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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

MARY ANN MCNULTY

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
McNulty v. Canada Revenue Agency

In the matter of individual grievances referred to adjudication

Before: John G. Jaworski, a panel of the Public Service Labour Relations and Employment Board

For the Grievor: Doug Hill, Public Service Alliance of Canada

For the Employer: Joshua Alcock, counsel

Heard at Ottawa, Ontario,
October 6 to 8, 2015.

I. Individual grievances referred to adjudication

[1] Mary Ann McNulty ("the grievor") was employed as a senior programs officer at the Service and Program Group 8 (SP-08) group and level with the Canada Revenue Agency (CRA or "the employer") in Ottawa, Ontario.

[2] On June 3, 2014, the grievor was terminated from her employment with the CRA, effective that day. The stated reason for termination was the grievor's misconduct in forging and submitting 16 medical certificates, which led to an irreparable breach of trust. On June 17, 2014, she grieved her termination, and as relief, she requested the following:

- that she be reinstated as a full-time indeterminate employee at her substantive level;
- that she receive all her pay and related benefits from the date of termination;
- that she be provided with rehabilitation; and
- that she be made whole.

[3] The grievance was denied at the final level of the grievance process and was referred to the Public Service Labour Relations and Employment Board ("the Board") on March 24, 2015, under s. 209(1)(a) and (b) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). The grievor alleged that the CRA breached clause 19.01 of the collective agreement it had entered into with the Public Service Alliance of Canada for the Program Delivery and Administrative Services Group, which was signed on October 29, 2010, and expired on October 31, 2012 ("the collective agreement").

[4] Clause 19.01 of the collective agreement states as follows:

> ***19.01*** *There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national origin, religious affiliation, sex, sexual orientation, family status, mental or physical disability, membership or activity in the Alliance, marital status, or a conviction for which a pardon has been granted.*

[5] The same day the grievor also filed a Form 24, Notice to the Canadian Human Rights Commission ("the CHRC"), claiming that the CRA's decision to terminate her employment constituted discrimination on the basis of disability (alcohol dependency) contrary to the *Canadian Human Rights Act* R.S.C. 1985, c. H-6; ("the *CHRA*"). The CHRC informed the Board that it would not be making submissions in this matter.

II. Summary of the evidence

[6] The grievor began her career with the CRA in 1989 as a clerk and moved through several levels before becoming a senior programs officer at the SP-08 group and level in December of 2010.

[7] The grievor received a number of awards during her tenure with the CRA, including the "CRA Award for Excellence" in 2010. She has also been active as a volunteer within the CRA both with the Government of Canada Workplace Charitable Campaign (GCWCC) and as well during National Public Service Week activities.

[8] Two performance appraisals were filed into evidence. The first was for the fiscal year from September 1, 2009, to August 31, 2010, in which the grievor received a performance rating of "Meets Expectations", and the second was for the fiscal year from September 1, 2010, to August 31, 2011, in which she received a performance rating of "Meets '+' Expectations", which means that she not only met all expectations but also in some instances went beyond them.

[9] The grievor is divorced and has one daughter of whom she has shared custody.

[10] At the relevant times, Marlene Sylvest was a manager in the CRA's Policy and Legislative Research Section, which is in the Trust Accounts Division of the Debt Management Compliance Directorate (DMCD). She had been in that position since June of 2010. She was responsible for a group of approximately 10 to 12 employees that included the grievor until her termination. The grievor reported to Ms. Sylvest for between three-and-a-half and four years. Ms. Sylvest in turn reported to a director, Lyne Levac, who in turn reported to the DMCD's director general (DG), Kevin McKenzie. Mr. McKenzie has been the DG since November of 2012.

[11] The Policy and Legislative Research Section provides direction and guidance on complex questions of employer compliance and other programs that deal with trust funds under Part 13 of the *Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp.)). Ms. Sylvest

stated that staff who work in this area, including the grievor, have in-depth knowledge of the work, policy, and legislation governing Part 13.

[12] Ms. Sylvest described the relationship she had with the grievor as good and that the work the grievor did, she did well.

[13] Ms. Sylvest testified that by early 2013, she had become concerned about the significant amount of work the grievor had been missing. She stated that in 2010 and early 2011, the grievor had advised her that she was dealing with some serious family issues, which were that a family member was ill and that another had died. When the grievor returned to work after these events, Ms. Sylvest stated that she asked her if she was alright to return to work, to which she stated the grievor told her that she was okay and that she wanted to return to work. Ms. Sylvest stated that despite the grievor's assurances, she continued to be absent from work. As such, Ms. Sylvest offered the grievor leave with income averaging.

[14] Ms. Sylvest stated that when she would raise the absences with the grievor, the grievor would insist things were fine. Ms. Sylvest testified that the grievor began to miss work without calling in and without letting Ms. Sylvest know. According to Ms. Sylvest, about 10 absences were unaccounted for, and the grievor had missed about 50 days by February 20, 2013. Ms. Sylvest wanted to ensure that the grievor and she were on the same page, and as such, she delivered to the grievor an "Administrative Conditions Letter" dated February 20, 2013 ("the February 20th letter").

[15] The February 20th letter stated the following:

> *This is intended to remind you of the various administrative conditions and mechanisms related to requests and authorization for leave, extended absences during the working hours, expected behaviour at work and to the various established administrative conditions you must comply with at work.*
>
> . . .
>
> ***Work Schedule***
>
> ***1.*** *Your hours of work are 7:00 a.m. to 3:00 p.m. with a one half-hour break for lunch. Except when operational requirements do not permit, you are entitled to two (2) rest periods of fifteen (15) minutes each full working day (one in the morning and one in the afternoon).*

Absences

2. *If you have to be away from work, you must notify your immediate supervisor the same day, by telephone during the normal working hours of 8:00 a.m. to 4:00 p.m. You can reach your immediate supervisor at 613-957-9463.*

Failure to report your absence as indicated above may result in your absence being considered unauthorized, which may be subject to disciplinary action.

Vacation leave

3. *If you wish to take vacation leave, you must fill out the appropriate electronic form in advance and obtain your supervisor's approval.* ***Please note that vacation leave will not be approved retroactively.***

Sick leave

4. *When you are absent from work for reasons of illness, you must, in accordance with the provisions of your collective agreement, follow the procedure established by your employer. When the employer is satisfied with the reasons given, the request can be approved. In your situation and in accordance with your collective agreement, a written statement by you will not be sufficient. In all cases of sick leave:*

i. If your doctor determines that you are to be absent from work ***for more than one day****, you must notify your supervisor immediately and provide the expected date of return to work indicated by your doctor. Only in cases when your supervisor was duly notified of your return date, you will not be required to contact your supervisor every day.*

ii. The date on the medical certificate must fall within the period during which you were absent from work. Certificates dated after the absence will not be acceptable.

iii. Please not that any medical certificate may be subject to verification by an independent 3rd party physician chosen by the Employer.

iv. The original medical certificate must be submitted ***within 7 calendar days from the start of your absence*** *or on the first day of your return to work if you were absent for* ***less than 5 working days.*** *If you fail to produce the original medical certificate within that time period, you will be considered on unauthorized leave, which is subject to disciplinary action.*

Family Related Leave

5. *Please note that it is your responsibility to clearly demonstrate to the Employer that you meet all the conditions under the collective agreement to be entitled to this type of leave.*

Medical/Dental Appointment

6. *Should you schedule a medical or dental appointment you must advise your supervisor at least 24 hours in advance. Every reasonable effort will be made on your part to schedule this appointment outside of your working hours. In the event that this is not possible, your medical appointment should be scheduled near the end of your workday. It is equally important to mention that to be absent without a loss of salary, the absence must be for reasons such as routine appointment and/or check-ups. In the event that you must undergo a series of treatments, you must obtain authorization as sick leave. Finally, to authorize this sick leave, your manager may request documentation supporting your request.*

Professional Behaviour

7. *While at work, you should at all times be in a condition to be able to perform all your professional duties. I refer you to the Code of Ethics and Conduct and emphasize that "you are expected to behave in a way that does not bring discredit to the CRA". Among other things, your "effectiveness [should never be] impaired to the extent that it could pose a hazard or embarrassment to you, to the CRA, to others or to property".*

For any reason, if you are unable to perform your work, you must immediately advise your manager and establish with your manager the most appropriate way to hand the situation. If you have any physical or health issues that could be detrimental to your work performance, you should advise your manager accordingly. You will not have to disclose any specific details with regards to your condition; only appropriate accommodation measures would be discussed with your treating physician.

It is important that you respect the above mentioned administrative measures. Failure to comply with these administrative measures could result in progressive disciplinary action being taken, up to and including termination of employment.

I would also like to reinforce that you may avail yourself to the services of EAP when dealing with personal issues.

. . .

> *We will meet again on monthly basis to discuss your progress in adhering to these requirements.*
>
> . . .
>
> [*Sic* throughout]
>
> [Emphasis in the original]

[16] Ms. Sylvest stated that on February 20, 2013, she met with the grievor in her office and that they went through the provisions set out in the February 20th letter. She stated that the grievor was using a lot of sick leave, and she asked the grievor during that meeting if there was anything that she or the CRA could do to help. She said that the grievor told her that there were no issues and that the grievor assured her that she would be at work.

[17] On page 2 of the February 20th letter, paragraph 4 sets out specific terms with respect to taking sick leave and providing medical certificates from a doctor. When asked if the certificates were discussed with the grievor, Ms. Sylvest said that the grievor did not tell her that providing the medical certificates was not possible. The grievor acknowledged receiving the February 20th letter on that date.

[18] In cross-examination, Ms. Sylvest was brought specifically to paragraph 4 on page 2 of the February 20th letter and was asked if she consulted the collective agreement when she prepared that part, to which she answered that she did remember looking at the collective agreement when drafting the letter. However, she recalled looking at it with respect to sick leave.

[19] In cross-examination, Ms. Sylvest was also brought specifically to the third page of the February 20th letter, where it states as follows: ". . . If you have any physical or health issues that could be detrimental to your work performance, you should advise your manager accordingly. You will not have to disclose any specific details with regards to your condition; only appropriate accommodation measures would be discussed with your treating physician." The grievor's representative asked Ms. Sylvest for the purpose of this clause, to which Ms. Sylvest stated that she understood it to mean if something, a physical or health issue, was keeping the grievor from performing her work tasks, Ms. Sylvest was to be advised, and the condition was to be addressed. She needed to know what the aggravating factor was and whether there was something to accommodate.

[20] In her evidence-in-chief, the grievor was brought to the February 20th letter and was asked if it was imposed on her, to which she replied, "Yes. It makes sense."

[21] Ms. Sylvest was asked about the grievor's attendance after February 20, 2013. She stated that the grievor continued to be absent from work and that she would often call and say she was sick. Ms. Sylvest said that because of the condition requiring providing a medical certificate, when the grievor returned from sick leave, Ms. Sylvest would approach her, see how she was doing, and ask for one. She stated that when she asked the grievor for a medical certificate, the grievor would generally not have it, would not be able to find it in her bag, or would say she had left it at home, and would then bring it in later, sometimes weeks later. Ms. Sylvest testified that when the grievor would not provide the medical certificate, she would remind her that it was necessary; she stated that she did not want to discipline the grievor if in fact there were medical certificates and the grievor was just forgetting to bring them in.

[22] Ms. Sylvest stated that despite the February 20th letter, she continued to be concerned about the amount of time the grievor was absent. She said that she would speak with the grievor and ask her if she was alright, if she needed anything, or if she would be in the next day or after a weekend, and she stated that the grievor would assure her that she would be in and then would be absent.

[23] Ms. Sylvest testified that she would ask the grievor if there was anything she or the CRA could do, because she was trying to see if there was something that was keeping the grievor from coming to work and whether the CRA could do something to alleviate the situation. The only thing that the grievor suggested was that it conduct an ergonomic assessment, so in July of 2013, one was conducted.

[24] Due to the grievor's continued absences from work, Ms. Sylvest determined that a fitness-to-work evaluation ("FTWE") should be conducted to determine if a physician could see the grievor and find out what was causing her to miss so much work and to provide some guidance for accommodation, if necessary. Ms. Sylvest testified that in June of 2013, the grievor consented to an FTWE and that the grievor actively participated in drafting the letter for the FTWE.

[25] On July 18, 2013, a letter (the July 18th letter), together with a signed consent, the FTWE form, and a work description, were sent to the grievor's family physician, Danielle DeBanne, requesting an FTWE of the grievor. Ms. Sylvest said that the grievor

agreed with the content of the July 18th letter before it was sent and that she was provided with a copy of it and all the material that was sent to her doctor.

[26] In cross-examination, Ms. Sylvest was brought to a copy of the FTWE consent form, specifically the first paragraph, in which it stated: "The reason(s) I have been asked to undergo a medical assessment have been fully explained to me by a representative of my employer, the Canada Revenue Agency (CRA)", and was asked if she had explained the reasons to the grievor, to which Ms. Sylvest answered that she had. She was asked the specifics of what she had explained, and her recollection was that she had told the grievor that she was concerned about the absences and the amount of sick leave and that the grievor would say she was fine but would then be off work again. So Ms. Sylvest was concerned and wondered if a physician could help.

[27] The results of the grievor's FTWE are dated August 19, 2013 ("the FTWE report"). Ms. Sylvest stated that she recalled getting it in or about late August 2013. It stated that the grievor was fit to work on a full-time basis, with the proviso that she be allowed to take breaks and lunches daily without being made to feel guilty. The FTWE report did not specify any limitations, in fact stating "Not applicable" in that respect; however, Dr. Debanne then stated that the recommendations made on the ergonomic assessment be implemented as soon as possible. She then stated: "A sit to stand electric desk would be very helpful." This latter reference appears to have no bearing on the issues before me, and there was no testimony concerning this notation.

[28] Ms. Sylvest stated that she reviewed the FTWE report and that she did not know what the comment about taking breaks and lunches without feeling guilty referred to; nor did she recall discussing this with the grievor.

[29] Ms. Sylvest stated that after the FTWE, the grievor's absences continued, and that when she was absent, Ms. Sylvest would request a medical certificate from her, and she would either not have it or would be unable to find it, would say that she left it at home, and would then bring it in at a later date.

[30] Ms. Sylvest said that after the FTWE was done, she continued to have discussions with the grievor about her absences from work and that in September of 2013, they discussed bringing her time sheets up to date, as the grievor was often absent, many times for unclear reasons. Ms. Sylvest said that she would sometimes

have to bring the grievor the time sheets and fill them in with her.

[31] Due to the continued absences, Ms. Sylvest said that management determined that another FTWE had to be conducted; however, this time, the grievor refused to give her consent, as she said she was feeling fine, and no FTWE needed to be done.

[32] Entered into evidence were copies of 93 handwritten notes Ms. Sylvest made of either phone calls from the grievor or phone messages she left or Ms. Sylvest's notes of when the grievor was absent and did not phone in. The notes were made between February 28, 2013, and May 29, 2014, concurrent with the absences taking place. Some of the notes provide very little information and state only that the grievor would not be coming in and noting the date and time of the call, while others offer more detail, such as the grievor attending an appointment, either for herself or a family member, and a phone number. Some of the notes were just for absences of a day, while others referenced missing work for more than one day.

[33] Ms. Sylvest stated that when she listened to the messages, her impression was that they were clear and comprehensive and that she had no difficulty understanding what the grievor was stating; she did not notice anything unusual or unexpected. The grievor's speech was not slurred, and she did not lack coherence.

[34] Entered into evidence were copies of 16 typewritten or computer-generated medical certificates covering several periods between May 14, 2013, and March 21, 2014, which state that the grievor was unable to attend at work ("the forged medical certificates"). They identify 10 different doctors and a physiotherapy clinic. Ms. Sylvest identified the notes as all being provided to her by the grievor to justify absences from work. The salient details of the forged medical certificates are as follows:

- certificate dated May 14, 2013, covering the period of May 13 to 17, 2013, and identifying the treating physician as Dr. A. Saeed, located at 2430 Bank Street in Ottawa;
- certificate dated May 27, 2013, covering the period of May 23 to 31, 2013, and identifying the treating physician as Dr. C. Renaud, located at 2430 Bank Street in Ottawa;
- certificate dated June 4, 2013, covering the period of June 3 to 7, 2013, and identifying the treating physician as Dr. A. Kane, located at 2430 Bank Street in Ottawa;
- certificate dated June 19, 2013, covering the period of

June 17 to 21, 2013, and identifying the treating physician as Dr. A. Saeed, located at 2430 Bank Street in Ottawa;

- certificate dated July 31, 2013, covering the period of July 29 to August 2, 2013, and identifying the treating physician as Dr. A. Kane, located at 2430 Bank Street in Ottawa;

- certificate dated August 26, 2013, covering August 26, 2013, and identifying the treating physician as Dr. A. Kane, located at 2430 Bank Street in Ottawa;

- certificate dated October 2, 2013, covering the period of October 2 to 4, 2013, and identifying the treating physician as Dr. C. Doss, located at 2430 Bank Street in Ottawa;

- certificate dated October 29, 2013, covering the period of October 28 to November 4, 2013, and identifying the treating physician as Dr. P. Varma, located at 2430 Bank Street in Ottawa;

- certificate dated November 13, 2013, covering the period of November 12 to 15, 2013, and identifying the treating physician as Dr. I. Mahdy, located at 2430 Bank Street in Ottawa;

- certificate dated November 27, 2013, covering the period of November 25 to 29, 2013, and identifying the treating physician as Dr. D. DeBanne, located at 110 Craig Street in Russell, Ontario;

- certificate dated January 6, 2014, covering the period of December 30, 2013 to January 6, 2014, and identifying the treating physician as Dr. A. Chadha, located at 2430 Bank Street in Ottawa;

- certificate dated January 21, 2014, covering the period of January 13 to 20, 2014, and identifying the treating physician as Dr. G. Shivani, located at 110 Craig Street in Russell;

- certificate dated January 30, 2014, covering the period of January 29 to 31, 2014, and identifying the treating physician as Dr. A. Asgher, located at 2430 Bank Street in Ottawa;

- certificate dated February 20, 2014, covering the period of February 17 to 20, 2014, and identifying the treating physician as Dr. G. Shivani, located at 110 Craig Street in Russell;

- certificate that is undated, covering the period of March 3 to 7, 2014, and identifying the treating professional as Marc Dignard, physiotherapist, located at 657 Notre Dame Street in Embrun, Ontario; and

- certificate that is undated, covering the period of March 18 to 21, 2014, and identifying the treating professional as L. Long, physiotherapist, located at 657 Notre Dame Street in Embrun.

[35] Ms. Sylvest stated that when she received the last two forged medical certificates, both from the physiotherapy clinic, she became suspicious. She stated that she brought her concerns to her supervisor (Ms. Levac) and that she gave copies of them to Labour Relations (LR). She stated that LR advised her that they were falsified, that an investigation would be initiated, and that the CRA Internal Affairs and Fraud Control Division's ("IAD") investigators would contact the grievor and interview her.

[36] Mr. McKenzie testified that he first became aware of a potential issue involving the grievor and the forged medical certificates on March 20, 2014, as a result of a discussion that he had with Ms. Sylvest and Ms. Levac. He understood that LR had made enquiries about the alleged authors of certain medical certificates and had determined that they were not genuine. He stated that the IAD became involved shortly after he found out about the issue.

[37] Ms. Sylvest identified handwritten notes of a meeting she had with the grievor on April 8, 2014. She stated that on that day, the grievor had come to see her and had told her that her illness was alcoholism and that she had forged the certificates because she had been too drunk to go to the doctor when she had called in sick. Ms. Sylvest stated that at the meeting, the grievor asked to see Mr. McKenzie, and she and the grievor did meet with him that day.

[38] Mr. McKenzie identified typewritten notes that he made of his April 8, 2014, meeting with the grievor and Ms. Sylvest, which took place in his office, and he stated that they reflect what was said in the meeting. He testified that the grievor and Ms. Sylvest arrived at his office requesting to speak to him about an important matter and that the grievor had just informed Ms. Sylvest of her pattern of absenteeism and its relation to an alcohol dependency.

[39] Mr. McKenzie's April 8, 2014, notes state the following in part:

. . .

> *Mary Ann justified the forging of notes given the fact that when she was absent she was too drunk to drive to the doctor's office to get a note - Her words were to the effect of "you would not want me to drive drunk. . .".*
>
> *Mary Ann revealed that she had been treated in the past for alcohol abuse and had been sober for a number of years. Her resumption of alcohol abuse started again (about two*

> *years ago) when members of her family became ill.*
>
> *Mary Ann stated that she now wants to stop drinking and has sought help at the Royal Ottawa Hospital where she stated that she had been treated in the past. She had the name of a contact at the Royal Ottawa with her and offered to call the hospital in my presence to demonstrate that she was actively seeking help…*
>
> . . .
>
> *I asked her about the nature of the program she would attend – from her explanation I understood that it was a few hours a week in the evenings and hence there was not a need for the employer to provide flexibility in the work schedule.*
>
> *It became clear that the trigger for the revelation of her alcohol abuse was a contact from Internal Affairs asking her to meet on the subject of the forged doctor's notes. I understood that the interview with the investigator would be held the next day.*
>
> *Mary Ann asked about the impacts of her fraud (forged notes to obtain paid and unpaid leave) on her job. I told her that there was a process of investigation that we needed to allow to run its course first and the findings of that investigation would inform next steps. I stated that the immediate priority was that she deals with her alcohol abuse issues in consultation with her doctor and/or counsellor.*
>
> *I understood at the meeting that Marlene had already offered her time off to facilitate the treatment process but Mary Ann had declined the offer at this time. She would only need a few hours here and there for appointments during the day.*
>
> . . .

[40] Mr. McKenzie was asked about his impressions of the grievor and that meeting, to which he stated (which he also referred to in his meeting notes) that she explained what had happened but that she showed no remorse and at times appeared to deflect the blame from herself to others, such as her manager for requiring her to produce medical certificates, and that she avoided responsibility by stating: "you would not want me to drive drunk."

[41] Mr. McKenzie stated in the last paragraph of his meeting notes that he found that the treatment program that the grievor had described for him as "light". He testified that given the behaviour, the extent of the problem, and, that it was a second

event, he expected more than just one evening a week.

[42] Produced into evidence at the hearing is a copy of the IAD report into the forged medical certificates, dated April 22, 2014 and authored by Josee Labelle who is a director in the Internal Affairs and Fraud Control Division of the CRA ("the IAD report"). The IAD report states in part as follows:

. . .

> *On April 7, 2014, Geoff Broadfoot, Internal Investigator, contacted Mary Ann McNulty, who agreed to be interviewed on April 9, 2014. However on April 8, 2014, Mary Ann McNulty requested a meeting with her manager, Marlene Sylvest, and her director general, Kevin McKenzie. At this meeting, Ms. McNulty reported that she suffered from alcoholism, and admitted that she had created and submitted falsified medical notes to certify her absences and use of sick leave. Furthermore, she expressed her desire to stop drinking, and called the Royal Ottawa Hospital while in the company of management to make an appointment with Dr. Grymella* [sic] *of the alcohol dependency program for April 10, 2014.*
>
> *When she met with the internal investigator on April 9, 2014, Mary Ann McNulty reported that she was sick when she took the leave as a result of her drinking, and had forged the 16 medical certificates because she was never sober enough to attend the doctor's office to obtain them legitimately. She indicated that approximately 10 years ago, she had entered into a 28-day treatment program for alcohol dependency at the Royal Ottawa Hospital, and had remained sober for approximately eight years until numerous family deaths and illnesses created a stress level that resulted in her resuming drinking. Mary Ann McNulty expressed remorse and her desire to regain the trust of her managers and co-workers.*

. . .

[43] The IAD report went on to identify the sixteen medical certificates that were forged by the grievor, which were used by her to claim 216 hours of sick leave with pay and 218.5 hours of sick leave without pay. According to Mr. McKenzie's calculation, the 216 hours of sick leave with pay was worth, based on the grievor's rate of pay at the time, roughly about $9300.00 before deductions.

[44] Mr. McKenzie stated that upon review of the IAD report, he invited the grievor to a disciplinary hearing on May 14, 2014 at 10:00 a.m. The invitation advised the grievor that she could bring a bargaining agent representative with her if she wished.

The grievor did attend the meeting but was not accompanied by a bargaining agent representative. Mr. McKenzie was accompanied by Maxime Quesnel, a LR officer. Produced at the adjudication hearing were copies of the email invitation Mr. McKenzie sent to the grievor as well as notes of the disciplinary hearing (the "disciplinary hearing notes"). Mr. McKenzie testified that at the disciplinary hearing he set out the results of the IAD report and asked the grievor if she had anything to add; or, any information that may might be relevant, or anything at all to say about the report. She did not. He stated that she told him that at the time she was forging the medical notes, she did not consider the seriousness of her action or that it was fraud. He stated in his disciplinary hearing notes and in his evidence that she confirmed to him that she was familiar with the CRA's "Code of Ethics and Conduct" and that she understood that her actions of forging the medical certificates were not consistent with the guidelines set out in that Code.

[45] The disciplinary hearing notes indicated and he testified that the grievor advised him that she was not under the influence of alcohol at the time she forged the medical certificates but that on some occasions, she was suffering the after-effects of drinking, in that she was hung-over. Also set out in the disciplinary hearing notes and in Mr. McKenzie's testimony was that the grievor told him that she had always been sober when she had given the notes to her manager.

[46] Subsequent to the disciplinary hearing, but on the same day, the grievor returned to see Mr. McKenzie, to provide him with further information, which he then set out in an email to Mr. Quesnel, also on that same day, as follows:

- it had not occurred to the grievor that forging the medical notes was fraudulent;
- she stated that fraud occurred every day at the CRA, with employees taking long breaks;
- her brother had died;
- her sister had suffered a serious illness;
- her uncle had died;
- her mother was in declining health;
- she had always been a good employee;

- she had worked on the GCWCC and had received the award for excellence;
- the 16 or 17 instances of fraud were not indicative of her career as a public servant; and
- she did not want to lose her job as she needed it to support herself and her child.

[47] Mr. McKenzie set out in that email and in his evidence before me that the grievor did not apologize or acknowledge that she was accountable for her actions.

[48] In her evidence, the grievor stated that when she forged the 16 medical certificates, she was sometimes intoxicated, sometimes hung-over, and sometimes sober. In cross-examination, she was referred to both Mr. McKenzie's testimony and the disciplinary hearing notes in which he had stated that she had told him that she had forged the medical certificates when she was sober or when she was suffering the after-effects of drinking (she was hung-over). She was asked if his statement was inaccurate. She replied that "after-effects" means "intoxicated". When pushed on the subject by counsel, she stated that she told Mr. McKenzie that the after-effects "were hung-over; I was intoxicated." When counsel then suggested to her that she did not clarify the difference to Mr. McKenzie, her response was that his interpretation and hers might have been different.

[49] Mr. McKenzie determined that the grievor's conduct of forging the medical certificates was serious enough to warrant terminating her employment, and he took that step on June 3, 2014, at which time a meeting was held with her. In addition to the grievor and Mr. McKenzie, Mr. Quesnel also attended. The grievor was advised that she was entitled to representation by a bargaining agent representative; however, she declined that option. At the meeting, she was told of the decision to terminate her employment. Entered into evidence at the hearing was a copy of Mr. McKenzie's notes of the meeting ("the June 3 meeting notes").

[50] According to the June 3 meeting notes, the grievor took the position that the fault was with management and blamed her immediate manager, whom she stated was a poor manager who had not responded to her emails on many occasions with respect to matters of her leave. The grievor questioned how termination could align with the CRA's position on supporting employees with mental health and addiction problems and stated that she had been trying to make things right. According to the June 3

meeting notes and Mr. McKenzie's testimony, the grievor had been angry but composed.

[51] According to the June 3 meeting notes and Mr. McKenzie's testimony, the grievor:

- did not apologize for her actions;
- did not accept responsibility for what she had done;
- did not show any remorse; and
- transferred accountability for her actions, including to CRA management and to her personal circumstances.

[52] Also entered into evidence was a copy of the termination letter authored by Mr. McKenzie and dated June 3, 2014, which he testified that he provided to the grievor at meeting on that day. The letter stated in part as follows:

. . .

> *A fact finding investigation was conducted between March 24 and March 27, 2014 which confirmed that you submitted 16 fraudulent medical notes. In addition, you were interviewed by an investigator from the Internal Affairs and Fraud Control Division on April 9, 2014 who found that you breached the Code of Ethics and Conduct when you submitted fraudulent medical notes supporting receipt of paid and unpaid sick leave.*
>
> *In arriving at my decision, I have considered the seriousness and repetitive nature of your misconduct, your failure to respect the conditions outlined in the Administrative letter, the medical information which states that you are fit to work without any limitations or restrictions and the CRA's values which include integrity, professionalism and respect. Further, I have considered your performance, years of employment, disciplinary record and representations made to management at the May 14, 2014 meeting.*
>
> *The public's trust in our integrity is something very precious. It is something that we must collectively nurture and protect because it is absolutely critical to our ability to carry out our business. In view of the fact that you have irreparably breached the confidence and trust that your employer placed in you and which is required as an employee of the CRA,*

> *I find it is necessary to terminate your employment effective immediately.*
>
> . . .

[53] The grievor was not suspended from work after the April 8, 2014, meetings with Mr. McKenzie and Ms. Sylvest. Mr. McKenzie was asked about this in cross-examination, about how he could have found that the grievor's actions were such a serious breach of trust and yet allowed her to remain at work pending the IAD's investigation and while deliberating on what if any discipline to impose. He stated that he had contemplated an administrative suspension but that he considered the risks and felt her presence in the workplace could be managed.

[54] The grievor testified that in 2004, she was arrested for impaired driving and that she lost her driver's licence. She said that at that time, she was drinking heavily and was involved in a custody battle with her husband over their young daughter. She stated that her husband used her drinking against her in the dispute. She testified that she was seen by Dr. John Grymalla at the Royal Ottawa Hospital (ROH), who diagnosed her with alcohol dependency.

[55] Entered into evidence at the hearing was a copy of what was purported to be Dr. Grymalla's initial assessment report, dated December 13, 2004, which set out in part that the grievor told him the following:

- she had a history of abusing alcohol;
- she had stopped drinking when she was pregnant;
- she had suffered blackouts and hallucinations;
- she had experienced withdrawal, shakes, and diaphoresis;
- she had five brothers and five living and one deceased sister;

[56] According to that report, Dr. Grymalla referred the grievor to Addiction Services at the Meadow Creek Treatment Program ("Meadow Creek") for the Day Clinic and she was also referred to Gail Mezger, the ROH intake nurse.

[57] The grievor testified that Meadow Creek has an extensive 28-day program for alcohol abuse. A person can be admitted as a day patient (8:00 a.m. to 8:00 p.m.) or can

stay there full-time for the 28 days. She chose to be a day patient. Entered into evidence was a copy of the admission note dated January 25, 2005, which states that she was admitted as a day patient. She stated that she completed the 28-day program.

[58] I was not provided with any further details of Meadow Creek or of Dr. Grymalla's or Ms. Mezger's credentials or expertise.

[59] Entered into evidence was a copy of the grievor's discharge summary after she completed Meadow Creek on February 22, 2005, which states in part as follows about her:

. . .

- *completed the intensive phase of treatment on February 22, 2005;*
- *participated modestly in the therapeutic aspects of the program;*
- *self-disclosure level in group therapy was limited and she appeared not to be as forthcoming in individual therapy as one might have wished;*
- *appeared to be quite anxious when in the day clinic and in group therapy;*
- *was pleasant, cooperative and interacted reasonably well with peers and staff;*
- *was not particularly guidable within the therapeutic process and as a result of this it is felt that she has developed limited insight into the relationship between her drinking and adjustment issues;*
- *at discharge was euthymic on no medications; eating and sleeping well; her affect was bright and stable, and she was future oriented with a good plan in place;*
- *admitted on the second last day of treatment that she had not been as forthcoming because she was concerned about her medical reports being subpoenaed for an impending family court hearing;*
- *appears to have an avoidant personality trait; and*
- *requested that her discharge summaries not be sent to her family physician or Health Canada.*

. . .

[60] The grievor testified that she was sober for approximately eight years. She stated that during this time, she was at work on a regular basis, missing only the odd day, and that she accumulated over 500 hours of sick leave.

[61] The grievor said that in 2011, one of her brothers and one of her sisters were each diagnosed with a serious illness and that in 2012, a brother had died, an uncle had died, a sister was admitted to hospital due to a serious illness, and, her mother was diagnosed with a medical issue. She stated that the impact on her was that at or about Christmas 2011, she relapsed and began drinking.

[62] The grievor said that she typed up all 16 forged medical certificates on her home computer and that she either printed them there or sometimes emailed them to her office computer and printed and signed them at work. She said that with respect to the certificates and the time off, her drinking was the cause.

[63] When the grievor's representative asked her why she did not see a doctor when she was off on the days she was drinking and for which she had forged the medical certificates, she stated that she had been too intoxicated to drive and that even if she had not necessarily been drinking on a particular day, she had still been incapable of driving, due to her intoxication.

[64] The grievor confirmed in cross-examination that one of her sisters lived near her and could drive.

[65] The grievor stated that she did not drink when her daughter was in her custody. In cross-examination, the grievor confirmed that although there was a pattern to her drinking, she could and would abstain from drinking whenever she had her daughter with her. She stated that when she was drinking, she would drink from the moment she got up in the morning to that night (about 14 hours), Monday to Friday, and then she would stop and use the weekend to recover.

[66] Entered into evidence was a copy of a document from the ROH dated April 22, 2014, and titled "Substance Use and Concurrent Disorders Program Reassessment". Dr. Grymalla completed it, and it states in part as follows about the grievor:

. . .

- *has a history of abusing alcohol;*
- *had attended Meadow Creek in 2005 and had abstained from alcohol completely until about two years ago;*
- *when she relapsed her stressors at that time included the death of a brother and a sister having medical problems;*
- *stated that she would go on binges, drinking three to four days at a time;*
- *stated that she had stopped drinking altogether on either April 2 or 3, 2014;*
- *stated that she continued to be involved in self-help groups and has a number of friends that she met in recovery who are supportive;*
- *stated that she was experiencing blackouts, withdrawal shakes and diaphoresis;*
- *at the time of the interview, her affect and behaviour were appropriate to the content of the interview; her speech pattern was normal; she was oriented to time place and person; and her thought process was organized and goal-directed; and*
- *did agree that attending some sort of program in order to re-establish some basics might be useful.*

[67] According to that document, Dr. Grymalla referred the grievor for assessment for the Addiction Services educational program, which was 2 hours, 1 day per week, for 16 weeks. I was not provided any detail of that program.

[68] Entered into evidence was a copy of a document from the ROH dated August 12, 2014, and titled "Substance Use and Concurrent Disorders Program ("the program") Admission Note". Dr. Ted Schnare completed it, and it states in part as follows about the grievor:

. . .

- *was admitted to Meadow Creek from the outpatient clinic at the ROH Substance Use and Concurrent Disorders Program;*
- *was previously sober for 8.5 years after treatment in the Meadow Creek program;*
- *relapsed in 2012 and has been binge drinking since; her*

> *binges last 3-4 days and stops for a week and a half and binges again;*
>
> - *last consumed alcohol on July 24, 2014; and*
> - *has blackouts but denies DTs, and withdrawal seizures but has morning shakes and wicked hangovers . . . .*

[69] I was not provided any detail of the Substance Use and Concurrent Disorders Program. I was not provided any detail of Dr. Schnare's credentials or expertise.

[70] Entered into evidence was a copy of a document from the ROH dated September 4, 2014, and titled "Discharge Summary" ("the September 4 report"). Dr. Melanie Willows completed it, and it states in part as follows:

> . . .
>
> - *the grievor had reported to be able to stop drinking and was supported through the Outpatient Clinic attending on a daily basis from July 2, to August 11, 2014;*
> - *the grievor appeared to be participating in the treatment program appropriately, both in individual and group sessions;*
> - *on August 25, 2014 the grievor called in stating that she had a migraine and did not arrive until later in the evening that Monday;*
> - *the grievor, after the Labour Day long weekend did not return to the program;*
> - *the grievor appeared to call the program several times but when the phone was picked up she hung up;*
> - *numerous attempts were made to contact the grievor; the grievor had left more than one phone number and when one of the numbers was called the program was told on two occasions that it was the wrong number;*
> - *as of September 4, 2014, the grievor was not in touch with the program and the program could not get in touch with the grievor, resulting in her being discharged while on unauthorized leave from the program;*
> - *throughout the program the grievor's mood was good; her affect appropriate; her speech was normal; she had no thought disorder and her insight and judgement appeared to be reasonably good; and*

- *it was highly likely that the grievor had returned to consuming alcohol.*

[71] I was not provided any detail of Dr. Willow's credentials or expertise.

[72] The grievor testified that she left Meadow Creek in late August or early September of 2014 because her mother had been admitted to hospital and her mother's health was declining. She said that the last week of the program dealt only with nutrition, so she felt that she did not miss the "meat of it". She said she had to care for her mother at that time.

[73] In cross-examination, when asked about the reference to the phone call hang ups that were set out in the September 4 report, the grievor denied doing them and stated the report was inaccurate in that vein. She said that the program had both her home and cellular phone numbers and that it had had them for years. She also stated that she advised the program why she was leaving and that it failed to note it in the September 4 report.

[74] The grievor testified that

- the last drink she had before the hearing was in January of 2015;
- as of the hearing, she was still seeing Dr. Grymalla;
- she was seeing Ms. Mezger; and
- she was attending Alcoholics Anonymous ("AA") meetings twice per week.

[75] The grievor testified that when she met with the CRA investigators, she admitted to what she had done, expressed remorse, and cooperated with the investigation.

[76] The grievor testified that she was sorry for her actions and that she would never do what she did again. She said that she had been a good employee for 25 years and that she had done nothing wrong until the alcohol abuse started. She stated that other than her misconduct with respect to the medical certificates, she had adhered to the CRA's policies.

[77] In cross-examination, it was put to the grievor that she had sought treatment in 2004 and that at that time, it sounds as if she had been drinking heavily, to which she stated that she had not been. However, when it was put to her that at that time whether she had forged medical certificates, when she had sought treatment for her alcohol abuse and while a number of stressors had been ongoing in her life (a divorce, a custody battle, and an impaired driving charge), she stated that she had not.

[78] In cross-examination, when it was put to the grievor that despite relapsing in late 2011, she did not seek treatment until 2014, she said that in 2012, she saw both Dr. Grymalla and Ms. Mezger. She stated that between 2005, when she was discharged from Meadow Creek the first time, and 2012, she saw Dr. Grymalla every three months and Ms. Mezger once per month. She stated that in 2012, she saw Ms. Mezger a few times but that in September, when she had an appointment with Ms. Mezger, her uncle died, and she called Ms. Mezger and then never went back.

[79] The grievor admitted that between that time in 2012 and April 2014, when her forging of the medical certificates came to light, she did not seek any treatment and that she had known that treatment was available.

[80] The grievor was asked in cross-examination if she was "seeing Dr. Grymalla now?" She answered, "Yes." When she was asked when her next appointment with him was, she replied it was in December of 2015, and when she was asked when her last appointment with him was, she replied that it had been in 2014.

[81] The grievor never paid back the roughly $9300 that she received as a result of the 216 hours of certified sick leave she took based on the forged medical certificates. She stated that she did not offer to pay it back.

[82] Entered into evidence were copies of medical records from the grievor's family physician, Dr. Debanne. One was for the week of August 15 to 19, 2013 ("the August 2013 record"), and the other was for January 21, 2014 ("the January 2014 record"). The August 2013 record disclosed as follows:

- *on August 9, 2013, the grievor contacted the doctor's office for an appointment and was seen on August 15, 2013;*

- *the grievor stated that she had missed a lot of work;*
- *she complained of a sore shoulder interfering with her sleep;*
- *she said she was getting sick every second week, with headaches and shoulder pain;*
- *she advised that her brother and uncle had died and that a sister had been diagnosed with a serious illness;*
- *she stated that her work was really stressful and that her manager really stressed her off;*
- *she stated she had been drinking for a bit and was still drinking a bit;*
- *she was advised that this was a dangerous path to be on; and*
- *resumation of drinking; she understands that this is not the best thing for her.*

[83] The January 2014 record disclosed no reference whatsoever to her drinking or being too sick to work, despite that the week of January 21 was the date of one of the forged medical certificates, which stated that she was seen that day and was being put off work for the previous week.

[84] Both the August 2013 record and the January 21 record were put to the grievor in cross-examination, and it was suggested to her that she was not being honest with her family doctor, to which she responded: "Family doctors do not have the knowledge that ROH doctors have; I basically stopped confiding in my family doctor." When pressed that she had not been honest with her family doctor, she admitted as much.

III. Summary of the arguments

A. For the employer

[85] The misconduct was established as the grievor admitted to falsifying 16 medical certificates and as a result to being granted 216 hours of paid leave and 218.5 hours of unpaid leave. The value of the paid leave is approximately $9300.

[86] The grievor's misconduct was not a one-time thing and was not done at the spur of the moment; it involved 16 separate forged documents that required planning in which she created, printed, and brought to work 16 separate forged documents. The jurisprudence suggests that the discipline rendered, the termination of her employment, was justified.

[87] In *Sauvageau v. Treasury Board (Employment and Immigration Canada)*, PSSRB File No. 166-02-14870 (19850129), [1985] C.P.S.S.R.B. No. 55 (QL); *Forrester v. Treasury Board (Post Office Department)*, [1981] C.P.S.S.R.B. No. 16 (QL); *McKenzie v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 26; *Morrow v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 43; the grievors all falsified medical certificates and fraudulently obtained paid leave. They were all discharged, and each one grieved. Each grievance was referred to either the PSLRB or its predecessor, the Public Service Staff Relations Board (PSSRB), and all discharges were upheld on adjudication. The employer also referred me to *Plank v. Federal Express Canada Ltd.*, [2006] C.L.A.D. No. 510 (QL).

[88] In *Canada Post Corporation v. Assn. of Postal Officials of Canada*, [1990] C.L.A.D. No. 3 (QL), and in *Kohler Ltd. v. Hytec Employees Association*, [2007] B.C.C.A.A.A. No. 246 (QL), the grievors, while they had not submitted forged medical certificates, nonetheless had fraudulently obtained paid sick leave and had been discharged from their jobs; both grievances went to arbitration, and both discharges were upheld.

[89] A component of the grievor's argument is that there are substantial mitigating factors. Based on the evidence, she is relying on remorse, cooperation, and work performance.

[90] With respect to the mitigating factor of remorse, the evidence is limited at best. One line in the IAD report stated that the grievor expressed remorse, and at the hearing, she was asked if she was sorry, to which she answered, "Yes". Then, she was asked if she had expressed remorse, to which she again answered, "Yes". Neither is a clear indication of remorse, and in the face of Mr. McKenzie's evidence that she expressed no remorse, each should be given no weight. It should be noted that Mr. McKenzie's evidence on this point was not contradicted. One would expect someone who is truly sorry for his or her actions to express more of a form of remorse than what she presented.

[91] With respect to the mitigating factor of cooperating with the investigation, she did so.

[92] With respect to the mitigating factor of work performance, her work was satisfactory; however, the CRA submits that her alleged work performance cuts both ways. When she was at work, she allegedly worked at a high level. Given that during the relevant period she was able to work at a high level of competence, how was she unable to recognize that submitting 16 forged medical certificates was wrong?

The medical defence

[93] The grievor alludes to a breach of the duty to accommodate her disability. The law in this area is developing, and several attempts have been made to articulate a common approach. The fundamental question to be asked is whether the grievor is culpable for the misconduct; no one benefits from punishment for actions they are not responsible for, and likewise, no one benefits from being excused for actions, for which they are responsible.

[94] The CRA's position is that the grievor's case fails on the evidence.

[95] Historically, there types of cases involve looking at the conduct of the person claiming the disability, and then, either of the following occurs:

- the disability is considered as a mitigating factor; or
- the disability absolves the conduct.

[96] However, as of today, the favoured approach is more of a hybrid type; that is, the four-part test set out in *Canada Safeway Ltd. v. Retail, Wholesale and Department Store Union* (1999), 82 L.A.C. (4th) 1 ("*Canada Safeway*"), which was followed in *Durham (Regional Municipality) v. Canadian Union of Public Employees, Local 132*, [2011] O.L.A.A. No. 410 (QL), and in *Brampton (City) v. Amalgamated Transit Union, Local 1573*, [2014] O.L.A.A. No. 97 (QL). The test is as follows:

1) Is there an illness, condition or situation being experienced by the grievor?
2) Is there a link or nexus between the illness, condition, or situation and the misconduct?

3) If there is a link between the illness, condition, or situation and the misconduct, was there a sufficient displacement of responsibility from the grievor to render her conduct less culpable?

4) If the first three elements are established, the tribunal still has to be satisfied that the grievor has been rehabilitated.

[97] Arbitrators and adjudicators have approached resolving culpable conduct and disability in another way, which is by carrying out two separate analyses. First is the standard three-step approach for determining misconduct, as follows: Is there misconduct? Does it give rise to discipline? And is the discipline appropriate? Second, the arbitrator or adjudicator addresses the classic human rights analysis, as follows: Is there a *prima facie* case of a disability? Is the grievor a part of a protected group (person with a disability)? Was there an adverse impact? And is there a nexus between the adverse impact and the disability?

[98] The CRA submits that it does not really matter how it is approached; courts and tribunals basically still drill down to the same point, which is the nexus between the conduct and the disability.

[99] The CRA submits that when a medical defence is being advanced, the grievor bears the burden of proof. I was referred to *Kelly v. Treasury Board (Correctional Service Canada)*, 2002 PSSRB 74.

[100] As set out in *Canada Safeway* and *Brampton (City)*, the mere existence of an addiction does not explain aberrant conduct. To establish the defence, there must be a connection between the disability and the conduct (see *Canada Safeway*, *Fleming v. The Corporation of the City of North Bay*, 2010 HRTO 355, and *Health Employers Association of British Columbia v. British Columbia Nurses' Union*, [2006] B.C.J. No. 262 (QL) ("*Health Employers Association of BC*")).

[101] The CRA submits that not just any nexus or cause is sufficient (see *Wright v. College and Association of Registered Nurses of Alberta*, 2012 ABCA 267, *Bish v. Elk Valley Coal Corporation*, 2013 ABQB 756, and *British Columbia (Public Service Agency) v. British Columbia Government and Service Employees Union*, 2008 BCCA 357 ("*BC v. BC*")).

[102] In *BC v. BC*, an alcoholic employee was terminated for stealing alcohol. At paragraph 11 of the decision, the Court stated that there was no suggestion that the

alcohol dependency played a role in the termination; the employee was terminated like any other employee would have been on the same facts. The fact that an alcohol-dependent employee might demonstrate a "deterioration in ethical or moral behaviour" and might have a greater temptation to steal alcohol does not permit inferring that the employer's termination of the employee was based on or influenced by his or her alcohol dependency.

[103] There is no suggestion that the grievor was terminated because of her alcohol dependency; she was terminated because of the forged medical certificates that she used to obtain the paid and unpaid sick leave.

[104] There is also the issue of indirect discrimination in which someone is held responsible for something that he or she has no control over. This was addressed in *BC v. BC* at para. 15, where the Court stated as follows:

> *[15] I can find no suggestion in the evidence that Mr. Gooding's termination was arbitrary and based on preconceived ideas concerning his alcohol dependency. It was based on misconduct that rose to the level of crime. That his conduct may have been influenced by his alcohol dependency is irrelevant if that admitted dependency played no part in the employer's decision to terminate his employment and he suffered no impact for his misconduct greater than that another employee would have suffered for the same misconduct.*

[105] The CRA referred me to *Wright*, at paras. 57 and 61, and particularly at para. 64, when addressing the matter of indirect discrimination and the behaviour of addicts when they act inappropriately. The Alberta Court of Appeal held as follows:

> *[64] . . . This argument rests on an assumption, not well proven on this record, that addicts are more inclined than the general public to steal and forge documents. There are many addicts who suffer from a disability, but do not engage in criminal conduct. In any event, not every distinction of this kind amounts to discrimination. . . .*

[106] The grievor in this case directly stole from her employer. It would be absurd if in the employment context she were provided with more leeway than in the criminal courts, where a person's liberty is at stake. Forgery is defined at s. 366 of the *Criminal Code of Canada* (R.S.C., 1985, c. C-46), and the grievor's actions fall within that definition of forgery and the use of or trafficking of a forged document.

[107] The CRA also referred me to *Bellehumeur v. Windsor Factory Supply Ltd.*, 2015 ONCA 473, *Menard v. Royal Bank of Canada*, 2013 FCA 273, and *Walton Enterprises v. Lombardi*, 2013 ONSC 4218.

[108] The CRA accepts that the grievor has an addiction or disability. The grievance must fail under the second and third components of the *Canada Safeway* test, which are the nexus component of a *prima facie* case. There is no nexus between the grievor's disability and the misconduct. There was only a bald assertion that they are connected. The grievor said she stayed at home because she was intoxicated and that she did not obtain a legitimate medical certificate because she could not drive.

[109] In such a fact situation, a rational person does not state that the next step is to forge a medical certificate. Many other steps have to be taken before the conduct in question in this case is carried out. If a person has the flu and cannot get to a doctor and a medical certificate is required, the next step in the process is not to forge one. If a person is seen by a doctor and the doctor refuses to issue a note, again, the next step is not to forge a medical certificate. These actions on their face do not demonstrate discrimination; they do not meet the threshold.

[110] In this case, the grievor could not work; nor could she obtain a medical certificate, which left her in a difficult situation. However, forging a medical certificate was not the next logical step. The grievor could have done the following instead:

- spoken to her manager — Ms. Sylvest testified and spoke of all the steps she took to try to help the grievor; if a disability existed, then there could have been an accommodation and the employer's duty could have been engaged;
- spoken to her or any doctor and explained the situation; or
- not complied; while she likely would have been disciplined, the discussion would have been different and would have been about not providing medical certificates.

[111] All those were better options than forging medical certificates to obtain leave.

[112] Alcohol did not cause the grievor to forge and deliver the medical certificates. She never suggested that. In 2004, she was going through a stressful time. She was

drinking heavily as she went through a divorce and a custody battle. When asked if at that time she had forged medical certificates, she answered emphatically that she had not. This demonstrates that being an alcoholic does not cause one to forge documents. It is also known that as severe as she stated her alcoholism was, when her child was staying with her, she did not drink and did exercise the option to resolve her problems.

[113] The CRA referred me to the grievor's January 2014 record, and to one of the forged medical certificates. She was actually with her family doctor on January 21, 2014, for a prescription refill; yet, she was off work from January 13 to 20, 2014, and forged a medical certificate for that time.

[114] The grievor did not submit evidence establishing a medical defence. Such cases require special evidence, which does not exist in this case. The burden of proof could be met by evidence from a medical doctor, but in most cases, expert evidence is required. Only in the clearest of cases could a tribunal make the assessment that the grievor asks of the Board without a doctor's assistance. The CRA referred me to *Canada Safeway, Fleming*, *Brampton (City), Thunder Bay (City) v. Canadian Auto Workers, Local 229*, [2005] O.L.A.A. No. 472 (QL), *Attorney General of Canada v. Demers*, 2008 FC 873, and *Unifor Local 199 v. Complex Services Inc.*, 2015 CanLII 39662.

[115] The CRA submits that the grievor's case has another significant weakness, which is that she has failed to seek treatment. Addicted employees who are aware of their addictions have a duty to facilitate their rehabilitation and to seek treatment and accommodation. I was referred to *Canada Safeway*, *Health Employers Association of BC*, and *Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115*, 2006 BCCA 58.

[116] The grievor stated in her evidence that she was alcohol dependent, that she had been treated for it previously, that she was aware of treatment resources for her dependency, and that she knew that what she was doing (forging the medical notes) was wrong. She did not seek treatment; in fact, if her testimony about her August 15, 2013, meeting with her family doctor is accepted, she went so far as to mislead her doctor about her absences rather than using the doctor to seek assistance. While she did not necessarily have to see her family doctor about the problem, she did have to do something, as opposed to forging the medical certificates.

[117] While the grievor did seek treatment, she removed herself from it. The ROH discharge summary reflects facts different from those conveyed by the grievor; she could not explain the discrepancy.

[118] The CRA also referred me to *Casey v. Treasury Board (Public Works and Government Services Canada)*, 2005 PSLRB 46.

[119] The CRA requests that the grievances be dismissed.

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

[120] The grievor submits that two issues are to be addressed, as follows:

1. Should the termination of employment be upheld, or are there mitigating factors that should be considered?

2. Did the employer discriminate against her for failing to give proper consideration to her illness and accommodation?

[121] The February 20th letter states as follows at the second paragraph of the third page:

> *If you have any physical or health issues that could be detrimental to your work performance, you should advise your manager accordingly. You will not have to disclose any specific details with regards to your condition; only appropriate accommodation measures would be discussed with your treating physician.*

[122] Ms. Sylvest stated that the CRA was not looking for a diagnosis, only for a way of helping or accommodating the grievor.

[123] The July 18 letter to the grievor's physician appears on the right track, seeking medical information to arrange for an accommodation. Only on April 8, 2014, did the employer become aware of the grievor's alcohol dependency, ask for information, and offer accommodation. The grievor disclosed her alcoholism to first her supervisor, Ms. Sylvest, in whose presence she phoned the ROH, and then to the DG, who stated it was not required to phone the ROH in front of him. At that point, instead of reaching out to her family physician or the ROH, the employer shut the grievor down. The CRA failed to accommodate her; instead, it discriminated against her on the prohibited ground of disability.

[124] Once the grievor disclosed her disability, she established a *prima facie* case, and the CRA did not provide a *bona fide* reason for failing to accommodate her.

[125] The grievor submits that the IAD report is flawed. An objective investigation should gather information to exonerate rather than incriminate people. The investigator never reached out to the ROH; surely, the grievor would have consented to that. This goes directly to the fact that the CRA did not give due consideration to all the facts when it terminated her employment. It did not consider medical information from the ROH.

[126] The CRA was furnished with the information, and the grievor confessed to what she had done. The CRA confirmed what she had done and did not suspend her from work.

[127] Whether it was direct or indirect discrimination, the grievor feels that based on a balance of probabilities, the CRA should have accommodated her. She should have been given more time.

[128] With respect to the issue of mitigation, it is obvious that some form of discipline is appropriate in the circumstances.

[129] The grievor was cooperative with the investigator, who must have been impressed, because he clearly wrote in his report that she had showed remorse. Mr. McKenzie chose to ignore this in his termination letter; he picked and chose aspects of the IAD report to rely upon. If she had showed remorse, why not say so. While the CRA submits that little weight should be given to this, she submits that a great deal should be given because it was set out in the IAD report.

[130] In addition to the reference to remorse in the IAD report, the grievor admitted to her wrongdoing. She admitted that she forged the documents, some while intoxicated, some while hung-over, and some while sober. She admitted to her wrongdoing in the witness box; she apologized and stated that it would never happen again.

[131] The grievor is a long-time employee with 25 years of service.

[132] The medical reports disclose that the grievor referred herself for further medical attention.

[133] The grievor submits that I carefully review the ROH admission report of August 12, 2014, and that I review it with the ROH discharge summary of September 4, 2014. The documents reflect positive comments, such as sobriety, enthusiasm, and abstinence from alcohol. These all go toward her rehabilitative potential; so does the fact that she admitted herself for medical attention.

[134] The grievor referred me to *McNamara v. Treasury Board (National Defence)*, PSSRB File No. 166-02-18291 (19890320), [1989] C.P.S.S.R.B. No. 62 (QL), in which the grievor in that case submitted 15 falsified medical certificates over a 20-month period, thus obtaining 109 hours of paid leave, worth approximately $1200. Mr. McNamara either forged his personal physician's name or signed the documents with the names of non-existent doctors. He was reinstated into his position, without compensation.

[135] In *McNamara*, the employee was found to be an asset to the organization but to have an illness that the employer failed to seriously consider. Mr. McNamara was a stores clerk, and as such, a serious trust issue was argued.

[136] *McNamara* is similar to this case; I was referred to page 4 of the decision, where it states the following: "The need for the signed forms was caused, however, because of alcohol-associated absences." The same thing applies to the grievor. Also at page 4 of the decision, the adjudicator stated as follows:

> *The magnitude of Mr. McNamara's crime in wrongfully claiming this leave was in the order of $1,200.00. The irony is that had he simply gone to a physician and explained that he was ill from alcohol it is not unlikely that he would have obtained the proper signature of a real doctor attesting to this fact. After all, he did have an illness and he was unfit for work. What he was doing, really, was trying to hide this from his employer, his doctor and, most of all, himself.*

[137] In *McNamara*, the grievor in that case was reinstated with conditions; this case is very close to the facts in *McNamara*. Indeed, the grievor in this case was a long-term employee with no previous discipline, while Mr. McNamara was not a long-term employee, and he had a discipline record.

[138] *Rollins v. Treasury Board (Transport Canada)*, PSSRB File Nos. 166-02-22248 and 23749 (19930630), [1993] C.P.S.S.R.B. No. 115 (QL), involved an employee who had received work-related discipline due to alcohol use, including a 25-day suspension and the termination of his employment. The 25-day suspension related to him making

fraudulent claims for paid sick leave. He had called in sick for seven days when he had actually been drunk and incapable of performing his duties. The adjudicator upheld the 25-day suspension as no mitigating circumstances warranted intervening; however, the adjudicator was not convinced that discharge was appropriate and that Mr. Rollins was beyond recovery, so the adjudicator reinstated him, with conditions.

[139] The grievor was sober for eight years before her relapse. Her alcohol dependency was used against her to take her child away; her full custody was changed to shared custody. If her impaired driving conviction and pardon application are examined, it becomes clear that she knows not to get behind the wheel while intoxicated; she was not about to make the same mistake twice. She should have a second chance with the CRA since she demonstrated eight years of sobriety.

[140] *Heyser v. Deputy Head (Department of Employment and Social Development)*, 2015 PSLREB 70, involved a single forged medical certificate. Ms. Heyser was terminated from her employment. The employer in that case relied on revoking her reliability status as opposed to imposing a disciplinary termination. Ms. Heyser was returned to the workplace for six months before her reliability status was revoked. The grievor referred me to paragraphs 130 to 141, 155, and 165 to 167 of that case.

[141] The grievor submits that the grievances be allowed and that a lesser penalty be substituted for the termination of her employment; she asked for something in the range of the time she took from the employer.

[142] The grievor submits that she be reinstated with conditions in place for a year requiring her to continue to attend AA meetings and attend the ROH for treatment.

C. <u>The employer's reply</u>

[143] The grievor advanced a false equivalency with respect to the administrative conditions imposed on her due to a disability but without informing the employer of the disability, which is very different from someone coming forward and admitting that he or she has committed fraud and that there is a duty to accommodate. The two are not logically linked.

[144] There is no procedural duty to accommodate that is separate from a substantive duty to accommodate. The CRA referred me to *Canada (Attorney General) v. Cruden*, 2014 FCA 131.

[145] The grievor did not articulate a link between the misconduct and alcohol. She was not disciplined for her absence; she was disciplined for falsifying the medical certificates and for obtaining fraudulent sick leave.

[146] Mr. McKenzie did not state that the grievor's actions were not serious; he said that for a short period, the risk she posed to the workplace could be managed or accepted.

[147] The suggestion that the grievor could not see a doctor because she could not drive is not acceptable. She could have called a relative or a taxi. It is known that on January 14, 2014, she was at her doctor's office, and that she did not always drink. Driving while intoxicated was not her only alternative.

[148] *Heyser* is not helpful. It was based on a revocation of a reliability status. It is a jurisdiction case. The comments in *Heyser* do not apply in this case, and its comments with respect to discipline are clearly in obiter. There also was no monetary benefit to the grievor in that case.

[149] With respect to the amount of time an employee remains in the workplace even though his or her presence is considered a risk, in *Heyser*, the grievor was there for six months in the face of an alleged finding that she was a risk to it. This is different from this case, in which the grievor was in the workplace for a short period and the determination was made that the risk she posed could be managed.

[150] *Rollins* is not helpful as its fact situation is very different. The discipline for forging medical certificates was a 25-day suspension in that case, and it was upheld. The termination of employment was for absences from work related to alcohol.

[151] *McNamara* is an old case. The cases the CRA submitted are not only more recent but also set out the current approach when assessing cases of this nature, which involves reconciling the intersection of disability and misconduct. *McNamara* is out of step with the current jurisprudence.

IV. Reasons

[152] Adjudication hearings with respect to discipline under s. 209(1)(b) of the *Act* are hearings *de novo*, and the burden of proof is on the employer in this case.

[153] The usual basis for adjudicating issues of discipline is by considering the

following three questions (see *Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162,* [1977] 1 CLRBR 1 ("*Wm. Scott*")): Was there misconduct by the grievor? If there was, was the discipline imposed by the employer an appropriate penalty in the circumstances? If not, what alternate penalty is just and equitable in the circumstances?

[154] The first question to be determined is whether the grievor's actions amounted to misconduct.

[155] The grievor admitted to forging 16 medical certificates, which she provided to the CRA to justify her absences from work. She did so to satisfy the CRA's requirement set out in the February 20, 2013, letter, which was imposed to address issues with what it viewed as an attendance problem. On the basis of those 16 forged medical certificates, the grievor was advanced 216 hours of paid sick leave, which was valued at roughly $9300 of salary (before deductions), and 218.5 hours of unpaid sick leave. There is no question that her actions amounted not only to misconduct but also to serious misconduct.

[156] Once the misconduct has been proven, the second part of the *Wm. Scott* test poses the question of whether the penalty imposed was appropriate. In this case, the grievor's position is that she should not have been terminated from her job and that while her behaviour warranted some discipline, the penalty should be reduced, as the employer failed to consider the following factors:

- her remorsefulness;
- her work performance;
- her cooperation with the investigation;
- her length of service; and
- her disability, which should have been and should continue to be accommodated.

[157] As with most of the evidence, the arguments and jurisprudence put forward by the parties focussed on the grievor's disability, and whether the employer met its duty to accommodate her disability. Accordingly, I shall address the allegation of

discrimination first by undertaking the requisite human rights analysis.

A. Is there a *prima facie* case of discrimination?

[158] Under section 7 of the *CHRA*, it is a discriminatory practice to refuse to continue to employ an individual if it is based on a prohibited ground of discrimination.

[159] Disability is one of the prohibited grounds of discrimination (s. 3 of the *CHRA*). Disability is defined in section 25 of the *CHRA* as including "any previous or existing dependence on alcohol".

[160] In order to establish that an employer engaged in a discriminatory practice, a grievor must first establish a *prima facie* case of discrimination, which is one that covers the allegations made and that, if the allegations are believed, would be complete and sufficient to justify a finding in the grievor's favour in the absence of an answer from the respondent (see *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536 ("*O'Malley*"), at para 28).

[161] It is not necessary that discriminatory considerations be the sole reason for the actions at issue in order for the claim of discrimination to be substantiated. The grievor has only to show that discrimination was one of the factors in the employer's decision (see *Holden v. Canadian Railway Company* (1990), 14 C.H.R.R. D/12 (F.C.A.), at para 7). The standard of proof in discrimination cases is the civil standard of the balance of probabilities (see *Public Service Alliance of Canada v. Canada (Department of National Defence)*, [1996] 3 F.C. 789 (C.A.)).

[162] To establish a *prima facie* case of discrimination, the grievor must show the following: that she has a disability; that she experienced an adverse impact with respect to her employment; and, that her disability was a factor in that adverse impact (see *Moore v. British Columbia (Education)*, 2012 SCC 61 CanLII at para 33).

[163] If a *prima facie* case of discrimination has been established, the employer can avoid an adverse finding by calling evidence showing that its actions were in fact not discriminatory or by establishing a statutory defence based on section 15 of the *CHRA* that justifies the otherwise discriminatory practice (*A.B. v. Eazy Express Inc.*, 2014 CHRT 35, at para 13). Conversely, if the grievor is unable to establish a *prima facie* case of discrimination, then it is not necessary to decide whether the employer has

proven that it has accommodated the grievor's needs related to her alcohol dependency to the point of undue hardship (see, e.g., *Fleming* at para. 81).

[164] The CRA admitted that the grievor has a disability. In both its opening statement and closing argument, it admitted that she has been diagnosed as alcohol dependent. Thus, in the case before me, there is no dispute that the grievor has a disability.

[165] There is also no dispute that the grievor experienced an adverse impact with respect to her employment; she was terminated.

[166] What remains for me to determine is whether the grievor has proven that her disability was a factor in the employer's decision to terminate her employment. It is on this key element that the parties are diametrically opposed.

[167] The grievor must establish that her disability was a causal factor in her misconduct.

[168] In *Bish*, the Alberta Court of Queen's Bench addressed this point as follows:

> . . .
>
> *[36] As noted by Elk Valley, the Appellant's argument hinges on the proposition that* any *connection between the disability and the adverse treatment is sufficient for a finding* of prima facie *discrimination. That proposition was correctly rejected by the Tribunal.*
>
> . . .
>
> *[39] In* **Wright** *the court accepted that ". . .the appellants' conduct was to some degree caused or motivated by their disability, that is [,] their addiction. The question, however, is whether the [Respondent's] conduct . . . is legally connected to the appellants' disability. . .". . . .*
>
> . . .
>
> [Emphasis in the original]

[169] In *Thunder Bay (City)*, the arbitration board discussed the evidence that is necessary in cases such as these. It stated at paragraph 39 as follows:

> *. . . Even if we were to assume that the grievor was addicted to Percocet we cannot assume that such an addiction*

> *provides a ready answer or a mitigating factor for his act of uttering a forged document and his other actions with respect to obtaining prescription medications fraudulently. There simply was no expert evidence that an addiction to Percocet would remove any inhibitions or control that the grievor should otherwise have had with respect to the actions he undertook to acquire the drug by fraudulent means. Even with the lack of expert evidence on the point, the grievor's own evidence tends to refute such a conclusion. It was his own evidence that during the time that he was "addicted" he was functioning in the stressful and technical job of a paramedic. As already indicated, there was no evidence from either party that anyone suspected that the grievor was ever functioning "under the influence".*

[170] In *Health Employers Association of BC*, the British Columbia Court of Appeal, dealing with an appeal of an arbitration decision reinstating an employee discharged for conduct that allegedly arose due to drug addiction, by allowing the appeal and reinstating the discharge of employment, with respect to evidence linking the disability to the misconduct, stated at paragraph 41 as follows: "It is important not to assume that addiction is always a causal factor in an addicted employee's misconduct. . . To find prima facie discrimination, there must be evidence that the employee's misconduct was 'caused by symptoms related to' the disability . . ."

[171] Finally, in *Fleming*, the adjudicator for the Human Rights Tribunal of Ontario stated as follows:

> *[68] In a case such as this one that involves addiction to alcohol, discipline and termination of employment, the main issues that I am required to determine are whether the applicant has established that the respondent suspended him and then terminated his employment because of misconduct that was causally related to his addiction to alcohol, and if so, whether the respondent has established that it accommodated the applicant's needs related to his addiction up to the point of undue hardship…*

[172] The grievor submitted that she disclosed her alcoholism on April 8, 2014, and that rather than accommodate her, the CRA shut her down. She submitted that her disclosure of her drinking established her disability, thus meeting the *prima face* test, and that the employer has not put forward a *bona fide* reason for failing to accommodate her.

[173] The grievor's evidence disclosed that she had a disability that she was well

aware of as far back as late 2004 or early 2005, when she was admitted into a treatment program for alcohol dependency. According to the evidence, upon discharge from that program in 2005, she remained sober until sometime before Christmas 2011, when she started to consume alcohol again. While I have no doubt that the grievor knew of her disability for an extended period, as far back as 2005, and that she kept it to herself, as long as that disability did not intersect with her work environment, the need for an accommodation did not exist.

[174] There is no evidence that the grievor ever disclosed her alcohol dependency or a need for any form of accommodation related to it to her employer at any time after 2005 and before her meetings with Ms. Sylvest and Mr. McKenzie on April 8, 2014. However, in late 2011, the effects of that disability started to intersect with her employment, in the guise of missed days of work. The evidence disclosed a pattern by the grievor of an active concealment of the disability and a steadfast denial of any need for an accommodation.

[175] Concurrent with the grievor resuming drinking, her supervisor, Ms. Sylvest, began to be concerned over the grievor's growing absenteeism. Ms. Sylvest testified that over the course of 2012, she had been concerned about the grievor's attendance and use of so much sick time that she enquired as to whether she the CRA could do something about it. Ms. Sylvest's evidence was that the grievor would tell her she was fine and that she would be in to work the next day but that that was not in fact the case.

[176] The grievor was not truthful or forthcoming with her supervisor or employer as, based on the evidence, everything was not fine, and she did not necessarily show up for work. Ms. Sylvest tried to determine the issue that was causing the grievor to miss work and whether the grievor required some form of accommodation.

[177] The grievor's absenteeism reached such a point that in the summer of 2013, the CRA determined that an FTWE should take place, and one was carried out. The FTWE materials were contained in the July 18th letter to the grievor's family physician, Dr. Debanne. The reason Ms. Sylvest stated for the FTWE was to try to see if the grievor's family doctor could assist with the apparent attendance problem the grievor was having and if there were measures that the CRA could take to accommodate an illness or disability.

[178] The FTWE report came back negative. The grievor admitted to hiding her drinking from Dr. Debanne.

[179] The August 2013 record, which recorded the grievor's visit to Dr. Debanne's office on August 15, 2013, appeared to address a number of physical ailments and issues and with respect to alcohol consumption by the grievor stated as follows:

> *"She was drinking for a bit and still drinks a bit. I have advised her that this is a dangerous path to be on.*
>
> *…*
>
> *Resumption of drinking. She understands that this is not the best thing for her…."*

[180] What is clear to me from Dr. Debanne's comments is that the doctor had at least some knowledge of a problem that the grievor had or had had with alcohol, albeit that the extent of the problem and the doctor's knowledge of it cannot be ascertained from the limited evidence. What can also be ascertained is that the grievor had provided Dr. Debanne with some information about her family history with respect to alcohol use, which the doctor noted as a concern.

[181] What is also clear is that for between May 13 and August 26, 2013, there are the forged medical certificates, covering roughly 26 days, including from July 31 to August 2, 2013, for all of which the grievor has admitted she was either drinking or too hung-over to go to work.

[182] The evidence disclosed that despite the FTWE and the grievor's assurances that all was fine, she continued to miss a significant amount of work, so much that the CRA wanted a second FTWE carried out. While I was not provided with the exact date of when that was suggested to the grievor, it would have been sometime between after the FTWE report was issued on August 19, 2013, and April 8, 2014, when she admitted to forging the medical certificates. The evidence also disclosed that she was not prepared to undergo another FTWE; according to Ms. Sylvest, the grievor refused a second one because she said that she was fine and that no further FTWE was needed.

[183] The grievor admitted that she knew she had a problem with alcohol dependency as far back as her experiences in 2004 and 2005. She described them to me in such a

fashion that I can conclude only that they left an indelible mark on her, so much so that she was well aware of the risks and pitfalls of going down the path of resuming alcohol consumption. Indeed, she admitted that she was aware of the treatment options, social services, and strategies available to her. However, she also admitted that between the time she started drinking again in late 2011 and April 8, 2014, when she admitted to forging the medical certificates, she sought no assistance from the programs she had previously been in and the services that she was aware of.

[184] It is both hard to envision and difficult to comprehend the grievor's suggestion that the CRA should have accommodated her when it appears from the evidence before me that she had been resolute in concealing her disability and in thwarting any attempt at accommodation from the CRA. It could not have accommodated someone who did not identify a need for one and who indeed steadfastly frustrated its attempts to help her.

[185] In any event, as explained below, I do not need to determine whether the greivor was accommodated to the point of undue hardship since she has failed to establish a *prima facie* case of discrimination based on her alcohol dependency.

[186] The CRA submitted that there is absolutely no evidence that the grievor was terminated for her disability. I agree. I was not presented with any evidence that would suggest that the CRA did so. The evidence before me was clear, cogent, and convincing that Mr. McKenzie determined that the behaviour on which he based his determination that discipline was warranted was her forging of the medical certificates.

[187] On April 8, 2014, the CRA became aware that the grievor had a problem with alcohol that from her admission was the reason for her extensive absenteeism. She admitted that she had been either inebriated or hung-over on all the days for which she had forged medical certificates and either obtained paid or unpaid sick leave between May 13, 2013, and March 21, 2014.

[188] The grievor's disability was identified in the ROH documents as alcohol dependency; at times, the parties referred to it as alcoholism, and she described it as binge drinking. I have no medical evidence that, as the British Columbia Court of Appeal stated in *Health Employers Association of BC,* ". . . the employee's misconduct was 'caused by symptoms related to' the disability . . .". To paraphrase the findings as set out in *Thunder Bay (City)*, I have no expert evidence that alcohol dependency would

remove any inhibitions or control that the grievor should otherwise have had with respect to the actions she undertook to acquire the leave by fraudulent means. Indeed, while the grievor suggested that sometimes she had been intoxicated or hung-over when she typed the forged medical certificates, she had been sober when she handed them to her supervisor.

[189] Therefore, the grievor has not established that her misconduct, namely, forging and submitting 16 medical certificates, was causally related to her alcohol dependency. As such, I find that the grievor has not established a *prima facie* case of discrimination on the prohibited ground of disability. Given this finding, it is unnecessary for me to consider whether the employer has made out a statutory defence under section 15 of the *CHRA*.

[190] The CRA established that misconduct occurred. It determined that the appropriate discipline was termination. As I have found that there was a lack of medical evidence to support the grievor's argument that her disability should mitigate the penalty, I shall now address other mitigating factors that the grievor's representative urged me to consider in determining whether termination was appropriate discipline in the circumstances.

B. Remorse

[191] The grievor submits that she was and is remorseful for her actions. Her representative pointed to the line in the IAD report that stated that she was remorseful. That line read as follows: "Mary Ann McNulty expressed remorse and her desire to regain the trust of her managers and co-workers." The IAD report's results were laid out during the disciplinary hearing, and referenced in the June 3, 2014, termination letter authored by Mr. McKenzie. The IAD report was tendered into evidence by the employer. In her testimony at the hearing, she was asked if she was remorseful and sorry for what she had done, and she responded by saying that she was.

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

. . .

If a trial Judge's finding of credibility is to depend solely on

> *which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility. . . A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.*
>
> *The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. . . .*
>
> . . .

[193] I have no doubt that the grievor and the truth were not always synonymous with one another. The grievor did the following:

- lied about being sick for all the days covered by the 16 falsified medical certificates; she had not been sick but had been drinking, intoxicated, or suffering from the after-effects of drinking;
- lied about seeing a doctor or physiotherapist with respect to the 16 instances set out in the falsified medical certificates;
- lied about obtaining the medical certificates;
- misled her family physician about her drinking problem; and
- lied to her supervisor by stating that everything was fine and that she would be at work.

[194] Mr. McKenzie stated in the April 8 meeting notes his impressions after the grievor advised him of her actions. More importantly, his May 14, 2014, notes following the disciplinary hearing are impactful. According to those notes, while she finally understood that her actions amounted to fraud, the grievor stated to him that fraud is committed every day in the CRA as evidenced by the long breaks people take in the lunch room. Mr. McKenzie noted further that there was still neither an apology nor an acknowledgement that she is accountable for her actions. Mr. McKenzie reiterated those impressions at the hearing, which were that the grievor appeared to blame others and avoid responsibility, that she forged the medical notes because she was required to produce them (which was her supervisor's fault, according to her), and that she had been unable to get to the doctor (as she said, "you would not want me to drive drunk").

[195] This characteristic also appeared in the grievor's cross-examination when she was questioned on how the September 4 report (the ROH discharge summary) differed from her evidence. While nothing substantive turned on the discrepancy, she blamed the administration of Meadow Creek for not having her correct phone numbers and allegedly misstating the truth when it recorded that she had called twice and hung up.

[196] I find particularly troubling the grievor's excuse for not obtaining legitimate medical certificates, which was that she was either too intoxicated or too hung-over to drive. At first blush, one might consider that a somewhat commendable action, within an otherwise dreadful situation; however, when looked at a little closer, it is really meaningless and self-serving and is a way of avoiding responsibility for her actions. Had she not been intoxicated or severely hung-over, she would not have missed work; ergo, she would not have required a medical note and would not have had to see a doctor. I have never seen or heard of a situation in which an employee has shown up at a doctor's office and asked for a note to excuse him or her from work because he or she was too intoxicated or was hung-over. What is particularly disquieting about this in the grievor's situation is that if she really needed to see her family doctor, she had a sister who lived close by and who could drive; but more troubling is that the grievor's family physician's office was within walking distance of her home.

[197] So while the grievor might have said that she is sorry and remorseful for her conduct, her past behaviour suggests that she is not always truthful and that she tends to blame others and not accept responsibility for her actions. Given her evidence and

that of Mr. McKenzie on this point, I prefer to accept Mr. McKenzie's.

C. Work performance

[198] According to Ms. Sylvest, and as set out in the two performance appraisals put forward at the hearing, when she was at work, the grievor performed either at her level or sometimes above it. In addition, she did participate in volunteer activities with her employer, which is commendable. The grievor had also worked with the CRA for 25 years. However, when taken in context and against her misconduct, her work performance and length of service are not sufficient to sway me to alter the discharge penalty.

D. Cooperation with the IAD's investigation

[199] The grievor did cooperate; however, I am not prepared to give this factor much weight, given the circumstances. On the eve of the investigation, the grievor admitted to her wrongdoing. I suspect she did so given the likelihood of its discovery. It would not have taken the investigators much effort to determine that the medical certificates were indeed forged. Calls to the doctors' offices would likely have yielded this information. Thus, even though the grievor cooperated with an investigation into wrongdoing to which she had already admitted, this factor is also not sufficient to sway me to alter the discharge penalty.

E. Rehabilitation

[200] The grievor's evidence with respect to rehabilitation was not what I would consider in her favour. While initially, upon admitting her wrongdoing, she contacted medical professionals to seek help, the evidence disclosed that while she had said she had stopped drinking, she in fact had not. While that in and of itself is not determinative of her rehabilitative potential, more troubling is that despite that initial move towards rehabilitation, she has not pursued it in a meaningful way.

In August of 2014, she entered a treatment program, which she did not finish. In her evidence before me, she stated that she was scheduled to see Dr. Grymalla in December of 2015 and that her previous appointment with him was sometime in 2014, which certainly would not demonstrate that someone is serious about rehabilitation.

[201] Finally, the grievor submitted that I should follow the PSSRB's decision in *McNamara*, a case that is strikingly similar to the facts of this case. Mr. McNamara had an alcohol dependency problem and had forged medical certificates to cover days of work he missed due to his drinking, which allowed him to obtain paid sick leave, amounting to approximately $1200. On the other hand, the CRA's counsel provided me with several cases in which employees had also acted in a manner similar to the grievor and had been terminated from their employment, and the terminations were upheld.

[202] I am not prepared to follow *McNamara*. It would appear that based on the facts in that decision, the adjudicator found that Mr. McNamara was actively involved in the rehabilitative process and not only admitted to his wrongdoing but also exhibited true remorse. It is clear that Mr. McNamara convinced the adjudicator that he deserved to be reinstated. I do not share that view as it applies to the grievor. Based on the facts and evidence, I do not believe that she is truly sorry and remorseful or that she is serious about rehabilitation.

[203] With respect to *Heyser*, the facts in that case distinguish it from this case. In this case, although the grievor was not suspended, she remained in the work environment for only a short time (April 8 - June 3, 2014), and according to Mr. McKenzie's evidence, the risk of having her back in the workplace was managed. This is certainly different from the facts in *Heyser*, in which the grievor was returned to the workplace without restriction for six months. *Heyser* also dealt with the Board's jurisdiction. As set out at paragraphs 158 through 161, the Board held that the employer was bound by the grounds upon which it relied at the time of termination, which was the revocation of Ms. Heyser's reliability status; the employer maintained that the action was not disciplinary but administrative.

[204] I also note that *Morrow v. Treasury Board (Correctional Service of Canada*, 2006 PSLRB 43 was discussed in *Heyser*. In *Morrow*, the grievor had been terminated for having submitted 14 forged medical certificates for 14 different absences over a 4-year period. Like in the case before me, given elements such as her blaming her employer and her contrived explanations for falsifying the medical certificates, the adjudicator there determined that he could not mitigate the penalty on the basis that she had good rehabilitative potential.

[205] With respect to *Rollins*, I do not believe it is helpful. In that case, the PSSRB did not set aside the discipline for the claim of improperly obtained paid sick leave. Albeit that the discipline was only a 25-day suspension, the determination of 25 days was made by the employer in that case, and the PSSRB did not opine on whether the 25 days was an appropriate penalty, merely that it found no mitigating circumstances to set it aside.

[206] The misconduct of the grievor justified the penalty imposed and I conclude that there is no reason to interfere with the employer's decision.

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

(The Order appears on the next page)

V. Order

[208] The grievances are dismissed.

October 19, 2016.

John G. Jaworski,
a panel of the Public Service Labour Relations and Employment Board