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Citation: 2015 PSLREB 83

Public Service Labour Relations Act Before an adjudicator

BETWEEN

ROSHEEN MCLAUGHLIN

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
McLaughlin v. Canada Revenue Agency

In the matter of individual grievances referred to adjudication

Before: Margaret T.A. Shannon, adjudicator

For the Grievor: Ray Domeij, Public Service Alliance of Canada, and Kristan McLeod, counsel

For the Employer: Zorica Guzina, counsel

Heard at Edmonton, Alberta,
September 16 to 18, 2014, and July 7 to 10, 2015.

I. Individual grievances referred to adjudication

[1] The grievor, Rosheen McLaughlin, alleged that the employer, the Canada Revenue Agency (CRA or "the employer"), discriminated against her when it required her to undergo a fitness-to-work evaluation (FTWE) by a doctor of its choosing without reasonable and probable grounds, banned her from the workplace without reason, and failed to provide her with a work environment free of discrimination and harassment.

[2] 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 new Board") to replace the former Public Service Labour Relations Board ("the former Board") 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.

II. Summary of the evidence

[3] The grievor testified at length, recounting her version of the events since she was hired up to the time she filed her grievances. She was employed as a taxpayer services agent by the employer at its call centre in Edmonton, Alberta. Her role was to respond to "level 1" telephone inquiries related to corporate tax, GST and payroll from taxpayers. She was initially hired on a one-year term contract, which commenced with six weeks of training. Each day was an 8-hour shift with two 15-minute paid breaks, 15 minutes of reading time and a half-hour unpaid lunch break. For the rest of her time, she was on the phones answering calls. Initially, she worked on the 10:00 to 18:00 shift, but later, she was moved to the 07:00 to 15:00 shift at her request. The reason for the change was that the morning shift was quieter, and it made it easier for her to go to doctors' appointments.

[4] The grievor started her employment in June 2008, and by September 2008, she was having difficulties with a co-worker, "M", who according to the grievor was very loud and disruptive in the workplace, which made it difficult for the grievor to perform her duties. She met with her team lead, Eric Beaudoin, on numerous occasions

concerning the impact of M on her statistics. The conflict was resolved when the parties used the employer's conflict resolution process. The source of the conflict, according to the grievor, was that M became upset when the grievor asked her to be quieter in the workplace. M was under the impression that the grievor did not like her. The resolution of this conflict was for the grievor to move to the morning shift, which was much quieter.

[5] After she was moved to the morning shift, the grievor felt that everything was fine until she advised the employer in October 2008 of her anxiety issues. This disclosure happened in the course of an unrelated conversation with Mr. Beaudoin, when the grievor advised him that she was on medication that could cause irritability. When she started her employment, she was on a 75 mg dose of Effexor. By the time she left the CRA, her dosage was 300 mg. She also required medication to help her sleep. When she disclosed this information to Mr. Beaudoin, he showed no apparent reaction. The first time she became aware of anything wrong was one day when she was called into the office of Nadine Bell, Mr. Beaudoin's supervisor, along with him, to discuss a conflict-of-interest issue.

[6] Ms. Bell told the grievor that her act of helping friends organize their finances and file their tax returns was a conflict of interest. It surprised the grievor since she had advised Mr. Beaudoin that she was doing so and had asked if she needed to sign a conflict-of-interest declaration. Mr. Beaudoin had indicated that she did not need to, yet he made no such mention at the meeting. As a result, the grievor testified that her one-year term employment was shortened to three months. She was initially hired for June 2008 to June 2009. However, she could not remember when this meeting occurred.

[7] A series of extensions were granted to the initial offer of term employment, which was from June 9, 2008, to April 3, 2009. Her term was extended from April 3, 2009, to June 26, 2009; from June 26, 2009, to August 7, 2009; from August 7, 2009, to April 9, 2010; from April 9, 2010, to April 1, 2011; from April 1, 2011, to June 24, 2011; from June 24, 2011, to October 28, 2011; from October 28, 2011, to December 30, 2011; and from October 28, 2011, to March 30, 2012 (see Exhibit 7, which details staffing actions and term extensions).

[8] The grievor testified that Ms. Bell informed her that there would be no further extensions of her contract beyond the initial three-month extension. In the first

three-month extension, the grievor had had no meetings with Mr. Beaudoin. She had received no written coaching or anything in writing about her work. When she questioned why there would be no further extensions, Ms. Bell advised her that if she could not get along with her co-workers, there was no place for her at the CRA. Despite asking for written documentation of what Ms. Bell meant, none came. The next day, she was given a two-month extension.

[9] During this extension, the grievor was still not provided with counselling. Mr. Beaudoin told her a couple of times a week to smarten up or there would be no further term extensions. He never explained to her what he meant. Conflicts with the grievor's co-workers continued. "J" came into the grievor's workspace while she was on the phone with a client and allegedly stamped her foot and began yelling at the grievor. J claimed that the grievor was not giving the client the correct information, even though she could hear only the grievor's side of the conversation. The grievor felt violated by J's intrusion into her workspace; her anxiety level was intensified. Mr. Beaudoin heard the conflict from his office and came over, to determine what was going on. He was very upset and told both of them to stop it right away. Other co-workers had logged off the phone system to see what the excitement was all about.

[10] On April 3, 2009, following the incident with J, the grievor was called in to a meeting with Mr. Beaudoin to sign a statement that she was not meeting CRA core values and to accept an action plan that Mr. Beaudoin had developed for her. She was told to smarten up or there would be no further extensions of her term contract. She asked for a copy of the action plan, with the intention of adding her comments to the area on the form provided for them the next day. It was not provided to her until months later. On the day that Mr. Beaudoin called her into his office to discuss the action plan, the grievor suffered an anxiety attack because she was taken by surprise.

[11] The grievor wanted clarification on how she was not meeting CRA values. She also wanted an action plan that was specific, measureable, attainable, reasonable and timely. She sent an email to Mr. Beaudoin seeking the clarification and received no response.

[12] Shortly after the April 3, 2009, meeting, other term employees at the call centre were given permanent positions, while the grievor received only an extension. She assumed that everything was all right with her performance. Her statistics were good, yet others who had started with her became indeterminate employees, and she did not.

Pursuant to CRA policy, the grievor sought feedback as to why she was not granted indeterminate status. She was to receive written feedback back within 10 working days of her request. She received nothing.

[13] By the time the grievor met with her union representative, Edith Keefe-MacLeod, along with Mr. Beaudoin and Ms. Bell on July 2, 2009, she still did not have a response to her demands concerning the action plan. At the meeting, she requested to be removed from Mr. Beaudoin's team and assigned to a team lead who was more sensitive to employees with anxiety and depression to escape the harassment she was suffering from Mr. Beaudoin. In her opinion, it was clear that Mr. Beaudoin had an issue with her, which was causing her extreme anxiety and an inability to sleep. The grievor testified that at the meeting, she was questioned extensively about what medications she was on and about her doctors. In the course of the meeting, they developed a list of how the grievor would be treated, but she was denied a change of team lead (see the email: Exhibit 8).

[14] The recommendations included among other things that there would be no surprise meetings; that the grievor and Mr. Beaudoin would meet every Friday afternoon for half an hour to discuss her progress; that she was to have a quiet place to work near a window; that she would not discuss her personal situation with her teammates; that if she had issues with her teammates, she would follow the CRA's dispute resolution model; that she would be allowed to leave her workspace to de-stress when required; that she would use appropriate language in the workplace and would control herself when in the call centre; and that she would continue to work the morning shift and would be provided a dual-ear headset to minimize distractions. Following the meeting, Ms. Keefe-MacLeod showed the grievor to the prayer room and told her that she could use it as she needed to de-stress.

[15] The grievor repeated her requests to be removed from Mr. Beaudoin's team to Rick Wilson, who had replaced Ms. Bell (see Exhibits 2 and 3). She told him that she felt harassed, discriminated against and held back by Mr. Beaudoin. Mr. Wilson told her union representative that he was happy with the grievor's work and her statistics. However, the grievor did have two incidents of conflict with callers, about which she had met with Mr. Wilson. In one case, the caller could not remember to whom he or she had spoken. In the second case, the client was a woman who had called numerous times and had spoken to a number of agents. The client felt that she received different

answers every time she called in. The grievor walked her through the process on how to file a complaint. Mr. Wilson signed off on the complaint, indicating that all was proper with how the grievor dealt with the call.

[16] On October 7, 2009, the grievor was to meet with Mr. Wilson and Mr. Beaudoin. Since Mr. Beaudoin was leaving to take a new assignment, he was replaced with an acting team lead, Sue Sohnle, at the meeting. Shortly before the meeting, Mr. Wilson decided it was not necessary for him to attend. The grievor was not comfortable meeting with Ms. Sohnle by herself, particularly since at the July 2, 2009, meeting an agreement had been reached that meetings would be set at least two days prior and that attendees would not be changed without notice. This caused her a great deal of anxiety, so the grievor went to the prayer room to de-stress.

[17] While there, a security guard came in to see why she was crying. The grievor was so distraught that the security guard called CRA security, building security and an employee assistance representative. He told her that she had to go back to work or she could lose her job, which made her even more anxious. The grievor called her office and advised the traffic centre that she was unable to work due to a full-blown anxiety attack. She then left, and once she became able to drive, she went to her doctor's office. He provided her with a medical certificate indicating that she should be off work. However, in the course of the discussion with her doctor, he indicated that if she could not take paid leave, she would be less anxious if she went to work. She brought the doctor's note (Exhibit 3) to Ms. Sohnle on October 26, 2009, and was told that she was to be off work until an FTWE had been completed. She was told to log off the system and was sent home.

[18] The grievor asked to meet with Mr. Wilson but was told that she had to leave as she was a liability. She tried to explain that she could not afford to be on leave without pay, but it made no difference. Mr. Wilson sent her a letter (Exhibit 24) confirming the requirement for an FTWE, following which they would meet to discuss any accommodations that may be required. This discussion never happened.

[19] On November 2, 2009, Denis Chenevert took over as the grievor's team lead. She and Mr. Chenevert had been friends before, so the grievor had hopes that things had greatly improved and that she would be able to salvage her career. There were no issues that she was aware of until January 2010, when she was moved from her quiet workspace by the window to accommodate another employee.

[20] The grievor asked Mr. Chenevert why that other employee's need for accommodation superseded hers and received no reply. Her new workstation was in a high-traffic area, which caused the grievor increased anxiety. Between March 2 and 4, 2010, she was off work. When she returned, Mr. Chenevert met with her and asked her pages of questions related to her illness.

[21] On March 10 or 11, 2010, the grievor went to the CRA library in the basement of her building to make a call. On the way, she tripped on a brick and fell, which scared her. She suffered an anxiety attack and became hysterical. She tried to calm down over lunch but could not. When lunch was over, she reported to Mr. Chenevert and asked to go home. He told her that she could not go and that she was to sit at her desk and fill out an accident report form. At one point, they went to see where she had fallen. The grievor remained at work as long as she could. Approximately 40 minutes before the end of her shift, she could stand it no longer and went to find Mr. Chenevert. When she could not find him, she told one of the secretaries that she had to leave.

[22] Following this incident, she spoke to a police social worker, who took her to the emergency department at the Royal Alexandra Hospital, where she was hospitalized for five days in the psychiatric unit. Her treating physician in the hospital wrote a note for her employer confirming that she had been hospitalized. He also advised the grievor not to disclose the reason for her admission to her employer. A couple of days after her return to work, Mr. Chenevert advised her that she was to see a Dr. Grootelaar and that the employer would pay for the appointment. She would not be paid to attend the appointment as she had exhausted her sick leave. The appointment was later changed to Dr. Grootelaar's associate, Dr. Els. Before the appointment, the grievor was required to provide blood and urine samples. She was to book an appointment to provide the samples and was then to book her appointment with the doctor. Failing to book it would result in her being responsible for the cost of the appointment.

[23] Following this discussion, she went home. She received a series of three registered letters from her employer indicating that she was off work until she complied with its request. Her failure to comply could result in disciplinary action. The grievor wrote to her local labour relations office and explained that she had no problem seeing the doctors but that she required specific reasons for being required to see them and for being required to give blood and urine samples. The labour relations advisor replied that she could not answer the grievor's questions via unsecured email

as it would constitute a violation of her privacy. The grievor did not understand why she could not consult her own physician, who had letters after his name, which indicated he had done extra courses in the treatment of anxiety. The grievor remained off work as a result of her refusal to attend the appointment.

[24] Sometime later, Sun Life Insurance ("Sun Life"), the grievor's long-term disability carrier, suggested that she see another doctor, who specialized in schizophrenia. Sun Life then contacted Mr. Chenevert to determine if a return to work could be organized for the grievor. His response was that she could not return to work unless and until she had seen a doctor of the CRA's choosing. Eventually, the grievor was sent to Gibbons, Alberta to see a Dr. Oyama. The grievor was put on disability insurance on April 13, 2010, until her return to work in November 2011. Dr. Oyama did not change the treatment plan given to the grievor before she was discharged from the hospital.

[25] While all this was going on at work, the grievor was going through the breakup of her common-law relationship, including a division of assets. She was heard making personal calls related to this from her desk and discussing her situation with clients. She was directed to use the phone in the lunchroom or in the library to make personal calls. Her illness and the added stressors caused the grievor to be regularly absent from work. Her medication also caused her to be late on occasion, when she overslept. She was directed to call in to her team lead and to the traffic centre and advise them when she would be late or would not be at work.

[26] Mr. Beaudoin testified on behalf of the employer. He was the grievor's team lead between July 2008 and September to October 2009. During that time, his cubicle was located approximately 20 feet away from the grievor's, which made it possible for him to overhear her.

[27] On October 1, 2008, he received a report from one of his employees, stating that the grievor had been heard being rude on a phone call. He spoke to others who were also at work that day to get their versions of what had happened. He did not expect the grievor's reaction; she became very upset when he questioned her about the call. She accused one of her co-workers of constantly sending emails criticizing her. One co-worker (M) in particular would peek over the partition and tell her what to do during a call. The grievor admitted that on October 1, she became so upset with M's interference that she stood up, yelled at her and told her to mind her own business.

[28] Mr. Beaudoin met with the grievor and M on October 8, 2008, in an attempt to resolve the situation. After each explained their version of what had happened, M apologized to the grievor and expressed her hope that they would be able to work together in a harmonious relationship in the future. The grievor also apologized but qualified it by saying that she was tired of M criticizing how she did her job. Mr. Beaudoin advised the grievor that she should come speak to him when things were bothering her rather than letting things escalate to the point of shouting at her co-workers.

[29] On December 31, 2008, Mr. Beaudoin was in his cubicle and could hear the voices of two people becoming heated. The grievor and another co-worker were involved in a discussion, and their voices were escalating. Apparently, they were arguing over how a certain form was to be filled out. Mr. Beaudoin went to them and told them that this type of behaviour was inappropriate. The grievor was disrespectful toward him while he spoke by continually cutting him off.

[30] Mr. Beaudoin returned to his cubicle and emailed the grievor, directing her to see him. When she arrived, she appeared flustered and shaky, having been upset by J, who allegedly had yelled at her and who, she alleged, deliberately escalated any discussion they had.

[31] The grievor was directed to walk away in those situations and to take time to breathe. If she had questions about her work, she was to come see Mr. Beaudoin. J was told the same thing. On January 8, 2009, Mr. Beaudoin followed up on the allegations the grievor made against J. No one else on the team saw this behaviour, but they all noted that the grievor often escalated a disagreement to the point of yelling, whether on the phone or with team members. On January 9, 2009, Mr. Beaudoin again met with the grievor. He used a compliment he had received about her to launch a discussion on how she should conduct her calls so that the taxpayer on the other end did not hear her frustrations.

[32] On February 3, 2009, another co-worker (“D”) reported that he had heard the grievor tell a taxpayer to “shut up” (see the email: Exhibit 12). D sat the furthest away from her and was able to hear the call — the grievor had been that loud. Mr. Beaudoin met with the grievor and told her she could not tell taxpayers to shut up. In response, she advised him that she was very stressed and seeing a counsellor. He first became aware of the medication that she was taking through an email in which she alluded to

them. She was expecting to see a new counsellor, whom she expected would prescribe new medications for her.

[33] On March 3, 2009, co-worker "R" reported to Mr. Beaudoin about overhearing the grievor making inappropriate comments and having an inappropriate conversation with a taxpayer. R stated that he was tired of hearing about the grievor's personal life, her inappropriate comments to taxpayers and her gossip, all of which he felt were inappropriate. In follow up, Mr. Beaudoin spoke to co-worker "L", who sat next to the grievor. L replied that this type of thing happened daily. Following this, Mr. Beaudoin relayed his concerns to the grievor. When she was met with to discuss her contract extension, she was advised that it would be only for a further two months because of her inappropriate behaviour. Mr. Beaudoin testified that she was extended rather than rejected on probation since it would give her time to improve, as he saw potential in her. She was technically reliable and had good attendance. In addition, Mr. Beaudoin again raised the availability of the Employee Assistance Program (EAP) to help her control her stressors, which were causing problems in her work. Qualifying for candidate pools or being appointed to a permanent position was not discussed.

[34] On March 20, 2009, the grievor sent Mr. Beaudoin a request for a conflict resolution meeting with J. Apparently, while he was on vacation, the grievor and J got into an argument over forms at their team meeting. The grievor allegedly cut off J, and others tried to intervene to defuse the situation. Things escalated when the grievor would not let the discussion go even though the question had been tabled. After the meeting, she told the acting team lead that the whole situation was J's fault as she was always criticizing the grievor.

[35] When he was uncertain as to how to deal with this situation, Mr. Beaudoin spoke to his manager, Ms. Bell. Previously, she had given him many ideas and counselling on how to deal with conflict in the workplace. Mr. Beaudoin told Ms. Bell that he did not know how to deal with the situation, as his attempts to remedy the grievor's behaviour had been unsuccessful. Ms. Bell told him to spell out clearly what the problems were and what improvements were expected. He was to ensure that she understood that her behaviour had consequences and that he was to identify those consequences if her behaviour continued. Based on this direction, he presented her with an action plan on April 3, 2009 (Exhibit 14).

[36] Mr. Beaudoin met with the grievor on April 3, 2009, to discuss the action plan. At their meeting of March 13, 2009, at which they discussed the extension of her contract, Mr. Beaudoin identified what behaviours needed to be corrected. He gave her advice on how to correct them, which she did not follow. The action plan was a formal direction on what behaviours needed to be corrected and how she was to accomplish this. Those identified were that she was to uphold CRA values in her communications with taxpayers and co-workers and that she was to manage conflict effectively. They also discussed the personal phone calls that the grievor received while at work and that she was to be mindful that she had an audience. The grievor was not happy and began to shout at Mr. Beaudoin, indicating that it was not her fault. This reaction was inappropriate, in Mr. Beaudoin's opinion, and her behaviour, yelling at him, was unacceptable.

[37] The grievor again raised her desire to have a conflict resolution meeting with J, who was not willing to participate. The grievor took no responsibility for her actions at this meeting or the previous team meeting and stormed out of the meeting room. Mr. Beaudoin asked her to sit down and discuss the situation so that they could move forward, but the grievor indicated that the conversation was finished and that she was no longer interested in discussing it with him. Even though she was obviously not happy, she signed the action plan and left.

[38] On June 3, 2009, Mr. Beaudoin heard the grievor on the phone; he could hear that the conversation was escalating. A team member came to his cubicle and indicated that the grievor's conversation was becoming very heated. Mr. Beaudoin went to see what was going on and found that other agents working in the area had put their calls with taxpayers on hold so that they could not hear the grievor's conversation. He asked the grievor to accompany him to his cubicle to discuss the call and indicated to her that he had received a complaint from a co-worker. The manner in which she had addressed the person on the call had been inappropriate in both context and volume. Apparently, she did not realize that she was being that loud, and she felt it appropriate to take a personal call from her cubicle while on break. There were quiet rooms available from which such calls could be made where she would have been beyond the earshot of her co-workers and the taxpayers on the phones.

[39] On June 24, 2009, R met with Mr. Beaudoin to discuss his concerns over discussions in the workplace. Apparently, he had overheard the grievor and another

co-worker discussing him. R did not appreciate hearing this type of conversation. He confirmed his complaint in an email to Mr. Beaudoin.

[40] On July 2, 2009, Mr. Beaudoin met with the grievor, Ms. Keefe-MacLeod and Ms. Bell to discuss his working relationship with the grievor, to ensure she was successful in the workplace. Ms. Keefe-MacLeod took notes (Exhibit 8) of the meeting. Those in attendance agreed that the grievor would be provided a headset to block workplace noise and that she would be located in a cubicle by a window. She and Mr. Beaudoin were to meet weekly so that he could provide her with performance feedback. The first meeting took place on July 3; they were scheduled for every Friday afternoon after that.

[41] On July 6, the grievor did not show up for work and did not call in to report her absence, as required by CRA policy. This type of absence was out of character for the grievor and caused Mr. Beaudoin concern. He phoned her at the number she had provided as a contact but received no response. When she was again absent the next day, Mr. Beaudoin consulted Ms. Bell, who advised him to call again. He was unable to reach her until later in the day. She advised him that things were in disarray and that she would be in tomorrow and not to worry. She did not come to work the next day as promised or the day after that. When she did not show at work or call in to report her absence, Mr. Beaudoin again called her. No one answered the phone when he called, so he left her a voice mail. The grievor called him back on July 9 and told him that she was having difficulty sleeping and that she would be in on July 10.

[42] When the grievor did report to work on July 10, Mr. Beaudoin met with her and discussed his expectation that she report her absences. She was to follow CRA policy and call in when she was unable to come to work. He expressed to her that he had been worried about her because of stressors in her life that he was aware of and that it was unlike her not to report to work when scheduled. He agreed to allow her to use vacation time to cover her unauthorized leave for July 6 to 9 (see the leave approval Exhibit 17).

[43] The next regular meeting of Mr. Beaudoin and the grievor occurred on July 23. The next day, she called in sick due to the stress of the meeting of the day before. Mr. Beaudoin did not understand as he was of the opinion that the meeting had gone well. When they had their regular meeting on July 28, 2009, he noted improvement in her behaviour. He reiterated that she was to keep her personal life out of the

workplace. Despite this, she continued to be absent on occasion throughout the summer. In August 2009, he completed her annual performance review (Exhibit 21).

[44] The next time Mr. Beaudoin was to meet with her was at the beginning of September, when the grievor was again absent. She used vacation leave to cover her absences on September 3 and 4 with the approval of Mr. Wilson, who had taken over as the manager from Ms. Bell. She was again absent on September 21 and 22 without phoning in to report it. On September 23, she sent Mr. Beaudoin an email, advising him that she would not be in. This concerned Mr. Beaudoin as it again was out of character. The reliability of employees is essential to the operation of the call centre.

[45] The grievor returned to work on September 25, 2009. On that day, there was a fire drill. The CRA's policy is that if an emergency occurs while an employee is on the phone with a taxpayer, the employee is to terminate the call and vacate the premises. Despite having been told more than once to hang up, the grievor refused to terminate a personal call and remained behind, posing a threat to the safety of others. Following this incident, Mr. Beaudoin met with her to discuss personal calls in the workplace (Exhibit 20). This was the second incident involving her personal phone calls. On September 17, she had a very upsetting personal call, which was upsetting to her co-workers who overheard it. At this point, Mr. Beaudoin considered giving her a letter of direction, but given her attendance, the content of her email (Exhibit 20) and their previous discussions, he thought that an FTWE would be more appropriate. When he discussed the grievor's email (Exhibit 20) with her, Mr. Beaudoin observed that she was not happy with him and that she had a physical reaction to their meetings.

[46] Mr. Beaudoin discussed this possibility with his manager, Mr. Wilson, and with the local CRA labour relations advisor. An FTWE can identify issues and suitable accommodations. He had told the grievor in March and April 2009 that if her behaviours continued, there was a possibility that her contract would not be renewed. If some medical reason meant that she could not perform her job, an FTWE might provide insight into her restrictions, which could impact the decision to renew her contract. He was concerned by the irrational behaviour she had demonstrated in the workplace and how she would escalate into anger if she felt challenged or spied upon.

[47] Mr. Beaudoin had earlier advised the grievor that there was no medical certificate on file identifying her medical issues and that one was needed were she to be accommodated. He was aware that she had requested a move to another team in

July because she was feeling harassed by him and his management of her performance. She felt that he treated her differently because she had a mental illness.

[48] Ms. Sohnle replaced Mr. Beaudoin in September 2009. A meeting was scheduled for October 7, 2009, which was intended to facilitate presenting the grievor with a letter of direction concerning her absences. She was advised that the meeting was being held to obtain medical information concerning her illness. Mr. Wilson was originally scheduled to attend, but in the end, he withdrew and was replaced by Ms. Sohnle. The grievor was very upset by this change, and the meeting never occurred. This was intended to be a transitional meeting from one team lead to another. In preparation for it, Mr. Beaudoin shared the grievor's statistics file, her performance review and the emails she had sent with Ms. Sohnle. He also shared with her his knowledge of the grievor's medical situation.

[49] Ms. Sohnle was the grievor's team lead between October 5, 2009, and October 30, 2009. The grievor left the workplace on October 7, 2009, rather than attend the scheduled meeting. Rather than consult her team lead as required, the grievor went to the call traffic control centre and advised them that she was not feeling well and that she was leaving. The centre notified Ms. Sohnle that the grievor had left.

[50] The grievor phoned Mr. Chenevert around 15:00 that afternoon, and he transferred the call to Ms. Sohnle. The grievor advised Ms. Sohnle that she was phoning to find out what her options were as her doctor had put her off work from that day until November 2, 2009. She asked Ms. Sohnle about what leave was available to her. When Ms. Sohnle asked for a contact number to call her with the information, the grievor advised her that her phone had been disconnected and that it was not possible for her to be called back. Instead, Ms. Sohnle gave the grievor the phone number for the Compensation Call Centre so that she could call them and obtain the required information directly. The grievor sounded as if she were close to tears on the call. Ms. Sohnle told her that she sounded very frustrated. The grievor was very disrespectful and responded with profanity, which surprised Ms. Sohnle.

[51] At the conclusion of the call, the grievor advised Ms. Sohnle that she would not hear from her on Thursday or Friday (the call happened on a Wednesday). The office was closed the following Monday for the Thanksgiving holiday. The next workday was Tuesday, October 13, 2009. Ms. Sohnle checked, and the grievor had left no voice mail or email. Ms. Sohnle tried to contact her at the last known phone number, but it was

not in service. On the same day, Ms. Sohnle was advised that there had been an incident in the prayer room where the grievor had gone when she had left the call floor the previous Wednesday.

[52] Ms. Sohnle advised Mr. Wilson on Wednesday that she had not heard from the grievor in a week and that she had been unable to contact her. The next day, Ms. Sohnle met with the grievor's union representative to determine whether she had heard from her and if she had, to ask the grievor to contact Ms. Sohnle. Ms. Sohnle added that if the grievor was not comfortable contacting her, then she could contact the traffic centre. In addition, Ms. Sohnle asked the grievor's union representative to advise the grievor that she required a medical certificate for her absence. Again on the Friday, there was no word from the grievor.

[53] On Monday, October 19, 2009, at approximately 07:30, Ms. Sohnle discovered the grievor sitting at her workstation taking phone calls as if nothing had happened. Ms. Sohnle was surprised to see her as the grievor had never told her that she would be in that day. Ms. Sohnle waited for the grievor to end the call and asked her to join her in a meeting room. The grievor insisted on meeting with Mr. Wilson. He was not yet at work at that point, so Ms. Sohnle directed the grievor to wait in the meeting room for him. At the meeting, the grievor handed over a doctor's certificate for her absence, which indicated that she was unfit to work until November 2, 2009 (Exhibit 3). Ms. Sohnle explained to the grievor that she could not allow her to work when the doctor had certified her as being unfit for work. The grievor was not to return to work until the employer heard otherwise from her doctor. Mr. Wilson gave the grievor a request for an FTWE, to be taken to her doctor.

[54] Following the meeting, the grievor went to her desk, made a couple of calls and then left. Nothing more was heard from her until October 26, 2009, when again Ms. Sohnle discovered her at her desk, taking calls. When Ms. Sohnle approached her, no discussion took place. The grievor handed over a letter from her doctor indicating that she was fit to work, with certain accommodations (Exhibit 4). Ms. Sohnle took the doctor's letter to Mr. Wilson, and that was the end of her involvement with the grievor.

[55] Mr. Chenevert replaced Ms. Sohnle on November 2, 2009, as team lead, partly because he was thought to have a good rapport with the grievor. In addition, he had experience in his personal life dealing with mental illness issues. He met with the grievor on November 6 to remind her of the procedure for reporting in late or absent.

On December 2, she did not show up for work; nor did she contact Mr. Chenevert or the traffic control centre. The next day, she emailed him, advising him that her landline telephone had been disconnected. This was the beginning of his concerns with her attendance. On February 4 and March 2, 3 and 4, 2010, the grievor was again absent without notifying him. During the same period, she was frequently late, anywhere from 15 to 90 minutes. She had been reminded on January 27 of the procedure to follow if she was going to be late, yet on February 15, she failed to advise that she would be late.

[56] By March 2010, Mr. Chenevert had concerns over the grievor's absences, her disrespect for procedure, and her not showing up for work or providing adequate notice and an explanation. On March 8, 2010, he met with her concerning her absences on March 2, 3 and 4. She advised him that in 2002 she had been diagnosed with depression and an anxiety disorder. She was on medication, which her doctor was trying to adjust to an optimal level and combination. She had asked to be removed from Mr. Beaudoin's team three times and had been refused. When others had had their contracts renewed, Ms. Bell had threatened to fire her. She was in a battle with her common-law spouse over her home, which she had purchased but for which she had added his name to the deed and was facing bankruptcy for the second time, and her mother refused to let her move back in. All this caused a depressive episode. Mr. Chenevert took notes of the conversation, typed them and sent them to the grievor for her review (Exhibit 9).

[57] At the same meeting, Mr. Chenevert discussed obtaining an FTWE with the grievor. The previous FTWE provided by her doctor had listed no restrictions, only required accommodations. Mr. Chenevert understood that a doctor cannot dictate required accommodations, which are the CRA's decision. Mr. Chenevert's concerns over her absences, the frequency of her tardiness and her comment that Dr. Mansell was her depression specialist made Mr. Chenevert wonder if there were other doctors treating the grievor who were not aware of each other.

[58] Mr. Chenevert began the process of preparing the request for an FTWE with the labour relations representative. He was not interested in the grievor's medical diagnosis but rather wanted to know how he could get her to work and provide her with a stress-free environment while she was there. Mr. Chenevert had not received any

medical information supporting her self-reported diagnosis and had no information on which to determine whether it was true or accurate.

[59] On March 11, 2010, the grievor lost her footing on the escalator in the building. She returned to the workplace after her fall and spoke to Mr. Wilson. He took her back to the place of the accident to determine what happened so that an incident report could be filled out. She was given the link to the workers' compensation claim forms, which needed to be filled out. She was crying while talking to Mr. Wilson and was obviously shaken up by the time she was asked to fill out the forms. She did not ask for any instructions on how to fill out the forms or express any concerns. She went downstairs for a coffee and returned to the workplace.

[60] On March 12, the grievor did not report for work or call in as required. Apparently, she had been admitted to a hospital the previous day following her request to police to drive her there. Initially, she said that she had called the police, but her story changed to her going to the police station to request a ride. She was again absent on March 15, 16, 17, 18 and 19. She called in to advise that she would be absent on the 15th. On March 18, she advised that she had gone to the Royal Alexandra Hospital. On the 19th, she advised that she would not be in to work but provided no reason for her absence. She was again absent on March 26 and 31 and April 1, 8 and 9, 2009. She did not report any of her absences as required. Mr. Chenevert could have disciplined her for this behaviour but chose not to since he wanted to help her.

[61] Mr. Chenevert met with the grievor on March 22 to discuss the absences of March 15 to 19. They talked about what an FTWE was and why it was required. The employer wanted to address her struggles attending work and to ensure that she was getting care for her needs. Initially, Mr. Chenevert anticipated that her family doctor, Dr. Mansell, would fill out the FTWE form. When the grievor indicated that she knew he would put her off work and that she knew exactly what to have him say, he became concerned by this possibility. A third-party physician was selected because of these concerns.

[62] On April 13, 2010, Mr. Chenevert met with the grievor to present her with the FTWE form and to have her sign the consent to undergo the examination and to release the information forms (Exhibit 24). This meeting did not last long. Mr. Chenevert got through only part of the request. When she saw the doctor's biography and was advised that the doctor expected her to provide blood and urine samples, she became

irate. She was shaking with anger, and she threw things on the table. Mr. Chenevert was afraid and intimidated by her behaviour. She wanted to know why there was a reference to the incident in the prayer room on October 7, 2009. She stormed out of the meeting, only to come back later and ask for a copy of the letter to include in her human rights complaint.

[63] Mr. Chenevert was so upset by the grievor's reaction that he needed to leave the workplace to clear his mind. Before leaving, he advised the other team leads in the area to watch out for her as they would be alone with her after he left. Around 17:00 that day, he saw the grievor on the phone. He told her that she was done for the day, which she disputed. He indicated that the schedule had her listed as working 9 to 5 that day, but she continued to argue. When he insisted that she was done for the day, she stormed out, angry and crying. She was not removed from the workplace that day as she was not a threat to the taxpayers on the phone.

[64] The next day, Mr. Chenevert summarized the meeting and sent it to Mr. Wilson. He indicated that he felt uncomfortable with her in the workplace and that he was fearful for his well-being. He also wanted to explain why the FTWE was not done as it required the grievor's consent, which was not forthcoming. Mr. Wilson sent the grievor a registered letter to meet with him on the second floor of the call centre and invited her to attend. Mr. Wilson made the decision to remove her from the workplace until the employer received confirmation that she was fit to work. He directed Mr. Chenevert to have the grievor's identification and swipe card deactivated pending the receipt of the FTWE results.

[65] Mr. Chenevert never saw the accommodation letter from Dr. Mansell (exhibit 4). He did not recall changing the grievor's workstation. She was always located near the window. He recalled that she might have been moved once when she worked on a Saturday during T4 season. Neither the grievor nor Ms. Keefe-MacLeod ever raised concerns about the grievor's work location. He was aware that the employer had agreed to provide her at least 24 hours' notice of any meeting along with a list of those invited and the agenda. However, at least twice, he was required to meet with the grievor to discuss taxpayer complaints without providing her with notice because of the time-sensitive nature of the responses to these complaints. Mr. Chenevert thought both meetings went well despite the lack of notice. May 4, 2010, was the last day that Mr. Chenevert was the grievor's team lead.

[66] Mr. Chenevert was responsible for discussing her attendance and performance issues with the grievor. He did not recall having any discussions about her term. On February 24, 2010, he suggested to the entire team that they apply to an external process for a permanent position in the call centre. His thought was that the more candidate pools an employee is in, the more chance the employee has to secure indeterminate employment with the CRA. Pools expire on a regular basis without notice, so the more pools one is in, the better the chances. On February 10, 2010, Mr. Chenevert received an email from the grievor stating that she had been given misinformation about the need to apply for candidate pools. Any misinformation that the grievor received concerning pools was given to her by another team lead.

[67] Ms. Bell was, until July 2009, the manager of the Business Inquiries Call Centre, where the grievor worked. She was involved with the grievor for approximately one year before leaving this position. She was made aware of the situation by Mr. Beaudoin, who reported to her. Between January 2009 and July 2009, a competition and rehire process was run. Since a number of call centre employees were term employees, she wanted to give them all the opportunity to obtain either longer-term contracts or indeterminate positions. Candidate pools were created from this competition, and appointments were made.

[68] Ms. Bell talked to the grievor in February 2009 about extending her term contract. She was offered a shorter term than others in the call centre due to her performance issues. It was explained to her that she would be given the opportunity to address the employer's concerns with her inappropriate and unprofessional behaviour in the workplace and to address a conflict-of-interest in which the grievor used her position to resolve a tax issue for a friend. Ms. Bell used a script for all such meetings (Exhibit 27), which had been created in consultation with her assistant director and was used by all three managers in the call centre to address their staff.

[69] The grievor wanted to discuss the possibility of obtaining a permanent position and was advised that due to her performance issues, it was not possible at that time. She also wanted to discuss her relationships with her colleagues, which caused Ms. Bell concern. If the grievor could not get along with her colleagues, she was not suitable for employment in the area. The intention was to provide her with additional coaching and training during the brief extension offered to her. At no time did Ms. Bell advise the grievor that there would be no further extensions or that a permanent position would

be offered. The meeting did not end well; for that matter, no meeting with employees in the same category as the grievor went well.

[70] The grievor was advised previously that her unprofessional behaviour in the workplace was unacceptable. She reportedly told Ms. Bell that she was depressed and on medications that made her irritable. The grievor's contract was again extended in August 2009, until April 2010. Ms. Bell was not aware of any further concerns with the grievor's behaviour, and it was the employer's normal practice in such cases to extend a term employee until the end of the filing season.

[71] The grievor and Ms. Keefe-MacLeod met with Ms. Bell and Mr. Beaudoin on July 2, 2009. Ms. Bell was there as Mr. Beaudoin's manager and as someone who had a great deal of conflict resolution experience. The purpose of the meeting was to find a method to develop a harmonious working relationship between the grievor and Mr. Beaudoin and thereby limit the impact of their conflict issues on the workplace. There were no discussions about what medications Ms. McLaughlin took or what her doctor's qualifications were. Ms. Bell did not recall any specific request from the grievor to be moved from Mr. Beaudoin's team. Even if she had received such a request, she would not normally have granted it. In general, the tone of the meeting was positive. The grievor's union representative drafted a summary of the commitments from the meeting (Exhibit 8).

[72] Mr. Wilson replaced Ms. Bell as the grievor's manager later in July 2009. Like Mr. Chenevert, Mr. Wilson has had to deal with mental illness in his personal life. Before assuming the position, he had no knowledge of any issues with the grievor. In fact, when he took over the team, there were no outstanding issues related to her. He met with Mr. Beaudoin, who discussed the agreement that was made at the July 2, 2009, meeting. He was provided a copy of the email summary prepared by Ms. Keefe-MacLeod. He was also aware that the grievor had advised Ms. Bell and Mr. Beaudoin that she suffered from mental illness. At the outset, Mr. Wilson thought that they needed to obtain a medical opinion regarding the grievor's suitability to be in the workplace. However, he agreed to live to the agreement struck at the July 2, 2009, meeting.

[73] Mr. Wilson was copied on the minutes of the relationship-building meetings between the grievor and Mr. Beaudoin, which stopped at some point after July 31, 2009. The grievor and Mr. Beaudoin had different interpretations of what was

said at the meetings. Ms. Keefe-MacLeod reported to Mr. Wilson that the grievor had the impression after their last meeting that Mr. Beaudoin was stalking her, used these meetings for disciplinary hearings, took the opportunity to reprimand her and threatened to take the minutes himself, contrary to what had been agreed to on July 2 (see the email: Exhibit 33).

[74] Following the receipt of Ms. Keefe-MacLeod's email (Exhibit 33), Mr. Wilson met with Ms. Keefe-MacLeod to discuss the grievor's concerns. When asked about the stalking, Ms. Keefe-MacLeod equated it to micromanaging. The grievor alleged that Mr. Beaudoin was listening to her from his workstation and was therefore micromanaging her. She felt harassed because, in her opinion, he tattled on her. According to Ms. Keefe-MacLeod, the grievor blamed her use of sick leave on Mr. Beaudoin, who had only negative things to say and looked for some transgression to raise at their weekly meetings. Ms. Keefe-MacLeod also informed Mr. Wilson that the grievor suffered from an anxiety disorder. Mr. Wilson agreed to discuss these and other allegations with Mr. Beaudoin (see the notes of the meeting: Exhibit 34).

[75] As promised, Mr. Wilson did follow up with Mr. Beaudoin. In general, Mr. Beaudoin had several positive things to say about the grievor's performance as she was technically very sound. He did listen to her phone calls as part of his role as team lead and as part of the performance management and assessment process. It was part of his job. He was not treating the grievor any differently from anyone else on his team. He was required to listen to calls. The grievor's issue was that she felt he should not listen to her calls. Her co-workers had expressed concerns to him over the amount of personal information the grievor shared with taxpayers on the phone; this was a way to monitor that concern. In Mr. Wilson's experience, all employees subject to performance management perceive their supervisors as harassing them. His investigation did not result in any changes. Mr. Beaudoin in his opinion had handled the grievor correctly. Mr. Wilson followed up with Ms. Keefe-MacLeod and advised her of his conclusion.

[76] The action plan prepared by Mr. Beaudoin should have had an end or review date attached. He did err by omitting this, but it was not harassment. He forwarded a copy of the grievor's annual performance review to Mr. Wilson on August 5, 2009, with which Mr. Wilson agreed. In September, Mr. Wilson received another request from Ms. Keefe-MacLeod to change the grievor's team lead. The grievor was advised that

change was coming as Mr. Beaudoin was leaving the team and a new team lead would soon be in place. At that point, Mr. Wilson did not know that Mr. Chenevert would take over following Ms. Sohnle; however, it was always intended that Ms. Sohnle's time as team lead would be brief.

[77] One month after the grievor's performance review, a letter of direction was prepared by Mr. Beaudoin and labour relations that focused on the grievor's unplanned absences and her failure to report in to work as required. The purpose of such a letter is procedural directions. It is non-disciplinary and is administrative in nature. This approach deals with procedural directions, while performance plans deal with workplace behaviours. Mr. Wilson was not certain whether the grievor was given this letter.

[78] The October 7, 2009, meeting that was scheduled with the grievor never occurred. She was upset about Mr. Wilson's decision not to attend and the substitution of Ms. Sohnle in his place. This was the day that the incident in the prayer room occurred. The grievor was free to leave her workstation and use the prayer room. However, her behaviour there that day prompted the security guards on duty to call in an EAP representative. She became more agitated because she did not want to speak to the EAP representative, and the security guards' attempts to calm her made her more upset. Mr. Wilson testified that he received calls expressing concern over what she was saying in the room that day. Apparently, she was using profanity and was very distressed. He received reports about what took place that day and dealt with the complaints that came in afterwards. She denied using profanity in the prayer room, although she admitted she was upset. As a result, he had concerns over the grievor's suitability to be at work.

[79] Mr. Wilson met with Ms. Sohnle and Ms. Keefe-MacLeod on October 15, 2009, after the employer had heard nothing from the grievor concerning her absence from work. They needed to know where she was and when she would be returning to the workplace. They were aware that she had a medical note but had not received it. They chose to meet with Ms. Keefe-MacLeod because they could not get hold of the grievor directly.

[80] When the grievor returned to the workplace on October 19, she brought in the medical note. It indicated that she was to be off work until November 2, 2009, so Mr. Wilson met with her and told her she had to stop work until they had a medical

note saying that she was fit to return to work. He recommended that the grievor consent to undergo an FTWE. A letter to take to her physician, a copy of the job description and a release of information form were sent to her via registered mail after the meeting. The purpose of the request was to identify her restrictions and, if any, her accommodation needs. The letter identified the employer's concerns about the grievor's absences from work, her statements about suffering from depression, calls she had made to her team lead in an agitated state, her behaviour and her crying in the workplace. He felt that she was clearly in distress and that it was preventing her from being at work. The October 19 meeting was very stressful for her. She wanted to be at work as she needed the money and had no paid leave remaining in her leave bank.

[81] In response to the employer's request, Mr. Wilson received a letter from Dr. Mansell (Exhibit 4) indicating that three accommodations were necessary. He told the grievor's team lead to do her best to implement these accommodations. It is difficult to find a quiet place in a call centre, but the grievor was assigned to a workspace near the window. The team lead was directed to give her appropriate notice of any meetings, even though on a couple of occasions she was asked to meet without notice concerning formal complaints received from taxpayers, without effect. When this happened, the meetings went well. The grievor was calm and rational and explained her side of the taxpayer call.

[82] Between October 2009 and April 2010, the grievor continued her pattern of absences. Her lack of contact with the workplace was Mr. Wilson's main concern. As he was told that these absences were health related, he directed Mr. Chenevert again to obtain an FTWE. When Mr. Chenevert met with the grievor to advise her of this request, things did not go well. She had an angry, emotional outburst at her team lead and conducted herself in an inappropriate manner, which continued into the workplace. Her outburst upset her co-workers when she threatened Mr. Chenevert's safety.

[83] The grievor's outbursts were inappropriate, regardless of their cause. How a manager is to deal with them differs when they are health related. This is why the decision was made to obtain a third-party FTWE. Following the recommendations of the grievor's physician had not been successful, so Mr. Wilson felt that it was time to get another opinion. If she was fit to work, then her outbursts were culpable behaviour. If she was unfit to work, then her outbursts were health related and non-culpable behaviour. One is dealt with through disciplinary action; the other may require medical

treatment and possibly accommodation in the workplace. Mr. Wilson relied on the CRA "Injury and Illness Policy" (Exhibit 41) and labour relations to guide him through the process of obtaining a third-party FTWE.

[84] The grievor was directed not to return to work until she was capable of controlling her outbursts or the employer had received an FTWE indicating that she was fit to be at work. In making this decision, Mr. Wilson considered the negative impact the grievor's presence in the workplace had on her co-workers, the possibility of physical violence, given her demonstrated lack of control in her meeting with Mr. Chenevert, and the possibility that she could easily lose her temper with a taxpayer on the phone if she were upset.

[85] Mr. Wilson was under the impression that the grievor would attend the FTWE scheduled for May 5, 2010. That was until she realized that the doctor required blood and urine tests for a complete assessment. Based on this, the grievor refused to attend the appointment. As a consequence, she was not allowed to return to the workplace. Through Ms. Keefe-MacLeod, a time was scheduled for her to pick up her personal effects, but she did not go to the office. Throughout this and the following months, the grievor remained assigned to the same cubicle. The employer continued to pursue a third-party FTWE. Eventually, the grievor went on long-term disability.

[86] Mr. Wilson did not recall receiving any requests from the grievor to be removed from Mr. Beaudoin's team. Even if he had received such a request, he would not have granted it as she was undergoing performance management. However, when she returned from long-term disability, he did assign a new team lead, given the passage of time. It allowed her to start fresh.

[87] No accommodation plan was developed for the grievor as required in the Illness and Injury Policy because the employer had merely accepted and implemented the recommendations as set out in Dr. Mansell's letter (Exhibit 4). While the policy also states that the employee's medical practitioner is the primary source of medical information in accommodation cases, in consultation with labour relations, it was decided to seek an independent third-party FTWE.

III. Summary of the arguments

A. For the grievor

[88] The grievor alleged a violation of article 19, "No Discrimination," of the collective agreement between the Canada Revenue Agency and the Public Service Alliance of Canada for the Program Delivery and Administrative Services Group, with an expiry date of October 31, 2012 ("the collective agreement"), and paragraph 7(*b*) of the *Canadian Human Rights Act* (R.S.C. 1985, c. H-6; *CHRA*).

[89] Between April 2008 and March 2012, the grievor was employed by the CRA in its business inquiries call centre. On April 3, 2009, she was placed on a performance action plan that had no end date. Her performance review of August 26, 2009 (exhibit 21), referred to the action plan (see Exhibit 14). According to her performance review, she mostly met the requirements of her job.

[90] In early 2009, the grievor notified the employer of her disability and attributed it to extreme stress in the workplace. In February 2009, she discussed with Mr. Beaudoin her extreme stress and advised him that she was on medication and undergoing counselling (Exhibit 11). Ms. Bell, Mr. Beaudoin's manager, was notified of the grievor's anxiety disorder and symptoms on June 11, 2009 (Exhibit 28). On July 2, 2009, Ms. Bell and Mr. Beaudoin met with the grievor and Ms. Keefe-MacLeod to discuss how she could be accommodated in the workplace. An agreement was reached and was circulated among those in attendance (Exhibit 8). Mr. Wilson, who replaced Ms. Bell, was notified that the grievor suffered from depression and an anxiety disorder when he took over from Ms. Bell in July 2009 (Exhibit 34). He was also made aware of the accommodations that were put in place following the July 2 meeting. On September 25, 2009, the grievor sent an email to Mr. Beaudoin explaining that she experienced extreme stress in meetings with managers and that she expected Mr. Wilson to attend a meeting scheduled for the following week; however, Ms. Sohnle attended in his place.

[91] The team leads who replaced Mr. Beaudoin, Ms. Sohnle and Mr. Chenevert, were not made aware of the accommodations in place for the grievor when they took over her team. However, Mr. Chenevert was aware of the requirement to give the grievor at least 24 hours' notice of any meeting she was to attend.

[92] Dr. Mansell, the grievor's treating physician, provided the employer with a list of suitable accommodations (Exhibit 4) on October 22, 2009. Following the receipt of this letter, the employer requested no further information from him, although he continued to treat her throughout the duration of her employment.

[93] The employer failed to follow the agreed-upon accommodations for Ms. McLaughlin. Her agreed-upon meetings with Mr. Beaudoin ceased at the end of August even though they were expected to continue weekly. Despite the employer's commitment to provide her with notice of meetings with managers and to advise her as to who would be attending, on October 5, 2009, Ms. Sohnle attended a meeting with the grievor and Mr. Beaudoin when Mr. Wilson should have been there. Mr. Wilson did not plan to attend the meeting, and the grievor was not advised. As a result, she had a significant anxiety attack before the meeting for which she sought immediate medical treatment from her doctor. Mr. Wilson testified that on two occasions he met with her about service complaints in February 2010 without giving her any notice.

[94] The grievor testified that she was moved several times and that at one point she was required to change workstations in order for another person to be accommodated. She was not told why her requirement for a quiet work area with few distractions was not being accepted. Mr. Chenevert did not recall these moves.

[95] On October 7, 2009, Ms. McLaughlin suffered a significant anxiety attack and removed herself from the workplace to find someplace to calm herself down. She went to the prayer room. She testified that the security guards on duty kept speaking with her and telling her that her problems were not that severe and that if she did not return to her workstation, she could be disciplined for job abandonment. She found it impossible to calm down in the circumstances and left the building. This was the first time she made use of the accommodation to remove herself from the workplace; it merely escalated her anxiety.

[96] Mr. Wilson testified that he had accepted the accommodations recommended by Dr. Mansell on October 22, 2009 (Exhibit 4). However, on October 28, 2009, in an email, Mr. Wilson stated that he did not view it as the doctor's role to recommend accommodations (Exhibit 38). The employer decides on what accommodations are appropriate. He never met with the grievor to discuss her accommodations because he accepted the accommodations recommended by the doctor. This evidence is contradictory. Mr. Chenevert repeated the employer's view of the doctor's role in

determining appropriate accommodations to the grievor on March 8, 2010, when after she complained that her doctor's orders were not being followed, he advised her that the doctor could not tell the employer what accommodations she needed. The doctor could identify only what restrictions she had, and then the employer would decide how it could accommodate them. It is not apparent in this case whether the employer accepted the doctor's recommended accommodations.

[97] The employer perpetuated harassment against the grievor through its performance management system and by failing to investigate her harassment complaint. The employer continued to rely on Mr. Beaudoin's action plan (Exhibit 14) despite acknowledging that she had shown improvement. She had no further conflicts with co-workers after the action plan was put in place. She still had problematic issues in her personal life that occasionally affected her while she was at work, but there is no evidence that these matters affected the work she or others did. Other than that, her anxiety-fuelled outbursts were related to the employer's failure to meet her accommodation needs.

[98] Mr. Wilson admitted that the employer failed to follow the requirements of the action plan yet continued to rely on it. Once the action plan was put in place, no meeting were held to discuss the grievor's progress. Mr. Beaudoin admitted that if her behaviours were not corrected, her contract would not be extended. The employer did not reconcile the events leading up to the action plan with the information related to her disability and her accommodation needs. The failure to reconcile these matters and deal appropriately with the action plan, which was linked to behaviour caused by the grievor's disability, was discriminatory.

[99] Mr. Wilson testified that the grievor asserted in July 2009 that Mr. Beaudoin was harassing her. His investigation into this allegation consisted of asking Mr. Beaudoin informally about how he was handling the grievor's action plan and performance management. He stated that after speaking to Mr. Beaudoin, he was satisfied that Mr. Beaudoin had done nothing wrong. He did not seek additional information from the grievor or anyone else. She requested to be moved to another team and was denied. In the meantime, she felt increasingly more stressed and isolated in the workplace. She testified that her attendance problems were related to her experiences with the action plan, her failure to secure a transfer to a different team and the employer's refusal to abide by her accommodation requirements.

[100] Mr. Chenevert testified that he had concerns with the grievor's attendance and hospitalization following her fall in March 2010. On March 23, 2010, he discussed these concerns with her (see the meeting summary: Exhibit 26). At some point between March 23, 2010, and April 13, 2010, Mr. Wilson determined that an FTWE should be done by a third party based on a comment made by the grievor and his opinion that Dr. Mansell's intervention was not working. His opinion of Dr. Mansell's interventions was based on Mr. Wilson's belief that the grievor would tell Dr. Mansell what to report to the employer based on her comments to Mr. Chenevert. The employer's Illness and Injury Policy states that medical information about accommodation should be gathered from the primary treating health-care provider, and only if it is not possible to obtain the required information from that provider would a third party be used (Exhibit 41). Mr. Wilson did not attempt to get the information from Dr. Mansell in April 2010.

[101] The information that went to the third party included information that the grievor disputed. This fact was not reported in the referral letter. The fact that she had accommodations in place, which were not always followed, was also not mentioned in the referral letter (Exhibit 24). Upon reading the information in the referral letter, she became extremely upset and had a significant anxiety attack. Another third-party referral letter was prepared and sent to her requesting her to attend an FTWE with Dr. Els who required her to provide blood and urine samples. When she expressed concern with attending this FTWE, she was advised that she was not allowed to return to work unless she consented to this examination.

[102] To prove *prima facie* discrimination based on a disability, the grievor had only to show that she had a disability, she experienced an adverse impact with respect to her employment and the disability was a factor in the adverse impact (see *Moore v. British Columbia (Education)*, 2012 SCC 61, at para 33). The employer did not question her disability. She asserted it and informed her employer, which accepted that she had a medical condition, and requested reasonable accommodation. She was not accommodated to the point of undue hardship, and the employer's failure to provide consistent accommodation constituted discrimination. The employer did not question her disability. However, her request for a reasonable accommodation was not met, and the employer's failure to provide consistent and ongoing accommodation constituted discrimination.

[103] The employer had the duty to take reasonable steps to accommodate the grievor's functional limitations, to the point of undue hardship (see *Cyr v. Treasury Board (Department of Human Resources and Skills Development)*, 2011 PSLRB 35, at para 45). The duty to accommodate includes procedural aspects requiring employers to obtain all relevant information about the employee's disability and then to work with the employee to see how he or she can be accommodated. Employers are required to make diligent efforts to accommodate employees and should not seek to reduce accommodation efforts solely out of convenience (see *Stringer v. Treasury Board (Department of National Defence) and Deputy Head (Department of National Defence)*, 2011 PSLRB 33, at para 84 and 85). Furthermore, employers must be reasonably justified when ending workplace accommodations, even temporarily (see *Kirby v. Treasury Board (Correctional Service of Canada)*, 2015 PSLREB 41, at para 147). An employer need not necessarily find that an objective basis for accommodation exists. In some cases, it is sufficient for a grievor with an anxiety disorder to show that the grievor's anxiety, fear and perceptions of a hostile work environment are sufficient to justify an accommodation (see *Frito-Lay Canada v. USWA, Local 461* (2007), 166 L.A.C. (4th) 157, at para 63 and 72). Failing to adhere to accommodations and to include the multiple parties whose interests are affected can result in findings that the employer's efforts to accommodate are inadequate (see *Lloyd v. Canada Revenue Agency*, 2009 PSLRB 15, at para 39 and 40).

[104] The grievor requested that she be made whole and that she receive all lost wages for the period she was excluded from the workplace on a discriminatory basis up to the point her long-term disability insurance coverage began on July 19, 2010, consistent with the decision in *Panacci v. Treasury Board (Canada Border Services Agency)*, 2011 PSLRB 72. She also sought damages under all categories enumerated in the *CHRA*.

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

[105] The grievor alleged that the employer has failed its duty to accommodate her and relied on the doctor's note provided to the employer in late October 2009 (Exhibit 4). The grievor also alleged that she was placed on an indeterminate action plan, yet there is no evidence that it is still in place. Mr. Chenevert and Ms. Sohnle both testified that they had never seen any such action plan.

[106] The employer met with the grievor in June and July 2009 to discuss workplace incidents in which she had been involved. Her behavioural patterns were brought to her attention. On July 2, 2009, a meeting was held at which the grievor, her union representative and employer representatives developed a plan of action intended to address and rectify problems she was experiencing in the workplace with her co-workers (Exhibit 8). The meeting was not to initiate the accommodation process. Neither the grievor nor her representative put forward her restrictions. Her doctor, in his medical note in October 2009 (Exhibit 4), did not identify her restrictions; rather, he identified what was necessary to accommodate her in the workplace.

[107] Before the October 7, 2009, planned meeting, the grievor did not present any medical notes indicating that a change to who attended the meeting would pose a problem for her. She could not raise this as proof that the employer failed to accommodate her. While the employer admitted that Mr. Wilson met with her to discuss service complaints that arose after October 2009, she did not indicate or express any concerns with the lack of notice of the meetings and according to the evidence was comfortable and distress-free during and after them. As to moving her from her cubicle as she alleges was done contrary to the doctor's recommendation that she be provided a quiet work environment, the evidence was that it was done no more than twice when she was working overtime on a weekend. The rest of the time, she remained assigned to the same cubicle with a window as is so to this date.

[108] The grievor also alleged that the employer failed to investigate her harassment complaint against Mr. Beaudoin. She did not file a formal harassment complaint; she expressed her concerns with his treatment of her as her team lead. Through the lens of her complaints, Mr. Wilson looked into Mr. Beaudoin's management of her and determined it appropriate. There was no *prima facie* case of harassment. The investigation process undertaken by Mr. Wilson was adequate. Given how the complaint was made, Mr. Wilson took all reasonable steps to verify the legitimacy of her concerns.

[109] Mr. Beaudoin's management of the grievor might not have been perfect, but he did not treat her any differently from any other of his employees. His actions were consistent with the employer's policies and expectations of a team lead. The employer was trying to manage her attendance and her behaviour in the workplace. Two managers and three team leads were involved in managing the grievor, and she took

issue with every one of them. The employer had either received reports from co-workers or observed behaviours she demonstrated in the workplace that caused concern, and it needed to address these issues.

[110] The employer recognized that performance management is a difficult process for any employee. Numerous meetings were held with the grievor at which the employer expressed its concerns. She was given a chance to improve her behaviour in the workplace as is evidenced by the numerous extensions of her employment contract. The employer demonstrated good faith by providing her with the opportunity to improve her performance.

[111] In June 2009, the grievor met with Mr. Beaudoin and Ms. Bell to discuss the next steps in developing a working relationship with Mr. Beaudoin. A plan of action was developed (Exhibit 8). In it, the grievor acknowledged that interpersonal issues with her co-workers needed to be resolved. No medical limitations were identified in the plan of action although the grievor, her bargaining agent and the employer agreed to establish certain workplace accommodations for her. Weekly meetings were held to discuss issues that arose during the week, but there is no evidence that these meetings were disciplinary in nature.

[112] By August 2009, these meetings were suspended as the grievor misinterpreted their intended outcome to address issues that she was experiencing in the workplace. Imperfect implementation of the plan does not prove malice or bad faith on the part of the employer.

[113] Mr. Beaudoin tried to work with the grievor. In September 2009, they exchanged a series of emails about her failure to follow the proper procedure for reporting her absences. There is no evidence that between July and October 2009 she was denied the opportunity to leave her workstation to de-stress as was agreed to in the action plan. On October 7, 2009, an incident occurred in the prayer room. The only evidence of the incident is the grievor's. The employer had nothing to do with calling security to the prayer room or with calling in an EAP agent to help her. The employer should not be blamed for the actions of the security guards, who are not in its employ. The grievor did not file a complaint concerning the EAP representative's actions. Management could not address something of which it was not aware.

[114] Between October 7 and 19, 2009, the grievor was absent from the workplace. She provided the employer with a medical certificate (Exhibit 3) which indicated that she was to be off work until November 2, 2009, which was why Ms. Sohnle sent her home. Dr. Mansell responded to the employer's request for an FTWE and provided information about concerns raised with management, including notices of meetings and a quiet work environment (Exhibit 4).

[115] The grievor returned to work on October 26, 2009. Within two weeks, she had gone from being certified as unable to work until November 2, 2009, to being fit for work. During this time, she told people she was in financial difficulty and needed to be at work. From this, it can be inferred that the reason for the change in the doctor's opinion was related to the grievor's financial situation.

[116] The employer accepted Dr. Mansell's recommendations and admitted that on two occasions, meetings were scheduled with the grievor without prior notice. As much as possible, Mr. Wilson tried to limit her stress in the workplace. When emails of a general application were sent out, she was notified in advance. Mr. Chenevert had no problem giving her notice of meetings up to April 2010. The accommodations might not have been implemented perfectly, but an employee is not entitled to a perfect accommodation (see *Callan v. Suncor Inc.*, 2006 ABCA 15; and *Taticek v. Treasury Board (Canada Broder Services Agency)*, 2015 PSLREB 12). The employer could have managed the accommodation better, but this is not sufficient to constitute discrimination.

[117] The onus is on a complainant to establish discrimination on a *prima facie* basis, and once he or she has done so, the onus shifts to the employer to demonstrate a *bona fide* occupational requirement or undue hardship to avoid liability (see *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4; and *Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593). Never in any of Dr. Mansell's notes does he make a statement that the grievor is disabled. The employer accommodated her based on her doctor's recommendations. It acknowledged that she needed some sort of accommodation based on its conclusion and assessment of her behaviour in the workplace. The accommodation might not have been perfect, but it met the needs identified in Dr. Mansell's letters, which was sufficient to discharge the duty to

accommodate the grievor (see *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536 (*O'Malley*)).

[118] The grievor alleged that the employer refused to accommodate her by transferring her from Mr. Beaudoin's team, which would have been inappropriate, given that he was dealing with her in a performance management scenario. The employer took her concerns with Mr. Beaudoin into consideration when it assigned her to Mr. Chenevert's team on the departures of Mr. Beaudoin and Ms. Sohnle. Mr. Wilson tried to address her harassment concerns by finding a team lead who was on good terms with her. The fact that there was a failure to transfer all relevant information between team leads did not show malice or bad faith on the part of management. Mr. Chenevert was understanding and compassionate with the grievor. Both he and Mr. Wilson were empathetic as they were both dealing with family members suffering with mental illness.

[119] After the grievor fell down the escalator on March 11, 2010, there was no indication that she wanted to leave the building or that the employer prevented her from leaving. She expressed no concern about staying at work after the incident. The employer cannot be faulted for how it dealt with the events of that day.

[120] The employer made genuine efforts to manage the workplace and help the grievor. Exhibit 23 (an email dated October 7, 2009) proves that it provided her with training, an indication of its good faith in its dealings with her. It has the right and a duty to have an employee undergo a medical examination if there are reasonable and probable grounds for one (see *Tobin v. Treasury Board (Fisheries and Oceans Canada)*, PSSRB File Nos. 166-02-18410 to 18412 (19900124); and *Lacoste v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 68).

[121] Mr. Chenevert, as did Mr. Beaudoin, had concerns about the grievor's absences and her pattern of failing to report them, contrary to policy. On April 13, 2010, he called a meeting to discuss the employer's request that she undergo an FTWE. During this meeting, she became very angry, which intimidated Mr. Chenevert (see the summary of the meeting: Exhibit 25). Mr. Wilson determined that an independent third party should conduct the FTWE after reading Mr. Chenevert's account of the April 13, 2010, meeting. He was particularly concerned by this account, the grievor's absences and her failure to follow reporting procedures.

[122] The employer was trying to manage the grievor's failure to follow policies while at the same time dealing with the question of whether she had a disability that impacted her ability to be in the workplace and the workplace itself. Her increased absences in February and March 2010 and her emotional outbursts in the workplace left the employer wondering whether this might be a disciplinary and not an accommodation matter. To determine this, the employer decided to request an FTWE from an independent third party. The grievor had previously indicated to Mr. Chenevert that she did not want to take the request to Dr. Mansell because he would put her off work, which she could not afford (see Exhibit 25). She was not opposed to going to the independent third party, Dr. Els, until she learned that she would be required her to provide blood and urine samples.

[123] It was reasonable for the employer to request an independent medical examination. Who was selected to perform the grievor's FTWE was beyond the employer's control. The company contracted for the purpose determined to which doctor it would be assigned. The employer sent the documents required by the policy. There was nothing inappropriate in what the employer did. Eventually, the grievor agreed to the independent medical evaluation and was determined fit for work in November 2011.

[124] The employer can require employees to submit to medical examinations (see *Firestone Tire & Rubber Co. of Canada v. United Rubber Workers, Local 113*, [1973] O.L.A.A. No. 3 (QL); and *Hood v. Canadian Food Inspection Agency*, 2013 PSLRB 49). An independent medical examination may be performed by a doctor appointed by the employer or a third party (see *Via Rail Canada Inc. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada*, [2002] C.L.A.D. No. 207 (QL)). The employer is also entitled to seek a second opinion when there is a lack of confidence in the grievor's personal physician (see *Canada Post Corp. v. Canadian Union of Postal Workers*, [1990] C.L.A.D. No. 43 (QL)). In this circumstance, the employer had concerns about whether the grievor's conduct was culpable and whether the accommodations she required were being met. Therefore, it was only reasonable to seek an independent third party's opinion.

[125] As to the grievance related to the allegation that the grievor was banned from the workplace, it is clear that she was denied access to the workplace based on concerns for her health and its impact on the workplace. There was no malice on the

employer's part. Her access card was deactivated because she insisted on coming to work when her doctor had advised the employer that she was unfit for work. The employer was merely complying with her doctor's restrictions. Following the demand for an independent medical examination in April 2010, her access card was again deactivated, consistent with the employer's practice to control the workplace. The grievor was put off work from April 2010 to November 2011 due to her disability, not the employer's actions.

[126] The grievances should be denied, and even if they are allowed in whole or in part, there was no evidence of recklessness or bad faith on the part of the employer that would support the grievor's claim for damages for pain and suffering. Similarly, there are no grounds upon which to base an award for special circumstances. The employer took into account her concerns about Mr. Beaudoin's management of her and determined that he did not harass her.

IV. Reasons

[127] The grievor relied on clause 19.01 of the collective agreement and paragraph 7(*b*) of the *CHRA* with respect to all three of her grievances. The collective agreement simply states as follows:

> *ARTICLE 19*
>
> *NO DISCRIMINATION*
>
> *19.01 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 Alliance, marital status, or a conviction for which a pardon has been granted.*

This language reflects that of section 7 of the *CHRA*, as follows:

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

on a prohibited ground of discrimination.

[128] With respect to files 7737 and 7738, the grievor contested her ban from the workplace pending the performance of a Fitness to Work evaluation by an independent third party physician rather than one of her choosing. While the grievor has established a *prima facie* case of discrimination in that she has shown that she has a disability, that the employer was aware of this disability and that this disability had an adverse impact on her employment. For the reasons below, I also find that the employer has met its onus of providing a *bona fide* occupational reason as per section 15 of the *CHRA* for requiring a third party FTWE and advising her that she was not to come to the office until such time as she had provided medical certification.

[129] The employer has, to my satisfaction, demonstrated that it's legitimate interest in protecting her health and the safety of other employees required that she be stopped from entering the workplace. Her unusually strong reactions to events and her prior actions in disregarding medical certificates and in coming to work during periods when she should have been off support the employer's decision to require a FTWE and to make it clear that she should remain at home pending the results of the FTWE. This was a legitimate exercise of management rights and was not arbitrary or discriminatory.

[130] The evidence disclosed that the employer had serious concerns regarding her health which prompted it to request the FTWE in April of 2010. The grievor admitted to having anxiety issues which caused her difficulty sleeping and required medication, she had a long history of run-ins with fellow employees and had suffered anxiety attacks at work, the latest of which, in March of 2010, had culminated with her admission to a psychiatric unit for five days.

[131] During the same period, the employer became increasingly concerned over the grievor's tardiness and absences, many of which were without adequate notice or explanation. In addition, she was going through a very difficult time in her personal life which she admitted only served to exacerbate her behavioural issues at work. Exhibit 25 (email summary of concerns) indicates that only a few days prior to being asked for the FTWE, the grievor's supervisor, Mr. Chenevert, had a conversation with her in which she advised him that she was 'on very heavy medication' and was going to ask her doctor if she 'was crazy' because she had been losing things (bank card, gift card, keys). Mr. Chenevert also reported that she had displayed unusually strong

reactions to conversations, screaming, crying and storming out of her supervisor's office, making him uncomfortable and fearful for his physical security. The employer has, in its testimony and in the documentation submitted, justified the requirement for the grievor to obtain a FTWE. I find that the request was reasonable and non-discriminatory.

[132] In addition to the requirement to undergo the FTWE, the grievor also contests the fact that she was prevented from returning to the office pending the results of the evaluation. The employer felt that this was necessary to make clear to the grievor that she was not to attend at the office until such time as the doctor conducting the FTWE had authorized her return to work. As I have stated above, the employer's conclusion that the grievor's continued attendance at work could have had a negative impact on her health was well-founded and non-discriminatory. As the grievor had in the recent past attended work during a period of sick leave where her medical certificate indicated that she was unable to work, the employer was not only reasonable in its request that she not return to work until such time as she had been cleared to do so, but it could be argued that the employer had no choice but to do so since allowing an employee to work without medical clearance could have negative legal consequences on an employer, opening it up to actions by the grievor or fellow employees. I find that the employer has provided a non-discriminatory explanation for its actions in this regard.

[133] Finally, with respect to the requirement that the FTWE be conducted by a third party physician, I also find that the employer had provided a non-discriminatory justification for this requirement. The employer's evidence was not contradicted with regard to its motivation in requiring a third party assessment. Mr. Chenevert testified that he was content to have the grievor's doctor complete the assessment until the grievor advised him that she knew exactly what to have him say. The grievor did not contest this aspect of the evidence, which I find raised a reasonable doubt in the employer's mind regarding any reliance that it could place on such a FTWE.

[134] Given that the grievor advised Mr. Chenevert that she knew what to tell Dr. Mansell to put down on the FTWE, the employer was justifiably uncertain whether the information it would receive from him would accurately reflect the nature and extent of the grievor's disability. It had relied on his recommendations for accommodating the grievor, and yet her attendance remained an issue, and she

continued to have interpersonal issues with her co-workers and team leads. As I have found above, the employer was entitled to pursue an FTWE, and the process followed was consistent with the employer's policy. The demand for an FTWE was an exercise of management rights and was not punitive, arbitrary or unreasonable, nor was it tainted by discrimination. The employer, in coming to the conclusion that a third party FTWE was required, treated the grievor in the same manner that it would have treated any other employee and I am unable to find any link between her disability and management's request.

[135] Furthermore, the grievor delayed the process when she refused to attend the selected physician because of the requirement that she provide blood and urine samples, thus forcing the employer to regroup and determine what alternate approach it would take to secure the necessary information. The grievor's statement that she did not want to return to Dr. Mansell for further information because he would put her off work merely confirmed that the employer's concerns were legitimate. Mr. Wilson stated that he needed to determine whether the ongoing issues that her team leads were experiencing in managing her attendance and performance were as a result of culpable and non-culpable behaviour, and the only way to do it was to have an FTWE conducted by an independent third party. He had reason to believe that a report from Dr. Mansell might not truly reflect the nature of the grievor's needs.

[136] The grievor's third grievance alleges that the employer did not provide her with an environment free of harassment and discrimination and failed to accommodate her in the workplace. The evidence with respect to this grievance was broad and covered many incidents that occurred over a lengthy span of time. I have concluded that none of these incidents, either alone or when viewed together, constitute a violation of either Article 19 of the collective agreement or sections 7 or 14 of the *CHRA*.

[137] Harassment and exceptions to claims of harassment are dealt with in sections 14 and 15 of the *CHRA*, which reads as follows:

> ***14.*** *(1) It is a discriminatory practice,*
>
> *. . .*
>
> *(c) in matters related to employment,*
>
> *to harass an individual on a prohibited ground of discrimination.*

> *Sexual harassment*
>
> *(2) Without limiting the generality of subsection (1), sexual harassment shall, for the purposes of that subsection, be deemed to be harassment on a prohibited ground of discrimination.*
>
> *Exceptions*
>
> ***15.** (1) It is not a discriminatory practice if*
>
> *(*a*) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a* bona fide *occupational requirement;*

Briefly stated, it is a discriminatory practice under the *CHRA* to harass an individual on a prohibited ground of discrimination in matters related to employment. The following excerpt from *Khalifa v. Indian Oil and Gas Canada*, 2010 CHRT 21 sets out the law with respect to this ground of discrimination:

> *[109] Harassment, within the meaning of the* CHRA*, consists of unwelcome conduct related to one of the prohibited grounds of discrimination that detrimentally affects the work environment or leads to adverse job-related consequences for the victims (*Janzen v. Platy Enterprises Ltd., *1989 CanLII 97 (SCC), [1989] 1 S.C.R. 1252 at 1284;* Rampersadsingh v. Wignall *(No. 2)(2002), 45 C.H.R.R. D/237 at para. 40 (C.H.R.T.)). In* Canada (HRC) v. Canada (Armed Forces) and Franke, *1999 CanLII 18902 (FC), [1999] 3 F.C. 653 at paras. 29-50 (F.C.T.D.) (*Franke*), Madame Justice Tremblay-Lamer set out the test for harassment under the* CHRA*. In order for a complaint to be substantiated, it must be demonstrated:*
>
> *i. That the respondent's alleged conduct is related to the prohibited ground of discrimination alleged in the complaint;*
> *ii. That the acts that are the subject of the complaint were unwelcome;*
> *iii. That there was an element of persistence or repetition in the impugned conduct. In certain circumstances, however, even a single incident may be severe enough to create a hostile environment. An objective, reasonable person standard is used to assess this factor; and*
> *iv. That where a complaint has been filed against the employer regarding the conduct of its employees, the victim of the harassment has, whenever possible, notified the employer of the alleged offensive conduct.*

In support of its argument, the bargaining agent reviewed a number of the events outlined in the evidence, pointing to them generally as evidence of harassment and a

failure to accommodate. I will deal with the issue of the employer's alleged failure to accommodate first.

[138] It is well recognized that an employer must accommodate an employee with a disability to the point of undue hardship to meet its obligations under section 7 of the *CHRA* and article 19 of the collective agreement. The employer in this case did accommodate the grievor based on her physician's recommendations. Despite her assertions otherwise, the evidence supports the finding that it is with the implementation and continuing nature of that accommodation that the grievor found fault.

[139] The grievor alleged that the employer had not respected her accommodation plan. She claimed that the employer's implementation of the required accommodations was insufficient as on two occasions she did not receive at least 24 hours' notice of a meeting, because she had been assigned to a different cubicle and because her requests to be assigned to a different team lead were not granted. The employer, on the other hand, argued that the grievor's needs were accommodated in the workplace and that despite this, she continued to have performance and attendance problems.

[140] The employer accepted Dr. Mansell's recommendation that the grievor not be subject to surprise meetings and admitted that despite having agreed to provide her with 24 hours' notice of meetings along with a list of those invited and the agenda, on two occasions meetings were scheduled with the grievor without prior notice. However, Mr. Chenevert testified to the fact that on those occasions, he was required to meet with the grievor without notice given the time-sensitive nature of the taxpayer complaints. He indicated that the meetings had gone well and the grievor did not appear to be upset or in distress. The bargaining agent did not contest this characterization of the meetings and produced no evidence to indicate that the grievor had advised the employer on those occasions that she objected to the impromptu meetings.

[141] While the accommodations might not have been implemented perfectly, an employee is not entitled to a perfect accommodation (see *Callan* and *Taticek*). The employer could have managed the accommodation better, but this is not sufficient to constitute discrimination. I find that the employer has provided a good faith and non-discriminatory explanation for its actions with regard to scheduling of meetings. Two discussions with her manager related to work inquiries did not in my opinion

constitute an interruption in the notice provisions of her accommodations as is outlined in the jurisprudential framework above. The employer was entitled to meet with her to discuss her work and to address work-related inquiries. At no time did she indicate to Mr. Wilson that she was unwilling to meet with him to discuss the complaints he had received from taxpayers. The evidence of both was that these meetings did not cause her any distress. Minor inconveniences of the sort she experienced did not constitute an interruption of her accommodation.

[142] The grievor's representative pointed to the employer's failure to continue meeting with the grievor weekly as an example of its failure to accommodate and stated that the employer failed to reconcile the events leading up to the action plan with the information related to her disability and accommodation needs. The commitment to weekly meetings arose from the employer's application of the performance management plan to the grievor and not from any requirement to accommodate her disability. I was provided with no evidence to indicate that the grievor ever protested the non-occurrence of these meetings. No medical documentation to support the need for such meetings was provided to the employer.

[143] The grievor also raised the issue of her cubicle as an example of the employer's failure to accommodate her needs. Exhibit 8 reflects notes taken by the grievor's representative during a meeting on July 2, 2008 in which the parties agreed that the grievor would be placed 'in a quiet place' and that her position next to the window was acknowledged by her to be a suitable place. A medical note dated October 22, 2009 (Exhibit 4) indicates only that the grievor needs a quiet place to work without distractions. I was provided with no evidence to suggest that even if the grievor was moved on occasion during T4 season that the cubicle to which she was moved was unsuitable to her accommodation plan or that it posed a threat to her health. Nor was I provided with evidence to suggest that the grievor had advised the employer of her opposition to any move at the time that it occurred. The employer did not question her disability, and her request for reasonable accommodation was met. Her accommodation might not have been perfect; however, it was reasonable in light of Dr. Mansell's recommendations, which was sufficient (see *Andres v. Canada Revenue Agency*, 2014 PSLRB 86). Interruptions of the sort complained about do not constitute an interruption in the accommodation process.

[144] The grievor further alleged that the employer's initial refusal to assign her to a new team lead was evidence of its failure to accommodate. I find that the grievor was not entitled to determine who would be assigned as her team lead, particularly when there was no medical justification for such a change. The grievor's evidence was that in the meeting of July 2, 2009, she requested a change of team lead, alleging that Mr. Beaudoin was harassing her. The grievor provided no medical evidence, either then or at the hearing, to provide justification for her request. Also, she testified to the fact that during the meeting, she and her union representative, along with the employer, drew up a list of how she would be managed. The grievor's allegations and needs were heard and taken into account and the employer's denial of a change in team lead was not a violation of her right to be accommodated.

[145] The employer was within its rights to refuse to reassign the grievor to another team lead, particularly when a change of team leads was anticipated to happen very shortly. Mr. Beaudoin might have been remarkably unsuited to the task of managing her, or he might merely have been faced with managing her and her accommodation in an environment in which communication with her was very difficult, but the evidence does not support her claims that he treated her differently because of her disability. Mr. Wilson took into account her concerns with Mr. Beaudoin, looked into her concerns and determined that there was no basis for her verbal claims of harassment or her request for a change of team lead.

[146] Mr. Wilson did not ignore the grievor's expressed concerns with the employer's choice of team lead for her. The employer turned its mind to her apparent inability to get along with Mr. Beaudoin when it selected Mr. Chenevert as her team lead. It chose someone with whom she apparently had a cordial relationship and who had experience dealing with people suffering from mental illness. Despite this and the accommodations provided to her, she continued to display the same disruptive behaviours in the workplace, was frequently absent, and continued to refuse to comply with the employer's policy and directions on reporting her absences.

[147] On the issue of harassment, the grievor pointed to the incident in the prayer room. The fact that someone unrelated to the employer sought to intervene when they perceived the grievor to be in distress when she went to the prayer room does not establish that the employer failed to allow her to leave the workplace to de-stress as part of her accommodations. The employer did not prevent her from going to the

prayer room. Not one of her managers or team leads initiated the intervention by the security officers; nor did the employer contact the EAP representative. There is no suggestion that the employer should have notified the security guards on duty that the grievor would be using the prayer room. The evidence does not support the allegation that the employer failed to accommodate her in this aspect any more than it supports the allegations that it did not accommodate her in general.

[148] Furthermore, she contended that Mr. Beaudoin harassed her as he attempted to deal with her attendance and performance issues through the performance management system by continuing to rely on a plan with no end date and even though she had shown improvement including in her relationship with co-workers. She also alleged that the employer's failure to investigate her harassment complaint was an example of this harassment. While the grievor may not have had further conflicts with co-workers, her conflicts with management continued and she continued to display inappropriately strong and emotional reactions to events, reactions which justified the employer continuing to apply the performance management plan to her. A defect in format and wording of the action plan did not render it irrelevant or discriminatory.

[149] While the grievor may believe that she was harassed by management's attempts to deal with her attendance issues, I find that this is not the case. It was not so much her absences which concerned management but her failure to properly report her absences and advise of when she would be in. I have been provided with no information to indicate that her failure to properly report her absences was the result of her medical condition and have found no evidence of discrimination in the actions of management and its attempts to deal with this issue.

[150] Despite the fact that the grievor was being accommodated in the workplace, the employer was entitled to manage her attendance and performance. One of the intentions of accommodating her was to ensure that she was provided with the elements necessary to improve her attendance and performance. The action taken to address her performance issues was not discriminatory and fell within its rights to deal with performance concerns. It attempted to take steps to determine whether these issues were related to her disability or whether they were truly culpable behaviour. The IME it requested was intended to determine the source of these behaviours. In so doing, it acted in a responsible manner that was non-discriminatory.

[151] As stated in *Taticek*, at para 103 to 105:

> *103. In order to establish that an employer engaged in a discriminatory practice, a grievor must first establish a* prima facie *case of discrimination. A* prima facie *case is one that covers the allegations made and which, if the allegations are believed, would be complete and sufficient to justify a finding in the grievor's favour in the absence of an answer from the respondent (*O'Malley *at para. 28)). The Board cannot take into consideration the employer's answer before determining whether a* prima facie *case of discrimination has been established (see* Lincoln v. Bay Ferries Ltd., *2004 FCA 204 at para. 22).*
>
> *104. An employer faced with a* prima facie *case can avoid an adverse finding by calling evidence to provide a reasonable explanation that shows its actions were in fact not discriminatory; or, by establishing a statutory defence that justifies the discrimination (*A.B. v. Eazy Express Inc.*, 2014 CHRT 35 at para. 13). If a reasonable explanation is given, it is up to the grievor to demonstrate that the explanation is merely a pretext for discrimination (see* Maillet *at para. 6).*
>
> *105. It is not necessary that discriminatory considerations be the sole reason for the actions at issue in order for the claim of discrimination to be substantiated. The grievor need only show that discrimination is one of the factors in the employer's decision (see* Holden v. Canadian National Railway Company *(1990), 14 C.H.R.R. D/12 (F.C.A.) at para. 7). The standard of proof in discrimination cases is the civil standard of the balance of probabilities (see* Public Service Alliance of Canada v. Canada (Department of National Defence), *1996 CanLII 4067 (FCA), [1996] 3 FC 789).*

[152] The employer did take steps to determine whether there was a basis on which to investigate the grievor's harassment allegations. Mr. Wilson spoke directly to the managers in question and determined that the manner in which the grievor was managed was consistent with the employer's expectations. Based on all the evidence placed before me and the arguments and representations of counsel for both parties, I conclude that the grievor has not established a *prima facie* case of discrimination on this allegation.

[153] To prove *prima facie* discrimination based on a disability, the grievor needed only to show that she had a disability, she experienced an adverse impact with respect to her employment and that disability was a factor in the adverse impact (see *Moore*). The employer did not question her disability. She asserted it, informed her employer, which accepted that she had a medical condition, and requested reasonable accommodation. There was no question of whether the point of undue hardship arose

for the employer as its accommodation of her, while not perfect, was consistent with her physician's recommendations. Contrary to the grievor's argument that she was not accommodated to the point of undue hardship because of minor interruptions in the ongoing nature of her accommodations, the employer did not fail to provide her with consistent accommodation. As the grievor argued, the employer did have the duty to take reasonable steps to accommodate her functional limitations, to the point of undue hardship (see *Cyr*). The duty to accommodate does include procedural aspects requiring employers to obtain all relevant information about the employee's disability and then to work with the employee to see how he or she can be accommodated. Part of this process is seeking independent medical advice when the medical information provided by the employee's treating physician is insufficient or does not have the impact on his or her continued employment desired by the parties.

[154] Employers are required to make diligent efforts to accommodate employees and should not seek to reduce accommodation efforts solely out of convenience (see *Stringer*). Furthermore, employers must be reasonably justified in ending workplace accommodations, even temporarily (see *Kirby*). As argued by the employer, I agree that the onus is on a complainant to establish discrimination on a *prima facie* basis, and once the complainant has done so, the onus shifts to the employer to demonstrate a *bona fide* occupational requirement or undue hardship to avoid liability (see *McGill University Health Centre (Montreal General Hospital)* and *Tranchemontagne*). In this case, the employer accommodated the grievor based on her doctor's recommendations, whether or not there was a formal accommodation plan or meetings to discuss the proposed accommodations. The employer received recommendations from her physician for changes to be made to the workplace, which would have enabled her to continue to be employed. This was a *de facto* accommodation based on the employer's conclusion, and an assessment of her behaviour in the workplace acknowledged that she needed some sort of accommodation. The accommodation might not have been perfect, but it met the needs identified in Dr. Mansell's letters. There is no evidence that she suffered an adverse consequence in her employment related to her disability (*Ontario Human Rights Commission*).

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

(The Order appears on the next page)

V. Order

[156] Grievances 566-34-7736, 7737 and 7738 are dismissed.

October 14, 2015.

Margaret T.A. Shannon,
adjudicator