Date: 20170120

Files: 566-02-7312, 7326, 9621, and 9999

Citation: 2017 PSLREB 10

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

EMELINE LAYNE

Grievor

and

DEPUTY HEAD (Department of Justice)

Respondent

and

TREASURY BOARD (Department of Justice)

Employer

Indexed as
Layne v. Deputy Head (Department of Justice)

In the matter of individual grievances referred to adjudication

Before: Nathalie Daigle, a panel of the Public Service Labour Relations and Employment Board

For the Grievor: Amarkai Laryea, Public Service Alliance of Canada

For the Respondent and Employer: Caroline Engmann, counsel

Heard at Toronto, Ontario, November 3 to 6, 2015,
via teleconference November 16, 2015, and May 2 to 6, 2016.

I. Introduction

[1] Emeline Layne, the grievor, is a legal assistant classified at the CR-05 group and level. She works at the Ontario Regional Office (ORO) of the Department of Justice ("the deputy head" in grievances bearing Board File Nos. 566-02-7312 and 7326 and "the employer" in grievances bearing Board File Nos. 566-02-9621 and 9999). She was involved in an incident at work for which she was issued a one-day suspension, which she grieved. She also grieved a letter of discipline she received for an alleged absence without authorization. She claims that she suffered a monetary loss as a direct result of that letter. She maintains that discipline was unwarranted and inappropriate in the circumstances.

[2] The grievor also maintains that she experienced discrimination related to her return to work from long-term disability leave. From the moment that her treating physician declared her fit to return to work with accommodations, it took the employer approximately a year to find her a new position. She asks for her salary for the year that she waited to be accommodated and for compensation for pain and suffering.

[3] In another grievance, the grievor asks that the employer be ordered to reintegrate her into the Department of Justice. However, she had been reintegrated and accommodated as of the hearing. Therefore, she agreed that that grievance was moot as the corrective action sought has been met.

[4] The deputy head maintains that the one-day suspension the grievor received for alleged prohibited behaviour at work was warranted and appropriate in the circumstances. The deputy head also maintains that the Public Service Labour Relations and Employment Board ("the Board") has no jurisdiction to consider the grievance about the monetary loss that the grievor suffered for her absence without authorization since she received only a letter of reprimand for this absence.

[5] Finally, the employer maintains that it did not discriminate against her with respect to her disability and that the delay that occurred with implementing the accommodation is attributable to her. The employer also agrees that her request to be accommodated is moot as she has returned to the workplace.

[6] The grievances were filed on March 21, 2011, on June 13, 2013, and on March

3, 2014. They were referred to adjudication on July 26, 2012, and on March 5 and September 9, 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 Board to replace the former Public Service Labour Relations Board as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act*, No. 2 (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) before November 1, 2014, is to be taken up and continue under and in conformity with the *Public Service Labour Relations Act* as it is amended by sections 366 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[7] For the reasons that follow, I find that the deputy head demonstrated that the one-day suspension was not excessive in the circumstances. With respect to the monetary loss that the grievor suffered for an absence without authorization, I find that I do have jurisdiction to hear the related grievance as the denial of paid sick leave amounted to disguised discipline in this case.

[8] For reasons that will be discussed in the second part of this decision, I also find that the grievor established a *prima facie* case of discrimination. However, the employer provided a persuasive answer that it attempted to accommodate her needs before her return to work in March 2014 and that the delay that occurred implementing the accommodation is attributable to her.

[9] With respect to the grievance that relates to whether the employer failed to appropriately accommodate the grievor, I accept the parties' position that this grievance is moot because the grievor has returned to work.

II. Background

[10] The grievor worked in the employer's Immigration Law Division (ILD) and provided administrative assistance to its litigators from July 10, 2000, to November 7, 2011. The ILD is a very large division of the ORO. It comprises approximately 150 employees. It is fast-paced and has a high volume of motions and applications requiring quick turnaround times.

[11] In early 2011, the grievor received three different disciplinary actions as a result of a number of incidents that occurred in October and November 2010. One allegation was that she did not follow directions to attend training and left work without reporting her absence, another was that she was involved in a conflict with a colleague that included unwanted physical contact and inappropriate language. The third one does not form part of the issues referred to adjudication and is not before me.

[12] In addition, multiple issues arose with the grievor's work performance before she left the ILD for an extended sick leave. She was on a performance improvement plan (PIP) that set out the essential duties of her position, the standards expected, and the deficiencies. The PIP included training and meetings.

[13] On November 7, 2011, the grievor was informed by letter that an investigative interview would be held because she had allegedly been insubordinate on three occasions during discussions about her PIP. The next day, November 8, 2011, she was seen by her physician and was placed on medical leave. Her doctor saw her regularly after that, and her sick leave was extended.

[14] On July 26, 2012, the grievor referred two grievances (Board File Nos. 566-02-7312 and 7326) to adjudication pursuant to s. 209(1)(b) of the *Public Service Labour Relations Act* (*PSLRA*). The first grievance is about the one-day suspension that she received, and the other is about the monetary loss she suffered for the two-and-a-half hours that she was away from work.

[15] On January 31, 2013, the grievor's disability insurance (DI) plan benefits ended; they had begun in February of 2012.

[16] On March 20, 2013, the grievor visited her family physician and told him about her financial constraints. That day, her physician agreed that she could go back to work, but only under certain conditions, which were communicated to the employer on April 18, 2013. Her employer found that some of the conditions were unclear or seemed factually incorrect. Among the conditions were that the grievor not work in the ILD and with eight named lawyers, supervisors, or managers.

[17] As the employer suspected that the grievor's behaviour at work was a manifestation of a disability, it requested that she consent to undergo an

independent medical evaluation (IME). The IME's purpose was to provide the employer with an independent assessment of her fitness to work and any recommended workplace accommodations if she were deemed fit to work. The grievor refused to consent to undergo an IME. After several months of discussions between her representative and the employer's representative, on August 19, 2013, she signed consent forms to initiate a Health Canada fitness-to-work evaluation (FTWE).

[18] The grievor cancelled several appointments that Health Canada arranged.

[19] The FTWE report was issued on January 31, 2014. It included accommodation recommendations similar to those made by the grievor's physician. However, one recommendation appeared factually incorrect to the employer. It sought clarification on an expedited basis from the occupational health medical officer about the ambiguous recommendation.

[20] Health Canada issued its clarification on February 27, 2014.

[21] On March 5, 2014, and September 9, 2014, the grievor referred two additional grievances to adjudication (Board File Nos. 566-02-9621 and 9999), pursuant to s. 209(1)(a) of the *PSLRA*. In them, she alleges that the employer discriminated against her, contrary to article 19 of her collective agreement and the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*) and that it did not accommodate her appropriately. In her view, it should have accommodated her and authorized her return to work in March 2013.

[22] The grievor gave the appropriate notice to the Canadian Human Rights Commission, which notified this Board that it did not intend to make submissions on the matters.

III. Preliminary matters

A. Duty-to-accommodate grievance

[23] The parties agreed that the issue raised in the grievance in Board File No. 566-02-9999, i.e., whether the employer failed to accommodate the grievor as required by the collective agreement and the *CHRA*, is moot and that it should be dismissed because she has returned to work. Thus, it is not necessary to address this

grievance. The grievance is therefore dismissed.

B. Request to adjourn the hearing

[24] During the week of November 3, 2015, the grievor had difficulty with the hearing process, and she explained that she found it very hard to be in the same room as her supervisors, managers, and colleagues when they testified. The hearing was interrupted for several short breaks. At one point, her representative formally asked that I adjourn the hearing. As for the grievor, she wished to proceed. The deputy head and employer's counsel vehemently objected to adjourning the hearing.

[25] Both parties requested that my decision on the adjournment request be noted in the decision, which I am doing at this point. I denied the request but asked that an accommodation measure be put in place for the remainder of the week of November 3, 2015. A teleconference system was set up in the hearing room, and the grievor was provided with a choice: she could stay in the room to hear the witnesses testify, or she could follow their testimony from a different room. She chose the second option. She returned only when it was her turn to testify. For the week of May 2, 2016, she did not request any accommodation, and she was present in the hearing room while the deputy head and employer's witnesses testified.

IV. Issues

[26] The Board must decide the following issues:

1. Did the deputy head have cause for imposing a disciplinary action for the alleged prohibited behaviour at work, and was the one-day suspension excessive in the circumstances?

2. Does the Board have jurisdiction over the monetary loss that the grievor allegedly incurred as a result of a letter of discipline?

3. Did the employer discriminate against the grievor by refusing her treating physician's assessment that she was fit to return to work with accommodations? If so, what is the appropriate remedy?

V. Analysis

A. Did the deputy head have cause for imposing a disciplinary action for the alleged prohibited behaviour at work, and was the one-day suspension excessive in the circumstances?

[27] The grievor's first grievance concerns the letter of suspension dated February 16, 2011, which she received from Diane Dagenais, deputy regional director and senior counsel, ILD, ORO. The letter stated the reasons for imposing a one-day suspension. Part of the letter read as follows:

…

> *On November 4, 2010 you were involved in an incident with a colleague, which included unwelcome physical contact in the kitchen and the use of inappropriate language in the legal assistant's area on the 19th floor of the Immigration Law Division (ILD). You pushed your colleague to the side by moving into the area where she was standing at the sink in order to rinse your dish. You later referred to your colleague as being a "bitch", while speaking to another legal assistant in the open workplace environment of the legal assistant's area.*

…

[28] With respect to this disciplinary action imposed on the grievor, I must decide whether the deputy head had cause for imposing a disciplinary action for the alleged prohibited behaviour at work and whether the one-day suspension was excessive in the circumstances. The burden of proof rests on the deputy head to establish cause and that the one-day suspension was not excessive.

[29] The deputy head, relying on *Lachance v. Treasury Board (Agriculture Canada)*, PSSRB File No. 166-02-26840 (19960329), [1996] C.P.S.S.R.B. No. 26 (QL), *Focker v. Canada Revenue Agency*, 2008 PSLRB 7, *Burke v. Deputy Head (Department of National Defence)*, 2012 PSLRB 119, and *Mohan v. Canada Customs and Revenue Agency*, 2005 PSLRB 172, submits that the grievor's conduct warranted discipline and that the discipline imposed was appropriate and proportionate to the nature of the offence, given the aggravating and mitigating factors.

[30] On the other hand, the grievor submits that her conduct did not warrant discipline, highlighting that the facts of this grievance are not clear.

[31] Ms. Dagenais; Laura Soskin, legal assistant supervisor; Charlotte Dias, Holly Tang, and Geneviève Rondeau, legal assistants; and the grievor testified that on November 4, 2010, the grievor was involved in an incident with Ms. Dias.

[32] Ms. Dias alleged that the grievor had pushed her aside while she was washing her dishes in the kitchen and then had used the word "bitch" while referring to her in the legal assistants' area.

[33] This incident came to the deputy head's attention by virtue of Ms. Dias going to Lori Hendriks, the ILD's director, after it happened. Via email, Ms. Hendriks then asked Ms. Dagenais to look into the matter. Ms. Dagenais was the ILD's regional deputy director and the coordinator of its legal assistants at the time.

[34] On the same day, November 4, 2010, Ms. Dagenais asked Ms. Soskin for her assistance with this matter.

[35] At the hearing, Ms. Soskin confirmed that she was asked to speak to the legal assistants and gather all the information relevant to the November 4 incident. To obtain more information about it, on November 5, 2010, she spoke to Ms. Dias and other legal assistants whom she believed were present when the incident took place.

[36] Ms. Dias confirmed at the hearing that she spoke to Ms. Soskin on November 5. She told her that around 1:00 p.m., on November 4, 2010, she was in the small lunchroom by the assistants' area with Ms. Rondeau. She had just finished her lunch and was in the process of washing her dishes at the sink. She had already soaped her dishes when the grievor came into the lunchroom, put her lunch into the microwave, and pushed her to move into the space in front of the sink where Ms. Dias was standing. The grievor said to hurry up and wash her dishes as she was in a rush to eat and go over to reception. Ms. Dias told the grievor that she was almost done. According to Ms. Dias, the grievor said something like she "couldn't take this anymore".

[37] Ms. Dias explained that the grievor was on her right and that the grievor had pushed her to the side by moving into her space to wash her dish over that of Ms. Dias. Ms. Dias testified that the grievor said, in a very rude tone, words to the effect of: "Charlotte, I've had it with you, are you going to wash all the dishes in the sink? I'm in a rush and you should have got out of my way, I have to cover reception".

[38] Ms. Dias affirmed that she told the grievor that she needed to learn some manners. Ms. Dias picked up her Tupperware container and fork but left her cup in the sink because she was rushed. She walked out, back to her cubicle, while the grievor stayed at the sink and kept talking.

[39] Ms. Dias also said that she left the kitchen first and that the grievor left it a couple of minutes after she did. Ms. Dias testified that she saw the grievor pass by her cubicle on her way to her own cubicle. Ms. Dias then heard her talking to someone about what had happened in the kitchen. Ms. Dias heard the grievor saying the words, "that bitch", in reference to her. At that point, Ms. Dias walked to Ms. Hendriks' office, crying, and told her about the incident.

[40] Ms. Dias also explained that in the afternoon of November 4, 2010, Ms. Tang approached her and told her that the grievor had come to speak to her right after the incident. Ms. Tang told Ms. Dias that she did not want to be involved in the matter and that she was sorry for what happened.

[41] That same night, at approximately 1:30 a.m., Ms. Dias felt the need to speak to Ms. Soskin and left her a voicemail on her work telephone, telling her about the incident. The next morning, Ms. Dias spoke with Ms. Soskin on the telephone about what had happened in the kitchen and afterwards. She told Ms. Soskin that she felt harassed and bullied by the grievor.

[42] Ms. Tang also testified and confirmed that she spoke to Ms. Soskin on November 5. She told her that on November 4, she was at her desk at around 1:10 p.m. when the grievor walked back from the kitchen. The grievor appeared angry and stood at the divider between their two workstations. The grievor started telling her about how she needed to cover reception and how Ms. Dias was cleaning her dishes and would not let the grievor wash her dish. The grievor said that Ms. Dias was inconsiderate. The grievor continued talking about Ms. Dias and used the word, "bitch". Ms. Tang testified that she felt uncomfortable and that she was concerned that Ms. Dias would overhear the conversation because the legal assistants all sit together, and the grievor was loud because she was angry.

[43] Ms. Tang confirmed that she went to see Ms. Dias about an hour later and that she told her she was sorry and that she did not agree with the grievor. Ms. Tang said that Ms. Dias looked teary-eyed and upset.

[44] On Monday, November 8, Ms. Tang and another legal assistant spoke with the grievor, informing her about their conversations with Ms. Soskin on November 5. Ms. Tang informed the grievor that she told Ms. Soskin that they had had a conversation, and when Ms. Tang was asked whether the grievor had used the word "bitch" in relation to Ms. Dias, she answered that the grievor had done so.

[45] As for the grievor, she testified that Ms. Soskin did not speak to her on November 5, 2010. However, she sent Ms. Soskin an email on November 8 (the Monday after the Thursday incident) to provide her version of the events. She explained in her email and testified at the hearing that on November 4, she went to the kitchen to rinse a saucer to heat up one slice of pizza. She already had her saucer and her slice of pizza, which was wrapped in foil, when she entered the kitchen.

[46] After waiting for a moment standing on the left of Ms. Dias, the grievor asked her if she could rinse her saucer. She testified that Ms. Dias took her time washing her bowl, then took her time washing the cover of her bowl, and then took her time washing her cutlery, etc. According to the grievor's email and testimony, Ms. Dias had a smirk on her face while she deliberately took more time than necessary to wash her dishes. As the grievor did not have much time before she had to go cover reception, she put her saucer under the water to rinse it while Ms. Dias was still at the sink. In her view, Ms. Dias was not considerate enough to understand that she was in a rush.

[47] The grievor testified that she did not touch Ms. Dias. She insisted that she was able to rinse her dish without touching Ms. Dias. She insisted that she did not even brush against her. After she rinsed her saucer, she put her pizza on the plate, which she put in the microwave for 30 seconds. She also testified that she left the kitchen before Ms. Dias did.

[48] The grievor admitted conveying her feelings to Ms. Tang after the kitchen incident took place. She also admitted saying, "Charlotte was being a bitch". She explained that that is different than calling Ms. Dias a "bitch". At the hearing, the grievor recognized that using the word "bitch" in relation to someone in an open workplace environment is not professional. But she explained that she was speaking to a friend in confidence. She stated that she regretted that Ms. Tang told Ms. Soskin what she had said. She insisted that Ms. Tang betrayed her and that in the past, Ms. Tang had used vulgar language when speaking privately to her. When Ms. Tang was

asked about it at the hearing, she answered that she could not say she had never used such language in the past when speaking privately with the grievor, but she added that she did not typically do so. She explained that the grievor and her were friends and had confided in each other in the past.

[49] Following the incident, Ms. Dagenais launched an investigation. As part of it, more employees were interviewed, in addition to those listed earlier in this decision.

[50] Ms. Rondeau was one of the employees that Ms. Dagenais interviewed. She explained that she did not remember specifically discussing the incident with Ms. Soskin on November 5 but that when the investigation was launched, Ms. Dagenais interviewed her.

[51] She reported that at approximately 1:10 p.m. on November 4, she was sitting in the lunchroom with her back to the sink when she overheard the exchange between Ms. Dias and the grievor. Ms. Rondeau said that she heard the grievor come into the kitchen and that she then heard the fridge door open. She described what happened as the grievor "starting in" on Ms. Dias for being where she was. The grievor did not ask Ms. Dias to move; nor did she speak kindly or in a voice that one would expect in a work environment. She described the grievor's tone as bossy and combative and that she used words like: "Why do you have to be there?" and, "Shift over." According to Ms. Rondeau, Ms. Dias's response was calm in the circumstances; she stated that she would be done soon. Ms. Rondeau deliberately did not turn around because she said she would have told the grievor what she thought about what she was hearing, and she did not wish to escalate things.

[52] Ms. Rondeau heard Ms. Dias leave the kitchen first. Ms. Rondeau remembers that the grievor stayed at the sink for a short time, speaking angrily to herself, before leaving. Ms. Rondeau left about a minute later and went to her cubicle. She heard the grievor speaking at her workstation. She heard Ms. Tang's voice too but did not hear any specific words.

[53] Ms. Rondeau testified that the legal assistants usually cooperate well, which creates a good atmosphere and good working relationships. The only clash that she has experienced at the office was this one. Ms. Rondeau added that half an hour after the kitchen incident, she saw Ms. Dias at the photocopier. She recommended to Ms. Dias that she ignore the grievor. After the incident, the grievor stopped speaking to

Ms. Rondeau.

[54] On November 26, 2010, Ms. Dagenais held an interview with the grievor and her bargaining agent representative to address the incident of November 4 and other matters. After the interview, the grievor sent Ms. Dagenais two emails dated November 26, 2010, in which she again denied touching Ms. Dias and claimed that she asked Ms. Dias more than once if she could use the sink to rinse her saucer.

[55] On January 19, 2011, the grievor was provided with a copy of the fact-finding report prepared by Ms. Dagenais and an opportunity to respond to it. The grievor provided her response on February 3, 2011.

[56] The grievor, in her response, made allegations of bias against Ms. Dagenais and allegations that inappropriate language and detrimental remarks about co-workers were common place in ILD. She recognized that using the word "bitch" in reference to Ms. Dias was not "the best word to use". However, in her view, Ms. Dias deserved it. The grievor portrayed Ms. Dias as a liar. She also made several allegations of wrongdoing on the part of Ms. Dias. She stated that as far as she is concerned, she did nothing wrong, and that she is a person of good character who keeps what others tell her to herself.

[57] In her response, the grievor also made an important number of allegations against Ms. Tang, whom she believes betrayed her by denouncing her. While she wrote that her intention was not to "bash" Ms. Tang, she put great effort into discrediting Ms. Tang by describing several events in which she believes Ms. Tang committed wrongs.

[58] The grievor also wrote in her response that Ms. Rondeau's version of what occurred "is not facts [*sic*]". She emphasized at the hearing that Ms. Dias's and Ms. Rondeau's versions of events are not credible because they contradict her version. For example, the grievor insisted that she left the kitchen long before Ms. Dias did. On the other hand, Ms. Dias and Ms. Rondeau stated that Ms. Dias left the kitchen first, the grievor second, and Ms. Rondeau third.

[59] The grievor also testified that Ms. Rondeau could not have heard her speaking angrily at the sink after Ms. Dias left because she had left before Ms. Dias. She maintained that she is the only one speaking the truth, while all the others are lying.

She insisted that what the others have been saying is all fabrications and speculations.

[60] Ms. Soskin was questioned about the department's rules of conduct and about whether they have been uniformly enforced. Ms. Soskin answered that in February of 2011, it was brought to her attention that the grievor had reported in her response to the fact-finding report that Ms. Tang had used inappropriate language in the workplace. Ms. Soskin explained that she discussed the matter with Ms. Tang, who did not remember using such language. However, Ms. Soskin conveyed the need to be aware of the language used in the workplace at the next legal assistants' meeting. Ms. Soskin also informed the grievor on several occasions that if she was uncomfortable by the language a co-worker used, she was encouraged to let the co-worker know, and if necessary, to report it to her. When asked at the hearing if a different standard was set for the grievor for workplace language, Ms. Soskin answered that her intention was to treat all the assistants as equally and as fairly as possible. She also recognized that each situation is different and needs to be examined with that in mind.

[61] Based on emails filed in evidence, the grievor continued to complain about the language her co-workers used but never provided Ms. Soskin with the names of those who, in her view, used profane language in the workplace.

[62] On February 16, 2011, in her final report, Ms. Dagenais found that the allegation of prohibited behaviour at work was founded. She considered the grievor's suggestion that both Ms. Dias and Ms. Rondeau were lying. However, she saw no reason to disbelieve both Ms. Dias's and Ms. Rondeau's evidence. Therefore, she concluded that the grievor's unwelcome physical contact with Ms. Dias at the kitchen sink and inappropriate language later in the legal assistant's area constituted serious misconduct that was contrary to the departmental policy entitled *Towards a Workplace Free of Conflict and Harassment*. Thus, the deputy head imposed a one-day suspension on the grievor for a breach of the departmental policy.

[63] At the hearing, Ms. Soskin testified that the grievor was aware of the departmental policy as on October 19, 2010, the grievor attended training on the subject of conflicts and harassment in the workplace. The reason the grievor was asked to attend this training was that she was often in conflict with others, including

the persons she reported to. Ms. Soskin explained that she had also observed during meetings with the grievor that she could benefit from training on the subject of bullying.

[64] The grievor stressed, at the hearing, that the facts are not clear with respect to this grievance. On one hand, the grievor affirmed that she walked into the kitchen that day carrying a slice of pizza and a saucer that she kept at her desk. She explained that she did not need to get her lunch from the fridge because she already had it with her. She testified that she simply needed to rinse her saucer before heating her pizza in the microwave.

[65] On the other hand, Ms. Dias testified that the grievor came into the kitchen and put her lunch into the microwave. Then, according to her, the grievor walked to the sink to rinse her saucer. Ms. Rondeau testified that she heard the grievor walk into the kitchen and to the fridge to get her lunch before putting it into the microwave. Next, the grievor walked to the sink to rinse her saucer. Therefore, Ms. Dias and Ms. Rondeau provided similar, but not identical, versions of the sequence of the events, which differ completely from the grievor's.

[66] The grievor also highlighted another contradiction in the evidence, which is where the grievor stood to rinse her saucer. Ms. Dias affirmed that the grievor stood on her right and pushed her to the side by moving into her space to wash her dish over hers. On the other hand, the grievor affirmed that she stood on Ms. Dias's left and that she did not push her. The grievor stated that she had been in a rush but that she had not been aggressive.

[67] For the following reasons, I find that the deputy head has established that it had cause to impose discipline and that the disciplinary action was not excessive in the circumstances.

[68] With respect to the kitchen incident, I find there are essentially two versions of the events: the grievor's and Ms. Dias's, which is supported by Ms. Rondeau's version. Consequently, as submitted by the parties, I must establish which version is the more credible.

[69] To that end, the employer referred me to the decision of the British Columbia Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354. Based on it, I must

determine which version is in most "… 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."

[70] In sum, I must determine which version is more probable, in light of the rest of the evidence before me. On one side, the grievor's version is that she did not push Ms. Dias, and on the other side, Ms. Dias's version, which is supported by Ms. Rondeau's version, is that the grievor's conduct was abusive. Specifically, in her statement to the investigator, Ms. Dias stated as follows: "[the grievor] pushed me by moving into my space".

[71] The grievor cited the case of *Hotel and Club Employees' Union, Local 299 v. Sheraton Ltd.* (1980), 26 L.A.C. (2d) 122, in which a board of arbitration found that when they are unable to determine which of two witnesses is more credible, the impasse may be resolved by applying the onus of proof. As the onus is on the deputy head to prove that discipline was for just cause, according to the grievor, the Board could find that the grievor was not disciplined for just cause.

[72] However, having considered all the evidence, I find that Ms. Dias and Ms. Rondeau provided a more plausible explanation of the events than the grievor did. Taking into consideration *Faryna*, their version of the facts is more consistent with the evidence as a whole.

[73] I note that the kitchen incident took place four years before the hearing, and it is possible that the witnesses' memories are failing. In particular, there is contradictory evidence with respect to the sequence of the events — it is not clear whether the grievor entered the kitchen that day and walked first to the fridge, the microwave, or the sink. There is also contradictory evidence with respect to the grievor's location while she rinsed her saucer — it is not clear whether she stood on Ms. Dias's right or left.

[74] Regardless, on the balance of probabilities, I accept Ms. Dias' evidence that the grievor pushed her by moving into her space at the sink in the kitchen. This caused the unwelcome physical contact, while the grievor rinsed her dish on top of Ms. Dias's dishes.

[75] With respect to the cubicle conversation, it is not disputed that the grievor

used the word "bitch" when referring to Ms. Dias. The grievor recognized that she said that Ms. Dias was being a "bitch". However, in her view, Ms. Dias deserved it, and the grievor did not express any regret or apologize for using such language. Therefore, I am satisfied that the grievor made the alleged offensive remark about Ms. Dias in the legal assistants' area.

[76] The deputy head disciplined the grievor for a breach of the departmental policy entitled, *Towards a Workplace Free of Conflict and Harassment*. It was of the view that departmental employees are required to adhere to the policy and to display, at all times, a professional and respectful attitude and behavior toward all other employees. The deputy head was also of the view that the grievor ought to have known that her behavior and comment would demean, belittle, and cause personal humiliation to her colleague. The grievor did not dispute that she had knowledge of the departmental policy. In particular, she had received training on October 19, 2010, on the subject of workplace bullying.

[77] The policy provides the setting for a workplace that is free of conflict and harassment. Having considered the evidence before me, I am satisfied on the balance of probabilities that the grievor's behavior towards Ms. Dias at the kitchen sink and language later in the legal assistants' area constituted offensive conduct contrary to the policy. Therefore, I find that the deputy head had cause for imposing a disciplinary action.

[78] With respect to the one-day suspension, the grievor submits that it was excessive. She recognized in her written response and at the hearing that using the word "bitch" after the kitchen incident in reference to Ms. Dias was not "the best word to use". However, she argues that that situation is similar to the one in *Canadian Union of Public Employees, Local 2101 v. Sheridan Villa Home for the Aged* (1996), 57 L.A.C. (4th) 141. In that case, a board of arbitration found that discharge was excessive as the conversation at issue was essentially private, between two employees, in which one employee was expressing how upset she was. The board of arbitration noted that although others overheard, nothing suggested that the grievor intended anyone else to hear what she said. It was simply an unfortunate and regrettable incident. In the circumstances, the board questioned the appropriateness of the penalty as follows at pages 144 and 145:

…

> *While we understand the Employer's concern about the language its employees use when residents or their families can overhear, and while we understand the Employer's concern that neither its employees nor its supervisors be subjected to abusive or harassing behavior, we consider that this is an instance where the Employer has overreacted. As we have already noted, this was essentially a private conversation between the grievor and another employee, in which the grievor was expressing how upset she was in very graphic terms. Although others overheard, there is nothing to suggest that the grievor intended anyone else to hear what she said. It was simply an unfortunate and regrettable incident.*
>
> *It is our view that this matter would have been better and more effectively dealt with had the grievor been reminded that when private conversations are held in public places where residents and others may hear what is being said, discretion should be used to ensure that offensive language is not used and that others cannot overhear what is being said. In our view, at most this incident would merit a warning of that sort, even given the grievor's past record.*

…

[79] The grievor argues that her use of the word "bitch" did not warrant a suspension as it was used in her private conversation with Ms. Tang. A warning would have been more appropriate.

[80] In addition, the grievor argues that when deciding whether to mitigate the disciplinary action imposed, the Board should consider the 10 factors elaborated in *United Steelworkers of America, Local 3257 v. Steel Equipment Co.* (1964), 14 L.A.C. 356 at 357 and 358. These factors include, among others, the employee's good record and long service. In addition, the grievor emphasized that factors 5 and 7, which read as follows, are applicable to this case:

> *5. Whether the offence was committed on the spur of the moment as a result of a momentary aberration, due to strong emotional impulses, or whether the offence was premeditated ….*
>
> …
>
> *7. Evidence that the company rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination ….*

[81] The grievor stressed that she used the term in question on the spur of the moment as she was very upset. She also maintained that there was evidence that vulgar language had been used in the past, without repercussions. In her response to the fact-finding report in February 2011, for example, she reported that Ms. Tang had used inappropriate language in the workplace when speaking to her.

[82] The deputy head submitted that the two cases raised by the grievor can be distinguished. In particular, the deputy head maintained that in addition to expressing how upset she was to a colleague, the grievor also said bad things about Ms. Dias, and others heard her used the word "bitch" in relation to her. The deputy head also maintained that the departmental policy *Towards a Workplace Free of Conflict and Harassment* had been uniformly applied.

[83] Having considered the evidence and arguments submitted by both sides on whether the disciplinary action imposed was excessive, I find that the one-day suspension without pay was not excessive, for the following reasons.

[84] To start, the evidence does not support a finding that the departmental policy *Towards a Workplace Free of Conflict and Harassment* was not applied uniformly. According to Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, at 7:4414, similar cases must receive similar treatment, which is "… a universal precept of fairness and justice that has always been recognized in arbitration law." However, in the present case, the evidence does not show that the deputy head violated this principle by disciplining the grievor while not disciplining other co-workers for the same actions.

[85] After the grievor complained in her response to the fact-finding report in February 2011 that a co-worker, Ms. Tang, had used inappropriate language in the workplace, Ms. Soskin questioned Ms. Tang. However, Ms. Tang informed Ms. Soskin that she did not remember saying openly bad things about a colleague. While she stated at the hearing that it was possible that she had used improper language in the past when speaking privately with the grievor, she did not typically do so. She explained that the grievor had been her friend and that they had confided in each other in the past. Ms. Soskin thus asked Ms. Tang to be mindful of her language.

[86] After that, during a legal assistants' meeting, Ms. Soskin reminded the legal assistants of the importance of using proper language in the workplace. Afterward,

Ms. Soskin was not provided with the names of employees who would have used improper language in the workplace.

[87] Then, in March of 2011, when the grievor complained again that another co-worker, whom she did not identify, had used inappropriate language in the workplace, Ms. Soskin responded to the grievor by email dated March 3, 2011. Ms. Soskin informed her that if the language a co-worker used made her uncomfortable, she was encouraged to let the co-worker know, and if necessary, report it to her. The grievor, on the other hand, did not get back to Ms. Soskin.

[88] Finally, in September and October 2011, the grievor raised with Ms. Soskin, again, the matter of the language used in the workplace. In her view, some people still used profane language. Ms. Soskin asked the grievor to tell her specifically who these people were so that she could speak with them directly. However, the grievor did not provide names.

[89] In the circumstances, the evidence does not support a finding that the departmental policy was not applied uniformly or that the employer disciplined the grievor while not disciplining other co-workers for similar actions. Firstly, Ms. Soskin addressed the grievor's allegation that Ms. Tang had used inappropriate language when speaking with the grievor in the past. However, Ms. Tang did not recall using improper language to refer to another colleague in an open workplace environment; she recalled confiding to her friend, the grievor, only in the context of private discussions. In the circumstances, Ms. Soskin did not have any substantial evidence that Ms. Tang had used improper language openly to refer to other colleagues. Secondly, Ms. Soskin was not provided with the names of other co-workers who would have openly used profane language. In any case, to foster a workplace that is respectful of others, Ms. Soskin reminded all the legal assistants about the need to be aware of the language used in the workplace.

[90] Likewise, I have reviewed the case of *Canadian Union of Public Employees, Local 2101*, cited by the grievor for guidance. In my view, it can be readily distinguished. The board of adjudication in that case found that the discharge imposed was excessive for several reasons, one being that the offensive remarks were not directed towards another employee. However, in this case, they were.

[91] The grievor's actions were out of character, but she refuses to take

responsibility for them, and she continues to deny that she did anything wrong. Instead, she blames others for her misbehavior. There is no indication that a lesser disciplinary action would deter her from repeating such actions. Given those facts, I believe the employer's response of issuing a one-day suspension was not excessive.

B. Does the Board have jurisdiction over the monetary loss that the grievor allegedly incurred as a result of a letter of discipline?

[92] The grievor's second grievance concerns a monetary loss that she allegedly suffered as a result of a letter of discipline. She received a letter of reprimand on February 16, 2011, for insubordination in relation to some unauthorized absences. The letter of reprimand, signed by Ms. Dagenais, included the following:

…

> *On November 16, 2010 you attended the morning portion of the Diversity Awareness Forum which was held off-site. However you did not return after lunch for the afternoon portion. During the lunch break, you went home without notifying your supervisor, who was present at the training, nor someone else in authority. Your explanation that you felt sick and that nobody was present at the time you decided to leave does not excuse your failure to notify someone in authority when you arrived home.*

…

[93] The letter also specified that the reprimand was issued to impress upon the grievor the seriousness of her disregard for the employer's direction and authority. The letter did not mention that she would not be paid for the hours she was absent without authorization on November 16, 2011.

[94] The grievor requested the following relief with respect to that letter:

> 1. *That the above-noted letter of discipline is removed from my file and all copies be destroyed in my presence and in my union representative's presence.*
>
> 2. *That all mention of discipline regarding this situation be removed from my file.*
>
> 3. *That I be reimbursed for a half day of pay deducted, and that instead, I be allowed to claim sick leave on Peoplesoft for a half day re my absence in the afternoon of November 16, 2010.*

4. That I be made whole.

[95] In general, with respect to disciplinary actions, the deputy head's burden is to establish on a balance of probabilities a cause to impose discipline and that the disciplinary action was not excessive in the circumstances. However, in this case, it argues that I do not have jurisdiction to hear this grievance because it does not fall under s. 209(1)(b) of the *PSLRA*, which requires that the grievance be related to a disciplinary action that resulted in a termination, demotion, suspension, or financial penalty. The deputy head argues that not paying the grievor for the two-and-a-half hours that she did not work was not disciplinary but administrative. Consequently, the grievance should be dismissed for lack of jurisdiction.

[96] The deputy head further argues that the grievor has the burden of proving on a balance of probabilities that the deputy head did impose discipline through its letter of February 16, 2011, which resulted in a termination of employment, demotion, suspension, or financial penalty. Only in that case would the nature of the discipline qualify it as an appropriate matter for a reference to adjudication under s. 209(1)(b) of the *PSLRA*.

[97] Thus, the onus is on the grievor to establish her allegation that the deputy head's decision to deny her request for paid sick leave for the afternoon of November 16, 2010, was a disguised disciplinary action.

[98] The grievor, Ms. Dagenais, and Ms. Soskin testified about this grievance. The evidence adduced for this purpose shows that on February 16, 2011, the grievor received a letter of reprimand for two reasons: insubordination and an absence without authorization on November 16, 2010. She was not paid for the hours that she was absent without authorization on November 16, 2010, which she grieved. The insubordination was about an allegation that on October 19, 2010, she did not attend the full information session that Ms. Soskin and Ms. Dagenais had directed her to attend.

[99] On November 16, 2010, the grievor was scheduled to attend the Diversity Awareness Forum. She attended in the morning but did not return after lunch when it resumed at around 1:15 p.m.

[100] During the interview Ms. Dagenais held with the grievor and her representative

on November 26, 2010, the absence without authorization was addressed. The grievor responded to Ms. Dagenais' fact-finding report on February 3, 2011. In her response, she wrote that on the day of the training, she started feeling ill because of some of the things she heard at the session. She disagreed with a speaker who said the Department was a good place to work for single mothers. In her response to the fact-finding report, the grievor wrote the following:

…

> *69. … one of the main speakers was saying thing* [sic] *that was not true, which I believe contributed to my not feeling well…. I felt that his comment was very offensive. It was an insult to me because my life has been a living hell working here. I really felt that my blood pressure was elevating. To secure my health, I left the forum.…*
>
> *70. The following morning as I came in to work I was approached by* [Ms. Soskin] *who asked for a meeting with me….*

…

[101] The grievor testified that she felt insulted by what she heard at the forum. She testified that the Department of Justice treated her like dirt. She explained that for example, she had to sign in and out when she came in or left because she had been reprimanded in the past for lateness. She stressed that working for the department has caused her a great deal of anxiety. Thus, what she heard at the forum made her feel unwell, and she decided to leave. She was not familiar with anyone at the forum at the time she left. For that reason, she did not advise anyone that she was leaving. However, she testified that she was almost certain that on her way home, she left Ms. Soskin a message.

[102] Ms. Soskin was present at the training but left for lunch at approximately 12:35 p.m. She testified that the grievor did not inform her or anyone else at the training that she was leaving; nor did she leave her or anyone else at the office a message.

[103] Ms. Soskin explained that in the afternoon of November 16, Ms. Dagenais sent her an email to ask her how the forum was going. An exchange of emails between them followed after Ms. Soskin informed Ms. Dagenais that the grievor had not

returned after lunch. Ms. Dagenais checked the grievor's cubicle and asked two of her immediate supervisors if they had seen her. No one had seen or heard from her. Ms. Dagenais also testified that she received no message from the grievor.

[104] The day following the training, Ms. Soskin met with the grievor about her absence. She informed Ms. Soskin that she had gone home the day before during the lunch break. When she said that she would put the time into PeopleSoft for her absence, Ms. Soskin said that she would have to get back to her after following up with her manager, Ms. Dagenais.

[105] At the hearing, Ms. Soskin insisted that when the two of them met to discuss the grievor's absence, the grievor did not mention to her that she had left her a message. Ms. Soskin prepared a note summarizing their conversation right after their discussion, and nowhere does the note mention that the grievor left Ms. Soskin a message. It can also be noted that in the grievor's response to the fact-finding report, she does not mention leaving Ms. Soskin a message or advising anyone of her departure and the reason for it.

[106] On February 16, 2011, Ms. Dagenais found that the allegation of being absent without authorization was founded. She noted that she considered the grievor's explanation for leaving and found that she ought to have known that she could not leave work at lunch, even if she felt sick, without notifying her supervisor or someone else in authority.

[107] At the hearing, Ms. Dagenais added that the reason the deputy head did not allow the grievor to avail herself of sick leave for that afternoon is that she did not believe the grievor was too sick either to let anyone know that she was leaving or to call her supervisor when she arrived home. The grievor's comments were that what she heard at the session had "made her sick". In other words, Ms. Dagenais did not believe the grievor had experienced a serious illness or some other personal emergency that had precluded her from advising a member of management that she was leaving the session, which is why the grievor was provided with the letter of reprimand.

[108] The grievor contends that not granting her application for paid sick leave was disguised discipline. According to her, not paying her amounted to a "financial penalty". She maintains that there is a direct connection between reprimanding her

for leaving the training session without notifying management and not granting her paid sick leave. She further maintains that she was disciplined for the same action for which she was reprimanded (leaving the training session without notifying management). According to her, she was disciplined for being sick. She confirmed that the grievance is not about the reprimand that she received for insubordination.

[109] The deputy head submitted that it has the right not to pay an employee for work that was not performed, citing *Canadian Labour Arbitration* at 8:1420 as follows:

…

> *The principle that an employer may not withhold wages fairly earned does not, however, require that it must pay for work which was not performed. In the absence of a provision in the agreement to the contrary, employers have, for example, been allowed to deduct an amount from an employee's regular wages for the time missed by reason of illness or a snowstorm, although the rule may be otherwise if an employee is late ….*

…

[110] The deputy head argues that in this case, there was no disciplinary action resulting in a financial penalty. Rather, the evidence establishes that the grievor lost two-and-a-half hours of pay because she did not work. The deputy head argues that the case law supports the contention that a decision not to pay an employee for hours not worked does not, on its own, reflect disciplinary intent. (See *Purtell v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 15; *Ho v. Deputy Head (Department of National Defence)*, 2013 PSLRB 114; *Rogers v. Canada Revenue Agency*, 2010 FCA 116; *Canada (Attorney General) v. Basra*, 2008 FC 606; and *Canada (Attorney General) v. Frazee*, 2007 FC 1176).

[111] On the other hand, the grievor submits that the real issue is why she left the training. According to her, the issue is not whether she should have given notice that she was leaving. Relying on *Buckwheat v. Treasury Board (Canada Border Services Agency)*, 2009 PSLRB 156, she argues that the deputy head was required to have some evidence that she was not sick to justify imposing discipline. She submits that it has not met its burden of proof and that therefore it did not have just cause to impose the disciplinary action resulting, in this case, in a financial penalty.

[112] I must decide whether the denial of sick leave was a disguised disciplinary action. The onus is on the grievor to prove this allegation.

[113] For the following reasons, I find that this grievance does fall under s. 209(1)(b) of the *PSLRA* and that the Board has jurisdiction to deal with it. The essential facts and considerations leading to my conclusion can be summarized as follows.

[114] It is widely accepted that a decision maker can look behind the employer's reasons when determining whether discipline occurred (See *Frazee*, at paras. 19 and 23, and *Legere v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 70 at para. 55). As stated in *Frazee* (at paragraph 19), an employer's stated intention is not necessarily determinative, and decision makers may have to consider whether an apparent administrative action is in fact disguised discipline. This involves assessing all the surrounding facts and circumstances (see *Canada (Attorney General) v. Grover*, 2007 FC 28).

[115] In this case, I note that the February 16, 2011, letter of reprimand itself does not spell out intent by the deputy head to impose a financial penalty on the grievor. However, a disguised disciplinary action will not be spelled out in official correspondence. It will be suggested by circumstantial evidence.

[116] The issue is whether the denial of paid sick leave was tantamount to disciplinary action in this case. Was the grievor's sick leave denied to punish her?

[117] The grievor is entitled to paid sick leave unless the deputy head considers the application for sick leave not true. Section 35.02 of the applicable collective agreement states that an employee shall be granted sick leave with pay when he or she is unable to perform his or her duties because of illness or injury provided that (a) he or she satisfies the employer of this condition in such a manner and at such time as may be determined by the employer, and (b), he or she has the necessary leave credits.

[118] No evidence has been produced in this case to establish that pre-authorization was required of employees before they went home sick.

[119] However, the grievor established that she experienced an illness that made her unable to perform her duties. She also established that she was denied paid sick leave and that, as a result, she suffered a financial loss.

[120] Ms. Dagenais stated that she was not satisfied that the grievor experienced a serious illness that precluded her from advising a member of management that she was leaving. However, the only requirement for sick leave is to be unable to perform duties. If in this case the deputy head did not believe that the grievor was unable to perform her duties, it could have asked for a medical certificate, but it did not.

[121] For these reasons, I find that the grievor has established that the denial of paid sick leave was imposed as a means of discipline.

[122] In the circumstances, the Board does have jurisdiction to hear this grievance as a disciplinary action resulting in a financial penalty was imposed and the subject matter of the grievance does fall within the ambit of s. 209(1)(b) of the *PSLRA*. I find that the denial of paid sick leave was disguised disciplinary action in the circumstances of this case.

C. Did the employer discriminate against the grievor by refusing her treating physician's assessment that she was fit to return to work with accommodations? If so, what is the appropriate remedy?

[123] In this grievance, the grievor alleges that the employer refused to allow her to return to work after her extended absence and thus discriminated against her, in violation of article 19 of the collective agreement and the *CHRA*. It took the employer approximately a year to accept her back to work after she was declared fit to return to work, with accommodations.

[124] In her grievance filed on June 13, 2013, the grievor requests the following relief:

> *That my employer respects my Collective Agreement in its entirety. That my employer cease discriminating against me immediately and provide me with the requested accommodation up to under hardship. That I be reinstated without loss of pay and benefits from March 22, 2013, where the Employer became aware of my doctor's letter of accommodation, and that I be made whole. That immediate joint consultation between by union representative, the Employer, and myself occur to establish accommodation measures as per my needs outlined by my physician. That this grievance will not prejudice me in any future dealings with the employer. That I be compensated by the employer in the amount of $50,000.00 for pain and suffering, psychological, and physical damages I have suffered, and will continue to suffer in an ongoing manner due to my*

> *Employer's neglect. That any tax implication resulting from this grievance be the responsibility of the employer.*
>
> [*Sic* throughout]

[125] Article 19 of the collective agreement provides that there shall be no discrimination exercised or practiced with respect to an employee by reason of mental or physical disability, among other grounds.

[126] According to s. 226(2)(a) of the *PSLRA*, the Board may, in relation to any matter referred to adjudication, interpret and apply the *CHRA* (other than its provisions relating to equal pay for work of equal value), whether or not there is a conflict between the *CHRA* and the collective agreement, if any.

[127] Section 7 of the *CHRA* provides that it is a discriminatory practice, in the course of employment, to differentiate adversely in relation to an employee on a prohibited ground of discrimination. Disability is a prohibited ground of discrimination (s. 3(1) of the *CHRA*). Section 25 of the *CHRA* defines "disability" as any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug.

[128] 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, 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 employer (see *Ont. Human Rights Comm. v. Simpsons Sears*, [1985] 2 S.C.R. 536 at 558 and 559). The Board cannot consider the employer's answer before determining whether a *prima facie* case of discrimination has been established (see *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204 at para. 22).

[129] An employer faced with a *prima facie* case can avoid an adverse finding by calling evidence to provide a reasonable explanation that shows its actions were in fact not discriminatory or by establishing a statutory defence that justifies the discrimination (*A.B. v. Eazy Express Inc.*, 2014 CHRT 35 at para. 13). If a reasonable explanation is given, it is up to the grievor to demonstrate that it is merely a pretext for discrimination (see *Maillet v. Canada (Attorney General),* 2005 CHRT 48 at para. 6).

[130] It is not necessary that discriminatory considerations be the sole reason for

the actions at issue for the discrimination claim to be substantiated. The grievor need only show that discrimination is one of the factors in the employer's decision (see *Holden v. C.N.R.* (1990), 112 N.R. 395 (F.C.A.) at para. 7). The standard of proof in discrimination cases is the civil standard of the balance of probabilities (see *PSAC v. Canada*, [1996] 3 F.C. 789 (C.A.)).

[131] The grievor, Janet Hauck, the grievor's union representative, Dr. Andrew Lam, Dr. Bonnie MacDonald, Mses. Dagenais and Hendriks, Lisa McNulty, the ORO HR regional director, and Amisha Modi, a labour relations officer, testified about this grievance.

1. Did the grievor establish a *prima facie* case of discrimination?

[132] For the reasons set out later, I find that the grievor has established a *prima facie* case of discrimination.

[133] The grievor explained that in addition to having a stressful job in the ILD, she was continuously summoned to attend investigative meetings, which affected her health. She felt stressed, harassed, bullied, intimidated, isolated, and discriminated against.

[134] On November 7, 2011, she was informed by letter that another investigative interview would be held on November 9 because she had allegedly been insubordinate on three occasions during discussions of her PIP.

[135] On November 8, 2011, she consulted her family doctor, Dr. Lam, who placed her on medical leave for two weeks. He recommended that she remain away from work for that time due to "job-related stress", among other reasons.

[136] There is no dispute between the parties that the grievor had a disability.

[137] The grievor consulted her doctor on several occasions over the following years, and her leave was extended for additional periods until she returned to work in March 2014.

[138] On November 18, 2011, Dr. Lam filled a Service Canada form to help the grievor obtain Employment Insurance sickness benefits. On the form, he indicated that the grievor was indefinitely incapable of working.

[139] On November 21, 2011, the grievor received a package in her mailbox that contained two letters from Ms. Dagenais. The grievor testified that the letters made her feel unsafe. She felt she should not be disturbed at home.

[140] On January 19, 2012, Dr. Lam referred the grievor to the Anxiety Disorders Program at the Credit Valley Hospital.

[141] The grievor met with Dr. MacDonald, a psychologist working at the Credit Valley Hospital, on September 10, 2012. Dr. MacDonald practices in clinical neuropsychology and clinical psychology for adults. The grievor returned for a follow-up visit with Dr. MacDonald on September 17, 2012.

[142] At the hearing, Dr. MacDonald confirmed that the grievor's symptoms were consistent with situational stress. In her report dated October 1, 2012, she noted the following:

…

> *It is also recommended that for a successful re-integration* [*sic*] *into the workplace, that Ms. Layne be placed in a similar position but in a different work setting or environment, in order to reduce the interpersonal stress of her current position. In my opinion, she is psychological* [*sic*] *disabled from returning to her current work position at this time, based on her psychological presentation.*

[143] Dr. MacDonald also recommended that the grievor be referred to the Mental Health Intervention Clinic.

[144] On January 31, 2013, the grievor's DI benefits ended; they had started in February of 2012.

[145] On March 20, 2013, the grievor visited her family physician and told him about her financial constraints. That day, after discussing her panic triggers at work, Dr. Lam agreed that she could go back to work, but with certain conditions. One was that she "[m]ust not work in Immigration or Tax section…" Another condition was that she "[m]ust not work with or under" eight specifically named ORO employees. Dr. Lam also provided clarifications to these conditions in a form that he completed and sent to the employer.

[146] This information was communicated to the employer on April 18, 2013.

[147] The employer did not understand why the grievor could not work with or under the eight ORO employees specifically named in the note. She had worked for most of these individuals, who were in management positions, in the previous 12 years. Thus, the employer requested that the grievor consent to undergo an IME. The letter sent to her mentioned that the purpose of the evaluation was to provide the employer with an independent assessment of her fitness to work and any recommended workplace accommodations if she were deemed fit to work.

[148] The grievor refused to consent to undergo an IME because, in her view, it was contrary to normal practice. When an employer needs additional information to successfully accommodate an employee, the approach suggested in the Treasury Board of Canada tool entitled, *Handling Disability Management Cases - Medical Assessment* is to follow up with the employee's medical practitioner.

[149] After the union and employer representatives had many discussions, the union representative informed the employer that the grievor was willing to undergo an FTWE. She then submitted the signed consent forms necessary to initiate the FTWE in August 2013.

[150] For many reasons, the grievor did not show up for a first appointment and cancelled several other appointments that Health Canada had arranged. On one hand, she explained that she might not have been informed of them. On the other hand, she explained that she feared for her life and that she felt she could be hurt during the examination. She feared she could receive a drug injection and that she could die. She requested to be put on travel status while she attended the appointments to protect her child in case something went wrong. However, the employer informed her that that was impossible. She attended Health Canada appointments on November 22, and December 3, 2013.

[151] When the Health Canada report was issued on January 31, 2014, it included two accommodation recommendations similar to those that the grievor's physician had made. However, the employer sought further clarification from the Occupational Health Medical Officer at Health Canada, and the clarifications were provided on February 27, 2014. The employer received them on March 3, 2014.

[152] On March 4, 2014, the grievor was back on the payroll, and she was back in the office on March 18, 2014. She now works as a legal assistant in the Business,

Regulatory and Extradition Law Division.

[153] The grievor asks for the payment of her salary from March 22, 2013, which is when she alleges that the union communicated to the employer that her doctor agreed that she could go back to work, under certain conditions, to March 3, 2014, which is the day before she was back on the payroll.

[154] Applying the *Simpsons Sears* test, I find that the grievor's evidence, if believed, would be complete and sufficient to justify a finding in her favour in the absence of an answer from the employer. It is not contested that she was disabled, and her evidence shows that in March 2013, her physician recommended that she go back to work but only with certain conditions. However, only a year later did the employer allow her return to work. During that time, she did not receive her salary. Accordingly, she has established on a *prima facie* basis that she was adversely differentiated in her employment on the basis of her disability.

[155] I note that the grievor also testified that there was nothing wrong with her work before she left on medical leave and that the employer putting her on a PIP was discriminatory. However, she has not established that there was nothing wrong with her work before she left on medical leave. As a result, I find that the grievor's evidence does not establish a *prima facie* case of discrimination with respect to this allegation.

[156] Similarly, the grievor claims that she received differential treatment for her "Performance Review and Employee Appraisal" (PREA) for 2011-2012. She explained that the practice was that the legal assistants met with their lawyers about their PREAs. However, no meeting was held between her lawyers and her on this subject in April 2011. I find that there is no link between this alleged missed meeting in April 2011 and the fact that the employer did not accept her back at work in March of 2013. Therefore, I find that the grievor has also not established a *prima facie* case of discrimination with respect to this allegation.

2. <u>Did the employer provide a reasonable non-discriminatory explanation?</u>

[157] I find that the employer has provided a persuasive answer to the grievor's *prima facie* case; namely, that in fact it attempted to accommodate her needs before her return to work in March 2014 and that the delay that occurred with

implementing the accommodation is attributable to her.

[158] The reasonable explanation provided by the employer is based on the following facts.

[159] The grievor was repeatedly in conflict with others, including the persons she reported to. The evidence that was filed shows that, for example, she was very disrespectful and rude towards Ms. Soskin and Ms. Dagenais, who managed her work before she left on medical leave. The grievor's relationships with the other persons she reported to in previous years were also strained. She continuously made serious accusations that her supervisors and managers and the lawyers she worked for harassed her or discriminated against her. She filed complaints against some of them. Ms. Dagenais testified that these complaints were investigated and were dismissed.

[160] Taking into account the nature of her behaviour, management believed she could benefit from, and insisted that she attend, training on the subject of bullying. That session was held on October 19, 2011, and the grievor attended a good part of it.

[161] A few days later, during a meeting held on October 25, 2011, and in an attempt to understand the grievor's behaviour, Mses. Dagenais and Modi asked her if a medical issue could explain her irregular behaviour. In the past, the grievor had implied as much, but she did not provide a clear response at the meeting.

[162] On November 8, 2011, the grievor was seen by Dr. Lam and was placed on medical leave for two weeks.

[163] The grievor's return-to-work date was set for November 23, 2011. The employer was hoping Dr. Lam could shed some light as to whether there was a medical reason for her irregular behaviour. Ms. Dagenais attempted to reach the grievor twice on November 15, 2011, to talk to her. The grievor confirmed that she willingly did not answer her phone on November 15. At that time, Ms. Dagenais had taken up the responsibility of being the coordinator of the ILD legal assistants. She assumed this responsibility on a rotational basis.

[164] Thus, Ms. Dagenais prepared two letters. One, dated November 16, 2011, was for the grievor. The other, dated November 16, 2011, was attached for her physician.

The letter to the grievor mentioned that to determine whether there was a medical foundation to her work performance and behavioural issues, the employer was asking that she take the attached letter to her physician, preferably while she was still on leave. The letter was also intended to determine her fitness for work and any workplace accommodations that she may require. The employer asked for a response, if possible, from her doctor upon her return to work on November 23.

[165] On November 16, 2011 when Purolator came to the grievor's home with the letters, she refused to accept them.

[166] On November 21, 2011, the grievor received a package by regular mail that contained the two letters. In the letter for the grievor's physician, the employer was seeking the physician's medical opinion of the grievor's behavioural issues as well as her fitness to work. The letter stated that there had been ongoing behavioural issues and interpersonal conflict and insubordination. The purpose of the letter was to determine whether there was a medical foundation to her behaviour. The letter also detailed events that had occurred in the past and that had involved her. It also included the following statement:

…

> *It is our view that Ms. Layne frustrates management's attempts to address performance and behaviour deficiencies. She does not follow direct management instructions. She refuses to accept responsibility for her work or her behaviour. She places the blame on management or the lawyers to whom she provides assistance. Ms. Layne is also belligerent and unreasonably argumentative during meetings. In general, she displays a disrespectful attitude toward authority.*
>
> *In view of the foregoing, I am seeking a response from you to the following questions.…*

[167] The questions included whether the grievor was fit to work full-time in her current position as a legal assistant, and if so, what if any were her functional abilities or limitations. The grievor's work description was also enclosed, as well as her ongoing performance objectives.

[168] On November 18, 2011, the grievor was again seen by Dr. Lam. Because there had been no improvement to her symptoms, he signed a medical certificate that indicated that she was incapable of working for an "indefinite" period. The grievor

thus submitted a leave application for the period from November 23 to February 22, 2012.

[169] The grievor's return-to-work date was then set for February 23, 2012. On February 6, 2012, Marissa Bielski, who had replaced Ms. Dagenais as the coordinator of the ILD legal assistants, sent the grievor a letter by regular mail about her anticipated return to work. The November 16, 2011, letter to the grievor's doctor was also attached, and Ms. Bielski informed the grievor that for the reasons outlined in the letter, she would like a response from the grievor's physician. The letter advised that in the absence of a response, the employer would assume that there was no medical foundation for her behavioral issues. The letter also specified that if she chose not to take the letter to her physician, the employer still required a medical note certifying that she was fit to return full-time to her legal assistant position. Her work description was also enclosed, as well as her "Ongoing Performance Objectives". At this point, the grievor had been away from work for a period of more than three months.

[170] The grievor did not return to work on February 23, 2012. On April 9, 2012, she saw Dr. Lam and indicated to him that the employer requested a specific time frame for her absence. Dr. Lam then prepared another note, indicating that the grievor "… must remain away from work … until at least Dec. 31, 2012". The following additional information was noted: "Ms. Layne's medical condition will be reviewed within a year". So she submitted a leave application for the period from February 23 to December 31, 2012. However, she did not submit her physician's reply to the questions she had received from the employer on November 21, 2011.

[171] As the leave application that the grievor had submitted was to end on December 31, 2012, Ms. Dagenais, whose responsibility again included being the coordinator of the ILD's legal assistants, sent the grievor, on November 16, 2012, a letter to prepare her return to work that was set for January 2, 2013. Ms. Dagenais also attached a letter for the grievor's physician. Ms. Dagenais provided the context for her question as to whether there was a medical foundation to the grievor's behavioural deficiencies. Ms. Dagenais asked the physician to respond to seven questions, including whether the grievor was fit to work full-time in her current position as a legal assistant and if so, what, if any, were her functional abilities and limitations. The grievor's work description and "Ongoing Performance Objectives"

were attached.

[172] On November 22, 2012, the grievor acknowledged receiving the letters Ms. Dagenais sent November 16, 2012. She then sent Ms. Dagenais a letter to state that she was not medically fit to return to work until December 31, 2012, at which time she was scheduled for a medical reassessment.

[173] On December 4, 2012, in response to that letter, Ms. Dagenais sent the grievor a letter to clarify that it was in consideration of her medical reassessment that she had provided the letter to be given to her physician. She reiterated that the letter was intended to determine her fitness to return to work and any workplace accommodations that she could require. In particular, Ms. Dagenais mentioned that question seven of the letter spoke to whether there was a medical foundation to the behaviour issues that she had exhibited before her departure. Ms. Dagenais specified that to have sufficient time to prepare for her return, she was asking for a response from the grievor's physician within a reasonable time before her leave expired.

[174] At the hearing, Ms. Dagenais explained that some of the things that the employer needed to do to prepare for the grievor's return to work included finding the lawyers she would report to and identifying the tasks she would be asked to accomplish. This was going to be a challenging task as the grievor did not work well with others. Ms. Dagenais wanted to efficiently manage and coordinate the grievor's return to work, and receiving the requested medical information would have helped her.

[175] On December 27, 2012, Dr. Lam prepared another note indicating that the grievor "… must remain away from work … [for] 6 months". The note also indicated the following: "Ms. Layne must remain away from her current work environment – Ms. Layne is still undergoing further assessment".

[176] Thus, on December 31, 2012, the grievor submitted a leave application for the period from January 1, 2013, to June 27, 2013. In the circumstances, she did not submit her physician's reply to the questions she had received from her employer.

[177] On January 31, 2013, the grievor's DI benefits that she had been receiving since February 2012 from Sun Life Financial ended. Thus, she no longer earned any income.

[178] On February 12, 2013, a Human Resources (HR) adviser emailed Ms. Hauck, who was then the regional vice-president of the Union of Solicitor General Employees, to provide her with an update on the file. The HR adviser wrote that she had contacted Sun Life Financial, which had informed her that the grievor's benefits had terminated.

[179] Ms. Hauck replied by asking the HR adviser for the employer's course of action.

[180] The HR adviser responded that since the grievor's leave was up to date, the employer had no action to take. However, she added that as a practice, if the employer received updated medical information that an employee's health had improved, it could accept an updated medical note. In this instance, it was explained that the grievor would be required to provide a response to the employer's letter (the seven questions listed in the letter prepared for the grievor's physician) before her return, regardless of when that was to occur.

[181] On March 20, 2013, the grievor visited her family physician and told him about her financial constraints. That day, after discussing her panic triggers at work, Dr. Lam agreed that she could go back to work, but with certain conditions. In the note that he prepared, he listed the following four conditions:

> *… Return to work under these conditions:*
>
> 1. *3-day workweek (with corresponding workload); i.e. Tues., Thurs., Friday*
> 2. *Must not work in Immigration or Tax section; nor deal with immigration matters*
> 3. *Must not work with or under Ms. Pupas* [*sic*], *Dagenais, Hendriks, Bielski, Soskin, Brisco, Rashid, or Mr. Lunny* [*sic*]
> 4. *Must avoid stressful situations*

[182] Ms. Hauck testified that on March 22, 2013, she phoned the HR adviser to inform her that the grievor had received an accommodation note from her doctor. She agreed to forward it to the HR adviser once she received it. The HR adviser then informed Ms. Hauck that the employer needed to receive a copy of the medical form (the seven questions), in addition to the accommodation note, as requested in the last letters sent to the grievor.

[183] On March 25, 2013, Ms. Hauck informed the HR adviser that the grievor had misplaced the last two packages sent by the employer and asked for a copy of the medical form. The HR adviser sent it to her that same day.

[184] In early April 2013, Dr. Lam provided the following answers to the employer's seven questions:

Date of Request: November 16, 2012	*Return by: December 14, 2012*
Employee Name: Emeline Layne	*Position: Legal Assistant, Immigration Law Division*

1. *Is Ms. Layne fit to work in her current position as a legal assistant?*

   Yes.

2. *If Ms. Layne is fit to work, what (if any) are her functional abilities and/or limitations?*

   She may start working with one or two lawyers. This ratio will be reviewed in 1 month. To reduce stress levels, please have lawyers place work needed to be done onto Ms. Layne's desk.

3. *If Ms. Layne is currently fit to work, does she require any workplace accommodations? If so, what accommodations would you recommend?*

   Please see attached Letter of accommodations [The March 20, 2013, medical note]

4. *Are these accommodations permanent or temporary in nature? If they are temporary, how long should they remain in effect?*

   Permanent

5. *If Ms. Layne is not fit to work, can you provide an estimated return to work date?*

   NA

6. *From a medical perspective, is there anything that would prevent Ms. Layne from adhering to the attached performance objectives for her position?*

   The performance objectives presented is from the Immigration Law Section. It is recommended that Ms. Layne not work in the Immigration Law Section.

7. *Lastly, is there a medical foundation for the behaviour Ms. Layne exhibited during the various performance meetings*

> *and/or disciplinary investigation meetings?*
>
> > *Based on my medical assessment of Ms. Layne, there is a medical foundation to support her behaviour.*

[185] On April 9, 2013, the HR adviser asked Ms. Hauck if she could provide an update as to when the grievor would send the accommodation note March 20, 2013, and the medical form. The following day, the HR adviser informed Ms. Modi that she had no new information from the grievor.

[186] On April 18, 2013, Ms. Hauck sent the HR adviser the accommodation note and medical form. It included Dr. Lam's answers to the employer's seven questions.

[187] At the hearing, Ms. Dagenais explained that senior management and the HR advisers discussed the recommendations made by Dr. Lam and concluded that it would be difficult to successfully accommodate the grievor because some of the recommendations were confusing, contradictory, or unclear. For example, the employer did not understand why the grievor could not work with the eight lawyers, supervisors, or managers named in the note. While 7 of them were individuals to whom the grievor had reported to in the previous 12 years or was still reporting to as a legal assistant, she had never worked with one, Ms. Prupas, who had never worked in the ILD. Some of Dr. Lam's recommendations also appeared factually incorrect. One recommendation was that the grievor not work in the Tax Law Division, but the grievor had never worked there before. Dr. Lam also recommended that the lawyers bear the responsibility of placing the work needed to be done onto Ms. Layne's desk. The employer did not understand why Dr. Lam made this recommendation. The basis used for it was unclear.

[188] At the hearing, in response to the question as to why Dr. Lam specified that the grievor "must not work with or under" eight individuals, Dr. Lam answered that he wrote their names after assessing with the grievor the situations that were triggering her panic and anxiety. Dr. Lam identified those lawyers, supervisors, or managers as stressors.

[189] At the hearing, the grievor was also asked why Dr. Lam had recommended that she not work with Ms. Prupas. The grievor confirmed that she had never worked with or even met Ms. Prupas. She assumed Ms. Prupas worked in the Tax Law Division as some of her colleagues had told her as much. As will be seen later, Mr. Prupas did not

work in the Tax Law Division. However, the grievor explained that in the past, she had erroneously been sent an email from Ms. Prupas that had been intended for Ms. Dagenais.

[190] Ms. Dagenais clarified that she had consulted Ms. Prupas at a certain moment in the past because Ms. Prupas had extensive experience with returns to work. When Ms. Prupas responded to her, the grievor was copied on it by mistake.

[191] At the hearing, Ms. McNulty also clarified that Ms. Prupas never worked in the Tax Law Division. Ms. Prupas is senior counsel in the Public Safety and Defence Law Division.

[192] Also at the hearing, Dr. Lam was specifically asked why the grievor could not work with Ms. Prupas. He answered that he assumed she was a lawyer for whom the grievor worked. When he was asked if he would still have included Ms. Prupas in the list if he had been informed that she was not a lawyer for whom the grievor worked, he answered that he would have, because he considered that she was a trigger to the grievor's mental distress, as the grievor had told him so. He then acknowledged that he had simply written down names the grievor had supplied to him.

[193] At that point, Dr. Lam was informed that Ms. Prupas did not work in the ILD. He recognized that he had not inquired to assess the legitimacy of the grievor's statement that the eight individuals were stressors who triggered her mental distress. He said that that was not his job, which was to help reduce the different stressors experienced by the grievor.

[194] With respect to the other individuals named by Dr. Lam, the grievor clarified that they were lawyers, supervisors, or managers she reported to or had reported to in the previous 12 years. Ms. Dagenais clarified that the grievor had the habit of submitting complaints against the persons she reported to. For example, she had made a discrimination complaint against Kevin Lunney, one of her previous managers, named in the note. The complaint against Mr. Lunney was found unfounded. Similarly, after the grievor started reporting to Ms. Dagenais, the grievor continuously made serious accusations and complaints against her.

[195] Dr. Lam was also questioned about his recommendation that the lawyers bear the responsibility of placing the work needed to be done onto Ms. Layne's desk. He

was informed that communicating by email is the norm at the Department of Justice. His answer was not clear.

[196] Nor did Ms. Hauck know why this condition was necessary.

[197] Questioned as to whether he had reviewed the grievor's job description or spoken to someone at the Department of Justice before outlining the accommodation conditions, Dr. Lam answered that he had not spoken to anyone there. He spoke only to the grievor before writing his answers in response to the seven questions.

[198] Dr. Lam was also asked why he had indicated that the grievor could not work in the Tax Law Division, in addition to the ILD. He answered that he applied the same reasoning as set out earlier in this decision. The grievor said the Tax Law Division was a particular stressor, so he added it to the list. He viewed it as necessary in view of the prior harassment in the workplace the grievor had mentioned. Dr. Lam was then informed that the grievor had never worked in the Tax Law Division. He did not comment.

[199] Nor could Ms. Hauck explain why the grievor could not work in the Tax Law Division. However, she recognized that the employer could potentially need to know why she could not work there if the only vacancies were in that division. She also recognized that to successfully accommodate the grievor, the employer could potentially need to know why she could not work with the eight individuals listed in the accommodation letter.

[200] In addition, Dr. Lam was asked if the grievor needed to be permanently accommodated in a new division. He answered that she did since she told him that it was the only way to reduce her stress. At that point, he agreed that the accommodation recommendations he had made had not been based on an assessment of the work the grievor did in her workplace.

[201] The last leave application submitted by the grievor was valid for January 1 to June 27, 2013. Nonetheless, at the end of April, the employer was informed that she wanted to return to work before June 28, 2013.

[202] On April 30, 2013, Ms. Hauck spoke to the HR adviser, who informed her that the employer required additional information to successfully accommodate the grievor. Ms. Hauck then sent her an email to confirm that the grievor was willing and

able to return to work, effective immediately. However, Ms. Hauck specified that the grievor was not prepared to see a physician other than her own. The email also included the following information:

…

> *… If the employer requires further medical information or further clarification on the medical information already provided, please request this through Ms. Layne's physician at your cost;*
>
> *If the employer is not in a position to immediately return Ms. Layne to the workplace, that Ms. Layne be paid appropriately until such time as she is returned to work;*

…

[203] Ms. Dagenais and the HR advisers, including Ms. McNulty and Ms. Modi, discussed the different options open to them at that point. They also consulted Ms. Hendriks. The option of asking Dr. Lam to provide further clarification was considered, but it was agreed that that would not be the best solution as management had serious doubts about the accuracy of the information on which Dr. Lam was basing his recommendations. He appeared to be acting as his patient's advocate by simply transcribing the information she provided or dictated. In particular, it looked like he had transcribed the names of persons the grievor did not want to work with. In fact, the accommodations measures appeared to be primarily based on not having to interact with those who were directly or indirectly involved in supervising her or with managing her performance. The employer believed it needed to know whether she would be able to receive direction from supervisors and managers should she return to work. Yet Dr. Lam's initial accommodation measures and his additional specifications provided later in his answers to the seven questions did not help with that.

[204] The employer's representatives also discussed the possibility of asking the grievor to undergo a Health Canada FTWE. Ms. Modi had contacted Health Canada, which had confirmed that it would take three to six months for the process to be completed, depending on the complexity of the case. She explained that apart from the different completion times, an IME and an FTWE are similar. The practitioners that are hired to carry out the assessments are independent from the employer.

[205] Ms. McNulty also explained that because FTWEs take between three and six

months, IMEs are becoming more prevalent in departments. Ms. McNulty clarified that the primary difference between them is the time it takes to receive the results. Apart from that, the two processes are very similar, and both involve consulting with the employee's treating physician. Ms. McNulty also mentioned that an IME had been used in the past for another employee, and it had worked well.

[206] The employer was conscious the grievor was without pay and eager to return to work. Its representatives, thus, determined that it would be preferable to proceed with an IME, because it is faster than an FTWE.

[207] In addition, recognizing that the grievor was not being paid, with Ms. Hendriks' approval, arrangements were made to pay the grievor's salary from the time of the assessment until the report was issued. Ms. Hendriks testified that she approved it as her experience is that an employee undergoing an IME is usually required to attend 1 appointment, and then within 10 days, a report is issued. She mentioned that the Department of Justice has to manage its resources efficiently. Paying the grievor's salary while she was at home could be justified only if it was for a short time. In her view, the IME was the most efficient way of proceeding, and she could justify paying the grievor's salary for the 10 days that it would take to receive the report.

[208] For the purpose of this decision, I do not need to decide whether the employer had a right to request that the grievor undergo an IME. Therefore, I make no judgment in respect of this. However, the discussions between the parties about an IME are relevant to deciding whether the employer provided a reasonable non-discriminatory explanation in the circumstances of this case.

[209] Ms. Bielski sent the grievor a letter on May 9, 2013. She indicated that the employer had received Dr. Lam's medical note, dated March 20, 2013, which Ms. Hauck forwarded to the HR adviser on April 18, 2013. The letter advised that management and HR had carefully reviewed the information that Dr. Lam had provided and that they had determined that it was insufficient to successfully provide for the grievor's return to work. The letter provided the following reasons for rejecting Dr. Lam's recommendations:

…

> *… You have been on sick leave from November 8, 2011 to the present. Your doctor indicates that, as a result of your medical condition, you are unable to work in the Immigration Law Division (ILD) or with the named lawyers, supervisors or managers within the ILD. Your fitness to work appears to be primarily based on not having to interact with those who were directly or indirectly involved in the management of your performance. This calls into question whether you are able to receive direction from supervisors and managers which is a requirement for any position. We must be satisfied that the behavior exhibited in the workplace prior to your absence will not reoccur or impede you from performing the duties of your position in any work environment. Otherwise, your health and safety and that of others in the office could be adversely affected.*
>
> *Therefore, in order to approve and accommodate your return to work, I am requesting that you consent to undergo an Independent Medical Evaluation. The purpose of the evaluation is to provide us with an independent assessment of your fitness to work and any recommended workplace accommodations if you are deemed fit to work. Given the information provided in your doctor's medical note, we also need to understand how your ability to perform your duties is affected by your medical condition. Please note that we will not be requesting personal medical information such as a diagnosis. The assessment will be conducted by Altum Health, University Health Network. You may contact Beverly Bernabe, Clinical Practice Leader at … if you require additional information regarding the evaluation process. The consent forms will be provided to you at the evaluation. The Department of Justice will cover the entire cost of the assessment. If you elect not to consent to the assessment, we will not be in a position to facilitate your return to work.*
>
> *The following appointment times are available, May 23, 2013 at 2:00pm, May 30, 2013 at 2:00pm, and June 14, 2013 at 9:30am. … Please confirm your availability and preferred appointment time for this assessment by contacting Sharon Jonhson-Lopez [sic] … by* ***Monday, May 13, 2013****….*
>
> …
>
> [Emphasis in the original]

[210] Recognizing that the grievor was without pay, arrangements were thus made for an assessment with Altum Health to take place as early as May 23, 2013. Attached to the letter was a referral to Altum Health that the grievor was to bring with her to the clinic. The referral included background information on her work situation and the seven questions, including whether she was fit to work full-time in her current

position as a legal assistant and if so, what her functional abilities or limitations were, if any. The grievor's work description was also enclosed, as well as the medical note from Dr. Lam dated March 20, 2013.

[211] At the hearing, Ms. Hauck confirmed that she did not contact the service provider to assess whether an IME would be an appropriate option. She explained that the grievor's position was that any additional information that was needed had to be obtained from her physician. If that was not possible, then the employer could request that Health Canada conduct an FTWE. In her view, an IME was not an option, even though the assessment would be carried out by fully independent doctors in a much quicker time.

[212] The grievor declined to participate in the IME with Altum Health.

[213] For the purposes of this decision, I do not need to decide whether the grievor had a right to refuse undergoing an IME, and I decline to.

[214] On May 16, 2013, Ms. Hauck and Ms. Modi spoke on the phone, and Ms. Modi informed Ms. Hauck as to why an IME was being requested; namely, that it was the fastest way to obtain an evaluation as the grievor was without pay. She stressed that the IME could take place as early as May 23, 2013

[215] On May 17, 2013, Ms. Hauck, the grievor, and Ms. Modi conversed. Ms. Modi testified that she informed the grievor and Ms. Hauck of the following. The grievor's leave request was to June 27, 2013. On April 18, Ms. Hauck had forwarded to the HR adviser the medical note dated March 20, 2013. Despite the HR adviser asking if the note provided was in anticipation of the June 27, 2013, return, neither the grievor nor Ms. Hauck informed the employer that Dr. Lam was recommending that she was fit to return to work earlier than June 27, 2013. Accordingly, the employer's understanding was that she remained on leave until June 27, 2013.

[216] That same day, May 17, 2013, Ms. Hauck and the grievor both wrote to Ms. Modi with respect to the discussion with her. The grievor asked for a reply from Ms. Modi, who sent her the following email on the same day:

…

> *With respect to the note dated March 20, 2013, as stated in the attached correspondence to you, the note is insufficient to*

> *successfully provide for your return to work. Therefore, management is requesting that you consent to undergo an Independent Medical Evaluation. An independent medical evaluation is significantly faster than a Health Canada assessment which can take up to 4 to 6 months and it is also conducted by an impartial service provider. As I stated to Jan, I encourage you to contact Beverly at Altum Health. She can take you through the process and provide you with information regarding the available doctors. You can even select the doctor that you feel is better suited to your situation.*
>
> *Should you consent to the IME, management is prepared to pay you from the date of the assessment until the date the report is received.*
>
> …

[217] On May 17, 2013, Ms. Modi also emailed to Ms. Hauck a link to an upcoming audio conference on IMEs as Ms. Hauck had mentioned to her that she was not familiar with them.

[218] Ms. Hauck explained that she found it odd that the employer had requested an IME. In her view, the employer could only either accept the grievor's return to work or request an FTWE. An IME was not an option. So on May 28, 2013, she decided to send a letter to the HR adviser. It read as follows:

> …
>
> *The Union is requesting that the Department of Justice outline specifically why only an Independent Medical Assessment [sic] will be accepted and not that of the employer's physician, Health Canada. The Union is quite prepared to have Ms. Layne attend a Health Canada Assessment at any time to satisfy the employers [sic] concerns.*
>
> …

[219] On May 30, 2013, Ms. Modi again informed Ms. Hauck by email as follows as to why an IME was being proposed instead of an FTWE:

> …
>
> *During our conversation on May 15, 2013, you stated the union's objection to the IME process but did not indicate a specific concern. In your letter dated May 28, 2013, you state that the union is prepared to have Emeline attend a Health*

> *Canada assessment. I contacted Health Canada and they advise that the timeframes within which they can complete the fitness to work evaluation is 3-6 months depending on the complexity of the case. If Emeline agrees to proceed with that process, we want you to understand that she will not be returned to the workplace until the process is completed. During this period she will remain on sick leave without pay. As we had advised you previously, the IME remains a much faster option.*
>
> *However, if Emeline will only consent to a HC referral, I will send out the necessary letters and evaluation forms for completion by no later than Friday, May 31, 2013.*
>
> *If you prefer to revisit the IME, please advise me by tomorrow.*
>
> …

[220] Ms. Hauck testified that she was of the view that the employer had not provided valid reasons for its proposal that the grievor undergo an IME. Thus, on June 4, 2013, she wrote to Ms. Modi that the employer had not answered her questions and that a grievance was being filed to contest the employer's decision not to pay the grievor's salary until the FTWE was completed and the results were available. Ms. Hauck also asked that the employer make the referral for an FTWE to Health Canada. The discrimination grievance was then filed.

[221] The employer accepted the grievor's request, and in a letter dated June 11, 2013, Ms. Bielski informed her that the employer had prepared a referral to Health Canada that she could review. As explained, the purpose of the FTWE was to provide the employer with an assessment of her fitness to work and any recommended workplace accommodations if she were deemed fit to work. Included were the letter to be sent at a later date to Health Canada and some attachments.

[222] The grievor did not respond to this letter in June or July of 2013 and provided no explanation of why she did not respond at that time. Ms. Hauck sent her another copy of the letter and the forms to be completed on August 1, 2013.

[223] On August 19, 2013, the grievor submitted the signed consent forms necessary to initiate the FTWE. On August 20, 3013, Ms. Modi sent the forms to Health Canada, which then informed her and the grievor that appointments were scheduled for October 3 and 16, 2016.

[224] Dr. Lam prepared another medical certificate on September 3, 2013, to help the grievor receive new training in a different field. It was not shared with the employer at the time. The grievor explained that she did not pursue that avenue as she did not satisfy one of the criteria required in the program. The medical certificate specified that, among other things: "Ms. Layne … needs to find alternate employment in a different field."

[225] The grievor did not attend her October 3, 2013, appointment at Health Canada. On October 10, 2013, Ms. Hauck requested that Ms. Modi cancel the October 16 appointment as she had not been able to reach the grievor. However, on October 10, 2013, Ms. Modi responded that the employer would not cancel the appointment as it was the grievor's responsibility to cancel it. On October 11, 2013, Ms. Modi sent the grievor a letter stating that if she were unable to attend an appointment, it was her responsibility to contact Health Canada with an explanation and to reschedule it. Ms. Modi required the grievor to keep her updated on the status of the appointments.

[226] The grievor did not attend the October 16, 2013 appointment. She called Health Canada to reschedule. Appointments were rescheduled for her for November 4 and 5, 2013.

[227] At the hearing, the grievor stated that she might not have known about the October 3 appointment because at one point, Health Canada had omitted indicating her unit number in her address. However, Ms. Modi testified that the appointment dates of October 3 and 16 were stated in the second-level decision, dated September 25, 2013, on the discrimination grievance with Board File No. 566-02-9621, which was sent to the grievor by registered mail. In turn, the grievor indicated that she did not read the grievance decision.

[228] On November 1, 2013, the grievor asked to be on a "travel arrangement" while attending the FTWE. She testified that she feared for her life and felt that she could be hurt during the examination. She wanted her child be protected in case she did not make it out of the examination alive.

[229] On November 1, 2013, Ms. Modi responded to the grievor's request to be put on travel status while attending the appointment. She wrote that it was impossible as the grievor was on sick leave without pay. The grievor was reminded that she was attending appointments as part of an FTWE. She had not yet returned to work;

therefore, she was not entitled to be on travel status. However, the employer agreed to reimburse her commuting expenses to attend the appointments, which she had also requested.

[230] The grievor rescheduled the November 4 and 5 appointments.

[231] On November 18, 2013, the grievor wrote to Ms. Modi, informing her that she intended to attend her rescheduled November 22 and December 3, 2013, appointments at Health Canada.

[232] On November 19, Ms. Modi informed the grievor that if she did not attend the November 22 appointment, the one for December 3 would be cancelled, and that the employer would interpret missing it as meaning that she was no longer consenting to the FTWE.

[233] The grievor attended the November 22 appointment at Health Canada by taxi and submitted the receipt to the employer for reimbursement. She also attended the December 3, 2013, appointment.

[234] On January 31, 2014, in a letter, Health Canada provided the results of its FTWE for the grievor. The letter stated that she could work three days a week as a legal assistant in a division other than the ILD or the Tax Law Division. It also contained some notable differences from Dr. Lam's recommendations. Specifically, it stated as follows:

…

> *…We have reviewed our consultants' reports and we agree with their conclusions. The following comments address the questions posed in your letter:*
>
> *1) Is Ms. Layne fit to work full-time as a legal assistant wherein she will have regular contact with and be directed by legal professionals, supervisors and/or managers?*
>
> ***Ms. Layne is fit work** [sic] **to return to her position as a Legal Administrative Assistant with accommodations. It is advised that she work a 3-day work week in an entirely different area of the Justice Department. It is advised that she not work for her previous management (in the Immigration or Tax Section). This recommendation is made without prejudice.***

2) *From a medical perspective, can you confirm whether Ms. Layne will be able to maintain her composure and a professional approach when discussing the details of her performance and/or behavior with legal professionals, supervisors or managers?*

It is anticipated that with the accommodations in place that Ms. Layne will be able to perform her duties as outlined in her job description.

3) *If Ms. Layne is fit to work, are there any occupational restrictions and/or limitations, from a medical perspective, that we should know about having regard to her work description and the organizational structure at the Ontario Regional Office of the Department of Justice? Please provide details as to the degree of any restrictions.*

As stated above the recommended accommodations for Ms. Layne are a 3-day work week in a different area of the Justice Department providing she receives adequate training for this new position. A reassessment is recommended in 6-9 months to determine whether she can increase the number of days per week worked.

4) *If Ms. Layne is fit to work, does she require any workplace accommodation? If so, what accommodations would you recommend? Please correlate your recommendations to the duties set out in the enclosed work description, as applicable.*

The accommodations for Ms. Layne are listed above.

5) *Are these accommodations, occupational restrictions and/or limitations permanent or temporary in nature? If they are temporary, how long should they remain in effect?*

The recommended accommodations should remain in effect until her reassessment in 6-9 months.

6) *If Ms. Layne has a diagnosed condition that currently makes her medically unfit for work, can you provide an estimated return to work date? Please note that her current medical note expires on June 27, 2013. However, Ms. Layne indicates that she is now fit to return, provided she is accommodated as per Dr. Lam's note of March 20, 2013.*

Not applicable.

7) *Please offer any additional information that may assist us in attempting to successfully accommodate Ms. Layne*

> *in the workplace.*
>
> ***There are no further recommendations/accommodations other than those listed above.***

[Emphasis in the original]

[235] On February 6, 2014, Ms. Hauck emailed Ms. Modi, asking that the employer pay the grievor retroactively from March 20, 2013, to February 2014 because, in the grievor's view, Health Canada's findings were similar to those of Dr. Lam. The email read as follows:

> …
>
> *Now that we are in receipt of the HC findings, it is the Union's opinion, that the employer must accommodate Ms. Layne immediately.*
>
> *Over the past year, Ms. Layne has been financially and emotionally disadvantaged as a result of the employer's lack of accommodation and insisting that her own physician was not in a position to make proper accommodation recommendations to the employer. We now know that the accommodations were in fact what was needed.*
>
> *The Union expects that the employer will do the right thing and pay Ms. Layne retroactively from March 20, 2013 to present including all benefits and superannuation.*
>
> …

[236] On February 7, 2014, Ms. Modi responded to Ms. Hauck and reminded her that the employer had reasonable grounds to request that the grievor undergo an FTWE. She specified that the reasons were clearly set out in the initial letter to her on May 9, 2013. Ms. Modi reminded Ms. Hauck that the employer had offered a more expeditious IME process and that it had agreed to cover Ms. Layne's salary for the period in which she would have been evaluated until a determination could be made. However, the grievor had refused.

[237] Ms. Modi also reminded Ms. Hauck that only on June 4, 2013, did she indicate that the grievor would consent to undergo an FTWE with Health Canada. Then, she did not submit the necessary consent forms until August 2013. Afterwards, the grievor cancelled Health Canada appointments for evaluations on October 16, November 4, and November 5, 2013. Therefore, it was explained that the employer

would not compensate the grievor for the extended period during which she refused to undergo an FTWE and delayed submitting consent forms or while the parties waited for the results of the FTWE after the grievor attended the required appointments. She also stated the following:

…

> *The letter confirming Ms. Layne's fitness to work was received from Health Canada on February 3, 2014. In respect of the specific accommodations, we are seeking further clarification from the Occupational Health Medical Officer in order to facilitate Ms. Layne's return to work and the accommodation that will ensure her return to work is successful. We have requested that this information be provided on an expedited basis. Once this is received and shared with all parties, we will arrange for her return and understand that, as her representative, you would like to be involved in discussions regarding her reintegration. We have already informed regional management of the need to proceed with this re-integration as soon as possible.*

…

[238] The employer then informed Health Canada that the grievor had never worked in the Tax Law Division or with any lawyers working there. The Tax Law Division was one of the ORO's biggest divisions; it and the ILD were the only areas with vacancies. Ms. McNulty explained that a position in the Tax Law Division was available and that the grievor could have returned to work there had it not been for the condition that she not work there. The employer also asked for a quick answer given that the grievor was at home with no salary.

[239] On February 11, 2014, Ms. Hauck wrote to Ms. Modi to let her know about her disappointment to hear that the employer had a position available in the Tax Law Division for the grievor given that Health Canada had recommended that the grievor should not return to the ILD or the Tax Law Division.

[240] However, on February 12, 2014, Ms. Modi clarified the employer's position. She explained that the Health Canada letter stated: "… It is advised that [the grievor] not work for her previous management (in the Immigration or Tax Section)…." Ms. Modi explained that the grievor had never worked in the Tax Law Division. She further explained as follows:

…

> *… The Division is on a different floor and there is no overlap in management. As result, I have followed up with Dr. Jhirad* [Health Canada] *regarding that limitation who has in turn followed up with the consultant who made that recommendation.*
>
> *As* [*sic*] *may be aware, there are currently not a lot of availabilities and we have to consider any and all availabilities that exist. Right now there is work in the Tax Law Division which is one of the larger legal divisions. Given that* [the grievor] *is on a leave without pay situation, and there is work in the Tax Law Division, we are giving her the option of returning to work immediately or to wait until next week. Either way, we cannot make a final decision regarding where to place* [the grievor] *until we hear back from Health Canada regarding where she can and cannot work.*

…

[241] The grievor did not agree to return to work in the Tax Law Division.

[242] In the meantime, Health Canada consulted the doctors who had assessed the grievor, and on February 27, 2014, it provided clarification about the accommodation recommendations. Ms. Modi confirmed that the employer received the letter on March 3, 2014. Health Canada changed the wording of its recommendation from: "It is advised that [the grievor] not work for her previous management (in the Immigration or Tax Section)…" to: "It is advised that [the grievor] not work in the Immigration or Tax Section of the department…." The letter did not say why she could work in the Tax Law Division.

[243] The day the employer received the Health Canada clarification, it reinstated the grievor. She received a letter of reinstatement on March 3, 2014, and she was back on the payroll on March 4, 2014.

[244] On March 13, 2014, Ms. Modi confirmed to Ms. Hauck that the employer could deploy the grievor to the Business, Regulatory and Extradition Law Division as a legal assistant (CR-05). Ms. Modi noted that both the deployment and the terms of the grievor's new work arrangement were in accordance with Health Canada's recommendations. To facilitate her return, Ms. Modi prepared a "Temporary Modified Work Agreement". The grievor started in that position on March 18, 2014.

[245] Ms. McNulty explained that while the CR-05 position that was offered was in

the Business, Regulatory and Extradition Law Division, it had not been funded in the past by reason of lack of work. Therefore, the Department took the financial risk of staffing the position permanently, considering that a reduction in employment could be achieved through attrition, when some employees retired. It was seen as the right solution with the best chance of success.

[246] The underlying issues in this case are whether refusing Dr. Lam's recommendations for accommodations and requesting the grievor to undergo an IME were discriminatory actions.

[247] The grievor's position is that the employer ought to have obtained the additional information it required from her doctor. She stressed that when an employer needs additional information to successfully accommodate an employee, the approach suggested in the Treasury Board of Canada document entitled, *Handling Disability Management Cases - Medical Assessment* is to follow up with the employee's medical practitioner. The document states: "**As much as possible, the employee's treating medical practitioner should be the primary source of information...** [emphasis in the original]." Therefore, in her view, requesting that she undergo an IME was unreasonable.

[248] The grievor referred me to the following excerpt from paragraph 7:6142 of Brown & Beatty, *Canadian Labour Arbitration*, which supports the principle that an employer should consult an employee's treating physician when in need of additional information after the employee who has been off work because of illness or injury is ready to return to work:

…

> *In an effort to balance the responsibility of employers to provide a safe and productive work environment and the right of employees to protect the privacy of their persons, some arbitrators have favoured a principle that directs employers to use the least intrusive means capable of securing whatever information they require. So, for example, when an employer has reasonable grounds to question the validity of a medical opinion, it has been suggested that rather than insist on the employee being examined by a physician they have chosen to employ, a request should be made for more information from the employee's own doctor….*

…

[249] The grievor also relies on *Brinks Canada Limited. v. Teamsters, Local 141* (1994), 41 L.A.C. (4th) 422, in support of her position that additional information should have been sought from her doctor. In that case, an arbitrator found that while the employer was justified in exercising the utmost care in ensuring that the employee was mentally able to deal with the responsibility of operating a firearm, it had to be balanced against the employee's privacy interest in not being unduly interfered with through a psychological assessment. As a result, the arbitrator found that the employer, instead of compelling the employee to be examined by a psychiatrist it retained, ought to have obtained more information from the employee's doctor or allowed the employee to be examined by another general practitioner of the employer's choosing.

[250] Both parties agree that when an employee has been off work because of illness or injury, a presumption is that the employee is, *prima facie*, unfit to work because of the illness or injury. The onus is upon the employee, as a precondition to any return to work, to establish his or her fitness to work, without posing a health risk to himself or herself or to others, as mentioned in *Communication, Energy and Paperworkers' Union, Local 49-0 v. Proboard Ltd.* (2001), 97 L.A.C. (4th) 271, *National Automobile, Aerospace, Transportation and General Workers Union of Canada (C.A.W. Canada), Local 504 v. Fisher & Ludlow*, [2011] O.L.A.A. No. 602 (QL), and *Service Employees International Union, Local 1.ON v. Stirling Heights Long-Term Care Centre,* [2009] O.L.A.A. No. 110 (QL).

[251] However, the union argues that when the employee has submitted a valid note that attests to his or her fitness to work, then this satisfies the employee's initial onus, and the burden shifts to the employer to demonstrate that the medical documentation is insufficient. According to the grievor, the employer can satisfy itself independently through an FTWE that the employee is fit to return to work; however, it must have reasonable grounds for not accepting the medical documentation provided by the employee. In other words, employers have the right to know more about an employee's medical information only if there are reasonable and probable grounds to believe the employee presents a risk to health or safety in the workplace. See *International Brotherhood of Electrical Workers, Local 636 v. Niagara Peninsula Energy Inc.* (2012), 217 L.A.C. (4th) 307, *United Food and*

Commercial Workers Union, Local 832 v. Maple Leaf Meats Inc. (1998), 54 C.L.A.S. 166, *Ontario Nurses Association v. St. Joseph's Health Centre (*2005), 76 O.R. (3rd) 22 (Div. Ct.), and *Canadian Union of Public Employees, Local 500 v. Winnipeg (City)* (2015), 252 L.A.C. (4th) 140.

[252] The grievor submits that these principles have been summarized as follows in *Office & Professional Employees' International Union, Local 131 v. Tele Direct (Publications) Inc.* (1989) 8 L.A.C. (4th) 159 at 177:

…

> *In short, an employer has the right and obligation to assure itself that an employee returning to work after a long illness is fit to return to his job. An employee can establish his fitness by producing a medical certificate to that effect. Once an employee produces a medical certificate stating unequivocally that he is fit to return to work, the onus is on the employer to establish that he is not fit to return to work. If the employer has reasonable grounds on the facts of the case to question the validity or the completeness of the opinion stated in the medical certificate, then it must explain clearly to its employee why a medical certificate is not acceptable and what specific informations [sic] are requested so that the employee can return to its [sic] treating physician and obtain the proper information. If the explanations are not satisfactory the company may, after consultation with the concerned employee, require that a medical examination preferably by an independent doctor be undertaken.*

…

[253] The grievor submits that *McLaughlin v. Canada Revenue Agency*, 2015 PSLREB 83, is also relevant to this case. In it, the adjudicator found that given that the employee had advised her team leader that she knew what to tell her doctor to put on an FTWE, the employer was justifiably uncertain whether the information it would receive from the doctor would accurately reflect the nature and extent of the employee's disability. The grievor in this case submits that she did not advise the employer that she could dictate the information Dr. Lam would include in his medical notes.

[254] Thus, the grievor submits that the employer did not have reasonable and probable grounds to request an IME. Instead, it should have accepted the medical documentation provided by Dr. Lam or should have gone to him with questions if

necessary.

[255] The grievor also mentioned that in *United Steelworkers, Local 6500 v. International Nickel Co. of Canada* (1974), 6 L.A.C. (2d) 443, the employer was ordered to compensate the employee for the difference between his regular rate of pay and his insurance benefits for a certain period because it had not provided him with the opportunity to provide the additional medical information it required. Instead, the employer's medical director had mailed a request to the employee's specialist in psychiatric medicine for a report on the employee's treatment and findings. However, that specialist provided the required information only after a few weeks had passed. An arbitrator found that had the employee been involved, he could possibly have obtained the necessary information more quickly.

[256] For its part, the employer submits that seeking further clarification from an employee's doctor is not always the best way to proceed. When the employer has reasonable doubts about the quality and completeness of the medical information provided, it is not unreasonable to ask for an IME. It pointed out that this was established in *Canadian Union of Public Employees, Local 831 v. Brampton (City)* (2008), 174 L.A.C. (4th) 140. In that case, a number of property standards officers resisted the employer's initiative to purchase a number of Mercedes Benz "Smart Cars" and the related requirement to wear a uniform. The employee was one of the property standards officers who vocally opposed these changes. He told the employer that he had a "psychological disability" that made it impossible for him to drive the Smart Car. He asserted that the employer had to "accommodate" this "disability" by either allowing him to drive his own car or by giving him another vehicle to drive.

[257] In that case, while the employer did seek clarification from the employee's doctors, an arbitrator noted that the employer needed objectively reliable medical information because it suspected that — not unreasonably as it turned out — it should not rely upon what the employee's caregivers were saying, which was based exclusively on what the employee was saying to them. In fact, the arbitrator noted the following at pages 191 and 192:

…

… Indeed this is a textbook case of why Employers are

> *sometimes right not to blindly rely upon what an employee's family doctor has to say.*
>
> *This is not to suggest that the statement from an employee's physician is inherently unreliable, but only that doctors are as open to manipulation as anyone else, and that in a "rights based world" employees have come to learn the value of these "medical trump cards". And paradoxically, the more physicians are inclined to unquestionably support such claims, the more difficult it may be for workplace parties (and adjudicators) to sort out these kinds of questions. It leads to cynicism, not solutions. And it leads to litigation.*
>
> *Moreover, the trust relationship that doctors understandably seek to foster with their patients, may actually inhibit their ability (or inclination) to get to the truth, and thus to an accurate medical picture particularly if it involves pressing and probing what the patient has said (something which a busy doctor may not have the time or the inclination to do)….*
>
> …

[258] Thus, the arbitrator found that if the employer has reasonable and good-faith doubts about the quality and completeness of the medical information, it is not unreasonable to ask for an IME, which the employer did in this case.

[259] The question is whether Ms. Dagenais had a legitimate doubt about the validity or the completeness of the recommendations stated in the medical certificate provided by Dr. Lam and in his responses to the seven questions at the time that they were provided. If so, should she have sought clarifications from him or could she ask for an IME?

[260] For the following reasons, I am satisfied that Ms. Dagenais had a legitimate doubt about the validity or the completeness of Dr. Lam's recommendations and that it was not unreasonable for her to ask for an IME.

[261] Ms. Dagenais testified that after reviewing Dr. Lam's recommendations, the employer was not confident that it would obtain a reliable medical assessment unless it was done independently.

[262] In essence, Dr. Lam's recommendation in the March 20 medical certificate was that the grievor was fit to work under the following conditions: (1) she was not to work more than three days per week; (2) she was not to work in the ILD or the Tax Law Division; (3) she was not to work with or under eight specifically named

employees at the ORO; and (4) she was to avoid stressful situations. His responses in April to the seven questions asked by the employer also offered the following additional specifications: (1) the grievor was fit to work in her current position as a legal assistant; (2) the lawyers were to place the work needed to be done onto her desk, to reduce her stress level; and (3) the accommodations were permanent. The employer viewed this information provided by Dr. Lam as insufficient, ambiguous, and factually incorrect.

[263] On one part, all but one of the eight named individuals had managed the grievor's performance, supervised her, or given her instructions, so it was unclear how the employer would be able to manage her performance once she was back at work. On the other part, it was recommended that the grievor not work in the ILD or the Tax Law Division, which are the ORO's two biggest legal divisions. However, the grievor had never worked in the Tax Law Division. Accordingly, the recommendations appeared to be based on information that did not relate to the grievor's work history at the ORO.

[264] It was also recommended that the grievor avoid stressful situations. However, Ms. Dagenais and Ms. Hendriks explained that a legal assistant's job is stressful, given that that assistant has a high level of responsibility and a heavy workload. Among other things, the grievor's work description that was included with the seven questions sent to Dr. Lam stated that legal assistants have a high level of responsibility and a heavy workload and that errors they make could lead to potentially serious consequences for the department and its clients.

[265] Nonetheless, Dr. Lam stated in the medical form under question 1 that the grievor was fit to work in her current position as a legal assistant. However, he did not specify whether she would be able to meet the work expectations in her work description that was attached to the medical form. Furthermore, as Ms. Hendriks explained, the recommendations made under questions 1 and 6 appeared contradictory. Under question 1, it seemed to her that the doctor was stating that the grievor was fit to work in her current (ILD) position as a legal assistant. However, under question 6, he stated that she could not return to the ILD.

[266] The grievor pointed out that in *Communications, Energy and Paperworkers' Union, Local 49-0*, an arbitrator recognized that when an employee has been off work

because of illness or injury, the presumption is that the employee is, *prima facie*, unfit to work because of illness or injury. If the employee has provided a note that attests to his or her fitness to work, but the employer is unsure whether fitness to work has been established, it can, in addition to communicating the basis for its conclusion that the medical documentation is insufficient, prepare a list of specific questions to present to the employee's doctors.

[267] I note that, in the present case, the employer did submit a list of specific questions to present to the grievor's doctor. However, the employer found that the additional specifications Dr. Lam offered made the accommodations measures even more ambiguous. In particular, the employer found it confusing that he recommended that the lawyers place the work needed to be done onto the grievor's desk. It was unclear what the basis for this recommendation was.

[268] I note that in *Grover*, the nature of the question was whether the employer had a legitimate doubt justifying a request that the grievor attend a medical assessment by a physician other than his own personal physician and reasonable and probable grounds to further instruct him to refrain from presenting himself to work until he complied with the request. The Federal Court agreed with the adjudicator that the employer did not have a legitimate doubt and reasonable grounds. Thus, it concluded that the grievor had not been provided with reasonable justification for such requests.

[269] The evidence before me differs from that in *Grover* in a number of important respects, in particular the overall context and the employer's attitude. While in *Grover* the employer did not consider the two proposals made by the employee that he be assessed by an independent physician that both he and the employer agreed to, in the present case, the employer promptly accepted the grievor's proposal to undergo an FTWE conducted by Health Canada, instead of an IME. In addition, while in *Grover* the employer had not established a legitimate doubt for the request that the employee undergo a medical evaluation, I am satisfied that the employer in the present case did establish a legitimate doubt for not accepting Dr. Lam's recommendations and requesting a medical assessment by another doctor. The employer clearly explained in its correspondence and subsequent communications to the grievor why Dr. Lam's recommendations were not acceptable or sufficient in the circumstances.

[270] In particular, the May 9, 2013, letter explained to the grievor why the employer needed more information about the accommodations required for her return to work. It mentioned that her fitness to work appeared to be primarily based on not having to interact with those who were directly or indirectly involved in managing her performance. The letter specified that this called into question whether she would be able to receive direction from supervisors and managers, which was a requirement for her position.

[271] I find that the employer established that it had a legitimate doubt about the accuracy of the information on which Dr. Lam had based his recommendations and that it constitutes a reasonable non-discriminatory explanation for not accepting them.

[272] Afterwards, Ms. Modi explained to the grievor that an assessment with Altum Health could take place as early as May 23, 2013. Ms. Modi also explained to her that if she agreed to undergo an IME with Altum Health, she could select the doctor that she felt was better suited to her situation.

[273] The May 9, 2013, letter also explained to the grievor that the employer needed to satisfy itself that her health and safety and that of others in the office would not be adversely affected.

[274] In *Grover*, the Federal Court stated that employers have the right to refuse to accept an employee's return to the workplace only if there are reasonable and probable grounds to believe that the employee presents a risk to health or safety in the workplace.

[275] In the present case, I am satisfied that the employer established that it had reasonable and probable grounds to believe that the grievor presented a risk to health or safety in the workplace. The evidence shows that during most of Ms. Soskin's discussions with the grievor, the grievor's behaviour disturbed Ms. Soskin greatly and left her shaken, anxious, and restless. The grievor was repeatedly observed having outbursts of anger, and she expressed constant hatred and resentment towards those who managed her work. According to the evidence, the grievor was not well and was struggling.

[276] I am satisfied that the evidence has shown that the grievor's actions were

serious and that they showed a pattern of behaviour. In addition to the evidence presented by the employer, Dr. Lam testified that as of February 2015, he was no longer the grievor's physician because her behaviour towards his clinic's staff had been offensive and unacceptable.

[277] For all these reasons, I find that the requirements of the jurisprudence cited earlier have been met. The employer established that it had reasonable and probable grounds for requesting that the grievor be medically assessed by a doctor other than her physician before coming back to work, which constitutes a reasonable non-discriminatory explanation.

[278] In the circumstances, I find that the employer had a reasonable non-discriminatory explanation for not accepting the grievor back in the workplace based on her physician's assessment that she was fit to return to work with accommodations. I further find that the employer had a reasonable non-discriminatory explanation for not accepting the grievor back in the workplace until it received Health Canada's FTWE and its further clarifications about her.

[279] I also find that the employer did not have to compensate the grievor for the extended period during which she waited for the FTWE results. I note that while on June 4, 2013, she indicated that she consented to undergo an FTWE with Health Canada, she did not submit the necessary consent forms until August 2013. Afterwards, she cancelled Health Canada appointments for evaluations on October 16, November 4, and November 5, 2013. I was provided with no cogent evidence to explain why she could not attend these appointments.

[280] After that, the Health Canada letter contained a recommendation that the grievor not work "for her previous management" in the ILD or Tax Law Division. The employer sought clarification with respect to this recommendation because the grievor had never worked in the Tax Law Division, and it and the ILD were the only areas with vacancies. This constituted a reasonable step taken by the employer to solve the problem.

[281] In sum, as the employer provided evidence showing that it took reasonable steps to accommodate the grievor throughout the whole period until she returned to work, I find that, in the final analysis, its actions were not discriminatory.

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

(The Order appears on the next page)

V. Order

[283] The grievance in Board File No. 566-02-7312, about the one-day suspension, is dismissed.

[284] I declare that the Board has jurisdiction over the grievance in Board File No. 566-02-7326. The grievance in Board File No. 566-02-7326, about the denial of paid sick leave, is allowed. I order the deputy head to grant the grievor 2.5 hours of paid sick leave for her absence of November 16, 2010, to pay her the equivalent amount at the appropriate rate of pay, and to deduct her sick leave credits accordingly. In the event that the grievor's sick leave bank contains insufficient credits, I order the deputy head to advance to the grievor the missing credits from her 2016-2017 allotment.

[285] The grievance in Board File No. 566-02-9621, about discrimination, is dismissed.

January 20, 2017.

Nathalie Daigle,
a panel of the Public Service Labour Relations and Employment Board