed in evidence demonstrate that the employer did not identify the grievor's emails and chronology as a complaint and that it did not have a unified purpose to conduct an investigation. According to the IT investigation report, it was a technical investigation for the limited purpose of investigating the origins of the email sent to Ms. Crone on December 15, 2006. Its conclusions are directed at identifying the weaknesses in Passport Canada's IT systems and making recommendations to reduce the likelihood of a similar incident in the future. The investigation was concluded on December 21, 2006.

[149] The administrative investigation was a joint fact-finding effort by the human resources department and the security bureau. The lead investigator was Mr. Cormier of the security bureau. The investigation report summarizes the written chronologies of the grievor and Mses. Crone and Pezzack, as well as several interviews, excluding the grievor who, according to section 4 of the report, could not be interviewed for

medical reasons. No conclusions are drawn, other than that the investigators are unable to identify the perpetrator(s).

[150] I am puzzled by the employer's position that the grievor never filed a complaint of religious discrimination and harassment or that the incidents alleged by the grievor never even occurred. The facts clearly contradict that position. Here are four examples of the grievor's intention of filing a complaint.

1) An email dated December 27, 2006 that accompanied the grievor's chronology and that stated the following:

. . .

> *I am writing to bring your attention, in the event it hasn't yet been, an ugly anti-Semitism case that just occurred at Passport Canada. As the victim of that anti-Semitism, I went to the police last Friday morning, with my chronology of events. A criminal investigation is to take place. I have attached with this e-mail are the three documents that will form the basis of the criminal investigation and which consist, in my view, in the culmination of seven months of defamation against me. I am also attaching for your information my chronology of events.*
>
> *My employer did ask me to go back to work on Friday, the 22nd of December. I think you will understand that, in addition to not being in an emotional state to immediately resume my functions, work is currently not a safe environment for me. I am therefore home on sick leave.*
>
> *I trust that you will give the situation the attention it warrants and thank you in advance for ensuring that my workplace is a safe one where I can serve the public.*

. . .

[*Sic* throughout]

[Emphasis added]

2) An email from the grievor to Ms. Larcher-Auger dated January 4, 2007 that stated the following:

. . .

[Translation]

> *Moreover, with a view to returning to work, I would like to be informed of the steps that have been taken or are being considered or proposed to ensure that my workplace is safe. I think you can understand that my safety is a concern for me given the facts with which we are dealing.*

. . .

3) The grievance dated January 23, 2007 that stated the following:

> *I grieve the Employer violated Article 16 of the collective agreement. I grieve the Employer violated the Canadian Human Rights Act. I grieve the Employer violated its duty to accommodate me which is a violation of the Canadian Human Rights Act and Article 16 of the collective agreement.*

4) The grievor's notice to the employer on December 21, 2006 that she was seeking advice from the Canadian Human Rights Commission and the subsequent notice from that Commission dated February 1, 2007 and copied to Mr. Cossette and Ms. Marquis that the grievor should use the grievance process to file a complaint before doing so with the Commission.

[151] There is no written formality in either the collective agreement or the *CHRA* with respect to making a complaint. While there may have been some doubt about the grievor's intention to file a complaint before December 27, 2006, there can be no doubt about her intention after that date.

[152] The employer's lack of understanding of the grievor's complaint and the meaning of its obligations under the *CHRA* and the collective agreement is illustrated in the following excerpt from the final-level response to the grievance, dated October 18, 2007:

. . .

> *It is important to note that upon receipt of the anonymous correspondence at Passport Canada headquarters building in December 2006, Passport Canada took all the necessary measures to ensure your safety and to determine the origin of this correspondence. An administrative investigation was ordered and the Royal Canadian Mounted Police ("A" Division) was involved. The administrative investigation was inconclusive as to the originator of any items of anonymous correspondence and pointed out* [*sic*] *to no employee having a motive or*

> *advantage to be gained through sending such correspondence. Some aspects of the same incidents are currently under investigation by the Royal Canadian Mounted Police.*
>
> *Furthermore, I personally met with all employees informing them that Passport Canada was taking this situation very seriously, that the security of all employees was our priority and that Passport Canada was committed to a work place free of discrimination and/or harassment and that such behavior will not be tolerated.*
>
> *I was also informed that while you were employed with Passport Canada, management made very reasonable effort to accommodate with flexible hours or time off and to fulfill your religious obligations.*
>
> *In light of the above, it is my opinion that Passport Canada had dealt correctly with the situation. Consequently, your grievance is denied.*
>
> . . .

[153] The obligation under article 16 of the collective agreement is not merely to react to complaints; it is an ongoing obligation to be diligent. While the grievor could have perhaps acted more formally, this does not relieve the employer from its responsibility to investigate a situation plainly presented to it. Eliminating discrimination in the workplace is the responsibility of the employer, not the grievor. The employer must address an employee's concerns as soon as they are raised. In addition, the employer must actively implement effective mechanisms to monitor discriminatory conduct when it is brought to its attention as well as investigate and remedy all incidents of discrimination. The employer cannot simply invoke a zero-tolerance policy for workplace discrimination and hope for a discrimination-free work environment, yet do nothing to achieve it. Meeting with employees after the fact was in this case an empty gesture. Notably, since this case came to a head, the employer has rolled out a polished orientation program for employees that deals with values, policies and ethical issues.

[154] In this case, the grievor invoked much more than the anonymous correspondence; she invoked a poisoned workplace. The employer cannot be said to have lacked the knowledge of the offensive conduct. It simply chose to limit its investigation to finding the perpetrator(s) of the anonymous correspondence without paying attention to the other incidents raised by the grievor. Therefore, it is my finding that the employer failed to ensure a workplace free of discrimination for the grievor.

E. Was the grievor owed a duty of accommodation?

[155] The grievor alleges that the employer did not accommodate the medical condition created by the workplace harassment. After she filed her complaint with the police on December 21, 2006, the grievor was asked to immediately return to work because no new threats had been received. When the grievor informed the employer that she was not up to returning to work under the circumstances, the employer put her on sick leave and asked her to obtain a certificate to cover her absence as of December 21, 2006.

[156] The employer takes the position that the grievor was never disabled as a result of the anonymous correspondence and that there is no expert medical evidence that the symptoms she suffered were related to that correspondence. When she was asked to return to work on December 21, 2006, the grievor provided a medical certificate to cover her absence until mid-February 2007, and she did not mention that she wanted to be accommodated. Requiring a medical certificate to justify sick leave is not discriminatory, and in any event, the grievor was unable to resume her duties full-time.

[157] The evidence is that the employer never questioned the legitimacy of the medical certificates submitted by the grievor beginning on December 21, 2006, either when they were submitted or at the hearing. The employer's witnesses readily accepted that the grievor was absent on sick leave due to the threatening letters. Hence, I see no reason not to accept the grievor's assertion that she suffered emotionally and mentally from the trauma of being notified of the threats, the previous discriminatory actions and eventually the employer's decision to terminate her secondment. Given the timing of the grievor's illness and the situation she faced at the workplace, it is reasonable to conclude that the workplace situation triggered the grievor's inability to work. The employer's lack of concern for the grievor's well-being and its failure to investigate her allegations of religious discrimination were perhaps the greater cause of the grievor's illness than the threats themselves. That being said, I am persuaded that the timing of the grievor's illness, along with her testimony as to its effect, provide ample evidence that the grievor's emotional and physical distress were a result of the discrimination she suffered in the workplace and the failure of the employer to provide a workplace free of discrimination, contrary to section 16 of the collective agreement and section 7 of the *CHRA*.

[158] Having found that the grievor became disabled as a result of the discrimination she suffered in the workplace, it follows that the employer had the obligation to accommodate her. The law is well settled that an employer must accommodate a disabled employee unless doing so would result in undue hardship. The onus rests on the employer to show that it has met its statutory threshold. While the grievor and the union must cooperate with the employer's efforts to accommodate, the primary responsibility lies with the employer. Neither is the duty to accommodate static; it continues to evolve, depending on individual conditions. Apparently, the employer did not believe it had an obligation to accommodate the grievor because her secondment was coming to an end as a result of the completion of a competition process in which she was not successful.

[159] For reasons that I specified earlier in this decision, I disagree with the employer's justification for not accommodating the grievor. Each case must be assessed on its facts. The grievor was absent because of workplace discrimination and harassment. Ms. Bowman, the other employee whose secondment was terminated, was not. The circumstances of the grievor were different from those of Ms. Bowman.

[160] The duty to accommodate has evolved to such an extent that the law now requires an employer to look beyond the employee's own position as a means of accommodation. In fact, the employer must increasingly broaden the scope of its search for suitable accommodation. If the employee is unable to do his or her own job, then the employer must consider modifying another job or adjusting the work duties to accommodate the employee. The duty to accommodate persists as long as the employer is able to achieve it, short of undue hardship. I was not convinced that the employer even considered finding other work for the grievor. As a point of reference, Ms. Bowman was able to find other employment at Passport Canada after her secondment in Ms. Crone's unit was terminated. The decision of the Supreme Court of Canada in *O'Malley* is unequivocal that the employer must tender evidence of undue hardship to succeed in its defence that it could not accommodate the employee.

[161] Accordingly, I find that the employer did not accommodate the grievor's medical condition created by the workplace harassment.

F. Was the termination of the grievor's secondment related to the anonymous correspondence?

[162] The grievor filed her grievance on January 23, 2007. She received notice of the termination of her secondment on January 24, 2007. The grievor did not file a grievance disputing the termination of her secondment. However, at the hearing, she testified that the termination of her secondment immediately after she filed her grievance had an impact, not only on her well-being and self-confidence, but had a financial impact as well. She alleged that the termination of her secondment after she had filed a grievance was further evidence of workplace discrimination due to her religious beliefs. The grievor requested that I take this event into consideration in determining a remedy.

[163] In its closing argument, the employer took the position that the notice of termination of the grievor's subsequent was subsequent to the grievance and should not be considered. Nonetheless, as part of its case, a substantial part of the evidence was led about events subsequent to the grievance, namely, the administrative investigation and the organizational reasons for terminating the grievor's secondment. Moreover, the CEO admitted in his testimony that ending the grievor's secondment was a consideration after the anonymous correspondence was received and before she was terminated on January 24, 2007 because the grievor had decided to limit her communications with the employer to certain key persons. This fact is recorded as part of a management meeting held on December 28, 2006. The grievor was not aware of this consideration until she received a copy of the employer's documents as a result of an access-to-information request made in preparation for the adjudication of her grievance.

[164] The issue before me, therefore, is whether in granting a remedy, I should take into consideration events that occurred after the grievance was filed.

[165] In *Cie minière Québec Cartier v. Québec* [1995] 2 S.C.R. 1095, a case concerning post-discharge evidence of an employee terminated because of excessive absenteeism due to chronic alcoholism, the Supreme Court of Canada held that an arbitrator could consider such evidence, but only in limited circumstances, that is, where the subsequent-event evidence is relevant to the issue in dispute. The court stated the following:

….

> *This brings me to the question I raised earlier regarding whether an arbitrator can consider subsequent-event evidence in ruling on a grievance concerning the dismissal by the Company of an employee. In my view, an arbitrator can rely on such evidence, but only where it helps to shed light on the reasonableness and appropriateness of the dismissal under review at the time that it was implemented. Accordingly, once an arbitrator concludes that a decision by the Company to dismiss an employee was justified at the time that it was made, he cannot then annul the dismissal on the sole ground that subsequent events render such an annulment, in the opinion of the arbitrator, fair and equitable. In these circumstances, an arbitrator would be exceeding his jurisdiction if he relied on subsequent-event evidence as grounds for annulling the dismissal. To hole otherwise, would be to accept that the result of a grievance concerning the dismissal of an employee could vary depending on when it is filed and time lag between the initial filing and final hearing by the arbitrator. […]*
>
> ….
>
> [Emphasis added]

[166] While the principle that subsequent-event evidence may be admissible would appear to be settled law, nonetheless, many arbitrators have distinguished its application by relying on the statutory basis for their remedial authority. (For a discussion see Mitchnick, Mort and Etherington, Brian, *Labour Arbitration in Canada*, Lancaster House (2007), pages 114 to 118; R. Germaine, "*Post-Discharge Evidence : The Varied Response to Québec Cartier*" in Labour Arbitration Yearbook (1999-2000), Vol II at page 39 and companion articles by J.B. West- & K. Wattson and G. Fiorillo and J. Parmar; as well as, J.E. Dorsey, *"Remedial Role of Arbitrators"* in Labour Arbitration Yearbook 1998 at page 29; as well as *Développements récents en droit du travail* (1996), Éditions Yvon Blains inc. at pages 148 and 149; Gagnon, Pierre, *Le droit du travail au Québec* (5e édition), Éditions Yvon Blais at pages 526 and 527; Blouin, Rodrigue et Morin, Fernand, *Droit de l'arbitrage de grief* (5e édition), Éditions Yvon Blais at pages 388 and 389..)

[167] This being said, it is my view that the Supreme Court of Canada did not intend to limit the principle of the admissibility of relevant subsequent-event evidence to discharge cases, but refined a broad evidentiary principle that applies to the scope of

all arbitral authority, that is, that the arbitrator must consider all the relevant evidence before deciding the outcome of a grievance.

[168] It should also be added that an administrative tribunal has some flexibility in applying the rules applied by the courts. This is not to suggest that an administrative tribunal should ignore the traditional canons upon which decisions are made. The integrity of a decision relies first and foremost on the relevance and reliability of the evidence. In the case of the *PSLRA*, the procedure and conduct before the adjudicator is permissive. Paragraph 226(1)(d) states the following:

> ***226.****(1) An adjudicator may, in relation to any matter referred to adjudication,*
>
> *….*
>
> *(d) accept any evidence, whether admissible in a court of law or not;*
>
> *….*

This provision gives the adjudicator the discretion to admit evidence into the record that would not otherwise satisfy the strict evidentiary test of admissibility, the only caveat being that it must relevant to the subject matter of the proceedings.

[169] The discretion of the adjudicator is further enhanced by subsection 228(2) of the *PSLRA* that defines the decision-making power of the adjudicator:

> ***228.****(2) After considering the grievance, the adjudicator must render a decision and make the order that he or she considers appropriate in the circumstances. ….*

These provisions, together with the principle articulated by the Supreme Court of Canada, in my view, leave the door open for an adjudicator to consider subsequent-event evidence that may shed light on the context of a grievance.

[170] In this case, the subsequent-event evidence put forward by the grievor is relevant to her grievance because it serves to confirm the ongoing nature of the employer's inappropriate response to the incidents she alleged as being discriminatory. The severance of the grievor's employment after receiving the anonymous correspondence was not only another indication that the employer condoned the discrimination, but it was the culminating event of its discriminatory behaviour.

[171] The termination of the grievor's secondment is also relevant because it happened while she had an illness that can be attributed to the employer's discriminatory treatment. The grievor's secondment was to run until April 30, 2007. Her medical practitioner declared her able to return to work on February 19, 2007. Yet the employer terminated the grievor's secondment effective February 7, 2007. As a result, the grievor was not given the opportunity to even request accommodation for her return to work.

[172] I reject the employer's argument that the termination of the grievor's secondment was not discriminatory because another employee who was unsuccessful in the competition process also had her secondment terminated on the same date.

[173] I am not persuaded by the employer's argument that the termination of the grievor's secondment was an event separate from her complaint or that it was "an unfortunate coincidence. When her secondment was terminated, the grievor had not completed two high-profile projects assigned to her, and the competition process had apparently not yielded a sufficient number of candidates to fill all the positions. Therefore, the urgency of terminating the grievor's secondment remains unexplained. I have no information concerning Ms. Bowman other than that her secondment was terminated on the same date as the grievor and that she found other employment at Passport Canada shortly afterward. This in and of itself does not make terminating the grievor's secondment less discriminatory. The grievor was in a different situation than Ms. Bowman. Ms. Bowman had not filed a complaint of discrimination nor had she received threatening correspondence.

[174] I also examined the sequence of events that preceded the grievor's termination. The tight sequence of events that follow suggest that, after the grievor sent her chronology to the Deputy Minister, the employer finely scripted the termination of her secondment with Passport Canada.

- December 21, 2006, the IT Security Incident Report is issued, stating that it is not possible to identify the sender of the anonymous email;
- December 21, 2006, the grievor files a complaint with the Gatineau police as requested by the employer;
- December 21, 2006, the grievor advises the employer of her intent to seek advice from the Canadian Human Rights Commission;

- December 21, 2006, the employer ends the grievor's administrative leave and asks her to obtain a certificate of medical fitness to participate in an internal investigation;

- December 21, 2006, the grievor sends an email to the union, requesting that she not speak with anyone other than those immediately involved in the investigation. A copy is sent to the employer;

- December 22, 2006, the grievor begins sick leave;

- December 23, 2006, the grievor files a medical certificate indicating that she will be absent from work for medical reasons until January 22, 2007;

- December 27, 2006, the grievor sends an email to the Deputy Minister and others that includes a detailed "Chronology of Hatred at Passport Canada";

- December 28, 2006, a management meeting is held to discuss the grievor's chronology that was forwarded to the Deputy Minister's office. Mr. Cossette states that the employer should consider ending the grievor's secondment because she wishes to limit her contacts with the employer;

- December 29, 2006, the employer advises the grievor in an email that it will undertake a preliminary investigation into her "work environment";

- January 2, 2007, Ms. Crone provides her chronology of events dated December 30, 2006, to the investigators;

- January 3, 2007, the grievor obtains a certificate of medical fitness to participate in an internal investigation;

- January 4, 2007, the grievor requests to be informed of the steps that the employer intends to take to make her workplace secure;

- January 9, 2007, the global scores for the ES-05 competition are completed; the grievor is not a successful candidate;

- January 14, 2007, Ms. Pezzack provides her chronology to the investigators;

- January 15, 2007, the grievor is informed in writing that she is an unsuccessful candidate in the ES-05 competition;

- January 19, 2007, the grievor obtains a medical certificate extending her sick leave to February 5, 2007;

- January 22, 2007, Mr. Nussbaum (DFAIT) advises Ms. Crone that he is about to permanently fill the grievor's substantive position;

- January 22, 2007, Ms. Crone responds to Mr. Nussbaum by advising him that the grievor was unsuccessful in the ES-05 competition, that her plan is to likely end the grievor's secondment and that "there is a sensitive issue surrounding this file" and to give her a call;

- January 23, 2007, the grievor files her grievance; and

- January 24, 2007, the grievor is advised that her secondment will be terminated as of February 7, 2007.

[175] While I agree with the employer that the grievor was given notice that her secondment could be terminated with two weeks' notice, this argument appears to me to be window dressing compared to what really occurred.

G. <u>The employer's liability</u>

[176] The employer argued that, by investigating the anonymous correspondence and coming up empty handed, it met its obligations towards the grievor. It submitted that it could not be responsible for the acts of people who were unknown or who were not under its control.

[177] The employer's liability depends on its knowledge of the offensive conduct and the extent of its response. This liability can be established by answering two questions. First, did the employer know about the alleged discrimination or harassment, and if so, what was done to address it? Second, if the employer did not know about the harassment, what steps did it take to protect its employees from discrimination and harassment?

[178] In considering the evidence and the submissions of the parties, I have concluded that the employer did know about the alleged discrimination but that it did not take steps to address it. In fact, it was poorly advised of its obligations, and its subsequent actions simply compounded the discrimination. In *Robichaud v. Canada (Treasury Board),* [1987] 2 S.C.R. 84, the Supreme Court established very clearly the liability of employers for all acts of their employees "in the course of employment." This latter expression was determined to mean "job related." The Court explained that the employer's liability under the *CHRA* is purely statutory and that it serves a purpose similar to that of vicarious liability in tort by placing an organizational responsibility on the employer to take effective remedial action to remove the undesirable conditions. The object of that *Act* is the removal of discrimination, as stated in *Robichaud*:

. . .

> 8. *The purpose of the Act is set forth in s. 2 as being to extend the laws of Canada to give effect to the principle that every individual should have an equal opportunity with other individuals to live his or her own life without being hindered by discriminatory practices based on certain prohibited grounds of discrimination . . . As McIntyre J., speaking for this Court, recently explained in* Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd., *[1985] 2 S.C.R. 536, the Act must be so interpreted as to advance the broad policy considerations underlying it. That task should not be approached in a niggardly fashion but in a manner befitting the special nature of the legislation . . . .*
>
> 9. *It is worth repeating that by its very words, the Act (s. 2) seeks "to give effect" to the principle of equal opportunity for individuals by eradicating invidious discrimination. It is not primarily aimed at punishing those who discriminate. McIntyre J. puts the same thought in these words in* O'Malley *at p. 547:*
>
> > *The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant.*
>
> 10. *Since the Act is essentially concerned with the removal of discrimination, as opposed to punishing anti-social behaviour, it follows that the motives or intention of those who discriminate are not central to its concerns. Rather, the Act is directed to redressing socially undesirable conditions quite apart from the reasons for their existence.* O'Malley *makes it clear that "an intention to discriminate is not a necessary element of the discrimination generally forbidden in Canadian human rights legislation" (at p. 547). . . .*
>
> . . .

[179] Thus, *Robichaud* disposes of the employer's argument that it cannot be liable because it was ignorant of the perpetrator of the anonymous letters and because it was unaware of the discrimination. I also take the view that the employer turned a blind eye to the signs that discrimination and harassment came from within the organization. The IT investigation report states in the first paragraph of the "Background" that the email was likely an employee or co-worker and further in the part relating to the "Investigation" that "[t]he individual certainly seems to have

knowledge of personnel working within this group," and further, ". . . it is most likely indicative of an insider." Ms. Lévesque testified that she did not shared the information about the grievor with anyone outside the organization. Ms. Crone testified that details contained in the December 15, 2006, email would have been known to only three people.

[180] As much as the employer would like to believe that it cannot be responsible for the discriminatory actions because it could not identify the perpetrator of the anonymous correspondence, the employer could not ignore that the discrimination, whether the anonymous correspondence or the acts of Ms. Lévesque or those of its managers, Mses. Crone and Pezzack, were workplace related. The Supreme Court in *Robichaud* could not have been clearer. Section 2 of the *CHRA* focuses on the removal of invidious discrimination, not on punishing those who discriminate. That *Act* is geared to provide relief to the victim of discrimination, and it is the results of the discriminatory actions that are significant. The motives or intentions of those who discriminate are not the concern but rather redressing the undesirable conditions. *O'Malley* is unambiguous in stating that an intention to discriminate is not a necessary element of the discrimination generally forbidden in human rights legislation.

H. <u>Conclusion</u>

[181] On the basis of these findings, I conclude that, on a balance of probabilities, the grievor's allegations are to be believed, and the employer has not provided a satisfactory explanation for its actions. In addition, I find that the employer failed to accommodate the grievor to the point of undue hardship by not attempting to find suitable employment for the grievor after she made it known in December 2006 how deeply the anonymous letters had affected her. Granting brief administrative leave and sick leave, providing her taxi chits and suggesting EAP assistance is not accommodation.

[182] Accordingly, the grievance is allowed, and I make the following declarations:

> 1) The employer violated paragraph 7(*b*) of the *CHRA* by differentiating adversely in relation to the grievor on a prohibited ground of discrimination.

2) The employer violated clause 16.01 of the collective agreement by allowing the grievor to suffer discrimination, interference, harassment and a poisoned workplace by reason of her religious affiliation.

3) The employer further violated clause 16.01 of the collective agreement by failing to promptly investigate the grievor's complaints of religious discrimination after they were brought to its attention.

4) The employer violated sections 7 and 15 of the *CHRA* by not seeking to accommodate her disability caused by discrimination, interference, harassment and a poisoned workplace.

5) The grievor is entitled to relief as a result of the employer's violations in accordance with paragraphs 53(2)(*e*) and 53(2)(*c*) of the *CHRA*.

[183] My decision about a remedial award is taken under reserve. Should the parties be unable to reach an agreement within 60 days concerning an indemnity that may be owed the grievor, upon application by either party I will exercise my discretion to fashion a remedial order that is appropriate in the circumstances.

[184] For all of the above reasons, I make the following order:

(The Order appears on the next page)

V. Order

[185] The grievance is allowed.

[186] The grievor is owed compensation.

[187] I reserve my jurisdiction for a period of 60 days from the date of this decision.

May 18, 2010.

Michele A. Pineau,
adjudicator