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Public Service Labour Relations and Employment Board Act and *Public Service Labour Relations Act*

Before a panel of the Public Service Labour Relations and Employment Board

BETWEEN

CATHERINE CALABRETTA

Grievor

and

TREASURY BOARD
(Department of Public Safety and Emergency Preparedness)

Employer

Indexed as
Calabretta v. Treasury Board (Department of Public Safety and Emergency Preparedness)

In the matter of an individual grievance referred to adjudication

Before: David Olsen, a panel of the Public Service Labour Relations and Employment Board

For the Grievor: Goretti Fukamusenge, Grievance and Adjudication Officer

For the Employer: Richard Fader, counsel

Heard at Toronto, Ontario,
May 12 to 15, 2015.

I. Individual grievance referred to adjudication

[1] On April 25, 2014, Catherine Calabretta grieved "the letter of termination of employment dated April 8, 2014 signed by Shawn Tupper, Assistant Deputy Minister (ADM), Emergency Management and Programs, Public Safety Canada. Consultation is requested with my Labour relations officer on this grievance at the final level of the grievance procedure."

[2] By way of corrective action Ms. Calabretta requested "that the above noted letter of termination be immediately withdrawn, all copies destroyed in her presence, reinstatement without loss of pay and benefits and that she be made whole."

[3] The letter of termination dated April 8, 2014 referred to in paragraph 2 reads in part as follows:

> *This is further to the previous correspondence,… on March 11, 2014 regarding your absence from the workplace due to illness which began in July 2010. While a progressive return to work was attempted in January 2013, it was ultimately unsuccessful and led to your return to full-time sick leave in June 2013.*
>
> *In order to resolve your long-standing leave without pay situation, management sought to obtain a potential return to work date. Unfortunately, the medical information it received indicated that your return to work was not possible in the foreseeable future…. Although leave without pay is granted in order to provide continuity of employment while you are unable to work, under the provisions of the Treasury Board of Canada Secretariat's Policy on Leave and Special Working Arrangements, it cannot be granted indefinitely. It is with regret that I must inform you that I will not be approving further leave without pay. Consequently, and pursuant to my delegated authority in accordance with section 12(1)(e) of the Financial Administration Act, I am terminating your employment for non-disciplinary reasons effective close of business today….*
>
> *I also advise you that you have the right to file a grievance against this decision in accordance with the provisions of your collective agreement.*

[4] On July 11, 2014 the Public Service Alliance of Canada filed two references to adjudication of the grievance. One reference was filed under section 209 of the *Public Service Labour Relations Act* concerning an alleged contravention of Article 19, the no discrimination article of the Program and Administrative Services group collective

agreement. The other reference was filed jointly under section 209(1)(*b*) of the *PSLRA* (Disciplinary action resulting in termination, demotion, suspension or financial penalty) and as well under section 209(1)(*c*)(i) of the *PSLRA* (Demotion or termination of an employee in the core public administration under paragraph 12(1)(*d*) of the *Financial Administration Act* for unsatisfactory performance or under paragraph 12(1)(*e*) of that *Act* for any other reason that does not relate to a breach of discipline or misconduct).

[5] A pre-hearing conference call was held on April 27, 2015. The employer asserted that the case is solely about the grievance against the non-disciplinary termination of employment in 2014. The employer argued that the case is not about alleged discrimination or harassment, as claimed in one of the referrals to adjudication, as those issues had been grieved and decided at the final level of the grievance process prior to the grievor's termination and those grievances were not referred to adjudication.

[6] The bargaining agent, Public Service Alliance of Canada, argued that the grievances concerning alleged discrimination and harassment were properly before the Board. In addition, it was argued that an outstanding complaint to the Canadian Human Rights Commission claiming that the employer discriminated against the grievor on the basis of her disability should be consolidated and heard together with the grievances.

[7] I ruled that I would reserve my decision and would hear evidence and entertain argument on the employer's preliminary objection in final argument. With respect to the Board's jurisdiction to hear the grievor's human rights complaint, a timeframe for the exchange of written argument in order that this issue could be determined prior to the hearing of the grievances was established. On April 28, 2015 the bargaining agent withdrew the request to have the grievor's human rights complaint heard in conjunction with the grievances.

[8] The hearing proceeded on May 12-15, 2015. The employer called three witnesses, Shawn Tupper, Stephanie Dusablon, labour relations officer, and Nicola Epprecht, acting regional director, Public Safety Canada. The bargaining agent called four witnesses, Danny Epstein, former director, Environment Canada,

Audrey Devlin, independent investigator, Danielle Belleau, Regional Vice-President, Union of Solicitor General Employees (USGE), and the grievor, Catherine Calabretta.

[9] 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 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) before November 1, 2014, is to be taken up and continue under and in conformity with the *Public Service Labour Relations Act* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

II. Summary of the evidence

[10] Catherine Calabretta started her employment in the federal public service in 2004 with Environment Canada, progressing from casual employment to positions as a CR, AS-1 and AS-2. She enjoyed her work at Environment Canada and was recognized for her contribution to the department.

[11] Mr. Epstein, the former regional director for Environment Canada in Toronto, stated that Ms. Calabretta worked in his branch from 2004 and in 2006; she became his executive assistant. He described her as being very professional, discreet, respectful and possessing considerable initiative. He stated that she worked best in a learning culture where she felt part of the team and where initiative was appreciated. Conversely, he stated Ms. Calabretta would not function well in a situation where she was micromanaged and there was a lack of flexibility especially with respect to the hours of work.

[12] In February 2009 the then-acting regional director, Public Safety Canada, Ontario, called Mr. Epstein looking to recruit an employee with demonstrated initiative. She explained that she was recruiting to staff a PM-2 position and that that person would likely progress to a PM-4 position within a year. Mr. Epstein thought

Ms. Calabretta would be a good fit, encouraged her to apply for the position and recommended her.

[13] Ms. Calabretta stated that she had heard the acting director publicly speak about the work at Public Safety Canada and was excited about joining the branch. As Mr. Epstein was about to retire, she was looking at ways to advance her career. Mr. Epstein recommended that she apply for the position.

[14] Ms. Calabretta was interviewed for the position. Ms. Calabretta stressed during the interview that it was important that her hours of work were to be from 7 AM to 3 PM in order to accommodate her childcare needs. She testified that she was reassured that her preferred hours of work would not be a problem.

[15] She was offered the position and accepted it. She commenced in July 2009. On her first day she was directed to sit at the reception desk and was advised that her hours of work would be from 8 AM until 4:30 PM. When she raised her concerns with the acting director she was told that everyone has to pay their dues by manning the reception desk and that it would just be temporary.

[16] Ms. Calabretta testified that after the first three months there was very little work for a junior person to do in the office and what there was, was menial. She was assigned such tasks as watering plants and doing the dishes. She was advised by the acting director that she was not ready for more substantial work. She was monitored closely and her email checked. She started to feel uncomfortable going into the office and felt isolated. She stated that she was subjected to derogatory remarks and intimidating behavior by the acting director. After a couple of months of being subjected to this conduct she went to the union with her concerns.

[17] She started to withdraw and was not able to focus and was becoming emotional in the workplace.

[18] She had the opportunity to take a free course that was related to her work; however, the acting director would not let her attend. She stated that she had refused to sign her written performance review that commented adversely on her punctuality as her lateness was attributable to her hours of work and her childcare situation. She stated that she made up any lost time due to her lateness.

[19] She had been looking forward to being involved with the G-8/G-20 conference in Toronto along with the rest of the staff of the office. The morning the conference was to begin she was advised by the acting director that she would not be participating. The acting director called her into her office that afternoon and commented adversely on her health and made inappropriate comments concerning her family situation.

[20] She had never been in a position before where she thought she had to protect herself. In her view the acting director was becoming very aggressive with her.

[21] Her physician diagnosed her as suffering from depression and severe anxiety that exacerbated a pre-existing condition. In her view, the acting director wanted her to leave the department, telling her that she was not a good fit, and encouraged her to apply for other positions. However, she would make it difficult for her to pursue other opportunities. She started to take time off, one day then two.

[22] She began suffering from fainting spells and hit her head on a console that required an attendance at hospital.

[23] Ms. Calabretta left on extended sick leave on July 6, 2010. She filed doctors' notes with her employer. The acting director requested that she provide her with updates as to her condition. She wrote to her attaching a work description for her position that would enable her and her doctor to determine if she had any functional limitations in her ability to carry out her duties that would assist the department in determining if she needed to be accommodated.

[24] On September 10, 2010, Ms. Calabretta's physician advised the employer that she would remain unfit to work until further notice. The acting director requested a note from her doctor providing an estimated date of return to work or indicating that she would be off work until further notice and if the latter to provide regular updates.

[25] On November 1, 2010 Mr. Chris Lorenz, the new acting regional director, wrote to Ms. Calabretta seeking to schedule a telephone call with her together with a representative from Labor Relations to follow up on her file. In the interim the former acting director had returned to her substantive position.

[26] Ms. Calabretta requested that her bargaining agent become involved. On November 2, 2010 Mr. Robin Kerrs advised Mr. Lorenz that he had been assigned responsibility for her file.

[27] Mr. Lorenz replied to Mr. Kerrs on November 8, 2010 advising in part that effective disability management required a certain level of communication between the disabled employee and management and that he would like to establish a system whereby Ms. Calabretta kept management apprised of her health progress to allow the managers to more easily distribute work and as well to maintain contact to help ensure an easier reintegration to the office when she returned.

[28] On November 8, 2010, Mr. Kerrs wrote to Mr. Lorenz advising that he had reviewed a file from the local union president detailing a number of incidents experienced by Ms. Calabretta, which coloured her reception of his overtures. Mr. Kerrs also advised that the details of her file suggested to him that he advise her to file a complaint or grievance alleging personal harassment and as well a formal human rights complaint alleging discrimination on the basis of disability. He also advised Mr. Lorenz that he had encouraged Ms. Calabretta to respond to appropriate queries from the department as to her health status.

[29] Ms. Dusablon testified that this was the first time that departmental labour relations became aware of the allegation of harassment or of a complaint relating to discrimination on the basis of disability.

[30] On November 16, 2010, a teleconference took place between Mr. Lorenz, Ms. Calabretta, Ms. Jessica Roy, labor relations advisor, Ms. Danielle Belleau, regional vice president, USGE, and Mr. Robin Kerrs to ascertain the status of Ms. Calabretta's health. It was determined that it was too early to talk about a return to work. Subsequent to the meeting Mr. Kerrs again advised the management representatives that based on the information in the union's possession there would likely be a personal harassment complaint and possibly a human rights complaint coming.

[31] On November 17, 2010 Jessica Roy, Labour Relations, wrote to Danielle Belleau requesting a meeting to discuss the allegations that were said to be forthcoming, indicating that the department was taking them very seriously and remained open to discussions regarding an informal solution if appropriate and requesting further details.

[32] Ms. Belleau indicated that she was willing and open to work with management; however, at this stage it was premature but she was planning on meeting with Ms. Calabretta at the end of that month.

[33] On February 25, 2011 Mr. Lorenz wrote to Ms. Calabretta, following up on the telephone conversation of November 16 to see how she was doing and requesting an update. On March 2, 2011 Ms. Calabretta advised Mr. Lorenz that she had been working hard on getting better.

[34] On April 13, 2011 Ms. Calabretta contacted the Canadian Human Rights Commission concerning allegations of discrimination involving her former acting director. She alleged that she had been discriminated against on the grounds of disability or marital status, by failing and refusing to accommodate her, being subjected to a poisoned work environment, being treated in an adverse differential manner and not being provided with a harassment-free workplace.

[35] On April 28, 2011 Ms. Calabretta presented a grievance stating as follows:

> *I grieve that I was subject to discrimination on the grounds of disabilities, sex, family status and marital status in my workplace by my manager,…, from the period of June 2009 to August 2010 which caused me adverse differential treatment, non-anti-harassment free workplace environment and failure/refusal of duty to accommodate which is in contradiction article 19 of my collective agreement (PA Group).*

[36] The corrective action requested was that "the Public Safety Department take appropriate action to cease this behavior of my manager, that appropriate accommodation for my disabilities are provided and I be made whole."

[37] On April 29, 2011 the Canadian Human Rights Commission wrote to Ms. Calabretta and the department concerning her allegations of discrimination. The letter acknowledged her allegations and observed that under section 41(1)(*b*) of the *Canadian Human Rights Act*, the Commission may refuse to deal with a complaint that can be dealt with initially or completely under another Act of Parliament.

[38] The letter stated in part that as an employee in the public service, she had the right under the *Public Service Labour Relations Act* to file a grievance regarding the issues she raised and as a consequence the Commission would not accept a complaint at that time. She was encouraged to have her allegations of discrimination addressed through the grievance process.

[39] On May 17, 2011 Mr. Louis Germaine, the national manager, Labour Relations, for the department, wrote to Ms. Calabretta to inform her that the deputy minister of Public Safety Canada had received a copy of a letter from the Canadian Human Rights Commission and advised her that the grievance process was available to her as a possible recourse and that in addition the harassment complaint process was another mechanism that she might wish to consider to pursue her allegations and that a union representative would also be able to provide her with guidance for the submission of a harassment complaint.

[40] In mid-May 2011 the employer and the bargaining agent agreed that Ms. Calabretta's grievance would be considered to be in abeyance pending the submission and evaluation of her full allegations under the harassment complaint process.

[41] In mid-June 2011 Ms. Calabretta's union representative submitted a complaint under the harassment process incorporating the allegations of harassment referred to in her grievance dated May 17, 2011. The employer sought additional information for each of the allegations for the purpose of screening the harassment complaint and providing a mandate for an investigator.

[42] On June 10, 2011 the former acting director was advised that she had been named as a respondent in a formal harassment complaint. She was provided with a copy of the allegations submitted by the complainant against her and was advised that a number of the allegations would be referred for investigation. The same day Ms. Calabretta was also advised which allegations would be referred for investigation and those which would not.

[43] On December 9, 2011, Ms. Calabretta and the former acting director were advised that the firm of Audrey Devlin and Associates had been hired to conduct an investigation into the allegations.

[44] Audrey Devlin met with Ms. Calabretta on January 17, 2012 and with the former acting director on February 23, 2012.

[45] On March 29, 2012 a draft report on the allegations of harassment was completed by Ms. Devlin. On May 14, 2012 a copy of the preliminary report was sent to Ms. Calabretta and to the former acting director. They were asked to review the report

and provide comments including clarifications, corrections or additional information in writing directly to the investigator by June 1, 2012.

[46] Significant delays were incurred as the former acting director had left on long-term sick leave and her doctor indicated that she was medically unable to respond to the harassment complaint at that time. The investigation report was only finalized and sent to the parties in August 2013.

[47] In the interim, discussions were held with Ms. Calabretta regarding a possible return to work. On July 16, 2012 the department prepared a letter for Ms. Calabretta's treating physician outlining the department's duty to accommodate and seeking the physician's expertise in determining whether Ms. Calabretta had any functional limitations which required accommodation in order to ensure a successful return to work. On September 17, 2012 the department received medical information from Ms. Calabretta's physician which stated that she was now fit to return to work provided that certain accommodations were made and that her return be done on a progressive basis. The most important of these accommodations was that she not return to work in the Emergency Management Office in Toronto. As a consequence she was unable to return to her substantive position.

[48] Based on this letter management looked at other employment alternatives. However, the department was already undergoing a downsizing. It was recognized that Ms. Calabretta's substantive position as well as another employee in a PM-2 position would be affected and they would have to go through a Selection for Retention or Lay Off (SERLO) process. It was agreed with the union that management would not force Ms. Calabretta to undergo the SERLO process until she was back at work full-time.

[49] Ms. Epprecht, who was the regional director of Public Safety during 2012 until January 2013, was informed in the fall of 2012 that Ms. Calabretta would be returning to work and would likely be placed in the Grants and Contributions unit at the National Crime Prevention Centre (NCPC). She had been advised that Ms. Calabretta's classification was that of a PM-2. There were no PM-2 positions in the NCPC at that time so she took steps to obtain Ms. Calabretta's resume to review her experience to determine how she could support the unit. Environment Canada was approached to provide input with respect to Ms. Calabretta's experience. She tried to create

meaningful work for Ms. Calabretta. Preparatory meetings were held with all of the involved parties including Ms. Calabretta.

[50] Ms. Calabretta came to the office. Ms. Epprecht had received a letter from Ms. Calabretta's physician requesting a quiet workspace. She had identified a workspace that was quiet as requested by the physician. She showed the workspace to Ms. Calabretta. Ms. Calabretta requested a different workspace. Ms. Epprecht had no problem in making the change. She emailed pay and benefits to ensure that Ms. Calabretta would get back on the payroll and she was anticipating an October return.

[51] A meeting was held on October 2, 2012 between Ms. Calabretta, her union representative, Ms. Belleau, and Ms. Nichola Epprecht. The purpose of the meeting was to outline the possible work that could be assigned to Ms. Calabretta at the NCPC office in the same department but at a different location in Toronto in order to accommodate her. Proposed hours of work were discussed, four hours a day with a 30-minute lunch break between the hours of 10 o'clock and two o'clock, three days per week, At the end of the meeting it appeared that an agreement had been reached that Ms. Calabretta would report to work in that office to begin a progressive return to work to be effective Tuesday, October 9, 2012.

[52] On October 5, 2012, Ms. Belleau sent an email, which indicated that she no longer felt that the accommodation was acceptable and as a consequence Ms. Calabretta's return would be delayed. Ms. Belleau stated in part:

> *… although, I recognize that Nichola has worked to the best of her ability to try to accommodate our member, I am concerned that the lack of existence of the PM-02 position, specific duties and job description will only be to the detriment of my member which I strongly believe cannot be exposed to at this point. This would only set her up to failure, as previously done in the past which cause(d) [sic] this entire mess.*

[53] Ms. Belleau explained that in her view what was proposed was not a proper accommodation as there was no position at the PM-2 level. In addition, the bargaining agent was concerned that Ms. Calabretta not perform financial work as that would involve her reporting to a CR-4. Ms. Belleau had also learned that in 2011 Ms. Calabretta had been declared an affected employee along with another PM-2 and

would have to undergo a SERLO process. In her view some of the limitations prescribed by her physician were not respected as initially she was put in an open workstation.

[54] Ms. Calabretta stated the reason she felt the accommodation was unacceptable was that there was no formal position for her to occupy; no job duties had been specifically identified nor was there a proper workstation.

[55] Representatives of management expressed their surprise, as they thought the October 2, 2012, teleconference had gone well; however, the creation of a new position was impossible at this point in time. Ms. Epprecht emailed Ms. Calabretta requesting more information from her treating physician as to the nature of her accommodation needs and in addition asked for her consent to a fitness-to-work assessment at Health Canada.

[56] Ms. Epprecht explained that she was surprised and although there was not a PM-2 position in the Ontario region it did exist in two other regions. She stated that she had reviewed the background and the functions of the PM-2 positions in the other regions. Although technically there was no PM-2 position available in Ontario every effort was made to create new tasks in line with the functions of the other two positions. She was not making something up from scratch.

[57] The union requested a meeting with the deputy minister to discuss Ms. Calabretta's situation. A meeting took place on December 10, 2012. In attendance were John Edmund, Danielle Belleau, Catherine Calabretta, Philippe Thompson, Nichola Epprecht and Stephanie Dusablon. At that meeting the department reiterated its desire to retain Ms. Calabretta as an employee and expressed its willingness to accommodate her medical issues. Ms. Calabretta expressed anxiety at the prospect of a return to work and confirmed that she would meet with her doctor to obtain information required to properly accommodate her situation. It was also agreed that tasks would be identified based on a PM-02 position that had existed in the Québec region and that she would be entitled to a learning plan in order to assist her in her work.

[58] On December 19, 2012, a medical note was received confirming that Ms. Calabretta was able to return to work on a part-time basis, nine hours a week, and that these hours would be revisited as Ms. Calabretta's condition improved.

[59] A meeting was held on December 21, 2012 concerning Ms. Calabretta's return to work that included the director general and the union president. During that meeting a lengthy discussion took place with respect to the duties that Ms. Calabretta would be required to perform. It was agreed that Ms. Calabretta would return to work on January 7, 2013 on a progressive schedule, which could be amended based on her medical needs; that she would be provided with a learning plan and performance objectives and that she would be advanced paid sick leave of 19 days. It was also agreed that Ms. Dusablon and Ms. Belleau would travel to Toronto on her first day of work to facilitate her return.

[60] Ms. Calabretta returned to work on January 7, 2013. At that time Ms. Calabretta, Ms. Belleau, Ms. Epprecht and Ms. Dusablon reached agreement on the type of work that Ms. Calabretta would be performing as well as other matters. Ms. Calabretta was concerned about the title of her position. She did not want a title that suggested that she was performing administrative work. Ms. Epprecht had no issue with a change in title and worked with classification to come up with a suitable title.

[61] Ms. Epprecht stated that Ms. Calabretta was welcomed by her team, which were very professional and respectful. She worked for three hours three times a week. Ms. Calabretta attended program officer meetings involving all staff. In her view to the best of her recollection during the period January to April 2013 things were working out very well with Ms. Calabretta's integration into the work unit.

[62] By early February 2013 Ms. Calabretta's advance of 19 days sick leave had been exhausted as she had only been working nine hours a week yet she was being compensated at full salary. Apparently, the appropriate leave-without-pay forms had not been completed. This resulted in a substantial overpayment. Ms. Calabretta stated that this took her by surprise. The bargaining agent took the position that the department should continue Ms. Calabretta's full salary as part of the resolution of the harassment complaint.

[63] Ms. Belleau approached Gina Wilson, an ADM who granted Ms. Calabretta an additional three weeks of pay. Management took the position that they were doing their best to take a balanced approach to Ms. Calabretta's situation and were moving as fast as they could to identify mediation dates for the resolution of her harassment complaint.

[64] In April 2013 Ms. Epprecht and Ms. Calabretta had a discussion about whether it would be appropriate to undergo a performance review, which is normally done at the end of the fiscal year and after at least six months' employment. Ms. Epprecht thought it would be a good idea to do it because it would be a positive review.

[65] A written performance review was prepared for the period January 1 to March 31, 2013. The report reads as follows:

> *Catherine returned to work at Public Safety Canada on a part-time basis in January, 2013, after a prolonged absence. Her substantive position is with Emergency Management however she is with NCPC on an assignment for the foreseeable future. Catherine has joined a team she did not previously know well and is now working in an area that is new to her. Catherine is demonstrating initiative, flexibility and a willingness to learn. She makes an effort to try things herself before asking for help, and has taken a keen interest in the work done by NCPC. This is reflected in her enthusiasm and the questions and/or points she raises. Catherine is being integrated into the work slowly but my expectation and hope is that with increased hours Catherine will be able to take on more concrete, meaningful tasks that contribute to the advancement of the mandate and contribute to her own learning and development. Assessment: Meets expectations.*

[66] Ms. Calabretta stated that she did not sign the performance appraisal because she was not at full capacity, it was not a real work assignment and she had not had the opportunity to demonstrate her strengths. She wrote to Ms. Epprecht that she would like the department to provide concrete permanent plans about her future and that she had forwarded her concerns to Ms. Belleau and had spoken to Mr. Thompson. Ms. Epprecht stated that this was something that she did not have any control or authority over.

[67] On or about April 9, 2013 Ms. Calabretta wrote an email to Ms. Epprecht complaining that it had been agreed at the meeting in December 2012 that anything to do with her employment should go through the union. She questioned why her performance appraisal did not go through the union. She also stated that it was agreed that tasks would be distributed through Ms. Epprecht and that all instructions would be given to her in writing. She then questioned why she was given a task by a work colleague who was not aware of her accommodation when it had been agreed that Ms. Epprecht would assign her tasks directly. She asserted that Ms. Epprecht was going

against her doctor's recommendations and was putting barriers in place that would affect her return-to-work progress. The union became involved and alleged that management was setting her up for failure.

[68] A conference call was held on April 17, 2013 to discuss the issues raised by Ms. Calabretta in her email to Ms. Epprecht. Attendees included Ms. Calabretta, Louise Blouin, Ms. Belleau, Ms. Dusablon, Mr. Kerrs and Ms. Epprecht. During the teleconference it was agreed that the union is not usually involved in performance management. Ms. Calabretta asked that bad news be conveyed through the union. She was told that this was not always possible. Ms. Epprecht raised the possibility that Ms. Calabretta's pay would be cut if she did not submit the appropriate leave forms. It was reiterated that there was no PM-2 position at NCPC at that time, but as a temporary measure the duties of a PM-2 position were made clear. It was agreed that management would prepare a fitness-to-work evaluation for Health Canada, which Ms. Calabretta could review prior to consenting to the evaluation. It was also agreed that all further directions from Ms. Epprecht to Ms. Calabretta would be in writing.

[69] At the hearing Ms. Calabretta stated that she felt like she was being over-managed because of her health issues. She complained that she was given mounds and mounds of reading material that in her view were not consistent with her physician's instructions.

[70] Ms. Epprecht disagreed that Ms. Calabretta was being set up for failure. She recalled her being eager to work and wanting to be more involved in the work of the department. At this stage this required more learning than doing. She stated that to the best of her ability she personally assigned tasks to Ms. Calabretta; however, in her role as manager she was not always available and that in a small team it was not unusual for another staff member to advise employees what needs to be done. Ms. Epprecht stated that she did not know if she would change anything in the manner in which she managed Ms. Calabretta and that everyone in her branch wanted her to succeed. She stated that she never felt any of her managerial actions were contrary to Ms. Calabretta's physician's recommendations and that almost everything she did was vetted by labor relations or senior management.

[71] Ms. Calabretta complained that she could not do the work of the unit, Grants and Contributions, as she had not had the necessary training. She acknowledged that

she attended a national staff meeting in Ottawa that she found helpful but she would have preferred more solid training. There were two sessions on Grants and Contributions offered by the Canada School of Public Service, one in Toronto and one in Ottawa. The earlier course in Toronto was full or not available. Her request for training on Grants and Contributions was approved for Ottawa; however, it was not pursued.

[72] On May 15, 2013 Ms. Calabretta advised Ms. Epprecht that she was not prepared to consent to a Health Canada assessment. Ms. Dusablon explained that management needed the Health Canada assessment to determine what further steps could be taken to accommodate Ms. Calabretta in light of the issues raised by her in her letter of April 9, 2013, and the fact that the existing medical notes were nonspecific.

[73] As of May 21, 2013 Ms. Calabretta increased her hours and began working 12 hours per week.

[74] She left on sick leave as of June 10, 2013 in order to prepare for the mediation of her harassment complaint against the previous director. She participated in a three-day mediation process from June 24 to 26, 2013.

[75] At the conclusion of the mediation the parties entered into an agreement that partially resolved the conflict. It was agreed that the hours for the mediation would be paid as work hours, as would 30 additional hours for conference calls with the mediator. It was also agreed that the mediator would review the current job description with Ms. Epprecht to identify the comprehensive job-specific tasks and then develop a plan to return to work that would include short-term, medium-term and long-term job tasks in accordance with the duty to accommodate with the support of Ms. Calabretta's physician and Ms. Belleau. In addition, Ms. Dusablon agreed to set up a meeting with Ms. Calabretta, the mediator, and Ms. Belleau to discuss and try to come to agreement on a communication protocol and sensitivity.

[76] Ms. Calabretta did not return to work after the mediation.

[77] Following the mediation, a meeting was held between management and union representatives to discuss the accommodation. The union was seeking a permanent position; however, management was of the view that it did not have the flexibility to create a new PM-2 position in the Ontario region. The discussion centred around

bundling duties without actually creating a new position and focusing on her reintegration into the office environment and learning the basic office skills that would help her when she returned to work.

[78] On June 27, 2013 Ms. Calabretta advised Ms. Epprecht that she would be absent from work due to medical reasons and that she had contacted Sun Life to reactivate her claim for disability. Ms. Epprecht responded to her advising that the department would require a medical certificate outlining the length of her absence and that in the event a potential return-to-work date could not be established, to indicate the date for her next assessment.

[79] On July 10, 2013 Ms. Calabretta filed a number of grievances. Those grievances included a grievance for additional compensation time for preparation for the mediation; a grievance relating to recovery of overpayment of salary; and a grievance with respect to the mediation process.

[80] In addition she filed a grievance with respect to a harassment-free environment that reads as follows:

> *I grieve that the Department, Public Safety Canada, has not provided me with a Harassment free work environment as prescribed by Treasury Board Policy since beginning my employment in July 2009. I also grieve that the Department has not protected my rights in this process by failing in their duty to act fairly in not completing, finalizing and delivering the harassment investigation in a timely manner, also as prescribed in the Treasury Board Policy. Furthermore, I grieve that my supervisor discriminated against me based on my illness and on my family status and that the Department failed to act to protect me from such discrimination when they were made aware of the discriminatory acts. I grieve that the Department therefore failed in its duty towards me under article 19 of the PA collective agreement. The Employer has not only violated Article 19 of the collective agreement but has violated the Canadian Human Rights Act. I also grieve that by acting in this fashion and causing undue and unnecessary delays in dealing with harassment and discrimination investigation report, the Department has impeded my successful return to work. They have further caused me to become increasingly ill and have failed in their duty to accommodate my needs to return to work in a harassment free environment. The failure to complete a timely investigation is an additional demonstration of their on-going attempts to harass and discriminate against me. Corrective action requested: I request that appropriate action*

> *be taken to complete the investigation before July 23, 2013 and that I be immediately provided with a harassment-free environment. I also request the department provides me a guaranteed, substantive and existing position at the PM-04 level within the organization in the Toronto regional office and that I be made whole.*
>
> [*Sic* throughout]

[81] On July 13, 2013 Ms. Calabretta's physician provided the Department with a medical certificate indicating that she should be reassessed in a month's time.

[82] On August 19, 2013 Ms. Calabretta's physician advised the Department that she was not fit to work due to medical reasons and that she did not foresee her returning to work prior to 4 to 6 months from that date.

[83] On August 22, 2013 Mr. Tupper wrote to Ms. Calabretta enclosing the investigator's final report concerning her allegations of harassment against her previous supervisor. Mr. Tupper stated in part as follows:

> *I have carefully considered the report prepared by Devlin and Associate [sic] Canada and I am not satisfied with all of the conclusions presented by the investigator. As such, I have accepted the investigator's findings as they pertain to allegations 4, 7, 8 and 9, but conclude that her findings were unsubstantiated on all other allegations.*

[84] Allegations four, seven, eight and nine as recited in the final report read as follows:

> *4. Did the Respondent harass the Complainant by refusing to allow her to work the shift that had been agreed on during the recruitment process, causing significant stress on her family situation and ability to arrive punctually at work and subsequently include the issue of her lack of punctuality as an issue in her PREA?*
>
> *7. Did the Respondent harass the Complainant by refusing to allow her to transfer to the Dennison office, while allowing others to do so in effect of the treating her differently?*
>
> *8. Did the Respondent harass the Complainant by making an inappropriate comment to her during a Town Hall teleconference, which caused the Complainant to feel demeaned, embarrassed and humiliated?*
>
> *9. Did the Respondent harass the Complainant by refusing to allow her to take training courses which would have*

> *expanded her skill set, when others were allowed to take courses, thus creating an "inequitable" environment? Did the Respondent harass the Complaint by refusing to accommodate her training needs resulting from her medical condition?*

[85] Mr. Tupper continued his letter as follows:

> *In light of the above, I have concluded that you were harassed in the course of your employment at Public Safety Canada, and I take findings of harassment seriously. I am pleased to report that since the events giving rise to your complaint, many changes in regional management have taken place, and that the workplace has undergone significant transformation.*
>
> *We continue to work towards improving moral [sic] in regional offices; and I would encourage you to communicate with your Director, Ms. Corita Harty, to get more information on how to get involved with current regional changes.*

[86] Ms. Dusablon explained that the Treasury Board has delegated authority to the department to decide what recommendations to accept arising from an harassment investigation and to determine the remedial action. In this case the department determined that a number of the conclusions did not flow from the evidence presented to the investigator; consequently, the department only accepted four of the conclusions.

[87] Ms. Devlin, who has been conducting workplace investigations since 1976, testified that originally the complainant had made 18 allegations; however, the department had retained 12 allegations to be investigated. She conducted her investigation in early 2012 and presented her draft report to the department in March of that year. The final report was completed in August 2013. The department instructed her not to complete the report until she had obtained the response from the respondent. The respondent had left on sick leave the day she had received Ms. Devlin's draft report.

[88] Ms. Devlin was not advised that only four of the allegations had been confirmed by the department and that her conclusions with respect to the eight other allegations had been rejected. She stated that she received a large number of questions from the department on the final report and that there were several telephone discussions with the department. She stated that the department encouraged her to change some of her

findings, which she was not prepared to do. She stated that the department rejected the findings they felt most strongly about. She was of the view that all of the findings should have been substantiated.

[89] On September 6, 2013 Ms. Epprecht sent a letter to Ms. Calabretta's physician requesting that the doctor clarify if the 4- to 6-month window indicated a potential return-to-work date or simply a date at which time Ms. Calabretta would be reassessed.

[90] The physician replied on September 10th, 2013 stating "as previously stated in my August 19, 2013 letter I don't expect her to return to work before 4 to 6 months."

[91] On October 2, 2013 Ms. Belleau wrote to Ms. Epprecht indicating that she had had discussions with Ms. Calabretta and if required Ms. Calabretta would agree to participate in a Health Canada assessment.

[92] A formal request for a fitness-to-work evaluation was made on November 18, 2013.

[93] On December 10, 2013, Mr. Tupper wrote to Ms. Calabretta with respect to the third-level grievance response to her original grievance of April 28, 2011 that had been held in abeyance pending the investigation of her harassment complaint:

> *This is in response to the grievance you submitted on May 17, 2011 in which you grieved that you were the subject of discrimination on the grounds of disability, sex, family and marital status by your manager... I have carefully reviewed the harassment investigation report submitted by Ms. Audrey Devlin, arguments presented in your grievance along with the additional information presented by your bargaining agent representatives during the course of the grievance hearing held November 13, 2013. As indicated in the letter I sent to your attention on August 22, 2013, I accept four of the investigator's findings, three of which were founded. As a result, I conclude that you are the subject of harassing behavior on the part of your manager at the time…This being said, neither myself nor the investigator could establish that, based on the information contained in the report, the differential treatment you were subject to in the course of your employment was based on one of the prohibited ground [sic] set out in the* Canadian Human Rights Act. *Nonetheless, harassment remains a very serious matter which will not be tolerated at Public Safety Canada. Since the events giving rise to your complaint, significant changes have occurred in the Toronto Office, including the departure of (your previous*

> *manager). As a result, I am pleased to inform you that the corrective measures requested in your grievance have been addressed. I am also aware that you are presently on sick leave, and I want to assure you that regional management as well as myself are committed to accommodating your medical condition to the point of undue hardship as is our obligation under the* Canadian Human Rights Act*. As a result of the above, your grievance is granted to the extent outlined above.*

[94] This grievance was not referred to adjudication.

[95] The same day Mr. Tupper wrote to Ms. Calabretta with respect to the third-level grievance response to the grievance she had submitted on July 10, 2013 in which she had grieved that the employer has not provided a harassment-free work environment since the beginning of her employment in July 2009, among other allegations, fully recited at paragraph 80. The reply states in part as follows:

> *Harassment-free Workplace*
>
> *The first part of your grievance relates to the allegations of harassment and discrimination you submitted in 2011, and which pertain to events occurring in 2009 and 2010. You further indicated that the Department failed to protect you once it was made aware of the discriminatory acts giving rise to your complaint. This being said, your representative clearly indicated that no additional allegations of harassment were being submitted through this grievance. As a result of not having established the necessary pattern of on-going or continuing harassment, you have not demonstrated that the Department condoned harassing or discriminatory behaviors once allegations were submitted. In addition, these allegations pertain to events in 2009 and 2010 and are the subject of a previous grievance filed in 2011. Considering that you have not raised any new allegations of harassment, this part of your grievance is untimely as per article 18.15 of your collective agreement. While the substantive issue is addressed in a separate grievance response, I would like to reiterate that I take founded allegations of harassment very seriously, and that these practices are not deemed acceptable by management. As a result, you can continue to expect a safe and healthy workplace should you be deemed fit to return to work.*
>
> *Timeliness of Harassment Investigation*
>
> *… I recognize that the timeframe between the filing of the complaint and its completion was unusually long, but I would like to reassure you that those delays were neither undue nor*

> *unnecessary, nor were they entirely the responsibility of the employer…. The longest delay in completing this process was attributable to having to place the complaint on hold from May 2012 to June 7, 2013 as the respondent was unable to participate in the process for medical reasons…. moving the investigation forward while the respondent was medically unable to participate would have been a discriminatory practice that this Department does not endorse and could not pursue. As a result, while I agree with you that the time in finalizing the investigation of your complaint was longer than preferable, I do not consider them to have been unnecessary or made through negligence or bad faith.*
>
> *Duty to Accommodate*
>
> *… Again I wish to restate that during both grievance hearings, your representatives clearly stated that this grievance was not intended to submit allegations of harassment in addition to those which were submitted in 2011. Therefore, it is my understanding that the workplace to which you returned was in an harassment-free environment. I would also like to note that the work which was assigned to you during this return was established based on the medical information you provided. In addition, the Department offered to send you to Health Canada for a fitness to work evaluation on at least two occasions before and during your progressive return to ensure that we had all pertinent information to proceed and that you refuse to consent to this process. As a result, I conclude that the Department has met its duty to accommodate by abiding by the medical information you made available. In addition, there is no information at my disposal which would suggest that you were harassed or discriminated against in the work environment in which we attempted at a progressive return to work. As a result, your grievance is allowed to the extent outlined above.*
>
> [*Sic* throughout]

[96] This grievance was not referred to adjudication. The other grievances filed on July 10, 2013 with respect to compensation for mediation preparation, overpayment recovery and the mediation process were answered at the final level by Mr. Tupper on December 10, 2013. None of these grievances were referred to adjudication.

[97] Ultimately Health Canada completed a fitness-to-work evaluation and on February 25, 2014 advised the employer and Ms. Calabretta that she was currently not fit to work her substantive job as an emergency management officer at the PM-02 level.

[98] In response to the question "if the employee is currently unfit for work, please indicate if a return to work date can be established at this time and based on the medical information available" Health Canada responded that "another fitness to work could be completed in 6 to 9 months to determine when and if a return to work can be attempted."

[99] On March 11, 2014, Corita Harty, who in the interim had been appointed regional director, Ontario for Emergency Management and Programs, Public Safety Canada, wrote to Ms. Calabretta. She referred to the Health Canada assessment that indicated she was currently unfit to work and that a return-to-work date could not be established at that time. She also referred to the Treasury Board Secretariat directive on leave and special working arrangements. The letter stated in part as follows:

> *Your period of sick leave began on July 6, 2010 and despite our best efforts to facilitate your progressive return to the workplace in January 2013, your medical situation did not allow you to remain in the workplace past June 2013. Medical information stemming from both your treating physician and Health Canada indicate that you will not be able to return to work in the foreseeable future. As such, the following options are available to you: Resignation; Retirement; or Retirement on medical grounds (approval required from Health Canada)…. In order for you to make a final decision in this regard, we wish to offer you the time to examine these options with the guidance of a financial advisor, a member of your family or a trusted person. Consequently, I would ask that you inform me of your decision by April 11, 2014. Please note that if I receive no response or decision from you by that time, I will be making a recommendation to the delegated authority to terminate your employment for medical incapacity.*

[100] On March 11, 2014, Ms. Calabretta's legal representative advised Ms. Harty that her letter

> *… violates the intent and purpose of the Canada Human Rights Code and the Charter of Human Rights and Freedom. You cannot dismiss or discipline an employee while they are legitimately on sick leave or trying to get better to return to work in a therapeutic and fully recovered manner. We would therefore like to advise you that Ms. Calabretta will neither resign nor retire as per your Directives. This matter is being pursued at the Human Rights Commission in the near future. Please be advised that you are not to contact Catherine directly…*

> [*Sic* throughout]

[101] On March 17, 2014, Ms. Calabretta telephoned Ms. Harty and among other things requested that the employer be more patient and grant her an opportunity for reassessment by Health Canada in a number of months. Ms. Harty advised her that the organization considered that they had been very patient and there was another individual being impacted to whom the organization also had a duty of care but that she would raise the matter with labor relations and get back to her.

[102] On March 19, 2014, Ms. Calabretta wrote to Ms. Harty following up on the telephone conversation of March 17 and confirming her request for an extension to the letter of March 11, 2014 regarding her options and stating in part "both my physicians agree including Health Canada that a date for a RTW could possibly be provided during my next assessment in six months…"

[103] On March 21, 2014 Ms. Harty wrote to Mr. Roche, Ms. Calabretta's legal representative, acknowledging receipt of his letter of March 11, 2014, noting his explicit instructions not to contact his client directly and advising him that his client had contacted the employer twice directly and included the tenor of the messages sent by her. The letter noted that until the employer received written notice from Ms. Calabretta to the contrary, he was her representative and that the position set out in his letter was his client's formal position. The letter further stated in part:

> *However, in the interest of clarity we will exceptionally be providing an answer to her inquiries. She first requested that the Department wait an additional 6 months to allow for the next medical reassessment prior to enforcing the letter of March 11, 2014. The decision to offer Ms. Calabretta these options was carefully considered in light of the length of her absence on leave without pay, the lack of clear prognostic for a return to work in the foreseeable future as well as applicable policies. As a result, this extension would not be appropriate under the circumstances."*
>
> [*Sic* throughout]

[104] On April 8, 2014 Mr. Tupper wrote to Ms. Calabretta noting her absence from the workplace due to illness which began in July 2010 and the attempt at a progressive return to work in January 2013, which was unsuccessful, stating in part as follows:

> *In order to resolve your long standing leave without pay situation, management sought to obtain a potential return to*

> *work date. Unfortunately, the medical information received indicated that your return to work was not possible in the foreseeable future. Following this determination, you were offered the options of resignation, retirement or medical retirement subject to Health Canada approval. In an email sent on March 11, 2014, your representative, Mr. Roche, indicated on your behalf that none of these options were acceptable to you.*
>
> *Although leave without pay is granted in order to provide continuity of employment while you are unable to work, under the provisions of the Treasury Board of Canada Secretariat's* Policy on Leave and Special Working Arrangements*, it cannot be granted indefinitely. It is with regret that I must inform you that I will not be approving further leave without pay. Consequently, and pursuant to my delegated authority in accordance with section 12.(1)(e) of the* Financial Administration Act*, I am terminating your employment for non-disciplinary reasons effective close of business today.*

[105] The Treasury Board of Canada Secretariat's *Directive on Leave and Special Working Arrangements*, Appendix B, deals with leave without pay and provides in part as follows:

> *Persons with the delegated authority are to regularly re-examine all cases of leave without pay due to illness or injury in the workplace to ensure the continuation of leave without pay is warranted by current medical evidence. Such leave without pay situations are to be resolved within two years of the leave commencement date, although each case must be evaluated on the basis of its particular circumstances. All leave without pay due to illness or injury in the workplace will be terminated by the person's… termination for reasons other than breaches of discipline pursuant to the Financial Administration Act.*

[106] Mr. Tupper testified that his decision to terminate Ms. Calabretta's employment was difficult. He had been fully briefed on her situation. He described the attempts the department had made to accommodate Ms. Calabretta's disability. His department was in the midst of a reorganization and a downsizing that impacted a number of people. He stated that the department in order to be fair to Ms. Calabretta had delayed a SERLO process that impacted other employees until it was clear that the department could not determine a return-to-work date for her. He stated that he could no longer sustain the situation that the SERLO process had been significantly delayed and had left both Ms. Calabretta and another employee in limbo.

[107] As noted above Ms. Calabretta grieved the letter of termination. The grievance was heard at the final level of the grievance process. The response denying the grievance was issued on June 4, 2014.

[108] Mr. Tupper testified that he heard the grievance at the final level of the grievance process. Ms. Calabretta's representative asked him to reconsider the decision to terminate her employment. The only issue raised was to allow a reassessment. No new information was offered. There was no allegation made that Ms. Calabretta had been discriminated against or had been harassed. Mr. Tupper declined to reconsider the decision to terminate her employment.

[109] Ms. Dusablon was present at the final-level grievance hearing with Mr. Tupper. Mr. Kerrs represented Ms. Calabretta, who was not present. According to Ms. Dusablon Mr. Kerrs stated that the wording of the grievance did not mention harassment or discrimination and that he would not make a presentation on those subjects. The grievor's representative requested to defer cross-examination of Ms. Dusablon until she had had an opportunity to speak with Mr. Kerrs. Mr. Kerrs was not called as a witness. The grievor's representative did not seek to recall Ms. Dusablon for cross-examination.

[110] At the hearing before me, the bargaining agent sought to enter into evidence a report from Ms. Calabretta's psychologist, Dr. John Fleming, dated May 1, 2015 concerning her capacity to return to work. Counsel for the employer objected to the introduction of the report on the basis that there was no opportunity to cross-examine the psychologist. In addition it was argued that the issue to be adjudicated was whether the decision to terminate the grievor's employment in 2014 was reasonable and that I should not consider evidence concerning events which occurred subsequent to the decision by the employer to terminate the employment relationship. Counsel relied upon the Supreme Court of Canada decision in *Cie minière Québec Cartier v. Quebec (Grievances arbitrator)*, [1995] 2 S.C.R. 1095. I ruled that the information contained in the report was arguably relevant to the reasonableness of the 2014 decision and allowed its introduction into evidence. My ruling is consistent with *Cie minière Québec Cartier* (see para 13).

[111] The report dated May 1, 2015 reads in part as follows:

> *Based on a long history of successful employment and strong personal identity with her work, I do think that Catherine is ultimately capable of returning to work, though her successful return is by no means a certainty. She has struggled for over five years in an effort to work through the barriers to return to work and has developed very substantial anxiety around these issues…. Her anxiety is currently very substantial and it will either be exacerbated or diminished depending upon her degree of success in her return to work… If thrown into an environment similar to her last experience, I would not expect the outcome to be particularly positive. In light of this I would very strongly encouraged* [sic] *that she* ***not*** *once again be returned to the department in which she experienced so much distress. I think this would greatly hamper her recovery.*
>
> [Emphasis in original]

III. Summary of the arguments

A. For the employer

[112] The following is a summary of the employer's oral and written submissions.

[113] This case is not about alleged discrimination or harassment. This case is about the grievance against the non-disciplinary termination of employment in 2014. The ultimate issue is whether the employer had cause to terminate for non-disciplinary reasons. The case turns on whether the employee is available for work in the reasonably foreseeable future.

[114] What is not at issue is the employee's allegation that the reason she was not available was the employer's failure to accommodate based on harassment or discrimination. These issues were decided at the final level of the grievance process in earlier grievances and not referred to adjudication.

[115] Neither discrimination nor harassment was mentioned in the current grievance or during the grievance process, raising the *Burchill* principle. Shawn Tupper testified that the grievor's representative did not raise harassment or discrimination during the final-level grievance hearing. Mr. Tupper was not cross-examined on the point. Stephanie Dusablon testified that the bargaining agent began its presentation at the

grievance hearing by stating: "The wording of the grievance makes no reference to harassment or discrimination, as a result I will make no presentation on the subject."

[116] The only issue is whether the employer can establish that the grievor was unavailable for the reasonably foreseeable future (at the point of termination) based on the evidence it was presented with at that time.

[117] Issues dealt with in prior grievances and not referred to adjudication: the following issues were grieved and decided at the final level prior to the grievor's termination and were not referred to adjudication; namely, allegations of discrimination, allegations of harassment, and allegations of undue delay in the harassment investigation process.

[118] At the second level of the grievance process it was noted: "Your bargaining agent representatives have also confirmed that you do not feel that you have suffered any harassment from your manager or coworkers in the workplace in which you have been working since your return to work on January 7, 2013. Therefore you have been provided a harassment-free workplace." The second level also indicated that the delay was due to factors beyond the employer's control and at all times they were acting in good faith.

[119] The final-level grievance reply, dealing with the initial grievance against discrimination and harassment, noted that there was no discrimination, that management only accepted four of the findings from the harassment investigation and that the corrective action requested had been addressed.

[120] The final-level reply, dealing with the second grievance against discrimination and harassment, noted "our Rep. clearly indicated that no additional allegations of harassment were being submitted through this grievance." The grievance concluded that there was no harassment after the events occurring in 2009 and 2010. This aspect of the grievance was untimely. The reply also explained the delay in the harassment investigation, where the longest delay was attributed to the medical condition of the respondent. Ultimately, the reply concluded that the delay was not unnecessary or made through negligence or bad faith. The reply also concluded that the department had met its duty to accommodate by abiding by the medical information.

[121] None of the grievances denied at the final level were referred to adjudication.

[122] The jurisprudence is clear that the failure to refer these matters to adjudication in a timely manner is deemed abandonment of the position. See specifically *Canadian Labour Arbitration*, Brown and Beatty, 2:3230; *C.U.P.E., Local 207 v. Sudbury (City)*, (1965), 15 L.A.C. 403; *Hamilton Health Sciences v. O.N.A.* (2010), 192 L.A.C. (4th) 332.

[123] Having not referred the matters to adjudication in a timely way the grievor is now bound by those findings made at the final level. As noted in *Mark v. Canadian Food Inspection Agency,* 2007 PSLRB 34, at paragraph 24:

> *… time limits contribute to labour relations stability by providing closure on the employer's business decisions with the consequence of avoiding, for either the bargaining agent or the employer, constant or long-term exposure to workplace incidents.*

[124] Separate and apart from the abandonment issue is the fact that the grievor's concerns revolved around one manager and that manager left the workplace in May 2012 and never returned. The current grievance is dated April 2014; any concerns needed to be grieved in a timely way. In fact they were grieved and dealt with — there was no referral to adjudication.

[125] Closure is marked when the grievor decides not to refer a grievance to adjudication. If a grievor were permitted to raise the same issue years later in the context of a different grievance, there would never be any closure.

[126] Any request to enlarge the scope of this grievance to deal with discrimination or harassment would be contrary to the established *Burchill* principle. See *Burchill v. Canada (A.G.)*, [1981] 1 F.C. 109 (C.A.); *Boudreau v. Canada (A.G.)*, 2011 FC 868; *Babiuk et al. v. Treasury Board (Department of Citizenship and Immigration)*, 2007 PSLRB 51; *Chase v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 9; *Baranyi v. Deputy Head (Canada Border Services Agency)*, 2012 PSLRB 55.

[127] It is the position of the respondent that the determination of this question is not a mere technicality but is fundamental to the proper functioning of the dispute resolution system for labour disputes in the federal public administration.

[128] The *PSLRA* allows employees to grieve a wide range of matters affecting their terms and conditions of employment. See section 208 of the *PSLRA*.

[129] However, the *PSLRA* provides that only specific grievances may be referred to adjudication. There are essentially two streams that allow grievable matters to be referred to adjudication: (a) disciplinary actions (including non-disciplinary termination/demotion), and (b) collective agreement issues (see section 209).

[130] Fundamental to this system is the fact that employees are not permitted to alter the nature of their grievances during the grievance process or upon referral to adjudication.

[131] The determination of grievances pursuant to section 208 of the *PSLRA* allows the parties to resolve complaints quickly and informally and is fundamental to sound labour relations. In *Babiuk* the grievors were reclassified after a lengthy review process. The employees grieved that the date of reclassification should have been earlier than established. At adjudication the grievors argued that they were denied acting pay pursuant to their collective agreement. The grievors argued that they were doing the duties of a higher level and that they were entitled to acting pay.

[132] The adjudicator held that the grievances, on their face, did not mention acting pay only classification (the latter is non-adjudicable). He further noted that there was no evidence that acting pay was a live issue between the parties during the grievance process. In rejecting the argument that acting pay stems from the subject matter of the grievance, i.e., the effective date of the reclassification, the adjudicator noted at para 51:

> *While the change of position in* Burchill *was a more radical change than the change of position taken in these grievances, the general principle that one cannot change horses in mid-stream still applies. In order that the internal grievance procedures are allowed to work to resolve complaints quickly and informally in the workplace, and in order to foster sound labour relations, it is fundamental that the subject matter that gave rise to the grievance be made perfectly clear. How can the parties move forward if they present one case to the employer and a different case, yet unanswered, to an adjudicator?*
>
> [Emphasis added]

[133] A cornerstone of the grievance system is a requirement that the subject matter of the grievances be "made perfectly clear"; *Babiuk* at paragraph 51. The Federal Court of Appeal in *Shneidman v. Canada (Customs and Revenue Agency)*, 2007 FCA 192, at

paragraph 28, noted: "Both parties benefit from this notice requirement. The employer must understand the nature of the allegations to be able to adequately respond to them. The employees likewise benefit from the notice requirement because it allows her to understand the reasons why the employer has rejected her grievance." The Court of Appeal further noted at the same paragraph that the requirement is a "critical component of the conciliation process."

[134] In *Chase supra* the adjudicator noted (at paras 25 and 27):

> *In* Burchill, *the Federal Court of Appeal stated that a grievance presented at adjudication cannot differ from the one decided at the final level of the grievance process. The matter to be considered by an adjudicator must have been discussed by the parties. In this case, I am not satisfied that the alleged demotion or deployment has been raised within the grievance process.*
>
> …
>
> *In* Canada (Treasury Board) v. Rinaldi, *127 F.T.R. 60 (T.D.), the Federal Court pointed out that the wording of the grievance is important because the allegations made in it have the effect of "attributing jurisdiction." The Court also stated that it is primarily in light of the wording of the grievance that it must determine whether the allegation made at adjudication so altered the original grievance as to change its nature and make it a new grievance. In this case, the grievor challenged an investigation report and a three-day suspension, not a demotion or a forced deployment.*

[135] In *Laughlin Walker v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 62, the adjudicator held (at paras 27 to 29):

> *First, I am of the view that this grievance is about the grievor's disappointment with the result of the reclassification process. As I reviewed the exhibits, I was convinced that at no time during the grievance process did either party treat this grievance as a disciplinary matter…*
>
> *I believe that the law is clear with respect to referring grievances to adjudication. The case law is clear that only the subject matter set forth in the grievance can be referred (see* Burchill *and* Lee*). There are good policy reasons for that approach, as it makes good labour relations sense to ensure that the employer knows the specifics of the grievor's grievance so that it may properly address them.*

> *In this case, the specifics of the grievance were the reclassification process and the inherent flaws alleged by the grievor. In her submission to adjudication, she altered the basis of her grievance to a disciplinary grievance. In my view, that cannot be allowed.*

[136] In *Shneidman supra* at paragraph 24 the Federal Court of Appeal held that for an argument based on an alleged violation of the collective agreement to be advanced at adjudication it must be "specifically raised" at the final level of the grievance procedure. In the case at bar no such reference was made and as a result, the adjudicator is bound by the decision of the Federal Court of Appeal (at para 24):

> *…Whether or not the language of the grievance is potentially broad enough to include a complaint that the collective agreement has been violated, the complaint will not be permitted to proceed to adjudication, and thus will not be in the adjudicator's jurisdiction, unless it has been specifically raised at the final level.*

[137] The grievor's attempt to reformulate her grievance into one alleging a breach of the collective agreement was at odds with the *Burchill* principle and would require the employer to "defend against a substantially different characterization of the issues than it encountered during the grievance procedure". This is amplified, for example, by the grievor's request for damages in her opening statement. In the grievance there is a simple request that termination be rescinded. For the first time, in her opening statement, the grievor requested a whole host of monetary damages. This is in clear violation of the *Burchill* principle.

[138] The grievor has attempted to characterize her grievance at a high level of generality. However, as noted by the Federal Court of Appeal in *Shneidman* at paragraph 27 the focus of this analysis is on the "grounds of unlawfulness" relied upon in the grievance.

[139] As adjudicator Butler noted in *Boudreau v. Treasury Board (Department of National Defence),* 2010 PSLRB 100 at paragraph 33:

> *… The grievor's health <u>was</u> on the table but, in my view, it was broached by the parties more as an element to be considered for the purpose of remedy than as the primary problem revealed by the grievance. I am not able to conclude based on the facts that the employer's occupational safety and health obligations under clause 16.01 of the collective agreement were understood, or should have been*

> *understood, by the employer to be at issue, and were certainly not explicitly addressed by the grievor or the bargaining agent.*
>
> [Emphasis in the original]

[140] As a result, counsel for the employer submitted that the grievor's reliance on discrimination and harassment violates the *Burchill* principle and the Board is without jurisdiction to consider them.

[141] The recent decision of *Chamberlain v. Treasury Board (Department of Human Resources and Skills Development)*, 2013 PSLRB 115 stands for the proposition that an adjudicator must be properly seized of jurisdiction under section 209 of the *PSLRA* before addressing questions of remedy. Until the relevant provisions of Bill C-4 are proclaimed into force adjudicators have no independent jurisdiction over complaints under the *Canadian Human Rights Act*.

[142] The only issue before the Board is the termination of the grievor's employment and whether the employer has established cause to terminate at the point of termination in 2014.

[143] It is the position of the employer that the jurisprudence in this regard is well established.

[144] In terms of the *Meiorin* test set out by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 (*Meiorin*), there is no dispute that the first two elements have been established; the issue in this case revolves around the concept of undue hardship.

[145] The following principles emerge from the Supreme Court of Canada's decision in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montreal*, 2007 SCC 4. The factors which support a finding of undue hardship are not entrenched and must be applied with common sense and flexibility. Accommodation is not a one-way street; both parties have an active role to play. Undue hardship resulting from an employee's absence must be assessed globally starting from the beginning of the absence. In *McGill*, an employee was terminated after a three-year absence. The termination was upheld.

[146] The following principles emerge from the Supreme Court of Canada's decision in *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43. Accommodation according to the *Meiorin* test is whether no further accommodation is possible without imposing undue hardship. The purpose of the duty to accommodate is not to completely alter the essence of the employment contract — the employee's duty to perform work in exchange for remuneration. If the employer shows that the employee will be unable to resume his or her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship. Neither the employer nor the employee may disregard the past in assessing undue hardship.

[147] The Federal Court of Appeal decision in *Sketchley v. Canada (Attorney General)*, 2005 FCA 404 stands for the proposition that a rigid application of the two-year period in the previous Treasury Board policy, as it existed at the time, without regard for the individual circumstances of each case is inconsistent with the duty to accommodate. It is clear from the facts of this case that management approached this case in an individualized manner and did not apply a rigid application of the two-year rule.

[148] In the Federal Court decision in *Scheuneman v. Canada (Attorney General)*, [2000] F.C.J. No. 1997 the appellant was dismissed because he was unable to perform any work and was unlikely to do so in the foreseeable future. It is a basic requirement of the employment relationship that an employee must be able to undertake work for the employer. While an employee may wish to remain on indefinite leave there is no requirement on employers to indefinitely retain an employee who may not be able to work for several years.

[149] On the facts of this case Ms. Calabretta commenced employment at Public Safety Canada on July 13, 2009. She left on sick leave on July 6, 2010. She exhausted her paid sick leave and then went on disability insurance until late December 2012 returning to the workplace on January 7, 2013.

[150] Almost immediately management began requesting more information, including medical, in order to determine the grievor's limitations in order to facilitate a return to work. By September 2010 the employer requested a medical note with an anticipated return-to-work date and regular updates.

[151] In the summer of 2012 the employer agreed to facilitate a return to work consistent with the medical information it had on file by moving the grievor to a new work location, despite the fact that the acting director was no longer in the office, having left in May 2012. The employer agreed to allow the grievor to work reduced hours with the goal of returning to full-time hours. The employer agreed to bundle meaningful duties to create a job for the grievor in the context of the return to work. The grievor's medical information indicated that she could not return to her substantive position and she required reduced hours. It was also established that there were no vacant PM-02 positions in Toronto. In fact the region was in negative balance due to downsizing. The employer agreed to hold off on the SERLO exercise that related to her substantial position in emergency management until she was back to full-time hours despite the fact that this placed the other employee at the PM-02 level in limbo pending the grievor's full reintegration. The employer continued to seek more medical information to assist in the reintegration plan.

[152] On October 2, 2012 management and the bargaining agent agreed on an October return-to-work date, specific duties for the grievor and a schedule of working hours in accordance with her doctor's note. The grievor was given an orientation to the new office and was allowed to select a preferred workspace. Management's goal was that the grievor work her way up to full-time hours.

[153] Ultimately, the bargaining agent decided to withdraw from the agreed-upon return-to-work plan. Both Ms. Epprecht and Ms. Dusablon testified that this had taken them by surprise as they felt they had consulted with the bargaining agent and the grievor and had come to a common understanding.

[154] As a result, on October 24, 2012, management requested a Health Canada fitness-to-work evaluation, in order to get a better handle on the grievor's specific limitations and to determine what was required to accommodate the grievor. The grievor did not consent to a Health Canada assessment until late 2013. The employer received another note from the grievor's treating psychologist, which in the employer's view was vague and inconsistent.

[155] With disability insurance expiring in mid-December 2012, the grievor agreed to attempt to return to work in January 2013. The employer continued its work, with the

limited medical information available, to develop learning plans, performance objectives, and the duties and responsibilities of the position.

[156] The employer advanced the grievor the maximum number of paid sick leave days available under the collective agreement to bridge her from the end of disability insurance to the start of January 7, 2013. The employer subsequently also advanced three weeks of salary based on a full 37.5-hour week. Employer officials traveled to Toronto on the first day to meet with the grievor.

[157] The grievor worked from January to April without incident. The grievor's performance review was "brief but positive". By mid-April things appear to have deteriorated with the grievor leveling allegations against Ms. Epprecht. Ms. Epprecht both in writing at the time and in testimony refuted these allegations.

[158] In April 17, 2013 at a meeting with the grievor and the bargaining agent the employer, once again, reiterated its request for accurate medical information, asking for the grievor to consent to a Health Canada assessment. On May 15, 2013 the grievor indicated that she would not consent to a Health Canada assessment. In the employer's view the existing medical notes were nonspecific and contradictory and as a result the employer was not well equipped to accommodate beyond what it was already doing.

[159] The parties agreed to go into mediation on June 25 and 26, 2013. The grievor went off on sick leave two weeks prior to this, never to return to the workplace. On June 27, 2013, the grievor contacted Sun Life to reactivate her claim. On July 3, 2013 the grievor submitted a medical note indicating that she would not be back "until further notice".

[160] On August 19, 2013, the grievor submitted another medical note indicating "I do not foresee her returning to work prior to 4 to 6 months from now."

[161] The employer wrote to the grievor's doctor, asking if the assessment was that the grievor would return in 4 to 6 months or if she would simply be reassessed in 4 to 6 months.

[162] The doctor wrote a non-responsive note indicating that "I don't expect her to return to work before 4 to 6 months".

[163] After a third request, the grievor finally agreed to consent to a Health Canada assessment. On February 25, 2014 Health Canada indicated that the grievor "is currently not fit to work her substantive job." Health Canada went on to state that another fitness-to-work evaluation "could be completed in 6 - 9 months."

[164] In light of the fact that all medical information pointed to the fact that the grievor was medically unfit for the reasonably foreseeable future the grievor was presented with the standard options letter. The grievor refused to apply for medical retirement or to resign.

[165] The grievor's employment was terminated on April 8, 2014 almost 4 years after she first went off on sick leave and attempting a brief return to work (three hours per day, three days per week) from January to mid-June 2013. The termination was non-disciplinary and the grievor was permitted to apply for medical retirement and remained a disability priority under the *Public Service Employment Act*.

[166] It is the position of the employer that it has established cause for termination as the evidence clearly established that at the point of termination the grievor was unavailable for work for the reasonably foreseeable future. Mr. Tupper testified that it was a difficult decision for him but in reviewing the file and weighing all relevant factors, it was a decision he had to make.

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

[167] This grievance arises from the termination of employment of Catherine Calabretta on the ground of incapacity. Ms. Calabretta was a member of the Program and Administrative Services group whose collective agreement expired June 20, 2014. She was employed by Public Safety Canada in Toronto, Ontario.

[168] On April 25, 2014, Ms. Calabretta grieved the letter of termination of April 8, 2014 requesting consultation with her Labour Relations officer at the final level of the grievance process and by way of corrective action sought the withdrawal of the termination letter, reinstatement without loss of pay and benefits and that she be made whole.

[169] The grievance was referred to adjudication under termination of employment and the interpretation or application of article 19 (no-discrimination clause of the

collective agreement). Since the grievance involves an interpretation of the *Canadian Human Rights Act*, a Form 24 was sent to the Canadian Human Rights Commission.

[170] There are two outstanding issues before the Board.

[171] One is related to the *Burchill* principle.

[172] Another is related to the merits of the grievance.

[173] The question before the Board is to determine whether, in all of the circumstances, the decision to terminate Ms. Calabretta was necessary, fair and reasonable and non-discriminatory.

[174] The respondent has taken the position that this is not the right forum in which to discuss the harassment complaint or the differential treatment that Ms. Calabretta was subjected to. It has been concluded by an independent investigator, Ms. Audrey Devlin, and confirmed by the respondent (Shawn Tupper and Stephanie Dusablon) that Ms. Calabretta was in fact harassed and subjected to a differential treatment. However, the entire employment history of Ms. Calabretta during her time at Public Safety Canada is very significant to the determination of this grievance.

[175] The grievor's representative stated that she understood that the harassment complaint is not before the Board. However, she submits that the Board cannot ignore that it is intrinsically linked to the problems that led to Ms. Calabretta's employment being terminated.

[176] In effect, although medical evidence may be useful in establishing a health condition, it is not necessary, in this case, to establish the serious and detrimental nature of the respondent's conduct and the damage to Ms. Calabretta's health and dignity.

[177] In fact, due to the harassment and the lengthy delays in processing the harassment complaint, Ms. Calabretta became depressed and exhausted her bank of sick leave and was obliged to be off work on leave without pay for a period of time, which caused the termination of employment in April 2014.

[178] Ms. Calabretta was entitled to a workplace free of harassment, she was entitled to equal treatment, and entitled to a healthy and productive work environment. But on

the contrary she was isolated and deprived of meaningful work assignments and when her health failed the employer decided to terminate her employment.

[179] The employer has failed in its duty to accommodate.

1. Hours of work

[180] Ms. Calabretta testified that prior to her transfer to Public Safety Canada, she discussed hours of work (7:30 to 3:30) to be able to take care of her triplets after work. Despite the promises these hours of work were never approved.

2. No proper accommodation was identified

[181] Danielle Belleau testified that many meetings and discussions took place with management, labour relations and Ms. Calabretta in the late summer of 2012. This came about when Ms. Calabretta's professional physicians confirmed to the insurer Sun Life that she would be in a position to return to work with limitations, which they identified in their reports.

[182] Ms. Belleau stated that at the time they were planning for a return to work she learned that Ms. Calabretta, the previous year, had been declared an "affected" employee, which meant that she would have to undergo a SERLO process in order to retain a permanent position, for a job she never did.

[183] One of the limitations was that she not return to the Emergency Management Office so the only opportunity according to management was for Ms. Calabretta to be placed in the NCPC office because it was the only other office in Toronto.

[184] Nichola Epprecht also testified that the NCPC office did not have a PM-02 position and that management was trying to pull some duties together to make a job.

[185] Ms. Belleau emphasized that the proposal was for Ms. Calabretta to do finance work such as paying invoices, which would involve reporting to a CR-4, which was inappropriate for Ms. Calabretta, who held the position of a PM-02. According to Ms. Belleau management later identified two other tasks, including ATIP; however, no specific plan was prepared on how she was going to achieve that.

[186] During their testimony, both Stephanie Dusablon and Nichola Epprecht took the position that the union (Ms. Belleau) postponed the planned return to work of October 2012.

[187] However, Ms. Belleau explained that there was no permanent position for Ms. Calabretta to return to and no proper accommodation had been identified. Ms. Calabretta was actually shown a workstation in the middle of the office with a lot of people around. This was in contradiction to her doctor's recommendation. Ms. Calabretta testified that there was no accommodation such as computer, telephone etc., ready for her at that time. It is clear that Ms. Calabretta was returning to Public Safety Canada without the stability of a position making her even more vulnerable than was her situation in the Emergency Management Office where she had a permanent position.

3. Refusal of Training

[188] Despite several requests for training Ms. Calabretta was not provided with significant training as per her doctor's recommendations.

4. Refusal to comply with Doctor Fleming's recommendations

[189] Dr. Fleming made recommendations on several occasions. In his letter of August 13, 2012 he states as follows: "I would propose that she returns [*sic*] to work in a fairly graduated fashion and perhaps a good start might be for her to become involved in some form of training that is pertinent to the position that she will take on." As previously indicated, there was no position; there was no plan for training.

[190] Dr. Fleming also noted in his letter of August 13, 2012 that "given a supportive environment… the prognosis for her returning to full-time employment is reasonably good."

[191] It is the position of the bargaining agent and Ms. Calabretta that Public Safety Canada did not provide her a supportive work environment. On the contrary Ms. Calabretta was isolated and not provided with meaningful work.

5. No rehabilitation with respect to the findings of the harassment complaint

[192] The respondent was not diligent in dealing with the harassment complaint: the person who was the subject of the complaint was given preferential treatment to the detriment of Ms. Calabretta.

[193] In 2011, Ms. Calabretta filed a harassment complaint against her supervisor, alleging harassment and discrimination. An independent investigator was retained and a preliminary report was released in March 2012 but it took up to 15 months for the respondent to allow the investigator to complete her final report. Most importantly, Doctor Fleming warned that "the ongoing harassment investigation certainly muddies the water about the work environment and adds to Catherine's self-consciousness."

[194] Despite the fact that the final report confirmed that Ms. Calabretta was harassed it took 15 months to allow the final report to be released. Furthermore, there has been no rehabilitation, and no closure attempt with respect to the harassment complaint, adding hardship to the already difficult situation of Ms. Calabretta.

6. Case Law

[195] It is very important to keep in mind that the case of Ms. Calabretta is a very particular case in the sense that she was subjected to a differential treatment and harassed by the respondent before becoming ill and taking sick leave without pay. In addition, the employer has failed to comply with the Public Service Occupational Health Program (Health Canada) recommendation to conduct another fitness-to-work assessment within 6 to 9 months to determine when and if a return to work can be attempted.

[196] The grievor's representative agrees with the principle that it is unreasonable to expect management to wait indefinitely on a medical situation and that the duty to accommodate is not absolute. However, each case is different and in the case of Ms. Calabretta it was unreasonable to terminate her employment without allowing sufficient time for medical evaluation, especially when medical professionals are recommending to do so.

[197] The duty to accommodate requires an individualized approach (*McGill* at paragraph 22).

[198] Furthermore, "the duty to accommodate implies that the employer must be flexible in applying its standard if such flexibility enables the employee in question to

work and does not cause the employer undue hardship"; *Hydro-Quebec* at paragraph 13.

[199] The employer would have incurred no financial hardship to allow Ms. Calabretta to remain on leave without pay for the 6 to 9 months that were recommended by Health Canada.

7. Case law submitted by the respondent

[200] The bargaining agent respectfully submits that Ms. Calabretta's case cannot be compared to the cases listed in the respondent's book of authorities. The cases are simply not similar to the case of Ms. Calabretta.

[201] For example, in *Scheuneman*, the appellant was dismissed from employment eight years after becoming ill. At the time of his termination, the medical evidence was that the appellant could not do any work, even on a part-time basis.

[202] In *McGill,* the arbitrator at first instance dismissed the grievance because the grievor was still unfit to work at the end of the three-year period provided in her collective agreement. The arbitrator considered the facts supporting termination, which demonstrated that she was still, as of the final hearing day, totally incapable of performing her usual duties; her physicians considered her to be totally disabled. Ms. Calabretta has never been declared totally disabled. In addition the post-termination doctor's note indicates that "Catherine [Ms. Calabretta] is ultimately capable of returning to work, though her successful return to work is by no means a certainty"; Dr. Fleming's letter of May 1, 2015.

[203] In *English-Baker v. Treasury Board (Department of Citizenship and Immigration)*, 2008 PSLRB 24, the grievor had been on sick leave over four years, which is not the case here. Ms. Calabretta left in July 2012, attempted her return to work in October 2012, came back in January 2013 and was at work until July 2013. Contrary to the case of *English Baker*, the employer in this case mechanically applied the Treasury Board *Directive on Leave and Special Working Arrangements*.

[204] Finally, the employer relies on *Mutart v. Canada (Attorney General)*, 2014 FC 540. *Mutart* cannot be compared to the case of Ms. Calabretta. The grievance in *Mutart* was dismissed for two reasons. One was related to jurisdiction. He resigned. On the merits, he had been absent on sick leave for 14 years.

8. Conclusion

[205] It is the position of the bargaining agent and Ms. Calabretta that the employer discriminated against her on the basis of disability contrary to article 19 of the collective agreement. Ms. Calabretta has an incapacity that the employer did not accommodate. According to the test in *Meiorin*, the burden shifted to the employer to prove that it has accommodated Ms. Calabretta to the point of undue hardship. The employer has not demonstrated that it was impossible to accommodate Ms. Calabretta without incurring undue hardship.

[206] In any event, termination of employment is the capital penalty that can be imposed on the employee.

[207] It is the position of the bargaining agent that Public Safety Canada's decision to terminate her employment on April 8, 2014 was premature and not justified since Health Canada recommended that Ms. Calabretta be reassessed within another 6 to 9 months.

[208] The bargaining agent and Ms. Calabretta understand that it is unreasonable to expect management to wait indefinitely on a medical situation. However, each case is different and it was unreasonable to terminate her employment without allowing sufficient time for a medical evaluation especially when medical professionals are recommending to do so.

9. The grievance's wording and the *Burchill* objection

[209] Ms. Calabretta was terminated on the grounds of disability. The termination for incapacity for employees not able to indicate a firm date to return to work was found to be *prima facie* discrimination in *Sketchley at* paragraph 91.

[210] Although a board of arbitration is bound by the grievance before it, the grievance should be liberally interpreted so that the real issue is dealt with, and if a breach of the collective agreement is established, the appropriate remedy fashioned; *Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486* (1975), 8 O.R. (2d) 103.

[211] Ms. Calabretta's representatives argued throughout the grievance process that the termination of employment was unfair and unjustified.

[212] The termination letter refers to Ms. Calabretta's absence from work due to illness beginning in July 2010.

[213] Ms. Calabretta submitted a harassment and discrimination complaint in 2011.

[214] The termination letter also refers to the progressive return that was attempted in January 2013. Ms. Calabretta, her union representatives, and her treating physician all raised issues of failure to accommodate.

[215] This is not a case where the referral under the no discrimination clause (Article 19) of the collective agreement would take the employer by surprise.

[216] The referral under article 19 does not change the nature of the grievance.

[217] For all of the reasons listed above, the *Burchill* principle does not apply in this case.

10. Corrective Measures

[218] Ms. Calabretta has lost everything because of the unjustified differential treatment, harassment and the employer's failure to accommodate despite the doctor's specific recommendations. Before she transferred to Public Safety Canada, Mr. Epstein testified she was an exemplary employee with an unblemished record and excellent performance evaluations. She had even won a number of awards of excellence for her work. Throughout this ordeal, her health, her family, her financial situation, her career, and her motivation have been affected.

[219] The bargaining agent requests the following measures.

- A declaration that Public Safety Canada's decision to terminate Catherine Calabretta was unnecessary, unfair, unreasonable and discriminatory.
- A declaration that Public Safety Canada failed in its duty to accommodate Catherine Calabretta to the point of undue hardship.
- That Catherine Calabretta be reinstated retroactively with all benefits and salary.

- That Public Safety Canada pay compensation of $100,000 for pain and suffering, loss of self-esteem, humiliation and distress caused by the employer and any other redress that the Board deems to be reasonable and appropriate.

C. Reply argument of the employer

[220] The union had the opportunity to challenge the third-level grievance response to the original grievance of April 28, 2011 alleging discrimination and harassment. It did not. Similarly, the union had the opportunity to challenge the second-level response dated August 1, 2013 to the grievance with respect to the harassment-free environment dated July 10, 2013. It did not.

[221] The evidence indicates that the employer bent over backwards to accommodate Ms. Calabretta holding off on the SERLO process and putting her into a new business line and taking all reasonable steps to accommodate her.

[222] Health Canada did not recommend that she be reassessed in six or seven months' time.

[223] The argument that termination is tantamount to capital punishment does not apply to a non-disciplinary termination.

[224] The better approach in the federal public sector is reflected in the *Boudreau* case as opposed to the approach represented by the Ontario Labour Relations Board in *Blouin Drywall*.

[225] The argument that the employer would not be taken by surprise by the referral of this grievance under article 19 of the collective agreement, the no discrimination clause, is not the issue. The issue is whether article 19 was grieved.

IV. Reasons

[226] The authorities are clear that if a grievor or a bargaining agent has actually or impliedly accepted the decision of management in a grievance reply by not referring the grievance to a higher level in the grievance procedure or to adjudication/arbitration they should not be allowed to resubmit essentially the same grievance at a later date. The rationale is that management would never know whether

in fact its decision had been accepted by the individual grievor or the union representing him. The authorities state that this would be an abuse of the grievance procedure. The purpose of this rule is to provide finality.

[227] On April 25, 2014 Ms. Calabretta grieved the termination for cause of her employment as a PM-02 at the Emergency Management and Programs branch of Public Safety Canada. She requested consultation with her labour relations officer on the grievance at the final level of the grievance procedure and requested that the letter of termination be withdrawn and that she be reinstated without loss of pay and benefits and made whole.

[228] The bargaining agent referred the grievance to adjudication under section 209 of the *PSLRA* concerning an alleged contravention of article 19 of the collective agreement, the no discrimination article, and under section 209(1)(*b*), disciplinary action resulting in termination, demotion, suspension or financial penalty, and under section 209(1)(*c*) for any other reason that does not relate to a breach of discipline or misconduct.

[229] The employer argues that this case is not about alleged discrimination or harassment as claimed in one of the referrals to adjudication as those issues had been grieved and decided at the final level of the grievance process prior to the grievor's termination and those grievances were not referred to adjudication.

[230] The bargaining agent argues that the grievances concerning the alleged discrimination and harassment are properly before the Board. As well the bargaining agent initially took the position that the outstanding complaint to the Canadian Human Rights Commission claiming that the employer discriminated against the grievor on the basis of disability should be consolidated and heard together with the grievances. As noted on April 28, 2015 the bargaining agent withdrew the request to have the grievor's human rights complaint heard in conjunction with the grievance.

[231] The initial grievance dated April 28, 2011 grieving in part that Ms. Calabretta was subject to discrimination on the grounds of disabilities, sex, family status and marital status in her workplace by her previous manager from the period of June 2009 to August 2010, more fully recited at paragraph 35, was initially held in abeyance pending the harassment investigation and was answered at the final level on December 10, 2013 by Mr. Tupper.

[232] In that reply, more fully set out at paragraph 93, he concluded that she was the subject of harassing behaviour on the part of her manager at the time. He noted that this being said neither he nor the investigator could establish that based on the information contained in the report that the differential treatment she was subjected to was based on one of the prohibited grounds set out in the *Canadian Human Rights Act*. Nevertheless, he observed that harassment remained a very serious matter and would not be tolerated at Public Safety Canada. He also noted that since the events giving rise to her complaint significant changes had occurred in the Toronto office including the departure of her previous manager and as a result the corrective measures requested in the grievance had been addressed. There is no dispute that this grievance was not referred to adjudication.

[233] In addition Ms. Calabretta filed a number of grievances on July 10, 2013. The one of particular relevance to these proceedings alleges that the Department had not provided her with a harassment-free work environment since the beginning of her employment in July 2009; alleges that the Department has not protected her rights by failing in their duty to act fairly and not completing, finalizing and delivering the harassment investigation in a timely manner; alleges that her supervisor discriminated against her based on her illness and her family status; alleges the department failed in its duty towards her under article 19 of the collective agreement and under the *Canadian Human Rights Act*; and alleges that the Department had failed in its duty to accommodate her needs to return to work in a harassment-free environment. By way of corrective action she requested that she be provided with a harassment-free work environment and that the Department provide her a guaranteed, substantive and existing position at the PM-04 level within the Toronto regional office.

[234] On December 10, 2013 Mr. Tupper responded to this grievance at the third level in part as follows. With respect to that part of her grievance that related to the allegations of harassment and discrimination pertaining to the events occurring in 2009 and 2010, Ms. Calabretta's representatives at the grievance hearing clearly indicated that no additional allegations of harassment were being submitted through this grievance. He observed that these allegations related to events in 2009 and 2010 and were the subject of the previous grievance filed in 2011 and considering that she had not raised in the new grievance allegations of harassment, that part of her grievance was untimely.

[235] Nevertheless, while the substantive issue was addressed in a separate grievance response, he reiterated that he took founded allegations of harassment very seriously and as a result she could continue to expect a safe and healthy workplace should she be deemed fit to return to work.

[236] With respect to the timeliness of the harassment investigation he observed that the completion of the investigation was unusually long but the delays were neither undue nor unnecessary nor were they entirely the responsibility of the employer as the complaint was on hold from May 2012 to June 7, 2013 as the respondent was unable to participate in the process for medical reasons. In the result the finalizing of the investigation was longer than preferable but he did not consider the delay to have been unnecessary; nor did it constitute major negligence or bad faith.

[237] With respect to the duty to accommodate he noted that the work which was assigned to her during her return to work was established based on the medical information she provided and that in addition the department offered to send her to Health Canada for a fitness-to-work evaluation on at least two occasions to ensure that they had all the pertinent information and that she had refused to consent to this process. He concluded therefore that the department had met its duty to accommodate. In addition there was no information at his disposal that suggested that she was harassed or discriminated against in the work environment where she attempted a progressive return to work. Her grievance was allowed to the extent outlined in the reply. This grievance was not referred to adjudication.

[238] The other grievances filed on July 10, 2013 with respect to compensation for mediation preparation, overpayment recovery and the mediation process itself were answered at the final level by Mr. Tupper on December 10, 2013.

[239] None of these grievances were referred to adjudication.

[240] At the hearing of the termination grievance Mr. Tupper testified that the bargaining agent's representative asked him to reconsider the decision to terminate Ms. Calabretta's employment and that the only issue raised was whether to allow a reassessment of her in six months. No new information was offered; nor was there an allegation made that Ms. Calabretta had been discriminated against or had been harassed. Ms. Dusablon was also present at the grievance hearing and she testified that the bargaining agent representative stated that the wording of the grievance did not

mention harassment or discrimination and that he would not be making a presentation on those subjects. The bargaining agent after being accorded an opportunity to consult with the bargaining agent's representative at the grievance hearing did not cross-examine Ms. Dusablon on this issue nor call any evidence.

[241] Clearly the allegations of discrimination, as well as the allegations of harassment and of undue delay in the harassment investigation process, were grieved and ultimately decided at the final level of the grievance process, and they were not referred to adjudication. This occurred prior to the grievor's termination. Moreover, the grievor's representative represented that these matters were not part of the grievance with respect to the termination. In line with the authorities, having not referred these matters to adjudication the grievor is bound by those findings made at the final level.

[242] The evidence is also clear that these issues were not raised expressly in the wording of the termination grievance; nor were they raised in the grievance process dealing with that grievance. Nevertheless, the grievor seeks to deal with discrimination and harassment in the context of the present grievance. The employer argues that any request to enlarge the scope of this grievance to deal with discrimination or harassment would be contrary to the established *Burchill* principle. In *Burchill*, the Federal Court of Appeal stated in part, at para 5, that:

> *… it was not open to the applicant, after losing at the final level of the grievance procedure the only grievance presented, either to refer a new or different grievance to adjudication or to turn the grievance so presented into a grievance complaining of disciplinary action leading to discharge within the meaning of subsection 91(1). Under that provision it is only a grievance that has been presented and dealt with under section 90 and that falls within the limits of paragraph 91(1)(a) or (b) that may be referred to adjudication. In our view the applicant having failed to set out in his grievance the complaint on which he sought to rely before the Adjudicator, namely, that his being laid off was really a camouflaged disciplinary action, the foundation for clothing the Adjudicator with jurisdiction under subsection 91(1) was not laid. Consequently, he had no such jurisdiction.*

[243] The bargaining agent argues that although a board of arbitration is bound by the grievance before it, the grievance should be liberally interpreted so that the real issue is dealt with, and if a breach of the collective agreement is established, the

appropriate remedy should be fashioned relying upon the Ontario Court of Appeal decision in *Blouin Drywall*.

[244] The bargaining agent argues that its representatives argued in the grievance process that the termination of employment was unfair and unjustified, that Ms. Calabretta submitted a harassment and discrimination complaint in 2011, that this is not a case where the referral under the no discrimination clause, article 19 of the collective agreement, would take the employer by surprise, that the referral under article 19 does not change the nature of the grievance, and that the *Burchill* rationale does not apply in this case.

[245] The employer replies that the bargaining agent had the opportunity to challenge the third-level grievance response to the original grievances alleging discrimination and harassment but did not. Similarly, the bargaining agent had the opportunity to challenge the response to the grievance with respect to the harassment-free environment. It did not. It argues that the better approach in the federal public sector is reflected in the *Boudreau* case as opposed to the approach represented by the Ontario Labour Relations Board in *Blouin Drywall* and that the issue is not whether the employer would be taken by surprise by the referral to adjudication of this grievance under article 19 of the collective agreement. The issue is whether article 19 was grieved.

[246] In *Boudreau*, Mr. Justice Martineau considered whether there was an inconsistency between the *Burchill* approach and the approach reflected in *Blouin Drywall*. At paragraphs 17 to 19 of the decision, he stated as follows:

> *The applicant submits to the Court that the "strict" approach adopted by the Federal Court of Appeal in* Burchill *in 1980 has been replaced or runs contrary to the "soft" approach endorsed by the Supreme Court of Canada in* Parry Sound *in 2003, who has acknowledged "the general consensus among arbitrators that,* [to] *the greatest extent possible, a grievance should not be won or lost on the technicality of form, but on its merits" …*
>
> *The Court notes that the arbitral decisions referred to by the Supreme Court in* Parry Sound*, above, establish that "the grievance should be liberally construed so that the real complaint is dealt with" (*Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Jeiners [*sic*] of America, Local 2486*, (1975) 8 OR (2d) 103 (CA) at page 108)*

> *and, as stated by the Supreme Court of Canada in* Parry Sound*, above, at para 69, reflect the view that procedural requirements should not be stringently enforced in those instances in which the employer suffers no prejudice. The Court sees no inconsistencies with these principles and what the Federal Court of Appeal has decided in* Burchill*, above, as long as the referral to adjudication under section 209 of the Act does not change the nature of the grievance originally filed by an employee or the bargaining agent under section 208 of the Act or the collective agreement.*
>
> *In the Court's opinion, the rules of procedural fairness dictate that employer* [*sic*] *should not be required to defend in arbitration against a substantially different characterization of the issues than it encountered during the grievance procedure. This is not merely a technicality, but is fundamental to the proper functioning of the dispute resolution system for labour disputes in the federal public administration…*

[247] I too see no inconsistency in the principles articulated in *Blouin Drywall* and *Burchill* in so far as they stand for the proposition that the grievance should not be interpreted in an overly technical way and that the real issue in dispute should be dealt with so long as it does not change the nature of the originally filed grievance.

[248] In its essence, the *Burchill* principle is about ensuring procedural fairness.

[249] I stated in *Savard v. Treasury Board (Passport Canada)*, 2014 PSLRB 8 at para 72 as follows:

> *In deciding whether or not the grievance contravenes the principles in* Burchill*, I must decide whether or not the grievance that the grievor wishes to present is a new or different grievance than the one presented during the grievance process. The test in these cases is whether the employer knew what the grievance was about during the grievance process and had an opportunity to address the issues.*

[250] The termination letter that triggered the grievance and, ultimately, the reference to adjudication, identified the following as the employer's reason: "Unfortunately, the medical information received indicated that your return to work was not possible in the foreseeable future." At the final level grievance, Ms. Calabretta's representative contended that the decision to terminate her employment without allowing for a re-assessment in six months was unfair and unwarranted in the circumstances. The final level response by Mr. Tupper dated June 4, 2014, denying the grievance, stated in

part: "Consequently, I find my decision to terminate your employment was consistent with the Treasury Board Secretariat's *Policy on Leave and Special Working Arrangements* considering the length of your period of sick leave and the inability to establish a return to work date in the foreseeable future." The reference to adjudication was accompanied by a letter from the bargaining agent dated July 11, 2014, stating, as follows: "Since the grievance raises an issue involving the interpretation and application of the *Canadian Human Rights Act*, we have sent the Form 24 to the Canadian Human Rights Commission." The Form 24 to the Canadian Human Rights Commission stated: "Ms. Calabretta submits that the employer discriminated against her on the basis of disability by failing to accommodate her."

[251] The real issue in dispute is whether the employer has discriminated against Ms. Calabretta on the basis of disability and, if so, whether accommodating her disability would impose undue hardship on the employer. Not only was the employer fully aware of this, counsel for the employer led evidence and made arguments on the employer's accommodation efforts. Accordingly, there is neither prejudice nor procedural fairness concerns for the employer in me deciding on the obvious allegation of discrimination raised in the termination grievance.

[252] For all of the foregoing reasons I conclude that, while the allegations of harassment and discrimination that were raised in the 2011 grievances are not properly before me, I have jurisdiction to determine whether the employer discriminated against Ms. Calabretta on the basis of disability and, if so, whether accommodating her disability would impose undue hardship on the employer. It is the issue that arises from the termination grievance.

[253] According to section 226(2)(a) of the *PSLRA*, an adjudicator or the Board may, in relation to any matter referred to adjudication, interpret and apply the *Canadian Human Rights Act*.

[254] The employer terminated Ms. Calabretta's employment for non-disciplinary reasons based on the medical information it had received that indicated that her return to work was not possible in the foreseeable future based on her incapacity.

[255] I have no difficulty in finding on the evidence presented before me that a *prima facie* case of discrimination has been established. To demonstrate *prima facie* discrimination, Ms. Calabretta must show: that she had a characteristic protected from

discrimination under the *Canadian Human Rights Act*; that she experienced an adverse impact with respect to her employment; and, that the protected characteristic was a factor in that adverse impact (see *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33). First, Ms. Calabretta had a characteristic protected from discrimination under the *Canadian Human Rights Act*. One of the prohibited grounds listed in section 3 of the *Canadian Human Rights Act* is disability. Under section 25 of the *Canadian Human Rights Act*, disability "means any previous or existing mental or physical disability…" The evidence is overwhelming that Ms. Calabretta suffered from a disability. Secondly, there is no question that she experienced an adverse impact with respect to her employment – she was terminated. Finally, the evidence clearly establishes that Ms. Calabretta's disability was a factor in her termination.

[256] As previously noted, the Treasury Board promulgated the *Directive on Leave and Special Working Arrangements* effective April 1, 2009. Appendix B, paragraph 2, deals with the management of specific leave without pay situations including situations where a person will not be able to return to work within the foreseeable future. The directive provides that:

> *Persons with the delegated authority are to regularly re-examine all cases of leave without pay due to illness or injury in the workplace to ensure that continuation of leave without pay is warranted by current medical evidence. Such leave without pay situations are to be resolved within two years of the leave commencement date, although each case must be evaluated on the basis of its particular circumstances. All leave without pay due to illness or injury in the workplace will be terminated by the person's… termination for reasons other than breaches of discipline pursuant to the* Financial Administration Act.

[257] The employer relied on the current Treasury Board policy in terminating Ms. Calabretta. In the termination letter, Mr. Tupper stated, in part: "Consequently, I find my decision to terminate your employment was consistent with the Treasury Board Secretariat's *Policy on Leave and Special Working Arrangements*…"

[258] Given my finding of *prima facie* discrimination, it falls on the employer to establish that its application of the standard was justified. In *McGill*, the Supreme Court of Canada reiterated the three-part *Meiorin* test as follows (at para. 13):

> *It is well established that the employer must justify the standard it seeks to apply by establishing:*

> *(1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;*
>
> *(2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and*
>
> *(3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.*
>
> (*Meiorin*, at para. 54)

[259] I agree with counsel for the employer that the first two parts of the *Meiorin* test have been established and the issue in this case revolves around the concept of undue hardship.

[260] The analysis thus shifts to whether accommodating Ms. Calabretta's disability would impose undue hardship on the employer.

[261] As the Supreme Court of Canada in *Hydro-Québec* explained, at para. 12, the employer is required to prove undue hardship, "which can take as many forms as there are circumstances."

[262] In *McGill*, the Supreme Court of Canada stated at paragraph 11:

> *The duty to accommodate in the workplace arises when an employer seeks to apply a standard that is prejudicial to an employee on the basis of specific characteristics that are protected by human rights legislation. This can occur in the context of a sick employee's right to be absent from work….*

[263] The issue in this case is whether the circumstances presented imposed undue hardship on the employer.

[264] The Supreme Court in *McGill* at paragraph 15 stated that:

> *The factors that will support a finding of undue hardship are not entrenched and must be applied with common sense and flexibility… For example, the cost of the possible accommodation method, employee morale and mobility, the interchangeability of facilities, and the prospect of interference with other employees' rights or of disruption of*

> *the collective agreement may be taken into consideration. Since the right to accommodation is not absolute, consideration of all relevant factors can lead to the conclusion that the impact of the application of a prejudicial standard is legitimate.*

[265] At paragraphs 18 and 19, the Supreme Court further stated:

> *… it must be recognized that parties to a collective agreement have a right to negotiate clauses to ensure that sick employees return to work within a reasonable period of time. If this valid objective is recognized, the establishment of a maximum period of time for absences is a form of negotiated accommodation.*
>
> *The fact that such a period of time has been negotiated and included in the collective agreement indicates that the employer and the union considered the characteristics of the enterprise and agreed that, beyond this period, the employer would be entitled to terminate the sick person's employment …*

[266] At paragraph 20, the Supreme Court continued:

> *The period negotiated by the parties is therefore a factor to consider when assessing the duty of reasonable accommodation. Such clauses do not definitively determine the specific accommodation measures to which an employee is entitled since each case must be evaluated on the basis of its particular circumstances….*

[267] At paragraph 22:

> *… The scope of the duty to accommodate varies accordingly to the characteristics of each enterprise, the specific needs of each employee and the specific circumstances in which the decision is to be made. Throughout the employment relationship, the employer must make an effort to accommodate the employee. However, this does not mean that accommodation is necessarily a one-way street…*

[268] At paragraph 33:

> *… Undue hardship resulting from the employee's absence must be assessed globally starting from the beginning of the absence, not from the expiry of the three-year period.*

[269] The arbitrator in that case took the clause of the collective agreement into account, as well as all of the events leading up to the termination of the employment relationship including the accommodation measures granted by the hospital in

agreeing to rehabilitation periods longer than those provided for in the collective agreement. The arbitrator also considered the employee's state of health and the absence of evidence that she would be able to return to work in the foreseeable future. The Supreme Court concluded that the arbitrator had correctly determined that the employer could not continue to employ someone who had been declared to be disabled for an indeterminate period.

[270] In *Hydro-Québec*, the Supreme Court of Canada expanded on the principle of undue hardship as follows at paragraph 12: "What is really required is not proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship …"

[271] The Supreme Court continued at paragraphs 14, 15, 16 , 17 and 19 in part as follows:

> *… The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.*
>
> *However, the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration…*
>
> *The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.*
>
> *… However, in a case involving chronic absenteeism, if the employer shows that, despite measures taken to accommodate the employee, the employee will be unable to resume his or her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship.*
>
> …
>
> *The employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future.*

[272] The test then is has the employer demonstrated that it has taken measures to accommodate the employee yet despite these measures the employee will be unable to resume his or her work in the reasonably foreseeable future.

V. Conclusion

[273] Ms. Calabretta commenced employment at Public Safety in July 2009 as an emergency management officer in a PM-2 position. She was diagnosed as suffering from depression and severe anxiety that exacerbated a pre-existing condition and left on extended sick leave on July 6, 2010 and did not return to the workplace until January 7, 2013.

[274] Shortly after going on sick leave she was requested to provide management with updates as to her condition and was provided a work description for her position that would enable her and her physician to determine if she had any functional limitations in her ability to carry out her duties that would assist the department in determining if she needed to be accommodated. In September 2010 Ms. Calabretta's physician advised the employer that she would remain unfit to work until further notice.

[275] In November 2010 management requested Ms. Calabretta to keep them apprised of her health progress to help ensure an easier reintegration into the office when she returned. On November 16, 2010 a teleconference took place between management, labour relations, the bargaining agent and Ms. Calabretta at which time it was determined that it was too early to talk about a return to work.

[276] In February 2011 management wrote to Ms. Calabretta following up on the teleconference of November 16 to see how she was doing and requesting an update. Ms. Calabretta advised management that she had been working hard on getting better.

[277] Discussions were held with Ms. Calabretta regarding a possible return to work and on July 16, 2012 the Department prepared a letter for Ms. Calabretta's treating physician outlining the department's duty to accommodate and seeking the physician's expertise in determining whether she had any functional limitations which required accommodation. In September the department received medical information from Ms. Calabretta's physician stating that she was now fit to return to work provided certain accommodations were made and that her return be done on a progressive

basis; the most important of the accommodations was that she not return to work in the Emergency Management Office in Toronto.

[278] Management looked at other employment alternatives. The department was already undergoing a downsizing and it was recognized that Ms. Calabretta's substantive position as well as another employee in a PM-2 position would be affected and both employees would have to go through a SERLO process. It was agreed with the bargaining agent that management would not force Ms. Calabretta to undergo the SERLO process until she was back at employment full-time.

[279] Management decided to place Ms. Calabretta in another office at a different location in the NCPC Grants and Contributions unit even though her previous manager was no longer in the workplace. Ms. Epprecht took steps to obtain Ms. Calabretta's resume, to review her experience to determine how she could support the NCPC Grants and Contributions unit. Her previous employer was approached to provide input with respect to her experience. Ms. Epprecht tried to create meaningful work for Ms. Calabretta. Meetings were held with all of the involved parties, the bargaining agent and Ms. Calabretta. Ms. Calabretta was given a tour of the office. Her physician had stated that she should have a workspace that was quiet. The workspace identified by Ms. Epprecht was not suitable to Ms. Calabretta. She requested a different workspace. Ms. Epprecht had no difficulty in making the change. Payroll was notified that she would be coming back in October 2012.

[280] On October 2, 2012 management, the bargaining agent and Ms. Calabretta agreed on an October return to work in the NCPC Grants and Contributions unit, the work that she would be assigned and reduced hours of work, three days a week, in line with her physician's recommendations.

[281] The bargaining agent decided to withdraw from the agreement as it was concerned that the lack of the existence of a PM-02 position, specific duties and a job description would be to the detriment of Ms. Calabretta.

[282] Both Ms. Epprecht and Ms. Dusablon stated that this took them by surprise as they thought they had come to a common understanding. Ms. Epprecht requested more information from Ms. Calabretta's treating physician as to the nature of her accommodation needs and also asked for her consent to a fitness-to-work assessment at Health Canada for the same purpose.

[283] Subsequently, a meeting was held at the most senior levels of the Department with the deputy minister and the bargaining agent to discuss Ms. Calabretta's situation. The department reiterated its desire to retain Ms. Calabretta as an employee and expressed its willingness to accommodate her medical issues.

[284] On December 19, 2012 Ms. Calabretta's physician confirmed that she was able to return to work on a part-time basis and again a meeting was held on December 21, 2012 concerning her return to work with senior officials of the department and with the union president. A discussion took place with respect to the duties that she would be required to perform; that she would be provided with a learning plan and performance objectives; that she would be advanced paid sick leave of 19 days and that Ms. Dusablon and Ms. Belleau would travel to Toronto on her first day of work to facilitate her return.

[285] She was welcomed by the team. She attended regular program officer meetings involving all staff and according to Ms. Epprecht during the period January to April 2013 things were working out very well. In April 2013 Ms. Epprecht prepared a written performance review, which was positive. In February Ms. Calabretta had exhausted her 19 days of advance sick leave. The department granted her an additional three weeks of pay.

[286] However, in April 2013 Ms. Calabretta complained to Ms. Epprecht that it had been agreed that anything to do with her employment should go through the union including her performance appraisal. She also asserted that it was agreed that all tasks would be distributed through Ms. Epprecht, and not through a work colleague, and that all instructions would be given to her in writing. She claimed that Ms. Epprecht was going against her doctor's recommendations.

[287] Ms. Epprecht personally assigned tasks to Ms. Calabretta; however, she was not always available and in a small team it was not unusual for another staff member to assign tasks to an employee. Ms. Epprecht did not know if she would change anything in the manner in which she managed Ms. Calabretta. Everyone in the office wanted her to succeed. None of her actions were contrary to Ms. Calabretta's physician's recommendations and in fact virtually everything she did by way of managing Ms. Calabretta was vetted by labour relations and senior management.

[288] A conference call to discuss the issues raised by Ms. Calabretta was held during which it was agreed that the union is not usually involved in performance management and that it was not always possible to involve the union. The discussion is more particularly outlined at paragraph 68.

[289] At this meeting it was agreed that management would prepare a fitness-to-work evaluation for Health Canada, which Ms. Calabretta could review prior to giving her consent, as management needed the assessment to determine what further steps could be taken to accommodate Ms. Calabretta in light of the issues raised by her and the fact that the existing medical notes were non-specific. Ms. Calabretta was not prepared to consent to the assessment.

[290] Ms. Calabretta went off on sick leave two weeks prior to the mediation held June 25 and 26, 2013, and did not return to the workplace thereafter. Nevertheless, at the mediation the parties agreed to review the current job description with the mediator to identify the comprehensive job specific tasks and develop a plan to return to work that would include short-term, medium-term and long-term job tasks in accordance with the duty to accommodate with the support of Ms. Calabretta's physician and her bargaining agent.

[291] On June 27, Ms. Calabretta advised Ms. Epprecht that she would be absent from work due to medical reasons and that she had reactivated her claim for disability.

[292] In July Ms. Calabretta's physician advised the department that she would be reassessed in a month's time. In August her physician advised the department that she was not fit to work due to medical reasons and that she did not perceive her returning to work prior to 4 to 6 months from that date. In September, her physician reiterated that she did not expect Ms. Calabretta to return to work before 4 to 6 months.

[293] In November Ms. Calabretta consented to a fitness-for-work evaluation. On February 25, 2014, Health Canada advised the employer and Ms. Calabretta that she was currently not fit to work her substantive job and in response to the question if the employee is currently unfit for work, please indicate if a return to work can be established at this time based on the medical information available, Health Canada responded that "another fitness to work could be completed in 6 to 9 months to determine when and if a return to work can be attempted".

[294] On March 11, 2014 the department wrote to Ms. Calabretta referring to the Health Canada assessment and noting that the Health Canada assessment indicated that she would not be able to return to work in the foreseeable future and outlined the various options that were available to her.

[295] Ultimately, Ms. Calabretta's employment was terminated on April 8, 2014 for non-disciplinary reasons. Mr. Tupper found the decision difficult. However, he had been fully briefed on her situation and was knowledgeable about the attempts the department had made to accommodate her disability. His department was in the midst of a reorganization and a downsizing. He had delayed a SERLO process on account of Ms. Calabretta's situation that impacted other employees until such time as it was clear that the department could not determine a return-to-work date for her. The grievor was permitted to apply for medical retirement and remained a disability priority under the *Public Service Employment Act*.

[296] In my view based on the facts that I have recited I am led to the conclusion that the employer has demonstrated that it has taken measures to accommodate the employee yet despite these measures the employee will be unable to resume her work in the reasonably foreseeable future. Based on the recommendations of her physician the employer went out of its way to accommodate Ms. Calabretta's brief return to work. Ms. Epprecht, in particular, did everything within her power and authority to welcome and create meaningful employment for the grievor and accommodate her limitations.

[297] At the time her employment was terminated in April 2014 she had been absent from the workplace for almost 4 years with the exception of her attempt to return to the workplace from January to mid-June 2013 working three days a week, three hours a day. Health Canada concluded in February 2014 that she was currently not fit to work her substantive job. In response to the question of whether a return-to-work date could be established, Health Canada advised that "a fitness to work assessment could be completed in 6 to 9 months to determine <u>when and if</u> a return to work could be attempted" [emphasis added]. In my view Health Canada did not recommend that Ms. Calabretta be reassessed within another 6 to 9 months, but rather stated that another evaluation could done in 6 to 9 months to determine when and "if" a return could be attempted. There is nothing in this statement that detracts from the

conclusion that the grievor was medically unfit for the reasonably foreseeable future in April 2014.

[298] The report of Ms. Calabretta's psychologist dated May 1, 2015, almost a year after the termination, is very qualified, observing that she has struggled for over five years in an effort to work through the barriers to return to work and has developed a very substantial anxiety around these issues. He also observes that her successful return is by no means a certainty. As noted at paragraph 110, I determined that the information in the report was arguably relevant as to the reasonableness of the 2014 decision to terminate employment. In my view the report arguably reinforces the decision of the employer to terminate Ms. Calabretta's employment.

[299] The employer has shown that, despite measures taken to accommodate Ms. Calabretta, she was unable to resume her work in the reasonably foreseeable future. Thus, the employer has discharged its burden of proof and established undue hardship.

[300] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

VI. Order

[301] The termination of employment under paragraph 12(1)(*e*) of the *Financial Administration Act* is upheld.

[302] The grievance is dismissed.

October 28, 2015.

David Olsen,
a panel of the Public Service Labour Relations and Employment Board