

Date: 20150420

File: 566-02-8961

Citation: 2015 PSLREB 34



Public Service Labour Relations Act

Before an adjudicator

BETWEEN

THERESA NAVIKEVICIUS

Grievor

and

**DEPUTY HEAD
(Department of Employment and Social Development)**

Respondent

Indexed as

Navikevicius v. Deputy Head (Department of Employment and Social Development)

In the matter of an individual grievance referred to adjudication

Before: John G. Jaworski, adjudicator

For the Grievor: Herself

For the Respondent: Caroline Engmann, counsel

Heard at Hamilton, Ontario,
July 22, 2014 and March 3 to 5, 2015.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Theresa Navikevicius (“the grievor”) was employed by Human Resources and Skills Development Canada (“HRSDC”), now Employment and Social Development Canada (collectively, “the employer”), as a Client Service Officer at the Program Manager (PM) 01 group and level in the Hamilton, Ontario, call centre of HRSDC. On June 22, 2012, the grievor was terminated from her position in accordance with paragraph 12(1)(e) of the *Financial Administration Act*, R.S.C., 1985, c. F-11 (“FAA”). The employer determined that it had cause to terminate her employment on the basis that her continued unauthorized absence from work constituted an abandonment of her job.

[2] On July 26, 2012, the grievor filed a grievance against the termination of her employment and requested that

1. the termination of her employment be rescinded;
2. the termination letter of June 22, 2012 be removed from her personnel and human resources files;
3. she be made whole;
4. she receive damages including but not limited to the restoration of all benefits; and
5. she receive any other remedy deemed appropriate by an adjudicator.

[3] On October 4, 2013, the grievor’s grievance was dismissed at the final level of the grievance process, and on September 4, 2013, she referred her grievance to the Public Service Labour Relations Board (“PSLRB”) for adjudication. Her reference to adjudication included an allegation of a breach of article 19 (“No Discrimination”) of the collective agreement between the Public Service Alliance of Canada (“PSAC”) and the Treasury Board, which expired on June 20, 2014.

[4] The grievance was scheduled to be heard July 22 to 25, 2014 in Hamilton, Ontario. On July 18, 2014, the PSAC withdrew its representation of the grievor and also withdrew that portion of her grievance which alleged a breach of the collective agreement.

[5] The hearing days of July 23-25, 2014 were postponed.

[6] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (“the Board”) to replace the former PSLRB as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 396 of the *Economic Action Plan 2013 Act, No. 2*, an adjudicator seized of a grievance before November 1, 2014, continues to exercise the powers set out in the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) as that Act read immediately before that day.

[7] At the outset of the hearing, I made an order excluding witnesses.

II. Summary of the evidence

[8] The employer called three witnesses: John Bedic, Acting Service Manager for the Hamilton call centre, Brian St John, Director responsible for all call centres of the employer in Ontario, and Shannon Hughes, Labour Relations Consultant. The grievor testified on her own behalf.

[9] The employer provided me with a brief of documents, which contained 16 tabs, which I marked as Exhibit E-1, with the understanding that all documents contained therein, with the exception of the copies of the grievance, final-level grievance response, and reference to adjudication (form 21), would have to be properly identified or would be removed from the brief and not be retained. Documents that were contained at Exhibit E-1 at Tabs 4, 6, 12, 13, 15, and 16 were all removed and do not form part of the exhibit.

[10] The grievor commenced her employment with the employer in May of 2001 as a part-time indeterminate employee. Her scheduled work hours were seven hours per day, five days per week.

[11] At the time the grievor’s employment was terminated, she reported to Mark Broerse, who was her team leader. Mr. Broerse in turn reported to Mr. Bedic. Mr. Bedic became the Acting Service Manager in May of 2011 and reported to Mr. St John.

[12] Lorene Slaughter was the Service Manager for the Hamilton call centre prior to May of 2011.

[13] Ms. Hughes was consulted by Ms. Slaughter, Mr. Bedic, and Mr. St John with respect to matters involving the grievor starting in or about January of 2011.

[14] The grievor testified that she had long-standing issues with the employer regarding her work environment. She testified that the workload was heavy and the ergonomic conditions were not good. Mr. St John, who was responsible for all of the Ontario call centres, including the Hamilton call centre, stated in his evidence that call centres were difficult work locations and that there were often requests and requirements for accommodation.

[15] The grievor testified that prior to the summer of 2010, she did not have a family physician. When medical issues arose, she would see a doctor at a walk-in clinic or at a local hospital emergency room. In the summer of 2010, Dr. Mark Levy became her family physician.

[16] On January 6, 2011, the grievor presented her employer with a note from Dr. Levy, which note was dated December 3, 2010 (“the December 3 note”), which was handwritten on what appears to be prescription pad paper. The December 3 note stated that the grievor would be able to work either only 4 days per week or 2 days per week and this was “due to her medical problems + stressors in her life from work.” The number “2” preceding the word “day” has a “4” that appears to be written over it.

[17] The grievor testified that she delivered the note in January of 2011 rather than December 3, 2010 because she could not afford to lose any days of work. On January 11, 2011, there was an exchange of emails between the grievor and Ms. Slaughter with respect to the December 3 note. In response to an enquiry by the grievor as to whether she would work on a particular day, Ms. Slaughter enquired of the grievor about the delay in the delivery of the note, as follows:

...

In addition your medical note was dated December 3, 2010, I require an explanation for the delay in submitting it to your team leader as you should not have been working a full time schedule in December.

...

[18] In response to Ms. Slaughter's enquiry about the delay, the grievor wrote back, as follows:

...

I wish I could have afforded to begin my accommodation at the beginning of December 2010. If I had done this I would have lost 7 days pay for the month, as I do not get paid for Christmas, Boxing Day and New Year's day.

...

[19] On January 21, 2011, the employer provided the grievor with a letter ("the January 21 letter") addressed to Dr. Levy, which was a response to the December 3 note. The January 21 letter asked Dr. Levy to provide the employer with a clear understanding of what, if any, functional limitations the grievor may have, such that any accommodation in the workplace, if necessary, could be addressed. The January 21 letter set out, in summary fashion, the duties and responsibilities of the grievor's work and attached a functional abilities form as well as a copy of the grievor's work description. The January 21 letter posed the following questions:

1. *Does **Theresa** have a disability that must be accommodated within the workplace?*
2. ***Theresa** currently works from _____ to _____ per day (7 hours per day, 35 hours per week). Is she fit to continue reporting for work at the Hamilton CPP/OAS National Call Centre at her current schedule?*
3. *If a reduction in hours to Theresa's current schedule is being recommended, what do you recommend as a new schedule? What is the duration of this new schedule?*
4. *Is Theresa able to perform all of the duties of her Client Services Officer work description? If not, what duty(ies) is she unable to perform?*
5. *Does **Theresa** have any functional limitations that must be accommodated within the workplace? If so, please provide details of any functional limitations and/or restrictions she may have.*
6. *Are the functional limitations and/or restrictions identified permanent or temporary in nature? If temporary, please provide timeframes.*

7. *Are there any triggers/stressors in the workplace that her employer should be aware of **which would prevent her from performing the functions of her job?***
8. ***Would you also please complete the attached Functional Abilities Form which will provide additional details on Theresa's abilities/restrictions with the workplace.***

[Emphasis in the original]

[20] The January 21 letter was provided to the grievor together with a second letter dated that same day, addressed to her, from Ms. Slaughter. This letter to the grievor stated as follows:

...

In order to provide you with an appropriate workplace accommodation, it is necessary that we have a clear understanding of any functional limitations you may have within the workplace.

Therefore, we require you to take the attached letter/attachments to your treating physician for discussion and have your physician provide us with written responses to the questions posed. Please not that we are not asking for a medical diagnosis from your physician, only your functional limitations within the workplace.

This information should be provided to me by February 11, 2011. Once this information is received from your treating physician, you and I will then be able to determine appropriate options for a suitable workplace accommodation.

...

[21] On February 11, 2011, the grievor filed a grievance which took issue with some of the wording contained in the January 21 letter. The grievance was denied.

[22] According to the evidence, Dr. Levy was charging a \$200.00 fee for providing a response to the January 21 letter and completing the functional abilities form. An issue appears to have arisen over how and when this fee was to be paid. The evidence about this is somewhat unclear. According to the grievor, Dr. Levy wanted cash, not a cheque or a credit card, and wanted the money up front, which she was not prepared to pay, and as such, Dr. Levy would not provide the necessary response.

[23] The employer's evidence was that they were prepared to pay the fee.

[24] The grievor stated that while the employer's evidence was that they were prepared to pay for the response to the January 21 letter and offered to pay by credit card (Corporate American Express Card), failing which they were prepared to enter into a contract with Dr. Levy and pay him by cheque (once he delivered the response to the January 21 letter), she did not believe the employer.

[25] Exhibit E-8 is a series of email exchanges dated March 3 and 4, 2011; the initial exchange is between the grievor and Ms. Slaughter, and the latter exchange is between Ms. Slaughter and personnel at the employer who could facilitate the payment of funds to Dr. Levy. These documents clearly show that the employer was taking steps to see to the payment of the \$200.00 fee to Dr. Levy.

[26] Exhibit E-9 is another set of email exchanges between the grievor and Ms. Slaughter. In an email that is part of Exhibit E-9 dated March 20, 2011, Ms. Slaughter writes to the grievor and amongst other things states to the grievor:

...

The medical information is required in order to appropriately respond to your requirement for a workplace accommodation. Just to reconfirm the employer will pay for the medical report once appropriate arrangements are made for payment. This matter needs to be resolved as soon as possible.

[27] Also as part of Exhibit E-9 is an email dated March 22, 2011 from the grievor to Ms. Slaughter, which states as follows: "This doctor is not going to complete the forms, unless the money is paid up front. He no longer is my doctor. I will see if I can get it completed at a walk in. I really do not know what to do."

[28] In May of 2011, Ms. Slaughter ceased to be the manager responsible for the grievor's work unit. Mr. Bedic became the manager responsible.

[29] Ms. Slaughter did not testify before me.

[30] Mr. Bedic testified that he neither had a discussion with the grievor with regard to the payment for the Levy response to the January 21 letter nor did anything with respect to any payment for that response.

[31] Mr. Bedic testified that while he was aware that there had been a change on the face of the Dr. Levy note of December 3, 2010, and had been advised by Ms. Slaughter

about her actions in this regard, he stated that he had no discussion with the grievor about the change. According to Mr. Bedic, when he took over for Ms. Slaughter, the grievor was working four days a week. He confirmed that the grievor told him she was being impacted by her work and that she was in pain. When asked what he did about it, he stated that he required the functional limitation assessment.

[32] Dr. Levy did not testify before me.

[33] The grievor testified that she was on unpaid leave in the summer of 2011 and was supposed to return to work from leave in September. She stated that she returned to work in mid-September and worked until the end of October 2011. The exact dates of the leave were not provided to me.

[34] Exhibit E-10 is an email dated October 7, 2011 sent by Mr. Bedic to Ms. Hughes. The email was about the grievor. Mr. Bedic stated in his evidence that he contacted Ms. Hughes as he was new in the manager role and did not know what the options were, especially without a medical note. The email states as follows:

I spoken to one of my staff this morning and she advised me that she wants out of the call centre as soon as possible. She is wanting to take a three year leave, with the hope that a new job is offered to her before the three years ends. Part of her reason is the work setting and part is medical. I advised her that she should be providing a medical, but she said she has no Doctor and the Clinics can't help (appears she doesn't want to go down that road). What options can I present to her.

[Sic throughout]

[35] The grievor admits to having spoken to Mr. Bedic about taking more leave in October of 2011 but denies that she was looking for three years' leave, as she could not afford to take that kind of time off. She states that she did take leave at that time, which was confirmed by Mr. Bedic in his testimony. The exact time frame of and length of the leave taken was not clear. I was not provided with any documents regarding the specifics of the leave; however, the grievor testified that she took unpaid leave for the months of November and December 2011 and January of 2012.

[36] Mr. Bedic testified that in January of 2012, while the grievor was on leave, they had a telephone conversation, during which a Health Canada ("HC") assessment was discussed. He testified that during the course of the discussion about the

HC assessment, the grievor had stated that she wanted the doctor who would conduct the assessment to have been born and educated in Canada, who spoke English, and who shared her race and ethnicity. Mr. Bedic stated that the grievor told him that she was aware of immigrants in her community who were provided with doctors who speak their language and shared their ethnic background and that she felt it would be fair for her to get the same rights as these immigrants. Mr. Bedic testified that he told the grievor that these requirements could not be entertained.

[37] The grievor, in her evidence, denies that as part of her request regarding the HC doctor she asked that the doctor be able to speak English.

[38] Mr. Bedic stated that he had asked the grievor to put her request in writing because he had hoped that if she actually saw what she was requesting, she would understand why the request was inappropriate.

[39] Exhibit E-10 is an exchange of emails between the grievor and Mr. Bedic on February 21, 2012 with respect to the HC assessment and the grievor's request with respect to the doctor who would conduct the assessment. The following is the exchange:

[9:00 a.m. From the grievor to Mr. Bedic:]

I have not heard anything from you re: my medical with health [sic] Canada. It has been a month since we last discussed this. Has an appointment been arranged?

[9:59 a.m. From Mr. Bedic to the grievor:]

When we spoke you had indicated that there were specific requirements you had in relation to the Doctors. You were to provide those to me, to see if your request could be accommodate [sic].

If this is no longer a concern for you please advise.

[11:31 a.m. From the grievor to Mr. Bedic:]

I believe that I did state my request to be accommodated over the phone. I would be more comfortable with a doctor that was born and educated in this country, who shares my race and ethnicity.

[40] Mr. Bedic stated that he forwarded the exchange as set out in paragraph 39 above to Ms. Hughes and sought her advice. Ms. Hughes' advice is found in an email from her to Mr. Bedic dated February 28, 2012 at 2:58 p.m. (Exhibit E-12), as follows:

. . .

For the time being , this case is a Labour Relations DTA [duty to accommodate] case since Theresa is not leaving work due to illness/injury, or returning to work following an absence due to an illness/injury.

Please meet with Theresa to discuss her preferences for the type of doctor she is requesting to see for the Health Canada Fitness to Work Evaluation (FTWE). Please be sure to cover the following information:

-Theresa was given the opportunity to review the requirements for the Health Canada doctor that she specified to you over the telephone

-Theresa followed up in writing to restate that she is more comfortable with a doctor who is was [sic] born and educated in this country, and shares her race and ethnicity.

The employer is not able to support Theresa's request to have a doctor from Health Canada perform a Fitness to Work Evaluation (FTWE) with the preferences she has described. Management is very concerned about the preferences she has outlined as they are in conflict with the following:

- 1) The Code of Values and Ethics for the Public Service. . . .*
- 2) The Canadian Human Rights Act. . . .*
- 3) The Guidelines of Conduct for Service Canada: . . .*

**It is important that she understands that this type of behaviour is not appropriate and will not be tolerated. At this time, it is recommended that this issue be addressed by means of outlining expectations (coaching) versus pursuing disciplinary action.*

If Theresa is interested in having Health Canada or an Independent Medical Examiner perform a FTWE to determine any functional limitations she may have in the workplace, please let her know that employees are expected to be cooperative and reasonable in the accommodation process. The employer is not able to support personal preferences that are not within the law and that are not in conformity with public service values and ethics.

Lastly please provide Theresa with a deadline to provide the two consent forms required for the FTWE through Health Canada (COB next Tuesday). There are two consent forms to sign: Consent to Undergo a Fitness to Work Evaluation and a Consent to Release Medical Information form. The Consent to Undergo a Fitness to Work Evaluation is signed by the employee and given to the Manager. The Manager includes that signed form (Consent to Undergo a Fitness to Work Evaluation) with the letter to Health Canada that the Manager prepares and sends to Health Canada. The Consent to Release Medical Information form is signed by the employee and sent directly to Health Canada (by the employee).

...

[41] Mr. Bedic testified that in or about this time, a decision had been made to place the Hamilton call centre on a closure list, and it was scheduled to close at the end of August or early September 2012.

[42] A meeting took place on March 2, 2012. Present at the meeting were the grievor, Mr. Bedic, and the grievor's bargaining agent representative, Donna Kinchen. There is some dispute over how events unfolded at the meeting.

[43] Mr. Bedic testified that his intent at the meeting was to move forward with the HC assessment process. To do this, the request by the grievor with respect to her requirements for the doctor had to be addressed and those requirements removed. He had the material (as advised by Ms. Hughes in her email of February 28, 2012) available to explain to the grievor why her request could not be acceded to. Mr. Bedic testified that during the course of the meeting, he explained to the grievor why the requirements requested by her, with respect to the HC doctor, were not acceptable to the employer. He stated that the grievor was not prepared to accept what he had to say on the matter. He stated that the grievor accused him of "setting her up." Mr. Bedic stated that he told the grievor that this was not his intent but that his intent was to get her to see her own request and understand how it was inappropriate. He stated that the reference material set out in Ms. Hughes' email of February 28, 2012 (Exhibit E-12) were given to the grievor.

[44] The grievor testified that it was her understanding that the meeting was to facilitate the HC assessment. She testified that Mr. Bedic started off the meeting by stating how disturbed he was at her request and that he had passed it around the workplace, and other people in the workplace were disturbed by the request. The

grievor stated that Mr. Bedic told her that he would have disciplined her if he could have but that he asked the grievor's co-workers if she had ever done something like this before, and since they said no, he couldn't discipline her. According to the grievor, Ms. Kinchen said and did nothing. The grievor confirmed that Mr. Bedic had the documents as set out in Ms. Hughes' email of February 28, 2012. She stated that he was angry and yelling at her; he was stabbing his material with his pen, and saliva was both spraying from his mouth and massing at the corners of his mouth.

[45] During his cross-examination, Mr. Bedic confirmed to the grievor that he told her during their telephone conversation that the employer could not accede to her request regarding certain requirements for the HC doctor.

[46] The grievor never asked Mr. Bedic nor did she suggest to him that he had shown to other employees at the Hamilton call centre her request with respect to the HC doctor.

[47] The grievor never asked Mr. Bedic nor did she suggest to him that he was stabbing his pen into material on his desk or that saliva was both spraying from his mouth and amassing at the corners of his mouth.

[48] Exhibit G-2 is an email exchange between the grievor and Ms. Kinchen. The first email in the chain is the grievor's email of August 6, 2012, and the second email in the chain is Ms. Kinchen's response dated August 10, 2012. The email exchange deals with a number of issues arising out of the grievor's termination including, the grievor's and Ms. Kinchen's recollection of the March 2 meeting. As the entire exchange is relevant for the purposes of the case, I have set it out in its entirety.

[49] The grievor's email of August 6, 2012 at 10:58 a.m. to Ms. Kinchen was as follows:

Donna:

When I met you on Thursday July, 26, 2012 to give you my grievance presentation form, I asked you about the grievance that I put in before I had to leave the office regarding not being paid for all the work hours that I worked. You replied that I quit and that you did not pursue the grievance. Whether I am employed or not I have the right to fair representation. I do not work for free. How are you going to correct this?

You stated that you felt that I deserved to be fired because I was given the opportunity to come into the office. I have to wonder if your attitude is reflective of the union support that I am about to receive.

You also stated that John Bedic was not screaming at me in the meeting were [sic] you were present at the end of February 2012. I told you that I knew you would say this and this was the reason that I requested a copy of your notes from this meeting which you refused to provide to me. When we left that meeting, I was in tears and I told you that I was going to quit because of his abusive behaviour. You told me to think about a decision over the weekend.

Theresa

[50] Ms. Kinchen's reply email to the grievor of August 10, 2012 at 1:58 p.m. was as follows [sic throughout]:

Hi Theresa

When I met you on July 26/12 we were walking and talking so I was trying to recall what the status was with the grievance about your salary because you had taken lwop and management took an overpayment from your classification grievance lump sum payment.

You had previously stated that CSB deposit was withdrawn as well. We inquired about this to Brian St. John, the senior director and he had correspondence sent to you that we discussed with him on a conference call. We discussed that you were paid for two stat holidays that you were not entitled to and that you had advised management about these and it took several pays to recover these and we discussed why this took so long. There were a couple of other pay issues as well. The pay stubs were very difficult to follow to determine if everything is in order. I will review my notes to determine what the next steps are. I don't think it was long after this that you advised me you quit and this is the first time you have contacted me about this since then.

I DID NOT SAY YOU DESERVED TO BE FIRED!!! I don't know where you got this from, I said you were provided with a letter stating to come into the office on a specific date to either put in a leave request or return to work and you did not respond to this or come into the office. I said that management had given you the opportunity to contact them and you didn't so they assumed you had abandoned your job because you turned in your ID and the door key and advised people in the office that you quit.

I asked you if you had the opportunity to see the Health Canada doctor (and only request a female doctor) would you return to work and you replied, to an abusive environment where the manager yells. So you really didn't answer my question, so I'm not sure if you want to or not. I advised you that we are going to be doing EI processing so that we won't be the call centre effective Jan/13.

As far as the manager yelling, he did not. When you said to him "you're trying to set me up" and he said "what would I have to gain from this" he sat up straighter and changed his tone slightly but he did not yell. I think he was insulted by your accusation because he managed to get you an apt with a Health Canada doctor without you providing a doctor's note to get this appointment.

As you recall when we left the meeting with John I said let's talk because you were noticeably upset. So we sat in the coaching room for about an hour and a half. I said much more than just "think about it over the weekend". I advised you to consider seeing any Health Canada doctor that they provide or if you felt more comfortable, ask for a female doctor. I said you may want to consider applying for WSIB for your injury and or EI sick benefits and long term disability. You said you wouldn't make much less if you were on Mothers Allowance given that you are part time and said you would think about it. I also stated that we wouldn't be in the call centre that much longer so to look forward to working in the processing centre.

I also discussed your request that you made for a doctor from Health Canada that had certain criteria and said that that is not acceptable under the departments Values and Ethics. You stated that there are people in your building that request doctors of specific ethnic backgrounds so you thought you would be able to do the same. I said that this would be a provincial rule and that we are federal and that wouldn't apply with our dept.

The manager said he could have done disciplinary action but he didn't and asked that you review the Value and Ethics guidelines only.

You came in the office on the following Monday, put your cards on my desk and stated that Shannon wasn't in the office and walked away. I asked you to stop and talk and you said you didn't want to.

I sent you an email and you didn't respond so I advised you to contact Patricia Harmony and as far as I know she has spoke to you and provided you with information in writing.

I didn't hear from you until now when you wanted to submit the grievance regarding you being fired.

...

[51] Exhibit G-2 was in the possession of the grievor at the time of the hearing but was never put to any of the employer witnesses, including Mr. Bedic. It was only introduced after the employer had completed leading its evidence.

[52] The grievor testified that on Monday, March 5, 2012, she attended at the Hamilton call centre and left her pass and identification card ("ID") with Ms. Kinchen. When cross-examined on this, the grievor stated that when she did this she was sick, distraught, emotional, and depressed.

[53] The grievor did not return to work after March 5, 2012.

[54] On April 12, 2012, Mr. Bedic wrote to the grievor (Exhibit E-1, Tab 7), which letter stated as follows:

...

This is further to events leading up to your absence from the workplace. Your last day in the office was March 5, 2012 and you are currently absent from the workplace without authorized leave.

On March 5, 2012 you indicated that it was your intention to resign from the department and that your written notice would be forthcoming. As an alternative, I asked that you consider the leave options provided by the collective agreement, and suggested that you speak to your union representative.

To date, I have not received a leave request or a letter of resignation. You are now required to provide me with documentation to support a leave request or a letter of resignation. This information is to be provided to me no later than April 20, 2012. Should this information not be provided to me by April 20, 2012, your leave will be considered to be unauthorized which may be subject to disciplinary action up to and including termination.

In addition, I would like to remind you that the Department's Employee Assistance Program (EAP) is available to assist you at any time at 1-800-268-7708.

Please contact me if you have any questions at 905-572-2765.

...

[55] The grievor confirmed she received the April 12, 2012 letter.

[56] The grievor testified that she knew that if she was going to be absent from work she needed to ask for leave and the request must be approved.

[57] The grievor did not return to work after receiving the April 12, 2012 letter; nor did she submit a letter of resignation.

[58] On April 30, 2012, Mr. Bedic wrote a second letter to the grievor (Exhibit E-1, Tab 8), which letter stated as follows:

...

This is further to my letter of April 12, 2012 regarding your absence from the workplace.

On March 5, 2012 you indicated that it was your intention to resign from the department and written notice would be forthcoming. As an alternative, I asked that you consider the leave options provided by the collective agreement, and suggested that you speak to your union representative.

According to my letter of April 12, 2012, you were required to provide me with a leave request or to provide documentation to support your intention to resign no later than April 20, 2012. In addition, you were asked to contact me if you had any questions. To date, I have not received a response from you nor have I heard from you. As such, your absence is currently unauthorized.

Furthermore, I am directing you to report to my office on Monday May 7, 2012 at 9:00 am regarding your absence from the workplace. Your failure to comply with this direction may result in your termination of employment.

Please note that the Department's Employee Assistance Program (EAP) is available to assist you at any time at 1-800-268-7708.

Should you have any questions or concerns regarding this matter please call me at 905-572-2765.

...

[59] The grievor confirmed she received the April 30, 2012 letter.

[60] The grievor did not attend at the Monday, May 7, 2012, 9:00 a.m. meeting with Mr. Bedic.

[61] The grievor did not return to work after she received the April 30, 2012 letter.

[62] On April 30, 2012, the grievor wrote a letter to Mr. St John, complaining about the process involved in the aborted HC assessment and the March 2, 2012 meeting with Mr. Bedic. The grievor stated as follows [sic throughout]:

Mr. Bedic begins the meeting angry and in a raised voice states that he could not believe that I would request this accommodation. He tells me he was shocked by my request and how shocked others were when he passed my email around from them to read. I sat there and was unable to wrap my mind around what he was saying. I believed that we were going to discuss an appointment date, transportation issues etc. It was as if my brain was frozen. At this point the union steward stepped in and asked if I could explain why I made this request. I stated that there were many federally funded programs that allowed someone to receive culturally sensitive service. I asked if I was going to be disciplined and Mr. Bedic replied that he wanted to discipline me but he asked around and I had never treated any of my co-workers this way, so he could not discipline me.

At this point it dawned on me that if my request was so disturbing why would Mr. Bedic not pull me aside earlier and explain why I could not be accommodated. I told him this and state that he set me up. At this point he completely lost it and began screaming. It was abusive, frightening, humiliating and demeaning. I was so shocked that I sat there with my head down for what seemed to be an eternity and he just continued on and on. I could not sit there and listen to this anymore and looked up to tell him that I wanted to speak to my steward and noticed that from screaming at me he had accumulated this massive saliva bubble in the corner of his mouth. I left his office in tears.

...

[63] Mr. St John stated that he received the grievor's April 30, 2012 letter, on May 8, 2012, and as a result, he contacted and interviewed both Mr. Bedic and Ms. Kinchen. The notes of Mr. St John's conference call on May 31, 2012 at 2:00 p.m. with Ms. Kinchen are found at Exhibit E-1, Tab 11. The notes of Mr. St John's conference call on June 8, 2012 at 1:30 p.m. with Mr. Bedic are found at Exhibit E-1, Tab 14.

[64] Mr. Bedic, in his discussion with Mr. St John, denied ever having screamed at the grievor during the meeting of March 2, 2012 and stated that it didn't occur to him that he would have bubbles forming at the corner of his mouth as he does not have any physical condition that would cause that. Mr. Bedic also stated that the grievor did not leave the meeting in tears.

[65] Ms. Kinchen, in her discussion with Mr. St John, stated that Mr. Bedic did not scream at the grievor during the meeting of March 2, 2012. She stated that Mr. Bedic did become more assertive after the grievor said that Mr. Bedic had set her up. Ms. Kinchen, when posed with the question of whether or not Mr. Bedic was foaming at the mouth, stated that she was sitting right beside the grievor across from Mr. Bedic and she did not see this. Ms. Kinchen was also asked if anyone else was in the room or was it possible for anyone else to have heard what was going on; to this, Ms. Kinchen not only replied that there was no one else in the room but that no one else could have overheard the conversation as it was not a loud conversation.

[66] With respect to Ms. Kinchen's email to the grievor of August 10, 2012 (Exhibit G-2), the grievor stated that the information contained in that email was accurate except for the following two statements:

1. At the end of the third paragraph, where Ms. Kinchen states that the grievor told her that she (the grievor) advised people in the office that she had quit.
2. At the fifth paragraph, where Ms. Kinchen states that the manager (Mr. Bedic) was not yelling.

[67] Mr. St John wrote to the grievor on May 23, 2012. This letter was further to Mr. Bedic's letters of April 12 and 30, 2012. Mr. St John, in his letter of May 23, 2012, stated as follows:

According to the letter of April 12, 2012, you were required to provide your manager with a leave request or to provide written confirmation of your resignation no later than April 20, 2012. No response was received from you.

Furthermore, in a letter dated April 30, 2012, you were directed to report to work on Monday May 7, 2012 at 9:00 am. You did not report to work nor did you contact your manager. Your manager did not receive any communication from you to indicate that you were unable or prevented from following the direction in both letters.

Accordingly your absence since March 5, 2012 is considered to be unauthorized. Unauthorized absences can result in discipline, up to and including termination of employment.

On May 8, 2012, I received the letter you sent me in which you raised a number of issues. I am looking into your concerns. I am confident that we can address your issues through dialogue, recourse, and/or the Office of Informal Conflict Management (1-866-382-7502). I encourage you to work with your manager and myself in a cooperative manner to resolve the issues that you have identified, but to do so, you need to immediately resolve your employment situation since your absence from the office is unauthorized. I will require that you report to work on Wednesday June 6, 2012 at 9:00 at the Hamilton Call Centre to attend to these matters.

If you are incapacitated, I will require a completed Physician's Certificate of Disability for Duty form (copies attached) completed by your physician and returned to me no later than June 6, 2012.

A failure to report to work, or a failure to provide medical documentation to support your absence, or a failure to provide your written resignation by June 6, 2012 as directed will result in a recommendation being made to the Assistant Deputy Minister to terminate your employment.

Please note that the Department's Employee Assistance Program (EAP) is available to assist you at any time at 1-800-268-7708.

I can be reached at 416-730-1333 if you have any questions.

[68] The grievor confirmed that she received Mr. St John's letter of May 23, 2012, together with the Physician's Certificate of Disability for Duty form, the Application for Leave form, and a two-page IntraWeb document on EAP (all at Exhibit E-1, Tab 10).

[69] The two-page IntraWeb document on EAP stated in part as follows:

...

What is your Employee Assistance Program (EAP)?

It is a voluntary and confidential service, to help employees at all levels and in most instances immediate family members who have personal concerns that affect their personal well-being and/or work performance.

Is this therapy?

This is a short-term problem-solving service and very often only a few sessions are required. If long-term help or a more specialized service is needed, a referral can be made, with consent, to a specialist in your community.

What type of concerns?

- *Marital and family*
- *Interpersonal relations*
- *Personal and emotional*
- *Stress and burn-out*
- *Work-related (employees and managers)*
- *Alcohol, drugs and prescription drugs*
- *Critical incident stress*
- *Conflict at work or home*
- *Grief*
- *Any other concern that affect or could affect personal well-being and/or work performance*

...

[Emphasis in the original]

[70] The grievor confirmed that she wrote to Mr. St John so she didn't have to deal with Mr. Bedic.

[71] The grievor confirmed that she did not call Mr. St John despite having received his direct phone number. The grievor also confirmed that she did not send him an email.

[72] The grievor confirmed that she did not request of Mr. St John to extend the deadline as set out in his letter of May 23, 2012.

[73] The grievor confirmed that she did not fill out or provide a Physician's Certificate of Disability for Duty form or the Application for Leave form. She stated that she was too upset.

[74] The grievor confirmed that she did not contact EAP.

[75] The grievor confirmed that she was aware of the June 6, 2012 deadline and did not return to work.

[76] The grievor confirmed that she was aware that the employer knew she had said she had resigned, and she confirmed that she never disabused the employer of this.

[77] Mr. St John did not receive any communication from the grievor after his letter of May 23, 2012.

[78] Mr. St John testified that he recommended to the Assistant Deputy Minister (“ADM”) Mary Ann Triggs that the grievor be terminated from her position.

[79] By letter dated June 22, 2012, ADM Triggs terminated the grievor from her position with the employer.

[80] The grievor confirmed in cross-examination that when she did not have a family doctor (including that time after Dr. Levy ceased to be her family doctor), when she was unwell, she would use either a walk-in clinic or a hospital emergency room.

III. Summary of the arguments

A. For the employer

[81] The *FAA* states at paragraph 12(1)(e) as follows:

12. (1) Subject to paragraphs 11.1(1)(f) and (g), every deputy head in the core public administration may, with respect to the portion for which he or she is deputy head,

...

(e) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, of persons employed in the public service for reasons other than breaches of discipline or misconduct

[82] Subsection 12(3) of the *FAA* states as follows:

12. (3) Disciplinary action against, or the termination of employment or the demotion of, any person under paragraph (1)(c), (d) or (e) or (2)(c) or (d) may only be for cause.

[83] It is well established in the jurisprudence of both the former PSLRB and its predecessor, the Public Service Staff Relations Board (“PSSRB”), and private-sector arbitrators that when an employee fails to show up for work, the employee has abandoned their employment and that is considered “cause” within subsection 12(3) of the *FAA*.

[84] Paragraph 7:3100 of *Canadian Labour Arbitration*, 4th Edition, by Donald Brown and David Beatty (“*Brown and Beatty*”), states as follows:

7:3100 Attendance at Work

Punctuality and regular attendance are essential attributes of all employment relationships. Employees who are unable or unwilling to report for work on time and as scheduled risk being disciplined by their employers. Arbitrators have consistently held that so long as an employer does not discriminate or waive its rights, it may suspend, demote and, where the problem persists, even discharge an employee who is absent from work without permission or a legitimate reason.

...

[85] Paragraph 7:3100 of *Brown and Beatty* states as follows:

7:3110 Notification of absence

In addition to the requirement of showing up for work at the proper time, the obligation of regular attendance also means that employees who expect to be absent from work have a responsibility to notify their employers of their situations. Employees who do not do so may be disciplined, lose their seniority rights, or be deemed to have quit, abandoned or terminated their employment. . . .

[86] In *Toronto District School Board v. Canadian Union of Public Employees Local 4400*, 2009 CanLII 5414, at paragraph 55, the arbitrator states as follows:

The foundation of the employment relationship is a bargain of compensation in exchange for work performed. That the Employer has a proper interest in ensuring employees regularly attend to their duties is not questioned. Nor is the proposition that absence from work must be authorized, whether expressly (or impliedly) by the Employer, under the contract of employment and/or legislation; the failure of which may justify discipline up to termination on the grounds of job abandonment and/or for just cause. . .

Subject to the express provisions of the collective agreement to the contrary (or any legislative restriction), the Employer has the right to establish and enforce reasonable rules concerning attendance at work, including the requirement for timely notification of absences for legitimate illness, as certified by the employee's qualified medical practitioner (and updated to remain current) in appropriate circumstances.

[87] In *Pachowski v. Canada (Treasury Board)*, [2000] F.C.J. No. 1679 (QL), the Federal Court upheld the PSSRB decision dismissing a grievance against a non-disciplinary termination of the grievor for cause for failure to return to work. The grievor left work claiming illness and personal harassment. Subsequent to the harassment investigation, the grievor was offered return-to-work alternatives and was given a specific date to return to work, failing which her employment would be terminated. The grievor failed to return to work despite being instructed to do so on several occasions. The employer finally terminated her employment. The Federal Court upheld the adjudicator's decision to dismiss the grievance stating at paragraph 68 that:

The fact that the applicant chose not to return to work was relevant in the Adjudicator's determination that the respondent acted reasonably and in good faith. In considering whether the department's demand that the applicant return to her substantive position was illegal, immoral or unsafe, the Adjudicator was assessing whether the respondent's demand was not arbitrary, discriminatory or unreasonable, which is the applicable test in the case at bar.

[88] In *Lindsay v. Canada Border Services Agency*, 2009 PSLRB 62, the grievor was absent from work on unauthorized leave. The employer regularized her leave by granting her leave without pay, after the leave had been taken without authorization, albeit requesting her to indicate to them whether she was away due to illness, for personal reasons, or on assignment. The grievor did not respond and eventually was instructed to return to work and advised that if she failed to do so, she could be terminated. The grievor did not return to work. The employer gave her two further chances to return to work before they elected to terminate her employment. The adjudicator agreed with the employer that the termination was for administrative reasons as the grievor did not comply with the employer's legitimate instructions. The adjudicator found at paragraph 91 that despite the evidence of the grievor that she did not want to abandon her position that was in fact what she had done by not complying with the employer's instructions to return to work.

[89] Paragraph 93 of *Lindsay* states as follows:

An employer is fully entitled to expect an employee to show up for work. That is an intrinsic part of the employment relationship and contract. The employee needs advance authorization to be absent from work. Such authorization is given according to the rules set out in the collective agreement. The only exceptions to that basic logic would be situations in which an employee cannot, for compelling reasons, contact the employer to obtain leave authorization. . . .

[90] The facts in *Lindsay* are strikingly similar to the within case. The grievor admits that she handed in her ID and her pass but states that she didn't really mean it. The grievor could have done several things to dispel the belief that she had meant to abandon her position. In cross-examination, the grievor admitted that there were a number of things she could have done; however, she did none of them, and her reason was that she was depressed and unwell.

[91] The evidence is that the grievor made no effort to return to work. While the grievor stated that she did not have a family doctor, she admitted that she used both walk-in clinics and the emergency room, yet admitted that she didn't use either of these to justify her absence from work. The grievor admitted that she was provided with the information for EAP, yet again made no effort to contact them.

[92] *Okrent v. Deputy Head (Department of Public Works and Government Services)*, 2013 PSLRB 65, is similar to the within matter, as the employer had requested that Ms. Okrent complete leave forms and provide medical information to justify her absences from the workplace and substantiate her request for accommodation. Ms. Okrent ignored these requests, and the warnings were that failure to comply could result in the termination of her employment, which eventually happened. The adjudicator held at paragraph 42 as follows:

I find that the employer had ample administrative reasons to terminate the grievor's employment based on her ongoing failure to respond to its legitimate requests for information to substantiate her absences from the workplace. . . .

[93] Upon receipt of Mr. St John's correspondence of May 23, 2012, the grievor had direct access to Mr. St John as he had provided her with his direct phone number. She never called him; nor did she write back to him. The grievor refused to communicate.

[94] *Weiten v. Treasury Board (Revenue Canada - Customs & Excise)*, [1995] C.P.S.S.R.B. No. 68 (QL), involves a grievor who alleged harassment and subsequently began a long period of leave. The employer requested, on a number of occasions, for the grievor to inform it of his intentions regarding his employment, failing which he could be terminated. The grievor took no steps to communicate with his employer to make arrangements for his return to work. The adjudicator stated at page 9 as follows:

. . . he took no steps to communicate with his employer to make arrangements for his return to work or for continued absence. He had a duty to do so. When ordered to return to work, Mr. Weiten had a choice. He could have returned and continued to address his concerns through the avenues provided. He could also have communicated with his employer and made some suggestions about the manner of returning to work. He elected to do neither. To respond to the letter of October 14 by indicating he would not return to work until unresolved issues were resolved does not satisfy that duty.

[95] The employer also referred me to *Latchford v. Treasury Board (Solicitor General Canada - Correctional Service)*, [1996] C.P.S.S.R.B. No. 97 (QL), in which the grievor was absent from work without authorization. The employer terminated the grievor, deeming her to have abandoned her position. At paragraph 29, the adjudicator stated as follows:

. . . I believe that the employer made every reasonable effort to accommodate her by offering her access to the Employee Assistance Plan, by granting her previous written leave requests and by attempting to reach her regarding the USGE request for leave. She simply chose not to respond.

[96] The grievor provided no reasonable or logical explanation why she never responded to Mr. St John's correspondence of May 23, 2012. Her only explanation was that she was unwell. She doesn't explain why she didn't exercise any of the options given to her.

[97] It is the submission of the employer that its conduct throughout has been reasonable.

[98] The grievor stated that she is in constant pain; yet, when she obtained a medical certificate limiting her to four days' work per week, she does not submit it but sits on

it for a whole month, her explanation being that she could not afford to lose pay. This is neither logical nor reasonable. If she was so unwell that she could not work, there are programs that could have been utilized.

[99] When the employer received the December 3 note, one month after it was written, it was reasonable to enquire as to the grievor's functional limitations, as the December 3 note was silent in this regard. The employer provided the grievor with the January 21 letter to bring to Dr. Levy, which requested him to provide the employer with an assessment of any functional limitations, to assist the employer in accommodating the grievor, if necessary. The grievor's response to the January 21, 2011 letter was to file a grievance (Exhibit E-5).

[100] Dr. Levy wants to be paid for his response to the January 21, 2011 letter, and the grievor suggests that the employer was not prepared to pay for the letter. At no point does the employer state that it will not pay for the letter. The grievor is told that she will be reimbursed if she pays Dr. Levy up front. The employer was always prepared to fund the payment of the response from Dr. Levy. This is confirmed in an email dated March 20, 2011 from Ms. Slaughter to the grievor (Exhibit E-9).

[101] The process of obtaining functional limitations from Dr. Levy ends when the relationship between the doctor and the grievor is severed. No reasonable explanation is given to the employer.

[102] The employer referred me to *Kwan v. Treasury Board (Revenue Canada - Taxation)*, [1996] C.P.S.S.R.B. No. 66 (QL), where a grievor refused to work, claiming fear of another employee after an altercation occurred. While fear for one's safety can be a reason to refuse to obey an order, this fear must be objectively assessed.

[103] The grievor stated that at the March 2, 2012 meeting Mr. Bedic was yelling at her, yet the evidence of Mr. Bedic was that he was not. This evidence is corroborated by Ms. Kinchen, who, in an email sent by Ms. Kinchen to the grievor (Exhibit G-2), stated that Mr. Bedic was not yelling. The evidence of Mr. St John was that Mr. Bedic was soft-spoken and that Ms. Kinchen told him that Mr. Bedic was not yelling at the March 2, 2012 meeting (Exhibit E-1, Tab 11). According to the grievor, at that same meeting, Mr. Bedic threatened to discipline her, yet Mr. Bedic testified that he did not. There was no threat and there was no discipline. Even if there was the threat of

discipline, this is not a reasonable reason to disobey the instruction to return to work or provide leave documents or medical notes as requested.

[104] The employer submits that even if I find the facts of this case sympathetic, as the grievor has alluded to various losses that she has suffered due to the loss of her employment, my decision should not be driven by that sympathy. If there is cogent evidence, sympathy should not rule the day. In that regard, the employer referred me to paragraph 76 of *Kwan*, which states as follows:

I am of the opinion that the employer's evidence is overwhelming in support of the decision to terminate Mr. Kwan's employment. Even though I have a lot of sympathy for an employee such as Mr. Kwan who finds himself unemployed in these hard and difficult times, he left me little choice but to dismiss his grievance. . . .

[105] The employer also submitted that an element of credibility has crept into this matter in a very narrow way. The grievor alleges that at the March 2, 2012 meeting, Mr. Bedic said certain things and acted in a particular manner. Exhibit G-2, an email exchange between the grievor and Ms. Kinchen, does not support the grievor's alleged version of the facts of the meeting of March 2, 2012. The grievor was taken through this document and stated that she agreed with what Ms. Kinchen stated, except for the fact that she denied that Mr. Bedic was not yelling and that she "told people she quit." This means that the grievor agrees with the version of the facts as set out in the email and on this alone, the grievance must be dismissed.

B. For the grievor

[106] The grievor submitted that she would not be in this position if it wasn't so difficult for people to get family physicians in Ontario.

[107] The grievor stated that you cannot get on disability by going to walk-in clinics, as they have no medical history.

[108] The grievor argued that her employer could have sent her to HC at any time but did not. She had no objection to going to HC for an assessment, and her employer could have forced her to go if they wanted.

[109] The grievor stated that she took things for 10 years and that when she went back to work, the pain was so strong that she couldn't bear it.

[110] The grievor stated that it is well known that the federal government has mental health issues within its workforce.

[111] The grievor argued that Mr. Bedic was untruthful in his testimony. She never asked him for a three-year leave of absence as she would not have been able to financially survive.

[112] Mr. Bedic was untruthful when he stated that he suggested that she go to HC for an assessment. In her submission, she argued that the employer never suggests that employees have an HC assessment because they are well aware of the high level of mental health issues.

[113] With respect to the request for certain accommodations regarding the HC doctor, the grievor stated that Mr. Bedic was dishonest in stating that she required the doctor to be able to speak English.

[114] The grievor stated that the request she made for an HC doctor that was born and educated in Canada and who shares her race and ethnicity was one that she thought she could make as she states thousands of people every day make this request in Ontario. She states that she would not have held up the HC assessment if she had known that they could not make this accommodation.

[115] The grievor states that Mr. Bedic “set her up” by asking her to put her request for accommodation for a doctor that was born and educated in Canada and who shares her race and ethnicity in writing. She argues that the meeting of March 2, 2012 was to discipline her, and he did discipline her. She states that this is the way management always behaved.

[116] The grievor states that Labour Canada is legally responsible to see that work environments are healthy and safe and that her workplace was not but that nothing was ever done.

[117] The grievor submits that the return-to-work correspondence sent by both Mr. Bedic and Mr. St John all wanted her to return to work under Mr. Bedic. They could have offered to set up an HC appointment. The suggestion of accessing EAP was not the same as an HC assessment, and the employer knew this. Forwarding her the form for the physician to fill out for leave was not appropriate as they knew she had no family doctor.

[118] The grievor submitted that the employer could have offered her a job in another department or another division. They could have done a lot of things for her, which they did not do. They had power and they abused that power.

[119] Mr. Bedic was abusive, demeaning, and degrading.

C. Employer's reply

[120] The grievor never cross-examined Mr. Bedic on the allegations she has made in her argument on him being abusive, demeaning, and degrading. There are two pieces of evidence aside from Mr. Bedic's testimony about the meeting, Exhibit E-1, Tab 11, and Exhibit G-2. Exhibit G-2 contains the email from Ms. Kinchen to the grievor on August 10, 2012 and sets out Ms. Kinchen's recollection of what happened at the meeting. This was not put to Mr. Bedic. The grievor never stated in her testimony that Mr. Bedic was abusive, demeaning, and degrading.

[121] The grievor submitted that EAP is not the same as an HC assessment and does not have the same clout. There is absolutely no evidence of the differences between the two nor what EAP services could have done to assist the grievor, as she never went to EAP. The only evidence regarding EAP is found in the materials attached to Mr. St John's correspondence of May 23, 2012 at Exhibit E-1, Tab 11, which is an excerpt from the EAP website, which references short-term counselling and the assistance of EAP to refer an employee to a specialist if necessary.

[122] The grievor's submissions are consistent with the actions she took throughout this matter; she makes assumptions whether they are right or wrong.

IV. Reasons

[123] It is well accepted in labour jurisprudence that when an employee fails to show up for work without being on some form of authorized leave, that employee has for all intents and purposes abandoned their job, which is cause within the meaning of paragraph 12(1)(e) and subsection 12(3) of the *FAA*. (See, e.g., *Lindsay, Okrent, Weiten, and Latchford*).

[124] The salient facts here are not in dispute. On March 5, 2012, the grievor attended her place of work, handed her pass and ID to her bargaining agent representative, left, and did not return.

[125] While there is some dispute as to whether the grievor said she was quitting or resigning, the delivery of the pass and ID to Ms. Kinchen, her failure to return to her workplace, and her failure to submit any form of leave application strongly indicates that her intention was, at that time, to abandon her job.

[126] On April 12, 2012, the manager responsible for the grievor's work unit, Mr. Bedic, wrote to her and enquired if she intended on resigning. In his letter, he suggested to her to consider leave options as set out in the collective agreement and that she speak to her bargaining agent representative. He instructed her to provide him with documentation to support a leave request or a letter of resignation. He told her that failure to do so by a particular date would be considered unauthorized leave and that she could be subject to discipline up to and including the loss of employment. The grievor was given the number of the EAP and also was given the manager's phone number, with instructions to contact him if she had any questions. The grievor did not respond in any way to this letter.

[127] On April 30, 2012, Mr. Bedic wrote to the grievor a second time. He reiterated what was set out in his letter of April 12, 2012, and confirmed that he had not heard from her. He instructed the grievor to report to his office on May 7, 2012 at 9:00 a.m. and that her failure to do so could result in the termination of her employment. He once again provided her with the contact number for the EAP and as well provided her with his phone number for her to contact him if she had any questions. The grievor received the April 30, 2012 letter. However, she did not respond to Mr. Bedic; nor did she report to work on May 7, 2012 at 9:00 a.m. as instructed.

[128] Coincidentally, a letter dated April 30, 2012 was sent by the grievor to Mr. Bedic's superior, Mr. St John, which he stated he received on May 8, 2012. This letter made allegations regarding the behaviour of Mr. Bedic in a meeting held on the afternoon of Friday, March 2, 2012.

[129] Mr. St John responded to the grievor's April 30, 2012 letter by way of a letter dated May 23, 2012. He stated that he would investigate the allegations that the grievor made with respect to Mr. Bedic at the March 2, 2012 meeting; however, he also instructed the grievor that she had to immediately resolve her employment situation as she was on unauthorized leave from work and had been since March 5, 2012. She was required to report for work on Wednesday June 6, 2012 at 9:00 a.m.; if she was incapacitated, she was to complete a Physician's Certificate of Disability for Duty form,

and if she failed to report to work or failed to provide medical documentation to support her absence or failed to provide her resignation by the June 6, 2012 deadline, he would recommend that she be terminated from her employment.

[130] The grievor, by her admission, ignored Mr. St John's letter and the clear and unambiguous instructions contained therein. Quite simply put, she was to show up for work on June 6, 2012 at 9:00 am, failing which she had better provide a doctor's note justifying that she couldn't or provide her letter of resignation.

[131] Mr. St John also provided the grievor with access to the EAP and as well provided her with his direct telephone number. The grievor, by her admission, did not contact the EAP; nor did she contact Mr. St John.

[132] On March 5, 2012, the grievor chose to turn in her pass and ID and chose not to attend work. She was aware that she was absent without leave and that the employer viewed her employment status as being on unauthorized leave. The grievor was aware that she had to, at the very least, request and obtain leave from the employer when she was going to be away. She chose not to take this step.

[133] After tendering her pass and ID, and not returning to work, the grievor was instructed on two separate occasions by her employer to report to work, failing which she could lose her job. She did not report for work, she did not fill out a leave form, and she did not provide a medical certificate to justify her absence.

[134] The grievor's explanation for not showing up for work when instructed by Mr. St John was that she was sick and she was upset. The grievor did not produce any medical note to the employer; nor did she produce any medical evidence of any kind to this hearing to substantiate this claim. The only medical evidence provided to me was the December 3 note from Dr. Levy. While the grievor did testify that she did not have a family doctor after the relationship with Dr. Levy ended in or about the spring of 2011, she did state that if she was not well, she would attend walk-in clinics or the emergency room of a hospital.

[135] The grievor suggests that it was Mr. Bedic's behaviour at the meeting of March 2, 2012 that caused her to hand in her pass and ID. I have difficulty accepting the grievor's evidence in this regard, for a number of reasons.

[136] First and foremost is the evidence of what occurred at the meeting itself. There were only three people in the room, two of whom testified before me, and their evidence was contradictory.

[137] Issues of credibility are dealt with by the test articulated in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, where the British Columbia Court of Appeal stated as follows:

...

If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility. . . A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. . . .

...

[138] The third person who was in the meeting of March 2, 2012 was the grievor's bargaining agent representative, Ms. Kinchen. Ms. Kinchen did not appear before me; however, Exhibit G-2 was an email exchange between the grievor and Ms. Kinchen. The grievor's recollection of the facts of the meeting and that of Ms. Kinchen are at variance in certain critical respects. The grievor alleged that during the course of the meeting, Mr. Bedic yelled at her and threatened to discipline her. Mr. Bedic stated in his

testimony that he did not yell at the grievor but likely was more assertive after the suggestion by the grievor that he had “set her up.” Ms. Kinchen’s recollection as set out in her email of August 10, 2012, sent only to the grievor, mirrors the version of events conveyed by Mr. Bedic in his testimony.

[139] Mr. St John had interviewed Ms. Kinchen with respect to the grievor’s allegations about Mr. Bedic yelling and threatening her with discipline at the meeting. Mr. St John’s evidence of what Ms. Kinchen told him happened at the meeting also mirrors what Ms. Kinchen wrote in her email of August 10, 2012 sent to the grievor.

[140] Mr. Bedic was not the grievor’s direct supervisor but was in the chain of authority above the grievor’s direct supervisor, Mr. Broerse. Mr. Bedic had very little direct contact with the grievor and was only in his position a short time, taking over from Ms. Slaughter in May of 2011. According to the evidence of both the grievor and Mr. Bedic, the grievor was off during the summer of 2011 and then again off for three more months, being November and December of 2011 and January of 2012, returning in February of 2012. From what I can gather, when the grievor handed in her pass and ID on March 5, 2012, Mr. Bedic would have been the grievor’s indirect supervisor for roughly 9 months, of which the grievor was out of the workplace for 5 months. In addition, it appears that the grievor’s complaints about her workplace and her medical situation long predate Mr. Bedic’s appearance in the reporting chain.

[141] While the meeting of March 2, 2012 appeared to have been scheduled to deal with facilitating the HC assessment, the evidence before me strongly suggests that the grievor never actually proceeded with the HC assessment. The HC assessment is a process that requires the grievor’s consent. The evidence suggests that the grievor had requested certain conditions with respect to the nationality, ethnicity, and education of the HC doctor she would be prepared to meet. The employer, at the March 2, 2012 meeting, made it clear to the grievor that those conditions would not be acceptable. While there is some dispute over what happened at the meeting, no one provided me with any evidence that the grievor: accepted the employer’s position that the conditions requested by her about the HC assessment doctor were unacceptable; or, provided her consent to the HC assessment.

[142] The only evidence about the HC assessment, other than about the grievor’s request for conditions attached to the HC doctor, comes at paragraphs 4 and 5 of the August 10, 2012 email from Ms. Kinchen to the grievor (Exhibit G-2). Ms. Kinchen, in

reconstructing what occurred in her meeting with the grievor on March 2, 2012 after they left the meeting with Mr. Bedic, states that she asked the grievor if she would return to work if she had the opportunity to have an HC assessment and the only condition attached with regard to the doctor being that she is a female. According to the email, the grievor responded to Ms. Kinchen with the comment “to an abusive environment where the manager yells.” Later in the email, Ms. Kinchen stated that she said to the grievor that the grievor should consider seeing any HC doctor the employer provides. The grievor, in cross-examination, agreed that this part of Ms. Kinchen’s email was accurate.

[143] These facts all taken together suggest that the events of the meeting of March 2, 2012 did not unfold in the manner suggested by the grievor.

[144] Mr. Bedic wrote to the grievor on two occasions, and Mr. St John wrote to her on one. While the grievor may not have wanted to deal with Mr. Bedic, this certainly does not explain why she did not contact Mr. St John when he gave her his direct phone number; nor does it explain why she did not fill out a leave form or attend at a clinic or emergency room to obtain a medical note to justify her absence. It also does not explain why she did not seek the assistance of EAP, which could have referred her on to a specialist, if necessary.

[145] The grievor had opportunities to address her situation by either showing up for work or providing a medical certificate; she did neither. The grievor also did not take any other step, which, at the relevant time, could have perhaps afforded her other options. The grievor simply did nothing.

[146] The grievor attended this hearing into those matters that led to the loss of her employment. Some of the facts were in excess of four years after the December 3 note was provided and some three years after the events of March 2 and 5, 2012. The grievor still had no medical evidence whatsoever about what ailed her at the time or since.

[147] I find that the actions of the grievor by being absent from work without authorization demonstrate that she had abandoned her job, and the employer was justified in terminating her employment for cause.

[148] For all of the above reasons, I make the following order.

(The Order appears on the next page)

V. Order

[149] The grievance is dismissed.

April 20, 2015.

**John G. Jaworski,
adjudicator**