**Date:** 20151125

**File:** 566-02-8565

**Citation: 2015 PSLREB 91**

*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

**SUGHRA SAIFUDDIN**

Grievor

and

**DEPUTY HEAD**
**(Department of Public Works and Government Services)**
Respondent

Indexed as

*Saifuddin v. Deputy Head (Department of Public Works and Government Services)*

In the matter of an individual grievance referred to adjudication

**Before:** Kate Rogers, a panel of the Public Service Labour Relations and Employment Board

**For the Grievor:** Herself

**For the Respondent:** Joshua Alcock, counsel

Heard at Ottawa, Ontario.
December 8 to 11, 2014.

On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the Board") to replace the former Public Service Labour Relations Board ("the PSLRB") as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2, "the *Act*") before November 1, 2014, is to be taken up and continue under and in conformity with the *Public Service Labour Relations Act* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

## I. Grievance referred to adjudication

[1] Sughra Saifuddin ("the grievor") was a human resources consultant, classified PE-03, employed in the Human Resources (HR) Branch, Public Works and Government Services Canada (PWGSC or "the employer"). As a member of the PE occupational group, she was an excluded employee. On October 20, 2011, her employment was terminated under paragraph 12(1)(*e*) of the *Financial Administration Act* (R.S.C., 1985, c. F-11; *FAA*), which provides as follows:

> ***12.*** *(1) Subject to paragraphs 11.1(1)*(f) *and* (g)*, every deputy head in the core public administration may, with respect to the portion for which he or she is deputy head,*
>
> . . .
>
> *(*e*) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, of persons employed in the public service for reasons other than breaches of discipline or misconduct . . . .*

[2] On November 3, 2011, the grievor filed a grievance against the termination of her employment and sought, as corrective action, the withdrawal of the termination, punitive damages, and damages for the emotional stress, degradation and financial loss that she had suffered as a result of it. The grievance was heard at the final level of the grievance process on March 25, 2013, and was denied in a decision dated May 7, 2013.

[3] The grievor referred the grievance to adjudication under subparagraph 209(1)(*c*)(i) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) on May 22, 2013. At the same time, she filed a notice to the Canadian Human Rights Commission (CHRC; a "Form 24") signifying her intention to raise an issue relating to the interpretation or application of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*). Specifically, the grievor alleged that the termination of her employment was the result of discrimination on the grounds of age, ethnicity and religion.

[4] In addition to the remedies sought in her grievance, the grievor indicated in her notice to the CHRC that she would be requesting special compensation under paragraphs 53(2)(*d*) and (*e*) and subsection 53(3) of the *CHRA* and systemic remedies under subsection 226(1) of the *PSLRA*.

[5] The CHRC initially intended to make submissions on the human rights issues raised by the grievor. However, following receipt of supplementary disclosures from the parties, it advised the former Public Service Labour Relations Board on July 16, 2013, that it had reconsidered its intention to participate in the hearing and would not make submissions.

[6] At the hearing, the grievor, who represented herself, submitted written notes to accompany her oral argument. The employer did not object to the written submission, which contains a mix of evidence and argument. I have used it when it was helpful to explain or expand on the points the grievor made in her oral argument but remained cognizant that she did not testify to a number of the assertions made in the document and that she was not cross-examined on those assertions because the document was presented after she testified.

## II. Summary of the evidence

[7] The employer called Diane Lorenzato, formerly Assistant Deputy Minister, HR, PWGSC; Louis Seguin, formerly Director General, HR, PWGSC; Laura Milsom, formerly Senior Labour Relations Advisor, HR, PWGSC; and Jessie Larente, formerly HR Advisor, PWGSC, to testify, and it introduced 45 documents. The grievor testified and introduced eight documents.

[8] The grievor began working for the employer in 1990 and, with the exception of two years when she worked at both the Treasury Board of Canada Secretariat and the Public Service Commission (PSC), worked as a statistician consultant in the employer's HR Branch for the entire period of her employment.

[9] The grievor stated that when she turned 64, she began to experience discrimination and harassment and, as a result, became ill.

[10] At some point in February 2009, she contacted Charles Vezina, who was the employer's national harassment prevention coordinator. She also obtained a certificate from Dr. David Burt, her physician, dated February 9, 2009, which referred to health problems arising from the stress of workplace conflict (Exhibit G-3). In an email dated February 20, 2009, to Mr. Seguin, the grievor's manager, Mr. Vezina described a follow-up meeting with the grievor in which she referred to the workplace stress she experienced and the resulting health problems. Mr. Vezina recommended a change in the grievor's reporting relationship (Exhibit G-8).

[11] For reasons that were not made clear at the hearing, the employer did not immediately act on Mr. Vezina's recommendation to change the grievor's reporting relationship with her director. On April 30, 2009, she wrote to Ms. Lorenzato (Exhibit E-1). She complained of discriminatory practices by her director, which she alleged Mr. Seguin, the director general, supported, and she attached a copy of correspondence that she contended supported her complaint. She stated that her health had been affected by the stress of her situation. She asked Ms. Lorenzato to investigate and to change her reporting relationship because, on her doctor's advice, she could no longer work in the existing work environment. She stated that she would provide a medical certificate if it were required.

[12] Ms. Lorenzato testified that, as the assistant deputy minister for the employer's HR Branch, she was responsible for the processes to deal with harassment complaints and accommodation requests, among other duties. Because the grievor's April 30, 2009, letter referred to both a potential harassment situation and a health problem, there was a possibility that two separate processes would be triggered. In cases in which a complaint is clearly described, it is sent to be investigated directly, using either an internal investigation process or an outside investigator, depending on the circumstances. However, the grievor's complaint was generic and without detail,

and for that reason, Ms. Lorenzato wrote to her to obtain further details. In reference to health concerns expressed by the grievor, she also requested a medical certificate on the grievor's fitness to work and any necessary accommodations. (Exhibit E-2).

[13] The grievor provided a medical certificate but it did not answer Ms. Lorenzato's questions to her satisfaction. Therefore, on June 17, 2009, she wrote again asking the grievor to provide additional medical information concerning her fitness to work and any necessary accommodation measures that might be required (Exhibit E-45).

[14] The grievor filed a formal complaint alleging harassment and discrimination by her managers, including Mr. Seguin, on June 1, 2009. Ms. Lorenzato testified that because the grievor's complaint was against her managers, it was necessary to separate her from her managers. Therefore, she ensured that the grievor was moved to another section, the Business Systems and New Initiatives (BSNI) group, which was part of the HR Branch, for the duration of the investigation. The investigation was conducted by an outside investigator and was completed in February 2010.

[15] The investigation report did not support the grievor's complaint. Ms. Lorenzato testified that she accepted the investigator's findings that the allegations were unfounded and, given those findings, concluded that it was no longer necessary to maintain the grievor's temporary assignment to the BSNI. On February 9, 2010, she wrote to the grievor about the results of the investigation and asked her to return to her substantive position in March 2010, following a period of annual leave that had already been scheduled (Exhibit E-3).

[16] The grievor did not accept the investigator's findings. She wrote to Ms. Lorenzato on February 12, 2010, and asked for time to review the report and for a delay in returning to her substantive position (Exhibit E-4).

[17] In May 2010, the grievor asked François Guimont, the deputy minister, to review the investigator's findings with respect to her complaint. She also asked to be placed in a safe work environment (Exhibit E-5). Ms. Lorenzato testified that her staff prepared the deputy minister's response to the grievor's request (Exhibit E-6). Her request was denied, and in response to her concerns about the impact of the workplace on her health, the deputy minister recommended that the grievor participate in a referral that had been arranged for her with Health Canada.

[18] In early May 2010, the grievor forwarded a medical certificate from Dr. Burt dated May 5, 2010, which stipulated that she could not return to her substantive position because of the stress that she experienced in that work environment. Her doctor stated that she would be willing to undergo an assessment through Health Canada if the employer considered it necessary (Exhibit E-16).

[19] Mr. Seguin testified that, as the director general of the HR Branch, it was his responsibility to oversee the process of finding an appropriate accommodation for the grievor once it was determined that she could not return to her substantive position. He wrote to the grievor on June 7, 2010, to explain the process, and attached the forms that she needed to sign for the referral to Health Canada (Exhibit E-15). He explained that he believed that it was necessary for Health Canada to assess the grievor because to place her in an appropriate work environment and in a position in which she could be successful, it was necessary to have as much precision and clarity as possible on her accommodation requirements. The medical certificate that the grievor had provided in May 2010 left the employer lacking information that it could have used to determine the type of work environment that would be conducive to her success.

[20] Mr. Seguin also explained that the grievor had not returned to work following the period of annual leave taken in March 2010. Her return to work had been delayed initially by circumstances beyond her control and then, as certified by her doctor, by illness. Therefore, she was placed on sick leave effective the date of the medical certificate.

[21] The grievor responded to Mr. Seguin's letter in a letter dated June 16, 2010 (Exhibit E-17). Contrary to Dr. Burt's assertion in the medical certificate of May 5, 2010 (Exhibit E-16) that the grievor was willing to be assessed by Health Canada, she made it clear that she did not consider the employer's request that she undergo such an assessment reasonable and, therefore, refused to go. She stated that, both in her letter to Mr. Seguin and in her testimony, Dr. Burt's notes (Exhibits G-3 and E-16) were very clear and that, therefore, there was no need to provide further details. However, she agreed to allow Mr. Seguin to contact her doctor if he required further details or clarification concerning her accommodation requirements.

[22] Given the grievor's willingness to allow the employer to contact her physician directly, Mr. Seguin asked the labour relations section to follow up with Dr. Burt.

Ms. Milsom wrote to the doctor, requesting clarification on the grievor's work restrictions and accommodation needs (Exhibit E-18). Mr. Seguin forwarded a copy of Ms. Milsom's letter to the grievor on July 9, 2010, with his own explanation of why the employer required further information about her accommodation requirements (Exhibit E-18). He noted in the final paragraph of his letter that it had come to his attention that she continued to come to the workplace. He asked her not to in the future. He testified that he wrote that instruction because he was concerned that her presence in the workplace was contrary to her doctor's instructions, and he did not want to perpetuate the circumstances that had caused her to be ill.

[23] On August 8, 2010, Dr. Burt responded to Ms. Milsom's request for clarification on the grievor's work restrictions (Exhibit G-4). He wrote that, among other things, the grievor's difficulties at work arose from her inability to work with the people that she had named in her complaint. Although Dr. Burt acknowledged that the complaint had not been upheld, he stated that the decision had not ". . . eradicated her feelings or her perception of her situation." He stated that the grievor should have no contact with any of the people named in her complaint and, therefore, should not work on the same floor or in the same vicinity as those people; nor should they supervise any aspect of her work. He recommended that she work for a new manager, who should have no contact with her previous managers. He recognized that the grievor might not be able to continue to work in the HR Branch, given his recommendations, and stated that the restrictions that he identified were permanent because he did not believe that the grievor's feelings or opinions would change; therefore, any contact with the individuals in question would be detrimental to her health.

[24] Because the medical recommendations that had been provided to the employer stipulated that the grievor should not work in the section that housed her substantive position and suggested further that she should not work in the HR Branch, Mr. Seguin believed that she should be placed on the departmental priority list. He testified that including her on that list gave the employer the best opportunity to market or promote her within PWGSC, with the objective of securing her employment that would meet the conditions set out by her doctor.

[25] In an email to the grievor dated September 1, 2010, Mr. Seguin explained his decision to try to have her placed on the departmental priority list and explained that Ms. Larente would contact her to begin the process. He advised the grievor to begin

updating her resume and suggested that Career Services could assist with that task (Exhibit E-19).

[26] In response, the grievor asked, among other things, for permission to go to her office to sort out her personal belongings, to work on her resume and to obtain assistance from career counselling (Exhibit E-19). Mr. Seguin testified that he agreed to her request because he saw it as simply a request to retrieve her belongings, and he did not want to deny her that opportunity. He believed that she should be allowed to access the career counselling services that were available in the building, although not on the same floor as her former office.

[27] However, it soon became apparent that the grievor was occupying her former office on a regular basis. Ms. Larente, who had been trying to locate alternate employment for the grievor at Mr. Seguin's request since the end of August 2010, noted in an email that the grievor had asked to have all correspondence sent to her former work address because she was located there (Exhibit E-20). Ms. Milsom testified that when she became aware that the grievor was going to her former office to work on her resume, she became concerned, because the medical instructions had been clear that the grievor was not to work in the same vicinity or on the same floor as the people that she had named in her complaint.

[28] Mr. Seguin and Ms. Milsom both believed that the grievor should not be occupying her former office, given the instructions that they had received from her doctor. Therefore, on September 20, 2010, Gerald Boucher, who had become the manager of the grievor's section during her absence, was asked to go to her office and explain to her that she should not be there. Because she did not know Mr. Boucher, she was concerned about his request that she leave the office. She voiced her concerns in an email to Mr. Seguin in which she stated that, among other things, she needed to use her office for the essentials required of her job. She also noted that she did not feel sick any longer and asked that she be relocated as soon as possible so that she could prepare for her next assignment (Exhibit E-21).

[29] At the same time that Mr. Seguin and Ms. Milsom were attempting to deal with the grievor's desire to work in her former office, a job opportunity arose in the BSNI section, where she had worked during the investigation of her complaint. Ms. Milsom testified that she believed that the grievor had enjoyed her work in the BSNI section.

She thought that since the position was at the same group and level as the grievor's substantive position, with some adaptation, it would meet the medical requirements set out by the grievor's doctor. In particular, the employer decided that the reporting relationship for the position would be changed to exclude Mr. Seguin from any supervisory role, in keeping with Dr. Burt's recommendations.

[30] However, when the employer attempted to schedule a meeting with the grievor for September 27, 2010, to explain the job and to allow her to meet the new manager of the BSNI section, she refused to attend (Exhibit E-35). Instead, she sent an email on September 27, 2010, in which she stated that, among other things, her doctor had come to believe that she could not work in the same branch as Mr. Seguin (Exhibit E-35).

[31] On September 23, 2010, Dr. Burt sent a new medical certificate to the employer, which confirmed that the grievor was able to return to work immediately provided that she did not work in the same branch as her former director general, Mr. Seguin (Exhibit G-5).

[32] Ms. Larente testified that when the employer received the medical certificate that indicated that the grievor could not work in the same branch as Mr. Seguin, the search for alternate employment became more difficult because it meant that she could not work within the HR Branch. The grievor's position was classified PE, and positions in the PE group are found only in the HR Branch.

[33] Ms. Larente explained that because the search for alternate employment would have to go outside the grievor's branch, it became important that she be placed on the departmental priority placement system, which provides the only staffing priority specific to the PWGSC (Exhibit E-43). It is an administrative priority aimed at reintegrating disabled employees into the workforce within the department. Two criteria have to be satisfied to become eligible: employees must be able to return to work, but they must not be able to return to their substantive positons because of permanent limitations, as confirmed by a medical authority.

[34] The PWGSC's priority placement system differs significantly from the priority administration system managed by the PSC. The PWGSC system is administrative, while the PSC's system is regulatory and is driven by the provisions of the *Public Service Employment Regulations* (SOR/2005-334) ("the *PSE Regs.*"). To qualify for a

disability priority under the *PSE Regs.*, an employee must have applied and qualified for disability compensation, which is not a requirement under the departmental priority system. Once an employee has been granted a priority under the *PSE Regs.*, it is applicable to all staffing actions within the public service and not just within the department. Government departments cannot place employees on the PSC's priority list; nor can they place employees in positions outside themselves. Only the PSC has access to government-wide staffing actions for the purposes of priority placements.

[35] Ms. Larente testified that the grievor was registered on the departmental priority system after the corporate staffing group was consulted. Because she could no longer work in the HR Branch, it was necessary to identify appropriate classification groups and levels outside the PE group that would be commensurate with her skill set.

[36] After analyzing the groups in the department, Ms. Larente determined that positions in the Administrative Services (AS) group, the Program Administration (PM) group and the Economic and Social Services (EC) groups were the most appropriate. Of those three groups, Ms. Larente believed that positions in the EC group most closely matched the grievor's background in economics and statistics because it included work that involved planning and conducting surveys and projects and social science research with an emphasis on analyzing quantitative information.

[37] Position levels in the PE group did not exactly match the position levels in the three groups identified by Ms. Larente. She testified that the rules of the priority placement system required her to find a match that was close to the grievor's substantive position but that did not constitute a promotion. Therefore, to determine the appropriate level of suitable positions in the three target classification groups, she conducted a series of calculations (Exhibit E-39) designed to identify the appropriate level. Ultimately, she concluded that level 4 was the appropriate level in each classification group. However, level 4 represented a decrease in pay in comparison to the grievor's substantive position.

[38] Ms. Larente explained that as soon as the grievor was registered on the departmental priority placement system and her resume was updated, her name would have been entered in the HR system, with the classification groups and level that had been determined most suitable for her.

[39] On October 7, 2010, Ms. Larente sent an email to the grievor, following up an earlier conversation in which she had suggested that she modify her resume to more clearly identify her skills, abilities and work experience (Exhibit E-34) and noted that she could contact Career Services for assistance. A week later, Ms. Larente followed up her request for an updated resume and noted that the grievor's name could not be entered as a departmental priority until she had an updated resume (Exhibit E-34).

[40] Because the grievor could not work in her former office, she wanted access to a workspace. Ms. Larente testified that although she looked for an available cubicle for the grievor, the search was not successful because it was limited to areas outside the HR Branch, and there were no available cubicles. However, in her email exchange with the grievor in October 2010 (Exhibit E-34), the workspace issue resurfaced.

[41] On October 13, 2010, Dany Bisaillon, a senior labour relations advisor, contacted the grievor to discuss arrangements for clearing out her office and retrieving her personal belongings.

[42] On October 17, 2010, the grievor wrote to Ms. Larente and asked for an update about when she could set up the new cubicle that she believed would be provided. She noted that she had been denied access to her office and that without access to a workstation, it was not possible for her to work or to update her resume (Exhibit E-34).

[43] On October 22, 2010, Ms. Milsom intervened and responded to the grievor's October 17, 2010, email (Exhibit E-33). She testified that her intention was to explain to the grievor that the employer was not being punitive when it refused to allow her to use her former office but was trying to respect her doctor's instructions. However, her explanation did not satisfy the grievor. Ms. Milsom testified that the communication between them became difficult because, in her opinion, the grievor became accusatory and critical.

[44] The grievor responded to Ms. Milsom on October 24, 2010 (Exhibit E-34). She noted that, among other things, her doctor advised her to return to work immediately, and therefore, she needed access to tools and equipment. She stated that she did not understand why she could not switch to an office on another floor while she waited for a placement in a new branch. She asked that the employer provide her with a temporary office so that she could return to work while she waited for the new position recommended by her doctor.

[45] In an email on October 29, 2010, Ms. Milsom tried to explain to the grievor that, even though her doctor recommended that she return to work immediately, the restrictions that he placed on where she could work meant that the employer had to find her a new position in a different branch. In those circumstances, the employer's standard practice was to place the employee on leave until a new position could be found. She noted that the grievor could access the computers in the Self-Learning Centre if required. She also explained that because the grievor was not returning to her substantive position, it was necessary that she vacate her former office so that it could be used by her replacement.

[46] On November 4, 2010, Ms. Milsom responded to further questions from the grievor about the employer's request that she collect her personal belongings, and she clarified the employer's position. In response, the grievor agreed to come to the office to collect her belongings. She also asked to have access to her personal computer so that she could clean up any unnecessary files and secure any data before it was deleted (Exhibit E-34).

[47] Ms. Larente testified that she received the grievor's resume at some point in the early part of November 2010. On November 15, 2010, she advised the grievor that she had been registered as a departmental priority and explained that because it was not possible to refer her to positions in the HR Branch, the employer would have to look outside the PE group. Ms. Larente also explained that, after analyzing the groups and levels that were closest in pay and in the required skills, competencies and experience to the grievor's substantive position, she had determined that AS-04, PM-04 and EC-04 positions were the most appropriate groups and levels and were the closest fit. She acknowledged that the pay rates for these positions were lower than the grievor's substantive position and explained that in those circumstances, there was no entitlement to salary protection or reinstatement (Exhibit E-38).

[48] The grievor responded by email on November 17, 2010 (Exhibit E-38). Both in her email and at the hearing, she took the position that she was not disabled because she was perfectly capable of performing the duties of her substantive position if moved to a different work environment. She stated that the decision to place her on the departmental priority list was financially disadvantageous to her and that she would not accept any position that was below her then-current salary at the PE-03 level. She would have considered a position at the EC-05 level because it was the

equivalent of an ES-04 position, which she had previously held. She also noted that the delay moving her to an appropriate position was contrary to her financial interests and well-being.

[49] Ms. Larente testified that she tried to explain to the grievor why she was being included in the departmental priority. In an email on November 25, 2010, she referred the grievor to her doctor's medical certificate of August 8, 2010, and noted that he identified limitations that were permanent and that meant that she could no longer work in the HR Branch, even though she was ready to return to work in another position. Ms. Larente told the grievor that the employer was trying to find a position that complied with her doctor's recommendations but that it meant that she could not work as a PE-03. She again explained the reasons that the employer was looking at positions at the AS-04, PM-04 and EC-04 levels. She reiterated to the grievor that she could not refer her to a position that would constitute a promotion using the departmental priority system but that the grievor was welcome to apply to competitions for positions at that level. She advised the grievor that if she needed help or guidance on how to apply for positions that interested her, she should contact the Career Services (Exhibit E-38). She testified that she did not know if the grievor had been able to access the Career Services Centre but assumed that if she had not been able to, she would have said so.

[50] At some point in early November 2010, the grievor apparently exhausted her sick leave. On November 12, 2010, Mr. Seguin responded to correspondence from her to him and to Ms. Lorenzato (Exhibit E-31). He advised the grievor that he had authorized an advance of sick leave to ensure that her salary was not cut off. He also confirmed that the employer was searching for alternate employment for her using both the departmental priority placement list and personal contacts. However, he encouraged her to apply for long-term disability benefits in case the search for alternate employment took longer than anticipated. He testified that he thought that the grievor should get the benefit of long-term disability benefits rather than run out of sick leave.

[51] On November 26, 2010, the grievor wrote to Ms. Lorenzato to complain about the employer's failure to place her in a position consistent with her doctor's recommendations and, in particular, about the fact that the employer considered positions at a lower level than her substantive positon to be appropriate assignments

for her. She also complained that because of the delay finding a suitable assignment, her sick leave had been exhausted, and she was no longer receiving her salary. She asked to be placed in an EC-05 position compatible with her skills and experience, to be salary protected if it was necessary to move her to a lower-level position, or to be given a lateral transfer to another department (Exhibit E-7).

[52] Ms. Lorenzato testified that she authorized the continuation of the grievor's salary when it was brought to her attention that the grievor's pay had been cut. She explained that she made that decision because the department's search for alternate employment for the grievor coincided with significant reductions in the public service, which made the job search much more difficult. She testified that 2010 was the last year of the strategic review that had already resulted in a five percent reduction in resources. However, the government had announced a new deficit reduction action plan. Departments had been asked to identify an additional 10 percent reduction, which represented a loss of 19 200 positions over the whole public service. She stated that the PWGSC was one of the larger affected departments. She testified that she did not think that it would be fair to cut the grievor's salary when such circumstances made it more challenging to find her a new job.

[53] Although the grievor was on the departmental priority placement list, Mr. Seguin testified that he also used his personal contacts to try to find a suitable position for her. On November 15, 2010, he sent an email to Shirley Squires, the director of Government Consulting Services (GCS), with whom he had worked in the past. He asked her if any of her clients could use someone with the grievor's skills, even on a temporary basis. To facilitate any possible assignment, he offered to have the HR Branch cover the grievor's salary to the end of the fiscal year (Exhibit E-22).

[54] Ms. Squires agreed to circulate the grievor's resume (Exhibit E-23), which yielded results. Mr. Seguin explained that the GCS was an in-house consulting firm that provided services to other departments. In late December, Danl Loewen, the director of organizational effectiveness and strategic human resources services in the GCS, advised Mr. Seguin that, following discussions between the grievor and senior members of his staff, he was prepared to offer her a temporary assignment relating to her field of expertise (Exhibit E-24). Mr. Seguin testified that she would have been paid at her substantive PE-03 salary and would have been doing data analytics work and workforce composition research.

[55] The grievor started working on the assignment on Monday, January 17, 2011. The following morning, she advised the project supervisor, Louise Vignault, Acting Director of Finance and Analytics, that she could not continue to work on the project, for medical reasons. According to a note to file written by Ms. Vignault at Mr. Seguin's request, which was entered into evidence on consent, the grievor explained that working on the project would be a risk to her health (Exhibit E-27).

[56] At a meeting on January 19, 2011, between the grievor, Ms. Vignault and Mr. Loewen, attempts to find alternate work in the GCS failed because the grievor felt that it was not appropriate work for her. She elected to end the assignment, although she did continue to work on the workforce data analysis for the remainder of that week, and the assignment was formally terminated on January 26, 2011. It should be noted that in her closing argument, the grievor stated that she worked on the GCS assignment for a couple of weeks.

[57] On January 25, 2011, the grievor sent an email to Mr. Seguin in which she explained her reason for declining to work on the assignment. She stated that she obtained a copy of the agreement between the PWGSC and the GCS and learned that the project in question was led by a manager in the HR Branch who was named in her harassment complaint. Given her medical restrictions, she believed that she had no option other than to withdraw from the project (Exhibit E-28).

[58] Mr. Seguin took the position both in his email responses to the grievor (Exhibit E-28) and in his testimony at the hearing that the assignment met the conditions set out by her physician. Although he acknowledged that the HR Branch was the client for whom the GCS undertook the project and that one of the HR Branch managers the grievor named in her harassment complaint was overseeing the project for the HR Branch, he believed that contact between the GCS and the HR Branch would have been only at the highest levels and would not have had any impact on the grievor's work.

[59] The grievor introduced the contract between the GCS and the HR Branch at the hearing (Exhibit G-2) and noted that the manager in question was identified in it as the project authority who would provide assistance to the GCS on the provision of demographic data and other information. She asked Mr. Seguin how she could have

worked on the project without coming into contact with that manager. He reiterated that the manager in question would have interacted only with Ms. Vignault.

[60] Mr. Seguin testified that, following the end of the grievor's assignment with the GCS, he sent an email to her that explained that, among other things, the employer would continue to look for work for her within the PWGSC but that it was not possible to look for assignments outside the department because she was not eligible to be included on the PSC priority placement list (Exhibit E-28). He advised her that if she wanted to pursue opportunities in other departments, she would have to apply for the positions that interested her. He also suggested that she undergo a language evaluation because he believed that having an accurate language profile would have been of assistance in pursuing a new position.

[61] The grievor's response to Mr. Seguin's email made it clear that she believed that she should not be dealing with him because he was one of the people that she had named in her harassment complaint and because she believed that he was obstructing her attempt to find a suitable accommodation (Exhibit E-29). Mr. Seguin testified that on his receipt of the grievor's email, he advised Ms. Lorenzato that he believed it would be best for everyone if she dealt with the grievor.

[62] On February 25, 2011, Ms. Lorenzato sent an email to the grievor in which she reiterated that the independent investigation into the grievor's harassment complaint had not found harassment or discrimination either against the grievor or in her work environment and that, therefore, all the individuals named in the complaint had been cleared of any allegations against them. Ms. Lorenzato emphasized that she accepted the harassment complaint investigator's findings. Despite the fact that the employer did not accept that there had been harassment or discrimination in the grievor's case, Ms. Lorenzato acknowledged that the grievor's perception of it gave rise to a medical restrictions that the employer undertook to respect. She noted that because of those restrictions, the grievor was not able to work in the HR Branch, which made the search for alternate employment challenging (Exhibit E-8).

[63] In her email and in her testimony, Ms. Lorenzato stated that by February 25, 2011, the employer had screened the grievor's resume against 23 vacant positions in the PWGSC that matched her skills and experience but that she had been screened out of all of them, largely due to language requirements. Ms. Lorenzato

testified that, because the PWGSC is largely a service provider, most of its positions are bilingual, which made the job search difficult.

[64] The grievor's response to Ms. Lorenzato on March 3, 2011, confirmed that she did not accept the findings of the harassment investigation and that her doctor's advice was intended to address that fact. However, she also referred to her belief that her ". . . competencies were termed redundant in PWGSC operations" (Exhibit E-8). She disputed that she was disabled and claimed that, since she had been told that her skills and expertise were redundant, she should be placed on the interdepartmental priority list.

[65] Ms. Lorenzato testified that the grievor had never been declared redundant. She stated that the grievor had never been sent a letter advising her that her status was affected under the Workforce Adjustment Directive, which only the deputy minister could issue. Furthermore, she stated that positions in the HR Branch had not been declared redundant or affected. Therefore, in an effort to address those issues and to explain again to the grievor why she had been placed on the departmental priority list, Ms. Lorenzato sent another email to her on March 15, 2011, outlining the legislative provisions (Exhibit E-9). In it, she noted specifically that the employer had contacted the PSC, which had confirmed that the grievor's circumstances were not covered by any of the provisions that would give rise to a priority under the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*).

[66] During the period in which Ms. Lorenzato was corresponding with the grievor, Ms. Larente was also engaged in trying to identify an appropriate position for her. On February 21, 2011, she wrote to the grievor about a position as a senior business and pay services analyst, classified AS-04, in the Accounting, Banking and Compensation Branch (ABC) (Exhibit E-40). Ms. Larente testified that the opportunity had been identified through the priority placement system and that she thought that the grievor might appreciate the opportunity to tailor her resume for the job. She stated that it was standard practice to give candidates a chance to explain how their resumes fit the job criteria.

[67] The grievor responded to Ms. Larente on February 23, 2011 (Exhibit E-40). She stated that the job that was being offered to her was not compatible with her education, experience, salary and other competencies. She also stated that the

suggestion that she tailor her resume was demeaning and that it constituted "accelerated harassment." She made it very clear that she would not contemplate a position that was not at the same level as her substantive PE-03 position or at the ES-04 level, which she had held in the past when employed at the PSC (Exhibit E-40).

[68] Ms. Larente testified that she responded to the grievor by email on March 2, 2011, and that she tried to explain both the staffing process and the reasons that she thought the grievor might find the opportunity in the ABC Branch interesting.

[69] On March 25, 2011, Ms. Larente wrote again to discover if the grievor was interested in the job opportunity and noted that, if she was, she would be contacted to participate in a written examination, which was a component of the staffing process (Exhibit E-40). Ms. Larente testified that the purpose of the written examination was to ensure that candidates met the essential qualifications of the position. She stated that it was a standard way to assess qualifications. The grievor refused the job opportunity and told Ms. Larente to contact her only if she had serious opportunities for her (Exhibit E-40).

[70] Ms. Lorenzato testified that she became concerned that the employer was referring the grievor to positions but that she would not consider any of them. On May 19, 2011, she sent an email to the grievor asking her to confirm that she was not able to work in her substantive position but that she was able to return to work subject to her doctor's restrictions (Exhibit E-10). Ms. Lorenzato advised her that until an appropriate position was identified, the employer would continue to approve her leave but that, effective May 30, 2011, it would be converted to leave without pay. Ms. Lorenzato testified that it was difficult to justify paying the grievor when she refused to participate in a process to help find her another job.

[71] The grievor responded to Ms. Lorenzato on May 27 and June 14, 2011 (Exhibit E-10). She continued to dismiss the investigation report into her harassment complaint as biased and argued that the employer's response to her doctor's recommendations was inappropriate and constituted "consistent harassment." She stated that the job referrals that she had received were demeaning, did not match her skills and experience, and would result in significant financial losses for her. She described them as discriminatory. She also complained that she had been denied access to her office and noted that she was not ill and was not disabled. Instead of

being offered positions that constituted a demotion, she expected a promotion and stated that she would not consider a lower-rated position unless she was salary-protected (Exhibit E-10).

[72] Because of the grievor's lengthy responses, Ms. Lorenzato decided to continue the paid leave until she had an opportunity to fully consider them. She testified that, in the end, the grievor remained on full salary until her employment was terminated.

[73] Ms. Milsom testified that because a number of job opportunities had been brought to the grievor's attention and had been refused, the employer believed it necessary to ensure that it understood the medical restrictions established by her doctor. Therefore, on May 30, 2011, when a position as a policy analyst, classified EC-04, became available in the Acquisitions Branch, Ms. Milsom sent a copy of the job description to Dr. Burt and asked him to review it and advise the employer whether the job satisfied the limitations he had established (Exhibit E-36).

[74] Dr. Burt responded on June 2, 2011 (Exhibit G-6). He agreed that the job, as outlined in the description sent to him, would satisfy the recommended medical limitations, but he noted that the grievor would view it as a demotion because it was at a lower salary level than her substantive position.

[75] Ms. Larente testified that she believed that the policy analyst position in the Acquisitions Branch was an appropriate job referral for the grievor. The position was in the office of small and medium business enterprises and involved, among other things, conducting statistical surveys, research, environmental scans, and planning. On June 2, 2011, after the employer had received Dr. Burt's response, she asked the grievor for her consent to be considered for the position (Exhibit E-41). The grievor responded on the same day that she would not consider the position because it was at a lower salary level than her substantive position and stated that the employer had to protect her salary (Exhibit E-41).

[76] On June 3, 2011, Ms. Lorenzato wrote to the grievor. She summarized the steps that the employer had taken up to that date, first in dealing with the grievor's complaint and, following that, in trying to accommodate the medical restrictions identified by her doctor. She asked the grievor to reconsider her refusal to consider the position in the Acquisitions Branch identified by Ms. Larente, and she reminded the grievor that refusing an appropriate job offer could result in her being removed from

the priority placement system and in her employment being terminated on the grounds of incapacity. The grievor was asked to respond to the offer in the Acquisitions Branch before June 7, 2011 (Exhibit E-11). She responded on June 7, 2011, and asked Ms. Lorenzato for more time, given the importance of the issue and the need to consider all her options and to identify the best course of action to protect her interests (Exhibit E-11).

[77] On August 24, 2011, Ms. Milsom invited the grievor to attend a meeting with her, Ms. Larente and Carloyne Juneau, a senior labour relations advisor, to discuss the next steps in the search for alternate employment for the grievor (Exhibit E-12). The grievor refused to attend. In an email sent on August 31, 2011, she noted that Ms. Larente had only referred her to positions that would have resulted in a demotion and a loss of pay, and she accused the labour relations staff of discriminating against her, bullying her and threatening her. Given that behaviour, she stated, her doctor had recommended that she stay away. She stated that if Ms. Milsom clarified the available options, she would respond to them by email (Exhibit E-12).

[78] Ms. Lorenzato testified that, when she learned that the grievor had refused to meet with Ms. Milsom and the other labour relations officers, she sent an email on September 8, 2011, offering to meet with the grievor directly to discuss a deployment offer (Exhibit E-12). The grievor refused to attend (Exhibit E-12).

[79] On September 29, 2011, Ms. Lorenzato wrote to the grievor and attached copies of the statements of merit criteria for three positions that she had intended to discuss with her in the meeting that she had proposed for September 8. Ms. Lorenzato testified that the employer needed the grievor's consent to send her resume to the responsible managers. She stated that she tried to explain in her letter to the grievor the reasons that the positions had been identified as appropriate accommodations for her, and she set out the process that would be followed if the grievor consented to have her resume referred. She also warned the grievor that if she refused to participate in the process to identify an appropriate position, her employment would be terminated on non-disciplinary grounds for incapacity.

[80] Ms. Larente testified that the three positions referred to in Ms. Lorenzato's September 29, 2011, letter (Exhibit E-13) had been identified as possible opportunities because they required similar competencies and skills as the grievor's substantive

positon. One of the positions was as a controlled goods analyst, classified PM-04, in the Departmental Oversight Branch, which involved research and analysis. The second position was as an evaluation analyst, classified EC-04, also in that branch. Ms. Larente testified that the position required research and statistical analysis. The third position recommended to the grievor was as a policy analyst, classified EC-04, in the Acquisitions Branch, which was similar to the positon that was offered to her in June 2011. The job descriptions for the three positions were entered as Exhibit E-42.

[81] Ms. Larente was asked in cross-examination why she identified jobs that had lower educational requirements than the grievor possessed and for which she had no experience. Ms. Larente explained that she chose job opportunities that matched the grievor's skills as closely as she could, but because she could not look within the HR Branch for job possibilities, the matches were approximate, not identical. The educational requirements were simply the minimum requirements needed to perform the duties. She also believed that the grievor could learn new tasks because her skills matched the requirements of the positions.

[82] The grievor responded by email to Ms. Lorenzato on October 7, 2011 (Exhibit E-30). She accused Ms. Lorenzato of bullying her and, in essence, of manipulating events to effect the termination of her employment. She alleged that Ms. Lorenzato had ignored all her doctor's recommendations, as well as all her requests for accommodation and assistance made both before and after she filed her harassment complaint in 2009. In particular, she alleged that she had requested a transfer to the BSNI in early 2009 but that she had been allowed to stay there only during the period of the harassment investigation.

[83] The grievor suggested that the employer commonly arranged deployments and assignments outside the department for professional development but that because the employer labelled her as disabled, she was excluded from such opportunities. She wrote that she had been denied the use of a workspace on even a temporary basis, which meant that she could not continue with her research work or apply for interdepartmental opportunities. She alleged that she had been told that if she reported to work, she would be escorted off the premises.

[84] Finally, she stated that the positions that were being offered to her were demeaning and inappropriate. In her view, Ms. Lorenzato's letter was ". . . a manifesto

of discrimination against me certainly on the basis of my age." She would not accept any position that did not protect her then-current salary level and that was not made through the appropriate channels, like a secondment or a departmental program. She considered that the termination of her employment would be unjustified and noted that she would seek recourse.

[85] Ms. Lorenzato testified that she believed that the employer had tried to accommodate the grievor for a long period. She refused to meet with it and had refused to participate in the process. She continued to be on paid leave and had demanded a promotion to an EC-05 position. In Ms. Lorenzato's opinion, it was not possible to accommodate someone who did not want to be accommodated.

[86] Ms. Lorenzato testified that she had a letter prepared for the grievor, advising her that her employment was terminated. She explained that the letter was prepared on her directions but that Mr. Seguin signed it because she was out of the country when it was ready to be sent. It was sent to the grievor on October 20, 2011 (Exhibit E-14).

[87] The grievor testified that when Ms. Milsom sent a copy of the job description for the policy analyst position in the Acquisitions Branch (Exhibit E-36), she did not mention the preconditions attached to the job but simply asked the doctor for information based on particular questions, to which the doctor responded. The preconditions attached to the job, such as the requirement that the grievor qualify through a written test or an interview, or both, and that she satisfy a reference check, were set out in Ms. Lorenzato's letter of September 29, 2011 (Exhibit E-13), and in Ms. Larente's email of March 25, 2011 (Exhibit E-40), but were not shared with Dr. Burt. The grievor testified that when Dr. Burt said that moving her to another branch would be acceptable from a medical perspective, he was giving that opinion without knowledge of the actual positions or the preconditions. However, she acknowledged in cross-examination that she was aware of the preconditions in March 2011, long before Ms. Milsom wrote to Dr. Burt, but that she did not bring them to his attention. She stated that Dr. Burt was concerned only about her health and that, although she thought the preconditions concerned her health, she did not mention them to him.

[88] The grievor testified that the employer never offered her appropriate positions, commensurate with her skills, ability and experience. The offers Ms. Lorenzato sent to

her were demeaning, and the fact that they were made under the threat of terminating her employment was upsetting. She stated that she did not attend the meeting proposed by Ms. Milsom and Ms. Lorenzato because she was frightened to meet with them after having been evicted from her office.

[89] The grievor explained that after she read Ms. Lorenzato's September 29, 2011, letter (Exhibit E-13), she realized that the employer intended to terminate her employment. She stated that she wrote her response of October 7, 2011 (Exhibit E-30), in her "protected capacity." She also stated that it was not a requirement of her job to cooperate in the process to find her alternate employment.

[90] Ms. Larente identified a document that she created that set out all the staffing actions that had been undertaken during the period that the employer attempted to find a suitable accommodation for the grievor. She explained that the document identified all the referrals made to the grievor, as well as all the positions not referred to her and the reasons for not referring them (Exhibit E-44). Ms. Larente also testified that she attempted over the course of her dealings with the grievor to find a workstation that she could use. The search was not successful because it was limited to areas outside the HR Branch, and there were no available cubicles.

## III. Summary of the arguments

### A. For the employer

[91] Citing *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, and *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536, the employer acknowledged its obligation under the law to take reasonable steps to accommodate the grievor's disability. However, the jurisprudence also established a concomitant obligation on her to facilitate and participate in the employer's search for a reasonable accommodation for her. The employer submitted that she did not accept that obligation and noted that she concluded her evidence-in-chief by stating that she was not required to participate in the process.

[92] The facts of this case establish that the grievor did not accept her obligation to facilitate the search for a reasonable accommodation. She repeatedly established conditions that she believed the employer had to meet before she would consider any accommodation measure. She refused to participate in processes designed to test her

suitability for particular positions, and she set up barriers that prevented the employer from acquiring the detailed information that it needed on the functional limitations that she needed to have accommodated.

[93] The evidence demonstrated that the employer repeatedly sought detailed medical information on the grievor's functional limitations so that it could better determine the accommodations required. The medical certificates provided by her doctor in February 2009 and May 2010 (Exhibits G-3 and E-16) provided little detail beyond stating that, for example, the grievor needed a "new work environment." She refused to attend a Health Canada assessment, which was surprising in light of her doctor's statement that she would attend.

[94] Only in August 2010 did the grievor's doctor advise the employer that because of her perception of harassment and discrimination, she could not have any contact with the people that she named in her complaint. Therefore, her supervisors could not oversee any aspect of her work, and she could not work on the same floor or in the same vicinity as them. The grievor's doctor advised that it was possible that she would no longer be able to work in the HR Branch and that those restrictions were permanent (Exhibit G-4).

[95] The employer noted that shortly after it received that medical certificate, an opportunity arose in the BSNI. The grievor had worked in that section during the harassment investigation and acknowledged that she had enjoyed the assignment. Modifications were made to the reporting relationship for the position to ensure that she would have no contact or reporting relationship with Mr. Seguin. However, within days of offering that opportunity to her, she provided a new medical certificate that stated that she could not work anywhere in the HR Branch. The employer contended that this was the start of a pattern of it attempting to accommodate her and of her rebuffing the effort.

[96] The employer stated that once it became clear that the grievor could not work in the HR Branch, it took two meaningful steps to try to find her alternate employment. First, it circulated her resume to managers within the branch and to personal contacts, and second, it included her name on the departmental priority placement list. Every single vacancy in the department was scrutinized to determine if it would be a suitable accommodation for her. That process meant that hiring actions were delayed by at

least a month to give the grievor time to decide whether she would agree to be considered for any of the positions that were thought suitable.

[97] The employer noted that its search for alternate employment for the grievor took place in a period of significant retrenchment in the public service, which meant that there were very few job openings. Furthermore, many of the available positions were identified as bilingual, which she was not. Despite those challenges, opportunities were identified.

[98] Despite the employer's efforts, the grievor found fault with every opportunity identified. Although she agreed to the GCS assignment, which was classified in the same group and level as her substantive position, she ended it shortly after starting because she did not think it was suitable. At that point, she had exhausted all her leave with pay entitlements. Even though the employer disagreed with her assessment of the assignment, it did not stop paying her and agreed to continue looking for alternate employment.

[99] The employer identified five more positions that it considered suitable. The grievor refused to consider any of them and refused to meet with the employer to discuss employment opportunities. In fact, she told the employer that it should not contact her unless it had a position that met her demands.

[100] The grievor objected to the opportunities identified by the employer largely on the basis that they were classified at lower levels and therefore paid lower salaries. She also objected to the fact that she would have had to participate in the hiring process and to have been found qualified. She wanted salary protection, if not a promotion.

[101] Citing *Renaud, Fontaine v. Deputy Head (Department of Fisheries and Oceans)*, 2012 PSLRB 91; *Boyce v. Toronto Community Housing Corp.*, 2012 HRTO 853; *Rush v. Richmond (City)*, 2011 BCHRT 244; *Callan v. Suncor Inc.*, 2006 ABCA 15; *Sioui v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 44; *Spooner v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 60; *Yeats v. Commissionaires (Great Lakes)*, 2010 HRTO 906; and *Ontario Public Service Employees Union v. Ontario (Ministry of Community Safety and Correctional Services)* (2011), 210 L.A.C. (4th) 350; the employer argued that an employee has an obligation to accept reasonable accommodation and cannot hold out for the perfect solution. Nor can employees dictate to the employer what they will accept.

[102] The employer also noted that it has no obligation to consider jobs that might constitute a promotion when searching for a suitable accommodation. It cited *Ellis v. General Motors of Canada Ltd.*, 2011 HRTO 1453, *Hamilton Health Sciences v. Ontario Nurses' Association*, 2013 CanLII 36061 (ON LA), and *Baum v. Calgary (City)*, 2008 ABQB 791, in support of that proposition.

[103] The employer also contended that an employee seeking an accommodation is not entitled to salary protection. The duty to accommodate protects employment security rather than income security. Employees are entitled to move into a new position and to the compensation that is attached to that position because they are being paid for the services rendered while in that position.

[104] In the circumstances of this case, there was no evidence that there were other positions for which the grievor might have been qualified. Because she was not bilingual, the number of positions for which she was qualified was small. Furthermore, she refused to cooperate in the job search. Given those facts, the employer had no choice but to terminate her employment. Therefore, it asked that the grievance be dismissed.

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

[105] The grievor made an oral argument and submitted written notes to accompany it. The employer did not object to the written submission, which contains a mix of evidence and argument. I have used the written submission when it was helpful to explain or expand on the points the grievor made in her oral argument.

[106] The grievor cited sections 5, 7, 9, 10 and 14.1 of the *CHRA*, which provide as follows:

> ***5.*** *It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public*
>
> *(*a*) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or*
>
> *(*b*) to differentiate adversely in relation to any individual,*
>
> *on a prohibited ground of discrimination.*
>
> . . .

> ***7.*** *It is a discriminatory practice, directly or indirectly,*
>
> *(*a*) to refuse to employ or continue to employ any individual, or*
>
> *(*b*) in the course of employment, to differentiate adversely in relation to an employee,*
>
> *on a prohibited ground of discrimination.*
>
> *. . .*
>
> ***9.*** *(1) It is a discriminatory practice for an employee organization on a prohibited ground of discrimination*
>
> *(*a*) to exclude an individual from full membership in the organization;*
>
> *(*b*) to expel or suspend a member of the organization; or*
>
> *(*c*) to limit, segregate, classify or otherwise act in relation to an individual in a way that would deprive the individual of employment opportunities, or limit employment opportunities or otherwise adversely affect the status of the individual, where the individual is a member of the organization or where any of the obligations of the organization pursuant to a collective agreement relate to the individual.*
>
> ***10.*** *It is a discriminatory practice for an employer, employee organization or employer organization*
>
> *(*a*) to establish or pursue a policy or practice, or*
>
> *(*b*) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,*
>
> *that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.*
>
> *. . .*
>
> ***14.1*** *It is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.*

[107] The grievor stated that she was segregated and discriminated against because she was denied access to her office and denied the rights of employment. The fact that

she was allowed to use the Career Services Centre proved that she was discriminated against and segregated.

[108] The grievor argued that under the provisions of the *PSEA Regs.* and guidelines, a disability is defined as when a person is unable to perform any requirement of his or her position. In her case, she was not able to work in an environment where she was harassed, but she was fully competent to perform all the duties of her position. Therefore, she was not disabled. A person who is able to perform the duties of the position but who is unable to perform them in the position's location is not eligible for a priority appointment under the *PSEA*. The grievor stated that, under the legislation, if the employee's restrictions are such that he or she cannot work in any location in the organization, it is possible that there is a priority entitlement. Entitlement to a priority is a positive measure and requires a doctor's certification and the employee's consent.

[109] The grievor stated that because she was not disabled, she did not qualify for a priority under the *PSEA*. However, the employer granted her such a priority and, therefore, violated the law. Because the employer labelled her as disabled, she was denied access to public service opportunities. She contended that that action was done as an act of retaliation, in response to her doctor's medical certificates. She stated that under the priority administration system, an employee who recovers within the established five-year period can be reinstated. She was denied that right.

[110] The grievor stated that the medical certificate that her doctor provided on February 9, 2009 (Exhibit G-3), recommended that she be moved and that her doctor made at least six such requests. The employer ignored those requests and, therefore, did not undertake the positive measures required by the law. She did not agree to undergo the assessment by a Health Canada physician because she did not believe that Health Canada could evaluate her condition better than her own doctor could.

[111] The grievor stated that it was incorrect to allege that she worked only a few days on the GCS assignment. She accepted the secondment, which was for three months. It started on January 17, 2011, and she worked for two weeks. In the middle of the second week, she was shown a memorandum that demonstrated the connection to Mr. Seguin. Because of that information, she ended the assignment.

[112] The grievor argued that she never received appropriate job offers commensurate with her skills, expertise or salary level and that the referrals made to

her contained demeaning preconditions. Her refusal to participate in the process was legitimate and was protected under Part III of the *Canada Labour Code* (R.S.C. 1985, c. L-2; "the *Code*").

[113] The grievor stated that Part III of the *Code* provides that an employee is constructively dismissed when the employer fails to comply with the employment contract or unilaterally and substantially changes the terms of employment or expresses an intention to. She stated that she did not accept the new terms of employment that Ms. Lorenzato offered to her and that she made it clear to Ms. Lorenzato that the conditions were not acceptable to her. She stated that on her side, there was no violation of the law, but that the employer breached the terms and conditions of employment. The priority administration system was applied to her, in disregard of the relevant legislation. She was intimidated and harassed over a long period. Her employment was terminated without notice.

[114] The grievor cited *Tipple v. Canada (Attorney General)*, 2012 FCA 158, *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, *Honda Canada Inc. v. Keays*, 2008 SCC 39, and *Disotell v. Kraft Canada Inc.*, 2010 ONSC 3793. She stated that her grievance should be allowed and that she should receive full back pay and reinstatement and the maximum compensation allowable under the *CHRA*. Additionally, she requested compensation in the amount of $300 000 for the employer's breach of the duty of good faith and its obligation to protect her, for restricting her participation in the workforce and for the stressful situation that the employer created over a number of years.

## IV. Reasons

[115] On October 20, 2011, the employer terminated the grievor's employment under paragraph 12(1)(*e*) of the *FAA* on the grounds that she was unable to perform the duties of her substantive position on medical grounds and that all efforts it had made to find her a suitable accommodation failed because she refused to participate or cooperate in the process.

[116] The grievor alleged that the termination of her employment was based on false grounds and that it constituted discrimination on the grounds of age, ethnicity and religion. She took the position at the hearing that she was not disabled and that, therefore, the employer placed her on the departmental priority placement system

improperly and to her disadvantage because it prevented her from being placed on the PSC priority system and from accessing positions in other departments. She further contended that she never received an appropriate offer of accommodation from the employer because the positions it identified were at a lower salary level and had preconditions attached that were not acceptable to her.

[117] Although the grievor asserted that her termination constituted discrimination on the grounds of age, ethnicity and religion, she did not adduce any evidence in support of her assertions. It should go without saying that assertions are not evidence. Therefore, in the absence of any evidence of discrimination on the grounds of age, ethnicity or religion, I must dismiss that aspect of the grievance before me.

[118] The grievor filed a harassment complaint on June 1, 2009. That complaint was investigated by an outside investigator appointed by the employer. It was dismissed as unfounded. Neither the complaint nor the investigation report was in evidence before me. There was also no evidence before me that the grievor took any legal steps to challenge or overturn the investigation report. Despite that, she insisted that her entitlement to a reasonable accommodation arose as a result of the harassment and discrimination that she suffered and that led to her filing the harassment complaint. It did not. In the absence of a finding of harassment or discrimination, the employer was entitled to conclude that the grievor had not been the victim of harassment or discrimination. I would add that, other than asserting her perception that she was the victim of harassment and discrimination, she presented no evidence in support of the allegation.

[119] During the investigation of her harassment complaint, the grievor worked on an assignment in the BSNI section. In February 2010, following the release of the investigation report, she was asked to return to her substantive position, after a period of scheduled vacation leave. But she never returned to her position. On May 5, 2010, she presented a medical certificate from her physician, Dr. Burt, which identified a number of medical problems that he attributed to workplace stress. He stated that the grievor could not “return to her previous work environment.” He also stated that she would be willing to undergo a Health Canada assessment (Exhibit E-16). She was placed on paid sick leave at that point and continued to receive her full salary until the termination of her employment.

[120] Despite Dr. Burt's statement, the grievor was not willing to undergo a Health Canada assessment. She testified that she believed that Dr. Burt's instructions were clear, and therefore, a Health Canada assessment was unnecessary. Because of that fact, the only medical information available to the employer was that supplied to it by the grievor and her physician.

[121] On August 8, 2010, in response to an employer request for more information, Dr. Burt provided another medical certificate, in which he noted that the grievor had difficulty at work dealing with the managers that she had named in her complaint. He stated that the harassment investigation report had not ". . . eradicated her feelings or her perception of her situation" (Exhibit G-4). He advised as follows:

> *. . . in my opinion, Ms. Saifuddin should have no contact with any of the individuals named in her complaint. Therefore she should not work on the same floor or in the same vicinity as any of these individuals. They should not oversee any aspect of her work. This would include the Director General. She should work for a new manager but one that has no contact with her previous Director or Director General. She therefore may not be able to continue to work in the Human Resources Branch of Public Works. These restrictions would be permanent as I do not see her feelings or opinions changing and I feel that any contact with these individuals would be detrimental to her health. There are no other restrictions or limitations that Ms. Saifuddin requires. As stated her only problem appears to be her relationship with the people named in her complaint.*

[122] The employer accepted that Dr. Burt's medical certificate identified a permanent disability that rendered her incapable of working in her substantive position. At the hearing, she took issue with the employer's conclusion that she suffered from a disability. She contended that she was fully capable of performing all the duties of her position, and therefore, it could not be said that she was disabled. In the circumstances, it was a curious position to take. If she was able to perform in her position, there was no legitimate basis for her to be absent from work.

[123] The grievor's position that she was not disabled appears to have derived from her perception that the duties that she performed could be separated from the position to which they were attached. But her job did not exist in a vacuum. It was part of the overall organizational structure. The work that she performed was done as part of the HR Branch's work. Ultimate responsibility for that work rested with the branch's

managers, and the grievor's medical restrictions stated that she could not work with them. Therefore, she could not work in her positon, on medical grounds. The employer accepted that the grievor's inability to work with her managers constituted a disability, based entirely on the medical information that she had provided to it.

[124] Having accepted Dr. Burt's opinion, the employer began its search for an appropriate accommodation. In September 2010, an opportunity arose in the BSNI section, where the grievor had worked during the harassment investigation. The assignment was at her classification group and level, and the employer believed that, with some modifications to the job's reporting relationship, it would satisfy Dr. Burt's recommendations. There is no doubt that it was a reasonable and good-faith attempt to accommodate the grievor.

[125] However, the grievor refused to meet with the employer to discuss the assignment. On September 23, 2010, Dr. Burt provided a new medical certificate (Exhibit G-5), which stated as follows:

> *Ms. Sughra Saifuddin was examined in my office today. She is able to return to work immediately provided she not be working in the same branch as her previous director general. She still has ongoing anxiety and concerns as a result of his previous treatment towards her.*

[126] The grievor's position was classified PE. The uncontradicted evidence before me was that positions in the PE group exist only in human resources in the federal public service. If she was unable to work in the HR Branch, then the employer would have had to look for an appropriate position in a different classification group. It identified positions at the AS-04, PM-4 and EC-04 levels as being the closest matches to her position. There was no evidence before me that any other classification group or level would have been more appropriate. However, positions at the AS-04, PM-04 and EC-04 levels pay less than the grievor's position, and she made it clear to the employer that she would not consider any position with a salary level lower than that of her substantive position.

[127] To find a position that would accommodate the grievor's disability, the employer registered her on its departmental priority placement system, and as a consequence of that action, she was considered for all relevant vacancies in the department. Mr. Seguin testified that he also used his personal contacts within the

department to find a suitable position for her. The employer's efforts to find a suitable accommodation for her took place against the backdrop of significant reductions in federal public service staffing levels.

[128] Aside from the job opportunity in the BSNI section that the grievor rejected because it was situated in the HR Branch, the employer also located a temporary assignment in the GCS, which would have maintained her substantive classification and salary level. She rejected that opportunity after a brief trial period because she believed that it also required her to work with her former managers, in contravention of her medical restrictions. Ultimately, she also rejected all other opportunities identified by the employer between September 2010 and her termination of employment in October 2011 because they were at lower salary levels than her substantive position and because she would have had to undergo an assessment to determine her qualifications.

[129] The grievor testified that she was not obligated to participate in the process, but that is not the case. As noted by the employer, the jurisprudence, going back at least to the decisions of the Supreme Court of Canada in *Simpsons Sears Ltd.* and *Renaud*, has consistently held that an employee seeking accommodation must facilitate and participate in the search.

[130] The duty to accommodate arises in the employment context as a means of respecting and protecting the right of individuals to be free from discrimination on a prohibited ground, such as disability. But the duty to accommodate is not without limits. In *Simpsons Sears Ltd.*, which examined the duty to accommodate in the context of religious accommodation, the Supreme Court held that the employer's duty is to take those steps necessary to accommodate the employee without ". . . undue interference in the operation of the employer's business and without undue expense to the employer." The Court further stated, at paragraph 23, as follows:

> *. . . Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance in this case of part-time work, must either sacrifice his religious principles or his employment.*

[131] In *Hydro-Québec v. Syndicat des employé-e-s de techniques professionelles et de bureau d'Hydro-Québec*, 2008 SCC 43, the Supreme Court reaffirmed that the goal of

accommodation is to ensure that people who are capable of working are not unfairly prevented from doing so, if working conditions can be adapted without undue hardship. But the Court also affirmed at para. 15 that ". . . the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration."

[132] *Koroll v. Automodular*, 2011 HRTO 774, like *Simpsons Sears Ltd.* and *Renaud*, concerned religious accommodation. In that case, the complainant sought paid leave for the purposes of religious observance. The Tribunal found that although the duty to accommodate was fundamentally about enabling employees to participate in the workforce, it did not go so far as to require employers to protect the salaries of employees seeking leave for religious observance. The Tribunal noted the Ontario Court of Appeal's decision in *Ontario Nurses' Association v. Orillia Soldiers Memorial Hospital*, 1999 CanLII 3687, and wrote as follows at para. 57:

. . .

> *The Ontario Court of Appeal reached a similar conclusion in* Orillia Soldiers. *At issue in that case was whether the duty to accommodate nurses off on disability leave required the employer to compensate them on the same basis as nurses actively employed. The court found that the duty to accommodate does not impose on employers "the burden of simply topping up the wages of the disabled employees," a suggestion it found to be "inimical to the principles underlying the Code." (at para. 54) The court confirmed that the goal of accommodation is to put the employee in a position where he can do the available work, not to compensate him according to a different standard than the one applicable to his peers (at paras. 55 to 56).*

. . .

[133] Similarly, in *Ontario Public Service Employees Union v. Ontario (Ministry of Public Safety and Security)*, 2003 CanLII 52861 (ON GSB), which concerned the duty to accommodate a disability, it was held that the employer was not required to pay an employee at the rate of his substantive classification if he was unable to perform the essential duties of the position and therefore was accommodated in a lighter job or in a lesser classification.

[134] In the circumstances of the case before me, the employer made a sincere effort to accommodate the grievor's disability, as it understood her condition. It attempted

first to place her in positions at her substantive classification and level, going so far as to modify the reporting relationship in the job in the BSNI section in order to allow her to work in that position in a manner consistent with her physician's recommendations. When it became clear that she could not work anywhere in the HR Branch and, therefore, would not be able to remain in the PE classification, the employer identified positions in the classifications and at the salary levels closest to the grievor's PE classification group and level. She refused to participate in that process and to consider any position that did not guarantee the salary of her substantive position. She contended that she was entitled to either salary protection or to a transfer to a position at her substantive level in another government department based solely on her unsubstantiated belief that she had been harassed in her substantive position.

[135] I agree with the decisions that hold that an employer who accommodates an employee in a lesser or lower-rated job is not required to maintain the employee's salary at the pre-accommodation level. In my view, such a requirement would unduly interfere with the employer's operations and would create undue expense, in the words of *Simpsons Sears Ltd.* Therefore, I do not believe that the employer was required to protect the grievor's salary when it offered her positions at different classification levels that were paid at lower rates than her substantive position.

[136] Nor do I believe that, in the circumstances of this case, the employer was required, or even able, to transfer the grievor to a position at her substantive level in another government department. The evidence before me was clear that the search for an alternate position for her occurred at a time of government-wide job reductions which would have made a job search outside the department difficult.

[137] More importantly, the grievor did not qualify for any of the statutory priorities managed by the PSC. Without the PSC's assistance and authority, the employer did not have a mechanism to access jobs in other departments on a priority basis. The grievor was told that fact on a number of occasions and Mr. Seguin explicitly advised her to apply for disability benefits, which would have protected her income and given her access to the PSC disability priority. But because the grievor did not accept that she was disabled, she refused to do so.

[138] In my opinion, the employer cannot be faulted for failing to search outside the PWGSC for a reasonable accommodation for an employee who refused to accept that

she was disabled and therefore refused to cooperate. It must also be noted that the employer found acceptable, although not necessarily perfect, accommodations within the department, which the grievor refused to consider. Under those circumstances, the employer was not obligated to continue the search outside PWGSC.

[139] Faced with a medical certificate that indicated that the grievor suffered from a disability that rendered her permanently incapable of working in her substantive positon and her subsequent and unjustified refusal to participate in a process designed to identify an alternate position, the employer terminated her employment. I believe that it was entitled to conclude that it could not accommodate her without undue hardship and that, under the circumstances, there was no reasonable prospect that the grievor would be able to return to work in the foreseeable future.

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

*(The Order appears on the next page)*

## V. Order

[141] The grievance is dismissed.

November 25, 2015.

**Kate Rogers,**
**a panel of the Public Service Labour Relations and Employment Board**